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TITLE TO THE SOIL UNDER PUBLIC WATERS—A QUESTION OF FACT

In *State v. Korrer*¹ the supreme court of Minnesota decided that the owners of land bordering on public waters have no right to take iron ore from the bed below low-water mark and for that purpose to fill in the bed of the lake; and, on the other hand, that the state had no right to recover the value of the ore mined under a stipulation of the parties, and order of court, that the state should be paid for it if the riparian owners were not entitled to it.

The riparian owner is denied the right to remove the minerals in the bed on two grounds: (1) "the state owns the soil under public waters in a sovereign, not a proprietary, capacity, and the shore owner does not;" (2) "the state has the power to preserve the integrity of its public lakes and rivers, and riparian rights do not include the right to fill and destroy the bed. . . . for the purpose of taking ore therefrom, against the protest of the state."² The state is denied recovery for the minerals taken because "the state owns the bed. . . . 'not, however, in the sense of ordinary, absolute proprietorship, with the right of alienation, but in its sovereign governmental capacity, for common public use, and in trust for the people of the state for the public purposes for which they are adapted.' "³

¹ (1914) 127 Minn. 60, 148 N. W. 617.
² Ibid., at 73.
³ Ibid., at 70.
There is great difference between the two reasons first given. Ownership is a collective name for rights in a thing, indefinite, but exhaustive. It may be qualified by, or subject to, rights in others, such as easements or profits a prendre, but would still connote all residuary rights not included in the special right. If the state owns the bed, and whether absolutely or in trust for the public is here immaterial, the riparian is necessarily excluded from any right therein peculiar to him, except such as he may have by some special right; and the first part of the decision is that the riparian has no profit a prendre of minerals in the state's land. The second reason, however, does not necessarily import ownership in the state, but only a quasi-easement which the state holds for the public, with power to conserve it for the public use. This would leave the riparian the owner of the bed, subject only to the public right. And as the public right does not include minerals, the riparian would own the minerals, but must not destroy the public right in getting at them. The reason for denying recovery to the state under the stipulation is ambiguous and may correspond to either of the above. It may mean that the state is owner of the bed, but without power to alien any interest in it, or that the state has merely a special interest measured by the public right, and that the general ownership is in the riparian; that the state's right is proprietary in extent, though not in power, or not proprietary in either respect. This dual reasoning reflects the state of the Minnesota decisions.

For most purposes it makes no difference whether the ownership is in the state or in the riparian. So far as the public right goes it is paramount, and either the state or the riparian holds subject to it. So if the public right were exhaustive of all possible uses of the soil, the inquiry who has the dry legal title would be of only academic interest. But there are uses of the soil not included within the jus publicum, the right which the public enjoy directly as individuals. The taking of minerals is one of these, and it becomes important to determine whether these residuary rights, the jus privatum, are in the corporate state, as distinguished from the public, or in the riparian,—which of the two is the general owner.

4 Austin, Jurisprudence Secs. 515, 1054.
5 "It seems to me that the supreme court of Minnesota, has, in effect and for all practical purposes, finally adopted the common law rule . . . that of a qualified fee ownership in the riparian owner of the bed of the stream to the middle thread thereof." Per Judge Morris in Hobart v. Hall, (1909) 174 Fed. 433.
If the corporate state is the owner, other questions arise. It is conceivable that a right like that to minerals may be enjoyed without any impairment of the value or use of the public waters for other purposes, as by dredging, or that it cannot be enjoyed without impairing or destroying the public waters, as by draining. May the state alien the beds of the public waters to be enjoyed in either manner?

It is intended to discuss—

(1) Does the state own the beds of its public waters, or is the title in the riparian?

(2) If the state owns the beds, may it use or alien them, subject to public and riparian special rights?

(3) May the state use or alien the beds for any purpose impairing or destroying the public and riparian special rights?

Waters are public which are tidal or which are navigable in fact. What waters are included under navigable in fact is itself a difficult question, into which we shall not enter here.

In England the crown has prima facie title to the beds of tidal waters, but the beds of public fresh waters are prima facie in the riparians. As the American cases usually refer to the English rule, either to follow it or to distinguish it, a consideration of the origin and meaning of that rule is necessary.

It has been pointed out that the distinction between tidal and fresh waters, in respect to ownership of the beds, did not exist in the earlier English law. Mr. Moore has thrown by his valuable treatise a flood of light into this obscure corner of the law. He has shown that prior to the time of Elizabeth, where the upland was in possession of a subject the crown asserted no title to the foreshore of tidal waters, now included within the prima facie title of the crown, though there had been much litigation between crown and subject wherein such an allegation would have been of the greatest value to the crown's cause, and that the first case in which the prima facie title of the crown was successfully asserted was in the reign of Charles I. His conclusion is that originally the riparian subjects owned both the beds of fresh waters and of tidal waters so far as they were valuable for purpose of ownership.

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6 Willow River Club v. Wade, (1898) 100 Wis. 86, 76 N.W. 273, 42 L. R. A. 305, and note.
7 History and Law of the Foreshore and Seashore.
8 Moore, Foreshore, xxxvi, 169, 262, 644, 650.
What was the origin of the title of the subject to the bed of fresh and to the foreshore of tidal waters and how did the prima facie theory of the title of the crown to the latter arise?

It must be remembered that settlement and occupation of the lands of England preceded the development of any adequate system of law. The tribes landing on the English shores, unlike the colonists of America, brought with them only the most primitive ideas of law. Their acts would determine law, rather than be determined by it. Claiming by conquest, they would own what they possessed, rather than possess what they owned. The feudal theory was as yet undeveloped. It is reasonable to suppose that a people under such circumstances would take possession of whatever was worth possessing.

