CASE LAW WORKSHOP

Selected Cases in Adverse Possession

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[COURT OF APPEAL]

Brown v. Phillips et al.

SCHROEDER, MCGILLIVRAY AND KELLY, JJ.A. 8TH NOVEMBER 1963.

Limitation of actions — Possessory title to land — Quality and duration of required possession — Limitations Act, ss. 4 and 15.

A succesful claim of possessory title under ss. 4 and 15 of the *Limitations Act*, R.S.O. 1960, c. 214, must be founded on satisfactory evidence by the claimant as to the quality and duration of the possession relied upon. As to quality, his possession must be such as to give the rightful owners a right of action for recovery of their land as distinct from a mere right of action for trespass; and as to duration, it must be shown that such right of action was allowed to go unenforced continuously for the statutory 10-year period. A right of action for re-

covery of land does not accrue on mere wrongful entry by way of trespass but only when the conduct of the wrongdoer is such as to prevent the owner from enjoying that measure of physical possession of which the land in question is capable. The owner, in effect, must be excluded from his land, and any degree of possession by the wrongdoer short of this (in the sense that the owner is not prevented from enjoying some use) will not extinguish the owner's title even if such possession is continued for the statutory period. The right of action for recovery of land will terminate when the wrongful possession of the necessary quality is interrupted or the exclusion of the owner ceases, and if such possession is later resumed time begins to run anew without reference to the anterior possessory period. *Held*, where a person acquires a possessory title he is not entitled to an order declaring him to be the owner but only to one declaring the owner's title to be extinguished.

[*Gray v. Richford* (1878), 2 S.C.R. 431, follld]

APPEAL by defendants from a judgment for plaintiff for trespass and a declaration of possessory title.

B. Grossberg, Q.C., for defendants, appellants.

G. T. Walsh, Q.C., for plaintiff, respondent.

The judgment of the Court was delivered by

KELLY, J.A.:—This is an appeal by the defendants from the judgment of His Honour Judge A. M. Carter, sitting in the County Court of Victoria, dated February 18, 1963; that judgment declared the plaintiff to be the owner of a possessory title in certain lands in the Village of Fenelon Falls, awarded damages for trespass and ordered a fence to be replaced.

The action as it was originally constituted was against the male defendant alone and, notwithstanding the fact that the formal judgment purported to include Georgina Phillips as a defendant and to award a judgment against her, Georgina Phillips, at the date of the hearing of this appeal, was not a party. On October 16, 1963, pursuant to a consent signed by her, she was made a party. Since her testimony had been given at trial and her position at law is identical with that of her co-owner Brandt Phillips, I proposed to deal with this appeal as if Georgina Phillips had been regularly made a party at or before the trial.

Lot 62 and block "A", plan 100, are contiguous parcels of land situated on the south side of Helen St. in the Village of Fenelon Falls, lot 62 being to the west of block "A". One dwelling-house stands completely within the limits of each parcel. For a considerable number of years prior to 1944, Sarah Sabina Martin, and, after her death, her executors were the owners of both lot 62 and block "A".

By deed dated December 18, 1944 and registered on August 13, 1945, the Martin executors conveyed to Archibald L. McKendry the whole of block "A"; he in turn, by deed dated

October 15, 1953 and registered on October 26, 1953, transferred the whole of block "A" to the defendants as joint tenants. While the evidence is not conclusive as to who were the occupants prior to 1950, it would appear that from 1950 until the Phillips acquired the property, the house upon block "A" was occupied by a Mrs. Webber as a tenant of the owner McKendry. Since their purchase, the Phillips have themselves occupied that house.

The Martin executors conveyed lot 62 to Norman Percy Martin by deed dated July 14, 1947, and registered September 21, 1950. No evidence was adduced as to the occupancy of the house on lot 62 prior to the year 1950. At some time in that year one Townley went into possession of the house as a tenant of Norman Percy Martin and continued to reside there until lot 62 was purchased by the plaintiff in 1953; since that time the plaintiff's daughter and her husband have been the occupants.

A great number of years ago, while the two parcels were in common ownership, a picket fence was erected on block "A", commencing at a point in the south limit of Helen St. distant 23 ft. east of the boundary line between lot 62 and block "A" and running on a course south nine degrees fourteen minutes east (approximately at right angles to Helen St.) for a distance of approximately 40 ft. This picket fence at its southerly end did not connect with any other fence or erection; its northerly end appears to have met the easterly end of a low stone wall surmounted by a woven-wire fence which extended westerly along the south limit of Helen St. from the picket fence to a point beyond the projection northerly of the west face of the west wall of the house on lot 62.

The land in dispute in this action is a quadrilateral, bounded on the north by the south limit of Helen St., on the south by the south limit of block "A", on the west by boundary line between block "A" and lot 62 and on the east by the line of the west face of the picket fence and its projection southerly to the south limit of block "A".

Some time after the plaintiff became the owner of lot 62, the stone wall surrounded by the woven-wire fence, along the north limit of the land in dispute, was removed by the plaintiff or his tenants to permit entry of cars from Helen St. onto the north portion of the land in dispute; thereafter regular use was made of the northerly 30 ft. of the land in dispute for the parking of cars of the plaintiff's tenants.

In 1955, the picket fence along the east limit of the land in dispute having fallen into disrepair, it was replaced by an-

other fence which remained standing until removed by the defendants in the year 1962. The learned trial Judge has found that the male defendant took the initiative in proposing that the fence be replaced and that Jones, the plaintiff's tenant was asked to share the costs of the lumber for the new fence. No discussions took place at that time between the defendants and Jones as to the location of any boundary line.

In July, 1962, the defendant, without consulting the plaintiff or his tenants, removed the picket fence and erected a fence along the dividing line between lot 62 and block "A". This conduct gave rise to the present action in which the plaintiff claims:

(a) damages in trespass occasioned by the defendant to the plaintiff's land;
(b) removal by the defendant of the fence erected by the defendant on the plaintiff's land;
(c) an order directing that the defendant replace the fence removed by him in or about the month of June, 1962;
(d) a declaratory judgment establishing the boundary between the land of the plaintiff and the defendant.

The defendants assert title to the lands in dispute as owner by virtue of the grant from McKendry. The plaintiff alleges that the defendants' title has been extinguished by the plaintiff's possession for a period of 10 years commencing in the year 1950. To succeed the plaintiff must satisfy the Court that by virtue of ss. 4 and 15 of the *Limitations Act*, R.S.O. 1960, c. 214, the right and title of the defendants to the said lands had been extinguished, prior to the commencement of this action, by reason of failure of the defendants to exercise their right to make an entry or to bring an action to recover the lands for a period of 10 years from the time when the right to make entry or bring the action first accrued to them.

The relevant sections of the *Limitations Act* read as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.
>
> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

To satisfy the statute the plaintiff must give satisfactory evidence as to the quality and the duration of the possession on which he relies; as to the quality — that his possession of the land in dispute was such as to give the defendants a right of action for the recovery of the land, as distinguished from a mere right to bring an action for trespass; as to the duration — that such right of action was allowed to go on unenforced for a continuous period of 10 years.

The right of an owner to bring an action for the recovery of land against the wrong-doer depends not on the wrongful entry by the wrong-doer which would be the foundation for an action for damages for trespass. The right of action for recovery of land accrues only when the conduct of the wrong-doer on the land in question is such that the owner thereof is prevented from enjoying that measure of physical possession of which land of the character of the land in question is capable. In other words, the conduct of the wrong-doer must be such that the owner is excluded from his land. Consequently, any degree of possession by the wrong-doer which does not prevent the owner from enjoying some use of the land (whether or not such conduct may be sufficient to create some easement in favour of the wrong-doer) will not, even if continued for the statutory period, extinguish the title of the real owner.

The right to bring an action for recovery of land accrues when possession, of the necessary quality, occurs. If possession of that quality is interrupted, or there be any cessation in the exclusion of the owner, then necessarily the right of action itself terminates and time ceases to run under the statute. If wrongful possession is later resumed a new cause of action for recovery accrues and time again begins to run but will be calculated only from the beginning of the latter act of possession. To satisfy the requirements of the statute the possession of the wrong-doer must therefore be exclusive and continuous in the sense I have above described.

It is admitted by the parties that despite the fact that the plaintiff has not been the owner of his lands for a full period of 10 years the occupation of the predecessor in title of the plaintiff may be taken into consideration and that if the plaintiff and his predecessor in title are proven to have been in continuous occupation for 10 years during the time of their successive ownership, the plaintiff is entitled to the same remedies as if he personally had been in occupation during the time his predecessor in title is proven to have occupied the lands.

After a careful perusal of the evidence I am in agreement with the conclusions of the learned trial Judge that the plaintiff has given proof of possession of a character and a duration sufficient to extinguish the defendants' right of action for recovery of and title to that part of the land in dispute to which the possession extended: but having in mind the onus on the plaintiff to establish continued and exclusive possession of the land with respect to which he claims the defendants' title has been extinguished, I consider that the learned trial Judge erred in finding that such possession extended to the whole of the lands in dispute.

At trial considerable reliance was placed on the existence of the picket fence as indicating the line recognized by both parties as the boundary between the respective properties. The evidence clearly established that the lands in dispute were never enclosed fully by any fence or other erection. In view of the nature of the fence, I do not consider that it is more than one of the elements of evidence from which must be drawn the conclusion as to whether the necessary possession has been proven by the plaintiff.

The picket fence was erected by the common owner of both parcels and correspondingly belonged wholly to him. By the successive conveyances to McKendry and the defendants the whole of such fence became the property of the defendants. At the time when the fence was removed in 1955, the land upon which it stood, in fact the whole of block "A", still belonged to the defendants since at that time there had not been continuous possession for a time sufficient to have extinguished their title. The plaintiff did not acquire his title by possession to any part of the land in dispute until some time in the year 1960, and the defendants until that time could have maintained an action for recovery of land in respect of the whole of the lands in dispute. Whatever contribution the plaintiff or his tenants made in time or money to the reconstruction of the fence did not give to anyone but the defendants any right of ownership in the fence, and at the time of its destruction the defendants still were the sole owners of it.

The plaintiff could not have been at any time in exclusive possession of the lands upon which the picket fence stood nor of any part of block "A" lying east of that picket fence; nor can I see on the evidence how he could establish exclusive possession of any part of the portion of block "A" lying south of the southerly terminus of the picket fence. Consequently, I conclude the part of the land of which the defendants' title

has been extinguished must lie to the west of the west face of the picket fence and to the north of the southerly terminus of the picket fence. I would accordingly reduce the area of the land to which the defendants' title has been extinguished to a parcel of land

> COMMENCING at an iron bar planted in the southerly limit of Helen St. at the boundary between lot 62 and block "A" registered plan 100, Fenelon Falls; THENCE easterly along the southerly boundary of Helen St. a distance of 23 ft. to a point where the same is intersected by the line of the west face of a picket fence standing in the year 1962; THENCE southerly on a course nine degrees fourteen minutes east, 40 ft. more or less to a point, said point being the southerly terminus of the said picket fence; THENCE westerly parallel to the southerly boundary of Helen St. to the westerly boundary of block "A"; THENCE northerly along the westerly limit of block "A" to the point of commencement.

Turning to deal with the claims of the plaintiff in the order in which they are set out in the pleadings, I would support the findings the learned Judge made that the plaintiff has proven trespass by the defendants, but of course that trespass must be limited to that portion of the land in dispute which I have described in the preceding paragraph; as to the balance of the land in dispute there can have been no trespass; if any fence or obstacles erected by the defendants still stand on that land, there should be an order for their removal by the defendants.

Since the original picket fence removed by the defendants in June, 1962, was, in my opinion, wholly on the defendants' lands and was their absolute property, they cannot in these proceedings be directed to replace that fence; the *Line Fences Act*, R.S.O. 1960, c. 216, provides machinery for the erection of boundary fences if one is required.

While I consider that the plaintiff is entitled to judgment declaring that the title of the defendants to the lands above described has been extinguished, I do not consider that in this action the plaintiff can have an order declaring him to be the owner of these lands. The position of the person whose possession has extinguished the title of the former owner was stated by Strong, J., in *Gray v. Richford* (1878) 2 S.C.R. 431 at p. 454 as follows:

> The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not one of acquisitive prescription — in other words, the Statute operates to bar the

right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 *Wm.* 4 says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of *James*, which only barred the remedy by action, but its operation is by way of extinguishment of title only.

There is no reason for interfering with the portion of the judgment dismissing the counterclaim of the defendants.

I would allow the appeal of the defendants with costs and vary the judgment at trial so that the judgment as varied would

(1) order that the plaintiff do recover against the defendant $100 for trespass,
(2) declare that the defendants' right to recover possession of and the defendants' title of and to the lands described above have been extinguished,
(3) order that the defendants do pay the plaintiff's costs of the action forthwith after taxation thereof,
(4) order that the defendants' counterclaim be dismissed without costs.

Appeal allowed in part.

RAAB v. CARANCI et al.

Ontario High Court of Justice, Lerner, J. March 3, 1977.

Real property — Adverse possession — Quality of possession — Plaintiff constructing small brick wall partly over defendant's property — Property paved and maintained by plaintiff — Property in constant open view of all parties — Plaintiff asking no permission from defendant — Plaintiff not seeking any defrayment of cost — Plaintiff satisfying onus of establishing adverse possession.

[*Pflug and Pflug v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681; affd [1953] O.W.N. 140, [1953] 1 D.L.R. 841; *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; *Warren v. Yeoll*, [1943] O.R. 762, [1944] 1 D.L.R. 118; *Walker et al. v. Russell et al.*, [1966] 1 O.R. 197, 53 D.L.R. (2d) 509; *Smaglinski et al. v. Daly et al.*, [1970] 2 O.R. 275, 10 D.L.R. (3d) 507; affd [1971] 3 O.R. 238, 20 D.L.R. (3d) 65, apld]

Real property — Adverse possession — Plaintiff establishing adverse possession to certain property — Plaintiff given declaratory judgment that he has possessory title to lands.

EDITORIAL NOTE: This case only recently came to our attention but was thought to be of sufficient importance to be reported at this time.

ACTION for declaration of possessory title.

J. H. Gardner, Q.C., for plaintiff.
H. J. Keenan, for defendants.

LERNER, J.:—This action is for a declaration of possessory title to land claimed by adverse possession.

The issue is whether the plaintiff acquired possessory title by virtue of the *Limitations Act*, R.S.O. 1970, c. 246, ss. 4 and 15, to a small triangular piece of land forming part of the defendants' front yard adjoining the street.

The plaintiff and defendants are owners of adjoining residences. The plaintiff obtained his residence at 132 Jay St. about June 25, 1958, and on the south thereof the defendant, Domenico Caranci, and his brother took possession of 130 Jay St. on March 4, 1959.

In the summer of 1959, the plaintiff built a brick wall between his and the defendants' front yards with its east end beginning well on the street allowance at the roadside curb at a height of about four inches. The wall rose as it extended westward to a maximum height of 18 ins. at the point where it terminated. This wall encroaches on the defendants' land 3.16 ft. at the point where it crosses the street line. From there the wall angles northwest for approximately 17 ft. to the point where it terminates on the mutual boundary line. This is near the front wall of the plaintiff's garage that is built into his house.

Within weeks of finishing the wall, the plaintiff paved the whole of his driveway, including all land on his side (the north side) of the brick wall beginning at the municipal road curb and thence westward to the front wall of his garage. In the result, the east 18 ft. of the brick wall and all pavement to the north of that 18 ft. are on municipal lands and, similarly, the remaining west 17 ft. of the wall and pavement encroach on the defendants' property. This whole paved area is triangular in shape: see survey ex. 5.

In the next year the plaintiff erected several metal posts on the defendants' lands immediately to the south of the brick wall. These posts continued to the rear (west end) of his property. He did not string any wire. The plaintiff alleged that he had an agreement with the defendant, Domenico Caranci, and his brother, Desiderio, that they would string the wire if he erected the posts but the brothers never carried out their end of the bargain.

They never objected or complained about the wall or pavement at that time. The most easterly post can be seen on the municipal lands at the road curb in ex. 13. I am satisfied that it was installed as early as the year 1960 because ex. 13 must have been taken in 1960. The station-wagon seen in this photograph (when magnified) has a 1960 Ontario licence plate and is similar to the station-wagon seen in ex. 10.

The only other alleged discussion was between the defendant, Pasqualine Caranci, and the plaintiff about May 11, 1965, when she confronted the plaintiff in the backyard where he was erecting a new fence. The plaintiff assured her he was erecting a fence to a point approximately opposite the front wall of his garage and not in the front yards. She had no objection to the extent of that fencing because it was being erected on their common boundary line and not encroaching upon her property. She did not suggest that there was any encroachment in the front yard [*sic*] by the wall or pavement.

The defendants had a survey carried out in August, 1973. The plaintiff observed the surveyor drive a spike into the boundary line between their respective properties substantially north of the brick wall. He made no objection and no argument occurred until Sunday, June 30, 1974, when the plaintiff and his wife returned from church to find that the defendant, Domenico, and his brother had erected a metal mesh wire fence on the surveyed boundary. This fence can be seen in ex. 15, photograph 1, and ex. 14, photographs 1 and 2. The most easterly post is at the point of intersection of the boundary line and the street line and at the point where the surveyor's "set nail" or spike is seen in ex. 7. The defendants' new fence continues along this boundary line as established by the survey westward ending even with the front wall of the plaintiff's house.

These residences are in an area of small city lots crowded with dwellings and garages. For example, the fronts of their respective dwellings are approximately 17 ft. from the street line. The south-east corner of the plaintiff's house and garage is 1.98 ft. from the common boundary and at its rear, 5.98 ft. from the line. The front of the defendants' house is 11.82 ft. from the same boundary and 6.63 ft. from it at the rear. Neither dwelling stands parallel to the lot lines, but the erection of the brick wall by the plaintiff in 1959 gave the adjoining lots an appearance of symmetry.

The defendants, the brother and his wife, putting their evidence at its highest, gave uncertain, questionable and unconvinc-

ing testimony about their objections to the encroachment. They testified that they had complained in 1960 and were told by the plaintiff that if they were not satisfied with the location of the brick wall they should obtain a survey. Their explanation for failing to obtain this was a lack of funds. They also claimed to be aware that there was an encroachment because they had measured their 50-ft. frontage, using a marker located on the adjoining property to the south at the time of their purchase. I find this difficult to accept because this would have made it obvious that the brick wall and pavement were on their land. They also claimed to have asked the plaintiff to remove the metal posts that he erected south of the brick wall in 1960. In the photographs taken approximately 14 years later, they are still standing. If that request had been made and refused, there was nothing to prevent them from removing these posts. They also testified that the plaintiff assured them that if a survey showed the wall and pavement encroaching, he would remove them. I accept the plaintiff's denial that this conversation took place. The defendants, in my view, were attempting to establish that this was a permissive encroachment or easement and not adverse possessory title. I reject that proposition.

The defendant, Domenico Caranci, and his wife, Pasqualine, purchased his brother's undivided half-interest on January 11, 1963. Neither the defendants nor the brother, while he was a joint owner, ever made objection to the brick wall or to the pavement until the defendants obtained a survey about August 29, 1973, establishing the triangular encroachment: see ex. 7. The defendants obtained this survey for the purpose of ascertaining the location of their front yard vis-à-vis the street line because they intended to build a front porch and did not want to encroach on land of the municipality. It was not obtained to verify an encroachment by the brick wall and pavement.

The adverse possessory title claimed by the plaintiff is not a common factual situation when compared to the facts found in many of the cases dealing with this type of dispute. It is a claim to part of the front yard of the defendants' property which was in constant open view of all parties, having been paved and presumably maintained by the plaintiff and enclosed with his land by a brick wall, albeit, of low height. In 1971, the municipality tore up the pavement and wall on its street allowance when it installed sewers and sidewalks. At the conclusion of the project, its workmen restored the pavement and brick wall as it had existed for almost 12 years. There was no objection or complaint from the defendants when this restoration was being made.

