County of St. Clair Vs. Lovingston

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Appeal No. : 90 U.S. 46

Appellant : County of St. Clair

Respondent : Lovingston

Judgement :

County of St. Clair v. Lovingston - 90 U.S. 46 (1875)
U.S. Supreme Court County of St. Clair v. Lovingston, 90 U.S. 23 Wall. 46 46 (1875)

County of St. Clair v. Lovingston

90 U.S. (23 Wall.) 46

ERROR TO THE SUPREME COURT OF ILLINOIS

SYLLABUS

1. Where a survey begins "on the bank of a river" and is carried thence "to a point in the river," the river bank being straight and running according to this line, the tract surveyed is bounded by the river. It is

even more plainly so when it begins at a post "on the bank of the river, thence north 5 degrees east up the river and binding therewith."

2. Alluvion means an addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land is contiguous.

3. The test of what is gradual and imperceptible is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.

4. It matters not whether the addition be on streams which do overflow their banks or those that do not. In each case, it is alluvion.

The County of St. Clair, Illinois, brought ejectment against Lovingston, for a piece of land within its own boundaries, situated on the east bank of the River Mississippi (as its east bank now runs), opposite to St. Louis. The land was confessedly "made land" -- that is to say, it was land formed by accretion or alluvion, in the general sense of that word, though whether it was land made by accretion or alluvion in the technical or legal sense of the word was a point in dispute between the parties in the case. The bank of the river had confessedly, in some way, been greatly changed, and in this part added to. The tract in dispute is indicated on the diagram upon the next page, by the deeply shaded or most dark part of it; the part at the bottom of the diagram and on the left hand side of it.

The case was thus:

Before the year 1815, and in pursuance of an early formed intention by the government to give a piece of land to soldiers in the old French settlements in Illinois, a survey was made in the public lands for one Nicholas Jarrot, of one hundred acres, which was either on or near to the Mississippi River, as it then ran, though whether, in all its parts, on

the river or only beginning on its bank and leaving a strip or pieces of land between the tract and the river -- edges more or less ragged -- was one point in the case.

image:a

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The field notes and a plot of the tract, as given in proof, were thus:

image:b

"Beginning *on the bank of the Mississippi River,* opposite St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70 3/4 W.; thence S. 5 W. 160 poles to a point in the river from which a sycamore 20 inches diameter bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning."

At the time of this survey, the west line of the tract, if not in all its course on the river, was confessedly in all its course near to the river, the general course of the river bank in 1814, just before the survey, being indicated on the Diagram No. 1 by the words "River-bank in 1814," and the tract, the field notes of whose survey are above given, being marked on that diagram as "No. 579, N. Jarrot."

To the north of this tract of one hundred acres to Jarrot were two other tracts, each of one hundred acres. They are numbered on the Diagram No. 1, the one 624 and the other 766, and their general position is thus shown. Jarrot, in virtue of a transfer from some other French settler, claimed also this latter tract, No. 766.

At a later date -- that is to say in 1815 -- a certain Pierre Coudaire got a survey which covered the whole of the three

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abovementioned tracts, and some irregular edges on the east between them and the Cahokia Creek, as also a small strip bending round and going to the south of the southernmost of the three tracts, or tract No. 579. What this survey embraced on the west -- that is to say, on the river side -- not embraced by the surveys of the others, or, more especially, and so far as that extent of line was concerned, not embraced by the west line of tract No. 579 -- and whether it embraced anything at all -- in other words, whether it brought the title any more upon or to the river than the old surveys -- was one of the questions of the case. The field notes of Coudaire's survey, which a drawing, Diagram No. 3, thus illustrates, called for a post in the northwesterly line of survey

image:c

636 as the point of beginning; thence south 3850' west with said line 17 poles to a post; thence south 5110' east with another line of said survey 134 poles, to a post on the west side of Cahokia Creek; " *thence down the said creek with its different courses;* " thence by courses and distances described to a post. The field notes then continued:

"Thence 85 W. 174 poles to a post *on the bank of the Mississippi River,* from which [Footnote 1] -- thence N. 5 E., up the Mississippi River and binding therewith (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles),

551 poles and 10 links to a post, northwesterly corner of Nicholas Jarrot's survey, No. 766, claim No. 100, from which a sycamore 36 inches diameter bears S. 21 W. 29 links; thence S. 85 E. with the upper line of the last-mentioned survey 88 poles to the beginning."

The right of Jarrot was confirmed at an earlier date than that of Coudaire. Coudaire's survey bore the number 786.

Several old maps were introduced which seemed to show plainly enough that at the time when the surveys were made, the river bank, in this part of it, ran in what might fairly be called a straight line. Oral testimony in the record proved also that it did so.

We have already said that after the surveys were made, the east bank of the river greatly advanced. But what caused this change in position was not quite obvious.

