# Port Administration and the Law

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THE DEVELOPMENT of American ports as unified business enterprises and integral units of a transportation system belongs mainly to this generation. Fifty years ago port administration was largely a matter of policing the harbor and waterfront. There was no recognized body of port laws, distinct from maritime law and the law of waters, because the port was not looked upon as either a political or a business entity. Water terminals for ocean commerce were rarely operated by public authority and public transshipment facilities in the modern sense were non-existent. The creation of a State board of harbor commissioners for San Francisco in 1863 and of a similar State board for the port of New Orleans in 1896 led to the public operation of water terminal facilities in those ports. Legislation by the State of New York in 1871 provided for a complete system of publicly owned wharves and piers in the Port of New York; but, under the policy adopted in this port, the operating control of waterfront properties was largely ceded back to private interests by long-term lease arrangements. At several points on the Atlantic coast the waterfront was developed by competing trunk-line railroads, resulting generally in a series of uncoordinated terminals rather than a unified port. Some years later—after 1900—the principle of public ownership and operation of water terminal facilities gained wider recognition in the larger ports, but as recently as 1910 it was officially reported that "private interests control nearly all of our active water frontage."[1] Public control was found in considerable degree only at New Orleans, San Francisco, Baltimore, and New York. At Baltimore it comprised only a very small section of the waterfront and at New York it was greatly modified by exclusive private leases for long terms. At most of the ports the essential water terminals were largely under private control.

The period since 1910 has shown an increased tendency toward public ownership and operation of waterfront properties, especially in the newly developed ports. This movement seems to be due in part to the recognized community of interest among the commercial and industrial enterprises of each port, and partly to the increasing tendency of Congress to require communities receiving Federal aid in harbor and waterway improvements to maintain public terminals. But economists and engineers still complain of the "lack of coordination in port and terminal facilities" at many points.

A broader interest in the public control of port properties and public operation of essential water terminals was stimulated by conditions during the war. The war left us with a new merchant marine; with the example of Federal operation

[1] Report of the Commissioner of Corporations on "Transportation by Water," part 3, p. xx.

of large transshipment terminals on the seaboard; with a new desire for world commerce; and, in many localities, with a new appreciation of the fact that every port of consequence has definite services to perform for a vast tributary area and that the port itself calls for a centralized administrative control regardless of the constitutional divisions between National, State, and private rights. We have recently seen the establishment of a port of New York authority, constituted by the legislatures of New York and New Jersey and charged with the development of a comprehensive plan for the administration of the entire port. And the large sums recently appropriated for public port improvements on the Atlantic seaboard, as well as the continued expansion of public facilities in the Pacific and Gulf ports,[2] go to emphasize the increasing interest in public construction and operation.[3]

Progress in public development and operation gives rise to several important questions of law. In this twilight zone between Federal, State and municipal jurisdictions what sort of governmental body can be established to secure the public interests in the port area? What will be the scope of its authority? To what extent will it regulate port traffic and the operation of port terminals? What property rights can it assume and what services can it properly perform? These questions can be best answered by a consideration of the public and private rights involved.

## Navigation and the Port Waters

In general, the power to regulate and protect navigation and to control the movement of goods and persons into and out of the country is vested in Congress. The doctrine has been laid down with unvarying uniformity in the Federal courts that when Congress has, by an expression of its will, occupied the field, such action is conclusive of any right to the contrary asserted under State authority.[4] Under this rule, for example, a city cannot impose a license tax upon a vessel already carrying a Federal license, where there is no presumption that the tax is a compensation for special benefits offered by the city.[5] Furthermore, Congress has paramount authority to make improvements in the navigable rivers and harbors,[5a] and to prevent any waterfront development which will impede navigation or infringe upon channels or harbor lines which have been established by Federal authority; and the Secretary of War, under authority

[2] Except at Galveston where a highly efficient administration seems to have been effected through private terminal companies, the city owning a one-third interest in the largest of these—the Galveston Wharf Company.

[3] See the author's treatise entitled *Control of the Port* published by the Board of Engineers for Rivers and Harbors, Washington.

[4] *Wisconsin* v. *Duluth* (1877) 96 U. S. 379, and cases there cited.

[5] *Harman* v. *Chicago* (1893) 147 U. S. 396; *Huse* v. *Glover* (1886) 119 U. S. 543.

