New Zealand Surveyor February 1985

THE "GUARANTEE OF PARCELS" and "A LITTLE MORE OR LESS"

by J. A. McRae F.N.Z.I.S.

ABSTRACT

The origin and use of the term "guaranteed" title in New Zealand is examined, both in the legislation and in general usage. This is followed by a discussion of the allied and equally important term of "a little more or less", with some emphasis placed on the ways in which it has been interpreted in legal cases in New Zealand and elsewhere.

INTRODUCTION

In August 1979 an article by R. R. Goodwin appeared in the *New Zealand Surveyor* (Vol. XXIX (3), No. 255, pp. 272-301) and was read with interest by Professor D. W. Lambden, a member of New Zealand Institute of Surveyors who holds a Chair of Surveying at Erindale College of the University of Toronto. Dave who is well-known to both Australian and New Zealand surveyors wrote to me questioning one or two of the statements in Ron Goodwin's paper and we engaged in some correspondence on the question of the extent of the "guarantee" of parcels offered by the Land Transfer Act 1952 and the meaning of the term "a little more or less." We also discussed the allied question of the extent to which monuments prevail over documentary or title evidence.

During some recent casual discussions on the extent of the guarantees provided by the New Zealand legislation, the papers relating to our 1979 correspondence were dredged up and I have come under some pressure from Professor Jones and the Editor to put the views expressed at that time into the form of a paper. This is the result, and with my impending retirement looming has not been generated from any pressing need to join the ranks of the "publish or perish" brigade of which membership is now unfortunately a matter of grave necessity for those who wish to succeed in an academic career.

WHERE TO START?

On perusing the correspondence and papers referred to, I find it difficult to decide on a starting point, so, perhaps, if I stick with my title I will do best. The "guarantee" provided by the Land Transfer Act is probably the best point at which to begin and in that context I must make my first point that there is virtually no reference to a "guarantee" in the Act. The only references which I can find are in the headings of Section 64 ("Title guaranteed to registered proprietor") and Section 204 ("When interests excepted from guarantee extinguished") and in both cases the section refers to a guarantee of "title" as discussed later.

GUARANTEES IN THE EARLY LEGISLATION

The original idea of "guarantee" sprang from the provisions of the Land Transfer Act 1870 which set up the Land Assurance Fund (Section 35) and the further sections providing for the payment of compensation to any party "deprived of land" (Section 130 *et seq*). There was in that Act and its successors no mention of any title other than an ordinary (or in modern idiom "fully guaranteed") title. The first occasion on which it became necessary to distinguish between different grades of title was with the passing of the Land Transfer (Compulsory Registration of Titles) Act 1924. This Act was passed with the objective of speeding up the process of bringing all privately owned land in the country under the provisions of the then operative Land Transfer Act 1915 and

thereby providing all private land with Torrens type title. The 1924 Act, the provisions of which are now contained in Part XII of the 1952 Act, required the Registrar, who filled the dual roles of Registrar of Deeds and District Land Registrar, to examine the title to all land not already held under the Land Transfer Act 1915 and "with all convenient speed" issue titles under that Act. To avoid the heavy costs of survey which was normally required on bringing land under the Act the Registrar was empowered to issue new types of title to overcome some of the difficulties and avoid undue hardship.

LIMITATIONS UNDER THE LAND TRANSFER (COMPULSORY REGISTRATION OF TITLES) ACT 1924.

The legislation provided for differentiation not by implying any guarantee but by providing for titles which, for one reason or another, were limited in their application. The Act consistently referred to the type of title normally issued under the Land Transfer Act as "an ordinary" Land Transfer title and provided for three new types of "limited" titles. The limitations were:

> "limited as to title", where the actual evidence of title was not sufficient to justify the Registrar in issuing an ordinary title;
> "limited as to parcels", where the survey on which the existing deeds were based was not sufficiently accurate or well enough documented for him to issue an ordinary title;
> "limited as to parcels and title", where the reason for not issuing an ordinary title was a combination of both the above factors.

The "limitations" were noted on the title and the titles so issued were usually referred to as "limited" titles. The limitation as to title was to be of fixed duration and was intended to protect those persons who may have some right to claim titles against the registered proprietor. If, after the lapse of the statutory period of twelve (12) years, no such counter claim had been lodged then the Registrar could declare and note on the title that it had "become conclusive as to title by effluxion of time". He may, if there was some evidence of occupation adverse to the registered proprietor, before making his declaration require proof that such other title had not matured and extinguished the title of the registered owner.

Surveyors are notorious for the use of loose terminology. Terms such as "guaranteed" and "fully guaranteed title" are both inaccurate and confusing and should in my opinion be dropped or discontinued in favour of the correct terminology of "ordinary land transfer titles" on the one hand and "land transfer titles limited as to parcels (or title)" as the circumstances might require, on the other.

