

No. 13434

Supreme Court of Illinois

Seaman et al

vs.

Smith

10

SUPREME COURT,
Third Grand Division.

No. 211.

Learner
vs

Smith

1843

1860

1861

In the Supreme Court of the State of Illinois - Third Grand
Division - April Term A.D. 1861 -

John F. Seaman
Ann Seaman
Appellants

vs
Solomon A. Smith
Respondent

Arthur W. Windett, of counsel with Appellants, respectfully prays this Honourable Court, to grant a re-hearing of this cause -

With great deference, but with not less confidence, I submit to your Honours, that the Court has erred in the decision of this cause - In order to justify this assertion, I will state the facts and testimony in the case, upon which the question arises, as briefly as possible, but I ask leave to state them so fully and distinctly, that no difficulties may be felt in appreciating the force of the views I shall offer to your consideration.

Rec. p. 13.

The Parties, Appellant and Respondent, both claim the premises in question in this cause, as being part of a larger tract, granted in 1833 or 4 to James Harrington by the United States; and described in the patent as a fractional qr of Sec. 22 &c containing $106\frac{16}{100}$ acres of land, in fact lying upon the shore of Lake Michigan.

By deed dated Dec. 3. 1834. Harrington conveyed forty three $\frac{87}{100}$ acres, off the North part of that tract, bounding them by lines on the North and South sides - Starting from the West line of the original fractional qr. Sec. running to Lake Michigan - And on the East side, following the course of the lake -

Wright conveyed this land by deed dated July 28. 1840 to the State Bank of Illinois

" " 16

On the 28th of July 1843, the State Bank, conveyed a part of their $43\frac{87}{100}$ acres to Aug Garrett, describing it as follows: - viz: beginning at the S.W. Corner of that part sold by Harrington to Wright, running along the West line of the original tract, Northwards

then East to Lake Michigan, so as to include 33 acres of land, intended to be taken off the South end of said $43\frac{87}{100}$ acres.

Let it be borne in mind, that Garrett took, on the face of his deed, not a specific piece of land, with all of its limits ascertained, but a quantity to be ascertained. And the same was the case with Wright; with the difference, that Wright's quantity was to be ascertained from a specific tract of land, with fixed limits, while Garrett's land was only a quantity to be taken off from a quantity - involving in his case a double survey, and the chances of error greatly multiplied, in obtaining a result absolutely fixed and certain, and free from error, from two uncertain quantities.

14.
Nearly a year and a half after the grant to Garrett, the Bank, by deed, dated Dec. 20, 1845, conveyed to Laflin land therein described, as follows: viz: that portion of said frac. of Sec. commencing at the North West corner, at a stone, running thence East 21 chs. and 50 links to Lake Michigan; thence South, along the shore of said lake, 4 chs. and 30 links thence Westward &c. supposed to contain $9\frac{32}{100}$ acres.

The Appellant's claim under the deed to Garrett, made in 1843, and the Respondent claims under the deed of 1845, the property described in it, and the whole of the premises in dispute.

May it please your Honours, this last deed, that from the State Bank to Laflin, is in the nature of a residuary grant; it is not, ex vi legis, an effective conveyance of a definite corpus, or lot with fixed bounds of ~~determination~~ delimitation: because, when the deed to Garrett was made, if at that time, there only existed within the 43 acre tract, whether by reason of the encroachment of the Lake, or other causes, 33 acres of land, and no more, the whole passed by that deed to him, if more, that was lost a residuum, upon which alone, the Laflin deed when made, took effect, in fact and law. Nothing but the residuum, however much or little, whether three, five, or nine acres, or none at all, passed to Laflin.

In the month of May 1844, Bradley being then Clerk County Surveyor, made a survey of the land conveyed to Garrett in his official character, with a view to fix the location and limits of the thirty-three acres called for by Garrett's deed.

The South and West lines were the only ones definitely fixed by the deed itself; the Lake constituting the third line, and the North line being the limit which would result from setting off the 33 acres from the rest of the tract, to Garrett. And the present controversy arises thus. If in measuring and setting off 33 acres to Garrett, Bradley was bound to go to the water itself of the Lake, or to Low Water mark: the specific lots now claimed by Smith, belong to him. But if instead of going to low water mark, he was required by law to stop at high water mark, leaving out the Shore or beach of the Lake, lying between the high and low water marks, the Premises now in controversy, belong to the Seamanis: because, they are the precise difference between the Surveys respectively made upon these different principles - In other words, they are a space exactly equal in extent to that lying between the two lines of water - mark above spoken of -

It may be here remarked, that, it does not appear, in what way, or indeed whether, the tract conveyed by Harrington to Wright was known to contain $43\frac{87}{100}$ acres in 1834. The South, West and North lines bounding that tract began at fixed points. Whether those lines running from those points to the Lake, did contain $43\frac{87}{100}$ at that time, cannot now be certainly known. No actual contemporaneous survey or measurement is shown to have been made. When Bradley surveyed it in 1844, ten years afterwards, the tract then contained $42\frac{32}{100}$ acres, or one acre and more than a half less. But it may be inferred, that, if surveyed by Harrington in or before 1834, he measured by low water mark: since Bradley surveying to high water mark found its contents to be $42\frac{32}{100}$ acres, leaving about one acre and a half for the space covered by the Shore, lying between high and low water. But whether Harrington surveyed to high, or low water mark, or to neither, is a matter of no sort of consequence to us in this case. We are entitled to 33 acres of land taken off from the South end of the Wright tract: bounded upon, or by Lake Michigan, with the North boundary line adjusted and located by the law itself:

If high water-mark is the point at which Smith's land terminates, the judgment of the court below, should be reversed. If on the contrary, it terminated at Low water-mark it must be affirmed -

I.

First: The Respondent Smith, claiming under the deed of Dec. 20. 1845, was bounded by the line of high-water-mark, excluding the Shore, or the space lying between high and low water-mark.

+ course
The call of the deed is East, to Lake Michigan, thence South along the Shore of said Lake &c. This made it a limited, or restricted grant, with the Shore as the boundary, or in other words, with the line of high-water-mark as its boundary.

In Lehild vs Starr, 4 Hill 369-383, a mill-lot was bounded by a line running to the Genesee River, thence North along the Shore of said River &c. Held that the River and shore, were excluded by the call along the Shore &c.

" If the grantor after giving the line to the River, bound his land by the bank of the River, or describes the line as running along the bank of the River, or bounds it along the margin of the River, the grant is a restricted one; and it appears to me equally clear that the grant is restricted where it is bounded by the Shore of the River, as in the present case."

" The shore of tide water is that part of the land alternately covered and left bare, by the flux and reflux of the tide. A River without tides has no shores. It has riparian but not littoral."

" But when the boundary lines are described as running along the shore of a river, this fixes the termini of the North lines, and limited the grant to the Shore, instead of the thread of the stream - The term shores is only applicable technically to the Sea, Lakes or other large bodies of water, to consider the expressions along the stream, and along the Shore as meaning the same thing, would be to confound things and distinctions well settled, and uniformly recognized, by Walworth-Chancellor, and Bradish Pres. -"

In Storr vs Freeman 6 Maf. 435, the conveyance described the lines as running to a heap of stones at the shore of the tract, and thence by the Shore to the place of beginning. Parsons Ch. J. held. That a conveyance of land described as running to the shore, and thence along the Shore, did not include the shore, or the flats between high and low water mark.

In Hatch vs Dwight 17 Maf. 298, the Court held, that land bounded by the Bank of the Stream is necessarily excluded from the stream itself, - referring to and approving the former decision of the Court above cited.

And see particularly the cases of *Den B. Wright* 1. Pet. 66. Rep 64-69 - *Dunlop* and *Stetson* 4 Mason Rep 349.

In the present case, the grant of the State Bank to Laffin, by express terms contained in the deed, in the very words of description, is bounded by a line running to the Lake, and thence along the Shore of the Lake &c. The shore of the Sea is the space alternately covered, and left bare by the flowing and reflowing of the tides - See Lib. 261. A. note by Butler. And *Child vs Starr*, ubi supra - comprehending the whole space between high and low water mark.