[5a] From a survey of Federal and State cases it appears that channels or rivers are navigable in law which are navigable in fact. They are navigable in fact when they are used or can be used in their ordinary condition as highways for commerce on which trade and travel are or may be conducted in the customary modes of trade and travel on waters. And they constitute the "navigable waters of the United States" within the meaning of the acts of Congress when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continuous highway over which commerce may be carried on with other States or foreign countries in the customary modes of commerce by water.—See especially, *United States* v. *Banister Realty Co.*, 155 Fed. 583, and *Harrison* v. *Fite*, 148 Fed. 781.

from Congress, can summarily remove structures which impair navigation, even where wharf or harbor lines have not been established.[6] Bridges affecting the navigation of navigable waters are subject to the control of Congress; that is, Congress can authorize the construction of a bridge independently of State action, and it can order the removal of a bridge constructed by permission of a State.[7] In regard to ferries, the local authorities ordinarily exercise the licensing and regulatory power but this does not preclude the right of the Federal Government to supervise their regulation with a view to the safety of commerce or of passengers.[8] Local port officers, such as harbor masters, have customarily controlled the moorage and anchorage of vessels in many harbors, but the Secretary of War, upon recommendation of the Chief of Engineers, is authorized to define and establish anchorage grounds in all navigable waters.[9] The entry and clearance of vessels are matters requiring uniform national regulation and come clearly within Federal control.[10]

Yet there remain many port matters of local concern over which the States and their agencies may exercise active control. In some matters of this kind the States may act concurrently with Congress; in others they may act independently to the extent that the Congress has not expressed its will: and in certain phases of port administration they may properly take jurisdiction under their police powers. In conformity with these principles the States and their duly authorized local authorities may improve the navigability of harbor waters and collect reasonable tolls in compensation for the use of such improvements,[11] establish harbor lines beyond which water-front structures shall not be extended;[12] control the movements of vessels by marking channels, setting off areas for anchorage and moorage, and prescribing the lights which shall be carried at night;[13] make pilotage regulations;[14] enforce reasonable quarantine and inspection laws;[15] police the harbor to prevent crimes and fires and to dispose of salvage; establish and regulate ferries;[16] and control other port activities of a local and limited nature where a uniform rule of national application is not required.

## Title to Shore Lands

Closely related to the question of preserving the use of harbor waters for navigation is that of control over the shore lands, i. e., to the areas between high

[6] *Greenleaf Lumber Co.* v. *Garrison* (1915) 237 U. S. 251; *Willink* v. *United States* (1916) 240 U. S. 572.

[7] *Union Bridge Co. y. United States* (1907) 204 U. S. 364.

[8] *Gloucester Ferry Co.* v. *Pennsylvania* (1885) 114 U. S. 196.

[9] U. S. Comp. Stats. (1916) sec. 9950a.

[10] A "clearance" is judicially defined as "the gracious permission of the sovereign to depart from a port into which, without like permission implied from an 'entry,' there was no right to come." *International Mercantile Marine Co.* v. *Stranahan* (1907) 155 Fed. 428.

[11] *Sands* v. *Manistee River Improvement Co.*, (1887) 123 U. S. 288.

[12] *Prosser* v. *Northern Pacific Railroad* (1894) 152 U. S. 59.

[13] *Owners of Big "James Gray"* v. *Owners of Ship "John Fraser" et al* (1858) 62 U. S. 184.

[14] *Anderson* v. *Pacific Coast S. S. Co.* (1912) 225 U. S. 187.

[15] *Morgan* v. *Louisiana* (1886) 118 U. S. 455; *People* v. *Rensselaer and Saratoga R. R. Co.* 15 Wend. Rep. (N. Y.) 113 and cases there cited.

[16] *Wiggins Ferry Co.* v. *East St. Louis*, 102 Ill. 560.

and low watermark on navigable waters, designated sometimes as the "foreshore," and, where there is an ebb and flow of tide, as the "tideway" or "tidal lands."

The importance of this question is readily apparent, for it is over these areas that transshipment is largely made between land and water carriers. There are three distinct phases of the general subject of control over these lands: (1) The question of abstract title as between the State and private individuals; (2) the question of alienability, i. e., the private rights to be acquired by grants, franchises, and leases in the shore lands; and (3) the question of riparian rights, especially whether the owner of upland bordering on navigable waters has a right of access to the channel which may be considered a substantial property interest. These questions are fundamental to any consideration of the powers and limitations of local officers charged with the development of the water front in a given port.

