[HIGH COURT OF AUSTRALIA.]

PHILLIPS AND OTHERS . . APPELLANTS;
PETITIONERS,

AND

THE CROWN . . . . . RESPONDENT,
RESPONDENT,

ON APPEAL FROM THE FULL COURT OF WESTERN AUSTRALIA.

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PERTH, *October* 27, 31.

Griffith C.J., Barton and O'Connor JJ.

Land Act 1898 (*W.A.*) (62 *Vict. No.* 37), *secs.* 19, 105—*Application for pastoral lease—Boundaries—Amendment—Fixed point—Natural or permanent artificial object—Falsa demonstratio.*

The appellants were in possession of a pastoral lease called Block A., containing more than 600 square miles, which included a permanent spring known as Eracootharra Pool. The boundaries of Block A. were not visibly defined. Of the identity and actual location of that pool there is no doubt, but its geographical position with regard to Block A. was not accurately known when one Comtesse put in an application for a pastoral lease, submitting a sketch showing the pool in the south-west corner of the land applied for, and also showing the supposed position of the land applied for in reference to Block A. Comtesse's application was approved of, and sometime afterwards the actual position of Eracootharra Pool was discovered to be in Block A., and not in the land applied for by him. Sec. 19 of the *Land Act* 1898 (W.A.) (62 Vict. No. 37) directed (*inter alia*) that "every application for land which has not been surveyed . . . . shall contain or be accompanied by a sketch of the proposed boundaries, which shall be fixed wherever possible with reference to some natural or permanent artificial object, and show the position of the land with reference to any lake, river, or main stream, and also to land held by or in the occupation of any other person in the locality; and also show all permanent waterholes and springs within the area applied for." Sec. 105 of the same Act directed (*inter alia*) that the "description furnished by an applicant for pastoral land shall be full and particular, and shall refer to some fixed point or object which can be recognized by the Department."

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Held, that the provision as to reference to land held by or in the occupation of another person in the locality is directory, and only applies to land in the visible occupation of other persons and the boundaries of which are actually defined, or at least known with some reasonable degree of certainty, and that Comtesse was entitled to have the land applied for by him fixed relatively to the actual position of Eracootharra Pool which was the "natural object" contemplated by sec. 19 and the "fixed point or object" contemplated by sec. 105, but not so as to interfere with any of the appellants' rights in respect to Block A.

Per Grffith C.J.—Where there is an apparent repugnancy between different parts of a description so that full effect cannot be given to the whole, the proper rule is to give most effect to those things about which men are least liable to make a mistake.

Decision of the Full Court of Western Australia: *Phillips and others* v. *The Crown*, 12 W.A. L.R., 182, affirmed.

THIS was an appeal from a decision of the Full Court of Western Australia, who allowed an appeal by the Crown from a decision of *Rooth* J. sitting upon a hearing of a petition of right at *nisi prius*. The facts are fully set out in the judgments hereunder.

Pilkington K.C. and *F. M. Stone*, for the appellants. The *Land Act* 1898 sets out what an applicant must do. The sketch of the land applied for must show the relation to *some natural or permanent artificial object* (sec. 19), and also to some *fixed point or object* (sec. 105); also by sec. 19 the relation to *land held by or in the occupation of any other person in the locality* must be shown. Comtesse's sketch showed that the land he applied for was to the north of blocks of land already granted to the petitioners who then applied for the vacant land on the east and their application was approved of. It being discovered that Eracootharra Pool was in the eastern portion of the petitioners' first blocks of land, and not, as Comtesse thought, to the north-west of it, Comtesse applied to have his lease rectified, by which means his block would be shifted to the south-east, and take up portion of the petitioners' second block. The rule of law is that the whole of the application must be looked to in order to properly construe it, and it would not be right to merely regard the fixed point and disregard the description of the relation to lands held by another person. Whatever

else Comtesse's application may have meant, it was an application for land to the north of the petitioners' first blocks.

Russell and *Lukin*, for the Crown. It is clear that Comtesse knew Eracootharra Pool, though he did not know, nor did anybody else, its exact geographical position. The Act requires that the applicant shall refer to some fixed object which can be recognized by the Department and the description must be certain. The boundaries of petitioners' first blocks were not actually defined, and a description in relation to them would not be certain.

