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John A. Humbach
Fordham University School of Law

Jane A. Gale
Fordham University School of Law.

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Cover Page Footnote
John A. Humbach: Associate Professor of Law, Fordham University School of Law. B.A., Miami University (Ohio); J.D., summa cum laude, Ohio State University College of Law. Jane A. Gale: Student, Fordham University School of Law. B.A., Fordham University. At the time of preparation of the briefs in the Appellate Division in the case of Dolphin Lane Associates, Ltd. v. Town of Southampton, discussed at length infra, Ms. Gale was a para-legal in the litigation department at the firm Mudge, Rose, Guthrie & Alexander, counsel for the Town of Southampton and the Trustees of the Freeholders and Commonalty of the Town of Southampton.

TIDAL TITLE AND THE BOUNDARIES OF THE BAY: THE CASE OF THE SUBMERGED "HIGH WATER" MARK

John A. Humbach and Jane A. Gale***

The unique character and special public importance of lands bordering the sea have been recognized since ancient times.[1] In the nature of things, shore lands, together with the waters which cover them (permanently or periodically), have a number of valuable uses not shared generally with inland territories. Navigation,[2] passage,[3] fishery,[4] and bathing[5] are among the particular uses of the shore or adjacent sea for which the public has traditionally received greater or lesser legal protection. However, this list is neither exclusive[6] nor closed. For example, the recent avalanche of accretions to our stock of ecological knowledge has heightened (if not created) a general awareness of the economic importance of tidal areas as a source of ocean nutrients and as a sink for ocean pollutants.[7]

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*Associate Professor of Law, Fordham University School of Law. B.A., Miami University (Ohio); J.D. *summa cum laude*, The Ohio State University College of Law.

**Student, Fordham University School of Law. B.A., Fordham University. At the time of preparation of the briefs in the Appellate Division in the case of Dolphin Lane Associates, Ltd. v. Town of Southampton, discussed at length *infra*, Ms. Gale was a para-legal in the litigation department at the firm of Mudge, Rose, Guthrie & Alexander, counsel for the Town of Southampton and the Trustees of the Freeholders and Commonalty of the Town of Southampton.

1. Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970). The author noted that, according to Justinian's INSTITUTES, the sea and shore were "common to all" and that no one therefore was forbidden access to the shore. *Id.*, *citing* JUSTINIAN, INSTITUTES 2.1.1-.6. *See also* F. Maloney & R. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 198-99 (1974) [hereinafter cited as Maloney & Ausness].

2. Knickerbocker Ice Co. v. Shultz, 116 N.Y. 382, 387, 22 N.E. 564, 565 (1889); People v. Vanderbilt, 26 N.Y. 287 (1863).

3. Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1903).

4. Knickerbocker Ice Co. v. Schultz, 116 N.Y. 382, 22 N.E. 564 (1889); *see* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 412 (1842), *quoting* LORD HALE, DE JURIS MARIS.

5. Tucci v. Salzhauer, 40 App. Div. 2d 712, 336 N.Y.S.2d 721 (2d Dep't 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973).

6. It is suggested that there are nine separate uses of or interests in the shore: navigation; ports; passage; commerce; fishery; sand, gravel, shellfish, and seaweed; bathing (recreation); conservation and aesthetics; and the "public interest." Comment, *supra* note 1, at 781-87.

7. *See* Comment, *Can New York's Tidal Wetlands Be Saved? A Constitutional and Common Law Solution*, 39 ALBANY L. REV. 451, 545-56 (1975). The New York State Legislature has found that wetlands "constitute one of the most vital and productive areas of our natural

The allocation of the use of inland territories via the market mechanism, *viz.* by private purchases and sales of various private rights to use and/or possess, produces a fairly rational and efficient pattern of land use for such territories.[8] However, it is the characteristic of shore lands that many of their unique uses may be taken advantage of efficiently only if such uses are enjoyed by large numbers of persons.[9] For example, the rights to use shorelands for fishing or bathing do not require exclusivity to be enjoyed, and the enforcement of exclusivity would result in drastic under-utilization of the shore's capacity to sustain these uses. Of course, the allocation of the shore for these purposes could still be attempted through private purchases and sales of private rights of use, since a right to use may be "private" without necessarily being "exclusive."[10] Nonetheless, inefficiency is bound to result if private purchases and sales are relied upon to allocate all potential uses of shore lands. The market mechanism is simply inadequate to effectuate an efficient allocation of such uses because the "transaction costs" would be too high.[11]

To take an extreme case, if the right to navigate the tidal waters depended upon negotiation with every owner of the subjacent soil, navigation (or at least lawful navigation) would be in such areas impossible. This would be true even if the price exacted by the subjacent owners were nominal. Transaction costs would form a

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world . . . ." Tidal Wetlands Act §1, N.Y. Sess. Laws ch. 790 (McKinney 1973). The Atlantic commercial fishing industry is dependent on the tidal salt marshes virtually for its existence. Hitchcock, *Can We Save Our Salt Marshes?* 141 National Geographic 729 (1972). More than 75 species of fish, including commercially important species, spend some part of their lives in the marshes and as much as 95 percent of the catch may be nurtured by the marshes. *Id.* *See also* United States v. Baker, 2 Envir. Rptr. Cas. 1849, 1850-51 (S.D.N.Y. 1971).

8. Even for inland territories, the pattern of use produced by the market mechanism is by no means perfect, as testified to by the need for zoning laws, environmental regulations, eminent domain proceedings, and other "collective" solutions to resource use and allocation problems.

9. *See generally* Comment, *supra* note 1.

10. For example, the right of an apartment tenant to use common halls and stairways may be a "private" right, but it is not an "exclusive" one.

11. Transaction costs would include not only the costs (expense and trouble) of finding the appropriate seller and, for the seller, of having someone available to receive a prospective buyer; also involved would be the costs of negotiating the transaction of purchase and sale in which the desired rights to use are acquired and of policing out those who do not pay. Thus, transaction costs would be borne initially by both buyer and seller. However, such costs may be partially or wholly shifted from one to the other, depending upon the relative elasticities of demand and supply for the right to use in question.

barrier to the acquisition of rights of use,[12] and this transaction-cost barrier would be all out of proportion to the barrier created by possible costs inherent in the resource utilization itself. The result would be under-utilization of the shore resource in question.[13]

The navigation case, though extreme, is not atypical for shore front uses. With most if not all of the peculiar shore uses, (e.g., bathing, fishing), the use-associated costs[14] are typically close to nil, whereas the transaction costs are substantial.[15] Hence, the almost inevitable result of removing shore resources from the public domain is to insure under-utilization of the shore.

Where the magnitude and deterrent effect of transaction costs is greatly disproportionate to the use-associated costs, and the latter are insubstantial, a cogent argument may be made, in the name of efficiency and overall welfare, for setting a user-fee of zero—thereby obviating all transaction costs (though leaving use-associated costs where they fall). That is to say, an argument exists in such cases,

12. The barrier may be total, as would likely be the case with navigation rights, or it may be partial, as for example where fishing or bathing rights are involved. In the cases of bathing and fishing, the appropriate seller of such right (*viz.* the possessor of the subjacent soil) can fairly readily establish a collection point and policing mechanism to assure that only those who pay his price can avail themselves of the rights (or licenses) to use which he may dispense. If demand is sufficient (in the relevant price range), he may cover his transaction costs, and the costs associated with use per se, and he may likely achieve a profit (or economic "rent") besides.

The barrier created by a price which is based on transaction costs, use-associated costs and economic "rent" will not be a total barrier if there are some potential users willing to pay such a price. However, if there are potential users willing to pay a price equal to use-associated costs, but who are not willing to pay additional amounts, then the inclusion of transaction costs (and economic "rent") in the price will result in at least a partial deterrent to potential users.

13. Even ignoring the possibility of an economic "rent," the collection of a user-fee which includes transaction costs will assure (absent infinite inelasticity of demand) that the shore will be under-utilized compared with the utilization that would occur if use-associated costs were the only deterrent to use. That is, if the costs of collections and policing are borne out of user-fees, the amount of such fees will need to be correspondingly higher than would be fees that reflected use-associated costs alone; thus, charging the higher fees will have the effect of deterring more potential users than would be deterred if the fee reflected only use-associated costs.

14. *I.e.*, costs incurred because of the use per se, ignoring the opportunity cost of foregone economic "rent."

15. Realistically, one must also take account of the fact that, if user-fees are charged and transaction costs are thereby recovered, the temptation will exist (if demand makes it feasible) to tack on a further amount as a profit or economic "rent." This of course would exacerbate the under-utilization effect of the transaction cost barrier and further justify the position that the price of use should be zero.

for conferring a right to use upon the public generally.

By conferring such a public right of use, recognition would be accorded to pressures to use which, though very real, cannot be satisfied by the market even though the prices which potential users are willing to pay may equal or exceed the use-associated costs involved in such satisfaction.[16] The overpowering effect of disproportionate transaction costs prevents satisfaction of any part of this demand except for those potential users who are willing to pay a huge surcharge over use-associated costs in order to obtain the use. Only with a societal (*i.e.*, legal) decision to set the price of use at zero will there be anything like close alignment between the use demanded (at a price equal to use-associated costs) and the rights to use which are in fact supplied.

The law has long recognized, though generally implicitly, that the allocation of shore land uses cannot as a practical matter follow the private-purchase-and-sale model employed for inland territories; *i.e.*, that public rights to use must be recognized in order to avoid the public inconveniences which are the concomitant of underutilization. The Romans' answer was to regard the sea and the foreshores as *res communes*: all could use but none could privately own.[17] After the fall of Rome, when law in general and property law in particular pragmatically took on something of "might makes right" aspect, the power of adjacent possession was far more important in the allocation of shore land uses than were notions of commonality of interest.[18]

In England, which achieved a semblance of central control somewhat earlier than the rest of Europe, it was apparently the King who held the might; under the so-called "prima facie rule," given the judicial imprimatur in 1633,[19] the King was held to have absolute fee title to tide waters and tide-flowed lands with an unqualified right to make such conveyances as he saw fit.[20] This largesse exer-

16. These prices and costs are at the margin. *See generally* Economics and Public Policy in Water Resource Development (S. Smith & E. Castle ed. 1964).

17. Maloney & Ausness, *supra* note 1, at 198.

18. For the history and its philosophical impacts on modern thinking, see Comment, *supra* note 1, at 763-74. It has been observed that the period of non-recognition of public rights in the shore more or less coincided with a general loss in interest in commerce or other activities which would have made such rights necessary to public convenience. *Id.* at 772-74.

19. Attorney-General v. Philpott, (1633) *described in* Attorney-General v. Chamberlaine, 70 Eng. Rep. 122, 123 (V. Ch. 1858).

20. *See* Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 291, 91 N.E. 846,

cised by the King on behalf of himself apparently was an important factor in the Grand Remonstrance and uprisings which, in 1649, brought the Stuart Dynasty (temporarily) and Charles I (permanently) to an end.[21] But even before, based upon some not-too-compelling language of the Magna Charta,[22] time had been eroding the absoluteness of the King's claim. Apparently among the earliest public rights to achieve recognition were those of navigation and fishery.[23] And the right to navigate may have never been eclipsed.[24]

The growth of commerce and other pressures to reopen shore uses to the public had their evident influence upon judicial thinking, and the trend of the law was to expand the public's right of use. As this trend became clear, a theory was developed to take account of such public rights of use. Known as the "public trust" doctrine, the theory essentially was that the King, as owner of the soil beneath the sea and its arms, held it subject to a trust for the protection of the public and the public's acknowledged rights of use.[25] Moreover, although conveyances of the King's ownership interest in underwater lands remained possible,[26] the transferees would take subject to the public trust.[27]

These ideas amounted to a bifurcation of the "absolute" title which the sovereign held in shore lands subjected to the trust. On one hand, there was the *jus privatum*, or private right, which a person (sovereign, quasi-sovereign or private) could have with respect to the soil itself, *i.e.*, a fee title.[28] On the other hand, there was

847 (1910); Maloney & Ausness, *supra* note 1, at 198-202.

21. *See* Town of Smithtown v. Poveromo, 71 Misc. 2d 524, 336 N.Y.S.2d 764 (Dist. Ct. 1972), *rev'd on other grounds sub nom.*, People v. Poveromo, 79 Misc. 2d 42, 359 N.Y.S.2d 848 (2d Dep't 1973); Parsons, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706, 708 (1922) [hereinafter cited as Parsons].

22. One commentator has traced the manner in which obviously teleological judicial reasoning "expanded the Magna Charta almost unrecognizably over the years." Comment, *supra* note 1, at 765-68.

23. Parsons, *supra* note 21, at 708; *see* Blundell v. Catterall, 106 Eng. Rep. 1190 (K.B. 1821).

24. Comment, *supra* note 1, at 781-82.

25. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 91 N.E. 846 (1910); Teclaff, *The Coastal Zone—Control Over Encroachments into the Tidewaters*, 1 J. MARITIME L. & COMMERCE 241, 263 (1970).

26. *See* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 424-27 (1842); People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 54 N.E. 682 (1899); People v. Vanderbilt, 26 N.Y. 287 (1863).

