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Book Review: Riparian and Littoral Rights by Carroll Dunscombe (1970)

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BOOKS REVIEWED

Riparian and Littoral Rights. By Carroll Dunscombe. New York: The William-Frederick Press. 1970. Pp. 84. \$3.00.

As its title suggests, *Riparian and Littoral Rights* by Carroll Dunscombe is primarily a study of the rights of waterfront property owners in navigable waters. Although Mr. Dunscombe emphasizes Florida law, there are ample references to the laws of other jurisdictions to provide the reader with an overall national view. However, since no text of less than one hundred pages can give more than a brief overview, *Riparian and Littoral Rights* should be regarded as a starting point for further research rather than as a definitive treatise.

The author begins by distinguishing riparian and littoral rights: the owner of riparian property—land which is bound by the shore of an inland navigable river or lake—has various rights in the waters; the owner of littoral property—land which abuts on an ocean or gulf—has no rights beyond the high-water mark. The navigable character of waters is determined principally by reference to their ability to sustain commerce,¹ although federal courts will consider the effect of reasonable improvements in their determination of navigability.² The author devotes several chapters to a consideration of the interests reserved to riparians alone, such as consumptive use rights, view, and accretion.³ He also discusses those rights such as fishing, swimming, and boating, which are held in common with the public⁴ as well as loss of riparian rights by means of adverse possession, prescription or physical erosion of the land.⁵

Most of the book is concerned with the legal aspects of dredging and filling. Since states frequently grant riparian owners the right to fill out to the channel,⁶ it is possible for many owners to obtain the full benefit of their location by

1. See, e.g., *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), rev'd on other grounds sub nom. *Nacirema Co. v. Johnson*, 396 U.S. 212 (1969); *Wisconsin Pub. Serv. Corp. v. FPC*, 147 F.2d 743 (7th Cir.), cert. denied, 325 U.S. 880 (1945); *In re River Queen*, 275 F. Supp. 403 (W.D. Ark. 1967); *United States v. 2,899.17 Acres*, 269 F. Supp. 903 (M.D. Fla. 1967); *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909); *People ex rel. Erie R.R. v. State Tax Comm'n*, 266 App. Div. 452, 43 N.Y.S.2d 189 (3d Dep't 1943), aff'd, 293 N.Y. 900, 60 N.E.2d 31 (1944).

2. E.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Rochester Gas & Elec. Corp. v. FPC*, 344 F.2d 594 (2d Cir.), cert. denied, 382 U.S. 832 (1965); *Davis v. United States*, 185 F.2d 938 (9th Cir. 1950), cert. denied, 340 U.S. 932 (1951); *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155 (D.C. Cir. 1941), cert. denied, 315 U.S. 806 (1942). See also *People v. System Props, Inc.*, 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S. 2d 859 (1957), modifying 281 App. Div. 433, 120 N.Y.S.2d 269 (3d Dep't 1953).

3. C. Dunscombe, *Riparian and Littoral Rights*, chs. 9, 17, & 21 (1970) [hereinafter cited as Dunscombe].

4. *Id.*, chs. 11-12.

5. *Id.*, chs. 7-8, 16.

6. *Id.* at 6. See generally *United States v. Smoot Sand & Gravel Co.*, 248 F.2d 822 (4th Cir. 1957); *Norfolk Dredging Co. v. Radcliff Materials, Inc.*, 264 F. Supp. 399 (E.D. Va. 1967).

taking whatever steps are necessary to reach navigable waters. The right to fill out to the channel, however, is subject to superior governmental authority. For example, in the exercise of its commerce power, the federal government can regulate and even prohibit dredge and fill operations in federally designated navigable waters. By use of the public trust doctrine,⁷ under which the sovereign holds the submerged beds under navigable waters in trust for the benefit of its citizens, the states may also restrict the riparian owner's right to fill. Since the federal government acquired submerged beds from Great Britain and Spain subject to a "public trust" and conveyed them on the same terms to the states upon their admission to the Union,⁸ an argument can be made that alienation of these sovereign lands by the states to riparian owners may violate the public trust doctrine.

Mr. Dunscombe takes the position that littoral owners have no right to fill since their property interests do not extend beyond the high-water-mark.⁹ He interprets the California Tidelands decision¹⁰ as excluding any state claims beyond the high-water-mark, thus prohibiting any grants to the beds of such waters to littoral owners.

