Supreme Court of Canada
Standly v. Perry, (1879) 3 S.C.R. 356

Date: 1879-05-09

Robert William Standly et al. *(Plaintiffs) Appellants;*

and

Ebenezer Perry et al. *(Defendants) Respondents.*

1879: January 23; 1879: May 9.

Present: Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, J.J.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Accretion—Public Right of Way—Implied Extinction by Statute—Cobourg Harbour Works—22 Vic., c. 72.

By 10 *Geo.* iv., c. 11, the *Cobourg* Harbour Company were authorized to construct a harbour at *Cobourg,* and also to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever, as should be useful and proper for the protection of the harbour, and to alter and amend, repair and enlarge the same as might be found expedient.

The Harbour Company commenced their work in 1820 by running a wharf, southerly from the road allowance between lots 16 and 17 of the township of *Hamilton,* which now forms Division Street in the town of *Cobourg.* By means of the mud and earth raised by dredging and gradual accretions, which were prevented from

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being washed away by being confined by crib work, the original wharf was widened to the full width of Division Street, and in addition they constructed a store house and placed a fence dividing it from the land which appellant (whose lot fronted on Division Street and extended to the waters' edge,) had gained by accretion since the addition to the original wharf was made.

Thereupon the appellant filed a bill complaining that his access to this alluvial land was obstructed by the store house and fence which the respondents caused to be placed on the addition to the wharf and praying that the respondents, other than the Attorney General, be decreed to remove them.

Held,—1. That land gained lay alluvial deposits arising from natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land.

2. That the storehouse and fence complained of in this case were not constructed on any part of Division Street, but on an artificial structure constructed under the authority of a statute on

the line of Division Street for harbour purposes, and, therefore, appellant was not entitled to be indemnified because he is denied access to his alluvial land through the premises of the respondents.

3. That the public right of way from the end of Division Street to the waters of Lake *Ontario,* was extinguished by statute by necessary implication.

Corporation of Yarmouth v. Simmons[1] followed.

APPEAL from a judgment of the Court of Appeal for *Ontario,* reversing a decree of the Court of Chancery of *Ontario,* and ordering that the Bill of Complaint filed by the Appellants, other than Her Majesty's Attorney General for the Province of *Ontario,* be dismissed with costs.

The Bill in this cause was filed on the 10th of day March, 1876, by the appellant *Standly,* against the respondents *Perry, Graveley, Dumble, McCallum, Boulton and Sutherland,* (who were Commissioners of the *Cobourg* Harbour Trust) and Her Majesty's Attorney General, complaining of the erection by the defendants, other than the