[They referred to *Minister for Lands* v. *Boulton* (1); *Martin* v. *Baker* (2); *Downing* v. *Howe* (3); *Boardman* v. *Lessees of Reed & Ford* (4).]

Pilkington K.C., in reply.

Cur. adv. vult.

The following judgments were read :—

October 31.

GRIFFITH C.J. Under the *Land Act* 1898 (Western Australia) applications for unsurveyed land take priority according to the order of their being lodged (sec. 17).

Sec. 19 is as follows :—" Every application for land which has not been surveyed shall be for land in one block, and, except in special cases to be allowed by the Minister, in the form of a rectangle, with boundaries in the direction of the meridian and at right angles to it, and the proportion of depth to breadth, except as herein specified, shall not exceed three to one, unless the Minister shall otherwise direct. . . . . Every application shall contain or be accompanied by a sketch of the proposed boundaries, which shall be fixed wherever possible with reference to some natural or permanent artificial object, and show the position of the land with reference to any lake, river, or main stream, and also to land held by or in the occupation of any other person in the locality; and also show all permanent waterholes and springs within the area applied for."

This section was in 1906 applicable to all applications for

(1) 17 N.S.W. L.R., 389.
(2) Knox (N.S.W.), 418.
(3) 2 S.C.R., (N.S.W.), 75.
(4) 6 Pet., 328.

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unsurveyed land whether by way of pastoral lease or by way of conditional purchase, which latter might be for comparatively small areas in settled districts.

Sec. 105 is as follows:—"The position of pastoral leases and the arrangement of boundary lines shall be subject to the approval of the Minister; and any description furnished by an applicant for pastoral land shall be full and particular, and shall refer to some fixed point or object which can be recognized by the Department." This section applies to applications for pastoral leases only, which may be for immense tracts of country.

Before 1906 the petitioners had applied for a tract of waste land situated about 350 miles from the sea coast, which is spoken of as lease No. 584, and their application had been approved. The area of the tract was 403,668 acres—about 630 square miles. The shape was irregular, and the distance from the extreme northern end to the extreme southern limit was about 40 miles. In the extreme northern part there was a northerly extension, about 10 miles in length, and about 7 miles in width, measured from east to west. The land had not been surveyed. There were no fences, and there was nothing on the ground to denote the boundaries. Any occupation would have been by a few stock roaming over the wilderness. Most of the adjoining land appears from the plans put in evidence to have also been held by the petitioners.

There was nothing at that time in existence anywhere to denote the actual boundaries except the sketch plan lodged in the Government Department with the application, but the lines marked on that plan were as imaginary as lines of latitude and longitude. They were capable of being, but had not been, ascertained. We are told that the starting point of the description on the plan was a hill or mountain called Mount Sir Samuel, distant more than 20 miles to the south of the northern limit. The position of the land applied for had not in fact been located on the ground.

On 3rd January 1906 the petitioners applied for a lease of 10,000 acres, being a strip of land lying along their northern boundary and now known as No. 2941. There is no doubt as to

what they wanted, namely, the land adjoining No. 584 to the north, wherever No. 584 might turn out to be.

This application was approved on 16th March 1906.

In that locality there is a spring or pool known as Eracootharra Pool, of the identity and actual location of which there is no doubt, but its actual position with regard to the boundaries of No. 584 was not ascertained until August 1908. It was not denoted on the Government plan, or on the sketch plan of the application for No. 584.

On 7th February 1906 one Comtesse applied for a tract of 20,000 acres, now known as No. 2960, and his application was approved on 9th April. The only description given in the application was a diagram, which represented a rectangular block bounded on the north and south by lines running east and west 550 chains in length, and on the east and west by north and south lines 363.64 chains in length, and enclosing Eracootharra Pool, which was delineated as lying near the south-western corner at a distance of 40 chains from both the western and the southern boundaries, the point of intersection of these lines being marked as the "start." The diagram also represented No. 2941 as adjoining the land applied for on the south, the distance from the south-west corner of the land applied for to the north-west corner of No. 2941 being stated as "about 175.00" (*scil.* chains).

