

OFFICE OF THE SURVEYOR GENERAL
DEPARTMENT OF PRIMARY INDUSTRIES
PARKS WATER AND ENVIRONMENT
TASMANIA

LEGAL PRECEDENTS IN CADASTRAL BOUNDARY REINSTATEMENT

A COMPILATION OF
CASES
APPLICABLE IN TASMANIA

FRANK HOOGESTEGER
(Registered Surveyor)

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ABSTRACT

Extracts from commonly recognised cases are provided as an aid to registered land surveyors in the process of cadastral boundary reinstatement. The cases are categorised as examples of decisions which help determine intent as the primary predictor of the position of any existing cadastral boundary.

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Foreword

The attempt to compile an article on the legal basis of common law reinstatement of cadastral boundaries in Tasmania is an exercise fraught with dangers. Nevertheless, it has been undertaken here with the motivation of an improved understanding by the surveying profession of the judicial basis of our day to day cadastral activities.

No claim to originality is made here. It is hoped that, as many of the well known cases have been brought together in one place, the profession will see it as a useful aid to good boundary reinstatement and to which it will contribute meaningfully as better Tasmanian examples emerge.

Caution

It should be noted from the outset that the presentation of any particular case below is not to be interpreted as an endorsement by the Surveyor General of that case as a definitive precedent in any particular situation. That decision is the surveyor's and ultimately, of course, the court's. It remains the registered land surveyor's responsibility to apply "*the best evidence that the nature of the case admits*" in all ways – including legal.

This article is also not intended to be an exhaustive treatise but rather a short, "daily" compendium to the task of reinstatement. For reasons of brevity then, what follows are extracts only from the cases cited. It remains possible that a different meaning or application could emerge were the transcript to be read in its entirety. In addition it is not uncommon for some cases to span more than one of the categories into which they have been organised below.

Where possible, local cases have been provided but a relative lack of Tasmanian decisions and the age of the cases which have provided the reinstatement principles now widely accepted mean that few have actually been cited below.

Introduction

The survey of cadastral boundaries in Tasmania is governed by the Surveyors Act 2002 (No. 36 of 2002), the Surveyors Regulations 2003 (S.R. 2003, No. 140) and the subsidiary Survey Directions. This Legislation controls a variety of technical and administrative aspects of the activities of a Registered Land Surveyor. The reinstatement of boundaries itself is controlled by Direction 3.2.2 Reinstatement of Boundaries. Only Direction 3.2.2.4 provides any guidance at all into the highly complex legal task of boundary reinstatement, and that of a very shallow nature only.

In the words of the South Australian Cadastral Survey Guidelines

“There is no controlling legislation that directs surveyors in common law boundary reestablishment.” either in that state, Tasmania or Australia.

Put another way, boundary reinstatement in Australia and particularly (as far as this article is concerned) Tasmania is a common law practice. Consequently,

“Being based on common law, the position of a disputed cadastral boundary can only be unequivocally determined by a Court of law. In practice, Courts are requested to adjudicate only on rare occasions and the surveyor assumes a quasi-judicial role in boundary determination in the absence of legal dispute. ‘...every day I find that surveyors have to do more than surveying. They have to give decisions as to boundaries that may have to be upheld in a Court ...’ (Weingarth 1913, p. 59).

The registered land surveyor’s complex role extends through legislated standards (including marking of boundaries and documentation that may not be immediately necessary for the client’s needs) to serve the wider community obligation to properly maintain the cadastre. It includes the interests of his/her client, but also that of the neighbour and any other parties, including the Crown as owner of many roads, other reservations and un-alienated land that may be affected by the position of the boundary, now and in the future.

The following cases, forming a sample (only) of the total of all precedents available, are presented then as an aid and indeed (only) justification of the land surveyor’s activities as he/she exercises his/her “*quasi-judicial role*” and attempts to “*emulate the Courts’ decision making process*” when carrying out a boundary redefinition.” (SA Cadastral Survey Guidelines)

A Background to Case Law

Tasmanian law at any given time is a combination of (i) the inherited or English element by virtue of Act 9 George IV c. 83 (July 25 1828) which directly applied the law brought into Australia (and Tasmania) by the first fleet; (ii) the Imperial element; (iii) the Federal element and (iv) the Tasmania State element. An amount of case law is to be found within each of these elements. Examples from all categories will be found in the body of work below.

Case law has been influenced over time not only as detailed above but by decisions made in other jurisdictions, particularly those with a similar legal history and system to ours e.g., New Zealand, South Africa, Canada and the USA. Many of the principles of reinstatement we adhere to and think are “Tasmanian” actually find their genesis in decisions made in other jurisdictions. Again, examples will be found below. However caution should be exercised in the application of “foreign” decisions unless and until they have found acceptance in the local jurisdiction.

