1930
*Nov. 3.
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HIS MAJESTY THE KING..... APPELLANT;

AND

WILLIAM HENRY FARES, ALEXANDER SMITH AND SMITH & FARES, LIMITED (SUPPLIANTS)... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Waters and watercourses—Real property—Crown grants of land in North-West Territories abutting on non-navigable lake—Subsequent recession of waters owing to drainage for construction work—Subsequent acquisition of title by present owners—Claim by present owners, against the Crown, to land to centre of lake—Presumption of grant ad medium filum aquae—Applicability—Rebuttal or exclusion of the presumptive rule by inference from statutes, language of grant or agreement, surrounding circumstances—Dominion Lands Acts, R.S.C., 1886, c. 54; 1879, c. 31; Territories Real Property Act, R.S.C., 1886, c. 51; North-West Territories Act, R.S.C., 1886, c. 50, s. 11.

In 1888, 1889 and 1890, the Crown issued patents, some to the C.A.C. & C. Co., and some to the C.P.R. Co., for certain fractional sections of land in the North-West Territories (within what is now the province of Saskatchewan), which fractional sections then abutted on Rush Lake (held to be non-navigable). The only survey at that time of lands in Rush Lake's vicinity was that of 1883, and was of land not covered by water. The patents made no reference to the survey nor to Rush Lake. The descriptions in the patents were all in form such as follows: "All that parcel or tract of land, situate * * * in the 17th township * * * and being composed of the whole (fractional) of section 12 of the said township, containing by admeasurement 127 acres more or less." The survey of 1883 shewed the edge of Rush Lake as a meandered line, and the area of each fractional section bordering on the lake was shown, on the map, on that fractional section. The rights of the C.A.C. & C. Co. to its lands were acquired under an agreement in 1887 (made pursuant to an Order in Council) in which the Dominion Government agreed to sell 50,000 acres, 5,000 acres at each of ten points, of which Rush Lake was one, at the price of $1.50 per acre and performance of certain cultivation conditions, which acreage the company selected and paid for. The rights of the C.P.R. Co. to its lands were acquired under agreement of October 21, 1880, appended to and ratified by c. 1 of 44 Vict. (Dom.). In 1903-4, the C.P.R. Co., for the purposes of straightening its railway line, made a drain to lower the waters, and the effect was to make bare a large extent of land formerly part of the lake bed. In 1909 the respondents acquired title to the fractional sections in question (on the same descriptions of the lands as in the patents). In the present action they claimed, as being successors in title to the patentees and riparian owners, to be entitled to all the land in front of their fractional sections to the centre of Rush Lake, or, in any event, to the remainders of the whole sections respectively (which remainders had become dry owing to the recession of the waters).

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

Held: Respondents were not entitled to the land so claimed. Judgment of the Exchequer Court (Maclean J.), [1929] Ex. C.R. 144, reversed.

Under English law, the presumptive rule for construing a conveyance as a grant *ad medium filum aquae* is rebutted if an intention to exclude it is indicated in the language of the conveyance or is reasonably to be inferred from the subject matter or the surrounding circumstances. (*Dwyer* v. *Rich,* I.R. 6 C.L. 144, at 149; *City of London Tax Commrs.* v. *Central London Ry. Co.,* [1913] A.C. 364, at 372, and other cases cited). Likewise, assuming that said presumptive rule would otherwise apply in the Territories (*North-West Territories Act,* R.S.C., 1886, c. 50, s. 11; *semble,* the rule was not entirely excluded from the general body of English law as introduced into the region—*per* Duff and Rinfret JJ.; Lamont and Cannon JJ. inclining to the same view), and would apply there to such a body of water as Rush Lake, yet the rule would be excluded if the Dominion statute law applicable to the Territories satisfactorily disclosed an intention inconsistent with its application. And, *per* Anglin C.J.C., the Dominion statute law in force when the patents in question were issued indicated, as the proper inference therefrom, an intention to exclude the application of the rule to grants of Crown lands in the North-West Territories. (Lamont and Cannon JJ. were inclined to the same view, but based their decision on the interpretation, as stated below, of the patents and agreements from the Crown. Duff and Rinfret JJ. held that where lands were acquired through the commoner transactions sanctioned by the *Dominion Lands Act*—homestead entry, preemption entry, sale at a given price per acre—the presumption must necessarily be excluded in order to give full effect to the intent of the statutory provisions.) (*Dominion Lands Acts,* R.S.C., 1886, c. 54, particularly ss. 3, 8, 14, 29, 32, 129, 130, 131; 1879, c. 31, particularly ss. 30, 34; *Territories Real Property Act,* R.S.C., 1886, c. 51, referred to.) Also, the patents, and the agreements under which the lands were acquired from the Crown, and the circumstances of the purchase, (all as interpreted in the light of the statutory provisions), indicated, as the reasonable inference therefrom, that there was no intention that the *ad medium filum* rule should apply, but that the patents to the fractional sections now in question should be granted and accepted as covering only the acreage therein set out.

Duff and Rinfret JJ. further held that, even assuming that the presumption *ad medium filum* took effect and that, by force of the presumption, strips of the bed of the lake *ex adverso* passed to the grantees from the Crown, yet, on the subsidence of the lake in 1904, the land expressly described in each grant ceased to be riparian land, and, to a conveyance of this land to respondents under that express description, land not in contact with the lake, the presumption could not apply; no equitable right of respondents had been alleged or proved. (Anglin C.J.C. doubted whether the Crown should be allowed to set up the fact of the subsequent transfers in reference to the present claim; and was inclined to the opinion that, although respondents must succeed by the strength of their own title, they had an equitable, if not legal, right to everything granted by the Crown to their predecessors in title.)