In the case of *Lake Michigan A Sea* without tides. 12 How. 453. The difference between high and low water mark, although not caused by tides, yet shown to exist by irrefragable proof and covering a broad, and measurable space, equally distinct, in its natural features, as the Shore of the Ocean itself - wears the same character because it possesses the same qualities as the Sea-Shore - In the present case, it constitutes a space so broad, so well defined, and extensive, that it is equal to the land which Smith claims - The whole of that space is excluded from the land conveyed to Laffin; high water mark therefore is the point at which the Plaintiff's land terminates, and the judgment of the Court below, must be reversed, 24 Ws. 523. In this case the Premises in dispute are the difference between high and low water-mark -

II.

But under the general call for Lake Michigan as a common boundary of the whole tract originally conveyed to the State Bank, under which both parties claim, the Appellants are entitled to have this judgment reversed. And to hold the Land in question.

This leads at once to a discussion of the Rule of Law governing this case. The extent and mode of its application. And of the facts established by the witnesses touching the character and nature of Lake Michigan, and its shores, which constitute the object to which that rule is to be applied.

It has already been seen, that the Shore in front of the tract is a space equal to the premises in controversy - The whole of that space, forming the

Shore, is shown by the testimony, to be subject to the periodical overflow of the waters of the Lake, occurring independently of the winds, storms, or weather.

I beg to ask the especial attention of your Honours, to the evidence in detail, bearing upon this general subject.

" " 17.

William A. Brown, the first, says. "I am acquainted with the rise and fall of the water of Lake Michigan, I don't know that the water ever receded beyond the point where it was that day. I have known it to be higher - but that was the usual stage." This proves conclusively that the water was then at the lowest point of water-mark. He knew of its being higher - and that a storm, as he says, would have made it considerably higher. Of course who could doubt that it would. This also shows that the usual, ordinary, actual, water-mark of the Lake is at low water-mark. So that if we are to take the Lake where it is in fact usually to be found, at ordinary times, we shall have to go to low water mark in the teeth of the rule established by the Court in this very case. He repeats - "the water was this day at the uniform line, according to my observation"

Upon cross examination, he says.

"The water rises from one to two feet here when there is no wind - One year it was quite frequent - Not very frequent as a general thing - but it was so one year - more often in Summer than in Winter - It is not uncommon in Summer to see the mutations of the Lake - A rise of a foot would cover 30 feet on that day - the beach had a very gentle inclination"

James H. Rees another of their witnesses, who made a survey in compliance with Mr. Brown's directions - says that a line of 26 chains, carried them to within a few links - i.e. five or six feet of the actual edge of the water on a still day, without wind - And this is what he calls the uniform water-line - The point where the water then was is the uniform line

" " 19.

A South West Wind would throw the water still further East. The rise of a foot, would not make a difference of more than 5 or 6 feet - We stopped where it was about one foot higher than the edge of the water -

Brown's testimony shows these two statements cannot be true - a rise of a foot would cover 30 feet instead of five or six - A proof that Rees, surveyed to a point, not more in actual elevation than two or three inches above the actual water's edge - at what is clearly proved to have been low water-mark - This, if not sailing pretty near the edge of the wind, was going on land pretty near the edge of the water, and that too, at low water-mark.

He adds "a strong Northerly wind blowing two or three days, raises the water a foot and a half to two feet - it would carry the water from sixty to one hundred feet upon the Shore - An ordinary North West Wind would roll up the waves from 30 to 50 feet - Now then, it is indisputable, that the shore was so low, so very gentle, that a rise of one foot and a half in the water would cover sixty feet of the Shore - a rise of two feet would cover a hundred feet of this Shore lying in front of this tract of land.

Mr Rees says, that a strong blow from the North would effect this rise of the Lake - So it would - but the other testimony shows, that a rise sufficient according to Mr Rees to cover at least sixty feet, or twice the quantity of land in dispute, actually takes place without a strong North blow at all, and in still weather - and by other causes, than the winds, or storms, or weather -

Mr Rees himself says, that in a still day, the water would rise, he can't say how much, that he had observed it - This beyond doubt is the periodical rise of the Lake, which takes place constantly irrespective of storms - which Mr Brown - and Brown and Bradley speak of - Eighteen inches is the ordinary change covered by this rise and fall. Mr Brown says, covering at least sixty feet of the shore - according to Mr Rees measurement -

Mr Brown was the next witness, who had lived in Chicago for 25 years - 13 upon the Lake Shore - He says - "I have observed the action of the Lake upon the Shore particularly - sometimes the Lake would remain about stationary, in mild weather for days - sometimes it would vary three feet in a day. 18 inches would be the ordinary change. Sometimes the Lake would come on the Shore 3, 4 or 5 rods on the South side, depending upon the angle of the Shore. South -

Westerly winds would lower the water, and make a difference in the shore of fifteen rods. Northeasterly winds would sometimes bring in the water a long distance: in one instance it came above Washington St. from the rise of the water. It raised 4 or 5 feet at that time above ordinary water mark. The lake shore south of the Fort was washing away for years, until the erection of the Rail. Road Breakwater. The action of the water was such that the Shore would sometimes increase, and sometimes diminish. A high wind would take the Shore away, after the wind went down it would form again. A South and South East wind would make the Beach accumulate, a North East wind would make it diminish. There was quite a beach in 1842, 1843, and 1844. I think it was from one to three rods wide between high and low water mark. The effect for a series of years, was for the lake to encroach on the Shore.

Bradley, for eleven years, County Surveyor, testified, "The length of the South line to high water mark was twenty five chains. I took for high water mark the line of drift wood left by the Lake. Began observations upon the Lake in 1836; my Office was then on the Lake Shore. The rise and fall of the Lake when there was no wind, first attracted my attention. The difference between high and low water mark at this place, on the South line, would have been ten rods, and on the North, five rods; this would be the extreme of high, and low water", (from 150 to 225 feet)

By the Survey of 1844, the difference in the lines, is the property now in dispute, about thirty three feet in width. The wind was blowing when I made the last survey from the South West, therefore the Shore was bare.

In 1844, I ran to the drift wood. I stopped at it. it was a line made of brush, chips and wood thrown from the vessels. The first survey (in 1844) the line was run within a chain of the water's edge - on both lines - The shore outside of a line between the two points, was a beach, sometimes covered with water and sometimes not. When the wind blew from the North, it would cover all the shore to my line - when from the South there would be about a chain bare beyond my line.

The natural action of the Lake would cause variation of about a chain in width - a part of the bank was bold, a part of it was Sand Hills, covered with pines and willows. The Bank was eight feet high - one half of it bold. The East end of the North line is in front of the bold bank. There was some drift wood there - the Lake never reached the bank on ordinary occasions. The bold bank was west of the my line. The bank was a little over a chain from the water in its ordinary stage. Pines and cedars grew on the Sand Hills. None of them grew outside of our line. We went beyond all vegetation. Surmising by a deed calling for Lake Michigan as a boundary, without any direction from parties I should have run to high water mark

" " 28.

" " 11.

Brown in his deposition says "I contended that he should run to the border" i.e. margin of the Lake.

This is in substance the whole of the testimony, and from it there appears to be several different stages of the waters of Lake Michigan -

1st

The first is the lowest stage of all - which is reached when Westerly, or South-Westerly winds after blowing for some days, have driven the waters from the West shore.

2nd

The second stage is the general condition of the Lake, its ordinary low-water mark, where it is ordinary, i.e. for the greater part of the time, to be found standing in the absence of causes to make it higher. This is the stage described by Brown as existing the day he accompanied Bradley. And also by Reese as existing when he made his survey. Brown says, "It was a quiet still day, and the water was where it usually is, when undisturbed by any extraordinary cause. I don't know that the water ever receded beyond the point where it was that day."

" " 4.

