Ker and Co. Vs. Couden

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Appellant : Ker and Co.

Respondent : Couden

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Ker and Co. v. Couden

No. 11

Argued January 27, 1912

Decided February 1912

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ERROR TO THE SUPREME COURT

OF THE PHILIPPINE ISLANDS

SYLLABUS

The question of ownership under the Spanish law of accessions to the shore by accretion and alluvion has been a vexed one.

The Roman law is not like a deed or a modern code prepared *uno flatu,* but history has played a large part in its development.

Under the civil law, the seashore flowed by the tides, unlike the bank of rivers, was public property, belonging, in Spain, to the sovereign.

Under the Spanish Law of Water of 1866, which became effective in the Philippine in 1871, lands added to the shore by accession and accretions belong to the public domain unless and until the government shall decide they are no longer needed for public utilities and shall declare them to belong to the adjacent estate.

This rule applies not only to accessions to the shore while it is washed by the tide, but also to additions which actually become dry land.

The doctrine that accessions to the shore of the sea by accretion belong to the public domain, and not to the adjacent estate, has been adopted by the leading civil law countries, including France, Italy and Spain.

In determining what law is applicable to title in the Philippines, this Court deals with Spanish law as prevailing in the Philippines, and not with law which prevails in this country, whether of mixed antecedents or the common law.

Where a case is brought up on an appeal on a single question, in regard to which there is no error, judgment below will be affirmed.

The facts, which involve the title to land in the Philippine Islands formed by action of the sea, are stated in the opinion.

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MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action brought by Ker & Company to recover possession of land held by the defendant under a claim of title in the United States. The land is the present extremity of Sangley Point, in the Province of Cavite and Island of Luzon, projecting into Manila Bay. It has been formed gradually by action of the sea, all of it since 1811, about three-quarters since 1856, and a part since 1871. For a long time, the property was used by the Spanish Navy, and it now is occupied by the present government as a naval station, works costing more than half a million dollars having been erected upon it. The plaintiffs claim title under conveyances from the owner of the upland. The Philippine courts held that, under the Partidas, III, Tit. 28, laws 3, 4, 6, 24, and 26, and the Law of Waters of 1866, the title to the accretions remained in the government, and the vexed question has been brought to this Court.

That the question is a vexed one is shown not only by the different views of Spanish commentators, but by the contrary provisions of modern codes and by the occasional intimations of the doctors of the Roman law. Justinian's Institutes, 2, 1, 20 (Gaius, II. 70), followed by the Partidas, 3, 28, 26, give the alluvial increase of river banks to

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the owner of the bank. If this is to be taken as an example illustrating a general principle, there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu.* History plays too large a part to make it safe to generalize from a single passage in so easy a fashion. Alongside of the rule as to rivers we find that the right of alluvion is not recognized for lakes and ponds, D. 41, 1, 12 -- a rule often repeated in the civil law codes, *e.g.,* Philippine Civil Code of 1889, Arts. 366, 367; Code Napoleon, Art. 550; Italy, Civil Code 1865, Art. 454; Mexico, Art. 797. If we are to generalize, the analogy of lakes to the sea is closer than that of rivers. We find further that *In agris limitatis jus alluvionis locum non habet.* And the right of alluvion is denied for the *agrum manu captum,* which was *limitatum* in order that it might be known (exactly) what was granted. D. 41, 1, 16. The gloss of Accursius treats this as the reason for denying the *jus alluvionis.* If this reason again were generalized, it might lead to a contrary result from the

passage in the Institutes. Grotius treats the whole matter as arbitrary, to be governed by local rules, and both the doctrine as to rivers and the distinction as to accurately bounded lands as rational enough. De Jure B. & P. Lib. 2, cap. 8, 11, 12. A respectable modern writer thinks that it was a mistake to preserve the passage concerning definitely bounded grants in the Digest, 1 Demangeat, Droit Romain, 2d ed. 441 ("antiquirt," Puchta, Pandekten, 165), but, so far as we have observed, this is an exceptional view, and from the older commentators that we have examined down to the late brilliant and admirable work of Girard, Droit Romain, 4th ed. 324, this passage seems to be accepted as a part of the law. At all events, it shows that, as we have said, it is unsafe to go much beyond what we find in the books. And to illustrate a little further the uncertainty as to the Roman doctrine, we may add that Donellus mentions

