CANADIAN EXPLORATION LIMITED (*Defendant*) ..... APPELLANT;

1960
*May 6
Nov. 21

AND

FRANK R. ROTTER (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Waters and watercourses—Conveyance of land with registered plan indicating one boundary at top of river bank—Whether title extends to centre line of stream—Application of ad medium filum aquae rule—Land Registry Act, R.S.B.C. 1948, c. 171—Land Act, R.S.B.C. 1948, c. 175.

R took conveyance to a certain sub-lot of land, except that portion thereof which had previously been conveyed to him, and which in turn was transferred by him to the Crown as the result of expropriation proceedings. This latter portion, of which the appellant company later became the registered owner, by transfer from the Crown, lay on the opposite side of a river from R's property.

The description of the appellant's land was that which appears coloured red on the registered plan, the western limit of which was a line drawn along the top of the river bank. The certificate of title which issued to R described the lands held as being sub-lot 36 save and except those parts of the lot shown outlined in red on the plan.

The appellant having entered into the stream bed of the river opposite its lands and having carried out certain works, R commenced an action. The appellant counterclaimed for damages and for a declaration that it was the lawful owner of the bed of the river *ad medium filum aquae.*

The finding of the trial judge that the appellant was the owner of the bed *ad medium filum* was reversed by the Court of Appeal. By special leave of the Court of Appeal the appellant appealed to this Court.

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

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Held (Martland J. *dissenting*): The appeal should be allowed.

Per Locke, Cartwright, Abbott and Judson JJ.: The rights acquired by the Crown, all of which were transferred to the appellant, were the same in their nature as if the western boundary of the property had been defined as being the river. The matter is not affected by the fact that the land conveyed is shown in the description by measurement and colour on the plan. *Micklethwait v. Newlay Bridge Co.*, (1886), 33 Ch. D. 133; *Berridge v. Ward,* (1861), 10 C.B.N.S. 400, referred to.

Whether the basis upon which the title of such an owner *ad medium filum* rests is of common right, as stated by Sir Mathew Hale in his Treatise De Jure Maris and by Lord Blackburn in *Bristow v. Cormican* (1878), 3 App. Cas. 641, or whether it passes as a matter of construction of the grant, as it was treated by the Judicial Committee in *Lord v. City of Sydney* (1859), 12 Moo P.C. 473 and in *Maclaren v. Attorney General of Quebec,* [1914] A.C. 258, the principle is too deeply embedded in the law to be disturbed or doubted. *City of London v. Central London Railway,* [1913] A.C. 364, referred to.

The proper construction of the grant by the respondent to the Crown cannot be affected by the terms of ss. 53, 125, 141(1) and 156 of the *Land Registry Act,* R.S.B.C. 1948, c. 171. The failure of the Crown to ask that the grant be construed as conveying title *ad medium filum* cannot deprive the appellant of the right to insist as against the grantor that it should be so construed.

Esquimalt Waterworks Co. v. City of Victoria (1906), 12 B.C.R. 302; *Chasemore v. Richards* (1859), 7 H.L. Cas. 349; *Gibbs v. Messer,* [1891] A.C. 248; *The Queen v. Robertson* (1882), 6 S.C.R. 52, referred to. *The King v. Fares et al.,* [1932] S.C.R. 78, explained and distinguished.

Per Martland J., *dissenting*: The rebuttable rule of construction at common law as to conveyances of land bounded by a non-tidal river, that the land extends to the middle of the stream, is not applicable to a certificate of indefeasible title under the *Land Registry Act*. The appellant's certificate does not establish title in the appellant to any lands beyond those which are actually described in it.

The contention that if the form of the appellant's certificate of title is not in a form satisfactory to include the whole of his interest he is in a position in equity to apply for rectification of the title fails.

The King v. Fares, supra; Gibbs v. Messer, supra; Micklethwait v. Newlay Bridge Co., supra, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing in part a judgment of Brown J. Appeal allowed, Martland J. dissenting.

Evans E. Wesson, for the defendant, appellant.

J. F. Meagher, for the plaintiff, respondent.

The judgment of Locke, Cartwright, Abbott and Judson JJ. was delivered by

[1] (1960), 23 D.L.R. (2d) 136, 30 W.W.R. 446.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] brought by special leave of that Court. That judgment allowed in part an appeal of the present respondent from the judgment of Brown J. by increasing the damages awarded and declaring that the present appellant is not the lawful owner of that part of the bed of the Salmo River adjoining its property *ad medium filum aquae.*

While oral evidence was given at the trial, the case filed in this Court contains only an agreed statement of the facts, the material parts of which are as follows:

The appellant is the holder of a certificate of indefeasible title to a parcel of land in the Nelson Assessment District, therein described as being those parts of sub-lot 36 of lot 1,236, Kootenay District, Plan X 69, shown outlined in red on Reference Plan 61457-I.

The plan referred to was prepared under the circumstances to be hereinafter described and shows the property in question coloured in red lying immediately to the east of the Salmo River, the westerly boundary of which is indicated by stakes placed in the ground at the top of the river bank and lettered A, B, C, D, E, F, G and H.

The question to be determined in the action is as to the respective rights of the parties to the ground lying between the line thus delineated and the centre line of the stream at the relevant times.

In 1897 the Nelson and Fort Shepard Railway Company obtained a grant of land in the Kootenay District which included a parcel described in the Crown grant to it as lot 1,236. There was no reservation in this grant of the beds of any rivers or streams. In 1938 a portion of these lands described as sub-lot 36 of lot 1,236 was owned by the Erie Timber Co. Ltd. and, through this lot, there runs a river or stream known as the Salmo River. In that year the respondent purchased sub-lot 36 from the Erie Timber Company under an agreement of sale and entered into possession.

