

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

W. Nesbitt, K.C., and H. M. Mowat, K.C., for the plaintiff.

H. L. Drayton, K.C., and W. Johnston, for the defendants.

BOYD, C.:—This action was dismissed by my brother Magee, on the ground that the plaintiff's property was land and not water, and that he was not in any sense a riparian proprietor. My brother Middleton's research has demonstrated that the whole neighbourhood of the land bounded on the south by what is now called Ashbridge's Bay was originally marsh or morass and was so treated by the Government of Canada.

The law of the case is that law which pertains to the ownership of marsh land. The difference between this case and *Beatty v. Davis*, 20 O.R. 373, is that this place is marsh or swamp land with some intermingled spaces of non-navigable water, and the other was partly marsh and partly land covered by water, practically navigable. The plaintiff's land is now, and always has been within historical memory, marsh and nothing but marsh. Between the plaintiff's land and the artificial channel to which he seeks access, as riparian owner, there is land, of a like marshy character, owned by the defendants, and, to get to that deep water so made, he must pass over the property of the defendants. That he has no right to do by virtue of his proprietary rights, and as to alleged riparian rights he has none. His marsh property is thus bounded on the lake side by another marsh property over which he cannot pass indiscriminately as if his land was on the water's edge. The Crown had the right to deal as it did with this marshy land by treating it as non-navigable and conveying part to the predecessor of the plaintiff in title and part to the city in front of what is owned by the plaintiff: *Ross v. Village of Portsmouth*, 17 C.P. 195, 202.

There is not much law on this point in our Courts or the English, but the matter has been much considered in the Courts of the States bordering on the great lakes. An interesting series of cases on the ownership of marsh or flat lands may be found in vol. 127 of the Michigan Reports: *Brown v. Parker*, at p. 391; *State v. Lake St. Clair Fishing and Shooting Club*, at p. 580; and *Baldwin v. Erie Shooting Club*, at p. 659.

The case of the plaintiff fails in fact and in law, and the appeal should be dismissed with costs.

*To be reported in the Ontario Law Reports.