Over the years the parties were on good terms. They visited by stepping over the brick wall to and from their dwellings. At times the defendants' children played on the paved driveway.

In order to establish his right to possessory title by adverse possession, the plaintiff must establish that his possession is open, notorious, constant, continuous and exclusive of the right of the true owner. In *Pflug and Pflug v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681, affirmed [1953] O.W.N. 140, [1953] 1 D.L.R. 841, Wells, J., at p. 527 O.R., p. 689 D.L.R., stated in words cited with approval by the Divisional Court in *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482 at p. 487, 50 D.L.R. (3d) 650 at p. 655, that to succeed claimants to title by adverse possession must show:

> (1) Actual possession for the statutory period by themselves and those through whom they claim;
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> (2) that such possession was with the intention of excluding from possession the owners or persons entitled to possession; and
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> (3) discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.

All of these requirements must be met throughout the ten-year limitation period as provided by ss. 4 and 15 of the *Limitations Act*.

In *Warren v. Yeoll*, [1943] O.R. 762, [1944] 1 D.L.R. 118, the plaintiff sued for possessory title. A fence enclosed part of the defendants' land making it appear to be part of the plaintiff's adjoining property. At pp. 768-9 O.R., pp. 122-3 D.L.R., Gillanders, J.A., stated:

> While the existence of the fence is not conclusive evidence of possession under the circumstance here present it is cogent evidence. Standing as it did between two small city lots, it is of more significance here than it might be in the circumstances in the case of *Ledyard v. Chase*, *supra* [(1925), 57 O.L.R. 268, [1925] 3 D.L.R. 794], where the property in question consisted of marsh lands. In addition to this there is relevant evidence, apparently accepted by the trial judge, referring to the property lying to the north of this fence. It is in evidence that in the period from 1914, when the fence was erected, in 1934, the occupants of the adjoining property "had children who used to play in that yard and used to use the whole of that"; that the adjoining owner "used it all the time" and that the defendant's predecessors in title never disputed the right of the adjoining owner to use the lands to the north of this fence.
>
> I appreciate that the evidence of user and occupation is sketchy. It must, however, be viewed in the light of the circumstances of this case. The land in question is part of a small city residential lot. The board fence was treated as the boundary line by all parties for much longer than the necessary statutory period, and the defendant and his predecessors in title back to 1914 never disputed the right of the plaintiff, and his predecessors in title, to use the land beyond the fence.

The evidence of the defendants has not had that ring of conviction to weaken the precise evidence of the plaintiff and his witnesses that he took possession of the disputed land in 1959 and that it was never questioned, objected to or treated by the defendants as anything but the plaintiff's property until they obtained a survey in 1973 for other purposes and indirectly discovered the encroachment.

The plaintiff had the *animus possidendi* — the intention of possessing the disputed triangle of land. He first built the wall and then paved all land north thereof. He asked no permission nor sought any help to defray the cost. He also maintained the wall and pavement continuously for more than ten years as his own property.

The plaintiff, who bears the onus of establishing his adverse possession, has satisfied the several areas of the burden as discussed in *Walker et al. v. Russell et al.*, [1966] 1 O.R. 197, 53 D.L.R. (2d) 509; *Pflug and Pflug v. Collins, supra*, and *Smaglinski et al. v. Daly et al.*, [1970] 2 O.R. 275, 10 D.L.R. (3d) 507; affirmed [1971] 3 O.R. 238, 20 D.L.R. (3d) 65.

In my view the plaintiff's right to possessory title is not affected by the fact that he may not have been aware that he had taken possession of lands to which he did not have the legal title. In *Smaglinski et al. v. Daly et al.*, Osler, J., stated at p. 282 O.R., p. 514 D.L.R.:

> It is pointed out by Smily, J., in *McGugan et al v. Turner*, [1948] O.R. 216 at p. 221, [1948] 2 D.L.R. 338 at p. 342, that acts that would otherwise evidence a possessory title done under a mistaken assumption as to the title may nevertheless be acts of possession such as, if continued for the requisite period, will result in a possessory title. By analogy, I think it can be said that a person who remains in exclusive possession, even though uncertain of his right to do so, can nevertheless acquire a possessory title. In the present case Joseph Norlock, though uncertain of and quite probably unconcerned about the precise legal nature of his occupancy, did act in a manner entirely consistent with ownership in clearing and sowing the land and there is no evidence whatever that his right to do so was questioned at any time by Philip Norlock, owner of the paper title.

This was referred to directly in the appeal with approval in [1971] 3 O.R. at p. 239, 20 D.L.R. (3d) at p. 66.

In the result there will be (1) a declaratory judgment that the plaintiff has possessory title to the lands described in the metes and bounds description in para. 5 of the statement of claim; (2) an injunction restraining the defendants, their servants or agents from interfering with the plaintiff's wall and use of the lands described above; (3) a mandatory injunction requiring the defen-

dants to remove the post and wire fence constructed by them on the boundary of the above described lands and the plaintiff's lands, and (4) damages for damage done to that portion of the driveway by the erection of the fence in the sum of $50. The plaintiff shall have his costs of the action against the defendants on the County Court scale.

Judgment accordingly.

RAAB v. CARANCI et al.

[97 D.L.R. (3d) 154]

Real property — Adverse possession — Quality of possession — Plaintiff constructing small brick wall partly over defendant's property — Property paved and maintained by plaintiff — Property in constant open view of all parties — Plaintiff asking no permission from defendant — Plaintiff not seeking any defrayment of costs — Plaintiff satisfying onus of establishing adverse possession.

Real property — Adverse possession — Plaintiff establishing adverse possession to certain property — Plaintiff given declaratory judgment that he has possessory title to lands.

NOTE: After this case was published we were informed that an appeal from the judgment of Lerner, J., was dismissed by the Ontario Court of Appeal (Brooke, MacKinnon and Weatherston, JJ.A.) on March 8, 1979. No reasons were delivered but the following was endorsed on the appeal record by

BROOKE, J.A.:—There was evidence upon which the learned trial Judge could properly base his conclusions of fact. The case is essentially factual and since the findings are unassailable we cannot interfere. The appeal must be dismissed with costs.

LUTZ v. KAWA

Alberta Court of Appeal, McGillivray, C.J.A., Laycraft and Harradence, JJ.A.
April 18, 1980.

Real property — Adverse possession — Neighbour erecting fence on registered title holder's side of property line — Both parties assuming fence on property line — Whether neighbour's possession of enclosed strip of land adverse — Whether mental element required to achieve title through adverse possession — Land Titles Act, R.S.A. 1970, c. 198, s. 73.

Land titles — Adverse possession — Neighbour erecting fence on registered title holder's side of property line — Both parties assuming fence on property line — Whether neighbour's possession of enclosed strip of land adverse — Whether mental element required to achieve title through adverse possession — Land Titles Act, R.S.A. 1970, c. 198, s. 73.

Land titles — Adverse possession — Limitation period — Occupation by neighbour of strip of registered owner's land — Whether 10-year time period for adverse possession commences against registered title holder during her occupation of land prior to her becoming registered title holder — Land Titles Act, R.S.A. 1970, c. 198, s. 73.

A fence was erected along what was assumed to be the dividing line between two lots. It subsequently was discovered that the fence was off the line and that it enclosed a small strip of the neighbouring lot. The plaintiff, who had owned property in and resided upon the lot for nearly 40 years, claimed title to the enclosed portion by adverse possession. The defendant had first occupied the neighbouring lot as the beneficiary under a will, but subsequently made payments owing under an outstanding agreement to purchase and acquired title less than 10 years prior to the commencement of the action.

On an appeal from a judgment which dismissed the plaintiff's action for a declaration that the registered owner's title to the strip of land had been extinguished, *held*, the appeal should be dismissed.

The fence had always been assumed by all concerned to be on the boundary line. The plaintiff's occupation was, therefore, though an actual possession which was open and notorious, not "adverse" in the sense of being a deliberate disregard of a superior property interest known to belong to another. Nevertheless, the lack of "adverse" intention to deprive the rightful owner is not material to the gaining of title by adverse possession. Section 73 of the *Land Titles Act*, R.S.A. 1970, c. 198, recognizes the adverse possessor's right to gain title notwithstanding the fact that the wrongful possession resulted from a mistake common to the parties as to the location of the boundary line. However, an acquisition of title requires that time run against the registered title holder for 10 years and title may be defeated whenever the registered title is transferred to a purchaser for value. Time had only begun to run against the current registered title holder when she acquired title and had stopped when she filed her defence and counterclaim to the plaintiff's action. As this time period was less than 10 years, the plaintiff's adverse possession was insufficient to deprive the defendant of her title.

[*Raab v. Caranci et al.* (1977), 97 D.L.R. (3d) 154, 24 O.R. (2d) 86 [affd 104 D.L.R. (3d) 160*n*, 24 O.R. (2d) 832*n*], aprvd; *Belize Estate & Produce Co., Ltd. v. Quilter*, [1897] A.C. 367; *Harris et al. v. Keith* (1911), 3 Alta. L.R. 222, 16 W.L.R. 433; *Wallace v. Potter* (1913), 10 D.L.R. 594, 4 W.W.R. 738, 6 Alta. L.R. 83; *Dobek v. Jennings*, [1928] 1 D.L.R. 736, [1928] 1 W.W.R. 348, 23 Alta. L.R. 306; *Boyczuk v. Perry et al.*, [1948] 2 D.L.R. 406, [1948] 1 W.W.R. 495; *Paradise Beach & Transportation Co. Ltd. et al. v. Price-Robinson et al.*, [1968] 1 All E.R. 530; *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Calfee v. Duke* (1976), 544 S.W. (2d) 640; *Clarke v. Babbitt*, [1927] 2 D.L.R. 7, [1927] S.C.R. 148; *Martin v. Weld et al.* (1860), 19 U.C.Q.B. 631; *McGugan et al. v. Turner et al.*, [1948] 2 D.L.R. 338, [1948] O.R. 216; *Smaglinski et al. v. Daly et al.* (1970), 10 D.L.R. (3d) 507, [1970] 2 O.R. 275; affd 20 D.L.R. (3d) 65, [1971] 3 O.R. 238; *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 50 D.L.R. (3d) 650, 5 O.R. (2d) 482; *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.* (1974), 44 D.L.R. (3d) 687, [1975] 1 S.C.R. 684, 5 Nfld. & P.E.I.R. 541, 1 N.R. 527, consd; *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.*, [1974] 3 All E.R. 575, refd to]

APPEAL from a judgment of Belzel, D.C.J., 98 D.L.R. (3d) 77, 9 Alta. L.R. (2d) 151, 17 A.R. 288, dismissing an action for a declaration of title by adverse possession.

Norman R. St. Arnaud, for appellant.
Donald M. Savich, for respondent.

The judgment of the Court was delivered by

LAYCRAFT, J.A.:—The appellant, Mrs. Lutz, appeals the dismissal by the learned trial Judge (98 D.L.R. (3d) 77, 9 Alta. L.R. (2d) 151, 17 A.R. 288) of her action claiming title by adverse possession to a triangular piece of land only a few inches in width at the edge of her residential lot in Edmonton. At issue on this appeal is the question whether land wrongly enclosed by a fence which, unknown to both owners, does not lie on the surveyed boundary line may be obtained by adverse possession. In this case the question is complicated by the fact that there have been, since the fence was built, changes in the ownership of the adjoining lot from which Mrs. Lutz seeks the land.

Mrs. Lutz became the owner with her husband of Lot 17 in a residential subdivision in Edmonton in 1938. They held title as joint owners until her husband's death in 1967 when Mrs. Lutz became the sole owner. The adjoining land to the south, Lot 18, was owned by Mr. and Mrs. Kushner. The two lots were separated by a wire fence when Mr. and Mrs. Lutz arrived in 1938. In 1964, with the approval of Mr. and Mrs. Kushner, Mr. and Mrs. Lutz replaced the wire fence with a substantial solid board fence supported by steel posts built into a partial concrete foundation. This fence was placed on the same line as the earlier wire fence.

The respondent, Mrs. Kawa, first occupied the house on Lot 18 in 1964 as a tenant of two joint owners, Nick Wozny and Walter Dmytrow, who had purchased the house from the Kushners under an agreement for sale in the same year. Mr. Wozny was her father. On May 28, 1966, Wozny and Dmytrow assigned their agreement for sale to her. She filed a caveat against the title to protect her interest on February 9, 1968. The balance owing was paid out and Mrs. Kawa received title to Lot 18 on February 2, 1971.

In August, 1977, Mrs. Kawa demolished her house on Lot 18 and built a new house. During this construction she had the lot legally surveyed and discovered that the fence built by Mr. and Mrs. Lutz in 1964, on the location of the earlier wire fence, was wholly on her Lot 18. The survey showed that this fence was 1.34 ft. south of the boundary at the lane, and .11 ft. south of it at the street. To these measurements must be added the five-inch width of the fence.

Following her discovery of the encroachment Mrs. Kawa requested Mrs. Lutz to remove the fence since she felt it interfered with the construction on her narrow lot. Mrs. Lutz responded to this request by filing a caveat against Mrs. Kawa's

title to Lot 18 on October 4, 1977, claiming an interest in the lot "under and by virtue of the right of adverse possession pursuant to The Limitation of Actions Act of Alberta". She did not, in this caveat, define the precise portion of Lot 18 as to which she advanced her claim.

In her action Mrs. Lutz followed the procedure prescribed by s. 73 of the *Land Titles Act*, R.S.A. 1970, c. 198, of seeking a declaratory judgment that Mrs. Kawa's title to the portion of Lot 18 which she claimed had been extinguished. On filing this judgment in the Land Titles Office she would obtain title to the disputed portion. Mrs. Kawa defended this action and counterclaimed for recovery of the land.

The relevant statutory provisions are ss. 18, 19 and 44 of the *Limitation of Actions Act*, R.S.A. 1970, c. 209, and s. 73 of the *Land Titles Act*. These sections provide:

The Limitation of Actions Act

18. No person shall take proceedings to recover land except

(a) within 10 years next after the right to do so first accrued to such person (hereinafter called the "claimant"), or

(b) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to such predecessor.

19. Where in respect of the estate or interest claimed the claimant or a predecessor has

(a) been in possession of the land or in receipt of the profits thereof, and

(b) while entitled thereto

(i) been dispossessed, or

(ii) discontinued such possession or receipt,

the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the *dispossession* or *discontinuance of possession* or at the last time at which any such profits were so received.

. . . . .

44. At the determination of the period limited by this Act to any person for taking proceedings to recover any land, rent charge or money charged on land the right and title of such person to the land, or rent charged or the recovery of the money out of the land is extinguished.

The Land Titles Act

73(1) Any person recovering against a registered owner of land, a judgment declaring that the person recovering the judgment is entitled to the exclusive right to use the land or that he be quieted in the exclusive possession thereof, pursuant to *The Limitation of Actions Act*, may file a certified copy of the judgment in the Land Titles Office for the proper registration district.

(2) At the expiration of three months after the filing thereof, the Registrar shall, unless he is satisfied that an appeal from the judgment is being taken, make, upon the certificate of title in the register, a memorandum cancelling the certificate of title, either wholly or partially, according to the tenor of the judgment and setting forth the particulars of the judgment.

(Emphasis added.)

The learned trial Judge concluded on four grounds that the action should be dismissed. He held that:

1. Mrs. Lutz had not established her possession of the disputed strip of land because she did not establish an intention to dispossess the true owner. That there was no such intention must follow from her ignorance that there was anyone to dispossess; she thought she owned all the land within the fence herself. Citing a number of English and Canadian authorities the learned trial Judge expressed himself in these terms [p. 82 D.L.R., p. 158 Alta. L.R.]:

> In addition to occupancy, there must be shown an intention either to discontinue on the part of the owner sought to be barred or an intention to dispossess the owner on the part of the person claiming the adverse possession. That intent when formed and accompanied by the requisite act of possession marks the point at which the statute begins to run under s. 19.

2. Mrs. Lutz's action is barred in any event by s. 180 of the *Land Titles Act* by which it is provided that no action for the recovery of land shall lie against the owner of land for which a certificate of title has been granted, with six exceptions, none of which is applicable here.
3. Mrs. Lutz occupied the strip of land in dispute under a licence express or implied from Mrs. Kawa or her predecessors in title, and her occupation is, therefore, not adverse possession.
4. As an alternative to the third reason advanced, the fence when built on Lot 18 became the property of the owners of Lot 18. Thus it is said that Mrs. Lutz is restricted to the remedies contemplated by s. 183 of the *Land Titles Act*. This section provides:

> 183(1) Where a person at any time has made lasting improvements on land under the belief that the land was his own, he or his assigns
>
> (a) are entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements, or
>
> (b) are entitled to or may be required to retain the land if the court is of opinion or requires that this should be done having regard to what is just under all the circumstances of the case.
>
> (2) The person entitled or required to retain the land shall pay such compensation as the court may direct.

It becomes necessary at this point to consider in some detail the history of this cause of action in Alberta since the law in this Province has developed differently than in the other Provinces with Torrens land titles systems. That history is discussed in detail by Professor Jeremy Williams in a most lucid and illuminating article, "Title By Limitation in a Registered Conveyancing System", 6 Alta. L. Rev. 67 (1968). The learned author observes that "there is a basic incompatibility between the policy of allowing the acquisition of title by limitation and the Land Titles Act, the avowed aim of which is to allow complete reliance on the register".

The Alberta law on this subject has its origin in *Belize Estate & Produce Co., Ltd. v. Quilter*, [1897] A.C. 367. That case was an appeal to the Judicial Committee of the Privy Council from British Honduras. Professor Williams summarizes this case and the results of it in Canada elsewhere than Alberta as follows:

> The case of *Belize Estate & Produce Co. v. Quilter* raised the same issue when it was presented to the Judicial Committee of the Privy Council in 1897. Lord Watson delivered the advice of the Committee which depended very largely on construction of the statutory provisions involved. Their view was that, "the right and title of the true proprietor of land, which is and has been the subject of adverse possession by one having no title of property, to bring a suit for recovery of possession is absolutely extinguished by the lapse of the statutory period . . ." It is not clear whether their Lordships conceived that the two statutes could work in harmony or whether the Limitation Act prevailed over the Land Registry Act. The British Honduras Land Registry Act differs from many modern Torrens Systems in that it was there at the option of any given owner whether he would have his title registered. Therefore, since registration was virtually an afterthought, there would not be such a reverence for the register as there would be in a system where almost all dealings with titles must be registered before they become effective. This is a consideration not adverted to by the judges who took this as the *fons et origo* of the modern Alberta position. Lord Watson stated further that, "Their Lordships are unable to discover either in sec. 30 or in any other clause of the [Land Titles Registry] Act, a single expression indicating that the Legislature meant to deal with any question of possession." This statement has been adverted to in more recent decisions.
>
> The Supreme Court of Canada has rejected the application of *Belize Estate v. Quilter* to the Manitoba legislation on the ground that the wording of sec. 76 of the Manitoba Real Property Act expressly excludes the operation of the Limitations Act [*Smith v. National Trust Co.* (1912), 45 S.C.R. 618]. The Supreme Court also found the Privy Council's decision inapplicable in Ontario, when in *Gatz v. Kiziw* (1959) S.C.R. 10, it held that the clearest statutory language had been used to avoid such an eventuality. Since 1913, the position in Saskatchewan has been similar to that obtaining in Manitoba. The Land Registry Act of British Columbia since 1905 has resembled those of Manitoba and Saskatchewan, and the same rejection of *Belize Estate v. Quilter* is found.

From an early point, the Courts of this Province took a view

different than that in the other Provinces. Ultimately that position was endorsed and supported by an appropriate change to the relevant statute. In *Harris et al. v. Keith* (1911), 3 Alta. L.R. 222, 16 W.L.R. 433, Stuart, J., relied on *Belize Estate & Produce Co. v. Quilter, supra,* to dismiss the claim of the registered owner of land against an adverse possessor. In *Wallace v. Potter* (1913), 10 D.L.R. 594, 4 W.W.R. 738, 6 Alta. L.R. 83, Simmons, J., granted a declaration that a plaintiff had become the owner of land by adverse possession but declined to direct the Registrar of Land Titles to issue a title to him holding that the statute did not authorize the granting of a new title. At p. 596 he said:

> The result is that the plaintiff has acquired a title to the land which cannot be attacked by the person actually registered as the owner and in whose name a certificate of title is now upon the register. The result is quite an anomalous one but the authority for removing the anomaly is in the legislature and not in the Courts.

