1946

*May 14, 16.
*Oct. 1.

MUNICIPALITY OF QUEEN'S COUNTY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

ARTHUR I. COOPER (DEFENDANT) ..... RESPONDENT.

Riparian owners—Tidal and navigable river—Alluvion—Accretion—Riparian owner's rights subject to changes effected by nature—Island and mainland gradually connected together—Deposits of alluvium over course of years—Rights of riparian owner and owner of island—To whom the accreted, or increased, land has accrued.

The appellant municipality is the owner of an island situate in the Saint John river, a tidal and navigable river, and the respondent is the owner of a tract of land bordering on the same river immediately above the head of the island. At the time of the grant to the appellant's predecessor in title, there was an access to the main river in front of the respondent's land and the island was separated from the eastern shore of the river by a narrow channel of water. But, in the course of a century, by gradual and imperceptible deposits of alluvium, the respondent's land has become extended upstream into a junction with the easterly bank of the island as it became extended by alluvium. The narrow channel was blocked up and the island connected with the respondent's land. At the time of the trial, the junction of these accreted lands was indicated by a narrow, wet, but apparent, depression. The appellant municipality claimed title to the extension of the island on the ground that through the years the island has been enlarged by the process of accretion up to the depression and brought the present action for damages

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

for trespass and for an injunction. The respondent contended that the entire increase is an accretion to the mainland, and, in the alternative, that as riparian owner he is entitled either to the accreted land itself by virtue of adverse possession or to rights over it sufficient to maintain his riparian privileges; and, by counter-claim, he asked damages for interference with his occupation and for an injunction. The trial judge upheld the appellant's claim. The Appeal Division reversed that judgment and held that the accreted land, at some stage in the process of its formation, have become the respondent's property and that, as riparian owner, the latter had a right of access to the river over the accretions physically connected with the island.

Held, reversing the judgment of the Appeal Division (18 M.P.R. 317), that the judgment of the trial judge should be restored, which judgment upheld the appellant municipality's claim for a title to the extension of the island up to the depression shown at the junction of the accreted lands.

Held also, and the trial judge so found, that the claim advanced by the respondent to title founded on adverse possession should, upon the evidence, be dismissed.

Per The Chief Justice and Hudson and Rand JJ.:—The right of access of the riparian owner to the river is not the consideration underlying accretion; but even if it were, to extend its application to land formed quite otherwise than by accretion vis a vis the riparian owner is, in the law as laid down for centuries, quite out of the question. If, in the circumstances, the most efficient use of the newly formed land would lie in its connection with the original ripa, the legislature must bring about that change; but that, on such a ground, a court should forcibly re-allocate ownership, with all its possibilities of areas and values, is a proposition supported neither by authority nor principle.—Upon the facts of the case, the Municipality has been in actual occupation of the accreted lands since their formation.

Per Kerwin and Hudson JJ.:—As a riparian owner, the respondent, or his predecessors, had certain rights at one time, among them being that of access to the river. "The rights of a riparian proprietor, * * *, exist *jure naturae,* because his land has, by nature, the advantage of being washed by the stream: * * *" (*Lyon* v. *Fishmonger's Company* [1875-76] 1 A.C. 662, at 682). But, once the advantage of being washed by the water is put an end to by an act of nature, this right of access disappears, as it has disappeared in this case. Then, no question of public policy can interfere with the title which, so far as the parties hereto are concerned, has been acquired by law by the appellant Municipality.

Per Hudson and Estey JJ.:—The riparian owner's rights are subject to the changes effected by nature. So long and to the extent that nature continues the riparian owner as such, he enjoys riparian rights, but nature or the act of any person in the exercise of his rights may from time to time alter or even destroy those of a riparian owner.—In the present case, the relative positions of the appellant municipality and the respondent have thus been determined by nature: the first has been fortunate, while the latter unfortunate.

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APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing the judgment of the trial judge, Richards J. and dismissing the appellant municipality's action for trespass and an injunction.

The trial judge also dismissed a counter-claim by the respondent, who, alleging his own title to the land, claimed damages for interference with his occupation and an injunction and that judgment was affirmed by the Appeal Division.

The material facts of the case and the questions at issue are stated in the above headnote and in the judgments now reported.

A. McF. Limerick for the appellant.

W. J. West K.C. for the respondent.

The judgment of the Chief Justice and of Rand J. was delivered by

RAND J.:—The respondent is the owner of land bordering on the Saint John river below tidehead. It was formerly a portion of a large tract which in the original grant in 1787 was bounded on the west

> along the easterly bank or shore of the said River following its several courses upstream to the bounds first mentioned.