When a survey was made in 1908 it was found for the first time that the pool was in reality situated within the boundaries of No. 584, and lay about 8 miles to the south-east of the north-west corner of No. 2941.

On these facts the question for determination is: What was the land applied for by Comtesse, and which the Government by their approval of his application agreed to grant to him? The duty of the Court is to interpret the instrument of application by ascertaining the intention of the parties, and for this purpose we must as far as possible put ourselves in their position at the time when the application was made and approved. When this is done it is plain that Comtesse knew the pool, but did not —nor did anyone else—know its exact geographical position; that he knew of petitioners' applications Nos. 584 and 2941, but did not know—nor did anyone else—in what precise place the

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tracts comprised in them lay, although he knew the general locality; and that he thought, erroneously, that the north-west corner of No. 2941 was about 2 miles to the eastward of the pool, whereas it was in reality about 8 miles to the north-westward of it. The description was therefore in some respect inaccurate.

Mr. *Pilkington* contends that the reference in the sketch plan to No. 2941 should be taken to be the governing reference.

Sec. 19 of the Statute, which I have read, requires that the boundaries shall in all cases be fixed wherever possible with reference to some natural or permanent artificial object, and sec. 105 that the description shall in the case of pastoral leases refer to some fixed point or object. The reference to Eracootharra Pool complies with both conditions. Sec. 19 also prescribes that the application shall show the position of the land with reference to land held by or in the occupation of any other person in the locality. In my opinion this provision is directory only, so that a failure to comply with it would not vitiate the application, and could not be taken advantage of by a rival but later applicant. I think, further, that it only applies to land in the visible occupation of other persons and the boundaries of which are actually defined, or at least known with some reasonable degree of certainty. Where there is an apparent repugnancy between different parts of a description so that full effect cannot be given to the whole, the proper rule is, in my judgment, to give most effect to those things about which men are least liable to make a mistake. (See *Davis* v. *Rainsford* (1)).

In the present case there was no room for mistake with regard to the fact denoted by the reference to Eracootharra Pool. That was an actual visible fact. The starting point is delineated as lying due south-west from it, and distant about 56 chains (the hypotenuse of an isosceles right-angled triangle whose sides were 40 chains long). The sketch was equivalent to a description in this form :—" Commencing at a point 56 chains south-west from Eracootharra Pool and bounded thence " &c. The reference to No. 2941, on the other hand, was a reference to a provisional plan in the Lands Department, and not a reference to any visible or known existing fact. This is the view which was adopted by

(1) 17 Mass., 207.

the Government and by the Full Court, and, in my opinion, is clearly right.

The result was that the Government could not accept Comtesse's application so far as it comprised land already included in No. 584, but was bound to give priority to it so far as it comprised land not so included. The petitioners' claim is in respect of an application made by them on 9th July 1906, and approved on 28th September, for land which was comprised in Comtesse's application and was not comprised in No. 584, and which the Government therefore could not grant to them. They were, in fact, aware when they made it of Comtesse's application, but this is not material in the present suit, though it would be very material if the Government had granted them a lease to the prejudice of Comtesse.

It is not suggested that a suit can be maintained against the Government in respect of a promise to grant a lease of land which they had already contracted to grant to another, that fact being by reason of the condition of the subject matter not known when the promise was made.

Comtesse is not a party to this suit, and I do not think that specific performance could in any event be granted in his absence. The inconvenience of passing upon the validity of his title without hearing him is obvious, but, as it happens, justice can be done between the parties to the suit as now constituted.

The appeal must therefore be dismissed.

BARTON J. It is highly necessary to keep in mind that the application of Comtesse for a lease of the block now numbered 2960 was accepted by the Crown on 9th April 1906, three months before the appellants applied for the block now numbered 3155. If any land which the Crown duly contracted to let to Comtesse is included in the appellants' application, it fails for at least the included part, the subject of their claim. But their claim is based, as Mr. *Pilkington* admitted, entirely on the contention that this part was in law duly contracted to be let to them as part of Block 3155. Such a contract could not lawfully be made if the land the subject of it had already been allotted to somebody else; but they claim that Comtesse's application did not

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really include the overlapping part, and did not prevail over the contract with them. If, then, there was a valid contract with Comtesse which included this part, then *ex concessis* the appellants' petition fails.

