EDWIN I. CLARKE (PLAINTIFF)..... APPELLANT;

AND

CITY OF EDMONTON (DEFENDANT).. RESPONDENT;

AND

ATTORNEY-GENERAL OF CANADA (INTERVENANT)..... RESPONDENT.

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*April 26, 29.
*Nov. 4.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Accretion—Bench formed by action of water at river bank claimed by riparian owner—Whether bench still part of river bed—Whether true accretion—Formation in a "gradual and imperceptible manner"—Ownership of river bed—Alberta law as to accretion—Boundary of land at the river—Construction of title and plan—Part of original river bank still visible above bench; effect thereof as to rule of accretion applying.

Plaintiff, as riparian owner, claimed as an accretion to his land (in Edmonton, Alberta) a bench which, through action of the water of the North Saskatchewan river in depositing sand, silt, etc., had accumulated against and permanently united with the bank at the river, and he sued defendant city for damages for trespass thereon.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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Held (1) On the evidence as to the nature of the soil and vegetation on the bench, it no longer formed part of the river bed. Criteria for determining what is and what is not the bed of a river discussed.

(2) The bench (on the evidence as to manner of its formation) was a true accretion. (What constitutes an accretion discussed). The fact that the bench was formed in 15 years or less was not inconsistent with the view that it was formed in a "gradual and imperceptible" manner. Also, there may be a true accretion notwithstanding that after a flood it can be ascertained by measurement or even observed by visual examination that a few inches, or even a few feet, have been added laterally to the border line. The test is, not the number of years it took the bench to form, nor yet whether an addition to the shore line may be apparent after each flood, but whether, taking into consideration all the incidents contributing to the addition, it properly comes within what was known to the Roman law as "alluvion," which implies a gradual increment imperceptibly deposited, as distinguished from "avulsion" which implies a sudden and visible removal of a quantity of soil from one man's land to that of another, which may be followed and identified, or the sudden alteration of the river's channel. The rule that accretions must be "gradual, slow and imperceptible" only defines a test relative to the physical conditions of the place to which it is applied.

(3) Assuming (but not deciding) that the common law presumption that a riparian owner owned the bed of a non-tidal but navigable river *usque ad medium filum aquae* was not incorporated into the law of the Territories (because not "applicable"—i.e., suitable to the conditions existing—within R.S.C., 1886, c. 50, s. 11), and that the Crown owned the bed of the river in question, yet the English law as to accretions did become the law of the Territories (its "applicability" discussed; the right to accretions from a navigable river does not depend upon the ownership of the bed thereof) and is the law of Alberta; and by that law (which was binding on the Crown) all accretions became the property of the riparian owner to whose land they attached.

(4) Plaintiff's title gave him "all that portion of" lot 21 "lying north of" a certain road, and, upon construction of the plan with reference to which Crown patent of lot 21 had been issued, the northern boundary thereof was the river, i.e., the edge of the river bed. Assuming, on the evidence and admissions, that at one time the most northerly part of lot 21 comprised a steep bank to the foot of which the water came (but the line to which the water then came, wherever it was, and which then constituted the northern boundary of lot 21, had since been obliterated by deposit of sand and silt), the fact that the upper part of that old bank was still plainly visible above the bench did not prevent the rule as to accretions applying (*Hindson* v. *Ashby*, [1896] 2 Chy. 1, at p. 27, distinguished on the facts).

(5) The bench, therefore, belonged to plaintiff, and he was entitled to damages for trespass thereon.

Judgment of the Appellate Division, Alta. (23 Alta. L.R. 233) reversed.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1)

(1) 23 Alta. L.R. 233; [1928] 1 W.W.R. 553.

which, affirming in the result the judgment of Tweedie J., held that the plaintiff was not entitled to a certain bench of land, claimed by him to have become part of his land by accretion, and in respect of which bench he had sued the defendant city for damages for trespass in depositing garbage thereon.

By direction of the Appellate Division, the Attorney-General of Canada was notified, and counsel for him appeared before it and presented argument.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed with costs.