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), hold-

(1) [1929] Ex. C.R. 144.

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ing that, according to the true construction of the grants from the Crown (in the right of the Dominion of Canada) of the whole (fractional) of sections 12, 13 and 14, in township 17, range 11, and of the whole (fractional) of sections 9, 16, 17, 18, 19 and 20, in township 17, range 10, all west of the 3rd meridian, in the Dominion of Canada (said land being within what is now the province of Saskatchewan), there was granted by the Crown to the grantees all the lands bounded by and abutting on Rush Lake, to the centre of the lake in front of said sections and more particularly all of sections 12, 13 and 14, in township 17, range 11, and all of sections 9, 16, 17, 18, 19 and 20, in township 17, range 10, all west of the 3rd meridian; and that the suppliants (the present respondents) are now the owners of the said lands, excepting out of any of said lands those portions now vested in the Canadian Pacific Railway Company.

The material facts of the case and the questions in issue are sufficiently set out in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was allowed with costs.

R. V. Sinclair, K.C., for the appellant.

E. F. Newcombe, K.C., and *W. C. Hamilton, K.C.*, for the respondents.

ANGLIN, C.J.C.—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* (1)), 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

(1) (1908) 16 Ont. L.R. 184, at 190, 192.

lands in the North West Territories, was sufficiently manifested by the provisions of the *Dominion Lands Act* (c. 54, R.S.C. 1886).

I had occasion some years ago in *Keewatin Power Co.* v. *Kenora* (1), to consider the applicability of the *ad medium filum* rule in Ontario. Notwithstanding the reversal of my decision by the Ontario Court of Appeal (2), with the utmost respect, I still entertain the opinion which I then held. The difference between my view and the view taken by the Court of Appeal was this: in my opinion, notwithstanding the general adoption of English law in Upper Canada effected by the Act of 1792, only so much of that body of law as was suitable to the conditions of that province was thus brought in. The Court of Appeal, on the contrary, took the view that, the words of the statute being absolute and unqualified, the entire body of English law, as it stood at the date of the Act in question, was thereby introduced, including the provisions thereof which might not be suitable to the circumstances of the province. That question, fortunately, does not arise here owing to the wording of the *North-West Territories Act,* which expressly limits the provisions of English law introduced by it (R.S.C., 1886, c. 50, s. 11) by the words, "in so far as the same are applicable to the Territories." Moreover, the introduction of English law thus effected was made subject to repeal, alteration, variation, modification, or other affection thereof, by, *inter alia,* any Act of the Parliament of Canada.

The restriction of the application of the *ad medium filum* rule in Saskatchewan rests on legislation of the Parliament of Canada. See sections 3, 8, 129, 130, 131 of the *Dominion Lands Act,* c. 54, R.S.C., 1886,—provisions which were in force when the grants in question were issued in 1888 by the Crown,—and the *Territories Real Property Act* (c. 51, R.S.C., 1886), providing for the adoption in the Territories of the Torrens System of land transfer. I think that these provisions indicate an intention on the part of Parliament,

1. To have a definite clear cut system of survey of all lands coming under the *Dominion Lands Act,* in which a section should be an integral part of a township and should consist generally of 640 acres;

(1) (1906) 13 Ont. L.R. 237. (2) (1908) 16 Ont. L.R. 184.

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2. That the boundary lines thereof should run from one corner post or monument to another, each of which should be as nearly as possible a mile in length;

3. That these lines should be the "true and unalterable boundaries" of the section (s. 129) and that the section should consist of the whole width between the corner posts respectively "and no more or less" (s. 130); and

4. To provide by section 29 of the *Dominion Lands Act* for a price per acre of surveyed lands to be fixed by Order in Council.

The inference proper to be drawn therefrom, in my opinion, is the indication of an intention by Parliament to exclude the application of the *ad medium filum* rule of construction of English law to grants of Crown lands in those Territories.

My conclusion that this appeal should be allowed rests solely upon the inapplicability of the *ad medium filum* rule and has been reached entirely independently of the view pressed by counsel for the Crown as to the effect of the subsequent conveyances. I doubt whether the Crown should be allowed to set up the fact of those subsequent transfers in reference to the present claim. While, owing to privity of estate, they may not have been strictly *res inter alios acta,* they were certainly closely akin thereto. Although, no doubt, the plaintiff must succeed by the strength of his own title, the equitable, if not the legal, right of the respondent to everything granted by the Crown to his predecessors in title would seem to be reasonably apparent.

The judgment of Duff and Rinfret JJ. was delivered by

DUFF J.—Some questions of general interest which were rather elaborately discussed by counsel may be very summarily disposed of. That the presumptive rule *ad medium filum,* to employ a convenient label, was not entirely excluded from the general body of English law as introduced into the region later known as the Canadian Territories, is not susceptible of serious dispute. *Lord* v. *Commissioners of Sydney* (1). To what extent it is open to the courts to

(1) (1859) 12 Moo. P.C. 473.

hold that the rule was varied on its introduction, by force of the principle that the common law as introduced into a new colonial settlement must be regarded as modified, in so far as that may be necessary in order to make it reasonably capable of adaptation to the circumstances of the new country, it is unnecessary now to examine.

