THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA (*Respondent*) ..... APPELLANT;

AND

THOMAS EDWARD NEILSON (*Petitioner*) ..... RESPONDENT.

1956

*May 16, 17, 18

*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Accession and accretion—Island in navigable and tidal river granted by the Crown—Subsequent purchaser claiming accretion—Quieting Titles Act, R.S.B.C. 1948, c. 282—Land Registry Act, R.S.B.C. 1948, c. 171, s. 38(1), cls. (a) to (j).

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) (1899), 7 B.C.R. 12 at 17. (2) (1900), 30 S.C.R. 344.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

The petitioner, as the registered owner of an island situate in the delta of a navigable and tidal river in British Columbia (the Fraser), claimed, under the *Quieting Titles Act*, the ownership of certain allegedly accreted lands. The island was granted by the Crown in 1889 and purchased by the respondent and his father in 1946. A provincial public road was constructed in 1931 leading from the village of Ladner to the north-westerly limit of the island and, as the important area claimed lay to the south-west of that road, the conditions as they existed prior to its construction were those to be considered. It was agreed that if there were accretion, it had been gradual and imperceptible, and that there was nothing in the terms of the Crown grant to prevent that accretion going to the petitioner. The trial judge allowed the claim and this judgment was affirmed by a majority in the Court of Appeal.

Held: The appeal should be allowed and, subject to any claim the petitioner might wish to make in respect of two small areas east of the road, the petition dismissed.

Per Kerwin C.J. and Locke, Cartwright and Nolan JJ.: The petitioner had failed to show that prior to the construction of the road, the area in question was not overflowed by the waters of the river at the medium high tide between the spring and neap tides and, consequently, had failed to establish that the area had through accretion ceased to be the property of the Crown.

Per Kerwin C.J.: The evidence was not sufficient to show that in 1930 any part of the area claimed was capable of ordinary cultivation or occupation.

Per Rand J.: The essential condition for accretion is a slow and imperceptible change resulting in the projection outwards of the mean high water line and the correlative annexation to the land of what was formerly below that line. The elements of a practical nature such as convenience or utility are irrelevant. The gradual rise was not, during its progress, accretion; it was a process of widespread emergence of land owned by the Crown.

APPEAL by the Attorney-General for the Province of British Columbia from the judgment of the Court of Appeal for British Columbia (1), affirming, Robertson J.A. dissenting, the judgment at trial (2). Appeal allowed.

J. D. Forin, for the petitioner, respondent.

M. M. McFarlane, for the respondent, appellant.

THE CHIEF JUSTICE:—These proceedings commenced with a petition under the *Quieting Titles Act*, R.S.B.C. 1948, c. 282, for a declaration that the petitioner, the present respondent, Thomas Edward Neilson, is the legal and beneficial owner of certain alleged accreted lands. The

(1) 16 W.W.R. 625, [1955] 5 D.L.R. 56.

(2) (1954), 13 W.W.R. (N.S.) 241, *sub nom. Re Quieting Titles Act and Neilson.*

petition was granted by Wilson J. (1) and the accreted lands outlined in red on a sketch attached to and forming part of his formal order. This order was subject only to the reservations contained in clauses (*a*) to (*j*) of subs. (1) of s. 38 of the *Land Registry Act*, R.S.B.C. 1948, c. 171, and amendments, and to a certain easement in favour of British Columbia Telephone Company as marked on the said plan, but free from all other rights, interests, claims and demands whatsoever. No question arises as to the reservations or easement. In the Court of Appeal for British Columbia (2), O'Halloran and Sidney Smith JJ.A. agreed in dismissing an appeal by the Attorney-General for the Province of British Columbia but Robertson J.A. dissented. The Attorney-General now appeals.

In 1943, the respondent and his father agreed to purchase from the then owner, C. S. V. Branch, Lot 471, Group 2, Municipality of Delta, New Westminster District, Province of British Columbia. This lot was an island situated in the delta of the Fraser River which is a tidal stream emptying into the Gulf of Georgia. When the island was patented in 1889 it contained 168 acres and a sketch attached to the Crown grant shows that the island was of irregular shape, bounded on the east by a slough and at all other points by the waters of the Fraser River. The purchase by the respondent and his father was completed in December 1946 and the respondent alone now has the title to the island with the exception of that part which, pursuant to a proviso in the Crown grant, was resumed in 1930 by the Crown for the purpose of the Ladner Ferry Road and which road was constructed in 1931. In fact, most of the road is built on land which allegedly had been added to Lot 471 but all of the road is excepted from the area awarded to the respondent by the order of Wilson J.

It was agreed that if there were an accretion, it had been gradual and imperceptible within the meaning of the authorities and that there was nothing in the terms of the Crown grant to prevent that accretion going to the respondent. It was also agreed that the prevailing mean high tide for the area in question is a twelve-foot tide at Point Atkin-

(1) (1954), 13 W.W.R. (N.S.) 241, *sub nom. Re Quieting Titles Act and Neilson.*

(2) 16 W.W.R. 625, [1955] 5 D.L.R. 56.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Kerwin C.J.

son, as shown on the official tide tables. It is unnecessary to consider if s. 2 of the *Official Surveys Act*, R.S.B.C. 1948, c. 321, prevents the operation in British Columbia of the English common law in regard to accretion as that point which was taken before Wilson J. was abandoned by counsel for the appellant.

