1927
Sept. 12, 13, 16.
1928
Sept. 10.
1929
May 16.

WILLIAM HENRY FARES ET AL.....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Grant by the Crown—English Common Law—Dominion Lands Act—Title to land of inland lake—Riparian rights—North West Territories.

Held, that the English Common Law, as it was established on the 15th July, 1870, was introduced into the North West Territories by Statute of Canada, 1886, ch. 25, sec. 3, and that the same was neither expressly nor by implication altered or amended, in its application to riparian rights, by any subsequent Canadian legislation.

2. That a grant from the Crown of land bounded on one side by the waters of an inland non-tidal and non-navigable lake carriers with it the ownership of the land covered by water to the centre of the lake.

PETITION OF RIGHT by suppliants to have it declared that the grant to them of property on the shores of Rush Lake carried with it the title to the land under the water of the Lake to the middle thereof, and for an order that the certificates of entry for soldiers' grants to certain persons of said land are invalid and that they be cancelled, and for possession of the land in the lake in front of their property.

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The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Winnipeg, Regina, and Ottawa.

H. A. Robson, K.C., and *W. F. Hull, K.C.*, at hearing in Winnipeg and Regina, and *E. F. Newcombe, K.C.*, at Ottawa for the suppliants.

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

The facts are stated in the reasons for judgment.

The PRESIDENT, now (May 16, 1929), delivered judgment.

In 1888, 1889 and 1890, the Crown, in the right of the Dominion of Canada, granted and assured to the Canadian Agriculture Coal and Colonization Company Ltd., and to the Canadian Pacific Railway Company, and their assigns, certain whole and fractional sections of land situated in the North West Territories, and now within the province of Saskatchewan. The suppliants are the assignees of the Canadian Agricultural, Coal and Colonization Company Ltd., and the Canadian Pacific Railway, directly or through intermediate transfers. The fractional sections of land so granted, abut on one or more sides of Rush Lake which will later be described; and the subject of the controversy here, had its origin in the granting of fractional sections of land abutting on Rush Lake. The following taken from one of the grants conveying a fractional section only, illustrates the practice then prevailing in describing a fractional section.

> All that parcel or tract of land situate lying and being in the Seventeenth Township, in the Eleventh Range West of the Third Meridian in the Provisional District of Assiniboia in the North West Territories in our Dominion of Canada, and being composed of the whole (fractional) of Section Twelve of the said Township containing by admeasurement one hundred and twenty-seven acres, more or less.

The original survey plans of the territory within which the grants in question were made, indicate the water line of Rush Lake at that time in relation to the land purporting to be granted, but no mention is made of such plan of survey, or Rush Lake, in any of the grants. It is agreed that the acreage of land mentioned in the several grants, was in fact satisfied without including any portion of Rush Lake, and that the original grantees paid the Crown only for the precise acreage mentioned in the grants.

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The reservations contained in the grants may be of importance and perhaps should be referred to. In one of the grants to the Canadian Agricultural, Coal and Colonization Company Ltd., the reservations are as follows:—

> Saving and reserving nevertheless, unto Us, Our Successors and Assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may be hereafter found on, or under, or flowing through or upon any part of the said Parcel or Tract of land; also reserving all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same, and for this purpose to enter upon, and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals, or the mines, pits, seams and veins containing the same; and also reserving thereout and therefrom all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to said lands, and also the privilege of landing from and mooring boats and vessels upon any part of the said lands and using the said lands in connection with the rights of Fishery and Fishing hereby reserved, so far as may be reasonably necessary to the exercise of such rights.

In one of the grants to the Canadian Pacific Railway Company the reservation is somewhat different, and is as follows:—

> Subject to the reservation unto Her Majesty, Her Successors and Assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may hereafter be found on, or under or flowing through or upon any part of the said Parcels or Tracts of Land.

It is perhaps convenient here to describe briefly, Rush Lake. It is irregular in shape, and said to be approximately five and a half miles long, and from one and three-quarters to two and a half miles wide, and contains approximately about six thousand acres. It is largely fed by snow and rain through small creeks, and is also drained by a small creek. When the grants in question were made by the Crown, marsh grass grew around the shores of the lake, and out into the lake quite a distance, the surrounding land being for the most part low and marshy; rushes grew promiscuously all over the lake. There were however limited spaces of open clear water in parts of the lake, particularly at the eastern end, where the land was highest; the open spaces of water would constitute it is said, about one-third of the entire lake. In the summer season, the waters of the lake fell considerably, according to the snowfall of the previous winter, and marsh hay was annually cut around the shores of the lake upon the land thus exposed by the recession of the water. The depth of water presently in the lake varies, the greatest depth being from

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eight to ten feet but in spots only; in many places the depth varies from one to two feet. 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 deeping 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, in some places it was I think hardly noticeable. 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 only boats ever used on the lake, were shallow punts or boats taken there occasionally by hunters. I do not think that in any sense whatever, Rush Lake can be said to be navigable, nor was it at any time since the lands in question were granted by the Crown.