About the time when the new land began perceptibly to form, certain coal dykes for the accommodation of the public were built above the point where the land in controversy was. The United States also made some improvements to throw the channel of the river more towards the City of St. Louis -- that is to say away from the side where these tracts were, and the city itself put certain large rocks on one edge of the river to preserve its own harbor. How far, exclusively of natural causes, all this had formed the new land was not clear. The evidence showed, however, that the defendants had nothing to do with the making of any of these artificial works, and it was not clear that in a river like the Mississippi the new land might not have been made without them, and by natural causes alone.

The fact that the additions were a making was perceptible at certain intervals, though the additions were too gradual to strike the eye as they were in the actual process of formation.

In this state of things, and a considerable addition having now been made, Congress, on the 15th of July, 1870, passed an act in these words: [Footnote 2]

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"That the title of the United States to all lots, out-lots, tracts, pieces, parcels, and strips of land in St. Clair County, State of Illinois, lying and situate outside of the United States surveys as noted in the field notes of the United States surveyors, and on the Mississippi River near surveys 766, 624, and 579, . . . &c.;, be, and the same is hereby, confirmed and granted to said St. Clair County, in said state."

The plaintiff, St. Clair County, claimed under the above-quoted acts, and under certain other acts of legislation, federal and state, not necessary to be quoted. [Footnote 3] Its positions were:

1st. That the west boundary of the earlier and the later survey was the same; that this west boundary was a line originally established irrespective of the river line; that accordingly the lands included by the surveys never extended to the river, and that the new-made land, even if it were "accretion," or "alluvion," never belonged to the owner of tracts surveyed, as riparian owner, but was unconveyed land belonging to the United States, which by its above-quoted act of Congress it had granted to the plaintiff, St. Clair County.

2d. That if what is above said as to the western line of the tracts as surveyed was not true, and if the tracts did originally extend to the river, yet that the made land was not "accretion" or "alluvion" in a legal sense, since the making had been brought about by artificial means; that therefore the new land belonged to the United States as sovereign.

3d. That even if neither of these two propositions were true, yet that the surveys were specifically brought to the river and were limited to one hundred acres each, and hence that they could not embrace an addition as large as or larger than themselves.

4th. That independently of all other positions, the Mississippi

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in the sense of the American law -- where "navigability" meant navigability in fact -- was a "navigable river," as respected riparian rights, and that accretions on it belonged to the sovereign.

The position of the defendant, Lovingston, who held under the two surveys, 579 and 786 (a valid title to which was admitted to be in him, or in those under whom he claimed), was that those surveys were both (or certainly the last one) bounded originally by the river, and that whether the additions were caused wholly by

natural causes or whether in part by the artificial structures, as causes causative, the new land fell within the technical and legal idea of accretion or alluvion, and so belonged to him as riparian owner, and that it made no difference, even if by the terms of the survey or grant the title came originally but to the river, or whether the river was a "navigable" one or not.

Of this opinion was the Supreme Court of Illinois, where the case finally came, and where judgment was given for the defendant. The case was now here on error from that judgment.

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MR. JUSTICE SWAYNE delivered the opinion of the Court.

We shall assume for the purposes of this opinion that all the title which could be passed by Congress and the state was and is vested in the plaintiff in error.

It is not denied, on the other hand, that a valid title to the surveys 579 and 786 is vested in those under whom the defendant in error holds.

Two questions are thus presented for our determination:

One is whether the river line was the original west boundary of the surveys, or either of them?

The other, if this inquiry be answered in the affirmative, is to whom the accretion belongs?

The first is a mixed question of law and fact. The second is a question of law.

Before entering upon the examination of the first of these questions, it may be well to advert to a few of the leading authorities apposite to this phase of the case.

It is a universal rule that course and distance yield to natural and ascertained objects. [Footnote 4] A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance. [Footnote 5]

Artificial and natural objects called for, have the same effect. [Footnote 6]

In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decision of the state tribunals. [Footnote 7]

In *Bruce v. Taylor,* [Footnote 8] a patent called

"to begin on the Ohio

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River, and then for certain courses and distances, without any corners or marked lines, to the mouth of the Kennikek, and then certain courses and distances, without any courses or marked lines, to a stake in the Ohio River."

If the river was the boundary, the land in controversy was within the patent. If the courses and distances prevailed, the patent did not affect it. The court said: "It is our opinion that the river is the boundary." It was added:

"Two of the calls are on the river. There are no intermediate marked lines or corners. The general description is, 'to lie on the Ohio.' These facts alone would not leave room for any other construction of the patent."

This case is very instructive, and contains much additional argument in support of the view expressed. *Cockrell v. McQuinn,* [Footnote 9] is to the same effect. In the latter case, the court said:

"None will pretend that the legal construction of a patent is not a matter proper for the decision of the court whose province it is to decide all questions of law."

