Volcanic Oil and Gas Co. v. Chaplin

TRIAL DECISION

[1912] O.J. No. 3
27 O.L.R. 34
6 D.L.R. 284

[1] ACTION by the Volcanic Oil and Gas Company, John G. Carr, and the Union Natural Gas Company of Canada Limited (added by order in Chambers), plaintiffs, against Chaplin and Curry, defendants, for a declaration of the plaintiffs' right of ownership of certain lands, and for an injunction and damages in respect of trespasses alleged to have been committed by the defendants thereon.

[2] April 9 and 10. The trial of the action was begun and the evidence taken before FALCONBRIDGE C.J.K.B., without a jury, at Chatham.

[3] May 10. The argument was heard at Toronto.

G. F. Shepley, K.C., and J. G. Kerr, for the plaintiffs.
O. L. Lewis, K.C., for the defendant Curry.
W. Stanworth, for the defendant Chaplin.

[4] July 12. FALCONBRIDGE C.J.:-- The plaintiffs the Volcanic Oil and Gas Company carry on business in the counties of Essex and Kent in the production and sale of petroleum and natural gas; the plaintiff Carr is a farmer; the defendant Chaplin is described as a wheel manufacturer; the defendant Curry is an oil and gas drilling operator.

[5] The plaintiff Carr is the owner and occupant of the westerly half of lot 178, Talbot road survey, in the township of Romney. It was granted by the Crown by patent dated the 29th January, 1825, to Carr's predecessor. The lands are described in the patent in manner following, that is to say: "All that parcel or tract of land situate in the township of Romney, in the county of Kent, in the western district in our said Province, containing by admeasurement one hundred acres, be the same more or less, being the south-easterly part of lot number 178 on the northwesterly side of Talbot road west, in the said township, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed, [27 OLR Page36] which said one hundred acres are butted and bounded or may be otherwise known as follows, that is to say: commencing at the north-westerly side of the said road in the limit between lots numbers 177 and 178 at the easterly angle of the said lot 178; thence on a course about sixty degrees west along the northwesterly side of the said road

twenty chains seventy-one links more or less to the limit between lots numbers 178 and 179; thence north forty-five degrees west sixty chains more or less to the allowance for road between the townships of Romney and Tilbury East; thence east twenty-nine chains more or less to the limit between lots numbers 178 and 177; thence south forty-five degrees east 47 chains more or less to the place of beginning."

[6] The plaintiffs claim that the original Talbot road, which formed the south-westerly boundary of the lands included in the above patent, ran near the bank of Lake Erie, which at this point is many feet above the beach, and rises perpendicularly therefrom, having a clay front facing the waters of the lake. The plaintiffs further allege that along the shore of Lake Erie, in that locality, the waters of the lake have been encroaching upon the lands, undermining the bank, causing it to subside, and then gradually washing it away; that, by reason of this encroachment of the lake, Talbot road at an early period grew dangerous and unsafe for public travel, until, about the year 1838, it was abandoned as a means of public travel, and a new road, which has for many years been known as the Talbot road, was opened up and dedicated to public travel; that this road still continues to be the travelled road known as Talbot road, but the original Talbot road across the lake front has long since been washed away by the waters of the lake, and now those waters have advanced beyond where they were at the time of the original Talbot road survey; so that they have washed away the reserve left in front of the Talbot road, also the Talbot road itself and some rods of the front of the surveyed lots; so that now so much of the lands patented to Carr's predecessor, and now owned by him, as are now above the waters of Lake Erie, border on the waters of the lake, and not on the original Talbot road.

[7] The above statements are denied by the defendants, but I find them to have been proved, as I shall hereinafter state.

[8] On or about the 4th July, 1908, the plaintiff Carr executed [27 OLR Page37] and delivered to the plaintiffs the Volcanic company a grant and demise of the exclusive right to search for, produce, and dispose of petroleum and natural gas in, under, and upon the said lands, together with all rights and privileges necessary therefor, etc.

[9] By instrument under the Great Seal of the Province of Ontario, dated the 1st August, 1911, known as Crown lease number 1836, the Government of the Province demised and leased unto the defendant Chaplin, his heirs, executors, etc., the whole of that parcel or tract of land under the waters of Lake Erie in front of this lot, amongst others (the particular description of which is set out in paragraph 5 of the statement of defence of Curry).

[10] About the month of September, 1911, the defendant Chaplin made a verbal contract with the defendant Curry for putting down a well for the production of petroleum and natural

gas in and upon the lands so demised by the Crown to Chaplin; and Curry, acting under such contract, entered upon what the plaintiff Carr claims to be his land, with men and teams, and constructed a derrick and engine-house, etc.

[11] The plaintiffs, claiming that this entry was wholly unlawful, made objection thereto; and, on the defendants persisting in their operations, the plaintiffs obtained an injunction from the local Judge, which injunction was continued until the trial. The plaintiffs now ask: (1) that the injunction be made perpetual; (2) a declaration of their rights as to the ownership of the land, and as to riparian rights; and (3) damages.