G. H. Steer for the appellant.

H. H. Parlee, K.C., for the respondent, the City of Edmonton.

E. Lafleur, K.C., for the Attorney-General of Canada.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (Beck, J.A. dissenting) (1) dismissing an appeal by the plaintiff from a judgment of Tweedie, J., in an action for damages for trespass to the plaintiff's land. The material facts are as follows:—

About the year 1920 the plaintiff purchased a piece of land on the south side of the North Saskatchewan river in the city of Edmonton and, on July 24, 1924, he became the registered owner thereof. This land is described in the plaintiff's certificate of title as

> All that portion of River Lot Twenty-one (21) of the Edmonton Settlement, in the said Province, lying North of the North boundary of the Dowler Hill Road, as the said Road is shewn on Plan 7258X, of record in the Land Titles Office for this Land Registration District.

Plan 7258X is a plan of subdivision of the northern part of Lot 21, and it shews Dowler Hill Road as running along the Saskatchewan river close to the river on the east side of the lot but not so close on the west. The plaintiff's land is, therefore, in the shape of a narrow triangle. It is a portion of what is known as Gallagher's Flats, which, as the evidence shews, are situated on what was formerly a part

(1) 23 Alta. L.R. 233; [1928] 1 W.W.R. 553.

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of the bed of the river, but which, years ago, was reclaimed therefrom. On the river side of the plaintiff's land at its western boundary there was, in 1910 when the land at that point was examined by Mr. Haddow, the defendant's engineer, a steep bank or slope 24·7 feet high, the drop being made in a horizontal distance of twenty feet. It does not appear that Mr. Haddow measured any other part of the northern boundary of Lot 21, but it is not disputed that there was a bank along that boundary. At the time of Mr. Haddow's examination, the water's edge was 131 feet from the toe of the bank on an almost imperceptible slope which had a drop of only two and a half feet in that distance. Through the action of the water since 1910 there has accumulated against the bank and permanently united with it a ridge or bench comprised of soil, sand, silt and other substances. This bench is some 1,400 feet long and attains at one point a width of 80 feet. Near the western boundary of Lot 21 the top of this bench is 13 feet above the level of the water, but the bench gradually decreases in height until, near the eastern boundary, it is only some seven feet above the water level. On a portion of the bench toward its eastern end and covering an area 275 feet long by from 35 to 56 feet wide, the City of Edmonton had, since 1920, been depositing ashes and other garbage. In order to reach the bench the city's teams had to cross a portion of the land described in the plaintiff's certificate of title. In June, 1925, the plaintiff discovered for the first time as he says, that the city was depositing its garbage on the bench. He immediately interviewed the city authorities and claimed the bench as his own property on the ground that as riparian owner it constituted an accretion to his land. In September, 1925, he brought this action against the city, claiming damages for trespass to his property. The trial judge awarded the plaintiff $50 damages for trespass to the land included in his certificate of title which the city's teams had crossed, but dismissed that part of his action in which he claimed damages for trespass to the accretion or bench, holding, in effect, that the plaintiff did not own nor had he possession of the bench. From that dismissal the plaintiff appealed to the Appellate Division. That court, after hearing argument on behalf of both parties, considered that the Crown, as owner of the bed of the river, should be given

an opportunity of being heard, and, consequently, directed notice to be served upon the Attorney-General of Canada. The Attorney-General intervened and was heard by his counsel. After argument the members of the court viewed the bench, examined its soil and vegetation, and unanimously came to the conclusion that the bench no longer constituted part of the river bed. The majority of the court, however, held that as the bench had been formed within the last twelve or fifteen years there could not have been, in this case, that gradual and imperceptible addition to the plaintiff's land in the ordinary course of the operations of nature which a true accretion requires. The majority of the court also seem to have been of the opinion that there could be no accretion in its true legal sense without the obliteration of the original boundary line and that in this case the original boundary line was still in existence and plainly visible. The plaintiff's appeal was, therefore, dismissed. From that dismissal the plaintiff now appeals to this court.

Two questions arise in this appeal: (1) Had the bench at the time the city dumped its garbage thereon become a true accretion, and (2) If so, had the plaintiff acquired the ownership thereof so as to enable him to maintain an action for trespass against the city?

(1) The matters to be considered in determining whether a given piece of land forms part of the bed of a river or has been wrested therefrom were stated by Romer, J. in *Hindson* v. *Ashby* (1) as follows:—

> I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growth and its user.