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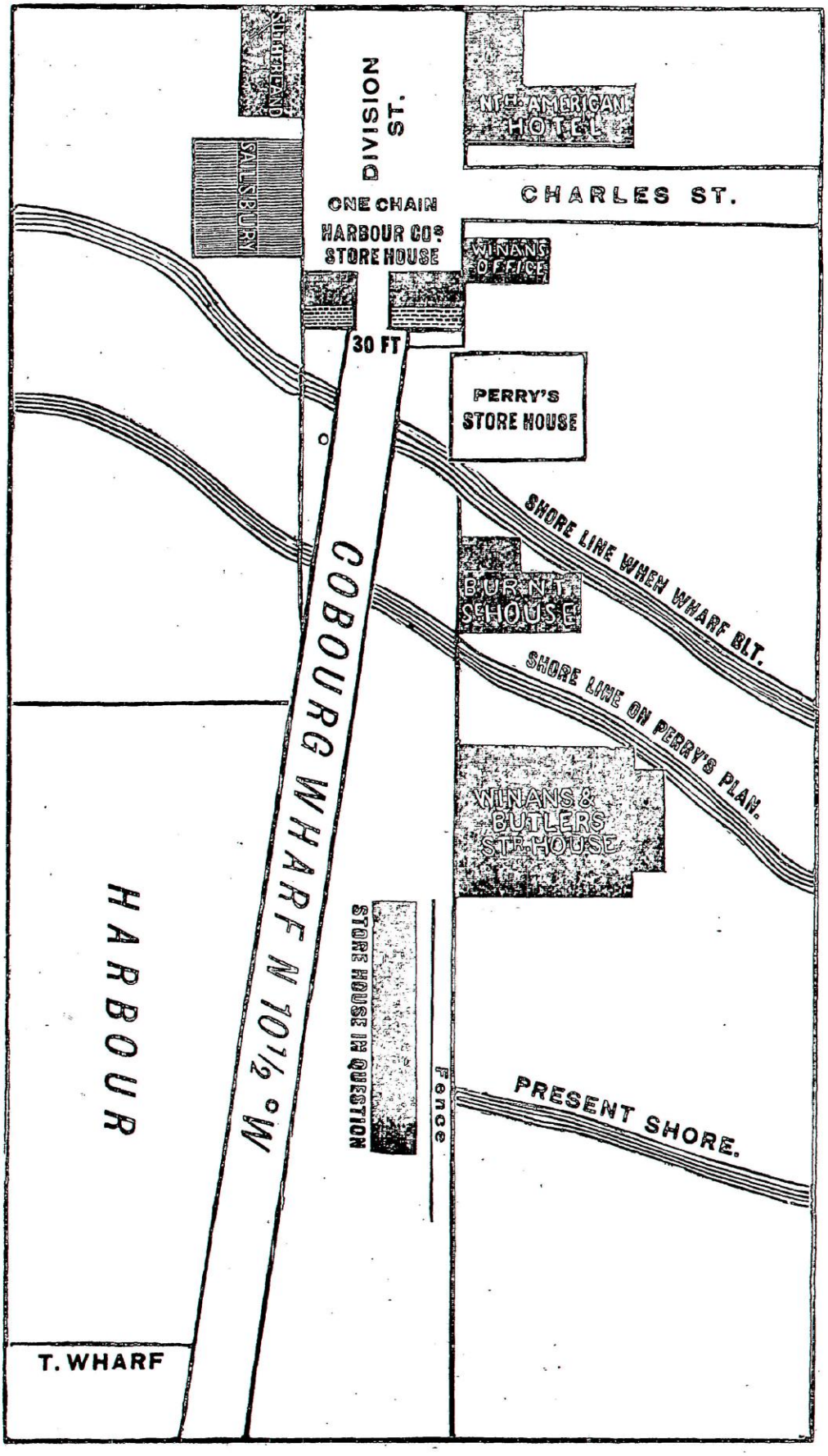
[1] L.R. 10 Ch. D. 518.


SUTHERLAND
SALLS BURY
DIVISION ST.
NTH. AMERICAN HOTEL
CHARLES ST.
ONE CHAIN
HARBOUR Co's STORE HOUSE
WINANS OFFICE
30 FT
PERRY'S STORE HOUSE
SHORE LINE WHEN WHARF BLT.
BURNT STORE HOUSE
SHORE LINE ON PERRY'S PLAN.
WINANS & BUTLERS STR. HOUSE
COBOURG WHARF N 10½° W
HARBOUR
STORE HOUSE IN QUESTION
Fence
PRESENT SHORE.
T. WHARF

Attorney General, of a store-house in the street called Division Street in the town of *Cobourg,* whereby the plaintiff's access to and from his property to the highway was hindered, and praying that the defendants, other than the Attorney General, might be decreed to remove the building. The bill was taken *pro confesso* against the Attorney (General, who was only a formal party.

The other defendants answered the bill, setting forth in substance that they were commissioners of the *Cobourg* Harbour Trust; that under various statutes respecting the Harbour at *Cobourg,* they were authorized to erect and did erect the store-house referred to; that the land on which the store-house was erected was not a part of any public highway, but was part of the property vested, under the statutes in question, in them, for the purpose of the harbour.

The cause was heard at the sittings of the Court of Chancery, at *Cobourg,* before the Hon. V.C. *Proudfoot,* on the 9th and 10th of May, 1876.

The facts of the case sufficiently appear in the judgment of His Lordship Mr. Justice *Strong.*

The Vice-Chancellor determined, 1st. that the land formed in front of Division Street, and the plaintiff's land was so formed by accretion; that the effect in law was to prolong Division Street and to add to the plaintiff's land the land formed between the former boundary of the plaintiff's lot and the water's edge. 2nd. That the defendants could not under any of the statutes referred to, justify the erection of the storehouse in front of the plaintiff's lot, and he therefore pronounced a decree for the removal of the building[2].