Intention

Boundaries do not exist of or for themselves. Title (and therefore title boundary) creation is an act of will with intention to achieve an aim – to bequeath to another, to acquire, to make a profit by sale, to reduce liability etc. Surveys creating boundaries are conducted for a purpose or to a design. That purpose or design is expressed in the survey, perhaps in words but also by the plan and survey notes and the annotations there-on. That purpose or design is its intent. A surveyor's role when reinstating boundaries be they originally surveyed or not, is to determine and mark on the ground where it was intended that they be originally created. 'We are seeking to re-establish boundaries on the ground where it was intended that they be when originally created.' (Smith, PA (1987), *Aspects of Cadastral Surveying in South Australia.*, p18).

Hallmann says *"every boundary originated with a title severance; or put conversely, each time... a proprietor or other authorized person introduces a new line of severance by disposing of part of his property by sale or otherwise a new boundary is created."* He goes on... *"Note, however, that the location of a boundary is primarily governed by the expressed intention of the originating party or parties, or where the intention is uncertain by the behaviour of the parties"*. Bouviers Law Dictionary (1856 Edition) states *"The existence of the intention is usually matter of inference; and proof of external and visible acts and conduct serves to indicate, more or less forcibly, the particular intention"*. Willis provides the pertinent quote - *"Tell me what you have done under such a deed and I will tell you what the deed means (per Lord St Leonards in A.G. v Drummond, 1 Dru. & War. 368)*. This rule of construction, however, must be modified with the restriction that it is not the intention that the parties may have had but failed to express in the instrument, but it is the intention that is expressed by said instrument. That is to say, the question is not what the parties meant to say, but the meaning of what they did say. Humphries ultimately makes intention a rule of reinstatement when he says *"excepting senior rights of others, the intention of the parties to a deed, as expressed by the writings, are the paramount considerations in determining the order of importance of conflicting elements"*.

Legally, intent can be defined as *"n. mental desire and will to act in a particular way, including wishing not to participate. Intent is a crucial element in determining if certain acts were criminal. Occasionally a judge or jury may find that "there was no criminal intent." Example: lack of intent may reduce a charge of manslaughter to a finding of reckless homicide or other lesser crime"* (<http://dictionary.law.com/>)

Intention has long been recognized as the most important determinant in the most serious of cases. A recent (non-surveying) Tasmanian example:

A.J.H. v The Queen (NO 2) No. CCA 24/1992

The deceased died almost instantly from a bullet wound to the heart, the bullet having been discharged from a rifle held by the appellant. The Crown contended that the homicide was planned and deliberate but it was the appellant's case that although at first intending to commit

suicide in front of his father, he had changed his mind and had voluntarily and intentionally discharged the rifle in the direction of his father but in circumstances in which he had not had the specific intent required by the Criminal Code, (Supreme Court Of Tasmania Judgment No. A41/1993).

More specifically, in considering boundary reinstatement, intent is similarly elevated to a paramount level as the predicator of the position of a boundary.

Below are a number of cases which typify the Courts approach to the doctrine of intent as applied in the practice of cadastral boundary reinstatement.

Jacques v Doyle Vol.2., 1881, NSW Law Reports Martin C.J. stated *“It is a well-known principle in construing of deeds that a grant ought to be construed according to the intention of the parties, and that where any doubt arises, the deed ought to be construed more strongly as against the grantor; in all contracts or conveyances you must ascertain the intention of the parties and carry it out.”*

Overland v Lenehan (11 Q.L.J 59) (1901) Griffiths C.J. expressed intent in another way:

... some rules which, I think should be applied in construing instruments relating to land for the purpose of determining the identity of the subject matter...may be summed up by saying that most weight should be given to those points on which the parties at the time were least likely to be mistaken.” Further, *“... a certificate of title does not rest upon a pinnacle by itself but is an ordinary written instrument, and that, although its operation is far reaching and in some aspects exceptional, it must be construed with the ordinary rules for the construction of documents of title....The doctrine expressed in the words ‘falsa demonstratio non nocet’ is just as applicable to it as to any other instrument.”*

Williams v Booth (10 C.L.R.341) (1910) Griffiths C.J. summarised these principles:

The duty of the Court in construing any instrument is to ascertain the intention of the parties and all so-called rules of construction or rules of conveyancing are merely subsidiary means for arriving at this end. He went on to say “it was the intention of the parties that the land granted should not extend beyond the margin of the lagoon, and that this intention being clearly expressed, the then actual nature and condition of the lagoon was immaterial”

Gates v Lewis, 7 Vt., 511 *“where boundaries mentioned are inconsistent with each other, those are used which best show the intention manifest on the face of the deed”* “Surveying” by J.B. Johnson, C.E. American Edition published 1911

The Rule of Construction

There are systems of basic rules and maxims applied by courts to aid in their interpretation of a written document, such as a statute or contract. This introduces a 'presumption' in relation to words in a legal document unless the contrary can be proved. Some examples of these in relation to deeds and similar legal documents are:

- The court will give words their plain and ordinary meaning, interpreting them as an ordinary, average, or reasonable person would have understood them when the document was created.
- An instrument containing ambiguity in its intent is most strongly interpreted against the grantor, or in favour of the grantee.
- The actions of the parties to an instrument deed in relation to that instrument demonstrate its meaning.
- The rule to find the intent is to give most effect to those things about which men are least liable to make a mistake.
- 'falsa demonstratio non nocet' – Where a description in a legal document contains irreconcilable parts, if the part that is true describes the subject with sufficient legal certainty the untrue part will not invalidate the document.
- 'ad medium filum' – Where land is described in a Crown grant/conveyance/transfer as being bounded by a non-tidal stream or road, and the grantor or vendor is owner of the river bed or road at the time of grant or sale, the grantee or purchaser is presumed to have received the grant or sale of property to the middle thread of the river or road. (refer Land Titles Office circular 1/1999).