In December, 1918, the Crown, purported to give to one Mason and one Becksfield, certificates of entry as Soldiers' Grants for portions of the land which had been reclaimed owing to the recession of the waters of Rush Lake, but which at the date of the grants of land here in issue was land ordinarily covered by water. These certificates of entry, it is pleaded, entitled the holders to occupy and cultivate the several pieces of land entered for and to hold possession thereof to the exclusion of any other person. The suppliants claim that certain fractional sections mentioned in the original grants, were bounded on one or more sides by Rush Lake, which was not a tidal water, and was not navigable, and that the said fractional sections are riparian lands; that upon a true construction of the grants from the Crown, they are the legal owners of all the lands reclaimed in front of the granted fractional sections abutting on Rush Lake,

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to the centre of that lake; and that the certificates of entry for Soldiers' Grants are invalid and constitute clouds upon the suppliants' lands. The suppliants invoke the common law of England relating to the rights and title of riparian owners to the beds of adjacent non-tidal and non-navigable waters which they say is here applicable, and they ask that it may be declared that they are the owners of all the reclaimed lands in front of certain mentioned fractional sections and out to the centre of Rush Lake, or alternatively to the projected boundary lines of the whole sections within which they were granted a fractional portion only, and that the mentioned certificates of entry for Soldiers' Grants be declared invalid and cancelled.

The case for the respondent is, that where fractional sections were granted, the specific number of acres mentioned as granted in each of said fractional sections, and no more, was granted; that the grantees or their assigns the suppliants, upon a true construction of the said several grants, did not acquire any right or title to the lands covered with water in front of the fractional sections abutting on Rush Lake, to the centre of the lake; and the respondent has the right to possession, and to grant, the lands in front of such fractional sections which have been reclaimed by the subsidence of the water as described. The respondent contends that the principle of the common law of England here invoked by the suppliants, was never introduced into the North West Territories, and that the same was not there applicable at the time the grants were made, or since.

It becomes necessary now to inquire, if the law of England was applicable to Dominion Lands in the North West Territories, when the lands involved in these proceedings were granted by the Crown. English Law, as it was established on the 15th day of July, 1870, and in so far as the same was applicable, was introduced into the North West Territories by Chap. 25, sec. 3 of the Statutes of Canada, 1886, 49 Vict., and which is as follows:

Subject to the provisions of the next preceding section 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 may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Terri-

tories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

I have considered carefully the provisions of the Dominion Lands Act, Chap. 54, R.S.C., 1886, which was in force at the time the grants of the lands in question were made and long prior thereto, with a view of ascertaining if that Act expressly or by implication altered or affected the English common law rule applicable to riparian lands, or if in any way its provisions prevented the application of that rule in the circumstances of this case. Some sections of that Act, under which the Dominion Lands owned by the Crown in the right of the Dominion were to be administered and managed, might feebly suggest, that under the elaborate system of survey and division of lands required by the Act, the lands to be granted thereunder would be definitely limited to the quantity actually surveyed and granted; if this were its effect the common law rule would be altered in an important particular. On the other hand the Act expressly reserved from ordinary sale, "water powers; harbours and stone quarries," which could only be disposed of on such terms and conditions as were fixed by the Governor in Council. The title to the public highways was not to be vested in adjacent owners, and the right to the fisheries and minerals was reserved to the Crown. The free use and enjoyment of navigable waters was also reserved to the Crown. The silence of the Act as to any suggested repeal or alteration of the common law rule relating to the beds of non-navigable inland waters and streams, is emphasized by the fact that by Chap. 35, sec. 5 of the North West Irrigation Act, enacted in 1894, it was provided, that except in pursuance of some agreement or undertaking existing at the time of the passage of that Act, no grant should thereafter be made in such terms so as to vest in the grantee any property or interest in the bed or shore of any lake, river, or stream, or other body of water, or the water flowing therein. This enactment cannot I think be regarded as declaratory of the law, but rather as an alteration of the law. I am of opinion that there is nothing to be found in the Dominion Lands Act, which can be construed as altering the law as it was in England in 1870.

