# DEPARTMENT OF PROPERTY.

EDITOR-IN-CHIEF,
HON. CLEMENT B. PENROSE,
Assisted by
ALFRED ROLAND HAIG.

## BARRETT *v.* ROCKPORT ICE CO.[1]. SUPREME JUDICIAL COURT OF MAINE.

*Title to Ice—How Acquired.*

The lessee of a portion of the shores of a great pond, who, without scraping the snow from the ice thereon, erects stakes, with his name upon them, around nearly one-half the pond, does not thereby acquire such a right to the ice thus enclosed as will enable him to maintain trover against an ice company which, previous to the formation of the ice, had removed the lily pads from the surface of the pond, and afterward scraped off the snow, bored holes in the ice to let off the surface water, and proceeded to harvest the ice against the written protestation of the plaintiff.

ICE, AND PROPERTY THEREIN.

(1) ITS NATURE.—As ice is merely frozen water, formed over the land, and so included in its indefinite extent upward, it would at first blush seem to be of the nature of realty; and it has accordingly been compared to alluvion, accretion or accession, and held to be the property of the owner of the subjacent soil, and not open to seizure and occupancy. State *v.* Pottmeyer, 33 Ind., 402; S. C., 5 Am. Rep., 224; Edgerton *v.* Huff, 26 Ind., 35; Paine *v.* Woods, 108 Mass., 160. "Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consistent with legal policy, that such an article should be held a thing of common right, and be left the subject of general scramble, leading to acts of force and violence." Washington Ice Co. *v.* Shortall, 101 Ill., 46; S. C., 38 Am. Rep., 255, note. But, on the other hand, the separate and distinct nature and properties of ice, its lack of permanence, the very precarious character of its connection with the soil, and the fact of its being so frequently severed and made an article of extensive trade, would seem to indicate the propriety of regarding it, for some purposes, at least, as personalty; and it has been held that a sale of ice already formed, whether in or out of the water at the time, is a sale of personalty, and not within the Statute of Frauds. "The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original

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place. Its connection—if its position in the water can be called a connection—is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water." Higgins *v.* Kusterer, 41 Mich., 318; S. C., 2 N. W. Rep., 13; 32 Am. Rep., 160. But this same result could be as easily reached by holding, on the basis of the reasoning above, that a sale of ice was a sale of personalty, not because of its nature, but because of the fact that such a contract necessarily contemplates its severance, thus putting it on the same footing as a sale of standing timber. This would be equally consonant with principle, and would avoid the anomaly of treating the subject-matter as invested with two differing natures. It is far better, then, to regard ice as of the same legal, as it is in fact of the same physical nature as water, and treat it as realty until severed. Then, of course, it becomes personalty, and may be the subject of larceny. Ward *v.* Peo., 6 Hill (N. Y.), 144.

(2) WHO ENTITLED TO ITS POSSESSION.

(*a*) *In Unnavigable Waters.*— As the title to water covering land is generally in the owner of the land that underlies it, Gardner *v.* Newburgh, 2 Johns., Ch. 162; Goddard *v.* Dakin, 10 Metc. (Mass.), 94; DeWitt *v.* Harvey, 4 Gray (Mass.), 486; so, also, the title to the ice that forms thereon is in the owner of the underlying soil, as has been stated above. "The just and reasonable use of the water which belongs to the riparian proprietor, in case of its being congealed into ice, would give him the unlimited use and appropriation of the ice as his exclusive property:" Washington Ice Co. *v.* Shortall, 101 Ill., 46. His right in the water may be compared to that of the owner of land adjoining a public road or street: Brookville and Metamora Hydraulic Co. *v.* Butler, 91 Ind., 134; S. C., 46 Am. Rep., 581. His interest in the ice, however, differs somewhat from that which he has in the water. As the latter is of an unstable, transitory nature, his rights therein can only exist while it is within the limits of his domain, and cease of necessity as soon as it passes beyond them; and, further, by the operation of the old maxim, "*Aqua currit, et debet currere, ut currere solebat,*" he has only a right to the use of it as distinguished from an absolute property therein. Ice, however, is not, at least while cold weather lasts, of a transitory nature, but is reasonably fixed and permanent—quite as much so as the soil that forms the banks of the stream—and may, therefore, well be considered capable of absolute ownership. This has been doubted in one case only: Marshall *v.* Peters, 12 How. Pr. (N. Y.), 218, where Judge EMOTT held that the owner of a mill-dam and one-half of the soil underlying it had no such absolute right to the ice overlying his land that his licensee could bring suit for an injunction to restrain another from cutting and carrying off the ice from that portion of the pond. But this is opposed to the weight of authority;

