



**Memorandum**

Date: April 2, 2025

To: Thomas Mooney, Planning Director  
Nick Kallergis, Esq., Deputy City Attorney

From: Tracy Slavens, Esq.  
Wes Hevia, Esq.

Re: Florida Rights to an Unobstructed View  
DRB File No. DRB24-1030

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We have analyzed whether a property owner’s right to an unobstructed view where the purchase of his or her real property was strongly motivated by the view is enforceable in Florida. Specifically, whether the proposed development of new multi-story single-family residence at 8, 9, and 10 Century Lane on Belle Isle in Miami Beach, would impermissibly interfere with the views of nearby property owners including at 1 Century Lane, known as The Vistas, and the multi-family buildings in the surrounding area, (collectively, the “Objectors”) so as to give rise to a cause of action.

***Brief Answer***

The Objectors do not have the right to an unobstructed view under Florida law, regardless of whether the purchase of real property was strongly influenced by the view. Property owners generally do not have the right to a view over adjoining land under Florida law, whether of water or of other property. Similarly, while water-adjacent property owners have a riparian right of a view of navigable waters, none of the Objectors, here, have a valid riparian rights claim.

**Background Facts**

The owners of 8, 9, and 10 Century Lane, located on Belle Isle that are zoned RM-1 (Residential Multi-Family Low Intensity District), propose to assemble the lots and develop one multi-story, single-family home thereon (the “Residence”). The Residence is proceeding through the required City processes to obtain approvals required to build a residence on the small, irregularly shaped subject lots pursuant to DRB File No. DRB24-1030.

Legislation was previously proposed that would have created a zoning overlay significantly limiting the possible development of the remaining single-family parcels on Belle Isle. That prospective overlay legislation was referred to the City's Land Use and Development Committee where it was discussed briefly on November 18, 2022. At that meeting, several residents from nearby properties expressed support for the overlay and concern about the proposed Residence. Previously, negative commentary was provided by the residents of The Vistas, a 6-story condominium that was built in 1998 and has 48 units, and 9 Island Avenue ("Nine Island"), a 25-story condominium built in 1981 with over 200 units, in connection with the prior designs proposed for 8 and 10 Century Lane by the property owners (DRB22-0841 and DRB22-0847, respectively). A map of Belle Isle and the surrounding waterways is attached as Exhibit "A".

Although the above-described legislation ultimately did not move forward, we understand that some of the Objectors may have similar objections to the currently proposed residence at 8, 9, and 10 Century Lane under the subject application. This memorandum addresses the erroneous assertion by the Objectors that Florida law guarantees a right to views over adjacent property.

### Analysis

Generally, property owners do not have the right to unobstructed views over either adjoining land or water under Florida law. Likewise, while some landowners are entitled to the riparian right of a view of adjoining navigable waters, it is highly unlikely that any of the Objectors have a valid riparian rights claim. Riparian rights only protect direct views of adjoining navigable waters. Here, while the Objectors arguably abut navigable waters, the Residence does not impact direct views of adjoining navigable waters, and therefore, the Objectors do not have a valid riparian rights claim to an unobstructed view. Thus, it is highly unlikely that any claims to unobstructed views or riparian rights exist.

#### **I. The right to an existing view is subject to the right of other landowners to build on their respective properties.**

Under Florida case law, interference with an otherwise available view over adjoining land does not give rise to a cause of action. *See Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357, 359 (Fla. 3d DCA 1959) (noting that there is no "legal right to the free flow of light and air"). In *Fontainebleau Hotel v. Forty-Five Twenty-Five*, the plaintiff, owner of the Eden Roc Hotel, filed suit to enjoin its neighbor, the Fontainebleau Hotel, from building an addition that would block the sun and view on the Eden Roc's pool and sunbathing area. *See id.* at 358. The Florida Third District Court of Appeal held that there was no "cause of action, either for damages or for an injunction" even if a structure interferes "with the view that would otherwise be available over adjoining land ...." *See id.* at 359. The court reasoned that "adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired of them ...." *See id.* at 360.

Here, the Residence is separated by a street (Century Lane in one case and the Venetian Causeway in another) from many of the Objectors. As noted in *Fontainebleau Hotel*, MBP has the right to build to the line of its property "to such a height as is desired ...." subject to the Land Development Regulations. However, that right is not subject to any existing view of neighboring

property owners. In addition, under *Fontainebleau Hotel*, property owners in Florida do not have the right to the free flow of light and air, views included.

## **II. Property owners only have a valid riparian right to a view over adjoining waters.**

While a limited number of property owners may claim riparian rights as defined by Florida statutory and case law, it is unlikely that any of the Objectors have a valid riparian rights claim. Chapter 253 of the Florida Statutes defines “riparian rights” as those rights “incident to land bordering upon navigable waters.” 253.141(1), Fla. Stat. (2018). Riparian rights include the rights of ingress, egress, boating, and other rights as defined by law, including the right to an unobstructed view of navigable waters. *See id.*; *see also Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 75 Fla. 28, 58-59(1917). However, riparian rights only attach to land that extends to the ordinary high watermark of navigable waters. *See* 253.141(1). Therefore, property owners only have a valid riparian right of view over waters that directly adjoin their property. *See Mickel v. Norton*, 69 So.3d 1081, 1083 (Fla. 2d DCA 2011); *see also Thiesen*, 75 Fla. at 78.

In *Mickel v. Norton*, the plaintiffs sought an injunction to remove a fence that neighboring property owners built which allegedly obstructed the plaintiffs’ water view. *See Mickel*, 69 So.3d at 1081-82. However, the plaintiffs’ property did not border the same body of water as the neighboring property, and the blocked water view was not that of the water body directly bordering the plaintiffs’ property. *See id.* at 1083. The Florida Second District Court of Appeal held that the plaintiffs were not entitled to relief because their property did not border the water body at issue, and, thus, riparian rights did not attach. *See id.*

Here, the Objectors do adjoin navigable water, but it is not navigable water that will be obstructed by the Residence. As in *Mickel v. Norton*, the Objectors are contesting the alleged obstruction of a water view to which they do not have a valid riparian right. As in *Mickel*, the condominium associations are claiming a riparian right to view over waters that their properties do not adjoin. Thus, none of the Objectors can claim a right to an unobstructed view.

## **III. Obstruction of the riparian right of view must be substantial, material, and direct.**

The riparian right of view does not extend in all directions. Even if a riparian right of view exists, a compensable obstruction must be substantial and material. Property owners only have a riparian right of view in the direction of the adjoining navigable waterways, and that right is subject to equitable concerns of others. A compensable obstruction “must substantially and materially obstruct the land owner’s view to the channel.” *Lee County v. Kiesel*, 705 So.2d 1013, 1015-16 (Fla. 2d DCA 1998). In *Lee County v. Kiesel*, the construction of a bridge obstructed the plaintiffs’ view of a navigable channel by more than eighty percent. *See id.* at 1016. The plaintiffs’ experts testified that the bridge would reduce the property at issue’s value from approximately \$659,000 to \$300,000, representing a forty-five percent decrease. *See id.* at 1014. The Florida Second District Court of Appeal affirmed the trial court’s holding that the bridge “substantially and materially interfered with the ... riparian right of view.” *Id.* at 1016. In its ruling, the court noted that in order to constitute a compensable obstruction, interference with a riparian right of view must be “more than a mere annoyance” and “must substantially and materially obstruct the ... view ....” *See id.* at 1015-16.

The riparian right of view only extends over an area in the direction of navigable waters and is subject to equitable considerations. *See Lee County*, 705 So.2d at 1015; *see also Hayes v. Bowman*, 91 So.2d 795, 801 (Fla. 1957). In *Hayes v. Bowman*, the Florida Supreme Court held that waterfront owners could not enjoin the fill and development of newly filled land because of the riparian right of view. *See Hayes*, 91 So.2d at 803. The court found that, even with development, the waterfront owners would “still have a direct, unobstructed” view of the navigable waterway at issue. *See id.* at 801. The court promulgated the rule that riparian rights of property owners extend “over an area as near ‘as practicable’ in the direction of the [navigable waterway] so as to equitably distribute the submerged lands between the upland and the Channel.” *See id.* at 802.

The Objectors do not have a riparian right to view extending beyond the immediately adjacent waterway. Even if such an entitlement existed, the condominium owners would still have a direct view to all navigable nearby waterways. The development of the Residence will not substantially or materially obstruct direct water views from the Objectors. As stated above, the Residence is separated from many of the Objectors by a street and covers only three modest single-family parcels. Unlike in *Lee County v. Kiesel*, the proposed development will not obstruct water views.

Finally, the Residence will not obstruct direct views to any of the nearby waterways. As stated, riparian rights only extend to adjoining navigable waters. The Residence will not obstruct direct views of the water. Moreover, the owners of 8, 9, and 10 Century Lane have the right to the full use and enjoyment of their property. They purchased their property under the RM-1 zoning designation, intending to construct the Residence in accordance with the City’s Land Development Regulations.

### **Conclusion**

Under Florida law, property owners do not have a cause of action to enjoin or seek compensation for the obstruction of a view over adjoining land. While a small segment of property owners whose properties extend to the ordinary high watermark have a riparian right to an unobstructed view, that right only entitles such owners to a view over directly adjoining waterways. In addition, an obstruction of a riparian right of view must be substantial and material. All Objectors will retain direct existing views to navigable waterways. Thus, the Objectors will not prevail if they allege a right to an unobstructed view.

For your convenience, a copy of the applicable Federal and Florida specific case law referenced herein has been attached as Exhibit “B”.

## Exhibit "A"

*Map of the properties at issue and surrounding waterways.*



See Google Maps (last visited December 2, 2022),  
<https://www.google.com/maps/place/8+Century+Ln,+Miami+Beach,+FL+33139/@25.7913442,-80.1521755,17z/data=!4m5!3m4!1s0x88d9b47b9fe542eb:0xc490801c1f03aa28!8m2!3d25.7922137!4d-80.149858>

**Exhibit "B"**

Supporting Case Law

KeyCite Yellow Flag - Negative Treatment  
Declined to Follow by *Obolensky v. Trombley*, Vt., February 6, 2015

114 So.2d 357  
District Court of Appeal of **Florida**,  
**Third District.**

**FONTAINEBLEAU HOTEL CORP.**, a  
**Florida corporation**, and **Charnofree**  
**Corporation**, a **Florida corporation**,  
Appellants,  
v.  
**FORTY-FIVE TWENTY-FIVE**, INC., a  
**Florida corporation**, Appellee.

No. 59-450.  
|  
Aug. 27, **1959**.

Rehearing Denied Sept. 23, **1959**.

#### Synopsis

Action to enjoin owners from continuing with construction of fourteen-story addition to their **hotel** on a beach facing the Atlantic Ocean. The Circuit Court, Dade County, Robert H. Anderson, J., entered an order temporarily enjoining owners from continuing with the construction and they appealed. The District Court of Appeal held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim sic utere tuo ut alienum non laedas, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.

Reversed with directions.

West Headnotes (6)

- [1] **Constitutional Law** — Relationship to police power or public welfare in general

The maxim sic utere tuo ut alienum non laedas,

does not mean that one must never use his own property in such a way as to do any injury to his neighbor, but means only that one must use his property so as not to injure the lawful rights of another.

- [2] **Adjoining Landowners** — Right to and Obstruction of Light, Air, or View

At common law, a landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land.

5 Cases that cite this headnote

- [3] **Easements** — Acquisition of rights as to light, air, and view

The English doctrine of “ancient lights” has been unanimously repudiated in the United States.

- [4] **Adjoining Landowners** — Motive in erecting obstruction  
**Injunction** — Encroachments by buildings, fences, and other structures

Where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim sic utere tuo ut alienum non laedas, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.

12 Cases that cite this headnote

[5] **Zoning and Planning** → Modification or amendment; rezoning

If public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved.

[6] **Injunction** → Other particular cases

Where construction of a 14-story addition was proceeding under a permit issued by the city pursuant to mandate of the District Court of Appeal in a previous action between owners of the addition and an adjoining landowner, and such mandate authorized completion of the addition according to plan showing a 76-foot setback from the ocean bulkhead line, and adjoining landowner's objection to the distance of the structure from the ocean was made for the first time in a suit to enjoin further work on the structure, and such suit was filed almost a year after the beginning of the construction of the addition, at a time when it was roughly eight stories in height, and represented an expenditure by owners of several million dollars, adjoining landowner stated no cause of action for equitable relief based on violation of setback requirement of an applicable city ordinance, even if there was in fact a violation of such ordinance.

**Attorneys and Law Firms**

\*358 Sibley, Grusmark, Barkdull & King, Miami Beach, for appellants.

Anderson & Nadeau, Miami, for appellee.

**Opinion**

PER CURIAM.

This is an interlocutory appeal from an order temporarily enjoining the appellants from continuing with the construction of a fourteen-story addition to the **Fontainebleau Hotel**, owned and operated by the appellants. Appellee, plaintiff below, owns the Eden Roc **Hotel**, which was constructed in 1955, about a year after the **Fontainebleau**, and adjoins the **Fontainebleau** on the north. Both are luxury **hotels**, facing the Atlantic Ocean. The proposed addition to to **Fontainebleau** is being constructed twenty feet from its north property line, 130 feet from the mean high water mark of the Atlantic Ocean, and 76 feet 8 inches from the ocean bulkhead line. The 14-story tower will extend 160 feet above grade in height and is 416 feet long from east to west. During the winter months, from around two o'clock in the afternoon for the remainder of the day, the shadow of the addition will extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc, which are located in the southern portion of its property.

In this action, plaintiff-appellee sought to enjoin the defendants-appellants from proceeding with the construction of the addition to the **Fontainebleau** (it appears to have been roughly eight stories high at the time suit was filed), alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach wholly unfitted for the use and enjoyment of its guests, to the irreparable injury of the plaintiff; further, that the construction of such addition on the north side of defendants' property, rather than the south side, was actuated by malice and ill will on the part of the defendants' president toward the plaintiff's president; and that the construction was in violation of a building ordinance requiring a 100-foot setback from the ocean. It was also alleged that the construction would interfere with the easements of light and air enjoyed by plaintiff and its predecessors in title for more than twenty years and 'impliedly granted by virtue of the acts of the plaintiff's predecessors in title, as well as under the common law and the express recognition of such rights by virtue of Chapter 9837, Laws of **Florida** 1923 \* \* \*.' Some attempt was also made to allege an easement by implication in favor of the plaintiff's property, as the dominant, and against the defendants' property, as the servient, tenement.

\*359 The defendants' answer denied the material allegations of the complaint, pleaded laches and estopped by judgment.

The chancellor heard considerable testimony on the issues made by the complaint and the answer and, as noted, entered a temporary injunction restraining the defendants from continuing with the construction of the addition. His reason for so doing was stated by him, in a memorandum opinion, as follows:

'In granting the temporary injunction in this case the Court wishes to make several things very clear. The ruling is not based on any alleged presumptive title nor prescriptive right of the plaintiff to light and air nor is it based on any deed restrictions nor recorded plats in the title of the plaintiff nor of the defendant nor of any plat of record. It is not based on any zoning ordinance nor on any provision of the building code of the City of Miami Beach nor on the decision of any court, nisi prius or appellate. It is based solely on the proposition that no one has a right to use his property to the injury of another. In this case it is clear from the evidence that the proposed use by the **Fontainebleau** will materially damage the Eden Roc. There is evidence indicating that the construction of the proposed annex by the **Fontainebleau** is malicious or deliberate for the purpose of injuring the Eden Roc, but it is scarcely sufficient, standing alone, to afford a basis for equitable relief.'

<sup>[1]</sup> This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbor. **Beckman v. Marshall**, Fla.1956, 85 So.2d 552. It means only that one must use his property so as not to injure the lawful *rights* of another. **Cason v. Florida Power Co.**, 74 Fla. 1, 76 So. 535, L.R.A.1918A, 1034. In **Reaver v. Martin Theatres**, Fla.1951, 52 So.2d 682, 683, 25 A.L.R.2d 1451, under this maxim, it was stated that 'it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance.*' [Emphasis supplied.]

<sup>[2]</sup> <sup>[3]</sup> No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to

unobstructed light and air from the adjoining land. **Blumberg v. Weiss**, 1941, 129 N.J.Eq. 34, 17 A.2d 823; 1 Am.Jur., *Adjoining Landowners*, § 51. And the English doctrine of 'ancient lights' has been unanimously repudiated in this country. 1 Am.Jur., *Adjoining Landowners*, § 49, p. 533; **Lynch v. Hill**, 1939, 24 Del.Ch. 86, 6 A.2d 614, overruling **Clawson v. Primrose**, 4 Del.Ch. 643.