[2] 23 Grant 507.

From this decree the respondents appealed to the Court of Appeal of *Ontario.* That Court reversed the

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decree of the Vice-Chancellor upon both the points referred to[3].

The present appeal was from the judgment of the Court of Appeal. The appellants *Covert* and *Hargraft* are trustees of the lands belonging to *Standly,* and were made parties in pursuance of a direction in the decree.

Mr. Bethune, Q.C., for appellant:—

[3] 2 Ont. App. R. 195.

The land claimed by appellant was formed partly by gradual accretion and partly by artificial accretion. The fact that the accretion to the lands in question was accelerated by the cribs and piers of the harbour, cannot deprive the appellants, the riparian proprietors, of their right to the new land so formed by accretion. This very point was expressly decided in *doe dem McDonald v. The Cobourg Harbour Company*[4]; *Throop v. Cobourg and Peterboro' Railway Company*[5]. The Judicial Committee of the Privy Council and the U.S. Supreme Court have also arrived at the same conclusion on this point. See *Doe dem. Seebkristo et al. v. East India Co.*[6]; and *Livingston v. The County of St. Clair*[7]. This accretion had also, the effect of prolonging Division Street, as may be seen by referring to the plan. The Commissioners had no right, by the erection of cribs or otherwise to exclude the public from pursuing the public highway to the waters' edge, the original boundary of Division Street.

[THE CHIEF JUSTICE: Is not the case of *Corporation of Yarmouth v. Simmons*[8] in point?]

There it was a right of way by custom that was taken away; in this particular case the only thing which has

[4] U.C.Q.B. Mic. Term. 7 Vic, Robinson & Har. Dig. p. 48.
[5] 5 U.C.C.P. 509 & 549.
[6] 10 Moore P.C.C. 158.
[7] 64 Ill. R. 64; S.C. in appeal 23 Wallace 46.
[8] L.R. 10 Ch. D. 518.

been legalized is the wharf, and this was not physically inconsistent with the prolongation of Division Street. We contend the statute did not give the respondents the right of closing up streets, or take away from the public the right of going to the waters' edge over their highway. All the Judges in the Court below have agreed that according to the law of *Ontario,* the prolongation of Division Street by means of this accretion belonged to the public as part of Division Street. The Act incorporating the Harbour Company did not authorize them to take any land belonging to the Crown. When the Crown is not expressly named in an Act, the Crown property cannot be affected by it. The rights and powers of the respondents are defined in the Acts passed relating to the *Cobourg* harbour, and no authority was given to them to close up streets or to use or obstruct without purchase any original road allowance. The public continued to have the right of reaching the water over any embankment the Company or Commissioners may have constructed, and if this prolongation remained a highway, the appellants' right of access to it cannot be denied. The following authorities support this contention: *Marshall v. Ullswater Co.*[9]; *Eastern Counties Ry. Co. v. Dorling*[10]. It is contended on the part of the respondents that subsequent legislation has legalized the acts of the Commissioners. Admitting that it has legalized the erection of the wharf, it cannot extend to the store house complained of, as it was not built when the last Act was passed. The Acts belong to that class of Acts which are to be construed restrictively, and not so as to confer on them the right of closing up a public highway when such a right has not been given by express language. *Magee v. The*

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London and Port Stanley Ry. Co.[11]; *Galloway v. The Mayor of London*[12].

Mr. Boyd, Q.C., and Mr. Sidney Smith, Q.C., for respondents:

The appellant contends that the statute authorizing the construction of a harbour at *Cobourg* could not affect Crown property. Now it is clear that all the works authorized necessarily interfered

[9] L.R. 7 Q.B. 166.
[10] 5 C.B.N.S. 821.
[11] 6 Grant 172.
[12] L.R. 1 H.L. 34.

with the rights of the Crown, as the works were to be built on Crown property. See *Rex v. Smith*[13], *Atty, Gen. v. Richards*[14]. The real question to be decided is, whether the extension was made as an extension of Division Street *qua* street, or as part of the Harbor Works, authorized by statute? The land in question never formed part of the town of *Cobourg,* and this has been recognized by the municipality of *Cobourg* itself: see 22 Vic. c. 72. The evidence also proves this land or "esplanade" to be artificially formed land, over which the Harbour Commission has always exercised its control, independent of the town jurisdiction.