The Hierarchy

The determination of intention is then the cadastral problem. Cadastral evidence indicates the intended location of the boundary. Where conflict in evidence exists, it is the intended location of the boundary which is in doubt. The courts have developed the hierarchy of evidence as a means of determining intention (“tell me what you have done...”). It qualifies intent and provides a realistic frame work from which the land surveyor may launch his efforts to determine where and how a boundary exists on the ground.

Brown provides an appreciation of how the hierarchy has developed when he quotes from two Cases before the Full Court of Queensland “*the most weight should be given to those points on which the parties at the time were least likely to be mistaken*”. Brown also provides a hierarchy, which he finishes with “*10. Finally and most important of all, any one of these rules may be of more (or less) weight in one case than another. The rules set out are for cases of conflict, they are general rules, to be used as a guide but not as a straight jacket*” (emphasis added). This principle is also recognised in other jurisdictions similar to our own. Ballantyne et al reports that “... *in Richmond Hill Furriers v Clarissa Developments (1996) ... the court explicitly defined the hierarchy as only an evidentiary principle, rather than a substantive rule*”.

Donaldson v Hemmant (1901) 11 QLJ 35 the plaintiff bought certain pegged lots at auction. Inspection by the plaintiff after the sale apparently proved satisfactory. Dimensions in the lodged plan and the sale litho apparently did not accurately reflect actual dimensions between those pegs. Nine years after sale, but before transfer, the plaintiff brought an action alleging fraudulent alteration of the position of those pegs from their original position which he contended agreed with the plans at that time. The jury rejected this claim. The question before the court then was the true dimensions of the lots sold at auction. Griffith C.J. concluded that the lot sold was that marked on the ground by numbered pegs at the time of sale and not that delineated more or less accurately in the plan and other documents.

“... *a rule to which I referred in the course of the argument, has been laid down in the American Courts... I have quoted it many times in this Court from the Bar, and I now quote it again from the Bench:-*

“*The object in cases of this kind is to interpret the instrument - that is, to ascertain the intent of the parties. The rule to find the intent is to give most effect to those things about which men are least liable to mistake. On this principle the things usually called for in a grant - that is, the things by which the land granted is described - have been thus marshalled in America:*

- (1) *The highest regard is had to natural boundaries.*
- (2) *To lines actually run and courses actually marked at the time of the grant.*
- (3) *If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no departure from the deed is thereby required, marked lines prevailing over those which are not marked.”*

This case gives us our first hint of “the hierarchy”. When we as Registered Land Surveyors refer to “the hierarchy” we often think of a rigid system by which we are compelled to abide. Whilst it certainly does have a generally accepted format it is by no means inflexible. More on this later.

Errors in title do occur of course and intent is obscured. In these circumstances the principle “**falsa demonstratio non nocet**” is invoked as exemplified in the following case:

Small v Glen (1880) 6 V.L.R. (L) 154

“Where the description of land in a certificate of title giving the area approximately is merely a plan on the margin showing abutments at each end on a street the dimensions of the boundary lines also being so marked, but falling short of the actual distance between such two streets the position shown by plan will govern to the exclusion of the figured dimensions, which will be considered as falsa demonstratio.”

Hallman states “... This principle is usually expressed by the saying that, generally speaking, abutments prevail over stated lengths. This is also to be derived from the basic principle that the evidence of the bounds carries more weight than the evidence of the metes.

Watcham v A-G of East Africa Protectorate (1919) A.C. 533 (see below)

Other examples of error in title and subsequent confusion over intent are available which can only be summarised very briefly here:

W.A. Fresh Food and Ice Co. V Freecorn (1904) 7 WAR 22 Dispute concerned a title “...which because of a mistake in measurements was issued with a 62 foot frontage instead of the 60 feet that was in his possession”. Later the plaintiff owner of that title “issued a writ for possession ... claiming to be entitled to all the land described ... found in favour of the plaintiff on the ground that they were bona fide purchasers for value”

Horne v Struben (1902) A.C.454 “In a grant of land with certain specified boundaries ‘as will further appear by the diagram framed by the surveyor.’ HELD that, as a matter of construction where the diagram is repugnant to the terms of the Grant, the latter will prevail”

Some Exceptions to the “Rule”

Whilst the hierarchy (as it is normally presented) is generally applied to determine disputed or lost boundaries, its application is by no means rigidly adhered to in each and every case. Whilst it certainly does have a generally accepted format it is by no means inflexible depending the weighting of all the factors. Humphries “rule” clearly implies that the hierarchy may be varied depending on circumstances and as necessary in each case to determine the intention. In certain circumstances its rigid application would produce a boundary redefinition which bore no resemblance to the original intention. Following are a few examples in which “the hierarchy” is not adhered to.