<sup>[4]</sup> There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite. See the cases collected in the annotation in 133 A.L.R. at pp. 701 et seq.; 1 Am.Jur., *Adjoining Landowners*, § 54, p. 536; \*360 **Taliaferro v. Salyer**, 1958, 162 Cal.App.2d 685, 328 P.2d 799; **Musumeci v. Leonardo**, 1950, 77 R.I. 255, 75 A.2d 175; **Harrison v. Langlinais**, Tex.Civ.App.1958, 312 S.W.2d 286; **Granberry v. Jones**, 1949, 188 Tenn. 51, 216 S.W.2d 721; **Letts v. Kessler**, 1896, 54 Ohio St. 73, 42 N.E. 765; **Kulbitsky v. Zimnoch**, 1950, 196 Md. 504, 77 A.2d 14; **Southern Advertising Co. v. Sherman**, Tenn.App.1957, 308 S.W.2d 491.

<sup>[5]</sup> We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. (No opinion is expressed here as to the validity of such an ordinance, if one should be enacted pursuant to the requirements of law. Cf. **City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.**, Fla.App.1959, 108 So.2d 614, 619; certiorari denied, Fla.1959, 111 So.2d 437.) But to change the universal rule—and the custom followed in this state since its inception—that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. As stated in **Musumeci v. Leonardo**, *supra* [77 R.I. 255, 75 A.2d 177], 'So use your own as not to injure another's property is, indeed, a sound and salutary principle for the promotion of justice, but it may

not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction.’

We have also considered whether the order here reviewed may be sustained upon any other reasoning, conformable to and consistent with the pleadings, regardless of the erroneous reasoning upon which the order was actually based. See *McGregor v. Provident Trust Co. of Philadelphia*, 119 Fla. 718, 162 So. 323. We have concluded that it cannot.

The record affirmatively shows that no statutory basis for the right sought to be enforced by plaintiff exists. The so-called Shadow Ordinance enacted by the City of Miami Beach at plaintiff’s behest was held invalid in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, supra. It also affirmatively appears that there is no possible basis for holding that plaintiff has an easement for light and air, either express or implied, across defendants’ property, nor any prescriptive right thereto—even if it be assumed, arguendo, that the common-law right of prescription as to ‘ancient lights’ is in effect in this state. And from what we have said heretofore in this opinion, it is perhaps superfluous to add that we have no desire to dissent from the unanimous holding in this country repudiating the English doctrine of ancient lights.

The only other possible basis—and, in fact, the only one insisted upon by plaintiff in its brief filed here, other than its reliance upon the law of private nuisance as expressed in the maxim *sic utere tuo ut alienum non laedas*—for the order here reviewed is the alleged violation by defendants of the setback line prescribed by ordinance. The plaintiff argues that the ordinance applicable to the Use District in which plaintiff’s and defendants’ properties are located, prescribing ‘a front yard having a depth of not less than one hundred (100) feet, measured from the ocean, \* \* \*’ should be and has been interpreted by the City’s zoning inspector as requiring a setback of 100 feet from an established ocean bulkhead line. As noted above, the addition to the *Fontainebleau* is set back only 76 feet 8 inches from the ocean bulkhead line, although it is 130 feet from the ocean measured from the mean high water

mark.

\*361 <sup>161</sup> While the chancellor did not decide the question of whether the setback ordinance had been violated, it is our view that, even if there was such a violation, the plaintiff would have no cause of action against the defendants based on such violation. The application of simple mathematics to the sun studies filed in evidence by plaintiff in support of its claim demonstrates conclusively that to move the existing structure back some 23 feet from the ocean would make no appreciable difference in the problem which is the subject of this controversy. Cf. *Taliaferro v. Salyer*, supra. The construction of the 14-story addition is proceeding under a permit issued by the city pursuant to the mandate of this court in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, supra, which permit authorizes completion of the 14-story addition according to a plan showing a 76-foot setback from the ocean bulkhead line. Moreover, the plaintiff’s objection to the distance of the structure from the ocean appears to have been made for the first time in the instant suit, which was filed almost a year after the beginning of the construction of the addition, at a time when it was roughly eight stories in height, representing the expenditure by defendants of several million dollars. In these circumstances, it is our view that the plaintiff has stated no cause of action for equitable relief based on the violation of the ordinance—assuming, arguendo, that there has been a violation.

Since it affirmatively appears that the plaintiff has not established a cause of action against the defendants by reason of the structure here in question, the order granting a temporary injunction should be and it is hereby reversed with directions to dismiss the complaint.

Reversed with directions.

HORTON, C. J., and CARROLL, CHAS., J., and CABOT, TED, Associate Judge concur.

#### All Citations

114 So.2d 357

Select Year:  

## The 2021 Florida Statutes (including Special Session B)

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[Title XVIII](#)  
PUBLIC LANDS AND PROPERTY

[Chapter 253](#)  
STATE LANDS

[View Entire Chapter](#)

### **253.141 Riparian rights defined; certain submerged bottoms subject to private ownership.—**

(1) Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

(2) Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.

(3) The submerged lands of any nonmeandered lake shall be deemed subject to private ownership where the Board of Trustees of the Internal Improvement Trust Fund of Florida conveyed the same more than 50 years ago without any deductions for water and without any reservation for public use and when taxes have been levied and collected on said submerged lands since conveyance by the state.

(4) Where private ownership of submerged bottoms outward from the shore has originated in a Spanish or other land grant approved by the Congress specifically describing an area in which was included navigable water, or by patent out of the United States prior to the date on which Florida became a state likewise containing a description including navigable water, or upon a valid conveyance out of the state, the submerged land included in such grant, patent, or conveyance shall be subject to taxes lawfully imposed.

**History.**—ss. 1, 2, ch. 28262, 1953; s. 2, ch. 61-119; s. 31, ch. 82-226; s. 200, ch. 85-342; s. 140, ch. 95-148.

**Note.**—Former ss. 192.61(1)-(4), 271.09, 197.315(3), 197.228.

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Superseded by Statute as Stated in [Commodores Point Terminal Co. v. Hudnall](#), S.D.Fla., August 9, 1922

75 Fla. 28

Supreme Court of **Florida**.

**THIESEN**

v.

**GULF**, F. & A. RY. CO. et al.

Nov. 3, 1917.

|

On Petition for Rehearing, Jan. 14, 1918.

|

On Rehearing, Feb. 21, 1918.

|

Further Rehearing Denied April 19, 1918.

### Synopsis

Error to Court of Record, Escambia County; Kirke Monroe, Judge.

Action by Christian **Thiesen** against the **Gulf, Florida** & Alabama Railway Company and others. From a directed verdict for defendants, plaintiff brings error. Reversed.

West Headnotes (13)

[1] **Water Law** 🔑 Ordinary high water line or mark in general

Private ownership of land riparian to navigable waters in **Florida** extends ordinarily to high-water mark.

[3] **Water Law** 🔑 Ordinary high water line or mark in general

At common law lands which were bounded by and extended to high-water mark of waters in which tide ebbed and flowed were riparian or littoral to such waters.

1 Cases that cite this headnote

[4] **Water Law** 🔑 Federal paramountcy

**Water Law** 🔑 Ordinary high water line or mark in general

Title to soil under waters where tide ebbs and flows, and in **Florida** all navigable waters between high and low water mark is in state subject to power of Congress to regulate commerce.

[5] **Water Law** 🔑 Access to water in general

At common law riparian proprietor whose land extended to high-water mark of tide waters had right of ingress and egress to and from land over the waters upon which his land bordered.

10 Cases that cite this headnote

[6] **Water Law** 🔑 Right to construct or maintain

Riparian owner of lands, bounded by or extending to high-water mark of tide waters or navigable streams and lakes, without the consent of state, cannot build any structure upon submerged land between ordinary high and low water marks.

14 Cases that cite this headnote

[7] **Pleading** 🔑 Surplusage and unnecessary matter

Declaration in action for damages for interfering with rights of common-law riparian owner of land abutting on bay, alleging right to build wharfs, piers, and docks on submerged land to channel of bay, may be treated as valid by eliminating allegations as to right to build as surplusage.

1 Cases that cite this headnote

[8] **Evidence** 🔑 Public Documents, Records, Exemplifications, or Official Copies

American State Papers are received in evidence without other proof of their authenticity than published volume.

2 Cases that cite this headnote

[9] **Eminent Domain** 🔑 Water rights

Rights of a riparian owner at common law constitute property of which he cannot be deprived by the state under the Constitution, without just compensation.

9 Cases that cite this headnote

[10] **Eminent Domain** 🔑 Water rights

Laws 1899, c. 4802, granting water front of city of Pensacola, did not justify railroad under city's grant of submerged land between high and low water marks lying in front of land of riparian owner in depriving him of his common-law rights without just compensation.

7 Cases that cite this headnote

[10] **Water Law** 🔑 Title and rights held in public trust

State's title to soil under waters where tide ebbs and flows and all navigable waters is held in trust for people having rights of navigation, fishing, bathing, and commerce upon and in waters.

1 Cases that cite this headnote

[11] **Water Law** 🔑 View of water

**Water Law** 🔑 Access to water in general

**Water Law** 🔑 Extent of right to use water in general

In **Florida** riparian proprietor whose land extends to high-water mark of tide waters has right of ingress and egress, of unobstructed view over waters, and, in common with public, right of navigation, bathing and fishing over and in such waters.

6 Cases that cite this headnote

[12] **Trial** 🔑 Insufficiency to support other verdict; conclusive evidence

Verdict should not be instructed unless prevailing party has proved material allegations and evidence would not justify different verdict.

[13] **Trial** 🔑 Verdict for defendant

Where burden is on plaintiff to prove all elements essential to sustain his claim to relief and he fails to make such proof, verdict may be directed for defendant.

2 Cases that cite this headnote

*Syllabus by the Court*

Private ownership of land riparian to navigable waters in this state extends ordinarily to high-water mark.

While a verdict should not be directed for one party when there is evidence on which the jury may lawfully find for the opposite party, yet where the burden is on the plaintiff to prove all the elements essential to sustain his claim to relief, and he fails to make such proof, a verdict may be directed for the defendant. Browne, C. J., dissenting.

On Rehearing.

At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters.

The title to the soil under the waters where the tide ebbs and flows and in this state all navigable waters, between high and low water mark is in the state of **Florida** subject to the powers of Congress to regulate commerce. The title to such land, however, is held by the state in trust for the people who have the rights of navigation, fishing, bathing, and commerce upon and in the waters.

At common law a riparian proprietor whose land extends to high-water mark of tide waters had the right of ingress and egress to and from the lot over the waters upon which his land bordered. In this state he enjoys such right and that of unobstructed view over the waters and in common with the public the right of navigation, bathing, and fishing in such waters.

A riparian owner of lands that are bounded by or extend to the high-water mark of tide waters or navigable streams and lakes has no right, without consent of the state, to erect or build any structure upon the submerged land between the ordinary high and low water marks of such waters.

A declaration, in an action for damages for interfering with one's rights as a common-law riparian owner of land on a bay, which declaration alleges a right in the abutting landowner to build wharves, piers, and docks upon the submerged land to the channel of the bay, may be treated as a valid declaration by eliminating the allegations as to the right to build wharves, docks, and piers to the channel as surplusage.

The American State Papers are received in evidence without other proof of their authenticity than the published volume.

The rights of a riparian owner at common law constitute property of which such owner cannot be deprived by the state under the Constitution, without just compensation.

Chapter 4802, Laws of **Florida**, 1899, entitled 'An act to grant the water front of the city of Pensacola,' is ineffectual to justify a railroad company under a grant from the city of the submerged land between high and low water mark lying in front of the land of a riparian owner, in depriving such riparian owner of his common-law rights as such without just compensation.

#### Attorneys and Law Firms

**\*30 \*\*492** Sullivan & Sullivan and John S. Beard, all of Pensacola, for plaintiff in error.

Blount & Blount & Carter and Philip D. Beall, all of Pensacola, for defendants in error.

PER CURIAM.

In an action to recover damages for filling in from the shore line towards the channel opposite plaintiff's land upon the waters of Pensacola Bay in Escambia county, **Fla.**, the court directed a verdict for the defendants, and the plaintiff took writ of error to the final judgment for the defendants.

The statute under which the action is brought is as follows: '643. An act entitled 'An act to benefit commerce,' approved December 27, 1856, and the grants therein made shall remain in force, which act is as follows:

"Whereas it is for the benefit of commerce that wharves be built and warehouses erected for facilitating the landing and storing of goods; and whereas, the state being the proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving their water lots; therefore,

"The state of **Florida**, for the consideration above mentioned, divests itself of all right, title and interest to all lands covered by water, lying in front of any tract of land owned by a citizen of the United States, or by the United States for public purposes, lying upon any **\*31** navigable stream or bay of the sea or harbor, as far as to the edge of the channel, and hereby vests the full title to the same in and to the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in, to erect warehouses or other buildings, and also the right to prevent encroachments of any other person upon all such submerged lands in the direction of their lines continued to the channel, by bill in chancery, or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the state, for any interference with such property, also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands, for the purposes herein mentioned.'

'644. Nothing in this article contained shall be so construed as to release the title of the state of **Florida**, or any of its grantees, to any of the swamp or overflowed lands within the limits of the same, but the grant herein contained shall be limited to those persons and bodies corporate owning lands actually bounded by, and extending to low-water mark, on such navigable streams, bays and harbors.'

Sections 643, 644, Gen. Stats. 1906, Compiled Laws 1914.

Without objection on the part of the defendants, the plaintiff offered in evidence a written conveyance by Spanish authority dated December 31, 1813, covering 'one lot known by the number 369 (three hundred and sixty-nine) containing ninety-five feet front, by one hundred **\*32** and thirty-one feet three inches in depth fronting on the bay.' Conceding, but not deciding, that it sufficiently appears that title to the described **\*\*493** land passed by successive conveyances or otherwise

to the plaintiff, yet in order to maintain this action under section 643, General Statutes of 1906, the plaintiff must have shown that the described land was ‘actually bounded by and extended to,’ the waters of a ‘navigable stream or bay of the sea or harbor.’ Section 644, Gen. Stats. 1906. This is necessary to give to the plaintiff the statutory rights that under section 643 of the General Statutes of 1906 accrue to stated riparian owners in and to the ‘lands covered by water, lying in front of any tract of land \* \* \* lying upon any navigable stream or bay of the sea or harbor.’ While the expression ‘fronting on the bay,’ contained in the above-mentioned conveyance, may be taken in connection with other circumstances to indicate a boundary, it may also indicate aspect or location with reference to outlook. *Alden v. Pinney*, 12 Fla. 348. Taken alone, the words ‘fronting on the bay’ certainly cannot be held to be sufficient to show that the land was ‘actually bounded by, and extended to’ the waters of a navigable ‘bay.’ This being so, it was incumbent upon the plaintiff to show by evidence that the described land was ‘actually bounded by, and extended to’ the waters of a navigable stream or bay of the sea or harbor.’

It appears that a lot numbered 368 lies north of lot 369, which lot 368 extends north to Zarragossa street. It also appears that a ‘dummy’ railroad track now exists between the water and the uplands of lot 369. In the plaintiff’s chain of title the description is ‘east half of lots three hundred and sixty-eight and three hundred \*33 and sixty-nine in block one, containing forty feet front on Zarragossa street and extending back two hundred and sixty-one 3/12 feet to the Bay of Pensacola and fronting thereon forty-seven 6/12 feet be the front and depth more or less.’ The dimensions of lot 368 are not given in the testimony. A map in evidence seems to indicate that lot 368 is 130 feet north and south. The bill of exceptions shows that the plaintiff testified, viz.:

‘I measured the east side of lot 369 from Zarragossa street. I measured from Zarragossa 368 and continued through lot 369 to the water. I measured the west side in the same way. I measured one straight line, from Zarragossa street, practically the middle of the block; the alleyway, to the inside of the dummy track, 261 feet. It was 261 feet inside of the dummy track; just inside one rail, between the two rails. It was about 25 or 30 feet from there to the water before the **Gulf, Florida & Alabama** filling in was constructed.’

This does not show the southern boundary of lot 369 to be ‘actually bounded by and extending to’ the waters of a navigable bay. The plaintiff offered no direct testimony that in 1856, when the riparian statute was enacted, or since then,

the lot was in part bounded by and extended to the waters of a navigable bay.

Frank Caro testified on behalf of plaintiff:

‘I have known that property since 1882. There was a fence running east and west. but there was a lot run down to the bay.’ ‘There was no fence to the south. In fact it was open to the bay.’

Another witness, C. P. Bobe, whose grandfather had owned the lot, testified that:

‘This lot came down pretty close to the water or to the beach, before the wharf or the terminal track was built. My recollection is that \*34 the lot did not go clear to the water, \* \* \* about 5 feet, nearly to the beach.’

On redirect:

‘I could not say how far the lot went down to the water. I do not know where the lot line was on the south side.’

Mr. Albert Riera testified on redirect:

‘I cannot state whether or not this lot ran down to the ordinary high water.’

This testimony, as well as that of other witnesses, does not show that lot 369 actually extended to the waters of the bay. There is testimony that the plaintiff and his predecessors in occupancy of lot 369 used the submerged lands in front of the lot with wharves, etc., but this use does not confer riparian rights under the statute. The lot must be actually bounded by and extend to low-water mark of the navigable bay for the riparian rights under the statute to attach. The maps put in evidence by both parties indicate that the lot did not extend to the waters of the bay.

