15 Mont. 417

GIBSON
v.
KELLY.

Supreme Court of Montana.

Feb. 26, 1895.

Appeal from district court, Choteau county; Dudley Du Bose, Judge.

Action by Charles S. Gibson against William Kelly to recover land. Judgment for plaintiff, and defendant appeals. Affirmed.

A demurrer to the defendant's answer was sustained, and judgment accordingly entered for plaintiff. The defendant appeals. The action is one in the nature of ejectment. Plaintiff sets up in his complaint that for five years last past he has been, and still is, the owner of lot No. 3, section 12, township 23 N., range 7 E., county of Choteau, state of Montana, according to the government survey; that said land is bounded on the southeast side by the Missouri river; that the defendant has entered upon and taken possession of a portion of said premises, to wit, a strip 600 feet wide, lying next to and bounded by the said river, on the southeast side; and that he wrongfully and unlawfully occupies and possesses the same, and detains the same from the plaintiff. The answer admits that the plaintiff is the owner of said lot No. 3, and alleges that the defendant is not occupying any portion of said lot. The defendant admits that the Missouri river is the southeast boundary of said lot, but that the said southeast boundary is the high-water mark of said river. He alleges that said river is a navigable river. The defendant admits that he is in possession of a strip of land 600 feet wide in said section 12, township 23 N., range 7 E., and he alleges that said strip is bounded on the southeast by the Missouri river, and on the north by said lot No. 3,-the land owned by the plaintiff,-and that said northwest boundary of defendant's said land is the ordinary high-water mark of the Missouri river; that the piece or parcel of land so possessed and occupied by the defendant is the same parcel alleged in plaintiff's complaint to be a part of said lot No. 3; and that said strip of land in controversy is the land which lies between the low-water mark and the high-water mark of said river. By reason of which facts, defendant alleges that said strip of land is not, and never was, a part of said lot 3, and that plaintiff has not, and never had, any right, title, or interest therein, or in any part thereof, or any right to possession thereon. The plaintiff's demurrer to this answer was upon the ground that the answer did not state facts sufficient to constitute a defense. This demurrer was sustained. The question presented is whether, when the plaintiff's land was bounded by the Missouri river, he could maintain ejectment against the defendant for taking possession, and retaining and excluding the plaintiff from the possession, of the strip of ground between the high-water mark and the low-water mark.

Ransosm Cooper and Wm. T. Pigott, for appellant.

Riparian owners on navigable waters own to high-water mark only. Coburn v. Ames, 52 Cal. 385;McManus v. Carmichael, 3 Iowa, 1;Parker v. Packing Co. (Or.) 21 Pac. 822;Bowman v. Wathen, Fed. Cas. No. 1,740, 2 McLean, 376; Pollard's Lessee v. Hogan, 3 How. 212;Goodtitle v. Kibbe, 9 How. 471; The Genesee Chief v. Fitzhugh, 12 How. 453;Howard v. Ingersoll, 13 How. 381;Illinois Cent. R. Co. v. Illinois, 13 Sup. Ct. 110.

Arthur J. Shores, for respondent.

Riparians on navigable streams own to low-water mark. Bell v. Gough, 23 N. J. Law, 624; Nichols v. Lewis, 15 Conn. 137;Simons v.

French, 25 Conn. 346;Mather v. Chapman, 40 Conn. 382;Illinois Cent. R. Co. v. Illinois, 13 Sup. Ct. 110;Town of Ravenswood v. Flemings, 22 W. Va. 52;Delaplaine v. Railroad Co., 42 Wis. 224; Lyon v. Fishmongers' Co., 1 App. Cas. 662; Berry v. Synder, 3 Bush, 266;Miller v. Hepburn, 8 Bush, 332;Ball v. Slack, 2 Whart. 508; Blundell v. Catterall, 5 Barn. & Ald. 268; Clement v. Burns, 43 N. H. 609;Rice v. Ruddiman, 10 Mich. 130;Hanford v. Railroad Co. (Minn.) 44 N. W. 1144;Morrill v. Water-Power Co., 2 N. W. 842, 26 Minn. 228;Middleton v. Pritchard, 3 Scam. 510;Morgan v. Reading, 3 Smedes & M. 366; The Magnolia v. Marshall, 39 Miss. 109;Fletcher v. Boom Co., 16 N. W. 645, 51 Mich. 277;Webber v. Boom Co. (Mich.) 30 N. W. 472;Wadsworth v. Smith, 11 Me. 278;Day v. Railroad Co. (Ohio Sup.) 7 N. E. 528;Jones v. Pettibone, 2 Wis. 309;Delaplaine v. Railway Co., 42 Wis. 224; Ex parte Jennings, 6 Cow. 518;Smith v. City of Rochester, 92 N. Y. 463; Fishing Co. v. Carter, 61 Pa. St. 21; Stuart v. Clark's Lessee, 2 Swan, 9;Home v. Richards, 4 Call, 441;State v. Narrows Island Club (N. C.) 5 S. E. 411.

DE WITT, J. (after stating the facts).

This case presents a proposition which is wholly new in this state, and one which, for a century past, has commanded the interest and learning of the ablest of the United States and state courts. The question is simply stated: If one's land be bounded by a navigable river, does his title extend ad filum medium aquae, or to the low-water mark, or to the high-water mark? The legal literature upon this subject in this country is rich in research, reasoning, and learning. In fact, the matter has been so extensively treated that at this late day, when a new state is called upon to fix the rule, there is nothing left to say upon the subject, either new or original; and the labors of a court are perhaps nothing more than to select from the three rules which have heretofore been adopted in different jurisdictions that which may be deemed to be the one which, under all the circumstances, should obtain in this state.