In 1921 the Legislature came to the rescue with the enactment of the provision in the *Land Titles Act* corresponding to s. 73 of the present Act which I have quoted above. Whether or not *Belize Estate & Produce Co. v. Quilter, supra,* was originally wrongly applied to the Alberta Torrens statute is now beside the point. The Legislature recognized and adopted that statement of law when it enacted a procedure to obtain title after a declaratory judgment for adverse possession. Despite its incompatibility with the pure theory of a Torrens statute, adverse possession is here to stay unless there is a change of policy by the Legislature. That fact has been recognized in many cases in this Court including *Dobek v. Jennings*, [1928] 1 D.L.R. 736, [1928] 1 W.W.R. 348, 23 Alta. L.R. 306, and *Boyczuk v. Perry et al.*, [1948] 2 D.L.R. 406, [1948] 1 W.W.R. 495, which I shall consider in more detail later. To some extent at least these cases have reconciled the incompatibility of the Torrens system and the law of adverse possession.

Because of the development of the law of adverse possession in Alberta, I respectfully disagree with the second ground stated by the learned trial Judge for dismissing the claim: that s. 180 of the *Land Titles Act* enables Mrs. Kawa to plead her title as an answer to a claim for adverse possession. To so state is to say that title to land cannot be acquired by adverse possession in Alberta. Long-standing authority as well as the express provisions of s. 73 of the same Act are to the contrary. Section 73 must be taken as an additional exception to the six exceptions to indefeasibility of title set forth in s. 180 of the *Land Titles Act*.

I also respectfully disagree with the third and fourth grounds

stated by the learned trial Judge as reasons for dismissing the claim. It is, in my view, impossible on these facts, which were not in dispute, to infer the existence of an express licence for the construction of the fence on Lot 18. It is an entry into the realm of fiction to find an implied licence. What seems evident is that at all times Mrs. Lutz and all the owners from time to time of Lot 18 believed the fence was precisely on the boundary. They could not have thought any consideration of a licence was necessary. The application to the Kushners for approval of the new, elaborate fence in 1964 was no more than the usual neighbourly gesture to have approved the style, appearance and design of the fence. No one knew until the surveyors arrived in 1977 that a mistake had been made.

I am also unable to agree that any provision of the *Land Titles Act* restricts Mrs. Lutz to the remedies contemplated by s. 183 of the *Land Titles Act*. If she has fulfilled the requirements for a declaration of the Court that she has acquired title under the *Limitation of Actions Act*, she may invoke the aid of s. 73 of the *Land Titles Act*. If she has not, and Mrs. Kawa maintains her title to the disputed land, she may or may not succeed under s. 183. That application has not yet been made to the Court. Nothing in either section, however, forbids reliance on s. 183 as an alternative relief, should a claim fail under s. 73.

There remains for consideration the principal ground on which the learned trial Judge dismissed the claim for adverse possession: that Mrs. Lutz had no intention to dispossess the holder of the title to Lot 18 of the disputed portions of the land. In substance, this amounts to a conclusion that where the property owners concerned are unaware that a wrongly placed fence encloses with one tract of land a portion of another, there cannot be adverse possession of that portion.

It seems quite clear that the modern use of the term "adverse possession" is to some extent a misnomer. The possession which now extinguishes title under the *Limitation of Actions Act* is different than the possession which was termed "adverse possession" prior to the *Real Property Limitation Act*, 1833 (U.K.), c. 27. Prior to that statute some possessions had been held to be "non-adverse". The 1833 statute from which most Canadian limitations statutes, including that in Alberta, are derived abolished such distinctions. In *Paradise Beach & Transportation Co. Ltd. et al. v. Price-Robinson et al.*, [1968] 1 All E.R. 530, Lord Upjohn giving the judgment of the Judicial Committee of the Privy Council on an appeal from the Bahamas, said at p. 534:

> Onto the Statutes of James the common law engrafted the doctrine of "non adverse" possession, that is to say, that the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition, namely "adverse possession" *so that there had to be something in the nature of ouster.* In practice, however, it was very difficult to discover what was sufficient to constitute adverse possession; thus the possession of one co-tenant was the possession of the rest though undisputed sole possession for a very long time might be evidence from which a jury could properly assume ouster. (See *Doe d. Fishar and Taylor v. Prosser* (1974), 1 Cowp. 217. *All this was swept away by the Act of 1833* as was explained in an illuminating judgment of LORD DENMAN, C.J., in *Culley v. Doe d. Taylerson* (1840), 11 Ad. & El. 1008 at p. 1015 [113 E.R. 697 at p. 700].

(Emphasis added.)

In Williams, *Limitation of Actions in Canada* (1972), at p. 92, it is said:

> The Statute of Limitations, 1623 required the possession to be adverse to the interests of the title holder. Some possessions were subsequently held to be "non-adverse" until they were abolished in England by the Real Property Limitation Act of 1833. Now any party who has been in possession throughout the limitation period extinguishes the title of the former owner provided his possession complies with certain requirements. *The intention or state of mind of the adverse claimant has not been of great relevance since 1833 and the abolition of "non-adverse" possession.* The courts of many American jurisdictions are still bound to make narrow findings on these matters. Canadian jurisdictions do not have to contend with the concept of 'non-adverse' possession. The Canadian Acts are either drawn from the 1833 Act or are of more recent vintage and have overcome the problem by a series of statutory presumptions and rules which produce conclusions without reference to the state of mind of the squatter.

(Emphasis added.)

With respect, it seems to me that to require on the part of the claimant as a matter of law in all cases an intention to dispossess the holders of the title of the land in dispute is to return to the concept of "non-adverse" as opposed to "adverse" possession. A brief reference to modern United States authorities on the topic will show the distinction. The usual description of the type of possession necessary for adverse possession in Canada is that it is "an actual possession, an occupation exclusive, continuous, open or visible and notorious" for the requisite period: *Sherren v. Pearson* (1887), 14 S.C.R. 581 at p. 585. In some United States jurisdictions which retain the common law or do not have statutes derived from or similar to the 1833 English statute, a further element is added that the possession must be "hostile", thus importing an element of intent. In 2 C.J.S., p. 645, adverse possession is defined as "the open and *hostile* possession of land under claim of title to the exclusion of the true owner . . .". Even in those jurisdictions in which this element of intent is imported, however, it is

the intent to possess which is important and not the intent to take (2 C.J.S., p. 681). Thus, it is held in most such jurisdictions, in a case such as this one, that the fact both owners are mistaken as to the location of the true boundary will not preclude a holding hostile in character. The owner who has appropriated the other's land is held to intend to possess the land up to the fence line against all comers. That he does so because he thinks the land is his own does not make his intention to possess less fierce, but probably the reverse. Cases to this effect are gathered in 2 C.J.S. at pp. 762-3. One such modern case is *Calfee v. Duke* (1976), 544 S.W. (2d) 640 at p. 642 (Texas S.C.).

There have been some Canadian cases in which adverse possession has been found to have existed though the encroachment occurred because of ignorance of the correct boundary. The contrary result has also been reached and it is therefore necessary to review this case law.

In *Clarke v. Babbitt*, [1927] 2 D.L.R. 7, [1927] S.C.R. 148, the respondent's predecessor in title placed a hedge between his property and his neighbour's in the belief it was on the boundary. Twelve years later the appellant had a survey taken and discovered an encroachment of some four feet along the whole boundary. Adverse possession of the four feet was held to exist. The judgment does not, however, have an express discussion of the effect, if any, of the ignorance of the parties.

In *Martin v. Weld et al.* (1860), 19 U.C.Q.B. 631, the plaintiff and defendant were in a common error as to the true boundary of their lands. The issue was whether this common error prevented the Statute of Limitations from running. At p. 632 Robinson, C.J., said:

> We do not consider that the fact (if the truth was so) that the plaintiff and defendant were under a common error in regard to the true line of division between them, would prevent the new Statute of Limitations running, though it might and has been allowed to do so under the former law, when it was necessary to make it appear that the possession for twenty years was adverse, and not with acquiescence or permission.

Martin v. Weld, supra, was followed by Smily, J., in *McGugan et al. v. Turner et al.*, [1948] 2 D.L.R. 338, [1948] O.R. 216. In that case there was a dispute whether, in dividing property bequeathed to them by their father, two sons had followed the directions in the will and so followed the true boundary. On the question whether the son in possession of the disputed portion had gained title to it by his possession Smily, J., said at p. 342 D.L.R., p. 221 O.R.:

The defendants contend that any acts of ownership performed by either Hugh Turner or Daniel Turner and their successors in title, on the assumption the lands were devised as contended by the plaintiffs, were performed in ignorance of the true and proper construction of the will of the father and of their respective rights and in an erroneous interpretation of such will, and therefore were not intended to, and do not, result in any alteration of the ownership as devised by such will, and that there has been no exclusive possession by either Hugh Turner or Daniel Turner, "in view of the facts the lands have been used in common by them both as pasturage".

As to the first contention, no authority was submitted on behalf of the defendants on the point, and I know of no principle which would support such contention. The matter is now governed by the *Limitations Act*, R.S.O. 1937, c. 118, and the relevant sections are 4 and 15. No exception is made in the statute, in the said sections or any other, of ignorance or mistake as to the true ownership. In fact it has been held that a common error by the owners in regard to the true line of division between their properties does not prevent the statute running where the statute does not require it to be shown that the possession was adverse and not with acquiescence or permission: see *Martin v. Weld* (1860), 19 U.C.Q.B. 631 at p. 632. This, of course, applies to the present statute.

McGugan v. Turner was in turn referred to in *Smaglinski et al. v. Daly et al.* (1970), 10 D.L.R. (3d) 507 at p. 514, [1970] 2 O.R. 275 at p. 282, where Osler, J., said:

It is pointed out by Smily, J., in *McGugan et al. v. Turner*, [1948] O.R. 216 at p. 221, [1948] 2 D.L.R. 338 at p. 342, that acts that would otherwise evidence a possessory title done under a mistaken assumption as to the title may nevertheless be acts of possession such as, if continued for the requisite period, will result in a possessory title. By analogy, I think it can be said that a person who remains in exclusive possession, even though uncertain of his right to do so, can nevertheless acquire a possessory title. In the present case Joseph Norlock, though uncertain of and quite probably unconcerned about the precise legal nature of his occupancy, did act in a manner entirely consistent with ownership in clearing and sowing the land and there is no evidence whatever that his right to do so was questioned at any time by Philip Norlock, owner of the paper title. No enclosure of the land was necessary under the existing circumstances as that portion separating it from the other lands of Philip Norlock possessed an unmistakeable natural boundary in the creek and the lakes.

On appeal (20 D.L.R. (3d) 65, [1971] 3 O.R. 238) Aylesworth, J.A., in oral reasons for judgment quoted with approval the reasons for judgment of Osler, J., dealing with the uncertainty of Norlock as to the precise legal nature of his occupancy.

The learned trial Judge relied on the decision of the Ontario Divisional Court in *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 50 D.L.R. (3d) 650, 5 O.R. (2d) 482, though that case was dissimilar on its facts from the present. In the *St. Clair* case the land in dispute was not enclosed and all the parties were aware of the true title to it. The use of the lands by the party

claiming adverse possession was described as being enabled by an attitude "in the nature of a friendly acquiescence" by the title holder. There was also evidence that on two occasions the claimant had acknowledged the title of the owner by attempting to buy the land. Pennell, J., held that in such circumstances the claimant must show not only exclusive possession but, as well, an *animus possidendi*; that is an intention to exclude the owner as well as others. In reaching this conclusion Pennell, J., analyzed the extensive case law dealing with the term "*animus possidendi*". He considered it necessary to distinguish the decision in *Smaglinski v. Daly, supra*, and did so in these words [p. 657 D.L.R., p. 489 O.R.]:

> I do not read the language of my learned friend, Mr. Justice Osler, as I gather that counsel for the appellants does. I am myself unable to accept the suggestion that Justice Osler was saying that an intention to defeat the true owner was unnecessary. Moreover, there is nothing to show that the minds of the trial Judge or the members of the Court of Appeal were directed to the point.

The essentials to be established in a case of adverse possession are that the claimant be in possession and that the true owner be out of possession. The nature of the possession, of course, varies with the circumstances of the case. In *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.* (1974), 44 D.L.R. (3d) 687 at p. 689, [1975] 1 S.C.R. 684 at p. 687, 5 Nfld. & P.E.I.R. 541, Dickson, J., said:

> ... I think it beyond question that a tenancy cannot be created in the absence of exclusive possession. *Exclusive* possession by the tenant is essential to the demise and the statute will not operate to bar the owner unless the owner is out of possession. In an early judgment of this Court, *Gray v. Richford et al.* (1978), 2 S.C.R. 431 at p. 454, Strong, J., quoted Baron Parke in *Smith v. Lloyd et al.* (1854), 9 Ex. 562, 156 E.R. 240, to this effect:
>
> > " 'There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.' "
>
> and added at p. 455:
>
> > "In short, the Statute has no application, except so long as the title and possession are separate, when the possession is in the rightful owner Statutes of Limitation are not required."
>
> The same thought had been expressed a few years earlier by Erle, C.J., in *Allen v. England* (1862), 3 F. & F. 49 at p. 52, 176 E.R. 22, in these words:
>
> > "But, in my judgment, every time Cox (the landowner) put his foot on the land it was so far in his possession, that the statute would begin to run from the time when he was last upon it."

In my view, however, it does not follow that the essentials of a case of adverse possession cannot be established if the person in possession thinks the land is his own. Indeed, in most cases, to

show such a belief would be added support for the fact of his own possession. He excludes *all* others, including the person who unknown to him has title to the land. That his motive for the exclusion is his belief in his right to ownership does not change the fact that he is in possession himself while the true owner is out of possession. If this were not so, the intentional trespasser would be in a better position in the law of adverse possession than would be the claimant who held the land in innocent error. The law cannot have intended any such advantage for deliberate as compared to innocent trespass.

This view is in accord with the result reached by Lerner, J., in *Raab v. Caranci et al.* (1977), 97 D.L.R. (3d) 154, 24 O.R. (2d) 86 [affirmed 104 D.L.R. (3d) 160*n*, 24 O.R. (2d) 832*n*]. In that case Lerner, J., found as fact that the claimant for adverse possession "may not have been aware" that he had encroached on his neighbour's land. Lerner, J., nevertheless applied the tests stated by Pennell, J., in *Re St. Clair Beach Estates Ltd. v. MacDonald, supra*, including the requirement of an intention to exclude the owners. Lerner, J., then said, at p. 159 D.L.R., p. 91 O.R.:

> In my view the plaintiff's right to possessory title is not affected by the fact that he may not have been aware that he had taken possession of lands to which he did not have the legal title.

Lerner, J., then quoted from *Smaglinski v. Daly, supra*, the words I have set forth above.

The remainder of the Canadian cases cited by the learned trial Judge are cases in which the claimant had knowledge of the title of the owner. In *Sherren v. Pearson, supra*, for example, the lands claimed were wild unfenced lands and the possession claimed, was by isolated acts of trespass. When the judgment speaks therefore of dispossession of the actual owner it does so in analyzing the type of possession required. It does not lay down any rule that in all cases the only way to show possession is to prove an intent to exclude a known true owner.

The learned trial Judge also relied upon the judgment of Lord Denning, M.R., in *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.*, [1974] 3 All E.R. 575. In that case all parties were aware of the true state of title. The disputed lands had been purchased for future development by the oil companies in expectation of road construction which did not take place. During the waiting period, the owners, who were merely waiting until the time had come for development, did nothing with respect to the land. The claimants farmed adjoining lands as well as the disputed lands with no fence in between. Just before the

expiration of the time limited by the applicable limitation statute the owners twice wrote to the claimant offering to sell the land. The claimants, undoubtedly with an eye to the expiration of the period, did not reply to either letter. At p. 579-80 Lord Denning, M.R., said:

> Wallis's stake their claim on actual possession for 12 years. They farmed the land as their own for ten years and used it as their own for another two years. They say that Shell ought to have brought an action for possession during those 12 years; and that not having done so, Shell are barred; and Wallis's have a possessory title under the Limitation Act 1939.
>
> There is a fundamental error in that argument. Possession by itself is not enough to give a title. It must be *adverse* possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. *There must be something in the nature of an ouster of the true owner by the wrongful possessor.* That is shown by a series of cases in this court which, on their very facts, show this proposition to be true.

(Emphasis added.)

In holding that there "must be something in the nature of an ouster of the true owner", Lord Denning, M.R., made no reference to the judgment of Lord Upjohn just six years earlier in the Judicial Committee of the Privy Council in *Paradise Beach & Transportation Co. Ltd. v. Price-Robinson, supra*, which I quoted above. In that case Lord Upjohn, referring to the law as it stood prior to the statute of 1833, said that there "had to be something in the nature of ouster" and then said "all this was swept away by the Act of 1833". Again, since the claimant was required to show that he and not the owner had been in possession, he might in establishing that fact, be required to show the point at which the owner was dispossessed. In that sense he might show ouster. That is not to say, however, that there might not be other means of proving the same fact. I cannot believe that Lord Denning, M.R., intended to revert to the law prior to 1833 which Lord Upjohn stated had been swept away.

In this case Mrs. Lutz believed the land was her own. She has demonstrated possession as against all persons by enclosing it with her own land for more than 40 years. The substantial fence erected in 1964 in particular shows possession by excluding all others from it. That possession is not lessened in its effect because she was unaware that the owners of Lot 18 had any claim to a portion of the land enclosed. I therefore respectfully disagree with the reasons given by the learned trial Judge for dismissing the claim

The learned trial Judge expressed in very pessimistic terms his

view of the effect as a precedent of allowing Mrs. Lutz's claim for adverse possession. He said [pp. 80-1 D.L.R., pp. 155-6 A'lta. L.R.]:

> This case is one of special importance far beyond the value of the strip of land in dispute. A decision in favour of the plaintiff would seriously cloud the security of boundaries assumed to be inviolable under registered plans of survey or descriptions under the Torrens system. We can all take congnizance of the fact that there are countless instances in this Province where fences have been erected, by eye, on what was intended to be the true boundary line between adjoining properties without the assistance of a qualified surveyor, as there are also countless instances where there are no fences at all to mark the boundaries of large cultivated areas. Deviation from the true line in such cases, as in the case at bar, is almost inevitable. Havoc and a flood of litigation must result if such lines fixed by eye can supersede surveyed and registered boundaries. Such a result was never contemplated by statutes of limitations.

This very forceful criticism, if valid, must apply to all cases of misplaced boundary fences, whether the misplacement was intentional or occurred through mutual error of the parties. The cure cannot, however, lie in a policy in which intentional trespass extinguishes the owner's title while innocent trespass does not. Indeed, the criticism to some extent applies to all cases of adverse possession as an exception to the indefeasibility of title supposed to be produced by a Torrens system of land titles. It points up the incompatibility of the two to use the term adopted by Professor Williams, *supra*. In my view, since the policy of the Legislature as expressed in the 1921 legislation carried forward in all subsequent revisions is to permit actions for adverse possession, the remedy if one is thought necessary must also come from the Legislature.

I now turn to a consideration of the effect, if any, on Mrs. Lutz's cause of action for adverse possession, of the title obtained by Mrs. Kawa in 1971 following the assignment to her of the agreement for sale in 1966. The learned trial Judge did not find it necessary to deal with this point since he had concluded that Mrs. Lutz's claim must fail in any event.

Mrs. Kawa first came into possession of the land in 1964 as a tenant of the joint owners, Nick Wozny (her father) and Walter Dmytrow. She paid monthly rent to her father who periodically lived in the house with her. There is no evidence as to the interest of Walter Dmytrow in the house.