and the doctrine that the ice belongs absolutely to the owner of the soil beneath it is now settled beyond controversy. It makes no difference whether the ice be formed in a pond or a running stream; whether his title extends from bank to bank, to the thread of a stream, or to only a limited portion of the area of a pond, in any case his title to the ice is commensurate with his ownership of the underlying land, and he can prevent its removal; or, if another removes it without license the latter will be guilty of a trespass: State *v.* Pottmeyer, 33 Ind., 402; S. C., 15 Am. Rep., 224; Clute *v.* Fisher, 65 Mich., 48; Bigelow *v.* Shaw, 65 Mich., 241; Washington Ice Co. *v.* Shortall, 101 Ill., 46; S. C., 38 Am. Rep., 255, note; 12 AM. LAW REG., 313. So, when a street of an incorporated village, situated upon the bank of a river, extends to the thread of the stream, and the fee of the street is in the corporation for the benefit of the lot-owners and the public, the village authorities may properly interpose to prevent an intruder from cutting and removing ice which may have formed upon the water overlying the course of the street: Brooklyn *v.* Smith, 104 Ill., 429; S. C., 44 Am. Rep., 90. A lesser of a river front has the right to have it free from obstruction in order that he may gather ice thereon, and may maintain an action against one who has erected a boom in front of the leased premises under a parol license from the grantor of the lease: Lorman *v.* Benson, 8 Mich., 18; and a lessee of riparian rights, having thereby acquired the right to enclose and store ice for his own use and profit, within the limits embraced in his leasee, provided that he does not interfere with the right of navigation or the proper use of the stream by other people, may recover from the owners of a steamboat that was run back and forth unnecessarily near his field of ice, thereby destroying it: People's Ice Co. *v.* Steamer "Excelsior," 44 Mich., 229; S. C., 6 N. W. Rep., 636.

The title of the owner of the underlying soil remains the same, whether the water upon which the ice forms is in the natural bed of a stream or is backed upon his lands by the erection of a dam. In the latter case, all that the owner of the dam or mill privilege possesses is the right of flowage and the right to have a sufficient supply of water. He can lay no claim to the ice that is formed upon the surface of the water so long as he is not the owner of the soil beneath; but the title to the ice vests absolutely in the owner of that soil, and he can cut and remove it, subject only to the limitation that he may not, by so doing, interfere with the rights of the owner of the dam or mill privilege: Cummings *v.* Barrett, 10 Cush. (Mass.), 186; Dodge *v.* Berry, 26 Hun. (N. Y.), 246; Brookville and Metamora Hydraulic Co. *v.* Butler, 91 Ind., 134; S. C., 46 Am. Rep., 581; Julien *v.* Woodsmall, 82 Ind., 568. "The ice forming upon the waters of the stream where it ran through the plaintiff's premises, without any overflow by the dam, would belong to her by reason of her proprietorship of the soil, although the waters of such creek could not be directed by her to the injury of the owners of the stream below her. Upon the same principle the ownership of the soil beneath the overflow would endow her with exclusive property in the

ice upon such overflow:" Bigelow *v.* Shaw, 65 Mich., 341. A contrary doctrine was held in Myer *v.* Whitaker, 55 How. Pr. (N. Y.), 376; S. C., 5 Abb. N. C. (N. Y.), 172; but there the learned Judge, in his reaction against the erroneous ruling in Marshall *v.* Peters, 12 How. Pr. (N. Y.), 218, suffered his eyes to be blinded to the fact that the facts of his case were different from those of the latter, and by following out a chain of reasoning adapted to that arrived at a result which would there have been correct but was wrong in the case before him. His decision, however, has been uniformly disregarded, and carries no authority.

