

S.C.

IN BANCO.

WELLINGTON. *Land Transfer Acts—Boundaries—Subdivisional Survey—Plan not deposited—Occupation—Surveyor's Pegs—Measurements in Certificates of Title—"More or Less"—Estoppel—Agreed Line of Fence—"The Land Transfer Act, 1885," Section 57.*

1901.

April 24.  
May 11.

STOUT, C.J.

## MOORE v. DENTICE.

A town section, under the Land Transfer Act, was subdivided by the owner for sale. The subdivision was made by an authorised surveyor, who prepared a plan, and pegged out the lots on the ground. The subdivisional plan was never deposited in the Land Transfer Office, and the transfers made of lots sold did not refer to it, but the different purchasers went into possession on the supposition that the subdivisional survey was correct.

*Held*, in an action involving the question what was the true boundary between two adjoining lots, That the peg originally put in by the surveyor in laying out the lots ought, under all the circumstances, to be followed, notwithstanding that this might give the defendant some four inches more of frontage than was shown in her certificate of title, and that there was some question whether there was sufficient frontage in the whole section to give the other owners as much as was shown in their certificates, and notwithstanding that the occupation had not been exactly according to the peg. *The Equitable Building and Investment Company v. Ross*(1) and *Tanner v. Thomson*(2) followed.

A variance of 4 in. on a frontage stated as 30 ft. is not more than is covered by the use of the words "be the said measurements a little more "or less."

Where adjoining owners concur in putting up a fence along a certain line, on an erroneous assumption by each that it is the true boundary, neither party having made any representation to the other upon the subject, neither is estopped from setting up that some other line is the true boundary.

*Semble*, That, in any case, section 57 of "The Land Transfer Act, 1885," would prevent such an estoppel from operating in the case of land under that Act.

(1) N.Z. L.R. 5 S.C. 229.

(2) 7 N.Z. L.R. 71.

THIS was a special case stated in an action to recover possession of a small strip of land 16 in. wide, the case being one of disputed boundary between adjoining lots of a town section (No. 1035 on the plan of the City of Wellington).

Section 1035 had been brought under the Land Transfer Act whilst owned as one holding, and a certificate of title issued in respect of it. It was bounded on the north and east by other town sections, and on the south and west by public streets (Herald Street and South Road respectively). The certificate of title gave these boundaries and the dimensions of the section, but did not fix the position of the streets or sections with reference to any standard peg.

Section 1035 was subsequently subdivided for sale by its registered proprietor. The subdivision was made by an authorised surveyor (Mr. Briscoe), who prepared a plan, and pegged out the lots on the ground; but his plan was never deposited in the Land Transfer Office. Lots were sold, and the special case stated that the parties went into possession on the supposition that the subdivisional survey was correct; but the transfers did not refer to the subdivisional plan (it not having been deposited), and both the transfers and the certificates of title issued upon them fixed the position of the lots by reference to the outer boundaries of the section, these again not being themselves fixed with reference to any standard peg.

The plaintiff, Ellen Louisa Moore, bought her lot in August, 1897. The defendant, Elicia Jane Dentice, bought hers in March, 1898. The subdivision had been made many years previously, and neither of them bought direct from the subdividing owner. An old fence between the two lots was standing both at the time of the plaintiff's and at the time of the defendant's purchase.

Shortly after the defendant went into possession of her lot the plaintiff gave her notice under the Fencing Act desiring that a new fence should be erected between them. The defendant agreed, and, at her request, the proposed fence was erected by the plaintiff's husband, and the defendant paid him half the cost of it. No question as to boundary had then arisen, but the new fence was erected on the line of the former one, which was assumed by both parties to be the boundary.

The plaintiff's lot was the western one of the two, and

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according to her certificate of title she was entitled to a frontage of 40 ft. to Herald Street, beginning at a point 160 ft. from the corner of Herald Street and the South Road, the South Road being the western boundary of the whole section (1035). The defendant's certificate of title gave her a frontage of 45.45 links, beginning at a point distant 151.52 links from the eastern boundary of Section 1035—its boundary, namely, by Section 1036.

The plaintiff's other neighbour (on her western side) was one Williams. Some little time before the commencement of this action Williams had a survey made, and according to this survey, and assuming the actual alignment of the South Road to be the true boundary of that road, the fence between Williams and the plaintiff encroached upon Williams's lot. The plaintiff consented to a removal of this fence to a line 160 ft. distant from the actual alignment of the South Road (160 ft. from the South Road being the position of her western boundary shown by her certificate of title). This left the plaintiff 16 in. short of the frontage of 40 ft. shown by her certificate of title, and she claimed that the fence between her and the defendant should be moved that distance to give her (the plaintiff) her full frontage. The defendant objected to this, and refused to give up possession of any part of the frontage of which she was in occupation. Other surveys were made, which are referred to in the judgment, and in the course of these the original peg, put in by the surveyor who subdivided the section, marking the boundary between the two lots, was discovered at a point 4 in. to the eastward of the fence between them.