His Lordship also quoted the following passages from the judgment of Curtis, J., of the Supreme Court of the United States, in the case of *Howard* v. *Ingersoll* (2), which he said were in accordance with English law on the point. Curtis, J., said:—

> The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually

(1) [1896] 1 Chy. 78. at p. 84.

(2) (1851) 13 Howard, 381, at pp. 427-428.

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covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. * * *

But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.

The case of *Hindson* v. *Ashby* (1) was, on appeal, reversed on the facts (2), but the criteria laid down by Romer, J., for determining what is and what is not the bed of a river were approved by the Court of Appeal.

The bench in question was formed by the action of the waters of the river in depositing sand, silt and other substances, against the bank or slope on the north side of the plaintiff's land. This deposit kept increasing in height until it required an excessive flood to cover it with water. The bench is 13 feet high at the west or upstream end; 11 feet high where the garbage is dumped and some seven feet high at its eastern end, and it covers the lower part of the bank or slope to the extent of these varying heights. On its north or river side it is a cut bank dropping straight down to the water. The top of the steep slope which, prior to the formation of the bench, was popularly referred to as the "south bank of the river" is higher than the bench and stands out above it varying in height from 11 feet at the west end to from six to eight feet at the east. It is thus clearly visible above the bench for its whole length.

At the trial considerable evidence was given as to the nature of the soil of the bench; the character and extent of the vegetation thereon and the fluctuations to which the river was, and is, subject. This evidence, in my opinion, established that the soil of the bench was precisely of the

(1) [1896] 1 Chy. 78. (2) [1896] 2 Chy. 1.

same nature as the soil of Gallagher's Flats, which, admittedly, is upland, and that the vegetation of the bench was similar in character to that of the uplands to the south but much younger. Some vegetation on the bench shewed a growth of six or seven years, while on Gallagher's Flats the trees would require for their growth some 20 or 30 years. None of the vegetation on the bench was water vegetation. Mr. Haddow admitted that the soil and vegetation of the bench were of the same character as the land to the south, and further admitted that the westerly 30 or 40 feet of the bench had been wrested from the river and no longer constituted part of the river bed. But he contended that the part of the bench on which the city's garbage had been dumped was still under the influence of the river. On cross examination he gave the following testimony:—

Q. Your contention is that because this land is flooded two or three days during the summer, which is the longest period since 1915, that it is not wrested from the river?

A. That is my contention exactly, that certainly is my sole contention.

The evidence of Mr. Pinder shews that in 1915 there was an excessive flood which covered not only the bench but Gallagher's Flats as well. In 1916 and 1917 the bench was flooded for a day each year. In 1918 and 1919 it was not flooded. In 1920 the water may have rested on the top of the bench for a day or two in May, but this is not certain. In 1921 and 1922 the bench was not flooded. In 1923 it was flooded for two days. In 1924 it was not flooded. In 1925 the flood was exceptional and for two days the waters covered the bench. The bench, therefore, is liable to be covered with water for a day or two in any year in which there is an exceptional flood. Taking the evidence as a whole, it, in my opinion, strongly supports the view that the bench no longer formed part of the river bed as the Appellate Division unanimously found.

The bench being no longer a part of the river bed the next consideration is, was it formed by that slow and gradual operation of the waters of the river in the course of nature which is necessary to the formation of a true accretion?

What constitutes an accretion has received judicial consideration in many cases, among others, *Attorney-General*

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of Southern Nigeria v. *John Holt & Co. (Liverpool) Ltd.* (1); *Attorney-General* v. *McCarthy* (2); *Rex* v. *Yarborough* (3); *Foster* v. *Wright* (4); *Brighton and Hove General Gas Company* v. *Hove Bungalows, Limited* (5); *Trafford* v. *Thrower* (6). The result of the discussions may, I think, be stated as follows:

The term "accretion" denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be, in a practical sense, imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been a fresh addition to the shore line. The increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man and deposited on, or annexed to, the land of another.

The fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production. *Stanley* v. *Perry* (7); *Brighton and Hove General Gas Co.* v. *Hove Bungalows, Limited* (8).