[1] In 1892 the predecessor in title of the plaintiff executed to the Pensacola Terminal Company a lease of ‘a right of way fifteen feet in width along and across the water front of the Bay of Pensacola, city of Pensacola, said state and county, now owned by the party of the first part, south of the premises now owned, occupied and under inclosure by the party of the first part, known and described as the east one-half of lot number three hundred and sixty-nine (369) in block number one (1), according to the plan of the old city of Pensacola, in said state and county, fronting forty-seven (47) feet front on the Bay of Pensacola to the edge of the channel of said bay, the said right of way to extend from the eastern to the western boundaries of the said described property of

the party of the first part.' This description is not of a lot actually bounded by and \*35 extending to the waters of the bay. It may be regarded as defining the location of the property leased to the terminal company for its railroad track 'south of the premises now owned' by the lessor. The conveyance to the plaintiff in 1896 is of the 'east half of lots three hundred and sixty-eight (368) and three hundred and sixty-nine (369) in block one (1) of the old city of Pensacola containing a frontage of forty (40) feet on Zarragossa street and running through to Pensacola Bay, being two hundred and sixty-one 1/4 feet and having a frontage on said \*\*494 bay of forty-seven and a half feet.' This does not define a boundary as extending to the waters of the bay, even if that could avail when the original Spanish grant was of a lot 'fronting on the bay,' which is not shown to have carried title to land 'actually bounded by and extending to low-water mark' of the navigable bay, as required by the statute quoted above conferring riparian rights. Private ownership extends ordinarily to high-water mark. *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 South. 428; *Ker & Co. v. Couden*, 223 U. S. 268, 32 Sup. Ct. 284, 56 L. Ed. 432; *United States v. Pacheco*, 2 Wall. (U. S.) 587, 17 L. Ed. 865.

The plaintiff's claim is predicated upon the grant of riparian rights contained in chapter 791, Acts of December 27, 1856, entitled 'An act to benefit commerce' (sections 643, 644, General Statute of Florida 1906; Florida Compiled Laws, 1914); and the defendants' claim is based on chapter 4802, Acts 1899, entitled 'An act to grant the water front of the city of Pensacola.'

[2] While a verdict should not be directed for one party when there is evidence on which the jury may lawfully find for the opposite party, yet where the burden is on the plaintiff to prove all the essential elements to sustain \*36 his claim to relief, and he fails to make such proof, a verdict may be directed for the defendant. In this case the burden was on the plaintiff to affirmatively show that lot 369 was actually bounded by and extended to low-water mark of the bay. This showing was not made, and there was no error in directing a verdict for the defendant. See *Bass v. Ramos*, 58 Fla. 161, 50 South. 945, 138 Am. St. Rep. 105.

Judgment affirmed.

TAYLOR, WHITFIELD, ELLIS, and WEST, JJ., concur.

BROWNE, C. J., dissents.

BROWNE, C. J. (dissenting).

I regret that I cannot concur in the decision in this case, but I am too firmly convinced by the evidence, both documentary and parol, that the lot in question extended to and was bounded by the bay, and that Thiesen was a riparian owner, to do otherwise. The earliest deed introduced in evidence in support of plaintiff's title was one from Lorenzo Vitrian, syndic, to Antonio Montero dated December 31, 1813, and contained this description:

'One lot known by the number 369 (three hundred and sixty-nine) containing ninety-five feet front, by one hundred and thirty-one feet three inches in depth, fronting on the bay.'

The majority of the court hold that:

'Taken alone, the words 'fronting on the bay' certainly cannot be held to be sufficient to show that the land was actually bounded by and extended to the waters of a navigable bay.'

In view of the testimony as to the south boundary of \*37 this lot, which to my mind clearly proves that the lot was actually bounded by and extended to the waters of the bay, I cannot see why we should discuss the effect of the description when 'taken alone.' Nevertheless, I contend, that, even 'taken alone,' the language used fully describes a lot bounded by and extending to the waters of the bay. 'Having a front on' or 'fronting on' are apt terms to describe the boundaries to real estate. Thus a lot described as 'having a front on' or 'fronting on' Monroe street means a lot extending to and bounded by such street. The natural, common sense meaning of these words is boundary and not aspect, and before we change the common sense meaning of words, and give them a strained and unusual one, it should plainly appear from the instrument itself that such was the intention, or from facts and circumstances which irresistibly force the latter construction. Where a deed conveys 'one lot known by the number 369 (three hundred and sixty-nine) containing ninety-five feet front, by one hundred and thirty-one feet three inches in depth fronting on Monroe street,' the natural meaning is that it conveyed a lot actually bounded by and extending to the street, and, if after taking his 131 feet 3 inches, there remained a strip between that point and the street, the grantor would take to the street; for there is no rule of construction more clearly settled than that courses and distances must yield to natural objects, and where they conflict, the distances must be contracted or expanded to accord to the monuments. In this case a map was introduced which showed lot 369

ending before it reached the water, but it is obvious that the party who made the plat was not familiar with this rule of construction, and arbitrarily \*38 limiting the depth of the lot to the course and distance described in the deed, instead of extending it to the natural object (the bay), cannot set aside a rule of construction enunciated by Chief Justice Marshall in *McIver's Lessees v. Walker*, 9 Cranch, 173, 3 L. Ed. 694, and followed without exception by all the courts of the country where the question has arisen, including Florida. *Daggett v. Willey*, 6 Fla. 482. To my mind the words used in this deed are not ambiguous, and leave no doubt about whether boundary or aspect was intended, but, if so, there remains the strong circumstance that neither Vitrian nor his heirs ever made claim for the strip between the upland and the bay, but that for over 100 years, Thiesen and his predecessors in title claimed the strip, and exercised all the rights of ownership, undisturbed by any one. The law does not recognize such a condition as land without an owner, and if Vitrian did not part with the title to the strip between the upland and the bay, he and his heirs lost all claim by reason of the open, notorious possession under claim of ownership of Thiesen and his predecessors in title \*\*495 for 100 years. This seems to dispose of the contention, but I am not satisfied to let it rest there. If there is any ambiguity or doubt as to whether Vitrian by the use of the words 'fronting on the bay' intended to grant the space between the upland and the bay, he or any one claiming under or through him ought not to be permitted to deprive Thiesen of the premises or his rights, under the rule of construction that when there is an uncertainty in a deed about what is meant, we should interpret the words against the vendor, because it was in his power and it was his duty to use such words as to leave no room for doubt.

\*39 The construction which I have placed on the words 'fronting on the bay' is well supported by the authorities. In the case of *Crane v. French*, 50 Mo. App. 367, it was held, in order that a lot should be regarded as 'fronting on the street,' it must actually extend to and be bounded by the street. In the case of *Proctor v. Maine Central R. Co.*, 96 Me. 458, 52 Atl. 933, the description in a deed to a lot of land was before the court for construction. It read:

'Granted to Deborah Mills the first thirtyacre lot toward the Round Cove as it is now laid out, with a road to be allowed upon the bank front thirty rods, and northeast by east into the woods eight score rod.'

The case hinged on whether the words 'front thirty rod' extended the lot to Fore river, and the court held that it did, and said:

'Besides, the descriptive language of the grant itself, 'front thirty rods,' is appropriate to land lying adjacent to the water, and is not appropriate to any other condition shown to have existed at the time of the grant. A lot of land may be said to 'front' on water, but not usually to 'front' on another piece of land. It may 'front' on a road. But in this case there does not appear to have been any existing road. The language to the grant, 'road to be allowed upon the bank,' indicates rather the reservation of a public right of way for a road than contemplated, than for one then existing. But in whatever condition the road was, it is clear that it was not referred to as a boundary. The Mills lot evidently 'fronted' on something, and we think that something was Fore river. It follows, therefore, by the usual rules of construction, that Deborah Mills, by the grant of this lot of upland fronting on tidewater, became also the owner of the adjacent flats to low-water mark, not exceeding 100 \*40 rods from high-water mark. And her record title has come to the plaintiff.'

The description which was thus construed to mean fronting on tidewater and carrying with it certain riparian rights, did not say, as description in the instant case says, that the land fronted on the water, but merely said 'front thirty rod,' and the court held that, as there was no road for it to front on, and as land is not usually described as fronting on land, and as the Mills lot evidently fronted on something, found that that something was Fore river. There is no necessity for me to resort to such fine reasoning to reach the conclusion that the lot in controversy fronted on the bay, for the deed states so specifically, and the Mills Case cited supra abundantly supports my position that the words 'fronting on the bay' carry with them the right to the lowlands lying between the upland and the waters of the bay, and the riparian rights thereto attaching.

A very strong and well-reasoned case, copiously supported by authorities, on the question involved in the one under consideration, is that of *Morgan v. Livingston*, 6 Mart. O. S. (La.) 19. It is instructive, in that it gives the Spanish and French terms used in descriptions in deeds and their translations, and their force and purport when expressed in sen's title is predicated was in Spanish, and was executed while Florida was a Spanish possession, and the words used in the description should be given the meaning which was intended by them. If the Spaniards used the expression 'Frente al Bayou' to designate a lot bounded by the bay, we should not defeat that purpose and say they meant aspect and not boundary, because they did not use our more labored \*41 and tautological one of 'bounded by and extending to the

waters of the bay.' I quote freely from the opinion in the case of Morgan v. Livingston, supra, not as an authority for the conclusion which I have reached, but in support of it. In that case J. B. Poeyfarre sold to P. Bailly property thus described: 'A lot of mine situated out of this city, consisting of 60 feet of front and 180 in depth, in conformity with the plan of Don Carlos Trudeau, public surveyor of the city, bounded on one side by a lot of the vendor, and on the other by one of B. Gravier, which lot belongs to me for having purchased it with greater quantity of land from B. Gravier and Maria J. Delhonde, his wife.'

In the deed to Poeyfarre, the premises were described as: 'A piece of land forming a trapezium, situated out of the Chaitoulas gate, consisting of 415 feet of land, frente al rio, front to the river, 186 feet in depth on the side of the city, 411 feet 8 inches on the side of the vendors' garden, and on the back 229 feet 8 inches. The whole forms 2,386 toises 4 feet and 6 inches of land in superficies, as appears by the plan of Don Carlos Trudeau, public surveyor, of the 9th instant, which the parties have signed, and which remains in the power of the vendee.'

In discussing the case the court said:

'From a very close examination of the books of the land office of the United States, which have been submitted to us, and the depositions of surveyors, examined in this case, it is clear that in French and Spanish conveyances, both public and private, the words 'face au fleuve,' 'face,' 'frente al rio,' 'frente,' 'front to the river,' or 'front,' exclusively designate estates bounded by the river, which in the country are otherwise called riparious, bound to the repair of the road, its ditches, bridges, and levees, and to supply ground for \*42 either or the whole of these, when that which they cover is carried away by the water. We are therefore bound to take the expression, 'frente al rio,' in the deed, as evidence of the intention of the parties to convey, and of the other to acquire, a riparious estate, unless by taking it in this sense we are led to an incongruous or absurd result. \* \* \* If the parties to the deed to Poeyfarre meant that \*\*496 a riparious estate should pass, their intention might be carried into effect by conveying as far as the river by express words, or by conveying everything susceptible of absolute private ownership between the line of the trapezium most distant from its front and parallel to the river, till the bank. In the present case both methods appear to have been adopted. The land is sold, front to the river, an expression which, in the general understanding of the county, is equivalent to the most explicit terms of a boundary on the

river; and it does not appear that the vendors, who, by the pleadings are admitted by both parties, since they both claim under them, to have been riparious owners, have retained any part of the ground between the trapezium and the river. \* \* \* The impression on our minds is irresistible that Poeyfarre sold to Bailly, as he had himself purchased from Gravier, a riparious estate, one bounded by the river, or separated only by the public road. \* \* \* We conclude that, on the inspection of the deed, it appears to us the words 'front to the river,' used therein, were intended to denote a riparious estate bordering on the river.'

In none of the cases which I have cited have the descriptive words been as strong and clear as in the instant case. One uses the term 'front thirty rod,' another 'front to the river,' but in both cases it was held that these words conveyed a riparious estate. Had \*43 the description in the deed from Ivtrian said 'fronting the river,' there might have been grounds for discussion and for giving a strained instead of the natural and obvious meaning to the words, but the use of the word 'on' in connection with 'fronting' removes all doubts and carries with it the idea of physical contact.

So far I have discussed only the proposition advanced by the majority of the court that:

'Taken alone, the words 'fronting on the bay' certainly cannot be held to be sufficient to show that the land was 'actually bounded by, and extended to, the waters of the navigable bay.'

But, as I said in the opening part of this opinion, this description need not, and should not, be 'taken alone,' but must be taken in connection with the evidence in the case. The superior court of the territory of **Florida** considered that the lot extended to the bay, because in the U. S. marshal's deed to Francis Bobe, dated August 31, 1841, it is described as:

'The eastern half of said lots, number three hundred and sixty-eight, and three hundred and sixty-nine, situated in the city of Pensacola, and containing forty-seven and a half feet front on Zarragossa street, and extending back two hundred and sixty-one feet and three inches to the Bay of Pensacola, and fronting thereon forty feet.'

In 1875 Francis W. Bobe sold the lot to Elias Lee, and in 1878 Elias and Mary Lee reconveyed it to Bebe, and in both deeds the land was described as 'extending back two hundred and sixty-one feet and three inches to the Bay of Pensacola and fronting thereon \* \* \* be the said fronts and depths more or

less.’ Beginning with the deed from Bobe to Lee, we find in all the descriptions to this lot the words ‘be the front and depth more or less,’ a clear recognition that since the earlier deeds there had been an accretion to this lot. The administrator \*44 of the estate of Francis Bobe in 1880, in his report to the county judge, described the lot as being ‘back on the Bay of Pensacola.’ In the same year the commissioner appointed by the county judge to sell the real estate belonging to the heirs of Francis Bobe reported that he had sold the ‘E. 1/2 of lots 368 and 369, block 1, containing 40 feet front on Zarragossa street, and extending back 267 3/12 feet to the Bay of Pensacola, and fronting thereon 47 6/12 feet, be the front and depth more or less.’ It is a circumstance to be considered that in this report the lot is described as extending back 267 3/12 feet, instead of 261 3/12 as theretofore. It is reasonable to assume that the lot had by this time gained 6 feet by accretion, and this explains the excess of land found by **Thiesen** when he measured it before the filling in was done by the **Gulf, Florida & Alabama Railway**. It is true that it does not account for all the excess, but the extensive fills made to the water fronts of Pensacola between 1880 and 1914 naturally resulted in the recession of the water line and the consequent extension of the line of all lots along the water front.

The commissioners in making a deed to Walters returned to the paper dimensions of the lot, but used the significant words ‘be the front and depth more or less.’

In 1892, Walters, a predecessor in title of **Thiesen**, leased ‘a right of way 15 feet in width along and across the water front of the Bay of Pensacola, city of Pensacola, said state and county, now owned by \* \* \* fronting 47 feet on the Bay of Pensacola to the edge of the channel of said bay \* \* \* and the said party of the second part especially agrees not to interfere with the water front and the riparian rights of the party of the first part south of the said right of way to the edge of the channel of the Bay of Pensacola all of which riparian \*45 rights are hereby reserved under the said party of the first part, his heirs and assigns, and the said party of the second part further agrees to keep the right of way hereby leased free and unobstructed so as to allow free and unobstructed access and passage over said right of way and from the wharf now built and owned by the party of the first part.’

The deed from Walters to **Thiesen** changed the phraseology of the description a bit, but did not alter its import. It reads: ‘Running through to Pensacola Bay, being two hundred and sixty-one 1/4 feet, and having a frontage on said bay of forty-seven and a half feet.’

In all the descriptions in the various documents from Vitrian's deed to Walters, I find an effort to convey a lot fronting on the bay, and I use the term ‘fronting on the bay’ advisedly, as I am satisfied that rhetorically, philologically, and legally it describes a lot \*\*497 ‘actually bounded by and extending to the bay,’ in the absence of anything to show a contrary intent.

I take it, that the natural meaning of the words ‘fronting on the bay,’ and ‘fronting on the street,’ mean boundary and not aspect, and consequently whoever contends for the unusual constructions assumes the burden of proof, and until he meets the requirement, the natural, obvious, common sense, everyday meaning of the words should be accepted.

I pass now to another phase of the case. Assuming there was doubt about the boundaries of this lot, it was a question of fact to have been decided by the jury. It is a settled rule in this state that:

‘When there is room for a difference of opinion between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or when there is room for such differences as to the inferences which might be drawn from conceded \*46 facts, the court should submit the case to the jury for their finding.’ *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 South. 975, L. R. A. 1917E, 715, decided in the January term of this court, and cases cited therein.

The testimony of old and reliable citizens like Mr. Albert Riera and others who testify for the plaintiff as to the ancient boundary of the lot was as specific as possible on the question of whether the land owned by the predecessor in title to the plaintiff was originally bounded by and extended to the waters of the navigable bay. The extensive fills which have been made for miles along the water front of Pensacola in the last 30 or 40 years have caused the shore line of the unfilled lots to recede, so that a lot which 100 years ago extended 131 feet to the waters of the bay may now extend much farther by reason of such recessions.