L. H. Rice says, I mean by the uniform water line, the point of the water on a calm day, the day we surveyed was a still day, not windy.

" " 5.

The testimony of both these witnesses shows, clearly, that the point at which the Lake stood at the times mentioned, calm days, without wind, was the ordinary or uniform water mark or line of the water in the absence of

disturbing causes - They both describe higher stages of the water. They both speak of the natural rise and fall of the Lake irrespective of winds and storms; and of the high water which then exists - as well as that still higher stage, caused by storms and strong winds from the North. But this stage which they describe as the ordinary or uniform stage of the Lake, is necessarily ordinary, and uniform low-water, and not high water. The waters of the Lake cannot and do not in fact, in still weather ^{or diffidely and uniformly} i.e. during the greatest part of the time, stand at high water mark. The laws of Nature, the Law of Gravitation of matter, forbid it. The very nature of the element forces is to seek, and to stand, at, the lowest point it can reach. The mass or body of the waters in Lake Michigan must of necessity stand at the lowest point, or line - It is an exception, and a change from the habitual or ordinary condition of things, that the water is found standing at a line higher than that of low-water.

III.

The third stage is reached by the Lake periodically, at intervals of time more or less certain, with somewhat of irregularity, through the oscillation of the waters of the Lake, not visibly or perceptibly caused or occasioned by the Winds or Storms, but by terrestrial forces acting upon so large a body of water as the Lake: more or less modified, it may be, by the presence of winds or storms. This is the change in the Lake spoken of by all the witnesses - as taking place without any visible or perceptible cause. And may be considered as being to the Lake, what the tides are to the high Sea.

" " 4.

Brown says - "The water rises from one to two feet here, when there is no wind - It occurs a good many times in the course of a year, but more often in Summer, than in Winter -

" " 5.

James H. Rus. says. There is a rise and fall in the water of the Lake. I have noticed that in a still day the water would rise, I can't say how much,

" " 6.

Brown said "Sometimes the Lake would remain stationary in mild weather for days, sometimes it would vary. three feet in a day. 18 inches

was the ordinary change

" " 8. Bradley says. The rise and fall of the Lake when there was no wind, first attracted my attention. The Natural action of the Lake would cause a variation of about a chain in width

The existence of this last as a stage of high-water, periodically recurring, although with more or less irregularity, and at all seasons of the year indifferently, is as plainly proved as any other fact in the cause - that it is not to be confounded with high-water caused by storms, or certain winds, is also as clearly made out. What causes it may be owing to, may be matter of speculation, to the Natural Philosopher. Whether it is a tide caused by the Sun or Moon, or both; or caused by the revolution of the Earth upon its axis, owing very much or partially to the Configuration of the Lake, the volume and depth of its waters, can make no difference as to the main fact, with which simply have we any concern.

IV.

The fourth stage, and the highest limit of standing water, is reached when storms, and prolonged winds blowing from the North and East, have driven the waters of the Lake upon its West Coast, beyond the line reached by the Dead Flood, or flow of the Lake last spoken of: and sometimes reaching a height of four or five feet above ordinary low water mark. See evidence of Brown, p. 6. of Abstract - and covering the shore to a very great distance, 4 to 5 rods, per Brown; 6 to 7 rods Res says. Abstract pp. 5. 6. and on the south line of this track where the bank was low, ten rods - Bradley - p. 8. on the north line in front of the high bank 5 rods. ibid - Brown says, that the difference caused by a par-

tinular wind would sometimes be as
much as 15 rods - on this shore, p. 6.
This last stage I conceive to be the
highest known stage of standing water.

Then different stages or lines
of water-mark, are all and each
well known, and clearly disting-
uished by all persons having a
personal knowledge of the subject.
It is believed that they are
characteristic of all great
bodies of water upon the Earth,
which are not current waters,
as rivers; nor tide waters as the
main ocean; but which are in
flood, as the great lakes all
are; not dead but active waters,
perpetually moving under forces,
impulses - ~~causes~~ ^{causes} peculiar
to themselves. These facts are
verified by common and scientific
observation -

Now the question is simply, Which
of these different stages of the lakes,
or lines of water-mark, constitutes
the true Boundary line of the Lake,
or as the question is stated by the
Committee in their opinion, What
Answer, the Call for Lake Michigan

as a Boundary Line in the various deeds which are the subject of evidence in this case?

And this may be considered as merely a question of law, arising upon a construction of the original Patent as to the extent of the grant made of it as affecting the Lake Shore; for if the United States only granted to the High Water Mark, excluding the whole space and extent of the Shore, the subsequent conveyances of the State Bank could not properly convey what was in the Dominion and Property of the Sovereign - first of the United States, next of the State of Illinois.

What then constitutes Lake Michigan? What are its shores? The Supreme Court of the United States decided in the case of *The Genessee Chief*, 12 Howard Rep. 453 - that our Great Lakes are Inland Seas - and consequently like the Sea, the Lake must be considered as constituted of & comprising as constituent parts of itself, water, the bed

or bottom on which the water rests or stands, and shores, and banks, or coasts which encompass its waters -

Mr. Justice Story defines shores, as the space between the margin of the water in a low stage and the banks which contain it in its greatest flow - distinguishing shores from banks -

Thomas v Hatch 3 Sumner 178
Chief Justice Parsons considers the term shores as synonymous with flats, i.e., the low lands dry at low water, and submerged at high water

Story v Freeman, 6 Mass. 438, 9
This opinion & definition were adhered to and confirmed by this same Court in Hatch v Dwight 17 Mass. 289, 98 -
The shore is the land between high & low water mark

Co. Lit. 261 a Butler's note
205 - Hale de jure maris c. 4. 5
~~The~~ shores of navigable waters,
& the soil under them, belong
to the State as a sovereign power
3 Kent 315 To the King - Pollard v Hogan
3 Howard 212

21-

M. W. Fisher Esq
Att and -
Illinois.

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Pollard & Hogan, 3 How. 212 decided
that mudflats lying in front
of the city of Mobile, ~~are~~^{bare} at
ordinary stages of water, and
only covered by the high tides,
reaching to the water, are part
of such waters, p. 235

By the Code of Louisiana the
sea shore is declared to be that
space of land over which the
sea spreads at the highest water
in the winter season - Code 442
See Justinian's Institutes Book II
Tit. 1 § 3 -

Est autem litus ^{maris} quatenus hibernicus
fluctus maximus excurrit - carrying
the sea to the line reached by the
highest tide -

The banks of a river contain
the water in its natural channel
when there is the greatest flow of
water -

(Livingston & Morgan) 6 Mart. 1119
Bouvier Law Dict. Banks of rivers
Ripa recte definitur id quod
flumen continet naturale
vigorem cursus sui tenens

Dig. Lib. 43 Lit. 12 85

Chief Justice Marshall says the
shores of a river border on the
water's edge - Super. of Hadley
v. Anthony, 5 Wheat. 374, 385

Adopting the argument of another
"If the shore borders on the edge
"of the water, it must extend
"upward to the bank, and
"therefore cannot be the bank -
"which at low water is separated
"from the water -

"A river then consists of water,
"a bed, and banks; these several
"parts constitute the river -
"The whole river - It is a compound
"idea - it cannot exist without
"all its parts - Evaporate the
"water, and you have a dry
"bottom - Remove the bank
"you have a boundless flood -
"He who owns the river, owns
"the water, the bed & the banks -
"Since these are the elements which
"constitute the river - 13 How. 392

By parity of reasoning, the
water, bed or bottom of Lake
Michigan, its shores, and banks

are the elements which constitute the physical object, the Lake - the States bordering upon this and the other great lakes in their public & sovereign capacity, or on their bed & shores.

