CONGRESSIONAL ACT DRAFTED TO SECURE THE DEDICATION OF HARBOR RIGHTS TO PUBLIC

J. B. Zeigler Interests Senator Lane in Measure Which Defines Public Highways and Provides for Their Control on Behalf of the People.

The dedication of harbor rights to the people is the fundamental purpose of an act which J. B. Ziegler would have Senator Lane introduce in congress. The act declares that all navigable waters shall be deemed public highways and subject to federal control, and prescribes what shall be construed as the boundaries of such navigable waters and the rights of commerce and navigation pertinent to them. The text of the act follows:

That all navigable waters and estuaries thereof which are or may become useful for navigation and terminals shall be deemed public highways and subject to the control of congress as vested in the war department, and that the boundary of said waters shall be the high water mark, including all the natural bed of the stream (and exclusive of overflows over the natural banks) for purposes of commerce and navigation. Rights for commerce and navigation shall include all improvements for interlocking water transportation lines with land lines, such as wharves, rail tracks and transfer machinery. Any fills above ordinary high water lines artificially made, or natural fills caused by artificial fills or obstructions or structures, or fills made by avulsion of floods shall not affect the boundaries of public waters which in port terminals and as such other as may be designated by congress shall be defined by fixing meander lines."

Senator Lane Favorable to Act.

In a letter to Mr. Ziegler from Washington, Senator Lane says:

"The question of the harbor rights is very important. You need have no fear but that I will do all I can to restore to the people the property there (in Portland) or any other property or rights to which they are justly entitled. I will take a copy of the bill to the engineer's office here and see what I can do toward getting them to stand by me after it is introduced."

In correspondence with the war department, Mr. Zieglar has gone over the history of Portland's harbor and subjoined is a letter from Secretary Garrison to Mr. Ziegler and the latter's reply to the head of the war department.

Secretary Garrison's Letter.

War Department, Washington, D. C., Oct. 21, 1913.—The receipt is acknowledged of the following communications from you concerning the occupation of the foreshore between the harbor lines and ordinary high water line, relocation of the harbor lines and related subjects in the harbor of Portland, Oregon:

Letter dated August 3, 1913, addressed to General Leonard Wood.

Telegram October 8, 1913, addressed to the Secretary of War.

Letter October 9, 1913, addressed to the Secretary of War.

Letter October 10, 1913, addressed to the Secretary of War.

It appears that the first United States harbor lines at Portland were established in 1892, on the recommendation of a board of engineer officers, after thorough consideration of the whole subject. You refer to the report of that board, and may know that special attention was given to the question of widening at the narrow places, and the board reached the conclusion that the removal of structures to accomplish such widening "does not now seem to be warranted by the necessities of the case." It was also stated with reference to the narrow section at the steel bridge—"by contracting the width of the river * * * scouring has been induced to such an extent that the high water cross section has actually been increased 5000 square feet ,and the average low water depth increased 17½ feet."

Another board of engineers reported upon a revision of the harbor lines throughout the harbor in 1900, having made a careful examination of the matter, including studies of the effect of the narrow places upon navigation interests. This board stated, "While the construction of some of the existing wharves and bridges to their present extent might have been prevented to advantage beforehand, yet it is the opinion of the present board that but little, if any, noticeable damage has been done, and their continued existence for so many years has apparently developed no sufficient reason for requiring removal of any part of them at this day." The changes recommended by the board in the narrow portion of the harbor consisted of such small advances of the lines as would bring them to the outer end of the wharves which had been constructed long before, and some advance at Burnside street bridge.

The revised lines recommended by the board, and adopted in 1900, are the existing lines, except at two places below the narrowest section, where slight modifications have since been made.

District Officer's Opinion Quoted.

Regarding your proposition that the harbor lines be now moved back to give greater harbor area, the district officer reported under date of October 6, 1913, "In my opinion, such action is not now necessary for the protection and preservation of the harbor, and if the lines were modified so as to shift them shoreward, there is a possibility that rigarian rigats would be infringed upon, and that the United States would become involved in suits for damages. The question as to title to foreshore between wharf line and ordinary high water line is one in which the federal government has no interest. It is a local question, to be determined by the state courts."