‘The rule governing additions made to land, bounded by a river, lake, or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public

policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.' *Banks v. Ogden*, 2 Wall. 57, text 67 (17 L. Ed. 818).

Charles P. Bobe testified:

'I do not think the lot went quite to the water after the wharf was built. Walters \*47 had a wharf. He utilized this wharf for fishing. He had boats along the wharf all the time.'

William Cline testified that 38 years ago there was a wharf and bathhouses on the property, and that he had seen boats landed there. 'The lot went out in the water, fishermen brought the boats there and loaded them there when they were going to sea.' He had seen fish boats land there more than 30 years ago. 'The wharf was knocked down several times by storms and floating timber, but was built back again.' Describing the south end of the lot he said:

'The sand that Mr. Bobe put there seeped out and was washed out with every blow and made land. Where there was water before there was land afterwards. It was made land. Boats were pulled right up on the lot from the bay before the road was built there.'

Frank Caro has known the lot since 1882. 'The fence ran down to the water, the fence on the western side and the eastern side. The wharves were maintained there, and sometimes the storm would wash the wharf down and he would replace it. Several times. Boats landed there. At high tide the water would go right up in front of the place, pretty near in the yard. In low tide you could walk out. There was a fence running east and west, but there was a lot run down to the bay. There was no fence to the south side of it at all. It was open to the bay.'

Mr. Albert Riera is 73 years old, has lived in Pensacola all his life except while in the Confederate Army. He testified:

'I knew that lot before the war. The lot on the west side of my father's was always known as the 'Bobe lot.' The lot on the west side of that was the Hernandez lot. There was a fence between my father's and Bobe's lot. I do not think the back portion of that Bobe \*48 lot was ever fenced. There was nothing between that lot and the water. It was just an open beach open to the bay. It was quite a short distance from the front portion of that lot to the beach. It depended upon the tides. There was sufficient room for a vehicle to pass by, where the waters would cover it at high water. By lot I mean the high land.'

It is clear that these witnesses, in speaking of the 'lot' or the 'yard,' had reference to the usable part of the lot, or the upland. Mr. Caro says, 'The place south of the house towards the bay is what I call the yard.' These explanations by Albert Riera and Frank Caro as to what they mean by 'lot' and 'yard' show the significance of the testimony of the other witnesses, and from all the testimony it seems very clearly established to my mind that this lot fronted on, was bounded by, and extended to, the waters of the bay.

The doctrine of the Anderson Case, cited supra, is thus stated in the fourth headnote:

'A party in moving for a directed verdict admits, not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.'

There is no denial that the plaintiff and his predecessor in title had been in actual possession of this lot for upwards of 50 years, living on the dry part of it, and using the water front for the benefit of such commerce as existed at that time and in that locality, and built such wharves as such commerce \*\*498 merce required. It is true the wharves built by Bobe and Walters and Thiesen were not as large as those built by the railroad which seeks to take from the owner his riparian rights without just compensation, nor was the commerce of that day and locality as great as that now handled by the railroad, but I fail to find in the act of 1856 a distinction based upon the size \*49 of the wharves or the volume of commerce. If they were adequate to the time and place, and the needs of those to be benefited, 'it is enough; it will serve.'

The cases of *Alden v. Pinney*, 12 Fla. 348, and *Sullivan v. Moreno*, 19 Fla. 200, hinged, as in this case, on the question of fact whether the lot in controversy had a water boundary. I quote from the opinion of Judge Westcott in the *Alden v. Pinney* Case:

'This leads us to the consideration of the case upon the proofs, and the first question to be determined is: Has the complainant established that the 'southern boundary of the lot' conveyed to Gonzalez on the 19th February, 1827, from whom he derives title, 'was the bay,' or that it extended to the line of ordinary high tides in calm weather at that time? What may be the effect of the reservation of lot E. for a market house and store house, as designated on the plan of the cabildo, we do not determine, as no point is made of it by defendants, and we treat the case as though an absolute and proprietary right is in the complainant to whatever passed under the deed. The question of boundary

here is a fact to be determined by a consideration of the whole evidence.' 12 Fla. 381.

In discussing whether certain calls in the deed indicated aspect or boundary Judge Westcott said:

'These terms, therefore, must receive that construction and signification which is most consistent with the other calls and the evidence in the case.' 12 Fla. 382.

In the case of *Sullivan v. Moreno* a public way, street, or common, lay between the Moreno land and the bay and the lot was described as bounded 'on the south by a street on Pensacola Bay,' and the question of Moreno's riparian ownership was decided on the ground that his deed described his south boundary as 'a street on the Pensacola Bay.' In neither of these cases was the \*50 description like that in the deed under which **Thiesen** claims, nor was there such evidence of long-continued possession and acts indicating a claim of ownership to the lowlands, as in this case.

Because of the 'differences of opinion' between the members of this court 'as to the inferences which might be drawn from conceded facts,' I think I am justified in saying that 'there is room for a difference of opinion between reasonable men,' and the case comes well within the rule of *Anderson v. Southern Cotton Oil Co.*, cited supra, and that the court erred in directing a verdict for the defendant.

Chapter 4802, Laws of **Florida**, Acts of 1899, which sought to dispose of certain parts of the water front of the city of Pensacola, is ineffective to deprive a person of riparian rights, if such existed prior to the passage of the act. The part which it is claimed affects the parties to this suit is that which provides in effect that if any person claiming riparian rights under the act of 1856 failed to make application for the same within two years before certain commissioners named in the act, the commissioners should make a deed to the city of Pensacola for all such lots or portion of such lots for which no application was filed. It is contended by defendant in error that because the owner of the land in controversy did not make application for a deed to the lowlands in front of his lot, the same became forfeited and title thereto passed to the city of Pensacola.

The act of 1856 imposed the conditions under which a riparian owner could acquire the right to the use of lands covered by water adjacent to his property, and divested itself of 'all rights, title and interest to all lands covered by water lying in front of any tract of land owned by any citizen of the United States

\* \* \* lying upon any \*51 navigable stream or bay of the sea or harbor as far as to the edge of the channel,' and vests 'the full title of the same in and to the riparian proprietor.'

This title is not contingent or dependent upon the erection of wharves or the filling in of the shore, bank, or beach.

The state, having divested itself of all rights, title, and interest in such lands, and granted the same to the riparian proprietors, had no power thereafter to impose new and additional burdens or obligations upon such riparian proprietors. The title to the lands covered by water which the riparian owner derived from the grant of 1856 is as absolute as a title derived from any other source, and the Legislature was without power to impose conditions upon him by which he would be divested of his title upon noncompliance with the same.

Assuming, however, that the Legislature had the power sought to be exercised by the act of 1899, the method pursued was clearly unconstitutional, in that it undertook to create a judicial tribunal not authorized by the Constitution, and in contravention thereof. Notwithstanding the act of 1899 designated the parties who were to carry into effect the provisions of the act, 'commissioners,' the powers conferred upon them were judicial. They were to receive, file, and record claims to real estate and rights appurtenant thereto; they were given power to summon and swear witnesses, to hear testimony and receive evidence, and finally to determine the rights of persons to whom grants were made, and such determination was conclusive as to such rights. That it was intended for these acts to be judicial is apparent from section 7, which refers to the finding of the commissioners as an 'adjudication.'

I think the court erred in refusing to permit the plaintiff \*52 to introduce in evidence \*\*499 that part of the report of the United States Commissioners on page 119, vol. 4, of *American State Papers* (Duff Green Ed.).

In 1826 (Act April 22, 1826, c. 29, 4 Stat. 156) Congress enacted:

'That all of the decisions made by the Commissioners, appointed to ascertain claims and titles to lands in the District of West **Florida**, made in favor of claimants to lands and lots in said district, contained in the reports, opinions, and abstracts, of the Commissioners. which have been submitted to the Secretary of the Treasury, according to law, be, and the same are hereby, confirmed.'

The parts of the report offered in evidence, objections to which were sustained by the court, are as follows:

‘The lots in Pensacola do not belong to the King but to individuals, and their dimensions carry them to the waters edge at high tide.’ ‘The line in front was one of admeasurement, and not entirely a line of boundary, and the lot was sold per aversionem, and not ad mensuram; that is, it was disposed of in the gross, and not by the measure, or so much the acre.’

The Supreme Court of the United States has decided that the American State Papers, published under revision of the United States Senate, contained authentic papers which are admissible as evidence without further proof. [Bryan v. Forsyth](#), 19 How. 334, 15 L. Ed. 674; [Gregg v. Forsyth](#), 24 How. 179, 16 L. Ed. 731.

I am very strongly convinced that the judgement in this case should be reversed, not only on account of the error in directing a verdict for the defendants, but on account of the other errors which I have discussed.

### Opinion

On Petition for Rehearing.

ELLIS, J.

The plaintiff in error filed a petition for \*53 rehearing in this case upon several grounds, in one of which, namely, the fifth, he contends that his action in the court below was based, not only upon the riparian act of 1856, but upon his common-law right of riparian owner.

This contention was not distinctly made either in the briefs or the oral argument. The case was argued upon the theory that the cause of action rested upon and the evidence established the ownership by the plaintiff of the submerged lands between high and low water mark in front of the lot which fronted on the bay. The case was decided with reference to that single contention; the court saying in effect that to acquire any rights under the Riparian Act of 1856, Laws of **Florida**, the owner of the land fronting on the bay should own the land to low-water mark, and as there was no evidence whatever in the record that the plaintiff in error not his predecessor in title owned the land to low-water mark, he acquired no rights under the act of 1856.

The effect of this decision was to hold that title to the foreshore, that is, to land between high and low water mark

on bays, harbors, or navigable streams, cannot be acquired by prescription. The title, being in the state for the benefit of the public, the statute of limitations does not run.

It is, however, now insisted in the petition for rehearing that the owner of the lot mentioned in the pleadings claimed a commonlaw right as riparian owner, that is to say, the right of ingress and egress over the waters of the bay to and from his lot and the right to bathe and fish in those waters; and, as that right depends merely upon the fronting of the lot on the bay, that is to say, the extension of the lot to high-water mark, there was evidence \*54 sufficient, as shown by the record, to be submitted to the jury on that issue.

With this proposition the court finds no fault, as it is of the opinion now, and was when the case was considered, that ‘there is room for difference of opinion between reasonable men’ as to whether the boundaries of lot No. 369 extended to the high-water mark of the bay.

We have therefore examined the pleadings as thoroughly as the condition of the record and manner of its make-up permits with the view of ascertaining whether there was any issue resting upon common-law rights of riparian ownership.

There are six counts to the declaration: The first two filed in October, 1914; the third and fourth counts filed in June, 1915; the fifth count on February 7, 1916; and the sixth count February 18, 1916. The third and fourth count went out upon demurrer, and the order was made the basis of the second assignment of error. These two counts were distinctly intended to be framed upon the rights alleged to have accrued to plaintiff's predecessor in title under the act of 1856. The fifth count distinctly asserts ownership in the plaintiff of the submerged lands in front of lot 369 on the bay side, while the sixth count seems to be an effort to allege by way of inference and innuendo the plaintiff's rights under the act of 1856. It alleges that when the plaintiff acquired the lot he was a citizen of the United States, a condition precedent to the taking effect of the grant; that he exercised the right to construct wharves and other water front rights on the submerged lands, and that he had constructed wharves and docks on the south side of the lot. The pleas to this count seem not to have been replied to, so that the case apparently went to trial \*55 with no issue upon those pleas. Issue was joined upon the pleas to the fifth count, which expressly denied ownership of the submerged ground by plaintiff, water boundary, ownership of the lot, and 20 years' proprietorship of riparian rights.

The second count of the declaration seems to be framed upon the theory that the plaintiff through his predecessors

in title had acquired a title by prescription to the submerged land, whereby he had the right to build \*\*500 wharves and bathhouses in the waters on the bay side of his lot, and such right had been interfered with by the defendant.

The first count of the declaration, by treating certain portions of it as surplusage, may be regarded as a declaration upon the common-law right of a riparian owner. The first plea to both counts, the plea of not guilty, and the first 'further plea' to the first count, seem to have been framed in the view that they would be applicable in case, the first count was construed as a declaration on the common-law right of a riparian owner.

It is our conviction from the pleadings in this case that the plaintiff's case was begun and tried upon the theory that he or his predecessors in title acquired rights under the act of 1856 or by prescription, and that the idea of insisting on the common-law rights which the plaintiff had if his land did actually extend to the waters of the bay occurred at a later time. We did, however, overlook the fact that the first count of the declaration could, by eliminating a large part of it as surplusage, be treated as a declaration upon the common-law right of riparian ownership and interference therewith by the defendant, and while the history of the case as disclosed by the records shows that such was not regarded as the basis of the complaint, yet in deference \*56 to the assertion of counsel to the contrary in their petition for a rehearing, we have decided to grant the petition.

A rehearing is ordered.

BROWNE, C. J., and TAYLOR, WHITFIELD, and WEST, JJ., concur.

On Rehearing.

ELLIS, J.

The plaintiff in error brought suit in the court of record of Escambia county against the **Gulf, Florida** & Alabama Railway Company and the Eastern Construction Company for damages which the plaintiff claimed he had sustained because the defendants had, by filling in the submerged land in front of plaintiff's lot which he alleged extended to the waters of Pensacola Bay, deprived him of his rights as a riparian owner.

The case came on for trial upon the issues joined, and after hearing the evidence and argument of counsel the court instructed the jury to find for the defendants. Final judgment was entered upon the verdict, and the plaintiff took a writ of error.

In an opinion filed November 3, 1917, this court affirmed the judgment upon the theory that, the plaintiff having based his action upon the act of 1856, entitled 'An act to benefit commerce,' commonly known in this state as the 'Riparian Act,' and having failed to prove that the lot in question was actually bounded by and extended to low-water mark of the bay, which was essential to sustain his claim for damages, the affirmative charge given by the judge in defendant's favor was correct.

\*57 The court granted a rehearing upon the petition of plaintiff in error upon the ground that, as the plaintiff contended that his action was based, not only upon the statute above mentioned and quoted in full in the first opinion, but also upon his common-law right as a riparian owner, and the court not having considered the case from that viewpoint, the plaintiff was entitled to be heard upon that feature of the case.

[3] [4] At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters. See *Broward v. Mabry*, 58 Fla. 398, 50 South. 826; *Pollard's Lessees v. Hagan*, 3 How. 212, text 219, 11 L. Ed. 565; *Sullivan v. Moreno*, 19 Fla. 200; *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 South. 353, 22 L. R. A. (N. S.) 337; *Ferry Pass Inspectors' & Shippers' Ass'n v. Whites River Inspectors' & Shippers' Ass'n*, 57 Fla. 399, 48 South. 643. 22 L. R. A. (N. S.) 345; *Gould on Waters*, § 148; *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 662. And, applying the commonlaw doctrine to the subject in this state, the title to the soil under such waters to the high-water mark is in the state of **Florida**, subject to the powers of Congress to regulate commerce. See *Sullivan v. Moreno*, supra; *Broward v. Mabry*, supra. The title, however, is held in trust for the people who have the rights of navigating, fishing, bathing, and commerce upon and in the waters.

The first count of the declaration alleges that the plaintiff is the owner in fee simple, and has the possession of the east half of lot 369 of block 1 of the old city of Pensacola, and for more than 20 years prior to the acts complained of the lot had a southern boundary upon the waters of Pensacola Bay, and during \*58 that period the plaintiff and his predecessors in title had access from the channel of the bay and its navigable waters to said lot by means of the water on the south boundary and for that period of time they have exercised the rights of ingress and egress to and from the said lot on the water or south side by boat and rafts, and during said period they have 'exercised the right to construct and

maintain wharves and bathhouses and other water front rights, on the south or shore side of said lots between the said lot and the channel of Pensacola Bay.' It is alleged that the defendants in 1913 interfered with these rights of the plaintiff by filling in with earth from the shore line of the lot to a long distance southward toward the channel of the bay, and constructed 'tracks' thereon and 'appropriated said space' so that the plaintiff has been deprived of his rights of 'ingress and egress from the navigable waters of Pensacola Bay to his said lot by boat or vessel,' and been deprived of the right to 'construct wharves, piers, \*501 docks, and other water front privileges,' by reason of which he has been greatly damaged, and hence brings this action.

This count of the declaration rests upon a right which the plaintiff alleges he has as owner of lot 369 to have ingress and egress to and from his lot over the waters of the bay and to construct and maintain wharves, piers, docks, and bathhouses on the south or shore side of the lot between the lot and the channel of the bay.