Turning to Comtesse's application made on 7th February 1906, which, as appears to be usual, describes the position and boundaries of the land applied for by means of a diagram, we find that it shows near the south-western corner of the land a spot marked "Eracootharra Pool," and indicates the southern boundary as 40 chains due south, and the western as 40 chains due west of that spot. The south-western corner of the diagram, approximately 56 chains south-west from the pool, is marked "start," *i.e.*, starting point. So far therefore we may take it that Comtesse intended that his lease should include the pool; that the southern and western limits of his land should each be, by direct lines, 40 chains from the pool, which would thus be 56 chains from their intersection at the south-western corner; and that the boundaries of his land, to include 20,000 acres, should be ascertained by measurement from the south-western corner as the commencing point. Further, he indicated that his starting point should be "about" 175 chains from the north-western corner of Block 2941. Now, all the land in the tract of country in question was unmarked and unsurveyed. Block 2941 had been applied for by the petitioners on the third of the previous month, and the application had not yet been accepted, nor was it accepted until 16th March. The north-western corner of 2941 was therefore not yet an ascertained point. It may be taken that Comtesse had access to, if he did not actually see, the previous applications for blocks in the vicinity. Assuming that he saw the application for Block 2941, he would see its date and that it proposed to take in an area of 10,000 acres north of Block 584, which the petitioners had obtained under lease some time previously, the western boundary of the proposed Block 2941 being a continuation of the western boundary of Block 584. But No. 584 itself, though leased, was still unsurveyed. It included over 403,000 acres, and its length from north to south must have been some 40 miles. So far as survey could ascertain them, the northern boundaries of 584 were not ascertained, nor is there any evidence

that they were identifiable by any mark. Yet on the boundaries of 584, at any rate those to the west and north, the position of 2941 must depend, for the petitioners had not made the boundaries of the latter referable to any fixed point or any object, whether natural or artificial, by which the Department could have identified it. It must be remembered that the district is 350 miles from the sea, and about 850 from Perth by the usual route, and that all the blocks for many miles round are in purely pastoral occupation and unfenced. Hence a person going out to take up land would, unless he chanced upon one of the homesteads, which, of course, are many miles apart, see no indicia of occupation except perchance, here and there, some sheep. In these circumstances such a person could not do more than hazard a guess at the possible corner-point of any block already let, for instance, that of No. 584. As to any block the subject of an application not yet accepted, his means of ascertainment would certainly be no better. Here we have strong reason why he should use the word "about" in indicating the distance of his starting point from the boundary or corner of another block. Now the inclusion of the pool is a plain physical means of ascertainment, and the starting point at 56 chains south-west of it is something which may be ascertained with finality. The distance of about 175 chains from the unascertained north-west corner of a block, applied for but unleased and depending for its position upon the location of another and a huge block, also still unsurveyed, is merely hypothetical. Both are available as evidences of intention, which of them is to prevail? Mr. *Pilkington* says we are to take the whole application together; so we must. But reading the document as a whole, is it not clear that the applicant was guided by the actual physical object, which was there to be seen, and only referred to the supposed distance from No. 2941 as an additional possible means of arriving at the starting point, which distance subsequent applicants as well as himself would have known for a guess, even if he had left out the word "about" which showed it? The pool was the dominant idea in his mind so far as we can gauge his intention from what he says. He knew where the pool was *in fact*, not relatively to unsurveyed lines, but he did not know, for nobody knew, quite where Block

