

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DANE R. MARTIN,)
)
 Petitioner,)
)
 v.) C.A. No. 2314-MG
)
 JOHN M. and CARLA TURNER, et al.)
)
 Respondents.)

MASTER'S REPORT

Date Submitted: October 21, 2008
Draft Report: April 6, 2009
Oral Argument on Exceptions: July 22, 2009
Final Report: November 23, 2009

Dane R. Martin, pro se, Petitioner.

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Attorney for the Turners.

Gertrude Robinson, pro se, Third-Party Respondent.

Robert F. Phillips, Esquire, of the Department of Justice, Wilmington, Delaware,
Attorney for DNREC, Intervenor-Respondents.

GLASSCOCK, Master

This matter initially involved a suit filed by petitioner, Dane R. Martin (“Martin”) complaining that respondents, John M. and Carla Turner (“the Turners”) had constructed a pier from their property to the low-tide line of Deep Creek, a tributary of the Nanticoke River, which pier encroached on Martin’s property. Martin and the Turners own adjacent lots which are riparian to Deep Creek, a navigable waterway. The pier was built pursuant to a permit from the Delaware Department of Natural Resources and Environmental Control (“DNREC”). A DNREC employee orally directed the Turners to place the pier in its current location. Martin seeks injunctive relief, requesting that this Court order that the Turner pier be removed. The Turners have counterclaimed, seeking a declaratory judgment that they have a right to maintain the pier. One day of trial was held in this matter on February 29, 2008. At that time, it became apparent that, if Martin’s theory of the location of his lot’s boundary lines was correct, the Turner pier also encroached (very slightly) on the property of a neighbor, Gertrude Robinson (“Robinson”). I directed that Mrs. Robinson be added as a party, and that she be given an opportunity to appear and opine on the boundary issues relevant here. Meanwhile, DNREC obtained leave to intervene. DNREC moved for summary judgment and filed a brief¹ supporting its theory of how the boundary lines along Deep Creek should be drawn. This is my report on the outstanding issues in this matter.

¹While I do not share all of the conclusions of that brief, it represents a scholarly piece of research and was helpful in deciding the issues here.

Background

The Turners received a private subaqueous land lease permitting the construction of their pier in 1998, and the pier was constructed soon thereafter. In 2000, DNREC determined that the pier was constructed entirely in the privately-owned area between the high and low-tide lines, and therefore DNREC revoked the subaqueous land lease in favor of a simple pier permit. There is no evidence that Martin or Robinson objected to the construction of the pier as it was being built. Martin's concerns that his lands were encroached upon appear to date no earlier than the time of his own unsuccessful application for a pier permit, in 2005. This action was commenced in 2006.

The Properties

The Turner, Martin and Robinson properties are all bounded by sidelines that run south to north, running to, and thence along, Deep Creek. The Robinson property is the eastern-most, the Martin property is at the center, and the Turner property is the western-most of the three properties, and all have as a northern boundary Deep Creek. Deep Creek generally flows from east to west, it discharges (via the Nanticoke River) into Chesapeake Bay. However, in the particular area of the creek in question, just before reaching the Robinson property, the channel begins a turn to the north. *See* the figure attached at the end of this report.² As the figure makes clear, the course of Deep Creek is

²The figure is based on the January 9, 2008 survey by Miller and Lewis, Inc. of record in this case. It should not be considered to be to scale. The figure is oriented with north at the top

nearly due north as it sweeps by the Robinson property; it returns to a westerly flow only after it passes the Turner property.

The Boundary Issues

a) The foreshore.

The properties in question run to Deep Creek. Deep Creek is a navigable tidal stream. In most states, the region between the high and low-tide lines (the “foreshore”) of such waters is in public ownership. Delaware, however, follows a different rule: in Delaware the foreshore is capable of private ownership, subject to a public navigational trust over the area when it is covered by the tide. State Ex. Rel. Buckson v. Pennsylvania Railroad Co., Del. Super., 228 A.2d 587, 597 (1967); Harlan & Hollingsworth Co. v. Paschall, Del. Ch., 5 Del. Ch. Rpts. 435 (1882); Bickel v. Polk, Del. Super, 4 Harr. 325 (1851). This rule has been described as the ancient English rule. *See* 1 Farnham Waters and Water Rights 210 (1904). A deed “to the river” or “along the river” or following courses along a river bank is deemed riparian, and, consistent with the maxim that a deed must be construed to transfer all the grantor has, such a grant will be deemed to include the foreshore, unless it is specifically excluded. *See* Buckson, Del. Super. at 594.

of the page. The cross-hatched area represent mudflats between the Turner and Martin properties and the channel of Deep Creek. The dotted line represents a theoretical low-tide line as it may have existed at the time these lots were created. This line is intended for illustrative purposes only, and its location is not based on any evidence of record.