[5] [6] [7] In so far as the declaration alleges the right of ingress and egress to and from the lot over the waters of the bay, it states a common-law right appertaining to riparian proprietorship. The common-law riparian proprietor enjoys this right, and that of unobstructed view over the waters, and in common with the public the right \*59 of navigating, bathing, and fishing, but whether as riparian owner he also has the right to build and maintain wharves, piers, docks, and bathhouses between his shore line, that is to say, from high-water mark, upon the submerged soil which belongs to the state, out to the channel of the bay is a question which will have to be determined in view of the fact that upon this alleged right existing in the riparian owner will depend largely the measure of damages to which the plaintiff may be entitled if he should recover for the alleged violation of his common-law right. Eliminating that portion of the count which alleges a right to construct and maintain wharves, docks, piers, etc., to the channel as surplusage, there remains in the count allegations sufficient to sustain an action upon the violation of the common-law rights of ingress and egress to and from the lot over the waters of the bay. The defendants did not demur to this count, nor did they make a motion to strike any part of it, nor for compulsory amendment, nor did they make any effort to eliminate from the case as made by this count the right conferred by the statute, but pleaded to it the general issue and several special pleas.

The count does not allege that the boundary of plaintiff's lot extended to low-water mark, but it does allege rights to exist

in the plaintiff which are conferred by the statute of 1856, sections 643 and 644 of the General Statutes of 1906, if at the time of the passage of the act the owner of the lot was a citizen of the United States and the boundaries of the lot extended to low-water mark. If the count should be tested and made to stand or fall by the allegations as to plaintiff's right to build wharves, docks, piers, etc., rights which, as stated, are secured by the act of 1856, we should be constrained \*60 to hold that the count rested on the act of 1856, and reaffirm our first opinion if the rights secured by the act did not also exist at common law.

As a count based solely upon the statute, it may have been subject to demurrer for lack of certain material allegations, but as it appears from the pleadings and was stated in the oral argument by counsel that the parties treated the count as a declaration upon the common-law right, we will so treat it here, and consider whether the allegations as here, and consider whether the allegations as wharves, piers, etc., to the channel should be eliminated as surplusage.

Counsel for plaintiff in error in their last brief say that the right to 'construct wharves, piers and docks and exercise other water front privileges are rights that belong to riparian owners under the common law,' and 'the books are full of cases showing the common-law rights and how they have been exercised both in England and this country.' In view of the fact that the declaration is based upon the plaintiff's asserted right to 'construct and maintain wharves and bathhouses and other water front rights' between the 'lot and the channel of the bay,' we regret that counsel deemed it unnecessary to cite a single case or text-book supporting the plaintiff's declaration if it is construed to be based upon the right in the plaintiff to construct docks, piers, and other buildings from the shore beyond low-water mark out to the channel. We have made a diligent search of the books for such a doctrine, but have been unable to find a single authority in support of it.

It is perfectly clear that the Legislature of 1856 did not consider the doctrine as announced by plaintiff's counsel to be so well settled; otherwise chapter 791 may \*61 have been confined to granting the privilege of filling 'up from the shore,' and that right may not have been limited to such owners of lots whose boundaries extended to lowwater mark. The act of 1856 granted to such riparian owners whose lots extended to low-water mark the right to 'build wharves into streams or waters of the bay or harbor as far as may be necessary' for facilitating the landing of goods. 'And to fill up from the shore, bank or beach as far as may be desired not

obstructing the channel,' and upon the lands so filled in to 'erect warehouses or other buildings.'

If the owners of lots which extended only to high-water mark had the right at common law to construct wharves, docks, and piers out into the bay to the channel, to 'wharf out,' as the saying is, the act of 1856 was superfluous. In fact it rather hinders than facilitates the purpose of its enactment by confining the privileges granted to the owners of such lots as were bounded by and extended to low-water mark.

The right did not exist at common law. In Hale's Treatise De Jure Maris, Hargrave, it is stated that the ground between ordinary high-water mark and low-water mark is owned by the sovereign, but not for his exclusive use and profit, but in trust for the common benefit of all his subjects. Any intrusion by the owner of the upland upon the shore between high and low water mark was unlawful, \*\*502 and was treated either as a purpresture or a nuisance. See Angell on Tidewaters, c. 7; Moore's History of the Foreshore, 370; 3 American Jurist, 185-190; *Republica v. Caldwell*, 1 Dall. 150, 1 L. Ed. 77. In the case of *Dutton v. Strong*, 1 Black, 22, 17 L. Ed. 29, the Supreme Court of the United States, speaking through Mr. Justice Clifford, said:

Where 'piers and landing places, as well as wharves, \* \* \* are \* \* \* constructed by the riparian proprietor \*62 on the shores of \* \* \* bays and arms of the sea, as well as on the lakes, and where they conform to the regulations of the state, and do not extend below lowwater mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation.'

In this connection the judge said:

'Our ancestors, when they immigrated here, undoubtedly brought the common law with them as part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject, and, in some, the right of the riparian proprietor rests upon immemorial local usage.'

Mr. Angell in his work on Tidewaters recognizes the doctrine of the common law that the right of property in tidewaters and in the soil thereof is in this country in the state, and the state may abate every intrusion thereon, whether the same be a nuisance to the navigation or not. Angell on Tidewaters, c. 7. At the same time, says he, 'it is well known that in the

respective states which lie along the margin of the Atlantic there are many places where the tide ebbs and flows,' and which therefore are public, 'that are of no navigable use, and in their original condition, without the aid of art and industry, afford to the public little or no advantage of any kind,' flats and marshes covered with water only at full tide. In many cases such waste places have been built up, docks or piers run over them to navigable water by the riparian proprietor, and the public have been thereby very considerably the gainers. But that condition in no wise affects the common law, but is one which commends itself to the Legislatures of the respective states for \*63 the adoption of such regulations as may be deemed to be for the best interests of the people.

In the case of *Railroad Company v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74, the Supreme Court of the United States, again through Mr. Justice Clifford, said that riparian proprietors on navigable streams have the right to construct suitable landings and wharves for the convenience of commerce, and cited *Dutton v. Strong*, supra, in support of the doctrine. In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, Mr. Justice Miller speaking for the court, said:

'But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be.'

But that case does not recognize the right of the riparian owner to build wharves beyond the low-water mark to the channel.

In the case of *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497, the court was of the opinion that the property rights of a riparian owner of land on navigable waters are to be measured by the rules and decisions of the state within whose boundaries the particular land lies. In *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224, it was recognized as the law that the title and rights of riparian proprietors upon the banks of the Mississippi were to be settled by the states within which the lands were included. That case was cited in *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, supra, in support of the doctrine \*64 announced in the latter case. The case of *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 34 L. Ed. 819, asserted the right of each state to determine the extent

of the title and of the rights of the riparian owners in waters within the territory of the state. See, also, *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, text 45, 14 Sup. Ct. 548, 38 L. Ed. 331; *Lowndes v. Town of Huntington*, 153 U. S. 1, text 19, 14 Sup. Ct. 758, 38 L. Ed. 615; *United States v. Kelly*, 243 U. S. 316, 319, 37 Sup. Ct. 380, 61 L. Ed. 746.

This court has several times indicated the extent of the rights of a riparian owner upon navigable streams. In *Ferry Pass Inspectors' & Shippers' Association v. Whites River Inspectors' & Shippers' Association*, supra, the court, speaking through Mr. Justice Whitfield, said:

'Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. The common-law rights of riparian owners with reference to the navigable waters are incident to the ownership of the uplands that extend to high-water mark.' 'Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and reliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes,' etc., enumerating other uses incident to the waters of a navigable stream.

Continuing, the court said:

'Subject to the superior rights of the public as to navigation and commerce and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings bathhouses, wharves, or other structures to facilitate his business or pleasure; but these privileges are subject to the rights of the public to be enforced by proper public authority \*\*503 or by \*65 individuals who are specially and unlawfully injured.'

In *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 South. 428, the court said:

'The owner of land abutting on navigable waters had no exclusive right in the waters below ordinary high-water mark or in the lands under the waters, except the right of access to and from the navigable waters, and rights in the land growing out of accretion or reliction.'

In this state because of its great coast line and many navigable rivers and lakes and the number of bays and harbors and lowlands, there are many places where the tide

ebbs and flows, or which are covered by ordinary high water, that are of no navigable use, but which according to the common law belong to the public, and because of this condition the owners of riparian lands in many instances have exercised the privilege of constructing wharves or piers to the navigable waters. Such structures, however, are none the less purprestures in law or nuisances if they amount to a damage to the port or navigation, and cannot be considered as a right appurtenant to the upland. The right to build wharves into the streams or waters of the bay or harbor and to fill up from the shore and to build upon the lands so filled in was granted by the act of 1856, but the grant was limited to those whose lands were actually bounded by and extended to lowwater mark. Sections 643 and 644, General Statutes 1906. We think, therefore, that so much of the first count of the declaration that alleges a right in the plaintiff to construct and maintain wharves and bathhouses and other water front rights on the south or shore side of the lot between it and the channel of the bay should be eliminated as surplusage.

The question of title is the next point involved. The declaration alleges in the first count that the plaintiff \*66 prior to and at the institution of the suit was and is the owner in fee simple of the east half of lot 369, block 1, of the old city of Pensacola, and that during a period of more than 20 years the plaintiff and his predecessors in title to the said lot have had access from the channel of the bay by means of the water on the south boundary or shore. The pleas deny the plaintiff's title, and deny 20 years' possession.

It is contended by defendant that there is no evidence that the title to the lot in question ever passed out of the Spanish government; hence it was acquired by the United States government upon the cession of **Florida** to the United States, and that there is no evidence that the title has ever passed out of the United States government.

If the title to the lot in question passed to the United States government when **Florida** was acquired from Spain by the Treaty of 1819, which was the case if the government of Spain had not before that time conveyed its title to some person, then the plea of defendant denying title in the plaintiff was sustained, and there was no error in the peremptory charge for the defendant. If, however, Spain had divested herself of title by sale or grant prior to the acquisition of the territory by the United States, and such sale or grant was confirmed by the commissioners of land claims in West **Florida**, or by act of Congress or by judgment of a court, then the plea was not sustained so far as this point was involved.

The plaintiff offered in evidence a copy of the record of a deed from Lorenzo Vitrian, syndic, to Antonio Montero, dated December 31, 1813, conveying lot No. 369 in Pensacola. The dimensions of the lot are given as 95 feet front by 131 feet 3 inches in depth 'fronting on the bay.' Also a \*67 copy of the record of a deed from Antonio Montero to Francis de Barrios, conveying the same lot, and dated February 18, 1814. This deed recites that Antonio Montero purchased the lot at a 'public sale ordered by this Ayuntamiento.' The plaintiff then offered certain parts of the American State Papers to show confirmation by the American government of the sale of the above-mentioned lot. The record shows that the court declined to admit these documents in evidence.

In 1822 (Act May 8, 1822, c. 129, 3 Stat. 709) Congress passed an act 'for ascertaining claims and titles to land within the territory of Florida.' Under this act commissioners were appointed for the purpose of ascertaining the claims and titles to lands within the territory of Florida as required by the Treaty of 1819. These commissioners were a board of inquiry, said Mr. Chief Justice Marshall, and not a court exercising judicial power and deciding finally on titles. The commissioners were to examine into and report to Congress such claims as ought to be confirmed. The purpose of the act under which the commissioners were appointed was to ascertain the claims and their location, preliminary to the sale by the government of public lands. The refusal of the commissioners 'to report a claim for confirmation' was not 'considered as a final judicial decision on the claim, binding the title of the party, but as a rejection for the purposes of the act.' See *United States v. Percheman*, 7 Pet. 51, 8 L. Ed. 604.

Section 1 of the act of Congress entitled 'An act to confirm the reports of the commissioners for ascertaining claims and titles to lands in West Florida and for other purposes,' approved April 22, 1826, confirms all the 'decisions made by the commissioners' in favor of claimants to lands and lots in the district 'contained \*68 in the reports, opinions and abstracts of the commissioners which have been transmitted to the Secretary of the Treasury.'

[8] The American State Papers, vol. 4, is a publication made under the authority of the Senate of the United States, and contains \*\*504 documents, legislative and executive, of the Congress of the United States in relation to public lands. This volume contains the reports of the commissioners appointed under the act approved in 1822, entitled 'An act for ascertaining claims and titles to land within the territory of Florida.' These documents are received in evidence without

other proof of their authenticity than the published volume. See *Sullivan v. Richardson*, 33 Fla. 1, 14 South. 692.

An examination of the reports of the commissioners shows a list of lots sold in Pensacola at public judicial sale by order of the 'superiority' of the town in December, 1813, and January, 1814. Lot No. 369 was adjudged to Don Antonio Montero according to this list. It seems from the reports that a question had arisen as to the authority of the town officials to sell the lots listed because they were laid off upon or contiguous to squares which under the British rule of the territory had been designated in the plats of the town as public squares. British purchasers of lots fronting upon or contiguous to these squares had, as the report shows, acquired certain rights with which the replatting of the town interfered. When the Spaniards acquired the territory no alteration of the town plan was thought of for many years until the 'mines of Mexico ceased to pour their floods of gold into the coffers of the provincial government.' Then in 1802 the first alteration was made. In 1806 Superintendent General Morales disapproved of the project, and refused to confirm the titles given by Governor \*69 Foch y Juan, but decreed that the grantees should remain in possession 'until the decision of his majesty should be known.' The report then states that it was not known whether the King approved the plan, but several years afterwards Morales granted some of the lots. The report then states that, in view of the long possession of the lots by the purchasers and the improvements made by them, the 'commissioners will do what the authorities of Spain could legitimately perform; and, as the lots have been improved and occupied for that length of time with the consent of the officers of the government, the original authorities, and the contiguous grantees, although there might have been an original defect of power, they will give confirmation to them.' The sale of lots, however, under the 'constitutional government,' says the commissioner, is a different case and has none of the sanctions of the sales under the first change of the town plan. As to the acts of the 'cabildo,' the powers of which 'both under the Constitution and the King relate to the sale of lands only,' and under a sale ordered by it the lots numbered in the list above mentioned were sold to the persons named in the list, there was doubt on the part of the commissioners concerning their validity. The report states that the matter should have been 'forwarded to the provincial deputation to be approved by the cortes,' but, say the commissioners, 'whether this was ever done or not, or what was the result, we have been unable to learn.' As to the purchasers of these lots the report states that the Governor of West Florida had decreed that there was no authority by

which the plan of the town could be altered so as even to interfere with the military buildings. The matter was referred to Congress for its decision, but the commissioners say:

‘This is admitted to be a hard case \*70 upon most of the claimants. The original vendees it appears paid a valuable consideration for the lots, and some of them have since passed into the hands of innocent purchasers. In equity and justice they are either entitled to the lots or the money with which they were purchased, but how they are to obtain redress Congress must determine.’

The commissioners' report contains the petitions of the purchasers of the lots to the Spanish authorities for an order confirming the sale of the lots. The petitions show the reasons operating upon the authorities of the town which induced them to enlarge the plan of the town and make sale of the lots, but they seem to relate to the lots which were carved out of the squares between Romana and new streets north of the squares of Ferdinand and Seville, while lot No. 369, according to a map other than the one appearing in the American State Papers, is located in a different part of the town and fronts on the bay south of Zarragossa street and four blocks west of Ferdinand Square in the southwestern part of the ‘old city.’ Lying immediately north of lot 369 and contiguous to it is lot No. 368, which was also included in the list of lots sold at public judicial sale by an order of the ‘superiority’ of the town, and referred to above. Nowhere in the report of the commissioners, the lists of lots sold, abstracts of claims to lots confirmed and those rejected, nor in the above-mentioned petitions of purchasers is any reference made to any lot of a larger number than 369, except in the one table on page 115, vol. 4, Am. St. Papers, under letter ‘F,’ which designates an abstract of claims founded upon sales at auction by the Spanish government which were confirmed by the commissioners. That entry is as follows: ‘No. 47’ claimed by M. Hanna and widow McPherson. ‘Original vendee, Francisco Barrios, nature \*71 of claim mesne conveyance,’ date of claim ‘Feby 18–1814 Number 399’ 80 by 170 feet and sold by ‘the cabildo.’ Under head of general remarks in the last column it appears that the lot was sold at auction ‘Dec. 31, 1817.’ This entry follows one numbered 46, in which it appears that lot No. 368 was claimed by the same persons, original vendee Antonio Colein, deed from the ‘cabildo’ December 30, 1813. This lot No. 368 appears in the list first mentioned of lots ‘sold at public judicial \*\*505 sale by order of the superiority of this town in the months of December, 1813, and January, 1814,’ as having been sold by the ‘cabildo’ to Don Antonio Collins. It is evidently the same lot referred to in abstract F as having been

originally claimed by ‘Antonio Colein as original vendee.’ Lot 369, as stated, appears to have been sold by the cabildo to Antonio Montero, but as shown by the deed from Montero to Francisco Barrios in evidence in this case was conveyed by the original purchaser under the cabildo to Barrios on February 18, 1814. It also appears from the reports of the commissioners that the sale of every lot in the list of lots sold by order of the ‘superiority’ of the town, except lots numbered 360 and 369, were either expressly confirmed or rejected by the commissioners or reported by them to Congress.

