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THE RIGHTS OF A RIPARIAN OWNER IN LAND LOST BY EROSION

In a recent case[1] decided by the Court of Errors and Appeals of New Jersey it was held, that if land was formerly fast land and the title was lost by erosion, it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely.

When is title lost by erosion? Can the state deprive a riparian owner of his right to accretion without compensation, or is such right a vested right which can be taken away only by proper proceedings and upon due compensation?

The rules applying to accretion and erosion are inseparably bound together, the gains of one compensating for the losses of the other. By the common law of England, two distinct cases were recognized. First, when the land was gained by gradual

[1] *Dewey Land Co., et al. v. Stevens et al.*, 90 Atl. (N. J.) 1040; 91 Atl. (N. J.) 934.

accretion or dereliction, land so made belonged to the owner of the adjoining upland. Second, when the land was gained by sudden avulsion or reliction, the land thus formed belonged to the king.[2] Conversely, and by way of compensation, when the sea gradually encroached on the land, the Crown took the benefit, while if such encroachment were sudden and violent, the subject did not lose his property, if he could still identify his property when it reappeared.[3]

The American cases are rather unsatisfactory. The opinions are loose and inaccurate, and contain numerous incorrect dicta. The advice of Lord Ellenborough[4] is particularly applicable. He said, "The rule stated in each case, like every other proposition laid down by a judge, ought to be understood with particular reference to the facts of the case then before the court."

Perhaps the most widely quoted rule is that although land be submerged by the sea, yet if it eventually reappear and remain capable of identification, the title thereto revests in the original owner.[5] Where the rule has been thus stated, the land had been suddenly washed away, and in so far as limited to such facts the cases are correct. But when the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost returns to the ownership of the state.[6] The title to such land is lost and cannot revest in the original owner if the land subsequently reappear. Whatever rights the original owner may acquire in the reformed land arise from his right of accretion and not from the former title.

When the land has returned to the ownership of the state, is that ownership absolute, or is it subject to certain rights of the adjacent riparian owner? Clearly, this ownership is subject to the right of the riparian owner to acquire title to the land, if it reappear as an accretion to his fast land. This right to alluvion is a vested right. It is an inherent and essential attribute to the

[2] *Hargrave's Law Tracts,* p. 30; 2 *Bl. Com.* 262; *Angell, Tide-waters,* pp. 264, 265.

[3] *In re The Hull and Selby R. R.,* 5 M. & W. 327; *Hale, De Jure Maris,* chap. 4; *Moore's History of the Foreshore,* p. 381.

[4] *Hunter v. Prinsep,* 10 East. 392.

[5] *Widdecombe v. Chiles et al.,* 173 Mo. 195; *Stockley v. Cissna,* 119 Fed. 812; *Mulry v. Norton et al.,* 100 N. Y. 424; *VanDevanter v. Lott,* 172 Fed. 574; *Murphy v. Norton et al.,* 61 How. Pr. 197.

[6] *Matter of City of Buffalo,* 206 N. Y. 319

original property, which cannot be taken away, even by the state for public use, without compensation.[7]

The decision in the principal case is undoubtedly correct, though the language used by the judge in his opinion is not strictly accurate. The custom of judges to digress from the facts of a case, and to lay down rules of law not necessary for the decision of the case in point, is a most pernicious one. It makes the reports of our cases unnecessarily long, and has given rise to many of the misconceptions of what the law actually is.

VALIDITY OF A GIFT MORTIS CAUSA MADE IN CONTEMPLATION OF SUICIDE.

A depositor in a bank drew a check and sent it to his betrothed in contemplation of suicide. Held, the transaction, if a gift *mortis causa,* is invalid under N. Y. Consol. Laws c. 40 sec. 2301 declaring that suicide is a grave public wrong.[1]

The effect of this decision is to punish one, the innocent donee, for the wrong of another. The case relied on for authority, and which it is believed is the only one in point, seems to be wrong. The reason given is that such a gift is contrary to public policy, but no such policy is evident. There are three reasons for the punishment of a wrong: reformation of the wrong-doer, retribution, and prevention of recurrences of the wrong.[2] This holding is supported by none of these reasons. It can neither reform nor wreak vengeance on the wrong-doer for he no longer exists. The very statute on which the decision rests does not make suicide a crime, the legislature realizing the "impossibility of reaching the successful perpetrator." It can not appreciably prevent other suicides, for either this rule would be unknown or, if known, the intending suicide would either make an absolute gift or would not care. A man may commit suicide for one or both of two reasons, because he hopes thereby to benefit some one for whom he has greater affection than for his own life or because the burden of living is greater than the instinctive dread

[7] *County of St. Clair v. Lovington,* 23 Wall. 46; *Freeland v. Pennsylvania R. R. Co.,* 197 Pa. 529; *Knudsen v. Omanson,* 10 Utah 124; *Municipality No. 2 v. Orleans Cotton Press,* 18 La. 122; *Farnham, Waters and Water Rights,* p. 324.

[1] *Bainbridge v. Hoes,* 149 N. Y. Supp. 20.

[2] *Holmes, The Common Law,* p. 42.

of death. If the first reason exists, the intending suicide would as soon make an absolute gift. If there is simply the second reason, the gift is only a collateral incident. In such case it is conceivable that he, wishing to make the gift, would prefer to make a gift *causa mortis* rather than an absolute one, for intending suicides may doubt that it is a physical possibility to destroy themselves, in which case they might wish the gift to be revocable. To the extent of this preference, one minor element in his desire to commit suicide is made less strong. But this preference for a gift *causa mortis* is not calculated to exert a preventive influence directly on the wish to end one's life where the second reason exists. It neither makes the intending suicide less miserable nor puts him more in fear of death but affects merely the collateral incident. Only in this partial effect on a minor element of the intent to destroy one's own life in one class of suicides does this rule have a preventive effect. If there be any policy in such a ruling, that of protection to innocent sufferers from such acts is more evident. That the public welfare is more important than protection to the individual does not mean that a decision is right which works the slightest public benefit and the greatest individual injustice, for the public is only a number of individuals. The principal case is distinguishable from the one relied on because, in the latter jurisdiction, suicide is made a crime.[3] A few cases hold that there can be a recovery on an insurance contract where the insured purposely takes his life while sane.[4] The cases holding the opposite view represent the more prevalent rule, but even these are distinguishable because in such cases the property would be taken away from another innocent third party, because an absolute gift of it could not be made at the time and because there is an implied promise in the contract that the insured will not do anything wrongful to hasten the maturity of the policy.[5] On the ground of policy it is submitted that the holding in the principal case is erroneous.

[3] *Agnew v. Belfast Banking Co.*, Ir. Q. B. 1896, 204.
[4] *Seiler v. Economic Life Ass'n.*, 105 Iowa, 87.
[5] *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362.