Privy Council Appeal No. 52 of 1916.

Patrick Edgar Watcham - - - - *Appellant,*

v.

The Attorney-General on behalf of the Government of the East Africa Protectorate - *Respondent.*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JUNE, 1918.

Present at the Hearing:

EARL LOREBURN.
LORD ATKINSON.
LORD SCOTT DICKSON.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a decree dated the 25th February, 1915, of the Court of Appeal for Eastern Africa whereby that Court affirmed a decree of the High Court of Eastern Africa, dated the 8th May, 1913, and made in an action in which the respondent, as plaintiff on behalf of the Government, sued the appellant as defendant in ejectment to recover possession of 753½ acres of land in the Nairobi district and for subsidiary relief.

The defendant claims to be entitled to these lands under three different titles.

First, the Riverside estate, under a certificate from the Crown dated the 1st December, 1899, made or granted in accordance with the East African Land Regulations dated the 29th December, 1897, and described as follows, the words underlined being in print and the rest typewritten:—

"The piece of land delineated on the plan hereto attached, situate in the railway mile zone, and containing 66¾ acres, or thereabouts, being (1) in extent from the intake of the Nairobi water supply down the pipe-line for a distance of one mile on the right bank of the river for a width of one-quarter of a mile from the river, and contains an area of 66 acres 3 roods 22 perches, as per plan attached."

The second, styled Moya's land, under a permit dated the 31st March, 1904, issued to him by the Survey and Land Com-

missioner, claimed to comprise 350 acres, and the third, styled Masondo's land, alleged to have been acquired by him from Masondo, a native, and claimed to be about 350 acres in extent.

The case was tried before Hamilton, C.J., who held that all the land acquired by the defendant through Moya, coloured green on a plan given in evidence at the trial, and numbered Plan 1, was outside the land, the possession of which was claimed by the Government. He further held that the land acquired by the defendant through Masondo, styled in the case Masondo's land, and edged brown on said plan No. 1, formed no part of the area claimed by the Government, and by his decree dated the 8th May, 1913, ordered that the areas of the lands in respecto f which the defendant paid compensation to these two natives, Moya and Masondo, and of which the plaintiff had undertaken to grant leases to the defendant were such as were shown on plan in the action, *i.e.*, Plan No. 1, marked respectively Moya and Masondo.

Their Lordships, after careful consideration of the evidence given in the case and the judgments of the learned Chief Justice and of the learned Judges in the Court of Appeal, see no reason to differ from the conclusion which has been arrived at in respect of these two pieces of land. They think the decree pronounced as to them should be confirmed. It only remains to consider the decision arrived at in reference to the Riverside estate.

That estate was in the year 1907 surveyed by a Mr. Woodruffe, the boundaries being pointed out by the Misses Watcham, the sisters of the defendant. It is delineated on the same plan and edged yellow, and as surveyed is found to contain only 39·7 acres. Their lordships are not satisfied that these ladies were authorised by the defendant to point out the boundaries of the estates, as they apparently did, at least to some extent, and do not think that the defendant can be held bound by anything they may have said or done in reference to that subject. The Attorney-General raised no objection at the trial to the boundary of the Riverside estate being extended so as to include a total area of 66 acres or thereabouts, and the Chief Justice held that under the certificate of the 1st December, 1899, the defendant was entitled to occupy the land edged yellow on the plan, and a further area of 27·21 acres, and ordered that the plaintiff should survey out an additional area to the plot marked Riverside on the plan in the action, so as to make up the holding of the defendant to 66 a. 3 r. 27 p. or thereabouts, the area mentioned in the certificate. He further ordered :—

"That the defendant do deliver up to the plaintiff possession of all that area within the line marked in red on the said plan, save and except a sufficient area as may be agreed on the survey above mentioned and adjoining Riverside on the south, as shown on the said plan, to make up that holding to 66 acres 3 roods 27 poles or thereabouts."