In the latter part of 1942 or early in 1943 Wartime Metals Ltd., a Crown corporation, commenced operation of a tungsten mine situated in the mountains to the east of sub-lot 36 and, requiring lands for a mill site and for a

[1] (1960), 23 D.L.R. (2d) 136, 30 W.W.R. 446.

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disposal area for tailings or waste from the mill, took expropriation proceedings to acquire a portion of sub-lot 36. During these proceedings the respondent caused a survey to be made of the property to be expropriated by Boyd C. Affleck, a British Columbia land surveyor. The agreed statement of the facts dealing with this aspect of the matter reads:

> The land to be taken by the Crown was to be that portion of the Sub-lot lying to the East of the River and South of Lot 275. In carrying out the survey on the river boundary the surveyor ran a series of traverses from point to point along the river bank, marking the points with stakes placed in the ground. These points, and the stakes, are represented on the plan of his survey as "A", "B", "C", etc. The boundary line along the river was the top of the riverbank—the line of perennial vegetation.

The plan so prepared was registered with the above mentioned reference number, with the first conveyance and application to register, in accordance with the requirements of the *Land Registry Act,* R.S.B.C. 1948, c. 171.

Rotter had not completed his payments to the Erie Timber Company at the time these lands were required by the Crown. The matter was arranged by that company conveying the lands described in the plan to Rotter and he, in turn, transferred such lands to His Majesty The King.

The conveyance from the Erie Timber Company dated March 29, 1945, described the lands transferred as being "those parts of sub-lot thirty-six (36) of lot 1,236, Kootenay District, shown outlined in red on the attached plan".

The conveyance from Rotter to His Majesty The King dated May 28, 1945, described the lands conveyed as being those parts of sub-lot 36 described in the deed last mentioned and shown outlined in red on the reference plan attached. The plan referred to in both of these conveyances was Reference Plan 61457-I.

While the documents are not mentioned in the agreed statement of the facts or made exhibits at the trial, it may be assumed that certificates of indefeasible title were issued to Rotter and to the Crown respectively for the lands mentioned pursuant to these conveyances, as required by s. 142(1) of the *Land Registry Act.*

By a conveyance dated December 11, 1945, the Erie Timber Company conveyed to Rotter sub-lot 36, save and except that portion theretofore conveyed to him as above mentioned.

By a conveyance dated April 11, 1947, His Majesty The King conveyed to the appellant the lands conveyed to him by Rotter by the above mentioned conveyance and the certificate of title first above mentioned dated October 21, 1947, issued in the appellant's name.

In November 1954 the appellant, purporting to be acting under the authority of a conditional licence granted by the Provincial Water Rights Branch for that purpose under the provisions of the *Water Act,* R.S.B.C. 1948, c. 361, entered into the stream bed of the river opposite its lands and carried out certain works, removing approximately 30,000 cubic yards of sand and gravel which it used to build an impoundment area for the tailings from its mill. These works extended in places to the west of the surveyed line upon the plan and into the westerly half of the bed of the river. In January 1955 the respondent commenced the present action for damages, for trespass, for the value of the materials removed from the bed of the river and for an injunction. The appellant, in turn, counterclaimed for the cost of certain repairs and reinforcements which it claimed to have been necessary to the east bank of the river by reason of a certain wing dam erected by the respondent at a point up stream on lot 275 about the year 1948, and for a declaration that it was the lawful owner in fee simple of the bed of the river *ad medium filum aquae* at the place in question.

Brown J., by whom the action was tried, found that the appellant was the owner of the bed of the stream *ad medium filum* and that it was entitled to remove the material from the eastern half of the bed of the stream but, as the evidence disclosed that material had also been removed from the western half, held that the appellant was liable in damages in a sum of $100 as the value of the material so removed. Upon the counterclaim it was found that the appellant had suffered damages by the variation of the course of the stream caused by the wing dam and damages were awarded in the sum of $3,075.17.

On appeal to the Court of Appeal this judgment was set aside in part, the judgment declaring that the present appellant was not the lawful owner of that part of the bed of the stream *ad medium filum* which is adjacent to the portion of sub-lot 36 owned by it, and increasing the damages awarded

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to the sum of $300. The appeal taken by the present respondent from the damages awarded on the counterclaim was dismissed.

The judgment of the court delivered by Coady J.A. proceeded upon a view of the questions involved which had not been raised at the trial or considered by Brown J. As will be seen from the foregoing recital, the description of the appellant's land was that which appears coloured red on the registered plan, the western limit of which was the line drawn between the stakes placed in the ground at the top of the river bank. The certificate of title which issued to Rotter, following the conveyance to him of the balance of sub-lot 36 by the Erie Timber Company, described the lands held as being sub-lot 36 save and except those parts of the lot shown outlined in red on the plan. Coady J.A. was of the opinion that, by reason of the fact that as he considered this latter certificate evidenced title to the bed of the stream in the respondent, this was conclusive of the matter, there being no grounds in his opinion upon which the conclusive nature of the certificate as declared by s. 38(1) of the *Land Registry Act* might be impeached.

The question is one which is of importance not only in British Columbia but in the three other Western provinces where the Torrens system of land holding is in effect, as well as in certain other of the provinces.

Brown J., considering that the law as to the rights of a riparian owner whose lands border a non-tidal or non-navigable stream were the same in British Columbia at the times in question as in England, found the rights of the appellant to the eastern half of the bed of the stream to be as they are stated in the judgment of Cotton L.J. in *Micklethwait v. Newlay Bridge Co.*[1] That learned judge there said:

> In my opinion, the rule of construction is now well settled that where there is a conveyance of land, even though it is described by reference to a plan and by colour and by quantity, where it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the description of the instrument to show that that is not the intention of the parties.