There was evidence that in 1925 a deposit of silt had been made on the bench amounting in places to a depth of six inches, as a result of that year's flood, and the test pit dug by Mr. Haddow gave indication of an equal or greater deposit in a former year. Whether or not this latter deposit was due to flood conditions or to imperceptible accumulation in the course of nature, or to a combination of both, we can only conjecture. It was, however, argued

(1) [1915] A.C. 599.
(2) [1911] 2 Ir. R. 260.
(3) (1824) 3 B. & C. 91.
(4) (1878) 4 C.P.D. 438.
(5) [1924] 1 Chy. 372.
(6) (1929) 45 T.L.R. 502.
(7) (1879) 3 Can. S.C.R. 356.
(8) [1924] 1 Chy. 372.

that such extensive deposits could not reasonably be said to have been gradual and imperceptible in their formation. What amount of alluvial matter might, by imperceptible deposit, be added to the plaintiff's land in any one year has not been disclosed by the evidence. Much, it seems to me, would depend upon the river itself, its volume, the rate of the current and how densely it was saturated with alluvial matter. But, although these conditions might influence the deposit of alluvial matter, the important question is: Was the formation of the deposit perceptible in its actual progress from moment to moment?

In his evidence Mr. Haddow said that the bench had been formed by sediment which had been deposited as a result of the slackening of the current, and that its slackening had been caused by the current being thrown out in the river towards the north, causing the water towards the south side to slacken. He explained what, in his opinion, had taken place, as follows:—

> In 1915 exceptionally heavy flood conditions occurred and there was about eighty or one hundred feet of the northerly end of River Lot 17 scoured away and washed completely down stream. This perhaps had the effect of opening out the channel so that the main flow would follow more nearly the centre or north side of the river, leaving the south side of the river adjoining River Lot 21 in comparatively quiet water, affording facilities for the deposit.

Mr. Pinder, a surveyor, who gave evidence for the plaintiff, on cross examination testified as follows:

> Q. Would you be safe in saying that there has been a new bank forming gradually from time to time?
>
> A. There has been a gradual alluvial deposit from year to year.
>
> Q. How long have you been out here?
>
> A. I came out in 1907.

and Mr. Pearson, likewise a surveyor, said:

> Q. In what way, in your opinion, has that bench been built up?
>
> A. By silt from the river deposited in the course of high water.
>
> Q. Has it been built up in such a way, in your opinion, as to be perceptible from moment to moment?
>
> A. Not in my opinion.

He could not say, however, how gradually the accumulation had taken place.

Another surveyor, Mr. Belyea, who gave evidence for the city, stated that "it had gradually grown up." The test pit disclosed that the deposit contained layers of alluvial matters of various thicknesses, one, at least, of which was 12 inches. But the time it took these layers to accumulate, whether months or years, we do not know. The

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proper inference to be drawn from all the evidence, in my opinion, is that for some 10 or 11 months in each year from the time the accumulation began until the bench had attained a considerable height, the sand and silt of the river was gradually and imperceptibly deposited against the steep bank or slope on the northern part of the plaintiff's land. Then for a few days or perhaps weeks flood conditions prevailed, during which an increased quantity of alluvial matter was brought down by the river. Much of this additional matter would, in all probability, be carried down by the current, but some of it, no doubt, would find a resting place upon the bench with the result that the deposit there at such time would be greater than if flood conditions had not existed. But even so, that does not prove that the deposit was perceptible in its actual progress, and the only evidence we have, in my opinion, points the other way. Neither can it affect the ownership of the deposit made gradually to the plaintiff's land during ten or eleven months in each year when there was an absence of flood conditions, for, as said by Gibson J. in *Attorney-General* v. *McCarthy* (1):

> each insensible addition attaches to the principal land, and though in result, the aggregate of additions may shew a substantial enlargement of the original territory, that cannot displace retrospectively the ownership of the previous minute accruing accretions.

In other words, where the increase is imperceptible in its progress, that increase becomes the property of the owner to whose land it attaches as it is formed; it is vested in him *de die in diem* and no additional increase resulting from flood conditions can deprive the owner of the increase which had already vested in him. Flood conditions in the North Saskatchewan river must be expected every year when the summer sun or the rains melt the snows in the mountains through which the river has its course.