By the third of the above-mentioned Land Regulations it is provided that every certificate shall be accompanied by plan of the lands, prepared or approved of and signed by a Government surveyor or other officer for the purpose of the Commission; but though words "as per plan attached" appear in the certificate immediately after the description of the parcels, no plan of the kind prescribed was attached to the certificate or produced. An effort was made to show from the conduct and admission of the defendant that a plan found in the Registry, marked 3 and not signed by anyone, had been attached to the certificate and was the plan referred to in the certificate; but in their Lordships' view the effort was not successful. The question, therefore, which their Lordships have to determine, unaided by any map, in effect resolves itself into whether the extent of the property conveyed or assured by the certificate is to be fixed by the description of its boundaries or by the description of its area. It is not a very easy question.

When there is in an ancient deed or other document a latent ambiguity, extrinsic evidence of user under it may be received to ascertain its meaning. Lord Sugden, in the oft-quoted passage in *Attorney-General* v. *Drummond*, 1 Dru and War 368, said :—

> "One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed and I will tell you what that deed means."

The reason for that rule is said to be that in the lapse of time and change of manners the words used in the instrument may have acquired a meaning different from that which they bore when originally employed, *Drummond* v. *Attorney-General*, 2 H.L.C., 837, 862. In *Waterpark* v. *Fennell*, 7 H.L.C. 650, at p. 680, Lord Cranworth states the rule of law thus :—

> "It is certain that where parcels are described in old documents in words of a general nature, or of doubtful import, we may, indeed we must, recur to usage to show what they comprehend. Where, indeed, words have a clear, definite meaning no evidence can be admitted to explain or control them. Thus a demise of my messuage at Dale could not by any parol evidence be shown to have been meant to describe, not a messuage, but a sheet of water. The distinction is obvious."

But where contemporary exposition is thus relied upon on the ground that the meaning of the words of an ancient grant has changed, the instrument must be old enough to permit this change, and there must be uncertainty or ambiguity in its language. *Rex* v. *Varlo*, 1, Cowper, 248–250; *Chad* v. *Tilset*, 2, *Brod and B.*, 403–406; *Hastings* (*Lord*) v. *North-Eastern Railway Company* (1899) 1 Ch. 656, 661, 663, (1900) A. C. 260.

A patent ambiguity is in "Bacon's Law Tracts," p. 99, defined to be—

"that which appears ambiguous on the face of the instrument. A latent ambiguity is that which seemeth certain on the face of the deed or instrument, but there is some collateral matter out of the deed which underlieth the ambiguity."

The principle of the above mentioned decisions, so far as it is based on the probability of a change during the lapse of time in the meaning of the language used in an ancient document, cannot of course have any application to the construction of modern instruments, but even in these cases extrinsic evidence may be given to identify the subject matter to which they refer, and where their language is ambiguous the circumstances surrounding their execution may be similarly proved to show the sense in which the parties used the language they have employed, and what was their intention as revealed by their language used in that sense. The question, however, remains whether in such instruments as these proof of user, or what the parties to them did under them and in pursuance of them, can be used for the like purpose. In *Wadley* v. *Bayliss* (5 Taunton, 752) it was decided that the user of a road described in an ambiguous way in an award made under an Enclosure Act by the owner of a holding by the award allotted to him, might be proved in evidence in order to ascertain the meaning of those who worded the award. In Doe. (A) *Pearson* v. *Ries* 8, *Bing* 178, Tindal, C.J., in delivering judgment, the document to be construed being modern, said :—

"We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties."

The fact mainly relied upon in that case to show that the document to be construed was a legal demise, and not a mere agreement for a lease, was this: that the person who claimed to be the tenant or lessee had been put into possession and remained there. In *Chapman* v. *Bluck*, 4 Bing (N.C.), 187, was practically to the same effect. Tindal, C.J., in giving judgment, said :—

"Looking only at the two first letters between the parties, on which the tenancy depends, I think this falls within the class of cases in which it has been held that an instrument may operate as a demise notwithstanding a stipulation for the future execution of a lease. But we may look at the acts of the parties also, for there is no better way of seeing what they intended than seeing what they did under the instrument in dispute."