By the common law itself the presumption with which we are concerned applies to the beds of non-tidal rivers, whether subject to public rights of navigation or not; and powerful arguments may be advanced for the proposition that under the common law there is at least no general rule excluding its application to the beds of lakes.

The conclusion of the learned President that Rush Lake was not at the critical period navigable, in any pertinent sense, is unassailable; and I shall assume for the purposes of this judgment that the presumption would apply to such a body of water as Rush Lake, and that it would govern the rights of riparian proprietors there, unless the rule after its introduction was abrogated by competent legislative authority, or unless by reason of provisions in such statutes as the *Land Titles Act*, the *Dominion Lands Act* or the *North-West Territories Act* it was so affected in its operation as to make it inapplicable either wholly or in some particular class of cases.

The *prima facie* rule, which declares a presumption or embodies a principle of construction, may be overborne by circumstances establishing satisfactorily a contrary intention.

The presumptive construction is not excluded by the fact that the lands are described by reference to a plan by colour and by quantity, or by metes and bounds, so long as the land is shewn to be bounded by the body of water or by the highway as the case may be. *Central London Railway Co.* v. *City of London Land Tax Commissioners* (1); *Thames Conservators* v. *Kent* (2); *Maclaren* v. *Attorney-General for Quebec* (3). Blackburn J., in *Plumstead Board of Works* v. *British Land Co.* (4), used these words:

And it is not enough to rebut that presumption (the presumption *ad medium filum aquae* or *viae*) to say that it is designated as adjoining to

(1) [1911] 1 Ch. 467, at 474.
(2) [1918] 2 K.B. 272, at 284.
(3) [1914] A.C. 258, at 273.
(4) (1874) L.R. 10 Q.B. 16, at 24.

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or abutting on that road or river, and this even if there was a mention of the acreage. But * * * it always has been held to be enough when there is anything to shew that it was not the intention to convey any part of the road.

The scope and application of the rule for our present purpose is very clearly stated by Fitzgerald J., in *Dwyer* v. *Rich* (1), in these words: "The authorities adverted to in the course of the argument establish, as a general rule of construction, that where land adjoining a highway or inland river is granted, the *prima facie* presumption" (this is also the phrase used by Blackburn J. in the last mentioned case)

is that the parties intended to include in the grant a moiety of the road or of the river bed, as the case may be; and that such general presumption ought to prevail, unless there is something to indicate a contrary intention. * * * To rebut the general presumption, there must be something in the language of the grant indicating an intention to exclude or something in the subject matter or in the surrounding circumstances from which such an intention may reasonably be inferred.

Again, in *Micklethwait* v. *Newlay Bridge Co.* (2), Cotton L.J. says:

There may be facts, whether appearing on the face of the conveyance or not, from which it is justly inferred that it was not the intention of the parties that the general presumption should apply.

"No doubt" said Lord Atkinson in *City of London Tax Commissioners* v. *Central London Ry. Co.* (3), "the presumption may be rebutted, either by the provisions of a grant or conveyance or by the surrounding circumstances."

The observation of Lord Moulton in *Maclaren* v. *Attorney-General for Quebec* (4), was directed to a case where the sole question concerned the effect of the language of documents of title. The passage does not contemplate a case such as the present; and, when the controversy relates to the construction of a conveyance executed under statutory authority, it cannot properly be read as excluding from consideration the statutory provisions which prescribe the conditions of the transaction.

In *Duke of Devonshire* v. *Pattison* (5), Fry, L.J., delivering the judgment of Lord Esher, Bowen, L.J., and himself, said:

They have further contended that this presumption can be repelled only by words in the deed itself. In our opinion, this latter contention cannot

(1) (1871) I.R. 6 C.L. 144, at 149.
(2) (1886) 33 Ch.D. 133, at 145.
(3) [1913] A.C. 364, at 372.
(4) [1914] A.C. 258, at 273.
(5) (1887) 20 Q.B.D. 263, at 273.

be maintained, for we hold that the presumption may equally be rebutted by the circumstances under which the deed was executed.

Decisions in which the circumstances were treated as displacing the *prima facie* rule are numerous. In *Marquis of Salisbury* v. *Great Northern Ry. Co.* (1), the presumption was held to be rebutted where there was a conveyance to a railway company, purchasing under their statutory power, on the grounds that before the conveyance the company had, in their deposited plans and book of reference, treated the road as being vested in turnpike trustees and that the conveyance exactly carried out that view. In *Pryor* v. *Petre* (2), the lands were described in a schedule by reference to the numbers on the ordinance map, on which the road in question was separately numbered; the number assigned to the road not being included in the schedule. Moreover, the road was a "grassy lane" in which there were some trees for which grantee had not paid; although he had paid for the trees on the land specifically. These circumstances were regarded as sufficient to override the *prima facie* construction. Again, in *Ecroyd* v. *Coulthard* (3), it was held by the trial judge, North J., that the presumption does not apply to awards under the Inclosure Acts unless the bed of the river or half of it is shewn to be part of the waste of the manor over which the tenants have right of common; and this view was approved by Lindley M.R., Chitty L.J., and Collins L.J., in the Court of Appeal (4).

Considering the applicability of the presumption to a patent under the *Dominion Lands Act*, it is necessary to ask oneself how far the *prima facie* construction is consistent with the provisions of the Act under the authority of which the land is granted.