Mr. Sinclair very ably argued that the law of England, in respect of the matter in issue here, was not applicable to the North West Territories in 1886, and that upon a true

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construction of the grants, only the quantity of land mentioned in the grants, and which was the amount paid for, passed to the grantees. I have concluded, after careful consideration, that binding authority compels me to hold to the contrary. I need only refer to *Maclaren* v. *Attorney General for Quebec* (1). There, their Lordships of the Judicial Committee of the Privy Council were of the opinion that the presumption that the bed of a stream *ad medium filum aquae* was included in a grant—a presumption well established in English law and said by Moulton L.J. to be rather a rule of construction—was not negatived by the fact that the metes and bounds of the parcels of land described in the patent or grant make them terminate at the bank of a river or stream; and that it is precisely in the cases where the description of the land, whether in words or in plan, makes it terminate at a highway or stream that the rule is needed, and if there is any indication of the land going further there is no place for its operation. Their Lordships further held that in construing a grant or document affecting land, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee; that in cases where the possession of the land so described would raise a presumption of ownership of the land in front of it *ad medium filum aquae or viae,* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it; that no description in words, or by plan, or by estimation of area is sufficient to rebut the presumption that land abutting on a stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts the stream, without indicating in any way that it includes the land under the stream. In the case under discussion it is not disputed that certain fractional sections of land when granted to the predecessors of the suppliants, abutted on Rush Lake, and the whole dispute had its origin in this fact. The law of England as judicially interpreted therefore, if it was applicable to the North West Territories, is conclusive upon this phase of the respondent's case.

(1) (1914) A.C. 258.

Considering now the point whether the law of England was applicable to the North West Territories. I do not think that the respondent's contention, that the law of England in regard to the point under discussion was not applicable to the North West Territories, can be sustained. The laws of England were by statute made applicable to the North West Territories. There does not appear to be any statute enacted before or since, altering or modifying those laws, in so far as this case is concerned. There was nothing so unusual in the conditions prevailing in the Territories, as of the date of the grants, as to convince me that the presumption of English law which I have discussed, was inapplicable or unsuitable to the Territories. Some law had to prevail, and in the failure to provide another I know of no reason why the law of England should not apply. I am inclined to the belief that at the time the grants in question were made, those responsible for the administration of Dominion lands were of that opinion also, and their directions to surveyors implied this. That of course, could not affect the law, whatever it was, but it is some evidence of the fact that conditions greatly contrasting with those in England were not believed to exist in the Territories, so as to make the rule of English law under consideration obviously inapplicable to the conditions found there. If conditions in the Territories were in marked contrast to those in England, or those to be found in other sections of Canada, one would expect that this would have been realized by the legislature having jurisdiction in the premises, and that the law would have been altered, or that a law would have been enacted to fit the unusual conditions to be found in the Territories so as to ensure certainty as to what was the law.

In England the land of the riparian owner bordering on the sea or navigable rivers—navigable waters being those in which the tide ebbs and flows—extends to high water mark, and the title to the bed of the sea or river is in the Crown, and extends to high water mark. If by the recession of the sea, the high water mark moves downward towards the sea, or downwards from the banks of a navigable river or stream, the riparian owner acquires that part of the shore which has become dry, whatever the cause may be. If by encroachment of the sea the high water mark is moved up

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upon the lands of the riparian owner, such portions of his former lands as are so encroached upon by the sea becomes the property of the Crown, and the same rule applies to land bordering on tidal and navigable streams. But the rule relating to inland non-tidal streams is different. Mr. Sinclair for the respondent argued that in England the title of the riparian owner of lands bordering on non-tidal streams such as inland lakes, extends by presumption of law to the centre of the lake, and that the riparian owner does not acquire title to any land that has become dry by accretion or dereliction, because the land was his before the recession of the water, and it remained his after the recession of the water, because by common law his title extended to the centre of the lake. From this, Mr. Sinclair argued, that in the North West Territories the title to all lands, including the beds of all non-navigable lakes and streams, belonged in fact to the Crown, and so remained until granted, and that when a grant was made bordering upon any non-navigable lake, the riparian owners' title stopped at the water's edge and the bed of the lake remained in the Crown; this, it is contended, differentiates this case from the corresponding situation in England, where the title to the bed of non-tidal inland streams, whether navigable or not, presumptively never belonged to the Crown. For this reason Mr. Sinclair contended that English law was not therefore applicable to inland streams in the North West Territories.

