

1881

Title to Lands under Fresh Water Lakes and Ponds

Thomas M. Cooley

University of Michigan Law School

Follow this and additional works at: <http://repository.law.umich.edu/articles>

 Part of the [Common Law Commons](#), [Natural Resources Law Commons](#), [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Cooley, Thomas M. "Title to Lands under Fresh Water Lakes and Ponds." *Cent. L. J.* 13 (1881): 1-5.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The Central Law Journal.

ST. LOUIS, JULY 8, 1881.

TITLE TO LANDS UNDER FRESH WATER LAKES AND PONDS.

In the Northwestern States there are innumerable lakes and ponds, which are largely resorted to for pleasure, and for the opportunities they furnish for the taking of game and fish. The scenery about them is, in most cases, picturesque and inviting, and they become, favorite locations for residence. On some the navigation is valuable for business purposes; others are navigated for pleasure only. In surveying the public domain for the purposes of sale, the Government caused all that were too large to be embraced within a single subdivision of a section, to be meandered at the water line, and the dry land only was measured for sale. The waters of many of these lakes and ponds are receding gradually, and some, after a time, disappear. Under these circumstances, the question who

owns the bed is one of considerable importance in the northwest, and is of interest in other parts of the country, though not so likely elsewhere to become the subject of litigation.

So far as concerns fresh water streams, the rule of the common law is clear and unquestionable. The owner of the bank owns to the thread of the stream, subject to the public rights of navigation, and perhaps of fishery; and he may make of it any use not inconsistent with the public easement.¹

If there are islands in the river, they belong to the owner of the bank on whose side of the center they lie; or, if they divide the main channel, they will themselves be divided in ownership between the bank proprietors.² And the above rules apply without regard to the magnitude or importance of the river whose bed or islands are in question.³ In North Carolina and Iowa, however, a different rule is applied; and it is held that, in the case of large rivers whose chief characteristic is their navigability, the line of private ownership is the bank, and not the thread of the stream;⁴ and such seems to be the rule in Indiana and Pennsylvania also.⁵ The judiciary of the State of New York also, after

considerable vacillation, is, at last, unmistakably arrayed on the same side of this important question.⁶ Whether the line of low water mark, or that of high water mark, is to be considered the boundary when the thread of the stream is not, is a question on which there are differences of opinion, and we shall not enter upon it here.

If the bank owners do not own the bed of the stream, it will be conceded that it is owned by the State. Whenever the United States was original owner, the right passed to the State on its admission to the Union, with all other rights pertaining to the eminent domain.⁷

But whether the State owns it as proprietary, or only as sovereign, is a point of no little interest. If it owns the soil as proprietary, it may perhaps sell it for private improvement and occupation, and the bank owner may thereby be cut off from any use of the stream in connection with his estate, and be deprived of benefits which he had reason to suppose he had acquired absolutely by his purchase. But if the State owns it as sovereign merely, under the eminent domain, it is to be preserved as the right of navigation is, for the common benefit and enjoyment of all the people. In New York it has been held that, on tide waters, the State may sell the bank between high and low water mark, and that the riparian owner has no remedy.⁸ Also, that the State may grant the bed of one of its fresh water navigable rivers, and turn away the river from the land of the bank owner without his being entitled to any redress.⁹ But this seems very harsh doctrine; and it is certainly one which has never been much acted upon, and is probably not generally accepted.¹⁰

It is a little remarkable that in England the question, "whether the soil of lakes, like that of fresh water rivers, *prima facie* belongs to the owners of the land, or of the manors on either side, *ad medium filum aquæ*, or whether it belongs *prima facie* to the king in right of his prerogative," has never been authoritatively determined. It was referred to in a recent decision,¹¹ but passed by, as