Therefore, a call in a deed “north to Deep Creek” denotes a property running to the low-tide line of Deep Creek, which forms the boundary of the riparian parcel.

DNREC points out that where (as here) the side boundaries of a lot are not perpendicular to a waterway, extending those lines from the high to low-water mark may result in a landowner being prevented (by his neighbor’s property line) from constructing a pier from his upland across the foreshore to the water’s edge in the shortest possible distance. Indeed, it was in order to encourage a shorter pier, with less impact on the environment, that DNREC instructed the Turners to place their pier in its current configuration which, as the figure demonstrates, runs across both the Martin and the Robinson side boundary lines, if those lines are extended without deviation from the high-tide line to the currently-existing low-tide line of Deep Creek.

It is DNREC’s position that, in a situation like the instant case, extending the side boundaries without deviation to the low-tide line will impede the owner’s access to the water, and therefore that this Court should use its equitable power to adjust the boundaries so as to give the lot owner the most convenient access to the waterway from his lot. DNREC points out that such an adjustment would ensure that access to the water is accomplished with the minimum of environmental impact (by permitting the minimum pier length necessary to carry access to the water). As the figure shows, if the boundary lines were continued without deviation to the low-tide line, a pier on the Turner property

giving the same water access as the existing pier would have to be much longer than the existing pier.

DNREC is quite correct that in some situations (including the instant one) extending the side boundaries of a lot down to the low-tide line may result in more difficulties in running a pier to the water's edge than would another lot configuration. Where a specific transfer of a particular portion of the foreshore is provided for by the grantor, however, equity may not disregard the boundaries so indicated. Where such side boundaries are called out specifically to the low tide line in the deed, therefore, the resulting lot configuration is simply a function of the property which the grantee owns. In other words, when the property was originally subdivided, if the grantor owned the foreshore, as with the rest of his property he was free to divide the foreshore and sell it in any manner he found fit. *See Buckson*, Del. Super. at 598 (holding foreshore capable of private ownership). "The policy of the common law is to assign everything capable of ownership a certain and determinate owner, and . . . to mark by certain indicia, not only the boundaries of such separate ownership, but the line of demarcation between rights which are held by the public in common, and private rights." 1 *Farnham* at 217. Boundaries to real property are matters of law, not equity. Applying the rules of equity to modify unambiguous property lines called out by deed is not only beyond the equitable power of the Court, but would likely cause far more mischief than it could cure.³

³DNREC notes case law from other jurisdictions holding that rights to accretions to riparian property, and other riparian rights such as the right to wharf out, may be apportioned

Therefore, to the extent the grantee owns the foreshore, and subdivides the property so as to transfer the foreshore, and specifically calls out a property line to the low-tide line, the run so called out must prevail as a matter of law, and is not subject to equitable adjustment. In such a case, the run would transfer the property to the low-tide line as it existed at the time of the creation of the lot.⁴

In this case, however, the foundational deeds by which these lots were first subdivided *do not* prescribe a specific boundary line to the low-tide line. The deeds use different devices to demonstrate the riparian nature of the property, but none specifically conveys by a run to the low-tide line. In this instance, then, the issue is not equitable modification of the deeds, it is instead a simple matter of deed interpretation: what must we assume that the grantor meant to convey? Martin suggests that the deeds be construed to provide that the sidelines extend, without deviation, to the low-tide line. I disagree.

The issue of how to run boundary lines across the foreshore where the deed does not explicitly so provide is of first impression in Delaware. Case law from the majority of

between adjacent landowners under principles of equity. *See, e.g.,* Manufacturers' Land and Improvement Co. v. Board of Commerce & Navigation, N. J. Supr., 121 A. 337 (1923)(applying rule that riparian grants appurtenant to shore-front property are delimited by lines running perpendicular to the shoreline, or otherwise "ratably," and not by extension of the property sidelines); *see also* DNREC's Brief supporting its Motion for Summary Judgment, and cases cited therein. But these are not ownership rights called out by deed. Instead, they are rights *incidental* to the property transferred, owing to its riparian character. It is because these rights are not subject to precise transfer by deed, that equity may guide their application.