During both the Anglo-Saxon and the Norman periods, in so far as the crown did own and grant the lands to subjects, no distinction was made between dry and submerged lands. The charters expressly included "to the mid-stream of non-tidal rivers, and in the case of tidal rivers inter fauces terrae, also to the mid-stream."

If these statements are correct,—and there is no evidence to the contrary,—the riparian owners in England had by actual possession or by actual grant from the crown acquired title to the submerged lands and foreshore of the kingdom. Their ownership was not a rule of law, but a statement of fact, as is the ownership of any lands. The only rule of law was that title might be acquired by the subject. That title was acquired was a fact. It was not even a recurring fact, for title once acquired continues. There was consequently no place for custom which makes the law, unless indeed it were in permitting the original acquisition of title by a subject. These known facts that as a general rule title to the submerged lands was in the subjects, either by possession taken by the riparian or by being expressly included in the crown's grant of the uplands, might well raise in course of time a general presumption that the title was in the riparian. The presumption would be justified, as indeed it is later justified by

9 Maitland's Domesday 225.
10 Maitland, ibid., 223.
12 Grants of forfeited and escheated lands were made to be enjoyed as before. Ibid., 652, 653.
Sir Matthew Hale with respect to non-tidal lands, by saying, "therewith agrees the common experience." The order in development of the ideas and facts would thus be, first, that riparians might take title to the submerged lands; second, that they actually acquired title by express grant or its equivalent; third, the presumption that they have title. The point to be remembered is that factual titles preceded the presumptive title.

That the ownership of the submerged lands was a question of fact is strongly supported by the origin, nature, and criticism of the theory of the prima facie title of the crown to the beds of tidal waters. Its history is exhaustively traced by Moore. The forfeitures in the reigns of Henry VIII and his immediate successors led to concealment of lands liable to forfeiture. "Title hunters" sought out lands to which the occupants had not a clear title, in the hope of securing grants of the lands for themselves from the crown. One of them, Thomas Digges, engineer, surveyor, and lawyer, wrote, early in the reign of Elizabeth, a treatise entitled "Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof."

"By this treatise was first invented and set up the claim of the crown to the foreshore, reclaimed land, salt marsh, and derelict land, in right of the prerogative. Mr. Digges boldly affirms that no one can make title to the foreshore or land overflowed by the sea, and says it is a sure maxim in the common law that 'whatsoever land there is within the King's dominion whereunto no man can justly make property, it is the King's by his prerogative.' He admits that some subjects may have it by grant, but 'whosoever holds it otherwise than by the Prince's grant they intrude, and no continuance of time or prescription can serve their turn.' He lays the claim of the prerogative as being in respect of the King's general ownership of the land of the whole kingdom, viz.: that the foreshore is parcel of the great

13 De Jure Maris Chap. I.
14 Foreshore 169 et seq.
15 "For yt is a sure Maxime in the Common Lawe that whatsoever lande there is within the Kinge's dominion whereunto no man can justly make propertye yt is the Kinge's by his prerogative." Mr. Digges' Arguments, Moort, Foreshore 187.
16 "Yt maye be farder alledged a greate noomber in this realme haue of the salt shore, and thinck they haue as good propertye in yt, as in enye other of their lande or inheritance. I answere true yt is, a greate noomber in this Realme possesse part thereof, and hould yt justly, for they have yt by pattent from the prince . . . but whosoever hould yt otherwise then by the prince's graunte, they intrude, and in this case Publicus error non facit legem, no contynuance of time or prescription can serue their toorne, as yt is before prooued by Brittoune and Bractons owne woordes, De Priuilegijs." Ibid., 190.
waste of the kingdom not granted out; 'the fresh shore, [he says] belongs to the lord of the soil adjoining, the salt shore to the general lord of all.' Thus we see that from its inception until today the claim of the prima facie title rests upon one basis, viz.: that it is parcel of the waste of the kingdom and has never been de facto granted out, and that evidence of user and longa possessio avails not to give a title to it unless the grant be shewn.

With the efforts of the crown to have Digges' doctrine adopted by the courts we are not here concerned. It did not at once receive popular approval. The repeated attempts of the crown to enforce rights based on it were protested in the Grand Remonstrance to Charles I. The first decree in favor of the crown, resting on the doctrine, was rendered 7 Charles I, in the case of The Attorney General v. Philpott. Sir Matthew Hale was counsel for the crown in subsequent cases. He accepted the doctrine in his treatise "De Jure Maris," written about 1666 and published in 1787. This treatise is the most authoritative work on the subject and has had the greatest influence on the law both in England and in America. As it is the main source of the modern law, some of the more important passages are brought together here.

17 "It is a grounde or maxime in our lawes that there is no lande within the Kinge's Dominion but it is either the land of the Kinge or of the Kinge's naturall subjects. And againe there is no lande of any subiect but he holdeth it mediate or immediate of the crowne of Englande, so that there is not lefte within the Kinge of Englands Dominion anie place to purchase per occupationem, which Bracton in his booke de acquirendo rerum Dominio expresslie reuleth, shewing howe an Ilande risinge in a publicke stream occupantis est. And therefore inferreth with these words. Et per consequens Regi propter priuilegium suum. . . . And therefore whatsoever he be, subiecte or other, that shall enter upon anie wastes of or in the seas shores of Englande intrudethe upon the Kinge of Englands inheritaunce, ratione priuilegii." Ibid., 204.

18 Moore, Foreshore 182.
20 Ibid., 278.
21 Ibid., 317.
23 Ch. I. "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, usque filum aquae; and the owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side. And if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." . . .
The theory of Digges and of Hale in respect to tidal waters was simple. By the feudal theory "all the land in the kingdom is

"But special usage may alter that common presumption; for one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river. . . .

"Though fresh rivers are in point of propriety as before prima facie of a private interest; yet as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected with them; viz., one of prerogative belonging to the king, and another of publick interest, or belonging to the people in general. . . .