The provisions of the *Dominion Lands Act* do not, in themselves, directly, or by necessary inference, effect a general repeal of the presumptive rule; but, when the provisions of the statute are viewed as a whole, those prescribing the rules for the acquisition of title, together with those relating to survey and division, there is ample warrant for concluding, where lands are acquired through the commoner transactions sanctioned by the Act (homestead

(1) (1858) 5 C.B.N.S. 174.
(2) [1894] 2 Ch. 11.
(3) [1897] 2 Ch. 554.
(4) [1898] 2 Ch. 358.

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entry, preemption entry, sale at a given price per acre), that the presumption must necessarily be excluded in order to give full effect to the intent of those provisions.

The identity of the parcels severally described in the grants in question and the boundaries of the parcels as so described, are established beyond dispute.

The parcels, when surveyed and when granted, were riparian properties, in the sense that on one side they were limited by the shore of Rush Lake, as surveyed in 1883, the other boundaries being rectilinear, and drawn and laid out in compliance with the normal practice in surveying lands for settlement under the *Dominion Lands Act* of 1879. These boundaries are delineated on the official plan of a survey made and confirmed in 1883 which is in evidence; and there is also in evidence a traverse of the shore of the lake of the same year. The respondents contend and the Court below has held that, by force of the presumptive rule, the patents of these several pieces of riparian lands vested, in each case, in the patentee, the title to a strip of the bed of the lake, *ex adverso* the lands explicitly described in the patent, extending from the shore line, as surveyed, to the middle of the lake. My conclusion is that such a construction of the grants cannot in the circumstances be accepted because to accept it would be inconsistent with the policy of the *Dominion Lands Act,* and in particular with certain specific enactments of the statute; and that this is sufficient to overcome the presumption.

The lands granted to the Colonization Co. were purchased under the authority of sec. 29 of the *Dominion Lands Act,* R.S.C., 1886, Cap. 54, by an arrangement, which, after modifications, ultimately assumed the form of a sale by the Crown of 50,000 odd acres of land not covered by water, at a price, fixed by the Governor in Council, of "not less than" $1.50 per acre. In point of fact, the aggregate price paid was a few cents more than the price calculated at the minimum rate. These lands included, as already mentioned, no land covered by water, but did include the fractional sections at Rush Lake, the total area of which was about 1,800 acres. It is plain, therefore, that, since the price authorized by the Governor in Council was to be not less than $1.50 per acre, nobody had authority to convey to the Company additional lands for the consideration thus

paid, in other words, to make a gift to the Company of such additional lands. Indeed, no such conveyance could have been made without departing from the express enactments of the *Dominion Lands Act,* which, as it then stood (sec. 29, R.S.C. 1886, c. 54), required the purchase price of lands sold to be fixed from time to time by the Governor in Council, and the only price so fixed was, as already stated, the price of " not less than " $1.50 per acre.

The only fair inference from the facts, interpreted by the light of the statute, is that no lands in addition to the 50,000 acres (that is to say, no lands covered by water), were intended to pass.

Then the authority to sell, given by section 29, it will be noted, extends to no lands but those which have been surveyed. Unsurveyed lands are outside the scope of that section and I know of nothing in the statute which would permit a grant of unsurveyed lands except under conditions having no place here.

Now the several strips of the body of the lake *ex adverso* the several parcels described in the grants, which, as the petitioners contend, passed to the grantees, by force of the grant, in virtue of the *ad medium filum* rule, could not in any given case be described as " surveyed " lands within the meaning of section 29. There had been no survey of any one of these strips; indeed, the middle line of the lake itself had not been fixed, either by markings on the ground or otherwise. The boundaries of the strips had been in no way determined; the acreage could not be calculated. It was not suggested that there was any order of the Governor in Council applicable to these lands, permitting sales to be made at prices determined in any other than the usual manner, at a given price per acre. The price of the strip as a whole could not therefore be ascertained.

It is worth while, on this point, to revert to the Act of 1879, the *Consolidated Dominion Lands Act* of that year, ch. 31, section 30. The section is in these terms:

30. Unappropriated Dominion lands, the surveys of which may have been duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase at the rate of one dollar per acre; but no such purchase of more than a section, or six hundred and forty acres, shall be made by the same person. Provided that, whenever so ordered by the Minister of the Interior, such unoccupied lands as may be deemed by him expedient from time to time may be withdrawn from ordinary sale or settlement, and offered at public sale (of which sale due and suffi-

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cient notice shall be given) at the upset price of one dollar per acre, and sold to the highest bidder:

2. Provided further, that any legal sub-division or other portion of unappropriated Dominion land which may include a water power, harbour or stone-quarry, shall not be open for purchase at the rate of one dollar per acre, but the same shall be reserved from ordinary sale, to be disposed of in such manner, and on such terms and conditions, as may be fixed by the Governor in Council on the report of the Minister of the Interior.

The uniform price fixed, it will be observed, is $1 per acre and the same price was fixed for pre-emptions, sec. 34, subsec. 1. There appears to be no authority anywhere in the Act (of 1879) to vary this price, except in certain special cases, as, for example, where the sale is to take place by public auction, which do not concern us here. It is plain, therefore, that in the survey of these fractional parcels in 1883 for sale or settlement, when the statute of 1879 was in force, the authorized officials must have contemplated the survey of parcels of land, the boundaries and the acreage of which should be fixed and determined so as to make it possible to dispose of them in the ordinary way, by sale or pre-emption, at the statutory price; and the evidence that this was so in fact is explicit. The shore line was run solely for the purpose of ascertaining the acreage of the fractional areas. The officials charged with the administration of the Act had no authority to include, in any sale of these areas, any unsurveyed part of the bed of the lake.

