My answer to the first question is Yes; and to the second No.

Questions answered accordingly.

Solicitors, for the claimants, *C. S. Beeby & Moffatt.*

Solicitors, for the respondents, *Derham & Derham.*

Solicitor, for the Commonwealth, *C. Powers*, Commonwealth Crown Solicitor.

Solicitor, for New South Wales, *J. V. Tillett*, Crown Solicitor.

Solicitor, for Victoria, *Guinness*, Crown Solicitor.

B. L.

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AUSTRALIAN BOOT TRADE EMPLOYES FEDERATION *v.* WHYBROW & CO.

[HIGH COURT OF AUSTRALIA.]

JAMES LESLIE WILLIAMS . . . APPELLANT; DEFENDANT,

AND

WILLIAM BOOTH . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 31; *April*, 1, 4, 14.

Griffith C.J., Barton, O'Connor, Isaacs JJ.

Crown grant—Construction—Intention of parties—Grant of land bounded by salt water lagoon—Inlet of sea—Right of riparian owner—Medius filus rule—Sea bottom—Accretion—Alluvium.

By Crown grants issued in 1819 and 1834 the Crown granted to the plaintiff's predecessors in title two adjoining parcels of land, which were separated by a salt water lagoon, situated near the sea. The boundaries of the land granted, so far as material, were described as, in the one case, "to a salt water lagoon and on all other sides by that lagoon and the sea," and in the other case, "to Dewy lagoon, on the north by that lagoon to the sea." The lagoon was separated from the sea by a sand-bar. At certain seasons and tides there was an open channel between the lagoon and the sea, through which the tide

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ebbed and flowed, while at other times the channel was closed by the sand-bar, until the waters of the lagoon, being swelled by rain, cut through the bar and restored communication with the sea. Prior to 1860 the channel was more often open than closed, but in recent years it had been more often closed than open.

Held, that having regard to the subject matter of the grant and the description of the boundaries, it was the intention of the parties that the land granted should not extend beyond the margin of the lagoon, and that this intention being clearly expressed, the then actual nature and condition of the lagoon was immaterial.

Held, also, that the *medius filus* rule is not applicable to marine lagoons, and that if it were so applicable, the fact that such lagoons are substantially part of the sea, and may be of public use for the purposes of fishing and navigation, would exclude the application of the rule in the present case.

Held, further, that even if the channel were now permanently closed to the sea, no case of accretion had been made out, and any addition to the soil of the grantee directly caused by each closure could not have been imperceptible.

Decision of *Street* J., *Booth* v. *Williams*, 9 S.R. (N.S.W.), 592; 26 W.N. (N.S.W.), 113, reversed.

APPEAL by the defendant from the decision of *Street* J., by which it was declared that the Crown had no right, title, or interest to the lands described in the statement of claim, and that as against the Crown the plaintiff was entitled to be registered under the provisions of the *Real Property Act* 1900 as proprietor of the said lands.

The facts are sufficiently stated in the judgments hereunder.

Knox K.C. and *Bethune*, for the appellant. At the date of the grants the bed of the lagoon was sea bottom, and no presumption applies as to the extension of the boundary of the grant beyond the edge of the lagoon. Where in a grant by the Crown the land is described as bounded by a salt water lagoon, the presumption is that the land under the salt water is not intended to be granted. Such a construction is consistent with the terms of the grant, and the evidence as to the conduct of the parties subsequently. Sea bottom is defined as where the tide flows and reflows when it is open to the tide. It does not exclude land which is intermittently beyond the reach of the tide: *Stuart Moore, Foreshore and Seashore*, 3rd ed., p. 791; *Hall*, p. 115. Prior to the grant the bed of

the lagoon was vested in the Crown. It still remains the property of the Crown unless the respondent shows that the Crown has granted it away. The grant does not expressly include the bed of the lagoon. The *medius filus* rule has never been held in England to apply even to fresh water lakes: *Laws of England*, vol. III., p. 120.

In America the decisions on this point are conflicting. Even if it had been held that the *medius filus* rule applies to fresh water lakes in England, there is good reason for holding that it does not extend to a salt water lagoon on the coast of Australia. There is no real analogy between the two cases. Primarily a salt water fishery would be a public fishery, and the salt water would be of no use to the adjoining owner. The rule is a purely arbitrary and artificial one, and there is no valid reason for extending it to the particular circumstances of this case. There is no judicial statement of the limits of the rule which compels the Court to so apply it. The fact that there is ample land to satisfy the terms of the grant without including the lagoon is also a material consideration which supports the appellant's view. Further, there is a practical difficulty in applying the *medius filus* rule to a lake or lagoon, and apportioning the bed of the lake upon any reasonable basis between the adjoining owners. Take, for instance, the case of a lake of irregular shape with a large promontory abutting into it. In the cases on which *Street* J. based his decision the Court was dealing with the rights of the Crown, and these cases have no application to the question to be decided in this case. The question is what was the intention of the parties to the grant. The grant refers to a salt water lagoon, and the rights of the parties must be determined on the assumption of the truth of this description. Its truth or falsity, in fact, is immaterial. The intention can only be gathered from the description which the parties themselves have chosen to apply. As to the suggested claim to the land by accretion, there is no evidence upon which this Court can decide in favour of the respondent upon this ground. If the Court is of opinion that this is a proper matter for inquiry, the appellant does not object to the pleadings being amended to allow this question to be decided on further evidence, for the purpose of saving expense to the parties.