On May 28, 1966, Wozny and Dmytrow assigned their agreement for sale to Mrs. Kawa. Mr. and Mrs. Kushner are shown as parties agreeing to this assignment though their signatures do not appear on the document. Mrs. Kawa testified that she was unaware of the assignment of the agreement for sale to her.

It was never delivered to her. From 1964 her father assured her from time to time that he intended to leave the property to her. Notwithstanding these assurances, Mr. Wozny twice attempted without success to sell the house, the last time only eight months before his death on March 28, 1967.

By his will Mr. Wozny left his entire estate to Mrs. Kawa subject to small payments by her to others of his children. She became aware of the assignment after his death and seems to have claimed under the assignment rather than under the will. On February 8, 1968, she filed a caveat claiming an interest under the assignment.

I infer from the fact that the assignment was never delivered to Mrs. Kawa and because Mr. Wozny continued to deal with the house as his own, both in collecting rent from Mrs. Kawa and in attempting to sell it, that the assignment document was intended to be merely a circuitous means of extinguishing the interest in the land of Walter Dmytrow. Mrs. Kawa took her interest under her father's will. The assignment was used in the chain of title so that the ultimate transfer from the Kushners in 1971 would not name Walter Dmytrow.

On these facts it is necessary to consider the effect on the law of adverse possession under a Torrens system of land registration of the decisions of this Court in *Dobek v. Jennings*, [1928] 1 D.L.R. 736, [1928] 1 W.W.R. 348, 23 Alta. L.R. 306, and *Boyczuk v. Perry et al.*, [1948] 2 D.L.R. 406, [1948] 1 W.W.R. 495. The literal wording of s. 44 of the *Limitation of Actions Act* is that at the end of the 10-year period limited for the recovery of land, the right to recovery is extinguished. Notwithstanding this provision it is clear that such a title, after it is "extinguished", may become the root of a valid title in the hands of a *bona fide* purchaser for value. Though the title of Mr. and Mrs. Kushner to the disputed land may have been "extinguished" by 1964, the purchaser for value, on obtaining title, would have a valid title. Mrs. Lutz would then require a further 10 years of the requisite possession before her right to obtain title by adverse possession would arise.

In *Dobek v. Jennings*, *supra*, the plaintiff sued for a declaration that he was entitled to land by adverse possession from 1905 until 1925. In 1910 the title holder sold the land to Hamilton who did not register his transfer until 1925. He then sold to the defendant who obtained a new certificate of title in his name. At p. 738 D.L.R., p. 351 W.W.R., Harvey, C.J.A., giving the judgment of the Court said:

> The principle of the Act is that a person may ascertain the state of the title

> by a reference to the records of the Land Titles Office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a *bona fide* purchaser subject only to what appears on the register and the reservations and exceptions of s. 57. *It is registration that gives or extinguishes title.* A right or interest without title may be protected by caveat but without such protection it may be lost entirely. This has been declared in frequent decisions. It is clear, therefore, that whatever right or interest the plaintiff may have acquired, if any, by his years of possession he lost completely upon the issue to the defendant of his certificate of title in August, 1925, there being no question of any fraud on the part of the defendant or even of knowledge of any claim of interest . . .

(Emphasis added.)

In *Boyczuk v. Perry, supra*, the appellant purchased parts of the North-West Quarter of Section 1 and the east half of the adjoining North-East Quarter of Section 2. The fence enclosing this land also enclosed a few acres of the West Half of the North-East Quarter. The appellant occupied all the lands for nearly 20 years. The respondent purchased and obtained title to the West Half of the North-East quarter of Section 2 in 1945, thus obtaining a new title to the land in dispute. The Court (O'Connor, J.A., dissenting) followed *Dobek v. Jennings*. It held that the respondent's purchase of the land for value and his acquisition of title defeated the claim for adverse possession.

It is also clear, however, that a new title in the hands of a person not within the description of a *bona fide* purchaser for value may be subject to rectification by the Registrar. That result flows from the unanimous decision of the Supreme Court of Canada in *Kaup et al. v. Imperial Oil Ltd. et al.* (1962), 32 D.L.R. (2d) 112, [1962] S.C.R. 170, 37 W.W.R. 193. In that case there were unauthorized "corrections" to a title by the Registrar. Though a new title incorporating these corrections had issued to the appellants, they had taken their interest as volunteers. It was held that the sections of the statute conferring indefeasibility of title are for the benefit only of the *bona fide* purchaser for valuable consideration.

In this case, Mrs. Kawa was at first a volunteer and not a *bona fide* purchaser for value. In March, 1967, she took her interest in the land as beneficiary of her father's estate though the form taken by the transaction was that she claimed through the assignment. Nevertheless, thereafter Mrs. Kawa commenced the monthly payments of the balance owing under the agreement for sale and continued them until she obtained title to the land on February 2, 1971. In my view the issuance of title on that date again defeated whatever right Mrs. Lutz had then acquired to the disputed portions of the land and time only then commenced to

run against Mrs. Kawa. That time had not run out when the counterclaim was filed in this action on November 17, 1977. In that counterclaim Mrs. Kawa sought recovery of the land. Since her title to the disputed portions of the land had not then been extinguished under the *Limitation of Actions Act*, Mrs. Kawa was entitled to have the action dismissed and to obtain judgment on her counterclaim. For these reasons I would dismiss the appeal with costs to the respondent.

It was not argued on this appeal, nor in the result has it been necessary to consider, the effect, if any, of planning legislation on the acquisition of land by adverse possession.

Appeal dismissed.

LUTZ v. KAWA

District Court of Alberta, Judicial District of Edmonton, Belzil, D.C.J. February 26, 1979.

Real property — Adverse possession — Animus possidendi — Plaintiff erecting fence encroaching on small sliver of defendant's land — Neither party knowing of encroachment when fence erected — Encroachment discovered much later — Plaintiff never having requisite animus possidendi to acquire adverse possession running from date when fence first erected.

[*Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.*, [1974] 3 All E.R. 575; *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 50 D.L.R. (3d) 650, 5 O.R. (2d) 482; *Keefer v. Arilotta* (1976), 72 D.L.R. (3d) 182, 13 O.R. (2d) 680; *Doe d. DesBarres v. White* (1842), 1 Kerr 515; *Williams Bros. Direct Supply Stores, Ltd. v. Raftery*, [1957] 3 All E.R. 593, apld]

Real property — Adverse possession — Land titles — Plaintiff claiming to be quieted in exclusive possession of land — Action for recovery of land — Action barred by s. 180 of Land Titles Act, R.S.A. 1970, c. 198.

[*Turta v. C.P.R. et al.*, [1954] 3 D.L.R. 1, [1954] S.C.R. 427, 12 W.W.R. (N.S.) 97; *Williams v. Thomas*, [1909] 1 Ch. 713, 78 L.J. Ch. 473, apld; *Mildenberger v. Prpic* (1976), 67 D.L.R. (3d) 65, [1976] 4 W.W.R. 67, refd to]

ACTION to be quieted in the exclusive possession of land pursuant to the *Limitation of Actions Act*, R.S.A. 1970, c. 209.

Geoffrey M. Bickert, for plaintiff.
Donald M. Savich, for defendant.

BELZIL, D.C.J.:—In this unfortunate action between neighbours, the plaintiff seeks a judgment that she be quieted in the exclusive possession of a thin sliver of the defendant's land pursuant to the *Limitation of Actions Act*, R.S.A. 1970, c. 209.

The plaintiff is the owner of Lot 17, Block 6, Plan 569 R., municipally known as 12228 — 96 St. in the City of Edmonton. She and her husband purchased and took up residence on the property in 1938 and acquired title to it in 1941. Upon her husband's death, the plaintiff became sole registered owner by filing proof of death on May 3, 1967. She has been in continuous possession of her property since 1938.

The defendant is now the registered owner of Lot 18 in the same block and plan, immediately south of and adjacent to the plaintiff's lot. The north boundary of Lot 18 is the south boundary of Lot 17. The east boundaries of both lots face 96th St.

Mrs. Kawa first occupied the house on Lot 18 in or about 1964 as tenant from her father and then from May 28, 1966, as purchaser from her father and one Dmytrow, by virtue of an assignment of agreement for sale from them. She filed a caveat on this assignment on February 9, 1968, and upon paying the balance owing under the agreement for sale, she received a transfer which resulted in title issuing to her on February 2, 1971.

When the plaintiff and her husband acquired Lot 17 in 1938, the properties were divided by a wire fence. In 1964, they replaced this fence with a solid six-foot fence to provide privacy for their backyard patio. The new fence was erected on the same line as the old, which was thought to be the proper boundary. This was all done with the consent of the then adjoining owners, Mr. and Mrs. Kushner. When asked if the Kushners had any objection to the new fence, the plaintiff testified that "No, they [the Kushners] were quite happy . . . they thought it would improve their property."

The fence is a well-constructed closed board fence supported by steel posts, interspersed with cedar posts and built to withstand wind. It is five inches thick. A portion of it, approximately 40 ft. at the east or front street end is on a six-inch concrete footing.

In August of 1977, the defendant demolished the old house on her lot and proceeded to erect a new house on it. She had the property legally surveyed to be sure that the new house was being built on her property and it was then discovered that the fence erected by the plaintiff and her husband was, in fact, situate on the defendant's lot. The plan of survey entered as ex. 7 shows that the fence is 1.34 feet south of the common boundary at the west or lane end of the fence and 0.11 feet at the east or street end of it. To these must be added the five-inch thickness of the fence to determine the total encroachment.

Upon discovering this encroachment, the defendant requested the plaintiff to remove the fence as it interfered with construction on her narrow lot. The plaintiff's response was to file a caveat on the defendant's title claiming "an interest under and by virtue of the right of adverse possession pursuant to *The Limitation of Actions Act* of Alberta". The caveat, which appears as ex. 8, does not limit the claim to the sliver of Lot 18 affected by the encroachment as above described, but purports to claim an interest in the whole of Lot 18. I will have more to say about this later in this judgment. The statement of claim, on the other hand, claims ownership by adverse possession of that portion of Lot 18 which is north of the line beginning eight inches south of the north boundary at a point 20 ft. west of the east boundary and extending from there to the west boundary to a point two and one-half feet south of the north boundary of Lot 18. This latter measure of two and one-half feet is not in accordance with the plan of survey and it is to be noted also that the plaintiff does not claim the easterly 20 ft. of the sliver.

The statement of claim asks for a declaration that the defendant's title to the land has been extinguished and that the plaintiff has a valid and subsisting caveat against the said lands and asks further for a declaratory judgment that the plaintiff be quieted in the exclusive possession of it.

In her counterclaim, the defendant seeks an order of ejectment, an order compelling removal of the fence, a declaration that she is the owner of the disputed strip, damages and punitive and exemplary damages.

The facts are found in an agreed statement of facts filed by agreement of counsel, supplemented by the evidence of the plaintiff and the defendant. The facts are not really in dispute.

The statutory provisions upon which the plaintiff relies in her action are found in the *Limitation of Actions Act* and in the *Land Titles Act*, R.S.A. 1970, c. 198. Those of the *Limitation of Actions Act* are as follows:

> 18. No person shall take proceedings to recover land except
>
> (a) within 10 years next after the right to do so first accrued to such person (hereinafter called the "claimant"), or
>
> (b) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to such predecessor.
>
> 19. Where in respect of the estate or interest claimed the claimant or a predecessor has
>
> (a) been in possession of the land or in receipt of the profits thereof, and

(b) while entitled thereto

(i) been dispossessed, or

(ii) discontinued such possession or receipt,

the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the *dispossession* or *discontinuance of possession* or at the last time at which any such profits were so received.

. . . . .

44. At the determination of the period limited by this Act to any person for taking proceedings to recover any land, rent charge or money charged on land the right and title of such person to the land, or rent charge or the recovery of the money out of the land is extinguished.

(Emphasis mine.)

These provisions of the *Limitation of Actions Act* of Alberta are essentially the same as those in the English and Ontario Act from which they obviously derive. Indeed, prior to the enactment of the present Alberta Act in 1935, the provisions of the *Real Property Limitation Act*, 1874 (U.K.), c. 57, of England were declared by our own Act to be and to have been in force in Alberta and in the Northwest Territories since the passing thereof (*cf.* s. 3 the *Limitation of Actions Act*, R.S.A. 1922, c. 90). English cases on the interpretation of that statute are accordingly germane to Alberta law.

The *Land Titles Act*, R.S.A. 1970, c. 198, then provides as follows:

73(1) Any person recovering against a registered owner of land, a judgment declaring that the person recovering the judgment is entitled to the exclusive right to use the land or that he be quieted in the exclusive possession thereof, pursuant to *The Limitation of Actions Act*, may file a certified copy of the judgment in the Land Titles Office for the proper registration district.

(2) At the expiration of three months after the filing thereof, the Registrar shall, unless he is satisfied that an appeal from the judgment is being taken, make, upon the certificate of title in the register, a memorandum cancelling the certificate of title, either wholly or partially, according to the tenor of the judgment and setting forth the particulars of the judgment.

This case is one of special importance far beyond the value of the strip of land in dispute. A decision in favour of the plaintiff would seriously cloud the security of boundaries assumed to be inviolable under registered plans of survey or descriptions under the Torrens system. We can all take cognizance of the fact that there are countless instances in this Province where fences have been erected, by eye, on what was intended to be the true boundary line between adjoining properties without the assistance of a qualified surveyor, as there are also countless instances where there are no fences at all to mark the boundaries of large cultivated areas. Deviation from the true line in such cases, as in the

case at bar, is almost inevitable. Havoc and a flood of litigation must result if such lines fixed by eye can supersede surveyed and registered boundaries. Such a result was never contemplated by statutes of limitations.

I have concluded that the plaintiff's action must fail on the several following grounds:

1. *The plaintiff has not established that she was in possession of the disputed strip for the statutory period within the meaning of the Limitation of Actions Act.*

It is clear from a long string of cases that ss. 18 and 19 of the *Limitation of Actions Act* must be read together. In summary, the 10-year limitation period fixed in s. 18 begins to run against the "owner" at the time of dispossession of the owner or discontinuance of possession by him as provided in s. 19. To succeed in her action, the plaintiff must prove that the defendant (the "claimant" defined in ss. 18 and 19) has in the words of the statute discontinued her possession or been dispossessed for the statutory period. It is not sufficient for the plaintiff to show actual occupancy or possession of the locus by her. What must be shown is a special kind of possession described by Lord Ormrod in *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.*, [1974] 3 All E.R. 575, a clear case of occupancy for the statutory period. Lord Ormrod states at p. 589:

> The case, therefore, turns on whether or not the plaintiffs can establish that they were in possession of the disputed land for the statutory period, within the meaning of the Limitation Act 1939, s. 10. The qualifying words, in my opinion, are of crucial importance, for it appears to me that the word *"possession" in this section and its predecessors has acquired a special and restricted meaning.* The overall impression created by the authorities is that the courts have always been reluctant to allow an encroacher or squatter to acquire a good title to land against the true owner, and have interpreted the word "possession" in this context very narrowly. It is said to be a question of fact depending on all the particular circumstances of the case *(Bligh v. Martin*, [1968] 1 All E.R. 1157, [1968] W.L.R. 804), but, to the relatively untutored eye, it has acquired all the appearances of a difficult question of law.
>
> The general principle appears to be that, until the contrary is proved, possession in law follows the right to possess: *Kynoch Ltd. v. Rowlands*, [1912] 1 Ch. 527 at 534. Lord Lindley MR in *Littledale v. Liverpool College*, [1900] 1 Ch. 19 at 21, put it in these words:
>
> > "In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it."
>
> The same point was made by Bramwell LJ in *Leigh v. Jack* (1879), 5 Ex. D. 264 at 272, where he said, referring to the Statute of Limitations: "Two things appear to be contemplated by that enactment, dispossession and dis-

> continuance of possession." If this is the right way to approach the problem, the question becomes: *"Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession, of the land in question for the statutory period?" rather than: "Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?"* It certainly makes it easier to understand the authorities if one adopts the first formulation.

(Emphasis mine.) In the same case, Lord Denning, M.R., describes the test as follows at pp. 579-80:

> Wallis's stake their claim on actual possession for 12 years. They farmed the lands as their own for ten years and used it as their own for another two years. They say that Shell ought to have brought an action for possession during those 12 years; and that not having done so, Shell are barred; and Wallis's have a possessory title under the Limitations Act 1939.
>
> There is a fundamental error in that argument. *Possession by itself is not enough to give a title.* it must be *adverse* possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. *There must be something in the nature of an ouster of the true owner* by the wrongful possessor. That is shown by a series of cases in this court which, on their very facts, show this proposition to be true.

(Emphasis mine.)

This proposition is supported by recent Canadian authority to which I will hereafter refer. In addition to occupancy, there must be shown an intention either to discontinue on the part of the owner sought to be barred or an intention to dispossess the owner on the part of the person claiming the adverse possession. That intent when formed and accompanied by the requisite act of possession marks the point at which the statute begins to run under s. 19. The necessity to prove intent was argued in the Ontario High Court in *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 50 D.L.R. (3d) 650, 5 O.R. (2d) 482. I quote extensively from the judgment of Pennell, J., which cites many cases to which I would otherwise have had to refer. He states at p. 655 D.L.R., p. 487 O.R.:

> The Courts have been generous in elucidating the nature of the burden upon a party seeking to establish title by possession. From a long stream of cases I select, first, that of *Pflug and Pflug v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681; affirmed [1953] O.W.N. 140, [1953] 1 D.L.R. 841. In that case, at p. 527 O.R., p. 689 D.L.R., Wells, J. (as he then was), made it clear that to succeed the appellants must show:
>
> (1) Actual possession for the statutory period by themselves and those through whom they claim;
>
> (2) that such possession was with the intention of excluding from possession the owners or persons entitled to possession; and

(3) discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.

If they fail in any one of these respects, their claim must be dismissed.

Then starting at the bottom of p. 656 D.L.R., p. 488 O.R., he says further:

Counsel for the appellants, however, contended that the concept of adverse possession does not involve an intention on the part of the person in possession to acquire a right against a particular person. He founded himself on a passage in the judgment of Osler, J., in *Smaglinski et al. v. Daly et al.*, [1970] 2 O.R. 275, 10 D.L.R. (3d) 507; affirmed [1971] 3 O.R. 238, 20 D.L.R. (3d) 65. On p. 282 O.R., p. 514 D.L.R., Osler, J., uses this language:

> "... I think it can be said that a person who remains in exclusive possession, even though uncertain of his right to do so, can nevertheless acquire a possessory title. In the present case Joseph Norlock, though uncertain of and quite probably unconcerned about the precise legal nature of his occupancy, did act in a manner entirely consistent with ownership in clearing and sowing the land and there is no evidence whatever that his right to do so was questioned at any time by Philip Norlock, owner of the paper title."

I do not read the language of my learned friend, Mr. Justice Osler, as I gather that counsel for the appellants does. I am myself unable to accept the suggestion that Justice Osler was saying that an intention to defeat the true owner was unnecessary. Moreover, there is nothing to show that the minds of the trial Judge or the members of the Court of Appeal were directed to the point.

The question, however, is not a new one. It was raised before the Court of Appeal in *A.-G. Can. v. Krause*, [1956] O.R. 675, 3 D.L.R. (2d) 400, and (to my mind) there deliberately answered. There the subject of controversy was a claim of title by possession. The judgment was delivered by Roach, J.A., who stated at p. 691 O.R., p. 408 D.L.R.:

> "The occupation, the holding or enjoying contemplated by the Nullum Tempus Act and which would bar the Crown, is such as would constitute a civil possession against a subject owner: see the reasons of Duff J., as he then was in *Hamilton et al. v. the King* (1917), 54 S.C.R. 331 at 371, 35 D.L.R. 226. This means that throughout the statutory period as against the Crown, there must have been, if the defendant is to succeed, (1) exclusive occupation in the physical sense, *i.e.*, detention, and (2) the *animus possidendi*."