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2941 was, and as to its position he made an erroneous guess. If he had left out all reference to it his application would have been good as to all land not included in previous allocations. *Quicquid demonstratæ rei additur satis demonstratæ frustra est.* His application is not to be turned from its dominant meaning by the addition, which may be rejected as surplusage: *Doe* v. *Galloway* (1), and *per Parke* B. in *Doe* v. *Cranstoun* (2). Hitherto I have dealt with the matter without reference to the *Land Act* 1898, several sections of which were cited. I take, first, sec. 105, referring to the position of pastoral leases. Comtesse's application clearly satisfies this section, if it is imperative, for the Eracootharra Pool was a "fixed point or object" which the Department could not easily mistake. The correspondence shows that it was well known by name, and a surveyor afterwards sent out seems to have had no difficulty in locating it. Sec. 19 was much relied on by the petitioners. It relates only to applications for land which has not been surveyed, but of course applies to cases where none of the surrounding land has been surveyed either. The argument was upon the passage beginning with the words "Every application," where they occur the second time, and ending at the proviso. This application did "contain . . . . a sketch of the proposed boundaries," together with the proposed starting point. Boundaries and the starting point were both "fixed . . . with reference to some natural . . . object," namely, Eracootharra Pool. The application shows the only "spring" we know of within the area applied for. But it is argued that it is deficient in a vital particular, because the boundaries must be "fixed wherever possible with reference . . . to land held by or in the occupation of any other person in the locality." The boundaries, it is said, were not truly so fixed, for Eracootharra Pool is, as a surveyor has found, on Block 584, and some miles south-east of Block 2941. On this I observe, first, that the boundaries are to be fixed with reference to land *held* or *occupied* by any other persons "in the locality," and Block 2941 was not on 7th February 1906 held or occupied by anybody, while it can scarcely be said that 584 was in the locality. Next, apart from the question of locality, I point out that this part of

(1) 5 B. & Ad., 43.

(2) 7 M. & W., 1, at p. 10.

the passage is imbedded in a number of directions referring to things visible on the spot, viz., objects, natural or, if artificial, permanent; lakes, rivers, and main streams; permanent waterholes and springs; and I think this part must refer only to land *visibly* "held by or in the occupation of" other persons in the locality, and in the absence of fences, surveyed boundaries, or neighbouring homesteads, it cannot be said that there was any such holding or occupation as an applicant could have discerned in February 1906. Thirdly, I do not think sec. 19 is imperative as contended by the petitioners. I think the Minister is entitled to accept an application for available land, *i.e.*, land not already the subject of contract, and otherwise open to lease, even if the directions of this section have not been fulfilled by the applicant with exactitude. It is not to be supposed, for instance, that an application accepted by the Minister would be void, if, after fixing the starting point and boundaries with reference to an outstanding tree with a distinctive mark on it, and showing the position of the land with reference to a lake or river, and also to the boundaries of an adjoining holding, or to the limits of the occupation of a neighbouring run-holder, it failed to show one out of several permanent waterholes or springs. To make particularity of an extreme kind the indispensable condition of a valid application would be an obstacle to the development of the country, which I am sure the legislature never contemplated. But what it aimed at was an identification of the land which would enable the Minister to see what was applied for, and would save other applicants from harassing conflict.

I am clearly of opinion, therefore, that neither section 105 nor sec. 19 stands in the way of the acceptance of Comtesse's application to the extent that it included land not already lawfully allotted to others.

It is of course open to the Minister under sec. 21 (2) to refuse such an application as that of Comtesse. But if he accepts it he does so according to its true meaning. This application was accepted without any condition or reservation, but the acceptance must be restricted to that which the Minister could rightfully grant, and the acceptance, in my opinion, rendered complete a contract the meaning of which is clearly ascertainable by refer-

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ence to the ordinary and sensible rules for the interpretation of documents.

In discussing the meaning of the contract I have said that the figures referring to the boundary of the then proposed Block 2941 may be rejected as surplusage. Leaving them out of consideration, we have the Minister accepting the application for an area of land ascertainable in its relation to the Eracoothra Pool, but so as not to include any part of the land applied for which had already been let to others.

Obviously then the contract cannot include the Eracootharra Pool. It is common ground between the petitioners and the Crown that this spring is within the limits of the petitioners' lease of Block 584, and if Comtesse were a party here it is plain that he could not have that which before his application had been given to others. For the same reason he cannot have a starting point south-west of the pool. But Comtesse's contract entitles him to 20,000 acres as near to the pool as the tenure of others created before his application will allow. Though his land so taken includes part of Block 3155, applied for by the petitioners three months after the acceptance of Comtesse's application, and granted to the petitioners on 28th September following, the validity of the contract with Comtesse has the effect of excluding the petitioners from the right to that part. As they place their claim entirely on the assertion of that right, their appeal must fail, for they do not set up that they can have specific performance of, or damages for the breach of, a contract to let to them land already the subject of a similar contract made with another person. In any case we could scarcely have entertained a claim for specific performance, seeing that Comtesse, whose claim to the same land was involved, is not a party. It is fortunate, however, that in this instance the absence of a person directly interested has not operated to his injury.

