

# TWENTY-FIFTH JUDICIAL CIRCUIT OF VIRGINIA

MALFOURD W. TRUMBO  
ALLEGHANY COUNTY COURTHOUSE  
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June 5, 2012

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RE: North South Development, et al v Frank Garden, et al

On May 4, 2012, an ore tenus hearing was held pursuant to Plaintiff's Motion for Partial Summary Judgment. The original pleadings were filed in this Court on February 24, 2011 alleging that named Plaintiffs "owned certain parcels of property bordering and including the streambed of the Jackson River in Alleghany County", Virginia, that "Plaintiffs have posted portions of the Jackson River, noting their ownership of the streambed and warning third parties to stay off the streambed", and that "the land that Defendants trod upon was posted as private property." The Plaintiffs requested "an injunction prohibiting Defendants from entering upon Plaintiff's property" and other relief.

On December 12, 2011, Plaintiff's filed a Motion for Partial Summary Judgment requesting "the Court grant partial summary judgment in their favor by determining as a matter of law that they are the owners in fee simple of the property under the Jackson River at issue in this action". On February 3, 2012, plaintiff's filed their initial Brief in Support of their Motion for Partial Summary Judgment. On March 22, 2012, Defendant's filed their Brief in Opposition to said Motion with Plaintiffs responding by filing dated April 14, 2012.

The issues presented in this cause are not totally new to this Court nor to others that find the Jackson River within their jurisdiction. See Hot Springs Lumber and Manufacturing Co. v Rivercomb, 110 Va. 240 (1909), Bath County Circuit Court; Frank Boerner v McCallister, 197 Va. 169 (1955), Alleghany County Circuit Court; Loving, et als v Alexander, et als, 745 F 2d 861 (1984), U.S. 4<sup>th</sup> Circuit of Appeals; Kraft v. Burr, et al, 252 Va. 273 (1996), Alleghany County Circuit Court. In conjunction with the above referenced cases, this Court provided counsel with a copy of a letter, attached hereto, outlining this Court's previously decided issues and findings authored by the Honorable Duncan M. Byrd, Jr., Judge, dated May 12, 1995. Judge Byrd's letter was filed with the Burr v Kraft case file (currently housed in the Clerk's Office of this Court). Judge Byrd's decision was affirmed in the above styled Kraft v Burr, 252 Va. 273 (1996). Today's Court can find no authority to reverse or alter the state of the applicable law as stated in Judge Byrd's letter. Therefore, Plaintiff's Motion will be reviewed in light of those parameters.

The Plaintiff's Motion for the Court to determine, as a matter of law, that they are the owners in fee simple of the property under the subject portion of the Jackson River is not the exact issue in this case. As addressed in Judge Byrd's letter opinion, citing Brunswick Land Corp. v Perkinson, 146 Va. 695, 707 (1926),

“And it is also well established that the prior peaceful possession by a plaintiff in ejectment of those under whom he holds, claiming to be the owner in fee, if proven, is prima facie evidence of ownership and seisin and is sufficient to authorize recovery unless the defendant shows a better title to himself or another.’

Id., at 707”

Under this theory

‘ ... a title prima facie is shown by a grant from some one who held possession, or by such grant and possession under it by the grantee. As against a mere technical objection by anyone who, at the time the objection is made, appears to be a mere stranger to the title, such a prima facie title would seem quite sufficient. To require more against such an objector would require every one to prove a perfect chain of title as against every stranger making any kind of a claim. This the law does not require. If the objector has a better or stronger title than the prima facie title proven, then he must show it, and until he does, the prima facie title prevails.’ See Cottrell v. Pickering, 32 Utah, 62, 88 Page 696, 20 L.R.A. (N.S. 404, and note; Dodge v Irvington

Land Co., 158 Ala. 91, 48 So. 383, 22 L.R.A. (N.S. 1100 and note.

Id., at 708

As stated by Judge Byrd, the issue here is not a determination as to whether Plaintiffs have proven that they are owners in fee simple, but have they met their burden of proof under the aforesaid prima facie theory?