It is significant that, neither in the abstract of claims to lots which were rejected by the commissioners and listed under the letter K above referred to, nor in the abstract of claims to lots which the commissioners reported to Congress, pursuant to their conclusion that certain claims should be referred to Congress for settlement, and which they listed under the letter L, does lot numbered 369 appear. It is apparent to us that the commissioners did not regard lot No. 369, which was sold \*72 by the cabildo to Montero, as being among those which for the reasons given by them should be either rejected or referred to Congress to specially confirm or reject as being unlawfully sold by the Spanish authorities. The commissioners undoubtedly intended to report upon all the claims submitted to them. A claim to lot 369, among others sold by the cabildo, was submitted. Some of these claims were confirmed, some rejected, and others referred specially to Congress for confirmation or rejection. The commissioners, after discussing at length the merits of some of these claims and others, made a list of those rejected, those specially referred to Congress and those confirmed. Lot 369 does not appear in the two first-mentioned schedules or abstracts, but in the list or abstracts of those claims confirmed appears one which was claimed by Barrios under mesne conveyance dated February 18, 1814. On that date Montero, who purchased from the cabildo lot 369, conveyed it to Barrios. The abstract gives the number of the lot as 399, a number greater than that borne by any lot referred to by the commissioners anywhere else in their report so far as we have discovered. In fact No. 369 is the highest number borne by any lot referred to by the commissioners aside from the one instance above mentioned. This entry in the abstract follows an entry dealing with lot 368 in the same order in which the two entries dealing with lots 368 and 369 appear in the list of lots sold at public auction by order of the superiority of the town, and hereinbefore mentioned.

In view of these facts we think the entry in schedule F, No. 47, deals with lot 369, and that the second figure of the number 399 appearing in that entry as the lot number is a

typographical error, and the lot number appearing in that entry should be 369 instead of 399.

\*73 It thus appears that the title to lot 369 passed out of the government of Spain to Antonio Montero, and by him conveyed to Barrios, and the claim of M. Hanna and Widow McPherson to the lot which appears to have been based on a sale at auction was confirmed by the United States government.

It is unnecessary to discuss the assignment of error based upon the court's ruling sustaining defendant's objection to the reading in evidence of the certified copy of the judgment of *Bobe v. Hanna and His Wife*, because, as there appeared a break in the chain of plaintiff's title from Barrios to M. Hanna and the Widow McPherson, the deed from the United States marshal to Bobe, purporting to convey the lot involved in this litigation, was offered and received in evidence as color of title, and there was evidence enough to go to the jury upon the question of plaintiff's title to the lot, based upon possession by him and his grantors for more than 20 years. Upon the question of the boundaries of the lot we said in the opinion granting a rehearing in this case, that:

'There is room for difference of opinion between reasonable men as to whether the boundaries of lot No. 369 extended to high-water mark of the bay.'

A re-examination of the evidence in this case confirms us in this view. In that case the question should not have been taken from the jury by a peremptory charge. See *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 South. 975, L. R. A. 1917E, 715.

The defendants pleaded that the submerged land, lying south of the lot, between ordinary high-water mark and a point where the waters of the bay in the direction of the channel reached the pier head line, was granted by the Legislature of Florida to the city of Pensacola, and that the city granted the same to the defendant railway \*74 company for purposes of railroad terminals, docks, piers, wharves, and other instrumentalities of commerce and navigation, with authority to improve same for such purposes, and that the defendant construction company, acting under authority and for the benefit of the railroad company, filled in the submerged land, and builded thereon the docks, wharves, and other instrumentalities of commerce which are the alleged acts complained of in the declaration. The plaintiff demurred to the plea, and the demurrer was overruled. If the plea was

good, it was a complete \*\*506 defense; if it was bad, the demurrer should have been sustained.

[9] [10] The plea rests upon chapter 4802, Laws of Florida 1899. The second section of the act purports to grant to the city of Pensacola, except as otherwise provided in the act, the space west of Alcaniz street and east of Barcelona street and south of Hickory street and the spaces included in a map of the water front of the city adopted by the provisional municipality to the east of Alcaniz street and to the west of Barcelona street, covered by water 'exceeding at this time twelve feet in depth, such spaces to be held by the city in perpetual trust for the public and to remain forever open to navigation and free access to the streets and wharves on the streets running north and south and to such other streets as the city may by ordinance lay out in any direction over any part of the space covered by this act from the intersection of any now existing street with the shore line to the southern limit of such space.' Section 1 of the act provides that it is the object of the act to dispose of all the land in front of the city of Pensacola embraced within the limits of the map of said water front above mentioned, 'and the grants herein made are of the streets and lots as laid down on said map.' Section 3 \*75 grants to the 'city \* \* \* the title to the soil and any water thereon embraced in the streets as delineated upon said map other than in the space granted in trust in section 2.' Section 4 grants in fee simple the improved lots in the space mentioned in section 1 to such persons as prior to January 1, 1898, have, by themselves or those under whom they hold, improved the same. Section 5 provides for the appointment of commissioners for the purpose of 'ascertaining and declaring the rights of those to whom rights are granted by this act.' It provides for the compensation to be paid the commissioners, the appointment of their successors, the keeping of a record of all claims considered by them, and that two-thirds of the commission shall decide all questions. Section 6 vests in the commission power to 'summon witnesses, to swear them, hear testimony and receive evidence and finally determine the rights of persons (including the city of Pensacola) to whom grants are herein made and such determination shall be conclusive as to such right.' This section also provides that: 'Upon such determination they [the commissioners] shall jointly execute a deed for the lots or portions of lots to all persons whom they shall find to be entitled under the provisions of this act and such deed shall convey in fee simple all the rights of the state to the lot or lots therein mentioned, and shall authorize the exclusive appropriation of such property to private uses by the grantee or his assigns: Provided, that whenever any property granted under this act is in litigation between parties, then any deed made hereunder

shall be without prejudice to the rights under this act of the party who may be adjudicated to be entitled to possession.'

Section 7 provides that:

'In making such adjudication and deed the commissioners shall not regard any claims of \*76 riparian rights or other rights not covered by this act and shall make deeds as if no such rights could arise but such determination and deeds shall in no wise be regarded as affecting any such actually existing rights.'

The act further provides that the commissioners shall not determine the effect of the act upon any lot except upon the application of some person claiming the same under the provisions of the act; prescribes the proceedings in such cases; a limitation of 2 years in which to file claims; that at the expiration of that time from the passage of the act the commissioners shall determine all unadjudicated applications, give to the person entitled thereto deeds, and after satisfying the requirements of section 3 of the act the commissioners shall make a deed to the city of Pensacola for 'all lots and portions of lots for which no application shall have been filed' (except certain key lots covered by water between Palafox street wharf and Baylen street wharf, etc.), and for all lots and portions of lots adjudicated to applicants, but for which they shall have received no deed because of their refusal or neglect to pay the commissioners' fees; for the employment of a clerk and his compensation, and a surveyor; and the keeping of a record showing each deed made; a deposit by each claimant of one dollar for each lot claimed by him, and for the deposit in the office of the clerk of the circuit court of Escambia county of the records made by the commissioners.

This act undertakes to deprive without compensation the owner of lots, the boundaries of which extend to high-water mark of the bay, lying within the area covered by the map of the water front referred to in the act, of their rights under the common law as riparian owners. We have said that the rights of a riparian owner at \*77 common law constituted property of which he could not be deprived without just compensation. See *Broward v. Mabry*, supra. This view we think is sustained by the weight of authority.

Mr. Farnham in his work on the Law of Waters and Water Rights, in volume 1, page 297, says:

'It thus appearing from the preceding sections that at common law the riparian owner has a right of access to the stream which cannot be destroyed even for the improvement of navigation without making compensation to the owner, the right should be much more fully protected in this country, where the constitutions prevent the taking of private property for public use without making compensation. And the general rule is that the rights are protected.'

He observes, however, that a few of the courts have refused to recognize a right of \*\*507 property in the riparian owner, or have held that it was subordinate to the public right, so that they have permitted the right to be cut off without any redress or compensation. See *Yates v. Milwaukee*, supra; *Van Dolsen v. Mayor of New York (C. C.)* 17 Fed. 817, 21 Blatchf. 453; *Myers v. City of St. Louis*, 82 Mo. 367; *Clark v. Cambridge & A. Irr. & Imp. Co.*, 45 Neb. 798, 64 N. W. 239; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654.

Mr. Justice Miller in *Yates v. Milwaukee*, speaking for the Supreme Court of the United States, said:

'This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.'

See, also, \*78 *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070; *Bell v. Gough*, 23 N. J. Law, 624; *Trenton Water Power Co. v. Raff*, 36 N. J. Law, 335; *Gould on Waters*, § 246.

Riparian rights we think are property, and, being so, the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.

The owner of land bounded by tidewater may maintain an action against a railroad corporation constructing its road by authority of the Legislature so as to cut off his access to the water is held in [Williams v. Mayor of New York](#), 105 N. Y. 419, 11 N. E. 829; [Rumsey v. New York, N. E. R. Co.](#), 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600.

We do not appreciate the force of the argument that the state as owner of the submerged land between high and low water mark should not, in the event it desires to improve the water front for navigation, be required to pay to the owner of the upland a just compensation for injury to his property incident to such public enterprise. But this is not such a case. A railroad company, operated by private capital, controlled by private individuals, conducting its business for private gain, is seeking to utilize the water front for its own use, but claims immunity \*79 from liability for damages to the plaintiff

upon the ground that the work of filling up the submerged lands and building piers out into the bay incidentally benefits commerce and navigation, although it also destroys a large part of the value of plaintiff's property, perhaps by wholly depriving him of his rights as a riparian owner.

The plea of justification under this statute we think was not good, and the demurrer should therefore have been sustained.

The judgment of the court below is reversed.


BROWNE, C. J., and TAYLOR, WHITFIELD, and WEST, JJ., concur.

#### All Citations

75 Fla. 28, 78 So. 491, L.R.A. 1918E,718

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 Declined to Follow by *Obolensky v. Trombley*, Vt., February 6, 2015  
 69 So.3d 1081

District Court of Appeal of Florida, Second District.

Michael J. **MICKEL** and  
 Barbara J. **Mickel**, Appellants,  
 v.  
 Robert J. **NORTON** and  
 Mary A. **Norton**, Appellees.

No. 2D10-3437

Sept. 23, 2011.

### Synopsis

**Background:** Homeowners brought action against neighbors, alleging that installation of six-foot-high vinyl fence along the property line between their homes constituted a nuisance and violated homeowners' "riparian and littoral rights" by obstructing their view of the water. The Circuit Court, Charlotte County, *George C. Richards*, J., entered judgment in favor of homeowners and ordered neighbors to remove portion of fence obstructing homeowners' view of the water. Neighbors appealed.

**Holdings:** The District Court of Appeal, *Kelly*, J., held that:

[1] homeowners held no private or special riparian right to an unobstructed view of body of water that did not border their property, and

[2] fence served a useful purpose and did not constitute a nuisance.

Reversed.

West Headnotes (3)

- [1] **Water Law** 🔑 View of water  
**Water Law** 🔑 Access to water in general

Those who own land extending to ordinary high-water mark of navigable waters are riparian holders who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of waters opposite their holdings; among them being the right of access from the water to the riparian land and the right to an unobstructed view over the adjoining water.

[2] **Adjoining Landowners** 🔑 Right to and Obstruction of Light, Air, or View

**Water Law** 🔑 Who are riparian owners, and what is riparian land

Homeowners held no private or special riparian right to an unobstructed view of body of water that did not border their property, but rather lay on the other side of neighbor's property.

[3] **Nuisance** 🔑 Fences

Homeowners failed to establish that six-foot-high vinyl fence constructed by neighbors along the property line between their homes constituted a nuisance, notwithstanding claims that fence was out of place in the neighborhood, diminished homeowners' property value, and unreasonably denied homeowners a view of the water from their backyard; fence served useful purpose by protecting neighbors' privacy and keeping trespassers from entering their property.

2 Cases that cite this headnote

### Attorneys and Law Firms

\*1081 *Mark A. Ebelini* of Knott, Consoer, Ebelini, Hart & Swett, P.A., Fort Myers, for Appellants.

*David K. Oaks* of David K. Oaks, P.A., Punta Gorda, for Appellees.

### Opinion

*KELLY*, Judge.

Michael and Barbara **Mickel** appeal from a final judgment granting permanent injunctive relief to their neighbors, Robert and Mary **Norton**. We reverse.

This dispute arose when the **Mickels** installed a six-foot-high vinyl fence along the property line between their home and the **Nortons'** home. The **Nortons** sued the **Mickels** alleging the fence constituted a private nuisance and that it violated their “riparian and littoral rights” by obstructing their view of the water. They sought a mandatory injunction requiring removal of the fence and a permanent injunction prohibiting \*1082 the **Mickels** from placing any items on their property that would obstruct their view of the water.

After a trial, the circuit court found in favor of the **Nortons**. The final judgment ordered the **Mickels** to remove the portion of the fence obstructing the **Nortons'** view from their backyard across the **Mickels'** property to the water. It also enjoined the placement of any items on the **Mickels'** property that would interfere with the **Nortons'** view. In making its decision, the trial court relied primarily on this court's decision in *Lee County v. Kiesel*, 705 So.2d 1013 (Fla. 2d DCA 1998). On appeal, the **Mickels** argue that *Kiesel* is inapplicable and that the **Nortons** have no legal right to a view of the water over the **Mickels'** yard. We agree.

In *Kiesel*, the owners of riverfront property prevailed in an inverse condemnation action against Lee County in connection with the county's construction of a bridge that obstructed the Kiesel's view of the river. This court affirmed the trial court's award of compensation to the Kiesel's based upon the supreme court's holding in *Hayes v. Bowman*, 91 So.2d 795 (Fla.1957), which recognizes the right of an upland property owner to an unobstructed view of adjoining waters. *Id.* at 799 (citing *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 75 Fla. 28, 78 So. 491 (1917)).

We conclude that *Kiesel* is inapposite. The Kiesel's home was situated on a riverfront lot. The bridge made landfall on property adjacent to the Kiesel's home. The bridge was not aligned perpendicularly to the shoreline, but rather extended over the river at an angle. As a result, the bridge extended directly across the view from the Kiesel home to the river. Because the bridge was built at an angle, the trial court found that it “substantially and materially interferes with ... the view across the waters of the Caloosahatchee River from the ... property.” *Kiesel*, 705 So.2d at 1014–15.

The evidence in this case demonstrated that the **Mickels'** fence did not interfere with the **Nortons'** view of the water bordering their property. The parties' homes are situated on adjoining pie-shaped lots on the tip of a small peninsula. The **Mickel** lot is at the tip of the peninsula. The west side of the lot borders Alligator Bay and the Peace River; the rear of their home faces west toward the water. The **Norton** lot lies to the north of the **Mickel** lot. The north side of the **Nortons'** lot faces the Sunrise Waterway, a manmade waterway that provides subdivision homeowners with access to Alligator Bay and the Peace River; the rear of their home faces north toward the water.

[1] In addition to the rights enjoyed by the public, private or “special” riparian rights are vested in owners of land that extends to the high water mark of navigable waters:

Those who own land extending to ordinary high-water mark of navigable waters are riparian holders who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of waters *opposite* their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law.

*Broward v. Mabry*, 58 Fla. 398, 50 So. 826, 830 (1909) (emphasis added). Among the “other easements allowed by law,” is the right to an unobstructed view over the adjoining water. See *Thiesen*, 78 So. at 507.

[2] The difficulty with the **Nortons'** contention that the **Mickels'** fence interferes with their riparian right to an unobstructed view of the water is that it ignores \*1083 the fact that their property and the **Mickels'** property border different bodies of water. The **Nortons** still have a direct and unobstructed view of the Sunrise Waterway, which is the only body of water adjoining their lot. At most, the **Nortons** established that the fence obstructed their view of the **Mickels'** side yard and Alligator Bay which lies to the west on the other side of the **Mickels'** lot. Because the **Nortons'** lot is not bordered by Alligator Bay, they are not entitled to the private or special riparian rights incident to the ownership of land bordered by that body of water, including the right to a view of the bay. Accordingly, the trial court erred when it concluded they were entitled to relief.

[3] The **Mickels** also argue, and we agree, that the trial court erred when it ruled in favor of the **Nortons** on their nuisance claim. The **Mickels** contend that they had the fence installed

for safety reasons to protect their privacy. At trial, Mr. **Mickel** testified that when he and his wife went into their backyard,

Mr. **Norton** would either stand out there and watch us the entire time ... or he'd be out there telling us, shouting over at us or coming over and saying that he had a legal right to the view over and through our property; he had a legal right to tell us where we could plant and not plant.... We finally had enough of it.

The **Nortons** alleged numerous reasons why the fence should be removed, including that the fence is out of place in the neighborhood, that it serves no useful purpose, that it diminishes the value of their property, that it was not constructed or installed in accordance with applicable instructions or requirements, and that it unreasonably denies them a view of the water from their backyard. However, there is no evidence in the record to support the **Nortons'** claims.