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Langer Owen K.C. and *Harvey*, for the respondent. The grant must be construed in the light of the circumstances existing at its date. The evidence shows that at that time the lagoon was practically closed to the influence of the tides, though occasionally the pressure of the fresh water from within the lagoon opened a passage through the sand-bar to the sea. When the water in the lagoon subsided the bar was again closed by the sand silting up. In its normal condition it was closed, in its abnormal condition it was open, and these conditions prevail at the present time. The terms of the grant are material for the purpose of identifying the lagoon which the parties agreed should form one of its boundaries. The parties were contracting upon the basis of the facts then proved to have existed. It is consistent with the terms of the grant that the boundary is a lagoon which approximately goes to the sea. The grant is carelessly drawn, and the expressions used may not be strictly accurate.

[GRIFFITH C.J. If a grant speaks of a salt water creek, and it turned out to be a fresh water creek, that would not affect the intention of the parties. A presumption cannot arise if opposed to the intention as expressed in the grant. A presumption arises from the circumstances. If the necessary circumstances do not exist the presumption cannot arise. "Lagoon" *primâ facie* means a piece of water connected with the sea. Its application to a fresh water lake is purely an Australian use of the word. The fact that these grants were made by the Crown soon after the occupation of New South Wales is very relevant to the construction of the term.]

The general rule of law is that if a grantor, having the soil *ad medium filum*, grants land on the bank of a river, the soil *ad medium filum* passes by the grant: *Micklethwait* v. *Newlay Bridge Co.* (1); *Tilbury* v. *Silva* (2). It was held in *Lord* v. *Commissioners for the City of Sydney* (3) that this rule applied to the construction of a Crown grant bounded by a creek. The question is whether this principle applies to a salt water non-tidal lagoon. It is submitted that where the water is not navigable, and not open to the flow of the tide, except under abnormal

(1) 33 Ch. D., 133.
(2) 45 Ch. D., 98.
(3) 12 Moo. P.C.C., 473.

conditions, the application of the rule is not excluded by the fact of the water in the lagoon being salt or brackish water. Land which is not periodically reached by the regular flow of the tide is not sea bottom : *Attorney-General* v. *Chambers* (1).

[O'CONNOR J.—In England the Crown only takes sea bottom. Here the land remains in the Crown until granted. The adaptability of the water for fishing purposes might be a public use which would prevent the application of the rule.]

In *Hardin* v. *Jordan* (2) it was held that at common law fresh water lakes, except the great navigable lakes, belong to the owners of the soil adjacent, who own the soil *usque ad medium filum*. In *Bloomfield* v. *Johnston* (3) it was held that the rule did not apply to navigable waters. Assuming the rule applies to some non-navigable lakes, in the absence of authority there is no reason for holding that it cannot apply to a lagoon of this size merely because the water is salt.

If the *medium filum* rule is not applicable, the question is have the grantees acquired the land under the lagoon by its addition to the land granted by matters subsequent to the date of the grant, that is by accretion or reliction ? Whatever was the original condition of the lagoon the evidence shows that it has now ceased to be part of the sea.

[GRIFFITH C.J.—The effect of that contention is that a large quantity of Crown land has suddenly become private land. The principal of accretion is not applicable to a change of that kind.

ISAACS J. referred to *The King* v. *Lord Yarborough* (4).]

If the formation of the bar is slow and imperceptible, the change in ownership is the result of a gradual process. The legal effect is that the lagoon has been gradually silted up. Apart from the closure of the mouth of the lagoon, there has been a considerable accretion of land upon its margin to which the respondent is entitled in any event. The right to land from which the water has receded is dealt with in *Foster* v. *Wright* (5) and *Hindson* v. *Ashby* (6). The respondent asks for a reference to the Master to take evidence on this point.

(1) 4 DeG. M. & G., 206.
(2) 140 U.S., 371.
(3) 8 I.R.C.L., 68.
(4) 2 Bl. N.S., 147.
(5) 4 C.P.D., 438.
(6) (1896) 2 Ch., 1.

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Knox K.C., in reply. The decision in *Hardin* v. *Jordan* (1), was disregarded by the Court of Illinois in *Fuller* v. *Shedd* (2), which was followed in *Hardin* v. *Shedd* (3). The doctrine of accretion depends on the imperceptible nature of the increase: *Attorney-General* v. *Reeve* (4). Here the change from sea bottom to land, if it took place at all, took place suddenly, at one tide.