Park, J., said :—

"The intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued."

In the case of *Van Diemen's Land Company* v. *Table Cape Marine Board*, 1906, A.C., 92, the action out of which the appeal arose was brought for trespass on the foreshore of Emu Bay, in Bass's Straits. The plaintiff claimed to be entitled under a grant from the Crown, dated the 17th July, 1898, in which there was a latent ambiguity. One of the questions in issue was the construction of this grant, and the substantial point in controversy was whether the piece of land granted extended to low-water mark, thus including the foreshore, or only to high-water mark. The plaintiffs sought to prove their title to the *locus in quo*, including the foreshore, by proof of acts of ownership over it before the grant, namely, that they had been in possession of it and had spent money in improving it, and had continued in possession of it after the making of the grant. The Judge at the trial rejected this evidence, and a new trial was moved for because of this rejection. The deed of the 17th July, 1898, contained a recital "that the company had been authorised to take possession of certain lands, and had ever since been in possession thereof." It was held that the evidence above mentioned was improperly rejected. Lord Halsbury, in delivering judgment, is, at page 98, after referring to this recital, reported to have said :—

"When these are the circumstances under which the grant is actually made, why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? It would be a singular application of the maxim quoted by Coke (2 Institutes, 11). *Contemporanea expositio est fortissima in lege*, to suggest that proof of user must be confined to ancient documents, whatever the word ancient may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued and thus to have brought the user back to the contemporaneous exposition of the deed. The contemporaneous exposition is not confined to user under the deed. All the circumstances which tend to show the intention of the parties, whether before or after the execution of the deed, may be relevant, and in this case their Lordships think are very relevant, to the questions in debate."

The case of *Hastings* v. *North-Eastern Railway Company*, A.C. 1900, above referred to, is not inconsistent with this case, as in it the decision was rested solely on the fact that the language of the instrument to be construed was plain and unambiguous.

These cases, their Lordships think, establish the principle that even in the case of a modern instrument in which there is a latent ambiguity, evidence may be given of user under it to show the sense in which the parties to it used the language they have employed and their intention in executing the instrument as revealed by their language interpreted in this sense. The question remains, however, whether such evidence can be adduced for the same, or a similar purpose, where the ambiguity in the language of the instrument is patent not latent, as when for instance the description by the boundaries of the property granted conflicts

with its description by its acreage, especially where those boundaries are fixed by or measured from natural physical features of the locality. Parcel or no parcel is, no doubt, a matter of fact to be decided by the Judge or Judges of fact. Extrinsic evidence may be given, as in *Doe and Norton* v. *Webster*, 12 Ad. and E. 442. where a garden proved to have been occupied with a house was held to have passed with the house under the word appurtenances. Direct evidence of the intention of the parties to it is of course inadmissible. Where in a grant of land there is a discrepancy between the parcels as described, and any plan referred to then as far as that discrepancy extends, the description of the parcels will generally prevail. *Horne* v. *Struben* (1902), A.C. 454. Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statements contained in it as to the dimensions or quantity of the property, or any inaccuracy in a plan by which it purports to be described will not vitiate this description. *Mellor* v. *Walmesley* (1905), 2 Ch. 164.

Where in a grant the description of the parcels is made up of more than one part, and one part is true and the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a *falsa demonstratio*, and will not vitiate the grant. It may, however, operate as a restriction, *Morrell* v. *Fisher*, 4 Ex 591, 604. It is immaterial, moreover, in what part of the description the *falsa demonstratio* occurs, *Cowen* v. *Truefitt* (*Limited*), 1899, 2 Ch. 309.