This language, under the established presumption, carries the title to the ordinary high water mark; and it is not disputed that the property in the bed of the river, including the shore, remained in the Crown.

The appellant Municipality is the successor in title to what was an island in the river, granted in 1819, then lying wholly below the respondent's land, which in the course of a century by gradual and imperceptible deposits of alluvium has become extended upstream into a virtual junction with the easterly bank from a point about four rods below the upper boundary of the respondent's line to a point a somewhat greater distance above it. There has also been a slight accretion to the mainland and the junction of these accreted lands is indicated by a narrow, wet, but clearly defined depression. When the river is at its highest, the westerly

(1) (1945) 18 M.P.R. 317.

portion of the respondent's land near the river as well as the disputed lands opposite are flooded, and they are of little apparent use otherwise than for raising hay. Between the extended island and the mainland southerly of the junction is now a narrow backwater which is of no benefit for reaching the body of the river.

The appellants, Webb and Bridges, in 1942 under an agreement with the Municipality sowed barley on the disputed land, the crop from which was to be theirs. The respondent destroyed part of that crop, on various occasions pastured cattle on the land, and in many or most of the years between 1914 and 1942 cut hay from it.

The Municipality claims title to the extension of the island up to the depression and brought the action in trespass and for an injunction. The respondent contends that as riparian owner he is entitled either to the land itself or to rights over it sufficient to maintain his riparian privileges.

On these facts the Appeal Division (1), reversing Richards J., held the accreted land, at some stage in the process of its formation, to have become the property of the respondent as riparian owner, and dismissed the action.

The result of that judgment is that a body of land at one moment vested in the Crown or its grantee, in the next is found to have passed to the respondent without any act or consent of its proprietor. This extraordinary transfer is said to have been effected through the operation of law by way of fulfilment of implications of the original grant of the shore-bounded property and on the consideration in policy of the most efficient utilization of the dry soil won from the river bottom. More specifically it is said to be necessary to the proper and contemplated enjoyment of the right of access to the river to which the riparian owner, by his grant, became entitled.

I should observe at the outset that no question of accretion arises directly. That doctrine applies to the encroachment of dry land on water-covered land following the slow retreat of the fluid boundary between them. It is based on the physical process of the gradual deposit of alluvium at and immediately below the boundary line by which the latter becomes imperceptibly pushed back towards the

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river or sea. There is also the like recession of the waters. The converse process is the slow erosion of the dry land. Contrasted with these are the sudden upheavals of shore or water-bed, the abandonment of the course of a stream or the violent invasion and cutting off of land by waters. It is obvious then that only between the Crown and the Municipality could the question of accretion arise here. But the doctrine has been invoked in two aspects: it is said to be founded on the maintenance of the riparian right of access, and that consideration has been extended to what are considered the analogous physical conditions existing here: and as it is put in a dictum in *St. Louis* v. *Rutz,* (1).

> The right of accretion to an island in the river (Mississippi) cannot be so extended lengthwise as to exclude riparian owners above or below such island from access to the river as such riparian proprietor.

I will deal with the latter first. In the case cited, the land over which the deposit moved belonged to the riparian owner. It was a contest between a riparian owner of the river bed and the owner of an island: it does not appear what portion of the river bed was annexed to the latter: but it was an invasion beyond the boundary of the river bed belonging to the riparian proprietor that was in question; and the dictum must be interpreted in the light of that fact. If in this case, the Crown owned not only the bed but the bank, a similar though not the precise question might arise: not precise because the boundary of the riparian owner's portion of the river bed was not a fluid line; and I quite agree that in a situation where the river bottom is parcelled out between riparian and island proprietors, the interests affected do raise considerations of the sort suggested. So does the case of adjoining owners of the bed of sea or river, without more.

In his work De Jure Maris, Lord Hale uses this language:

> This jus alluvionis, as I have before said, is de jure communi by the law of England the King's, viz. if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere, as well in maritime increases as in the increases by inland rivers. (6, II).

Now that view of the effect on accretion of "marks or measures" cannot be said to have been followed; but the

(1) (1890) 138 U.S. 226.

fact that it was held by such an authority is the strongest evidence that accretion is wholly involved in boundary and is inapplicable where that boundary is not a water line. In cases then where the stream bed is parcelled out in ownership by fixed or line limits, the essential condition of accretion is lacking: and the dictum in *St. Louis* v. *Rutz* (1) appears to be founded on that conception.