A yet more curious perversion of reasoning appeared in Mill River Mfg. Co. *v.* Smith, 34 Conn., 462, where the Court argued that the owner of the soil could not cut and remove the ice from a mill-dam, because, ice being frozen water, the volume of water in the dam might be materially lessened by so doing, and so an injury might be done to the mill owner. The fallacy of this was neatly exposed in Brookville and Metamora Hydraulic Co. *v.* Butler, *supra*, where the Court said: "This seems to us a narrow view, and one not in harmony with authority or consistent with sound principle. It may possibly be that if the evidence in a particular case shall show a diminution of the supply of water the land owner might then be prevented from taking ice; this, however, affords no ground for a broad general rule; the Court has as little ground for presuming that taking the ice would diminish the supply of water as for presuming that allowing a dozen, or a half dozen horses to drink from the pond would appreciably injure the owner of the easement:" see Dodge *v.* Berry, 26 Hun. (N. Y.), 246; and was successfully refuted in Cummings *v.* Barrett, 10 Cush. (Mass.), 186, as follows: "Ice must be cut in winter. It usually melts in the latter part of winter, or early part of spring, together with the ice and snow of the surrounding country; and these, together with the rains which cause and promote them, constitute what is usually called the spring flood, which commonly causes a great surplus of water in similar mill streams, not only not available to any useful purpose to mills but often injurious. And it may well be doubted, after any quantity of ice cut from such a pond, whether after the spring floods have subsided, and the useless surplus of water passed away, and long before the approach of any 'dry season,' the water in the pond would not be as full and copious for all mill purposes as if no ice had been so cut." This weight of authority and reason may be considered as settling the question; and not only has the owner of a mill-dam no right to the ice thereon unless he owns the soil under it, but the owner of the soil overflowed may cut and dispose of it, so long as no manifest injury is caused to the mill owner by his so doing. The land owner's right is so well settled that if the mill owner unnecessarily and maliciously draws off the water and so spoils the ice he will be liable in damages: Stevens *v.* Kelly, 78 Me., 445; S. C., 6 Atl. Rep., 868; 57 Am. Rep., 813. The owner may also recover if the ice is spoiled or damaged in any other way: See Finger *v.* City of Kingston, 9 N. Y. Suppl., 175.

(*b*) *In Navigable Waters.*—The

old English rule that the fee of the bed of tidal streams is in the sovereign, forms a part of the common law of this country; and, of course, the ice in such streams cannot belong to the riparian proprietor by virtue of his ownership of the soil. In regard to non-tidal streams, however, there is a conflict of decision. There are many navigable streams in the United States, far above tide-water, over which it is of the highest importance that the government should retain control; and, further, English non-tidal streams, which are insignificant and usually non-navigable, ought not to furnish a criterion for our inland rivers, such as the Missouri, Ohio, Tennessee and Arkansas. *Cessante ratione, cessat et ipsa lex.* This is in fact the doctrine approved by the courts of the United States: Barney *v.* Keokuk, 94 U. S., 324, and of some of the States: Woodman *v.* Pitman, 79 Me., 456; S. C., 10 Atl. Rep., 321. In Pennsylvania the question does not depend either upon tidal character or actual navigability of the stream: and where land is bounded by any of the large rivers, the title to beyond and low water mark remains in the Commonwealth: Carson *v* Blayer, 2 Binn., 475: Shrunk *v.* Nav. Co., 14 S. & R., 71; Johns *v.* Davidson, 4 Hains, 522 (where the difference between Pennsylvania and New York in that respect is referred to). Even when a stream is non-navigable the meandering of its shores by the government retains the title when the adjacent lands are disposed of; and the riparian proprietors have no title to its bed and consequently no exclusive title to the ice formed over it: Brown *v.* Cunningham (Iowa), 48 N. W. Rep., 1042. But in other States, even where the stream has been meandered, the common law rule as to tidal waters is retained in all its strictness and narrowness to avoid the disturbance of settled rights of property: Clute *v.* Fisher, 65 Mich., 48; Chicago *v.* Laflin, 49 Ill., 172; Chicago *v.* McGuin, 51 Ill., 266; Braxon *v.* Bressler, 64 Ill., 488. In Illinois the title of the riparian proprietor is held to extend to the centre thread of even the Mississippi: Middleton *v.* Pritchard, 3 Scam., 510; Houck *v.* Yates, 82 Ill., 179; Washington Ice Co. *v.* Shortall, 101 Ill., 46. Wherever the old rule prevails the principles stated above in regard to non-navigable waters apply to all but tidal streams, and the title of the riparian proprietor includes the ice.

