OCEAN BEACHES ARE THE PROPERTY OF THE PUBLIC
New York Times (1857-Current file); Oct 19, 1913; ProQuest Historical Newspapers The New York Times (1851 - 2004)
pg. SM8

OCEAN BEACHES ARE THE PROPERTY OF THE PUBLIC

Justice Benedict's Decision in Coney Island Case Is Highly Important in Preventing Any Obstruction of the People's Reasonable Use of the Shore.

THE beaches belong to the public. The people hold the fee title to tidal lands in their sovereign capacity in trust for the benefit of the public. The foreshore is to be considered for practical purposes as a public highway.

That is the essence of the highly important opinion handed down the other day by Supreme Court Justice Benedict in Kings County—in the case of the People of the State of New York against Steeplechase Park Company, Emilie Huber, and others. So ruling Justice Benedict ordered off the Coney Island beaches the fences, barriers and other structures that serve as private obstructions upon this—a public highway. The decision had to do directly only with a small strip of the Coney Island beach, but it points none the less to every obstruction which has been reared upon the foreshore of Long Island, or upon the foreshore of any other navigable water in this State.

It is the latest contribution to the voluminous and interesting literature and law of that debatable territory, the portion of land lying between the low water mark and the high water mark on a tide-washed shore.

It means simply that nothing must interfere with the public's reasonable use of the beaches for bathing, traveling, and recreation generally. In recent cases, fought all the way to the Court of Appeals, the riparian owner established his right to run a pier out from his land to the water. He may have his private dock, but as Attorney General Carmody reads the decision of Justice Benedict, no private dock and no other structure may be so built as to interfere with the right of every one of us to enjoy the beaches of the State. And on the strength of the decision the fight against such obstructions will be pushed till all the beaches are clear.

If this decision, or such a decision in a similar case, is sustained by the Court of Appeals, it will mean many changes. The seashore householder may not build anything to fence off as his own the beach in front of his home. The bathing houses at Coney and at Brighton and down toward Sea Gate may raise no bars of any sort. No hotel may rule the beach it fronts upon. The ropes must come down. The long fenced-in, pay-as-you-enter state of Manhattan Beach will have to change. Fees, however small, may not be charged to keep any part of the foreshore "exclusive." The beaches belong to the public.

At the request of THE SUNDAY TIMES, Attorney General Thomas Carmody has written this statement of the Steeplechase Park case, and his programme with regard to it:

"The decision of Mr. Justice Benedict, recently rendered in the case of the People of the State of New York against Steeplechase Park Company, Huber, and others, directing the removal of certain permanent structures on the beach or foreshore of their premises situate on Surf Avenue and the Atlantic Ocean at Coney Island, establishes a principle for which the Attorney General's department has been contending for two years, namely: that grants of land under navigable waters by the State of New York through the Land Board, either for commercial purposes or for beneficial enjoyment, must be taken under the implied reservation to the People of the State of the reasonable use, for traveling, bathing, and recreation of the land between high and low water mark.

"The principle is old and fundamental. The public has the right to use the navigable waters of the State. This includes all land up to high water mark. This is a sovereign right vested in the People, and can not be alienated either by the Legislature or any State authority except in the interest of navigation or for the public good.

Grants 'Appear' Absolute.

"Many of the grants of land under water around New York made during the past by the Land Board are apparently absolute, and in terms do not contain this reservation. This was so of one of the grants involved in the Steeplechase case.

"The Attorney General's department contends that this reservation is implied, and commenced an action for the purpose of vindicating this principle, which resulted in Justice Benedict's decision. This decision holds:

There are no restrictions upon the grant, but, on the other hand, there are no words to indicate any intention to surrender or extinguish the public right of passage. Hence, I conclude that her grant does not operate to deprive the public of such right. I do not hold that the grant is void, but merely that it is to be construed as subject to the public right aforesaid.

"The judgment of the court in the Steeplechase case directs that the following structures on the property involved be removed: the fences and barriers on either side of Steeplechase Park, owned or used by the defendants; the luncheon pavilion on the Huber property and the platform connecting the same with the pier; the roller coaster and machine horse railway, in so far as these structures or any of them project beyond the mean high water line. It provides that the piers may remain, provided that suitable means of free passage under or around them be maintained. In other words, the decision is that all obstructions must be removed that prevent free enjoyment of the public right to use the beach, and that all structures must be erected in such a way as not to obstruct this right.

JUSTICE RUSSELL BENEDICT

"It is the intention of the Attorney General's department to bring actions for the purpose of removing such obstructions wherever they exist on the shores of navigable waters. A complaint now exists in respect to certain structures on Manhattan beach, and an action has recently been brought by the Attorney General against the Delaware & Hudson Company to compel the removal of obstructions on the beach at Lake George.