[12] The defendants claim that, if the waters of the lake have washed away the bank and encroached in and upon lot 178, the lands up to the foot of the high bank before-mentioned became the property of the Crown, and that the south-westerly external boundaries of the lot shifted as the waters of the lake encroached thereon, giving full right to the Crown to enter into the Crown lease before-mentioned.

[13] The point involved is extremely interesting, and is one which, if I correctly apprehend the English and Canadian cases, has never yet been expressly decided, either in the old country or here.

[14] The surveyors who were called all agree that, by reason of the original survey having been made so long ago, and of the disappearance of original monuments, etc., they could not now lay out upon the land and water, as they now exist, the old Talbot road. [27 OLR Page38] Numerous witnesses were called who remembered that road and could speak of its boundaries, and of the erosion of the beach causing the road to be carried away north to its present position many rods north of its original situs. The evidence is overwhelming (I disregard the curious evidence of Samuel Cooper), and I find it to be the fact that the locus now in controversy is part of the lot 178 north of the old Talbot road.

[15] Having come to this conclusion, it follows that, if the plaintiffs' contention in law is well founded, it is quite immaterial whether or not the construction of the derrick is entirely in the water, or partly in the water and partly on the beach-the fact being that it is on Carr's property.

[16] In Gould on Waters, 3rd ed., para. 155, pp. 306 to 310, inclusive, after stating the general rule that "land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made," and that "conversely land gradually encroached upon by navigable waters ceases to belong to the former owner," quoting the maxim *Qui sentit onus debet sentire commodum*, the author proceeds (p. 309): "But when the line along the shore is clearly and rigidly fixed by a deed or

survey, it will not, it seems, afterwards be changed because of accretions, although, as a general rule, the right to alluvion passes as a riparian right."

[17] In *Saulet v. Shepherd* (1866), 4 Wall. (U.S.) 502, it was held that the right to alluvion depends upon the fact of contiguity of the estate to the river-where the accretion is made before a strip of land bordering on a river, the accretion belongs to it and not to the larger parcel behind it and from which the strip when sold was separated; citing at length the judgment in a case of *Gravier v. City of New Orleans*, which is in some little known report not to be found in our library at Osgoode Hall.

[18] In *Chapman v. Hoskins* (1851), 2 Md. Ch. 485, the general rule is stated as follows (paragraph 2, head-note): "Owners of lands bordering upon navigable waters are, as riparian proprietors, entitled to any increase of the soil which may result from the gradual recession of the waters from the shore, or from accretion by alluvion, or from any other cause; and this is regarded as the [27 OLR Page39] equivalent for the loss they may sustain from the breaking in, or encroachment of the waters upon their lands."

[19] Now, in the case in hand, the plaintiffs say that they could gain nothing by accretion, by alluvion, or other cause; and, consequently, they should not lose by encroachment of the water upon their land, to which fixed termini were assigned by the grant from the Crown. This doctrine seems to be well supported by decisions of Courts which are not binding upon me, but which command my respect, and which would seem to be accurately founded upon basic principles.

[20] In *Smith v. St. Louis Public Schools* (1860), 30 Mo. 290, the principle is very clearly stated: "The principle upon which the right to alluvion is placed by the civil law-which is essentially the same in this respect as the Spanish and French law, and also the English common law-is, that he who bears the burdens of an acquisition is entitled to its incidental advantages; consequently, that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be annexed to it. This rule is inapplicable to what are termed limited fields, *agri limitati*; that is, such as have a definite fixed boundary other than the river, such as the streets of a town or city." The reference in the judgment to the English common law is not quite so positive as the head-note states it. The Judge (Napton) in the course of a very learned opinion says (p. 300): "It will be found, indeed, that upon this subject the Roman law, and the French and Spanish law which sprung from it, are essentially alike, if we except mere provincial modifications; and it is believed that the English common law does not materially vary from them. This uniformity necessarily results from the fact that the foundation of the doctrine is laid in natural equity." In saying this he may have had in his mind the language of Blackstone, to be now found in book 2,

Lewis's ed., pp. 261-2; although he does not cite him. There are some earlier English authorities to which I shall refer later.

[21] Then there is a case of *Bristol v. County of Carroll* (1880), 95 Ill. 84 (para. 3 of head-note): "3. To entitle a party to claim the right to an alluvial formation, or land gained from a lake by alluvium, the lake must form a boundary of his land. If any [27 OLR Page40] land lies between his boundary line and the lake, he cannot claim such formation."

[22] In *Doe dem. Commissioners of Beaufort v. Duncan* (1853), 1 Jones (N.C.) 234, at p. 238, Battle J., says: "Were the allegations supported by the proof, an interesting question would arise, whether the doctrine of alluvion applies to any case where a water boundary is not called for, though the course and distance, called for, may have been coterminous with it? We do not feel at liberty to decide the question, because we are clearly of opinion that the evidence given on the part of the defendant does not raise it."

[23] *Cook v. McClure* (1874), 58 N.Y. 437, is a judgment of the Court of Appeals of the State of New York. The head-note is as follows: "It seems, the rule that, where a boundary line is a stream of water, imperceptible accretions to the soil, resulting from natural causes, belong to the riparian owner, applies as well where the boundary is upon an artificial pond as upon a running stream. In an action of ejectment, plaintiff claimed under a deed conveying premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond." Held, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the gradual and imperceptible result of natural causes."