That the bench as it exists to-day was formed between the year 1910 and the date of the trial in 1925, in my opinion admits of no doubt. Mr. Haddow says it did not exist in 1910. The evidence of the plaintiff is that in 1920 it was in existence and was then very much as it is to-day. The test pit dug by Mr. Haddow shewed ashes—presumably from the dump made by the city—at a depth of three

(1) [1911] 2 Ir. R. 260, at pp. 298-299.

feet from the top. The bench therefore, at any rate except its upper three feet, was formed between 1910 and 1920. Where the city dumped its garbage the bench is 11 feet high. Does the fact that the lower eight feet of the bench was formed in ten years justify the conclusion that the accumulation must have been perceptible in its progress from moment to moment or from hour to hour during that time? With great deference I do not think it does. The river in its long course west of Edmonton is fed by a great many streams, these, in turn, except during the winter, are fed by innumerable rivulets of melted snow which flow down the sides of the mountains, each carrying with it some of the soil of the mountain down which it runs. This soil is borne to the river and is carried along by the current until it comes to a place where the current slackens, when it sinks to the bottom. The only evidence before us of a considerable quantity of soil being washed up by the sudden action of the waters of the river is that related by Mr. Haddow when he says, that in 1915 an unusual flood "scoured away and washed completely down stream" 80 or 100 feet of the point on Lot 17. Mr. Haddow's evidence. however, is to the effect that the soil from this point was not deposited against the plaintiff's land, for he says that the bench was formed by sediment which had been deposited as a result of the slackening of the current. This itself was due to the fact that after the point had been washed away the current ran farther to the north leaving the water on the plaintiff's side quieter than before, and that this quiet water facilitated the deposit. The fact that the bench was formed in fifteen years, or less, is not, in my opinion, inconsistent with the evidence of the witnesses who gave it as their opinion that the formation of the bench had been gradual and had not been perceptible from moment to moment. The test, in my opinion, is not the number of years it took the bench to form, nor yet whether an addition to the shore line may be apparent after each flood, but whether, taking into consideration all the incidents contributing to the addition, it properly comes within what was known to the Roman law as "alluvion", which implies a gradual increment imperceptibly deposited, as distinguished from "avulsion", which implies a sudden and visible removal of a quantity of soil from one man's land to that of another,

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which may be followed and identified, or the sudden alteration of the river's channel.

Considering that in this case there is no evidence that the formation of the bench has been assisted by anything in the nature of an "avulsion", and considering that there is evidence pointing to its formation in a gradual and imperceptible manner; and, furthermore, that the additional alluvial matter deposited during flood time was only what was to be expected in the couse of nature, I agree with the late Mr. Justice Beck, who, in his able dissenting judgment said (1):—

> It is far from enough to prevent a true accretion to be able to say that, for instance, after a flood it can be ascertained by measurement or even observed by visual examination that a few inches or even a few feet have been added laterally to the border line.

This view is in accord with what was laid down by the Privy Council in *Secretary of State for India* v. *Raja of Vizianagaram* (2), where their Lordships said:—

> The extent of the river and the operation of its currents in forming alluvial tracts during the flood season must be borne in mind with reference to questions arising in this case.
>
> * * * * *
>
> In dealing with the great rivers in India and comparing them with the rivers in this country, it is necessary to bear in mind the comparative rapidity with which formations and additions take place in the former.
>
> * * * * *
>
> Their Lordships do not find it necessary * * * to discuss the exact meaning of the word "imperceptible" in the English rule which provides that all accretions must be "gradual, slow and imperceptible," for assuming the applicability of the English rule, "slow" and "imperceptible" are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is, in their Lordships' opinion, correctly laid down in the judgment of Ayling J. in the present case when he says: "It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the accretion is due to the normal action of physical forces; and the conditions of Indian and English rivers differ so much that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (3)."

In this latter case their Lordships point out that in proposing to apply the juristic rules of a distant time or

(1) 23 Alta. L.R., at p. 254.

(2) (1921) 49 Indian Appeals, 67, at pp. 71-73.

(3) L.R. 41 I.A. 221, at pp. 243 *et seq.*

country to the conditions of a particular place at the present day, regard must be had to the physical conditions to which the rule is to be adapted.

The bench being a true accretion the next question is, to whom did it belong?