But where the riparian proprietor has no title to the bed of the stream, that being vested in the government, the ice that forms over it is like a derelict, or an animal *feræ naturæ*, and becomes the property of the one who first appropriates it: Wood *v.* Fowler, 26 Kans., 682; S. C., 40 Am. Rep., 330. It is, of course, impossible to exactly define the acts which will constitute an appropriation sufficient to give title, but it seems to be enough if labor and money have been expended upon the preparation of the ice for cutting, and the intention to appropriate it be clearly shown. It is not essential that it be actually cut. "Any citizen who may lawfully go upon the stream may gather ice from it under the regulations prescribed by law. He is entitled to the ice he prepares by his labor to be removed. It is plain that if he cuts ice for transportation to his ice-house another cannot rob him of his labor by carrying

away his ice; and it is plain that when he makes preparations to use the ice upon a certain part of the stream, prepares its surface for cutting, erects machinery to handle the ice, makes walks or ways for workmen, or in any other proper manner indicates the part of the stream which he occupies in his operations, which must be reasonable in extent and in all other respects, he has a property right to the occupation of such locality during the ice season and to the ice formed there:" Brown *v.* Cunningham (Iowa), 48 N. W. Rep., 1042. It will be seen from this that the right of occupation is not an unlimited one, at least until perfected by actual seizure, but must be exercised with due regard for others. In other words, it is highly probable that the courts would refuse to sanction a claim to title by occupancy to the whole of the ice on a stream by merely preparing it for cutting; but if it were once actually cut and housed, it is difficult to see how they could impugn the title of its possessor.

One who has thus appropriated a field of ice upon a navigable river, by surveying, marking and staking it off, and expending money to preserve it and make it valuable commercially, has a sufficient possession to support an action for trespass against one who cuts it and carries it away with force and threats, the only limitation upon the right of occupancy being that it must not interfere with the paramount right of the public to free navigation: Hickey *v.* Hazard, 3 Mo. App., 480. In Maine, however, where the rivers are totally closed to navigation during the winter, and the ice upon them is then used as a public thoroughfare, while the right of the public to so use them is recognized, and any one who cuts holes in the ice near a customary winter way is liable to a traveler injured thereby, without fault on his part: French *v.* Camp, 18 Me., 433, yet, in view of the importance of the ice traffic, it is held that the right of passage in a place like the Penobscot at Bangor, where the great body of the ice is annually taken from the water, is relative only, and to be exercised reasonably; and that a traveler cannot recover if he had a clear opportunity to avoid the accident, even though the ice field was left unprotected: Woodman *v.* Pitman, 79 Me., 456; S. C., 10 Atl. Rep., 321.

The right of the riparian owner to take the ice which forms upon artificial waterways, such as canals, depends entirely upon the nature of the estate taken by the State and its grantees in the land upon which the same is constructed. If that estate be a mere easement, then, just as in the case of flowage by the erection of a dam, the ice belongs to the owner of the fee; but if the estate taken be a fee, the former owner has no remaining interest therein, and the ice is exclusively the property of the company that owns or leases the franchises of the canal: Water Works Co. of Indianapolis *v.* Burkhart, 41 Ind., 364; Cromie *v.* Board of Trustees of Wabash and Erie Canal, 71 Ind., 208. This, however, is strictly limited to the land necessarily taken for the bed and basins of the canal, and when, as an incident of its construction, a large pond is formed upon lowlands adjoining the canal used only for the purpose of overflow, the ice formed thereon is the property of the owner of the sub-

jacent soil, and he may cut and remove it, subject only to the conditions that no injury shall be done to the easement of the canal company, and that the flow of water shall not be materially lessened: Brookville & Metamora Hydraulic Co. *v.* Butler, 91 Ind., 134; S. C, 46 Am. Rep., 581. But, as has been shown above, this latter condition practically imposes no limitation upon the right of removing the ice, and the title of the owner in such a case may be considered absolute.