[24] In *The Schools v. Risley*, 10 Wall. (U.S.) 91, the decision was as follows: "A street or tow-path or passway or other open space permanently established for public use between the river and the most eastern row of blocks in the former town of St. Louis, when it was first laid out, or established, or founded, would prevent the owners of such lots or blocks from being riparian proprietors of the land between such lots or blocks and the river. But this would not be true of a passage-way or tow-path kept up at the risk and charge of the proprietors of the lots, and following the changes of the river as it receded or encroached, and if the inclosure of the [27 OLR Page41] proprietor was advanced or set in with such recession or encroachment."

[25] In *re Hull and Selby Railway* (1839), 5 M. & W. 327, the general law as to gradual accretion or recession is stated. Alderson B., says (p. 333): "The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and

decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all."

[26] See also Giraud's *Lessee v. Hughes* (1829), 1 Gill & Johnson (14 C.A. Md.) 115.

[27] The defendants' counsel, in the course of a very elaborate and careful argument, cited numerous authorities in support of the view that the plaintiff Carr had lost the land by the encroachment of the water. I do not cite all of these, because they are set out at large in the extended report of the argument; but I do not think that there is any case in which it has been expressly held that a person in the position of this individual plaintiff loses his property because of the gradual encroachment of the water past the land in front of the road, past the road, and past the fixed boundary of the plaintiffs' land. He could not have gained an inch of land by accretion even if the lake had receded for a mile; and, therefore, it seems that the fundamental doctrine of mutuality, formulated in the civil law and adopted into the jurisprudence of many countries, cannot apply to him.

[28] Perhaps the strongest English case cited by the defendants' counsel was *Foster v. Wright* (1878), 4 C.P.D. 438: "The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining the river, was enfranchised and became [27 OLR Page42] the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there: "Held, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land."

[29] That case goes a long way in support of the defendants' contention. But Lord Coleridge C.J., concurs only in the result arrived at by Lindley J. He thinks the safer ground appears to be "that the language (of the grant) conveys ... a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, i.e., as I understand the phrase, a right to take fish in *alieno solo*, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been."

[30] There is a reference in the argument, and in the judgment in this case, to some of the old authorities: for example, Britton, book 2, ch. 2, sec. 7, Nichol's translation, p. 218: "But if

the increase has been so gradual, that no one could discover or see it, and has been added by length of time, as in a course of many years, and not in one day or in one year, and the channel and course of the water is itself moving towards the loser, in that case such addition remains the purchase and the fee and freehold of the purchaser, if certain bounds are not found."

[31] Lindley J., seems to think that in In re Hull and Selby Railway, to which I have already referred, the Court declined to recognise this principle.

[32] As against the authorities in the United States which I have cited, there is a very strong case of *Widdecombe v. Chiles* (1903), 73 S.W.Repr. 444, a judgment of the Supreme Court of Missouri. The head-note is as follows: "Defendant was the owner of the [27 OLR Page43] south half of a section of land between which and the river bed there was originally a strip of 8 acres, forming the fractional north half, which had not been patented. The river changed its bed until it had washed away the 8-acre strip, and flowed through defendant's land, when it began to rebuild to defendant's land all that it had washed away, and about 200 acres additional. Plaintiff then received a patent for the fractional north half of the section as described by the original survey. Held, that, the accretion being to defendant's land, plaintiff took no title by his patent." And Valliant J., says (p. 446): "This Court has not said in either of those cases, and we doubt if any Court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river-which in fact did not reach the river when the deed was made-does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary."

[33] In considering authorities which are not binding upon me, and when I have to decide "upon reason untrammelled by authority" (per Werner J., in *Linehan v. Nelson* (1910), 197 N.Y. 482, at p. 485), I prefer those United States decisions, which I have earlier cited. There have also been cited to me authorities which it is contended dispose completely of the *Widdecombe* case, viz., the *Lopez* case, which is reported as *Lopez v. Muddun Mohun Thakoor* (1870), 13 Moo. Ind. App. 467; *Hursuhai Singh v. Synd Lootf Ali Khan* (1874), L.R. 2 Ind. App. 28; and *Theobald's Law of Land*, p. 37.

[34] It was strongly contended by the junior counsel for the plaintiffs that, apart from the main question, and granting that the erosive action of the lake has encroached upon the plaintiff Carr, and that he has lost some of his land, then at any rate he only loses it down to the low water mark. But, having regard to the view that I take about the main question, it is not necessary to consider that argument.

[35] I do not see that the statute 1 Geo. V. ch. 6 has any application to this case; nor do I see that the Attorney-General ought to bring the action or is a necessary party-the plaintiffs being

concerned only with the trespass upon their lands, and not with any supposed public right. [27 OLR Page44]

[36] The good faith, or the opposite of the defendants, in making the trespass, is a matter of no consequence in the disposal of the action.

[37] I find, therefore, that there has been a trespass by the defendants upon the plaintiffs' land, and that they are entitled to have the injunction herein made perpetual, with full costs on the High Court scale and $10 damages.

