[MASTEN, J.A.]

1932.

March 23.

MARTIN v. KELLOG.

Boundaries—Alleged encroachment—Plan—Overplus of land—Disposition—Corner of lot—Ascertainment from fixed lines—Principle of apportionment not applicable.

Where three lots faced upon a certain street and upon a survey being made it was found that there was more land upon the ground than shown upon the plan, and the question arising as to whether, this overplus of land should be added to one lot or apportioned between the three.

Held, that the crucial question being the location of the north-east angle of one lot, and that point being ascertainable by measurement from the true and unalterable lines upon the plan in accordance with s. 12(1) of the Surveyors Act, R.S.O. 1927, c. 202, the principle of apportionment introduced by s. 12(3) had no application, as that subsection only applies where the original stakes defining the angles of a lot cannot be found or their position satisfactorily established.

Held, also, that the overplus appeared always to have been treated as a part of that particular lot and formed part of it: *Re Brenzell & Rabinovitch* (1918), 42 O.L.R. 394, *Woodrow* v. *Connor* (1922), 52 O.L.R. 641.

ACTION for specific performance of an agreement for the purchase and sale of land.

J. C. McRuer, K.C., for the plaintiff.

J. H. Bone, K.C., for the defendant.

March 23. MASTEN, J.A.:—The plaintiff as vendor sues the defendant as purchaser for specific performance of an agreement dated June 19th, 1931, for the sale of the premises described in the agreement, as follows:—

"Situate on the south side of Wanda Rd., in the City of Toronto, known as house Number Fifteen, having a frontage of about

25 feet more or less by a depth of about 90 feet more or less with mutual drive and garage being lot number according to plan registered in the Registry Office as shown in deed."

The agreement contains the following stipulations which may be of importance in the determination of the case.

"The purchaser to be allowed ten days from the date of acceptance hereof to investigate the title at his own expense and if within that time he shall furnish the vendor in writing with any valid objection to the title which the vendor shall be unable or unwilling to remove and which purchaser will not waive, this shall be null and void and the deposit money return to the purchaser without interest. . . . Sale to be completed on or before the 15th day of July, 1931, on which date possession of the said premises is to be given me. Time shall be of the essence of this agreement."

The purchaser delivered certain objections to title under date of July 7th, and July 10th, all of which appear to have been satisfactorily answered, and the draft deed with description of the lands approved. On July 15th, the solicitors for the vendor and for the purchaser attended at the Registry Office for the purpose of closing the transaction, and as I understand the evidence all objections which had been raised up to that date had been satisfactorily answered or waived.

In connection however with the closing the solicitor for the purchaser raised an objection that the verandah in front of the house in question encroached over the street line and on this ground declined to complete the closing. The objection so taken turns out to have been unwarranted and incorrect, as appears more particularly from the plan or sketch filed as exhibit 11. As a result of this objection so raised by the purchaser on July 15th, no closing took place, and subsequently as a result of further surveys made on behalf of the purchaser he has declined to carry out the agreement and this present action is the result.

As now presented the purchaser's objection is that the agreement provides for the purchase of the premises known as No. 15, and that the dwelling house known as No. 15 does not rest exclusively on the lands to which the plaintiff is entitled, viz., the easterly portion of lot 51 on plan 916, but that the eaves of the house project over the lot line separating lot 51 from lot 52, and also that the cornice and eaves of the house at its north-east corner project over the street line onto Wanda Rd.

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This contention on the part of the purchaser turns upon the location of the north-east corner of lot 51, plan 916. The description of the premises as contained in the deed opens with the words "commencing at the north-east angle of lot 51; thence north-westerly along the south limit of Wanda Road," etc.

Exhibit 6 is a blue print showing the original subdivision in 1889 of a block of land of which lot 51 forms a part. It appears from exhibit 6 and from the evidence that the surveyors who prepared plan 916 first ascertained the boundaries of the lands to be subdivided and their bearings, these boundaries being Dundas St., on the east, Conduit St., on the north, an old fence line between township lots 34 and 35 on the west and Soho Ave., on the south. The general idea of subdivision appears to have been to divide the whole property into lots with a frontage of fifty feet. The streets running northerly and southerly are laid out on bearings parallel with Dundas St. The street which appears on exhibit 6 as Barrett St., is now known as Wanda Rd. In now measuring east and west, the distance from Dundas St. on the east to the fence line forming the westerly boundary of lot 51 there is shewn to be an over plus of land amounting to 2 feet 3¾ inches, and the controversy between the parties relates to the question whether this over plus of 2 feet 3¾ inches belongs wholly to lot 51, or whether it is divisible proportionately between lots 51, 52 and 53.

The plaintiff contends that the north-east angle of lot 51 is, under the circumstances shown in evidence, 100 feet west of the westerly limit of Dorval Rd., and the defendant contends that the true position of the north-east angle of lot 51 is 101 feet 6¾ inches west of the westerly limit of Dorval Rd.