The general rule is that ownership of the seashore, the land under the Great Lakes, and the land under a stream so far as the tide ebbs is in the State, *except* where the State has expressly divested itself of its title, or where title was granted before the State was admitted to the Union. This general doctrine has been recognized at one time or another by nearly all of the tidewater States. The rule is subject to many qualifications, however, because of the effect of legislative grants, and because of the doctrine of riparian rights as accepted in many States; and in Pennsylvania it has been held for a long period that the owner of upland on a tidal river holds to low-water mark.

In North Carolina a statute extended to riparian owners the right of entry upon lands covered by navigable waters for the restricted purpose of erecting wharves in front of the shore, "but the State evidently did not want to part with all of its title and granted merely a privilege or easement in the land and waters covered thereby, for the single purpose of building wharves in aid of commerce and a better enjoyment of the shores of navigable waters.[17]

The policies to be followed in granting rights in the shore lands to individuals, and the effect of such grants, are determined by the states through their legislatures and courts.[18] In some states the tideway (to a varying extent) was made an appurtenance of the uplands; other states granted title to shore lands to individuals subject generally to rights of navigation and fishery; while others, by constitution or statute, expressly prohibited the alienation of lands under navigable waters. In some instances shore lands have been granted to cities.

Where granted to a city they are held under the same conditions as when held by the state, and the municipality can grant them to private individuals only providing the state could have so granted them.[19]

[17] *Atlantic and North Carolina Railroad Company* v. *B. P. and B. W. Way,* (1916) 172 N. C. 774, 90 S. E. 937.

[18] *Shively* v. *Bowlby* (1893) 152 U. S. 1.

[19] *La. Construction and Improvement Co.* v. *Ill. Central R. R. Co.* (1897) 49 La. Ann. 527, 21 So. 891, 37 L. R. A. 661.

In the well known case of *Illinois Central Railroad* v. *Illinois*[20] the state had granted to the railroad company a mile of submerged lake-front lands (in 1869) and subsequently in 1873, repealed the act. The question of the validity of the repealing act as affecting the railroad's title came before the United States Supreme Court in 1892. The title to lands under navigable waters, said the court,—

". . . . is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . .

It is hardly conceivable that the legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."

Although it is generally accepted that the several states acquired all of the rights formerly possessed by the King and Parliament the precise nature of these rights has been a subject of controversy over a long period. This public right is asserted in the so-called *trust doctrine,* that is, the doctrine that shore lands are held in trust for the people, or in a public as distinguished from a private capacity.[21]

The trust doctrine probably exists in fullest expression in the law of Wisconsin, since there it is a doctrine of the courts set up without express constitutional direction, viz:

"The right which the State holds in these lands is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The State has no proprietary interest in them, and can not abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."[22]

It should be noted in connection with the Wisconsin rule that the riparian owner in that State has an undisputed right to wharf out or construct piers, booms, etc., to the line of navigation (assuming the risk of obstructing navigation).[23] This makes the situation very similar to that in Connecticut, where it has been said that the riparian rights of the upland owner constitute an estate in the land.

[20] *Ill. Central R. R. Co.* v. *Illinois* (1892) 146 U. S. 387.

[21] Brown, id., p. 73.

[22] *McLennan* v. *Prentice* (1893) 85 *Wisconsin* 427 p. 445, 55 N. W. 764. See also *Rossmiller* v. *State* (1902) 114 Wis. 169, 89 N. W. 839 and cases cited there.

[23] *Cohn* v. *Wausau Boom Co.* 47 Wis. 314, 2 N. W. 546.

The "trust doctrine," therefore, amounts to this: That the lands between high and low water mark are reserved for the common use of all the people but that upland owners, as a part of the public, may be permitted to use the shore fronting upon their property in order that they may have access to navigable water. The reservation of title in the State as trustee merely operates to give the State more substantial grounds for controlling the use which shall be made of these lands. For this reason the trust doctrine, as expressed in Wisconsin, may have advantages over the New York rule as a guide to port and harbor administration. But if the upland owner can be shown to have rights in the shore which the State can not destroy without compensation, there is little difference between the two rules in their practical effect upon water-front development.[24]

## Riparian Rights

Closely related to the subject of shore-land titles is that of riparian rights, including the right of the upland owner on the water front to have access to the navigable stream; the right to build wharves, piers, and other commercial structures out to the line of navigation; and the rights of reclamation and accretion in the areas between the high and low water marks.[25]