The Saskatchewan river is admittedly non-tidal and navigable in fact. The Province of Alberta, through which it flows, was formerly a part of Rupert's Land, and the North Western Territory, which became a part of the Dominion of Canada on July 15, 1870. From that date they were under the jurisdiction of the Parliament of Canada.

By s. 3 of c. 25 of the Statutes of 1886 (s. 11 of the *North West Territories Act,* R.S.C. 1886, c. 50) the Parliament of Canada enacted as follows:—

11. Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories. * * *

That Act was assented to by the Crown, so all the rights which the law of England applicable to the Territories gave to a subject as against the Crown in respect of the ownership of the bed of a river, and the accretions to its banks, were binding on the Crown in the North West Territories. The laws of England thus introduced included both the common law and the statutory enactments as far as either were applicable. By "applicable" here is meant suitable to the conditions existing in the Territories. It is, therefore, essential to ascertain what was the law of England on July 15, 1870, in respect of accretions to the land of a riparian owner bordering on a river non-tidal but navigable in fact.

The law of England, as stated by Coulson & Forbes, in Law of Waters, 4th ed., at pp. 77 and 91, is as follows:—

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries and arms of the sea is by law vested *primâ facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the right of navigation which belongs by law to the subjects of the realm, or the right of fishery, which is *primâ facie* common to all.

* * * * *

All rivers and streams above the flow and reflow of the tide are *primâ facie* private, though many have become by immemorial user or by Act of Parliament subject to the public rights of navigation.

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There are two presumptions with regard to the ownership of the bed of non-tidal waters—one, that the riparian owners own half the bed of the river *usque ad medium filum aquae;* the other, that the owner of the right of fishing in the river is owner of the soil, and this displaces the presumption that would otherwise arise in favour of the riparian owners being the owners of the bed of the river *usque ad medium filum aquae.*

The presumption that the riparian proprietor owned to the centre of the bed of all non-tidal waters applied to navigable as well as non-navigable rivers. Notwithstanding, however, that the bed of tidal waters was vested in the Crown and the bed of non-tidal waters was vested in the riparian proprietors, the law of England was that all accretions formed gradually and imperceptibly in the ordinary course of the natural operation of the water became the property of the owner of the land to which the accretion became attached, but if an accretion was the result of a sudden and considerable accumulation of soil, it could not be claimed by the riparian owner against whose land it accumulated. Blackstone, Vol. 2, at p. 262; *Rex* v. *Yarborough* (1).

In *In re Hull and Selby Railway* (2), the law as to accretions was held to apply alike to King and subject.

It was, however, argued that the common law presumption that a riparian proprietor owned the bed of a non-tidal but navigable river *usque ad medium filum aquae* did not become the law of the North West Territories because unsuitable to the conditions there existing, and reference was made to a number of cases including *Keewatin Power Co.* v. *Kenora* (3), in which the arguments and authorities on the point were exhaustively examined by my Lord the Chief Justice (then Anglin J.). In my opinion, it is not necessary in this case to pass upon that question, for, assuming against the plaintiff that the presumption was not incorporated into the law of the Territories and admitting that the Crown is the owner of the bed of the Saskatchewan River, the city has still to meet the law as to the ownership of accretions, which, as I have said, was, in England, binding on the Crown. If the law of England as to accretions was applicable to the Territories, then all accretions there became the property of the riparian owner to whose land they attached. The applicability of the law

(1) (1824) 3 B. & C. 91. (2) (1839) 5 M. & W. 327.
(3) (1906) 13 Ont. L.R. 237.

was challenged on the ground that the law depended for its vitality on the fact that the riparian proprietor was the owner of the bed of the river. In my opinion this is not so. The right to accretions is one of the riparian rights incident to all land bordering on the water. The rule is dependent, as set out in *In re Hull & Selby Railway* (1), on two principles: viz., (1) that that which cannot be perceived in its progress is taken to be as if it had never existed, and (2) the necessity for some such rule of law for the permanent protection and adjustment of property. That the right to accretions from a navigable river does not depend upon the ownership of the bed thereof is made clear in *Lyon* v. *Fishmongers' Company* (2), where, at p. 683, Lord Selborne said:—

> With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not the bed, of the stream; * * *

It was also urged that if the court held that the *ad medium filum* presumption of the common law was not applicable to fresh water conditions in the Territories, then, inasmuch as that presumption and the rule as to accretions had both been adopted from the civil law the court should hold the rule as to accretions also inapplicable. This contention is untenable. In enacting s. 11 Parliament was adopting the law of England as it actually existed irrespective of the sources from which it had been derived, and the only limitation placed on the adoption of that law was as to its applicability. In my opinion the English law as to accretions was applicable and became the law of the Territories.