Ch. II. "The king by an ancient right of prerogative hath had a certain interest in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or arms of the sea; and those are these which follow.

"1st. A right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. . . .

"And another part of the king's jurisdiction in reformation of nuisances, is, to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called altae viae regiae so these publick rivers for publick passage are called fluvii regales, and haut streames le Roy; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the king's care, supervision, and protection. And therefore the report in Sir John Davys, of the piscary of Banne, mistakes the reason of those books, that call these streames le Roy, as if they were so called in respect of propriety, as 19 Ass. 6, Dy. 11, for they are called so, because they are of publick use, and under the king's special care and protection, whether the soil be his or not. . . .

Ch. III. "There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are prima facie publici juris, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are publick rivers juris publici. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statute of Magna Charta, cap. 23. . . .

Ch. IV. "Thus much concerning fresh waters or inland rivers, which, though they empty themselves mediatly into the sea, are not called arms of the sea, either in respect of the distance or smallness of them.

"We come now to consider the sea and its arms: and first, concerning the sea itself. . . .

"The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not. . . .
supposed to be holden mediately or immediately of the King."

He is the only allodial owner. Of what he has given out he is
overlord. What he has not granted away remains in him not
only in respect to overlordship, but in respect to property. So
the waste lands of the kingdom are his, and these include the
lands under tidal waters. The presumption is that the terra firma
has been granted. This presumption arises from known facts;
but the tidal lands have not been generally granted, and the
presumption is, therefore, that they remain in the crown.

"In this sea the king of England hath a double right, viz. a right of
jurisdiction which he ordinarily exerciseth by his admiral, and a right
of propriety or ownership. The latter is that which I shall meddle with.

"The king's right of propriety or ownership in the sea and soil thereof
is evidenced principally in these things that follow.

"1st. The right of fishing in this sea and the creeks and arms thereof
is originally lodged in the crown, as the right of depasturing is originally
lodged in the owner of the wast whereof he is lord, or as the right of
fishing belongs to him that is the owner of a private or inland river.

"But though the king is the owner of this great wast, and as a conse-
quent of his propriety hath the primary right of fishing in the sea and
the creeks and arms thereof; yet the common people of England have
regularly a liberty of fishing in the sea or creeks or arms thereof, as a
publick common of piscary.

"IIId. The next evidence of the king's right and propriety in the sea
and the arms thereof is his right of propriety to
The shore; and
The Maritima Incrementa.

"(1) The shore is that ground that is between the ordinary high-water
and low-water mark. This doth prima facie and of common right
belong to the king, both in the shore of the sea and the shore of the
arms of the sea.

"And thus much of the king's right of propriety which he hath in the
sea, and also prima facie and in common presumption in the ports and
creeks and arms of the sea.

Ch. V. "Although the king hath prima facie this right in the arms
and creeks of the sea communis jure, and in common presumption, yet a
subject may have such a right.

"And this he may have two ways.

"1st. By the king's charter or grant; and this is without question.

"2d. The second right is that which is acquired or acquirable to a
subject by custom or prescription; and I think it very clear, that the
subject may by custom and usage or prescription have the true propriety
and interest of many of these several maritime interests, which we have
before stated to be prima facie belonging to the king. I will go over
them particularly, and set down which of these interests are acquirable
by usage or prescription by a subject.

Ch. VI. "The king of England hath the propriety as well as the
jurisdiction of the narrow seas; for he is in a capacity of acquiring the
narrow and adjacent sea to his dominion by a kind of possession which
is not compatible to a subject; and accordingly regularly the king hath
that propriety in the sea; but a subject hath not nor indeed cannot have
that property in the sea, through a whole tract of it, that the king hath;
because without a regular power he cannot possibly possess it.

24 2 Bl. Com. 59.

25 "The title of the King of England to the land or soil aqua maris
cooperta, is similar to his ancient title to all the terra firma in his
"The ground upon which the prima facie claim of the crown rests is the allegation that the crown has seldom or never parted with the foreshore to the subject, but has from the earliest time retained it as part of the waste dominions of the crown. Here, of course, we speak of the *jus privatum* or right of property in the foreshore, which the crown may alienate, in contradistinction to the *jus publicum*, which is inalienable, and survives for the benefit of the public whether the crown retains the foreshore or grants it to a subject. It is nowhere alleged that the crown has *never* parted with any portion of the foreshore; it has always admitted that at any rate in some places it has so parted with it. The truth or untruth of the theory, and the relative value and weight of the presumption in favor of the crown which is based upon it, depend, therefore, on a question of fact."\(^2\)

Criticism of the theory has been directed to the question whether this premise that the beds, and particularly the foreshore, of tidal waters have not been generally granted away by the crown is true. The injustice of the theory, if there be such, lay in creating a presumption which, it is alleged, is contrary to the facts. This presumption dispensed with evidence of the crown's title and enabled it to recover on the weakness of the defendant's title, and even on his inability to prove it. The private claimant, thought he be defendant, must furnish the proof of his right.\(^2\)

Grants of the upland did not carry title to the foreshore by implication. Doubts were resolved in favor of the crown. It is questioned whether the facts were such as to justify this presumption in its favor.\(^2\)

The answer to this question is im-

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\(^2\)See to same effect an earlier treatise by Sir Matthew Hale to be found in Moore's Foreshore 258, 362, 364, 367.

\(^2\)Moore, Foreshore, 638.


\(^2\)"On consideration of the charters here referred to, and the very numerous instances in which claims to wreck will be found to have been allowed when claimed infra manerium, it will appear that the widely prevailing notion that the Crown has scarcely ever parted with the foreshore has no foundation in fact; and as the theory of the prima facie title of the Crown rests entirely upon this assumption—viz.; that the
material to our present purpose, but the alleged basis in fact of
the presumption and the ground of the criticism are to be
emphasized.