THE REMEDIES IN THE ACT

The use of the term "guaranteed" may have some validity with regard to title when considered in the light of Sections 64 and 204 of the Act but does nothing but cause confusion and misunderstanding of the real position when applied to situations in which the "guarantee" relates to matters of survey and definition of the land contained in the title. Section 172 of the Act of 1952 provides for the payment of compensation for mistake or misfeasance of the Registrar and provides two grounds on which such compensation shall be payable to any person:

> "(a) Who sustains loss or damage through any omission, mistake or misfeasance of any Registrar, or of any of his officers or clerks in the exercise of their respective duties; or
> (b) Who is deprived of any land, or any estate or interest in land, through the bringing of the land under the Land Transfer Acts, or by the registration of any other person as proprietor of that land, or by any error, omission

> or misdescription in any certificate of title or in any memorial in the register, or has sustained any loss or damage by the wrongful inclusion of land in any certificate as aforesaid, and who by this Act is barred from bringing an action for possession or other action for the recovery of that land, estate or interest."

Where discrepancies occur between the dimensions found by survey and those shown on the title document, or the plan on which they were based, there is no possibility of relying on the assurance provisions of the Act to pay compensation because of those deficiencies. As far as I can gather, there have never been any claims paid from the Assurance Fund, or since its absorption into the Consolidated Fund, from that fund either, for discrepancies of this type. One of the contributing reasons would undoubtedly be that in such cases it would be virtually impossible to demonstrate that an owner had been "deprived" of any land because in the great majority of cases it is certain that the "missing land" has not existed and the discrepancies are ones of record rather than fact. In a note to paragraph 2.030 of "Land Law", Hinde, McMorland and Sim, in quoting Adams, comment that:

> ". . . The theory is that in an ordinary (guaranteed) title the land which is "guaranteed" is the land as originally pegged and if the claimant is in possession of that land he has got everything which the State has guaranteed . . ." (Note: the brackets are mine.)

In fact the only guarantee provided is one that says "A.B. is the owner of a piece of land shown on a particular survey plan and purporting to have certain dimensions and area but governed by the position of pegs placed in the ground by the surveyor". These are believed to be correct but because of the uncertainties of human actions and variations in survey measurements are qualified as being "a little more or less".

What this in fact means is that unless the old boundary monuments can be found one must fall back on other evidence of boundary and this may be some form of evidence other than a reliance on title or plan measurements, and, if the old marks are found undisturbed their positions prevail over any other plan or title dimensions.

A LITTLE MORE OR LESS

The expression "be the same a little more or less" is one not greatly to the liking of young surveyors who, having taken great pains to locate a peg precisely at some spot, the position of which is determined by bearing and distance from some already located mark, or by co-ordinate values relative to some second spot, tend to resent the qualifying tag. They resent that having taken great care to ensure accuracy they then have some lesser mortal display the audacity to tag the dimensions shown as ". . . being a little more or less". It is a well recognised fact in matters relating to survey measurements that two surveyors measuring the same distance under similar conditions (or indeed the same surveyor measuring the same line twice) will not necessarily always produce exactly the same opinion on the length of that line. Bearing this in mind therefore is the tag ". . . a little more or less" an unreasonable term to be used under the normal circumstances of survey operations? I think not.

Unfortunately ". . . a little more or less" is a legal and not a survey term. A surveyor might define a ". . . little more or less" in terms of closure error or as a representative fraction relating the probable error to the length of line. Some would relate it to the closures permitted under Survey regulations extant at the time the survey was made. More sophisticated means might be by determining the size and shape of the "error elipse" dictated by the equipment used and the configuration of the survey traverse. Lawyers on the other hand will take a much more liberal and somewhat flexible or, dare I say it, elastic interpretation of the term.

SOME LEGAL COMMENTS ON "more or less"

The expression "more or less" in common with "about" and "or thereabouts" has long been used as a means of qualifying quantities in contracts and

> ". . . being sometimes considered as extending only to cover a small difference one way or another; sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it". (Winch V. Winchester 1812 writing about contracts generally).

One of the earliest references to use of the words "more or less" in respect of land transactions is from an anonymous writer in 1609:

> "In the lease there are but 10 acres demised, and these words ("more or less") cannot in judgement of the law extend to thirty or forty acres for it is impossible by common intendment, and rather because the land demanded by the declaration is of another nature than which is mentioned in the 'per nomen'".

Most of the recorded cases where the phrase has been under discussion have referred to sale of goods and there are comparatively few circumstances in which the question has concerned the sale of land.