I am of opinion that the appeal should be dismissed.

O'CONNOR J. The appellants, in July 1906, applied under the *Land Act* 1898 for a pastoral lease of 40,000 acres in the Ashburton District of Western Australia. The application describes the land only by a sketch plan. There is no reference to any

natural feature, but it is shown as adjoining the eastern boundaries of leases 2941 and 584, which were, at that time, approved applications in the appellants' occupation. The starting point is indicated at the north-east corner of lease No. 2941. The shape is a parallelogram, of which the length marked on the boundary lines enclose the acreage applied for. In September 1906 the application was approved, and numbered 3155. The land was subsequently occupied by the appellants, who expended a substantial sum in improvement upon it. The present suit was brought to obtain a declaration of their right to a lease of the land comprised in the application, and an order for specific performance of the implied contract to grant a lease, or, in lieu thereof, for damages.

But for the rights which it is contended another applicant, Comtesse, had acquired over a substantial portion of the same land before the appellants' application, the latter would, without doubt, be entitled to the relief which they are seeking. The result of the present suit will therefore depend upon what are Comtesse's rights. His application was made and approved some months before the appellants'. *Rooth* J., in the Court of first instance, construed his application as describing a block of land adjoining the appellants' 2941 on its northern boundary only. If that is really the position of the land applied for, the appellants' application No. 3155 does not conflict with it. The Crown, however, dispute the correctness of that construction of the description, and contend that Comtesse's application covers land adjoining the whole of 2941 and part of 584 on their eastern boundaries, and therefore covers a substantial portion of the appellants' subsequent application 3155. If that contention is right, as the Supreme Court have held, the appellants must fail. This Court is now called upon to determine which of these contending constructions is correct. There is only one way in which that question can be settled, and that is by determining what is the right interpretation of the description in Comtesse's application. All the material parts of the description are contained in the sketch plan, which appears on the application. It shows the appellants' 2941 adjoining their 584 on its northern end, and it shows the land applied for in the form of a square, as adjoining the northern boundary of 2941, overlapping that boundary, in a

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due westerly direction, from the north-west corner of 2941 for about 175 chains to a point which is marked as the starting point of the description. But the starting point is also fixed in another way.

A natural feature, Eracootharra Pool, is marked in the south-west corner of the square, its distance from the southern boundary and from the western boundary of the square being so marked in links as to enable the starting point at the south-west corner to be definitely fixed on the ground, in relation to the pool. In other words, a surveyor on the ground with the application, having located the pool, would have no difficulty in fixing the starting point of the application.

Before dealing with the description, it becomes necessary to advert to some surrounding circumstances, the significance of which when once appreciated appear to me to afford an unerring guide in the interpretation of the document under consideration. At the date of Comtesse's application the appellants' 2941 had not been approved. It was at that time still open to the Government to reject it altogether, or to approve it with conditions and reservations (sec. 21 *Land Act*). The appellants' 584, though approved and occupied by the appellants' stock, was not marked or fenced, and had not, up to that time, been surveyed. It was a very large irregular area, embracing something like 630 square miles, running back as far as 40 miles, in its widest part 15 miles, and in the narrow tongue of it, jutting out to the north, to which 2941 was attached, it was about seven miles wide. Not only had 584 not been surveyed, but the position of Eracootharra Pool on the ground had not then been fixed. It has since been located by survey on 584, being on Eracootharra Creek, near where that Creek crosses the eastern boundary of that portion. But at the time of Comtesse's application, it appears to have been the opinion of responsible officers of the Lands Department that the pool was about nine miles to the north-west of that position, about where it is marked in Comtesse's application. I turn now to two sections of the *Land Act* 1898, which have some materiality in the construction of Comtesse's application. Secs. 19 and 105 were referred to by Mr. *Pilkington* as imposing, upon applicants for pastoral leases, the

obligation of observing certain requirements in the form of the application.