But here a third interest intervenes, the effect on which is precisely the same whether the emerged land is attributed to the Municipality or to the Crown and regardless of where it originated. The controversy must then be decided as if the emergence of the river bed had taken place through a process of deposit confined to the land of the Crown fronting that of the respondent.

Now is it a fact—and in the foregoing I have assumed it is not—that accretion is a consequence of the right to continued access to the boundary waters? I think the query is answered by the language of Smith, L.J. in *Hindson* v. *Ashby* (2):

> The whole doctrine of accretion is based upon the theory that from day to day, week to week and month to month, a man cannot see where his old line of boundary was by reason of the gradual and imperceptible accretion of alluvium to his land.

It is a matter of fluid and unstable boundary between his land and adjoining water-covered land: the title itself at that line becomes fluid and the soil passes to the one or other proprietor with the progress of the process. The identity of the ripa remains notwithstanding the accretion and the rights inhere in all of its modifications.

Baxter C.J. deduces from *Atty.-Gen. for Nigeria* v. *Holt* (3) the principle of preserving the right of access as fundamental to the original grant; but all the case decided was that the riparian owner, by constructing artificial works on the foreshore, did not, in the circumstances, abandon his riparian rights over it. The language of Lord Shaw, relied on by both the Chief Justice and Harrison J. was obviously directed to the conflicting interests of riparian and foreshore owners and the effect upon them of acts by either. It does not touch the effect of natural changes; and there is

(1) (1890) 138 U.S. 226.
(2) [1896] 2 Ch. 1, at 28.
(3) (1914) 84 L.J. P.C. 98.

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nothing in it that remotely countenances the divesting of Crown or other ownership following a natural change other than accretion.

I have already observed that the case must be treated as if the accreted land had imperceptibly emerged wholly on the river bed opposite the respondent's land and unconnected with the island. But from the point of view of the principle invoked, the process that brings about the obstruction is irrelevant. If that portion of the stream bed had been thrown up by a natural convulsion, the effect on the respondent would have been precisely the same; but in that case what change in property rights would have followed? None whatever. It is conceded that the owner of the river bottom would remain owner of the disgorged land; and in my opinion that settles the controversy. Admittedly, also, the same result would follow from a sudden reliction. And on principle what distinction could be made between natural changes where the legal result follows not from the mode of change but from the physical consequence?

What in fact is the position of a grantee of land along a river whose banks and shores and bed are, to a degree, in a state of slow flux? Is he, in effect, entitled to an implied grant or natural right to perpetual access regardless of natural changes? Or does he become the owner of land with horizontal dimensions, one boundary of which is fluid, which so long as the water contact remains carries certain rights related to the continuous waters, but which, if in the course of nature, it ceases to be riparian, *ipso facto* no longer supports those rights? The answer is furnished by the rule of law applicable to avulsion or sudden reliction; the fluid boundary becomes fixed and the land ceases to be riparian.

I am then unable to accept the view that the right of access is the consideration underlying accretion: but even if it were, to extend its application to land formed quite otherwise than by accretion vis a vis the riparian owner is, in the law as laid down for centuries, quite out of the question. If, in the circumstances, the most efficient use of the newly formed land would lie in its connection with the original ripa, the legislature must bring about that desirable change; but that, on such a ground, a court should

forcibly re-allocate ownership, with all its possibilities of areas and values, is a proposition supported neither by authority nor principle.

The case of *Waring* v. *Stinchcomb* (1), is treated as virtually identical with the facts here; but there the contest was between adjoining riparian owners, each of whom, by statute, had a right to build out in the water in front of his lands. This raises questions of the sort suggested between adjoining owners of submerged soil; and however they may be dealt with, the interests here are quite different and the considerations raised by them likewise.

On appeal the respondent was permitted to add a count to the counter-claim for an injunction against the continuance of a causeway across the lower end of the so-called creek between the island and the mainland. I find it impossible to say that we have all the evidence that might be brought forward for or against that claim; and I agree that, on the record before us, no judgment can be given on that question.

I had thought that as the Crown is the owner of the river bed, the Attorney-General should have been made a party to the action. No finding of title here can, of course, affect the interest of the Crown; but in the absence of the Attorney-General, I think it inadvisable to place a judgment in favour of the appellant on the ground that as against the Crown, the Municipality has acquired title to the lands by accretion. The facts are clear that the Municipality has been in actual occupation of the accreted lands since their formation; in fact the claim of adverse possession was asserted as against the Municipality: and on that possession by the Municipality, the claim is sufficiently founded.