These rights do not depend upon ownership of the soil under water but upon lateral contact with the water.[26] The so-called "right to wharf out," which is the principal subject of this chapter, involves questions of essential importance to port development and port administration. As is well known water-front sites have been the objective of industries and transportation companies primarily because of the facility afforded of making immediate shipment, or offering immediate passage, by water. The outstanding attribute of the water-front tract is the possibility of direct access to navigation. And the history of the older American ports, especially on the Atlantic coast, affords ample evidence of the customary practice of riparian owners to wharf out into the navigable stream.[27]

Wharves, quays, piers, and other landing places, for the loading and unloading of vessels were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times, and the right to build such erections was claimed and exercised by the owner of the adjacent land from the first settlement of the country. Where these structures did not

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[24] On the point of compensation, the Wisconsin court said in 1911: "It is well established in the law of this State that the rights of riparian owners on navigable waters rest upon the title to the bank, and that such rights may be condemned for public purposes as other property upon payment of a just compensation therefor." *In re Trempealean Drainage Dist.* (1911) 146 Wis. 398, 131 N. W. 838.

[25] See *Richards* v. *N. Y., N. H. and H. R. Co.* (1905) 77 Conn. 501, 60 Atl. 295. In *Hanson* v. *Thornton* (1919) 91 Oregon 585, 179 Pac. 494, it is said that "when we speak of riparian rights, we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a usufruct in the water."

[26] Farnham, *Waters and Water Rights,* p. 281.

[27] "In the early days the navigable channels were in most cases ample, the need of wharves urgent, and the public funds deficient. So, by common consent, supplemented in some instances by legislation, the riparian owner was permitted to erect wharves, and his right to do so was unquestioned." 40 L. R. A. 637 note.

extend below low-water mark and conformed to the regulations of the State, and where they did not operate to obstruct the paramount right of navigation, they were not regarded as unlawful.[28]

The opinion has been very widespread that a shore owner in the United States has a right of access to the water, and that a wharf can not be erected in front of his property without his permission.[29] Moreover, it has been stated as a general rule of law that the riparian or shore owner has a right to build a wharf and a pier out to the line of navigation so long as by so doing he does not obstruct navigation and does not interfere with the rights of adjacent owners.[30] "In this country," said one court, "a usage sprang up which at length acquired the force of law and gave to the riparian owner on navigable water either the absolute title to the soil or the exclusive right to erect wharves and to reclaim from the sea the flats in front of his land. . . . To the exercise of these rights of the riparian owner from the earliest stages of the settlement of our country to the present time are undoubtedly due the great facilities enjoyed by our commerce in the erection of wharves, docks, and other conveniences, and it is easy to understand that the wants of navigation should give the most liberal interpretation to the rights of the riparian owner."[31]

Yet this is by no means a fully accepted rule of all the States, and there is a diversity of opinion as to whether the riparian owner has an absolute right to build out to the line of navigation or whether such an extension may be licensed, controlled, and even denied altogether by the State. Is the riparian right of access a right of property of which he can not be deprived without compensation? Or does it exist by public license, either express or implied, and subordinate to public measures in aid of navigation? On one hand it is argued that a private right is generally regarded as absolute; that when the public wishes to abridge it compensation must be made; and that "the harmony of the law would be much better subserved by extending the same rule to riparian rights."[32] On the other hand it can be said that any structure built into navigable water may obstruct the free navigation of the waterway, and that the free use of navigable waters is an unqualified public right which should be protected regardless of any inconvenience to an individual proprietor.[33] Although many of the statutes and court decisions in the States recognize the general riparian right of access to navigable waters the precise nature of these rights is not settled by uniform rule as between the various ports.

Upon analysis it appears that the right of the owner of the *ripa*, or land bordering on navigable water, to have access to the navigable channel is recognized in some way by at least 13 of the States. In the States where title to the shore

[28] *Dutton* v. *Strong* (1861) 66 U. S. 23.
[29] 40 L. R. A. 596, note.
[30] 70 L. R. A. 193, note.
[31] *Clement* v. *Burns*, 43 N. H. 618.
[32] 40 L. R. A. 605, case note (H. P. F.)
[33] See *Scranton* v. *Wheeler* (1893) 57 Fed. 803.

has been expressly extended to riparian owners (Maine, Massachusetts, North Carolina, Georgia, and Florida, for example) it is presumed that these owners would wharf out over the tideway. In Pennsylvania, however, although they hold the legal title to low water they must not wharf out into navigable waters without permission. New Jersey, Maryland, and North Carolina have recognized the riparian right by express statutes. In Connecticut the riparian right is looked upon by the courts as a real property interest; and in Virginia it is property in that it can not be taken for public use without due compensation. In New York, on the other hand, the right can be destroyed for an improvement in aid of navigation, without compensation. The rule in Wisconsin, also approved by the Federal courts, that the riparian owner wharfs out, as by an implied license from the public, at his own peril of obstructing navigation, is perhaps the most logical way of expressing this right. The riparian right is always subject to the public right of navigation within the control of the Federal Government and, as already noted, in some States it is subject to this right as controlled by the State.