However, the appeal should succeed on the ground that the respondent has failed to produce evidence that prior to the construction of the Ladner Ferry Road in 1931 the area in question was not overflowed by the waters of the Fraser River at the high-water mark of the ordinary or neap tides. I consider that the law is correctly expressed in the Moore's History of the Foreshore, 3rd ed. 1888, at p. 678:—

> . . . it may be regarded as good law at this day, that the *terra firma*, and right of the subject, in respect of title and ownership, extends beyond the lines of the *high spring tides* and *spring tides*, and down to the edge of the high-water mark of the *ordinary* or *neap* tides. . . .

reading "ordinary" and "neap" as synonymous. However, it was decided in *Attorney General v. Chambers* (1), that, in the absence of particular usage, the extent of the right of the Crown to the seashore is *prima facie* limited by the line of the medium high tide between the springs and the neaps, and, to avoid misunderstanding, it is preferable that that phraseology should be followed. In that case the principle of the rule which gives the seashore to the Crown is stated to be that it is land not capable of ordinary cultivation or occupation and so is in the nature of unappropriated soil. Lord Hale had given as his reason for thinking that lands only covered by the high spring tides did not belong to the Crown that such lands are for the most part dry and maniorable (*i.e.*, manurable); and therefore the Lord Chancellor, sitting in equity in the *Chambers* case and assisted by Baron Alderson and Mr. Justice Maule, determined that the reasonable conclusion was that the Crown's right is limited to land which is for the most part not dry, or maniorable.

By 1931, when the Ladner Ferry Road was built, Mr. McGugan, the surveyor engaged by the previous owner, Mr. Branch, had already made a survey and testified at the hearing of this petition that the conditions in 1930, immediately prior to the construction of the road, were about

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486.

the same as in 1953 when he made a new survey on the instructions of the respondent. However, this is not sufficient either by itself or in conjunction with the other evidence called on behalf of the respondent to show that in 1930 any part of the area in question was capable of ordinary cultivation or occupation. A reading of the entire record and even discounting, as did the trial judge, some of the testimony adduced on behalf of the appellant, satisfies me that the petitioner has failed to make out a case. Mr. McGugan when testifying as to the conditions in 1926, when the first survey was made by him, is reported as follows:—

> Well, yes, definitely at times, the whole of it must have been. On very high tides, the whole of that island, the original island must have been under water. I know when we were surveying on that island there, there were numerous sloughs we crossed all the time. We had to make long detours to get around these sloughs. There may have been—looking at Green Slough—there was a ridge which was quite high, and there were trees on it and that was high. Most of the rest of it was relatively, you would call it relatively low, and when the tides were in you just couldn't work on it, that was all.

This is sufficient to dispose of the matter and I say nothing further as to the other grounds urged except to point out that it is difficult to believe that what the trial judge described as "ramparts", even if they existed in 1930, could be said to form an accretion in the accepted sense of that term.

The appeal should be allowed, the judgments in the Courts below set aside and subject to one reservation the petition dismissed. That reservation is as to two small areas east of the Ladner Ferry Road, one at its northern extremity and the other to the south of Lot 471 and east of the Ladner Ferry Road. These are included in the order of Wilson J. and shown on the sketch attached thereto, but no particular reference was made to these comparatively small bits as the argument was directed mainly to the large alleged accretion to the west of the road. The dismissal of the petition should be without prejudice to any claim the petitioner may wish to make in respect of them.

No order as to costs was made by the judge of first instance or by the Court of Appeal and the Attorney-General did not ask for costs in this Court. There should, therefore, be no costs in any Court.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

RAND J.:—This appeal raises a question of accretion. The respondent is the owner of land in the delta of the Fraser River granted by the Crown in 1889 which a plan annexed to the grant represents as an island. Since that time an area of what was then river bed to the west has been raised by alluvial deposits to an irregular level which at mean high tide is, to a greater extent than not, covered by water from 2 inches to 2 feet in depth. Narrow arms or reaches forming the outer rims or "ramparts", as Wilson J. at trial (1) described them, of the area have risen above the average level; and several sloughs or channels with their branches spread the incoming tides over it. It is covered with a mat of marsh growth about one foot thick and is overgrown with hydrophyte and hygrophyte types of vegetation such as sedges, rushes and weeds.

The Fraser River, from its sources and branches in the mountains to the north, carries a huge run-off in spring and the alluvial deposits are heavy. The process of the land formation is aptly described by Wilson J. (2):—

> The process by which this area, and, indeed, the whole of the Fraser delta, has been created is this: At a certain time the deposits of alluvial soil on the river bottom in any given area, such as the one I have to deal with, will reach an approximate low tidewater level. From this time on the deposits follow a curious pattern. The edges of the formed area present an obstacle against which the water washes, and which take from the water the heavier particles of silt and sand. The result is to build up about the perimeter of the emerging land a natural rampart which is higher than the area behind it. At its simplest this would result in the creation of a lake dyked off from the river. But the pattern is far more complicated. Running back from the outer margin are sloughs penetrating deep into the interior, and each of these sloughs has many branches. Along these sloughs, and along their branches, the pattern is repeated; the banks attract the heavier deposits and build up higher than the areas behind them. But this does not mean that accretion is arrested in these posterior areas. At high tides, and particularly at extreme high tides occurring during the freshet, when the river is heavy with alluvial matter, they receive large deposits of new earth. The lesser branches of the sloughs have banks that taper off from a high point near their emergence from a main slough to a level, at their tips, approximating that of the land or marsh surrounding them. They thus serve as channels to admit silt-laden water to those areas and carry on the work of soil building.
>
> They thus flood the lower land at mean high tide. The result, at that stage of water, is that there are large flooded areas surrounded by natural dykes or ramparts which do not flood. The depth of the flooding varies

(1) (1954), 13 W.W.R. (N.S.) 241.