'Under the decision of the Supreme Court in Pollard vs Hogan 3 How. 212, 230 the water, bed and low shores of Lake Michigan, subject to the overflow of the Lake at high water & upon the admission of Illinois into the Union, were vested in the State of Illinois Martin vs Middle 16 Pet. 406-8 Arnold v Mundy 1 Halsted 1

Consequently the Patent Grant by the United States to Harington did not convey the shore, a space between the high and low water of the Lake - And the shore has never been the subject of private property, or ownership -

I will here submit extracts from the opinion of the Supreme Court of the U. States - 13 How. 415
Howard v Ingersoll

The Court say "When banks of rivers were spoken of those boundaries were meant which contain the river at its highest flow and in that condition, they make part of what is called the bed of the river" Rivers have banks, shores, water, and a bed. "along the bank" being a part of the call, governs and controls the rest. On page 417 the Court say "It excludes the supposition that a line was to be traced at the edge of the water at low water, or at lowest low water - Water is not a call in the description of the boundary, though the river is, and that does not mean water alone, but banks, shores, water and the bed of the river - Water is but one of the parts of the river - The call is for the bank, the fast land which confines the water of the river in its channel or bed - in its whole width - The bank or the slope from the bluff or perpendicular of the bank may not be reached by the water for

~~no third~~ two thirds of the year
 still the water line impressed
 upon the bank above the slope
 is the line required by the
 Commissioners, and the shore
 of the river, though left dry for
 any time, but occasionally
 covered by water in any stage
 of it to the bank, was retained
 by Georgia as the river up to that
 line. Where in may be found
 it is a part of the State of Georgia
 Both bank and bed are to be
 ascertained by inspection, & the
 line is where the action of
 the water has permanently
marked itself upon the soil
 The bed of the river extends
 not only to where from the
 perennial flow of the water
 there is no margin, but also
 to where there is ^(i.e.) a margin
 The line can not be traced by either
 ordinary low water, or low water,
 Those terms only apply to parts of
 rivers within the ebb & flow of tides -
 to distinguish the water line at
 spring or neap tides - Such a

1 Difference occurs regularly twice
 1 every month - and is therefore
 1 called ordinary - Low water
 1 is the furthest receding point
 1 of ebb tide

Page 418. "The permanent fast
 land is the line x x x the bed of
 the river commences from the
 lower edge of that bank, i.e. on
 the west side." And where the bank
 is fairly marked by the water
 that water level will show at
 all places where the line is

Separate opinion of Nelson, J. 421
 "Exports of land, bounded by the
 sea, or by navigable rivers, where
 the tide ebb & flows, extend to high
 water mark, that is, to the
 margin of the periodical
 flow of the tide unaffected
 by extraordinary causes, & the
 shores below common high water
 mark belong to the State in which
 they are situate" - ^{xxx map 422} "On behalf of
 Georgia it is contended, the
 line shall be drawn on the
 bank or bluff, as described in
 the record, at high water mark;

"On behalf of Alabama, out the
 "bank or ridge of sand or gravel
 "where the western margin of
 "the river is found at ordinary
 "low water mark -

Page 423 "The bank inclosing
 "the perennial flow of the water -
 "when at its ordinary and usual
 "stage is equally within the description
 "and the limits within this bank,
 "on each side, is more emphatically
 "the bed of the river, than that
 "embraced within the more elevated
 "banks where the river is at flood."
 "xxx" The term high water when
 "applied to the sea, or to a river
 "where the tide ebbs & flows, has
 "a definite meaning. The line
 "is marked by the periodical flow
 "of the tide, excluding the advance
 "of waters above this line in the
 "one case by winds & storms, & in
 "the other by freshets or floods"

Curtis, J. on page 427

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

24

usually covered by water as to be distinguished 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 & the banks - And is where the presence & 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 ~~of~~ ^{to} vegetation as well as in respect to the nature of the soil itself."

In the light of these authorities the shore must be considered as a part of the bed or bottom of the lake - It is continually throughout its whole extent subjected to the action of its waters -

A permanent & distinct character is impressed upon it as a physical object - Vegetation is destroyed by it - Bradley says that his line was, ~~drawn~~ far beyond all vegetation - Justice Curtis says "The line dividing the bed from the bank" (speaking of a river) which line is in this case, the shore, "is where the presence and action of water are so common & so usual as to work upon the soil of the bed, a character distinct from the bank, in respect of vegetation as well as the nature of the soil" - The Court at page 418, 13 How. Say "The banks of rivers contain their waters at their highest flow. In that condition, they make what is called the bed of the river." The whole shore in front of this land, the space subject to the constant perennial ^{over}flow of the waters of the lake, at all times and in all seasons of the year; subject to the double overflow

of the Lake, namely, the periodical
 rise of the Lake taking place
 without regard to winds, taking place ~~caused~~
~~perpetually~~ and ~~caused~~
 by forces & movements peculiar
 to the Lake, analogous to the tides;
 and the irregular high water
 caused by storms, winds, ~~and~~
 local floods; - is therefore
 to be regarded as a part of the
 bed or bottom of the Lake and
 formed no part of the land
 granted by the United States to
 Harrington or to Savett by the
 State Bank -

I cannot but think, the
 Court came to the conclusion
 they did in this case, through
 compounding the terms used by the
 witnesses in speaking of the
 uniform or ordinary line of
 water-mark at which the
 Lake usually, and ordinarily
 stands in still weather, with
 the term "ordinary" as employed
 in speaking of the ocean tides,
 or the ordinary high water
 mark which bounds private
 property on the sea shore -

The Civil law also, also

the Louisiana Code is above
 quoted, define high water
 mark as that which is reached
 by the highest winter tides -
 Such is the rule of the Common
 Law. There are two kinds
 of tides - The neap tides occurring
 every day & the spring tides
 occurring but twice a month -
 much more violent and
 reaching a much higher
 line of water - mark than those
 the former - The point reached
 by the high spring tide, determines
 the line of water mark in
 boundaries upon the sea
 shore - and not the line of
 the low or neap tides. And
 it is a mistake to suppose,
 that the term "ordinary high
 water mark, or the line
 reached by ordinary tides,
 means, or is, the line of
neap tide water mark, or a
 supposed average distance between
 this low tide water mark - In the
 language of the Supreme Court
 of the United States, 13 How. 467
 "These terms, i. e. ordinary high

low water, are used to distinguish the water line at Spring or neap tides - Such a difference is uniform twice within every month of the year and because it is so is called ordinary - The full Spring tides are as much ordinary as the low neap tides - as regular - as sure to take place - but they are not so frequent - they are equally ordinary because they are caused by forces of nature acting permanently in its established order - In this sense they are ordinary and in no other - In this sense the low tides are ordinary but in no other - Thus the high water mark of the ocean is the limit of the high Spring tides - Thus the high Spring tides are themselves ordinary tides -

In answer then to the question what answer to the call for Lake Michigan as a boundary line, I say, the lake in its unity integrity - as a great physical object on the earth's surface -

comprehending its waters, its shores,
and bed - that the lake extends
to the limit of its shores - to the
bank holding in its waters
in their highest periodical
flow - that the land begins
where the lake terminates -

And I submit to the Court
that the facts of this case, &
the authorities, cited, establish
the proposition, that the tract
of land in question terminated
at high water mark of Lake
Michigan; and that therefore
the judgment of the Court
below should be reversed;
the appellants declared to be
the sole lawful owners of the
premises in controversy.