[1] (1886), 33 Ch. D. 133 at 145, 55 L.T. 336

Coady J.A., accepting without deciding that the learned trial judge was right in finding that the land conveyed extended to the river bank notwithstanding the plan, and also without so deciding that the *ad medium filum* rule was introduced into and became at one time part of the law of British Columbia, considered that the so-called rule had no application in the circumstances of this case where the title of the lands in question and the lands adjoining them immediately to the west was evidenced by certificates of indefeasible title issued under the provisions of the *Land Registry Act.*

By the provisions of the *English Law Act,* R.S.B.C. 1948, c. 111, the civil and criminal laws of England, as the same existed on the 19th day of November 1858 and so far as the same are not from local circumstances inapplicable, are declared to be in force in all parts of the province, save to the extent that such laws are modified and altered by legislation having the force of law in the province.

In the case of *Esquimalt Waterworks Co. v. City of Victoria*[1], Duff J. (as he then was) considered whether the English law relating to riparian rights became part of the law of the Colony of Vancouver Island where the river in question in that litigation was situate and concluded that the English law applied, referring to what was said by Lord Wensleydale in *Chasemore v. Richards*[2]. While unnecessary to decide whether this was so on the mainland, he expressed his agreement with a judgment of Martin J. (as he then was) in the case of *West Kootenay Power and Light Co. v. Nelson*[3], where that learned judge had expressed the view that the rules of English law on this point had since 1870 been the law of the whole Colony of British Columbia, and that of Drake J. in *Columbia River Co. v. Yuill*[4].

The exact ground upon which a riparian owner of lands upon a non-tidal or non-navigable stream is held to own the bed of the stream adjoining his property *ad medium filum* has been variously described. In Sir Matthew Hale's

[1] (1906), 12 B.C.R. 302.
[2] (1859), 7 H.L. Cas. 349 at 382, 11 E.R. 140.
[3] (1906), 12 B.C.R. 34.
[4] (1892), 2 B.C.R. 237.

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Treatise De Jure Maris, written in the 17th century, which is to be found in Moore's Law of the Foreshore, 3rd ed., the following statement appears (p. 370):

> Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquae*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side.

In *Chasemore v. Richards*[1], Lord Wensleydale said at p. 382:

> It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner.

In *Bristow v. Cormican*[2] where the question of the right of the Crown to the soil of an inland non-tidal lake was considered, Lord Blackburn said at p. 666:

> It is clearly and uniformly laid down in our books that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land.

In *Lord v. City of Sydney*[3], a grant by the Crown made in 1910 of land in New South Wales described as bounded by a creek was held to pass the soil *ad medium filum aquae*. The judgment of the Judicial Committee delivered by Sir John Coleridge quoted with approval a passage from *Kent's Commentaries*, ed. 1840, stating that:

> it may be considered as the general rule that a grant of land bounded upon a highway or river carried the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre and there be no words or specific description to show a contrary intent.

As the description of the boundary in the grant from the Crown did not exclude from it that portion of the creek which by the general presumption of law would go along with the ownership of the land on the bank of it, the Board considered that title passed.

[1] (1859), 7 H.L. Cas. 349, 11 E.R. 140.
[2] (1878), 3 App. Cas. 641.
[3] (1859), 12 Moo. P.C.C. 473, 14 E.R. 991.

The same principle has been held to apply in the case of lands which front upon a highway in England. In *Berridge v. Ward*[1], Erle C.J. at p. 415 said in part:

> I am of opinion that where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance and the close abuts on a highway and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance.

an opinion in which Williams, Willes and Keating JJ. concurred. The reference to this case in the 25th edition of Prideaux's Precedents in Conveyancing at p. 183 reads:

> When in the parcels the land is described as bounded on one side by a road or a non-tidal river the conveyance will, so far as the grantor has power to do so, pass the soil of the road or the bed of the river *ad medium filum,* unless a contrary intention is clearly shown. The fact that the land is described by reference to a coloured plan and no part of the road or river is coloured, and that precise measurements are given which will be satisfied without including any part of the road or river, are not sufficient indications of a contrary intention.

As authority for the last statement the learned authors quote *Micklethwait v. Newlay Bridge Co.*, above mentioned, which supports it.

In *City of London v. Central London Railway*[2] Lord Shaw, after referring with approval to what had been said by Kay J. in *Tilbury v. Silva*[3], and by Cotton L.J. in *Micklethwait v. Newlay Bridge Co.*[4], said in discussing the reasons for the doctrine (p. 380):

> But this doctrine is not a mere inference of dedication; it is not a mere convenience in conveyancing; but it is, and is nothing less than, a presumption of, and applicable to, ownership itself. This is too deeply embedded in the law to be disturbed or doubted.

a statement with which Lord Moulton agreed (p. 384).

In *Maclaren v. Attorney-General of Quebec*[5], the appellants held lands on either side of the Gatineau River under letters patent in which they were described as numbered lots in the Townships of Low and Denholm. These townships on opposite sides of the river had been created by letters patent and a proclamation which described them as being bounded by the river in addition gave detailed boundaries which were stated to start from a post and stone

[1] (1861), 10 C.B.N.S. 400, 142 E.R. 507.
[2] [1913] A.C. 364.
[3] (1890), 45 Ch. D. 98 at 109.
[4] (1886), 33 Ch. D. 133 at 145.
[5] [1914] A.C. 258.

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boundary upon the bank of the river, to describe a certain course inland therefrom, then to return to another post and stone boundary at a higher point on the river bank, and "thence along the bank of the river following its sinuosities as it winds and turns to the place of beginning." The judgment delivered on the appeal from this Court by Lord Moulton said in part (p. 272):

> In the Courts below the learned judges have held that the presumption that the bed of the river *ad medium filum aquae* was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the letters patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed.

