THE KING CANUTE SYNDROME: CASE LAW FROM HITHER & YON

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To begin:
Why was Canute just sitting there?

The encroachment of water - along with the ravages of the Vikings and the Normans - was a real concern in eleventh century England. The Doomsday Book refers to the effects of coastal erosion at Wrangle in Lincolnshire, where in 1086 a tenement "was waste on account of the acts of the sea."[1] Earlier in the eleventh century, a chap by the name of Canute proclaimed himself an expert at preventing such waste. Canute, who was also King of Denmark, England and (latterly) Norway from about 1015 to 1035, placed his chair on the beach and forbade the incoming tide to rise. His order was in vain, for the tide continued to roll in and Canute was soaked. Undeterred by this setback, he extended his expertise from tidal waters to fresh-water rivers, in response to a plea from the monks of Ely: "When the river was brim full of water, from the heavy rains, they once sent for their king, as their landlord, to come and see what he could do to improve matters."[2] Improving matters, as in forbidding the tide to rise, meant preventing the erosion or submergence of the upland. Again, Canute was unsuccessful. Rather than continue to pretend that he was an expert on limiting the encroachment of water into upland parcels, he devoted his remaining energies to the monarch.

In *fin-de-siecle* Ontario, erosion and submergence is of no less concern than in the *beginning-of-the-millennium* England. From a surveying perspective, the encroachment of water raises questions as to what is the boundary of the upland parcel, and as to where to locate the boundary on the ground. In the case of slow, gradual and imperceptible encroachment of water into an upland *riparian* parcel, the questions are easily answered by the doctrine of erosion. But what of the encroachment of water over remote boundaries into parcels of land that were originally non-riparian? When land, such as Crown reserve, a road allowance, a beach, or a granted parcel, initially separates the remote parcel from the water, what are the latter's boundaries when it is partially under water? Has it been eroded or merely submerged?

In the absence of Canute - who has been dead some 958 years - we must refer to the judgements which have addressed such questions. It is not an extensive body of law: the 1912 trial of *Volcanic Oil and Gas Co. v. Chaplin*[3] is the only reported Canadian decision on the issue of non-tidal water encroaching over a surveyed line.[4] Those cases which have visited the issue have refined it so that the question become: Is the boundary true and unalterable as monumented in the original survey and/or as described in the grant/transfer of the parcel? Cases from Canada, New Zealand, Australia and the United States have answered in the affirmative. Other cases from the United States have alternatively answered that the encroachment of water creates and ambulatory natural boundary. It is instructive to look at these cases at a time when road allowance around lakes in Muskoka and Haliburton are being surveyed, when title to beaches is contested between the Crown and individuals, and when the boundaries of parcel s on artificially flooded lakes in the Kawarthas are sought. By becoming familiar with the significant cases from various common law jurisdictions, we follow Chief Justice Falconbridge, who noted at 39 of *Volcanic* that American cases were: "Decisions of courts which ... command my respect, and which would seem to be accurately founded upon basic principles."

Part A:
The Principle of Mutuality

The principle of mutuality is reflected in the maxim *qui sentit commodum sentire debet et onus; et e contra*, or: he who enjoys the benefit ought also to bear the burden; and vice versa. The plaintiffs in *Volcanic* contended at trial that, because they were not original riparian proprietors, they could gain nothing by accretion and so should not lose by the encroachment of water. At 41, the court agreed:

> He could not have gained an inch of land by accretion even if the lake had receded for a mile; and, therefore, it seems that the fundamental doctrine of mutuality, formulated in the civil law and adopted into the jurisprudence of many countries, cannot apply to him.

This is the principle invoked in the following cases to support the original non-riparian boundary as true and unalterable.

Canada

In 1825, the westerly half of Lot 178, Talbot Road Survey, Township of Romney, Province of Ontario was patented by metes and bounds, with the southerly boundary abutting the northerly side of Talbot Road. The parcel was separated from the waters of Lake Erie by two parcels of land; namely a beach and the road. By 1838, Lake Erie had encroached onto the beach and Talbot Road had been destroyed by the action of wind and water. The plaintiffs in *Volcanic Oil and Gas Co. v. Chaplin* also claimed that the lake had encroached onto the front of Lot 178. In 1908, Carr, who had title to Lot 178, sold the oil and natural gas rights in, under and upon the lot to the plaintiff Volcanic Oil and Gas Co. In 1911, the Province of Ontario leased to defendant Chaplin the water lots in front of Lots 178 to 180 inclusive, together with the oil and natural gas rights. Chaplin then erected a derrick and engine-house on the *locus in quo*. Volcanic Oil and Gas Co. brought an ac-

tion for trespass against Chaplin for a declaration of the plaintiff's right of ownership of the *locus*. The 1912 trial judgement at King's Bench, was in Volcanic's favour. This was affirmed upon appeal to the Divisional Court of the High Court of Justice. The issue was well articulated by the Divisional Court at 487:

> The real question is this: whether, by accretion, the Crown became entitled to what was formerly a portion of Lot 178, or whether the plaintiffs are entitled to such lot, to the exclusion of the defendants, under the original grant from the Crown.