THE ENGLISH INTERPRETATIONS

Some of the English references which have concerned land transactions follow:

1. "A lessor possessed of a large piece of ground let it on building leases in different lots. One part was described in a lease by proper abuttals and as containing fifty-nine feet "more or less". The tenant erected a house sixty-two feet in length, but it corresponded with the abuttals.

"The words "more or less" in the lease being indeterminable, and the space covered, in fact, corresponding with the abuttals, the tenant has a fair title to insist that it was meant that so much would pass by the demise".

(Neale d. Leroux v Parkin (1794) 1 Esp 229 per Lord Kenyon p. 230).

2. "As to the expression "more or less", I do not say, those words in a contract will not include a few additional acres; but if the parties are contending about three acres, it would be very singular upon those words to add twenty-four map acres".

(Townshend (Marquis) v Strongman (1801) 6 Ves 328 per Lord Eldon, L. C. at p. 340).

3."In 1811 commenting on the impossibility of determining once and for all what should come within the meaning of the words it was said. "The effect of the words "more or less" added to the statement of a quantity has never been yet absolutely fixed by decision".

(Hill v Buckley (1811), 17 Ves 394).

And so the cases continued with it becoming clear, had it not been made so by Neale d. Leroux v Parkin in 1794 (1 above), that it could not be construed that any land other than that described in the deed should be included in a sale.

4. "It is said that the instrument contains within it the admeasurement of the quantity of acres, etc. comprised within the stated boundaries, and therefore that the conveyance is adapted to pass, and does pass, no more than the exact quantity of land that there is within the fence, and therefore could not convey the strip which is over the fence, and which moreover cannot pass as appurtenant to the close; but the parcels are always put down with the expression "more or less" in the conveyances of skilful conveyancers, and that part of the deed is so worded in this conveyance; so that the form of

the conveyance by no means, as was contended, favours the presumption that the strips belong to the owner of the enclosed land. But, in fact, the words used in the indenture seem to me entirely sufficient to convey the estate in the strips of land to the grantee".

(Simpson v Dendy 1860 6 Juv N.S. 1197 per Erle C. J. at p. 1207.)

5. "The plaintiff's claim is founded on this, that he is the owner of the soil of part of the passage coloured pink, and that it was not conveyed to the defendant. There is some ambiguity in the defendant's conveyance, but its meaning is explained by the plan. It describes the land conveyed to the defendant as eighty-seven feet six inches, of which five feet six inches consist of part of the passage. According to that measurement the conveyance is substantially correct, and there is a mere inaccuracy which is obviated by the words "be the same a little more or less".

(Dodd v Burchell (1862) 1 H C 113 per Channel B. at p. 121).

This seems to be the first case in which the phrase is enlarged to "a little more or less".

6. Another case probably not concerned with land and quoted in Halsbury said:

"I regard the words "more or less" as the ordinary words which one meets with in a contract, where they are equivalent to "about so much", and where the contract is not to be rendered void in respect of either of the parties because either a little more or a little less than the amount contracted has been supplied. I am rather disposed to agree . . . that the word "estimated" would probably have had the very same operation if the words "more or less" had not been there."

(Tancred. Arrol Co v Steel Co of Scotland, Ltd (1890) 15 App Cas. 125 per Lord Halsbury L. C. at p. 136).

SOME NORTH AMERICAN COMMENT AND CASES

American cases take much the same line of reasoning as, for example, commentary on "more or less"

". . . words intended to cover slight or unimportant inaccuracies in quantity . . ."

". . . in describing a boundary line relieves a stated distance of exactness."

". . . in connection with courses and distances may be disregarded if not controlled or explained by monuments, boundaries and other expressions of intent".

In an interesting Ontario case, which seems to be appropriate since the origins of the present discussion lie in that province, the facts were:

An owner of land made a deed to a purchaser, adopting the quantitative description contained in the original grant from the Crown. After a lapse of 20 years he sued the purchaser for the unpaid balance owing under the contract for sale. The purchaser having discovered a substantial deficiency in the quantity of land intended to be conveyed claimed that compensation should be paid out of the unpaid purchase moneys.

It was held that the words "more or less" in the deed disentitled the purchaser to any such claim there being no substantial misrepresentation proved.

However in another Ontario case where a depth stated to be 110 feet "more or less" was subsequently found on survey to be only 98 feet 6 inches, the court found that the discrepancy fell outside anything covered by the words and ordered an abatement of the price paid.