27. Blundell v. Catterall, 106 Eng. Rep. 1190 (K.B. 1821).

28. *Id.*

the *jus publicum*, or public rights of use, which could be enjoyed by persons at large despite the fact that the *jus privatum* may have rested in other hands.[29] The *jus publicum* (as a public right of use held in trust by the sovereign or its appropriate assignees)[30] was a kind of easement or incorporeal interest which could exist simultaneously with, and be a burden upon, the private fee title (*jus privatum*) held by another.[31]

As has been previously stated, the King's *jus privatum* or fee title could be[32] and often was conveyed. Conveyances of the *jus publicum*, however, were apparently severely circumscribed,[33] with public bodies or representatives probably being the only eligible takers.[34] The reason for the distinction is obvious: whereas the *jus*

29. People v. New York & S.I. Ferry Co., 68 N.Y. 71, 76 (1877); People v. Vanderbilt, 26 N.Y. 287, 292-93 (1863).

30. *E.g.*, municipal corporations. Apparently, the King always had the power to delegate his governmental powers to local governing bodies. *See* Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); *In re* Mayor of N.Y., 182 N.Y. 361, 75 N.E. 156 (1905); People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 54 N.E. 682 (1899). A similar power is of course recognized (within Constitutional limits) for the states as successors to the King's sovereignity. Illinois Central R.R. v. Illinois, 146 U.S. 387, 453-54 (1892); People *ex rel.* Howell v. Jessup, *supra*.

31. Although the burden of the *jus publicum* was made paramount to the residual fee ownership rights of the private owner (*i.e.*, the *jus privatum*) the absoluteness of the burden as an interference with the fee owner's rights of private use was perhaps always less than the burden of, say, an ordinary easement of way. In any event, the New York Court of Appeals developed a sort of "reasonable user" test to permit the public's right of use to be to some extent balanced against the private upland owner's interest in making meaningful use of his own rights. Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1908); Town of Brookhaven v. Smith, 188 N.Y. 74, 80 N.E. 665 (1907). In those cases, it was held that the littoral (*i.e.*, seaside) owner's right of access to the sea could be facilitated by permanent structures extending over the tidelands despite the fact that such structures would inevitably result in some impairment (albeit insubstantial) of passage by the public along the shore. But the littoral owner was permitted to interfere with public passage "just so far as it was a necessary consequence of the reasonable exercise" of the rights necessary to reasonable use of the upland. Barnes v. Midland R.R. Terminal Co., *supra* at 386, 85 N.E. at 1096. *See also* Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224 (1922).

32. *See* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 424-27 (1842); People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 54 N.E. 682 (1899); People v. Vanderbilt, 26 N.Y. 287 (1863).

33. The question is complicated by the issue of whether parliamentary approval (or in the new world, legislative approval) was necessary or even effective to validate particular grants. *See* Comment, *supra* note 7, at 478-82; *cf.* Marba Sea Bay Corp. v. Clinton St. Realty Corp., 272 N.Y. 292, 296-97, 5 N.E.2d 824, 825-26 (1936); Brookhaven v. Strong, 60 N.Y. 56 (1875).

34. Delegations to a municipality of the sovereign's power and property were (and are) to be held by the recipient municipality in trust for the people, Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 21, 136 N.E. 224, 225-26 (1922); People *ex rel.* Palmer v. Travis, 223 N.Y. 150, 119 N.E. 437 (1918); Town of Brookhaven v. Smith, 188 N.Y. 74, 78, 80 N.E. 665, 666 (1907); *In re* Mayor of N.Y., 182 N.Y. 361, 365-68, 75 N.E. 156, 158 (1905); DeLancey v. Piepgras,

privatum belonged to the King in a more or less private proprietary capacity—as much as any other property owner holds title to his lands, the *jus publicum* was held as sovereign, on behalf of the people generally, and thus should not be extinguishable by mere unilateral act of the trustee.[35] As an American court has said: "The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers . . . ."[36]

These rights, powers and limitations of the English sovereign over the shore lands were generally taken over in New York following the Revolution.[37] The state became the successor to the King's interest in crown lands,[38] and the *jus privatum* in previously conveyed parcels[39] and the *jus publicum* in the shore generally were preserved.[40]

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138 N.Y. 26, 33 N.E. 822 (1893), and municipal powers over waters were always subject to the sovereign power of the state, Knapp v. Fasbender, 1 N.Y.2d 212, 230-33, 134 N.E.2d 482, 491-93, 151 N.Y.S.2d 668, 681-85 (1956); People *ex rel.* Palmer v. Travis, *supra*; People v. Vanderbilt, 26 N.Y. 287 (1863), and not being contracts within the impairment of obligations of contracts clause, such municipal powers are revocable at the pleasure of the state, Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907); Demarest v. Mayor, 74 N.Y. 161, 167 (1878); *cf. In re* Long Sault Dev. Co., 212 N.Y. 1, 10, 105 N.E. 849, 852 (1914).

Apparently, a municipality's property rights in water-lands, being held governmentally "for public purposes . . . to be administered for the public good," are similarly subject to legislative modification and perhaps even extinction. People *ex rel.* Palmer v. Travis, *supra* at 164-67, 119 N.E. at 442-43. This may be true despite the fact that other municipal lands, if held in a proprietary capacity, may require compensation for taking. *Id. Contra*, Darlington v. City of N.Y., 31 N.Y. 164 (1865).

35. *See* Parsons, *supra* note 21, at 715.

36. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

37. People v. Steeplechase Park Co., 218 N.Y. 459, 473, 113 N.E. 521, 525 (1916); People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 257, 54 N.E. 682, 684 (1899); People v. New York & S.I. Ferry Co., 68 N.Y. 71, 78 (1877); Lansing v. Smith, 4 Wend. 9 (1829); *accord*, Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

38. Roberts v. Baumgarten, 110 N.Y. 380, 383, 18 N.E. 96, 97 (1888); *accord*, Shively v. Bowlby, 152 U.S. 1, 14-15 (1894). The "prima facie rule" that the King, and the state as his successor, holds title prima facie to those sea and shore areas not previously granted to others was initially recognized in People v. Vanderbilt, 26 N.Y. 287 (1863), but it was not without hesitation, Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1908); Town of Brookhaven v. Smith, 188 N.Y. 74, 80 N.E. 665 (1907); Parsons, *supra* note 21, that the notion finally received a firm foothold in New York, People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916).

39. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 291, 91 N.E. 846, 847 (1910); Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 384, 85 N.E. 1093, 1096 (1908); People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 257, 54 N.E. 682, 684 (1899); Sage v. Mayor of N.Y., 154 N.Y. 61, 82-83, 47 N.E. 1096, 1102-03 (1897).

40. People v. Steeplechase Park Co., 218 N.Y. 459, 479, 113 N.E. 521, 526 (1916); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 291, 91 N.E. 846, 847 (1910); Sage

Like the King, the state acquired the power to convey its right in shore lands to private takers[41] and to transfer the *jus publicum* to appropriate public bodies,[42] but it could not, in general, divest itself of the *jus publicum* in favor of private persons.[43] In fact, as inter-

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v. Mayor of N.Y., 154 N.Y. 61, 82-83, 47 N.E. 1096, 1103 (1897); Trustees of Brookhaven v. Strong, 60 N.Y. 56 (1875). Because of the federal government's power to regulate commerce and navigation, U.S. CONST. art. I, § 8 the *jus publicum* was itself divided, the federal government having paramount control within its sphere of constitutional jurisdiction, *e.g.* for navigation. Greenleaf Lumber Co. v. Garrison, 237 U.S. 251 (1915); People v. Hudson River Connecting R.R., 228 N.Y. 203, 219, 126 N.E. 801, 806 (1920); Lewis Blue Point Oyster Cultivation Co. v. Briggs, *supra*.

41. People v. Steeplechase Park Co., 218 N.Y. 459, 473, 113 N.E. 521, 524 (1916); People v. New York & S.I. Ferry Co., 68 N.Y. 71, 78 (1877); Wetmore v. Brooklyn Gas Light Co., 42 N.Y. 384 (1870).

42. *In re* Mayor of N.Y., 182 N.Y. 361, 365, 75 N.E. 156, 157 (1905); People *ex. rel.* Howell v. Jessup, 160 N.Y. 249, 257, 54 N.E. 682, 684 (1899); *see* Coxe v. State, 144 N.Y. 396, 407, 39 N.E. 400, 402 (1895).

43. This is not to say that the *jus publicum* may not, in certain instances, be cut down or extinguished by grants of the *jus privatum*. *See, e.g.*, People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916); Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1908); People v. New York & S.I. Ferry Co., 68 N.Y. 71 (1877). And the state (or municipal owners) may authorize the erection of private structures (*e.g.*, a bridge) which interfere to some degree with the public's right of use. People *ex. rel.* Howell v. Jessup, 160 N.Y. 249, 54 N.E. 682 (1899). Indeed, the court of appeals has gone so far as to say that:

> The right [of the state] to grant the navigable waters is as absolute and uncontrollable . . . as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people.

Langdon v. Mayor of N.Y., 93 N.Y. 129, 156 (1883).

However, holdings in later cases, recognizing the public purpose of the state's title as a limitation on its power to convey, indicate that the statement just quoted cannot in its extremity be taken as the law of New York. *See, e.g.*, Marba Sea Bay Corp. v. Clinton St. Realty Corp., 272 N.Y. 292, 5 N.E.2d 824 (1936); *In re* Long Sault Dev. Co., 212 N.Y. 1, 105 N.E. 849 (1914); Coxe v. State, 144 N.Y. 396, 39 N.E. 400 (1895). Although the court of appeals' decisions from the Revolution forward seem impossible to fully reconcile on this point, a probably truer statement of the law is that, when the state grants underwater lands to private persons, "the contemplated use . . . must be reasonable and one which can fairly be said to be for the public benefit *or* not injurious to the public." *In re* Long Sault Dev. Co., *supra* at 8, 105 N.E. at 852 (emphasis added).

Apparently, this power of the state to extinguish or cut down the *jus publicum* in favor of private persons is a departure from the common law as it developed in England where, at least as understood here, even the King and Parliament together were not competent to effect such a result. Coxe v. State, *supra* at 406, 39 N.E. at 402, *citing* Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). On the other hand, the states' expanded power of disposition to private persons, permitting extinction of the *jus publicum*, suggests the appropriateness of new limitations of a different sort—either on the types of eligible grantees or on the uses for which the grants may be made. Thus, grants for uses in furtherance of commerce are permissible, *e.g.*, Saunders v. New York Cent. & H.R.R.R., 144 N.Y. 75, 38 N.E. 992 (1894) (railroad

preted in New York[44] and elsewhere[45] in this country, the interest in preserving the public's rights was so strong that limitations were imposed on transfers of the *jus privatum* which were perhaps wholly unjustifiable in light of the King's extensive power to convey. Although grants of private ownership of the *jus privatum* (no matter to whom, how extensive, or for what purposes) should theoretically have no effect on the always paramount public rights of use,[46] such conveyances—especially if of large tracts[47] of underwater lands—have been held invalid by the courts where no public purpose could be shown.[48] And even with attempted conveyances of smaller parcels of *jus privatum*, the courts have rather jealously guarded the public interest. Although the "beneficial enjoyment" of the fee may be granted in the case of such smaller conveyances, even without a showing of public purpose, and even to the detriment of the public's rights to use,[49] it has been held that "the validity of the conveyance turns on the degree to which the public interest will be impaired . . . ."[50] Moreover, in construing grants allegedly conveying *jus privatum*, courts have employed a rule of strict construction, holding that no interest in trust lands passes unless specific lan-

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purposes), as are grants to the upland owner for beneficial enjoyment (*i.e.*, almost unqualified private use), *e.g.*, People v. Steeplechase Park Co., *supra*, but grants to persons other than upland owners for purely private purposes have been struck down, Marba Sea Bay Corp. v. Clinton St. Realty Co., *supra*; Coxe v. State, *supra*; *accord*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). And all such grants are probably subject to the limitation that the public interest not be impaired as a result. Roe v. Strong, 107 N.Y. 350, 358, 14 N.E. 294, 296 (1887); Riviera Ass'n v. North Hempstead, 52 Misc.2d 575, 276 N.Y.S.2d 249 (Sup. Ct. 1967), *opinion adopted*, Mannor Marine Realty Corp. v. Wachtler, 22 N.Y.2d 825, 239 N.E.2d 657, 292 N.Y.S.2d 918 (1968); *see* Illinois Cent. R.R. v. Illinois, *supra* at 452; *In re* Long Sault Dev. Co., *supra*.

44. *See* note 43 *supra*.

45. *E.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

46. Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 20-21, 136 N.E. 224, 225 (1922); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 278, 91 N.E. 846 (1910); People v. New York & S.I. Ferry Co., 68 N.Y. 71, 78 (1877).

47. For the effect of the size of the granted parcel as a factor limiting the state's power to convey, see Teclaff, *supra* note 25, at 265-68. *See also* Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892).

48. Marba Sea Bay Corp. v. Clinton St. Realty Corp., 272 N.Y. 292, 5 N.E.2d 824 (1936); Coxe v. State, 144 N.Y. 396, 39 N.E. 400 (1895).

49. *E.g.*, People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916); Wetmore v. Brooklyn Gas Light Co., 42 N.Y. 384 (1870).