Cur. adv. vult.

The following judgments were read:—

April 14.

GRIFFITH C.J. This suit, which was brought by the respondent on the equity side of the Supreme Court of New South Wales against the appellant as nominal defendant representing the Crown, and the Registrar-General, was in form a suit for a declaration of the plaintiff's title to five parcels of land. It was in reality brought as ancillary to an application by the plaintiff to bring the land under the provisions of the *Real Property Act*, and the only question raised upon the pleadings and discussed at the hearing was as to the plaintiff's title to the bed of a salt lagoon, called the Dewy (D.Y.) Lagoon, which is situated close to the sea a few miles north of Port Jackson. The Registrar-General was dismissed from the suit. The plaintiff contended that the soil or bed of the lagoon was included in the Crown grants issued to his predecessors in title, and, alternatively, that, if not so included, it had since become his by accretion. The learned Judge from whose decision this appeal is brought thought that the lagoon in question was a piece of water entirely surrounded by land, and that the doctrine under which the owner of land abutting on a non-navigable fresh water stream is entitled to the soil *usque ad medium filum aquæ* was applicable to the bed of such an enclosed water. The law applicable to the ownership of the bed of inland lakes was fully discussed before him and carefully considered in his judgment, but in the view which I take of the facts of this case I do not find it necessary to express any opinion upon the point, which is almost entirely free from authority.

(1) 140 U.S., 371.
(2) 161 Ill., 462.
(3) 190 U.S., 508.
(4) 1 T.L.R., 675.

The plaintiff's title depends upon the construction of two Crown grants, issued in the years 1819 and 1834 to W. Cossar and J. Jenkins respectively. The first was of a parcel of land described as "five hundred acres of land lying and situated in the district of Meyrick bounded on the north by Ramsay's farm" (which fronted the sea coast) "bearing west 50 chains, on the west by a south line of 72 chains, on the south by an east line of 17 chains 80 links to a salt water lagoon and on all other sides by that lagoon and the sea." The second grant was of a parcel described as "two hundred and one acres of land situate in the County of Cumberland, parish of Manly Cove, commencing at the north-east corner of John Harper's 40 acres," (which was a point on the sea shore), "and bounded on the south by that farm, viz., a line west 64 chains, on the west by a line north 50 chains, on the north by William Cossar's 500 acres and a line east 30 chains to Dewy Lagoon, on the north by that lagoon to the sea, and on the east by the sea to the commencing corner." The two pieces of land adjoined each other, the lagoon lying between them. The relevant descriptions of the boundaries are "by that lagoon and the sea" in the one case, and "by that lagoon to the sea" in the other.

Apart from the inference arising upon the words themselves, it appears from the evidence that the Dewy Lagoon (which is like many others on the east coast of Australia) lies near the Pacific Ocean, from which it is separated by a sand-spit, the breadth of which varies from time to time. The field-notes of the surveyor who made the original survey of the locality in the year 1814 were produced, and a drawing was prepared from them from which it appears that at the time of the survey the dividing sand-spit, which ran from the south, was very narrow, and that at the northern end the waters of the lagoon approached the sea by a narrow channel, the mouth of which was apparently dry at some states of the tide. There was abundance of evidence that for a period long subsequent to the dates of the grants the channel of communication between the lagoon and the sea was frequently open, and remained open for months at a time, the tide flowing and ebbing through it, while at other times the influence of the winds, waves and ocean currents formed a

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sand-bar across the mouth of the channel, which then remained closed until the water of the lagoon, being swelled by rain, cut through the obstacle and restored communication with the sea.

According to the evidence of witnesses who had known the locality from a time earlier than 1860, the periods during which the channel was open were at that time longer than those during which it was closed. On the other hand, of late years it appears to have remained closed for longer periods than it remained open. In the year 1905 a channel a chain wide was opened through the bar by the swollen water but was again closed within two days, and it may be taken that the channel is now closed for longer periods than it is open.

Before the year 1876 the spit dividing the lagoon from the sea was a narrow ridge, 50 or 60 feet high at its highest point, and covered with trees; and the channel, which at that time was always at the northern extremity of the spit, was of such a nature that the bar, when formed, could be opened with a spade with little effort. In 1876 occurred a heavy south-easterly gale, spoken of as the Dandenong Gale, the effect of which was to beat down and obliterate the ridge, leaving in its place an expanse of level sand, which has since encroached considerably upon the waters of the lagoon. It is plain that after this change in circumstances the channel, which was previously only liable to be closed by the deposition of sand suspended in the sea water, became liable to the inroads of drift sand blown from the surface of the sand-spit to the south of it. It is not surprising, therefore, that the evidence should show that the channel now remains closed for longer periods than before, or that its locality should change from time to time, or that a longer portion of the channel should be sometimes filled up.