Contentions to be Made.

"All that will be contended for by the Attorney General is that the piers, bulkheads, docks and other structures which patentees have erected under patents from the State must be so erected as not to obstruct the enjoyment by the public of the reasonable use of the beach. These patents, many of them, have been granted for nominal considerations, and it could never have been contended that they were to convey title in derogation of the sovereign rights of the people, even though the power to convey were unquestioned."

Broadly, and not without humor, Justice Benedict came to this conclusion:

"The structures which encroach upon the beach in front of the defendants' upland other than the pier and proper approaches thereto, and possibly the jetty, are public nuisances and should be abated as such. They are 'purprestures,' a term defined by Littleton as 'a clandestine encroachment for appropriation upon lands or water that should be common or public,' because they encroach upon what, so far as the right of passage is concerned, is to be considered for practical purposes as a public highway.

"The public has the right to pass over the foreshore, between mean high water mark and mean low water mark, at any point and at all times of the day and night, on foot or in vehicles, and to do so on dry ground, except when the state of the tide makes that impossible, subject only to the right of the owner of the upland to maintain a pier or dock or suitable approaches.

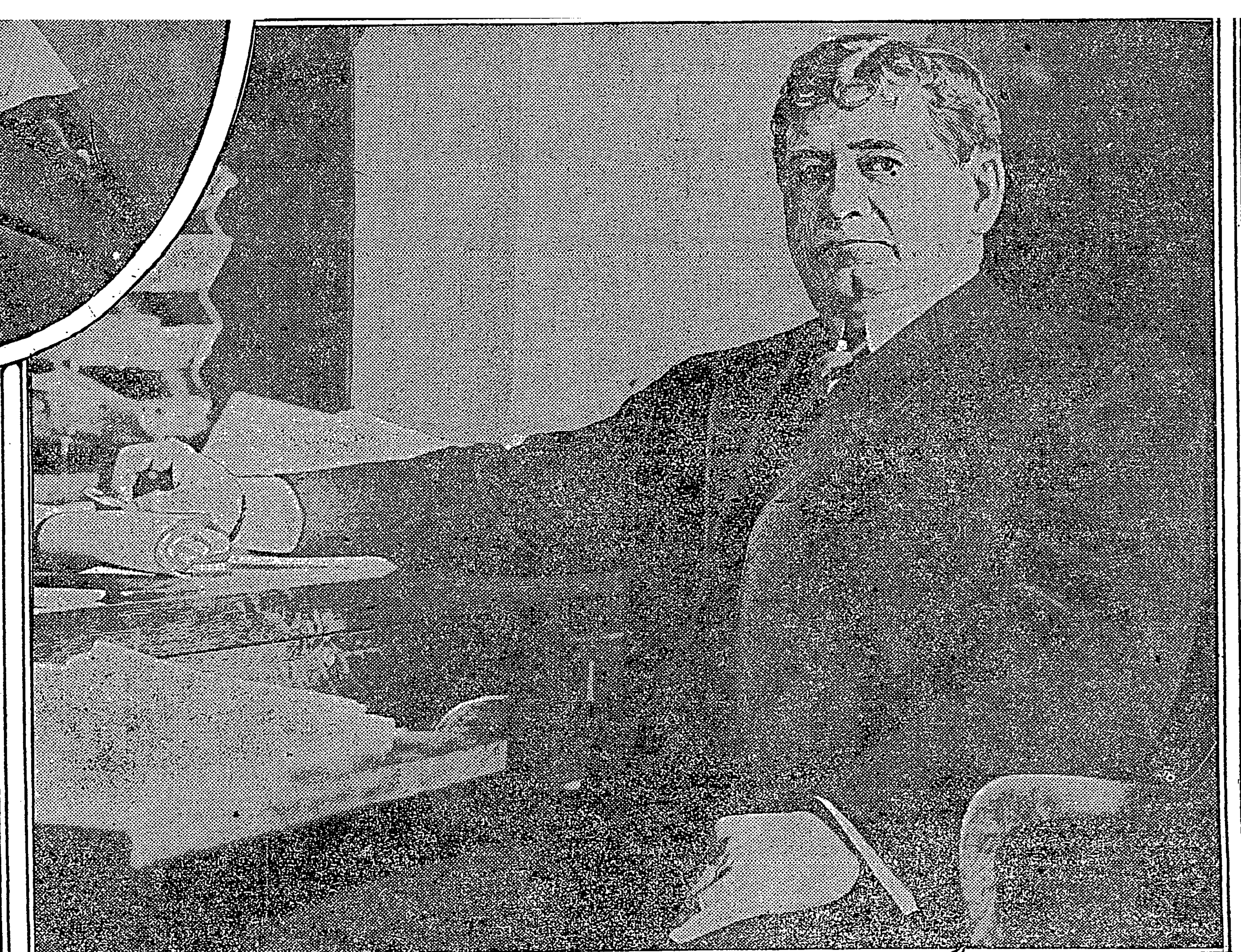
"Probably it would always be possible for persons in bathing suits to pass over the beach, outside of the obstructions, as is indicated in some of the photographs, but the defendants are not entitled to require the public to exercise its rights in this costume. So it might also be possible to drive about the spiles used in support of the defendants' structures with a dump cart; but the public is not limited to that means of vehicular traffic or agency of user."