Under the common law, navigable water was that which ebbed and flowed with the tides of the ocean. Upon navigable water the abutting landowner had title to high-water mark. Upon nonnavigable streams the abutting landowner had title ad filum medium aquae. In some of the original 13 states, which lay along the seashore, and where streams navigable in fact were generally those in which the tide ebbed and flowed, the common-law rule was adopted. But when, early in this century, the great tide of immigration began to flow westward, and follow the mighty water courses of the continent, it soon became apparent that the common-law rule could not be applied to the great rivers, navigable in fact were generally those in which the tide ebbed and flowed, the common-law rule was adopted. But when, early in this century, the great tide of immigration began to flow westward, and follow the mighty water courses of the continent, it soon became apparent that the common-law rule could not be applied to the great rivers, navigable in fact, and one of which alone is in fact navigable above tide water for a distance which would several times girdle the ancient home of the common law. The common law was therefore modified, and the rule is now established by the overwhelming weight of American authority that a stream navigable in fact is navigable in law. For the history of the development, up to the year 1856, of this American rule, we refer to that profoundly learned treatise found in McManus v. Carmichael, 3 Iowa, 1, in which case the supreme court of Iowa, with the aid of able counsel, exhausted the whole subject. With the adoption of this rule, the doctrine that the riparian owner's title to the land bounded by a river nontidal, although navigable in fact, runs ad filum, was also generally repudiated. But at this point the courts of different states have followed different paths. One group of states holds that the abutting title goes to high-water mark,

and the other group holds that it extends to low-water mark. On this line the battle of decisions has waged since a period long prior to the time when the waters of our state were made the servants of commerce. Argument, history, reasoning, and politics have been called to the aid of the advocates of the two doctrines. See the interesting collection of cases in the briefs of counsel in this case. As we, among the last commonwealths of the Union, approach a solution of this question, it would be interesting-but, in view of what has been done by scores of able courts before us, it would probably not be instructive or important-to make an excursion through this field, where the footprints of our remote predecessors have long ago been beaten into plain paths by those who are even now, to us, ancient explorers. But, in selecting into which one of these paths we shall turn the course of jurisprudence of this state, it would, were it not for a matter which we will mention below, be appropriate that we briefly state our reasons why we deem one rule, rather than the other, to be justified or demanded by our history, circumstances, geography, and topography, and by the fact that the common law, so far as the same is applicable and of a general nature, is adopted and in force in this state until repealed by legislative authority.

We have concluded, after a review of the decisions of other states upon this subject, that upon reason and authority, and in view of all the circumstances of this state, we are fully justified in holding that the boundary of land bordering upon a navigable river should, whenever another intent is not expressed, by held to extend to the ordinary low-water mark. We refrain from an elaborate presentation of our grounds for this holding, for the reason suggested above, and also for the reason that the rule thus announced by decision will become in a few months the rule by statute. This state is just about to enter upon a fully developed code era. The legislative assembly has just adopted a Code of Civil Procedure, a Civil Code, a Penal Code, and a Political Code, prepared by commissioners during the labors of several years past. The law adopting the Civil Code was approved by the governor February 19, 1895. This Code is to take effect and become the law on July 1, 1895. This subject of land being bounded by a navigable river is settled for the future by the Civil Code. The code commission and the legislature had before them the legal literature and learning to which we have above referred, and, as a result, they have adopted the rule of the low-water mark. Section 772 of the Civil Code is as follows: "Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." This rule will be the law on the 1st day of July, 1895. We are also of opinion, as above stated, that it is the wisest and most expedient rule. We are thus, by the view which we take of the reason and authority for the rule of the low-water mark, enabled to leave the law, in this important matter, so that it will suffer no change by the adoption of the Civil Code. We therefore, for the reasons given, shall follow the decisions of those courts which hold that the title of one owning land bounded simply by a navigable river extends to the ordinary low-water mark.

Another matter, perhaps, should be noticed. Defendant claims in his argument that ejectment is not the proper remedy. He asserts that he has rights, as a navigator or a fisherman, upon the strip of land between the high-water and the low-water mark, and that, having such rights, he cannot be ejected from that strip of land. It is true that, while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question. But no such case as that is made in the pleadings. Defendant does not claim any right whatever to be upon this strip of land for the purposes of navigation or fishery. His defense is clearly

made upon the issue that plaintiff has no title whatever to the strip, and therefore he cannot recover possession of the same. Upon this issue we have to hold against the defendant. By the pleadings it appears that defendant had excluded plaintiff from the possession of the ground, and is in possession himself, generally, if it may be so expressed, and that he is not there claiming rights as a navigator or fisherman. The rights of navigation or of fishing are not at all involved in these pleadings. Therefore, the plaintiff owning this strip of land, subject only to the public use of navigation and fishing, which are not here concerned, and defendant having no claim or color or pretense of title or right of possession, it is difficult to see why ejectment would not lie. It was said in Rice v. Ruddiman, 10 Mich. 130, by Martin, C. J., in a concurring opinion, as follows: "I think the rights of riparian proprietors upon our interior lakes *** are the same as those of proprietors upon navigable streams. They have the right to construct buildings, wharves, and other improvements in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they attach, and pass with it. Certainly, no one can occupy for his individual purposes the water front of such riparian proprietor, and the attempt of any person to do so would be a trespass." See, also, Berry v. Snyder, 3 Bush, 266;Hanford v. Railroad Co., 43 Minn. 104, 42 N. W. 596, and 44 N. W. 1144; and Ball v. Slack, 2 Whart. 508. We are therefore of opinion that the demurrer to the answer was properly sustained, and the judgment for the plaintiff is accordingly affirmed. Affirmed.

HUNT, J., concurs.