The plaintiff, in her statement of claim, claimed to recover possession of 16 in. of frontage from the defendant. The defendant, in her statement of defence, claimed that, under the circumstances, she was entitled to retain possession of the whole 16 in., and that in any case the plaintiff was not entitled to recover more than the 4 in. up to the old peg which had been discovered.

The other facts of the case will be found stated in the judgment.

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On the special case stated the Court was asked to determine whether the plaintiff was entitled to recover any, and, if so, how much, frontage from the defendant.

*Ollivier*, for the plaintiff:—

The plaintiff is entitled to the whole of the land claimed. The question is whether the acts of the parties estop them from claiming according to the true boundaries. Under the Land Transfer Act it is impossible that they should be so bound. Section 65 of "The Land Transfer Act, 1885," makes the certificate of title conclusive evidence. And under section 57 it is clear that any right claimed over another's land must be registered as an easement or otherwise.

*R. C. Kirk*, for the defendant:—

Very old fences existed which had been adopted as the boundaries before either of the present parties purchased. The defendant bought the land between the existing fences. At all events the defendant is entitled according to the old pegs, which were the basis of the subdivision. A *bonâ fide* occupation in accordance with old surveys cannot be overridden by the Land Transfer Office: *The Equitable Building and Investment Company v. Ross*(1). The defendant would not have contested the 4 in. only.

*Ollivier* in reply.

*Cur. adv. vult.*

STOUT, C.J.:—

This special case has been stated for the opinion of the Court as to where the true boundary between the subdivisions of Town Acre 1035, City of Wellington, is situated.

The acre was divided by a surveyor named Mr. Briscoe, and titles have been issued by the Land Transfer Department, though the subdivision plan has not been deposited, and the titles to the land of Mrs. Moore and Mrs. Dentice have been issued without reference to one another, and without being measured from a common starting-point. The one subdivision (Mrs. Moore's) has been issued with the western boundary beginning at a point 160 ft. to the east of the South Road,

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whilst Mrs. Dentice's land is not described at all in the body of the certificate, but has a figure on the plan, 151'52, which I suppose means 151'52 links from the boundary between Sections 1035 and 1036. It is not stated whether the figures are links or feet save that it is said the scale is 80 links to an inch. This certificate is not, I hope, a specimen of the certificates usually issued by the Department.

Two plans have been produced, but they differ. For example, Mr. Davis's plan makes the boundary of Mrs. Dentice's land, as occupied, 151'70 links from the eastern boundary of the acre, and Mr. O'Donahoo's 151'65. Mr. Davis's makes the total length between fences of Section 1035, 497 links, whilst Mr. O'Donahoo's makes it 499'3. According to the certificate of title it should be 500'01. There is also a difference as to the frontage occupied by Mrs. Dentice.

I gathered during the argument that Mr. Davis states that Section 1036 has too much land. The exact quantity was not stated. Mr. O'Donahoo makes the frontage to Section 1036 502'7 links, whilst the grant is only 500 links, and the certificate of title issued gives 501'7 links. There seems to be an old fence between Sections 1035 and 1036—said in Mr. O'Donahoo's plan to be about forty years old—and there is a very old fence between the acres on the opposite side of Herald Street. This fence is 1 link further westward than the fence between 1035 and 1036, and gives a frontage of only 498'3 links, not 500 links as Crown-granted. These measurements have, however, been made on the assumption that the South Road is in its proper place. There appears to have been a new alignment of this street, or road—or, at all events, its position has been recently fixed by surveyors, and this after Mrs. Moore's title was issued. I do not see how the present position of the South Road can be accepted as the proper position of the South Road. It may be where it ought to be, but, unless it is in the position that the original surveyor put it by pegging it on the ground, its present position is not binding on the owners of the land of Section 1035. I would assume by Section 1035 and the opposite section not having 500 links exact frontage to Herald Street that the original pegs have

