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Subject: THE AD MEDIUM FILUM "RULE"

Contents:

1. What is the ad medium filum "rule"

At common law where land is described in a Crown grant or in a conveyance, (or Torrens "transfer"), as being bounded by a non-tidal stream or by a road, and the grantor or vendor is the owner of the river bed or the road at the time of the grant or sale, the grantee or purchaser is then assumed to have received the grant or transfer of the property "ad medium filum". That is the grant or sale is to the centre of the non-tidal stream (ad medium filum aquae) or to the middle of the road (ad medium filum viae). [1] It is clear that this rule applies to Australia.[2]

It is important to note two features of this "rule". The first is that it is clear that the rule applies to Torrens title land.[3] The second characteristic is that it is an "implied" right, it seems not as the result of a presumption of law, but as a question of the construction of the terms of the Crown grant, the general law conveyance, or the Torrens transfer.[4]

2. How the "rule" works

There is some confusion about how the implication works. Often, it is assumed that because the river or road is shown adjacent to a parcel of land on any plan that this gives rise to the implication. This is not quite right. The implication arises at the time of subdivision whether in a grant of the Crown or in a private sale. It will only arise if the vendor (or grantor in the case of a Crown grant) owns both the land in the river bed or in the road as well as the land being sold or granted. It is at the moment of grant or transfer that the "right" arises.[5] (In the case of Torrens land of course when the dealing was registered).

3. The "rule" works the same way for both roads and rivers

There appears to be no difference between the rule for rivers and roads.[6] The difference in Tasmania arises out of the difference in the way the two have been handled by Crown grants, private transfers, and the effects of statute.

4. Rationale for the "rule"

A number of justifications have been advanced for the middle line rule. The rule has been said to be based on the consideration that the title to roads and the beds of non-tidal waters must be in someone, and that the difficulty in tracing title back perhaps many centuries makes such a rule convenient.[7]

In the case of roads, it has been said to be based on the supposition that the owners on each side contributed half of the land towards the road.[8]

If one was to go back to the days before the roads boards and more recently councils took over the responsibility of roads, in the English system of "parish" responsibility for road maintenance, the rule made sense.[9]

As Professor Butt states : "These reasons seem unsatisfactory in Australia, where titles are not as old as in England and where roads are often constructed on public land at public expense."[10] In any case, as we will see, statutory inroads into the rule both to roads in particular and to water have now rendered it largely obsolete. Unfortunately some of the confusion is continued by the apparently contradictory provisions of Sections 106(3) and 111 of the Land Titles Act 1980.

5. Roads (ad medium filum viae)

In relation to Crown grants, it was the almost invariable practice of the Crown in Tasmania to specifically exclude roads. This legacy of "reserved roads" survives to the present.

While the High Court ruled that the ad medium filum "rule" could apply to Torrens title land, it is clear that in Tasmania as noted from the way Crown grants were made and from conveyancing practices under the old system and more clearly from the way the Torrens title system was managed from its inception, that roads were clearly excluded from most of the transactions.[11] This too has left us with a legacy of disputes over the ownership of some roads.

Much of this was thankfully overtaken by Section 106(3) of the Land Titles Act 1980, the road vesting provisions in the old Local Government Act 1962, both with respect to subdivisions and the road maintenance provisions of that Act, (and its successors) as well as the Roads and Jetties Act 1935.

However, the clarity of these provisions is not helped by Section 111 of the Land Titles Act 1980. It is possible, that a few "private" roads could be subject to the ad medium filum viae "rule" if those roads are not maintainable by a highway authority, whether that authority is the State or a council.[12]

6. Non tidal rivers (ad medium filum aquae)

The position with non tidal rivers is less precise. It appears that some of the old Crown grants may have been defined as being bounded by a (non tidal) river and attract the "rule". It seems that later, as in the case of reserved roads, some non-tidal rivers were excluded from grants. In the case of private conveyancing, most old law conveyances simply replicated what went on before.

Like roads, the situation has been overtaken to a degree by the modern amendments to the Water Act 1957 which vest the water in permanent streams in the State Rivers and Water Authority. If ownership of some land still runs to the middle of the river then the ownership of the river bed is now largely illusory.

7. The "rule" does not apply to tidal rivers

Tidal rivers, being that part of the State's river systems which is subject to tidal influence, are in exactly the same situation as the sea front. The bed of the tidal river is vested in the Crown to the (mean) high water mark.[13] Historically in Tasmania the invariable practice was not to grant land to the low water mark and any suggestion that this was not the case was laid to rest in the 1906 Privy Council decision dealing with the Van Diemen's Land Company dispute with the Table Cape Marine Board.[14] It should be noted that in a few selected cases where it was necessary for the purposes of the grant, the grant expressly included the land to the (mean) low water mark. These are the only known exceptions.

8. High water mark defined

The expression high water mark has been judicially defined as being the mean high water mark, which is the line of the medium high tide between the highest tide each lunar month (the spring tides) and the lowest each lunar month (the neap tides) averaged out over the year.[15]

9. River bank defined

First, what is a river? It has been defined as a large stream constituted by both the channel and water.[16] The term includes a creek that flows directly or indirectly into the sea, whether seasonally or consistently throughout the year.[17]

A river bank has been defined as the elevations of land that confine the waters when they rise out of the bed [18] being the line along the outermost limits of the defined channel of a watercourse following the highest points of land within the channel that are covered by the waters of the watercourse. It is measured at its average or mean stage without reference to extraordinary flows in time of flood or limited flows in extreme droughts.[19]

10. What is the practical result

It is clear that it would be unusual indeed to find that the ad medium filum viae "rule" applies to any public roads in this State.