Fresh water rivers, wrote Hale, do of common right belong to
the riparians. That he meant nothing more than a presumption
in their favor is proved by the use of the words "common pre-
sumption" immediately after, and throughout the treatise. Special
usage, he adds, may alter that common presumption, for one
may have the river and another the soil adjacent. How can this
common presumption be justified? We find the answer in the
ancient charters which expressly granted the rivers to the mid-
stream. The river beds had been expressly granted away with
the terra firma, as a general rule. It will be later pointed out that
according to English authority they will pass in a crown grant
only by express reference.29 The riparians were in the enjoyment
of them so generally that the common presumption was in the
riparian's favor until a better right was shown. "Therewith
agrees the common experience." Express alienation by the crown
and possession by the subject were the foundation of the pre-
sumptive title. The factual titles did not grow out of a rule of
law, but a presumption of ownership grew out of the factual titles.

But the narrow sea, continued Hale, including the creeks and
arms of the sea, are part of the waste and demesnes of the king.
Yet, although the king hath prima facie this right in the arms
and creeks de communi jure, and in common presumption, a
subject may have such a right by the king's grant or by pre-
scription. Here the presumption is reversed. The factual title
has remained in the king so generally that the common presump-
tion is in his favor.

The distinction in English law, as it became settled, between
fresh water beds and tidal water beds is based on the assumption
that, as a general rule, the former were taken possession of by the

Crown has retained the foreshore as part of the waste dominions of the
Crown never granted out—it would seem that this theory (the origin of
which we shall shew in the time of Elizabeth) is a theory based upon a
presumption of fact which is, as regards, at any rate, the greater part
of the kingdom, wholly untrue. It is a theory of what might have been,
but it is not a theory based upon true facts." Moore, Foreshore 24.

It might be suggested that Mr. Moore's criticism is based on the
state of the title to the foreshore alone, while Hale's presumption is
based on the state of the title to the tidal lands as a whole. Hale treats
the foreshore as the terminus of the tidal lands and therefore presumably
of the same ownership. See ante note 23, Chan. VI, and post notes
30, 64, 65.

29 Post notes 46, 48, 55.
riparian subject or were granted to him by the crown, so that prima facie the title to them is in the riparian subject, while the latter were so seldom granted by the crown that prima facie the crown still retains the property in them.30

The first step in determining the ownership of submerged lands in England is the application of the presumption one way or the other, according to the nature of the lands. But the presumption may be rebutted, and the title to the beds of both fresh and tidal waters is ultimately one of fact.31 The modern English law as to fresh-water and tidal lands is thus stated by Bowen, L. J., and by Richards, C. B., respectively:

"The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, and, if he owns the land on both sides, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river. There is also a presumption that the owner of the bed of the river has the right to fish in the stream, and to prevent other persons from fishing there. But these are presumptions of fact, which may be rebutted. They are not rules of law which must apply to every case, because the other facts of a particular case may show that in that instance the presumption does not obtain. For example, it may be that in a particular place the bed of the river does not belong to the owner of the land which goes down to the bank. Or again, it may be that in a particular place a man may own the bed of the river itself, and yet someone else may have the right to fish, and to exclude others from fishing there. So that, in each case, applying the presumptions so as to throw the onus of proof on the right person, when you have got the whole of the evidence you must make up your mind how far the prima facie presumptions have been rebutted, and what is the real truth of the case apart from all technicality. It may also well be, that one person may have the right to fish in particular portions of a river; and another person may have the

30 "It is agreed by all, that the sea-shore was at first appropriated to the King, from whom the right to it must be derived. The present state of the shore shews the manner in which the Crown must have used it. Some parts of it were held exclusively by the Crown for the purposes of fisheries, harbours, warehouses, etc. But the greatest part was left open as a common highway between the sea and the land. This is the state in which it continues to this day, and in which, from its general sterility, it must ever continue. From the state of the greatest part has arisen the general rule, or common-law right, and the state of the portions exclusively occupied has occasioned the exceptions." Per Best, J., in Blundell v. Catterall, (1821) 5 B. & Ald. 268 (275), 24 R. R. 353.

right to fish in other portions of the same stream. We are dealing with the Thames, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river, that is, all the Queen's subjects have the right of passing and re-passing on it, and it is what is called in the old books a 'king's stream,' by which is meant, not that the soil must belong to the king, but that it is a highway, and that the king is the natural guardian and conservator of the commodious and convenient passage of the river by his subjects. It is a question of fact, not of law, in whom the bed of the river Thames in any particular place is vested. It may be that in one place the bed belongs to the king, and that in another place it belongs to a subject. In each particular part of the river it is a question of fact, to whom the soil belongs."

"It is a doctrine of ancient establishment, that the shore between the high and low water marks belongs prima facie to the King; and it is clear that the lands in question are between the ordinary high and low water marks, and consequently prima facie belong to the King; but it is equally clear that the King may grant his private right therein to subjects. It is upon such a grant that the defendants in this suit mainly rely, and such a title it is clearly incumbent on them to prove against the King. The subject may acquire a right of property in these mud lands by grant, charter, or prescription, the first question is whether the defendant has in this case established his title by either of those means of acquiring the right of possession, and shewn that the right has been taken out of the King and transferred to him. It is incumbent on the defendants to prove that case."

It is submitted that the development and nature of the English law may be stated as follows:

1. That factual titles to submerged lands were created by express grant from the crown or by prescription.
2. That these factual titles preceded any rule of law as to ownership of submerged lands.
3. That diverse presumptions of ownership of the two classes of submerged lands arose from the existing (or alleged) diverse states of the factual titles in the two classes of lands.
4. That these presumptions are common presumptions of ownership and not rules of construction of grants.
5. That the title to submerged lands is ultimately a question of fact.