In *Eastwood* v. *Ashton*, 1915, A.C. 900, four heads of identication of the parcels were mentioned in the instrument to be construed. The fourth was a plan endorsed on the deed and coloured pink. The first three of these were uncertain and insufficient, and the plan was accordingly preferred and adopted.

In the case of *Herriot* v. *Sixby*, 1, P.C. App. 436, a piece of land, about 140 or 150 acres in extent, was divided into two lots and sold. The eastern portion became vested in the appellant. It was described in the deed of conveyance as containing about 90 acres, more or less; the western portion, vested in the defendant, was described as containing about 50 acres. The descriptions in the deeds did not agree as to the way in which the boundary line between them should run. It was found that on the language of the deed it was very doubtful where it was intended the boundaries should run, the description of them equally admitting of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making that quantity different; the former was held to prevail. At the trial the respondent went into considerable evidence to prove his continuous possession and enjoyment of the land claimed in accordance with the construction of the deed which he relied upon. This evidence was not dealt with by Sir Richard Kindersley, who delivered

the judgment, as inadmissible, though he found it to be unsatisfactory, p. 453. Sir William Erle, Sir James Colvile, and Sir Edward Vaughan Williams formed with him the Board. And it is scarcely possible that if they considered this evidence of possession and acts of ownership to be inadmissible, that fact would not have been mentioned.

In *Booth* v. *Ratté*, 15 A.C. 188, the Crown, under the Great Seal of the Province, granted to one Joseph Aumond, a piece of land in the town of Bytown, styled a water lot, bounded as therein described. One of these boundaries was described as "from a point on the River Ottawa, two chains distant from the shore, southerly parallel to the general course of the shore to a point on the northern limit of Cathcart Street, produced on a course of south 66·30 west distant 2 chains from the aforesaid shore of the River Ottawa." The grantee sold portions of this lot to different persons, one of whom was Amable Prevost, to whom he by deed dated the 2nd November, 1867, conveyed the lot described in the grant from the Crown, excepting those portions conveyed to the other purchasers. By deed of the 23rd July, 1867, Prevost conveyed to the plaintiff Booth part of the water lot so granted to Aumond, describing the boundary towards the river, as "thence along the northerly line of Cathcart Street in a westerly direction to the water's edge of the River Ottawa, thence along the water's edge down the stream in a northerly direction to the line of Bolton Street." Here the boundary on the river's side is called the water's edge, whilst in the Crown Grant the boundary on the land granted is described as *two chains from the shore*. The plaintiff before the conveyance to him was executed was put into possession by Prevost. The contention of the defendants in the original action and on the hearing of the appeal was to the effect that the words "along the water's edge" meant the line which separated the land from the water, and that the plaintiff was not entitled to any strip of subaqueous soil. The plaintiff was allowed to prove acts of ownership over this subaqueous strip, by the erection of a large floating wharf and boating-house moored to the bank of the river, the use and occupation of which he had been permitted to enjoy for many years without objection by the Crown or Prevost. It was held that the description in the conveyance was capable of being explained by possession, and that the possession which in that case followed upon the conveyance was sufficient to give the plaintiff as against Prevost a good *primâ facie* title to the whole of the two chains.

In all these cases the ambiguity, such as it was, was patent not latent.

They in no way conflict with the decision in *Clifton* v. *Walmesley*, 5, Term R. 564, to the effect that where a covenant in a lease is clear and unambiguous the parties whatever their intention, in fact, may have been on entering into it are bound

by its terms and extraneous evidence cannot be received in explanation of it.

To the same effect are the judgments of Lords Blackburn and Watson in the *Trustees of the Clyde Navigation* v. *Laird*, 8 A. C., 658, 670, 673. The case of *Cook* v. *Booth* (Cowper R., 819) to the contrary effect has been discredited and cannot now be regarded as well decided; *Baynham* v. *Guy's Hospital*, 3 Ves. J., 294.

Now, applying the principles established by these authorities to the present case how does the matter stand as regards the first issue upon which the case went to trial, namely, what is the area covered by the original certificate of the Riverside estate, granted by Government to the defendant to which he is now entitled?