In this connection it is interesting to note that in India, where a number of the rivers more nearly approximate in size and character to the North Saskatchewan than do those of England, the law applicable to accretions was laid down by the Privy Council in *Sri Balsu Ramalaksmamma* v. *Collector of Godaveri District* (3), as follows:—

> There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land *which attracts it;* but the rule, though unwritten, is equally well established.

(1) (1839) 5 M. & W. 327. (2) (1876) 1 App. Cas. 662.
(3) (1899) L.R. 26 I.A. 107, at p. 111.

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There remains to consider only the argument that because some six or eight feet at the top of the old bank still stands out clear and visible above the bench, the rule as to accretions has no application. In support of the argument we were referred to the dictum of A. L. Smith L.J., in *Hindson* v. *Ashby* (1), where, at p. 27, His Lordship said:—

> I very much doubt if the plaintiffs can invoke the doctrine of accretion as applying to a case where, as here, the old line of demarcation between the plaintiffs' land and the river has always been in existence and still remains patent for all to see. I allude to the old 6 ft. bank.

The argument as applied in the present case is, in my opinion, based upon a misconception as to what constituted the northern boundary of the plaintiff's land. His title gives him " all that portion of River lot 21 * * * lying north of the north boundary of the Dowler Hill Road."

The patent of Lot 21 was issued by the Crown to George Donnell on June 26, 1887, and conveyed

> Lot numbered twenty-one, in Edmonton Settlement aforesaid, as shown upon a map or plan of the said Settlement, signed by Andrew Russell, for the Surveyor General of Dominion Lands, dated 25th May, 1883, and of record in the Department of the Interior, containing by admeasurement, One Hundred and Sixty-three Acres, more or less.

This map or plan which is the only evidence we have as to the boundary of Lot 21, shews that lot to have been twenty chains in width and to have been bounded on the south by a surveyed road. The west boundary is also a surveyed road running in a northerly direction at right angles to the south boundary a distance of 82·76 chains. The east boundary is parallel to the west boundary and is 79·02 chains in length. Both the east and west boundary lines run to the line which marks the river and no other delimitation of the northern boundary of the lot is given. This boundary line must, therefore, be determined by the rules of law and the construction to be placed upon the plan. A plan of land abutting on a river which shews the east and west boundary lines of a lot as running northerly to the river line and having no defined northern boundary, is, in my opinion, to be construed as having the river (i.e., the edge of the river bed) for the northern boundary of such lot. If, on the survey of Lot 21, the east and west boundary lines had stopped short of the river bed, there would have been a piece of land between the northern limit of Lot 21

(1) [1896] 2 Chy. 1.

and the bed of the river, in which case it would have been necessary for the surveyor to define the northern boundary of Lot 21. Not having done so, the presumption, in my opinion, is that the river was intended to be the northern boundary. This was the opinion of Mr. Haddow, who, on being shewn Plan 7258X, gave it as his opinion that the Saskatchewan river was the northern boundary of Lot 21. This view is also in harmony with the instructions given by the Department of the Interior to surveyors for their guidance in surveying Dominion lands, as shewn by extracts from the Manual of Instructions put in evidence at the trial, and which, in part, read as follows:—

193. Land abutting on tidal waters is bounded by the line of *ordinary high water*. In the case of an inland lake or stream, the boundary, if the parcel does not include the bed, is the *edge of the bed* of the lake or stream which edge is called the *bank*.

