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ATTORNEY-GENERAL *v.* NICHOLAS AND OTHERS

Skerrett, C.J.

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1927, May 17, 18, 25. Supreme Court, Northern District. Skerrett, C.J.

Land Transfer — Crown Grant — Plan — Not showing starting point or bench or datum point—Location of land in dispute—Application to bring land under Act—Physical feature not ascertainable from plan—Long occupation —Parol evidence—Acts of the parties.

Where the granted land cannot be fixed from the original survey, or where there are no natural boundaries and the original survey marks are gone, a long occupation, acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which the grant conveys, in the absence, of course, of striking differences in admeasurement or some significant countervailing circumstance, and if the description of the grant be ambiguous or doubtful, parol evidence of the practical construction given by the parties by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in aid of interpretation. *Equitable Building and Investment Co., Ltd., v. Ross* (5 N.Z.L.R. S.C. 229) applied.

Prendergast for plaintiff.
Holmden for defendant Nicholas.
Armstead for defendants Shaw.
Hubble for District Land Registrar.

SKERRETT, C.J.—The substantial purpose of this action is to define a line of road between allotment 71 of the parish of Pakuranga and allotment 1 of the same parish. The existence of the road is admitted by the parties. It is shown on the Crown Grant and also on the Crown Grant plan, but, unfortunately, neither the Crown Grant nor the Crown Grant plan discloses any defined starting point, or any known bench mark or *datum* point, by reference to which the survey might be plotted on the ground. The only question, therefore, between the parties is the precise location of the road. The present action concerns only a small portion of the length of the road.

The action was originally brought by the Attorney-General on the relation of the corporation of the Paparoa Road District Board, but on a re-arrangement of the districts of the local authorities the action was authorized to be continued by the Attorney-General on the relation of the corporation of the county of Manukau. The original defendant was William Hugh Nicholas, the owner of allotment 71. Nicholas acquired this allotment in the year 1906 and still holds it. Afterwards, by order of the Court, the defendants, the two Shaws, and the District Land Registrar were joined as defendants. The defendants Shaw were the owners of the southern part of lot 1, which they acquired in the year 1922.

The Crown Grant of allotment 71, then known as an allotment of the East Tamaki farms, dated the 18th March, 1854, shows a road between that section and allotment No. 1. The Crown Grant of allotment No. 1 has not been put in, but it was probably substantially contemporaneous in date, and showed the road between the sections in the same way as the Crown Grant of allotment 71. Unfortunately, the field book of the surveyor who made the survey upon which the Crown Grants were founded is lost, and even the surveyor's name cannot now be deciphered because of the wear and tear of his plan. His plan of the survey is purely diagrammatical. From it no fixed point can be ascertained. No physical features of the country are referred to. This appears to be common ground between the parties.

The result of these circumstances is that the Crown Grant plan is wholly insufficient to enable the road to be laid out from any information supplied by or to be clearly inferred from it.

The difference between the contentions of the parties as to the location of the road is slight and involves land of a very small area and of insignificant value. The plan constantly referred to at the trial was a plan of a survey prepared by a Mr. Jackson in December, 1919, after the dispute arose as to the position of the road. The several lines referred to at the trial and necessarily referred to in this judgment are designated by letters which appear on this plan. This plan must be referred to in order to follow this judgment.

Apparently the dispute arose in 1919, but it only arrived at the stage for determination at the trial before me. What happened was that both Nicholas and the defendants Shaw applied to bring their respective allotments under the provisions of the Land Transfer Act. In support of his application, the defendant

Nicholas lodged Mr. Kelly's plan of his survey; and the defendants Shaw lodged Mr. Griffiths' plan of his survey. The District Land Registrar intimated that he was prepared to issue a certificate of title in accordance with Mr. Griffiths' plan; but upon an application by the defendant Nicholas for an injunction to restrain him from doing so it was agreed that the situation of the road should be settled in an action brought on the relation of the local authority to which the respective applicants were to be made parties.

It is possible to state quite shortly the questions in dispute. Allotment 1 and allotment 71 are, as stated, shown in the respective Crown Grants, and in the Crown Grant plan to be divided by a road one chain wide. No question arises as to the location of the road until a point marked "V" on Jackson's plan is reached. This point "V" is on the southern boundary of allotment 13 which was surveyed by Mr. Harrison in the year 1889, the survey being represented by a deposited Land Transfer plan No. 1270. This survey was accepted, and a certificate of title was issued for lot 13 in accordance with the survey. The survey is a proper survey, and the survey plan enables the actual allotment 13 to be located on the ground. On the opposite side of the road to point "V" on this plan is point "F." To the westward of the points "V" and "F" no question arises in this action as to the location of the road. Point "F" is on the northern boundary of allotment No. 71. At point "V" the road, according to the Crown Grant plan, leaves its hitherto straight course at an angle; but the angle is in no way defined, nor are there any bearings enabling the northern boundary of the road to be laid out on the ground. It is in consequence of this deficiency that the question to be determined in this action arises. The question really relates to the angle at which the northern boundary ought to proceed from "V" until it intersects the adjacent road to the eastward, known as the "Ridge Road." The defendant Nicholas claims that the northern boundary of the road proceeds at an angle marked on Jackson's plan with the letters "V.R.W.," and the southern boundary of the the angle shown by the line "V.L.P." on the north side, and on the south side by the line "F.E." I have already said the direction and bearing of the road from the points "V" and "F" cannot be ascertained or determined from any information contained in the plan or from any physical feature fixed by the plan.