¹ Bichett v. Morris, L. R. 1 H. L. Sc. Ap., 47; Palmer v. Mulligan, 3 Caines, 307; Jackson v. Halstead, 5 Cow. 216; Horne v. Richards, 4 Call. 441; Browne v. Kennedy, 5 H. & J. 195; Arnold v. Mundy, 6 N. J. 1; Gough v. Bell, 21 N. J. 160; Young v. Harrison, 6 Ga. 141; Adams v. Pease, 2 Conn. 281; Chapman v. Kimball, 9 Conn. 88; Rice v. Ruddiman, 10 Mich. 126; Lorman v. Benson, 8 Mich. 18; Hayes v. Bowman, 1 Rand. 417; McCullough v. Wall, 4 Rich. (S. C.) 68; State v. Gilmanton, 9 N. H. 461; Norway Plains Co. v. Bradley, 52 N. H. 85; Boston v. Richardson, 105 Mass. 351; Houck v. Gates, 82 Ill. 179; Delaplaine v. Railroad Co., 42 Wis. 214; Morgan v. Redding, 5 Sm. & Mar. 195; Magnolia v. Marshall, 39 Miss. 109; Birney v. Snyder, 3 Bush, 266; Granger v. Avery, 64 Me. 292; O'Fallon v. Daggett, 4 Mo. 343; Ross v. Faust, 54 Ind. 471.

² Ingraham v. Wilkinson, 4 Pick. 268; Trustees v. Dickinson, 9 Cush. 548.

³ Rundle v. Canal Co., 1 Wall. Jr. 275; Adams v. Pease, 2 Conn. 481; Schurmeier v. Railroad Co., 10 Minn. 82; Houck v. Yates, 82 Ill. 179; Arnold v. Elmore, 16 Wis. 509; Gas Light Co. v. Industrial Works, 28 Mich. 182; Stewart v. Clark, 2 Swan, 9.

⁴ Wilson v. Forbes, 2 Dev. 30; Collins v. Benbury, 3 Ired. 277; Fagan v. Armistead, 11 Ired. 433; McManus v. Carmichael, 3 Iowa, 57; Fourten v. Railroad Co., 32 Iowa, 106; Houghton v. Railroad Co., 47 Iowa, 376.

⁵ Sherloch v. Bainbridge, 41 Ind. 35; Zug v. Commonwealth, 70 Pa. St. 138. And see Bullock v. Wilson, 2 Port. 447; Barney v. Keokuk, 94 U. S. 324, and cases cited; Walker v. Board, 16 Ohio, 540; Elder v. Bucrus, 6 Humph. 366.

⁶ People v. Canal Appraisers, 33 N. Y. 461.

⁷ Pollard v. Hagan, 3 How. 212.

⁸ Gould v. Railroad Co., 6 N. Y. 522.

⁹ People v. Canal Appraisers, 33 N. Y. 461.

¹⁰ See Bell v. Gough, 23 N. J. 624; Stevens v. Railroad Co., 34 N. J. 532; Walker v. Board, 16 Ohio, 540.

¹¹ Marshall v. Navigation Co., 3 Best & Smith, 732.

not being necessarily involved in the case at bar. In Massachusetts, by the construction of the colonial laws and ordinances, extending back almost to the first settlement, it is held that great ponds belong to the State, which may grant away either the soil or the water, or both; and that the boundary of the bank proprietor is at low water mark.¹² Under this rule, the State is at liberty to cut off by its grants all water rights in the bank proprietors. The Massachusetts decisions on this subject have little or no bearing on kindred questions arising at the common law, for the reason that private grants in the colony were made subject to the colonial laws which forbade the appropriation of great ponds to individuals.

In New York the rule is established as a common law rule, that the boundary of private ownership on fresh water lakes and ponds, is the low water mark.¹³ In Vermont the rule is the same; and it is there held in reliance upon New York precedents, that the bank owner has no appurtenant right in the water which would enable him to maintain ejectment against one who should take possession, fill in and occupy the bed of the pond below the low water line in front of him.¹⁴ In Illinois a deed of land, in which one boundary was described as "following the course of" Lake Michigan, was held to bound the land by the line at which the water usually stands when free from disturbing causes. In the decision of this point, Justice Walker says: "The great lakes of the North present questions affecting riparian rights that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean govern this case. A grant giving the ocean or a bay as the boundary, by the common law carries it down to

ordinary high water mark. The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regularly recurring periods to the same points, a portion of the shore is alternately sea and dry land. This, being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide is his boundary."