The trial court found against the respondent on the claim of adverse possession, a finding which the evidence, in my opinion, requires us to make.

As I have intimated, the disputed land is of very slight value and we were told that this was in the nature of a test case for a number of similar situations along the river. In those circumstances, I think the costs should be dealt with specially.

(1) (1922) 32 A.L.R. 453.

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I would allow the appeal and dismiss the cross-appeal, and restore the judgment at the trial. There will be no costs in this Court or in the Court of Appeal. This judgment will be without prejudice to the claim of the respondent in relation to the causeway.

KERWIN J.:—The pecuniary value of the matter in controversy in this appeal is slight but important questions of law present themselves for determination. The Appeal Division of the Supreme Court of New Brunswick (1) came to a conclusion opposed to that of Richards J., the trial judge, and gave leave to the plaintiffs to appeal to this Court.

The plaintiffs are the Municipality of Queen's County and Maurice Webb and Holland B. Bridges, and the defendant is Arthur I. Cooper. In 1787 a Crown grant was made to the defendant's predecessors in title of a tract of land, the westerly boundary of which is described as being

> along the easterly bank or shore of the said river (Saint John) following its several courses upstream to the boundaries first mentioned.

The Saint John river, it is admitted, was at all material times, and is, a tidal and navigable river. In 1819, the predecessors in title of the County obtained a Crown grant of Thatch Island in the river. At that time the island had a length from south to north of 71 chains and 50 links and its head was about 15 chains below or south of the continuation of the southern boundary of the land now owned and in possession of the defendant. Since then mud and silt have been deposited in the area of the river at the head of the island and between that and the mainland, with the result that the island has been extended up-river northerly for a distance of about 40 chains and has become attached to the mainland along the upper portion of this extension for a distance of about 8 chains. The juncture with the mainland begins at a point about 4 rods below the defendant's upper line, and the remaining 7 chains of juncture of the island with the mainland is with the land of the next adjoining mainland owner, north of the defendant's land. The claim by the County is for damages for trespass to that part of the land so formed in front of the defendant's intervale lots and for an injunction,

(1) (1945) 18 M.P.R. 317.

and by the individual plaintiffs for damages for cutting down barley sown thereon by them with the County's permission. By counter-claim the defendant set up his own title to and possession of the lands and claimed damages for interference with his occupation and an injunction.

The Crown is not before the Court but, as between the parties to this litigation, the findings of fact made by the trial judge must stand, that the alluvium, except for a small portion, formed an accretion to the head of the island, producing the latter's present extension; that the remaining portion of the alluvium formed a small accretion to the mainland; and that the boundary line between the accretion to the island and that to the mainland is a certain depression referred to in the evidence and in the judgment. On these findings of fact, Richards J. determined that in law the County was the owner of the land in question and directed judgment to be entered, with costs, for the County for $5.00 and for an injunction, and for the individuals, for $100 and dismissed the counter-claim with costs.

The Chief Justice of New Brunswick concluded that the County had no claim to the new made land as he considered that while, as between the island on the west and the bank owners on the east of the small channel between the island and the mainland, and also on the western side of the island, *ex adverso* of the western bank of the river, the owners of the island as originally formed were riparian proprietors, they were not so with respect to the head of the island, and he referred to a statement of Sir Louis Davies in *Francis Kerr Co.* v. *Seely* (1). In that case, however, it should be noted that what Sir Louis Davies was dealing with was a water-lot and it was in that connection that he stated that the lessee thereof was not a riparian proprietor in any sense of the word.

On principle, the owner of an island is a riparian proprietor as to every part thereof; the fact that this island has always been ovoid in shape is merely an accident and can make no difference in the application of the principle. Their Lordships of the Privy Council were dealing with an island in *Secretary of State for India in Council* v. *Foucar and Company, Limited* (2), where, at page 24, appears the following:—

(1) (1911) 44 Can. S.C.R. 629. (2) (1933) 61 Ind. App. 18.

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Kerwin J.

The conclusions which their Lordships draw from these facts are that in each case the grant was of land forming part of the foreshore of tidal water, of which the south boundary and, in the material cases, the east boundary also, was the river.