These being the facts, I return to the question of the construction of the deeds of grant. The duty of the Court in construing any instrument is to ascertain the intention of the parties, and all so-called rules of construction or rules of conveyancing are merely subsidiary means for arriving at this end. When it is said that certain words imply a particular consequence, all that was originally meant was that, in the opinion of the Court, unless that consequence were implied, the intention of the parties would be

defeated. A rule of construction so established is applied to all cases to which it is applicable. Thus, when the rule of *medius filus aquæ* was applied to conveyances of land described as abutting upon a non-navigable fresh water river, the reason was that, the title of the soil of the stream *ad medium filum* being vested in the vendor, it was inferred that it was not intended that he should keep for himself the soil covered with water, which might be inaccessible and useless to him, but that it was intended that that soil should pass to the purchaser.

What then is the meaning of the words " by that lagoon and the sea " and " by that lagoon to the sea " used in the grants, as applied to the subject matter ? As a matter of English, and apart from any technical or artificial rules of construction, I cannot doubt that a plain person with an ordinary acquaintance with the English language would understand that the parties meant, in the one case, a line dividing the land granted from the lagoon and the sea, *i.e.*, the margin of the lagoon and the sea, and, in the other, a line dividing the land granted from the lagoon and extending along its margin to the sea. In both cases the continuity of the lagoon and the sea is assumed. As I have shown, the existing facts at the dates of the grants were consistent with this view. It follows that the waters of the lagoon and the land covered by them were not included in the grants, unless there is some artificial rule of construction which compels us to a different conclusion. Even if at the dates of the grants the continuity of the lagoon and the sea was in fact interrupted, I do not think that it would make any difference, since the intention of the parties is to be gathered from the language which they used. If that language purports to comprise land extending to, but not beyond, the margin of the water, the meaning of the words is not altered by showing that the quality of the water was misunderstood. If, for instance, the boundary of lands comprised in a grant is described as navigable tidal water, of the identity of which there is no question, the clear intention of the parties is that the margin shall be the limit, and the operation of the grant is not affected by showing that the water was not navigable, or not tidal.

Is there, then, any rule of law which in the present case requires a different construction ? I know of none. No authority

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was cited to us which even suggests the extension of the rule of *medius filus* to marine lagoons. The onus is on those who assert the extension. But, even if it were not, the consideration that such lagoons are substantially part of the sea, and may be of public use for fisheries or even for navigation, at some times if not all, would exclude the basis of the rule applicable to fresh water rivers. For these reasons I am of opinion that the grants in question do not include the bed of the lagoon.

With regard to the alleged accretion, the case made is that the mouth of the lagoon is now permanently closed, so that it has become an inland water. The first answer to this argument is that it is not proved that the facts are so. Upon the evidence it is highly probable that the channel will, as heretofore, be opened and closed periodically, as occurred in 1905. But, even if it were shown to be permanently closed, I do not think that any case of accretion is made out. The law as stated by *Blackstone* (2 Bl. Com., p. 262), is that "if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*. . . . . But, if the alluvion or dereliction be sudden or considerable, in this case it belongs to the King; for, as the King is Lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry." The word "imperceptible" refers to the slowness of the additions to the soil. Assuming, then, that a moment has arrived at which the mouth of the lagoon became permanently closed, the suggested accretion is not an addition of an imperceptible quantity of soil to the plaintiff's land, but of an area of many acres occurring at the moment of permanent closure, so that, according to the plaintiff's contention, on one day the land belonged to the King as Lord of the sea and on the next to the plaintiff. This is a sudden and considerable alluvion or dereliction, and does not operate to confer a title by accretion. The exact point is considered in an able argument in *Mr. Hall's Essay* (2nd ed., p. 115, *et seq.*) the reasoning of which is I think conclusive.

The plaintiff, therefore, substantially failed in the purpose for which the suit was brought. The statement of claim, as already stated, prays a declaration of the plaintiff's title to five parcels of

land, but the allegations of fact have reference only to the two parcels bordering on the lagoon. On these pleadings it would, I think, be competent for the Court to declare the plaintiff's title to a portion of the lands in dispute, although, strictly speaking, it may be doubtful whether the plaintiff could claim such a declaration as of right. Probably he could not do so without amendment. It is not, however, desired by either party to take advantage of any technical points. It appeared in the course of the evidence that the area covered by water is now much less than at the dates of the grants, and it is obvious that a title by accretion might be set up, successfully or not, by the plaintiff in respect of the dry land so left by the salt water. But no distinct case founded on such a title was made by the pleadings, nor was the evidence addressed to this point. It may be that, with respect to some of the additions, the plaintiff is entitled to follow the margin of the lagoon as it imperceptibly receded, while as to others, which may have been sudden additions to the land, as, *e.g.*, on the occasion of the Dandenong Gale, he is not so entitled. These matters can, if desired, be investigated in the present suit, by way of inquiry or otherwise, but for that purpose an amendment of the pleadings would be necessary.