As to the meaning of *animus possidendi*, the observation of Lord Lindley, M.R., in *Littledale v. Liverpool College*, [1900] 1 Ch. 19 at p. 23, is most instructive. The particular passage to which I refer reads as follows:

> "They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi — i.e., occupation with the intention of excluding the owner as well as other people."

Confirmation for what has been said as to the meaning of *animus possidendi* by Lord Lindley is to be found in Black's Law Dictionary, 4th ed. (1951), p. 114, as follows: "*Animus Possidendi*. The intention of possessing."

New strength, I think, is given to definitions such as these when one passes to the decision of the Court of Appeal in *Krause v. Happy*, [1960] O.R. 385, 24 D.L.R. (2d) 310, McGillivray, J.A., in delivering the judgment of the Court, quoted with approval the language of Roach, J.A., in the passage which I just cited from *A.-G. Can. v. Krause*. At p. 394 O.R., p. 314 D.L.R., he goes on to discuss the evidence in these terms:

> "That the evidence did not indicate *animus possidendi* of the plaintiffs' part is indicated by the testimony of Wm. Krause Sr. Referring to the property he said, 'I wouldn't steal it from him' and 'I didn't expect to get the land for nothing.' "

This observation, I think, suggests on its face that the Court was concerned with the question of intention in considering the burden upon the one seeking to establish title by possession.

I agree, therefore, with the trial Judge that the question whether there was an intention on the part of the appellants to dispossess the owner was a matter to be considered.

The test set out in *Pflug and Pflug v. Collins*, [1952] 3 D.L.R. 681, [1952] O.R. 519 [affirmed [1953] 1 D.L.R. 841, [1953] O.W.N. 140], and followed in *St. Clair Beach, supra*, is adopted again by the Ontario Court of Appeal in *Keefer v. Arilotta* (1976), 72 D.L.R. (3d) 182, 13 O.R. (2d) 680, where Wilson, J.A., writing the majority judgment, states commencing at p. 193 D.L.R., p. 691 O.R.:

> The *animus possidendi* which a person claiming a possessory title must have *is an intention to exclude the owner from such uses* as the owner wants to make of his property.
>
> . . . . . .
>
> The test is not whether the respondents exceeded their rights under the right of way but whether they precluded the owner from making the use of the property that he wanted to make of it: *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650. Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner. This has been held to be the test for adverse possession since the leading case of *Leigh v. Jack* (1879) 5 Ex. D. 264.
>
> . . . . . .
>
> In *Pflug and Pflug v. Collins*, [1952] O.R. 519 at p. 527, [1952] 3 D.L.R. 681 at p. 689 [affirmed [1953] O.W.N. 140, [1953] 1 D.L.R. 841], Mr. Justice Wells (as he then was) made it clear that a person claiming a possessory title must establish (1) actual possession for the statutory period by themselves and those through whom they claim; (2) that such possession was with the intention of excluding from possession the owner or persons entitled to possession; and (3) discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession. If he fails in any one of these respects, his claim fails.

(Emphasis mine.)

In *Sherren v. Pearson* (1886), 14 S.C.R. 581, in the Supreme Court of Canada, Ritchie, C.J.C., said at pp. 585-6:

> To enable the defendant to recover he must show an actual possession, an occupation exclusive, continuous, open or visible and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.
>
> I cannot discover anything in this case to indicate that the defendant or those under whom he claims at any time made an entry on the land *with a view of taking possession of it under a claim of right or color of title*, or *with a view of dispossessing* the actual owner ... there is no evidence whatever to show that the acts relied on were done *with the knowledge of the owner* ... there was nothing sufficiently notorious and open *to give the true owner notice of the hostile possession begun.*

(Emphasis mine.)

The Chief Justice then goes on to adopt passages from the judgment of Parker, J., in *Doe d. DesBarres v. White* (1842), 1 Kerr 515 at p. 627, who in turn adopts principles followed in United States Courts that:

> ... there has been a great unanimity on the subject and a general opinion of the impropriety and inexpediency of giving any constructive effect to acts which do not of themselves clearly demonstrate the *intention of the party to dispossess the owner.*

(Emphasis mine.)

In *Williams Bros. Direct Supply Stores, Ltd. v. Raftery*, [1957] 3 All E.R. 593, before the English Court of Appeal, Hodson, L.J., states at p. 595:

> The first question which arises is whether the plaintiffs had, in the language of the statute, "discontinued their possession", and that question was answered by the learned county court judge in favour of the plaintiffs. He said:
>
> > "I am satisfied that they never *intended to discontinue their ownership* or to allow anyone else to acquire ownership."
>
> In my view the evidence justified that finding that there *was never any intention on the part of the plaintiffs to discontinue their ownership.*

and at p. 597:

> I cannot see that any act which the defendant did is capable of being treated as sufficient to dispossess the plaintiffs. *The Defendant never even thought he was dispossessing* the plaintiffs; ... so far as I know, he never had nor claimed *any intention* of asserting any right to the possession of this piece of ground.

(All emphasis mine.) See also on this point, *Wallis's Cayton Bay v. Shell-Mex, supra.*

In the present case, it is admitted that both the plaintiff and the defendant were ignorant of the encroachment of the fence upon the defendant's lot. While the plaintiff had actual possession of the strip lying between the fence and the boundary since 1938, it being used by her as part of her yard, she never formed the intention to oust or dispossess the defendant until August, 1977,

when she first learned of the encroachment. It is at that point that she formed the intention to oust the defendant and at that point that the statute would have begun to run in her favour if at all. It follows also from her ignorance of the encroachment that the defendant never formed the intention to discontinue her possession.

2. *The plaintiff's action is for the recovery of land and is barred by s. 180 of the Land Titles Act.*

That section reads as follows:

> 180(1) No action of *ejectment* or other *action for the recovery of any land* for which a certificate of title has been granted lies or shall be sustained against the owner under this Act in respect thereof, except in any of the following cases, that is to say:
>
> (*a*) the case of a mortgagee as against a mortgagor in default;
>
> (*b*) the case of an encumbrancee as against an encumbrancer in default;
>
> (*c*) the case of a lessor as against a lessee in default;
>
> (*d*) the case of a person deprived of any land by fraud as against the owner of the land through fraud, or as against a person deriving title otherwise than as a transferee *bona fide* for value, from or through the owner through fraud;
>
> (*e*) the case of a person deprived of or claiming any land included in any grant or certificate of title to other land by misdescription of the other land or of its boundaries, as against the owner of the other land;
>
> (*f*) the case of an owner claiming under an instrument of title prior in date of registration under this Act, or under the provisions of any law heretofore in force in any case in which two or more grants, or two or more certificates of title, or a grant and certificate of title, are registered under this Act or under any such law in respect of the same land.
>
> (2) In any case, other than as aforesaid, the production of the certificate of title or a certified copy thereof is an absolute bar and *estoppel* to any such action against the person named in the certificate of title as owner or lessee of the land therein described.

(Emphasis mine.)

The modern action of ejectment is the same as the action for recovery of land. In Mozley and Whiteley's Law Dictionary, 8th ed. (1970), ejectment is defined as follows:

> EJECTMENT. An action to try the title to land. The old action, which was very elaborate in procedure, was abolished in 1852. The action is now called one for the recovery of land.

Both the ownership and the possession of the disputed strip of land are placed in issue by the pleadings and the action is accordingly one for recovery of land squarely within the test laid down

by Estey, J., in *C.P.R. et al. v. Turta et al.*, [1954] 3 D.L.R. 1 at pp. 30-1, [1954] S.C.R. 427, 12 W.W.R. (N.S.) 97 at pp. 131-2:

> A reference to the pleadings in this case discloses that respondent Anton Turta asks for a declaration that he has "been in lawful possession" of the petroleum. The appellant C.P.R. denies Turta's possession and pleads, *inter alia*, that it has at all material times been both the owner and in possession of the petroleum. Moreover, the appellant Imperial Oil Ltd. alleges that Turta never was in possession of the petroleum.
>
> It will, therefore, be observed that in this action both the ownership and the possession of the petroleum in the said quarter section was in issue. This is, therefore, an action for the recovery of land and is brought within the period of 10 years permitted by s. 18 of the said *Limitations of Actions Act*.

The authorities on this point are extensively reviewed by Egbert, J., at trial in *Turta v. C.P.R. et al.* (1952), 5 W.W.R (N.S.) 529 at p. 550 *et seq* [affirmed [1953] 4 D.L.R. 87, 8 W.W.R. (N.S.) 609]. At p. 552 Egbert, J., quotes *Williams v. Thomas*, [1909] 1 Ch. 713, 78 L.J. Ch. 473, wherein Buckley, L.J., says this:

> "... the expression 'to recover any land' in s. 2 of the Act of 1833 (the *Real Property Limitation Act, 1833*), does not mean regain something which the plaintiff previously had and has lost, but means 'obtain any land by judgment of the Court,' yet it is not limited to the meaning 'obtain *possession* of any land by judgment of the Court.'"

3. *Plaintiff occupied the strip of land in dispute under licence, express or implied, from the defendant and her predecessors and such occupation under licence does not amount to adverse possession.*

The plaintiff testified as follows in direct examination:

> Q. Now, at the time that you constructed this fence who owned the, Lot 18, the neighbouring lot?
>
> A. At the time we built the fence Mr. and Mrs. Kushner owned the property.
>
> Q. Did you discuss with them the replacement of the old fence?
>
> A. Oh yes.
>
> Q. And did they share the cost of the new fence?
>
> A. No, they were quite happy that — they thought it would improve their property.
>
> Q. And after the new fence was constructed did they make any objection to the replacement of the fence?
>
> A. No.
>
> Q. And where did you put the new fence?
>
> A. Exactly in the same line as the old fence.

If the plaintiff and her husband believed that the fence was entirely on their property, there was no need to seek the consent of Mr. and Mrs. Kushner and no need for Mr. and Mrs. Kushner to

give it. That such a discussion was held and consent obtained indicates to me that the parties were unsure of the location of the fence in relation to the boundary line. In such circumstances it seems to me that deviation from the true boundary line is accepted by the parties, each licensing by implication the resulting entry upon his land by the other subject to reverting to the true line by survey on the ground as the need may arise. By express words or by implication Mr. and Mrs. Kushner gave to the plaintiff and her husband the licence or permission to enter on their land if necessary to follow the original fence line.

In Mozley & Whiteley's Law Dictionary, "Licence" is defined as follows: "In real property law, a licence is an authority to do an act which would otherwise be a trespass. A licence passes no interest . . .". Such licence is revocable at will if made without consideration and when revoked the licensed act will become a trespass if not discountinued within a reasonable time. Possession under licence does not amount to adverse possession, *cf., Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd., supra,* Lord Denning at p. 580.

4. *As an alternative to (3) above, if the plaintiff is not a licensee the fence in dispute is the property of the defendant.*

It is clear that the plaintiff in this case is not so concerned with acquisition of the strip of land between the fence and her boundary as she is in the retention of the fence. She wants to maintain the privacy which this fence affords her. She has no interest in the thin strip to the front of the lot which she describes as negligible. She shows no particular use of the strip between the fence and her yard except that it is a trivial extension to her yard and to a garden bed between the fence and a sidewalk. I am satisfied that she would find that strip negligible too, and of no interest to her, without the screen which the fence provides. She assumes in error that the fence is hers, a view which seems to have been shared by the defendant.

The situation with respect to ownership of the fence is that if it was erected in error and without licence by the plaintiff and her husband on their neighbour's property it became a permanent improvement to that property. As a permanent improvement it became part of the land in Lot 18 acquired by the defendant and her predecessors Wozny and Dmytrow. In that event, the plaintiff never owned the fence after acquisition of Lot 18 by Wozny and Dmytrow. Her situation and her remedy was that contemplated by s. 183 of the *Land Titles Act*:

183(1) Where a person at any time has made lasting improvements on land under the belief that the land was his own, he or his assigns

(*a*) are entitled to a lien upon the same to the extent of the amount by which the value of the land is enchanced by the improvements, or

(*b*) are entitled to or *may* be required to retain the land if the court is of opinion or requires that this should be done having regard to what is just under all the circumstances of the case.

(2) The person entitled or required to retain the land shall pay such compensation as the court may direct.

See, for instance, *Mildenberger v. Prpic* (1976), 67 D.L.R. (3d) 65, [1976] 4 W.W.R. 67. The plaintiff does not seek that remedy. Indeed, it may no longer be available to her.

Finally, the plaintiff in her statement of claim seeks a declaration that she has a valid and subsisting caveat against the said land. As previously mentioned, the plaintiff's caveat does not restrict itself to the strip of Lot 18 in dispute, but claims adverse possession to the whole of Lot 18, something which is not asserted by the plaintiff in her action. I can only surmise that this was done because the Registrar of Land Titles could not or would not have accepted a caveat on the strip without compliance with subdivision laws and regulations. Whatever the reason, the caveat in so far as it described excess lands did not accurately reflect the nature of the interest claimed (ss. 136 [rep. & sub. 1977, c. 27, s. 9; 1977, c. 94, s. 15(*a*)] and 137 of the *Land Titles Act*) and could not have been sustained. Regardless of the outcome of the other claims in this action, it was wrongfully filed and must be discharged.

In the result, the plaintiff's action is dismissed and the counterclaim is allowed. There will be an order declaring that the defendant (plaintiff by counterclaim) is the owner of the strip in dispute, and she will also have judgment for damages of $435 for extra costs incurred by her as a result of the plaintiff's refusal to permit her workmen access to the disputed strip. There should also be an order discharging the plaintiff's caveat.

The defendant has not shown actual damage flowing from the wrongful filing of the caveat. She has also asked for punitive and exemplary damages in the sum of $10,000. There is no evidence of malicious or improper motive on the part of the plaintiff such as would justify the assessment of punitive or exemplary damages against the plaintiff.

The defendant will be entitled to have the fence removed if she insists on it and counsel may speak to me as to the terms of that part of the order if she does.

Defendant will have costs in col. 5.

Judgment accordingly.

LEWIS v. ROMITA

Ontario Supreme Court [High Court of Justice], Southey J.

Judgment—February 7, 1980.

Adverse possession — Nature of agreement that will prevent running of statute — Mistaken agreement as to location of boundary will not prevent running of statute.

The east side of the plaintiff's land abutted the rear of the defendant's land. When the plaintiff acquired her land in 1943, the properties were physically separated by a fence, which, at the street line, encroached on the defendant's land by 1.8 feet. The plaintiff believed that the fence marked the boundary. In 1977, the defendant caused the fence to be moved west, closer to the lot line as shown on the deeds, but still encroaching slightly on the defendant's property. The plaintiff claimed title by adverse possession of the lands west of the original location of the fence, damages, and an injunction requiring that the fence be relocated in its original position. The agreed statement of facts included a statement that the defendant's predecessor in title had agreed to the location of the fence.

Held—The plaintiff had established actual possession, with the intention of excluding the owners, and discontinuance of possession by the owners for the statutory period.

While some types of agreement, involving the acknowledgment of the defendant's title, may prevent the Statute of Limitations from running, the reference to the agreement in the statement of facts did not establish that the plaintiff was party to any agreement, nor did it establish the nature of the agreement. If the agreement was only that the fence should be located on the boundary, with the parties being mistaken as to the actual location of the boundary, such agreement would not prevent the acquisition of possessory title.

As the plaintiff had unreasonably joined a claim for substantial damages to the other relief claimed, which claim was dropped *only* at the opening of trial, the plaintiff was refused costs.

Cases considered

Bea v. Robinson (1977), 18 O.R. (2d) 12, 81 D.L.R. (3d) 423 — not followed.

Brown v. Phillips, [1964] 1 O.R. 292, 42 D.L.R. (2d) 39 (C.A.) — applied.

McGugan v. Turner, [1948] O.R. 216, [1948] 2 D.L.R. 338 — applied.

Martin v. Weld (1860), 19 U.C.Q.B. 631 (C.A.) – applied.
Raab v. Caranci (1977), 24 O.R. (2d) 86, 97 D.L.R. (3d) 154, affirmed 24 O.R. (2d) 832n, 104 D.L.R. (3d) 160n (C.A.) – applied.

Statutes considered
Limitations Act, R.S.O. 1970, c. 246, ss. 4, 15.

ACTION for a declaration that defendant's title to certain lands extinguished, for a mandatory injunction to relocate a fence, and for damages.

David Cheifetz, for plaintiff.
Adrian Hill, for defendant.

(No. 24650/78)

February 7, 1980. SOUTHEY J. (orally):—The plaintiff is the owner and occupant of a residential property, 130 Pritchard Avenue, located on the north side of Pritchard Avenue, in the borough of York. The property was purchased by the plaintiff and her late husband in 1943 and she has lived there continuously since that time.

The defendant is the owner of a commercial property located on the northwest corner or Pritchard Avenue and Jane Street. The defendant's property extends back from Jane Street along the north side of Pritchard Avenue, so that the rear boundary of his property forms the easterly side yard boundary of the plaintiff's property.

The defendant purchased his property in 1975. At the time the defendant purchased the property, the fence between the properties of the plaintiff and the defendant was not located precisely on the boundary between the two properties, as determined by the descriptions contained in the registered instruments, but rather was located 1.8 feet east of the southwest [sic] corner of the plaintiff's property, as described in the instruments of title. That corner is the southeast corner of Lot 215 and is the point at which the easterly boundary of the plaintiff's property, as described in the instruments, intersects with the northern boundary of Pritchard Avenue.

The fence was much closer to the boundary line at the northern limit of the defendant's property, which was about 50 feet north of Pritchard Avenue.

At the time the defendant purchased his property in 1975, the property was in a very bad state of repair. The backyard, which was adjacent to the sideyard of the plaintiff's property, was literally a junkyard. The defendant proceeded to renovate the buildings on the property and to clean up the backyard. Ultimately he installed in the backyard a parking area for the businesses carried on in the commercial property on Jane Street, together with little gardens for the sideyards.

During the course of these renovations, in 1977, the fence, between the two properties, somehow was moved closer to the lot line, as determined from the paper titles.

Exhibit No. 6 is a survey of the defendant's property after these renovations had been completed and it shows the fence as being located at the intersection – as being located 5½ inches east of the lot line, at the intersection with the north side of Pritchard Avenue and 3½ inches east of the lot line, at the northern boundary of the defendant's properties. This means that the fence apparently was moved about 16 inches closer to the lot line, on the northern boundary of Pritchard Avenue and remained at about the same location at the northern boundary of the defendant's properties.

The matters in controversy in this action, therefore, are the respective rights of the plaintiff and the defendant to the tiny triangle of land between the fence, as located prior to the renovations, and its location after the renovations. That is a triangle, having a base of 16 inches on the north side of Pritchard Avenue and narrowing to a point about 50 feet north of Pritchard Avenue.

The plaintiff claimed damages in the amount of $10,000 for trespass to her lands; an order restraining the defendant from going on any part of her land; a declaration that she is the absolute owner of the triangular-shaped piece of land I have described; a mandatory injunction requiring the defendant to relocate the fence to its position, prior to the 1977 renovations; and her costs of the action.

The claim for damages was abandoned at the opening of trial this morning and counsel for both sides were in agreement that if the plaintiff is entitled to any relief, she is entitled to an order – a mandatory order requiring the defendant to return the fence to its location, prior to the 1977 renovations.

It appears from Ex. 5, which is a group of five photographs, that the effect of the move was to narrow very slightly at the Pritchard Avenue end, a narrow strip of land, covered with grass or low-lying weeds, located between a paved driveway, leading to the back of the plaintiff's property. No evidence was given of any actual interference with the plaintiff's use of her property, as a result of the move of the fence.

It is an unfortunate thing indeed that a controversy about such a tiny and insignificant piece of land should come to trial in this or any other Court.

Counsel for the defendant submitted that the value of the lands in question were so trifling, that the action should be dismissed, in accordance with the maxim, "de minimis non curat lex", that is, "The law does not concern itself with trifles".