* The authorities cited by counsel for the defendants were the following: Farnham on Waters, pp. 280, 281; 291, 296, 309; *Foster v. Wright*, 4 C.P.D. 438; Gould on Waters, 3rd ed., p. 308; *Standly v. Perry* (1879), 3 S.C.R. 356; Encyc. Laws of England, 2nd ed., vol. 2 pp 143, 145; vol. 14, pp. 625, 630, 631; *Hindson v. Ashby*, [1896] 1 Ch. 78 [1896] 2 Ch. 1; *Point Abino Land Co. v. Michener* (1910), 2 O.W.N. 122; *Parker v. Elliott* (1852), 1 C.P. 470 491; Michael and Wills on Gas and Water, 6th ed., pp. 409, 410, 411; Hall's Rights of the Crown in Sea-shore (1881), p. 683; *Attorney-General v. Terry* (1874), L.R. 9 Ch. 423; Halsbury's Laws of England, vol. 7, p. 116; *Regina v. Port Perry and Port Whitby R.W. Co*. (1876), 38 U.C.R. 431; Re Sinclair (1908), 12 O.W.R. 138; *Lyon v. Fishmongers' Co*. (1875), 1 App. Cas. 662, 671, 672, 679, 680.

DIVISIONAL COURT APPEAL DECISION

[1912] O.J. No. 60
27 O.L.R. 484
10 D.L.R. 200
Ontario High Court of Justice
Divisional Court
Clute, Riddell and Kelly JJ.

December 24, 1912

[1] APPEAL by the defendants from the judgment of FALCONBRIDGE C.J.K.B., ante 34.

[2] November 6. The appeal was heard by a Divisional Court composed of CLUTE, RIDDELL, and KELLY JJ. [27 OLR Page485]

O. L. Lewis, K.C., and W. Stanworth, for the defendants.
G. F. Shepley, K.C., and J. G. Kerr, K.C., for the plaintiffs.

[3] O. L. Lewis, K.C., and W. Stanworth, for the defendants, argued that., by the gradual wearing away by the water of the land between the old Talbot road and the lake, and afterwards the road itself and a portion of the plaintiffs' lot 178, the Crown became entitled to

the land under the lake to the present water's edge. In support of this contention they cited *Foster v. Wright* (1878), 4 C.P.D. 438; *Widdecombe v. Chiles* (1903), 73 S.W. Repr. 444; Farnham on Waters and Water Rights, ed. of 1904, p. 332; *Hindson v. Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; Gould on Waters, 3rd ed., pp. 156, 157, 308; Morine on Mining Laws of Canada, p. 75; In re Provincial Fisheries (1895), 26 S.C.R. 444*; Barthel v. Scotten* (1895), 24 S.C.R. 367; In *re Hull and Selby Railway* (1839), 5 M. & W. 327; *Scratton v. Brown* (1825), 4 B. & C. 485; *Rex v. Lord Yarborough* (1824), 3 B. & C. 91; *Attorney-General v. Perry* (1865), 15 C.P. 329; Encyc. of the Laws of England, 2nd ed., vol. 2, p. 145; vol. 6, p. 204; vol. 14, pp. 624, 625, 626; Ruling Cases (Eng.), vol. 17, pp. 555, 578; vol. 27, p. 50; *Standly v. Perry* (1877), 2 A.R. 195; S.C. (1879), 3 S.C.R. 356; *Point Abino Land Co. v. Michener* (1910), 2 O.W.N. 122.

[4] G. F. Shepley, K.C., and J. G. Kerr, K.C., for the plaintiffs, contended that the plaintiffs were not riparian owners, and so would not have been entitled to gain additional land in case the waters had receded. Therefore, there could be no correlative right in the Crown to gain upon the plaintiffs' land by the influx of the waters of the lake, as the rights of encroachment and recession, to have such a consequence, must be mutual. The boundaries of the plaintiffs' land could now and always could have been definitely shewn by metes and bounds. The point was in a narrow compass. He referred to Farnham on Waters and Water Rights, p. 2499, referring to the *Widdecombe* case, cited by the other side; *Lopez v. Muddun Mohan Thakoor* (1870), 13 Moo. Ind. App. 467, especially at p. 472; Farnham on Waters and Water Rights, p. 1462; *Stover v. Lavoia* (1906-7), 8 O.W.R. 398, 9 O.W.R. 117; *Servos v. Stewart* (1907), 15 O.L.R. 216; *Gilbert v. Eldridge* (1891), 13 L.R.A. 411; *Marshall v. Ulleswater Steam Navigation Co*. (1871), L.R. 7 Q.B. 166; *Iler v. Nolan* (1861), 21 U.C.R. 309; *Regina v. Lord* (1864), 1 P.E.I.R. 245. The plaintiffs did not become riparian proprietors, and so entitled [27 OLR Page486] to accretion and liable for erosion; and the Missouri case of *Widdecombe v. Chiles, supra*, is contrary to the current of American authorities.

[5] Lewis, in reply, submitted that the provisions of 1 Geo. V. ch. 6, sec. 2, applied here, notwithstanding the finding of the learned trial Judge.