Under these circumstances, I think that complete justice will be done by discharging the judgment appealed from, and ordering that upon payment of the costs of the suit subsequent to the statement of claim the plaintiff shall be at liberty to amend as he may be advised, and that in default of amendment within 30 days after the allocatur the suit be dismissed with costs.

BARTON J., who heard the argument, but was ill at the time of the judgments, agreed in the order proposed by *Griffith* C.J.

O'CONNOR J. The question involved in this appeal has arisen out of an application by the respondent to bring certain lands under the *Real Property Act*. His title rests upon two Crown grants, which between them surround a salt water lagoon on the sea coast covering about 62 acres. The portion of land covered by the waters of the lagoon was included in the application, the respondent claiming that it was within the

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grants. The Crown objected to the issue of the certificate in respect of that portion, contending that it was not covered by the grants, and so was still the property of the Crown. The object of the suit was to obtain a decision for the guidance of the Registrar-General in view of these conflicting contentions. The determination of the question involved must depend upon the construction of the two grants. Both of them describe the land granted in clear and definite terms, and, interpreting the words of description in their ordinary sense, neither of them include any portion of the land covered by the waters of the lagoon. In Cossar's grant the southern and eastern boundaries are described together in the following words:—"On the south by an east line of seventeen chains eighty links to a salt lagoon and on all other sides by that lagoon and the sea." In Jenkins' grant the description of the northern and eastern boundaries are as follows:—"On the north by William Cossar's 500 acres and a line east 30 chains to Dewy Lagoon. On the north by that lagoon to the sea, and on the east by the sea to the commencing corner." The first rule of interpretation applicable to any written contract is to ascertain the intentions of the parties by construing the language they have used according to its ordinary meaning. So construed, the language used by the parties clearly indicates an intention that the water of the lagoon extending to the sea shall be one of the boundary lines in each grant. The water of the lagoon, as it was at the dates of the grants respectively, was a natural feature marking out the boundaries, and easily ascertainable. If on the day after the grant it had become necessary to fix boundaries on the land, a surveyor reading the descriptions in accordance with their ordinary meaning would have been bound to follow with his pegs the water line of the lagoon in each case, that is to say, the margin of the lagoon. If that is the right method of interpreting the descriptions, it is quite clear that no part of the land covered by the lagoon is included in either of the grants. It was not, I think, seriously disputed on the argument that such would have been the correct interpretation of the grants were it not for the rule of construction or rule of conveyancing (authorities describe it in both ways), which the learned Judge of first instance considered himself bound to apply in construing the

descriptions of the land granted. The existence in English law of what may be called the *medius filus* rule of construction, in respect of grants of land described as bounded by a non-tidal stream, is, of course, admitted. It must also be conceded that *Lord* v. *Commissioners for the City of Sydney* (1), has authoritatively decided that the rule must be applied in similar circumstances to the construction of grants of land in New South Wales, Crown grants as well as other grants, unless the terms of the grant, or something in the nature of the subject matter, render it inapplicable. Where, therefore, one of the boundaries of a grant is a non-tidal river, the rule of construction applicable must now be taken to be the same in New South Wales as in England. In Scottish law apparently the rule has been applied to non-navigable inland lakes. In English law it would appear to be still an open question whether it is applicable even to inland non-navigable lakes. The learned Judge in the Court below seems to have collected and reviewed all the authorities bearing on the point. The additional cases referred to in the argument in this Court have not, so far as I have been able to see, thrown any new light on the matter. The position I take to be as follows:—Although opinions have been expressed by Judges and text writers which would seem to favour the extension of the rule to such inland lakes as I have mentioned, no case can be found in which the rule has been so extended. The learned Judge, therefore, in holding that the rule could be applied in Australia even to a non-navigable inland lake, would seem to have gone a step beyond anything which the English Courts have as yet decided. When it is sought to interpret the language of a deed, not according to the ordinary signification of the words used, but with a meaning attributed to them by an artificial rule of construction, it must be clearly established that there is such a rule, and that it is applicable to the document under consideration. In the state of the authorities to which I have referred his Honor was not, in my opinion, justified in coming to the conclusion that there was even in England such a rule applicable to bodies of water such as I have described. *A fortiori* he was not justified in applying it in New South Wales to interpret a grant