The manner in which plans of the nature of that referred to in the present case are to be prepared is defined in Part VI of the *Land Registry Act*. Section 80 requires that the land intended to be dealt with by the plan is to be shown thereon surrounded by a line in red ink and that each angle of each parcel shall be defined on the ground by the surveyor by a post or monument of a durable character. Reference Plan No. 61457-I shows the western boundary of the part of sub-lot 36 as an irregular line, the posts being placed at what was apparently regarded as the top of the eastern bank of the river.

While, by agreement between the parties, the case filed in this Court did not contain the evidence taken at the trial and which was considered in the Court of Appeal, the evidence as it appeared in the appeal books in that court is on the file and I have examined it. According to Mr. Affleck, the surveyor, the line showing the western boundary of the property in question was the bank of the river as it existed in 1944, which he described as the line of perennial vegetation, trees and shrubs growing there. This line indicates what is the edge or shore of the river at high water. This manner of preparing plans of lands adjoining non-tidal rivers was, he said, the standard practice followed on the instructions of the Surveyor General of British Columbia, an officer appointed under the provisions of the *Land Act*, R.S.B.C. 1948, c. 175, applying to all Crown granted lands except those affected by tidal waters. The Salmo River is

subject to floods in the spring of the year when the water overflows its banks usually. In times of low water, however, as indicated upon a photograph put in evidence at the trial, there is an area in the bed of the river between the eastern boundary of the river so delineated and the stream itself which is dry.

Section 38 of the *Land Registry Act* provides that every certificate of indefeasible title issued under the Act, so long as it remains in force and uncancelled, is conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever that the person named in the certificate is seized of an estate in fee simple in the land therein described, subject to certain exceptions. Of these, if as a matter of law the certificate of title issued to Rotter following the conveyance to him by the Erie Timber Company of December 11, 1945, included the entire bed of the stream, the only exception which could affect the absolute nature of the respondent's title is that lettered (i) which reserves the right of any person to show that the whole or any portion of the land is by wrong description of the boundaries or parcels improperly included in such certificate.

It is, however, to be remembered that the certificate of title referred to describes the land as being sub-lot 36, save and except thereout, *inter alia,* those parts of the sub-lot shown outlined red on Reference Plan 61457-I. In these circumstances, the extent of the lands of which the respondent holds an indefeasible title cannot be determined as between the appellant and the respondent without first determining that of the lands acquired by Rotter, under the transfer of March 29, 1945, from the Erie Timber Company, by His Majesty The King under the transfer from Rotter of May 28, 1945, and those of the appellant under the certificate of indefeasible title, issued to it consequent upon the transfer from His Majesty. It is only sub-lot 36, less the lands to which these parties became respectively entitled under these successive certificates of title, for which the respondent has an indefeasible title.

It must be taken, in my opinion, to be conclusively established that if the area of land described by reference to the plan in the appellant's certificate of title was held by it under a registered Crown grant issued under the provisions of the *Land Act* of British Columbia, the appellant would

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have title to the bed of the stream *ad medium filum,* with all the rights and benefits which accrue to a riparian owner by virtue of that fact. That appears to me to be determined by the judgments of the Judicial Committee in *Lord v. City of Sydney* and *Maclaren v. Attorney General of Quebec* and by the House of Lords in *Bristow v. Cormican,* above referred to. The rights of the grantee would not be held to be limited in any respect by the fact that the lands were described in reference to such a plan showing the boundary as the bank of the river containing the stream and not in midstream.

While evidence was not given as to the nature of the title of the Erie Timber Company to lot 1,236, it was stated in counsel's opening for the plaintiff at the trial that it had been registered in the name of that company since 1935 and it must be presumed that that company held a certificate of indefeasible title. It retained that title to sub-lot 36 at the time the portion shown on the plan was transferred by it to the respondent, to enable him to transfer it in turn to the Crown. According to the witness Mason, a mining engineer who was employed by Wartime Metals Ltd. from 1942 to 1944, after negotiations with the respondent, the land was acquired for the erection of a mill, for a tailings disposal area, and to afford direct access to the river for water for the operation of the mill. A pumping station was thereafter established for that purpose on the east bank by the Crown.

That the property was being acquired by the Crown for these purposes was undoubtedly known to the respondent during the course of the negotiations. No one would seriously suggest that either party contemplated that the land sold would afford to the grantee access to the water from the river, required for the operation of the mill, only during the time when it was in flood. Yet, this is the result if effect is given to the contention of the respondent that he is the legal owner of the entire bed of the stream. As the matter now stands, the appellant can only obtain access to the water for its mill by leave of the respondent, except during the spring floods. The property and the right to the use of the water is in the Crown in right of the province, as declared by s. 3 of the *Water Act,* and the apellant *qua* licensee might under the provisions of s. 21 of that Act

expropriate sufficient of the bed of the stream to afford access to the water. However, in the view that I take of this matter, that is not necessary.

In *The King v. Fares et al.*[1], the rights of owners of lands in Saskatchewan in respect of the bed of a lake upon which it was claimed such lands had originally abutted were considered. So far as I am aware, this is the only Canadian case in which any mention is made of the rights of such an owner where title is held under the Torrens System.

The lands in question had been purchased by Fares and Alexander Smith, partly from the Canadian Agricultural Coal and Colonization Company and partly from the Canadian Pacific Railway Company and included certain fractional sections in the 17th Township in the 11th Range West of the Third Meridian in the Northwest Territories. Patents had been issued in respect of these lands to the vendor companies between the years 1888 and 1890 and, at the time they were issued, the fractional sections in question abutted on Rush Lake, a non-navigable body of water. The Canadian Agricultural Company had acquired these lands by purchase from the Government of Canada in the year 1887. They were part of an area of 50,000 acres purchased from the Crown for a consideration of $1.50 per acre. The lands purchased from the railway company formed part of the land grant to which that company was entitled under the contract dated October 21, 1880, which forms the schedule to chapter 1 of the Statutes of Canada, 1881. By that contract the Government agreed to grant to the company a subsidy of 25,000,000 acres of land and it was a term of that contract that "lakes and water stretches" should not be computed in the acreage of the lands granted but should be made up of other portions in the tract known as the fertile belt.