A very simple but well recognised example to begin: it would require the most cogent proof available – original markings – to disprove that a road reserved one chain wide in a Crown Grant was not in fact of that width. Where occupation is less than one chain wide it is regularly ignored in favour of the “lower” order evidence of distance.

The case of **Watchman v A.-G. of East Africa Protectorate** (1919) A.C. 533 (see Willis) is an older and very interesting example of manipulation of the hierarchy to achieve the end of discerning the intention of the parties. In that case area was finally chosen over all other elements of the hierarchy, including distance and bearing. This case is a strong indication that the hierarchy is a slave, not a master. From that judgment, *“It is, their Lordships think, clear from these facts that the statement of the boundaries contained in the certificate is no true guide to the ascertainment of the property intended to be conveyed. There is only one other guide – the area. The choice lies between them, one or the other must be a falsa demonstratio. The area comes first and is repeated after the boundaries. In their Lordships view the description of the boundaries is the falsa demonstratio and the other description being complete and sufficient in itself, that of the boundaries should be rejected”*

A much more recent example is that of **Westfield and Anor. v The Registrar-General [2003]** NSWCA 343. It is worth quoting at some length from that case, which stemmed from a request to the Registrar General of NSW to determine the common boundary between two properties. There was much discussion regarding an “excess” of land purported to exist between the two titles (which claim was dismissed) but the following comments have some pertinence to this discussion.

“The fourth argument

41 *The foundation for this argument was that " long and unchallenged occupation " was capable of providing an appropriate indication of the land to which a grant relates. Accordingly, the principles of surveying required the Registrar-General and the Land and Environment Court on appeal to take account of the history of the occupation of that part of No. 35 determined by Mr Mudge to be an area of surplus land to the north of the determined northern boundary of that property. Reliance was placed upon a passage from the judgment of Sir Leo Cussen in National Trustees Executors and Agency Co of Australasia Ltd v Hassett [1907] VLR 404 at 412. However, in the passage cited his Honour determined that there could be no better indication of the land to which a grant relates than long and unchallenged occupation but only in the absence of survey marks. In the present case, verifiable survey marks were available, albeit to the south of No. 35.*

42 *Reliance was further placed upon the following passage from Hallmann's Legal Aspects of Boundary Surveying as Applying in New South Wales (2nd Ed, 1994) [13.3.], which states as follows:*

"The courts have established precedents granting priorities of weight if any two or more of the following boundary features present conflicting evidence in the hearing of the dispute. These are in order of priority:

- 1. natural boundaries*
- 2. monumented lines,*
- 3. old occupations, long undisputed,*
- 4. abuttals,*
- 5. statements of length, bearing or direction."*

43 *There is some support for the proposition that an error of law is committed where a decision maker for no rational reason rejects as wholly irrelevant evidence which prima facie affords some proof of the matter to be determined. However, the evidence in the present case does not support a finding that the long occupation of the relevant part of No. 35 was ignored for no rational reason: cf Melwood Units Pty Limited v The Commissioner of Main Roads [1979] AC 426 at 432; Maurici v Chief Commissioner of State Revenue (2003) 77 ALJR 727 at 729. Mr. Wallis rejected the relevant dividing fence relied on by the appellant as establishing long undisputed occupation of the area in question upon the basis that at the time of his investigation, the original fence had long since disappeared. Mr. Job agreed in his evidence that he had considered the question of occupation and in particular the retaining wall between the two properties, which he accepted was "... quite old ". However, his view was that there was other evidence of a more reliable kind which was determinative of the correct position of the relevant boundary.*

44 *Mr Mudge, on the other hand, relied heavily on his acceptance that a fence had been located at the top of the retaining wall for some 90 years, but it is clear that he utilised*

the physical occupation of this part of No. 35 as supporting his view that, pursuant to s 135H, the unallocated " surplus " should be allocated, as a matter of what was just and reasonable in the circumstances, to the appellants. Thus he first determined that there was a wedge-shaped "surplus" immediately to the north of the northern boundary of No. 35 (as determined by the Registrar-General and with which he agreed). On the basis of what he regarded as a long and undisputed perception of the position of the boundary with reference to different ground heights along the boundary line, the existing retaining wall, the position of the fencing up until December 2001 and the use by the occupants of No. 35 of that wedge-shaped portion, it was his opinion that the portion should be allocated to the appellants, since: "When all things are considered their property is in greater need"

45 However, there was nothing irrational in the acceptance by the primary judge of the approach of Messrs. Wallis and Job and the rejection of that of Mr. Mudge and his " surplus ". His Honour's reasoning process did no more than resolve a question of fact. Accordingly, the fourth argument should be rejected.