Respectfully submitted by

Arthur W. Mindett
of Counsel with Appellants

April 1861

211
Supreme Court.

J. F. Leaman
vs

S. F. Smith

Petition for a
warrant

Filed April 23

Filed April 23^d 1861
L. Leland
Clerk

In Supreme Court of Illinois
John F. Leamon }
vs Sol. } Pet. for a
Sol. F. Smith } rehearing

State of Illinois
~~State~~ La Salle County JS

Personally comes Melville W. Fuller being only known on oath declares says that he is one of the Counsel for the Appellants & Petitioners in the above entitled Cause - That H. W. Mindett is the Counsel by whom the petition was prepared - That on the 23rd of April instant this affiant received the petition from Mr. Mindett & a copy of ^{of said application} notice, & Mr. Mindett's Certificate of the service thereof on Sol. F. Smith, the Appellee - and this affiant filed said papers on said 23rd day of April instant - This affiant further says that the papers are not on the files & can not be found by the Clerk as he informs this affiant that this affiant has not taken or seen said petition, ^{& notice} since filing & being the same with the Clerk on said 23rd day of April - ^{& knows not where they are} This affiant on discovering the absence of the papers telegraphed Mr. Mindett & received today his draft

of the petition ~~which~~ with a
 part of a copy thereof which
 this affiant has completed from
 said drafts & believes to be
 a correct copy of the original
 petition

Subscribed & sworn before
 me this 25th day of April A.D. 1861

M. W. Fuller
 L. Deland
 J. B. Rice Deputy

State of Illinois
 La Salle Co. 881

Personally comes
 J. B. Rice being duly sworn states on
 oath that Mr. Fuller filed the
 petition on the 23rd inst. in
 the above entitled cause as stated in
 his affidavit nor appears by the
 Clerk's docket - that said petition
 was mislaid & this affiant believes
 has accidentally been taken by some
 attorney as it was lying on this affiant's
 table just prior to being placed in its
 wrapper - that this affiant has made
 diligent search & can now find
 said original petition & does not
 know where the same now is -

Subscribed & sworn to before
 me this 26th day of April A.D. 1861

J. B. Rice
 L. Deland Clerk

211

Seaman
 or
 Smith

Filed April 25th 1861
 L. Deland
 Clerk

In the Supreme Court of the State of Illinois
Third Grand Division
April Term A.D. 1861.

John F. Seaman &
Anna Seaman
Appellants

Solomon A. Smith
Respondent.

Arthur W. Windett of counsel with Appellants, respectfully
prays this Honorable Court to grant a re-hearing of this cause.

With great deference, but with not less confidence, I
submit to your Honours, that the Court has erred in the decision of this
cause. In order to justify this assertion, I will state the facts & testimony in the
case, upon which the question arises, as briefly as possible, but I ask leave to
state them so fully & distinctly, that no difficulty may be felt in appreciating
the force of the views, which I shall offer to your consideration.

Rec. p. 13.

The Parties Appellant and Respondent, both claim the
premises in question in this cause, as being part of a larger tract, granted in
1833 or 4 to James Harrington by the United States; and described in the
Patent as a free. of Sec. 22 ⁴⁰. containing $106\frac{16}{100}$ Acres of land, in fact lying upon
the shore of Lake Michigan.

By deed dated Dec. 3. 1834. Harrington conveyed forty three
 $\frac{87}{100}$ Acres off the North part of that tract, bounding them by lines on the North and
South sides, starting from the West line of the Original Fractional D^r. Sec. running
to Lake Michigan - and on the East side following the course of the Lake

. 14.

Wright conveyed this land by deed dated July 20. 1840

to the State

to the State Bank of Illinois.

" " 16-

On the 28th of July 1843. The State Bank, conveyed a part of their $43\frac{87}{100}$ acres to Aug. Garrett, describing it as follows: viz: beginning at the S.W. corner of that part sold by Harrington to Wright, running along the West line of the original tract, northwards to Lake Michigan so as to include 33 acres of land intended to be taken off the South end of said $43\frac{87}{100}$ acres.

Let it be borne in mind, that Garrett took on the face of his deed, not a specific piece of land, with all of its limits ascertained, but a quantity to be ascertained. And the same was the case with Wright: with the difference that Wright's quantity was to be ascertained from a specific tract of land with fixed limits, while Garrett's land was only a quantity to be taken off from a quantity, involving in his case a double survey, and the chances of error greatly multiplied, in obtaining a result absolutely fixed and certain, and free from error, from two uncertain quantities.

" " 14-

Nearly a year and a half after the grant to Garrett, the Bank, by deed, dated Dec. 28. 1845, conveyed to Sadler land therein described as follows: viz: that portion of said frac. gr. sec. commencing at the North West corner, at a stone, running thence East 21. chs. and 50 links to Lake Michigan, thence South, along the Shore of said Lake 4 chains and 30 links, thence Westward or supposed to contain $9\frac{32}{100}$ acres.

The Appellants claim under the deed to Garrett, made in 1843: And the Respondent claims under the deed of 1845, the property described in it, and the whole of the premises in dispute.

May it please your Honours this last deed, that from

the State Bank to Laflin, is in the nature of a residuary grant: it is not ex vi legis. An effective consequence of a definite corpus, or lot with fixed bounds of delimitation: because, when the deed to Garrett was made, if at that time, there only existed within the 43 acre tract, whether by reason of the encroachment of the Lake, or other causes, 33 acres of land, and no more. The whole passed by that deed to him, if more, that was but a residuum, upon which alone the Laflin deed when made, took effect, in fact and law. Nothing but the residuum however much or little, whether three, five, or nine acres, or none at all, passed to Laflin.

In the month of May 1844, Bradley being then Cook County Surveyor, made a survey of the land conveyed to Garrett, in his official character, with a view to fix the location and limits of the thirty three acres called for by Garrett's deed. The South and West lines were the only ones definitely fixed by the deed itself. The Lake constituting the third line, and the North line being the limit which would result from setting off the 33 acres from the rest of the tract to Garrett. And the present controversy arises thus: If in measuring, and setting off 33 acres to Garrett, Bradley was bound to go to the water itself, of the Lake, or to low water mark: the specific lots now claimed by Smith, belong to him: But if, instead of going to low water mark he was required by law to stop at high water mark, leaving out the shore or beach of the Lake, lying between the high and low water marks, the Premises now in controversy, belong to the Seamans: because, they are the precise difference between the surveys respectively made upon these different principles, in other words, they are a space exactly equal in extent, to that lying between the two lines of water mark above spoken of.

It may be here remarked that it does not appear, in what way, or indeed whether, the tract conveyed by Harrington to Wright was known to

contain $43\frac{87}{100}$ acres in 1834.

The South West and North lines bounding that tract began at fixed points. whether those lines running from those points to the Lake, did contain $43\frac{87}{100}$ at that time, cannot now be certainly known. No actual contemporaneous survey or measurement is shown to have been made. When Bradley surveyed it in 1844, ten years afterwards, the tract then contained $42\frac{32}{100}$ acres, or one acre and more than a half less - but it may be inferred, that, if surveyed by Harrington in or before 1834, he measured by low water mark: since Bradley surveying to high-water mark found its contents to be $42\frac{32}{100}$ acres, leaving about one acre and a half for the space covered by the shore, lying between high and low water - But whether

Harrington surveyed to high, or low water mark, or to neither is a matter of no sort of consequence to us in this case. We are entitled to 33 acres of land taken off from the South end of the Wright tract, bounded upon, or by Lake Michigan with our North boundary line adjusted and located by the Law itself.

If high water mark is the point at which Smith's land terminates, the judgment of the Court below, should be reversed. If on the contrary, it terminated at low water mark it must be affirmed -

II.

First:- The Respondent Smith claiming under the deed of Dec. 20. 1845. was bounded by the line of High Water mark excluding the shore - or the space lying between high and low water-mark.

The call of the deed is East to Lake Michigan, thence South along the Shore of said Lake &c. This makes it a limited or restricted grant, with the Shore as the boundary, or in other words with the line of high water mark as its boundary.

In Lehild vs Storrs 4 Hill 369 - 383. a Mill-lot was bounded by a line running to the Gunnesee River, thence North along

the Shore of said River &c. Held that the River and Shore were excluded by the call along the shore &c

"If the grantor after giving the line to the River, bounds his lands by the bank of the River, or describes the line as running along the Bank of the River, or bounds it along the margin of the River, the grant is restricted one; and it appears to me equally clear, that the grant is restricted where it is bounded by the Shore of the River as in the present case"

"The Shore of tide water is that part of the land alternately covered and left bare, by the flux and reflux of the tide: a river without tides has no shores. It has ripam but not litus."