I assume that both sections apply to applications for pastoral leases. But, in my opinion, their provisions are directory only. The Lands Department may, if it thinks fit, insist on compliance, but, when it has approved an application, failure to comply with some particular requirement of the sections would not, of itself, invalidate the application.

In the present controversy the provisions are relevant only as explaining the form of Comtesse's application. He no doubt intended to describe the land applied for by some natural feature, as provided by sec. 105, and, with reference to the occupation of land adjoining by the other persons in the locality, as provided by sec. 19.

The latter section, in requiring the proposed boundaries to be shown on the sketch with reference to "land held by or in the occupation of any other person," undoubtedly has regard to the land itself actually designated on the ground by occupation or by visible marking. It is referring to an artificial feature, if it may be so termed, in contradistinction to the natural feature mentioned a few lines earlier in the section. But both features must be features such as a surveyor could identify on the ground. It is, of course, often impossible to do more than refer to neighbouring lands, according to the occupation which a map purports to show. Nothing more than that was possible in this case when Comtesse made his application. At that time 2941 had not even been approved. Even if 584 had then been surveyed, the position on the ground of the northern boundary of 2941 would have been a mere matter of conjecture. But when one remembers that 584 itself was not then surveyed, and that its boundaries had never been fixed by Government on the ground—when one remembers its extent and shape—it is impossible to suppose that the line shown on the map, as the northern boundary of 2941, could be anything more than the vaguest approximation to the position which that line would occupy, when the positions of 584 and 2941 on the ground were fixed by actual survey.

Turning now to Comtesse's description, in the light of these surrounding considerations, its general intent becomes perfectly

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plain. Its main object was to indicate to the Lands Department where the land was, so that its starting point could be found, and its boundaries marked out on the ground. Anything else in the description was in aid of that object. The main feature of the description was therefore the fixing of the starting point at the south-west corner, by reference to the natural feature which he selected to use for that purpose—Eracootharra Pool. That alone was sufficient.

For the purposes of enabling the land applied for to be located on the ground, there was no need to show how the starting point stood, with regard to the land of neighbouring occupiers. He does, however, add that feature to his sketch plan, no doubt in attempted compliance with sec. 19; but can there be any doubt that he intended thereby to describe, by an additional feature, the same land, the land which was to be found by the measurements from the described starting point near Eracootharra Pool as inserted on his sketch plan? When the description is applied to the land, it turns out that Comtesse was mistaken when he fixed the boundary of 2941 as lying near to and eastward of the pool.

Under these circumstances, the only way in which the plain intent and object of the description can be given effect to is by treating that part of the description which refers to neighbouring occupiers as surplusage, and rejecting that portion of the sketch which wrongly describes the northern boundary of 2941 with reference to the pool. The well known principle *falsa demonstratio non nocet* is clearly applicable to such a description. In *Martin* v. *Baker* (1), and other decisions cited by Mr. *Russell*, the Court rejected as *falsa demonstratio* much larger and more vital portions of descriptions than it is called upon to reject in the present case. For these reasons I am of opinion that Comtesse's application must be read as describing the land applied for only by reference to Eracootharra Pool.

As the position of the pool has been fixed by survey within 584, and near its eastern boundary, the land applied for must adjoin that block to the east, and must therefore include a substantial portion of the land described in the appellants' subsequent

(1) KNOX (N.S.W.), 418.

application. Although that reading fixes Comtesse's starting point within the boundaries of appellants' 584, the identification of the land applied for is none the less definite. Comtesse's application can give him no right over any portion of 584. But the Government, by virtue of its powers under the *Land Act* 1898, may, as it has done, grant so much of the application as does not encroach on lands previously leased or granted, and may alter the boundaries of the application accordingly. It must be taken that the Government approved of Comtesse's application as legally construed, and that therefore when the appellants applied for 3155 a substantial portion of the land applied for had been already covered by Comtesse's approved application.

I therefore agree with the interpretation which the Supreme Court has placed on Comtesse's application, and hold with them that the appellants were not entitled to succeed in the action.

It follows that, in my opinion, the appeal must be dismissed.

Appeal dismissed with costs

Solicitors, for appellants, *Stone & Burt.*

Solicitor, for respondent, *Barker*, Crown Solicitor.

H. V. J.