"If you can lawfully get to the seashore I apprehend you can bathe there," observed an English Judge nearly a hundred years ago, and Judge Werner, in the Barnes case, spoke of the right of passage as "a necessary incident" to the right of the public to use the tide-washed foreshore for fishing, bathing, and boating.

A member of the New York bar who has taken a special interest in the history of riparian rights—"peculiar rights, neither wholly terrestrial nor entirely aquatic, which might almost be denominated amphibious"—is Frederic R. Coudert.

"I can recall offhand," he said the other day, "no case in which the Court of Appeals has decided squarely on the right of the pedestrian on the beach—on the right of the bather, if you will. The public right to the beach has been recognized, but as the law has stood that right is subordinate to the riparian owner's right of access to the water. I feel sure that the law would be against any riparian owner whose pier interfered with navigation, but not so sure that even an obstructive pier, if necessary to the riparian owner's purposes of access, could be regarded as an interference with the public right to pass along the foreshore.

"Were the riparian owner's rights in the foreshore so exclusive as to permit his erecting a barrier which prevented the public walking on the beach? That was the question in the Barnes case, and the Court of Appeals, while holding, as in the Brookhaven case, that the owner had a right to erect a pier which might incidentally be an obstruction to pedestrians on the foreshore, took the view that this right was limited to the necessities of the situation."



ATTORNEY GENERAL CARMODY
Copyright American Press Assn.

The long succession of legal battles fought on the foreshore both in this country and in England have been in no small degree fomented by the presence in our law of the doctrine of jus privatum, a worrisome inheritance from the days of the Stuart Kings, a relic of unscrupulous Stuart greed bequeathed for the distraction of the courts. Or so Mr. Coudert has pictured it in a paper in his new book "Certainty and Justice."

Briefly the jus privatum was that upon which the Crown based its claim to the private ownership of the foreshore.

"The study of the history of legal institutions has been said to tend to make one a legal skeptic," writes Mr. Coudert. "The history of the English law is admirably illustrative of the development of legal theories and their erection into principles or rules which come to be clothed with an almost sacred character, yet whose origin upon examination is sometimes found to be based upon a misconception of a historic situation.

"The theory of the kingly ownership of the foreshore was invented by an ingenious Crown lawyer, one Thomas Digges, in the reign of Elizabeth. His claim was that the foreshore belonged to the Crown, not as other royal property, but as part of the royal prerogative, and he supported it in a learned thesis on the subject based upon an assumption of a state of facts of which there is no proof and the reverse of which almost certainly existed. It appears that during the reigns of Elizabeth and of James I., in a number of cases, the crown claim to foreshore ownership was made by astute lawyers, filled with zeal to enlarge the royal jurisdiction; but all these cases seem to have been unsuccessful until the famous case of Attorney General v. Philpot in 1628, which, we may say in passing, is mentioned in the dissenting opinion in the Brookhaven case as the leading English case establishing that doctrine.

"It is extraordinary that it should be the foundation of a rule of property law, which, until 1907, was the law in the State of New York, when we reflect that the case was decided by Judges, some of whom sat in the famous Ship Money case and upon whom history has placed a heavy load of obloquy. The decision was apparently procured, as the Ship Money judgment had been by the personal pressure of Charles I., for the purpose of obtaining for the Crown properties and revenues to which it had no just title. The claim, says Mr. Moore, was founded in untruth and injustice, and the too great insistence upon it by Charles I. unquestionably was one of the causes of the great revolution.