(2) (1954), 13 W.W.R. (N.S.) 241 at 247.

from a few inches to a foot or two, but it is nowhere great, and a man in knee-height rubber boots could probably walk over all but a few pockets at mean high tide.

The banks have lost their character of marsh land and are covered by upland growth. They are increasing in size and vary in width from a few feet to a hundred feet. The marsh is grown in sedges, bulrushes and other marsh vegetation. Through the marsh there are numerous high spots where upland growth is emerging.

The picture thus presented is of a skeleton of ridges emerging from a lower level of marshy soil. What may be called the main rampart extends from the north-westerly boundary of the original lot in the form of an arm curving westerly and southerly, a distance of approximately 4,000 feet roughly parallel to the down flow of the river. Wilson J. remarked that no one could question the fact that that arm was an accretion to the original lot, but whether that is so or not depends on the mode and circumstances of its formation.

In 1931 at the north-westerly end of the original lot, a ferry terminal was constructed which called for a public road, vested in the province, from that point southerly along roughly the western boundary of the island and extending to the town of Ladner on the mainland. The area claimed lies to the west of that road. In the course of the work a great deal of dredging was done and the discharge deposited just westerly of the highway at its northerly end. For some years a portion west of that deposit has been used as a garbage dump. Beyond these the main arm runs to its tip. The claim for accretion must, then, be established as of 1931: subsequent annexation would be to land owned by the province.

From the finding quoted, the deposit is seen to have been generalized and the rise, except as to the ridges, substantially uniform over the area as a whole. The process of vegetational generation, predominantly marine or marsh, was likewise generalized. In that state of things, has there been, in the true sense of the word, any degree of accretion?

As applied to land bounded by the sea, accretion, under the ruling in *The King v. Lord Yarborough* (1) and *Gifford v. Lord Yarborough* (2), is the acquisition of extension to land, as distinguished from land covered with water, by its

(1) (1824), 3 B. & C. 91, 107 E.R. 668 at 673.

(2) (1828), 5 Bing. 163, 130 E.R. 1023.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Rand J.

owner through the slow and imperceptible withdrawal of the line of the mean high tide as that expression is defined in *Attorney General v. Chambers* (1), followed in *Lowe v. Govett* (2). The recession may be by the lowering of the sea level or by alluvion, the throwing up onto the shore by the flux and reflux of the tide of various kinds of marine matter. As this deposit rises the tide line retreats, and the boundary is gradually pushed out. It is found, then, in a situation of a fluid boundary. A sudden reliction of the water or displacement of land leaves the boundary as it was. The essential condition is a slow and imperceptible change resulting in the projection outwards of the boundary line and the correlative annexation to the land of what was formerly below the tide line: the determining fact is the line of the mean high tide which bounds the riparian land seaward.

The trial judge and O'Halloran J.A. in the Court of Appeal introduced into the idea of accretion elements which, while they may have been considered pertinent to the formulation of the rule, are not embraced within it nor can they be taken into account to supply a want of what the rule calls for as its necessary condition. These elements are of a practical nature: the general advantage from the standpoint of utility of giving the adjacent owner the added land which otherwise would remain less usable; and the maniorableness of the reclaimed portion, that is, its capacity to be worked by hand for ordinary land purposes such as the raising of herbage or crops. But these features of convenience and utility are irrelevant when the change of the tide line is perceptible, and they must be taken to be equally so when the change is imperceptible.

The rule is not one of justice or injustice, a consideration which, from the judgments below, one would gather to be of controlling importance. Here a private owner is claiming over 200 acres as an addition to his land to or for which he has contributed nothing. Under the Roman law, the line was drawn at that of the highest tides and Lord Hale was disposed to make it that of the neaps. The rule is of

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486 at 488.

(2) (1832), 3 B. & Ad. 863, 110 E.R. 317.

convenience and is arbitrary. It is said that the owner risks the loss of his land by action of the sea and should enjoy the benefit; but in either case the change must be imperceptible and he always has it within his power to prevent corrosion. How the Crown could, on its part, prevent withdrawal is not so apparent.

But accretion, the slow extension of land through the imperceptible change of boundary, is treated in both courts below as including the gradual generalized rise, through deposit, of the bed of a river. With the greatest respect I cannot but think this is a misconception. That gradual rise here was not, during its progress, accretion; it was on the contrary a process of widespread emergence of land owned by the Crown. Accretion does not arise until the high water line has retreated or been forced back by the expanding land. When the general low tide level in this case was reached, the area covered by water remained in the Crown: the deposit raising the bottom vertically had touched no other ownership. Then began the formation of outside ridges on that soil contemporaneously with that forming at the boundaries of the original lot. Except at the latter point they were emerging strips of what was river bottom unconnected with the lot. This generalized vertical formation had no element of progressive annexation to and extension of existing land resulting in a change of water boundary: the main ridge at the southerly end was in the same process and in the same degree of rising as at the northerly end.

