JUNE 17, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 26.

DEAR MR. MCLEAN:

You have asked whether the following facts are sufficient objection to preclude issuance of a grant to Robert Wilson for lands under water in front of his property on Luppatatong Creek, Keyport, New Jersey.

Robert Wilson has applied to the Council of Planning and Development as provided by R. S. 12:3—10 for a riparian grant to lands under the tide water of Luppatatong Creek, Keyport, New Jersey, in front of upland to which he claims title by appropriate deeds.

Arthur C. Schultz objects to the making of the grant on the ground that he owns all of the lands under the waters of Luppatatong Creek, and particularly in front of the Wilson property, by reason of a chain of title to said tidal lands which begins with an Indian deed to John Bowne, dated June 22, 1686, and recorded in the office of the Clerk of Monmouth County. The grantors in the Indian deed are described as the chief Sachems and proprietors. His contention is that the State has no title to the lands below high water mark of Luppatatong Creek.

As proof of his title, Schultz has furnished a search, copies of two Indian deeds and recent deeds purporting to convey to him not only the lands for which the grant is sought but all of the lands under the waters of Luppatatong Creek.

The early history of ownership of American lands, both above and below high water mark, is fairly familiar and is described in many early and later cases, among them being *Arnold v. Mundy,* 6 N. J. L. 1 (Sup. Ct. 1821); *Gough v. Bell,* 21 N. J. L. 156 (Sup. Ct. 1847); *Martin v. Waddell's Lessee,* 16 Peters 367, 41 U. S. 367, (1842.)

By the law of nations and of England, a conqueror has a right to impose such laws on the conquered as he would think proper. Such was the law of England. Such became the law in the colonies.

In 1664 King Charles II of England, owner of what is now New Jersey, by right of discovery and conquest from the Dutch, granted those lands by letters patent to his brother, the Duke of York. The Duke, in turn, granted the land to Lord Berkeley and Sir George Carteret, who divided the territory into two divisions called East Jersey and West Jersey. East Jersey they conveyed to a group of men called the proprietors of East Jersey, and West Jersey they conveyed to one Edward Billings, also called a proprietor.

In the cases cited above, the majority of the judges took the position that the proprietors by these conveyances had control of the tidewater areas since they held both governmental and proprietary rights, but that the surrender of governmental rights to Queen Anne, April 17, 1702, carried with it the surrender of the control and ownership of the tidewater areas since the same was an incident of sovereignty.

With the American Revolution, all of these royal rights became vested in the people of New Jersey as a sovereign of the country. But the sovereign power itself could not make a direct and absolute grant of the waters of the state, divesting all of the citizens of their common right. It could lease, or grant, or dispose of tide waters, but only in such a way as not to interfere with or impair the public right of navigation or the power of the general government to regulate commerce, navigation and the enjoyment of the waters by or of the people.

From the foregoing, it is established that title to lands under tidewaters is in the state; that prior to 1702, any grant to tidal lands made by the proprietors would be made in a governmental sense, and so as not to deprive the colonists of their right to use these waters in common with each other; that from 1702 such a grant could be made only by the sovereign, the extent of the grant depending on the law of the land and the common rights of the people; and that title to tidewaters remained in the sovereign unless granted in accordance with the law. Schultz does not claim title based on any grant made by the sovereign but depends solely on his Indian deeds for his title.

An examination of the cases involving the question of property rights of aboriginal Indians to lands, and the effect of conveyances made by them, leads to one conclusion only, and that is that the only rights of Indians in lands, which were and are respected, are tribal rights of possession in the lands occupied by a tribe. In 42 C. J. S., p. 688, sec. 28, the rights of the aboriginal Indians in lands is summarized.

> "On the discovery of the American continent, the principle was asserted or acknowledged by all European nations that discovery followed by actual possession gave title to the government by whose subjects or by whose authority it was made, not only against other European governments, but against the natives themselves. While the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate dominion and title to be in themselves.
>
> In the United States the rights of the European discoverers, having been succeeded to by the states or by the general government, the Indian title to land is a right of possession and occupancy, the fee being in the general government, or in the state where the land is situated, if it is one of the thirteen original states.
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> The right of occupancy and possession is lost by abandonment, and possession, when abandoned by the Indians, attaches itself to the fee without further grant.

So it is concluded that at the time of the execution of the Indian deeds in 1686 that the Indian tribes had only a possessory right to lands they occupied, and that the legal title to these lands was in the sovereign, and that when these lands were abandoned by the Indians the right of possession merged into the legal title leaving nothing outstanding. In passing, it will be stated that no one can hold adversely to the people.

> "Moreover, there can be no title by prescription against the public."
> *Quinlan v. Borough of Fairhaven,* 102 N. J. L. 443 (E & A) 1926.

You are, therefore, advised that you may disregard the objection made by Schultz to the application of Robert Wilson for a grant, and proceed with the merits of that application. We suggest that the Planning and Development Council note upon its minutes that the Attorney General has advised that the objection by Arthur C. Schultz be disregarded.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: SIDNEY KAPLAN,
Deputy Attorney General.