The crux of the issue was that Lot 178 did not border the water at the time of the grant and was therefore not riparian at that time.

Although the Ontario Court of Appeal reversed the case on the basis of the facts not being proved, the legal principle extracted from the trial and from the first appeal is cited in the *Canadian Encyclopedic Digest*:

> Where the line in a deed is a fixed and permanent one defined by fixed marks and features, when first conveyed, so as to indicate a definite parcel of land, the limit at the date of the deed remains, and does not follow the changes which may result from the subsequent action of water.[5]

This principle appears not to be well understood, perhaps because it was successfully appealed on the facts and not on the law, and perhaps because there have been no subsequent cases which have decided the issue.

New Zealand:

Attorney-General and Southland County Council v. Miller[6] was a 1906 decision of the Supreme Court which involved the erosion of a public road along the Mataura River, Southland County. Miller had title to Lot 4, Block 11, Wendonside, which had been surveyed in August 1883. The certificate of title showed Lot 4 as bounded on one side by the road along the bank of the Mataura River. By 1905 the Mataura River had encroached upon Lot 4, as noted at 351:

> Since the certificate of title was issued ... the course of the Mataura River has changed, and the line of road surveyed has been intersected by the river. The river has washed away a considerable portion of the surveyed line of road on the north-western boundary of Lot 4, and has cut into the south-western corner of Lot 4, and the position now is that one corner of Lot 4 and a part of the road as originally surveyed is now on the right bank of the river; about one-third of the road along Lot 4 as originally surveyed is now the bed of the river; and the rest of the surveyed line of road ... although still on the left-hand side of the river, is no longer along the river-bank.

At issue was whether the upland boundary between the road and Lot 4 shifted with the encroachment of the water. The court held at 360 that it did not, and that Miller was entitled to his parcel up the to original surveyed boundary: "So far, therefore, as the fencing-in of the defendant's own land is concerned, he has merely exercised an act of ownership over his own property."[7]

Australia:

The same era as *Volcanic and Southland* - the early 1900's - saw the 1912 division of *McGrath v. Williams*.[8] In 1843, a 640 acre parcel of land was patented by the Crown; the parcel was described in metes and bounds and was subject to a reservation of "all land within one hundred feet of high-water mark on the sea coast, and on every creek harbour and inlet of the sea." The parcel was bounded on the north by the Shoalhaven River, which was tidal. McGrath, who had title to the parcel, contended at the Court of Equiry that the 100 foot reservation had been eroded away by the river, so that at 480, "his northern boundary would in effect be the Shoalhaven River."

The Crown, on the other hand, contended that the reservation was ambulatory, moving with the movement of the river. The court held in favour of McGrath that the boundary between McGrath's parcel and the Crown reserve was fixed, and at 482, "the hundred feet must be measured from the high-water mark as at the date of the deed."[9]

United States:

The final case illustrating the doctrine of mutuality also dates from the same era. The 1891 decision of the Supreme Court of Minnesota in *Gilbert v. Eldridge*[10] involved land that had been submerged by the waters of Lake Superior. Title to Block 110 of Rice's Point Survey, which was bounded on its north-easterly side by the lake, was held by Eldridge. Block 108, title to which was held by Gilbert, was south-west of Block 110, separated by a street, and had no access to water. The court held, at 680, that between 1872 and 1885 the waters of Lake Superior:

> ... gradually encroached upon and washed away the shore at the easterly end and on the north-easterly side of Rice's Point. The process of erosion and encroachment was so gradual as not to be perceptible ... In 1885 this encroachment of the water had extended so far inland, on the north-easterly side of this point, that the shoreline at low water then ran across Block 108, Block 110 and the intervening street having become submerged.

The facts were thus remarkably similar to the facts in *Volcanic*. Gilbert claimed that Block 108 had come to be a riparian parcel, with full riparian rights, such that Eldridge should be prevented from filling in the submerged Lot 110. The District Court ruled in favour of Eldridge.