No authorities were cited to me to support the application of that principle in a case involving ownership of land, and I am reluctant to dispose of the case on that basis, where it involves title to a piece of land located close to a commercial area, and as to which no evidence has been given respecting value. The value must be slight, but I do not choose to speculate as to what the value of this one foot or more piece of frontage on Pritchard Avenue might conceivably be at some point in the future, when taken in conjunction with the lands now owned by the plaintiff or the lands now owned by the defendant.

Accordingly, I propose to decide the case on the merits, as best I can.

The case was put to me on an agreed statement of facts which reads as follows:

> "1. The fence has existed since before 1943 when the Plaintiff bought her land. At all material times, the Plaintiff believed that the fence was the boundary lot line and she made full use of the property up to the fence. The owner of the Defendant's lands prior to the Defendant, had agreed to the location of the fence.
>
> 2. The actual lot line and the prior location of the fence are accurately shown on the attached survey.
>
> 3. In 1977, during extensive renovations on the Defendant's property, the fence was moved closer to the lot line,

without the consent, approval, knowledge or direction of either the Plaintiff or the Defendant."

In addition, counsel made further statements of fact that were agreed upon between the parties, and to which I have or may hereafter make reference in my reasons for judgment.

The plaintiff claims that she had acquired possessory title to the triangular-shaped piece of land in question, by reason of her use and occupation of it for the 34 years, from 1943 to 1977 when the fence was moved. The requirements for establishing possessory title were stated as follows by Mr. Justice Lerner in *Raab v. Caranci* (1977), 24 O.R. (2d) 86 at 90, 97 D.L.R. (3d) 154, affirmed 24 O.R. (2d) 832n, 104 D.L.R. (3d) 160n (C.A.):

> "In order to establish his right to possessory title by adverse possession, the plaintiff must establish that his possession is open, notorious, constant, continuous and exclusive of the right of the true owner. In *Pflug and Pflug v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681, affirmed [1953] O.W.N. 140, [1953] 1 D.L.R. 841, Wells, J., at p. 527 O.R., p. 689 D.L.R., stated in words cited with approval by the Divisional Court in *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482 at p. 487, 50 D.L.R. (3d) 650 at p. 655, that to succeed claimants to title by adverse possession must show:
>
> '(1) Actual possession for the statutory period by themselves and those through whom they claim;
>
> (2) that such possession was with the intention of excluding from possession the owners or persons entitled to possession; and
>
> (3) discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.'
>
> All of these requirements must be met throughout the ten-year limitation period as provided by ss. 4 and 15 of the *Limitations Act*."

Looking at the photographs in Ex. 5 and the statement in the agreed statement of facts, that the plaintiff had, at all material times, made full use of the property up to the fence, it is quite obvious, in my judgment, that the plaintiff has satisfied the requirements for establishing possessory title, as set out in the passage I have quoted above.

The relevant provisions of The Limitations Act, R.S.O. 1970, c. 246, read as follows:

> "4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it."

Section 15 reads:

> "15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished."

On the basis of that, therefore, it would appear that the plaintiff's possession of the triangular-shaped parcel of land throughout the 34 years amply satisfies these sections of The Limitations Act, and that the effect of s. 15 is that the title of the plaintiff and his predecessors to this piece of land was extinguished.

Counsel for the defendant submitted, however, that there could be no adverse possession by the plaintiff of the sliver of land in question, because of the agreement referred to in the last sentence of para. 1 of the agreed statement of facts.

That sentence reads as follows:

"The owner of the Defendant's lands prior to the Defendant, had agreed to the location of the fence."

Undoubtedly, possession by the defendant of the land in question, under certain types of agreement would have been fatal to the plaintiff's claim for possessory title. For example, if there had been an agreement by the plaintiff and the defendant's predecessor in title, that the lands in question belonged to the defendant's predecessor in title, but could be used by the plaintiff in order to facilitate the use of her driveway, and that the fence might be located accordingly, then clearly the plaintiff would have occupied the land with the consent of the defendant's predecessor in title. In those circumstances, there would be no adverse possession and no possessory title could arise.

Counsel for the defendant conceded, however, that the onus was on the defendant to prove the existence of an agreement sufficient to negative adverse possession and the possessory title.

In my judgment, the agreed statement of facts and the other statements of fact to which counsel agreed orally at trial, do not provide evidence of any such agreement which might discharge that onus. I say that because in the first place, the agreed statement of facts does not establish that the plaintiff was a party to the agreement referred to in the sentence quoted above.

Secondly, the sentence is woefully lacking in any particulars as to what the nature of the agreement was. All the sentence says is, that it was agreed – that the owner of the defendant's land prior to the defendant, had agreed to the location of the fence.

This may have been simply an agreement that the proposed fence was located, in fact, on the boundary as determined by the paper titles, with such agreement being entered into by persons, both mistaken, as to the actual location on the land of that boundary.

If that was the agreement and in my judgment the defendant has not established by the evidence that it was not the agreement, then such agreement, in my view, would not negative adverse possession or prevent the acquisition by the plaintiff of possessory title.

With the greatest deference to my learned sister, Madame Justice Boland, I am unable to agree with the somewhat negative thoughts to the contrary, expressed by her in obiter in *Bea v. Robinson* (1977), 18 O.R. (2d) 12 at 16, 81 D.L.R. (3d) 423.

The weight of authority appears to me to be that that possession that would otherwise be adverse but which is enjoyed under an agreement made under a mutual mistake of fact as to the boundary between properties, is sufficient adverse possession to bring into operation the provisions of The Limitations Act: see the judgment of Chief Justice Robinson in *Martin v. Weld* (1860), 19 U.C.Q.B. 631 (C.A.), which was followed and expanded by Smiley J., in *McGugan v. Turner*, [1948] O.R. 216 at 221, [1948] 2 D.L.R. 338. That view, in my judgment, accords with common sense. If the neighbouring landowners have agreed as to the location of the boundary between their properties, and one of them erects a fence, and they then proceed to occupy the lands on either side of the fence for 30 years, as though that were the boundary, even though the original agreement was made under a mistake of fact, I should think that it was then too late, if the mistake was then discovered, for one of the parties to set aside the agreement and claim possession of land on the neighbour's side of the fence.

The party claiming to be entitled to set aside the agreement and claim land on the other side of the fence, had the right to bring an action to set aside the agreement from the time the agreement was made. After ten years, his right to bring that action, in my judgment, is barred by s. 4, and any title to the property on his neighbour's side of the fence is extinguished, under s. 15 of The Limitations Act.

If this were not the case, landowners could never rely on possessory title.

For the foregoing reasons, it is my view that the defendant has failed to discharge the onus upon him of showing the existence of an agreement, which would negative adverse possession and the acquisition of a possessory title.

Even if that onus was not on the defendant, I consider that I am entitled to make findings of fact, based on reasonable inferences from the agreed facts, that no such agreement did exist. In my judgment, the only reasonable inference from reading para. 1 as a whole is that the plaintiff was not the person who entered into the agreement referred to in the last sentence of the paragraph.

If that inference is not justified, however, I consider it fair to infer that if she did enter into an agreement with the owner

of the defendant's lands, prior to the defendant, she would not have agreed that such prior owner had any title to any lands on her side of the fence.

In my view, that is the only inference consistent with the agreed fact that the plaintiff believed that the fence was the boundary lot line and that she made full use of the property up to the fence.

I do not think it is reasonable to infer that the plaintiff, having that belief, would have entered into any agreement to the effect that she was not the owner of the lot up to the fence that she believed to be located on the boundary lot line.

The only agreements which it can possibly be inferred were entered into by the plaintiff, must have been agreements as to where the boundary lot line, in fact, fell, and that the fence might be put there.

For the reasons I have already given, such an agreement made by the plaintiff would not negative adverse possession or prevent her acquiring possessory title.

For these reasons, it is my judgment that the plaintiff is entitled to the relief that counsel have agreed upon, namely the mandatory injunction requiring the defendant to relocate the fence to its position, prior to September 5, 1977.

As I said earlier in my judgment, it is indeed an unfortunate thing that such a trifling matter has occupied this Court for the time which this case has involved.

I find myself considering, and indeed counsel covered this matter in their argument, who is responsible for this matter coming this far and why was it not settled amicably, without the commencement of any litigation.

In my judgment, the plaintiff acted most unreasonably in claiming damages in the amount of $10,000 on the facts of this case. The legal point at issue is not a simple one and it was no doubt very difficult to determine what were the facts at the time the various fences were built. In these circumstances, I don't think that the defendant can be blamed for defending the action, as long as it contained the claim for damages. That claim was dropped only this morning and by then it would have been pretty late in the game to move the fence, rather than incur legal costs.

I feel that the blame for this matter coming this far must rest squarely on the plaintiff, and accordingly I do not propose

to order that the defendant pay any of the plaintiff's costs of the action.

There will be no order for costs.

This disposition of costs can be further supported by the rather obvious fact that the value of the lands in question falls within the jurisdiction of the County Court. I prefer not to put my ruling as to costs on that basis, however, because I think it would have been wrong for this matter to have occupied the County Court for a day.

There will be judgment for the relief claimed in para. 7(b) of the statement of claim, but without costs.

MR. CHEIFETZ: I believe, My Lord, I am entitled to an order declaring that the title of the predecessor to the defendant was extinguished. You have made that specific finding in the judgment, but it is my understanding that that order has to go as well, because otherwise, this matter might pop up in Court again next time there is a conveyance.

HIS LORDSHIP: You are right and that was agreed to. Well, then, an addendum, Madam Reporter.

Counsel for the plaintiff has brought to my attention that counsel were agreed that the plaintiff, if entitled to any remedy, was also entitled to a declaration that the defendant's title to the triangular-shaped piece of property in question had been extinguished.

Counsel, there will be judgment for such a declaration in terms of para. 7(c) of the statement of claim.

MR. CHEIFETZ: And My Lord, you are not entitled to say that the plaintiff is the owner.

HIS LORDSHIP: You claimed the wrong thing.

MR. CHEIFETZ: In effect, yes, My Lord, what you must say is that the title of the predecessor was extinguished: The Court of Appeal in *Brown v. Phillips,* [1964] 1 O.R. 292, 42 D.L.R. (2d) 39 —

HIS LORDSHIP: I am not going into any more cases. What you agreed to isn't what you want. A declaration as to title is a declaration that the plaintiff is the absolute owner.

MR. CHEIFETZ: Well, My Lord, you can give me that declaration, but you won't have the authority to give me that sort of declaration.

HIS LORDSHIP: Well what is it you want?

MR. CHEIFETZ: An order to the effect that the title of the defendant's predecessors in title and my friend and I can speak to it –

HIS LORDSHIP: The defendant's predecessors –

MR. CHEIFETZ: – was the defendant in that case –

HIS LORDSHIP: It is the defendant that you have to worry about.

MR. CHEIFETZ: – in that case, that the defendant's title in that piece of property has been extinguished.

HIS LORDSHIP: All right. Well, you would prefer 7(c) – the plaintiff is the absolute owner.

MR. HILL: That's fine with me.

HIS LORDSHIP: I think that's the way –

MR. CHEIFETZ: Well –

HIS LORDSHIP: Have you got any authority that I can't say that?

MR. CHEIFETZ: Yes, My Lord.

HIS LORDSHIP: That I can't say that it is the absolute owner?

MR. CHEIFETZ: Yes, My Lord, you cannot say, under The Limitations Act where adverse possession is acquired, the Court of Appeal, a decision by Mr. Justice McGillivray, Schroeder, and Mr. Justice Kelly held in 1963 that the declaration to be given in these facts should be to the effect that the title be extinguished and not that the title be acquired.

HIS LORDSHIP: All right. The plaintiff will also have a declaration that the title of the defendant to lands west of the line on which the fence is to be relocated hereunder has been extinguished.

Judgment accordingly.

BEAUDOIN et al. v. AUBIN et al.

Ontario High Court of Justice, Anderson J. August 24, 1981.

Real property — Adverse possession — Intention to exclude — Mutual mistake as to boundary — Plaintiffs occupying strip of land adjacent to rented property for many years — Subsequently purchasing property and obtaining survey — Strip enclosed by fence with plaintiffs' property — Whether plaintiffs acquired title by adverse possession — Whether intention to exclude true owner must be based on knowledge of title — Whether declaration and injunction appropriate — Whether damages for emotional stress recoverable — Limitations Act, R.S.O. 1970, c. 246, ss. 4, 15.

The plaintiffs had occupied lot A, together with a 4.7-foot strip of Lot B to the north, since 1951. In that year they rented Lot A from the owners, and in 1966 they purchased it. Since 1951 there had been a fence along the entire northerly boundary of the 4.7-foot strip of land, which (except for the front part, destroyed in an accident) remained there until 1979, when the defendants, the owners of Lot B, removed it. On the evidence, the fence appeared to have been erected by the predecessor in title of the defendants. In addition, the plaintiffs' garage and driveway encroached on the strip of land. When the plaintiffs purchased Lot A in 1966 they had a survey made which indicated that the fence between Lots A and B was

situate 4.7 feet north of the boundary line shown in their deed. The defendants purchased Lot B in 1973. Thereafter the parties had a continuous dispute about the ownership of the strip of land, but nothing was done by the defendants until 1979, when they had a survey made and removed the fence. The plaintiffs then brought this action for a declaration that they were the owners of the strip of land, for damages and for an injunction. *Held*, judgment should be awarded to the plaintiffs for a declaration and an injunction, but the claim for damages should be dismissed.

(1) Although the *Limitations Act*, R.S.O. 1970, c. 246 (now R.S.O. 1980, c. 240), does not expressly confer a right to bring an action for a declaration that the plaintiff has title to property by adverse possession, such an action lies at law.

(2) The plaintiffs were in exclusive, open and notorious possession of the strip of land from 1951 at least until 1973 and probably until 1979, as evidenced by the fact that the strip was enclosed with their land. Thus, they occupied the disputed strip well in excess of the ten-year period stipulated by ss. 4 and 15 of the Act within which the defendants should have brought an action to recover possession, failing which their title was barred. Even if the plaintiffs' possession until 1966 enured to their landlord, which was not the case, they purchased whatever interest their landlord thus acquired.

(3) Ignorance of the true state of the title does not prevent possession, which is open and notorious, from ripening into title. Thus, the fact that until 1966 the plaintiffs were under a misapprehension as to the true state of their title to the disputed strip, or that the plaintiffs and the defendants' predecessor in title were under a mutual mistake as to the true boundary, did not mean that the plaintiffs' possession was not adverse. In order to acquire title by adverse possession, it is not necessary to have an actual intention to exclude the true owner if the true owner is in fact excluded for the statutory period by a possession which is certain and unequivocal. In those circumstances, intention is to be presumed. Intention only becomes relevant where the acts of possession are equivocal. Then the Court may consider whether there is an actual intention to exclude the true owner, which would render the acts of possession, while otherwise equivocal, certain.

(4) The consequences of emotional stress engendered by the dispute and suffered by the plaintiffs were not compensable.

[*Babbitt v. Clarke* (1925), 57 O.L.R. 60, [1925] 3 D.L.R. 55; affd [1927] S.C.R. 148, [1927] 2 D.L.R. 7; *Martin v. Weld et al.* (1860), 19 U.C.Q.B. 631; *Nouse v. Clark*, [1936] O.W.N. 563; *Hamilton et al. v. The King* (1917), 54 S.C.R. 331, 35 D.L.R. 226, folld; *Seddon v. Smith* (1877), 36 L.T. 168; *McGugan et al. v. Turner et al.*, [1948] O.R. 216, [1948] 2 D.L.R. 338, apld; *Kosman et al. v. Lapointe* (1977), 1 R.P.R. 119; *Lutz v. Kawa* (1979), 98 D.L.R. (3d) 77, 9 Alta. L.R. (2d) 151, 17 A.R. 288 [affd 112 D.L.R. (3d) 271, 13 Alta. L.R. (2d) 8, 23 A.R. 9], disaprvd; *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; *Pflug et al. v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681; affd [1953] O.W.N. 140, [1953] 1 D.L.R. 841; *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *Wright v. Olmstead* (1911), 3 O.W.N. 434; *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182; *Sherren v. Pearson* (1886), 14 S.C.R. 581; *Doe d. Des Barres v. White* (1842), 3 N.B.R. 595; *Williams Bros. Direct Supply Stores, Ltd. v. Raftery*, [1957] 3 All E.R. 593, distd; *A.-G. Can. v. Krause*, [1956] O.R. 675, 3 D.L.R. (2d) 400; *Griffith et al. v. Brown* (1880), 5 O.A.R. 303; *Paradise Beach & Transportation Co., Ltd. et al. v. Price-Robinson et al.*, [1968] 1 All E.R. 530; *Dean of Ely v. Bliss* (1852), 2 De G.M. & G. 459, 42 E.R. 950; *Smith v. Lloyd et al.* (1854), 9 Ex. 562, 156 E.R. 240, refd to]

ACTION for a declaration that the plaintiffs are entitled to a strip of land by adverse possession as against the defendants and for damages and an injunction; COUNTERCLAIM by the defendants for similar relief.

M. M. S. Fox, for plaintiffs.
F. W. Dickens, for defendants.

ANDERSON J.:—This is an action for a declaration that the plaintiffs are entitled to a strip of property at the northerly boundary of their lands where that boundary abuts that of the lands owned by the defendants. There is also a claim for damages for assault, trespass and property damage and for an injunction. There is a counterclaim for almost identical relief.

The substantial question for determination is whether the claim of the defendants to the strip in question is barred by limitation and their title consequently extinguished. This question involves a consideration of the plaintiffs' possession of the disputed land. The defendants contend that such possession has not, in the circumstances disclosed by the evidence, had the results contended for by the plaintiffs. Central to consideration of this is a mutual error as to the location of the boundary as defined by the deeds. The facts bearing on these issues are not complicated and are not greatly in dispute.

The plaintiffs are the owners of 137 Front Rd. N., Amherstburg, Ontario. Their property, as acquired by deed, is composed of the southerly 22 feet in perpendicular width throughout from front to rear of Lot 6 and the northerly 14 feet in perpendicular width throughout from front to rear of Lot 7, Plan 221.

The defendants are the owners of 141 Front Rd. N. Their property adjoins, and lies to the north of, that of the plaintiffs. According to the deed by which the property owned by the defendants was acquired, their lands comprise the northerly 42 feet in perpendicular width from front to rear of Lot 6 and the southerly four feet in perpendicular width throughout from front to rear of Lot 5, both according to Plan 221.

The disputed land comprises a strip 4.7 feet, more or less, in width, extending along the entire northerly boundary, according to the description in the deed, delineating the line between the property owned by the plaintiffs and that owned by the defendants. The strip in question is entirely located on land which, according to the deeds, belongs to the defendants.

The plaintiffs first occupied 137 Front Rd. N. in 1951, as tenants. In 1966, they purchased the property from their landlord,

one McConnell. The defendants purchased No. 141 in 1973. It is common ground that at least during the period from 1951 to 1966, the plaintiffs were in possession of the disputed land.

The genesis of the dispute is in a misunderstanding, common to the plaintiffs and the predecessors in title of the defendants, that the boundary line between No. 137 and No. 141 was not where the descriptions in the deeds would indicate, but some 4.7 ft. to the north, along a line indicated on the sketches of survey, which are exs. 1 and 4, as "line of occupation".

At the time of acquisition of the property by the plaintiffs there was a frame garage located at the northerly edge of their property which encroached on the disputed land. A portion of the plaintiffs' driveway also encroached. In 1968, the garage was replaced by one in substantially the same location.

It is not in dispute that during the period from 1951 to about 1968, the lands occupied by the plaintiffs, which included the disputed land, were separated and enclosed from the adjoining lands to the north by fences extending throughout the entire length of the "line of occupation". It is a fair inference on all of the evidence that the fence along the "line of occupation" extending from the street line as far as the westerly front, approximately, of the garage, was erected by the owner for the time being of No. 141, since a similar fence extended across the frontage of No. 141.

Prior to the purchase of the property by the plaintiffs in 1966, a survey was made of 137 Front Rd. As a result of this survey it may be inferred that the plaintiffs had notice at the time they acquired the property that the "line of occupation" which physically divided their property from No. 141 did not accord with the legal description of the property they had purchased.