⁴Any lands accreting to the property beyond the original low-tide line would be subject to division between adjacent landowners by equitable principles, as described in subsection (b), below.

jurisdictions in which the foreshore is publically owned are concerned with accretions, wharfing-out rights and submerged leases, and therefore are not persuasive with respect to the question here. Like Delaware, however, Pennsylvania follows the minority rule that privately-held riparian property includes the foreshore. In Wood v. Appal, Penna. Supr., 63 Pa. 210 (1869), the court considered the case of a riparian owner whose boundary lines were called out to marks along the bank of the Ohio River. Extensive flats existed between the bank and the low-water line of the river.⁵ Because the side boundaries were oblique rather than perpendicular to the stream, if the calls to the bank were extended over the flats, the owner's access to the channel would be severely limited at low water, compared with the extent of his property along the bank.⁶ In this situation, the court found that the intention of the grantor was to convey access to the stream proportional to the extent of conveyance of the bank; the court carried out this intent by running the property lines from the marks on the bank to the low-water line, perpendicular to the bank and stream.

⁵I assume that the area between high and low water in Wood was caused by seasonal, not tidal, fluctuations in water level.

⁶The side lines in Wood tended to converge as they approached the river—if extended to low water, the property's waterfront would be nearly non-existent, compared with a high-water shoreline of “8 or 9 perches”: roughly 140 feet.

I find the Wood rationale applicable here.⁷ In cases where the side boundaries of lots are roughly perpendicular to the shore, such a rule will present a result little or no different from one that assumes the grantor meant to run the side boundaries to the low-tide line, as Martin suggests. Where the side boundaries are oblique to the shore, however, it seems most unlikely that the grantor meant to convey, and the grantee accept, a parcel with a greater shore-length at high-tide than at low, or vice-versa. I note that water access has historically been the most valuable attribute of riparian property, and that the private character of the foreshore is of value to its private owners primarily to give access to the water.⁸ The only value to ownership of the intertidal area along the section of Deep Creek in question is the right to use it to access the stream; in fact, the intertidal mudflat is more a barrier to access than otherwise, and its value to the upland owner is only that he has a right to cross it to the creek itself.⁹ In such a situation, I find that the intent of the deeds containing a call to the creek is to convey the same access to the water at high-tide as at low. Therefore, rather than extending the side boundaries from the high-tide to the low-tide line, the intent of the grantor is best carried out by allocation of the

⁷ I apply a different methodology to achieve equitable boundaries than did the court in Wood. See subsection (b), below.

⁸ Another valuable characteristic of private foreshore, particularly along the beach, is the right to deny access to those wishing to recreate on the foreshore. Because the foreshore in question is not beach sand but instead semi-liquid mudflats, the right to exclude the public is of little concern or value.

⁹ Like the Missouri River of fable, these flats are “too thick to drink, too thin to plow.”

foreshore in proportion to the extent of the property's shoreline at high water, by the same method described below for the allocation of accreted lands. *See* subsection (b), below.

In any event, as a practical matter, it would be most difficult to determine the point of intersection of the side boundaries in question with the low-tide line as it existed at the time of partition. As the attached figure shows, the area between high and low-tide lines is mostly occupied by tidal mudflats, which extend for hundreds of feet. I take judicial notice of the fact that such flats are unstable over time, and I suspect (although the record is insufficient for me to find) that much of this mudflat has been deposited since the subdivision of the property, in which case its ownership would have to be determined under principles applicable to accretions, as described below.

b) Accretion.

As described above, just up-stream from the lots in question, Deep Creek changes direction rather dramatically: its westerly flow is channeled around a point of land, so that in the area of the litigants' lots the channel ebbs almost to the north. Once it rounds a point, it resumes its general westerly flow. The characteristic hydrology of Deep Creek at this point appears to cause the flow of the current to scour the south bank up-stream from the lots in question, right through the frontage of the Robinson property, which as a consequence has a steeply-sloping foreshore, without mudflats.¹⁰ Down-stream from the

¹⁰At the invitation of the parties, I viewed the properties personally. The facts recited here are also memorialized in the various surveys of record in the case.

Robinson lot, however, in front of the Martin and Turner properties, large mudflats are being deposited by the current. The extent of the accretion of land to the shoreline of the Martin and Turner properties, although undefined in the record, is no doubt substantial.

Unlike most real property with fixed boundaries, riparian property has a boundary formed by a waterway. Among the most important attributes of such a lot is its access to the water, and the various riparian rights which attach to that water access. If land accreted to such property did not become also the property of the lot owner—that is, if the boundary along the waterway remained fixed and the accreted land belonged, say, to the owner of the bottom—the formerly-riparian owner would be separated from the channel by this newly accreted land: he would no longer own waterfront property. Because the riparian nature of waterfront property is considered at common law such a valuable component of the owner’s rights in that property, under the doctrine of accretion, the riparian boundary follows the stream. “One of the most valuable of the rights of the riparian owner is the right to preserve his contact with the water by appropriating the accretions that form along his shore.” 1 *Farnham* at 320.