This judgement was affirmed on appeal; it was held that a distinction existed between Block 108 having access to the water and Block 108 acquiring full riparian rights. A parcel can be riparian in fact, without being riparian in law. Block 108 was bounded by a monumented line, and so, at 679, "the riparian right to reclaim and use the platted blocks

and streets did not attach to the block thus conveyed as incident thereto." The doctrine of erosion did not apply.[11]

PART B:
Refuting the Principle of Mutuality

The rights of encroachment and recession are not necessarily mutual. A riparian proprietor is entitled, after all, to stop erosion by erecting breakwaters or revetments. On the other hand, the same landowner benefits through accretion. If the principle of mutuality or reciprocity is thus rejected by a riparian proprietor when land is to be gained, perhaps it should not be invoked by a non-riparian proprietor when land is to be lost. Perhaps the failure to stop the geophysical process of erosion and to repel the encroachment of water represents acquiescence in the loss of land.

One reason for accepting the water's edge as the boundary is that it is a more certain boundary than a surveyed line described by metes and bounds, and is more likely to be easily located. It is this ease of identification which is the very foundation of all survey evidence, for the priority of evidence ranking means that most weight should be given to those matters about which a person is least likely to be mistaken. A property owner is entitled to know with certainty the status of title to land. By making a remote lot riparian after being encroached upon by water, and by establishing its limit as a natural boundary, then the title to any parcel (or part of a parcel) covered by water would vest in the owner of the bed. Thus the grantee's title would be extinguished to any land that existed between the remote parcel and the water. This would serve to quiet title.

Perhaps the hazards of depriving people of land are outweighed by the benefits of quieting title. The very plausible alternative would be to give a riparian proprietor the reasonable use of land only on an intermittent, unpredictable basis. Owing to the vagaries of wind and water, title to land would only be as certain as the next encroachment of water, provided that such encroachment was slow, gradual and imperceptible. Better for upland riparian proprietors to know that they were permanently dispossessed of the parcel because it was completely submerged and because the inland adjacent parcel had acquired riparian rights. This speculation is offered to partially explain the following decisions of United States courts which have held that the encroachment of water into a non-riparian parcel creates an ambulatory natural boundary.

In the 1887 case of *Welles v. Bailey*[12], the Supreme Court of Errors of Connecticut held, at 566, that:

> If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows naturally from the ordinary application of the principle. All original lines submerged by the river have ceased to exist. The river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate, lot. Having become riparian, it has all riparian rights ... The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of its bed.

This appears to be the first statement of the principle that the encroachment of water removes a monumented boundary and was the judgement upon which three subsequent cases relied.

The facts in *Peuker v. Canter*[13], a 1901 decision of the Supreme Court of Kansas, were that the Missouri River, which bordered Canter's land, gradually washed away its bank until it reached Peuker's land, which had not bordered the river. Years later, the river gradually receded. The court held, at 619 that:

> The plaintiff was entitled to follow the river as it receded and to retain an equitable proportion of such shoreline, though by so doing, he possessed land that had accreted on the former lands of the defendant.

Also dealing with the Missouri River was *Widdecombe v. Chiles*[14], a 1903 decision of the Supreme Court of Missouri.

The north-half of section 22 was bounded on the north by the river. The river gradually changed its bed over a 30 year period by wearing away the soil in a southerly direction, until it had encroached upon the south-half of section 22. The river then gradually moved north, over a 40 year period, until accretion had added 200 acres to the south-half. At 446 the court held that:

> The fractional part of the section was entirely washed away and the south-half of the section became, so to speak, riparian. The defendant owned the accreted land entirely, thus wiping out all the interests of the plaintiff.

Finally, the 1919 Supreme Court of Nebraska decision of *Yearsley v. Gipple*[15] held, at 641, that:

> If A is the riparian owner of a piece of land on a navigable stream and B owns land remote therefrom and, by erosion, the river cuts away all of the land belonging to A and leaves B as the riparian owner of the newly formed bank, the river receding thereafter and placing the accretion against the newly formed bank, said accretions will belong to riparian owner B, although they extend over the very space occupied by riparian owner A.

KING CANUTE cont'd

All four American cases support the principle that definite monumented boundaries do shift with the encroachment and reliction of water, and that a remote non-riparian parcel can become riparian at some point after it is granted. This is best summed up in *Widdecombe*, at 446:

> We doubt if any court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river - which in fact did not reach the river when the deed was made - does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary.

To Sum Up: Was Canute a humble bloke or a fathead?

The King Canute legend is given two quite different interpretations. The first has him vainly trying to stop the tide in order to silence his sycophantic flunkies, to whom he pointed out that he was unable even to stop the advance of small waves up the beach. This is Canute, the ordinary guy. The second interpretation comes under the folktale motif of *reversal of fortune*, in which there are traces of a belief that a king can indeed control the tides. This is Canute, the egomaniac. Surveyors would be well advised to keep the Canute legend in mine when surveying land which at first glance appears to be bounded by water. for there are two ways to interpret such a situation: that it is an upland riparian parcel or that it was originally a remote non-riparian parcel which is now merely submerged. If the former, then the doctrine of erosion applies. If the latter, however, then the location of the boundaries depends on the case law in the particular jurisdiction.