"But when the boundary lines are described as running along the shore of a River, this fixes the termini of the north line, and limited the grant to the Shore, instead of the thread of the Stream - The term Shore is only applicable technically to the Sea, lakes or other large bodies of water. To consider the expressions along the Stream, and along the Shore, as meaning the same thing, would be to confound things and distinctions well settled, and uniformly recognized by Walsworth Chancellor and Bradish Priest."

In Stor vs Freeman 6 Mass. 435. The conveyance described the lines as running to a heap of stones at the shore of the track, and thence by the Shore to the place of beginning. Parsons Ch. J. held, that a conveyance of land described as running to the Shore, and thence along the shore, did not include the Shore, or the flats between high and low water mark.

In Hutch vs Dwight 17th Mass. 278. The Court held that land bounded by the bank of the Stream, is necessarily excluded from the Stream itself, referring to and approving the former decision of the Court above cited. And see particularly, the cases of Dem vs Wright

1 Pet. 64. 69. Almlap vs Etison 4 Mason Rep. 349.

In the present case the grant by the State Bank to Daffin, by approp terms, contained in the deed, in the very words of description, is bounded by a line running to the Lake, and thence along the Shore of the Lake &c. The Shore of the Sea is the Space alternately covered and left bare by the flowing and reflowing of the tides - Co. Lit. 261. Note by Butler, and Leild vs Stor. ubi supra - Comprehending the whole space between high and low water mark. In the case of Lake Michigan, a Sea, without tides - 12 How. 453. the difference between high and low water mark, although not caused by tides - yet shown to exist by irrefragable proof, and covering a broad, and measurable space equally distinct in its natural features as the shore of the Ocean itself. wears the same character, because it possesses the same qualities as the sea-shore. In the present case, it constitutes a space so broad, so well defined, and extensive, that it is equal to the land which Smith claims. The whole of that space is excluded from the land conveyed to Daffin - high water-mark therefore is the point at which the plaintiff's land terminates, and the judgment of the Court below, must be reversed. 24 Ill. 523. In this case, the Premises in dispute are the difference between high and low water-mark.

II.

But under the general call for Lake Michigan as a common boundary of the whole tract, originally conveyed to the State Bank, under which both parties claim, the Appellants are entitled to have this judgment reversed, and to hold the land in question.

This leads at once to the Rule of Law governing this case, the extent and mode of its application, and of the facts established by the witnesses touching the Character and nature of Lake Michigan, and its shores, which constitute the object to which that rule is to be applied.

It has already been seen, that the Shore in front of the tract is a space equal to the premises in controversy - the whole of that space, forming the Shore, is shown by the testimony, to be subject to the periodical overflow of the Waters of the Lake, occurring independently of the Winds, Storms, or weather -

I beg to ask the especial attention of your Honours, to the evidence in detail, bearing upon this general subject -

" - " 17

William H. Brown, the first, says, "I am acquainted with the rise and fall of the waters of Lake Michigan. I don't know that the water ever reached beyond the point where it was that day, I have known it to be higher - but that was the usual stage". This proves conclusively, that the water was then at the lowest point of water mark. He knew of its being higher - and that a Storm as he says, would have made it considerably higher - of course who can doubt that it would -

This also shows that the usual, ordinary, actual water mark of the Lake is at low water mark - So that if we are to take the Lake where it is in fact usually to be found, at ordinary times, we shall have to go to the low water mark, in the teeth of the rule established by the Court in this very case. He repeats "The water was this day at the uniform line according to my observation"

Upon cross examination he says.

" - " 18.

"The water rises from one to two feet here when there is no wind - One year it was quite frequent - Not very frequent as a general thing - but it was so one year - More often in summer than in winter - It is not uncommon in summer to see the mutations in the Lake. A rise of a foot would cover 30 feet on that day - The beach has a very gentle inclination"

James H. Rees another of their Witnesses, who made a survey in compliance with Mr Brown's directions - says that a line of 26 chains carried them to within a few links - i.e. five or six feet of the actual

edge of the water on a still day - without wind - And this is what he calls the uniform water line - The point where the water then was, is the uniform line - A South West wind would throw the water still further East - The rise of a foot would not make a difference of more than 5 or 6 feet - we stopped where it was about one foot higher than the edge of the water -

Brown's testimony shows these two statements cannot be true - a rise of a foot would cover 30 feet instead of five or six - A proof that Res. surveyed to a point not more in actual elevation than two or three inches above the actual water's edge - at what is clearly proved to have been low water mark - This, if not sailing pretty near the edge of the wind, was going on land pretty near the edge of the water - and that too - at low water mark -

He adds a strong Northerly wind blowing two or three days, raises the water a foot and a half to two feet: it would carry the water from sixty to One Hundred feet upon the Shore - an ordinary North East Wind would roll up the waves from 30 to 50 feet.

Now then it is indisputable, that the shore was so low, so very gentle, that a rise of one foot and a half in the water would cover sixty feet of the Shore - a rise of two feet would cover a hundred feet of this shore lying in front of this tract of land - Mr. Res says that a strong blow from the North would effect this rise of the lake - So it would - but the other testimony shows, that a rise sufficient according to Mr. Res to cover at least sixty feet, or twice the quantity of land in dispute, actually takes place without a strong North blow at all - and in still weather; and by other causes than the winds or storms, or weather.

Mr. Res himself says, that in a still day, the water would rise, he can't say how much: that he had observed it - This beyond doubt is the periodical rise of the lake, which takes

" " 10

place constantly, irrespective of storms. which Mr Brown and Brown and Bradley speak of - Eighteen inches is the ordinary change caused by this rise and fall - Mr Brown says. Covering at least sixty feet of the Shore according to Mr Kes' measurement. Mr Brown was the next witness who had lived in Chicago of twenty five years: thirteen upon the Lake Shore - He says, "I have observed the action of the Lake upon the Shore particularly - sometimes the Lake would remain about stationary in mild weather for days - sometimes it would vary three feet in a day - 18 inches would be the ordinary change - Sometimes the Lake would come on the Shore 3-4. or 5 rods on the South side, depending upon the angle of the Shore - South westerly winds would lower the water, and make a difference in the Shore of fifteen rods. North Easterly winds would sometimes bring in the water a long distance, in one instance it came above Washington Street from the rise of the water. It raised 4 or 5 feet that time above ordinary water mark. The Lake Shore south of the fort was washing away for years, until the erection of the Rail Road break-water. The action of the water was such that the Shore would sometimes increase, and sometimes diminish. A high wind would take the Shore away, after the Wind went down it would form again. A South and South East wind would make the beach accumulate. A North East wind would make it diminish. There was quite a beach in 1842, 1843 and 1844. I think it was from one to three rods wide between high and low water mark. The effect for a series of years, was for the Lake to encroach on the shore -

" " 11

Bradley for eleven years County Surveyor testified. The length of the South line to high water mark was twenty five chains. I took for high water mark the line of drift wood left by the Lake. Began observations upon the Lake in 1836; my Office was then on the Lake Shore. The rise and fall of the Lake when there was

no wind, first attracted my attention - the difference between high and low water mark at this place, on the South line, would have been ten rods - and on the North five rods - This would be the extreme of high, and low water - (from 150 to 225 feet)

" " 24.