AN EXAMPLE FROM CLOSER TO HOME

The case which is probably most opposite to our New Zealand situation comes from Australia. During the course of his judgement the judge said:

> 7. "The property with which I am concerned was a property described as 'my farm situated at Mount Sabine comprising 280 acres more or less together with buildings and all improvements thereon', etc; and it appeared that on an accurate measurement the real acreage of that property was found to 262 acres 2 roods 6 perches . . . Primarily I should take it in construing this contract that 280 acres meant 280 by measurement, and that the words 'more or less' were intended to cover small discrepancies in the measurement, or perhaps discrepancies in measurements when the total acreage was made up by adding together the acreages of a number of blocks of land. I am not suggesting that the words 'more or less' are in every case to be limited to a deficiency arising from errors in measurement but I think that that is primarily what those words are intended to cover; and I think also that nowadays, when the facilities for accurate measurement are so much greater than formerly in all parts of the country, a smaller discrepancy should be held to be outside the words, 'more or less' than in earlier times.
> But in the present case I have no doubt in my own mind—and I do not think any authority compels me to decide otherwise—that a discrepancy of eighteen acres in an area of 280 acres is outside the qualifying words 'more or less' . . . Both parties have concurred in asking me also to indicate to what extent the variation would be covered by the words 'more or less'. I am asked in effect, to fix the limits which would be covered by those words; I think it is impossible to do so with accuracy, but, fixing an outside limit, I should think five acres short of 280 acres would be the proper figure to take. . . . I think I have taken a fairly liberal margin."
>
> (Belfrage v McNaughton (1924) V. L. R. 441 per Macfarlan J. at pp. 443,444.)

NEW ZEALAND CASES

The only New Zealand references to the meaning of ". . . more or less" that I can find are in the Appendix to Kelly's third edition of "Summary of the Law Relating to Surveying in New Zealand" at page 295:

> A Wellington case concerned a subdivisional survey and plan of Section 1935, Wellington. The plan had been made by a surveyor but was never deposited and the lots had subsequently been transferred to the purchasers according to diagrams on the memoranda of transfer. Many years later a dispute arose between subsequent owners, Mrs Moore and Mrs Dentice, concerning the location of the boundary between their respective properties. They had erected, by mutual agreement, a new fence on the line of the old fence and Mrs Moore subsequently claimed that it encroached on her land. Surveys revealed the old peg (from the original undeposited subdivisional plan) was four inches away from the fence on Mrs Dentice's side. It was held that the true boundary was according to the peg—"the old pegs must fix where land is. A map is intended to represent what is on the ground".
>
> (See Moore v Dentice (20 NZLR 128)).
>
> Thus with allotments in this case only 30 feet wide it was held that 4 inches was not more than is covered by the expression "a little more or less".

I wonder how many surveyors would find such a judgement palatable and accept an error of over 1% as coming within the meaning of the expression.

> In a second case one certificate of title showed a frontage of 755.7 links, but from the fence on one side to the peg on the other there was only 745.1 links, and the survey showed that though the Certificates of Title gave only 2501 links as the frontage of the whole section, the linkages between the original pegs was 2518.7 links. In the course of a judgement in the appeal court the Judge said: ". . . Where there are discrepancies between the measurements of sections of land as stated in certificates of title under the Land Transfer Act and the measurement of the sections as actually surveyed and pegged upon the ground, and there is no doubt as to the position of the original survey pegs, and possession has been taken and fences erected, and the sections occupied according to the original survey pegs, the land included in each certificate must be taken to be the lands surveyed and pegged and the pegs must be followed in subsequent disputes as to boundaries or fencing. . . ."
>
> (See Russell v Mueller (25 NZLR 256)

In this case it could well have been considered a case of survey error being governed by the monuments and occupations when they have been accepted by the parties over time. Undoubtedly that was an important factor in the case but the Judge went further and remarked that these variations might come within the phrase in the Certificates of Title "a little more or less" and there to all intents and purposes the matter rests and is more than adequately covered by N. T. Kerr in "Surveyor and the Law" in Chapter 5, pp. 57-65.

CONCLUSION

One wonders how many surveyors could agree with the learned judge on the question of a "little more or less" embracing apparent errors on nearly one and half percent? However to be fair most of us would admit to having from time to time probably found it necessary or expedient to take a more liberal view of acceptable tolerances than those set down in the current or even any past survey regulations.

The Australian judge in Belfrage v McNaughton (see above) seems to have taken the most realistic approach, at least from a survey viewpoint, and in stating that he has taken a fairly liberal margin when suggesting a maximum amount to be covered by "more or less", of one and three quarters per cent, would still be considered by most surveyors as applying a fairly elastic interpretation of the term.

In the final analysis the solution of problems relating to definition of boundaries comes down to the assessment of evidence and there is not, nor can there be, any other than a qualified "guarantee" of parcels, and liberal and sensible interpretations of the phrase ". . . a little more or less". The adamant refusal of the Courts to trammel themselves by setting percentage or other limits which might operate universally is undoubtedly wise and there is no doubt that despite the sophistication of modern measurement techniques "more or less" are words with which we will have to live for many years to come.