50. Riviera Ass'n v. North Hempstead, 52 Misc. 2d 575, 582, 276 N.Y.S.2d 249, 257 (Sup. Ct. 1967), *opinion adopted*, Mannor Marine Realty Corp. v. Wachtler, 22 N.Y.2d 825, 239 N.E.2d 657, 292 N.Y.S.2d 918 (1968).

guage of the conveyance shows the intention to convey them.[51]

The reasons for imposing such restrictions on conveyances of *jus privatum* are not entirely clear, although the failure of the courts to carefully distinguish the private right from the public's rights may be suggested as one explanation.[52] Another explanation is that the courts, contemplating the huge and unique shore land resources still owned in fee by the public, came to regard even the fee title—the *jus privatum*—as somewhat "affected by the public interest." As such, the courts simply balked at the thought of wholesale divestiture of this public domain by a possible improvident generation[53] which would thereby bind (in more ways than one) all future generations. Furthermore, there is the fact that private owners of the *jus privatum* can, by their use, effectively cut down or even extinguish the *jus publicum*.[54] In short, transfers of the *jus privatum* and *jus publicum* were not carefully distinguished because they are not really entirely distinguishable.

In any event, we have reached the point today where the *jus publicum* is not generally conveyable,[55] but the *jus privatum* is conveyable subject to fairly stern limitations, both on the character and the form of the conveyances.

Most of the judicial decisions to date in New York have concerned themselves with the questions of which attempted state conveyances are permissible and with the rights which may be enjoyed under the *jus privatum* and *jus publicum* respectively.[56] Curiously, comparatively little attention has been paid to the question of defining the upland limit of the shore lands subject to the public rights,

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51. The existence of the trust for the public, and public inconvenience that can readily result from conveyances of trust lands, *see* note 43 *supra*, are reasons for employing this rule of strict construction against the grantee. Sage v. Mayor, 154 N.Y. 61, 79-81, 47 N.E. 1096, 1101-02 (1897). "In patents from sovereign to subject the rule of construction which controls . . . is reversed and the terms are taken most strongly against the grantee, because the public interest is involved." Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 292, 91 N.E. 846, 847 (1910); *accord*, Shively v. Bowlby, 152 U.S. 1, 10, 13 (1893). This rule of construction applies to grants by municipalities as well. *In re* Mayor of N.Y., 182 N.Y. 361, 75 N.E. 156 (1905).

52. *See* Comment, *supra* note 7, at 478.

53. A measure of earlier improvidence is the name of the statute: "An Act for the Speedy Sale of the Confiscated and Forfeited Estates within This State . . . ." ch. 64, [1777-87] N.Y. Laws 127 (1784).

54. *See* note 43 *supra*.

55. *But see* note 43 *supra*.

56. *See* text accompanying notes 44-55 *supra*.

i.e., how to determine the boundary between those lands which are subject to the *jus publicum* and those which are not. Yet, because of the entirely different methods of use allocation applicable in the case of shore lands (as compared with inland territories),[57] this question would seem, in many cases, to be at least as crucial as the ones which have so many times engaged the courts.

Actually, the problem of locating the boundary between shore and upland has significance for at least two purposes. One, as just mentioned, is to determine the upland limit of the shore lands which are subject to the public's right of use; *i.e.*, defining the "servient tenement" of the *jus publicum*. The other purpose is to locate the seaward boundary of the parcels which, in instruments of conveyance, are described as extending "to the sea" or by a like boundary designation.

There is no particular policy reason why the same line should be used for both the upland boundary of the *jus publicum* and the seaward boundary of parcels bounded "by the sea." In interpreting the language used in grants of private interests, the ostensible object of the inquiry is to ascertain the parties' (particularly the grantor's) intent.[58] Subject only to limitations on the grantor's estate or power to convey, it is that intention which controls the extent of his transfer. On the other hand, in setting the upland boundaries of lands subject to the *jus publicum*, the courts are essentially making a policy determination, *i.e.*, which lands are subject to what mode of use-allocation,[59] a question of law in which private intentions play no role. Nonetheless, for reasons which seem largely historical, the rule of construction for grants extending "to the sea" has been held to result in the same boundary line as the line which, by law, defines the upland limits of the *jus publicum*.[60] In the case of both, the line

57. That is, the use of inland territories is allocated by private purchases and sales of rights to use and/or to possess, whereas use of shore lands is allocated, to a substantial degree, by recognition of rights to use as belonging to the public generally. *See* text accompanying notes 8-17 *supra*.

58. N.Y. REAL PROP. LAW § 240(3) (McKinney 1968). 15 N.Y. JUR. *Deeds* § 13 (rev. 1972).

59. *I.e.*, use-allocation by purchases and sales of private rights of use versus use-allocation (to a substantial degree) by recognizing rights to use as belonging to the public generally. *See* text accompanying notes 8-17 *supra*.

60. The rule of construction for grants extending "to the sea" seems to have resulted from a failure to distinguish the King's title by *jus privatum* from his title by *jus publicum*. Thus, in the construction of royal grants of sea-side lands, the assumption was made that the King did not intend to part with tidal lands held as sovereign. The confusion of *jus publicum* and

is the "high water" line.[61]

As a rule of construction, and as a rule of law delineating the limit of the public's right of use, the "high water" line rule is not without

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jus privatum was understandable in earlier times, prior to the recognition of public trust notion of *jus publicum*, inasmuch as the King's claim to tidal lands was apparently a claim to a private personal right. *See* Comment, *supra* note 1, at 764-5, 768-9. When the public trust of *jus publicum* was later seen as qualifying this private right of the King (somewhere between the Magna Charta and the 17th century), the tendency to confuse the private right of the King (and his grantees of shore lands) with the sovereign title held for the public (*jus publicum*) apparently persisted, and this confusion continued to cloud such issues as whether, for example, particular grants required parliamentary ratification to be valid. *Id. See also* Town of Brookhaven v. Strong, 60 N.Y. 56 (1875); Comment, *supra* note 7, at 478-82. American cases often continued this tradition, muddying the distinction between transfers of the private right and of the *jus publicum*, *e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Martin v. Waddel, 41 U.S. (16 Pet.) 367 (1842); Coxe v. State, 144 N.Y. 396, 39 N.E. 400 (1895), so that even after it became accepted that the *jus privatum* was transferable (subject to the *jus publicum*), the holding and transfer of the *jus privatum* was still hobbled by ideas of "public good" wholly unrelated to the private interest involved. *See, e.g.*, Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 21, 136 N.E. 224, 225 (1922); *In re* Long Sault Dev. Co., 212 N.Y. 1, 105 N.E. 849 (1914). Consequently, even though in theory the separate recognition of the *jus publicum* interest should have "liberated" the *jus privatum* for the freest possible transfer and enjoyment (subject only to the *jus publicum* itself), it has not had that effect. *See* Shively v. Bowlby, 152 U.S. 1, 17-18 (1894). The presumption that, absent clear intent, grants extending "to the sea" stop at the mean high water line, *see* note 51 *supra* and note 61 *infra*, and the limitations imposed on, for example, massive transfers of the *jus privatum* in shore lands, *see, e.g.*, Illinois Cent. R.R. v. Illinois, *supra*; Marba Sea Bay Corp. v. Clinton St. Realty Corp., 272 N.Y. 292, 5 N.E.2d 824 (1936); Coxe v. State, *supra*, are manifestations of this historical confusion. Perhaps courts have refused to distinguish the private right from the public rights because even the private right is sufficiently affected with a public interest to justify limiting its free alienation. Because transferees of the private right can, by their use, cut down or extinguish the *jus publicum*, the limitations on free alienation would seem to be in any event an appropriate policy compromise. *See* note 43 *supra* and accompanying text.

61. Examples of cases holding that the shore subject to the *jus publicum* extends to the "high water" or "mean high water" line are Knickerbocker Ice Co. v. Schultz, 116 N.Y. 382, 388, 22 N.E. 564, 565 (1889); Tucci v. Salzhauer, 40 App. Div. 2d 712, 336 N.Y.S.2d 721 (2d Dep't 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973); *accord*, Shively v. Bowlby, 152 U.S. 1, 12 (1894).

Examples of cases holding that grants extending "to the sea" or similarly described presumptively go only to the "high water" or "mean high water" line are Marba Sea Bay Corp. v. Clinton St. Realty Corp., 272 N.Y. 292, 5 N.E.2d 824 (1936); Tiffany v. Town of Oyster Bay, 209 N.Y. 1, 9, 102 N.E. 585, 587 (1913); *In re* Mayor of N.Y., 182 N.Y. 361, 75 N.E. 156 (1905); Sage v. Mayor, 154 N.Y. 61, 69, 47 N.E. 1096, 1097 (1897); Delancy v. Piepgras, 138 N.Y. 26, 36, 33 N.E. 822, 824 (1893).

In the interest of simplicity and in accordance with the object of this Article only New York cases or cases consistent with the New York view have been cited above. A minority of states have not followed the English common law (and New York) rule of setting the shore boundary at high water. *See* Maloney & Ausness, *supra* note 1, at 200-02.

its drawbacks. The sea is simply not compliant enough to cast its waters, even its high tidal waters, to any definite line. Even ignoring the action of the waves, which create a line that moves from instant to instant, the tides themselves exhibit a lack of consistency, with variations from tide to tide, season to season and year to year.[62] As a natural monument for land description purposes, the sea hardly offers the certainty of results provided by, say, an ancient oak. And this is not to mention the sea-edge variations that occur due to the effects of erosion and accretion on the profile of the shore.[63] In sum,

62. The formulation of a serviceable definition in light of this tidal variation was the subject of an extended discussion by the Supreme Court in Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 21-27 (1935). The Court observed that in England a considerable measure of indefiniteness had been removed from the "high water line" formulation by confining the reference to "the flux and reflux of the sea at ordinary tides." *Id.* at 22, *quoting* Blundell v. Catterall, 106 Eng. Rep. 1190, 1199 (1821). Thus, for purposes of fixing boundaries, the so-called "spring" tides (unusually high tides which happen twice a month) and "high spring tides" (which happen at the equinoxials) are not controlling, nor are the so-called "neap" tides (unusually low tides) taken as a reference. Instead, the Supreme Court accepted a "mean high water line" standard and the definition of the United States Coast and Geodetic Survey (now called the National Ocean Survey) that "mean high water at any place is the average height of all the high waters at that place over a considerable period of time." 296 U.S. at 26-27. Theoretically, based on the movements and relative positions of the sun, moon, and earth, the tidal variations repeat themselves in cycles of approximately 18.6 years; therefore, to fix the mean high water line as accurately as possible, "an average of 18.6 years should be determined . . . ." *Id.* at 27. For a complete discussion of tidal variations and their legal consequences see Maloney & Ausness, *supra* note 1.

Although in most New York decisions the courts have seemed content to refer simply to the "high water line" as the determinant without further specification, prior to Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975), the standard appeared to be the "mean" or "ordinary" high water line in this state as well. *See* Dunham v. Townshend, 118 N.Y. 281, 287, 23 N.E. 367, 368 (1890) ("The important question was . . . where ordinary high water mark was . . . ."); Gucker v. Town of Huntington, 254 App. Div. 10, 12-13, 3 N.Y.S.2d 788, 790-91 (2d Dep't 1938) (mean high water mark); Rockaway Park Imp. Co., Ltd. v. City of New York, 140 App. Div. 160, 124 N.Y.S. 1096 (2d Dep't 1910); 33 N.Y. STATE DEP'T REP. 415, 421 (1925) (mean high water mark). *See also* State v. Bishop, 46 App. Div. 2d 654, 359 N.Y.S.2d 817 (2d Dep't 1974); Town of Smithtown v. Poveromo, 71 Misc. 2d 524, 336 N.Y.S.2d 764 (Dist Ct. 1972), *rev'd on other grounds sub nom.*, People v. Poveromo, 79 Misc. 2d 42, 359 N.Y.S.2d 848 (2d Dep't 1973).

References herein to "high water" or "high water line" are meant to refer to ordinary or mean high water. It is to be observed, however, that no matter what meaning may be attributed to the words "high water line" as used by New York courts in the past, there is no indication that the reference was to vegetation lines or any other physical existence other than the intersections of the shores by the tidal planes.

63. In general, where upland area is lost due to erosion of the shore, title to the area eroded away is likewise lost to the neighboring (seaward) owner. Correspondingly, additions to the upland by accretion accrue to the upland owner to the detriment of the seaward estate. Both

the "high water" line, as a real estate boundary, is not a line at all but merely a linguistic formulation. And as such, it is scarcely more definite than the concept, "the edge of the sea," which it is supposed to define. About the only contribution that the "high water line" formulation makes to our understanding of the boundary location is to tell us that the division between upland and sea lies toward the landward, not the seaward, of the area of tidal wash. Since defining the sea-boundary in terms of a water-line does not get the line-drawers very far, it was inevitable that someone some day would ask the courts: "Where is the high water line?" Apparently the first definitive judicial resolution on this point in New York is the court of appeals' decision in *Dolphin Lane Associates, Ltd.* v. *Town of Southampton*,[64] decided in mid-1975.