As to the lands purchased by the Railway Company, these are fractional sections 9, 13, 17 and 19. These sections had been acquired by the Railway Company under article 11 of its agreement with Her Majesty the Queen which received statutory ratification by Chapter 1 of 44 Vict. That article contemplated the allotment to the Railway of full sections of 640 acres. Where such sections contained "lakes and water stretches" the beds of these were not to be counted in computing the 25 million acres to which the Railway Company became entitled under the statute and agreement, although it seems clear enough that the title to the whole section was to pass to the Company. In the case of the four fractional sections mentioned, the patents now in question, which were accepted by the Company, embrace in each case only the fractional section and under any one of these patents the fractional section alone would pass.

Now, by the arrangement between the Company and the Government, the Company became entitled to 25 million acres precisely, subject only to the exception relating to the beds of lakes and other water stretches included within the limits of any section granted to the Company. Beds of lakes and water stretches not included in any such section could be acquired by the Company only by selection in accordance with the last clause of article 11. There is no suggestion that such a selection was made by the Company of any part of the bed of Rush Lake. No authority was vested in anybody to convey to the Company any part of the bed of Rush Lake save in pursuance of such a selection. In these circumstances I think the presumption is negatived.

The judgment of the learned President of the Exchequer Court is also attacked upon a ground indicated in the "fourth defence" set out in the appeal case. The Crown alleges that the subsidence of the waters of the lake, which resulted from the works of the Canadian Pacific Railway Company, occurred some years before the transfers to the respondents by the Canadian Agricultural Coal & Colonization Company. It was this subsidence which laid bare the bed of the lake now claimed by the respondents. There is no dispute about the facts, which are stated by the learned trial judge in his judgment in this passage (1):

> At the time the grants of the lands in question were made, the average depth was considerably greater than at present. The Canadian Pacific Railway, in a revision of its main line in this region, in the year 1903, constructed its road bed across a section of Rush Lake for a distance of about two miles, and in order to construct the road bed through the lake with the minimum of material, it lowered the level of the lake by straightening and deepening a small creek leading out of Rush Lake into another lake called Reed Lake; this lowered the water of Rush Lake somewhere between two and three feet. At the north and west ends of the lake, where the banks were low and the water was ordinarily shallow, a considerable area of lake bed became dry; at the east and south ends of the lake where the banks were higher, the recession of the water was not so great. * * * By reason of the recession of the waters of Rush Lake some 3,900 acres of land, it is said, have been reclaimed since the date of the original grants, and this chiefly at the northwest end of the lake.

The title set up by the respondents in the petition of right is stated in this way: In the first five paragraphs, grants by the Crown, to the Colonization Company and

(1) [1929] Ex. C.R. at 147.

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the Railway Company respectively, of the sections with which we are concerned are alleged. Then in paragraph 6, there is an allegation that these sections, as described in the preceding paragraphs, are bounded on one or more sides by, and abut on, Rush Lake, and that the sections are riparian lands. Then there is an allegation that the petitioners "are now" the owners of an estate in fee simple in these sections.

The Crown contends that the allegation in paragraph 6, that the sections are riparian lands bounded by and abutting on Rush Lake, not only was not proved, but was disproved.

I see no answer to this contention of the Crown. Let us assume that the presumption *ad medium* took effect, and to that, by force of the presumption, strips of the bed of the lake *ex adverso*, passed to the grantees. The grantees would thereby acquire the right to have these undetermined strips defined, and thereupon, to obtain a legal title to them by registration, but on the subsidence of the lake in 1904, as shown in the plans in evidence, the land expressly described in each grant ceased, admittedly, to be riparian land. To a conveyance of this land under that express description, land not in contact with the lake, the presumption could not apply. It would be just as entirely inapplicable as to a grant by the Crown, before the subsidence occurred, of the part of the section, separated, let us say, by 100 chains, from the shore of the lake. There was some suggestion that the strip would pass as, in some sense, appurtenant to the land, formerly riparian, expressly described. That of course is impossible. The strip was held by a severable title, as was every square inch that passed to the patentee; and land cannot, of course, in point of law, be appurtenant to land. The petitioners had, in some cases at least, procured their title to the lands expressly granted to be registered, and had obtained certificates of title according to the description in the Crown grants. There is no rule of law or rule of construction by which the description—being a description of non-riparian lands—can be read as comprehending any part of an *ex adverso* strip of the former bed of the lake passing—if anything did pass—under the presumptive rule to the Crown grantee. If any part of the

bed of the lake passed to the grantees, it did not pass under the description but under the grant, in virtue of the presumption.

It is possible that the petitioners might have established an equitable right. No such right, no fact suggesting such a right, is alleged in the petition. No facts are proved, not a jot of evidence is to be discovered in the record, pointing to the existence of such a right. The petitioners' case, in the petition and at the trial, was founded upon their title to the lands expressly granted, which by the petition were alleged to be riparian lands. Even in the supplementary written argument equitable title is not advanced. The case of the petitioners failed, completely and obviously, because the fact on which they based their claim, the riparian character of the land transferred to them, was admittedly non-existent.

While one may be permitted to surmise the existence of facts that might have been adduced, in support of an equitable right, one cannot, of course, acting judicially, proceed upon a mere surmise. Moreover it is very doubtful if the necessary amendments to the petition would be competent, with or without the consent of counsel for the Crown. Robertson, Civil Proceedings by and against the Crown, pages 390 and 391. In the circumstances the Court cannot properly refuse to consider the Crown's contention, which, as I have said, is, I think, quite unanswerable.