Excluding the issue of the "excess", the court was satisfied that a distance from a verifiable survey mark, being a better starting point, "*albeit to the south of No 35*" was better evidence than an unoriginal fence and retaining wall (i.e. occupation) of 90 years standing. Clearly the hierarchy was not strictly adhered to in this case. In effect the principle elucidated above under *Donaldson v Hemmant* (1901) was invoked i.e. "*...the rule to find the intent is to give most effect to those things about which men are least liable to mistake.*" (The current surveyors Certificate "the best evidence that the nature of the case admits" derives directly from this principle.)

Examples of non-adherence to the hierarchy exist in other jurisdictions similar to our own as well. Ballantyne et al (see above) quotes from the aforementioned case **Richmond Hill Furriers v Clarissa Developments** (1996) "*The appellants had argued that a "rigid and strict application of the general rule that the best evidence of the location of the boundary between lots are the original posts is improper in certain circumstances". The Ontario Divisional Court agreed: monuments in the ground since the 1920's, but which were placed in error and reflected neither the plan nor the intent of the parties , were held to be inferior evidence to that of the plan distance"*

Natural boundaries

Natural features attain the highest endorsement as evidence of boundaries so described as they are “*points on which the parties at the time were least likely to be mistaken.*”(Overland v Lenehan supra)

There are significant cases however clarifying points of confusion. Most of the following are taken from Willis’ “Notes on Survey Investigation”.

Williams v Booth 10 C.L.R. 341 Crown Grants issued 1819 and 1834 described as “*to a salt water lagoon and on all other sides by that lagoon to the sea*” and “*to Dewy Lagoon on the north by that lagoon to the sea*”.

HELD that the intention that “*the land granted should not extend beyond the margin of the lagoon*” was “*clearly expressed, then the actual nature of the lagoon was immaterial*”

HELD that the *medium filum* rule is not applicable to marine lagoons.

McGrath v Williams (1912) 12 S.R.477 Crown Grant subject to reservation of “*all land within one hundred feet of high-water mark on the sea coast and on every creek, harbor and inlet of the sea*” issued in 1843 to land fronting the Shoalhaven River. “*Plaintiff* (owner) sought to bring the land to the (current) high-water mark under the Real Property Act, claiming that the 30.48 metre reservation had been eroded”.

HELD that the reservation operated by way of exception from the grant, and that consequently the 30.48 metres must be measured from high-water mark as at the date of grant”.

Attorney –General v White (1926) 26 S.R. 216 Two Crown Grants made in 1838 described land bounded on the south and west by the Hunter River and on the west by the Hunter River. At that point the Hunter was permanent non-tidal and non-navigable.

HELD “*...that the common law presumption of construction applied, and that the bed of the river ad medium filum passed to the grantee in the absence of any surrounding circumstances to negative the presumption*”.

Harvey C.J “*The presumption was in 1810 a well known matter of law to all conveyances and in order to rebut it there would in my opinion have to be shown by the Crown either surrounding circumstances rebutting the presumption in the particular case or else some*

general notorious matter of policy or overriding reason from which the court could draw the inference the Crown intended to reserve the soil of all creeks and rivers in New south Wales”.

Kingdom v The Hutt River Board (1905) 25 N.Z.L.R. 145 A river which flows irregularly confined to a small channel during dry months but increasing in wet weather and extending occasionally each year from bank to bank and once every two or three years it overflows its banks, the “bed” extends from bank to bank”

HELD that the presumption that the grantee held as medium filium applied, there being no circumstances existing at the time of grant to rebut the presumption.

Two good examples of some of the physical factors which may be considered in answering the question “is a body of water tidal” follow:

Attorney-General v Merewether (1905) 5 S.R. 157 Crown Grant in 1840 of 20.23ha bounded on the east by the sea beach and on the north by the south margin of a small lagoon or lake reserving all land “within one hundred feet of high water mark on the sea coast and on every creek, harbour and inlet”. The court found that (1) the state of the lagoon depended on wind and weather (2) it was more or less permanently separated from the sea by a sand bar which rose appreciably above both the lagoon and spring and neap tides (3) heavy rain would fill the lagoon to nearly the top of the bar (4) at such time a channel was often artificially cut (5) occasionally a natural channel occurred (6) the running water widened and deepened the channel (7) when the lagoon was empty the channel would quickly close up by the action of wind and sea and the sand bar reform (8) in recent years at high tide if the channel was open sea water flowed into the lagoon to a depth of 0.3 metre (9) prior to 1880 inflow from the sea was on rare occasions when waves lapped over the bar (10) at high spring tide with a south-easterly gale the end of waves ran over the bar into the lagoon (11) the water in the east end of the lagoon was salt (12) in 1840 the lagoon was less exposed to the entrance of the sea than in recent years (13) the lagoon was not subject to the ordinary ebb and flow of the tides.