In *Dolphin Lane* the issue was the boundary between private uplands and the non-privately owned lands[65] under Shinnecock Bay, a tidal body of water.[66] According to the court of appeals, no one "seriously disputed" that the high-water line was the boundary.[67] What *was* disputed was the "method or proof by which the high-water mark shall be precisely located on the land."[68] The court rejected reliance on hydrographic data[69] propounded as a scientific method for establishing the actual "high-water" line. Instead it decided that the high-water mark should be located on the ground

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of these general rules must be qualified by doctrines such as avulsion and reliction and by the principle that shore profile changes which are artificially made or induced do not affect the location of boundaries. *See* Maloney & Ausness, *supra* note 1, at 224-27.

64. 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975).

65. Title to the lands under the body of water in question, Shinnecock Bay, was held for the Town of Southampton by the Trustees of the Freeholders and the Commonalty of the Town of Southampton. For the origin of the titles at issue, see note 76 *infra*.

66. One of the contested issues in the case was whether Shinnecock Bay was in fact tidal throughout the relevant history or only since 1938, when a powerful hurricane carved the Shinnecock Inlet from the sea—an inlet which has been preserved in the interim by artificial means. Brief for Appellant at 24-38, Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975). Also questioned was whether the artificial maintenance of the inlet channel, and hence of tidal variations, could have an effect on titles and boundaries originating in non-tidal times. *Id.*; Brief for New York State Land Title Association as Amicus Curiae at 26-31. However, in light of its decision, the court of appeals did not reach these issues, and the result in this case as it may have been affected by these contentions is not here under discussion.

67. 37 N.Y.2d at 295, 333 N.E.2d at 359, 372 N.Y.S.2d at 53.

68. *Id.*

69. *I.e.*, data as to the actual level of the tides over a period of time.

"by reference to the line of vegetation."[70] The court of appeals described its method for fixing the high-water line as "the application of the traditional and customary method by which that verbal formulation [high water line] has been put in practice in the past to locate the boundary line along the shore."[71] Thus, the court purported to protect "the expectations of the parties" and to avoid introducing into the law of conveyancing an "element of uncertainty and unpredictability" that resort to science, as a dynamic body of understanding, would possibly bring.[72]

The amount of certainty and predictability that the court's decision adds to the law of conveyancing is problematical, considering the unpredictable nature of the line in question in the first place. What is more certain, however, is that by its decision the court of appeals has established a line of "high water" which one must go wading to see.

The action in *Dolphin Lane* was originally brought by the upland waterfront owner to have certain zoning ordinances of the Town of Southampton declared unconstitutional.[73] The town[74] responded to this attack on its ordinances with a counterclaim in which it asserted a superior title to parts of the lands affected by the zoning.[75] The lands claimed by the town were essentially those between the usually dry upland and the open water. It was this controversy as to title that was before the court of appeals.

The title dispute came down to a dispute over the location of the boundary line between the town's lands (mostly underwater) and the private plaintiff's lands (upland extending to the water). At the trial level, the court concluded that the original governmental conveyances under which plaintiff claimed[76] extended only to the

70. 37 N.Y.2d at 298, 333 N.E.2d at 360, 372 N.Y.S.2d at 55.

71. *Id.* at 296, 333 N.E.2d at 359, 372 N.Y.S.2d at 54.

72. *Id.*

73. 72 Misc. 2d 868, 869, 339 N.Y.S.2d 966, 968 (Sup. Ct. 1971), *aff'd*, 43 App. Div. 2d 727, 351 N.Y.S.2d 364 (2d Dep't. 1973), *modified*, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975).

74. The Trustees of the Freeholders and Commonalty of Southampton intervened and joined in the counterclaim. *Id.* For convenience, except where the distinction between the two is pertinent, the trustees and the town will be hereinafter referred to as the Town.

75. *Id.* at 869-70, 339 N.Y.S.2d at 968-69.

76. According to Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 8, 22 N.E. 387, 389 (1889) titles in the Town of Southampton are derived from the grant by the King to the Duke of York and the royal charters issued under his government. In 1676 Governor

Andross gave a charter to the inhabitants of what is now the town, granting to them, within the bounds of the town, "[a]ll of the afore mentioned Tract of Land . . . Together with all Rivers, Lakes, waters Quarrys Wood land Plaines Meadows, pastures, Marshes. ffishing Hawking Hunting and ffowling." Gov. Andross' Patent of South Hampton (1676) *reprinted in* 2 TOWN TRUSTEES RECORDS OF THE TOWN OF SOUTHAMPTON 379, 380 [hereinafter cited as TOWN RECORDS].

Ten years later, in 1686, Governor Dongan gave a second charter, the so-called "Dongan patent," which recited Andross' charter, and which granted, ratified, and confirmed to the "ffreeholders & Inhabitants of Southampton heerin after erected and made one body Corporate and Politique and willed and determined to be called by the name of the trustees of the ffreeholders and commonalty of the Towne of southampton and their Successors all the afore recited tracts & necks of land . . . marshes swamps plaines Rivers Rivolets waters lakes ponds Brooks streames beaches . . . harbours . . . fishing hawking hunting fowling . . . ." Gov. Dongan Patent of Southampton (1686), *reprinted in* TOWN RECORDS 385, 388.

The Dongan patent stipulated that "appropriated" (*i.e.* occupied) lands were transferred "to the . . . use" of the respective occupants and their heirs. TOWN RECORDS 389. This use was apparently executed by the Statute of Uses. Unappropriated lands were transferred "to the use . . . of such as have been purchasers thereof . . . made as tenants in Common . . . ." *Id.* This use was not executed (presumably because it was an "active" use) and the legal title to the unappropriated lands was accordingly held by the town (with power of sale) for the benefit of the persons who had acquired the same by earlier conveyance, seemingly the Andross patent. These purchasers who thus acquired an equitable interest in the unappropriated lands became known as the "proprietors" and apparently were the successors of the original settlers. *See* 72 Misc. 2d at 873, 339 N.Y.S.2d at 972.

Although the Dongan patent itself was quite indistinct on the point, the court of appeals has since held that the proprietors' equitable interest existed only with respect to the (unappropriated) uplands, and the proprietors had no interest in the lands under the water. Town of Southampton v. Mecox Bay Oyster Co., *supra*. With respect to the lands under water, the town acquired title in its governmental capacity with the full authority to do whatever would inure to the benefit of the inhabitants. *See* People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 262, 54 N.E. 682, 686 (1899).

In 1818, in accordance with a compromise worked out between the town and the proprietors, the state legislature enacted a statute which transferred management of the remaining unallocated lands to trustees of the proprietors. Act of April 15, 1818, ch. 155, [1818] N.Y. Laws 140. This divested the town of legal title to such lands and substituted a private trust arrangement for the trusteeship which had been theretofore held by the town. However, management of the waters was reserved to the town under the 1818 enactment, and this "sole control" was reconfirmed in a subsequent enactment. Act of April 25, 1831, ch. 283, [1831] N.Y. Laws 352.

From the foregoing it may be observed that all private titles in Southampton are traceable to grants either: (1) from freeholders who held appropriated lands at the time of the Dongan patent; (2) from the town acting as trustee for the proprietors; (3) from the trustees of the proprietors, who succeeded the town as trustees under the law of 1818. The plaintiff in *Dolphin Lane* traced its title to the trustees of the proprietors.

The original governmental conveyances would have been the Dongan patent and (though not a conveyance in the strict sense) the law of 1818, conveying legal title first to the town (as trustee) and then to the trustees of the proprietors. It was these conveyances (or, more precisely, the former as confirmed by the latter) that created the boundary; by creating an equitable interest in the upland that did not apply to the water lands, these conveyances effected a severance of the two. *See* note 88 *infra*.

For additional discussion of the title history, including a description of events in the pre-Andross patent period, see 72 Misc. 2d at 870-81, 339 N.Y.S.2d at 969-75.

high water line.[77] The trial court then proceeded to describe a practical method for locating this line.

Essentially, the trial court observed that natural growths of two types of marsh grasses predominated in the area in question. One type, *Spartina alterniflora* (cordgrass), thrives naturally only if inundated twice daily by the tides. The other type of grass, *Spartina patens* (salt hay), thrives only in areas beyond the reach of the twice-daily tidal inundations.[78] In the intermediate strip between the "colonies" of these two types of grasses, both are found growing, but neither grows vigorously. The natural characteristics and growth patterns of these two grass types were accepted by the trial court as evidence of the location of the water line.[79] The court did not hold that these plants fixed the boundary as a matter of law but only that their growth was "indicative of the tidal flow for all the months of the year, over the course of several years."[80] Accordingly, the line was to be in the intermediate strip between the primary growth areas of the two types of grass.

The court of appeals rejected the type-of-grass "test"[81] and, as previously stated, held that the high water line should be located by reference to the line of vegetation. Although it described the trial court's methodology as "independent," "novel," and "intellectually fascinating," the court argued that the result below would have significantly changed the on-the-site line and thus "do violence to the expectations of the parties and introduce factors never reasonably within their contemplation."[82]

Certainly the court of appeals' objective to avoid these horribles is commendable even if in the process a swipe must be taken at groping science which, in a most untrustworthy fashion, "may one day [replace] . . . [the type of grass test] by an even *more* sophis-

77. 72 Misc. 2d at 882, 339 N.Y.S.2d at 981, *citing* Tiffany v. Town of Oyster Bay, 209 N.Y. 1, 102 N.E. 585 (1922).

78. However, the areas in which *Spartina patens* grows may be subject to flooding by so-called "spring" tides which occur twice each month. *See* note 62 *supra*.

79. *See* 72 Misc. 2d at 885-86, 339 N.Y.S.2d at 984-85.

80. *Id.* The appellate division affirmed without opinion. 43 App. Div. 2d 727, 351 N.Y.S.2d 364 (2d Dep't 1973).

81. Although referred to as a "type-of-grass *test*" by the court of appeals, the method of the trial did not involve the use of a "test" at all; the trial court simply recognized the relevance of growth patterns as evidence. 72 Misc. 2d at 885-86, 339 N.Y.S.2d at 984-85.

82. 37 N.Y. 2d at 296, 333 N.E.2d at 359, 372 N.Y.S.2d at 54.

ticated and refined test . . . ."[83] Nonetheless, it is difficult to see how anyone's "expectations" can be disappointed if the term "high water line" is deemed to mean a line which represents, according to the best available information, the upper (average) reach of the high water. It seems, in any case, to do more violence to expectations—speaking strictly as laymen in hydrography—to place the "high water line" so far out in the bay that, even at mid to low tide, a person would have to wear galoshes in order to walk to the line in comfort. Yet, this is precisely what the court of appeals has done. By locating the line at the seaward edge of the *Spartina alterniflora*, a plant which needs tidal inundation twice-daily, the court of appeals has set the high water line on the bottom of the bay.[84]

How could the court of appeals reach such a result?

Fundamentally, the task of the court in *Dolphin Lane* was to adjudicate the boundary line between two adjacent landowners—a question of essentially a factual nature rather than one of law.[85] In principle, boundaries are established either by intention or conduct. Usually, it is intention which controls, meaning the intention of the grantor who originally created the boundary by severing a larger parcel into the smaller parcels which the boundary separates. Normally, the inquiry into the grantor's intention is limited to an interpretation of the expression thereof in the instrument of conveyance. However, the interpretation of instruments of conveyance, especially if ambiguous, may be assisted by reference to extrinsic facts—the conduct of the parties (or perhaps also their successors in interest) being an important source of such interpretative assis-

83. *Id.* (emphasis added). For the contrary view, that resort to science presumptively fosters certainty and not unpredictability, see Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1096 (1966).

84. Slightly less hyperbolically, the court of appeals has probably in effect fixed the "high water line" at the *low* water line, since *Spartina alterniflora* is apparently not a water plant living in areas *continuously* under water. It would be totally baffling to set *any* sort of water line by reference to a line of vegetation if the plants in question could grow throughout the shallows of the bay.

85. *See* text accompanying notes 58-59 *supra*. It may not have been a question of fact in the sense that its resolution should be left to the jury, of course. *Compare* People v. Hillman, 246 N.Y. 467, 159 N.E. 400 (1927) *with* Town of North Hempstead v. Oelsner, 148 App. Div. 779, 133 N.Y.S. 319 (2d Dep't 1912). However, even though the interpretation of instruments is generally left to the court, the basic issue—as to the parties' intentions—is essentially a factual one. By way of contrast, establishing a principle for fixing the limits of lands subject to the *jus publicum* would be purely a question of law.

tance.[86] In addition, the location of boundaries may be affected by conduct when, for example, a landowner acquires an adjacent portion of his neighbor's lands by adverse possession.[87] Thus, although the location of boundaries is normally determined according to the original grantor's manifested intention, conduct amounting to adverse possession or showing a more definite intention can influence the determination.

In *Dolphin Lane*, the disputed boundary had to be located by interpreting the original instruments severing the upland territory from the lands under water,[88] subject to the possibility that the boundary as originally established may have been relocated by adverse possession or an analogous theory.