Here, Plaintiff's allege ownership in fee simple and provide an uncontested chain of title dating from certain grants as set forth in Plaintiff's brief. These grants are located on the same segment of the Jackson River as addressed in Kraft v Burr. The "Abercromby Grant" was a conveyance dated October 29, 1743 and recorded August 20, 1760 from King George the Second, by his agent, to Robert Abercromby containing 320 acres. The description contains language placing one of its boundaries from two trees on the River "down the several courses of the River" to the beginning. The second grant, the "Mann Grant", derives from the Mann family who lived on and around the Abercromby Grant in the late 1700's and early 1800's. It is uncontested that William Mann Sr. devised property including the Abercromby Grant by his will. Furthermore William Mann, Jr., obtained a Commonwealth grant dated March 3, 1785 and recorded September 15, 1789. The description of the subject Mann property cites ownership lying on both sides of the Jackson River. The Defendants deny that Plaintiffs own any interest in the land located under the water of the Jackson River by either grant but do not claim any specific right for themselves other than through the Commonwealth of Virginia by general statute. As set forth above, Plaintiffs need only, in this trespass action, prove superior title over that of the defendants.

In consideration of the 1995 rulings of this Court, there are only two issues to be addressed in response to plaintiff's Motion regarding the ownership of the lands below the Jackson River. The first is when the subject property is conveyed by a "King's Grant" using the language describing a point "thence down the several courses of the River" to another point does the boundary extend to the "thread", i.e., the middle, of the river. Secondly, when a grant from the Commonwealth dated March 3, 1785, and recorded September 15, 1789 conveys property which places a single tract on both sides of the Jackson River does it also convey the land below the river.

Regarding the "Abercromby Grant", it is uncontested that the boundary of said parcel is either along the bank of the River or the middle of the river.

"By the common law, every river, so far as it ebbs and flows, belonged to the Crown, but rivers, not navigable, were the property of the proprietors of the lands on both sides of the river ... if different persons owned the lands on each side of the river, the bed belonged to them in moieties. ... In Hayes v. Bowman, 1 Rand, 417, this doctrine was

affirmed to be the law in Virginia, subject to the exceptions made by statute..." Mead and others v Haynes, 24 Va. 37, 3 Rand. 33, at 36 (1824).

In addition, "the Court [Hayes v Bowman] held that Bowman owned to the middle of the river. ... it would appear that the Commonwealth or Crown had granted its right to the bed of the stream prior to 1792, and the construction of the Acts of 1792 and 1802 was in no way brought in issue in the case. "Embrey, Alvin T., Waters of the State, Old Dominion Press, 1931, at page 269. As to the "Mann Grant", Judge Carr in his opinion in Crenshaw v. Slate River Company, 6 Rand 245 (262)(1828) said

"Applying this common law criterion to the Slate River, I have no doubt that it must be considered a private innavigable stream; and that the patent to Skelton in 1726, conveying the land on both sides and including the river in its bounds, gave him the property in the bed of the stream; ..."

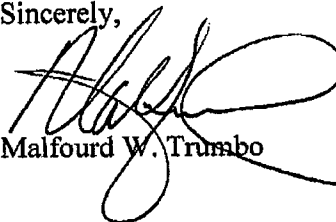
In as much as this Court can find no authority to the contrary, Embrey's comments continue to state the status of the land as it pertains to the present issues.

"These common law rights of the reparian owner, in the beds, or bottoms of non-navigable streams, it is believed, apply in Virginia to all land granted on the "Eastern Waters", prior to the Act of 1792, and to all lands granted on the "Western Waters, prior to the Act of 1802..." Embry, *Supra*, at 271.

The Court grants Plaintiff's motion for partial summary judgment only to the extent they have presented a prima facie title to the real property on which the alleged trespass took place.

Mr. Jennings is directed to prepare an Order consistent with this letter opinion.

Sincerely,



Malfourd W. Trumbo

MWT/jc  
Enclosure

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## FAX COVER SHEET

DATE: 6/8/12

TO: Erin Ashwell - 540. 993.7711  
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FROM: Janni

NUMBER OF PAGES: INCLUDING COVER SHEET

5

REMARKS:

Re: North South Development et al = Frank Coarden et al