The important holding was that the principle of accretion applied to Burma but it is significant that the point mentioned by the Chief Justice was never raised. It was also pointed out, at page 25, that the basis of the rule that gradual accretion enures to the land which attracts it has been differently stated at different times:—

* * * but their Lordships think it must be regarded as a rule of "general convenience and security": per Lord Shaw in *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (1); and as necessary for the "mutual adjustment and protection of property": per Lord Abinger *In re Hull and Selby Railway* (2).

A single sentence in the decision of the Supreme Court of the United States in *St. Louis* v. *Rutz* (3) is relied upon:—

The right to accretions to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below the island from access to the river.

That must be read in connection with the fact that there the riparian proprietor was the owner of the bed of the Mississippi river and with the prior holding of the Court that the law of title by accretion had no application since its progress was not imperceptible in the legal sense. *Mulry* v. *Norton* (4) also needs careful examination in order to ascertain exactly what the Court was dealing with. It is merely a decision that however accretions may be commenced or continued, the right of the one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of a coterminous neighbour. A number of other American cases have been referred to but in reading them care must be observed to differentiate between the decisions in States which have followed the English common law as to the title of an owner of lands bounded by water extending to the middle thread of a stream and those in which a different rule has been formulated. It will also be found that a number of these cases are concerned with the title to submerged land on its reappearance.

(1) [1915] A.C. 599, at 612.
(2) (1839) 5 M. & W. 327, at 33
(3) (1890) 138 U.S. 226, at 250.
(4) (1885) 100 N.Y. 424.

Mr. Justice Harrison considered that:—

> Public policy is served by providing for the most efficient utilization of land formed by accretion and the most efficient utilization is obtained by giving accreted land lying in front of a shore lot to the riparian owner, where such accreted land blocks access to the navigable water.

Undoubtedly, as a riparian owner, the defendant, or his predecessors, had certain rights at one time, among them being that of access to the river.

> But the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae,* because his land has, by nature, the advantage of being washed by the stream: * * *

per Lord Selbourne in *Lyon* v. *Fishmongers' Company* (1) at 682, and again at 683:—

> It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream.

Once the advantage of being washed by the water is put an end to by an act of nature, the right of access disappears. Countenance is lent this conclusion upon a question of a private right by the decision in *The King* v. *Montague* (2) where it was held that a public right of navigation in a river or creek may be extinguished by natural causes such as the recess of the sea or an accumulation of silt and mud. The right of access having in this case disappeared, no question of public policy can interfere with the title which so far as the parties hereto are concerned has been acquired by law by the County.

The claim advanced by the defendant to title founded on adverse possession was quite rightly dismissed by the trial judge. At the hearing of the appeal before the Appeal Division, the defendant was allowed to amend his counterclaim by alleging that the plaintiff County built a bridge or causeway across the lower end of the creek or channel between the mainland and Thatch Island, which interfered with the rights of the defendant. No such question was raised at the trial and there being no evidence directed to the point, the matter should not be dealt with.

The appeal should be allowed and the cross-appeal dismissed and the judgment at the trial restored. Since this is in the nature of a test case, under all the circumstances, there might very well be no costs in this Court or in the Appeal Division.

(1) [1875-76] 1 A.C. 662. (2) (1825) 4 B. & C. 598.

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Estey J.

HUDSON J.:—For the reasons given by my brothers Kerwin, Rand and Estey, I agree that in this action, on the facts as found by the learned trial judge, the appeal should be allowed and the cross-appeal dismissed and the judgment at the trial restored, with no costs here or in the Appeal Division.

ESTEY J.:—This is an appeal in an action for trespass, the real purpose of which is to determine which of the parties has title to the accreted part of Thatch Island in the Saint John river. The parties are in agreement that by the process of accretion the original island has been extended for some distance up the river and joined to the mainland. The judgment of the learned trial judge in favour of the appellant county was reversed by the appellate court of New Brunswick.

In 1819, when Thatch Island was granted to the Justices of the Peace of Queens County (subsequently taken over by the county), it consisted of a parcel of land 71·50 chains in length, lying along the easterly shore of the river and separated therefrom by a channel of water in width about 1·20 chains which varied only slightly throughout its length. The respondent's parcel then fronted upon the river a distance of 16·42 chains. The head of the island was then 20 chains below or down the river from the respondent's lower or southerly boundary. By 1900 the head of the island had by the process of accretion reached a point about opposite the respondent's upper or northerly boundary. By 1935 the head of the island was about 7 chains above that boundary and at some date between 1900 and 1935 it joined to the mainland at a point about 4 rods below the upper or northerly boundary of respondent's land, and now from that point adheres to the mainland some distance beyond the respondent's upper or northerly boundary.