The history of titles in the Town of Southampton is long and relatively complex;[89] however, for present purposes it is sufficient to note that, under the relevant grants, the lands under water[90] belong to the town whereas the uplands were granted either to the town (as to unallocated lands)[91] or to their respective occupants (of already appropriated tracts).[92] The uplands involved in *Dolphin Lane* ap-

86. White v. Knickerbocker Ice Co., 254 N.Y. 152, 172 N.E. 452 (1930). *See also* Hill v. Priestly, 52 N.Y. 635 (1873); French v. Carhart, 1 N.Y. 96 (1847); *cf.* Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 22 N.E. 387 (1889); Brookhaven v. Strong, 60 N.Y. 56 (1875); Pettit v. Shepard, 32 N.Y. 97 (1865); 15 N.Y. JUR., *Deeds* § 73 (rev. 1972).

87. If a boundary is agreed between parties and improvements are made in reliance thereon, another basis for recognizing the shifted boundary, estoppel in pais, may exist. *See* Baldwin v. Brown, 16 N.Y. 359, 364 (1857); Bell v. Hayes, 60 App. Div. 382, 385, 69 N.Y.S. 898, 900 (2d Dep't 1901).

88. In this case, the line was created when the Dongan patent was delivered since it is under that patent that the town claims its title to the waterlands and the private owners, as successors to the "proprietors," claim title to the uplands. Even though, with respect to these particular uplands, the Dongan patent effected no severance of *legal* title (since the town received both the waterlands, legally and beneficially, and the uplands, subject to the equitable interest of the proprietors), that patent nonetheless effected a severance as to the *equitable* title. *See* note 76 *supra*. It has already been held that the proprietors and their trustees received no interest in or power to convey the waterlands either under the patent or under the subsequent confirmatory legislation. Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 22 N.E. 387 (1889). Therefore, it is the boundary line created by the Dongan patent delivered in 1686 that is controlling unless subsequent conduct or events have moved the line.

89. *See* note 76 *supra*.

90. Under the apparently dispositive grant, the Dongan patent of 1686, the town (through its trustees) received the "Rivers Rivolets waters, ponds Brooks streames, beaches . . . harbours . . . ." TOWN RECORDS 388. *See* notes 76, 88 *supra*.

91. These were subject to certain equitable rights of the so-called "proprietors" who were, it appears, successors of the original settlers. *See* note 76 *supra*.

92. The court in Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 15, 22 N.E.

parently remained unallocated until 1861,[93] so it was not until then that the boundary between these uplands and the town lands under water became important. By a deed delivered in 1861, the *Dolphin Lane* plaintiff's predecessor in interest received a parcel of unallocated upland described as "bounded . . . on the north by Shinnecock Bay."[94] The division between waterlands of the bay and uplands now became relevant and, as previously noted[95] the court of appeals in *Dolphin Lane* accepted the traditional rule of construction in New York that the dividing line is the line of high water.

In giving more specific definitional content to the term "high water line" the court of appeals had several choices. It could adhere to a literal definition, requiring recourse to hydrographic data, over a period of time, showing the action of the tides.[96] If recourse to hydrographic data were deemed too cumbersome, it could use a "burden-of-proof" methodology: any relevant evidence tending to show the line would be considered, and the proponent of a particular on-the-site line would have responsibility for supplying sufficient proof.[97] Or the court could establish a "test" whereby some fact more susceptible to convenient proof (e.g., the line of vegetation) is "deemed" to be the line of high water. The last-named approach, that of establishing a "test," is the approach selected by the Court.

In evaluating the appropriateness of a judicial "test," the pertinent inquiries would seem to be (i) the convenience of the test, and (ii) the validity of the test. That is, when the courts decide cases on the basis of proofs other than of the fundamentally operative

387, 391 (1889) denied that the private "proprietors" had any power to make grants with respect to lands under the waters.

93. Actually, this deed was not delivered by the town but by the trustees of the proprietors who had succeeded, under legislative enactment, to the management of the unallocated lands. Act of April 15, 1818, ch. 155, [1818] N.Y. Laws 140. This management continued to be for the benefit of those who had equitable rights therein. *See* note 76, 88 *supra*.

94. 72 Misc. 2d at 873, 339 N.Y.S.2d at 973. This portion of the grant was confirmed by quitclaim deed by the town in 1899. *Id.* at 874, 333 N.Y.S.2d at 973.

95. *See* text accompanying notes 65-72 *supra*.

96. *See* note 62 *supra*. This was the approach taken by the Supreme Court in Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935). The *Borax* case involved the extent of lands held under a federal grant, and accordingly, the question was decided as a matter of federal law. However, where no federal grants or interests are involved (as would be generally the case along the eastern seaboard, less so in the west), federal law defining the high water line is not binding on the states. Shively v. Bowlby, 152 U.S. 1 (1893). *But see* notes 160, 178 *infra*.

97. This was apparently the approach of the trial court in *Dolphin Lane*. *See* text accompanying notes 78-80 *supra*.

facts, the substituted proofs should not only be *easier* than proof of the fundamental facts, they should also tend to show the existence (or not) of the *real* operative facts with a fairly high degree of reliability. Thus, to be an appropriate test, the "line of vegetation" test adopted by the court of appeals should not only be easier to prove than the actual high water line (which it is);[98] it should also generally correspond with that line. The lack of correspondency between the two lines under circumstances of *Dolphin Lane* raises a serious question as to the appropriateness of the test.[99]

Even if a judicial test does fall short of satisfying the criterion of validity or reliability, it still might be appropriate to apply the test, subject to rebuttal, if using the test greatly simplifies matters of proof compared with the proof of the "real" operative fact at issue. And, of course, proving the line of vegetation *is* much simpler than proof, by resort to hydrographic data over a long period, of the actual high water line.[100] However, in the case of such less-than-reliable tests, it should at least be open to the litigants to show, by reference to more reliable data, that the true state of facts is other than what the "test" would indicate. That is, unless the test in question is very reliable indeed, it should at most operate as a rebuttable presumption, yielding to reality in cases where the presumption proves to be erroneous. But the court of appeals appears to have established its line of vegetation test not as a rule of construction, not as a rebuttable *presumption* of intent; the court made its test a rule of property,[101] which can stand stubbornly against all

98. Using hydrographic data to fix the actual high line, as the Supreme Court approved in Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935), would require observations over a period of 18.6 years in order to be precise. *See* note 62 *supra*.

99. In the area in question, one of the important vegetation types was *Spartina alterniflora*, a species requiring twice-daily tidal inundation to thrive. That being the case, it is hard to see how the seaward line of *this* vegetation could possibly correspond to the high water line. It is even hard to see how evidence of the seaward line of this growth could be relevant *evidence* of the high water line. On the other hand, the *landward* limit of this type of vegetation would seem to be very probative of the location of the actual high water line. It was evidence of this *landward* limit which was accepted as evidence by the trial court and rejected by the court of appeals.

100. *See* note 98 *supra*.

101. The court stated:

> The controlling principle here is that which we wrote in Heyert v. Orange and Rockland Utilities (17 N.Y.2d 352, 363): "Whatever the rule might be if this were a case of first impression, it is certain that thousands of deeds . . . have been made on this rule . . . . *It has ripened into a rule of property* . . . ."

the truth and reality which the processes of proof can pose against it.[102]

In fact, the court adopted the line of vegetation test as a rule fixing the "high water line" entirely without reference to its reliability as an indicator of the *real* high water line—the ostensible historical boundary. At the same time, the court pointed to the "importance of stability and predictability in matters involving title"[103] as the reason for its holding. If there is an apparent conflict between what the court did and its reason for doing it, the conflict may be resolved, at least for the specific factual context of *Dolphin Lane*, by reference to the specific background of that case.

It appears that for many years it had been the normal practice of local surveyors to locate the high water line by reference to the line of vegetation.[104] Furthermore, title insurers claimed to have been insuring titles to shore areas on the basis of these surveys[105] and a succession of purchasers may have taken titles based thereon. Thus, it was to protect the expectations generated by local surveying techniques that the court of appeals decided to define the high water line by "the application of the traditional and customary method by

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37 N.Y.2d at 297, 333 N.E.2d at 360, 372 N.Y.S.2d at 55 (emphasis added). It is a question whether a rule of construction must be "ripened" into a rule of property in order to give the law's protection to justified reliance thereon. Nonetheless, the court of appeals clearly chose to treat the line-of-vegetation rule as so ripened.

102. By way of contrast, the Supreme Court of Alaska recognized a substituted high water line (a so-called "meander line") as only presumptive evidence of the boundary for title purposes in Hawkins v. Alaska Freight Lines, Inc., 410 P.2d 992 (Alas. 1966), where the real high water line was obscured by vegetation. The court thus managed to solve the practical problem of proof in a specific case without forever relinquishing the state's title to tideland areas. In general, absent clear intent, such lines are not taken as the boundary, and the actual high water line controls. *See* Maloney & Ausness, *supra* note 1, at 253.

103. 37 N.Y.2d at 296, 333 N.E.2d at 359, 372 N.Y.S.2d at 54.

104. 37 N.Y.2d at 297, 333 N.E.2d at 360, 372 N.Y.S.2d at 54. It may be seriously argued that this practice of surveyors was followed only in cases where the survey was for purposes *other than* locating the boundary at the shore. *See* note 142 *infra*. Historically, both surveyors and the court of appeals recognized the distinction between the high water line and the edge of the marshlands, and that the former was controlling in boundary disputes. Dunham v. Townshend, 118 N.Y. 281, 23 N.E. 367 (1890). It does not seem reasonable to assume that there was a discrepancy between surveying practice and a clear line of decisions, going back at least to 1890, holding that the line of high water is the boundary. *Id.*; *see* additional cases at note 140 *infra*. Nonetheless, the court of appeals in *Dolphin Lane* seems to have assumed that such a discrepancy did exist.

105. *See* Brief for New York State Land Title Association as Amicus Curiae at 4, Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52.

which that verbal formulation had been put in practice in the past to locate the boundary line along the shore."[106] Irrespective of whether the surveyor's long-standing practice was originally correct or incorrect, its persistence through the years, as the *de facto* norm on boundary questions, has therefore made it law.[107]

By attaching legal significance to surveying practice irrespective of whether that practice was originally correct or incorrect, the court has admitted the possibility that the boundary line, as apparently intended by the original severing grantor,[108] may have been *moved* by subsequent conduct and events.[109] When the line is so moved, an apparent expropriation of one landowner and a corresponding vesting in his neighbor must occur. At this point two questions are raised: How can the apparent expropriation involved in moving the line be justified? And even if moving the line is justified in this case, is it appropriate to elevate the line-of-vegetation test to a rule of property?

As already noted,[110] both adverse possession and "practical location"[111] are events or conduct which may justify locating the boundary at a place other than that which would be indicated by the grantor's manifest intention as expressed in the instrument of con-

106. 37 N.Y.2d at 296, 333 N.E.2d at 359, 372 N.Y.S.2d at 54.

107. The court stated:

> To give effect to such uniform practice is not, as the town contends, to delegate arbitrary powers to surveyors to determine property lines; rather it is the obverse, namely, to recognize that property lines are fixed by reference to long-time surveying practice.

Id. at 297, 333 N.E.2d at 360, 372 N.Y.S.2d at 54.

Presumably the court meant that it was recognizing that property lines are fixed *by the landowners* concerned by reference to long-standing surveying practice. If it meant that property lines are fixed *by the courts* by reference to long-standing surveying practice, it is difficult to see how the second half of the court's sentence is the "obverse" of the first.

108. *I.e.*, the patentor under the Dongan patent of 1686. *See* note 88 *supra*.

109. *Id.* at 297, 333 N.E.2d at 360, 372 N.Y.S.2d at 55. To be more precise, this discussion deals with subsequent events or conduct which may have changed the *principle for establishing* the boundary line, as contemplated by the original grant. The line may have been moved by events, such as erosion, accretion, or local tidal variations, which affect the location of boundaries but do not change the principle for establishing them. *See* State v. Bishop, 46 App. Div. 654, 359 N.Y.S.2d 817 (2d Dep't 1974). The movement of the line due to such latter events may be constructively deemed to have been contemplated by the original grantor, within the overall concept of "high water line." Accordingly, such movements can be recognized without doing violence to the original grantor's intention.

110. *See* text accompanying notes 86-87 *supra*.

111. *I.e.* locating the line where the parties have, in actual practice, treated the line as being.

veyance itself. Both could conceivably be invoked in support of a particular boundary line which, by long continued understanding and acquiescence, has been recognized by all concerned. However, the two are nonetheless somewhat different in their theoretical underpinnings.