Where the conditions of the operation of accretion for private benefit are not present, the ownership of the Crown is unaffected. The difficulties and confusion suggested by Wilson J. arise only when the rule is attempted to be applied to a situation in which its conditions are not present. The conditions in the Fraser delta may be exceptional but for that reason a modifying extension of the rule is not to be justified. I am unable to agree that, assuming certain portions of the ridges to satisfy the conditions of accretion, they carry with them the inner and larger body of soil which is not within those conditions; it would be a subtraction from ownership for which neither in convenience nor justice would there be any warrant. If, in such a situation, prac-

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Rand J.

tical necessities are to govern, the rule must be held not to given, the basis for any such assumption is not here present. attribute accretion to such strips which of themselves are quite without utility as land. But for the reasons already

I would, therefore, allow the appeal, reverse the judgment and declare the area in question to be vested in the Crown in right of the province. There will be no costs in any court.

While the question was not argued, the plan prepared by McGugan in 1953 shows two small areas east of the Ladner Ferry Road, one at its northern extremity and the other generally to the south of Lot 471, which are marked as accretions. Since I have not dealt with the matter of the respondent's right to these areas as against the Crown, the dismissal of the petition should be without prejudice to any claim he may wish to make in respect of them.

The judgment of Locke and Nolan JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), dismissing the appeal of the present appellant from an order made by Wilson J. (2), upon an application under the *Quieting Titles Act*, R.S.B.C. 1948, c. 282. Robertson J.A. dissented and would have allowed the appeal.

The respondent is the registered owner of a parcel of land which was at one time an island situate in the Fraser River some five or six miles from the place where the south arm flows into the Gulf of Georgia. This land was, by a Crown grant dated April 20, 1889, conveyed to Boyd Nordman and was described as follows:—

> All that parcel or lot of land situate in New Westminster District, said to contain one hundred and sixty-eight acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered Lot four hundred and seventy one (471) Group Two (2) on the Official Plan or Survey of the said New Westminster District in the Province of British Columbia.

The plan referred to showed an island surrounded to the north and to the west by the Fraser River and to the east and south by the waters of a slough. Among the terms and conditions of the grant, the only one requiring notice

(1) 16 W.W.R. 625, [1955] 5 D.L.R. 56.

(2) (1954), 13 W.W.R. (N.S.) 241.

was that which reserved to the Crown the right to resume any part of the said lands which might be deemed necessary for the purpose of making, *inter alia,* roads or other works of public utility or convenience, providing, however, that "the land so to be resumed" should not exceed one twentieth part of the whole.

The respondent and his father acquired this land from one Branch, one of the successors in title of Nordman, by a deed dated December 30, 1946, the conveyance being expressed as being subject to the reservations, limitations, provisoes and conditions expressed in the original grant from the Crown. George Edward Neilson, the father of the respondent, died before the commencement of the proceedings and his interest passed to the respondent. The manner in which this was accomplished is not disclosed by the evidence. Sixteen years prior to the acquisition of this land by the respondent and his father, the Department of Public Works of British Columbia had established and constructed a road leading from the village of Ladner to a point immediately adjoining what was the north-westerly limit of the island, as shown on the plan annexed to the Crown grant.

Under the provisions of the *Highway Act,* R.S.B.C. 1924, c. 103, s. 8, the Minister of Public Works was empowered to establish such highways and to declare the same by a notice in the British Columbia Gazette. The notice published in this matter defined the limits of the highway which commenced at a point on the Ladner highway and ran from there in a general north-westerly direction through various parcels of land, including District Lot 471, and terminated at the point above stated. A plan showing the exact location of the road was filed in the registry office at that time but was not put in evidence, though two rough sketches were marked as exhibits which do not show adequately the relative position of the easterly limit of the road and the westerly limit of Lot 471. A plan, however, prepared by Mr. D. J. McGugan shows that the highway which became known as the Ladner Ferry Road and led to a wharf used by the ferry operating between that point and Woodwards Landing on Lulu Island incorporated a

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

small part of Lot 471. No part of that lot, as described in the Crown grant, lay to the west of the westerly boundary of the road, a fact the importance of which will become apparent.

The claim of the respondent as advanced in his petition is that an area, now 207 acres in extent, all of which was undoubtedly at the time of the issue of the Crown grant to Nordman covered with water and part of the bed of the Fraser River, has through accretion become part of Lot 471, and a declaration was asked that the petitioner was the legal and beneficial owner in fee simple of all the area in question. All of it has been completely separated from the property described in the Crown grant since the establishment of the highway in 1930. The conditions as they existed prior to the construction of the road in 1930 are those which must be considered in determining the matter.