Where the riparian right is not recognized it does not mean that wharves, piers, and like structures can not be built; it means that they can be built only by express license, and not on the presumption of an implied license in favor of the upland owner. This is, in effect, the rule in Pennsylvania, Illinois, South Carolina, Mississippi, Louisiana, California, and Washington. In Oregon the riparian right was finally denied by the courts but it was extended, by statute, to littoral proprietors within the limits of a corporate town.

### Regulation of Waterfront Terminals

A port authority has several legal grounds for the regulation of private port facilities: (1) the protection of navigation; (2) the ownership and control of shore-lands by the State; and (3) the right of the general public to have access to navigable waters or to the shore. Where privately owned facilities are operated as public utilities they are, of course, subject to public regulation on that ground. But whatever be the legal sanction invoked, it has been common practice for local port authorities to regulate such improvements by a requirement of license or permit, and to establish rules for their operation.[34]

Even in Pennsylvania, where riparian proprietors on the Delaware River own to low-water mark the State delegates[35] to the director of wharves, docks, and ferries of Philadelphia the power to "adopt and promulgate rules and regulations for the construction, extension, alteration, improvement, and repair of wharves, piers, bulkheads, docks, slips, and basins within the limits of said cities."

[34] This was the practice even before the adoption of the Federal Constitution, viz: "By act of assembly, entitled 'An act appointing wardens for the port of Baltimore,' etc., passed in April, 1783, c. 24, it was among other things enacted (sec. 2) that certain persons therein named, should be wardens for the port of Baltimore town, and (sec. 9) that from and after the publication of the same act, 'no person or persons shall make, alter or extend a wharf or wharves, without laying before the said wardens a plan of his or their intended wharf or wharves, and without consent first obtained under the seal of the board, to carry the same in effect'," *Smith* v. *Yates*, 2 H. and McH. (Md., 1788). See also 24 U. S. Ct. Rep. 374 note: "The right to build wharves even on private lands, may be regulated by the legislature for the public good, and the power to establish and regulate them may, being a police power, be delegated to a municipality."

[35] 1907 P. L. 321; 1913 P. L. 261.

And the director has ruled[36] that the construction of such facilities "of any description abutting against or extending into navigable water within the limits of the city of Philadelphia can be undertaken only after application by the owner to the department . . . and the granting of a formal license covering the proposed work."[37]

It has been held by the California courts that if a wharf is erected in tide water and upon soil belonging to the State, it will belong to the State, and may be recovered by it in ejectment.[38] This is also the effect of the decisions in other States which deny the right of the riparian owner to wharf out. Private water-front improvements in these States[39] are controlled by license or permit, which is usually revocable.

As regards the right of access to navigable waters it seems to be the prevailing rule that the State or its municipal agency may prevent any occupation of the continuous shore or tide-way which will shut off the general public. But the limitations upon such regulation—especially where it is recognized that private property rights have vested in the upland owners—do not seem to be well defined in the law.

The term "public wharf" as regards its use by incoming vessels was defined by Mr. Justice Harlan in *Guy* v. *Baltimore*.[40] In this case it was held that an ordinance of the city of Baltimore whereunder vessels laden with the products of other States were required to pay for the use of the city wharves certain fees which were not exacted from vessels landing there with products from the State of Maryland, was in conflict with the Federal Constitution. The State could not control the use of a public wharf so as to discriminate against the commerce of other States. A "public wharf" could be used by vessels navigating the public waters regardless of the source of their cargo.

> The wharf at which appellant landed his vessel was long ago dedicated to public use. The public, for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland. It embraces necessarily all engaged in trade and commerce upon the public navigable waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or State authority; and the national Constitution secures to all, so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever, not excluded therefrom by, or under authority of, some statute in Maryland enacted in the exercise of its police powers.