What, then, is to be done under these circumstances? It appears to me the rule laid down by Mr. Justice Richmond in *The Equitable Building and Investment Co., Ltd. v. Ross* (5 N.Z.L.R. S.C. 229) should be applied That rule appears to be that where the granted land cannot be fixed from the original survey, or where there are no natural boundaries and the original survey marks are gone, a long occupation,, acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which the grant conveys in the absence, of course, of striking differences in admeasurement, or some significant countervailing circumstance. In that case the learned Judge referred to the occupation being authorized by the proper public authority. But this requirement is, I think, by no means an essential part of the rule. It is enough that there should have been a long occupation acquieced in by surrounding owners in the absence of countervailing circumstances. The learned Judge stated generally that if the description of the grant be ambiguous or doubtful, parol evidence of the practical construction given by the parties by acts of occupancy, recognition of monuments or boundaries or otherwise, is admissible in aid of interpretation. This view was adopted from decisions collected in a note to *Greenleaf on Evidence* (Section 301). I think, therefore, that I am entitled to have regard to the acts of the parties, their occupancies of the land adjoining the road, and in their light place an interpretation upon the Crown Grant plan as to the location of the road.

There are certain characteristics which exist in common between the several contentions of the parties as to the location of the road so far as it is claimed to be defined from information contained in the Crown Grant plan. Neither

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possible with the length of the boundaries given by the Crown Grant plan. Neither succeeds in doing this with any consistency. Both involve either shortages or excesses of the distances shown on the Crown Grant plan. The truth appears to be that the plan is not only deficient in showing the bearings and position of the boundary lines, but it is not even accurate as a record of the actual lengths of the boundary lines. Furthermore, each of the contentions has grave defects. The contention put forward on the part of the defendant Nicholas involves taking about one-eighth of an acre from lot 1 and adding it to lot 71, which already has an excess frontage to the Ridge Road. When I say that this contention takes away about one-eighth of an acre from Lot 1, I do so on the assumption that the line "L.P." was part of the southern boundary of this allotment. On the other hand, Jackson's plan and the plan presented on behalf of the defendants Shaw involve leaving a triangular piece of land between the actual surveyed boundaries of lot 13 and the road as located by them without an owner.

I am satisfied that any attempt to fix the location of the road between allotments 1 and 71 by reference to information in the Crown Grant plan would be futile. Its location must, I think, be fixed by reference to occupation marks and checked by the distance of the boundaries disclosed in the Crown Grant. In applying this check it must be constantly borne in mind that only a rough correspondence with the dimensions in the Crown Grant plan can be expected. Nothing is more clear than that exact correspondence with the dimensions shown on the Crown Grant plan is unobtainable; and in the circumstances the location of the road by reason of occupation as an interpretation of the survey cannot be rejected because it does not exactly agree with the dimensions of the Crown Grant. It is sufficient if the dimensions agree quite generally with the dimensions in the Crown Grant plan.

The outstanding feature is that it is common ground that from 1866 until the commencement of the action, the defendant Nicholas and his predecessors in title were in occupation of lot 71 up to the line "S.T.F." That line, I think it is established, was treated as the boundary of allotment 71 and therefore the southern boundary of the road shown on the Crown Grant plan.

It is true that at the same time an old fence existed on the line "L.P.," and the space between the two fences was made into an enclosure at some time or other by a temporary fence "L.T." "L.P." is relied on by the plaintiff as an ancient boundary fence. In my opinion, this has not been established. I am satisfied, upon the evidence, that there never was a ditch and bank fence along the line "L.P." The evidence is that boundary fences along roads in the district generally consisted of ditch and bank fences; and the absence of a ditch and bank fence along the line "L.P." is some evidence that the fence on the line "L.P." was not a road boundary fence. On the other hand, there was admittedly a ditch and bank fence on the line "S.T.F." I think that in the state of the survey the fence line "L.P." must be regarded as a temporary enclosure of part of the roadway. I regard it as significant that no trace of a ditch can be shewn on the line "V.L.P.," and, further, that no trace of a ditch can be traced on the line "F.E.," which is claimed by the plaintiff as the southern boundary of the roadway. In these circumstances I find that the proof of occupation contiguous to the roadway was an occupation from 1866 until the present time by the owners for the time being of allotment No. 71 up to the line "S.T.F."