[6] December 24. CLUTE J.:-- In 1825, the Crown granted to the plaintiffs' predecessor in title lot 178, Talbot road survey. The original Talbot road formed the south-easterly (misquoted in the judgment below as the south-westerly) boundary of the said lot. At the time of the survey, the Talbot road ran near the bank of Lake Erie, with a strip of land between it and the lake. The bank, composed of clay, was gradually washed away by the lake until the road became dangerous; and, in 1838, it was abandoned, and a new road opened up and dedicated to public travel. This road is still travelled and known as the Talbot road. The waters of the lake not only washed away the land between the road and the lake, but also the road, and

encroached a certain distance upon the plaintiffs' land. These facts are found by the learned trial Judge.

[7] In August, 1911, the Province of Ontario demised and leased to the defendant Chaplin, with other lands, "that parcel or tract of land under the water of Lake Erie in front of lots 178 to 180 inclusive, Talbot road lots." The particular description of the portion material to the present case is as follows: "Commencing at a point on the water's edge of Lake Erie at its intersection with the south-easterly limit of lot No. 178, Talbot road lot; thence south 45 degrees east along the production of said limit 40 chains; thence south-westerly 63 chains, more or less, to a point in the production of the south-westerly limit of lot No. 180, Talbot road, distant 40 chains from the water's edge of Lake Erie; thence north 45 degrees west along said produced limit 40 chains to the water's edge of Lake Erie, and thence north-easterly along the water's edge of Lake Erie to the place of beginning, containing 252 acres, more or less, of land covered with water, together with a right to drill and bore for petroleum and natural gas and to remove the same, saving and excepting thereout the small dock the south-easterly corner of lot No. 178, Talbot road lot, and free access thereto for all parties using the same." [27 OLR Page487]

[8] n September, 1911, the defendant Chaplin contracted with his co-defendant, Curry to sink a well for the production of petroleum and natural gas upon the lands so demised by the Crown to Chaplin. Under this contract Curry entered upon what the plaintiff claims to be his land, and constructed a derrick, an engine-house, etc., and brought thereon a boiler and the usual equipment for drilling operations.

[9] The plaintiff company is a lessee of the plaintiff Kerr, who granted him an exclusive right of boring for natural gas and petroleum on the plaintiff Kerr's lands, viz., the westerly half of lot No. 178, Talbot road survey, containing 100 acres, more or less, with all the rights and privileges necessary therefor.

[10] The plaintiffs claim that the defendants, by the erection of their building and appliances, have trespassed upon the plaintiffs' lands. The defendants answer that the lands in question do not belong to the plaintiff Kerr, but are owned by the Crown, from whom they claim the right under their lease to do as they have done.

[11] The real question in controversy is this: whether, by accretion, the Crown became entitled to what was formerly a portion of lot 178, or whether the plaintiffs are entitled to such lot, to the exclusion of the defendants, under the original grant from the Crown.

[12] The defendants insist that, even admitting that, by original survey, lot 178 was wholly above high water mark and bounded on the south-east by the old Talbot road, yet, by the slow encroachment of water, the land between the road and the lake and afterwards the road and a

portion of the plaintiffs' lot was gradually worn away, and the Crown thereby became entitled to the land under the lake to the present water's edge.

[13] The plaintiffs contend that the well-known rule in such a case has no application to the facts here disclosed; that the plaintiffs were not riparian proprietors; that the rights of encroachment and recession are mutual; and that, where there is no right of encroachment in case the waters receded owing to the fact that the plaintiffs were not original riparian proprietors, so there is no correlative right to the Crown.

[14] The cases have been very carefully reviewed by the learned Chief Justice, and it is not necessary to go over the ground covered [27 OLR Page488] by his judgment, in the conclusion of which I entirely agree. He finds as a fact that the locus now in controversy is part of lot 178 north of the old Talbot road.

[15] There seems to be no English or Canadian case exactly covering the question here involved. The principles governing the present case are, I think, to be found in the *Lopez* case, 13 Moo. Ind. App. 467. Lord Justice James (p. 472) refers to the English rule as laid down in Hale, de Jure Maris, p. 15: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art, or industry regained, the subject doth not lose his property." "If the mark remain or continue, or the extent can reasonably be certain, the case is clear." "But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues:" The Lord Justice points out that this principle is not peculiar to English law, but is founded in universal law and justice; "that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner." He then refers to another principle recognised in English law, "that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex v. Lord Yarborough*, 2 Bli. N.R. 147. And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (In re Hull and Selby Railway, 5 M. & W. 327). [27 OLR Page489] To what extent that rule would be carried in this country, if there were

existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined." It may very well be said here by the plaintiffs, as was said in the Lopez case: "I had the property. It was my property before it was covered by the lake. It remained my property after it was covered by the lake. There was nothing in that state of things that took it from me and gave it to them." The Privy Council held that the part of the case here referred to did not fall within a local statute, but must be determined by general principles of equity. In the *Lopez* case, the facts were different from the present, for there, after the encroachment and recession and re-encroachment, the waters ultimately subsided and left the land reformed on its original site. But the principles applied in that case are equally applicable to the present. Reference is made in the judgment given in the *Lopez* case to *Mussumat Imam Bandi v. Hurgovind Ghose* (1848), 4 Moo. Ind. App. 403. In that case it was held as follows (p. 406): "The question then is, to whom did this land belong before the inundation? Whoever was the owner then remained the owner while it was covered with water, and after it became dry." The decision in that case was followed in the Lopez case.