The Fraser is a navigable and tidal river which rises several hundred miles distant in the interior of northern British Columbia. Large quantities of silt are carried down by the stream and it is the deposit of this material upon the shores of the river and islands in the river and upon the bed of the stream itself which causes accretions of the nature giving rise to the present litigation. On a map published by the Canadian Hydrographic Service showing that part of the south arm of the Fraser River from Sand Heads to Tilbury Island, the whole area including Lot 471, as shown in the Crown grant, and an area equally as large lying to the west of Ferry Road is described as Ladner Marsh, and the river to the west of it as Ladner Reach.

Captain H. A. Young, who came to New Westminster in 1889 and was the master of a Dominion Government dredge working on the river for a very long period of years, said that in the early days of his employment paddle steamers plied between New Westminster and the village of Ladner and passed through the Green Slough, which ran along the eastern and southern boundary of what became Lot 471, and that boats from Ladner passed over the area now described as an accretion by the respondent which lies to the west of the highway. It was along the westerly banks of the Green Slough that the respondent and his father placed their dyke when they bought the property and were proceeding to make it ready for cultivation.

The time at which this use of the Green Slough and the property now lying to the west of the road ceased is not disclosed by the evidence. Mr. McGugan, a British Columbia land surveyor practising for more than forty years in New Westminster, had been asked by Branch in 1926 to survey Lot 471 and the area lying to the west of it. It is clear that between the times referred to by Captain Young and the date of McGugan's survey, very extensive deposits of silt had been made upon an area of approximately 200 acres lying between the western boundary of Lot 471 and Ladner Reach. While McGugan had made the survey in 1926, he did not prepare the plan which he produced until October 17, 1930. This was prepared from his field notes and shows the area and what he considered at that time to be an accretion to Lot 471 of 200.7 acres. Describing the area at that time, he said that he had fixed the boundaries of what he referred to as the accretion where he could see vegetation growing "indicating that that land was out of water sufficiently long to produce vegetation—might be grass or it might be brush or whatever it might be—but that was the point that decided it chiefly". He said that the whole of the land including Lot 471 must have been under water when the tide was very high and that when they were surveying the island there were numerous sloughs to be crossed. This was, of course, long prior to the time when Lot 471 was dyked and the land made suitable for cultivation. Comparing the level of the disputed area with that of other farm lands in the Fraser Delta, he said that it was virtually the same and, referring to Lot 471, said:—

> You see, I think this island, the original island was surveyed in 1885, and all of this area has been subject to flooding and deposit of sediment and silt all the time, so that in 1926, the elevation of the original Crown grant would be slightly higher than it was when originally surveyed.

According to this witness, some trees were growing on the bank of the Deas Slough which was to the north of Lot 471 at the point where the Ferry Road terminated, but the location of these in relation to the northern extremity of the road was not made clear.

Other than the evidence of McGugan, whose capacity as a land surveyor and whose complete reliability as a witness is not questioned, the respondent gave no further useful evidence as to the conditions existing in 1930.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

For the Attorney-General, Mr. T. H. Oliver who had lived in Ladner for sixty-four years, speaking generally of the area west of the road at the time this was constructed, said:—

> There was the bulrushes and more or less a few willows, vegetation, marsh vegetation.

and

> there was growth all through here. The toolies come first on the marshes.

This witness was a hunter and had frequently been on the property when hunting and said that the property would always be covered with water at high tide and, in answer to a question of the learned trial judge, said that he meant by this any high tide around 12 feet or over. He had been on the property when the road was being built and said that the biggest part of the trees which were shown to be growing near the northern extremity of the road had come since it was constructed. A photograph of the property taken in April 1954 showed a growth of trees along a considerable part of the westerly side of the road and these, he said, had grown following the construction of the road.

It should be said as to this witness that the learned trial judge said that he rejected his evidence, considering that he was more interested in preserving the area for duck-shooting than in giving a veracious picture of the terrain. I take this to refer to the witness's evidence of conditions as they were at the time of the trial in 1954, and not to what he had said as to the conditions twenty-four years earlier.

With these exceptions, there is no evidence as to the extent to which the property lying west of the highway built in 1930 was covered with water at medium high tide. There was, however, a considerable amount of evidence as to the condition of the property in 1948 and 1954, when the hearing took place. The learned trial judge also considered that it would assist him in appreciating the evidence if he were to examine the property himself and he spent a considerable time in doing so.

Under the provisions of the *Highway Act* referred to, the soil and freehold of every public highway were declared to be vested in His Majesty, and the entry by the Minister, his agents, servants or workmen operated as a complete

extinguishment of every title and claim to any lands so entered upon or taken possession of. These provisions of the Act, as it was at the date of the construction of the highway, are re-enacted in the *Highway Act*, R.S.B.C. 1948, c. 144.

In these circumstances, evidence directed to the condition of affairs as they were from eighteen to twenty-four years after the establishment of the road is of little weight, unless it has been shown that the conditions existing on the property were at these respective dates essentially the same.