In the result, the appeal should be allowed, and the petition dismissed with costs.

The judgment of Lamont and Cannon JJ. was delivered by

LAMONT, J.—In this case, as appears from the documents filed, there were issued by the Crown between September 1, 1888, and February 1, 1890, the patents for a number of fractional sections of land in township 17, ranges 10 and 11, W. 3, in the North West Territories. Some of these were issued to the Canadian Agricultural Coal & Colonization Company, and some to the Canadian Pacific Railway Company, both of whom were the suppliants' predecessors in title.

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The following facts set out in the appellant's factum are not disputed:—

"The grants so conveyed comprised, in all, 3,033·55 acres, for which the patentees paid $1.50 per acre.

"At the time of the issue of the patents the fractional sections in question abutted on the waters of Rush Lake. At that time the only survey of lands in the vicinity of Rush Lake was the survey of 1883. That survey was a survey of land not covered by water. Rush Lake itself was not then surveyed, nor was it or its bed surveyed until 1912.

"The patents above mentioned did not refer to the survey of 1883, nor did they make any reference to Rush Lake. The descriptions of the fractional sections covered by the patents are all in the following form:—

"'All that parcel or tract of land, situate, lying and being in the 17th township, in the 11th range, west of the third meridian, in the Provisional District of Assiniboia, in the North West Territories of the Dominion of Canada, and being composed of the whole (fractional) of section 12 of the said township, containing by admeasurement 127 acres, more or less.'

"The survey of 1883 shewed the water's edge of Rush Lake as a meandered line, and the area of the various fractional sections bordering on the lake was shewn on the map on each fractional section.

"In 1903-4, for the purpose of straightening its main line, the Canadian Pacific Railway Company built a drain to lower the water in Rush Lake. This drain was constructed southeasterly from Rush Lake to Reed Lake, and the waters of Rush Lake were drained into Reed Lake thereby, and the level of the water in Rush Lake was lowered at least three feet. The effect of this was to make bare and dry, or, practically dry, a large extent of land, formerly part of the bed of Rush Lake, and lying between the meandered line on the map indicating the water's edge of Rush Lake as it was at the time of the survey of 1883, and as it was when the patents above mentioned were issued, and the new water's edge of Rush Lake created by the lowering of the waters thereof.

"The suppliants acquired their title to the fractional sections in question in 1909—six years after the lowering of the waters of Rush Lake."

The claim of the suppliants is that upon the true construction of the original patents they, being successors in title to the patentees and riparian owners, are entitled to all the land in front of their fractional sections to the centre of Rush Lake, or, in any event, to the remainder of the fractional sections which have become dry owing to the recession of the waters of the lake. The claim of the Crown is that the area conveyed by each grant is confined strictly to the acreage mentioned in the description thereof.

The matter was tried before the learned President of the Exchequer Court (1), who found that the suppliants were riparian owners, and, following the rule of construction, well established in English law, that where in a conveyance of land the description shews that the land granted extends to the bank of a non-navigable stream, the conveyance is to be construed as a grant *ad medium filum aquae,* he held the suppliants to be entitled to the land in front of their fractional sections extending to the centre of the lake. From that judgment this appeal is brought.

By s. 11 of the *North-West Territories Act,* R.S.C., 1886, c. 50, the Parliament of Canada enacted as follows:—

> Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

At that date the *ad medium filum* presumption or rule of construction formed part of the law of England. It, therefore, applied to the construction of grants or other conveyances of land in the North-West Territories unless (1) it was not applicable to the conditions existing in the Territories, and, therefore, not introduced therein, or (2) it was otherwise excluded.

Now it has long been settled law in England that the *prima facie* application of the rule would be rebutted if there was anything in the language of the conveyance indicating an intention to exclude it or anything in the subject matter or the surrounding circumstances from which

(1) [1929] Ex. C.R. 144.

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such an intention might reasonably be inferred. *Dwyer* v. *Rich* (1); *City of London Tax Commissioners* v. *Central London Railway Company* (2); *Maclaren* v. *Attorney-General for Quebec* (3). Likewise the rule would be excluded if the statute law of the Dominion applicable to the Territories satisfactorily disclosed a legislative intention inconsistent with its application to conveyances of territorial lands.

Whether the conditions prevailing in the Territories when English law was declared to be in force therein were so different from those prevailing in England that we would be justified in holding the rule entirely excluded on that ground, may, in my opinion, well be doubted. At any rate a consideration of that point will be unnecessary in the present case if the statute law discloses an intention on the part of the Legislature, or the patents, or the circumstances under which they were issued, disclose an intention on the part of the parties thereto, to exclude the rule. Our first inquiry, therefore, will be whether the legislation of the Parliament of Canada, passed prior to the issue of the patents in question herein, indicates any legislative intention as to the application of the rule.

At the outset it may be noted that, after the surrender of Rupert's Land and the North-West Territories to Canada by the Hudson's Bay Company in 1869, the title to all public lands therein was in the Crown in right of the Dominion, and, therefore, subject to the jurisdiction of Parliament. The first legislation dealing with these lands is to be found in chapter 23 of the Statutes of Canada passed in 1872, and cited as the *Dominion Lands Act*. This Act, with certain amendments, was re-enacted as chapter 31 of the Statutes of 1879, and carried forward into the Revised Statutes of 1886, as chapter 54. The sections of the Act referred to below are taken from the Revised Statutes, 1886, but they are almost identical with the corresponding sections of the Act of 1872.