As to the fence, there was a necessity of putting it up in consequence of the sudden fall of 3 feet to get to the adjoining land. It is built on the crib works which the respondents had the right to put there in order to protect their wharf. This raising took place in 1852, and there was then that difference between the two properties. Can it be contended that the appellant would have had then lateral access to this wharf? and if not, can the fact of this gradual accretion give him more right now than he had in 1852?

Then also, it cannot be denied that the rights of the Harbour Commission to the *locus in quo* have been recognized by subsequent legislation. And if it is admitted

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that the wharf has been recognized by legislation, surely the word "appurtenances," which is to be found in sec. 2, of 13 and 14 Vic. c. 83, is quite sufficient to include "land" such as that in question in this suit. 36 Vic. c. 15, Ont., was passed after this esplanade was built and is an express recognition that it was one of the "appurtenances" of the Harbour.

Upon such a state of facts it is contrary to law to hold, as was done in the first instance, that the artificially formed land in front of Division Street was itself street. This could only be, at most, if the extension of the street was formed by process of accretion.

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[13] 2 Dougl. 441.
[14] 2 Anstr. 603.

In any case the works complained of were authorized by statute, and if they interfered with the right of the public reaching the water, to that extent this right, by necessary implication, was limited by statute.

The case cited by the Chief Justice, *Corporation of Yarmouth v. Simmons*[15], is an authority on this point and coincides with the view taken by *V.C. Blake* in the Court below,

Mr. *Bethune, Q.C.,* in reply:

My contention is that they had no right to take this land to the prejudice of the public. The appellant must take his stand as one of the public, and submits respondents had no right to close the highway against the public.

The judgment of the Court was delivered by STRONG, J.:—

The plaintiff is the owner of land in the town of *Cobourg.* The defendants are the Commissioners of the *Cobourg* Town Trust, sued as individuals and not in a corporate capacity, and the Attorney-General for

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the Province of *Ontario.* The bill alleges that the defendants, other than the Attorney-General, have created a public nuisance by placing a fence and store-house on the highway, which causes peculiar damage to the plaintiff, by obstructing the access to his land.

The defendants set up that the fence and store-house are not placed upon the highway, but upon a pier, or wharf, forming part of the works of *Cobourg* Harbor.

[15] L.R. 10 Ch. D. 518.

At the time Division street, which is the highway in question, was originally laid out, the site of the storehouse complained of was a long distance lakewards from the water's edge, the land on which it is built being made land, which has been brought into existence by means of works constructed for the purposes of the harbor. The plaintiff's land has been created by gradual accretions, which have been caused more or less by the harbor works.

The plaintiffs title to the land, in respect of which he sues, cannot be disputed; and it is equally clear, that if the site of the store-house forms part of the highway, or the defendants' works have been unauthorized by statute, the plaintiff is entitled to the relief which he asks; as, in either case, he would be entitled to sue for the special damage caused to him by a public nuisance interfering with the means of access to his land.

Four distinct points have been raised for our decision. *First,* it is said, that the place on which the store-house stands is a public highway, forming part of Division street. *Secondly,* that even though the *locus in quo* be part of the highway, yet the store-house is an illegal interference with the rights of the public, inasmuch as the statute authorizing the construction of the harbor, gave no authority to the Harbor Company to erect works in front of public highways or streets. *Thirdly,* it is urged, that even though the harbor and works may be perfectly legal, the public have a right of way

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over the pier or wharf in question. *Lastly,* it is said that the defendants have no authority under their statutes to erect a store-house as part of their harbor works.

The discussion of these questions involves an examination of the several statutes relating to the harbor.