It appears from the Judge's note that on the 30th April, 1913, the defendant put in a medical certificate to the effect that he should not strain his voice, and alleged that he was very unwell, but he never then or at any subsequent sitting of the Court was examined to establish into what area of land he went into possession under the certificate of December 1899, or what acts of ownership he exercised over any, and if so what portion of the land he now claims. It is found by Hamilton, C.J., and not disputed, that the area included within the boundaries mentioned in the certificate is 160 acres in extent.

It is also found by the Chief Justice that a Mr. Wilson had for several years before 1904 occupied under the Government a plot of land, 18 acres in extent, L.O. No. 991. This plot would, if the boundaries were correct, form portion of the 160 acres. In addition, the defendant when applying for a certificate for Masondo's land furnished a rough sketch, No. 7, which showed that his Riverside estate was bounded on the west by Mr. Wilson's holding. If the defendant was the owner and occupier of the whole 160 acres this sketch amounted to an admission by him against his proprietary interest. It was urged that Wilson might have acquired his portion either by assignment from the defendant, or from the Government with the defendant's consent. There was no proof whatever of any transaction of this kind. On the contrary a certificate was in the year 1902 given to Wilson by the Commissioner to hold this 18 acres of land direct from the Government for ninety years. No evidence was given on the behalf of the defendant to explain how it came about that he was from before 1902 out ofpossession of portions of the land he now claims as his own, or how it came about that the Crown in 1902 conveyed it to another, without, as far as it appears, his consent or concurrence. If, however, all that was conveyed to the defendant by certificate was 66 acres 3 roods and 27 poles no such difficulty presents itself since Wilson's holding might well lie outside that area.

Again the rough sketch represents the defendant's holding as bounded on the east by Moya's holding abutting upon the River Nairobi, as both the Riverside and Wilson holdings are represented to do. The permit, dated the 31st March, 1904,

given to the defendant to occupy Moya's holding and accepted by him describes that holding as adjoining the Riverside estate. In this respect the rough sketch must be accurate, but if the relative dimensions of the three plots of land be looked at either on the sketch map, or on the so-called trial map, it is perfectly clear that the river frontage of Riverside could not approach the mile in length which, if the boundaries in the certificate were accurate, it should do.

Again the rough sketch represents Wilson's holding as bounded on the west by the mission holding, also abutting on the same river. If the boundaries were accurate the mission holding would be cut by a line drawn from the intake at right angles to the course of the river, as it is contended it should be, and a large slice of that holding would be included in the 160 acres which the defendant claims. In fact this mission land appears to have been sold to Father Burke, presumably as trustee for the missions, and conveyed to him by the Crown by an agreement dated the 12th July, 1904. In this case, as in Wilson's, there is no proof whatever that this was done with the consent or approval of the defendant, or that Father Burke acquired any interest in the land from the defendant.

If the defendant was the grantee of the 160 acres included within the boundaries as he claims to be, this rough sketch would necessarily involve and embody several admissions against his proprietary interest to the effect that persons other than himself were owners of or were in possession of property he claimed as his own. The certificate is his only title. His user of any of the land must therefore be a user under it. It is a user, however, entirely inconsistent with the larger claim, since it only amounts to the possession and enjoyment of a small portion of that area, lying along a comparatively short stretch of the river, not a mile of it. No doubt the part within the map edged yellow is less than the acreage stated in the certificate.

The extent of the river frontage of it is not so inconsistent with the area as it is with the boundaries. A trifling removal of the southern boundary of the lot further southward would obviously increase the contents by 27 acres and bring the area up to the figure named.

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 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.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

PATRICK EDGAR WATCHAM

v.

THE ATTORNEY-GENERAL ON BEHALF OF THE GOVERNMENT OF THE EAST AFRICA PROTECTORATE.

DELIVERED BY LORD ATKINSON

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