Although the matter is not entirely free from confusion,[112] the distinctive role of practical location would seem to be to assist in the interpretation of instruments of conveyance which are indefinite as to boundaries.[113] For example, where a larger piece of land is severed into two smaller parcels and the deed fails to describe the boundary (or does so ambiguously), the conduct of the parties—*e.g.*, actual patterns of occupation or putting up a fence—can dissipate the vagueness of the deed and thereby give the courts a basis for upholding the parties' intent.[114] Similarly, evidence of a prior general understanding as to particular matter—*e.g.*, the boundaries of "Oak Hill Farm"—may supply a basis for enforcing a grant "of Oak Hill Farm" even without more particular words of description.[115] Though the latter is perhaps not, strictly speaking, "practical" location, the theoretical justification is the same; in attempting to gauge the intent of the parties, resort to extrinsic facts, outside the formal

112. Cases may be found to the effect that "practical location" has legal significance irrespective of any actual agreement of the boundary neighbors, and that it is a rule of repose, resting upon the same principles as adverse possession. *E.g.*, Katz v. Kaiser, 154 N.Y. 294, 48 N.E. 532 (1897); Jones v. Smith, 64 N.Y. 180 (1876); Baldwin v. Brown, 16 N.Y. 359 (1857). It may indeed be that "practical location" of a boundary by the parties can gain the force of law in appropriate cases by applying a theory of adverse possession or by an independent theory which is analogous to adverse possession. *See* text accompanying notes 135-144 *infra*. In cases such as Baldwin v. Brown, *supra*, where the deed description was quite unambiguous, an adverse possession-type theory might be the *only* basis for giving the support of law to a practical "location" different from the location described in the deed. *See* Sherman v. Kane, 86 N.Y. 57 (1881). However, statements in the cases to the contrary notwithstanding, it is submitted that the *distinctive* role of practical location, as a determiner of boundaries, is to supply extrinsic evidence of the parties' intent (where the deed-expressed intent is indefinite or ambiguous), not to justify the placement of boundaries in derogation of that intent. *See* Ratcliffe v. Gray, 3 Keyes 510, 513 (N.Y. 1867); Bell v. Hayes, 60 App. Div. 382, 69 N.Y.S. 898 (2d Dep't 1901). Even though this somewhat limited conceptualization of practical location may not be entirely reconcilable with all of the judicial statements on the subject, it is used here nonetheless in the interest of analytical clarity—to keep the operation of practical location separate from that of adverse possession.

113. 12 AM. JUR. 2d, *Boundaries* § 87 (1964); 15 N.Y. JUR., *Deeds* § 73 (rev. 1972).

114. Harris v. Oakley, 130 N.Y. 1, 28 N.E. 530 (1891); *see* 12 AM. JUR. 2d, *Boundaries* § 88 (1964); 6 N.Y. JUR., *Boundaries* § 10 (1959).

115. *See* Jones v. Smith, 73 N.Y. 205, 209 (1878); 6 N.Y. JUR., *Boundaries* § 8 (1959); 15 N.Y. JUR., *Deeds* § 88 (rev. 1972).

expression of intent, may give insights which will clear up uncertainties. In this role, practical location is distinct from adverse possession in that, unlike the latter, practical location theoretically involves no expropriation. It merely gives the intended import to an instrument of conveyance despite a defective expression of that intent in the instrument itself. Rather than expropriate, it leaves the parties where they intended to be, based on evidences of intent which are found *dehors* the instrument.

Thus, in *Dolphin Lane*, it is possible that the dispositive grant[116] may have contemplated a boundary line at the line of vegetation irrespective of where the high water line may have been. After all, the grant apparently made no reference to high water lines; rather, it simply granted to the town the "rivers, waters, lakes, ponds, brooks, streams, beaches, harbors", etc.[117] The high water line concept is read in only as a rule of construction, yielding presumably to any actual (and provable) contrary intention. On this theory, if there were proof that everybody at the time assumed the line of vegetation to be the boundary, reinforced by evidence of surveying practice, such proof would justify the court of appeals' line-of-vegetation test on the very terms that it was propounded: it locates "the boundary line of property, title to which has passed from owner to owner until it has now vested" in the present owner.[118] That is, the line is not *moved* by the test; it is confirmed to be where it always has been.

Unfortunately, two factors make this analysis of unlikely validity. First, there is the reference to "beaches" in the grant to the town.[119] The word "beach" denotes lands washed by the sea,[120] which lands are per force seaward of the high water mark. Hence, the reference to beaches shows an intention that the line of high water, not the line of vegetation, was the boundary contemplated by the grantor. Secondly, in order for practical location to serve as evidence of the grantor's intention, the conduct or understandings relied on presumably would have had to exist at or about the time of the grant,

116. *See* note 76 *supra*.

117. Town of Southampton v. Mecox Bay Oyster Co., 116 N.Y. 1, 3, 22 N.E. 387 (1889), quoting the patent in confirming the town's title to lands under water. The patent itself, though substantially identical, reads slightly different. *See* notes 76, 90 *supra*.

118. 37 N.Y.2d at 296, 333 N.E.2d at 359, 372 N.Y.S.2d at 54.

119. *See* text accompanying note 117 *supra*.

120. Trustees of Town of Easthampton v. Kirk, 68 N.Y. 459, 463 (1877).

in this case in 1686.[121] There is apparently no solid evidence of surveying practice or other relevant conduct as of that time,[122] and indeed the then applicable English rule of strict construction[123]—putting the boundary at the high water line[124]—along with the well-known "policy of the crown in not granting tidal waters to private individuals"[125] both militate against concluding that any such practice or conduct did exist. Thus, it appears that the boundary has moved; that the line intended by the original grantor controls no more.

Adverse possession, as a result of misunderstanding the original boundary or otherwise,[126] supplies an independent basis for locating the line at a place other than as originally created. There is no requirement that the conduct constituting the adverse possession have occurred at any particular time in relation to the original grants of title. It is only necessary that the possession be continued without interruption through a time span equal to the period of limitations for ejectment.[127] Thus, if there were proof in *Dolphin*

121. *See* notes 76, 88 *supra*.

122. There are apparently historical indications that the "meadows" were "laid out" to private owners by the town and were susceptible to private ownership and use for cutting "last hay" (*Spartina patens*) as fodder. *See* Brief for Appellant at 11-12, Brief for The New York State Association of Professional Land Surveyors as Amicus Curiae at 10, Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975). But there is apparently no concrete indication that areas covered by the coarser *Spartina alterniflora* (cordgrass), which requires twice-daily tidal inundation, were considered anything other than public domain. *See also* Brief for New York State Land Title Association as Amicus Curiae at 19-21.

123. *See* note 51 *supra* and accompanying text.

124. Bulstrode v. Hall, 82 Eng. Rep. 1024 (K.B. 1662); *see* Maloney & Ausness, *supra* note 1, at 198-200. The New York courts have interpreted the high water mark with respect to colonial grants. Sage v. Mayor, 154 N.Y. 61, 69, 47 N.E. 1096, 1098 (1897) ("the title ends at high water mark, as the law stood at the date of the Nichols charter and as it stands today"); *accord*, *In re* Mayor of New York, 182 N.Y. 361, 75 N.E. 156 (1905); Mayor of New York v. Hart, 95 N.Y. 443 (1884).

125. Smithtown v. St. James Oyster Co., 80 Misc. 173, 177, 140 N.Y.S. 981, 984 (Sup. Ct. 1913).

126. Apparently, adverse possession under a claim of right is not defeated in New York by showing that the claimant acted under a misapprehension of fact. Brand v. Prince, 43 App. Div. 2d 638, 349 N.Y.S.2d 222 (3d Dep't 1973). *Compare* Grube v. Wells, 34 Iowa 148 (1871) *with* Daily v. Boudreau, 231 Ill. 228, 83 N.E. 218 (1907). *See generally* 21 Baylor L. Rev. 95 (1969).

127. The period is now generally ten years in New York, N.Y. C.P.L.R. § 212(a) (McKinney 1972), but the period is twenty years for actions by the state or a grantee (or patentee) of the state. *Id.* at § 211. The doctrine of constructive adverse possession which excuses a claimant under color of title from actual possession of the *whole* parcel would appear to be

Lane (i) that the adjacent occupants from time to time had possessed their respective parcels as though the boundary were the line of vegetation, and (ii) that the upland owner had held his possession up to that line for the requisite period, then still another basis would exist to justify the court of appeals' line-of-vegetation test, though it is not the basis on which the court of appeals apparently relied.[128]

However, there are several problems in fashioning an adverse possession justification for the line-of-vegetation test adopted by the court of appeals.

First, it is unlikely that there was the requisite possession by the upland owners of the disputed tidal lands. Since 1848, it has been the law in New York by statute[129] that, for purposes of adverse possession, there must either be usual cultivation or improvement of the land or a substantial enclosure protecting it.[130] The law may be more liberal in its definition of possession in other jurisdictions,[131] but in New York, the statutory essentials of possession must be present "and no others"[132] are satisfactory. Neither indicating the disputed lands on a map as belonging to the upland owner[133] nor

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inapposite. N.Y. REAL PROP. ACTIONS LAW § 511 (McKinney 1963). Under the doctrine, occupation of part of the premises described in an instrument serves as occupation of the whole premises described in the instrument. *Id.* But occupation of a portion of premises which is *unambiguously* included in an instrument should not also be deemed to be occupation of adjacent vacant areas which the instrument does *not* unambiguously include. It would be bootstrapping to use a "color of title" theory to show possession if the purpose of showing possession is to cure description defects in the very same instrument which is supposed to supply the "color of title." Only if the claimants claimed under a deed describing the disputed tidal area definitely (*e.g.*, by courses and distances) would the doctrine of constructive adverse possession seem to come into play.

128. The principles underlying adverse possession have been judicially referred to in support of the operation of practical location as a means of determining boundaries. *See* note 112 *supra*. Consequently the court of appeals, since it was not explicit, cannot be said to have not considered adverse possession as a possible analytical support for its holding. *See* text accompanying notes 135-44 *infra*.

129. N.Y. REAL PROP. ACTIONS LAW § 522 (McKinney 1963) (corresponds to Code of Procedure § 85, Act of April 11, 1849, ch. 438, § 85, [1849] N.Y. Laws 634).

130. *Id.* § 511.

131. *See, e.g.*, Brumigan v. Bradshaw, 39 Cal 24, 50 (1870), where the court stated: "the acts of dominion and ownership which establish a *possessio pedis* must correspond, in reasonable degree, with the size of the tract, its condition and appropriate use, and must be such as usually accompany the ownership of land similarly situated." *Accord*, Ewing v. Burnett, 36 U.S. (11 Pet.) 39 (1837).

132. N.Y. REAL PROP. ACTIONS LAW § 522 (McKinney 1963).

133. Archibald v. New York Cent. & H.R. R.R. Co., 157 N.Y. 574, 580, 52 N.E. 567, 568 (1899).

surveyor's practices satisfy the terms of the statute. Thus, absent usual cultivation, improvement, or an enclosure after 1861 (when the uplands passed to private owners),[134] it is hard to see how the boundary could have been affected on an adverse possession theory.

An adverse possession-like policy of repose has, as previously noted, appeared in the case law under the heading of "practical location".[135] Apparently, long-term acquiescence in a boundary line (probably for the period of limitations on ejectment[136]) will have the effect of legitimizing the line even though the claimant cannot show actual possession up to the line for the applicable period of limitations.[137] However, in order for such an "adverse-acquiescence" theory to affect a boundary, the line must be definite and the acquiescence must be by both parties.[138] In particular, it is required that the losing party knew the location of the line acquiesced in and, probably, he must have joined in establishing it.[139] This "adverse-acquiescence" type of practical location could supply fairly compelling support for the court of appeals' conclusion that the boundary line in *Dolphin Lane* lies at the line of vegetation; it could, that is, provided that the long-standing practice of surveyors can be translated into acquiescence on the part of the town.

But what, precisely, did the town acquiesce in? Certainly there is no indication that the town ever objected to the surveyor's practice. But neither is there evidence that it had any reason to.[140] So

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134. *See* text accompanying notes 93-94 *supra*.

135. *See* note 112 *supra*.

136. Corning v. Troy Iron & Nail Factory, 44 N.Y. 577, 595 (1871); Fisher v. McVean, 25 App. Div. 2d 575, 266 N.Y.S.2d 951 (3d Dep't 1966).

137. *E.g.*, Baldwin v. Brown, 16 N.Y. 359 (1857); Ratcliffe v. Gray, 3 Keyes 510 (N.Y. 1867); Konchar v. Leichtman, 35 App. Div. 2d 890, 315 N.Y.S.2d 888 (3d Dep't 1970); Fischer v. McVean, 25 App. Div. 2d 575, 266 N.Y.S.2d 951 (3d Dep't 1966); Bell v. Hayes, 60 App. Div. 382, 69 N.Y.S. 898 (2d Dep't 1901).

138. Adams v. Warner, 209 App. Div. 394, 204 N.Y.S. 613 (3d Dep't 1924); Whitney v. Dudley, 40 N.Y.S.2d 838 (Sup. Ct. 1943); Hubbell v. McCullough, 47 Barb. 287 (N.Y. Sup. Ct. 1866).

139. Corning v. Troy Iron & Nail Factory, 44 N.Y. 577, 595-96 (1871).

140. Prior to the court of appeals' decision in *Dolphin Lane*, courts in New York had been defining the "high water line" formulation according to the tides rather than by references to vegetation. Sage v. Mayor, 154 N.Y. 61, 70, 47 N.E. 1096, 1098 (1897) ("title . . . did not extend beyond the dry land . . . ."); Dunham v. Townsend, 118 N.Y. 281, 23 N.E. 367 (1890); State v. Bishop, 46 App. Div. 2d 654, 359 N.Y.S.2d 867 (2d Dep't 1974); Board of Educ. v. Nyquist, 51 Misc. 2d 902, 274 N.Y.S.2d 229 (Sup. Ct. 1966), *aff'd*, 28 App. Div. 2d 936, 281 N.Y.S.2d 486 (3d Dep't 1967). The town should have likewise been justified in assuming that the actual line of high water was the boundary even though erroneous notions on this point

far as can be told, there were never any trespasses under claim of right on the disputed premises nor any other legal wrongs committed which would trigger the town into action.[141] Nor was there any fence built or other act to designate the boundary on the *locus in quo*.[142] If the court of appeals has held that title may be lost by acquiescing in conduct that is not unlawful (*i.e.*, the surveyor's practice of mismapping boundaries), and in the absence of any trespass or other cause of action, it is not likely that it has contributed much to the "stability and predictability of matters involving title." Moreover, such a result would be directly contrary to holdings in,

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may have persisted elsewhere.