It is to be remembered that the onus of proof lies on the plaintiff. The defendant Nicholas is in possession and has been, as I have said, in possession for many years up to the line "S.T.F." The plaintiff must therefore, under the circumstances, discharge the onus of showing that the occupation up to that line was not an occupation defining the southern boundary of the road. This he has failed to do. Apart altogether from this, I am satisfied that there was no satisfactory evidence that the southern boundary of the road was the line "F.E.," or that the northern boundary of the road was the line "V.L.P."

I am confirmed in this conclusion by the circumstance that this involves the line "V.R.W." being held to be the northern boundary of the road. This appears to be more consistent with the adopted Land Transfer survey by Mr. Harrison of lot 13 than the suggested line "V.L.P." Mr. Burnley, the Government surveyor, says that Mr. Harrison's plan follows more faithfully the angle at "V" shown on the

Crown Grant plan than does Mr. Jackson's survey or the later surveys. It is true that the adoption of this line may reduce the actual occupational area of the owners of the southern part of lot 1 by one-eighth of an acre. This circumstance is, in my opinion, insufficient to override the compelling circumstances which, by reason of the evidence relating to the occupation of the line "F.T.S.," compels me to adopt the line "V.R.W." as the northern boundary of the road.

The line "R.W." has rather a curious history, which may be referred to. In the year 1881 Edward Merrill was the owner of lot 71, and the fence "L.P." was in existence. Apparently the fence "S.T." was also in existence. Merrill being then the owner of section 71, for the purpose of advancing his interests, pulled down the fence "L.P." and erected a ditch and bank fence on "R.W." In 1881 Speechley required him to remove the fence. Merrill claimed that the road was a chain wide and that he was defining the road one chain wide. He, however, obliterated the fence on the line "R.W." and temporarily re-erected the fence on the line "L.P." It is for this reason that no evidence can be obtained as to whether there was originally a boundary ditch and bank fence on the line "R.W." It is a matter for observation that it is common ground that Merrill occupied allotment No. 71 up to the line "S.T.F.," and when he attempted to define the road at its full width he selected the line "R.W." as its northern boundary.

I may refer to one other matter which somewhat impressed me at the trial. The angle "M" on the eastern boundary of allotment 1 is a fixed physical point. It has the advantage that the measurement between it and the point "P" agrees within a few links with the Crown Grant measurements; where the measurement between "M" and "W" is fifty links short. I do not think, however, that it is possible to accept the point "M" as a fixed starting point and to re-adjust the whole of the boundaries of the block on that basis. Point "M" is the angle of an existing fence, but that fence is admittedly not upon the eastern boundary of lot 1 shown on the Crown Grant plan. I have arrived at the conclusion that it is impossible to accept "M" as a fixed physical starting point and adjust all the boundaries of the Crown Grant plan accordingly. I regard it as a mere coincidence that the dimensions "M" to "P" agree with the dimensions of the Crown Grant plan.

For these reasons, I am of opinion that the road beween allotment 71 and allotment 1 must be regarded as having its northern boundary substantially on the line "W.R.V." and its southern boundary substantially on the line "S.T.," prolonged on the same bearing to the westward in the direction of "F." The northern boundary can be fixed by making the road a chain wide from the line "S.T.F."

The defendant Nicholas has not interfered with the road so defined, and there must be judgment for him with costs on the lowest scale, witnesses' expenses and disbursements. The plaintiff must also pay the costs of the District Land Registrar who was ordered to be joined, fixed in the same manner. The defendants Shaw must pay their own costs.

Solicitors: for plaintiff: *Brookfield, Prendergast and Schnauer,* Auckland; for defendant Nicholas: *Wynyard, Wilson, Vallance and Holmden,* Auckland; for defendants Shaw: *Scott and Armstead,* Auckland; for District Land Registrar: *Meredith, Paterson and Hubble,* Auckland.

McKIBBIN *V.* McKIBBIN AND OTHERS.

1927, May 14, 28. Supreme Court, Otago and Southland District. Reed, J.

Will — Rule against perpetuities — Breach — Offending clause separable—Gift of income to persons having particular qualification—No person presently qualified—No trust for accumulation—No residuary clause—Intestacy—Distribution—Next-of-kin defined—"Nearest in proximity of blood."

By Clause 1 of his will testator directed that the proceeds of his estate were to be invested and held in trust during the term of twenty-one years from his decease, to pay the income therefrom "to such persons as shall from time to time during the said term. . . . be the eldest of my next-of-kin, but subject to paragraph 6 of this my will." By Clause 2 he attempted to provide for payment of the income after twenty-one years "to such persons as should from time to time throughout succeeding generations be the eldest of