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32 A. 166 (R.I. 1895)**19 R.I. 114****ALLEN****v.****ALLEN.****Supreme Court of Rhode Island****May 24, 1895**

Samuel W. R. Allen, for plaintiff.

Fred. C. Olney, for defendant.

PER CURIAM.

A riparian proprietor whose land borders upon tidewater has, by the common law, certain private rights to the shore between high and low water mark. These do not amount to seisin in fee, but are in the nature of franchises or easements. *Inhabitants of Town of East Haven v. Hemingway*, 7 Conn. 186, 202; *Simons v. French*, 25 Conn. 346, 352; *Lockwood v. New York & N. H. R. Co.*, 37 Conn. 387. The right to build wharves and to fill up the upland may be exercised, as against any one but the state, provided navigation is not impeded or a nuisance created thereby. *Engs v. Peckham*, 11 R.I. 210; *Bailey v. Burges*, *Id.* 330. Some of these rights may be alienated, or annexed to other upland estates, as the right to cut sedge or grass (see citation by Potter, J., in *Providence Steam-Engine Co. v. Providence & S. S. Co.*, 12 R.I. 369), and the right to take seaweed which is stranded on the beach (*Bailey v. Sisson*, 1 R. I. 233; *Kenyon v. Nichols*, *Id.* 106; *Hall v. Lawrence*, 2 R. I. 218; *Knowles v. Knowles*, 12 R.I. 400). When it is necessary or convenient, these alienable rights may be defined by boundaries, but this circumstance does not enlarge the character of the right. The state holds the legal fee of all lands below high-water mark, as at common law, as has been uniformly and repeatedly decided by this court. *Bailey v. Burges*, 11 R.I. 330; *Engs v. Peckham*, *Id.* 210, 224; *Brown v. Goddard*, 13 R.I. 81; *Folsom v. Freeborn*, *Id.* 200, 204. By the common law of Massachusetts and Maine, based upon or declared by a colonial ordinance, the fee in lands, to a certain distance below high-water mark, was given to the upland proprietor, and this rule applies to such portions of our shore as have been ceded from Massachusetts. This right of the state is held, however, by virtue of its sovereignty, and in trust for all the inhabitants,--not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend, even in Massachusetts, to all land below high-water mark, unless it has been so used, built upon, or occupied as to prevent the passage of boats, and the natural ebb and flow of the tide. *Weston v. Sampson*, 8 Cush. 347; *Moulton v. Libby*, 37 Me. 472; *Packard v. Ryder*, 144 Mass. 440, 11 N.

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E. 578. The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. *Engs v. Peckham*, 11 R.I. 224; *Providence Steam-Engine Co. v. Providence & S. S. Co.*, 12 R.I. 348, 355. Until actual filling out, the public rights exist as before. *Gerhard v. Commissioners*, 15 R.I. 334, 5 Atl. 199. Shellfisheries are public rights which may be regulated for the public good (*State v. Cozzens*, 2 R. I. 561; *State v. Medbury*, 3 R. I. 138; *Oyster Co. v. McGarvey*, 12 R.I. 392), as may also the right of navigation. In the absence of any express restriction, any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time. In doing so, he may disturb the soil, and dig up the grass or sedge, if necessary. The public right of fishery is paramount to the private right to cut grass or sedge. *Bagott v. Orr*, 2 Bos. & P. 472; *Parker v. Dam Co.*, 20 Me. 353; *Peck v. Lockwood*, 5 Day, 22; *Lakeman v. Burnham*, 7 Gray, 437; *Proctor v. Wells*, 103 Mass. 216; and other Massachusetts cases cited above.

The instructions of the judge before whom this case was tried were erroneous, in affirming that it was a

trespass in the defendant to disturb the plaintiff's thatch, in digging clams. A new trial must be granted.