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

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in which such waters as the Dewy Lagoon are described as one of the boundaries of the lands granted. For the purpose of determining the meaning of the description in question here it would not be necessary to go beyond that; but the question involved may become of importance in connection with some of the many similar bodies of water which are to be found along the coast of this State. I propose therefore to consider the matter from the point of view dealt with by the learned Judge at the trial. Concede that the rule would be applicable in England to a non-navigable inland lake. The question still remains whether it could be applied to a body of water such as Dewy Lagoon. A useful exposition of the *medius filus* rule is to be found in the judgment of *Lopes* L.J. in *Micklethwait* v. *Newlay Bridge Co.* (1). In stating what appears to him to be the result of the authorities, he says: "It appears to me to be this: that if land adjoining a highway or a river is granted, the half of the road, or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption." In examining the subject matter and the surrounding circumstances it is important to consider the nature of Dewy Lagoon. I agree with the learned Judge that it is not an arm of the sea, according to the test laid down by Sir Matthew Hale in his treatise, "*De jure maris et trachiorum ejusdem*," and therefore not exempt from the *medius filus* rule on that ground. Further I agree that its relation to the sea at the time of the grants was substantially what it is now. There are times when it is open to the sea and subject to the daily flow and reflow of the tide. But the sand-bar at the entrance gradually forms again and shuts the sea out. The lagoon then has no communication with the sea, but by operation of the stream entering it on the west side and the ordinary rainfall it again fills. The bar bursts and again lets in the sea—which again flows and reflows until the bar is again closed. And so, to use the words of Mr. Halligan in his paper on "Coast Sand Movement," "the cycle runs." This conclusion of fact as to the actual condition of the lagoon at the respective

(1) 33 Ch. D., 133, at p. 155.

dates of the grants is not, I think, substantially affected by their language. It must be taken from the words of the descriptions that at the time of both grants the lagoon happened to be open. It is so described in those documents, and there is no other evidence as to its condition on those dates. But it is evident from the plan on which Surveyor Meehan's notes have been plotted, that when he surveyed the grants three years before the date of the earliest of them, the lagoon was closed at the beach end of its entrance by a sand-bar similar to that which exists to-day. On the other hand, it has been clearly established that the obstruction to the opening of the lagoon to the sea would be easily removable by a few hours labour, and that it contains salt water fish, and has been during all the period of which the witnesses speak used by the public for the purposes of salt water fishing. Having regard to the foundation principle of the rule as expounded by *Lopes* L.J. in the passage quoted, I am of opinion that there naturally and reasonably arises from the subject matter of the grants and the circumstances surrounding an inference that the Government of the day could not have intended that the *medius filus* of the lagoon should be the boundary of each grant, and that it had no intention of surrendering to the grantee all public rights over a portion of land which was in substance, though not in law, part of the sea bottom, and which might by a trifling expenditure be legally made and kept so. Moreover the description in the deeds is directly opposed to any intention that the rule should apply. Whatever may have been the actual facts as to the condition of the lagoon at the time of the grants, the parties dealt with it as a boundary on the footing that it then communicated with and ran to the sea, and was, therefore, a body of water to which the rule could not apply. It must be remembered also that the Colony was then in its infancy; all ungranted lands belonged to the Crown, and the responsibility of managing them in the best interests of a young and growing community rested with the Crown. Having regard to the public use of the lagoon for fishing, and its possibilities for other public uses in the future, I think the surrounding circumstances tend strongly to rebut the inference that the parties intended the grants to have any other operation than that which would follow

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from the language used in the descriptions interpreted in its ordinary meaning. The respondent, however, has put forward an additional ground. He claims that, even assuming the bed of the lake was not included in the grants, it has become his by accretion. His contention is not that it has been filled up gradually by the deposit of alluvium on his boundaries, but that as the land under the lagoon waters has been altered from sea bottom to land under an inland water by the gradual silting up of the entrance, it must be taken to have come to the grantees by accretion. In other words that, as the bar shutting the sea out was formed by accretion, all the land under the waters of the lagoon became land acquired by accretion directly the sea was shut out.

In my opinion the word accretion is quite inapplicable in such a connection. In *Hall's Essay on the Sea Shore*, 2nd ed., at p. 117, the true nature of the accretion of which a land owner can take advantage against the Crown is clearly explained. "It is not," he says, "indeed, either the sudden or the gradual nature of the event which governs the law, but the perceptible or imperceptible nature of the acquisition ; and therefore the direction of the evidence will be to show the greater or less degree of distinctiveness and certainty with which the quantum of soil claimed can be ascertained to have accrued within time of memory. Whatever reason and common sense denominates imperceptible and indefinable, or which even if perceptible and definable is still too minute and valueless to appear worthy of legal dispute or separate ownership, will be deemed part of the adjoining soil, and, as it were, to have grown out of it. In all other cases the King's right will attach." In the accretion claimed the formation of the bar may have been gradual and imperceptible. But when once it shut out the sea water it is claimed that the whole lagoon bottom immediately became the respondent's property. In such a process I can recognize no feature of the kind of accretion described by Hall. For these reasons therefore I am of opinion that on the case made at the hearing this appeal must be allowed and judgment entered for the appellant. But the respondent, it appears, wishes to have a certificate issued for at least that portion of the lagoon bed which may have been added to his land by the gradual accumulation of silt or sand, that is, by accretion, in the true sense

of the term. That question has never been inquired into, but I agree that in the interests of both parties it would be well if it could be inquired into without the necessity for another application under the *Real Property Act* and another action. I have read the form of order proposed by my learned brother the Chief Justice for the purpose of effecting this object, and I concur in the view that the order allowing the appeal should be made in that form.