While it is unfortunate that the relations between these neighbors deteriorated to the point that the **Mickels** felt it necessary to install the fence to avoid confrontations with Mr. **Norton**, this does not support the conclusion that the fence is a nuisance. Even assuming the **Nortons** had a legal right to view the water by looking over the **Mickels'** yard, we conclude the fence served a useful purpose by

protecting the **Mickels'** privacy and keeping trespassers from entering their property. See *Calusa Golf, Inc. v. Carlson*, 464 So.2d 1271, 1271 (Fla. 3d DCA 1985) (finding that an injunction preventing the construction of a fence was inappropriate “even though a spiteful purpose may have partially motivated the construction” where the fence would “serve a useful purpose by protecting the [property] from trespass and vandalism”); *Walden v. Van Harlingen*, 220 So.2d 670, 671 (Fla. 1st DCA 1969) (finding that the fact that a property owner desires to enclose his property from public view does not render the fence unlawful as a nuisance); *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357, 359 (Fla. 3d DCA 1959) (stating that where a structure serves a useful and beneficial purpose it does not give rise to a cause of action regardless of the fact that it “may have been erected partly for spite”). Accordingly, we reverse.

Reversed.

**WALLACE** and **CRENSHAW**, JJ., Concur.

**All Citations**

69 So.3d 1081, 36 Fla. L. Weekly D2113



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Declined to Follow by [Center Townhouse Corp. v. City of Mishawaka](#),  
Ind.App., March 20, 2008

705 So.2d 1013

District Court of Appeal of Florida,  
Second District.

**LEE COUNTY**, Florida, a political  
subdivision of the State of Florida, Appellant,

v.

Edward C. **KIESEL** and Lorraine T.  
**Kiesel**, husband and wife, Appellees.

No. 96–05137.

|

Feb. 6, 1998.

**Synopsis**

Property owners brought inverse condemnation action against **county**, alleging that they were entitled to compensation because bridge built by **county** obstructed owners' riparian right of view. The Circuit Court, **Lee County**, **R. Wallace Pack, J.**, granted partial final judgment on issue of liability. **County** appealed. The District Court of Appeal, **Northcutt, J.**, held that bridge that substantially and materially interfered with plaintiffs' riparian right of view constituted actual physical intrusion to appurtenant right of property ownership even though bridge did not rest on owners' property.

Affirmed.

West Headnotes (4)

**[1] Eminent Domain** 🔑 Obstruction of light or air

Although bridge did not physically rest on any part of plaintiffs' riverfront property, bridge substantially and materially interfered with plaintiffs' riparian right of view, constituting actual physical intrusion to appurtenant right of property ownership for which plaintiffs were entitled to compensation, as bridge did not align perpendicularly to shoreline but extended over

river at an angle, reaching across view from plaintiffs' property.

4 Cases that cite this headnote

**[2] Eminent Domain** 🔑 Zoning, Planning, or Land Use; Building Codes

In case of regulatory taking, in which land owners' use of property is restricted by government regulation, owners are entitled to compensation only if regulation substantially ousted them from or deprived them of substantially all beneficial use of their property.

4 Cases that cite this headnote

**[3] Water Law** 🔑 View of water

Owners of uplands along navigable waters enjoy common law riparian rights, one of which is right to unobstructed view over water to channel.

3 Cases that cite this headnote

**[4] Eminent Domain** 🔑 Obstruction of light or air

Rights of owners of uplands along navigable waters to unobstructed view over water to channel constitute property, which government may not take or destroy without paying just compensation to owners.

7 Cases that cite this headnote

**Attorneys and Law Firms**

\*1014 **James G. Yaeger**, **Lee County** Attorney, and **John J. Renner**, Assistant **County** Attorney, Fort Myers, for Appellant.

**Kenneth A. Jones** of Peper, Martin, Jensen, Maichel and Hetlage, Fort Myers, for Appellee.

**Opinion**

**NORTHCUTT**, Judge.

We affirm a partial final judgment in this inverse condemnation action brought by Edward and Lorraine **Kiesel**

against **Lee County**. The trial court found that the **Kiesels** were entitled to compensation because a bridge the **county** built over the Caloosahatchee River obstructed the **Kiesels'** riparian right of view. The court gave the **county** the option either to proceed with a “quick take” procedure pursuant to Chapter 74, Florida Statutes (1995), or to pay the **Kiesels** after the entry of a final judgment assessing full compensation for the taking and any damages to the remainder. The **county** appealed.<sup>1</sup>

[1] Evidence at the bench trial reflected that the **Kiesels** purchased their riverfront property in 1987 for \$160,000 and constructed a home at a cost of \$265,000. After the home was built, the **county** proceeded with the alignment and construction of the bridge. The completed bridge makes landfall on property adjacent to the **Kiesel** home; none of the **Kiesels'** property was condemned for the construction. The bridge is not aligned perpendicularly to the shoreline, but extends over the river at an angle, reaching across the view from the **Kiesels'** property. The **Kiesels'** experts testified that the property previously had a value of \$650,000 to \$659,000. The experts opined that after the bridge construction the market value of the property was \$300,000. One expert directly attributed the loss in value to the bridge.

The trial court found that “[a]s a result of the angle at which the bridge is constructed across the front (river side) of the **Kiesel** property, it substantially and materially interferes with and disturbs the view across the waters of the Caloosahatchee River from \*1015 the said property.” The court concluded that “as a direct and proximate result of such substantial and material interference, the market value of the **Kiesel** property has substantially decreased, having been estimated by Plaintiffs' expert real estate appraisal witness as being in the range of \$194,250 to \$227,200.”

[2] We reject the **county's** argument that there was no physical taking here; that, since the bridge did not physically rest upon any of the **Kiesel** property itself, the **Kiesels** were entitled to compensation only if the bridge construction substantially ousted them from or deprived them of substantially all beneficial use of their property. That test would apply if this case involved a “regulatory taking”, in which a land owner's use of his property had been restricted by government regulation. *See, e.g., Florida Game and Fresh Water Fish Com'n v. Flotilla, Inc.*, 636 So.2d 761 (Fla. 2d DCA 1994). But this was not a regulatory taking. Rather, this case involved an actual physical intrusion to an appurtenant right of the **Kiesels'** property ownership. *Cf. Palm Beach*

*County v. Tessler*, 538 So.2d 846, 849 (Fla.1989) (although none of property owner's land was physically taken, owner was entitled to compensation when retaining wall built by **county** caused a substantial loss of owner's appurtenant right of access to property.).

[3] [4] Owners of uplands along navigable waters enjoy common law riparian rights, one of which is the right to an unobstructed view over the water to the channel. These rights constitute property, which the government may not take or destroy without paying just compensation to the owners. *See Thiesen v. Gulf, F. & A. Ry. Co.*, 75 Fla. 28, 78 So. 491 (1917); *Padgett v. Central and Southern Florida Flood Control Dist.*, 178 So.2d 900 (Fla. 2d DCA 1965).

Shorelines do not often neatly parallel channels, and property lines are not always perpendicular to shorelines or channels. Consequently, it is impossible to devise a rule for every case that would define the physical parameters of the riparian right of view or establish what degree of intrusion would constitute an obstruction. In this regard, both parties rely on *Hayes v. Bowman*, 91 So.2d 795 (Fla.1957). The **county** cites *Hayes* because it affirmed the denial of an upland owner's action for an injunction against a private party's construction of a landfill that would interfere with the land owner's riparian right of view to the channel. The **Kiesels** cite *Hayes* because it recognized this particular property right, and described its breadth in general terms as a case by case factual determination.

We ... hold that the common law riparian rights to an unobstructed view and access to the Channel over the foreshore across the waters toward the Channel must be recognized over an area as near ‘as practicable’ in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel. This rule means that each case necessarily must turn on the factual circumstances there presented and no geometric theorem can be formulated to govern all cases. An upland owner must in all cases be permitted a direct, unobstructed view of the Channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the Channel. If the exercise of these rights is prevented, the upland owner is entitled to relief.

\* \* \* \* \*

In making such ‘equitable distribution’ the Court necessarily must give due consideration to the lay of the

upland shore line, the direction of the Channel and the co-relative rights of adjoining upland owners.  
91 So.2d at 801–02.

When affirming the denial of relief to the property owner, the *Hayes* court limited its ruling to the effect of the landfill specifically as proposed. The court observed that “[i]f the fill should be extended in a southerly direction so as to interrupt appellants' remaining view of or approach to the Channel, appellants might then have substantial grounds for complaint.” 91 So.2d at 802. It thus appears that in *Hayes* the court applied to the riparian right of view a test that was similar to the one it later articulated with respect to a land owner's appurtenant right of access: to constitute a compensable obstruction of the riparian right of view, the \*1016 interference must be more than a mere annoyance. It must substantially and materially obstruct the land owner's view to the channel. Cf. *Tessler*, 538 So.2d at 849 (loss of the most convenient access to property is not compensable where other suitable access continues to exist; loss of access

is compensable when, considered in light of the remaining access, property owner's right of access has been substantially diminished).

In this case the trial court found that the bridge substantially and materially interfered with the **Kiesels'** riparian right of view. Our examination of the record confirms that this finding was amply supported by the evidence at trial. The **Kiesels'** expert testified that eighty per cent of their view to the channel was obstructed by the bridge. We agree with the trial court's conclusion that this was substantial and material.

Finding no merit in the **county's** other issues, we affirm the order under review.

CAMPBELL, A.C.J., and FRANK, J., concur.

#### All Citations

705 So.2d 1013, 23 Fla. L. Weekly D414

#### Footnotes

- 1 We have jurisdiction because the nonfinal order determined the issue of liability in favor of the party seeking affirmative relief. Fla.R.App.P. 9.130(a)(3)(C)(iv).

91 So.2d 795

Supreme Court of Florida, Special Division A.

Warwick J. **HAYES** and his wife, Olive  
**Hayes** and M. Parker Abbott and his  
wife, Esther S. Abbott, Appellants,

v.

J. Warren **BOWMAN**, Richard H. Misener  
and L. Carle McEvoy, Jr., Appellees.

Jan. 4, 1957.

**Synopsis**

Suit for declaratory judgment involving alleged riparian rights of the parties in tidal waters of Boca Ciega Bay. From a final decree of the Circuit Court, Pinellas County, C. Richard Leavengood, J., the plaintiffs appealed. The Supreme Court, Thornal, J., held, inter alia, that in any given case the riparian rights of an upland owner must be preserved over an area 'as near as practicable' in the direction of Channel so as to distribute equitably the submerged lands between the upland and the Channel and in making such 'equitable distribution' the court necessarily must give due consideration to the lay of the upland shore line, direction of Channel and the correlative rights of adjoining upland owners.

Affirmed.

West Headnotes (12)

[1] **Water Law** 🔑 Land Between High and Low  
Water Marks, Tidelands, Flats, and Foreshore

The state's title to submerged land under tidal waters is in the nature of sovereign proprietorship as it existed at common law, giving due regard to littoral and riparian rights of upland owners which are appurtenances to private property and are entitled to due recognition and protection.

[2 Cases that cite this headnote](#)

[2] **Water Law** 🔑 Public trust

The state holds title to lands under tidal navigable waters and the foreshore thereof and, as at common law, such title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses, and such title is not held primarily for purposes of sale or conversion into money, and basically it is a trust property and should be devoted to fulfillment of the purposes of the trust, the service of the people.

[6 Cases that cite this headnote](#)

[3] **Water Law** 🔑 Title and rights of grantees in  
general

The state may dispose of submerged lands under tidal waters to extent that such disposition will not interfere with the public's right of navigation, swimming and like uses, and any person acquiring any such lands from the state must so use the land as not to interfere with recognized common law riparian rights of upland owners, such as unobstructed view, and ingress and egress over the foreshore from and to the water.

[11 Cases that cite this headnote](#)

[4] **Water Law** 🔑 Land Between High and Low  
Water Marks, Tidelands, Flats, and Foreshore

Submerged tidal lands which the state may dispose of constitute tremendously valuable assets, and like any other fiduciary asset, must be administered with due regard to limitations of trust with which they are impressed. F.S.A. § 253.01 et seq.

[2 Cases that cite this headnote](#)

[5] **Water Law** 🔑 Right to reclaim or improve  
submerged lands in general

By so-called Butler Bill, right of upland owner to dredge, bulkhead and fill in front of his land to edge of Channel was provisionally granted to owners of lands extending to high-water mark instead of being limited to ownerships which extended to the low-water mark, but such privilege did not apply over public bathing beaches, and no title is acquired until

such submerged lands are actually filled in or permanently improved. F.S.A. §§ 271.01, 271.07, 271.09.

2 Cases that cite this headnote

[6] **Water Law** 🔑 View of water

**Water Law** 🔑 Access to water in general

The common law riparian rights to an unobstructed view and access to Channel over foreshore across the waters toward the Channel of Boca Ciega Bay must be recognized over an area as near “as practicable” in direction of Channel so as to distribute equitably the submerged lands between upland and Channel, so that each case necessarily must turn on factual circumstances there presented and no geometric theorem can be formulated to govern all cases. F.S.A. §§ 271.01, 271.07–271.09.

3 Cases that cite this headnote

[7] **Water Law** 🔑 View of water

**Water Law** 🔑 Access to water in general

An upland owner of land bounded by tidal waters must in all cases be permitted a direct, unobstructed view of Channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the Channel, and if exercise of such rights is prevented, upland owner is entitled to relief. F.S.A. §§ 271.01, 271.07–271.09.

5 Cases that cite this headnote

[8] **Water Law** 🔑 Reclamation and Improvement

Grantees of submerged lands in Boca Ciega Bay from trustees of the Internal Improvement Fund did not by proposed fill encroach upon common law riparian rights of upland owners where such owners would still have a direct, unobstructed view of the Bay “in the direction of the Channel” as well as a direct and unobstructed means of ingress and egress to the Channel of the Bay. F.S.A. §§ 253.01 et seq., 253.12–253.15; 271.01, 271.07–271.09.

11 Cases that cite this headnote

[9] **Water Law** 🔑 Nature and Extent of Rights in General

Riparian rights do not necessarily extend into the waters according to upland boundaries nor do such rights under all conditions extend at right angles to the shore line, since littoral or riparian rights are appurtenances to ownership of uplands, and are not founded on ownership of submerged lands. F.S.A. §§ 271.01, 271.07–271.09.

2 Cases that cite this headnote

[10] **Water Law** 🔑 Nature and Extent of Rights in General

In any given case the riparian rights of an upland owner must be preserved over an area “as near as practicable” in the direction of Channel so as to distribute equitably the submerged lands between the upland and the Channel, and in making such “equitable distribution” the court necessarily must give due consideration to the lay of the upland shore line, direction of Channel and the correlative rights of adjoining upland owners. F.S.A. §§ 271.01, 271.07–271.09.

4 Cases that cite this headnote

[11] **Evidence** 🔑 Particular Entities, Institutions, and Officials

The trustees of the Internal Improvement Fund will be presumed to do their duty, and hence court cannot assume that in supervision and disposition of submerged lands the trustees will knowingly ignore the rights of upland owners. F.S.A. § 253.01 et seq.

2 Cases that cite this headnote

[12] **States** 🔑 Special funds

The exercise of judgment of trustees of Internal Improvement Fund should not be subjected to adverse judicial scrutiny absent a clear showing of abuse of discretion or a violation of law. F.S.A. § 253.01 et seq.

6 Cases that cite this headnote

**Attorneys and Law Firms**

\*796 Lindsey & Cargell, St. Petersburg, for appellants.

Henry Esteva, St. Petersburg, for appellees.

**Opinion**

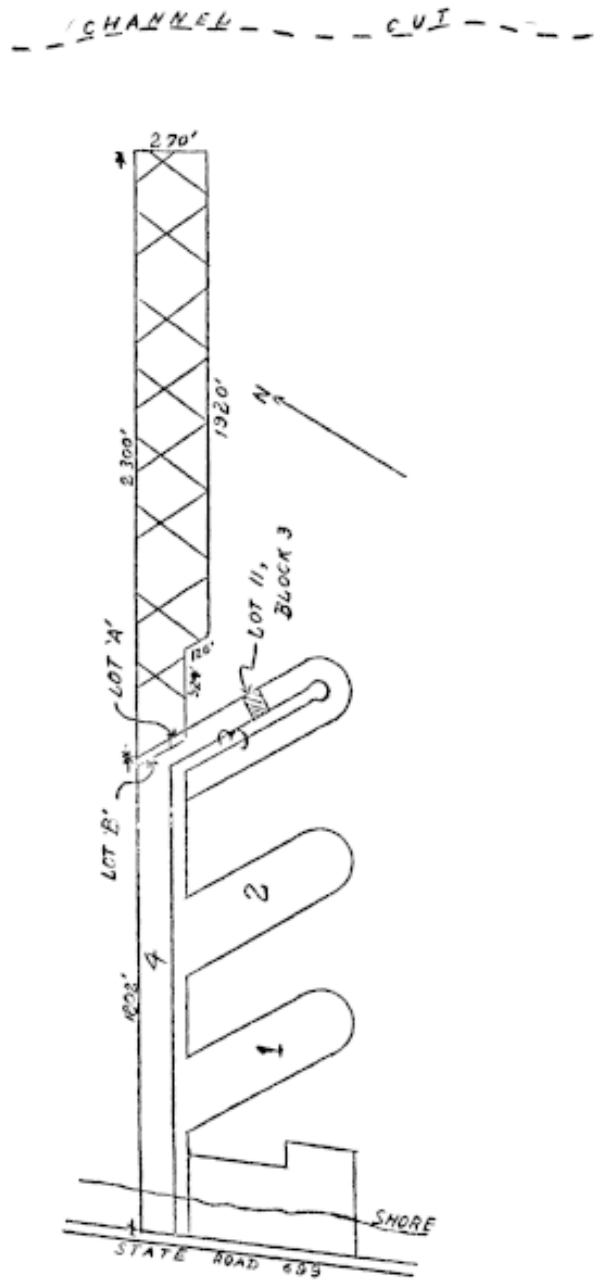
THORNAL, Justice.