By the Act of 1829[16], the *Cobourg* Harbor Company were incorporated, and were authorized to construct a harbor at *Cobourg,* which should be accessible to, and fit, safe and commodious for the reception of such description and burthen of vessels as commonly navigate the lake, and also to erect and hold all such needful moles, piers, wharves, buildings and erections whatsoever as shall be useful and proper for the protection of the said harbor, and for the accommodation and convenience of vessels entering, lying, loading and unloading within the same, and to alter and amend, repair and enlarge, the same as may be found expedient and necessary.

Section 3 provided for the determination by arbitration of the amount of damages to be paid to land owners whose lands might be taken for the purposes of the harbor, or of the roads, streets and approaches thereto.

Section 4 gave powers to take toll on goods and merchandise shipped or landed from or upon any part of the lake shore between the east boundary of lot No. 13 and the west boundary of lot No. 19 in the township of *Hamilton,* and upon all vessels and boats entering the harbor.

By the Act of 1832[17], after reciting the progress made in the construction of the harbor, of which the wharf or pier in question formed part, a loan of £3,000 by the province to the Harbor Company was authorized to be expended in finishing the harbor.

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In 1835, another Act[18] was passed, authorizing a further loan of £1,000; and in 1839, the time for the completion of the harbor was further extended by 2nd *Vic.,* cap. 42.

In 1837, a Board of Police was established for the town of *Cobourg*[19], and power was given to the board to lay out streets, subject to a proviso that no new street which might interfere with the powers conferred on the Harbor Company, should be established.

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[16] 10 Geo. 4, cap. 2.
[17] 2 Wm. 4, cap 22.

[18] 5 Wm. 4, cap. 43.
[19] By 7 Wm. 4, cap. 42, sec. 26.

The Act of 1850[20] recited that the harbor had never been completed; that the harbor had been conveyed by the company to the Board of Works in security for such moneys as the Provincial Government had expended, and should expend on the harbor; that £10,500, or thereabouts, had been expended; that it was desirable that the harbour should be made as safe, commodious and convenient as possible, and that the town council was interested in improving and keeping improved the harbor for the purposes of the trade of the town, and attracting thither vessels navigating the lake. The Act then dissolved the corporation of the Harbor Company, and vested in the municipal corporation of *Cobourg* the harbor and all land attached thereto, and the moles, piers, wharves, buildings, erections and appurtenances, and all other things erected, or being, or belonging to, or used with, or in the harbor, and theretofore vested in the company, and all other moles, piers, wharves, buildings and erections. By the same Act the town council were authorized to make additions and improvements in and to the harbor, and to borrow money for the purpose of completing and improving it, and of erecting additional wharves, moles and piers, and of making such other additions

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and improvements as the town council should resolve on and approve.

In 1859 there was a further statutory transfer[21] of the harbor, wharves, piers and appurtenances (together with other properties belonging to the town of *Cobourg*) to the Commissioners of the *Cobourg* Town Trust.

Lastly: By an Act of the Legislature of *Ontario,* passed in 1873[22], the Commissioners of the *Cobourg* Town Trust were authorized to issue debentures, not to exceed $100,000, charged upon the trust property, for the purpose of raising funds to deepen, enlarge, repair and improve the harbor.

[20] 13 & 14 Vic., cap. 83.
[21] By 22 Vic., cap. 72.
[22] 36 Vic., cap 120.

The Harbor Company commenced their work in 1830 by running a wharf, which is shown on the plan, southerly from the line or road allowance between lots 16 and 17 of the township of *Hamilton,* which now forms Division street in the town of *Cobourg.* This wharf was constructed upon sunken cribs, the most northerly crib being Laid partially on the land. The wharf did not run in the line of the street but inclined to the west. This wharf is known as *Cobourg* wharf. Further to the west another wharf, also running in a southerly direction, and of similar construction, was built, thus partially enclosing the waters of the lake so as to form the basin which constituted the harbor. In 1850, after the transfer to the town council, a contract was entered into by the town with *Cotton & Rowe* for dredging the harbor, and in carrying out this work the contractors deposited the mud and earth, taken from the basin formed by the two piers or wharves already mentioned, on the east side of the easterly pier. To retain these deposits, and to prevent their being washed away, to the injury of the harbor, they were subsequently confined by crib work. This crib work was laid down between 1853 and 1856. After the creation of the

