

adjacent sections to such streams determine the ownership of such islands. Chapter 12, Part IV, of the Civil Codes touches upon the ownership of islands, but the sections therein contained do not seem to explain the matter sufficiently for our purpose."

"The State is the owner of all land below the water of a navigable lake or stream; \* \* \*" Sec. 6674, R. C. M., 1921. This ownership arises as a right of sovereignty and not by conveyance. Upon admission to the Union, the state, by virtue of its sovereignty, becomes the owner of all lands under navigable waters within the state. *Martin v. Busch*, 112 So. 274, (Fla.); *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 225; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Knight v. U. S. Land Assn.*, 142 U. S. 161, 35 L. Ed. 974; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331; *Lowndes v. Town of Huntington*, 153 U. S. 1, 38 L. Ed. 615; *Morris v. United States*, 174 U. S. 196, 43 L. Ed. 946; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126; *United States v. Mission Rock Co.*, 189 U. S. 391, 47 L. Ed. 865; *Hardin v. Shedd*, 190 U. S. 508, 47 L. Ed. 1156; *Economy Light & P. Co. v. United States*, 256 U. S. 113, 65 L. Ed. 847.

Montana acquires no rights to lands under the Swamp Land Act. (Section 17 Enabling Act.)

Such ownership, however, is subject to the control of Congress in the interest of interstate and foreign commerce, and the general public. *Scott v. Lattig*, 227 U. S. 229, 57 L. Ed. 490; 44 L. R. A. (N. S.) 107.

"The words 'all land' in Section 6674 evidently refer to that below the low-water mark, for in Section 6771 it is provided that 'except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.' (And see *Gibson v. Kelley*, 15 Mont. 417, 39 Pac. 517.)" *Herrin v. Sutherland*, 74 Mont. 587, 595; 42 A. L. R. 937.

"6822. **Islands, in navigable streams.** Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if

#### Opinion No. 445.

##### Islands—State Lands—Navigable Waters—Non-Navigable Waters.

HELD: General rules for determining the ownership of islands in navigable and non-navigable waters within the state are set forth.

February 7, 1934.

You request an opinion from this office on the following matter: "Will you kindly give me your opinion as to the ownership of islands formed in navigable and unnavigable streams for our future guidance in this office. This matter is continually coming up and we would like to establish a course of action with reference to such islands. Further, does the date of survey of the

there is no title or prescription to the contrary." Modified by *Scott v. Lattig*, supra, and other decisions.

"6823. **In unnavigable streams.** An island, or accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed; or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river."

"6824. **Islands formed by division of stream.** If a stream, navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner."

"Patents to lots of land abutting on a river do not include actual islands of fast dry land of stable foundation lying between the lots and the thread of the stream." *Bode v. Rollwitz et al*, 60 Mont. 481.

Errors of the government surveyor in failing to extend the survey over an island in a navigable stream does not make it any the less a part of the public domain. *Scott v. Lattig* (Idaho) 33 U. S. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107 (1913); *Moss v. Ramey* (Idaho) (1916) 36 S. Ct. 183, 239 U. S. 538, 60 L. Ed. 425; *State v. Nolegs* (1914) 139 P. 943, 40 Okl. 479.

A government surveyor is not invested with authority to determine the character of land surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws, and his error in failing to extend his survey over islands in a river did not make them less a part of the government domain and the government was not thereby divested of title. *Bode v. Rollwitz* (1921) 199 P. 688, 60 Mont. 481; Note 21 Sec. 751, p. 56, Title 43, U. S. C. A.

The title to islands formed in navigable streams since the admission of Kansas into the Union is held by the state for the benefit of all the people. *Winters v. Myers* (1914) 140 P. 1033, 92 Kan. 414; *Steckel v. Vancil* (1914) 141 P. 550, 92 Kan. 591. Islands in the Arkansas river not surveyed or claimed by the government belong to the state. *Hurst v. Dana* (1911) 122 P. 1041, 86

Kan. 947. A large unsurveyed island on the Idaho side of the Snake river, a navigable stream, being in existence when Idaho became a State, did not pass to the state on admission, but remained the property of the United States. *Scott v. Lattig*, supra, reversing (1910) 107 P. 47, 17 Ida. 506; *Moss v. Ramey*, supra; *Callahan v. Price* (1915) 146 P. 732, 26 Idaho 745. The State in its proprietary right owns an island existing in public waters located within a school section which has been ceded by the federal government to the state. *Roberts v. Taylor* (1921) 181 N. W. 622, 47 N. D. 146.

Where, according to the local law, the patentee's title extends to the middle of the stream and includes an unsurveyed island within those limits, the United States cannot divest such title to the island by subsequent survey and patent thereof to another, in the absence of a showing that it was left unsurveyed by fraud or mistake. *Grand Rapids & I. R. Co. v. Butler* (Mich. 1895) 15 S. Ct. 991, 992, 159 U. S. 87, 40 L. Ed. 85; *Whitaker v. McBride* (Neb. 1905) 25 S. Ct. 530, 531, 197 U. S. 510, 49 L. Ed. 857; *Johnson v. Johnson* (1908) 95 P. 499, 14 Idaho 561; *Moss v. Ramey*, (Idaho) supra, holdings modified, (1913) 136 P. 608, 25 Idaho 1, which was affirmed, (1916) 36 S. Ct. 183, 239 U. S. 538, 60 L. Ed. 425; *Butler v. Grand Rapids & I. R. Co.* (1891) 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84, affirmed (1805) above; *Chandos v. Mach*, (1890) 77 Wisc. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207; *Farris v. Bentley*, (1910) 124 N. W. 1003, 141 Wis. 671.

