

EXTENDING THE APPLICATION OF THE LAW OF ACCRETIONS

Michaelson v. Silver Beach Improvement Association

342 Mass. 251, 173 N.E.2d 273 (1961)

Plaintiffs were riparian owners of property fronting on Wild Harbor in Falmouth, Massachusetts. A sea wall, which had water bracing it at both high and low tide, protected plaintiff's property. In 1950, the public works department of Massachusetts authorized the creation of a beach, abutting the sea wall, by dredging and pumping sand from the floor of the harbor. Jetties running perpendicular to the shore line into Wild Harbor were constructed in order to preserve the newly created beach. The plaintiffs sought to enjoin defendants from using the beach for recreational purposes.¹ The Superior Court entered a decree dismissing the bill and held that because the Commonwealth had created the beach, it should be dedicated to the use of the general public. The Supreme Judicial Court of Massachusetts reversed, holding that there must be a substantial and reasonable connection between the creation of land and the improvement of navigation before the Commonwealth can take land in connection with public works projects without compensating riparian owners.²

A riparian owner is one who has the right to access and use of the shore and water adjacent to his property.³ Massachusetts determined in 1907 that private ownership along the tide waters extends to the low-water mark, not exceeding one hundred rods from the high-water mark, whether the land was covered with water or not.⁴ This fee in the land between the high and low water mark is subject to an easement of the public for navigation, free fishing and fowling.⁵ The term accretion refers to the situation in which real estate is increased through the gradual deposit of solid material by water so that dry land is created from land which was previously submerged.⁶ The line of ownership of this real estate follows the changing water line.⁷ Hence, each riparian owner takes his property with the knowledge that the boundary may change through accretion or reliction.⁸ Although reformation of land by accretion is traditionally considered as

¹ Defendants were an association of residents of Silver Beach who used the property in front of plaintiff's land.

² *Michaelson v. Silver Beach Improvement Ass'n*, 342 Mass. 251, 173 N.E.2d 273 (1961).

³ *Bouvier's Law Dictionary* 1075 (Cent. ed. 1946); *Webster's New International Dictionary*, 1960 (3d ed. 1961).

⁴ *Butler v. Attorney General*, 195 Mass. 79, 80 N.E. 688 (1907).

⁵ *Ibid.*

⁶ *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935); *Baumhart v. McClure*, 21 Ohio App. 491, 153 N.E. 211 (1926).

⁷ *Allen v. Wood*, 256 Mass. 343, 152 N.E. 617 (1926); *East Boston Co. v. Commonwealth*, 203 Mass. 68, 89 N.E. 236 (1909).

⁸ *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155 (1810).

a gradual and imperceptible occurrence,⁹ there are many situations where artificial operations accelerate the natural processes of accretion and the additional land is treated as if it were created by natural accretion.¹⁰ For example, when the government of Oregon extended the banks of the Willamette River in the interest of commerce without asserting title thereto, the court ruled that such extensions accrued to the riparian owners.¹¹ Similarly, an Alabama Court recognized riparian ownership of accretions made by the federal government along Mobile Bay.¹²

In the instant case, however, it was the defendant's contention that the new land created by the Commonwealth was owned by the Commonwealth. The authority for this assertion was *Home For Aged Women v. Commonwealth*.¹³ In that case the legislature authorized the erection of a dam, the building of a lock with a drawbridge, and the filling of a strip of land outside of the sea wall for a public park as a single project for the public benefit. The court held that the creation of the park was related to the improvement of navigation in that it was a natural, if not necessary, incident of the change in the level of the water.¹⁴

In the principal case the dredging of Wild Harbor was not connected with the improvement of navigation. The facts indicate that the purpose of the project was to create a public playground, and only specific powers to regulate navigation and fisheries by the government are expressly recognized as exercisable without compensation to private parties. In order to qualify under these powers a substantial connection must be shown between the proposed project and improvement in navigation.¹⁵ For the government to proceed under the welfare power in building a public beach would require the exercise of eminent domain.¹⁶

In Ohio the riparian owner is regarded as having a right of access to navigable water adjacent to his property,¹⁷ and he may build a wharf

⁹ *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 68 (1874):

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, he 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.

See also *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.*, 137 Ohio St. 8, 27 N.E.2d 485 (1940).

¹⁰ *County of St. Clair v. Lovington*, *supra* note 9; *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917); *Burke v. Comm.*, 283 Mass. 63, 186 N.E. 277 (1933); *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151 (1807); *Lake Front East Fifty-Fifth Street Corp. v. City of Cleveland*, 7 Ohio Supp. 17, 36 N.E.2d 196 (1939); Ohio Rev. Code § 123.03 (Supp. 1961).

¹¹ *Gillihan v. Cieloha*, 74 Or. 462, 145 Pac. 1061 (1915).

¹² *State v. Gill*, 259 Ala. 177, 66 So. 2d 141 (1953).

¹³ 202 Mass. 422, 89 N.E. 124 (1909).

¹⁴ *Id.* at 436, 89 N.E. at 129.

¹⁵ *Home for Aged Women v. Commonwealth*, *supra* note 13.

¹⁶ *Lake Front East Fifty-Fifth Street Corp. v. City of Cleveland*, *supra* note 10.

¹⁷ *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 82 N.E.2d 709 (1948).

out to this water.¹⁸ This right is subject to control by the federal or state government in its regulation of navigation, water commerce, and fishery.¹⁹ When authorization to build structures which are not in the aid of navigation, water commerce, or fishery is given by the government and such structures impair the riparian rights of a proprietor or destroy wharves and structures built by him in aid of navigation, the riparian owner is entitled to compensation for his loss and damage.²⁰

Riparian rights are founded on the common law and such rights constitute a part of the owner's estate in the land.²¹ Whether the accretion is the effect of natural or artificial causes, the riparian right to future alluvion is a vested right. The title to the increment rests in the law of nature and is the same right as that of the owner of a tree which later bears fruit.²² If the Superior Court's theory in the principal case were followed, the government could create accretion by dredging along Lake Erie and claim title to the entire shoreline. Then all riparian owners would be deprived of access to navigable waters and thereby lose the greatest attraction possessed by riparian property. The theory of riparian property is to encourage, not frustrate, the development of private access to the sea. The instant case adheres to this doctrine and reaches a fair and just result.

¹⁸ *State v. Cleveland & P.R.R.*, 94 Ohio St. 61, 113 N.E. 677 (1916).

¹⁹ *State ex rel. Squire v. Cleveland*, *supra* note 17; *Lake Front East Fifty-Fifth Street Corp. v. City of Cleveland*, *supra* note 10.

²⁰ *State ex rel. Squire v. Cleveland*, *supra* note 17.

²¹ *Mansfield v. Balliett*, 65 Ohio St. 451, 63 N.E. 86 (1902).

²² Annot., 134 A.L.R. 469 (1941).