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not been followed. Further, I think, the old fence between 1035 and 1036 being 1 link further eastward than the old fence between sections on the opposite side of the street, it is likely to have been placed on the boundary as surveyed. If so, Mrs. Dentice's land, so far as its eastern boundary is concerned, is about correct, and it agrees with what the certificate of title says. It fixes its position as 151'52 from the eastern boundary of Section 1035, and the survey of Mr. Davis makes Mrs. Dentice's fence 151'70—a difference of 0'18 of a link, or about  $1\frac{3}{10}$  in. If Mr. O'Donahoo's plan is accepted, then the distance is 151'65, a difference of 0'13 of a link. As the measurements are stated in all certificates to be a little more or less, this may be assumed to be correct. Mr. O'Donahoo states that Mrs. Dentice's eastern boundary-fence has Mr. Briscoe's peg in its centre: this, if correct, proves that this was the subdivision originally made. Measuring from this fence westward till the peg of Mr. Briscoe's is found, we have a frontage of, according to Mr. Davis, 46 links, and, according to Mr. O'Donahoo, 45'65 links. This would give Mrs. Dentice, according to Mr. Davis, 0'55 links more than the certificate of title gives her—that is, about 4'35 in.; whilst according to Mr. O'Donahoo it would give her only 1'58 in. more. Even if it gave her 4'35 in. more, I do not think this would be an unreasonable margin to allow in admeasurements described as "more or less." Further, to adopt Mr. Davis's suggestion that Mr. Briscoe's pegs are wrong would mean the removal of all the fences in the subdivision of Acre 1035, the alteration of Mr. Briscoe's pegs by which the subdivision was made, and the alteration of the old boundary-fence between Sections 1035 and 1036. I do not see how any Court could do so. As has been pointed out in several cases, the old pegs must fix where the land is. A map is intended to represent what is on the ground: *The Equitable Building and Investment Company v. Ross*(1); *Tanner v. Thomson*(2).

So far as the facts stated in the special case, the maps, and the admissions made by counsel enable me to decide, I am of

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opinion that the true boundary is where the pegs of Mr. Briscoe put it. This, no doubt, will, if the measurement of Mrs. Moore's land is made from the new fence between her property and Mr. Williams's, her western neighbour, give her, according to Mr. O'Donahoo, 59'3 links, and according to Mr. Davis 58'95 links, whilst she has, according to her certificate of title, 60'61 links; but she has, perhaps wrongly, consented to a rectification of her western boundary. According to Mr. O'Donahoo, she will have 1'31 links less than her certificate gives her, or a loss of 10'21 in.; but Mrs. Dentice has not got this frontage—she will only have, according to Mr. Davis, 4'35 in., and according to Mr. O'Donahoo 1'58 in., more than her proper quantity—so the odd 6 in. would have to be got from other holders, or from owners in Section 1036.

The other point raised in the case is whether the fact that subdivisional fences have been long up, and that the plaintiff and defendant both treated the fence between them as being on the true boundary, estops the parties from averring where their true boundary is if the fences are not on the true boundary. Assuming that under the Land Transfer system—which seems to me not warranted by the statute—title can be transferred by estoppel (see section 67), the erecting of a fence on what was supposed by both to be the boundary will not, in my opinion, transfer the title to any part of the land. There is no question here of any representations of where the true boundary was. No dispute had arisen as to the boundary, and it was, as the case states, assumed by both parties that the fence was erected on the true boundary, and that the old fence had been on the true boundary. This seems to have been an erroneous assumption, for the peg of the surveyor who laid off the subdivision has been found, according to both surveyors, 0'5 of a link east of the fence. Both parties having acted under a mutual mistake of their rights and of where the true boundary was, there is no estoppel on either party.

I am of opinion that the true boundary is where the subdivisional peg was placed, and that the fence should be moved 0'5 link eastward—that is, placed in the line with Mr. Briscoe's peg. It cannot be doubted that if, as ought to have been

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done, the land had been transferred according to the subdivisional plan, the lots would have been numbered, and described by their numbers. If such had been done, could it for one moment have been suggested that the pegs would not have shown the true boundary even if the measurements on the ground differed by a few inches from the measurements on the plan? And, though the subdivisional plan was not registered nor referred to by the Land Transfer Department, it was by it that each party was put into possession of his lot. To allow now a new survey which has to encroach on what is known as Town Acre 1036 because a new datum-line has been fixed on the South Road would be to unsettle all titles, and is directly contrary to the law laid down in the cases already cited.

In my view of the matter neither party has succeeded, and therefore I am of opinion that each party should pay her own costs.

*Judgment for plaintiff without costs.*

Solicitors for the plaintiff: *Travers & Ollivier* (Wellington).

Solicitors for the defendant: *Kirk, Atkinson, & Wilson* (Wellington).