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LAND TITLES - BOUNDARIES

I. Introduction

The purpose of this paper is to set down a preliminary and quite general outline of the problems and possible solutions with regard to boundaries and areas, within the proposed Real Property system. This is meant merely as a rough draft of some of the issues, and may contain errors and oversimplifications. It should be considered a starting point for further research and consideration.

Once it has been determined who is to be certified or registered, and what interests may be certified, it must be determined where that interest is located, and to what extent certification of boundaries or areas or survey lines or acreages may be relied upon either by the holder of the interest himself or by a prospective bona fide purchaser from him.

II. Present Law - England

A. Background (from Ruoff and Roper, Registered Conveyancing 57)

An early attempt at requiring exact boundaries for registered conveyances in England met with little success. Under the Transfer of Land Act, 25 & 26 Vict., c. 53, ss. 10, 16, and 25(3), passed in 1862, maps and plans were required to show the exact boundaries of registered property. It was soon discovered that this requirement interfered with the orderly transactions of business and with land transfer generally, and resulted in needless and costly disputes over boundaries which had been uncontested, even if ill-defined, for generations. The provisions of the 1862 Act were changed by the 1875 Land Transfer Act, 38 & 39 Vict., c. 87, and the 1879 Conveyancing (Scotland) Act Amendment Act, 42 & 43 Vict., c. 40. These

acts established what is now known as the "General Boundaries Rule". The Report on Land Transfer, Cmnd. 474 (1919) recommended the continuation of the General Boundaries Rule, and it continues to the present day.

B. General Boundaries Rule

The General Boundaries Rule is expressed in the Land Registration Rules, 1925, r. 278.

Except in cases in which it is noted in the property register that the boundaries have been fixed, the filed plan or general map shall be deemed to indicate the general boundaries only.

In such a case the exact line of the boundary will be left undetermined - as, for instance, whether it includes a hedge or wall or ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the land registered includes the whole or any portion of an adjoining road or stream.

When a general boundary only is desired to be entered in the register, notice to the owners of the adjoining lands need not be given.

This rule shall apply notwithstanding that a part or a whole of the ditch, wall, fence, road, stream, or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title.

This is supplemented by rule 279 which provides that where, and so far as, physical boundaries and boundary marks do not exist, the fullest available particulars of the boundaries must be added to the filed plan or general map.

The General Boundary Rule system appears to have been used for registered conveyancing in England more than a century with considerable success.

C. Fixed Boundaries

Under the English Registry System, one may make application for fixing of boundaries by following certain procedures.

1. Upon receipt of an application, notice is given by the Chief Land Registrar to owners and occupiers of all adjoining lands of the intention to fix the boundaries.

a. This may be a difficult job in itself if it requires notice to large number of people.

b. It is also suggested that people who receive such notice immediately begin to consider whether some injury is about to be done them.

2. If and when the position of the boundaries has been ascertained by reference to the National Grid Co-ordinates, the particulars are noted on a filed plan, and there is also a note made on the property register of the title affected to the effect that the boundaries have been fixed.

3. The official title plan is thereupon deemed to define accurately the fixed boundaries. In other words, the precise position of the boundaries is thenceforth guaranteed under the Land Registry Acts with the result that an indemnity claim could be sustained in the event of even a slight rectification of the boundaries.

4. There are certain disadvantages to fixing of boundaries.

a. Notice to adjoining owners and occupiers may be difficult and time consuming.

b. People who receive such notice are put on

their guard and become suspicious that they are about to be wronged in some way.

c. An exhaustive and therefore expensive survey must be completed.

d. All adjoining freehold and leasehold owners must deduce and the Chief Land Registrar must closely examine their titles - an expensive process.

e. There is no guarantee that fixing of boundaries may indeed be possible.

D. Example of Application of General Boundaries Rule

A good example of how the General Boundaries Rule works is the case of Lee v. Barrey [1957] c. 251. In that case a purchaser bought a certain lot (Lot 3). A plan attached to the certificate showed the western boundary of lot 3 to be straight, but that boundary in fact angled toward the east. The result was that the purchaser actually received less land than the plan showed.

The court held that this was a boundary dispute rather than a property dispute, since the purchaser got what he bargained for, viz., Lot 3. Lord Evershed M.R. went on to say, at 261:

I think, for my part, that there is no doubt that the certificate purported to give him, and gives him, the right property. What, on the evidence, it has failed to do is to indicate its boundaries with sufficient correctness and precision.

The purchaser was left, therefore, with only the land that he had actually bought not

It must be noted, however, that should the Land Registry make a mistake in drawing its maps so that a registered proprietor suffered actual monetary loss through being deprived of property, he would have a claim for compensation notwithstanding that this land was registered with general boundaries (Land Registration Act, 15 & 16 Geo. 5, c. 21, s. 83 (1925), amended by Land Registration and Charges Act, 1971, c. 54, ss. 2, 3, 14(2) and 2d schedule.

