

MARCH 22, 1951.

THE HONORABLE SANFORD BATES, *Commissioner*,
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 14.

DEAR COMMISSIONER:

You desire to be advised regarding a situation at the State Prison which concerns a prisoner under sentence of death. It seems that he was convicted in a county court of murder in the first degree, without recommendation, and the death sentence was imposed. Thereafter, as a result of an appeal filed by him, the Supreme Court of New Jersey affirmed the conviction. The prisoner's application to the United States Supreme Court for certiorari was denied.

Thereupon the prisoner sought issuance of a writ of habeas corpus in a Federal District Court and the writ was denied. The prisoner now appeals to the United States Court of Appeals for the Third Circuit and has served upon the Warden of the State Prison a notice of his said appeal.

You desire to be advised whether the service by the prisoner, or his counsel, upon the Warden of the State Prison, of such notice of appeal to the United States Court of Appeals, shall operate, without more, as a stay of execution.

It is our opinion and we advise you that such notice of appeal, as described herein, when served upon the Warden of the State Prison, will not, per se, operate as a stay of execution, for the reasons set forth below.

With respect to this general situation, Title 28, section 2251, U. S. C. A., controls, and an examination thereof reveals the following provisions:

"A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending." (June 25, 1948, c. 646, 62 Stat. 966.)

It will be observed from the foregoing provision of the federal statute that the appellant in habeas corpus proceedings in the federal jurisdiction must make application for a stay of any proceedings against such person detained in any State court or detained by or under the authority of any State. It will further appear that if no such stay is granted, any such proceedings against any such prisoner so detained shall be as valid as if no habeas corpus proceeding or appeal were pending.

Accordingly, we advise you that in the situation you describe, the mere filing of a notice of appeal to the United States Court of Appeals by the prisoner involved is not sufficient to stay the execution, which we understand in the instant matter, with respect to this prisoner, has been scheduled by order of the court for the week of April 15th.

In view of the actual pendency of execution proceedings and because prisoner's counsel, when submitting a notice of appeal, observed that in his opinion it would

act as a stay, it would seem advisable for you to notify counsel for the prisoner that a notice of appeal filed by him is not considered as a stay of execution.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

JULY 2, 1951.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Department of Conservation,
520 East State Street,
Trenton, N. J.

FORMAL OPINION—1951. No. 15.

DEAR COMMISSIONER ERDMAN:

I have your letter of June 8th on the question presented as to whether or not the Riverton Yacht Club has a right to fill in, build upon or make any erection of or reclaim any of the lands under the tidewaters of this State without the grant or permission of the Department of Conservation and Economic Development.

It is my opinion that the Riverton Yacht Club has no right to fill in, build upon or make any erection on or reclaim any land under the tidewaters of this State in front of its yacht club without the grant or permission of the Department of Conservation and Economic Development.

The Legislature of New Jersey passed an act (P. L. 1852, p. 208) to incorporate the Riverton Improvement Company, under which act permission was granted to lay out streets and erect thereon the Town of Riverton; to construct wharves on the river for landing steamboats and other vessels. Under this act, Daniel L. Miller retained a lot on which to erect a dwelling. In section 6 the act provided that the company was authorized to improve that portion of the land to be held by erecting buildings, laying out lots and streets and building a wharf for commercial and shipping purposes, and not to injure the navigation of said river.

The Riverton Improvement Company sold the property to R. Biddle in 1868, and Biddle conveyed to Riverton Iron Pier Company in 1886. That company sold to Riverton Yacht Club in 1918.

Under 12:3-4 (P. L. 1891, p. 216) no person or corporation shall fill in, build upon or make any erection on or reclaim any of the lands under the tidewaters of this State without the grant or permission of the Department of Conservation and Economic Development, and any person or corporation so offending shall be guilty of a purpresture. By the reorganization Act of 1948, p. 1783 the powers and duties formerly exercised by the Board of Commerce and Navigation were transferred to the Department of Conservation and Economic Development.

A legislative grant is to be strictly construed and its general terms should not be extended to include specific rights not clearly included within its language. *Morris Canal vs. Central R. R.* 16 N. J. Eq. 419; *Townsend vs. Brown*, 24 N. J. L. 80; *New Jersey Zink vs. Morris Canal*, 44 N. J. Eq. 398; *Katzenbach vs. Armstrong Cork Co.*, 99 N. J. Eq. 32.