[16] In a subsequent Indian case, *Katteemohinee Dossee v. Ranee Moumohinee Dabee* (1865), referred to in the *Lopez* case, at p. 477, it was held, "that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river."

[17] Their Lordships, in the *Lopez* case, were unable to assent to any such distinction between surface and site, stating that "the site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided [27 OLR Page490] the ownership of the site be ascertained." They were careful, however, to observe in the judgment in that case (p. 478) that they "desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation." It is then pointed out in the judgment that the parties themselves took the proper and prudent means to prevent the necessity of any dispute arising. The plaintiff, as between him and the State, took the most effectual means in his power, by having the description and measurement of the submerged land recorded and continuing to pay rent for it, to prevent the possibility of any question of dereliction or abandonment being raised against him. "Their Lordships are,

therefore, of opinion that the property now being capable of identification ... and having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property."

[18] In the present case the land claimed by the plaintiffs was originally laid out by metes and bounds. It was not bounded in any part of it by the lake, between which and its southern boundary lay the Talbot road and land south of the Talbot road. As it stood at the time of the grant, the owner could, by no possibility, obtain any additional land by accretion from the lake. His land was definitely ascertained by metes and bounds, as contained in the original grant from the Crown. This boundary is still easily to be ascertained, and not the less so because a certain portion of the land is now covered with water. The grantee had no riparian rights, and was not, in my opinion, subject to the law of accretion or recession applicable in such a case.

[19] The site of the buildings erected by the defendants is on the shore, on land not covered by water at low water mark, and the plaintiffs, if they are-as the defendants allege-riparian proprietors, have right of access to the water and to every part of the approach to the water in front of their land. So that, in [27 OLR Page491] my opinion, even if this land covered by water had returned to the Crown, the Crown would have no right to make a grant in derogation of the plaintiffs' rights to reach the water: *Pion v. North Shore R.W. Co*. (1887), 14 S.C.R. 677; *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Co*. (1876), 1 App. Cas. 662.

[20] But I do not desire to put my opinion upon this narrow ground, but rather upon the broad ground that the plaintiffs, claiming under a grant of the land which covers the site of the alleged trespass, continue to own that land, though covered with water, because the grantee from the Crown had no riparian rights, and the same can now and always could be well and definitely ascertained by metes and bounds.

[21] The appeal should be dismissed with costs.

[22] RIDDELL J.:-- This is an appeal from the judgment of Sir Glenholme Falconbridge, the reasons for which are reported in 27 O.L.R. 34.

[23] The findings of fact at the trial are wholly justified by the evidence, and are, indeed, but feebly contested on this appeal.

[24] I am of opinion that the result is right, and the appeal must fail. Recognising the care and ability with which the learned Chief Justice has marshalled the authorities and arrived at his conclusion, I think it best to attack the problem independently and from a somewhat different point of view.

[25] There can, I think, be no dispute about the common law principles of the ownership or "propriety" of the King in the soil under the sea, etc.

[26] Sir Matthew Hale has written most learnedly "a work of great authority"-as the Judicial Committee calls it in 13 Moo. Ind. App. at p. 472-the well-known treatise De Jure Maris. It is to be found in a convenient form in Moore's History of the Foreshore, pp. 370-413, and I cite from that book. Hale says (p. 376): "In this sea the King of England bath a double right, viz., a right of jurisdiction, which he ordinarily. exerciseth by his admiral, and a right of propriety or ownership. ... The King's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow." Our Great Lakes follow in that respect the sea-the beds of all [27 OLR Page492] such belong to the King as represented by the Provincial Government: In re Provincial Fisheries (1896), 26 S.C.R. 444.

[27] If a person owns land adjoining a lake, such as Lake Erie, and the lake by gradual encroachment eats into his land, he loses this land so eaten away, and the King acquires it: In *re Hull and Selby Railway*, 5 M. &5 W. 327; *Throop v. Cobourg and Peterborough R.W. Co*. (1856), 5 C.P. 509.

[28] It is contended that this rule could not apply if the land encroached upon had been bounded on the side toward the water by some distinct line irrespective of the water's edge; and two Indian cases are cited.

[29] In *Lopez v. Muddun Mohun Thakoor*, 13 Moo. Ind. App. 467, the Judicial Committee quoted part of the following extract from Hale, de Jure Maris: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject cloth not lose his property; and accordingly it was held by Cooke and Foster, M. 7 Jac. C.B. though the inundation continue forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear.- Vide Dy. 326.-22 Ass. 93." I quote from Moore's History of the Foreshore, p. 381. The Judicial Committee, however, did not apply that statement of the law to the case in hand, which was that of a gradual encroachment by the River Ganges and a recession by that river. But they went on to say: "There is, however, another principle recognised in the English law, derived from the civil law, which is this,-that where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, therefrom the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex v. Lord Yarborough*, 2 Bli. N.R. 147. And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable,

river, so that there the owner of the river gained from the land in the same way [27 OLR Page493] as the owner of the land had in the former case gained from the sea (In re Hull and Selby Railway, 5 M. & W. 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea; or other means of that kind, has never been judicially determined." And the Committee, pointing out that the matter had been provided for by statute, determined the case on the "positive written law," and not the English law at all.