At the time when the patents were issued the lands were subject to the provisions of the *Territories Real Property Act*, S.C. 1886, c. 26, and, presumably, certificates of title had issued to the patentees under the provisions of s. 46 of that Act. That Act was taken practically *verbatim* from *The Real Property Act* of Manitoba passed in 1885, which introduced for the first time the Torrens System into Canada. While the report does not so state, the record in the case, which is available, shows that certificates of title were issued

[1] [1932] S.C.R. 78, 1 D.L.R. 421.

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to Fares and to Smith for undivided half interests in the lands in the year 1909. Since the lands were subject to the Act, these conveyances must have been made by transfers in the prescribed form.

At the time the lands were purchased by Fares and Smith, the level of Rush Lake had been so lowered by drainage that no part of them abutted upon the lake. Their claim, however, was that, as at the time the patents were granted to their predecessors in title they did so, they were entitled to the lands abutting on and to the centre of the said lake.

The patents issued defined the area of each of the parcels of land in acres. The land had been surveyed up to the border of the lake as it was at the time when the patents were issued, but no reference was made in these instruments to the survey. The lands purchased by the company were sold under the provisions of the *Dominion Lands Act*, R.S.C. 1886, c. 54, which permitted the sale of such lands only as had been surveyed at such prices as might be fixed by the Governor in Council and at a price not less than $1 per acre.

Duff J. (as he then was) considered that the letters patent could not be construed as conveying more than the acreage referred to in them, since to do so would be to convey unsurveyed lands without consideration, contrary to the terms of s. 29 of the Act. He held that what he referred to as the presumptive rule and also the presumptive construction of grants of riparian lands entitling the owners to non-navigable waters *ad medium filum* was rebutted by this fact and by the further fact that, at the time title to the lands was acquired by the claimants, the lands had long since ceased to be riparian lands. Lamont J. was of the same opinion upon the first of these grounds. It is in his judgment, which was concurred in by Cannon J., that the only reference is made to the fact that title to the lands was held under the *Real Property Act*. As to this Lamont J., after pointing out that the claimants obtained title by transfers under the Act, said that it would be noted that no provision was made under that Act for the registration of property or property rights to which a riparian owner would be entitled in the bed of a non-navigable stream or

lake by virtue of the *ad medium filum* rule if the same were applicable to conveyance of lands in the Northwest Territories.

In respect of the lands purchased from the Canadian Pacific Railway Company, in view of the fact that the agreement between that company and the Government above referred to pursuant to which the patents were granted by its terms excluded "lakes and water stretches" in the sections granted, it was held that the letters patent could not be construed as conveying any rights to the bed of Rush Lake.

The Torrens System of landholding originated in Australia and, in New South Wales where the question with which we are concerned appears to have been considered as a matter of doubt, the matter was dealt with by an amendment made in the year 1930 to the *Real Property Act 1900.* Section 45A, added to that statute, reads in part:

> Except as in this section mentioned, the rebuttable rule of construction applicable to a conveyance of land therein indicated as abutting on a non-tidal stream or a road, that the land extends to the middle line of the stream or road, shall apply, and be deemed always to have applied to instruments registered under the provisions of this Act relating to land indicated in the instruments as so abutting.

The cases in New South Wales dealing with the matter before this amendment was made are to be found in Baalman on the Torrens System, p. 180 et seq.

It is to be remembered that this is not a case where lands acquired by a person relying upon the state of the register are in question, as might have been the case had the parties to this litigation been some person who had purchased the remaining part of sub-lot 36 from Rotter after the conveyance to him by the Erie Timber Company and the appellant. What was said by Lord Watson in reference to the *Transfer of Land Statute of Victoria* in *Gibbs v. Messer*[1], has no relevance to the circumstances of this case.

In the evidence given by the respondent at the trial he stated that he had insisted on the preparation of a plan, apparently saying this in support of his contention that the property conveyed was bounded on the west by the line along the top of the bank shown on the plan, and this statement of fact is repeated in the reasons for judgment

[1] [1891] A.C. 248 at 254.

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delivered by Coady J.A. The statement, however, would appear to be inaccurate since the plan was necessary, since the property formed a part only of sub-lot 36, by reason of the provisions of ss. 83 and 84 of the *Land Registry Act* unless it was dispensed with by the Registrar under the powers given by s. 106. Section 80 of that Act requires that every such plan tendered for deposit shall be based on a survey made by a British Columbia land surveyor and shall comply with all regulations in regard to surveys and plans which may from time to time be issued by the Surveyor General, and that the land intended to be dealt with shall be shown thereon surrounded by a line in red ink. As shown by the evidence of the surveyor Affleck, in placing the stakes at the top of the bank of the river at the vegetation line he was complying with the instructions of the Surveyor General relating to surveys of Crown lands. If there were at the time in question any regulations issued by the Surveyor General in regard to lands fronting upon non-tidal waters in respect of which a certificate of indefeasible title had been issued under the *Land Registry Act* following the issue of a Crown grant, no evidence was given as to the fact. Section 6(5) of the *Land Act* provides that where land to be surveyed is in whole or in part bounded by any lake or river, such lake or river may be adopted as the boundary of the land. By s. 7(*d*) it is provided that if a corner of a lot falls in the bed of a stream or in any other locality unfavourable to the planting of a post, or if a post is likely to be disturbed or destroyed the corner shall be witnessed by witness-posts planted at the nearest suitable point on the surveyed line, that is, either north, south, east or west of the true corner. There are, however, no similar provisions in the *Land Registry Act*.