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32 Blount v. Layard, (note to Smith v. Andrews) [1891] 2 Ch. 681 (689).
The application of the rules above stated to the United States seems obvious. The crown of England claimed these territories by right of discovery. The lands were held under grants from the crown to the first proprietors. That the crown originally held the jus privatum as well as the jus publicum in both the dry and the submerged lands is indisputable.

Mr. Justice Shiras in the case of *Morris v. United States*, which deals with titles to the Potomac Flats at Washington City, summarizes the law:

"The conclusions reached by this court in several leading and well-considered cases were that the various charters granted by different monarchs of the Stuart dynasty for large tracts of land on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; that by those charters the dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community, to be freely used by all for navigation and fishery, and not as private property to be parcelled out and sold for his own individual emolument; that, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the constitution of the United States; that when the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered by the constitution to the general government."

Thus the ownership by the crown, by its grantees, the first proprietors, and by the state, the successor to both, of the lands of the colonies, antedated, both in legal theory and in actual fact, any private ownership thereof. The prima facie theory of the ownership of the crown (perhaps an erroneous doctrine for England, owing to the alleged prior possession of the submerged lands by subjects, but nevertheless applied to tidal lands), would be and remain logically applicable in the colonies to all submerged lands, unless and until these submerged lands were generally

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conveyed away. Whether they were thus conveyed or not is a question of fact.

The American decisions agree, as should be expected, with the English rule as to the beds of tidal waters. The general rule is, except where changed by legislation, that the state has at least a prima facie title below high water mark. 37

The decisions in respect to public fresh waters are in hopeless conflict. 38 A considerable number of jurisdictions purport to adopt the English common law rule, but they construe it as a rule of substantive law rather than a presumption. The majority of jurisdictions have repudiated the English rule, thus construed, as to some or all of their public fresh waters. Some states have title to the beds of all their public waters; others to the beds of their public rivers, but not of their public lakes; still others to the beds of their public lakes, but not of their public rivers. 39 The truth appears to be that the decisions purporting to repudiate the common law rule accord with its basic reason, while those which purport to follow it do not.

The courts refusing to follow the English rule as to fresh waters put their refusal on several grounds. One of the most common reasons is based on the statement that in England only tidal waters were navigable. 40 In Barney v. Keokuk, 41 Justice Bradley, speaking of the right of riparian owners to accretions, said:

"By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only,

39 1 MINNESOTA LAW REVIEW 39 and citations.
40 Farnham, Waters Sec. 23a et seq. and citations. The cases are very numerous.
41 (1876) 94 U. S. 324, 334, 336, 24 L. Ed. 224.
although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy."

That the reason of the prima facie title of the crown to tidal beds was that it should have control over navigable waters does not stand well with the statement of Hale, who more than any other is responsible for the rule. Navigable rivers in which the tide does not ebb and flow are spoken of by Hale as public rivers in which the king has a right of jurisdiction to preserve for himself and his subjects a right of passage, but he does not state that the soil ought to belong to the king for that reason, but says that it belongs to the riparians, as in the public highways. There is not a suggestion in the treatises either of Digges or of Hale that the public right of navigation had any bearing on the title to the soil.

The right of the crown of England to the tidal lands rested and still rests on its right to the waste lands not conveyed to its subjects. The question at issue in every case since the prima facie theory was adopted was one of fact whether the private claimant could show a title by conveyance or prescription. If he could, it was his; if not, it belonged to the crown. The distinction between fresh and tidal waters was taken on the assumption that the beds of fresh waters had in fact been conveyed, but that the beds of tidal waters had not been alienated. Fresh or tidal was not a test in itself, but distinguished the class of lands which had been generally alienated from that which had not. The public right of navigation did not in any degree affect the decisions. It was not deemed necessary that the title be in the crown to secure this public right, for the right existed whether the lands were in private ownership or in the crown.

It is submitted that the fundamental error in the American cases has been in treating the matter as a question of law. The
notion has been common that title to lands on the banks of fresh water rivers and lakes includes by a rule of law title to a portion of the bed. The courts which lay down this rule purport to be following the common law of England. In this they fall into two errors: (1) they mistake a rebuttable presumption for a conclusive rule of law; (2) they overlook the absence of the factual basis upon which even the presumption rests.

In England "the common experience" was that riparians owned the beds of fresh rivers. This created a presumption in favor of a riparian in any particular case. But nothing could justify the application of such a presumption in America where without doubt the sovereign for the time being originally owned the beds, except the general alienation of them by the sovereign. The cases are few where the sovereign expressly granted the submerged lands, as the crown in England granted what it held. But, it is answered, the riparians hold by the English common law to midstream. The inversion is complete.

In America titles may usually be traced back to the sovereign grant, and the riparian rights depend on the effect of these grants. The courts frequently state the rule to be that, on a grant from the sovereign of land bordering on public fresh waters, the riparian takes title to the middle thread of the stream. Thus, in Keewatin Power Co. v. The Town of Kenora,42 Meredith, J. A., in construing the effect of a crown grant of land in Ontario bounded by a navigable river, said:

"That, according to the law of England, title would pass to the medium filum aquae or viae, as the case might be, cannot be questioned. Such has always been the law of England, though in regard to some waters it does not appear to have been well understood until after Lord Hale's time; that, however, is immaterial."

Such statements involve an error in addition to those indicated above. The presumption of the English common law is that the riparian owns the bed, not that he takes it by a particular grant.