"This principle, however, which requires the usual high water mark as the boundary on the sea, and not the highest or the lowest mark to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it be extended to the lowest point to which it may recede from like disturbing causes. But it should be at that line where the water usually stands, when unaffected by any disturbing cause. The portion of the soil which is only seldom covered with water, may be valuable for cultivation or other private purposes. And the line at which it usually stands, unaffected by storms or other disturbing causes, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides. Again, where is the lake as called for by the deed? A fair and reasonable construction of the language, running to the lake, and with the lake, would mean to that place where its outer edge is usually found."¹⁵

This is specific and lucid; but it may be observed of the great lakes, that the outer edge is not usually found at the same line in successive years. These bodies of water have their periodical rise and fall; and though these do not usually flood and uncover any considerable belt of land, they do so in some

¹² *Cummings v. Barrett*, 10 Cush. 186; *Paine v. Woods*, 108 Mass. 160; *Commonwealth v. Vincent*, 108 Mass. 441; *Fay v. Aqueduct Co.*, 111 Mass. 27; *Hittinger v. Eames*, 121 Mass. 539. A pond of more than ten acres, is considered a "great pond" under the Massachusetts colonial laws. See *Body of Liberties*, art. 16; *Commonwealth v. Vincent*, *supra*.

¹³ *Wheeler v. Spinola*, 54 N. Y. 377; *Canal Com'rs. v. People*, 5 Wend. 423.

¹⁴ *Austin v. Railroad Co.*, 45 Vt. 205. See *Fletcher v. Phelps*, 28 Vt. 257; *Takeway v. Barrett*, 46 Vt. 316.

¹⁵ *Seaman v. Smith*, 24 Ill. 521.

localities where the shore is but little elevated above the lake.

The rule, as thus declared in Illinois, is approved in Ohio, with a reservation of any opinion, however, "in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce, as do not obstruct navigation."¹⁶ In New Hampshire the like view seems to prevail.¹⁷ In Wisconsin the boundary is held to be the ordinary water line, but with appurtenant water rights. Say the court: "There are *dicta* and decisions which hold, in reference to such bodies of water, the riparian proprietor takes only to the edge of the water in its ordinary condition when unaffected by winds or other disturbing causes; the proprietorship of the bed of the lake being in the State. This view commends itself to our judgment as sound and correct; and we have accordingly decided,¹⁸ that the water's edge is the boundary of the title of the riparian proprietor. But while the riparian proprietor only takes to the water's line, it by no means follows, nor are we willing to admit, that he can be deprived of his riparian rights without compensation. As proprietor of the adjoining land, and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they often give property thus situated its chief value. It is evident from the nature of the case, that these rights of user and exclusion are connected with the land itself, grow out of its location, and can not be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the re-

¹⁶ Sloan v. Biemiller, 34 Ohio St. 492.

¹⁷ State v. Gilmanton, 9 N. H. 461; State v. Franklin Falls Co., 49 N. H. 240, 250. See also Bradley v. Rice, 13 Me. 198; Wood v. Kelly, 30 Me. 55; Robinson v. White, 42 Me. 209; Murray v. Lerron, 1 Hawks, 56.

¹⁸ Diedrich v. Railway Co., 42 Wis. 248.

mark, that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini*, is the ownership of the bank or shore. In such ownership they have their origin. They may, and do exist, though the fee in the bed of the river or lake be in the State. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right: but his riparian rights, strictly speaking, do not depend on that fact."¹⁹ The same view of the riparian rights of the bank proprietor is held by the Federal Supreme Court, by which it has been declared that the right of such proprietor to erect piers, wharves, etc., only terminates at the line where the water becomes actually navigable.²⁰

In Michigan it has been decided, that the bed of those little lakes through which rivers flow, and which are in the nature of expansions of the rivers themselves, belongs to the bank proprietors, subject to the public rights therein.²¹ Judging from *dicta* in the decisions, it seems probable that the same rule would be applied to all other lakes. The practical difference between this ruling and that in Wisconsin and the Federal Supreme Court is not so great as at first blush might seem. If the bank owner is proprietor of the bed also, he is limited in his use of it only by the public rights; if not proprietor of the bed, he may still make use of it, limited only by the public right. The State or proprietor can not, either by regulation or sale, take from him his appurtenant rights in the water or in the navigation.