For rivers in relation to the ad medium filum aquae "rule", as the result of legislation as well as the Crown granting procedures and private conveyancing practices the situation is less clear.

11. What should be shown on a plan and what will be shown on a folio

The question as to how it is recorded on title was the central issue of a decision of the New South Wales Supreme Court in In re White (1927) SR NSW 129. In that case the Registrar-General of that State stated a case to the Court for a direction on the issue. The Court ruled that the plan drawn to support the title should not show title to midstream, but just to the river bank.[20] The Court held that the best place to record that the land extended ad medium filum was by a statement on the face of the title where the land was described.[21]

Past practice by this office to allow plans to show title to the middle of the stream was not good policy. There will not be any need to amend these plans. However, any new surveys of the land should conform to this circular.

12. How to apply to have it shown on a folio

White's case concerned an application to bring general law land under the Torrens title system. The Court ruled that an appropriate time to apply to show that the "rule" was attached to a folio was when the land was converted from general law to Torrens title.[22] It seems that this is the only opportunity to do it by application as there is no other procedure or methodology set out in the Land Titles Act 1980 to apply to record it on a

folio.

So if an owner of Torrens title land wishes to have land described ad medium filum aquae it would have to be done by application to the Supreme Court for a declaration that the land was to ad medium filum and a direction to the Recorder of Titles to amend the folio accordingly.[23]

13. Summary

1. As to "reserved roads" and roads maintained by a public authority, it is unlikely that the ad medium filum viae rule applies.

2. As to non-tidal rivers it is not possible to make a generalised statement as to the application of the ad medium filum aquae rule.

3. Tidal rivers are not subject to the ad medium filum aquae "rule".

4. The ad medium filum rule, if it applies in any particular case, can apply to land under the Torrens title system.

5. Put simply, whether the land remains at general law or is subject to Torrens title, when drawing a plan, it makes no difference whether or not the adjacent river or road is subject to ad medium filum ownership, the proper practice is to show the boundary on the plan to the near bank of the river or the near side of the road and not show the land to the centreline.

6. If the land is at general law then the best time to ask for it to be shown on a Torrens title is by application to the Recorder when the land is being converted to Torrens title.

7. If Torrens title land has the benefit of ad medium filum ownership and it is not shown on the folio as no procedure exists under the Land Titles Act 1980 to apply to have the benefit shown on the folio, it will be necessary to apply to the Supreme Court for an appropriate order directed at the Recorder to register the interest.

8. If Torrens title land has the benefit of ownership of that land ad medium filum, the correct way to record this interest on the folio is by a statement in the description of the land.

MICHAEL DIXON
Recorder of Titles

Footnotes

1 Mary Lord v Commissioners for the City of Sydney (1859) ER 991 (An appeal from New South Wales Supreme Court to the Privy Council).
Mews' Digest of English Case Law to 1910 Volume 14 Mews' Digest of English Case Law to 1910 Volume 14 items 1946 and 1966.

2 Mary Lord's Case at page 1000 of the English Report version.

3 Lanyon v Canberra Washed Sands (1996) 115 CLR 342.

4 F.D. Cumbrae-Stewart; Ownership of the Soil under Roads (1951) 24 ALR 510.
John Baalman The Medium Filum Rule is Out of Place (1951) 25 ALR 449 at page 449.

5 Mary Lord's case at page 1000 of the English Report.
John Baalman The Medium Filum Rule and the Torrens System (1951) 25 ALR 538.

6 Cumbrae-Stewart mentioned at note (4) at page 512.

7 Peter Butt Land Law 3rd Edition 1996 at page 43 Law Book Co.

8 Peter Butt at page 43.

9 John Baalman mentioned at note (4) at pages 451-2.
Mews' Mews' mentioned at note (1) at Volume 15 items 19 to 21.

10 Peter Butt at page 43.
See also John Baalman. The Medium Filum Rule is Out of Place (1951) 25 ALR 449.

11 John Baalman. The Medium Filum Rule and the Torrens System (1951) 25 ALR 538 at 539.

12 P. Moerlin Fox. The Medium Filum Rule (1952) 25 ALR 678 at 680.

13 Mews' Volume 14 at item 1881 to 1883.

14 Van Diemen's Land Company v Marine Board of Table Cape (1906) AC 92.

15 Attorney General, Ex re Prat v Chambers (1854) 43 ER 486.

16 R v Ward (No. 2) (1980) VR 209.

17 Errington v Jessop (1982) 59 FLR 99

18 Ward v R (1980) 142 CLR 308 Stephen J at 337 or (1980) 54 ALJR 271 Stephen J at 281.

19 Ward v R at 337 (CLR) or at 281 (ALJR).

20 In re White (1927) 27 SR NSW 129 Street CJ at page 131.

21 In re White, Street CJ at page 131.

22 In re White, Street CJ at page 132.

23 The powers of the Recorder are fairly exhaustively set out in the three very clearly written High Court cases : Drake v Templeton (1913) 16 CLR 153; Crowley v Templeton (1914) 17 CLR 457 and Templeton v Leviathan Pty Ltd (1921) 30 CLR 34. Templeton was the Registrar of Titles in Victoria at the time and was a remarkably successful litigant.