[30] That the Committee is contrasting a gradual swallowing up and one produced by "the violence of the sea" is clear enough, but is made even more clear, if possible, by the examples on p. 473 of the report, "covered by lava or ashes from a volcano"- lava and ashes from a volcano do not cover land by slow and imperceptible degrees.

[31] The same difference is to be seen in the argument of the Solicitor-General in 5 M. & W. at p. 329, and also that of Sir Frederick Pollock, at p. 330. Sir Frederick endeavoured to have the Court follow Hale's rule for "sudden ... overflowing of the land," in the case then under consideration of "an imperceptible overflowing"-but failed.

[32] The case of *Hursuhai Singh v. Synd Lootf Ali Khan* (1874), L.R. 2 Ind. App. 28, simply follows the case in 13 Moo. Ind. App. All the cases referred to in the Judicial Committee as "others which have followed it before this Committee" (p. 32), are Indian cases (p. 30).

[33] These cases, being decided upon positive written law, are no authority for the proposition in Theobald's Law of Land, p. 37: "If land is submerged by a river or the sea, and the river or sea retires and leaves the land free from water, the owner is entitled to the land if he can identify the site of it."

[34] Nor am I able to derive assistance from the maxim *Qui sentit onus debet sentire commodum*. The sages of the law were liable at any time to drop into Latin or Law French or a mixture of the two-generally a barbarous mixture-and give utterance to a "maxim." While, to borrow the terminology of formal logic, the maxim was not infrequently made a major premise of a syllogism, still almost invariably it is apparent that the maxim is really a sententious statement of a conclusion arrived at by [27 OLR Page494] the inductive method-a generalisation more or less accurate from a number of decisions or considerations. Not unlike the proverb, which has been defined as being "the wisdom of many and the wit of one," the maxim in most instances requires the modifier "sometimes" expressed or understood. A maxim is a convenient method of summing up conclusions, but is dangerous as a premise upon which to base an argument.

[35] Taking the maxim in question, I can find no possible reason why the two accusatives should not interchange, and the maxim, with equal accuracy and value, read, "*Qui sentit commodum debet sentire onus.*"

[36] But, in any case, I cannot see its application as an argument in favour of the respondents-there is no pretence that the rule as to gradual accretion, etc., would apply to lot 178 until it became in fact riparian-becoming so, it is argued that *sentit commodum*, and, consequently, *debet onus sentire*.

[37] The present case must, as it seems to me, be determined upon the principles laid down in cases of gradual accretion-or rather the reasons for these rules.

[38] In *re Hull and Selby Railway*, 5 M. & W. 327, at p. 333, Alderson B., gives this as the reason for the rule, that "if the sea gradually covered the land ... the Crown would be the gainer of the land. ... That which cannot be perceived in its progress is taken to be as if it never had existed at all."

[39] Lord Justice James, in the *Lopez* case, 13 Moo. Ind. App. 467, at p. 473, bases the rule upon the same principle, expressed in different language, and rather implicitly than explicitly "from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs."

[40] What this means is something like the following: "Where, to determine whether a piece of land belongs to a person on one side or another of some boundary, it is necessary to find that boundary-then, if the boundary moves one way or the other by insensible and gradual accretion or the like, the position of that boundary at any particular time is the boundary for the owner at that particular time, irrespective of its position either at the time of the deed or any time before or after." A man [27 OLR Page495] has a grant of land "to the water's edge," "to the bank of the lake," etc., etc.-to determine his boundary at any particular time, find the position of "the water's edge," "the bank of the lake," etc., at that particular time. The change, being imperceptible, is considered as not having happened at all.

[41] But, if the boundary is fixed and not movable-that is, the words fixing the boundary do not connote a shifting or moving line-the reasons do not apply; and *cessante ratione cessat ipsa lex*.

[42] In my view, no matter how far in the waters of the lake may come, the grantee of the lot 178 does not lose his "propriety" in the land; and, no matter how far out the lake may recede, he cannot get an inch beyond his line as first fixed.

[43] The single case of *Widdecombe v. Chiles*, 73 S.W. Repr. 444, 173 Mo. 195, is opposed apparently to that view. This, seems to be law still in Missouri-I do not find that it has been overruled, and it is cited without disapproval in *Frank v. Goddin* (1905), 193 Mo. 390, at p. 395. But it is not binding on us, and, as has been pointed out in the judgment appealed from, it is opposed to the mass of authority in the United States. It cannot, I think, be supported on principle, and I decline to follow it.