The original title of riparians to the soil of fresh water rivers in England arose, according to the evidence of the old charters, by express grant of the land to midstream. Perhaps in other cases it arose from possession taken. Centuries passed, and original charters were lost. But it was a fact that the riparians generally were in the enjoyment of the submerged lands. From

42 (1908) 16 Ont. L. R. 184 (196).
these facts of the generally express conveyances and general enjoyment arose the common presumption that the riparian owned the bed. It is significant that although Hale cites considerable authority for the prima facie title of the crown to tidal beds, he rests the riparians' rights to the fresh water beds largely on "common experience," and that, in the few cases cited, the issue was decided by the jurors, on the evidence, as a question of fact. The presumption is of ownership, and not that ownership is acquired in any particular way.

There is no rule of law, nor even presumption, in the common law of England that a crown grant of riparian lands on public waters, which is silent as to the submerged land, carries title to the middle of the stream. With respect to tidal lands the prima facie theory rests on the assumption that they had never been conveyed. It is consequently a necessary basis to the crown's claim that they had not passed when the uplands were conveyed away. And on the construction of particular crown grants, no soil below high water mark will pass without express mention. With respect to non-tidal lands the common presumption is that the riparian owns them. This may be based on the assumption that title passed generally out of the crown by the original grants. But it does not necessarily follow that it passed by implication, and the evidence of the charters is that it did not, but that it passed by express words. Still less is there any presumption that it passes by a particular grant. It is not the function of the common presumption of riparian ownership to determine the effect of a particular grant. It is not a rule of construction. It is a substitute for a grant, is operative only so long as the grant is not in evidence, or, being in evidence, does not determine the extent of the riparian ownership. In the same manner, where the terms of the grant of a several fishery are unknown, the owner of the fishery may be presumed to be the owner of the soil; but where these terms appear and are such as to convey an incorporeal hereditament only, the presumption is destroyed.

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43 Moore, Foreshore 468; Hall, On the Seashore 20, 65, 106, and post note 55.
44 Moore, Foreshore 1-29.
45 Best, Principles of Evidence Sec. 427; Duke of Somerset v. Fogwell, (1826) 5 B. & C. 875 (886), 8 D. & R. 747, 5 L. J. (O.S.) K.B. 49, 29 R. R. 449. There is a similar presumption that the lord of the manor owns the waste lands of the manor, which may be rebutted by the terms of a grant. Doe v. Williams, (1836) 7 C. & P. 332; Simpson v. Deudy, (1860) 8 C.B. (N.S.) 433, 6 Jur. (N.S.) 1197. So the presumption that the abutting owners have the soil in the highway exists only in absence
There is surprisingly little authority on the point as to fresh waters in the decisions of the English courts. In the case of *Lord v. The Commissioners of the City of Sydney* the Privy Council had to pass on the effect of a grant by the crown of land in New South Wales bounded in part by a small, non-navigable creek. The court said:

"Upon the true construction of this grant, the creek which it bounds the land is, ad medium filum, included within it. In so holding they do not intend to differ from old authorities in respect to crown grants; but upon a question of the meaning of words the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the crown, or from a subject: it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances. . . . The Crown had the power of granting it; no reason can be assigned why it should have reserved what might be directly and immediately useful to the grantee and could scarcely have been contemplated as of any probable use to the Crown."

The decision is based on this and other special circumstances. Kent's Commentaries was the only authority cited. The lack of English authority for even this limited rule, and the admission that the general rule was to the contrary, throws not a little light on the origin and meaning of the presumption of riparian ownership.

In *Bloomfield v. Johnston* the Court of Exchequer Chamber had to pass on a grant by James I of lands on the bank of Lough Erne. The court regarded the question whether the presumption of riparian ownership of submerged lands applied to large inland lakes as unsettled, but held that in any case the title to the bed did not pass by this grant. Whiteside, C. J., said:

"We are required by the pleading of the plaintiff to give him eight miles of land covered with water. Where is the grant of these lands? Lord Coke says such should be conveyed by the words 'terra aqua cooperta.' Where are such words to be found on this grant? Nowhere. Certain lands described are given to the grantee,—certain islands by name, and others parcels of the premises, but the lands covered with water are not granted nor intended to be granted. Is the Crown, the grantor, excluded by
this grant from the fishery or from the bed and soil of the lake, and if so, by what means? The bold doctrine that, without any words to pass this property, it has passed from the Crown cannot be maintained. The law as to riparian ownership of the banks of a river or stream flowing between the estates of adjoining proprietors cannot here dispense with a grant of the land covered with water.”

O'Brien, J., said:

“The presumption that a riparian proprietor is entitled to the adjacent subaqueous soil of non-tidal waters along his lands may be rebutted, and in my opinion such presumption in the present case is rebutted by the facts and documents before us.”

Lord v. The Commissioners was pressed upon the court, but distinguished on the special ground on which it was decided. O'Brien, J., said:

“This does not apply to the case before us, as from the size and extent of Lough Erne, so well adapted for general navigation and used by the public for that purpose, there is no absurdity in supposing that the Crown, in granting all the lands lying along the lake, should have reserved the soil of the lake, but, on the contrary, various reasons may be suggested why it should be advisable to reserve it.”

The right of the riparian grantee is often expressed in terms of construction of the boundary of the grant to him. Where a private riparian owns the bed of a river and conveys the upland bounded by the river, the presumption is that he intends to convey to the middle of the stream. It is urged that this rule of construction should apply to original grants by the sovereign. In Schurmeier v. St. Paul & Pacific R. Co.,49 the court, in discussing the effect of a federal patent for land on the Mississippi River, issued while Minnesota was a territory, said:

“At common law, grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and if the common law rule prevails here, Roberts, by his purchase, took to the center of the river.”

There seems to be no authority in the English decisions for applying this rule to crown grants, except Lord v. The Commis-

49 (1865) 10 Minn. 82 (G. 59), 102 (G. 76), 88 Am. Dec. 59.
sioners. Even in grants by private riparian proprietors it is but a presumption of intention and may be rebutted by showing the land to be bounded by the margin, bank, or shore, or by proof of surrounding circumstances in relation to the property tending to negative such an intention. In a leading case the court describes the rule as:

"A presumed understanding of the parties that the grantor does not retain a narrow strip of land under a stream or other highway, because the title of it left in him would generally be of little use, except for a purpose of annoyance and litigation."