HELD the lagoon was not an inlet of the sea within the meaning of the grant and there was no reservation within 30.48 metres of its southern shore

Attorney General v Swan (1921) 21 S.R. 408 Crown Grant in 1840 fronting a creek and a lake was granted subject to a reservation of “all land within 100 feet of high water mark on the sea coasts and on every creek, harbour and inlet”. The court heard that the lake was

only intermittently open to the sea as the sea's action closed the entrance which remained closed until either artificially opened or opened by pressure of accumulated water in the lake. It was more often open than closed but was closed for long periods of time. When open ordinary neap tides caused no variation in the water level at the grant.

HELD that the lake was not a harbour or inlet of the sea and was not subject to the regular ebb and flow of the tides

HELD that consequently the grant was not subject to the reservation.

Attorney General of Nigeria v Holt (1915) A.C. 599 On land granted as bounded by the sea the respondents carried out works on the foreshore to prevent incursion and erosion by the sea. Owing to these works a strip of reclaimed land resulted on which was built stores and sheds. The government knew of the reclamation.

HELD that the reclaimed land vested in the Crown as owner of the foreshore as the land was not the result of natural accretion but that the respondents continue to enjoy rights as riparian owners over that foreshore.

Verall v Nott (39 S.R. 89) By a gradual process of accretion land was added to four lots described in the grants as bounded on the south by the "North Harbour" (Sydney). A rubble wall constructed by V. had aided the process. The Maritime Services Board held ownership of the bed and shores of the harbour.

HELD that the Board's boundaries were not fixed but varied with high water mark.

HELD that V. was entitled to the benefit of the accretion although the original boundary was ascertainable and that the accretion was aided by the wall.

Brighton and Hove General Gas Co v Hove Bungalows Ltd (1 Ch 372)(1924)

"The general law of accretion applies to a gradual and imperceptible accretion to land abutting upon the foreshore brought about by the operations of nature, even though it has been unintentionally assisted by, or would not have taken place without, the erection of groynes for the purpose of protecting the shore from erosion.

The general law of accretion also applies where the natural accretion, gradual and imperceptible, abuts upon land of which the former boundary was well know and readily ascertainable."

A.G. v Reeve (1 T.L.R. 675) (1885) Accretions of land on the seashore perceivable in their process belong to the Crown not the adjacent private owner.

Riddiford v Feist (5 G.L.R.(N.Z.) 43 (1902-3) Allocation of accretions along a shore should be according to the rule laid down in *Batchelor v Keniston* (Amer. Rep. 12, p.143) *“Give to each owner a share of the new shore line in proportion to what he held in the old shore line, and complete the division of the land by running a line from the bound between the parties on the old shore to the point thus ascertained on the new”*

Monuments

Perman v Wead (6 Mass., 131) *“Where boundaries of lands are fixed, known, and unquestionable monuments, though neither courses, distances, nor computed contents correspond, the monuments must govern”*

Moore v Dentice (20 N.Z.L.R. 128) (1901) A town section was subdivided and marked but the plan was not deposited in the Land Transfer Office and transfers made of lots did not refer to it.

HELD that the lots as pegged be followed notwithstanding that this might give the defendant an excess of 0.1 metres where there was doubt that there was sufficient for the other titles in the section and that the occupation had not been exactly according to the peg. Stout C.J. said *“I am of the opinion that the true boundary is where the subdivisional peg was placed”*

“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 stopped from setting up that some other line is the true boundary”

The following case is of particular importance in resolving disparities between measuring technologies as the profession increasingly avails itself of the benefits GPS.

S.A. v Victoria (1914) A.C. 283

Much has been written on this classic case. A basic historical outline is given here to provide perspective.

On February 19, 1836 South Australia was created out of New South Wales by Letters Patent which declared the easternmost boundary to be the 141st degree of longitude. For administrative and legal reasons (criminal activity) the border between the two states needed to be marked. Work commenced in October 1839 on a first “temporary” marking of the border in the vicinity of the Glenelg River. Between 1847 and 1850 this work was extended northwards to the Murray River. The Imperial Acts 13 and 14 Vic. C 59, August 15 1850 relate to the forming of the Colony of Victoria which was said to simply run the eastern boundary of South Australia. In 1868 the border was observed at Chowilla on the Murray River with the benefit of accurate time provided with the aid of telegraph. The border was finally adopted as originally marked, although found to be 4.03 kilometres west of the 141st degree of longitude.

HELD by the Privy Council that the correct position of the boundary was that established and marked by the surveyors on the ground and agreed upon by the adjoining States.

Mt Bischoff v Mt Bischoff Extended (1913) (15 C.L.R. 549) The circumstances of the survey were described...*“The land is precipitous, in many parts covered by timber and what is called horizontal scrub...”* resulting in a finding ... *“The fact that a later and more accurate survey discloses errors in the original measurements is immaterial where the evidence of the boundaries is otherwise not in doubt...”*

In this case the conclusion was that the terrain did not allow for accurate measurement and the monuments should stand.

Overland v Lenihan (1901) (11 Q.L.J. 59) (vide supra)

In a case where monuments did not agree with measurement, Griffith C.J. said *“In construing instruments relating to land for the purpose of identifying the subject matter, most weight should be given to those points on which the parties at the time were least likely to be mistaken”*.