[44] The case of *Foster v. Wright*, 4 C.P.D. 438, cited in support of the appeal, does not assist the appellant when the facts of the case are examined. The owner of the manor of H. "also held the fishery of all the waters of H." He enfranchised a portion of land "A," but in the deed expressly "excepted and reserved from the grant ... his seigniorial rights ... together also with free liberty of ... fishing ... upon the premises or any part thereof. ..." The manor, being forfeited on attainder, was regranted to the predecessor in title of the plaintiff. The enfranchised land "A" did not at the time of the enfranchisement abut on the river L.; but, in course of time, by imperceptible degrees, the river ate into the land and ultimately encroached to some extent upon the land "A," now the property of the defendant. As a strip of his land now formed part of the bed of the river L., the defendant claimed the right to go upon that part of it and fish for salmon which [27 OLR Page496] came there. It is quite true that one of the Judges, Lindley J., thought that the bed of the river, shifting insensibly as it did, remained, with all its changes, the property of the owner of the manor through and over which it had originally flowed, that is, for all the purposes of the case. "I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner:" p. 446. No quarrel can be raised with this decision so guarded; the question was solely as to the right to fish-and all the learned Judge actually decided was, that, where the owner of a manor reserves the right to fish when enfranchising part of his manor, he has that right over the part so enfranchised in *aeternum*, and over any river that may be there at any time. This is the ground taken by the Chief Justice, Lord Coleridge, p. 449. It is quite true that Lindley J., says (p. 448): "Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title." It is to be noted that this conclusion is based upon cases such as In re Hull and Selby Railway-Lindley J., saying (p. 447) that the Court in that case declined to recognise the proposed qualification to the general rule "if certain boundaries are not found." But in that case the only "certain boundary" was the bank of the river; and, while the original boundary could be made out by metes and bounds, it could be done only by determining where the bank was at the time of the grant.

[45] In *Rex v. Lord Yarborough*, 3 B. & C. 91, the boundaries were a sea-wall or sea-bank and the sea; in *Attorney-General v. Chambers* (1859), 4 DeG. & J. 55, it was the sea-shore or one or other side of it. I do not find any case in which a boundary, a fixed, immovable line, has ever been crossed over on this principle.

[46] It is to be observed that Lindley J., bases his judgment also [27 OLR Page497] on the ground taken by the Chief Justice-and, further, that in none of the cases in which *Foster v. Wright* is cited, is the point now under discussion referred to: *Hindson v. Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Mercer v. Dense*, [1904] 2 Ch. 534.

[47] It may turn out that the land of the plaintiffs, being now under part of a navigable lake, is subject to the right of navigation, etc. That, however, is the right of the public, and gives no right to the Crown to grant away the soil or any interest in the soil.

[48] I am further of opinion that, even if the plaintiffs were only riparian proprietors, they would be entitled to maintain this action and hold the judgment they have obtained; but I do not pursue this inquiry.

[49] I am of opinion that the appeal must be dismissed with costs.

[50] KELLY J.:-- There is, to my mind, a distinction to be drawn between those cases where lands border upon navigable waters, the boundary not being otherwise defined, and the present case, where the boundary nearest to the water is “clearly and rigidly fixed” by the Crown grant, the description in which is by metes and bounds.

[51] In the present case, too, there is the further fact that the land so patented was separated from the water, not only by the Talbot road, but also by other lands between that road and the water’s edge.

[52] The grantee could not have been said to be a riparian proprietor, and his rights and liabilities differed in that respect from those of an owner whose lands border on navigable waters.

[53] After a careful perusal of the evidence and numerous authorities, I am of opinion that the judgment of the learned Chief Justice of the King’s Bench is correct, and it should not be disturbed.

[54] Appeal dismissed with costs.

ONTARIO SUPREME COURT APPEAL DECISION

[1914] O.J. No. 38
31 O.L.R. 364
19 D.L.R. 442
Ontario Supreme Court - Appellate Division
Meredith C.J.O., Maclaren, Magee and Hodgins JJ.A.

May 12, 1914

[1] APPEAL by the defendants from the order of a Divisional Court of the High Court of Justice, 27 O.L.R. 484, affirming the judgment of FALCONBRIDGE, C.J.K.B., 27 O.L.R. 34.

[2] September 24, 25, and 26, 1913. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

James Bicknell, K.C., J. W. Bain, K.C., and Christopher C. Robinson, for the appellants.

G. F. Shepley, K.C., and J. G. Kerr, for the plaintiffs, the respondents.

[3] May 12, 1914. THE COURT gave judgment allowing the appeal and dismissing the action with costs.

[4] MAGEE, J.A., wrote an elaborate opinion in which he examined the evidence in detail. His conclusions are expressed as follows:

[5] In my view, the plaintiffs have not proved either that the defendants' works are north of the site of the old Talbot road, or that the waters of the lake have reached so far; and hence they are not riparian proprietors.

[6] They do not shew any inconvenience or injury from the defendants' works beyond others of the public, and hence have established no right to relief.

[7] As a consequence, it is unnecessary to express any opinion as to the very interesting questions of law so fully discussed here and in the Courts below.

[8] The appeal should, in my opinion, be allowed, and the action dismissed, with costs of the action and of the appeal to the Divisional Court and of this appeal to the defendants.

[9] MEREDITH, C.J.O., and MACLAREN, J.A., concurred.

[10] HODGINS, J.A., also concurred, for reasons briefly stated in writing.

[11] Appeal allowed.