S. 3 of the Act, in force when the grants herein were issued, reads as follows:

> 3. Except as provided by any other Act of the Parliament of Canada, this Act applies exclusively to the public lands included in Manitoba and the several territories of Canada.

(1) (1871) I.R. 6 C.L. 144, at 149.

(2) [1913] A.C. 364, at 372.

(3) [1914] A.C. 258, at 273.

Then, under the heading of "Surveys" we have s. 8, which reads:—

8. The Dominion lands shall be laid off in quadrilateral townships, each containing thirty-six sections of as nearly one mile square as the convergence of meridians permits, with such road allowances between sections, and of such width, as the Governor in Council prescribes.

Subs. 2 provides that the sections shall be bounded and numbered as shewn by the diagram therein inserted. The diagram shews that the boundary lines run north and south and east and west at right angles, each line presumably a mile long and the whole forming a square. Provision is made in the Act for the establishing of various base lines beginning with the International boundary, and also for correction lines.

S. 14 states that each section shall be divided into quarter sections of 160 acres more or less, subject to the provisions thereinafter made in the Act.

The Act also provides that before any given portion of the country is subdivided into townships and sections it shall be laid out into blocks of four townships each, by projecting the base and correction lines and east and west meridian boundaries of each block, and that on such lines, at the time of the survey, all township, section and quarter-section corners shall be marked, and such corners shall govern, respectively, in the subsequent subdivision of the block.

Then, by sections 129 and 130, it is provided that all boundary lines of townships, and all section lines and governing points as defined by mounds, posts or monuments, erected, placed or planted at the angles of any township, section or other legal subdivision under the authority of this Act or of the Governor in Council "shall be the true and unalterable boundaries" of such township, section or legal subdivision respectively, and that such section or subdivision shall consist of the whole width included between the several mounds, posts or monuments erected at the several angles thereof, *and no more or less.*

S. 29 reads as follows:—

29. Dominion lands, as the surveys thereof are duly made and confirmed, shall, except as otherwise hereinafter provided, be open for purchase, at such prices, and on such terms and conditions as are fixed, from time to time, by the Governor in Council; but no purchase shall be permitted at a less price than one dollar per acre.

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2. Except in special cases in which the Governor in Council otherwise orders, no sale to one person shall exceed a section, or six hundred and forty acres.

* * * *

S. 32 provides that every person who is the head of a family and every male who attains the age of eighteen years shall be entitled to obtain homestead entry for any quantity of land not exceeding a quarter section. In the Act of 1872 his right is expressed to be for "one hundred and sixty acres, or a less quantity".

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.

Although the provisions relating to the survey and the registration of titles indicate a legislative intention with regard to the manner in which the land policy of Parliament was to be worked out, it is more particularly to the provisions enacted for the disposal of the public lands that we must look for any legislative intention as to the application of the *ad medium filum* rule to grants of such land. Is a legislative intention to restrict to one hundred and sixty acres the quantity of land which a homesteader may acquire under his homestead entry, consistent with an intention that, should one of the boundary lines of his quarter section coincide with the bank of a non-navigable stream or lake, he would be entitled to claim ownership of the bed of the stream or lake in front of his quarter to the centre thereof? In my opinion it is not. If the rule were applied in such a case it would enable the homesteader to acquire an acreage in excess of that which he could lawfully obtain under the Act.

Then take the case of a purchaser under s. 29, above quoted. Under that section no person can purchase Dominion lands until the lands have been surveyed and the survey confirmed. If he does purchase he must pay the price fixed by the Governor in Council. His purchase is also restricted to six hundred and forty acres. Being presumed to know the law the purchaser must be held to have been aware of these restrictions. He must be held to have known that no official could sell him any unsurveyed land or any quantity of surveyed land in excess of the amount allowed by the statute, and also that he must pay for every acre purchased. Charged with this knowledge I fail to see how any riparian purchaser under this section can be heard to say that he is entitled, by reason of the application of the rule, to any acreage for which he did not pay and which he knew could not lawfully be sold to him. As it was chiefly by homestead entry, and purchase under s. 29, that Parliament made provision for the disposal of the Crown lands in the North West Territories, the legislative intention, as disclosed in the provisions for disposal by these methods, would apply to the greater portion of the territorial lands. Parliament, it is true, in special cases granted territorial lands as a subsidy to assist in the construction of railways, but these, while not inconsiderable, do not affect the legislative intention as disclosed in the statute.

Other provisions indicate the same legislative intention, for example, the provisions under which certain lands were reserved for the Hudson's Bay Company. The company acquired its right to these lands under the Deed of Surrender by which Prince Rupert's Land and the North West Territories became part of the Dominion of Canada. The sections reserved and to which the company obtained title, gave it exactly the quantity of land which, in the deed, it was agreed that the company should have. That quantity could not afterwards be increased by the application of the rule without obligating the Crown to grant to the company a greater acreage than that specified in the deed.

In view of these statutory provisions I incline to the view that Parliament, by adopting a policy which, in so many of its operations was inconsistent with the existence of the rule, indicated a legislative intention that it was not to be applied in construing conveyances of Territorial lands.