By the survey of 1844, the difference in the lines, is the property now in dispute, about thirty three feet in width -

" " 25

The wind was blowing when I made the last survey from the South West, therefore the Shore was bare. In 1844, I ran to the drift-wood. I stopped at it - it was a line made of bark, chips, and wood thrown from the Rapids - The first survey (in 1844) the line was run within a chain of the water's edge, on both lines - The shore outside of a line between the two points, was a beach, sometimes covered with water, and sometimes not - When the wind blew from the North, it would cover all the shore to my line - when from the South there would be about a chain bare beyond my line - The natural action of the Lake would cause a variation of about a chain in width - A part of the beach was bold, a part of it was sand hills, covered with pine and willows: The Bank was eight feet high - one half of it bold - The East end of the North line is in front of the bold Bank - There was some drift wood there - The Lake never reached the Bank on ordinary occasions - The bold bank was West of my line - The Bank was a little over a chain from the water in its ordinary stage - Pines and cedars grew on the Sand hills - None of them grew outside of our line - We went beyond all vegetation - Surveying by a deed calling for Lake Michigan as a boundary, without any directions from parties, I should have run to high water mark

" " 28

Brown in his deposition says " I contended that he p. 11. Abstract should run to the border - i.e. margin of the Lake This is in substance the whole of the testimony -

And from it there appear to be several different stages of the Waters of Lake Michigan

1st

The first is the lowest stage of all, which is reached when westerly or south westerly winds after blowing for some days, have driven the waters from the West Shore -

2^d

The Second stage is the general condition of the Lake, its ordinary low-water mark. Where it is ordinarily is, for the greater part of the time, to be found standing in the absence of causes to make it higher. This is the stage described by Brown as existing the day he accompanied Bradley. And also by Rees as existing, when he made his survey -

Brown says, "It was a quiet still day, and the water was where it usually is, when undisturbed by any extraordinary cause. I don't know that the water ever receded beyond the point where it was that day

p. 4 of Abstract. J. H. Rees says, "I mean by the uniform water line, the line of the water on a calm day. The day we surveyed was a still day not windy."

Abstract p. 5. The testimony of both these witnesses shows, clearly, that the point at which the Lake stood at the times mentioned, calm days, without wind, was the ordinary, or uniform water mark, or line of the water - in the absence of disturbing causes. They both describe higher stages of the water - They both speak of the material rise and fall of the lake irrespective of winds and storms; and of the high water which then exists - as well as that still higher stage, caused by storms and heavy winds from the North -

But this stage which they describe as the ordinary, or uniform stage of the Lake - is necessarily ordinary, and uniform low-water, and not high-water - The waters of the Lake cannot, and do not, in fact, in still weather, ordinarily and uniformly

i.e. during the greatest part of the time, stand at high water mark. The laws of Nature, the law of gravitation of matter, forbid it. The very nature of the element forces it to seek, and to stand at, the lowest point it can reach. The mass or body of the water in Lake Michigan, must of necessity stand at the lowest point, or line. It is an exception and a change from the habitual or ordinary condition of things that the water is found standing at a line higher than that of low water.

III.

The third stage is reached by the Lake periodically, at intervals of time more or less certain, with somewhat of irregularity. That the oscillation of the waters of the Lake not visible or perceptibly caused, or occasioned by the winds or storms, but by terrestrial forces, acting upon so large a body of water as the Lake; more or less modified it may be, by the presence of winds or storms, this is the change on the Lake spoken of by all the whippers as taking place without any visible or perceptible causes, and may be considered as being to the Lake what the tides are to the high Sea. Mr Brown says, the water rises from one to two feet here when there is no wind, it occurs a good many times in the course of a year, but more often in Summer than in Winter.

p. 4. Abstract

p. 5. Abstract

of the Lake. James H. Pies says there is a rise and fall in the water. I have noticed that in a still day, the water would rise I can't say how much.

p. 6. "

Brown said, sometimes the Lake would remain stationary in mild weather for days. sometimes it would vary three feet in a day. eighteen inches would be the ordinary change.

Bradley says. the rise and fall of the Lake, when there was no wind first attracted my attention. the natural action

p. 9. Abstract of the Lake would cause a variation of about a chain in width

The existence of this last as a stage of high-water, periodically recurring, although with more or less of irregularity, and at all seasons of the year indifferently, is as plainly proved as any other fact in the cause. That it is not to be confounded with high-water caused by storms, or certain winds, is also as clearly made out. What causes it may be owing to, may be matter of speculation to the natural philosopher, whether it is a tide caused by the Sun or Moon or both; or caused by the revolution of the Earth upon its axis, owing very much or partially to the configuration of the Lake, the volume and depth of its waters, can make no difference as to the main fact, with which simply have we any concern -

IV.

The fourth stage and the highest limit of standing water, is reached when storms, and prolonged winds, blowing from the North, and East, have driven the waters of the Lake upon its West coast, beyond the line reached by the dead swell, or flow of the Lake, last spoken of, and sometimes reaching a height of four or five feet above ordinary low water mark see evidence of Brown - p. 6 of Abstract and covering the Shore to a very great distance, four to five rods, by Brown p. 6 - 6 to 7 rods by Res p. 5 - and on the South line of this track, where the beach was low ten rods by Bradley p. 8. On the North line in front of the high bank five rods ibid. Brown says that the difference caused by particular winds would sometimes be as much as fifteen rods, on this Shore p. 6 This last stage I conceive to be the highest known stage of standing water. These different stages or lines of water mark are all and each well known and clearly distinguished, by all persons, having a personal knowledge of the subject

It is believed that they are characteristic of all great bodies of water upon the Earth which are not current waters as rivers; nor tide waters as the main Ocean; but which are in flood as these great Lakes all are; not dead but active waters, perpetually moving under forces, impulses, and laws, peculiar to themselves.

These facts are verified by common and scientific observation. Now the question is simply, which of these different stages of the Lake, or lines of water mark, constitutes the true boundary line of this land. Or as the question is stated by the Court in their opinion what answers the call for Lake Michigan, as a boundary line in the various deeds which are the subject of evidence in this case.

And this may be considered as purely a question of Law, arising upon a construction of the original patent, as to the extent of the grant made by it, as affecting the Lake Shores; for if the United States only granted to the high-water mark excluding the whole space and extent of shore, the subsequent conveyances of the State Bank could not possibly convey, what was in the dominion and property of the Sovereign - first of the United States next of the State of Illinois.

What then constitutes Lake Michigan? What are its Shores? Supreme Court of the United States decided in the case of the *Genesee Chief* 12 Howard Rep. p 453 that our great Lakes are inland seas, and consequently like the Sea, ^{the Lakes} they must be considered as constituted of and comprising as constituent parts of itself - water - the bed or bottom on which the water rests or stands - and shores, and Banks, or coasts, which encompass its waters.

Mr Justice Story defines shores as the space between the margin of the water in a low stage, and the banks which

contain it in its greatest flow - distinguishing shores from banks
 Thomas vs Hatch 3 Sumner 178.

Chief Justice Parsons considers the term shores as synonymous with flats, the low lands dry at low water, and submerged at high water.

Shore vs Freeman 6 Mass. 438. 9.

This opinion and definition was adhered to and confirmed by this same court in Hatch vs Dwight 17 Mass. 289-98.

The shore is the land between high and low water mark
 Co. Lit. 261. Buntley's Note 205. c. 1. 5. Hale de Jure Maris -

The Shores of navigable waters, & the soil under them, belong to the State as a Sovereign power 3 Kent 15. top page.

Pollard vs Hagan 3 How. 212. decided that mud-flats lying in front of the City of Mobile, bare at ordinary stages of water, and only covered by the high tides, reaching to the waters, are part of such waters p. 235.

By the Code of Louisiana, the Sea-shore is declared to be that space of land over which the Sea spreads at the highest water in the Winter Season. Art 442.

So Justinian's Institutes. Book III Tit 1. § 3.

Est autem litus quatinus hibernicus fluctus maximus excurrit - carrying the Sea - to the water line reached by the highest tides.

The Banks of the river contain the water in its natural channel when there is the greatest flow of water.

Dwight vs Morgan 6 Martin R. 19. Donour low dict. banks of Rivers - *apud recta defunctum id quod flumen continet naturalium supremum cursus sui tenens.* Dig. Lib 43. Tit. 12. § 5.

Chief Justice Marshall says the shores of a river border on the water's edge. See of Handly vs Anthony 5 Wheat. 374. 385.

Adopting the argument of another.