It was not shewn that these or similar instructions were in force at the time Lot 21 was surveyed or the original plan prepared, but as their admissibility and applicability were not questioned at the trial and as they support the construction which the plan otherwise would bear, it seems not unreasonable that they should now be received as indicating the meaning which the surveyor who made the plan intended to convey. I am of opinion, therefore, that the northern boundary of Lot 21 as shewn on the Russell plan was the edge of the river bed. Where that edge was in 1883 we do not know. We have no evidence whatever as to its location before 1910 at which time the water was 131 feet from the toe of the bank on a slope which dropped only $2\frac{1}{2}$ feet in that distance. From 1910 to 1920 there is an absence of evidence as to where the edge was to be found. On the argument before the Appellate Division counsel for the plaintiff, as appears from the judgment of the learned Chief Justice, admitted

that the evidence established that at the time of the survey in 1883 and of the grant by the Crown in 1887, the northern boundary of the lot was a high steep bank to the foot of which the river came, and that such bank still exists as before, plainly visible.

The material part of this admission is that "the northern boundary of the lot was a high steep bank", that is that the bank and not the river constituted the boundary line. As, however, the learned Chief Justice in his judgment expresses the opinion that the admission was not intended in that sense, and as all parties knew that the evidence did

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not shew such to be the fact, I think we must conclude that all that the admission was intended and was understood to mean was that counsel for the plaintiff was willing to rest his case on the assumption that in 1883 the most northerly part of Lot 21 comprised a steep bank; that the water of the river came up to the foot of that bank, and that the upper part of that bank was still plainly visible. If it meant more than that it is contrary to the evidence. By that evidence it was clearly established that the only part of the bank still visible is the upper six or eight feet. Taking against the plaintiff the assumption here made, where was the edge of the river bed in 1883? Clearly it was not the top of the old bank nor yet its upper six or eight feet. It was the line at the foot to which the water came. That line, wherever it was, constituted the northern boundary of Lot 21. That line, however, was buried out of sight by eleven feet of sand and silt when the city dumped its garbage on the bench. This fact clearly distinguishes the case before us from *Hindson* v. *Ashby* (1), where it was established in evidence that the almost perpendicular six-foot bank there in question, to the foot of which the water came in 1803, still stood, and to the foot of which for a considerable part of the year the waters still came. The authorities on the question as to the application of the doctrine of accretion being conditional upon the non-existence of marks sufficient to distinguish the former water line, were reviewed by Pallas, C. B., in *Attorney-General* v. *McCarthy* (2), and he arrived at the conclusion that so long as the decision of the House of Lords in *Gifford* v. *Yarborough* (3) remains unchallenged, no lesser court is entitled to impose any such condition on its application. With this conclusion Romer J. in the *Hove Bungalows* case (4) agreed. As I have already pointed out, we are here not concerned with that question, because, not only has the edge of the river bed been obliterated, but also the most northerly part of Lot 21 to the extent of 11 feet up the slope. This slope or bank cannot be described as perpendicular, nor can its upper part be said to have been the edge of the river bed.

(1) [1896] 2 Chy. 1.
(2) [1911] 2 Ir. R. 260.
(3) (1828) 5 Bing., 163.
(4) [1924] 1 Chy. 372.

I am, therefore, of opinion that the bench in question was a true accretion; that it attached to the plaintiff's land by gradual and imperceptible degrees and obliterated the former line of demarcation between his land and the water. The bench, therefore, belongs to him and he is entitled to maintain this action against the city for trespass thereon.

As to damages: These are difficult to fix. The plaintiff claims the sum it would take to have the garbage removed from the bench although some of it is now buried three feet in the sand. The necessity for its removal is claimed by the plaintiff upon the ground that unless removed it will interfere with his obtaining gravel from the bed of the river opposite the place on which it is dumped. During the five years that the city was dumping garbage on the bench the plaintiff did not have any permit to remove gravel from the river and, without a permit, he could not lawfully remove it, and it was only a few weeks before the trial that he obtained a permit. It was further established that while there may be gravel at a certain place in the river during one year, the river may, the next year, wash it away. Under all the circumstances, I think $500 would amply repay the plaintiff for the damages he suffered through the trespass by the city to the bench.

The appeal should be allowed with costs here and below, the judgment set aside and judgment entered for the plaintiff for $500 and costs.

Appeal allowed with costs.

Solicitors for the appellant: *McDonald, Weaver & Steer.*

Solicitor for the respondent, the City of Edmonton: *John C. F. Bown.*

Solicitor for the respondent, the Attorney-General of Canada: *H. H. Parlee.*