The rule might well be applied to sovereign grants on small, non-navigable streams. Such is the basis of the decision in Lord v. The Commissioners. But in respect to navigable waters the reasoning of Bloomfield v. Johnston seems conclusive. The better view is also stated in an Ontario case:

"The title to both bed and banks being in the Crown, its grant of the latter may be construed according to the rules which govern the construction of grants made under similar conditions in England. There the nature of the tenure upon which the Crown holds title to the alveus of rivers navigable in law [tidal] precludes any presumption of an intention to part with any portion of it, unless such portion is granted in express terms. Since in all waters of this country which are navigable in fact the interest of the Crown in the bed is precisely the same as that which it possesses in the fundus of tidal navigable waters in England, it is a logical deduction that by nothing short of an express grant should the Crown be held to have parted with its title to the alveus of our navigable rivers."

The importance of the lands to the public should alone suffice to rebut any presumption of intention to convey them which is not expressed. But, in addition, conveyances by the sovereign should not be construed against the grantor as are conveyances of individuals. Especially is this true where the subject matter in dispute affects or is charged with a public interest.

"The English common law does not allow the riparian owner, under the grant of the sovereign, of lands bounded on tide waters,

50 Starr v. Child, (1838) 20 Wend. (N.Y.) 149; (1842) 4 Hill. (N.Y.) 369.
to go beyond ordinary high-water mark. Such grants are con-
strained most favorably for the King and against the grantee; and
Sir William Scott has vindicated such a construction as founded
in wise policy; for grants from the Crown are made by a trustee
for the public, and no alienation should be presumed that was
not clearly and indisputably expressed.5

That grants by the sovereign of land bounded on public waters
ought to be construed by the stricter rule in favor of the public
right has been asserted in many American cases.56

The foregoing reasoning is most clearly applicable in the
states formed out of the territories of the United States. That
the federal government held both the jus publicum and the jus
privatum in the lands of these territories is manifest. The nature
and effect of the federal patents of riparian lands is thus described
by the federal Supreme Court:

"Meander lines are run, in surveying fractional portions of the
public lands bordering upon navigable rivers, not as boundaries
of the tract, but for the purpose of defining the sinuosities of the
banks of the stream and as the means of ascertaining the quantity
of the land in the fraction subject to sale, and which is to be
paid for by the purchaser.

"In preparing the official plat from the field notes, the meander
line is represented as the border line of the stream, and shows,
to a demonstration, that the water-course, and not the meander
line, as actually run on the land, is the boundary.

5 3 Kent's Commentaries 432.

In grants from the Crown, "nothing passes unless the intention that
it should pass is manifest." Bayley, J., in Somerset v. Fogwell, (1825)
"It is established on the best authority, that, in construing grants
from the Crown, a different rule of construction prevails from that by
which grants from one subject to another are to be construed. In a
grant from one subject to another, every intendment is to be made against
the grantor, and in favour of the grantee, in order to give full effect to
the grant; but in grants from the Crown an opposite rule of construction
prevails. Nothing passes except that which is expressed, or which is
matter of necessary and unavoidable intendment in order to give effect
to the plain and undoubted intention of the grant. And in no species of
grant does this rule of construction more especially obtain than in grants
which emanate from, and operate in derogation of, the prerogative of
(283), L. J. Q. B. 204, 12 L. T. N. S. 114.

Canal Appraisers v. The People, (1836) 17 Wend. (N. Y.) 571 (574); Shively v. Bowlby, (1833) 152 U. S. 1 (10), 38 L. Ed. 331, 14 S. C. R. 548;
73 (G. 51). Cases illustrating the rule are collected in 3 Rose's Notes
on United States Reports (Rev. ed.) 699.
"Proprietors, bordering on streams not navigable, unless otherwise restricted by the terms of their grant, hold to the centre of the stream; but the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways."

"It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held both by the federal and state courts that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the state of Illinois.

"This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised. In the case of Barney v. Keokuk we held that it is for the several states themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections. That was a case which arose in the state of Iowa with regard to land on the banks of the Mississippi, in the city of Keokuk, and it appearing to be the settled law of that state that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high water

57 St. Paul, etc., R. Co. v. Schurmeier, (1868) 7 Wall. (U.S.) 272 (287), 19 L. Ed. 74.
58 (1876) 94 U.S. 324, 24 L. Ed. 224.
mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state, this court accepted the local law as that which was to govern the case."

These passages state the clearly settled rule of the federal courts. Whether the federal patents of the riparian land were issued before or after the admission of the state, the effect of the patent is now to be determined by the state law. With respect to the prior patents the rule seems indeed peculiar. Either the patentee had, under the federal law, title to the bed of the public water bordering his land from the date of his patent or he had not. In the former case, a denial of his right by state law would be taking his property without compensation; in the latter case, to hold that he now has the property is making a gift to him of the submerged lands. As to federal patents issued after the territory has become a state, the federal Supreme Court decided in Pollard's Lessee v. Hagen that a state admitted to the Union becomes by force of its sovereignty the owner of the soil under its public waters, and that the federal government has thereafter no power to convey the submerged lands. The decisions of the federal courts are clear that the property in the submerged lands does not pass by the federal patents, no matter when they are issued, and that the riparians have it, if at all, only by the bounty of the state. The conclusion is unavoidable that it can come to them only by an arbitrary rule of state law."