Your information regarding the change of harbor line at Pittsburg, Pa., involved in the case of The Philadelphia Co. vs. Stimson, Secretary of War, is not entirely correct. The harbor line was not moved back to the "ordinary high water line," but to a position about half way between its original location and the high bank line, and in its new position the harbor line is still some distance channelward of the shore line at a comparatively low stage. No wharves nor other structures had been built out to the line as originally located. At Portland the principal physical contractions of the waterway had been accomplished before the first United States harbor lines were established.

The law under which harbor lines are established or modified requires that it be made manifest to the Secretary of War that proposed lines are essential to the preservation and protection of the harbor. A liberal interpretation is given to this requirement, and the department desires to aid the development of harbor facilities in all feasible and legally practicable ways; but, in view of the reports of the two boards and of the district officer, referred to above, I am obliged to state that it is not clear at this time that the preservation and protection of Portland harbor requires any measures looking toward widening the narrow sections. This is, moreover, a separate matter from the very important question of title to the foreshore between the harbor line and ordinary high water. I concur in the opinion that the latter is a matter to be determined in accordance with state laws and the decisions of the courts.

Likewise the bond issues and expenditures of local funds, to which you refer in the letters of October 9 and 10, 1913, are not understood to be matters coming under the jurisdiction of the War Department.

Very respectfully,
LINDLEY M. GARRISON,
Secretary of War.

Ziegler's Reply to Garrison.

Portland, Or., Nov. 9, 1913.

Hon. Lindley M. Garrison,
Secretary of War, Washington, D. C.

Sir—Your letter of October 21, 1913, answering my request for a federal investigation of the disposition, control and utilization of the harbor area at Portland for commerce and navigation, duly received.

You quote from the report of the board of engineers locating the original federal harbor lines (so-called) in 1892, the conclusion that the removal of structures occupying narrow places in the river "does not now seem to be warranted by the necessities of the case."

By referring to this report, I find the paragraph dealing with this feature to be as follows:

"The board, while locating these lines, which in its judgment seem for the best interest of the commerce of Portland, has kept in mind the physical characteristics of the river and endeavored to avoid as much as possible any interference with structures at present existing along its banks. It is probable that different locations might have been selected for the lines in the narrower portions of the river, were it not that the banks in these localities are occupied by structures used for commercial purposes and built at considerable expense to their owners, the removal of which at any time in the future does not now seem to be warranted by the necessities of the case. It is only where wharves extend into the stream abnormally beyond the general line of the other wharves in the vicinity, and where there seems to be material encroachment upon a limited waterway that the board has thought it necessary to place the harbor lines so as to disturb existing property. In these cases it does not appear that there is any immediate necessity for the removal of the projecting wharves. It is thought, however, that, in the interests of the general commerce of the port, they should be set back to the proposed lines when it becomes necessary to repair or renew them. It was found that, with very few exceptions, the line could be located well outside of existing wharves, and lines established by city ordinance. The contractions resulting from building structures out to these lines, it is believed, will be beneficial to the harbor."

You will observe that the language you quote refers to "narrower portions of the river," and not to certain other "abnormally" encroached upon portions upon which the recommendation was made, that when repairs became necessary the wharf lines should be made to conform to the lines then fixed by the board.

If this had been done, the condition I complain of at the old steel bridge would not now exist. Instead, however, at the instance of private wharfowners, another board in 1900 relocated the line farther out in the stream, conforming the harbor to the old primitive wharves, instead of the wharves to the harbor as recommended by the board of 1892.

Of course, it is unnecessary to comment upon the policy thus established of giving preference to such private properties over great public harbors. However, a cursory examination of the map showing the river choked half in two, as set forth in the Hanbury report, in the central part of the city by private encroachments, and the fact that a drain is put upon the public resources to buy back the area it is proposed to thus abandon, are quite conclusive. No perfunctory phrases of bureaucratic clerks can justify congress in divesting itself of the responsibility imposed upon it in the federal constitution of protecting navigable waters to the public for commerce and navigation.

I understand that the authority of congress has been invested in the War Department for administration, and that various acts have been passed protecting this very public interest, and a board of engineers attached to the War Department to advise and keep congress informed upon the subject. A general letter of instructions has been sent out by this board, in obedience to these acts, to the local engineer's officers at the various ports. But these gentlemen have been strangely apathetic. The public interest and laws have been subordinated to the policy of "laissez faire" and "draw my salary."

You state: "At Portland the principal physical contractions of the waterway had been accomplished before the first United States harbor lines were established."