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It is not, however, necessary in the present case to express a final opinion upon that general question, as, in my view, the patents we have to deal with and the agreements under which the lands therein set out were acquired by the suppliants' predecessors in title respectively, justify the inference that neither the Crown nor the grantees intended the rule should be applicable but that these fractional sections should be granted and accepted at the acreage set out in the patents. I therefore leave the general question open for further argument and consideration.

The rights of the suppliants' predecessors in title, The Canadian Agricultural Coal & Colonization Company, to the land for which they obtained patents and which the suppliants now claim constituted it a riparian owner, were acquired under an agreement, dated 11th day of February, 1887, entered into pursuant to an order in council and made between the Government of Canada and the Canadian Pacific Railway Company and Sir John Lister Kaye. In this agreement the Government agreed to sell to Sir John Lister Kaye 50,000 acres of land; 5,000 acres at each of ten points, of which Rush Lake was one, for a consideration of $1.50 per acre, and the performance of certain stipulations as to cultivation. The agreement also provided for the purchase by Sir John Lister Kaye of a similar quantity of land at each of the points from the Canadian Pacific Railway Company.

On January 3, 1889, an order in council was passed which, after reciting that, according to representations made by Sir John Lister Kaye, over $700,000 had been spent by the Colonization Company on the farms purchased from the Government and the Canadian Pacific Railway Company, recommended that an immediate sale of the 50,000 acres be made to the company at a price of not less than $1.50 per acre. That this sale was carried out appears from the certificate of the Deputy Registrar of Dominion Lands' Patents, which reads as follows:—

> The Canadian Agricultural Coal and Colonization Company, Limited, which Company assumed the liabilities of Sir John Lister Kaye as set out in the Agreement of the 11th February, 1887, was permitted to purchase the 50,000 acres of land mentioned in the said Agreement by Order in Council dated the 3rd January, 1889 (P.C. 2757), at a price not less than $1.50 per acre, as originally agreed upon. Lands comprising a total area of 50,302 acres were duly paid for, and letters patent therefor in the name of the said Company were issued in the year 1889. All sec-

tions or fractional sections patented were lands shown to be not covered with water on the respective township plans in use at the time of the grants. The areas of dry land patented to the said Company in the five fractional sections bordering on Rush Lake in township 17, ranges 10 and 11, west of the 3rd meridian, aggregating 1,805·80 acres, are included in the total area of 50,302 acres referred to.

We have, therefore, the following circumstances from which to draw an inference as to the company's intention in reference to the application of the rule: The agreement was for 50,000 acres (allowed at 50,302 acres) to be paid for at $1.50 per acre. That acreage the company selected and paid for and received the patents thereof. As part of that acreage the company accepted the fractional even numbered sections in question herein, but it accepted them only at the acreage set out in the patents. It knew that no one, either under the statute or the order in council, had any right to convey to it an acreage in excess of that which it had received. That acreage was all it paid for and all it intended to pay for. Under these circumstances the only reasonable inference to be drawn, in my opinion, is that the company never intended that the *ad medium filum* rule should apply so as to give it an acreage in excess of that agreed upon and paid for.

The suppliants' other predecessor in title was the Canadian Pacific Railway Company. The rights of that company to the lands of which the suppliants are now the owners were presumably (for it is not clearly established) acquired under the special contract bearing date the 21st day of October, 1880, which forms the schedule to ch. 1 of the Statutes of Canada, 1881. In that contract the Government agreed to grant to the company a subsidy of 25,000,000 acres of land in consideration of the completion, equipment, maintenance and operation of the railway, as set out in the contract. The railway was completed and operated; the 25,000,000 acres were earned and I think we may assume that the company received the patents thereof, including the fractional uneven numbered sections bordering on Rush Lake. The contract between the railway company and the Government, however, contained a clause which, in my opinion, excludes the application of the rule to these patents. It reads as follows:—

11. The grant of land hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, on each side of the railway, from Winnipeg to Jasper

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House, in so far as such lands shall be vested in the Government,—the Company receiving the sections bearing uneven numbers. But should any of such sections consist in a material degree of land not fairly fit for settlement, the Company shall not be obliged to receive them as part of such grant; and the deficiency thereby caused and any further deficiency which may arise from the insufficient quantity of land along the said portion of railway, to complete the said 25,000,000 acres, or from the prevalence of lakes and water stretches in the sections granted *(which lakes and water stretches shall not be computed in the acreage of such sections)*, shall be made up from other portions in the tract known as the fertile belt * * *

Under this clause the company was to get the sections bearing uneven numbers. If any uneven numbered section was not fairly fit for settlement the company was not obliged to receive it as part of its subsidy, but, if it did receive it, it obtained the whole of the section although the land under water was not taken into account in computing their 25,000,000 acres. This seems to follow from the right given to the company to make up from other portions of the fertile belt any deficiency which might arise "from the prevalence of lakes and water stretches in the *sections granted*".

Being entitled under their contract to the land under water in each uneven numbered section as well as the dry land, the question of the application of the rule to these patents does not arise, for the company cannot be said to have been riparian owners with reference to the lands in the sections which were under water. The bed of the lake to the boundaries of each section was the company's to take. Title to that bed it did not take. Under these circumstances the intention both of the Crown and of the company must be held to have been not only that the *ad medium filum* rule should not apply but that the patents to these fractional sections should be granted and accepted as covering only the acreage therein set out.

In my opinion the appeal should be allowed with costs and the petition dismissed with costs.

Appeal allowed with costs; and petition dismissed with costs

Solicitor for the appellant: *R. V. Sinclair.*

Solicitors for the respondents: *Newcombe & Company.*