The court of appeals cited an opinion of the New York Attorney General, 33 STATE DEP'T REP. 415 (1925) to support the "authenticity" of the surveying practice of following the vegetation line. The Attorney General noted that, in a number of other jurisdictions, the high water line is "found at the point where the action of the waters *ceases to affect* the soil or the vegetation upon it." *Id.* at 418 (emphasis added). *See* Maloney & Ausness, *supra* note 1, at 256-58. The Attorney General's opinion concluded that "in most instances . . . the test [is] . . . point or extent to which the *upland* vegetation survives or would survive excepting for the presence and action of the waters." 33 STATE DEP'T REP. at 421 (emphasis added). But the court of appeals fixed the boundary, not by the line of *upland* vegetation, but by reference to the line of *Spartina alterniflora*, a species that requires tidal inundation *twice daily* in order to colonize or thrive. *See* text accompanying notes 78-82 *supra*. Thus, the court of appeals cited the Attorney General's opinion, but seems to have missed its clear import, *viz.* that the *actual* line of high water is the boundary and that *upland* vegetation is merely a convenient indicator of where that line of high water would lie.

141. *Cf.* Adams v. Rockwell, 16 Wend. 285, 302 (Ct. Err. N.Y. 1836) ("the party whose right is to be thus barred must have silently looked on and seen the other party doing acts.").

142. There is no evidence that *any* of the historical surveys were ever made for the specific purpose of delineating the boundaries between town lands (under water) and the several parcels held by upland owners. An apparently key survey of the area in question in *Dolphin Lane*, the so-called Cook Survey made in 1900, appears to have been primarily for the purpose of mapping inland areas, rather than to fix the boundary at the coast. Brief for Appellant at 6, Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292, 333 N.E.2d 358, 372 N.Y.S.2d 52 (1975). The field notes for the Cook Survey were inadequate to map a shore line. 72 Misc. 2d at 880, 339 N.Y.S.2d at 979. In any event, it is doubtful that the Cook Survey would be relevant to a boundary determination unless there was proof of, *inter alia*, the competency of the surveyor and the purpose of the survey. Ramapo Mfg. Co. v. Mapes, 216 N.Y. 362, 367, 110 N.E. 772, 775 (1915).

For the purposes of convenience, it has been the practice of many surveyors to map the *apparent* shore line (*viz.* at the line of vegetation) rather than the real high water line especially where the exact coastal boundary is irrelevant to the purpose of the survey. Maloney & Ausness, *supra* note 1, at 252. This fact, rather than customary acceptance of the line of vegetation as the boundary, may best explain the "long-standing practice of surveyors" which was relied on by the court of appeals. Thus to support its new "test" for fixing shore boundaries, the court may have adopted a practice which itself was never intended to designate those boundaries definitively.

for example, the prescriptive easement area where "negative" easements (*e.g.*, of light and air) cannot be acquired by long-term "acquiescence" of the servient neighbor.[143] However, even assuming that title may be lost by acquiescence in a mere *claim*, and that acquiescence by the town were shown, the suitability of such a basis for the *Dolphin Lane* holding ought still to be subject to the objections[144] applicable to the more usual type of adverse possession.

One of these objections to supporting the new boundary with an adverse possession theory (or an adverse possession-type theory) is that, in this case as in the usual case, the title being extinguished is that of a public body, of a municipality, as here, or of the state itself. To be sure, the title to lands held by the state or a municipality can be extinguished by adverse possession, though the period of limitations is twenty years for the state or its grantees (or patentees) rather than the ten year period which applies in the case of private owners.[145] However, the power of private persons to acquire title to public lands by adverse possession is subject to limitations not applicable to adverse possession generally; such public lands may not, it is said, be acquired by adverse possession if held by the state or municipality in a sovereign governmental capacity[146] or held in trust for the public good,[147] but they may be acquired by the adverse possessor if held in a proprietary capacity.[148] Likewise, public lands which are inalienable cannot, it is said, be lost by adverse possession.[149]

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143. *See, e.g.*, Parker & Edgerton v. Foote, 19 Wend. 309 (Sup. Ct. N.Y. 1838).

144. *See* text accompanying notes 145-58 *infra*.

145. *See* note 127 *supra*.

146. Town of Hornellsville v. City of Hornell, 38 App. Div. 2d 312, 328 N.Y.S.2d 941 (4th Dep't 1972); Hinkley v. State, 202 App. Div. 570, 195 N.Y.S. 914 (3d Dep't), *aff'd*, 234 N.Y. 309, 137 N.E. 327 (1922); Long Island Research Bureau v. Town of Hempstead, 203 Misc. 619, 118 N.Y.S.2d 39 (Sup. Ct. 1952), *aff'd*, 283 App. Div. 663, 126 N.Y.S.2d 857 (2d Dep't 1954), *aff'd*, 308 N.Y. 818, 125 N.E.2d 872 (1955).

147. Smith v. People, 9 App. Div. 2d 205, 193 N.Y.S.2d 127 (3d Dep't 1959); People v. Baldwin, 197 App. Div. 285, 188 N.Y.S. 542 (3d Dep't 1921), *aff'd*, 233 N.Y. 672, 135 N.E. 964 (1922); *cf.* Long Island Beach Buggy Ass'n. v. Islip, 58 Misc. 2d 295, 295 N.Y.S.2d 268 (Sup. Ct. 1968), *aff'd*, 35 App. Div. 2d 739, 316 N.Y.S.2d 430 (2d Dep't 1970).

148. *E.g.*, People v. Trinity Church, 22 N.Y. 44 (1860); People v. Arnold, 4 N.Y. 508 (1851); Hamlin v. People, 155 App. Div. 680, 140 N.Y.S. 643 (4th Dep't 1913).

149. City of N.Y. v. Wilson & Co., 278 N.Y. 86, 15 N.E.2d 408 (1938); Knickerbocker Ice Co. v. Shultz, 116 N.Y. 382, 22 N.E. 584 (1889); Arnold's Inn, Inc. v. Morgan, 63 Misc. 2d 279, 310 N.Y.S.2d 541 (Sup. Ct. 1970); Banner Milling Co. v. State, 117 Misc. 33, 191 N.Y.S. 143 (Ct. Cl. 1921), *modified on other grounds*, 210 App. Div. 812, 205 N.Y.S. 911 (4th Dep't 1924), *aff'd*, 240 N.Y. 533, 148 N.E. 668, *cert. denied*, 269 U.S. 582 (1925).

On the basis of these principles, it has been fairly consistently held that title to publicly-owned waterlands cannot be acquired by adverse possession.[150] These holdings are sometimes on the grounds that such lands are held as sovereign or for the public good[151] and sometimes on the grounds that the lands being inalienable, are not subject to loss by adverse possession.[152] However, the cases are not uniform in holding that publicly-owned waterlands are immune to acquisition by adverse possession. A few decisions have held that title may be acquired by an adverse possessor whenever the public lands in question were alienable.[153] It has also been said, in *dicta*, that where waterlands are not held in trust for the public, title to them may be acquired by adverse possession.[154] But these cases upholding an adverse possession-title on the grounds of alienability do not mention the fact that the lands in question may nonetheless have been held in a governmental capacity or in trust for the public.

In short, the New York cases on adverse possession of publicly-owned waterlands are not easily reconciled. However, it seems clear that the fact that waterlands may be alienable should remove only one of two objections to allowing title to be lost by this process. Alienable or no, waterlands still may be (and generally are)[155]

150. *In re* Piers Old Nos. 8-11, 228 N.Y. 140, 126 N.E. 809 (1920); Knickerbocker Ice Co. v. Shultz, 116 N.Y. 382, 22 N.E. 584 (1889); *In re* Roma, 223 App. Div. 769, 227 N.Y.S. 46 (2d Dep't 1928); Hinkley v. State, 202 App. Div. 570, 195 N.Y.S. 914 (3d Dep't), *aff'd*, 234 N.Y. 309 (1922); Campbell v. Rodgers, 182 App. Div. 791, 170 N.Y.S. 258 (1st Dep't 1918); Gunn v. Bergquist, 201 Misc. 992, 108 N.Y.S.2d 644 (Sup. Ct. 1951); *In re* East River Drive, 159 Misc. 741, 289 N.Y.S. 443 (Sup. Ct. 1936), *aff'd*, 259 App. Div. 1007, 21 N.Y.S.2d 507, *appeal denied*, 260 App. Div. 847, 23 N.Y.S.2d 203 (1940).

151. *E.g.*, Hinkley v. State, 202 App. Div. 570, 195 N.Y.S. 914 (3d Dep't), *aff'd*, 234 N.Y. 309 (1922).

152. *In re* Piers Old Nos. 8-11, 228 N.Y. 140, 126 N.E. 809 (1920); Gunn v. Bergquist, 201 Misc. 992, 108 N.Y.S.2d 644 (Sup. Ct. 1951); *In re* East River Drive, 159 Misc. 741, 289 N.Y.S. 443 (Sup. Ct. 1936), *aff'd*, 259 App. Div. 1007, 21 N.Y.S.2d 507, *appeal denied*, 260 App. Div. 847, 23 N.Y.S.2d 203 (1940).

153. Reid v. New York, 274 N.Y. 178, 8 N.E.2d 326 (1937); *In re* City of New York, 217 N.Y. 1, 111 N.E. 256 (1916); Timson v. Mayor, 5 App. Div. 424, 39 N.Y.S. 248 (1896); Arnold's Inn, Inc. v. Morgan, 63 Misc. 2d 279, 310 N.Y.S.2d 541 (1970).

154. Gottfried v. State, 23 Misc. 2d 733, 747, 201 N.Y.S.2d 649, 666 (Ct. Cl. 1960).

155. *See, e.g.*, Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224 (1922); *In re* Long Sault Dev. Co., 212 N.Y. 1, 105 N.E. 849 (1914); Hinkley v. State, 202 App. Div. 570, 195 N.Y.S. 914 (3d Dep't), *aff'd*, 234 N.Y. 309, 137 N.E. 327 (1922). Instruments such as the Dongan and Andross patents, *see* note 76 *supra*, were governmental in nature and intended to form the basis of political communities, Martin v. Waddell, 41 U.S. (16 Pet.) 367, 411 (1842), and the lands they conveyed were to be held by the recipient municipalities in a governmental or quasi-sovereign capacity for the benefit of the public, People *ex rel.* Palmer

deemed to be held by the state (or municipality) in a governmental capacity—for the public good—and this in itself should be enough to prevent their unilateral appropriation by private claimants.[156] The state "cannot lose such lands as it holds for the public, in trust for a public purpose . . . ."[157] A forest preserve is a classic example of public trust lands immune to adverse possession.[158] Should tide-washed lands, also held in a public trust and similarly important for preservation, be any different? It is not easy to see why.

However, the greatest obstacle to an adverse possession justification for the court's holding is that, for adverse possession to change boundaries, the presence of its elements must be considered on a case by case basis. The fact that A has acquired prescriptive title against B does not mean that A's neighbor has *also* acquired such a title. Yet, by announcing what appears to be a rule of property,

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v. Travis, 223 N.Y. 150, 119 N.E. 437 (1918); Town of Brookhaven v. Smith, 188 N.Y. 74, 78, 80 N.E. 665, 667 (1907); People *ex rel.* Howell v. Jessup, 160 N.Y. 249, 259, 54 N.E. 682, 685 (1899).

156. Compared with the obvious policy objective of the governmental ownership or "public good" limitation on adverse possession, the alienability test is merely a technical one, and it thus should yield whenever the technicality of inalienability is not present. It appears that the theory behind the inalienability test is that a grant to a private individual of inalienable lands cannot be presumed, precluding title by adverse possession. *See* People v. System Properties, Inc., 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S.2d 859 (1957); City of New York v. Wilson & Co., 278 N.Y. 86, 97, 15 N.E.2d 408, 413 (1938); Smith v. People, 9 App. Div. 2d 205, 193 N.Y.S.2d 127 (3d Dep't 1959). Or perhaps the explanation is that the policy judgment which led to establishing particular lands as inalienable applies as well to exempt such lands from the statute of limitations. *See* 2 N.Y. JUR., *Adverse Possession* §102 (1958). In any event, it appears that waterlands are alienable by the state (subject to the *jus publicum*), *see* text accompanying notes 41, 49 *supra*, and indeed the Public Lands Law authorizes certain officers of the state to make such conveyances thereof as "they shall deem necessary to promote the commerce of this state, or . . . for the purpose of beneficial enjoyment of the same by the adjacent owner for the benefit of the public at large." N.Y. PUB. LANDS LAW §75(7) (McKinney Supp. 1974). Apparently municipal owners of waterlands have similar powers to make conveyances. Arnold's Inn, Inc. v. Morgan, 63 Misc.2d 279, 310 N.Y.S.2d 541 (1970), *citing* City of New York v. Wilson & Co., *supra*. And the only general restriction upon such powers of alienation (other than the preservation, with qualification, of the *jus publicum*) would seem to be the limitation on massive transfers to other than upland owners. *See* authorities at notes 47, 48 *supra*. Whether allowing *every* upland owner to acquire a piece of the foreshore, as the court of appeals has done, would be a massive transfer invalid under earlier cases, is problematical. Implicitly, the court of appeals seems to have held in *Dolphin Lane* that it would not.