The witness McGugan had in 1944 been employed by the respondent and his father to construct a dyke around Lot 471, as it was shown in the Crown grant, and had directed the carrying out of this work. McGugan was also a member of the dyking authority in the area set up in the year 1948 and in that year, when there was a serious flood, the board had constructed a dam across the upper end of Deas Slough (which was in reality a channel in the river through which the current flowed) which, he considered, had had the effect of causing more silt to be deposited in the area further down stream, including the property to the west of the road. He had again surveyed the property in dispute in 1953 and said that he considered that a high tide would cover part of it but that with a 12-foot tide they could work there all the time. He did not say upon what part of the area this could be done. He had then prepared a plan which showed the area in dispute as 207 acres in extent and said that there had been a tremendous amount of sand and silt deposit on the northerly portion of it, caused by the damming of the Deas Slough. Asked if he could express an opinion as to the extent of the deposits upon the area generally, he said that he could not be definite but that it had been very gradual.

Captain Young whose dredge had pumped the sand used in the construction of the road in 1930 said that, as a result of his experience, he thought an average of 12 feet would be the mean average high tide in that area.

The respondent who, after dyking Lot 471, had by work done upon it converted it into highly arable land, said that with a 12 or 14 foot tide there would be no water on the lands in dispute and that in July, August, September and

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

most of October there would be no water on it at all in any tide. The land west of the road, he agreed, was quite useless for agricultural purposes in its present state and it would be necessary to dyke and drain it to make it so.

Mr. H. L. Huff, a retired inspector of lands for the provincial Department of Lands, had on the instructions of the department examined the property in 1949. Huff was a graduate in agriculture of the University of British Columbia and had examined the vegetation on the property in dispute. He said that it consisted of sedges, rushes, reeds, scattered willows along the higher portion, and on the highest portions a true deciduous tree growth of the type of alder. Asked as to whether there was a common name for the type of willow found there, he said:—

> Well, a willow is a tree, as far as that goes, but there is different types of vegetation and the types of vegetation out there are some hydrophyte and some hygrophyte types of vegetation. I make the distinction between that and your true grass or land vegetation which are your mesophyte type of vegetation.

Speaking of the trees growing at the north end of the property, he said that the deciduous type trees were from fifteen to twenty years old and that many were far less than that, and this applied also to the trees growing along the highway. He said that at a normal high tide "the great body of that marsh is covered by water". In 1949, accompanied by the Chief Inspector of Lands, he had started to walk on to the property from the road at a 12-foot tide and said that they did not get more than 20 feet from the road, that there was no wind at the time and said that he considered that was a normal high tide.

Mr. E. W. Taylor, a biologist in the employ of the British Columbia Game Department, had taken a series of photographs of the disputed property on April 17, 1954. These were taken on a calm day at around 5.30 in the afternoon. These photographs were taken from points about 400 yards west of the Ferry Road and not far distant from the westerly limit of the area. One showing the view to the east shows the line of trees which had grown along the west side of the highway and the greater part of the area covered with water, with some vegetation of the kind commonly seen in marshes growing in the water in the areas closest to

the camera. The view to the south shows a considerable area covered with what appeared to be bulrushes and similar marsh vegetation and a larger area mostly covered with water.

Mr. George Macey, an operator of a marine machine shop in Ladner, was called in rebuttal by the respondent and said that the average high tide in that area was around 11 or 12 feet and that a 12-foot tide would cover part but not all of the area in question. He said that there were times during the year when it was possible to drive a tractor along the high part of the area close to its westerly limit and said that with a 12-foot tide the portions of the area which would be visible were the banks of the sloughs running through the property, the edge of the area next to the river proper and quite a few places in the middle.

Further evidence as to conditions in 1954 were given by John Devington, a neighbour of the respondent who at times rowed across the area in a flat bottom boat in order to salvage logs or posts carried on to the area, who said that it required a 14-foot tide to provide sufficient water for operations of this nature.

The respondent also gave evidence as to using a tractor on part of the area and said that there were various upland grasses and pea vines growing in places.

By consent, a letter written by an official of the Game Commission containing information as to the mean high tide for the period October 1, 1952 to September 30, 1953, obtained from the official records kept at Steveston, was read into the record. This showed that in the area the average high tide was 12.1 feet, there being normally two high tides in each twenty-four hour period. The records further show that on April 17, 1954, at the time the photographs referred to were taken, the tide was 11.7 feet and that the high for that day was 12 feet, this occurring at 6.20 p.m.

In addition to this evidence, a number of aerial photographs were put in evidence. Of these, one had been taken in 1928 of Lot 471 and the area to the west of it, this being prior to the construction of the highway. Other than the

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

sloughs, no water appears on the land but no evidence was given as to the state of the tide when the photograph was taken, and it is thus of no assistance.

By s. 9 of the *Quieting Titles Act*, the judge investigating the title is entitled to receive not only any evidence properly receivable by the Supreme Court on the question of title or which the practice of English conveyancers authorizes to be received on the investigation of a title out of court, but "any other evidence, whether the same is or is not receivable or sufficient in point of strict law", provided the same satisfies the judge of the truth of the facts intended to be made out thereby.

The learned trial judge in making his findings of fact does not say that he exercised the power thus given to him when he took a view of the area in question. This was done, according to the reasons delivered, for the customary purpose of such a view in order that the judge might better understand the evidence. It should be emphasized that this view was taken in the summer of 1954, twenty-eight years after McGugan had made his first survey, and twenty-four years after the construction of the Ferry Road.