III. Present Law - Torrens System

A. Indefeasibility

Under the Torrens systems adopted with variations by a number of jurisdictions, the problem of boundaries is included in the general term "misdescription". Misdescription is, in most Torrens jurisdictions, an exception to indefeasibility.

Indefeasibility is the name given to the situation which exists when the state guarantees that the owner, registered as such on a certificate of title, has an indefeasible claim to the interest described therein, so long as he is a bona fide purchaser for value of that title. Ideally, one could rely on the "top" title, and needn't search backward to determine if that title has been issued correctly. A purchaser from the holder of a title should be able to rely on the state guarantee.

To this concept of indefeasibility there are certain exceptions, one of which is "misdescription".

B. Misdescription

The meaning of misdescription, and, therefore, the extent to which it is an exception to indefeasibility, is not exhaustively defined.

At most it can be said that the omission from a certificate of title of a reservation and exception of petroleum owing to an error of a registrar of titles is not a misdescription; and, therefore, that such an error does not deprive of indefeasibility the title of a bona fide purchaser for value relying on the registrar from which the reservation and exception of petroleum was erroneously omitted. There is no doubt that misdescription will entitle rectification to be made as between a registered titleholder and his immediate predecessor in title. Also, where misdescription results in the contemporaneous existence of two certificates of title for the same land, the prior certificate will prevail. (Lewis & Thompson, Canadian Oil & Gas, v. 1, paragraph 53(4)).

Misdescription was discussed extensively, but by no means conclusively in the classic case of C.P.R. v. Turta (1952) 5 W.W.R. 529, (1953) 8 W.W.R. 609, (1954) 12 W.W.R. 97. It can be said from all the judgments in that case that misdescription really only occurs where there is double certification, i.e. - where the same parcel of land is included in the supposedly indefeasible titles of two separate people.

The situation wherein this would most likely arise was described in the judgment of Walker J. in Hamilton v. Iredale (1903) 35 R. (N.S.W.) 535, 550.

Wrong description is where an applicant, intending to describe Blackacre, describes Whiteacre, or so describes Blackacre so as to make it include Whiteacre. It is not misdescription when the applicant correctly describes the land to he is applying for, though the land is not his. It is then a case of no title, and the efficacy of the certificate of title depends upon the bona fides of the applicant.

Obviously, where there has been misdescription and both parties have simultaneous title to the same piece of land, it must be determined as a matter of policy who gets the land and who is deprived thereof. It is also to be decided whether the deprived landowner can maintain an action against the state because of the state's guaranty (i.e. can he sue the assurance

fund?). These policy considerations are all part of the larger questions of to what extent can the state guarantee a title, and who should be compensated when there is reliance on the state's guaranty to some innocent person's detriment.

C. Other Considerations

Presently in Alberta, and in most other jurisdictions using the Torrens system, the register does not guarantee acreages (Burden v. Registrar NALRO (1913) 5 W.W.R. 122) nor does it guarantee the accuracy of surveys.

Alberta is so well and so accurately surveyed, that possibly the assurance fund could withstand any actions based upon inaccuracy of acreage or survey, so it may be possible for the register to guarantee the accuracy of acreage or survey. Alberta is one of the few regions in the world where this could be even considered. This should at least be more closely examined.

IV. There follows a short list of some of the leading cases from Australia and New Zealand in each area, along with short abridgments thereto. This is intended to be neither exhaustive nor definitive.

1. Hassett v. The Colonial Bank of Australasia
(1881) 7 V.L.R. 380.

Defendant, execution creditor of one John Hassett, registers writ against the land of the plaintiff, a different John Hassett. Defendant becomes registered owner of land on transfer from Sheriff, and subsequently sells to a bona fide purchaser. Plaintiff gives up land to bona fide purchaser upon presentation to him of bona fide purchaser's certificate of title. Plaintiff brings action against defendant for redress. Defendant argues inter alia, that correct action is

against Registrar.

Find for plaintiff.

"The error consisted in the misdescription of the land specified as that sought to be affected by the writ of execution. That writ, when registered, bound the land." That started the process whereby the plaintiff was ultimately deprived of his land - and this commencement may be held to be an application to bring the land under the act. p. 387.

"I think the plaintiff has been deprived of his land by an error occasioned by an omission or misdescription by the defendant, who must answer for it... If that be so, the plaintiff would have no redress against the assurance fund, which is intended as a last resort." p. 388.

So the previous owner cannot maintain an action against assurance fund, but only against misdescriber.

2. Stevens v. Williams (1886) 12 V.L.R. 152.

Plaintiff claims that defendant's building has been constructed encroaching on six inches of his land. Defendant's certificate of title had been issued prior to plaintiff's certificate and the location was not described so fully. By reference to pegs on the ground at the time of construction of the building, the defendant should have owned the six inches in question.

- find for defendant

- the defendant showed that the land in dispute was conveyed to her by a certificate of title at least equally conclusive with that of the plaintiff. Defendant had a prior certificate of title.