“It was proved to my satisfaction that subdivision 10 was, at the time of sale, marked by pegs corresponding to the four corners of the land as now occupied by the defendant...”

...and that the land intended to be comprised in the transfer and certificate of title for subdivision 10 was bounded by that line on the west, and that this is the proper construction of both those instruments”.

Stevens v Williams (1886) (VLR 152)

HELD “...*the position of the defendant’s land was to be ascertained by the original allotment peg, and that she was entitled to the land in dispute.*”

Russell v Mueller (1905) 25 NZLR 256

“...*To hold that a person who enters and takes possession by the survey pegs is not entitled to hold that possession, but only to hold possession of what the Land Transfer certificate calls the section, not what the survey pegs mark it out to be, would be to introduce confusion into all the surveys of the colony.*”

Donaldson v Hemmant (1901) (11 Q.L.J. 35)

(see above)

And finally, an early Tasmanian example illustrating the long standing of the principle of “monuments over measurements”

Glover v. Birchall

Supreme Court of Van Diemen's Land

Pedder C.J., 1 December 1827

Source: Hobart Town Courier, 8 December 1827

This was action of trespass in which the plaintiff claimed a piece of ground at Pittwater, which had been in possession of the defendant since the year 1813, agreeably to an original grant to A.W.H. Humphrey, esq. It appeared that the plaintiff had purchased three small farms on what is called the Iron creek, which had been granted subsequently to the other in the year 1817, and which backed on it. The plaintiff had at one time possession of the land in question by an agreement of purchase, but he failed to prove that he had ever possessed it by right of grant, and when the agreement of purchase was mutually annulled, the plaintiff himself had removed the fence to its original situation. The evidence showed that the disputed piece of ground had been originally marked to the defendant agreeably to the description of the grant, and his Honour the Chief Justice laid it down as a principle, that grants of land were not to be regulated so much by the number of acres which they might contain, as by the natural marks and descriptions particularised in the said grants as the boundaries; and that although the defendant's farm, agreeably to the description might contain even 1000 acres instead of 400, he would still be fully entitled to the whole.

Occupations

Turner v Myerson (1917) (18 S.R. 193)

Where a suburban lot in a plan had been in undisputed occupation for some 30 years, the occupation yielding dimensions that accorded well with the certificate of title dimensions, then in the absence of original survey marks and monuments, there was a cogent presumption that fences and walls erected soon after the division which marked the occupation were erected on the true boundary lines

Harvey J. said ... *“I say unhesitatingly that occupation that has continued uninterrupted for 30 years requires 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...I do not think that the evidence comes anywhere near the certainty which is required to justify the upsetting of such a long continued possession.”*

Turner v Hubner (1923) (24 S.R. 3)

Absence of original monuments or other reliable start points from which to take measurements appears to often dictate that occupation is adopted as the originally created boundary.

In a case heard some 60 years after subdivision, meaning that the occupation (a house wall) had been erected within about 18 years of boundary creation and where there were no reliable start points; the side streets had been aligned since subdivision. The party claiming encroachment had done so on the basis of laying subdivision data from the aligned side street position. The position of the house wall was supported by other occupation

HELD *“...the land...has been uninterruptedly occupied for 42 years, the most positive evidence is required to rebut the presumption that the land occupied is in accordance with the boundaries as originally plotted”*.

Equitable Building and Investment Co. v Ross (1886)(N.Z.L.R. 5 S.C. 229)

A case considering surveys made in the early 1800s.

“...Surveying was roughly done in the early days, and has left, it seems, but few monuments, and those of the rudest. In such circumstances, there can really be no better identification of the land to which a grant relates than long and unchallenged occupation by the grantee and those who claim through him of an allotment which in position, dimensions and area corresponds, in general, though it be somewhat roughly, with the description in the grant... The occupier is not to be driven to rely on a mere possessory title; but has a right to assert that the land he holds is the very land granted.

In the present case such evidence...is in favour of the conclusion that the occupation has been in accordance with the lines actually run, or recognised, at the time of the grants.”

Attorney-General v Nicholas (1927) N.Z. G.L.R. 340

“...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 ad measurement, 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 the aid of interpretation.”

Cable and Another v Roche and Others (1961) NZLR 614

In this case, where there were no reliable starting points, the fence was rejected, possibly because it did not have a reasonable positional relationship to other evidence:

HELD *“...mere proof of long and uncontested occupation does not relieve the Court of the duty of inquiry and of considering the history of the property and the technical evidence bearing on the dispute.*

It is sufficient to say that I am satisfied that this is a powerful collection of data and I feel that the conclusion is irresistible that at some date the late Mr Cable must have moved his western fence a short distance to the west.

Unfortunately, all the original pegs of D.P. 240 have long since disappeared and to some extent the precise placing of this plan on the ground is uncertain.”

James v Stevenson (1893) (A.C. 162)

In a case where the boundary apparently had been created without certified survey there was evidence that the fence line had been accepted and used for many years as the boundary, back to only three years after its creation. The alternative was to position the boundary by measurement a long way from an unreliable start point. It was claimed that the fence was well off a boundary.