Thus, where land is accreted to waterfront parcels such as in the Martin and Turner properties, those accretions belong to the owners of the upland. *See, e.g.,* 1 *Farnham* at 328. The question then arises, what method is to be used to set the boundaries of this newly-acquired property? Of course, there exists here no grant that dictates how this property should be divided: the grantor did not own the area now subject to private

ownership, which has been created subsequent to his sale of property. Mr. Martin suggests that the newly-accreted property be divided among the adjacent owners by simply extending the side boundaries of the property. Because following such a rule may work fundamental changes in the amount of shoreline appurtenant to a particular lot—with some lot owners winners and some losers—equity requires another method of division.¹¹

The division of flats and accretions is a matter for equity. 3 *Farnham* at 2475. “Since the object in dividing the new land is to give each riparian owner a proportional share, the direction of the side lines which bound the upland can in most cases be given no effect.” 3 *Farnham* at 2477. The general rule for apportioning tidal flats and accretions is to divide the new lands “as nearly as practicable” perpendicular to the line of the shore. 3 *Farnham* at 2472. Where the accretions are, as here, submerged at high-tide, the primary equitable consideration is to secure each riparian owner’s access to the channel, and to an equal share of the river front in proportion to each owners share of the original river front. See 3 *Farnham* at 2474-75. In light of these principles, I find that the most equitable method of dividing accreted property here, considering the irregular nature of the banks and channel of Deep Creek, is to divide the accretions by running lines

¹¹This can be demonstrated vividly by imagining a lot with sidelines which tend to converge as they approach the shore, to which land is accreting. Once sufficient land has formed against the former shoreline for the sidelines, if extended without deviation as suggested by Martin, to converge, the riparian nature of such a parcel would be lost entirely. The same inequity could be worked in many other instances, for example by applying the Martin method to properties with parallel sidelines running obliquely to a meander or cove which has silted in.

perpendicular to the thread of deep creek to the intersection of those lines with the point at which the sidelines called in the deeds intersect the bank¹² of Deep Creek. These perpendicular lines form the sidelines for the extensions of the riparian lots across the accreted lands.¹³

c) Wharfing-out rights.

One of the riparian rights held by an owner of property on a navigable stream is the right of wharfing-out to the channel. Because the Turner pier does not extend beyond the low-tide line as it now exists, I need make no decision here about how the area available for wharfing-out appurtenant to these properties is to be allocated.

¹²In tidal waters, the “bank” referred to is the low-tide line if the deed specifically calls to the low-tide line, otherwise (as here) the high-tide line. *See* the discussion at subsection (a), above.

¹³In the draft version of this report, I directed the division of the accreted lands by a different method, which required the drawing of a baseline from the points of intersection of both sidelines of each lot with the bank of Deep Creek, then the drawing of new sidelines perpendicular to each baseline across the accreted lands. There are advantages to the use of the baseline method, principal among them that, unlike the method described in the text of this report, it does not rely on the location of the thread of the creek, a mark subject to natural change over time. Both the Turners and DNREC took exception to the use of the baseline method here, however, and the matter was briefed and argued. I was convinced that here, and in most situations, the method of running perpendiculars to the thread will be the better method: it is easier to determine, preserves the principal of assigning the foreshore equitably, and allows the construction of piers and wharves in the shortest possible configuration—and thus, usually, with the least environmental and financial costs.

Conclusion

The areas occupied by the Robinson, Martin and Turner lots must be delimited by extending the sidelines in a manner perpendicular to the thread of Deep Creek, as described in subsection (b) above. Because the Turner pier is located entirely within the Turner portion of the foreshore, so defined, and because Martin may erect a pier on his property, so defined, without interference with the Turner pier, Martin's motion for injunctive relief is moot,¹⁴ the Turners' request for a declaratory judgment must be granted and DNREC's motion for summary judgment must be granted.

/s/ Sam Glasscock, III
Master in Chancery

¹⁴Even if I were to find that the Turner pier occupied property owned by Martin, the record would be insufficient to order the injunctive relief requested by Mr. Martin, given Martin's failure to object to the construction of the pier. *Farnham* points out that:

. . . the rule that where a boundary between adjoining proprietors depends upon conveyances, the legal effect of which is uncertain, the acquiescence of one in a line claimed by the other raises a presumption that it is the true line, is especially applicable in determining the boundaries between riparian rights of proprietors of business property on tide waters, the shore in such places being subject to constant changes. The acquiescence need not continue for the prescriptive period in order to establish the rights of the parties.
3 *Farnham* at 2474.

Fig. 1