The practical difficulties in surveying such property adjoining a mountainous stream such as the Salmo River, unless the river is stated to be the boundary, are obvious. In the summer time, at low water, it is apparent from the evidence that the body of the stream is comparatively small while, at the time of the spring floods, the banks at the vegetation line indicated on the plan are at times overflowed. To establish the *medium filum* or thread of the stream at a particular time would be feasible for a surveyor, but to mark it with posts which would be visible or continue

in place when the stream was in flood would probably be a matter of extreme difficulty. Since it is obvious upon the evidence that what was intended by the parties was that the area to be conveyed would be such as to afford Wartime Metals Ltd. direct access to the water in the stream at all seasons of the year, the placing of the stakes at the top of the bank, in accordance with the directions of the Surveyor General applying to Crown lands in such cases, should not, in my opinion, be held to restrict the rights of the transferee to something less than would be the case if the western boundary had been defined as being the river.

In my opinion, the rights acquired by His Majesty The King on behalf of Wartime Metals Ltd., all of which were transferred to the appellant, were the same in their nature as if the westerly boundary of the property had been described in the certificate of title and the accompanying plan as the Salmo River. The matter is not affected, in my opinion, by the fact that the land conveyed is shown in the description by measurement and colour on the plan (*Micklethwait v. Newlay Bridge Co., Berridge v. Ward,* above referred to). Whether the basis upon which the title of such an owner *ad medium filum* rests is of common right, as stated by Sir Mathew Hale in his treatise and by Lord Blackburn in *Bristow v. Cormican*[1], or whether it passes as a matter of construction of the grant, as it was treated by the Judicial Committee in *Lord v. City of Sydney*[2] and in *Maclaren v. Attorney General of Quebec*[3], the principle appears to me to be, as Lord Shaw said in *City of London v. Central London Railway*[4] too deeply embedded in the law to be disturbed or doubted.

The argument to the contrary, to which effect has been given in the Court of Appeal, means that a transfer of land described as bounded by a non-tidal or non-navigable stream in a grant from the Crown, registered under an Act repealed by s. 26 of the statutes of 1921 (see s. 126 of the *Land Registry Act*), would vest in the owner title to the bed of the stream *ad medium filum,* while a transfer of immediately adjoining property fronting upon the same water and similarly described in a certificate of indefeasible title would carry no such right, even as between the parties.

[1] (1878), 3 App. Cas. 641.
[2] (1859), 12 Moo. P.C.C. 473, 14 E.R. 991.
[3] [1914] A.C. 258.
[4] [1913] A.C. 364.

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The question to be decided in this action is the proper construction of the grant by the respondent to His Majesty dated May 28, 1945. That question cannot, in my opinion, be affected by the terms of ss. 53, 125, 141(1) and 156 of the *Land Registry Act* which deal with the manner of registration of conveyances and the duty of the registrar to register the title claimed if the statutory conditions are complied with. The failure of the Crown to ask that the grant be construed as conveying title *ad medium filum* cannot deprive the appellant of the right to insist as against the grantor that it should be so construed.

In the *Fares* case it was held that the proper construction of the grants in the letters patent was that they were not intended to convey and did not convey the unsurveyed lands covered by the waters of Rush Lake, for the reasons above mentioned. There was no authority in anyone to give away lands of the Crown or to sell unsurveyed lands, and to do so was expressly prohibited by the *Dominion Lands Act*. No statutory enactment of that nature affects the present matter.

The transfer of the lands in question was made, as I have pointed out, for the purpose of enabling Rotter to convey the same forthwith to His Majesty the King for the purposes above described. There is nothing to rebut what was referred to by Strong J. in *The Queen v. Robertson*[1], as the presumption that it was intended that the soil and bed of the river *ad medium filum* should pass by the conveyance: rather do the circumstances support such presumption and, in my opinion, the transfers should be so construed. As all of the right, title and interest of His Majesty in the property were transferred by the conveyance to the appellant, that title has, in my opinion, been vested in it since the date of the issue to it of the certificate of indefeasible title which has been mentioned.

In *Re White*[2], where an application was made to bring land bounded by a river under the provisions of the *Real Property Act 1900,* it was determined by the Court of Appeal that the certificate of title should show as part of the description of the land whether the presumption of ownership of the soil *ad medium filum* does or does not apply. Street C.J., who gave the judgment of the Court, considered

[1] (1882), 6 S.C.R. 52 at 130.

[2] (1927), 27 S.R. (N.S.W.) 129.

that it was the duty of the Registrar General in such cases to investigate the claim and determine whether the presumption applied and, if so, to insert in the description of the land in the certificate of title a statement to that effect. While in the present matter the appellant by its counterclaim asked for a declaration that it was the lawful owner in fee simple of the river bed *ad medium filum*, the prayer for relief did not ask that the certificates of title held by the parties respectively should be amended to evidence that fact.

This litigation has now been pending for more than five years and as the only persons whose rights may be affected are the parties to this action, it is, in my opinion, in the interests of the due administration of justice that such rights be now finally determined and defined upon the record.

I would allow this appeal with costs and direct that the judgment at the trial be amended by directing that the certificate of indefeasible title issued to the appellant by the Nelson Land Registry Office and the duplicate thereof in that office be amended by adding to the description of the land the following words immediately after the figures 61457-I in the description:

and the lands immediately adjoining the same to the west *ad medium filum aquae* of the Salmo River as of May 28, 1945

and that the certificate of indefeasible title of the respondent for the remaining portion of sub-lot 36 referred to in the pleadings and the duplicate thereof in the said Land Registry Office dated January 28, 1946, be amended accordingly.