Those readers who are unfamiliar with water rights are cautioned that some of the general statements in the book may not accurately reflect the law in every jurisdiction. This is particularly true of the right to fill, which is often subject to statutory regulation. The common law consumptive use doctrines have been modified by statute in some states,¹¹ and the right of accretion has been similarly limited in others.¹² Furthermore, development rights may also be subject to local zoning ordinances.¹³

In addition, events subsequent to the publication of this book may qualify

7. For a discussion of the public trust doctrine see *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *McDowell v. Trustees*, 90 So. 2d 715 (Fla. 1956); *State v. Nichols*, 241 Iowa 952, 44 N.W.2d 49 (1950); *Nugent ex rel. Collins v. Vallone*, 91 R.I. 145, 161 A.2d 802 (1960); *City of Madison v. Tolzman*, 7 Wis. 2d 570, 97 N.W.2d 513 (1959). See Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

8. See generally *United States v. Holt Bank*, 270 U.S. 49 (1926); *Shively v. Bowlby*, 152 U.S. 1 (1894); *McKnight v. Broedell*, 212 F. Supp. 45 (E.D. Mich. 1962); *State v. Longyear Holding Co.*, 224 Minn. 451, 29 N.W.2d 657 (1947).

9. Dunscombe 1.

10. *United States v. California*, 332 U.S. 19 (1947), noted in 14 *Brooklyn L. Rev.* 118 (1948) and 35 *Calif. L. Rev.* 605 (1947) and 5 *Wash. & Lee L. Rev.* 85 (1948). For a thorough discussion of this decision see Naujoks, *Title to Land Under Navigable Waters*, 32 *Marq. L. Rev.* 7 (1948); Sullivan, *The Tidelands Question*, 3 *Wyoming L.J.* 10 (1948).

11. E.g., *Iowa Code Ann.* §§ 455A.1-.39 (Supp. 1971); *Kan. Stat. Ann.* §§ 82a-701 to -725 (Supp. 1970). See also Heath, *Water Management Legislation in the Eastern States*, 2 *Land & Water L. Rev.* 99 (1967); Plager & Maloney, *Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern United States*, 43 *Ind. L.J.* 383 (1968).

12. E.g., *Fla. Stat. Ann.* § 253.151 (Supp. 1971).

13. See, e.g., *MacGibbon v. Board of Appeals*, 347 *Mass.* 690, 200 *N.E.2d* 254 (1964).

some of the principles discussed therein. In particular, the effect of the *Zabel*¹⁴ case and the enactment of the National Environmental Policy Act¹⁵ on the issuance of dredge and fill permits by the United States Army Corps of Engineers must be evaluated. Whereas formerly protection of navigation was the only concern, it now seems that environmental interests must also be considered. This change in policy may substantially limit the riparian owner's right to fill. Moreover, a growing body of state and federal environmental legislation will doubtlessly have a considerable impact on the future development of waterfront property.

In view of the author's limited objectives, there are few deficiencies attributable to anything other than the book's brevity. The consumptive use doctrines of both riparian and prior appropriation jurisdictions received only the briefest consideration.¹⁶ Pollution control was also slighted, reference being made to the federal statutes¹⁷ but not to common law remedies or state legislation. Compliance with state pollution control statutes will very likely become a significant problem in the development of waterfront property, particularly in areas around small lakes.¹⁸

A less important criticism of the book is directed towards the inaccuracy of some citations. Nonetheless, *Riparian and Littoral Rights* will give the average practitioner an adequate grounding in the fundamentals of water law and should be a useful addition to his law library.

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Authority and Rebellion. By Charles E. Rice. Garden City: Doubleday & Company, Inc. 1971. Pp. 252. \$5.95.

Sociologists define *anomie* as a condition of social "disorganization" or "un-organization."

In this condition, the society does not possess consensus with respect to societal goals or else does not possess consensus regarding means of achieving agreed-upon societal goals. Consequently, the individual is confronted with alternative goals or means, or he exists under conditions in which the norms of many members of the society are unknown to other members. He finds that behavior which is 'right' or 'correct' in one

14. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), noted in 12 B.C. Ind. & Com. L. Rev. 674 (1971).

15. National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (Supp. V, 1970). See also Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230 (1970).

16. Dunscombe 76-77.

17. *Id.*, ch. 13.

18. See generally Johnson & Morry, *Filling and Building on Small Lakes—Time for Judicial and Legislative Controls*, 45 Wash. L. Rev. 27 (1970).

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