It is true that much encroachment had been accomplished, but it is also true that at that time the harbor channel was defined by lines established by city ordinances, and that, with a few exceptions, these were landward of the present wharf lines (see the Hanbury report), and that the area of the harbor as then limited was greater than it is now. The city lines are marked on the old maps "Exterior Wharf Lines," and, according to the general understanding at that time, the area between that and the ordinary high water line was public property. The courts had so adjudicated. The legislature had in 1862 passed a wharf act extending to the riparian owner the "privilege" under state regulation, of erecting wharves to deep water. On the Willamette, the Oregon courts have uniformly upheld the public title up to ordinary high water line, until the present case, in which the public itself, through the dock commission, becomes, for the first time, the applicant for its use. Possibly that is the reason that the former policy has been reversed, and all former decisions revoked—that the courts are willing to vest the state's title in the foreshore in railroad corporations and other strong private interests, as against the donation land claimand and his assigns, but are not willing to so favor the public.

I prepared a map superimposing the present harbor lines upon the old lines existing prior to 1892, and showing the loss of harbor area by abandoning the natural lines, and published it in The Oregon Daily Journal, but it is not available now. I will send it to you later.

Flood Danger Cited.

There is another powerful reason why the natural capacity of the stream should be protected, and that is the dangers so graphically illustrated by the not unrecent Paris and Ohio floods. The Hanbury report states that "the normal width of the river where it flows through Portland is about 1600 feet. At its narrowest point (the old steel bridge), in its original condition, the width was 800 feet, and is now but 600. The natural width has been very much encroached upon by the construction of wharves and bridges."

By way of apology for interfering to such slight extent with these encroachment, the report goes on to state "that the soft character of the river's bottom has permitted erosion until the cross section area at this point is actually greater than it was before." This, however, only proves that the abnormal constriction only operated to raise a head water in the river above this point until a compensating area had been produced by an abnormal increase in depth, due to the wash. I append herewith a report I made on this condition and published in The Oregon Journal April 8, 1913. You will observe by the table given therein that the "slope" of the river caused by the contraction at this point ranges from 4.2 feet at a river state of 12.4 feet above mean low water to 3 feet at 14.3 feet, 6.1 feet at 17.8 feet, while at the highest flood 28 feet no records are available. A 15 foot rise is called the flood stage. So we have a slope of 3 feet in two miles for less than a flood stage.

This constitutes a serious injury to navigation also, so much so that, added to that of the draw bridges above the point, it is used as an argument for abandonment of the part of the harbor above.

Such action would operate to create a differential in favor of the railroads which have terminals in the heart of the shipping district above this point, amounting to the cost of transferring goods from water terminals in the Swan island district, down river, over that of transferring them from the railroad terminals in the heart of the city.

The slope of the river, as shown by these gauge readings, is absolute proof that the cycle scooped out at the constricted point, despite the increase of cross section area, furnished only partial relief. The report states that the maximum depth produced by erosion was 95 feet.

The question arises: Which cross section represents the most useful harbor measurements, 600 foot width by 80 foot depth, or 800 foot width by 60 foot depth, or 1200 foot width by 40 foot depth?

Conclusive proof exists that the harbor area, navigation, and flood capacity have all been injured, as well as the public control of strategic public properties by the policy of the federal government permitting administrative officers, by the fixing of an arbitrary line, which does not exist in physical fact, to shift upon half-baked local authorities a responsibility so essential to the commerce of the nation.

You say that my statement of the case of The Phila. Co. vs. Stimson is not entirely correct. I beg leave to quote from the U. S. Supreme Court decision, vol. 223, page 615, as written by Justice Hughes:

"In 1907, the Secretary of War, claiming authority under paragraph 11 of the Act of Congress, March 3, 1899, against the complainant's protest changed the harbor line. The report of the U. S. engineer at Pittsburg stated that the conditions of high and low water had not changed since 1895, but as along a part of the shore of the island the harbor line of 1895 ran several hundred feet outside high water mark as it then existed, it seemed advisable to change it so as to coincide with the actual high water mark. A copy of the report with the order of the Secretary of War, dated February 23, 1907, was annexed to the bill and made a part of it. It is stated that the location of the proposed harbor line was within the bed of the stream as it existed as a physical fact."

It would appear from the above that the location of the harbor line at the actual ordinary high water mark by the Secretary of War was the cause of the suit. The court's decree upheld the Secretary of War, and I am unable to account for your statement of the resulting location, unless it be that the War Department refused to profit by the decision, as in the Portland case of Portland vs. Montgomery, wherein this city waived its right to locate a wharf line landward from the federal line after it had won it in the courts.