Defendant's contention was supported by the evidence of surveyor Van Nostrand, indicating that the eave of the house in question, at its north-east corner, encroaches 9 inches east of the lot line as claimed by defendant. He also indicates 1 inch of encroachment at the south-east corner of the house, an encroachment of 1 foot 6¼ inches where a post and wire fence extends from the rear of house No. 15 to a garage on lot 52, and an encroachment of 1 foot 3¾ inches at the south-east corner of lot 51. These statements may best be apprehended by an examination of exhibit 9, which was produced and verified by the witness Van Nostrand.

If, however, as the plaintiff contends, the true line of division between lots 51 and 52 lies 100 feet west of Dorval Rd., that is

1 foot 6¾ inches further east than Van Nostrand's line, then the house and premises in question do not encroach on lot 52 at any point whatever.

For reasons to be presently stated, I think the plaintiff's contention as to the location of the line between lots 51 and 52 prevails and that there is no encroachment on lot 52.

I turn next to a consideration of the fundamental question presented in this action, namely, the true location on the ground of the line between lots 51 and 52 which in turn depends on the location on the ground of the north-east corner of lot 51, from which point the description of the lands in question begins.

The Surveyors Act, R.S.O. 1927, c. 202, s. 12 (1) and (3) reads as follows:

"(1) Where any city, town, village, lot, mining claim, mining location or part thereof, or any parcel or tract of land has been or may be surveyed and laid out and a plan thereof made by a company or individual in acordance with the provisions of *The Registry Act* or *The Land Titles Act*, all lines or limits shewn thereon and the courses thereof, given in such survey and laid down on the plans thereof and all posts or monuments placed or planted in the first survey of such city, town, village, or part thereof, or parcel or tract of land, to designate or define any allowances for road, street or lane, or any commons, lot, block or parcel of land, shall designate and define the true and unalterable lines and boundaries thereof respectively.

"(3) Where a surveyor is employed to establish or re-establish the boundaries or any road, street, lane, common, lot, block or parcel of land shewn on any such plan, he shall follow the method in making the original survey as shewn on the plan or field notes and shall give proportionate dimensions to each lot shewn thereon where the original stakes defining the angles of such lot cannot be found or their position satisfactorily established."

Subsection (1) promulgates the broad principle of non-disturbance of existing boundaries where it says that "where any . . . lot . . . or any parcel . . . of land has been . . . surveyed and laid out and a plan thereof made . . . all lines or limits shewn thereon and the courses thereof, given in such survey and laid down on the plans thereof . . . shall designate and define the true and unalterable boundaries thereof respectively." This general principle or non-disturbance goes back very

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far in the history of the world, for Solomon said: "Remove not the ancient landmark which the fathers have set." See also Deuteronomy, c. 27, v. 17.

Subsection (3) does not introduce an exception to the general principle, but provides for equitable and proportionate apportionment of any surplus or deficiency "where the original stakes defining "the angles of such lot cannot be found *or their position satisfactorily established.*"

The position on the ground of the north-east angle of lot 51 can be satisfactorily established. The true location on the ground of the southerly limit of Central Ave. (now Wanda Rd.) is not in controversy, and the westerly limit of Dundas St., is a fixed line, the location of which on the ground is also not in controversy. If, then, we measure westerly along the prolongation easterly of the southerly limit of Central Ave., a distance of 704 feet, as shewn on plan 916 (exhibit 6), we arrive at the north-east corner of lot 51 according to the true and unalterable lines and boundaries shewn on plan 916: the angle so located being 100 feet west of Barrett Ave. (now Dorval Rd.). Consequently as the position on the ground of the north-east angle of lot 51 is satisfactorily established s. 12 (3) has no application to the facts of this case.

The defendant's contention is that the north-east corner of lot 53 is to be taken as a point ascertained and fixed, and the measurement made along the southerly limit of Central Ave. (now Wanda Rd.) from the north-east corner of lot 53 of the old line fence between lots 34 and 35. This measurement gives a distance of 152 feet 2 and ¾ inches shewing a surplus of 2 feet 3¾ inches which defendant contends should be divided proportionately among lots 51, 52 and 53. Thus placing the westerly limit of lot 52 101 feet 6¾ inches west of the westerly limit of Dorval Rd.

I have carefully considered this contention and quite apart from the ground which I have already discussed, namely, that this case does not fall within s. 12 (3), I am of opinion that defendant's contention cannot prevail.