3. National Trustee v. Hassett [1907] V.L.R. 404.

Where a piece of land is included in two certificates of title, ordinarily the prior certificate is conclusive, but this is not so where the land has been included in the prior certificate of title through a wrong description of boundaries, or where the holder of the subsequent certificate has acquired rights to it by adverse possession before the issue of the prior certificate.

4. Pleasance v. Allen (1889) 15 V.L.R. 651.

Plaintiff buys land from X which certificate includes 5 1/2 inches into defendant's land and is short 5 1/2 inches on the other side, through a chain of title. Defendant applies to have his certificate amended and plaintiff takes action for ejectment. There was an original mistake in boundary description in the first transfer from the original owner.

Defendant entitled to get both certificates of title rectified, but only if he procured for plaintiff, the 5 1/2 inches on the other side of the plaintiff's property.

5. Mitchell v. Keogh [1934] V.L.B. 48.

Plaintiff's certificate says he owns 20 feet east of a lane (which would be 101 feet west of X road). Plan shows him owning 20 feet east and that is only 100 feet west of the road.

- find that his land extends 101 feet west of X road.
- the true extent of plaintiff's land was to be found in the measurement of the land itself as shown on the title, not by the figure indicating its distance from X street.

6. Hamilton v. Iredale (1903) 3 S.R. (N.S.W.) 535.

"Wrong description is where an applicant, intending to

describe Blackacre, describes Whiteacre, or so describes Blackacre as to make it include Whiteacre. It is not misdescription when the applicant correctly describes the land he is applying for, though the land is not his. It is then a case of no title, and the efficacy of the certificate of title depends upon the bona fides of the applicant.

Walker J. p. 550.

7. Turner v. Myreson (1918) 18 S.R. (N.S.W.) 133.

Contention that possession, which had continued uninterrupted for 30 days, was encroaching one to three and one-half inches onto another piece of land.

Held that it takes the most positive and direct overwhelming evidence to upset the presumption that the land so occupied is in accordance with the boundaries as originally plotted.

8. Registrar of Titles v. Experiance Land Co. (1899)
1 W.A.R. 118.

X sells half of his land to Y. X then sells the other half of his land to Z but the certificate of title to Z includes all of X's land (because of registrar's mistake). Z sells to the defendant, a bona fide purchaser.

Court orders defendant to submit his title to registrar for correction, i.e. his title was not indefeasible.

9. Rourke v. Schweikert (1888) 9 L.R. (N.S.W.) Eq. 152.

Plaintiff is in adverse possession of four acres inter alia. Defendant owns adjoining land. Resurvey shows defendant's land may include the strip of four acres and registrar changes defendant certificate of title to show the four acres.

Held that the registrar's action was wrong and alterations were void.

10. Hay v. Solling (1895) 16 N.S.W. 60.

Determination of whether purchaser acted bona fides is made by inquiring whether he had notice or knowledge, or the means of knowledge that the land transferred to him was, by misdescription of boundaries wrongly included in the certificate.

11. Oelkers v. Merry (1872) 2 Q.S.C.R. 193.

Plaintiff purchases land and gets certificate. Defendant later purchases same land from X and brings it under Real Property Act. Defendant now pleads that he is a bona fide purchaser. Plaintiff pleads prior certificate of title.

Find that since defendant had not asked X for the certificate of title to their land, and since title to their land has not been brought under the act, defendant was not protected by indefeasibility provision.

Quaere, what would have happened if defendant had sold to another bona fide purchaser?

12. Marsden v. M'Alister (1887) 8 N.S.W. 300.

The section granting conclusiveness of title must be read as modified by the section noting misdescription as an exception.

Here, two certificates of title for the same land, the second certificate of title having been written by mistake the first certificate of title must prevail.

13. Dempster v. Richardson (1930) 44 C.L.R. 576
(Aust.H.C.)

Plaintiff buys land stated to be 74 feet 9 inches long measured from point X on west corner. Plaintiff measures 74 feet 9 inches and builds building.

Defendant has land adjoining on east side, which is stated to be 79 feet 9 inches from point Y on east side. Defendant measures 79 feet 9 inches and finds defendant's lot extends 9 inches into plaintiff's lot.

Defendant tears down building of plaintiff and plaintiff brings action but action fails - defendant having good title to the double certified land.

Plaintiff now brings action against the assurance fund, but action fails.

1. An error of survey, not of title.
2. The deficiency was in her predecessor's title.
3. "[plaintiff] has not been deprived of any estate or interest in land through any error or misdescription in the certificate of title, but has obtained all the land her vendor could or did transfer."

Quaere, what could plaintiff have done?

14. Watcham v. East Africa Protectorate [1919] A.C. 533.

The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to ancient instrument, and where the ambiguity is patent as well as where it is latent.

Where there is a variance between the stated acreage and the area described by physical boundaries, evidence of user may be admitted.