The learned judge found upon the evidence that the mean high tide in the area in question is a 12-foot tide at Point Atkinson and that, at such a stage of the tide, the lower land in the area is flooded, while about the perimeter of the land a natural rampart has been formed which is not. He said:—

> The result, at that stage of water, is that there are large flooded areas surrounded by natural dykes or ramparts which do not flood. The depth of the flooding varies from a few inches to a foot or two, but it is nowhere great, and a man in knee-height rubber boots could probably walk over all but a few pockets at mean high tide.
>
> The banks have lost their character of marsh land and are covered by upland growth. They are increasing in size and vary in width from a few feet to a hundred feet. The marsh is grown in sedges, bulrushes and other marsh vegetation. Through the marsh there are numerous high spots where upland growth is emerging.

Having said this, the learned judge said:—

> I find that at mean high tide probably more of this land has water on it (although, in many places, an inconsiderable depth of water) than is high and dry.

and further:—

> But I do not consider this finding conclusive. The truth is that I think it impossible to call this 200-acre area foreshore. It is, as I have said, encompassed with natural walls and dykes stemming from and connected with the original island.

After saying that these ramparts, referring to the higher area along the westerly and northerly limits of the area, were undoubtedly accretions, the learned judge found that, as they were connected to the original island by these natural walls, they were accretions to the land of the petitioner. Whether they were continuous in 1954 was not stated.

Part of these findings, such as that as to the depth of water upon the area at mean high tide and as to the character of the vegetation, were clearly made as the result of the judge's own observations. The finding that the higher land around the perimeter of the area, to which reference was made, was connected to Lot 471, must clearly have been intended to refer to the situation that existed in 1930, prior to the time when the Ferry Road was built and, with great respect, is not supported by the evidence. Neither the evidence of McGugan nor the 1928 aerial photograph prove the existence of these so-called ramparts at that time or that they were connected with Lot 471 in any manner, and there is no other evidence on the point.

While the learned judge had found that it was impossible to call the area foreshore, he said further that, assuming this to be wrong, since McGugan had said that the disputed area was in 1926 of the same character and level as Lot 471, the land in the original grant was foreshore and, if the accretion was foreshore, it was subject to the same rules as an accretion of cultivable land and became the property of the petitioner.

I am unable, with great respect, to agree with these conclusions or with those of the majority of the Court of Appeal and agree with the dissenting judgment of Mr. Justice Robertson.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

The case of the petitioner as advanced in the petition is that, since the date of the Crown grant, "there has accreted to Lot 471 as it stood at the time of such Crown grant some 207 acres, mostly on the west side of Lot 471". It is alleged

> That a substantial portion of such accreted area is *now* grown over with willow or brush or grass and excepting for two very small sloughs is no longer washed by mean tides

and a declaration is asked that the petitioner is the legal and beneficial owner in fee simple.

The Crown grant to Nordman, read with the attached plan, was a grant of an island in the Fraser River. I think the only possible inference from the evidence is that this island had been gradually formed by vertical deposits of silt, carried down the river. As the Crown in the right of the province was the owner of the bed of the river, the island was its property. As pointed out by Robertson J.A., the area might have been sold by the Crown even though it were covered with water. As the land had been built up above the surface of the water, it was treated as the sale of an island, the area and limits of which were shown by the plan, and not as of a portion of the bed of the river. I can see no basis for finding that the area described in the grant was either foreshore or sold as such and the petition does not, indeed, suggest it.

In Sir Matthew Hale's treatise *De Jure Maris,* as it appears in Hargrave's Law Tracts at p. 12, dealing with the King's right of property on the shore, it is said:—

> The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea.

As to what was included in the expressions "shore" or "*littus maris*", it is said that

> it is certain that that which the sea overflows, either at high-spring tides or at extraordinary tides, comes not as to this purpose under the denomination of *littus maris;* and consequently the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides.

The question as to the proper interpretation of the expression "ordinary tides" was considered in the judgment of Lord Cranworth L.C. in *Attorney General v. Chambers*

(1). In that case, in which the Lord Chancellor was assisted by Alderson B. and Maule J., Lord Cranworth said, referring to the statement of Hale, that it should be construed as the medium high tide between the springs and the neaps. A like interpretation had been placed on the expression in *Blundell v. Catterell* (2), to which the Lord Chancellor referred. See also 33 Halsbury, 2nd ed. 1939, p. 525 and cases referred to in note (*s*).

The onus rested upon the respondent to establish that, prior to the construction of the Ladner Ferry Road, the area in dispute had through accretion ceased to be the property of the Crown. To establish this, it was necessary for him to show that at that time the area was not overflowed by the water of the river at ordinary tides, so construed. This has not been shown and that is decisive of the matter against the respondent, in my opinion.

McGugan, speaking of conditions as they were in 1926 when the survey was made, when asked whether the area was swept by tidal waters, said:—

> Well, yes, definitely at times, the whole of it must have been. On very high tides, the whole of that island, the original island must have been under water. I know when we were surveying on that island there, there were numerous sloughs we crossed all the time. We had to make long detours to get around these sloughs. There may have been—looking at Green Slough—there was a ridge which was quite high, and there were trees on it and that was high. Most of the rest of it was relatively, you would call it relatively low, and when the tides were in you just couldn't work on it, that was all.

The matter was not explored further, in either direct or cross-examination and there is no other evidence on the point.