ISAACS J. The respondent's real claim in the action was to have his application for registration proceeded with and completed. The application is in respect of the whole of the land covered by the lagoon as it existed originally.

There are two distinct and independent grounds upon which the claim is supported, viz., grant and accretion.

With regard to the first of these grounds, the question is one entirely of construction of the two deeds of grant of 1819 and 1834. As to this, the rule laid down by the Privy Council in *Lord* v. *Commissioners for the City of Sydney* (1), must be applied: "It is always a question of intention, to be collected from the language used with reference to the surrounding circumstances."

Mr. *Owen* has urged that the surrounding circumstances establish, as the learned primary Judge has found, that the lagoon referred to was not either in 1819 or 1834 an inlet or arm of the sea, in the sense that the tide ordinarily flowed or re-flowed within it. His Honor found that at all times material it was substantially a body of water fed by fresh water creeks, and it was only when its contents so acquired burst the bounds of the lagoon, and escaped by the opening so caused, that the sea entered and that the entrance again closed, this being repeated at uncertain intervals.

Upon this state of facts it was contended that a presumption of law arises that the grant, by legal construction, extends *ad medium filum aquae*; and as the learned primary Judge has also found—perhaps as a necessary consequence of what I have already stated—that after the grant of 1834 the lagoon was

(1) 12 Moo. P.C.C., 473, at p. 497.

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completely surrounded by the specifically granted land, the contention was that, *prima facie* in contemplation of law, the whole situs of the lagoon is the property of the respondent merely upon the true construction of the grants.

On the question of fact as to the actual nature and condition of the lagoon at the times of the respective grants, I do not see my way to differ from the conclusions at which *Street* J. has arrived. But having regard to the language of the grants themselves, the then actual nature and condition of the lagoon are unimportant, and therefore any discussion as to whether the presumption *ad medium filum aquæ* applies to such a body of water is unnecessary.

Taking the earlier deed first, the material words are, "on the south by an east line of seventeen chains eighty links to a salt lagoon, and on all other sides by that lagoon to the sea."

Parties may contract, and if the contract is for the sale and purchase of land, may go on to completion of the contract, upon the basis of admitted and conventional facts. If they do, neither party can be allowed, while the contract or conveyance stands, to dispute those facts. In *Young* v. *Raincock* (1) *Coltman* J., after referring to earlier cases, says " where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary." To have this operation the admission of the fact must of course be mutual: *Stroughill* v. *Buck* (2).

The words I have quoted import (1) that at every point of the irregular edge of the granted land (except the north, west, and south boundaries already mentioned), the boundary is to consist of a salt lagoon and the sea; (2) that—there being no mention of any land intervening between the lagoon and the sea—there is an uninterrupted line of communication between them, and therefore no portion of land separating them forms the boundary after the lagoon is reached; and (3) from the description of the lagoon as "salt" that the lagoon takes its predominant character from the sea.

(1) 7 C.B., 310, at p. 338. (2) 14 Q.B., 781.

This description of the lagoon and of its relation to the sea is a conventional fact, irrespective of what the lagoon might be, if its actual character were investigated. That conventional fact is not only material, but essential to the ascertainment of the parcel granted. The one party makes and the other party accepts the grant on the footing of that description, and it cannot be altered or departed from at the instance of one of the parties and against the will of the other, because that would be making an entirely new contract for them, even after the real contract had been carried out by the execution of the conveyance. It is therefore not permissible to rely on the circumstance that the lagoon at that time was not open to or connected with the sea, but was effectually separated from it by an intervening bar, over which the boundary line had to pass between the lagoon and the ocean.

The second grant dated 1834 recited that it was made in fulfilment of a promise made on or before 21st August 1821 by the Governor to William Cossar, who was the grantee of the deed of 1819, and the land was granted to Jenkins in accordance with a statutory report.

The second grant described the northern boundary in these words: "by William Cossar's five hundred acres and a line east 30 chains to Dewy Lagoon, on the north by that lagoon to the sea." The words "on the north by that lagoon to the sea," mean, as in the first grant, a continuous line of lagoon to the sea, uninterrupted by any intervening dry land.

The evidence as to the actual state of Dewy Lagoon is, therefore, as irrelevant to the second grant as to the first.