Some time after their acquisition, as a result of a motor accident occurring about 1968, the low fence to which I have referred as extending across the front of No. 141 and along the "line of occupation" from the street to the garage was demolished. It would appear, however, and I find as a fact, that the "line of occupation" still continued as the apparent boundary between the two properties in 1979, when, in June and July of that year, a survey of No. 141 was made, at the behest of the defendants, resulting in the sketch of survey which is ex. 4. The sketch of survey shows the "line of occupation" substantially as it was shown in the earlier survey of No. 137, prepared in 1966, which is ex. 1.

There is no evidence of any dispute or altercation concerning the boundary between No. 137 and No. 141 in the years between

1951 and 1973. It is conceded by the defence that from 1951 to 1966, the plaintiffs were in exclusive, open, and notorious possession of the disputed land. I conclude and find as a fact that such possession continued at least until 1973. I also conclude and find as a fact that from 1951 to some time in 1968, when the accidental destruction of a portion of the fence occurred, the disputed land was actually enclosed with that of the plaintiffs throughout its entire length. "Enclosure is the strongest possible evidence of adverse possession . . .": see *Seddon v. Smith* (1877), 36 L.T. 168 at p. 169.

In arriving at my findings concerning possession I have not overlooked the evidence of Bruce Edward Sinasac that from time to time he cultivated the flowers on or in the vicinity of the disputed land. He was the vendor to the defendants, having owned the property sold to them from 1968. His evidence is inconclusive and falls far short of establishing any interruption of, or interference with, the plaintiffs' possession. In any event, as will appear, any acts of his occurred at a time when they were no longer material.

From very shortly after the acquisition of No. 141 by the defendants, altercations arose between the plaintiffs and the defendants. While these altercations undoubtedly involved conditions at the boundary between the two properties, and the condition of the fences and other appurtenances along the line of occupation, I conclude that the plaintiffs' possession of the disputed strip was not directly challenged until 1979. In the view I take of the case it is not necessary that I should decide whether, between 1973 and 1979, the possession of the disputed land was interrupted by the defendants. I am not persuaded, however, that in the initial stages of these altercations the defendants had any understanding of the true position relating to the boundary between their property and No. 137. I think that a full realization of the situation did not arise until they obtained the survey in 1979. It is significant that the survey by Verhaegen, at the request of the defendants, was made on June 22, 1979, and on June 27th the defendant Aubin wrote and subsequently delivered the letter, ex. 3, demanding that the plaintiffs remove fencing and other things from "my land".

It is clear from the evidence of their surveyor, Verhaegen, and I find as a fact, that the ordering of the survey was as a result of concerns entertained by the defendants concerning the boundary of their lands at the northerly extremity, and not at the southerly extremity where they abutted those of the plaintiffs. Immediately

after the facts disclosed by this survey became known to the defendants, an aggressive programme with respect to the domination of the disputed lands was undertaken by the defendant Aubin which involved, among other things, the removal of the remaining fences standing on the "line of occupation".

It was common ground between counsel upon the argument that the rights of the parties fall to be determined by the application of ss. 4 and 15 of the *Limitations Act*, R.S.O. 1970, c. 246 [now R.S.O. 1980, c. 240]:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.
>
> . . . . .
>
> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made, or brought within such period, is extinguished.

Although the Act neither expressly nor by necessary implication confers a right upon the plaintiffs to bring such an action as this, it was not contended on behalf of the defendants that such an action would not lie. There is authority that it does: see, for example, *Babbitt v. Clarke* (1925), 57 O.L.R. 60, [1925] 3 D.L.R. 55; affirmed [1927] S.C.R. 148, [1927] 2 D.L.R. 7. A similar conclusion is established or to be inferred from numerous other cases here considered.

On the legal questions involved in the issue as to title to the disputed land, the difference between the parties is focused on the nature of the plaintiffs' possession and the circumstances under which that possession occurred.

Reduced to its narrowest compass, the submission on behalf of the defendants is that the statute did not run during the mutual misapprehension that the "line of occupation" represented the boundary as provided by the deeds, and that it was only after 1966, when the plaintiffs appreciated the true state of fact, that their possession was such as to start the running of the statute. Inherent in this is the contention that a specific intention to exclude the true owner is essential. In my view, which I shall express in more detail, this submission is based upon an erroneous concept of what constitutes "adverse possession" and of the nature and proof of the *animus possidendi*.

There was also some question raised by the defence as to whether such possession as was admittedly exercised by the plaintiffs during their occupancy as tenants could avail in considering the application of the statute because they were tenants and not owners of the land owned by McConnell, which they subsequently bought. The point was not really pressed in argument and is, in my view, without merit. The plaintiffs' landlord did not own and could not lease to the defendants the disputed land, their occupancy of which was simply as trespassers. Whether they occupied the property which they subsequently purchased as tenant or as owner seems to me quite irrelevant.

Possession of the disputed land by the plaintiffs was, on any view of the evidence, exclusive as against the true owners until 1966, when the plaintiffs purchased from their landlord, and continued thereafter. The true owners had then been out of possession for a period sufficient to bar any action and to extinguish their title. Even if possession and any rights to which it gave rise be ascribed during the period of tenancy to the landlord, and I see no reason that should be so, any interest of the landlord was acquired by the plaintiffs under their deed.

Consideration and disposition of the defendants' submission on adverse possession requires some historical review of statutes of limitation, both in England and in this country, and of cases decided under those statutes. Before embarking upon such a review I may say that but for certain general statements of principle, made in cases differing on their facts from that which is before me, I should have concluded without doubt or difficulty that the plaintiffs were entitled to succeed. Beyond any shadow of doubt the plaintiffs were, from 1951 to 1968, in open, peaceable and undisputed possession of the land in question, which was enclosed with the lands of which their landlord was the legal owner and which they purchased. They possessed, occupied and used that land as if it were their own. At any time during that period, the predecessors in title of the defendants could have made an entry or brought an action. They did not do so. Giving effect to the plain words of s. 4, their right to do so was barred as early as 1961. Giving similar effect to s. 15, their right and title were extinguished.

The defendants contend, however, that the case law has given a gloss to the words which, in the circumstances of this case, deprives the words of that effect. It is contended that because the plaintiffs did not know that they had no title to the disputed land, of which they had possession, their possession was not "adverse",

their *animus possidendi* was lacking the essential element of intention to exclude the true owner, and therefore the words of the Act do not have the effect they so plainly express. A situation in which both owner and possessor were under a misapprehension as to the true state of the title has been dealt with in several cases.

Before embarking on a review of these and other cases it is appropriate to make some reference to the historical development of limitation statutes.

In 1833 the *Real Property Limitations Act*, (U.K.), c. 27, was passed in England. Similar legislation followed in Upper Canada in 1834 (U.C.), c. 1. From 1834 to 1939, when significant changes were made in England, the Statutes of Limitations in England and in Upper Canada were similar in all respects material to the statute under consideration in this case.

Prior to the passage of these enactments, the law both in England and in Upper Canada gave a technical meaning to the words "adverse possession". Wrongful possession *per se* did not ripen into a claim to extinguish the owner's remedy unless there had been an ouster of the legal owner, an ouster of *seisin*: see *Cheshire's Modern Law of Real Property*, 12th ed. (1976), at p. 887 fn. This was likewise the law in Upper Canada prior to the passage in that Province of 1834 (U.C.), c. 1.

The first of the judgments which bear directly on this case was *Martin v. Weld et al.* (1860), 19 U.C.Q.B. 631. This was a judgment of the Court of Appeal which expressly reflects the change in the law and deals explicitly with the point which has been raised by the defence in this case.

The action was for trespass and assault. The plaintiff's claim to title rested upon possession. The appeal was from judgment upon the verdict of a jury. The misdirection complained of on appeal was in regard to the evidence upon the point of possession by the plaintiff of the *locus in quo* and the effect of such possession under the circumstances of an alleged common error respecting the true boundary. In the course of his judgment Robinson C.J. had this to say [at pp. 632-3]:

> We do not consider that the fact (if the truth was so) that the plaintiff and defendant were under a common error in regard to the true line of division between them, would prevent the new Statute of Limitations running, though it might and has been allowed to do so under the former law, when it was necessary to make it appear that the possession for twenty years was adverse, and not with acquiescence or permission ... Here, according to the true line of division, if that alone should given under the circumstances, the defendants would seem entitled to a verdict, but the evidence of possession

> being held by the plaintiff for more than twenty years of the *locus in quo*, does seem to be sufficient to warrant the verdict, and we have determined that upon the evidence given at the trial it ought not to be disturbed.

The change in the law effected by the statutes was the subject of helpful comment in 1892 in Banning, *The Statute Law of the Limitation of Actions*, 2nd ed. (1892) at pp. 101-2:

> By this section the doctrine of adverse possession in the old sense is abolished; but the term adverse possession is so convenient that it is better, perhaps, still to retain it, though with a variation of meaning. It will, therefore, in this volume mean any possession inconsistent with the title of the lawful owner. The doctrine which formerly prevailed implying a constructive authority from the owner, and thus excluding the operation of efflux of time in numerous cases, for example in the case of *possessio fratris*, is now abolished, and *all possession without the direct authority of the owner may now be considered as adverse.*

(Emphasis added.) The reference in this quotation from Banning is to what was first enacted as s. 2 of the *Real Property Limitations Act*, 1833 (U.K.), c. 27, which was in the following terms.

> 2. After the thirty-first day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims ...

It is significant that the language of this section does not differ in any material way from that of s. 16 of 1834 (U.C.), c. 1, which was under consideration in *Martin v. Weld*, nor save by difference in the period of limitation, from that of s. 4 of the present Act.

In *Babbitt v. Clarke*, *supra*, a judgment of the Appellate Division, affirmed by the Supreme Court of Canada, the plaintiff claiming a possessory title was successful. There was a mutual mistake as to the location of the true boundary. It is nowhere suggested that this factor was material, much less fatal, to the claim of the plaintiff.

In *Nourse v. Clark*, [1936] O.W.N. 563, the Court of Appeal sustained a judgment at trial dismissing the plaintiff's action upon the ground that the defendant had acquired a possessory title. Again, there was a mutual mistake as to the location of the true boundary. No reference is made to that as being significant.

Martin v. Weld, *supra*, was cited and followed by Smily J. in *McGugan et al. v. Turner et al.*, [1948] O.R. 216, [1948] 2 D.L.R. 338. This was an action for declaration as to the ownership of lands and included in the defences was title by possession. This defence had not been pleaded but amendment was permitted. The defendants contended that any acts of ownership performed by

predecessors in title of the plaintiffs were performed in ignorance of the true and proper construction of the will upon which the rights of the parties depended and in an erroneous interpretation of such will. In dealing with this aspect of the defence, Mr. Justice Smily had this to say, at p. 221 O.R., p. 342 D.L.R.:

> As to the first contention, no authority was submitted on behalf of the defendants on the point, and I know of no principle which would support such contention. The matter is now governed by *The Limitations Act*, R.S.O. 1937, c. 118, and the relevant sections are 4 and 15. No exception is made in the statute, in the said sections or any other, of ignorance or mistake as to the true ownership. In fact it has been held that a common error by the owners in regard to the true line of division between their properties does not prevent the statute running where the statute does not require it to be shown that the possession was adverse and not with acquiescence or permission: see *Martin v. Weld et al.* (1860), 19 U.C.Q.B. 631 at 632. *This, of course, applies to the present statute.*

(Emphasis added.) The concluding observation to which emphasis has been added can appropriately be made in respect of this case.

The cases cited above seem to establish the soundness of the disposition in favour of the plaintiffs which I propose, and to be fatal to the defence. If there were not other cases to be considered my task would be much less laborious and my reasons for judgment much shorter. In my view of the law, and upon my findings of fact, the action of the predecessors in title of the defendants was barred, and their title extinguished, long before the defendants purchased No. 141, and the plaintiffs are entitled to the declaration which they seek.

But there are other cases, which in fairness to the defence I must explore, to make explicit my reasons for concluding that they do not lead to any different result than I have proposed.

The first of these other cases is *Kosman et al. v. Lapointe* (1977), 1 R.P.R. 119. In it, Stark J. held that there were no acts of adverse possession because the alleged possessors believed themselves to be the owners. Again, the action was for a declaration as to the ownership of lands and a defence based on possession was raised. There was a mutual error as to the legal boundary involved. Stark J. held that there was no adequate evidence to indicate that the defendant and his predecessors exercised rights of ownership by way of undisturbed possession. However, he goes on to say, at p. 125:

> The evidence of the defendant, and other witnesses called on his behalf, is that in fact there are no acts of adverse possession, because the previous alleged possessors stated that "they at all times believed" that they were the true owners of the land.

No authority is cited for this proposition. There is no reference in

the reasons for judgment of Stark J. to any of the cases to which I have just referred, or the words of the statute. There is a critical editorial annotation at 1 R.P.R. at p. 120 with which I find myself in substantial agreement. With the greatest deference to Stark J., I am forced to conclude that he imported and implied a concept of adverse possession which was not appropriate, having regard for the Act which he was obliged to apply. I prefer to be governed in my disposition by *Martin v. Weld*, *Babbitt v. Clarke*, *Nourse v. Clark* and *McGugan v. Turner*, *supra*.

In support of the defence argument that the mutual mistake as to the true boundary is fatal to the plaintiffs' case, I was referred to *Lutz v. Kawa* (1979), 98 D.L.R. (3d) 77, 9 Alta. L.R. (2d) 151, 17 A.R. 288 [affirmed 112 D.L.R. (3d) 271, 13 Alta. L.R. (2d) 8, 23 A.R. 9], an Alberta decision given by Belzil D.C.J. It was conceded, of course, that the decision was not binding on me, but it was submitted that as a considered judgment, directly on point, it was of persuasive value. It dealt with, and purported to follow, a number of cases, including some from Ontario. Among the latter are some relied upon by the defence in this case, which are binding upon me, if they apply. In my view they do not, and I do not agree with the result in *Lutz v. Kawa*.

As introduction and background to my review of these cases, I propose to attempt here a brief comment on some of my conclusions arising from that review.

Two concepts recur which must be the subject of careful scrutiny, and which tend to merge or blur.

The first is the concept of adverse possession. In my view, it should, in Ontario, be given only the meaning ascribed to it by Banning, *supra*. In some instances I am inclined to think that continued use of the term "adverse possession" has imported considerations relevant under the law before the limitations Acts but no longer so. In any event, adverse possession is not really at issue in this case. Given its broadest interpretation, it requires proof that the true owner has been dispossessed or has discontinued possession. In any case at bar it has been conceded, and had there been no such concession it must have been found as a fact upon the evidence, that the true owner was out of possession for a period substantially exceeding the period of limitation.

The second concept is of *animus possidendi*, including an intention to exclude the true owner. This latter intention has been, properly, the focus of considerable attention in cases where the possession was doubtful or equivocal. In this case, the possession is certain and unequivocal and the *animus possidendi*

is to be presumed. Cases examining in detail the nature and components of that *animus* are at best of only peripheral interest and, more probably, quite irrelevant.

In argument, counsel for the defendants placed great reliance upon *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650, a judgment of the Divisional Court delivered by Pennell J. It is one of the cases relied upon in *Lutz v. Kawa, supra.* The question for determination in the case was whether the appellants had established their claim to a possessory title. Pennell J. says, correctly in my respectful view, that possession is a matter of fact depending on all the particular circumstances of the case. The Judge of first instance had held that the acts relied upon to establish possession were not sufficient to effect that result. However, he dealt specifically with a contention that the appellants required an *animus possidendi*, with the intention to exclude the title holders from the property, in order to acquire title by possession. In this respect he was sustained by Pennell J. who explored, in some detail, a number of the multitude of cases dealing with these sections of the Act and similar enactments elsewhere. He quotes, with apparent approval, the criteria enumerated by Wells J. in *Pflug et al. v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681; affirmed [1953] O.W.N. 140, [1953] 1 D.L.R. 841. Those criteria may be expressed in the following terms:

(1) actual possession for the statutory period by the claimants and those through whom they claim;

(2) that such possession was with the intention of excluding from possession the owners or persons entitled to possession, and

(3) discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.

It was conceded, properly, by the defence in the case at bar that Nos. 1 and 3 had been shown and the defence rested on No. 2. The point made is that if the plaintiffs had no knowledge of the legal rights of the predecessors in title to the defendants they could have had no intention to exclude them from possession. The defence relies upon the definition of *animus possidendi* as it appears from the reasons for judgment of Pennell J. commencing at the bottom of p. 489 O.R., p. 657 D.L.R., quoting from *Littledale v. Liverpool College*, [1900] 1 Ch. 19 at p. 23:

> "They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an *animus possidendi*—i.e., occupation with the intention of excluding the owner as well as other people."

In considering what was said by Pennell J. concerning *animus possidendi* it is essential to consider first the context in which it was said. He concluded that the respondents remained in possession of the land. At pp. 488-9 O.R., pp. 657-8 D.L.R., he says:

> If this conclusion be right, it is enough to decide the case in the respondent's favour. I note, however, that a point much agitated before this Court was whether the learned trial Judge erred in law in finding that the appellants required an intention to defeat or exclude the true owners from the land. I think I ought to deal with this point, though the careful judgment of the trial Judge, with which I agree, absolves me from attending to the matter in great detail.
>
> It is, I think, beyond the reach of controversy that the appellants never had any intention, nor claim any intention of excluding the Grants [predecessors in title of the respondents]. The dominant feature in the case is the fact that as late as 1969 the appellants offered to purchase the land from the Grant estate for the sum of $1,000. Counsel for the appellants, however, contended that the concept of adverse possession does not involve an intention on the part of the person in possession to acquire a right against a particular person.

Not only could it not have been found that the intention to exclude the true owners had been shown, but it might well have been found, affirmatively, that such intention was absent. Proof of possession was both doubtful (lacking, in fact) and equivocal. It is instructive to note that upon examination of the facts in *Littledale v. Liverpool College*, *supra*, the acts relied upon to establish possession were in their nature equivocal and at p. 23 of the judgment of Lindley M.R., we find this: "When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important".

Considered with the facts of the cases in which they were expressed, especially the equivocal nature of the acts of possession, the views concerning the necessity of an intention to exclude the true owner are readily understood. It is thus that the words of Pennell J., as of any Judge in any case, must be considered. Taken in that way they are not inconsistent with the conclusion that where there is possession with the intention of holding for one's benefit, excluding all others, the possession is sufficient and the *animus* is presumed. If it were necessary to say so, one could say of such a situation that the intention *ipso facto* included the intention to exclude the true owner even if his rights were unknown to the person in possession.

In considering *Re St. Clair Beach Estates Ltd. v. MacDonald et al.*, *supra*, as it relates to *animus possidendi*, it is instructive to examine *A.-G. Can. v. Krause*, [1956] O.R. 675, 3 D.L.R. (2d) 400, to which Pennell J. refers, and *Hamilton et al. v. The King*

(1917), 54 S.C.R. 331, 35 D.L.R. 226, which is referred to in *A.-G. Can. v. Krause*. The reference there is to the judgment of Duff J. in *Hamilton et al. v. The King* and the relevant passage is at p. 371 S.C.R., p. 253 D.L.R. It reads:

> The Crown cannot be disseized by a mere intrusion. The occupation, the holding or enjoying, therefore, contemplated by the statute as attracting the benefit of its provisions cannot be technically possession; but it seems reasonable to read the statute as contemplating such occupation as, if the question arose between subject and subject would constitute civil possession as against the subject-owner. On this assumption two elements are involved in the occupation required, exclusive occupation, in the physical sense, "detention", and the *animus possidendi*, that is the intention to hold for one's own benefit which, be it observed, is presumed to exist from the fact of "detention" alone. Given an occupation possessing these features the statutable conditions are, I think, fulfilled.
>
> The first element is admittedly present. Are there circumstances disclosed by the evidence which rebut the *presumption* of the existence of the *animus possidendi*? The answer to this last question turns upon the point whether or not the land was "held or enjoyed" in a character inconsistent with the existence of the intention on the part of the occupants to hold for themselves?