If there had been evidence that, prior to the construction of the Ladner Ferry Road, the so-called ramparts were not covered by water at mean high tide and, commencing at the north-west corner of Lot 471, extended continuously out into the river and surrounded or partly surrounded the lower portions of the bed of the river to the west of the respondent's property, the question as to whether the Crown's title was affected would require consideration.

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486.
(2) (1821), 5 B. & Ald. 268, 106 E.R. 1190.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

In my opinion, what has been called the doctrine of accretion is accurately stated in Coulson and Forbes on Waters and Land Drainage, 6th ed. 1952, at p. 39, where it is said:—

> Land formed by alluvion, or gradual and imperceptible accretion from the sea, and land gained by dereliction, or the gradual and imperceptible retreat of the sea, belongs to the owner of the adjoining *terra firma*. Where the increase is sudden or perceptible, the land gained still belongs to its original owner. The word "imperceptible" means imperceptible in progress, and not in result—that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year.

The principle is that gradual accretion enures to the land which attracts it. It applies to tidal and non-tidal and navigable or non-navigable rivers: *Foster v. Wright* (1). It was applied in this Court to lands through which the North Saskatchewan River runs in *Clarke v. City of Edmonton* (2).

If the so-called ramparts which were visible to the learned judge in 1954 extended in 1930 continuously from the north-west corner of Lot 471, westerly and then southerly along the boundary of the property in dispute, and had been gradually built up by accretion commencing on the foreshore of Lot 471 (and there is no evidence that they did), a question would arise as to whether the law relating to accretion would vest such a long narrow curving strip of land in a navigable river in the owner of the land upon which the accretion commenced and from which it was extended. It is not accurate, in my opinion, on the evidence in this case to say that this narrow strip of land is undoubtedly an accretion since if, for example, the portion of it along the westerly boundary of the property was formed by alluvion at that place and did not project out from Lot 471 and was not connected to an accretion there, it would be the property of the Crown, just as the island which formed the subject matter of the grant was its property. There is a complete absence of evidence, however, as to when and in what manner these ramparts rose above the surface of the water at medium high tide.

(1) (1878), 4 C.P.D. 438 at 444.
(2) [1930] S.C.R. 137, [1929] 4 D.L.R. 1010.

I am further unaware of any authority for the proposition that, assuming the ramparts were continuous and were true accretions to the respondent's property, the very large area of lands subject to flooding at medium high tide which were the property of the Crown and which lay between these ridges and Lot 471 thereby became the property of the respondent. No principle of the law as to accretion would make it so, in my opinion.

The conflict between the decision of the judges in *Gifford v. Lord Yarborough* (1), and part of the judgment of Lord Cranworth in *Attorney General v. Chambers* (2), which is discussed at length in the judgment of Palles C.B. in *Attorney-General v. M'Carthy* (3), does not touch any of the matters in issue in the present case. There is, however, a conflict which, I think, should be noted. In *Chambers' Case,* Lord Cranworth said, relying upon a passage from *De Jure Maris,* that the principle which gave the shore to the Crown was that it was land not capable of ordinary cultivation or occupation and so in the nature of unappropriated soil and, in Lord Hale's language, not maniorable. A passage in the judgment of Best C.J., referred to by O'Halloran J.A. in his judgment in this case, suggests that the right of the owner to an accretion depends not on the fact that the land which is above the mean high water mark is maniorable (or manurable) as it is left by the action of the tide but by virtue of the owner entering upon the area and improving it, thus acquiring title "by occupation and improvement". The question, it should be noted, was not one that was in issue in *Lord Yarborough's Case* and the accuracy of that portion of the judgment will have to be considered when the question arises. It does not arise in the present matter.

For these reasons, it is my opinion that this appeal should be allowed and, subject to one reservation, the petition dismissed. We were informed on the argument that the Attorney-General does not ask for costs in this Court. No order as to costs was made by Wilson J. or by the Court of Appeal and I would make no order as to the costs of the proceedings before them.

(1) (1828), 5 Bing. 163, 130 E.R. 1023.
(2) (1854), 4 De G.M. & G. 206, 43 E.R. 486.
(3) [1911] 2 I.R. 260.

1956

A.G. OF BRITISH COLUMBIA v. NEILSON

Locke J.

While the question was not argued before us, the plan prepared by McGugan in 1953 shows two small areas east of the Ladner Ferry Road, one at its northern extremity and the other generally to the south of Lot 471, which are marked as accretions. Since the matter of the respondent's right to these areas as against the Crown has not been dealt with, I think the dismissal of the petition should be without prejudice to any claim he may wish to make in respect of them.

CARTWRIGHT J.:—I agree that the appeal should succeed on the ground that the respondent has failed to establish that prior to the construction of the Ladner Ferry Road the area in question was not overflowed by the waters of the Fraser River at the high-water mark of the ordinary tides as defined in *Attorney-General v. Chambers* (1). This renders it unnecessary for me to consider the ground on which my brother Rand would allow the appeal.

I would dispose of the appeal as proposed by the Chief Justice.

Appeal allowed, no costs.

Solicitors for the petitioner, respondent: Campney, Owen, Murphy & Owen, Vancouver.

Solicitors for the respondent, appellant: Lawrence, Shaw, McFarlane & Stewart, Vancouver.