(*c*) *In "Great Ponds."*—This is a branch of the subject peculiar to the States of Maine and Massachusetts, where, by the colonial ordinance of 1641–7, the soil of great ponds—that is, ponds of more than ten acres in extent—is held by the State for the public, and, therefore, the rights of fishing, bathing and boating therein, and of taking ice therefrom, are common to all who can lawfully obtain access thereto, no one being able, by occupancy or otherwise, to obtain an exclusive right therein, except by grant of the legislature, or by prescription, which supposes a grant: Cummings *v.* Barrett, 10 Cush. (Mass.), 186. The title of the riparian owners only extends to low-water mark, and they have no greater rights in the pond itself than any other person has who can reach it without trespassing on the land of others, and it makes no difference in this regard whether the riparian owner be an individual or a company chartered for the express purpose of dealing in ice: West Roxbury *v.* Stoddard, 7 Allen (Mass.), 158; Brastow *v.* Rockport Ice Co., 77 Me., 100; Hittinger *v.* Eames, 121 Mass., 539; Gage *v.* Steinkraus, 131 Mass., 222; Rowell *v.* Doyle, 131 Mass., 474. The right being common to all, however, must be exercised by each one reasonably, and must not be so used as not to interfere with the rights of others: Paine *v.* Woods, 108 Mass., 160.

An exclusive right to cut ice from such a pond cannot be established by an agreement made by the riparian proprietors defining the respective portions of the ice which they are entitled to cut; and the grantee of a reservation to cut the ice from the grantor's portion cannot prevent a grantee of the land affected by the reservation from cutting it, although he had notice of the reservation: Hittinger *v.* Eames, 121 Mass., 539. Nor can a right to cut ice against all the land owned by the grantor and bordering on the pond be conveyed by an owner who has acquired no exclusive right against the public, so as to bind a subsequent grantee of the land, and prevent him from cutting ice thereon; for the covenants do not run with the land: Gage *v.* Steinkraus, 131 Mass., 222.

A title by occupancy to the ice on such a pond can be gained only by actual taking; a constructive possession cannot be gained by merely scraping off the snow and marking out the limits within which the occupier intends to cut, and then leaving it to thicken; and if another, who has the right to fish on the pond, cuts holes for that purpose in the ice the former has no remedy against him (unless, perhaps, he can prove that the act was malicious); for he has no right, to the exclusion of other public uses, to the occupation of any part of the pond, for the purpose, by artificial means, of increasing the thickness of the ice: Rowell *v.*

Doyle, 131 Mass., 474. Still less can such a title be acquired by merely staking off the ice without scraping it, as against one who has taken pains to prepare the ice for cutting: Barrett *v.* Rockport Ice Co. (the principal case), (Me.); 24 Atl. Rep., 802; S. C., 84 Me., 155. "The case is not like one of capturing animals *feræ naturæ*, or of taking possession of derelict property. It is more analogous to the case of a tenant in common attempting to take possession of a part of the common estate by staking it off and thus excluding his co-tenants:" People's Ice Co. *v.* Davenport, 149 Mass., 322; S. C., 21 Atl. Rep., 385.