Appellants **Hayes** and Abbott, who were plaintiffs below, seek reversal of a final decree of the Chancellor in a declaratory judgment proceeding involving alleged riparian rights of the parties in the tidal waters of Boca Ciega Bay.

Although many incidental questions are propounded, the determining point is whether a fill proposed by the appellees would, when constructed, encroach upon was common law riparian rights of appellants.

An understanding of the opposing contentions will be assisted by a drawing of the land and proposed fill, all of which is set out as follows:

\*797



\*798 Prior to the institution of this suit appellees and their predecessors were owners of a portion of the mainland on the western shore of Boca Ciega Bay. They acquired a parcel of submerged lands in the Bay from the Trustees of the Internal Improvement Fund. By dredging and filling they built a subdivision known as Brightwater Beach Estates shown in the foregoing drawing. The northern tier of lots comprising Block 4 is located on a narrow dredged-in peninsula approximately 1750 feet long in an easterly direction from the mainland toward the Channel. Lots A and B, Block 4, constitute a parcel of land across the eastern extremity of said Block 4. Blocks 1, 2 and 3 are dredged-in 'fingers' or peninsulas constructed in a southeasterly direction from the southern boundary line

of said Block 4. Block 3 is the easternmost of these three fingers. Appellants' property is Lot 11, Block 3. It is located on the easterly side of the Block. Consequently, the front of appellants' lot faces the waters and Channel of the Bay. The sidelines of appellants' lot run in a generally northeasterly-southwesterly direction.

Appellees own Lots A and B above mentioned. The south line of these lots is about 200 feet north of the northerly line of appellants' lot.

On October 22, 1954, appellees acquired from the Trustees of the Internal Improvement Fund an additional strip of submerged land 270 feet in width extending from the easterly edge of Lots A and B a distance of 2300 feet easterly toward the Channel. Appellees now propose to dredge and fill this newly acquired submerged land. Appellants filed a complaint to enjoin the proposed operation. The Chancellor entered a summary final decree for the appellees. Hence, this appeal seeking reversal of the decree.

It is the contention of the appellants that as upland owners of land bounded by navigable waters they enjoy certain common law riparian rights to an unobstructed view of the Bay, as well as a right of ingress and egress to and from their land over the waters of the Bay from and to the Channel. They contend that these rights exist in an area over the waters of the Bay to be determined by extending their side lot lines in a northeasterly direction to the Channel. They assert that appellees' proposed fill 2300 feet easterly of said Lots A and B toward the Channel would therefore completely bisect the corridor over and through which they are entitled to enjoy their riparian rights and reach the Channel. In other words, they contend that the common law riparian rights of an upland owner abutting navigable waters are exclusive against all interference in that area over the waters established by an extension of the side lines of the upland lot to the Channel.

It is the position of the appellees that when the Channel substantially parallels the shoreline the common law riparian rights of the upland owner are to be established in an area measured by lines drawn perpendicularly from the thread of the Channel to the corners of the property of the upland owner. By applying this rule they contend that the construction of the proposed fill would not in any way interfere with the area vouchsafed to appellants for the exercise of their common law rights.

[1] A cautious analysis and a thorough understanding of the nature of the sovereign's proprietorship of submerged lands under tidal waters is suggested by this record. To paraphrase

the language of Judge Learned Hand in *Jackson & Co. v. Royal Norwegian Government*, 2 Cir., 177 F.2d 694, 702, 'out of the rivers of ink that have been written on this subject' certain fundamental principles have emerged which are entitled to careful examination and restatement. In our democracy the State's title is in the nature of the sovereign proprietorship as it existed at common law. We must at the same time understand and give due regard to the \*799 littoral and riparian rights of the upland owners. These are appurtenances to private property which are entitled to due recognition and protection. The vital aspect of the problem in Florida is acutely demonstrated when we look to our general coastline of 1197 statute miles and our detailed tidal shoreline, including bays, sounds and other bodies measured to the head of tidewater, which measures 8426 statute miles. See *The World Almanac*, 1955, p. 258. The expanding importance of the situation is underscored by the enactment of the so-called Submerged Lands Act of 1953 by the Congress of the United States. 67 Stat. 29, 43 U.S.C.A. § 1301 et seq. See *State of Alabama v. State of Texas*, 1954, 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689. For earlier views of the Supreme Court of the United States, see *Shively v. Bowlby*, 1893, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331; *Skiriotes v. State of Florida*, 1941, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193; *Toomer v. Witsell*, 1948, 334 U.S. 385, 393, 68 S.Ct. 1156, 92 L.Ed. 1460; and contrast *United States v. State of California*, 1946, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889.

At common law, although admittedly there was some divergence of view, the title to all land under tidal waters below high water mark belonged to the Crown. These waters and the lands which they covered were held by the king in trust for the use of all his subjects. The primary uses were navigation, bathing and fishing. Thus it was that the title, *ius privatum*, was held by the king as sovereign but the dominion, *ius publicum*, was vested in him for the benefit of the people. At least from the time of Sir Matthew Hale (1609–1676) this was the accepted rule, except in cases where an individual had acquired rights in the submerged lands by express grant which did not interfere with navigation, and other riparian right such as fishing. Thus arose the doctrine of the so-called 'inalienable trust' whereby the sovereign held the legal title for the equitable use of his subjects. See Moore's, *History and Law of the Foreshore and Sea Shore*.

With the colonization of the Western hemisphere this became the accepted doctrine among the thirteen original states and the territories. *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331; *Martin v. Waddell's Lessee*, 1842, 16 Pat. 367,

414, 10 L.Ed. 997; *Skiriotes v. State of Florida*, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193. The rule has been varried slightly in some states by statute.

[2] Subject to certain statutory variations which we hereafter point out, it is well settled in Florida that the State holds title to lands under tidal navigable waters and the foreshore thereof (land between high and low water marks). As at common law, this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, towit: the service of the people.

[3] However, consonant with the common law rule, the State may dispose of submerged lands under tidal waters to the extent that such disposition will not interfere with the public's right of navigation, swimming and like uses. Moreover, any person acquiring any such lands from the State must so use the land as not to interfere with the recognized common law riparian rights of upland owners (an unobstructed view, ingress and egress over the foreshore from and to the water). *Thiesen v. Gulf, F. & A. Ry. Co.*, 75 Fla. 28, 78 So. 491, L.R.A.1918E, 718; *Hicks v. State*, 116 Fla. 603, 156 So. 603; *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249; *State v. Gerbing*, 56 Fla. 603, 47 So. 353; *State ex rel. Landis v. Rosenthal*, 109 Fla. 363, 148 So. 769; *Tampa Southern Railroad Company v. Nettles*, 82 Fla. 2, 89 So. 223. Upland owners have been \*800 granted additional statutory riparian rights which must be recognized. These we mention hereafter.

[4] This power of the State to dispose of submerged tidal lands has assumed important proportions in recent years. Valuable subdivisions have been built on dredged-in fill. Large areas have been leased to those who would speculate in drilling for oil. Increased interest in this type of land bears forebodings of even more complex problems in the future. These lands constitute tremendously valuable assets. Like any other fiduciary asset, however, they must be administered with due regard to the limitations of the trust with which they are impressed. *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428; *Martin v. Busch*, 93 Fla. 535, 112 So. 274; *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221; *Deering v. Martin*, 95 Fla. 224, 116 So. 54.

The custodians of this trust are the Trustees of the Internal Improvement Fund. See Chapter 253, Florida Statutes, F.S.A. Prior to 1951 the Trustees were authorized to sell tidal

lands upon which the waters were not more than three feet deep at high tide and which were separated from the mainland by a channel not less than five feet deep at high tide, and also certain sand bars and shallow banks along the mainland. See Chapter 7304, Laws of Florida 1917, Secs. 253.12–253.15, F.S.1941, F.S.1949, F.S.A. By Chapter 26776, Laws of Florida 1951, Sec. 253.12, Florida Statutes, F.S.A., title to *all* sovereignty lands (except in Dade and Palm Beach counties) was vested in the Trustees of the Internal Improvement Fund with power of disposition thereof in the manner provided by the statute. The submerged lands acquired by appellees for purposes of the proposed fill were purchased under this section. We note in passing that the constitutionality of Chapter 26776, Laws of 1951, is not assaulted and we therefore do not pass upon it.

[5] The riparian rights of upland owners of lands bounded by tidal waters in Florida have been expanded by statute. See Chapter 271, Florida Statutes, F.S.A. By Chapter 8537, Laws of 1921, the so-called Butler Bill (deriving its name from its sponsor Senator J. Turner Butler of Duval County), the right of an upland owner to dredge, bulkhead and fill in front of his land to the edge of the channel was provisionally granted to the owners of lands extending to the high-water mark instead of being limited to ownerships which extended to the low-water mark. The privilege did not apply over public bathing beaches. Section 271.07, Florida Statutes, F.S.A. It should be noted that no title is acquired until such submerged lands are actually filled in or permanently improved. Sections 271.01 and 271.08, Florida Statutes, F.S.A. Before this was done, the State's offer to riparian owners for them to secure title by improving the foreshore could be withdrawn and the provisional rights the reverted to the State. *Duval Engineering & Contracting Co. v. Sales*, Fla.1954, 77 So.2d 431.

The so-called common law riparian rights of upland owners bordering upon navigable waters have now been expressly recognized by statute. See Section 271.09, Florida Statutes, F.S.A., Chapter 28262, Laws of Florida 1953. See also *Adams v. Elliott*, 128 Fla. 79, 174 So. 731; *Williams v. Guthrie*, 102 Fla. 1047, 137 So. 682; *Holland v. Ft. Pierce Financing & Construction Co.*, 157 Fla. 649, 27 So.2d 76; *Freed v. Miami Beach Pier Corporation*, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177; *McDowell v. Trustees of Internal Imp. Fund*, Fla., 90 So.2d 715.

At the risk of repeating a number of rules heretofore settled we have herewith attempted to summarize the development of state ownership of submerged tidal lands, the power of disposition thereof and the co-relative riparian rights of

upland owners. It remains to apply these rules to the case before us.

**\*801** For purposes of this record we assume that appellants are 'upland owners'. No question is raised in that regard. It will be recalled that the lot owned by appellants is itself located on dredged-in fill. It is situated in Boca Ciega Bay on the dredged-in subdivision connected with the mainland by the peninsula designated as Block 4 of the subdivision. [Trustees of Internal Imp. Fund v. Claughton, Fla.1956, 86 So.2d 775.](#)

We harken back to the main points made by the parties. Appellants claim that they are entitled to an unobstructed view toward the Channel over a corridor measured by extending their northeasterly-southwesterly lot lines directly to the Channel. Appellees claim that this corridor is to be bounded by imaginary lines drawn at right angles from the thread of the Channel to the corners of appellants' lot. If appellants' contention is approved, the proposed fill would obstruct their view. If appellees' position is adopted, there would be no obstruction.

It is absolutely impossible to formulate a mathematical or geometrical rule that can be applied to all situations of this nature. The angles (direction) of side lines of lots bordering navigable waters are limited only by the number of points on a compass rose. Seldom, if ever, is the thread of a channel exactly or even approximately parallel to the shoreline of the mainland. These two conditions make the mathematical or geometrical certainly implicit in the rules recommended by the contesting parties literally impossible. We must therefore search elsewhere for a solution to this admittedly difficult problem. We find our answer at least suggested by the language of [Section 271.01, Florida Statutes, F.S.A.](#) granting bulkheading privileges to upland owners 'in the direction of the channel, or as near in the direction of the channel as practicable to equitably distribute the submerged lands \* \* \*.' Added legislative support for this notion is contributed by the fact that [Section 271.09, Florida Statutes, F.S.A.](#), does not purport to define or delineate the exact area over which the so-called common law riparian rights are to be enjoyed.

[6] [7] We are therefore of the view and must hold that the common law riparian rights to an unobstructed view and access to the Channel over the foreshore across the waters toward the Channel must be recognized over an area as near 'as practicable' in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel. This rule means that each case necessarily must turn on the factual circumstances there presented and

no geometric theorem can be formulated to govern all cases. An upland owner must in all cases be permitted a direct, unobstructed view of the Channel and as well a direct, unobstructed means of ingress and egress over the foreshore and tidal waters to the Channel. If the exercise of these rights is prevented, the upland owner is entitled to relief.

[8] In the instant case the Chancellor obviously held that the appellees had not encroached upon or threatened to encroach upon appellants' right of view or right of approach to the Channel of Boca Ciega Bay. We agree with the Chancellor. The appellees still have a direct, unobstructed view of the Channel as well as a direct, unobstructed means of ingress and egress to the Channel of the Bay.

It is true as appellants allege that they will be deprived of a view of the 'bright, white tower of Stetson Law School which shines as a beacon of learning on the eastern horizon.' We are nonetheless impelled to the thought that a view of that splendid institution of learning, so ably headed now by a former member of this Court, is not a special riparian right guaranteed to appellants and those similarly conditioned.

In *Freed v. Miami Beach Pier Corporation*, supra, the late Justice Whitfield, who many times wrote the view of this Court on the subject at hand, pointed out that **\*802** the shore line and the channel may not run in the same direction and the boundary lines of lands that extend to the shore line may not run at right angles with the shore line. He then added that these conditions tender questions as to rights of riparian owners that require the application of appropriate rules to particular facts in each case as it is presented for adjudication.

[9] Riparian rights do not necessarily extend into the waters according to upland boundaries nor do such rights under all conditions extend at right angles to the shore line. Our own precedents are completely inconsistent with the appellees' view that such rights extend over an area measured by lines at right angles to the Channel. It should be borne in mind that littoral or riparian rights are appurtenances to ownership of the uplands. They are not founded on ownership of the submerged lands. It is for this reason, among others that we cannot define the area within which the rights are to be enjoyed with mathematical exactitude or by a metes and bounds description.

[10] We therefore prescribe the rule that in any given case the riparian rights of an upland owner must be preserved over an area 'as near as practicable' in the direction of

the Channel so as to distribute equitably the submerged lands between the upland and the Channel. In making such 'equitable distribution' the Court necessarily must give due consideration to the lay of the upland shore line, the direction of the Channel and the co-relative rights of adjoining upland owners.

We realize that such a rule, like many others in equity, invokes the conscience of the Chancellor in the application of board principles to the factual situation presented by the particular case. Unlike John Seldon, however, we cannot agree that the standard for the exercise of the Chancellor's conscience is the length of 'the Chancellor's foot.' It is a judicial determination that he must make in each instance consistent with the rights of the parties presented by the record.

In the case before us the ruling of the Chancellor does no violence to the rights of appellants. They still may enjoy their riparian rights over the waters of Boca Ciega Bay in an area as 'near as practicable' in the direction of the Channel with a resulting equitable distribution of the submerged lands and the waters and area above said lands between their upland and the edge of the Channel. It should be made clear that this holding is limited to the effect of the proposed filling of the particular submerged land adjacent to appellees' lots A and B, Block 4, mentioned in our summary of the facts. If the fill should be extended in a southerly direction so as to interrupt appellants' remaining view of or approach to the Channel, appellants might then have substantial grounds for complaint.

[11] [12] It appears to us that our position is strengthened when we take note of the fact that the Trustees of the Internal Improvement Fund are five constitutional officers of the

executive branch of the government. If we are ever to apply the rule that public officials will be presumed to do their duty, it would appear to us to be most appropriate in this instance. Certainly we are not to assume that in the supervision and disposition of submerged lands the Trustees will knowingly ignore the rights of upland owners. It is to be assumed that they will exercise their judgment in a fashion that will give due regard to private rights as well as public rights. This Board would appear to be the most appropriate repository of the responsibility to be exercised in these matters in the first instance. The exercise of their judgment should not be subject to adverse judicial scrutiny absent a clear showing of abuse of discretion or a violation of law. For an interesting and helpful discussion on this entire subject see *Tidelands and Riparian Rights in Florida* \*803 by Melvin J. Richard, *Miami Law Quarterly*, Vol. 3, Number 3, p. 339, April 1949.

We have considered the other grounds for reversal argued by appellants. We find that the cause was appropriately disposed of by summary decree. The proposed conduct of appellees does not violate the restrictive covenants in the deeds under which they hold title to the upland.

The decree of the Chancellor is AFFIRMED.

DREW, C. J., HOBSON, J., and PEARSON, Associate Justice, concur.

**All Citations**

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