This line of argument, it is to be observed, proceeds upon the admission that under English law the title of the riparian owner extends to the thread of the stream, in the case of inland non-tidal streams. That I think is a correct statement of the law in England. There, in the case of inland lakes whatever the size of the water space may be, the Crown is not of right entitled to the soil of the lake. *Bristow* v. *Cormican* (1); *Johnston* v. *O'Neill* (2); *Lord* v. *The Commissioners for the City of Sydney* (3); and *Hardin* v. *Jordan* (4). If the law of England is therefore what I apprehend it to be, and is applicable here as I think it is, then that is the end of this point: the bed of an inland non-

(1) (1878) 3 A.C. 641.

(2) (1911) A.C. 552.

(3) (1859) 12 Moore P.C. 473; 33 L.T.R. 1.

(4) (1891) 140 U.S.R. 371.

tidal lake is presumptively in the riparian owners. The point taken by Mr. Sinclair is ingenious, but I think where the rule of English law was made applicable to the North West Territories by statute, it must prevail.

Mr. Sinclair further contended that under English law, any land formed by alluvium, or land gained by dereliction, belongs to the owner of the adjoining terra firma, but the increase must be gradual or imperceptible in its progress; but here a large area of dry land has been recovered, and the progress of the subsidence of the water was at least partially perceptible if not sudden, and it is claimed that for this reason the land so perceptibly gained belongs to the original owner, the Crown. The water level of Rush Lake varied each season according to the rain and snow fall, but in addition to that, there was a perceptible recession of the water at one end of Rush Lake particularly, upon the Canadian Pacific Railway Company straightening and deepening the creek flowing out of Rush Lake; it is not open to question that the lake level has been much lower since that time. However, if I am correct in my interpretation of the law of England in respect of the inland and non-tidal lakes, and if it is applicable here, then the title of the original grantees presumptively went to the centre of the lake in any event, so that the doctrine of accretion, whether perceptible or otherwise, does not apply, and the shifting of the shore line is therefore of no importance. There would also seem to be practical reasons why the degree of progress in gaining new land by alluvium or dereliction, should not apply in the case of an inland non-tidal lake; ordinarily accretions to the shore line of a lake are negligible as is also the recession of water. In the case of land bordering on the seas or the banks of rivers, both accretion and erosion are always imminent, and I think that all references to the perceptible or imperceptible changes in the shore line, to be found in the authorities, refer to cases of the kind where accretion and erosion are the natural consequences of waters where there is a tide or current. The principle of law under discussion in regard to accretion is founded upon security and general convenience. Ordinarily there is not the same necessity for the existence of the same principle in reference to non-tidal lakes, because there, usually there is no current, and accretion or erosion is not ordinarily to be

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found in any appreciable degree. Therefore I do not think that this case is affected by the fact that the accretions to the suppliants lands were perceptible or sudden, nor do I think it is affected by the fact that the lowering of the water of Rush Lake was in part caused by artificial causes, whether lawful or unlawful, but to which the suppliants were not parties.

The case is a difficult and important one, and I cannot say that I am entirely free from doubt in the conclusions which I have reached. Had the dry land reclaimed been due to natural causes, and if it had been much smaller in quantity, probably the case would never have been heard of. But no new principle of law can be invented or enacted by the Courts to meet the unusual state of facts brought about by the lowering of Rush Lake, by the Canadian Pacific Railway Company, which may have been an unauthorized and unlawful act. Possibly the suppliants might successfully question, even at this date, the right of that railway company to dispossess them of the privileges of having the waters of Rush Lake contiguous to their lands, if in law the recovered land has been lost to them; the fact that the quantity of land recovered is unusually large is no justification for departing from the proper principle of law, applicable to the case, if that can be ascertained. I do not think I need concern myself with possible difficulties which may arise in determining the rights of riparian owners around Rush Lake, when the boundaries of their respective properties are projected into the lake. Mr. Newcombe, for the suppliants, argued that the proper boundary lines to be projected, are the lines of the incomplete or fractional sections. On the ground of convenience there is much to be said in favour of this. Whether it has any legal basis I do not think I need determine.

I feel bound by authority to decide that the suppliants are entitled to the relief sought in the prayer of their petition. They are also entitled to the costs of their action.

Judgment accordingly.