157. People v. Baldwin, 197 App. Div. 285, 288, 188 N.Y.S. 542, 545 (3d Dep't 1921), *aff'd*, 233 N.Y. 672, 135 N.E. 964 (1922).

158. People v. Shipley, 229 App. Div. 21, 241 N.Y.S. 17 (3d Dep't 1930); People v. Baldwin, 197 App. Div. 285, 188 N.Y.S. 542 (1921), *aff'd*, 233 N.Y. 672, 135 N.E. 964 (1922); Helms v. Diamond, 76 Misc. 2d 253, 349 N.Y.S.2d 917 (Sup. Ct. 1973).

possibly applicable to all shore boundaries in the state, the court of appeals has moved the line for everybody. By stating that the high water line means the line of vegetation, the court has, in effect, replaced the high water line rule with an entirely different rule, exactly the sort of midstream change of rules that it set out to avoid.

From the foregoing, it appears to be the undeniable effect of the court of appeals' decision in *Dolphin Lane* to place the boundary seaward of the actual line of high water. Although the court's limited purpose was to define the seaward extent of the upland fee, there is nothing in the opinion which suggests that the court has not, at the same time, defined the landward extent of the *jus publicum* as well. Information as to the *actual* high water line (hydrographic data) was said to have "no legal significance."[159] In making its line-of-vegetation rule a rule of property, the court has turned a question of intent *de facto* into a question of policy. The policy which the court seeks to promote (the protection of long-standing expectations) would seem to apply equally whether the question was one of ownership per se (as in *Dolphin Lane*) or the question of what lands are burdened by the public's right to use. Thus, if the line-of-vegetation test is appropriate to control the seaward limit of lands extending to the sea it should, on the same policy basis, control the landward extent of the *jus publicum* as well.[160]

But either way, whether or not the court has definitively settled the landward extent of the *jus publicum*, the decision seems to have impacts which transcend the narrow controversy before it and which appear to be, on balance, not good.

In the first place, by moving the boundary seaward (based on past practices), the court has given legal effect to a fairly massive expropriation of the public's property in favor of upland owners.[161] Substi-

159. 37 N.Y.2d at 295, 333 N.E.2d at 359, 372 N.Y.S.2d at 53.

160. However, not all of the *jus publicum* can be lost in lands upward of the line of vegetation. The federal government's paramount power to regulate commerce and navigation, *see* note 40 *supra*, cannot be diminished by the court of appeals. And apparently federal law controls the definitions and limitations (spatial and otherwise) on this federal power. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935). It has already been held that tidal marshlands in New York are "navigable" within the United States Constitution and federal courts may enjoin (under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1970)), the filling of such areas. United States v. Baker, 2 Envir. Rptr. Cas. 1849 (S.D.N.Y. 1971).

161. The court did not specifically decide whether its line-of-vegetation test would also apply in those cases where that line was actually *inland* from the actual line of high water. If

tuting a line-of-vegetation test for the line of high water as the standard of demarcation has changed the title to the *jus privatum* in the lands between the two lines. Since public bodies hold even the *jus privatum* in such lands "in trust for the public good,"[162] whereas the title to uplands (as newly defined) is not so held, this aspect of the decision alone can be considered to be public-adverse.[163] But the legal consequences of the expropriation do not stop there.

For one thing, the decision may impair or jeopardize the tidal wetlands preservation and management program which it is the recently confirmed policy of the state to promote. Under the Tidal Wetlands Act, enacted in 1973,[164] lands subject to protection are defined as "those areas which border on or lie beneath tidal waters . . . ."[165] Prior to the court of appeals' holding in *Dolphin Lane*, the lands sought to be protected were, in large part, owned either by local municipalities or by the state itself, in trust for the public good. Regulation of the uses of these lands, even those owned by municipalities,[166] would have been unobjectionable, notwithstand-

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the "high water line" formulations were defined by reference to the line of vegetation in those cases as well, the net amount of land removed from the public domain would be less, with losses in some shore areas being offset by gains in others. There might even be a net *increase* in the public domain.

However, for at least two reasons, it appears unlikely that the line-of-vegetation test will control in situations where the vegetation line is inland from the "real" high water line. First, the court predicated its holding on long-standing surveying practice and the expectations created thereby. Unless, as is doubtful, surveyors have long fixed boundaries on bare beaches by reference to the line-of-vegetation, the theory of *Dolphin Lane* would seem inapplicable. Secondly, and perhaps more importantly, the expropriation of private owners, via a redefinition of the term "high water line" would probably be unconstitutional. *See* Hughes v. Washington, 389 U.S. 290, 294-98 (1967) (Stewart, J., concurring), *approved in* Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 331 (1973). The public, as such, having no comparable constitutional protection as against the state, *see* note 34 *supra*, cannot complain of expropriation through seaward movements of the boundary on this basis; but private persons *can* complain of landward movements. Consequently, the effect of *Dolphin Lane* seems to be to define the boundary as the high water line or the long-recognized line of vegetation, whichever is the more seaward. The result is a net expropriation of public lands.

162. Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 21, 136 N.E. 224, 225 (1921); *see* note 155 *supra*.

163. The adverse effect would, of course, be exacerbated if, as is apparently the case, the line-of-vegetation test also defines the upland for the purposes of *jus publicum* as well. *See* text accompanying note 159 *supra*.

164. N.Y. Sess. Laws ch. 790 (McKinney 1973)(codified at N.Y. ENVIRONMENTAL CONSERVATION LAW, art. 25 (McKinney Supp. 1974)).

165. N.Y. ENVIRONMENTAL CONSERVATION LAW § 25-0103(1)(a) (McKinney Supp. 1974).

166. The rights and powers of municipalities being subject to the state's sovereign powers,

ing that the regulation mandated outright preservation, prohibiting all use. However, with *Dolphin Lane*, management programs which heretofore may have been regulation of the public domain now become the regulation of private property. Hence, if heavy regulation—*e.g.*, prohibition of all uses—is deemed desirable, the result may be a flood of constitutional challenges, claiming compensation for takings in eminent domain. The flood may have indeed already begun.[167]

The prospects for the success of such constitutional challenges have been treated amply and ably elsewhere,[168] but the problem is essentially this:[169]

> While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . this is a question of degree . . . .

And this "question of degree" may be a serious one. Owing to the fragile ecological nature of wetland areas, the appropriate regulation may well be outright preservation, prohibiting any use at all of much of the wetlands in the state. Yet, it is hard to imagine a degree of regulation that goes further than a complete prohibition of all use.

Admittedly, the distinction between police power regulation and takings by eminent domain is a hazy one at best, and it cannot even be said that there are uniformly accepted lip-service standards for making the distinction.[170] However, courts in other jurisdictions have overturned regulations similar in object with the New York Tidal Wetlands Act where the restrictions were "so burdensome . . . that they are the equivalent of an outright taking."[171] And in

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see note 34 *supra*, municipalities would have much greater difficulty making a constitutional case of "taking by regulation" than would private persons. People *ex rel.* Palmer v. Travis, 223 N.Y. 150, 165-66, 119 N.E. 437, 442-43 (1918). Under the original Tidal Wetlands Act, N.Y. Sess. Laws ch. 790 (McKinney 1973) lands acquired by eminent domain are exempt from regulation. However, this exemption was recently repealed. N.Y. Sess. Laws ch. 136 (McKinney 1975).

167. Already there has been a challenge to the constitutionality of the Tidal Wetlands Act on the grounds that it operates to take property for public use without just compensation. New York Housing Auth. v. Commissioner of Environmental Conservation, ___ Misc. 2d ___, 372 N.Y.S.2d 146 (Sup. Ct. 1975). The court was able to side-step the constitutional issue this time by declaring the challenge to be "premature." *Id.* at ___, 372 N.Y.S.2d at 150. But this floodgate will not hold forever.

168. Comment, *supra* note 1, at 459-74.

169. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

170. Comment, *supra* note 1 at 459-74.

171. State v. Johnson, 265 A.2d 711, 715 (Me. 1970); *accord*, Bartlett v. Zoning Comm'n, 161 Conn. 24, 31, 282 A.2d 907, 910-11 (1971) ("the plaintiff's use of his property is non-

New York, a regulation may constitute a taking that requires compensation to the landowner if "the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted."[172]

Should appropriate management of the wetlands mean their preservation from encroachments by all destructive uses, the power of the state to effect such management, without paying just compensation, has now become more questionable. As previously noted, it has already been questioned.[173] To be sure, the court of appeals still has not ruled that extensive or prohibitory regulation under the Tidal Wetlands Act would exceed the police power; thus, it can still be hoped at least that the court will not require the public to buy back the lands which were lost in *Dolphin Lane*. But no one can be sure.

Another consequence of *Dolphin Lane* may be to arrest development, even by legislation, of any systemized approach to delineating shore boundaries at the high water line. Such systemized approaches, accompanied by programs of shore surveys and mapping, have been adopted or considered for adoption in other states.[174] With such legislation, surveys, and mapping, it is possible to give scientific definiteness to the shore boundaries within a legislated high water line standard. However, in New York, such a legislature-mandated systemized approach may be now impossible because the court of appeals has not only rejected the relevance of scientific data in locating the line of high water, it also adopted a substitute test, as a rule of property, to serve as the *exclusive* indicator of the "high water line" location. By thus concretizing the meaning of "high

existent unless he happens to own a boat"); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). *But see* Marks v. Whiting, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Just v. Mannette Co., 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

172. Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 226, 15 N.E.2d 587, 589 (1938); *see* Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 295 N.E.2d 788, 343 N.Y.2d 118 (1973).

173. *See* note 167 *supra*.

174. Florida Coastal Mapping Act of 1974, ch. 74-56, [1974] Fla. Laws 34. A proposed Model Coastal Mapping Act, on which the Florida statute is based, is reproduced and described by its draftsmen in Maloney & Ausness, *supra* note 1, at 241-73. This model act was produced with the assistance of personnel of the National Oceanic and Atmospheric Administration and the National Ocean Survey (formerly the Coast & Geodetic Survey), which has been mapping the United States coastline since 1835. Under the Model Act, accurate coastal surveys are to be produced (section 6) which will constitute evidence (but not exclusive evidence) in court (section 10), and the mean high water mark is to be determined by scientific methods approved by an agency formed thereunder (section 15).

water line," tying it by law to a visible and definitely locatable reference, the line-of-vegetation test may forever preclude other boundary standards of lesser generosity to upland owners. The test, as a rule of property, creates vested rights.[175]

So long as the operative term "high water line" remained an abstract linguistic formulation, it remained susceptible, within limits, to a certain flexibility of interpretation—able to meet the exigencies of particular cases. Various types of evidence could be introduced, subject only to the rule of relevancy, to show where the "real" line was located—all without violence to the concept that the actual line of high water, if ascertained, would control. But even more importantly, as an abstract formulation, the term did not preclude the introduction, by the legislature or the courts, of ever more informative techniques to determine the intended boundary location.

The court of appeals felt that constant replacement of old scientific techniques with even more refined ones would mean constant changes in the on-the-site line,[176] but in fact it would not. The line would stay the same (subject to erosion, accretion and the like), though the surveyor's approximation of the line might vary somewhat. This discrepancy between the "real" line and the surveyor's line might be critical in the case of a $1000 per square foot downtown urban lot; but at the shore it is tolerable, given the types of potential uses to which the shore may be put and, more to the point, given the "approximate" nature of high water lines in any event.[177]

Thus, for a scant benefit in terms of "predictability,"[178] the court of appeals has frozen—perhaps forever—the definition in this state

175. *See* Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 311 (1973), *citing* Hughes v. Washington, 389 U.S. 290, 294-98 (1967) (Stewart, J., concurring).

176. *See* text accompanying notes 82-83 *supra*.

177. It may be argued that it was never a good idea to adopt an uncertain standard like the "high water line" as the basis of a rule of construction. This may be so, and a more certain standard, *e.g.*, the line of vegetation, may have always made more sense. However, if one is to accept the court of appeals' thesis in *Dolphin Lane*, now hardly seems to be a good time—after 300 years of titles granted in reliance on the "high water line" rule—to make a change.

178. In any event, the "predictability" achieved is somewhat lessened by the fact that, at least for federal purposes (navigation and commerce) the "real" high water line, based on the tides, will continue to apply. *See* note 160 *supra*. Thus, in New York there are now two standards for fixing the boundary of the bay, the state line-of-vegetation test, applicable for some purposes, and the federal high water test, applicable for others.

of "high water line," placing it by law at the line of vegetation. Although the court said that conforming shore boundaries to hydrographic data is an innovation which "should be left to the Legislature,"[179] the court's new rule of property may have left the legislature constitutionally powerless to act.

179. 37 N.Y.2d at 296, 333 N.E.2d at 360, 372 N.Y.S.2d at 54.