The dispute between the parties hereto commenced, so far as the records are concerned, with a resolution passed by the Municipal Council of Queen's on January 19, 1932, requesting the respondent to discontinue cutting hay on the end of Thatch Island, and authorizing the placing of stakes to indicate the boundary of its property. The respondent does not remember receiving notice of such a

resolution and there is no evidence that these stakes were placed. Later a fence was erected by the county and by some person destroyed. The respondent, although admitting having seen the fence, denied having any part in the removal or destruction thereof. In 1942 the appellants, Webb and Bridges, under an agreement with the appellant county, planted a portion of the land in question with barley and timothy seed. The defendant, in August, entered upon the premises and cut and destroyed a portion of the barley. It is this alleged trespass upon the part of the defendant that provides the basis for this litigation.

The parties agreed to the following statement of facts:

1. That the Saint John river at the material times and places was and is a tidal and navigable river.

2. That the plaintiff, the Municipality of Queens County, was at all material times and still is the owner and possessor of as much of that certain island lot situate in the Saint John river, known as Thatch Island as is bounded and described in the grant of the said island to the Justice of the Peace of Queens County by the Crown, the said grant being numbered 1145 and being dated on the 1st day of September, 1819.

3. That the defendant was at all material times and still is the owner and possessor of certain intervale lands, situate in the parish of Canning in the county of Queens, known as lot no. 15 and the upper or northern one half of lot no. 16 as bounded and described in the grant to William Spry and others, the said grant being number 105 and being dated the 30th day of January, 1787, the said lots having been conveyed to the said defendant by one William S. Cooper by deed bearing date the 17th day of April, 1916, registered in Queen's County records in book P-4 at pages 312-3 as no. 31583.

4. That the westerly boundary of the said lots 15 and 16 was at the date of the said grant in 1787, described as being "along the easterly bank or shore of the said river (Saint John) following its several courses upstream to the bounds first mentioned."

The appellant county, as owner of the original island, submits that through the years this island has been enlarged by the process of accretion, and therefore it has at all times been the owner of the entire island.

The respondent submits that the entire increase is an accretion to the mainland. In the alternative that as the riparian owner he is entitled to all the island contained in the area bound by an extension of his upper and lower mainland boundary lines across the accreted area, and in the further alternative that he is entitled to that portion of the accreted land by virtue of the principles underlying adverse possession.

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Estey J.

The learned trial judge found as a fact

> that the alluvion, except for a relatively small portion, formed as an accretion on the head of the island, producing the present extension to the island; that the remaining portion of the alluvion formed a small accretion to the mainland; that the boundary line between the accretion to the island and that to the mainland is the line of depression above referred to, as shown in the survey of C. R. Starkey of 1942, and as marked by him on the ground by stakes "A", "B", "C" and "D" during that survey.

This finding of fact is supported by the evidence and provides an answer to the respondent's first contention.

The respondent's alternative constitutes the principal issue in this appeal. He submits that under the circumstances this case cannot be decided solely upon the basis of the law of accretion. That his rights as riparian owner must be maintained and to do so it is necessary that he be declared owner of that part of the accreted island land lying in front of his mainland. His submission on this point is as follows:

> In other words where there are competing rights the right of the riparian owner of access will prevail over that of another owner, particularly where the latter suffers no detriment. This is because of benefit and convenience and of the necessity for the permanent protection and adjustment of property and not because of physical attachment. Otherwise the land of the riparian owner would become a hinterland.

At common law as and when land was increased by the process of accretion the newly formed land became the property of the owner of the land to which it attached. The accumulation under that process is so slow and imperceptible that for practical and convenient purposes in the "mutual adjustment and protection of property" it is regarded as never having taken place and the owner of the land affected by the accretion as having always owned both the original and the accreted portion. *In re Hull and Selby Rly. Co.* (1); *Secretary of State for India in Council* v. *Foucar* (2).

The riparian owner acquires his rights not by grant or prescription but "as a natural incident to the right of the soil itself": *Chasemore* v. *Richards,* (3). His soil as it abuts upon a body of water gives to him his position and rights as a riparian owner. As Lord Selborne stated:—

(1) (1839) 5 M. & W. 327.
(2) (1933) 61 Ind. App. 18; 50 T.L.R., 241.
(3) (1859) 7 H.L.C. 349, at 382.