In *Bruce v. Morgan,* [Footnote 10] the rule laid down in *Bruce v. Taytor* was affirmed.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract. [Footnote 11]

Where a deed calls for a corner standing on the bank of a creek, "thence down said creek with the meanders thereof," the boundary is low water mark. [Footnote 12]

Where a deed calls for an object on the bank of a stream, "thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning," the stream at low-water mark is the boundary. [Footnote 13]

Where the line around the land was described as

"running to a stake at the river, thence on the river N. 640' 23 perches, thence N. 3950' W. 33 perches, thence N. 2020',

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35 perches and 8 links to a stake by the river,"

it was held that this description made the river a boundary. [Footnote 14]

Where premises above tidewater are described as bounded by a monument standing on the bank of the river, and a course is given as running from it down the river as it winds and turns to another monument, the grantee takes *usque filium aquae* unless the river be expressly excluded from the grant by the terms of the deed. [Footnote 15]

The eastern line of the City of St. Louis, as it was incorporated in 1807, is as follows: "from the Sugar Loaf east to the Mississippi, from thence by the Mississippi to the place first mentioned." This Court held that the call made the city a riparian proprietor upon the river. [Footnote 16] It was said in this connection that

"many authorities resting on adjudged cases have been adduced to us in the printed argument, presented by the counsel for the defendant in error, to show that, from the days of Sir Matthew Hale to the present time, all grants of land bounded on fresh water rivers, where the expressions designating the water line are general, confer proprietorship on the grantee to the middle of the stream, and

entitle him to the accretions. We think this, as a general rule, too well settled, as part of the English and American law of real property, to be open to discussion."

It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise. Whether in the present case the limit of the land was low water or the middle thread of the river is a question which does not

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arise, and to which we have given no consideration. The point was considered by this Court in *Railroad v. Schurmier.* [Footnote 17]

Survey 579 is the elder one. Its calls are:

"Beginning on the *bank of the Mississippi River,* opposite to St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70 3/4 W.; thence S. 5 west 160 poles to a *point in the river* from which a sycamore 20 inches in diameter bears S. 85 E. 250 links, thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning."

It will be observed that the beginning corner is on the bank of the river. The second corner is a point in the river. The line between them is a straight one. Where the course as described would have fixed the line does not appear.

There was an obvious benefit in having the entire front of the land extend to the water's edge. There was no previous survey or ownership by another to prevent this from being done. No sensible reason can be imagined for having the two corners on the river, and the intermediate line deflect from it. Under the circumstances, we cannot doubt that the river was intended to be made, and was made, the west line of the survey. In the light of the facts, such is our construction

of the calls of the survey, and we give them that effect.

The calls of survey No. 786 as respects this subject are:

"Thence N. 85 W. 174 poles, to a post on the bank of the Mississippi River, from which . . . ; thence N. 5 E. up the Mississippi River and binding therewith (passing the southwesterly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey, No. ___, claim No. 100, from which a sycamore 36 inches diameter bears S. 21 W. 29 links; thence S. 85 E. with the upper line of the last-mentioned survey 88 poles to the beginning."

Here the calls as to the river are more explicit than in

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survey No. 579. The language "up the Mississippi River and binding thereon," leaves no room for doubt. Discussion is unnecessary. It could not make the result clearer. The river must be held to have been the west boundary of this survey also.

In reaching these views, we pervert no principle of law or justice. Our conclusions are sustained by authority and reason.

This brings us to the consideration of the second question.

It is insisted by the learned counsel for the plaintiff in error that the accretion was caused wholly by obstructions placed in the river above, and that hence the rules upon the subject of alluvion do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial. [Footnote 18]

The law in cases of alluvion is well settled.

In the Institutes of Justinian it is said:

"Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion which is added so gradually that no one can perceive how much is added at anyone moment of time. [Footnote 19]"

The surveys here in question were not within the category of the *agri limitati* of the civil law. The latter were lands belonging to the state by right of conquest and granted or sold in plats. The increase by alluvion in such cases did not belong to the owner of the adjoining plat. [Footnote 20]

The Code Napoleon declares:

"Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other

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stream is denominated 'alluvion.' Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats or not; on the condition, in the first place, of leaving a landing place or towing path conformably to regulations. [Footnote 21]"

Such was the law of France before the Code Napoleon was adopted. [Footnote 22]

And such was the law of Spain. [Footnote 23]

Blackstone thus lays down the rule of the common law:

"And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water-marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex,* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible

charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the King, for as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. [Footnote 24]"

Blackstone takes his definition from Bracton, lib. 2, chap. 2. Bracton was a judge in the reign of Henry III, and the greatest authority of his time. Hale, in his *De Jure Maris,* says Bracton followed the civil law. Hale himself shows the great antiquity of the rule in the English law. [Footnote 25]

Chancellor Kent, the American commentator, recognizes the rule as it is laid down by the English authorities referred to. [Footnote 26]

By the American Revolution, the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. [Footnote 27] The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the states respectively. And new states have the same rights of sovereignty and jurisdiction over this subject as the original ones. [Footnote 28]

The question here under consideration is not a new one in this Court. In *New Orleans v. United States,* [Footnote 29] it was said:

"The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain."