No title can be acquired (to lands of the United States) by adverse possession. 2 C. J. Sec. 440, p. 213; *King v. Thomas*, 6 Mont. 409, 12 P. 865; See also, *Casey v. Anderson*, 17 Mont. 167, 42 P. 761.

"The owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the shore of the mainland." 45 C. J. Sec. 197, p. 528.

"Where the government conveys land on the bank of a navigable stream without reservation, all unsurveyed islands between the middle line of the stream and the bank pass by the grant, in a state where a riparian proprietor has title to the middle or center of the

stream, and the riparian owner can not be divested of title by a subsequent survey and grant of the islands, in the absence of a showing that they were left unsurveyed by fraud or mistake; but where an island is surveyed and plated as such, a patent to land on the bank does not include the island, especially where the mainland and the island are purchased by different parties as distinct tracts; and a large unsurveyed island of stable formation is not embraced in patents describing lots or fractional lots on the bank of a stream.

"A state will be held to have parted with the title to certain land where, although such land is not an island, it was at the time of a prior public grant a part of the mainland and within the terms and description of the grant; but it is held that a deed by the state to "all of" a certain section through which a navigable river runs covers only the lands shown by the government survey, and an unsurveyed island." 45 C. J. Sec. 267, p. 570.

40 Cyc. 620 gives the same rule as is set forth in Section 6823, R. C. M., 1921, in regard to islands in non-navigable streams and elaborates it to cover cases where there are two or more adjacent owners.

"The ownership of an island generally follows the ownership of the bed of the water, so that if the state or crown owns the land under water it also owns the island, while if the riparian owner has title to the bed the island belongs to him up to the line of his ownership of the bed, and if the riparian owner is not the owner of the bed of the stream, he is not the owner of the island, unless it has been granted to him." 45 C. J. Sec. 256, p. 563.

"Title to islands in a navigable stream cannot be acquired by actual settlement and improvement except where the statutes so provide." 45 C. J. Sec. 257, p. 565.

"Islands formed before the admission of a state to the Union do not pass to the state upon its admission to the Union, but remain the property of the United States and subject to disposition by it, where the islands are surveyed by the United States, or, although unsurveyed, are large and of stable formation. On the other hand if islands are formed after the admission of a state to the Union, the question whether they belong to the ripari-

an owner or are the property of the state is governed by local law, they being the property of the state according to the rule obtaining in some jurisdictions." 45 C. J. Sec. 258, p. 565.

"Islands formed in the stream before the admission of the state into the Union are subject to disposal by the Federal government the same as other public lands. If they are formed after the admission of the state the question whether they belong to the riparian owner, or are the property of the state, is governed by local law." Volume I, Page 50, Farnham, "Water and Water Rights"; See also 45 C. J. Sec. 258, p. 565; 60 Mont. 481, supra.

"If the title to the soil where the island springs up is in private ownership the island will belong to the owner of the soil. Therefore, where an island arises in a stream the title to the bed of which is in the state, it does not belong to the owner of either shore. An island formed upon the portion of the bed which belongs to the riparian owner becomes his property. Islands lying in the bed of a stream may be treated independently by the state in parceling out the lands on the shore. In such case the title to them must be obtained as the state prescribes. But a grant of land which carries title to the center of the stream will carry with it all islands between the shore and the center." Volume I, pages 275, 276, 277. Farnham, "Water and Water Rights."

"In *Steinbuechel v. Lane*, 59 Kan. 7, 51 Pac. 886, it is said that it is impossible to lay down a definite rule which will determine every case involving a question as to what passes by the grant of land bordering on a water course. Whether islands are intended to be reserved, or to pass, must be determined from their situation and extent and the action of the land department. There are certain general rules, however, which will decide most cases which may arise. If the policy of the government is to part with the title to the bed of the stream, the island will be presumed to have been regarded as part of the bed, and to have passed by a grant of the upland, unless it was expressly reserved, or there was plain implication that it was not intended to pass. Therefore, where the title of the grantee extends to the middle of the stream, an island in a river which the

government surveyor does not think of sufficient value to survey passes to a grantee of the bank. \* \* \* " Volume III, pages 2501-2502, Farnham, "Water and Water Rights."

From the various statutes and decisions cited above, our conclusions are as follows:

1. The title to the bed of navigable streams within the boundaries of Montana is in the state, subject to the control of Congress in the interest of interstate and foreign commerce.

2. Title to islands of dry upland in navigable streams at the time Montana became a state, whether surveyed or not, remains in the Federal Government. However, we have found no instance where the Federal Government has attempted to assert title to any island where the area was less than twenty acres.

3. Title to islands that have been formed by accretion since Montana was admitted to the Union is in the State. This, we think, is true even though such islands have been formed on shallow bars and lands that may have formerly been above low water mark and inundated only during high water flow.

4. Title to islands in non-navigable waters is in the riparian owner or owners.

5. Title of riparian owners of land on navigable streams extends to the edge of the stream at low water mark, subject to use of the lands to high water mark by those engaged in commerce, etc. on such streams.