It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; * * * *Lyon* v. *Fishmongers' Company,* (1).

Any infringement of his rights by a party or the Crown will give to him a right of action for damages and often a basis for an injunction. His rights, however, are subject to the rights of other riparian owners and indeed of those who in the proper exercise of their own rights may cause him damage. He must exercise his rights in a manner that will not interfere with the rights of other riparian owners.

In *Chasemore* v. *Richards* (2), the defendant dug a well upon his land and thereby utilized water upon his own premises which, while having no defined course, had prior thereto found its way to the river in question. The construction of this well adversely affected the flow of the river, but although the plaintiff's rights as riparian owner were interfered with, he had no claim against the defendant. See also *Mayor, etc., of Bradford* v. *Pickles* (3).

In *Foster* v. *Wright* (4), the river originally flowed through the plaintiff's land. Gradually and imperceptibly the river on one side wore away the plaintiff's land to the point that it was extinguished and continued to encroach upon and wear away the defendant's land until at the time of the action what was formerly defendant's upland was a portion of the river bed. The plaintiff had the exclusive right of fishing in this part of the river but the defendant contended that this right did not extend over that part of the river bed which could be identified as previously his land. The defendant had by virtue of the process of erosion become a riparian owner but his rights were subject to the fishing right of the plaintiff though the river had changed its position. The Court said:

The river has never lost its identity nor its bed the legal owner.

In the course of his judgment Lindley J. stated as follows at p. 446:

Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough,* (5); and, conversely, land gradually incroached upon by water, ceases to belong to the former owner: *In re Hull and Selby Ry. Co.* (6). The law on this subject is based upon

(1) [1875-76] 1 A.C. 662, at 683.
(2) (1859) 7 H.L.C. 349.
(3) [1895] A.C. 587.
(4) (1878) 4 C.P.D. 438.
(5) (1824) 3 B. & C. 91; 5 Bing. 163.
(6) (1839) 5 M. & W. 327.

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the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water.

In *Withers* v. *Purchase* (1), the defendant sought by dredging and cleansing the river to increase its flow "to restore the current to its former course". This work on the part of the defendant would have reduced the flow into Fish Lake Cut where the plaintiff had a mill. An injunction was granted restraining the defendant on the basis that while he was endeavouring to restore a former flow he was in fact interfering with the natural course of the river as it now obtained. Mr. Justice Kekewich, in the course of his judgment at p. 821, stated:

> The wonted or accustomed course of a stream which riparian owners are entitled to say must not be disturbed is not, in my judgment to be found by historical research, but is that which has its natural and apparently permanent course at the time when the right is asserted or called in question.

And again at p. 822:

> I can discover no sound argument against extending to the bed the principle applicable to the banks—that where a stream changes its course by slow steps the riparian proprietors are obliged to accept the consequent alteration in their boundaries.

The position of a riparian owner is set forth in an oft quoted and approved passage in a judgment of Lord Wensleydale:

> It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour. *Chasemore* v. *Richards*, (2).

Lyon v. *Fishmongers' Company* (3), *Hindson* v. *Ashby* (4), *North Shore Ry. Co.* v. *Pion* (5).

That the same rules with respect to accretion and erosion apply to islands as to the mainland would appear to be established: *Secretary of State for India in Council* v. *Foucar* (6); *Great Torrington Commons Conservators* v. *Moore Stevens* (7); 33 Halsbury, 2nd Ed. 534.

(1) (1889) 60 T.L.R. 819.
(2) (1859) 7 H.L.C. 349, at 382.
(3) [1875-76] 1 A.C. 662.
(4) [1896] 2 Ch. 1.
(5) (1889) 14 A.C. 612.
(6) (1933) 61 Ind. App. 18; T.L.R. 241.
(7) [1904] 1 Ch. 347.

The foregoing and the authorities generally indicate that the riparian owner's rights are subject to the changes effected by nature. So long and to the extent that nature continues the riparian owner as such, he enjoys riparian rights, but nature or the act of any person in the exercise of his rights may from time to time alter or even destroy those of a riparian owner.

The relative positions of the appellant and the respondent have been determined by nature. The appellant here has been fortunate, the respondent unfortunate. Sometimes nature favours one and sometimes another, but such are changes incidental to the soil abutting upon a body of water. The law recognizes such changes as inevitable and adjusts the rights of the parties as and when and to the extent that nature alters their positions. It is the natural process of accretion that has altered the areas in holdings of the appellant county and the respondent, and on that basis the learned trial judge has found their boundary to be that line along which the accretion to the island and the mainland met.