A later case[41] defines a public wharf as one to which vessels and the public can resort either at will or on assignment of berth by the harbor authority. If the wharf is operated by a common carrier it may be public even where there is no separate charge for wharfage (or dockage).[42]

[36] Regulation No. 2.
[37] See *Frankford* v. *Lennig*, 2 Phila. 403.
[38] *People* v. *Davidson*, 30 Cal. 379; *Coburn* v. *Ames*, 52 Cal. 385.
[39] E.g. South Carolina, Louisiana, California, and Washington.
[40] *Guy* v. *Baltimore* (1879) 100 U. S. 434, p. 442.
[41] *Kafline* v. *Terminal Co.*, 168 N. Y. S. 120.
[42] *Northern Commercial Co.* v. *United States* (1915) 217 Fed. 33.

These being the attributes of a public wharf, it is clear that the State or its local agencies may (1) require a license for its operation,[43] and (2) regulate the rates charged for the services performed.[44] Reasonable regulations of this sort are within the police powers of the States and of unquestioned validity.

It is the general rule that the charges at strictly private terminals are matters of private contract and not prima facie subject to public regulation. In a Federal case[45] the question was raised whether a pier owner or lessee was bound by a section in the New York City charter regulating the rates of wharfage and dockage to be exact "from every vessel that uses or makes fast to any pier, wharf, or bulkhead, within the said city," and providing a penalty for any charge in excess of the scheduled rates.[46] The *Allan Wilde* occupied a berth for 12 days at one privately owned pier and for 13 days at another. The lessees filed libels suing on agreements for hire at the rate of $75 per day, and $100 per day respectively. The appellant (claimant) contended that such agreements were illegal under the city charter. The court affirmed a decree to sustain the libels on the following grounds:

> The statute above referred to was passed in 1857. During the period that the piers were used by the schooner as a wharf, the European war had increased shipping so extensively that pier space was in great demand. There was testimony adduced at the trial which fixed the reasonable rental value at from $200 to $300 per day. Fixing the price, therefore, at $100 per day, if legal authority existed so to do, was not immoderate. Under such circumstances the appellant's plea for payment of $4.95 a day for this wharfage should not be sustained unless the statute in question is all compelling. We can not believe that the purpose of the statute was to fix or regulate, to the exclusion of the right by mutual agreement between ship owner and pier owner or lessee, the price for such hire. These were privately owned piers of very substantial size. Such a private wharf, so constructed and leased, may be reserved for private use, and may remain so, even though it may exist on the shores of a navigable river or lake, or in the harbor of a city from which access is obtained directly to the sea.

The rule in this case would seem to modify the force of existing statutes purporting to control port charges through the administration of the local port authorities.

### Public Construction and Operation of Port Facilities

The capital improvements required in a given port necessarily show a wide variation in character. An enumeration of the more important projects would include bridges, breakwaters, bulkheads, wharf and pier terminals, transit sheds, basins, dry docks, elevators and conveyors, warehouses, terminal railroads, power plants, ice plants, fuel supply stations, pilotage equipment, organized market places, passenger depots, and ferries. Many of these facilities are operated in one port

[43] Idem, supra.

[44] I.e. "dockage," "wharfage," "cranage," etc., varying with the facility. See 40 Cyc. 907 and cases there cited.

[45] *The Allan Wilde* (1920) 264 Fed. 291.

[46] It should be noted that the general practice in New York has been for lessees to control the services and charges at their private terminals.

or another by private concerns; and one or more of them have been authorized for operation under public authority in most of the important ports of the United States. The field of port administration has in the nature of things become so broad and so varied that the legal rights of the State or its local agency to acquire and operate the essential rail and water transfer facilities are fairly well established.

Although legal concepts frequently lag behind the actual administration, the courts have generally approved the operation under public auspices of the essential port facilities. In an early decision[47] the Louisiana court went so far as to rule that where a municipal corporation, under express authority of an act of the legislature, was clothed with the exclusive right to collect wharfage rates from all vessels that should make use of its wharves the right was a vested right, and could not be abrogated, or impaired, by any subsequent act of the legislature. But this right could include only those facilities which the city itself owned and operated.[48]

In 1881 the United States Supreme Court upheld[49] the right of a town situated upon navigable waters to erect wharves (as authorized by its charter); to collect reasonable "wharfage" proportioned to the tonnage of vessels; and to forbid vessels under a penalty from landing within the corporate limits at any point other than the public wharf or landing. And in 1892 the New York court[50] enunciated the following principle: To minister to the necessities of commerce by providing fit and proper places in a seaport where ships can be loaded and unloaded, with all proper facilities, is a public duty, owing by the State, and through it by the municipality which governs and controls the port. The only standard by which to judge of the extent of the duty consists in the necessities of the business."