There is here, as stated in the principal case, a serious conflict with some of the decisions in other States as to what will constitute appropriation. But this conflict is more apparent than real. It seems to have escaped the attention of the Court that the case of these great ponds is wholly different from that of other public waters, and, therefore, cannot justly be compared with them. In the latter instance no individual has any title until after occupancy by him, and all that is necessary to establish his title is, as in the case of public lands or mining claims, as noticed in Brown *v.* Cunningham, *supra*, to notify the world at large of his intention; and that is very effectually done by staking off the part he claims. But in the case of a great pond the individual has a title, inchoate, it is true, and perfected only by actual seizure; but, nevertheless, a subsisting title, one strong enough to support a bill in equity against one who interferes with its beneficial enjoyment: Tudor *v.* Cambridge Water Works, 1 Allen (Mass.), 164; and, therefore, not to be defeated by a mere constructive possession. As was said in People's Ice Co. *v.* Davenport, 149 Mass., 322; S. C., 21 Atl. Rep., 385, the public are tenants in common of the various incorporeal hereditaments arising in such ponds, which, nevertheless, are not strictly commons, for, if wholly surrounded, only the riparian proprietors would seem to have any rights therein. This being the case, it will be readily apparent that only actual possession can confer a paramount title as against the rights of others.

As to the exact nature of the right to the privileges of such ponds, and the vesting of the fee, there seems to be no precise adjudication; but it would seem plausible to hold that the fee was in the State or town as trustee for the inhabitants. This, however, is still an open question.

Where, as in Illinois, Card *v.* McCaleb, 69 Ill., 314, a right is given by statute to all persons resident along the line of a canal to cut and remove ice from the same, its feeders, side-cuts and basins, free of charge, it would seem very similar to that of cutting ice in a "great pond," and would presumably be governed by the same rules.

(3) Conveyance of Property in Ice.

The right to cut ice may be conveyed by deed or by parol license; but in the latter case no title to the ice will pass unless it be executed: Balcom *v.* McQuestien (N. H.), 17 Atl. Rep., 638. When conveyed by deed, however, it is more than a mere revocable license, and the grantee has a valuable right, for an encroachment upon which the law

will give him a remedy: Richards *v.* Gauffret, 145 Mass., 486. Such a conveyance, when joined with a conveyance of adjacent land, may create an easement appurtenant to the land: Huntington *v.* Asher, 96 N. Y., 604, reversing S. C., 26 Hun. (N. Y.), 496. But the right to take ice, as has been seen, does not pass with a grant of a mill-dam or flowage privilege: Dyer *v.* Curtis, 72 Me., 181. Nor can an ice company acquire an easement in the water through which it tows its ice from the cutting-ground to the ice-house, so as to prevent a grantee of the subjacent land from obstructing it: Knickerbocker Ico Co. *v.* State, 41 Hun. (N. Y.), 458.

When premises, used for hotel purposes, upon which was situated a partly filled ice-house, were sold, nothing being said about the ice-house during the negotiations nor in the deed, nor when possession was given to the vendee, and no reservation was made by the vendor of a right to enter upon the premises and use or remove the ice, the ice is to be regarded as a fixture, intended by the parties to be enjoyed with the realty, and constructively annexed thereto, on the ground that it is almost indispensable to the full use and enjoyment of the premises, and it passes to the vendee as a part of the freehold: Hill *v.* Munday (Ky.), 11 S. W. Rep., 956.

(4) DAMAGES FOR INJURING.

The value of the land for ice purposes may be considered as an element of damage when it is taken under the right of eminent domain: Ham *v.* Salem, 100 Mass., 350; Hyde Park *v.* Washington Ice Co., 117 Ill., 233; and also as an offset to damages claimed for flowing it: Paine *v.* Woods, 108 Mass., 160.

If ice accumulates in a pond as the consequence of the erection of a mill-dam, and water is thereby thrown back upon an existing mill to its material injury, the owner of the dam becomes liable for the damage done: Davis *v.* Fuller, 12 Vt., 178; Cowles *v.* Kidder, 24 N. H., 364; unless the injury was due to the intervention of casual and extraordinary forces, over which the owner of the dam had no control, and which he could not reasonably foresee: Smith *v.* Agawam Canal Co., 2 Allen (Mass.), 355.

NOTE.

Cutting natural ice from the surface of a pond or stream and storing the same in a building is not a manufacture, and a company formed for that purpose is not a manufacturing corporation: Hittinger *v.* Westport, 135 Mass., 258; Peo. *v.* Knickerbocker Ice Co., 99 N. Y., 181. *Contra:* Att.-Gen. *v.* Lorman, 59 Mich., 157.

R. D. S.