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Cobourg Town Trust in 1859 further dredging was done, the mud raised by which was also deposited to the east of the wharf and further crib work was laid down. By means of these deposits and additions, the original wharf was widened to the full width of Division street, not however to the full extent in length of the original wharf, but so as to project into the lake far beyond the shore line of the plaintiff's land adjoining, as shown on the plan. This plan also shows the line of the lake shore at the time the original harbor works were constructed, and at a later date, when, by accretion, that line had been advanced to what is called on the plan "Shore line on *Perry's* Plan," and it also shows the present shore line. The greater part of the fence and structure complained of are situate to the north of the present shore line. So much of the plaintiff's land as lies between *Perry's* shore line and the water's edge, in respect of which it is the plaintiff sues, has been gained by accretion since the addition to the original wharf was made. The addition is clearly delineated on the plan and distingushed from the original wharf.

The plaintiff complains that his access to this alluvial land is obstructed by the store-house and fence which the defendants have caused to be placed on the addition to the wharf. The deposits and crib work were, it is suggested, to some extent the cause of the accretion by which the plaintiff has acquired additional land, but whether this was so or not, it is beyond question that the accretion took place by imperceptible degrees. The addition to the wharf appears to have had several objects; the crib work was made in the first instance with a view to keep the deposits in their place, and to prevent their drifting away to the injury of the harbor; then a superstructure was added to widen the wharf and to enable, a line of railway to be laid down upon it for shipping purposes, which was afterwards done.

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The law applicable to the facts thus stated appears to be extremely plain. The plaintiff makes out his title to the land in respect of which he says he is damnified, for it can make no difference whether this land was gained by alluvial deposits arising from natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible. The case of *Doe dem. Seebkristo et al. v. East India Co.*[23] is authority for this. Then the fact cannot be disputed that the fence and store house do obstruct the access from the plaintiff's land to the wharf.

The plaintiff, therefore, makes out a case entitling him to relief if he shows either that the addition to the wharf upon which the store-house and fence complained of are placed form part of a public highway, or that the addition to the wharf was an illegal and unauthorized work. One or the other of these propositions he must establish to entitle himself to relief. I may here point out that the bill makes no case for relief on the ground of dedication to the public of a right of way on the original wharf and the addition, and that point does not appear to have been made in any of the courts below, nor was it raised in argument at this bar, and if it had been, in the present state of the pleadings, it would have been clearly inadmissible. Then, how did the land which forms the site of the store-house and fence become part of the public highway? We may grant that if this land had

[23] 10 Moore P.C.C. 158.

been formed by accretion instead of having been artificially made by the defendants' predecessors, it would have constituted part of Division Street. This may be more readily assumed here where the soil and freehold of the highway, like all public road allowances and streets under the municipal system

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established by law in *Ontario,* are vested either in the Crown or in the municipality, for the use of the public, than would be the case if the public had only a right of way in the nature of an easement, the title to the soil being in private owners, as is generally the case in *England.*

Assuming this to be the legal effect of an addition to a street by accretion, it does not in the least degree assist the plaintiff, since the undisputed facts do not warrant the application of such a rule of law, for the addition to the wharf was artificially constructed on what was, at the time, part of the bed of Lake *Ontario.* It is consequently out of the question to contend that the storehouse complained of is placed in a public highway.

Next, it is pretended that the addition to the wharf was not authorized by the statutes giving powers to construct the harbor. Nothing can be more extensive than the terms of the original act. It empowers the company to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever as should be useful and proper for the protection of the harbor, and to alter and amend, repair and enlarge the same as might be found expedient.

The evidence shows that this addition was made originally for the protection of the harbor, and that afterwards a superstructure was placed upon it for the purpose of enlarging in width the original wharf, thus bringing the work within the exact terms of the statute. It is then argued that the act did not confer power to erect the harbor works, so as to intercept the passage from the end of a public highway to the waters of the lake. The answer to this is to be found in the original statute which authorises the selection of any site at *Cobourg,* without any exception of streets, for works which are to be the private property of the company.