Some courts are adopting a less rigorous test than formerly to determine what waters are public. The older test was—were they capable of navigation for commercial purposes. But in Lamprey v. State it is said:

"Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing,

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60 (1845) 3 How. (U.S.) 212, 11 L.Ed. 565.
*"When land under navigable water passes to the riparian proprietor, along with a grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore." Holmes, J. in Hardin v. Shedd, (1902) 190 U.S. 508 (519), 47 L.Ed. 1156, 23 S.C.R. 685.
fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated."

If the riparians owned the beds of even non-navigable lakes from the date of their patents, this change of test of navigability would appear to violate the rule of stare decisis, and to take from them a vested property right. But there is no good reason for holding that the riparians have even the beds of non-navigable waters in all cases, without express grant. Submerged lands should pass by implication on sovereign grants, on the principle of *Lord v. The Commissioners*, only where they could scarcely have been contemplated as of any probable use to the sovereign, but might be regarded as useful to the grantee. Probably beds of navigable waters would never pass under this test, but it does not follow that all others would. The submerged lands might be of probable use to the sovereign because of their area, or for other reasons, although too shallow to be navigable. Navigation was in fact the one public use which was not dependent on crown ownership of the bed, while such uses as fishing, fowling and bathing were not of public right by the English common law, after the beds had passed into private ownership. To secure these uses to the public is sufficient reason against presuming an intention to pass the beds, where none is expressed. In *Noyes v. Collins* the court held that riparians did not have title to the bed of a large, shallow lake, though it was not navigable. The decision seems sound.

The courts have been approaching the result suggested although by varied reasoning. Mr. Justice Hallam says:63

"When it comes to the soil underlying public or navigable fresh waters, the confusion is great. As to the Great Lakes and other lakes, like Lake Champlain, it is agreed that the title to the underlying soil is in the state. Between great lakes and mere ponds there is a point in diminishing size below which title may be conceded to be in the individual. There is another point above which all agree that the title must be in the state. Between

62 (1894) 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609.


63 1 MINNESOTA LAW REVIEW 38.
the two are the many bodies of water which are the subject of controversy."

This summary of the decisions suggests the thought that the absurdity of giving away these lands by a rule of law has been at times too apparent to permit the rule's usual operation. But why should the courts give them away at all?

The English test of Digges and Hale was—were the lands part of the waste lands, part of the ungranted land of the kingdom and so belonging to the crown. The fresh water soils they admitted had been granted away to the king's riparian subjects and the presumption was in a riparian's favor; the tidal soils they claimed had seldom been granted. The king owns "that great waste," the sea;64 no one could claim that it had been granted; its distinguishing feature is the tide and the shores and rivers where the tide ebbs and flows are part of "that great waste."65 He may have granted away parcels, but that is so unlikely, the presumption is against it. There was no idea of benefiting navigation and commerce; he could do that without owning the soil. He intended to benefit himself. Digges and Hale were stating no great rules of public policy for the benefit of the subject; they were arguing a question of real property for the benefit of the crown's revenues.66 Whether the crown still has these lands is a question of fact, with the presumption in its favor. Digges and Hale took their feudal theory seriously.

In the American colonies the sovereign power for the time being owned all the lands, in theory and in fact. Such as were

64 "For although the use of the sea be common, yet the propriety thereof belongs to the Kinge as a royal wast; which is the reason that as well all the bona vacantia upon the seas belonge to the Kinge as the right of his admirall jurisdiction, so likewise ilands in the sea, which although by civil law fiunt occupantis, yet in our law they are annexed in point of interest to the crowne, who is thereof presently in possession, and so prevents any right to bee acquired per occupationem." Hale's first Treatise, Moore, Foreshore 367.

65 "Bycause as in forests so espetially in dominions termini sunt integre Regi; the shore is as it were part of the ocean, which is terminus though not jurisdictionis, yet perchance proprietatis." Ibid., 364.

66 "The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; . . . and the sea is not only under the dominion of the king; . . . but it is also his proper inheritance." The Royal Fishery of the Banne, Davies' Rep. 152, (8 Jac. I).

66 The immediate object of the many suits brought by the crown for the foreshore was to raise money by selling or releasing the claim. Digges, himself, thus obtained grants. Moore, Foreshore 212.
not expressly granted away remained in it as part of the waste lands. Grants of land bounded by public waters, tidal or fresh, should pass nothing under these waters, the reasoning governing construction of private grants not applying. These are, therefore, still part of the waste lands. And this reasoning is even more clearly applicable in the states formed from the territories of the United States.

It may be objected that it should make little difference what Digges and Hale meant three centuries ago. That would be true had our courts adopted an independent, uniform, logical rule on the matter. But as the original presumption in favor of the crown was itself reasonable and logical, assuming its premises true in fact, and since it was peculiarly applicable to our situation, there being no possible doubt of the truth of the premises here, yet our courts, overlooking the reason of the rule, have either restricted its application to tidal waters, thereby giving away great areas of public lands, or applied it more broadly on diverse reasoning, introducing confusion to the law, it seems desirable that a reorientation be had to the original meaning of the rule itself. It is now, perhaps, too late to change the rules adopted in the older states. But in a state like Minnesota, where the original riparian patents were largely issued by the federal government, where the federal Supreme Court is of the opinion that the federal government has received nothing from the riparians for the submerged lands, that these lands were not intended to pass by the patents, and that if the riparian owns them it is not by force of these federal patents, but by some rule of state law, and where there has been no settled rule of state law on the matter, it is submitted that it is not yet too late to adopt the essence of Hale’s rule and to hold that these waste lands remain in the sovereign, except where they have been expressly granted or have been acquired by citizens through adverse possession.

Submerged land constitutes about one-twentieth of the area of Minnesota. It would be an extraordinary doctrine that, because the crown, in England, recognized the actual possession of the submerged lands by its riparian subjects or expressly conveyed these lands to them, riparians in Minnesota own the corresponding lands without either actual possession or actual grant.

(To be continued.)

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