Regarding the opinion of the district officer, with which you concur, "that a change in harbor lines is not now necessary for the protection of the harbor, and might involve the United States in litigation with riparian owners," it would appear from the result of the Pittsburg case that there is nothing to fear from that quarter, and that the legal obligations of the government to the people to protect the public rights of commerce and navigation are of at least as much force as the riparian claims of upland owners.

That it is now proposed to replace the area considered lost by the purchase of Swan Island and the dredging it out at the cost of many millions, you say is something in which the federal government has no interest, I can hardly realize that, since the public properties and funds involved are for public commerce. The federal and local jurisdiction and expenditures are concurrent and the tremendous losses to both come out of the people for whom the trust is imposed upon both.

Especially does the federal trust become important when the local management becomes criminal in its character and the local courts refuse relief. That such is the case, that it has become a criminal conspiracy to convert $6,000,000 worth of public property into private possession and force the public to buy it back again before the port can develop there is little doubt. This conspiracy involves officials exercising the public trust in these properties and others that have been engaged in it, have a criminal record. But this I will make the subject of a future communication.

I think the matter of sufficient importance to merit an exhaustive investigation. The report made to you so far was, I take it, made by an officer I have charged with being partly responsible for the conditions complained of. No one interested in correcting these abuses has been called upon. The dock commission was not called upon for a report, nor for information. Neither were the city authorities, as far as I am aware.

The greater part of the foreshore in Portland harbor,including the sites for which the dock commission sued, are as yet entirely unimproved, just as was the property involved in the Pittsburg case. Very little of it is adequately nor tolerably improved.

Very respectfully your obedient servant,
J. B. ZIEGLER.

JUDGE HARRIS DENIES PETITION OF THE "WETS"

Eugene, Or., Nov. 15.—Judge L. T. Harris of circuit court this morning denied temporary injunction in the case of T. C. Luckey vs. County Commissioners seeking to enjoin defendants from declaring that prohibition exists in Springfield after January 1, and the commissioners duly made order. Judge Harris in giving decision said he was not expressing any opinion as to the merits of the case which will be tried out at final hearing, date of which is not set, in reference to the injunction.

OCEAN BEACHES ARE PUBLIC PROPERTY IS THE OPINION OF TRIBUNAL OF NEW YORK

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

The beaches belong to the public.

The people hold the fee title to tidal lands.

The foreshore is to be considered for practical purposes as a public highway.

This is the essence of the highly important opinion handed down recently by Supreme Court Justice Benedict, of New York, and it is of especial interest in Oregon at this time because of the fact that the same views of the subject is held by the officials of this state with reference to the foreshore from the mouth of the Columbia to the California line.

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

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

Grants Appear Absolute.

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

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

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

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

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

Contentions to be Made.

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

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

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

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

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

Views of Authorities.

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

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

"I can recall offhand," he said the other day, "no case in which the court of appeals has decided squarely on the right of the pedestrian on the beach—on the right of the bather, if you will. The public right to the beach has been recognized, but as the law has stood and low water mark constitutes a sort of natural public highway, and although it may not be subject to all the incidents of a regularly established public highway, it is subject to the right of the public to travel over it by all means used on the public highway of the state.

"I also think that the Barnes case is authority for the proposition that the people hold the fee title to such tidal lands in their sovereign capacity in trust for the benefit of the public, or, in other words, that this right of public passage over tidal lands is of the same nature as the jus publicum of the ancient English common law, a term which has, I admit, been usually applied to the right of navigation upon navigable waters, but which, under the Barnes case, seems also applicable to the right of passage over tidal lands."

Question of Long Standing.

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

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

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

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

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

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

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

"The 'Grand Remonstrance' of 1641 is almost as noteworthy a landmark in the history of English liberty and constitutional law as the great charter itself, yet how many judges who have learnedly considered these questions have had in mind the 26th article of that memorable document, charging the king 'with taking away of men's rights under color of the king's title to land between high and low water mark?'"

English Law Inapplicable.

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

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

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

"The Barnes case recognized a public right of passage over all lands over which the tide ebbs and flows. A public right of passage includes not only the right to pass on foot, but also, where it is possible, with vehicles, including vehicles drawn or propelled by horse or other motive power. In other words, as I interpret the Barnes case, it recognizes that a beach between high