There being no doubt, then, as to the general right of a State or a duly authorized local authority to operate water terminals of some sort for the convenience of commerce, the question narrows down to the character of the enterprise which the public authority seeks to conduct and the methods proposed for financing its construction and operation. Local port authorities have been authorized to engage in substantially every business operation incident to the movement of persons and merchandise through the port area. There is judicial sanction for the delegation to a local port authority of power to engage in the transportation business, to sell fuel to ships, and to operate a plant for the manufacture of ice and the storage of fish. And the New York court has said that the convenience of commerce may warrant the city in leasing to a steamship company a permanent pier and the exclusive right to its use.[51] That is, it may serve the public interest to provide facilities for a particular common carrier.

[47] *Ellerman* v. *McMains*, (1878) 30 La. Ann. 190.
[48] *Railroad Co.* v. *Ellerman* (1881) 105 U. S. 166.
[49] *Packet Co.* v. *Catlettsburg* (1881) 105 U. S. 559.
[50] *In re Mayor etc., of City of N. Y.* (1892) 135 N. Y. 253, 31 N. E. 1043.
[51] *In re Mayor of N. Y.* (1892) 135 N. Y. 253, 31 N. E. 1043.

The fact that the public port authority may enter into competition with private enterprise has not prevented it from engaging in these various activities wherever there is a reasonable presumption that the required expenditure of funds serves a public purpose. The legislative power to delegate authority for these purposes is frequently subject to certain constitutional limitations; but thus far constitutional objections to local public ownership and operation of port facilities have not been raised in any important particular.

### Form of Port Government

On the Atlantic seaboard and the Great Lakes the ports are more frequently controlled (so far as they are subject to public control) by a department of the municipal government, generally subordinate to the governing body[52] of the city. In some ports—New York and Philadelphia, for example—the powers and duties of this department have been defined by statute; in others by local ordinance. This general form of organization usually means that the administration of the port is looked upon as a function of the municipal government, comparable to the administration of parks and streets; except that the port facilities are directly related to the volume of commerce in the port and frequently produce substantial revenues for the city treasury. For these reasons they have sometimes aroused more interest than the nonrevenue-producing properties of the city.

In a few important instances the regulation of the port is not delegated to any single agency but comes within the partial control of numerous uncoördinated and overlapping departments and offices. Thus in Chicago no less than six separate governmental agencies or offices have some jurisdiction over the harbor waters.[53] In addition to Federal supervision and maintenance of the river channels and canals the State of Illinois assumes jurisdiction over the same area through the division of waterways, department of public works and buildings. The committee on harbors, wharves, and bridges of the city council initiates legislation for the control and improvement of the port by the municipality. An agency known as the harbor board, consisting of officials from various related departments, operates the Municipal Pier. The bureau of rivers and harbors under the harbor master polices the harbor waters, performs certain engineering functions, and may issue certain wharfing permits with the approval of the commissioner of public works. The commissioner of public works exercises control over private construction work in the harbor through the issuance of permits. Two separate park boards have certain powers to improve the lake front and reclaim submerged lands. Finally, the sanitary district, organized to control the disposition of sewage, has been engaged for several years in making important improvements in the navigable channels.

In many of the States there is some provision for port administration in the general laws relating to cities. An important instance of the powers conferred

[52] See *Delaware R. Trans. Co.* v. *Trenton* (1914) 85 N. J. L. 479, 90 Atl. 5.
[53] As of 1922.

upon cities in an act of this sort appears in the New Jersey session laws of 1920. By this act[54] the cities fronting upon navigable waters in the State are authorized to establish municipal docks, warehouses, ferries, terminals and shipping and industrial facilities, and to operate or lease the same in whole or in part; to construct connecting railways; and "to acquire in fee simple all the lands, lands under water, and all other property, easements, rights and appurtenances . . . as may be necessary to carry out the purposes of this act." And the city, through its governing body, is authorized "to raise all moneys necessary for carrying out the provisions of this act by issuing and selling bonds of such city to be known as 'Industrial Terminal Bonds' to the amount necessary for such purpose."