The appellant should have its costs in this Court and in the Court of Appeal.

MARTLAND J. (*dissenting*):—The material facts in the present appeal are set out in the reasons of my brother Locke and do not require to be repeated at length. In each of the conveyances, from Erie Timber Company Limited to the respondent, from the respondent to the Crown, and from the Crown to the appellant, the description of the land to be conveyed was those parts of Sub-lot 36 of Lot 1236, Kootenay District, shown outlined in red on the reference plan, which plan was registered, as No. 61457, in the Land Registry Office in Nelson, British Columbia. The significant thing to me is that, on the basis of a conveyance in this

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form, a conveyance which resulted from expropriation proceedings by the Crown, application was made to register title to land pursuant to s. 125 of the *Land Registry Act*, R.S.B.C. 1948, c. 171, which provides:

> Every person claiming to be registered as owner in fee-simple of land shall make application to the Registrar for registration in Form A in the First Schedule. R.S. 1936, c. 140, s. 124.

As Coady J.A. said, when delivering the judgment of the Court of Appeal:

> That application is not before the Court but we can assume, I think, that the property described in that application is that described in the conveyance and nothing more. The purpose of requiring application to be made on Form A is to make sure that the applicant and the Registrar are "ad idem" as to what land the applicant requests registration of and what land is to be included in the certificate of title.

The material portion of Form A reads as follows:

> I, , solemnly declare that I am entitled to be registered as the owner in fee-simple of the land hereunder described, and hereby make application under the provisions of the "Land Registry Act" and claim registration accordingly.

We must assume that the applicant for registration applied for registration of the parcel of land described as above and did not, on the strength of the conveyance in that form, seek registration of a title to include, in addition to the lands actually described in the conveyance, the lands to the west thereof *ad medium filum* of the Salmo River. On the basis of the various conveyances the appellant obtained a certificate of indefeasible title to those parts of Sub-lot 36 shown outlined in red on Reference Plan 61457-I.

These facts raise the issue as to whether the rebuttable rule of construction applicable, under the common law, to a conveyance of land therein indicated as abutting on a non-tidal stream, that the land extends to the middle line of the stream, is also applicable in respect of a registered title under a Torrens System of titles, such as the *Land Registry Act*. The appellant, in answer to a claim for trespass, and in support of its counterclaim, relied upon its title to the land to the middle line of the Salmo River and claimed ownership of that land. That claim depends upon what title was conferred upon it by its existing certificate of indefeasible title, for there has been no claim for any correction of the register or of any instrument.

That the rule itself is well established in English law is shown in the cases cited by my brother Locke. But as Anglin C.J.C. said, in this Court, in *The King v. Fares*[1]:

> I have had the advantage of perusing the carefully prepared opinions of my brothers Duff and Lamont. While they may differ in some details, as I read what they have written, they agree in holding that, assuming the *ad medium filum* rule of English law to be ordinarily applicable in Saskatchewan to non-navigable waters, such as the lake in question, it is, at the highest, a rule of interpretation, and the rebuttable presumption thereby created yields readily to proof either of circumstances inconsistent with its application, or of the expressed intention of a competent Legislature so to exclude its application. With that view, I entirely agree (*Keewatin Power Co. v. Kenora*, (1908) 16 Ont. L.R. 184, at 190, 192), and I also agree that the intention of the Dominion Parliament—an authority competent so to provide—to exclude the application of the rule to Dominion lands in the North West Territories, was sufficiently manifested by the provisions of the *Dominion Lands Act* (c. 54, R.S.C. 1886).

There was no provision in the *Dominion Lands Act*, there under consideration, expressly excluding the application of the *"ad medium filum"* rule, but it was held that the Act disclosed an intent inconsistent with its application.

Lamont J., with whom Cannon J. concurred, made some reference to the application of the rule to a Torrens System of titles, at p. 96, as follows:

> In addition, there was in force at the same time the *Territories Real Property Act* (ch. 51 of R.S.C., 1886), in which Parliament had adopted for the Territories the Torrens System of land registration and transfer by which the title of an owner was registered under the Act and a transfer of land could be made by a conveyance in Form G, in which form the land to be conveyed is described by section, township, range and meridian, according to the description given in the survey provided for by the *Dominion Lands Act*. It will be noted, however, that no provision was made for the registration of property or property rights to which a riparian owner would be entitled in the bed of a non-navigable stream or lake by virtue of the *ad medium filum* rule if the same were applicable to conveyances of land in the North West Territories.

Do the provisions of the *Land Registry Act* manifest an intention to exclude the rule in respect of certificates of indefeasible title in British Columbia? The judgment of the Court of Appeal, delivered by Coady J.A., in this case is that they do, and I have reached the same conclusion.

[1] [1932] S.C.R. 78 at 80, 1 D.L.R. 421.

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In the first place, the purpose of a Torrens System of titles, such as is provided for in the *Land Registry Act,* is that which was stated by Lord Watson, in the leading case of *Gibbs v. Messer*[1], when speaking of the *Transfer of Land Statute of Victoria*:

> The main object of the Act, and the legislative scheme for the attainment of that object, appear . . . to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

If the *"ad medium filum"* rule were to be applied to certificates of indefeasible title, it would always be necessary to go behind the register. The rule is a rebuttable one. It may be rebutted, as Cotton L.J. said, in *Micklethwait v. Newlay Bridge Company*[2], by "facts, whether appearing on the face of the conveyance or not". Consequently, if the rule were to apply to a registered title under the *Land Registry Act,* a person proposing to deal with respect to a parcel of land bounded by a non-tidal and non-navigable river, could not tell, even by a search of the conveyance which created the title, whether it carried the ownership of the land *ad medium filum* or not. The whole intent of this Act is that a person dealing with land may rely upon the register.