In some jurisdictions in the United States - Connecticut, Missouri, Kansas and Nebraska, for instance - surveyors must apply the statement at 566 of *Welles v. Bailey* that: "All original lines submerged by the river ceased to exist". In other states, such as Minnesota and North Dakota, the remote boundary is to be accepted as non-ambulatory. Similarly, if surveying in New Zealand or Australia, then the original upland boundary is true and unalterable. The doctrine of erosion has long been held to apply to upland *riparian* parcels on tidal waters or along running waters such as rivers; since 1981 the doctrine also applies to land bordering lakes.[16] And in Canada, *Volcanic Oil and Gas Co. v. Chaplin* instructs surveyors to accept the surveyed, monumented, fixed boundary of a remote, non-riparian parcel. It is incumbent upon land surveyors to understand and to follow the legal principles in their respective jurisdictions: this, as Canute should have known, is what separates fatheads from humble folk.

Reference Stuff

1. Loyn, H. *Anglo Saxon England and the Norman Conquest*. Longmans: 1962, p. 362
2. Briggs, K. *A Dictionary of British Folk-Tales: Folk Legends*. v. 2 Routledge & Kegan Paul: 1972, p. 235
3. *Volcanic Oil and Gas Co. v. Chaplin* (1914), 31 O.L.R. (Ont. C.A.); reversing on the basis of facts not being proved (1912), 27 O.L.R. 484 (Div. Ct.); affirming (1912), 27 O.L.R. 34 (King's Bench).
4. For an analysis of the setting, survey evidence, and legal reasoning in *Volcanic Oil and Gas Co. v. Chaplin*, and of the implications for land surveyors, see: Ballantyne, B. Water Submerging a Non-Riparian Parcel: When Erosion is not Erosion. *CISM JOURNAL ACSGC*. Submitted November 1992.
5. Lambden, D.W. & I. de Rijcke. Boundaries and Surveys. *Canadian Encyclopedic Digest* (Ontario) - Title 19, Third Edition. Paragraph 13. The Carswell Company: 1985.
6. *Attorney-General and Southland County Council v. Miller* (1906), 26 N.Z.L.R. (S.C.). This overruled the earlier decision of *Pipi Te Ngahuru v. The Mercer Road Board* (1887), 6 N.Z.L.R. (S.C.), the principle from which was considered in the 1906 case to not be the law.
7. This same principle was accepted in the 1979 unreported Supreme Court decision of *Mitchell v. Saunders* (A6/79 - Blenheim Registry). At issue was whether a building encroached upon a Crown reserve(formerly a public road), the upland boundary of which was located at the time of the grant one chain above the high water mark of Jackson's Bay, Queen Charlotte Sound. The court held that the boundary between the reserve and the granted parcel was fixed, relative to the MHWM in 1866.
8. *McGrath v. Williams* (1912), 12 S.R.N.S.W. 477 (C.J. in Eq.).
9. This is the same principle which had been adopted earlier in *Smith v. Renwick* (1882), 3 N.S.W.R. 398. It was held on appeal that the southern boundary of allotment No. 2 was fixed a distance of 100 feet from the high-water mark of Borany Bay at the time of the grant in 1834.
10. *Gilbert v. Eldridge* (1891), 47 Minnesota 210, 49 Northwestern 679 (Minn. S.C.).
11. This principle was upheld in the 1965 decision of the Supreme Court of North Dakota in *Perry v. Erling* (1965), 132 N.W. 2d 889 (N.D.S.C.), at 892:
    Where land which was riparian at the time of the original survey is lost by erosion, so that non-riparian land becomes riparian, and land is thereafter built be accretion to the land which was originally non-riparian extending over the location formerly occupied by the original riparian land, the owner of the land which was originally non-riparian has title only to the accreted land within the boundaries of the formerly non-riparian tract .... .
12. *Welles v. Bailey* (1887), 55 Connecticut 292, 10 Atlantic 565 (Conn. S.C.).
13. *Peuker v. Canter* (1901), 62 Kansas 363, 63 Pacific 617 (Kan. S.C.).
14. *Widdecombe v. Chiles* (1903), 173 Missouri 195, 73 South-western 444 (Mo. S.C.).
15. *Yearsley v. Gipple* (1919), 104 Nebraska 88, 175 North-western 641 (Neb. S.C.).
16. *Southern Centre of Theosophy v. State of South Australia*, [1982] 1 All E.R. 283 (p.C.). As a Privy Council decision, the judgement is binding on New Zealand.