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the opinion that alluvion from the sea goes to the private owner, only to remark that the texts cited do not support it, De Jur.Civ. IV., c. 27, 1 Opera, 1828 ed. 839.n., and treats the rule of the Institutes as peculiar to rivers, as also Vinnius, in his comment on the passage stating the rule, seems to do, while Huberus, on the other hand, thinks that rivers furnish the principle that ought to prevail. Praelectiones, II., Tit. 1, 34.

The seashore flowed by the tides, unlike the banks of rivers, was public property, in Spain, belonging to the sovereign power. Inst. II. Tit. 1, 3, 4, 5. D. 43, 8, 3 Partidas, III, Tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers, if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III. Tit. 28. Law 31. Inst. 2. 2, 23. D. 41. 1. 7, 5. But we are less concerned with theory than with precedent in a matter like this, whether we agree with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in

the Philippines in September, 1871, and the validity of which we see no reason to doubt, after declaring, like the Partidas, that the shores (*playas*), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use, Arts. 1, 3, goes on thus:

"Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not [longer] washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the

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coast guard service, the government shall [will?] declare them property of the adjacent estates, in increase of the same."

Notwithstanding the argument that this article is only a futile declaration concerning accessions to the shore while it remains such in a literal sense -- that is, washed by the tide -- we think it plain that it includes and principally means additions that turn the shore to dry land. These all remain subject to public ownership unless and until the government shall decide that they are not needed for the purposes mentioned, and shall declare them to belong to the adjacent estates. The later provision in Article 9, that the public easement for salvage, etc., shall advance and recede as the sea recedes or advances, simply determines that neither public nor private ownership shall exclude the customary public use from the new place. The Spanish Law of Ports of 1880, like the Law of Waters, asserts the title of the state, although it confers private rights when there is no public need.

The presumption that the foregoing provisions of the Law of Waters express the understanding of the codifiers as to what the earlier law had been becomes almost inexpungable when we find that the other leading civil law countries have adopted the same doctrine. The Code Napoleon, after laying down the Roman rule for alluvion in rivers, Arts. 556, 557, adds at the end of the latter article: " *Ce droit n'a pas lieu a l'egard des relais des la mer,* " which seems to have been adopted without controversy at the conference. *See further* Marcade, Explication, 5th ed.

vol. 2, p. 439. *And compare* 2 Hall's Am.Law Journal, 307, 324, 329, 333. The Civil Code of Italy, 1865, Art. 454, is to similar effect. *See also* Chile, Civil Code, Art. 650. The Supreme Court of Louisiana in like manner confines the private acquisition of alluvion to rivers and running streams, and denies

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the private right in the case of lakes and the sea. *Zeller v. Southern Yacht Club,* 34 La.Ann. 837. And the provision of the Louisiana Code, Art. 510, is like those of France, Italy, and Spain. The court of first instance below refers to judgments of the Supreme Court of Spain that seems to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, not to speak of the respect that we must feel for the concurrent opinion of both the courts below upon a matter of local law with which they are accustomed to deal. Of course, we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law.

As the case was brought up on the single question that we have discussed, the judgment of the court below must be affirmed.

Judgment affirmed.

MR. JUSTICE Mc KENNA, dissenting:

I cannot agree with the conclusion of the Court. It seems to be conceded that it is not necessarily determined by the authorities which are cited. I think the better deduction from them is that they only declare the constant integrity of the shore and the dominion of the government over it, whether it recede or advance. When it ceases to be washed by the tides or the seas, is becomes part of the upland, and belongs to the owner of the upland. And this is but the application of the principle, said to be of natural justice, that he who loses by the encroachments of the sea should gain by its recession. *Banks v. Ogden,* 2 Wall. 57, 69 U. S. 67 .