An Appeal Court Decision

Concerning The Boundary Between Land and Water

The following is a decision of the Ontario Court of Appeal which appeared in the Ontario Reports, June 23, 1972, and is published here in the interest of the profession. From time to time, members of the Association have run into problems concerning the boundary between land and water.

Re the Queen in right of Ontario and Walker et al.

AYLESWORTH, McGILLIVRAY and EVANS, JJ.A. 9th FEBRUARY 1972

Real property — Boundaries — Crown patent establishing edge of Lake Erie as boundary of lot — Whether boundary water's edge or high water mark.

Real property — Crown patent — Construction — Patent establishing edge of Lake Erie as boundary of lot — Whether boundary water's edge or high watermark.

In Ontario, the common law rule placing the boundary between land and water at the water's lowest mark has been in effect continuously except for a limited period of time when an amendment to the **Beds of Navigable Waters Act,** R.S.O. 1960, c.32 (now R.S.O. 1970, c.41), provided otherwise. Accordingly, a Crown patent which indicates one of the boundaries of the land granted is to be a boundary of water establishes that boundary at the water's edge and not upon any bank or high water mark, unless the grant reserves by description or otherwise a space between the lands granted and the water boundary or unless the boundaries of the lot can be so clearly delineated by reference to an original plan of survey as clearly to except or reserve to the Crown a space between the lands granted and the water's edge.

Real property — Adverse possession — Beaches — Whether vacant Crown lands exempt from Limitations Act by virtue of s. 16 thereof — Limitations Act, s. 16.

Although s. 16 of the **Limitations Act,** R.S.O. 1960, c. 214 (now R.S.O. 1970, c. 246), exempts vacant Crown land from the operation of ss. 1 to 15 thereof, it also provides that "... nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922". Accordingly, where possession of a beach to the low water mark extended back for a considerable period of years and well before June 13, 1922, s. 16 could not be applied to defeat a claim for prescriptive title against the Crown to the low water mark.

Appeal from a judgment of Stark, J., (1971) 1 O.R. 151, 14 D.L.R. (3d) 643, quieting titles pursuant to the **Quieting Titles Act,** R.S.O. 1960, c. 340.

The judgment of the Court was delivered orally by

Aylesworth, J. A.:—In this lengthy appeal, made lengthy by the great volume of material therein, the members of the Court during the three days occupied in the argument have had an opportunity of reading and re-reading the learned and exhaustive reasons for judgment of the trial Judge and the exhibits to which the trial Judge referred. We have also had an opportunity to examine the relevant statutes, that is to say, the **Limitations Act,** R.S.O. 1970, c. 246 (formerly R.S.O. 1960, c. 214), and the **Surveys Act,** R.S.O. 1970, c. 453 (formerly R.S.O. 1960, c. 390), and we have had the benefit of extensive argument not only with respect to the trial Judge's findings and the evidence but with respect to the legal effect of the material and of the statutes.

I may say at once that we are left in no doubt as to the correctness of the conclusion reached by the learned trial Judge concerning the extent of the lands granted by the two patents in question to the two McQueens. We agree with the learned trial Judge's conclusion and with his reasons for reaching that conclusion. Nor do we think that anything in the **Surveys Act** precluded the surveyors Jones and DeCew from conducting their surveys and placing their monuments for the purpose which the trial Judge found to be the function of such monuments; ss. 12 and 14 of the **Surveys Act** must be read and construed with ss. 27 and 34.

It was strongly urged before the trial Judge that altogether apart from the terms of the patents, the respondents had acquired title by possession as against the Crown. I quote from the conclusion with respect to the evidence as to possession reached by the trial Judge. He says (1971) 1 O.R. 151 at p. 188, 14 D.L.R. (3d) 643 at p. 680):

> It appears to me that the applicants have proven continuous and effective and undisturbed possession of the lands, save either for occasional trespassers or for occasional permissions granted for limited purposes.

The learned trial Judge then goes on, however, to hold that in so far as the contestant is concerned the applicants are not entitled to succeed on this ground. He quotes in particular s. 16 of the **Limitations Act** and I reproduce that section in full. It reads:

> 16. Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown . . . (and I am now paraphrasing) . . . but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

The evidence as to the possession referred to by the trial Judge establishes beyond question that that possession extended back for a considerable period of years and much back of June 13, 1922; in fact, well back before the turn of the century. It seems to us that the section relied on by the trial Judge, namely, s. 16, contains its own limitation therein and that the limitation is effective upon the facts in this case to prevent the section's application in defeat of the claim of the respondents for a prescriptive title against the Crown to the lands to the water's edge — that is, to low water mark. The concluding portion of the section had escaped the notice of counsel and consequently we derived no assistance from them in reaching our view as to its meaning. With respect to the learned trial Judge, we disagree, then, with his conclusion as to the effect of that section of the **Limitations Act** and we hold that the respondents are entitled to succeed against the Crown, both on the terms of the patents and on the claim for prescriptive title. We are not, however, to be taken as deciding that the disputed lands are or were waste or vacant land after the effective respective dates of the McQueen patents.

Before leaving the case, it is desirable, we think, to make specific mention of

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one aspect of the case as put for the Crown, upon which argument from Crown counsel was heard at length. That argument may be summarized in this way. It is said that the provisions of the **Beds of Navigable Waters Act,** R.S.O. 1970, c. 41 (formerly R.S.O. 1960, c. 32), preclude the respondents from succeeding inasmuch, it is submitted, as the bed of a body of water, such as Lake Erie, extends on land beyond low water mark to a line denoting a change in the soil from marine to land soil, a question of fact in each case, and that, therefore, the Crown patents to the McQueens must be construed accordingly. True, there is a proviso in that provision of that statute with respect to an express grant of the bed. Assuming, without at all agreeing, that the bed of Lake Erie extends from low water mark as contended, it is our view that the words respectively used in the two patents, as juditially determined and interpreted in this Province, constitute express grants in the patents of the lands to the water's edge and that, hence, the provisions of the **Beds of Navigable Waters Act** do not stand in the way of the respondents in any manner whatsoever in these proceedings.

In the Court below costs were granted to the respondents on the scale of solicitor and client and we have no quarrel with that disposition of costs or with the reasons stated by the learned trial Judge for the disposition thereof which he made. However, in this Court we think different considerations apply to costs of this appeal and, accordingly, we dismiss the appeal with costs to the respondents on a party-and-party basis — not on the basis of solicitor and client. All counsel engaged in this lengthy appeal obviously have put long and anxious hours upon it and this has shown itself in the submission of the arguments relied upon by the respective parties.

Appeal dismissed.