" If the Shore borders on the edge of the water, it must extend upwards
 " to the bank, and therefore cannot be the bank - which at low water
 " it separates from the water.
 " A River then consists of water, a bed and banks - these several parts
 " constitute the river - the whole river - it cannot exist without all its
 " parts - evaporate the water, and you have a dry hollow - Remove the
 " bank, and you have a boundless flood - He who owns the river, owns
 " the water, the bed and the banks - since these are the elements which
 " constitute the river" - 13 Howard 392

By parity of reasoning - The water, bed or bottom of Lake Michigan,
 its shores, and banks are the elements which constitute the physical
 object, the Lake. The States bordering upon this and the other great Lakes,
 in their public sovereign capacity, own this bed and shore.

Under the decision of the Supreme Court in *Rollard vs. Howard*, 3 Howard
 212-230, the waters, bed, and low shores of Lake Michigan, subject to the
 overflow of the Lake at high water, upon the admission of Illinois into
 the Union, were vested in the State of Illinois. *Martin vs. Waddell* 16 Pet. 406-18
Arnold vs. Woody 1 Halsted 1.

Consequently the Patent grant by the United States to Harrington did
 not cover the shore, or the space between the high and low water of the
 Lake. And the Shore has never been the subject of private property
 or ownership.

I will here submit extracts from the opinion of the Sup. Court
 of the U. States 12 Howard 415. The Court say " When Banks of Rivers
 were spoken of, their boundaries were meant which contain the river
 at its highest flow, and in that condition, they make part of what is
called the bed of the river"

Rivers have Banks, Shores, Water, and a bed.

"Along the bank" being a part of the call, governs and controls the rest.

417

" It excludes the supposition that a line was to be traced at the
 " edge of the water, at low water, or at lowest low water. Water is not a call in
 " the description of the boundary, though the river is, and that does not
 " mean water alone, but Banks, Slopes, Water, and the bed of the River, Water
 " is but one of the parts of the River. The call is for the Bank; the fast land
 " which confines the Water in its channel or bed - in its whole width.
 " The Bank or the Slope from the Bluff, or perpendicular of the bank may not
 " be reached by the Water for two thirds of the year. Still the water line impressed
 " upon the bank above the slope is the line; and the shore of the river, though
 " left dry for any time, and but occasionally covered by water in any stage of the
 " Bank, was retained by Georgia - as the river up to that line, wherever
 " it may be found, it is a part of the State of Georgia. Both Bank and
 " Bed are to be ascertained by inspection, and the line is where the action of the
 " water has permanently marked itself upon the soil -
 " The Bed of the River extends not only to where from the perennial flow
 " of the water there is no margin, but also to where there is a margin
 " The line cannot be traced by either ordinary low water, or low water,
 " Those terms apply to parts of rivers within the ebb and flow of tides, to dis-
 " tinguish the water line at Spring, or neap tides. Such a difference
 " occurs regularly twice every month, and is therefore called ordinary.
 " low water is the furthest receding point of ebb tide.

418

The permanent fast land is the line -

" The bed of the river commences from the west edge of that bank
 " i.e. on the West side -

" And where the bank is fairly marked by the water, that water
 " level will show at all places where the line is.

Exp. Op. by Nelson

421

" Grants of land bounded by the Sea or by navigable rivers, where the
 " tide ebbs and flows, extend to high water mark. That is, to the margin of

" the periodical flow of the tide, unaffected by extraordinary causes, and
" the shores below common high water mark, belong to the State in which
" they are situated."

" " 421 " On behalf of Georgia it is contended, the line shall be drawn on
" the bank or bluff, as described in the Record, at high water mark: on behalf
" of Alabama, at the brink, or ridge of land or ground, where the western
" margin of the river, is found at ordinary low water mark."

" " 422 " The Bank according to the perennial flow of the water, at its ordinary
" and usual stage, is equally within the description, and the limit, within
" the bank, on each side, is more emphatically the bed of the river, than that
" embraced within the more elevated banks where the river is at flood."

" The term high water, when applied to the Sea, or to a river where the
" tide ebbs and flows, has a definite meaning. The line is marked by the
" periodical flow of the tide, excluding the advance of waters above this
" line in the case of winds and storms, and in the other by freshets or
" floods."

Sep of. Curtis 426.

" The Banks of a river are those elevations of land which confine the
" waters, when they rise out of the bed: 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. That
" line is to be found by examining the bed and the banks; and is where
" the presence and action of water are so common and usual, as to mark
" upon the soil of the bed a character distinct from the banks, in respect of
" vegetation, as well as in respect of the nature of the soil."

In the light of these authorities the shore must be considered as
a part of the bed, or bottom of the Lake - It is continually throughout its
whole extent subject to the action of its waters - A permanent and distinct

Character is impressed upon it, as a physical object - vegetation is destroyed by it - Bradley says, that his line was far beyond all vegetation -

Justice Curtis says "The line dividing the bed from the bank" (Speaking of a river:) which line in this case is the Shore - "is where the presence and action of water are so common and usual as to mark upon the soil of the bed, a character distinct from the bank, in respect of vegetation as well as the nature of the soil"

The court at page 415. 13 How. say - "The banks of rivers contain their waters at the highest flow, and in that condition, they make what is called the bed of the river" -

The whole shore in front of this land. The space subject to the constant, perennial overflow of the waters of the Lake, at all times, and in all seasons of the year: subject to the double overflow of the Lake, namely the periodical rise of the Lake, taking place without regard to winds, taking place perpetually, and caused by forces and movements proper to the Lake, analogous to the tide: and the irregular high-water caused by storms, winds, or local floods, is therefore to be regarded as a part of the bed or bottom of the Lake - and formed no part of the land granted by the United States to Harrington or to Garrett by the State Bank -

I cannot but think the court came to the conclusion they did in this case, through confounding the terms used by the witnesses in speaking of the uniform, or ordinary line of water-mark at which the Lake usually, and ordinarily stands in still weather, with the term ordinary, as employed in speaking of the Ocean tides, or the ordinary high-water mark which bounds private property on the Sea-shore.

The Civil law and also the ~~Provisional~~ ^{Local} Code as above quoted, define high-water mark, as that which is reached by the highest winter tides -

Such is the rule of the common law.

There are two kinds of tides - the neap tides arising every

day - and the Spring tides occurring but twice a month, much more violent, and reaching a much higher line of water-mark than the former.

The point reached by the high Spring tide, determines the line of water mark in boundaries upon the Sea Shore - and not the line of the low or mean tides. And it is a mistake to suppose, that the term ordinary high water mark, or the line reached by ordinary tides, means, or is, the line of mean tide water-mark, or a supposed average distance between this low tide water-mark, and high tide water-mark.

In the language of the Supreme Court of the United States 13 How. 417.

" These terms &c. ordinary high, and low water, are used to distinguish
" the water line at Spring or ^{ebb} tides. Such a difference is uniform
" twice within every month of the year - and because it is so, is called
" ordinary" The full Spring tides are as much ordinary as
the low mean tides - as regular - as sure to take place - but they
are not so frequent - they are equally ordinary, because they are
caused by forces of Nature acting permanently, ~~eternally~~ in its
established order. In this sense they are ordinary, and in no
other - Thus the high water mark of the Ocean is the limit of the
high-Spring-tides - Thus the high Spring tides are themselves.
ordinary tides

In Answer to the question, what answers to the
call for Lake Michigan, as a boundary line.

I say that the Lake in its unity and integrity,
as a great physical object on the Earth's surface, comprehending
its waters, its shores, and bed. That the Lake extends to the
limit of its shores, to the Bank holding in its waters, in their
highest periodical flow. That the land begins where
the Lake terminates.

And I submit to the Court, that the facts of this case, and the authorities cited, establish the proposition, that the tract of land in question terminated at high water-mark of Lake Michigan: and that therefore, the judgment of the Court below should be reversed: and the Appellants declared to be the sole lawful owners of the premises in controversy.

Respectfully submitted by

Arthur W. Windett
counsel with Appellants.

April 10, 1861

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In the Supreme Court.

Wm F. Leaman vs

4
S. A. Smith

Petition for a rehearing.

Filed April 23. 1861

L. Hiland
Clerk

Notam N. Mindett