In Wisconsin it is also held that the rule of bank ownership is the same, whether the water is or is not susceptible of use for navigation.²² Nevertheless, if accretions are formed on the shore of non-navigable ponds by slow and imperceptible degrees, or if the bed is uncovered by the gradual recession of the waters, the land thus made or recovered belongs to the

¹⁹ Cole, J., in Delaplaine v. Railway Co., 42 Wis. 214, 225, quoting with approval Lyon v. Fishmongers' Co., L. R. 10 Ch. Ap. Cas. 679, S. C. 1 Ap. Cas. 683.

²⁰ Dutton v. Strong, 1 Black, 23.

²¹ Rice v. Ruddiman, 10 Mich. 125. See Lorman v. Benson, 8 Mich. 18.

²² Boorman v. Sunnucks, 42 Wis. 233.

proprietor of that which adjoins it. Under this ruling; if a lake or pond gradually disappears altogether, the adjoining proprietors would become owners of the whole bed, and might find their possessions increased to several times the original size. A like ruling has been made by the Federal Supreme Court.²³ In Michigan a like rule would probably be applied, whether the lake disappeared slowly or suddenly; and there really seems no reasonable ground for distinguishing the cases, if obedience to precedent did not seem to require it. It was held in North Carolina at an early day, that a grant could not be made in front of the water line, so as to cut off the bank-owner's right to alluvion;²⁴ and decisions covering the same principle have been made in Louisiana²⁵ and Arkansas.²⁶ Except, therefore, as the suddenness of the change might render it difficult to adjust boundaries between adjacent proprietors of the bank, there seems to be no sufficient reason why the State should claim title. But, in truth, the difficulty in extending the lines does not depend on the change being perceptible, or the reverse; it is solved as soon as it is determined by what rule the dividing lines shall be extended from the original shore. If we apply the same rule that is applied to rivers, and extend them into the bed of the lake or pond at right angles to the general course of the shore at the point of intersection, the extension can be made as well, and as readily when the change is sudden, as when it is made by slow degrees and imperceptibly. But this is not a very important matter, as the little lakes and ponds of the Northwest generally recede gradually if at all; and whether under the Wisconsin rule or that of Michigan, if they disappear, their beds come at last to be private property without any grant from the State.

One important right, however, may depend upon the question whether the ownership of the bed of lakes and ponds is in the State or in the bank owners. We refer now to the right of fishing. It is generally held that the right of fishing follows the ownership of the

bed; if that is in the State, the fishing is public; if not, it belongs to the bank proprietor.²⁷ And this rule has been applied to small ponds or lakes owned by individuals, after very full and careful examination of the whole subject.²⁸ But if the waters are navigable, and the public for that reason have rights therein, the right of fishing may well be held to be public also, irrespective of the ownership of the bed.²⁹ But of course, the public can not use the shore for the convenience of fishing without consent of the owner, nor so occupy the waters immediately in front as to deprive the owner of any appurtenant rights.

The right to cut and remove ice is perhaps to be held public or individual, according to the same rules which govern the right of fishing.³⁰

THOMAS M. COOLEY.

²³ Jones v. Johnson, 18 How. 156. See Banks v. Ogden, 2 Wall. 57; St. Clair v. Lovington, 23 Wall. 46.

²⁴ Murray v. Lennon, 1 Hawks, 56.

²⁵ Municipality v. Cotton Press, 18 La. An. 122.

²⁶ Belding v. State, 25 Ark. 120.