Plan 916 shews the westerly boundary of the subdivision as a straight line running on a bearing north 16 degrees west from a point fixed and ascertained on Conduit St., at the north-west corner of the subdivision to another fixed and ascertained point on Soho St., at the south-west corner of the subdivision. The frontage of lot 51 on Central Ave., shewn on the plan as 49 feet 11.

inches, is measured easterly from this straight line to the north-west angle of lot 52. But the old line fence between township lots 34 and 35 which forms the boundary on the ground is not a straight line but acording to the evidence bulges towards the west leaving land 2 feet 3¾ inches in width to the west of the westerly boundary line as shewn on plan 916. This strip of land appears to have been occupied and otherwise treated by the successive owners as part of lot 51 ever since the filing of the plan in 1889, and in my opinion forms a part of that lot. *Re Brenzell & Rabinovitch* (1918), 42 O.L.R. 394, and cases there cited, also *Woodrow* v. *Connor* (1922), 52 O.L.R. 631, at p. 641.

In this connection I refer to the evidence of Surveyor Abrey: "Q. Why did you put all that surplus of two or three feet into lot 51? A. For the same reason that I told you a few minutes ago, that that was an irregular boundary along that line, and that my father had given me to understand that that was the proper method in this case of determining those lots, not to proportion it. That it was a broken boundary line in there with an irregular measurement on. The lot should have been marked on the original plan a more or less distance, because it had never been measured, but it was not done so, but it should be treated as such; and therefore, as he had fixed and everybody else has followed since fixing the line of Dorval Rd., as measured westerly from Dundas St., the same line of deduction would follow that the other lots, which are given a definite measurement of fifty feet each at both ends, should be laid out in the same way."

I therefore find that no portion of the premises covered by the agreement and known as house No. 15 encroaches on lot 52.

It remains to consider the alleged encroachment on Wanda Rd. by the north-east corner of the house in question. Surveyor Van Nostrand swears that even if the north-east angle of lot 51 is located 100 feet west of Dorval Rd., there is still an encroachment on the street of 1 foot ¾ inches by the eaves and troughing of the house (see exhibit 10). So far as I recall there is no attempt to contradict this testimony, but the plaintiff proves a by-law of the City of Toronto which he claims permits such an encroachment by overhanging eaves and troughing. See p. 4 of exhibit 12.

I consider the potency of this by-law to be very doubtful and its efficacy questionable. But the encroachment is trivial and as appears from the evidence of the witness Little the difficulty can

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easily be remedied at small cost. At the opening of the trial on the 16th inst. counsel for the plaintiff asked leave to amend by offering compensation if any encroachment was shewn. Counsel for the defendant strenuously objected. I deferred judgment on the application to amend until the evidence was in, directed that the plaintiff might adduce his evidence as to compensation and suggested to defendant that he come on the next day prepared to meet it. I now give leave to amend as asked.

The evidence of Little is that the most extensive alteration necessary to remove the encroachment from overhanging Wanda Rd., will cost $50, though other effective plans costing as low as $10 could be adopted. The defendant adduced no evidence on the question of compensation and repeated his claim that it was not properly before the Court and that he was taken by surprise. He did not ask for an enlargement of the trial, nor suggest any evidence that could be adduced to controvert plaintiff's contention that the encroachment is trivial, and that the difficulty can be obviated at small expense. It is plain to me that such is the case, but it may cost more than $50 to remedy the difficulty, and in view of the surprise alleged by counsel for the defendant I fix the compensation at $100.

Counsel for the plaintiff raised the point that defendant was precluded by the terms of the agreement from raising the objection in question after the time stipulated for making objections had elapsed. The plaintiff agreed to give to defendant the whole building known as house No. 15. He is unable to do so. I think that the objection in so far as it relates to that portion of the premises which encroaches on the street goes to the "root of title," and can be raised notwithstanding defendant's delay. *Armstrong* v. *Nason* (1895), 25 S.C.R. 263.

All other objections to title having been satisfied or waived and the deed having been approved no reference to the Master is needed.

There will be judgment for specific performance with compensation fixed at $100. Costs to the plaintiff. Stay for fifteen days.

Judgment for the plaintiff.

Full Text of the Appeal

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Ontario Court of Appeal, Mulock, C.J.O., Latchford, C.J., Middleton, Fisher and Grant, JJ.A. October 17, 1932.

Specific Performance I E—Vendor and Purchaser III D and VI D—Contract to sell land—Vendor suing—Defect in title—Compensation —Effect of delaying objection past stipulated time.

Specific performance of a contract to sell land will be granted at the suit of the vendor with compensation to the purchaser when a defect in the described subject matter is trivial and can be remedied at small cost. When the defect goes to the root of the title objection can be raised notwithstanding defendant's delay until after the time limited for objecting to the title by the agreement.

APPEAL by the defendant from the judgment of Masten, J.A., [1932], 2 D.L.R. 496, O.R. 274, in an action for specific performance of an agreement for the purchase and sale of land. Affirmed.

J. H. Bone, K.C., for appellant.

J. C. McRuer, K.C., for respondent.

THE COURT dismissed the appeal with costs.

Appeal dismissed.

Sketch

Martin v. Kellogg [1932] 2 D.L.R. 496, Affirmed [1932] 4 D.L.R. 617

Registered Plan 916 (1889)