HELD *“...there arises ... a very cogent presumption in favour of the existing fence being on the line intended and expressed by the deed of conveyance ... a presumption not to be displaced, if at all, unless by the most conclusive evidence of error in the actual position of the fence. “*

National Trustees Executors and Agency Co. of Australasia v Hassett (1907) VLR 404

Where a fence is adopted as the best evidence of a boundary, it must be adopted at every point, not just at its terminals.

The grant plan showed a 1110 foot straight joining two corners. The fencing was later found to bow by up to 1 foot off a straight line between the adopted fence corners. The Court ruled the boundary should follow the bow as:

“...In the absence of the original survey marks there can be no better indication of the land to which a Crown grant relates than long and unchallenged occupation.”

Abuttals

Small v Glenn (1880) 6 V.L.R. (L) 154

(see above)

Francis v Hayward (1882) 22 Ch. D. 177

“When after description of a property it is stated that on one side it is bounded by a certain other property, and it appears that it is not so bounded for every inch there is an inaccuracy in the statement of the boundary but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it.”

Archard v Ellerker (1888) 10 ALT 196

“Where the figured dimensions on a plan in a certificate of title, and the fact that the boundaries are shown by straight lines, would lead to a wrong inference as to the dimensions of the land, but the abuttals are shown correctly, the owner is entitled to all the land which actual measurement on the ground would show to lie between those abuttals”.

Smith and Others v Neild (1889) 10 LR (NSW) 171

This case and that following confirm that admissible evidence must be in existence at the time of the grant of the subject land and the principle of seniority of title.

...” the description and boundaries in a Crown grant, dated 1858, are not admissible to show what are the boundaries of adjoining land granted by the Crown in 1855. ... a man's title to land is not to be affected by some description contained in a deed or grant to which he is in no way privy, and of a date subsequent to the grant under which he holds the land”

Van Amburgh v Hitt Mo. Sup.22 S.N.W., 177

...” of two overlapping surveys, the first one made has priority, particularly where the second is bounded with express reference to the first.”

Measurement

All the above case deal in some form with the supremacy (at least in the eyes of the court) of evidence other than measurement in the determination of a boundary's position.

The cases Turner v Myerson and Turner v Hubner (supra) both illustrate one of the main problems associated with reinstatement by measurement – uncertainty in the starting point.

Conversely, Westfield v Registrar-General of NSW (supra) illustrates that where a good starting point is available, measurement may well assume a higher weighting in the hierarchy than might otherwise be the case. The reader is advised to study these cases to understand the implications and to carefully analysis and determine each situation on its merits.

Where measurement is the only evidence available for reinstatement, the following cases may be of benefit.

Mooreland v Clark (date unknown) 8 Mo., 556

This case and that following relates to the apportionment of excess and shortages in measurement with the original survey or deed in the absence of any other evidence.

...“In re-establishing lost corners between remote corners of the same survey, when the whole length if the line is found to vary from the length called for, we are not permitted to presume that the variance arose from the defective survey of any part, but must consider , in the absence of circumstances showing the contrary that is arose from the imperfect measurement of the whole

line , and distribute such variance between the several subdivisions of the whole line in proportion to their respective lengths”

O’Brien v McGrane 29 His. Reports, 446

...” The rule of common sense and of law is that the surplus or deficiency is to be apportioned between the lots, on the assumption that the error extends alike to all parts.”

Hutchison v Leeworthy (1860) SALR 152

...”Then the land order being for 134 acres, would the grant of a block of land containing a larger entity be altogether void? I apprehend not ... However inaccurate the surveys may have been, the inaccuracy was a fault resting with the surveyor, and not with the purchasers. and it makes no difference, in my opinion, that the excess is great, if that excess has arisen merely from the mistake of the Government surveyors. The greatness of the excess may indeed raise a question as to the intention to include so large an area in the section; but the intention being admitted, I am of the opinion the whole would pass to the purchaser.... In the present case there is no ambiguity on the face of the grant. The section is defined, although the quantity is mistaken; and in such a case the rule is that the whole will pass.”

References

References and acknowledgements are provided where ever they are known. In some case the source document was itself devoid of detail.

ABBREVIATIONS

(In order of appearance in document)

Q.L.J.	Queensland Law Journal
C.L.R.	Commonwealth (of Australia) Law Reports
Vt.	(Unknown)
V.L.R.	Victorian Law Reports
A.C.	England, Appeal Cases Privy Council and House of Lords
W.A.R.	(Unknown)
N.S.W. C.A.	NSW Court of Appeal
S.R.	State Reports (NSW)
N.Z.L.R.	New Zealand Law Reports
Ch.	England, Court of Chancery Reports
T.L.R.	Times Law Reports
G.L.R.(NZ)	Gazette Law Reports(New Zealand)
Mass.	(Unknown)
V.D.L.	(Unknown)
A.L.T.	Australian Law Times
Mo.	(Unknown)
His. Reports	(Unknown)
S.A.L.R.	South Australian Law Reports

SOURCES

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