To the same effect are *Saulet v. Shepherd,* [Footnote 30] and *Schools v. Risley.* [Footnote 31]

In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.

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The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim *"qui sentit onus debet sentire commodum"* lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do and to those that do not overflow their banks, and where dykes and other defenses are and where they are not necessary to keep the water within its proper limits. [Footnote 32]

In England, the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea. [Footnote 33]

We may well hold that the adjudications of this Court to which we have referred are decisive of the case before us. They are binding upon us as authority. We are of the opinion that the United States never had any title to the premises in controversy, and that nothing passed by the several acts of Congress and of the Legislature of Illinois, relied upon by the plaintiff in error.

Judgments affirmed.

[Footnote 1]

There was a considerable blank here, in which no doubt the bearing of some object was meant to be inserted; though it never was in fact inserted -- REP.

[Footnote 2]

Chapter 301, 16 Stat. at Large 364.

[Footnote 3]

Act of February 18th, 1871, chapter 58, 16 Stat. at Large 416; act of September 28th, 1850, chapter 84, 9 *id.* 519; also under the Acts of the Legislature of Illinois of the 22d of June, 1852; of the 12th of February, 1853; of March 4th, 1854; of February 18th, 1859; and of March 11th, 1869.

[Footnote 4]

Preston's Heirs v. Bowmar, 6 Wheat. 580.

[Footnote 5]

Newsom v. Pryor's Lessee, 7 Wheat. 7.

[Footnote 6]

Barclay v. Howell's Lessee, 6 Pet. 499; *Baxter v. Evett's Lessee,* 7 Mon. 333.

[Footnote 7]

Preston's Heirs v. Bowmar, supra.

[Footnote 8]

2 J.J.Marshall 160.

[Footnote 9]

4 Monroe 62.

[Footnote 10]

1 B.Monroe 26.

[Footnote 11]

Churchill v. Grundy, 5 Dana 100.

[Footnote 12]

McCullock's Lessee v. Aten, 2 Ohio 309; *See also* *Handly's Lessee v. Anthony,* 5 Wheat. 380.

[Footnote 13]

Lamb v. Rickets, 11 Ohio 311.

[Footnote 14]

Rix v. Johnson, 5 N.H. 520.

[Footnote 15]

Luce v. Carley, 24 Wendell, 451.

[Footnote 16]

Jones v. Soulard, 24 How. 44; *see also Schurmeier v. St. Paul & Pacific Railroad,* 10 Minn. 830, and *Shelton v. Maupin,* 16 Mo. 124.

[Footnote 17]

74 U. S. 7 Wall. 287.

[Footnote 18]

Helsey v. McCormick, 18 N.Y. 147; 3 Washburne on Real Property 58, 358*.

[Footnote 19]

Lib. II, Tit. I, 20.

[Footnote 20]

D. XLI, 1, 16; Sanders' Institutes 177; *see also Morgan v. Livingston,* 6 Martin's Louisiana 251.

[Footnote 21]

Book II, of Property &c.;, 556.

[Footnote 22]

4 Nouveau Dictionnaire de Brillon 278; *Morgan v. Livingston,* 6 Martin 243.

[Footnote 23]

Partid. iii, tit. xxviii, Law 26.

[Footnote 24]

2 Commentaries 262; *see also* Woolwich's Law of Waters 34, and Shultes's Aquatic Rights 116.

[Footnote 25]

De Jure Maris, 1st pt, ch. 6; *see also The King v. Lord Yarborough,* 1 Dow & Clark, Appeal Cases 287.

[Footnote 26]

3 Commentaries 428.

[Footnote 27]

Martin v. Waddell, 16 Peters 367; *Russel v. Jersey Co.,* 15 How. 426.

[Footnote 28]

Pollard's Lessee v. Hagan, 3 How. 212; *Pollard v. Kibbe,* 9 How. 471; *Hallett v. Bute,* 13 How. 25; *Withers v. Buckley,* 20 How. 84.

[Footnote 29]

35 U. S. 10 Pet. 662.

[Footnote 30]

71 U. S. 4 Wall. 502.

[Footnote 31]

77 U. S. 10 Wall. 110.

[Footnote 32]

3 Washburne on Real Property 58, *452; *Municipality No. 2 v. Orleans Cotton Press,* 18 La.Rep. 122.

[Footnote 33]

The King v. Lord Yarborough, 3 Dow & Clark's Appeal Cases 178.