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The statute of 1837 establishing the Board of Police, which contains a provision that streets to be laid out are not to interfere with the works of the Harbor Company, has also an important bearing on this part of the case.

Further, the legislature has, by a series of enactments already referred to, coming down to as late a period as 1873, recognized the legality of the harbor works in a manner which entirely excludes the possibility of holding them to be *ultra vires.* A case, decided in *England* since the judgment of the Court below was delivered, has, however, been brought to our notice by the Chief Justice, which constitutes a conclusive answer to this objection. I refer to the case of *The Corporation of Yarmouth v. Simmons*[24], where the precise point I am now referring to arose, and where it was held that statutory powers to erect a pier, authorized the projection of such a pier on the line of a public highway, and that the public acquired no right on the erection of the pier, to pass over it, to reach the water; in that case, the sea. It was also there contended that a public right of way could not be taken away without express words, but this contention was distinctly denied by the Court. It was also said, that the right to get from the end of the street to the water was a right appertaining to the Crown, and could not for that reason be taken away without express words. The same point is adverted to by the learned Vice-Chancellor in his judgment in the present case. Mr. Justice *Fry,* however, denies that the *primâ facie* right of the public to have access to the water was a right vested in any way in the Crown. This also is exactly applicable here, for, although the soil in the original road allowance was vested under the Provincial statutes in the Crown, yet, if the harbor works originally constructed were in the

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water, and south of the termination of the street, no right of the Crown can be said to have been interfered with, and a mere right of way in the public and the title of the Crown to land are, as is pointed out by Mr. Justice *Fry,* entirely different. The case just quoted is, therefore, an authority

[24] L.R. 10 Ch. D. 518; S.C. 38 Law Times (N.S.) 881.

refuting nearly all the arguments by which the plaintiff attempts to support his case. It shows that there is nothing in the objection that the Harbor Company and their successors had no right to construct works in the lake opposite the line of a street. It also affords a conclusive answer to the claim that the public had a right of way from the street to the water over the harbor works, assuming them to be legal, and it shows that no rights of the Crown are interfered with.

The cases cited in the appellant's factum of *The Eastern Counties Railway Co. v. Dorling*[25], and *Marshall v. Ulleswater Co.*[26], are plainly distinguishable by the fact, that the barge and pier in those cases respectively were illegal, and unauthorized obstructions to the *primâ facie* right of way to which the public were entitled to enable them to obtain access to the water; here, on the contrary, we think that the obstructions interposed are authorized by statute.

The last ground on which the plaintiff rests his case is, that granting the addition to the wharf and all the other works to be *intra vires,* the store-house was unauthorized.

If the pier or additional wharf is a legal construction and there is no public right of way over it, conclusions which have already been arrived at, the plaintiff can have no *locus standi* to maintain any objection to a storehouse being erected on the pier which he has no right to come upon, merely on the ground that it is *ultra vires* of the company. The Attorney General may always file

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an information to restrain a corporation from doing or continuing an act which is beyond the powers conferred upon it by law, but a private individual has no right to complain, unless the act which is *ultra vires* occasions him some special legal injury.

Another conclusive answer to this last objection is that the act of 1829 gave the company authority to erect such buildings as should be useful and proper for the accommodation of

[25] 5 C.B.N.S. 821.
[26] L.R. 7 Q.B. 166.

vessels entering, lying, loading and unloading in the harbor. The evidence shows that this store-house is not only a useful and proper, but a necessary adjunct to the harbor works, and, indeed, the fact is so apparent that, even without evidence, we should be justified in so holding. The plaintiff, therefore, fails in this, as in the other arguments by which he has attempted to support his appeal.

Before concluding, I think I ought to notice an objection to the constitution of this record, which, though not raised in the answers of the defendants, nor made in argument, appears to me a serious one. By the act of 1859 the commissioners of the *Cobourg* Town Trust are legally incorporated. It is true that the words “corporation” or “incorporated” are not used, but the legal effect of the first section clearly is to constitute the individuals named a corporation. The corporation ought therefore to have been at least a party to the cause and in my judgment the sole party.

I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.
Solicitor for appellants: W.I. Stanton.
Solicitor for respondents: Sidney Smith.