"Sir Thomas Townsend, writing to a friend as to the Philpot case, intimates that it will be properly disposed of 'when some of the barons have received directions from the King.' The case itself seems to have been a moot case, contrived by the Stuart monarch for the purpose of obtaining a decision which might bring him needed revenues. The Crown lawyers raised the question by making a lease of a piece of foreshore to one Cornelius Vanderbilt with a view to establishing legal title by an action. It appears an odd coincidence that the Court of Appeals, two centuries later in the case of another Vanderbilt, should have declared as New York law the proposition advanced by an earlier Vanderbilt on behalf of Charles I. in the Philpot case.

"That a decision rendered under such circumstances should have stood in law in the United States for more than a century is a strong commentary upon the conservatism of our Judges, and perhaps, incidentally, upon their lack of knowledge of or indifference to history, at least as found outside of the reports of the law courts.

"The 'Grand Remonstrance' of 1641 is almost as noteworthy a landmark in the history of English liberty and constitutional law as the Great Charter itself, yet how many Judges who have learnedly considered these questions have had in mind the Twenty-sixth Article of that memorable document, charging the King with 'taking away of men's rights under color of the King's title to land between high and low water mark?'"

The doctrine of jus privatum was not so many years ago brought forth from the law books and flourished anew to serve the purposes of Brookhaven, a Long Island town vastly pleased with the fact that it was seized of certain lands under water under royal grants dating as far back as the seventeenth century. The town claimed a right to a fee ownership in the foreshore under these grants and therefore leased the beach to persons other than those whose property ran at least as far down as high-water mark—the riparian or littoral owners, as the lawyers have it.

The town lessees consequently sued in an action for trespass the riparian owners who had built docks upon this land. Here was the question: Had the owner of land abutting upon the sea or on an arm of the sea, in which the tide ebbed and flowed, the right to construct for his own use a dock giving him access to the navigable portion of the stream? That was the question in the famous case of Brookhaven vs. Smith. Mr. Coudert was one of the riparian owners who were victims of the Stuart doctrine of purpresture, or of what he calls the "vicious but ancient legal theory of jus privatum, devised by Thomas Digges, sanctioned by the Ship Money Judges, the final manifestations of which took the form of ludicrous antics on the part of petty town officers intoxicated by the recrudescent exuberance of royal prerogative."

This zealous desire to vindicate the kingly dignities inherited from English monarchs gave interest to the Brookhaven case—in which Mr. Coudert appeared—when it reached the Court of Appeals, which court effectively relegated the jus privatum to the "very proper category of legal antiquities." In his opinion Judge Gray said:

English Law Inapplicable.

"The jus privatum of the Crown, by which the English King was deemed to own the soil of the sea and of navigable rivers in his own right, rather than as a sovereign holding it in trust for his people, however applicable to the conditions in Great Britain were totally inapplicable to the situations of the Colonists of this country. * * * There is in my opinion the strongest evidence that this right has been abandoned to the proprietors of the land from the first settlement of the province and exercised by them to the present day so as to have become a common right and thus the common law."

"Here," says Mr. Coudert, "at last the coupe de grâce has been given to the old doctrine. The elaborate structure, invented by the keen but time-serving Digges, adopted by the Stuart Kings, sanctioned by subservient Judges and finally through the invincible English love of precedent become part of the common law, has at length died in the year 1907 as the result of a lawsuit over a little dock on a Long Island shore. The doctrine of the Brookhaven case has been reaffirmed and distinguished in the case of Barnes v. Midland Railroad Terminal Company, decided Nov. 10, 1908."

It is to these two cases as decided by the Court of Appeals of this State and to their corollaries that Justice Benedict turned for his rule. In his decision, he says:

"The Barnes case recognized a public right of passage over all lands over which the tide ebbs and flows. A public right of passage includes not only the right to pass on foot, but also, where it is possible, with vehicles, including vehicles drawn or propelled by horse or other motive power. In other words, as I interpret the Barnes case, it recognizes that a beach between high and low water mark constitutes a sort of natural public highway, and although it may not be subject to all the incidents of a regularly established public highway, it is subject to the right of the public to travel over it by all means used on the public highways of the State.

"I also think that the Barnes case is authority for the proposition that the people hold the fee title to such tidal lands in their sovereign capacity in trust for the benefit of the public, or, in other words, that this right of public passage over tidal lands is of the same nature as the jus publicum of the ancient English common law, a term which has, I admit, been usually applied to the right of navigation upon navigable waters, but which, under the Barnes case, seems also applicable to the right of passage over tidal lands. This right of passage, whether recognized by the old common-law writers and decisions or not, but which has been exercised from time immemorial over tidal lands, whether in public or private ownership, is of such a nature that it cannot be regarded as having had its origin in the jus privatum of the crown. Hence, the only possible conclusion is that it is a part of the jus publicum, although it may not, perhaps, until recently, have been judicially recognized."

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.