Another common type of port government is that of the State commission, subject generally to the appointing power of the governor. Where this form has been adopted port administration is looked upon as something of more than local concern, involving commerce with a vast tributary area extending into the interior. As a further consideration the natural port district frequently comprises several municipalities, and the port facilities can hardly be looked upon as the public works of any one city government. Moreover, the development of the port has often involved the use of State credit and large expenditures of State funds in the construction of terminals which would be beyond the means of most individual water-front cities.

State port commissions are, in several instances, endowed with the rights and privileges of public corporations. However, a more formal "incorporation" of the port is provided in Oregon and Washington in that the voters of a county may petition for a port charter in conformity with general incorporation laws relating to ports;[55] and may elect the commissioners of the corporation and exercise a certain control over its major activities. This scheme recognizes the special interests of the local electorate in port control and is presumed to separate this control from city politics and to protect the general interests of the State.

In summary, the city department type of government has been in force in Milwaukee, New York, Wilmington (Del.), Baltimore, Philadelphia, Charleston (S. C.), Savannah, Tampa, Houston, Los Angeles, and Portland (Oreg.); the State board type in Portland (Me.), Boston, Providence, New London, Mobile, New Orleans, and San Francisco; and the port corporation type (locally adopted and subject to local referendum) in the ports of Oregon and Washington. At Portland (Me.), and Savannah the appointing power is divided, to some extent, between the State and the city.

Analysis of the general and special laws relating to the larger ports shows the following substantive powers to have been conferred upon local port authorities:

(1) To fix harbor lines and wharf or pierhead lines (sometimes in connection with harbor improvements).

[54] Laws of 1920, chap. 176. For additional powers see Supp. Comp. Stats. N. J. 1915, pp. 262-267; Laws 1916, chap. 249; Laws 1917, chaps. 152, 234; Laws 1920 chap. 331.

[55] See Olson's Oregon Laws 1920, sec. 7156. Under the constitution of Oregon a port corporation is a corporation for municipal purposes. *Straw* v. *Harris* (1909) 54 Or. 424, 103 Pac. 777.

(2) To acquire valuable property in excess of the actual requirements of authorized projects.[56]

(3) To issue licenses or permits for water-front construction.

(4) To regulate the anchorage and moorage of vessels.

(5) To acquire the necessary properties and rights and to construct and operate various water-terminal facilities.

(6) To provide terminal transportation services and fix the rates therefor.

(7) To operate warehouse and storage facilities as public warehousemen and fix the rates for the services performed.

(8) To operate a pilotage service.

(9) To buy and sell coal and other fuel and supplies for ships.[57]

As regards capital improvements, most of the port authorities must have the authorization of a State or city appropriating body of the electorate (State, city, or district). The port authority is usually charged with the actual construction of the facility and with its operation or leasing.

What type of authority should be established to best govern an American port is a question to be determined by careful examination of administrative experience and was beyond the scope of the present inquiry. The differences in type are largely differences in method of constituting the commission or director. There has been no little argument advanced for removing port administration from State or city politics, or both. It is contended on one hand that a State board can not properly serve the local municipal area because of the opportunity for other sections of the State to exercise control where they have no immediate interests. And it is urged with equal force that port administration is something more than a local municipal matter, that it concerns a shipping public over a broad tributary area, that the port is essentially a State facility, and that it should not be subjected wholly to local municipal control.

This controversy we do not presume to settle. The port authority should have separate and independent control over its current financial operations. The trend of legislation points to the establishment of a local body with large corporate powers, these powers being conferred by the legislature of the State. Whether the particular controlling body is appointed by the governor, or the mayor, or locally elected, it is generally presumed that it will be chosen from citizens familiar with the problems of the particular port. The problem seems to be not so much to withdraw the port government from "politics" as properly to present port questions for public discussion and action.

[56] Specifically included in the powers conferred upon the State Board for New London, the State Board for San Francisco, and the port corporations of Washington. This power (of excess condemnation) seems to be implied in the powers conferred upon certain other authorities. For example, the Board of Port Commissioners for Tampa (as constituted in 1915) was authorized to condemn property, rights and privileges of any kind "which may be proper or desirable for the purpose of this act." It should be noted that where the rights of excess condemnation, or of improving lands for subsequent sale, are not specifically conferred by statute that the local authority is left in a weak and uncertain position with regard to such a policy.

[57] In New Orleans the State harbor commission may provide light, water, "and such other services . . . as they may deem advisable."