In the second place, in my opinion, specific provisions of the Act show a contrary intent. I have already referred to s. 125 and to Form A, dealing with an application to register land. Section 141(1) deals with the Registrar's power to register, and provides:

> Where an application has been made for the registration of the title to any land, if the Registrar is satisfied that the boundaries of the land are sufficiently defined by the description or plan on record in the office or provided by the applicant, and that a good safeholding and marketable title in fee-simple has been established by the applicant, the Registrar shall register the title claimed by the applicant in the register.

Section 156 deals with the issuance of subsequent certificates of title and reads:

> Where a conveyance or transfer is made of any land the title to which is registered, the grantee or transferee shall be entitled to be registered as the owner of the estate or interest held by or vested in the former owner to the extent to which that estate or interest is conveyed or transferred; and the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good

[1] [1891] A.C. 248 at 254.

[2] (1886), 33 Ch. D. 133 at 145, 55 L.T. 336.

safe-holding and marketable title, shall, upon production of the former certificate or duplicate certificate of title, register the title claimed by the applicant in the register. R.S. 1936, c. 140, s. 155.

These provisions establish that on the application for the issue of the first certificate of title the applicant must make claim to the title which he seeks to register and thereafter conveyances are made on the basis of the registered title.

Section 53 of the Act contains the following provision:

Instruments in statutory or other form sufficient to pass or create an estate or interest in land shall be registrable, and for all purposes of registration effect shall be given to them according to their tenor. R.S. 1936, c. 140, s. 52.

It seems to me, in view of this section, in the absence of any claim by the Crown that on the basis of the conveyance to it by Rotter it had become entitled to be registered as owner of the lands *ad medium filum* of the River Salmo, the only effect which could be given to that conveyance was the issuance of a certificate of indefeasible title to those lands which were actually described in the conveyance itself. That is what actually occurred and, in turn, a similar title issued in the name of the appellant as a result of the subsequent conveyance to it by the Crown.

The Act does contain a provision regarding title to minerals to the middle line of a highway, in certain circumstances. Section 112 provides:

(1) Where, on the subdivision of land, any subdivision plan or reference plan covering the land subdivided is deposited in any Land Registry Office, and any portion of the land subdivided is shown on the plan as a highway, park, or public square, and is not designated thereon to be of a private nature, the deposit of the plan shall be deemed to be a dedication by the owner of the land to the public of each portion thereof shown on the plan as a highway, park, or public square for the purpose and object indicated on or to be inferred from the words or markings on the plan. No certificate of title shall issue for any highway, park, or public square so dedicated.

(2) The deposit of any plan to which this section applies shall be deemed to vest in the Crown in right of the Province the title to such portion of the land subdivided as is shown thereon as a highway, park, or public square: Provided that the deposit of the plan shall not be deemed to vest in the Crown or otherwise affect the right or title to the minerals, precious or base, including coal, petroleum, fireclay, and natural gas, underlying any portion of the land shown as a highway, park, or public square, anything in the "Highway Act", the "Municipal Act", or any other Act to the contrary notwithstanding; but, upon conveyance of a parcel shown upon the plan adjoining a highway, park, or public square so dedicated, such minerals underlying the portion of the highway, park, or public square

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opposite the parcel conveyed and between that parcel and the middle line of the highway, park, or public square, unless expressly reserved, shall pass to and vest in the owner for the time being of the parcel conveyed. R.S. 1936, c. 140, s. 111.

It is to be noted that in this particular instance the question as to whether or not title to minerals to the middle line of the highway passes is made dependent upon whether or not there is an express reservation of minerals in the conveyance.

My conclusion is that the rebuttable rule of construction at common law as to conveyances of land bounded by a non-tidal river is not applicable to a certificate of indefeasible title under the *Land Registry Act*. In the present case the appellant, in claiming ownership of the river bed *ad medium filum,* relies upon its certificate of indefeasible title. In my opinion that certificate does not establish title in the appellant to any lands beyond those which are actually described in it.

I have dealt up to this point with the question of the applicability of the rule above mentioned to the certificate of indefeasible title itself. However, counsel for the appellant, in his factum, also submits the following proposition.

> If the form of the appellant's certificate of title is not in a form satisfactory to include the whole of the appellant's interest the appellant is in a position in equity to apply for rectification of the certificate.

The appellant's title is derived from a conveyance to it by the Crown. It could not acquire thereby anything beyond what the Crown owned. The Crown derived its title by virtue of the conveyance from the respondent whereby he had granted those parts of Sub-lot 36 "outline in red on reference plan attached thereto".

The portion of Sub-lot 36 outlined in red on the reference plan did not include the river bed of the Salmo River *ad medium filum.*

That conveyance from Rotter to the Crown was submitted by the Crown to the Registrar for registration and he, by virtue of s. 53 of the *Land Registry Act,* was bound to give effect to it "according to its tenor".

In Earl Jowitt's Dictionary of English Law, in defining the word "tenor", it is said:

> The tenor of a document means, in ordinary conversation, its purport and effect, as opposed to the exact words of it. In law, in its correct usage, the reverse is the case, and tenor means the exact words of the document.

In view of the provisions of s. 53, I do not see how the Registrar, solely on the basis of the conveyance presented to him by the Crown, could have issued to it a certificate of indefeasible title for anything more than the lands actually described in the conveyance. If the Crown contended that it was entitled to more it would seem that proceedings for rectification of the conveyance would have been necessary. No such proceedings have been taken, nor is there any evidence that the Crown made any such contention when it accepted its certificate of indefeasible title.

For these reasons, in my opinion, this contention of the appellant also fails.

In my view the appeal should be dismissed with costs.

Appeal allowed with costs, MARTLAND J. *dissenting.*

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Solicitor for the plaintiff, respondent: J. Frank Meagher. Trail, B.C.