The intention of the Crown not to include the lagoon in the land grant being in each case apparent from the terms of the document itself, there is no room for the operation of any presumption. We know the actual fact of intention from the unambiguous language of the deeds themselves—and where that is known, no presumption to ascertain it is needed or permissible.

Unless therefore the respondent can uphold his claim by the doctrine of accretion he must fail altogether.

The claim to accretion by reason of the sand-bar, rests on that fact alone. No case is made or suggested as to any gradual filling up of the body of the lagoon—apart from internal accre-

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tion of a limited character and unconnected with the bar. The whole of this part of the case is founded on the single circumstance of the imperceptible origin of the bar, which it is urged carries with it as a necessary consequence the severance of the lagoon from the sea, its conversion into an inland sheet of water, and the instantaneous transference of its ownership from the Crown to the respondent. No precedent has been cited in support of this contention, and on the other hand, *Hall* in his *Essay on the Sea Shore*, at pp. 115 to 117, considers just such a case, and after stating all the arguments on either side, finally considers that the single circumstance of the bar is insufficient to establish accretion. He points out that the circumstances may show a gradual accretion, by which he obviously means circumstances not confined to the existence of the bar—such for instance as the gradual filling up of the lagoon.

Various authorities were cited to show that accretion arises only by imperceptible addition to property, and with one exception I make no further reference to them than to say that the principle they affirm is opposed to the respondent's view. That exception is the now classic observation of *Alderson* B. in *In re Hull and Selby Railway* (1), that "that which cannot be perceived in its progress is taken to be as if it never had existed at all." The application to the present case of that observation, which has been repeatedly adopted as the central principle, comes with something like a shock.

There is one pronouncement of the law which deserves special notice, because it is that of the Privy Council in *Lopez* v. *Muddun Mohun Thakoor* (2): "Where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex* v. *Lord Yarborough* (3). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the

(1) 5 M. & W., 327, at p. 333. (2) 13 Moo. Ind. App., 467, at p. 473.
(3) 2 Bl. N.S., 147.

river gained from the land in the same way as the owner of the land had in the former case gained from the sea: *In re Hull and Selby Railway* (1)."

In 1905 the Privy Council again affirmed the accuracy of the rule as to accretion being by gradual, slow and imperceptible means: *Thakurain Ritraj Koer* v. *Thakurain Sarfaraz Koer* (2).

The question ought, moreover, to be tested from the opposite standpoint. It was observed by Baron *Alderson* in *In re Hull & Selby Railway* (1), and the observation was adopted by Lord *Chelmsford* in *Attorney-General* v. *Chambers* (3) that:—"It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore."

Now, transposing the natural operations which took place, suppose the lagoon had originally been the property of the appellant, protected by a bar such as now exists, and by a gradual wearing away of that bar, there happened in a night, an inundation of 62 acres of land, could that properly be said to be a case where, in the words of Baron *Alderson*, "the sea gradually steals upon the land which is thus silently transferred to the proprietor of the sea-shore." I do not think so; but the rule must work both ways, if at all. And see *Farnham on Waters*, p. 331, sec. 74 and note 1.

Another question was started, namely, whether, even though the wholesale acquisition contended for occurred—in law imperceptibly—the boundaries were such as permitted the doctrine to apply.

As to this it is unnecessary to say more than that the authorities leave the point open. The Privy Council in the case of *Lopez* v. *Muddun Mohun Thakoor* (4) said:—"To what extent that rule" (that is accretion) "would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by land-marks, by maps, or by

(1) 5 M. & W., 327.
(2) 21 T.L.R., 637.
(3) 4 De G. & J., 55, at p. 68.
(4) 13 Moo. Ind. App., 467, at p. 474.

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a mine under the sea, or other means of that kind, has never been judicially determined." The doubt still exists: *Hindson* v. *Ashby* (1).

The respondent, in my opinion, fails as to his claim for the totality of the land comprised in his application for registration. This was the only question actually fought, and the appeal ought to be allowed.

It may, however, be not unfairly considered that the pleadings include a claim to some accretion short of the whole lagoon, and based not on the existence of the sand-bar, but of gradual internal additions to the shores of the lagoon. Upon just terms it is certainly convenient, if the respondent so desires, that this limited claim should be disposed of in the present action, and I agree in the order proposed by the learned Chief Justice.

Appeal allowed.

Solicitor, for appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for respondent, *Robson & Cowlishaw.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

CITY BANK OF SYDNEY . . . . APPELLANTS;

AND

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McLAUGHLIN . . . . . RESPONDENT.

SYDNEY, *April* 4.

Griffith C.J.

IN CHAMBERS.

Costs—Costs of appeal—Fee for counsel's opinion as to advisability of appeal—Costs between solicitor and client—Costs of order for repayment of deposit for security—Review of taxation.

Upon an appeal to the High Court the appellant's costs begin with the

(1) (1896) 2 Ch., 1, at pp. 13 and 28.