Under this view there appears to be no conflict such as the respondent suggests.

The right to accretions is one of the riparian rights incident to all land bordering on the water. Lamont J., *Clarke* v. *City of Edmonton,* (1).

His position as a riparian owner is affected by the natural process of accretion or erosion as the case may be, and to his position as so determined the law attributes his rights as riparian owner. The common law has been developed to avoid just such conflicts as respondent suggests and does so by adjusting the rights of the parties according to changes effected by nature.

The respondent submitted a number of United States authorities in which discussions and statements will be found favourable to his contention. While these statements are entitled to the greatest respect, they were made in cases that are distinguishable upon their facts. *Mulry* v. *Norton* (2) and *St. Louis* v. *Rutz* (3), are not cases of accretion. Both of these decisions are reached upon

(1) [1930] S.C.R. 137, at 151.
(2) (1885) 100 N.Y. 424.
(3) (1890) 138 U.S. 226.

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principles well established in the common law. The discussions upon which the respondent relies were not necessary to the decisions and really dictum. The case of *Waring* v. *Stinchcomb* (1) does not involve an island and was decided largely upon a statement found in *Lamprey* v. *State* (2). In the latter case the basis of the law of accretion was stated as follows:

> * * * to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of *access to the water.*

Such a basis is quite different from that which, as already indicated, has been accepted in our law. It is also to be noted that *Fillmore* v. *Jennings* (3), and *Van Dusen Inv. Co.* v. *Western Fishing Co.* (4) were cases in which islands were involved and in which the island owner was entitled to the accretion to the island regardless of what part of the island it attached itself. It will therefore be observed that in the United States there is not uniformity of decision. Moreover, in some jurisdictions where a rule approaching that for which the respondent contends, it is found necessary to make exceptions thereto. Farnham, Waters & Water Rights, p. 2489. It would appear that in a country such as Canada, where we have large rivers and many islands large and small, the common law rule should be adhered to and if in a given locality the circumstances are such to make some other rule desirable the matter should be dealt with by legislation.

The respondent in the further alternative claims the land in question by virtue of his possession thereof. He and his brother bought the mainland parcel in 1912 and his brother sold out to him in 1916. He asserts his possession upon the fact that in each year from 1913 inclusive he cut the hay on the land in question in the month of August, except in the last three years when he rented it to another party. I am in agreement with the disposition made by the learned trial judge against this contention of the defendant. In my opinion his possession could not be described otherwise than "occasional, or for a special or temporary purpose", and therefore his occupation was not

(1) (1922) 32 A.L.R. 453.
(2) (1892) 52 Min. 181.
(3) (1889) 78 Cal. 634.
(4) (1912) 63 Or. 7.

"exclusive, continuous, open or visible and notorious" as required by the authorities. *Sherren* v. *Pearson* (1); *Wood* v. *LeBlanc* (2).

Before the Appeal Division the respondent amended his counter-claim by asking for damages and a mandatory injunction ordering the appellant municipality to remove a bridge or causeway constructed between the mainland and Thatch Island, and for a further injunction to restrain the appellant from building any other such bridge. The learned judges in the court of appeal, because of the conclusions at which they arrived, were not called upon to deal with this particular issue. It was not an issue at the trial and while there is some evidence with regard to it, one cannot but feel that there might well be additional evidence, particularly as it is built out from the mainland of another owner not a party to these proceedings. Furthermore, the act of the Municipal Council, as evidenced by its resolution of January 1936 giving to the respondent a right to cross the head of Thatch Island, may well be a factor in dealing with certain phases of such issues. In any event, I do not think there is sufficient evidence to justify a final disposition of the matter, and I therefore think that this decision should be without prejudice to the rights of the parties with respect to that bridge or causeway.

This appeal should be allowed, the cross-appeal dismissed and the judgment of the learned trial judge restored. I agree with the disposition of costs as directed by my brothers Kerwin and Rand.

Appeal allowed, cross-appeal dismissed, judgment of the trial judge restored, no costs.

Solicitors for the appellant: *Limerick & Limerick.*

Solicitors for the respondent: *Hanson, Dougherty & West.*

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(1) (1886) 14 Can. S.C.R. 581. (2) (1904) 34 Can. S.C.R. 627.