Applying the language of Duff J. to the facts of the case at bar, it is clear that there was ". . . exclusive occupation, in the physical sense, 'detention' ". The *animus possidendi* is therefore presumed to exist and there is not a tittle of evidence to rebut that presumption.

I turn now to *Lutz v. Kawa* and a review of the cases to which the Judge refers and upon which he relies. The action was one to quiet title by reason of possession. There was a mutual error as to the location of the true boundary. The judgment proceeds upon the premise that the provisions of the *Limitation of Actions Act*, R.S.A. 1970, c. 209, are essentially the same as those of England and Ontario.

In holding that the plaintiff had not established possessory title, the Judge says, at p. 81:

> It is not sufficient for the plaintiff to show actual occupancy or possession of the locus by her. What must be shown is a special kind of possession described by Lord Ormrod in *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & B.P. Ltd.*, [1974] 3 All E.R. 575, a clear case of occupancy for the statutory period.

In basing himself on this case, the Judge, in my view, erred, and it would appear that the error was fundamental to his judgment.

He does not appear to have recognized the change in the English law which occurred in 1939 and which imports new considerations and renders English cases since 1939, dealing with the topics under consideration here, of doubtful assistance. I do not propose to explore those differences in detail because, in any

event, the case was one of those where the possession was doubtful or equivocal and the Court was not prepared to conclude that the true owner had been dispossessed or discontinued possession.

Belzil D.C.J. then goes on to refer to *Re St. Clair Beach Estates Ltd. v. MacDonald et al.*, as to which I have already expressed my views.

He also refers to *Pflug et al. v. Collins, supra*. The criteria enunciated by Wells J. in that case were derived from *Wright v. Olmstead* (1911), 3 O.W.N. 434, a decision of the Divisional Court. It was held that there had not been continuous user and not throughout the statutory period. Speaking of the nature of the land and of the user, Mulock C.J. has this to say at p. 436:

> Thomas Herbert Colledge knew that the strip was intended to be used as a public way, and that he had no right to it except as one of the public. He admits that he was using it only until it was required for the purpose for which it was laid out. Thus his attitude was not that of a person claiming to be in possession to the exclusion of others having the right to use it; and, for this reason alone, the plaintiff fails.

Once again, the facts must be considered when one considers his statement, at p. 435, that a plaintiff must show, *inter alia*: ": . . the intention of excluding from possession the owner or persons entitled to possession".

A reading of *Pflug et al., supra*, shows that the alleged acts of "adverse possession" were ambiguous: there were doubts as to whether occupation had been continuous; there was doubt as to whether all those claiming under the true owner had been out of possession. Once again, one must bear the facts in mind when considering the statement concerning the necessity to show intention to exclude the true owner.

Reference is also made to *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182, a judgment of the Court of Appeal which refers with approval to *Re St. Clair Beach Estates Ltd. v. MacDonald, supra*, and to *Pflug et al. v. Collins, supra*. In *Keefer* the plaintiff was on a neighbour's property pursuant to a right of way. At issue was whether or not the fact that they exceeded their rights of user could mature into a possessory title. It was expressly found, at p. 691 O.R., p. 193 D.L.R., that this was not a case where the Keefers could be viewed as trespassers on their neighbour's property, so that their acts were a challenge to the constructive possession of the true owner. As in *Re St. Clair Beach Estates Ltd. v. MacDonald et al., supra*, it might almost have been found, affirmatively, that intention to exclude the true owner was lacking.

Next referred to by Belzil D.C.J. is *Sherren v. Pearson* (1886), 14 S.C.R. 581. As to this case, it must first be observed that it had to do with isolated acts of trespass, committed on wild lands. Ritchie C.J. says, at p. 586, in a passage quoted by Belzil D.C.J. [at pp. 84-5 D.L.R.]: ". . . there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun". That certainly cannot be said of the case at bar, nor could it be said on the facts in *Lutz v. Kawa*. *Sherren v. Pearson* is no authority for the proposition that ignorance of the legal position prevents possession which is open and notorious from ripening into title.

The case of *Doe d. Des Barres v. White* (1842), 3 N.B.R. 595, as referred to by Ritchie C.J. in *Sherren v. Pearson*, is expressly limited to possessory title of wilderness lands.

The final authority referred to by Belzil D.C.J. is *Williams Bros. Direct Supply Stores, Ltd. v. Raftery*, [1957] 3 All E.R. 593. This turns on the new and different language of the English statute of 1939. More cogent for purposes of this review is that, when one examines the facts of the case, to which Belzil D.C.J. makes no reference, not only was the user upon which the possessor relied doubtful and equivocal, but there were minor acts of user by the true owner, such as to make it clear that there had been no discontinuance of possession.

The application of judicial statements, without due regard for the facts of the case in which the statement was made, is a pregnant and perennial source of error. Upon such statements the defence has propounded the argument that, before a party can successfully rely on ss. 4 and 15 of the statute, he must establish a subjective intention, with knowledge of the rights of the plaintiff present to his mind, to occupy in defiance or denial of those rights. No case which I have considered, when one looks to the facts, supports that proposition and it is utterly inconsistent with the decisions in *Martin v. Weld*, *Babbitt v. Clarke*, *Nourse v. Clark*, and *McGugan v. Turner*, *supra*.

These reasons for judgment are already too long. For that reason I do not propose to refer in detail to other cases considered during their preparation. To do so would add nothing new to or different from those already discussed. My function and responsibility is to decide the case, making reasonably explicit why I have decided it as I have; not to write a text book.

For what limited value it may have, the following is a list of cases considered but not expressly mentioned: *Griffith et al. v. Brown* (1880), 5 O.A.R. 303 (C.A.), *Paradise Beach & Transpor-*

tation Co., Ltd. et al. v. Price-Robinson et al., [1968] 1 All E.R. 530 (C.A.); *Dean of Ely v. Bliss* (1852), 2 De G.M. & G. 459, 42 E.R. 950, and *Smith v. Lloyd et al.* (1854), 9 Ex. 562, 156 E.R. 240.

I turn now to the claims and counterclaims for damages and injunctions.

The statement of claim contains in para. 8 the following claims:

(b) Damages for assault, trespass, property damage, intentional interference with the use and enjoyment of the Plaintiffs' property and intentional infliction of mental suffering in the amount of $30,000.00;

(c) An injunction restraining the Defendants from entering upon or interfering with the Plaintiffs' use and enjoyment of their property described in paragraph 1 herein;

The counterclaim contains, in para. 12, the following claims:

(b) Damages for assault, trespass, property damage, intentional interference with the use and enjoyment of the Plaintiffs-by-counterclaim's property and intentional affliction of mental suffering in the amount of $50,000.00;

(c) An injunction restraining the Defendants-by-counterclaim from entering upon or interfering with the Plaintiffs-by-counterclaim's use and enjoyment of their property described in paragraph 1 and 2 of the Defendants-by-counterclaim's Statement of Claim against the Plaintiff-by-counterclaim;

The evidence adduced on behalf of both parties was replete with recriminations, numerous and incandescent, with charges and countercharges, and allegations of acts done and provocation given. It would be a more credulous person than I who would accept substantially what either side alleged. It would be a more astute and courageous one who could select, from among the welter of words and the emotion they reflected, evidence upon which reliable findings of fact pertinent to the issue of damages could be made. It is apparent that for years something approaching border warfare has gone on between the occupants of 137 and 141 Front Rd. N. Both vocal and physical episodes have occurred. Disputes between neighbours are notorious for the animosity generated and this one is remarkable for intensity, even for its type. In the circumstances which have existed, and with regard for the period of time over which the dispute has continued, I am not persuaded that any of the evidence concerning its incidents was reliable. By saying this, I do not denigrate nor discredit the basic integrity of the parties; I simply consider them so incensed and inflamed by the events which have occurred, events over which they have brooded for years, as to be unreliable witnesses with respect to those events. I recognize the obligation of a trial Judge to wrestle with conflicting evidence, and, where at

all practicable, to make findings. In this case, and on this issue, I do not consider it practicable. I have no confidence that any findings I might make on issues related to damages would be any better than pure speculation, with no more prospect of being correct than that afforded by blind chance.

There are other difficulties attendant upon the damage claims. Both plaintiffs and the defendant Aubin give convincing evidence of adverse effects upon their health, largely nervous or mental in nature or origin, arising as a result of the dispute. I accept that such adverse effects exist. Both the plaintiffs and the defendant Aubin are past middle age and I have no doubt that the continuing dispute which has existed has been trying for them in every sense of the word. Even without the frailty and conflicting nature of the evidence, I would find it impracticable to determine which consequences stem from some actionable cause, for which damages ought properly to be awarded, and which stem simply from the existence of the dispute and the apprehension, friction and tension which it engendered on both sides, for which no damages could be awarded. A dispute such as this, with all its incidents, including legal proceedings, creates great stress for those involved, regardless of the merits of the dispute, but the consequences of such stress are not compensable in damages.

The claims for damages asserted both in the statement of claim and in the counterclaim will be dismissed. In doing so, I have not overlooked the evidence of an assault on the plaintiff Ernest Beaudoin by the defendant Aubin, when the former was struck by the latter with a hoe, and perceptible physical injury was sustained. It is the contention of the defendant Aubin that she acted as she did in self-defence. I have little doubt that the incident, in the course of which the plaintiff Ernest Beaudoin sustained the injuries complained of, was one in a continuing series which involved aggression and response on both sides. In all of the circumstances, I am not prepared to make any award of damages for this assault. Even the victor in war must sometimes bear scars for which he receives no compensation.

In the result, there will be a declaration that the plaintiffs are entitled to the northerly 4.7 feet in perpendicular width throughout from front to rear of Lot 6 according to Registered Plan 221, Township of Anderdon. This description is taken from the statement of claim. If it is not correct or accurate I may be spoken to. There will be an injunction restraining the defendants from entering upon or interfering with the plaintiffs' use and enjoyment of that property. The action is otherwise dismissed. The plaintiffs should have their costs on the Supreme Court scale.

It has been submitted on behalf of the defence that if the action succeeded, costs should be only upon the County Court scale. It is by no means clear to me that the action was within the proper competence of the County Court. Even if it were, it would be my view that it was an appropriate case in which to exercise my discretion, if necessary, under Rule 656, and to dispose of the costs as I have done.

The counterclaim, in my view, contributed nothing of significance to the ambit of the litigation and it will be dismissed without costs.

Judgment for plaintiffs.

[COURT OF APPEAL]

Fletcher v. Storoschuk et al.

ARNUP, WILSON AND GOODMAN JJ.A. 10TH NOVEMBER 1981.

Limitation of actions — Real property — Owner of land erecting fence 18 ft. within his own boundary with intent to create "buffer zone" between his land and neighbour's property — Acts of adverse possession alleged by neighbour — Requirement that acts be inconsistent with form of use desired by paper title holder.

The plaintiff had erected a fence 18 ft. within the boundary of his land in order to prevent his cattle from wandering onto neighbouring residential lots. The defendants acquired the adjacent lot in 1967 and alleged that they had acquired title to the 18 ft. strip by the effect of the *Limitations Act*, R.S.O. 1970, c. 245 (now R.S.O. 1980, c. 240). They relied on various acts of adverse possession, including cutting weeds on the strip, planting buckwheat and maintaining a garden thereon. When in 1978 the defendants refused the plaintiff's request to remove a cement pad which the former had built on the strip, the plaintiff commenced his action for damages and for a mandatory injunction requiring removal of the structure. Defendants counterclaimed for a declaration that they owned the strip. The trial judge found for the defendants. The plaintiff appealed.

Held: the appeal should be allowed.

The trial judge erred in holding that the defendants' acts were sufficiently "adverse" to the plaintiff's possession to give rise to a defence under the *Limitations Act*. The acts alleged must be inconsistent with the form of use and ownership the plaintiff intended to make of the land in question. The plaintiff wishes only to use the property as a "buffer zone" between his land and that of his residential neighbours. In addition, the defendants acknowledged that the plaintiff could enter the strip in order to repair his fence and could have planted a garden on the strip if he desired.

Even if the acts were adverse to the plaintiff's title, they were merely seasonal and did not meet the requirement of constant and continuous possession laid down in the authorities.

[*Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273; *Kirby v. Cowderoy*, [1912] A.C. 599; *Leigh v. Jack* (1879), 5 Ex. D. 264; *St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; *Keefer v. Arillota* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182; *Pflug et al. v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681; *Ledyard v. Chase*, 57 O.L.R. 268, [1925] 3 D.L.R. 794; *Raab v. Caranci et al.* (1977); 24 O.R. (2d) 86, 97 D.L.R. (3d) 154 [affd 24 O.R. (2d) 832*n*, 104 D.L.R. (3d) 160*n*], refd to]

APPEAL from a judgment declaring that the defendants had acquired title to a strip of the plaintiff's land by the effect of the *Limitations Act*.

Tom Bordonaro, for plaintiff, appellant.
Mark Castle, for defendants, respondents.

The judgment of the Court was delivered by

WILSON J.A.:—This appeal concerns the ownership of a strip of land 18 ft. by 200 ft. lying between the property of two adjoining owners.

The facts in brief are as follows. The plaintiff, who is the owner of a fairly substantial piece of farmland in the Township of Binbrook, in the County of Wentworth, sold off over a period of years various building lots on the perimeter of his farm including a double lot measuring 200 ft. by 200 ft. to a predecessor in title of the defendants. When the defendants acquired the double lot in 1967 there was already in place a permanent farmer's fence of 4 ft. cedar posts and wire mesh that ran parallel to the legal boundary between the plaintiff's land and the defendants' lot. That fence had been put there by the plaintiff, replacing a temporary electric fence, in order to prevent his cattle from wandering too close to the adjacent residential lots which were unfenced. It was 18 ft. inside his own boundary and created the strip 18 ft. by 200 ft. between his farm and the defendant's lot which is in issue on the appeal. The fence had a gate in it so that the plaintiff could enter on the strip for purposes of maintenance and repair of the fence. The plaintiff at all material times paid taxes on the strip as part of his own farm.

The defendants' predecessor in title never made any claim to the strip, it not being included in the description in his deed, but the male defendant after he bought the property planted a row of spruce trees along the southern boundary of his lot and continued it along the southern boundary of the 18 ft. strip. He also paid the township once or twice to cut the weeds along the bottom of the plaintiff's fence and in 1968 planted buckwheat on his lot and extending over on to the strip in order to keep the weeds down. At that time his lot was unimproved and in its raw state as farmland and he acknowledged that he attended to the weeds because the neighbours were complaining and he found out that he was responsible at law for keeping the weeds down on his property. He testified that when he bought the lot in 1967 he assumed that his boundary went right to the plaintiff's fence.

In 1969 the defendants built a house on their property and after they moved in erected a Frost fence 4 ft. high inside their own lot line, thus leaving a 22 ft. space between that fence and the plaintiff's fence. The defendants also planted a garden on part of the strip between the two fences.

It was clear from the evidence that at least from 1970 on the defendants knew that the disputed strip was not included in their deed but in fact belonged to the plaintiff. Indeed, when they found out in 1970 that the plaintiff owned the strip they offered to buy it from him but could not afford his price. Their offer to purchase, however, was not put into writing and hence could not constitute an

acknowledgment of the plaintiff's title under s. 13 of the *Limitations Act*, R.S.O. 1970, c. 246 [now R.S.O. 1980, c. 240], for purposes of advancing the commencement date for the running of time under s. 4.

The dispute between the parties arose in October of 1978 when the plaintiff ordered the defendants to remove a cement pad the defendants had built on the strip for a filter for their swimming pool. The defendants refused and the plaintiff served his writ in December 1978, for a declaration that the defendants had no interest in the strip, for damages, and for a mandatory injunction requiring them to remove any structures they had erected on it. The defendants counterclaimed for a declaration that they were the owners of the strip and that the plaintiff had no interest in it.

The trial judge dismissed the plaintiff's claim and allowed the counterclaim. He found that the plaintiff's title to the strip of land was extinguished under ss. 4 and 15 of the *Limitations Act* by the adverse possession of the defendants which he found had continued for over 10 years and met the test established in the authorities of being "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner".

With respect, I think the learned trial judge was in error in concluding that the defendants had discharged the onus upon them of establishing in excess of 10 years adverse possession. I accept the trial judge's findings as to the acts performed on the disputed strip of land by the defendants. But acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use and enjoyment of it intended to be made by the owner: see *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273 at 288; *Kirby v. Cowderoy*, [1912] A.C. 599 at 603. The mere fact that the defendants did various things on the strip of land is not enough to show adverse possession. The things they did must be inconsistent with the form of use and enjoyment the plaintiff intended to make of it: see *Leigh v. Jack* (1879), 5 Ex. D. 264; *St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182. Only then can such acts be relied upon as evidencing the necessary "*animus possidendi*" *vis-à-vis* the owner.

The trial judge placed no emphasis on the plaintiff's evidence as to the purpose of the fence, that it was not intended to mark his boundary line but merely to restrain his cattle from wandering too close to the lots he had sold off for residential purposes. The effect of the plaintiff's evidence was that he intended to establish the strip as a buffer zone between the field on which he was grazing cattle and his neighbours, including the defendants. This was the use he intended to make of it. Indeed, in his evidence at trial Mr. Storoschuk

acknowledged that the plaintiff had the right to go on the strip and repair the fence which the plaintiff testified that he did. Mr. Storoschuk acknowledged also that the plaintiff would have been perfectly entitled to grow a garden on the strip alongside his garden and that he would not have objected if the plaintiff had done so.

It is trite law that the legal owner of property is in *constructive* possession of it even if he is not in *actual* possession of the whole of it. Wells J. affirmed in *Pflug et al. v. Collins*, [1952] O.R. 519, [1952] 3 D.L.R. 681, that a person claiming a possessory title as against the legal owner must not only establish actual possession for the statutory period but he must establish that such possession was with the intention of excluding the true owner and that the true owner's possession was effectively excluded for the statutory period.

In my view, the acts found by the trial judge to have been performed on the strip of land by the defendants posed no challenge to the use of it intended by the plaintiff. They lacked that quality of inconsistency with the intended use of the owner required to constitute adverse possession for purposes of the statute. Moreover, even if they could be viewed as acts of adverse possession, it seems to me that they were at most seasonal and intermittent and did not meet the required test of being "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner": see *Ledyard v. Chase*, 57 O.L.R. 268, [1925] 3 D.L.R. 794; *Raab v. Caranci et al.* (1977), 24 O.R. (2d) 86, 97 D.L.R. (3d) 154 [affirmed 24 O.R. (2d) 832*n*, 104 D.L.R. (3d) 160*n*].

I would therefore allow the appeal and set aside the judgment of His Honour Judge Sullivan. I would grant the plaintiff the declaration and mandatory injunction claimed in the action. The plaintiff, in my view, did not establish that he suffered any real damage as a result of the defendants' trespass on his land and I would therefore award him nominal damages in the sum of $1. I would give him his costs both here and in the court below.

Appeal allowed.

MASIDON INVESTMENTS LTD. et al. v. HAM

Ontario Supreme Court [Court of Appeal],
Zuber, Blair and Goodman JJ.A.

Heard - January 30 and 31, 1984.
Judgment - April 6, 1984.

Adverse possession - Possessory title - Requirements - Nature of requirement that adverse possession must effectively exclude title owner from possession - Use made by adverse possessor must be inconsistent with use intended to be made of disputed land by title owner during period of alleged adverse possession - Title owner not barred by adverse possession where only use intended by owner during period of alleged adverse possession was retention of land for future sale.

In 1956, appellant became the tenant of a 100 acre parcel owned by M. The parcel was mortgaged by M to respondent's predecessor in title. In 1967, the mortgagee registered a final order of foreclosure against the parcel. Subsequently, the west half of the 100 acre parcel was conveyed to a company controlled by M. Title to the east half remained in the mortgagee, until it was conveyed to respondents in 1968. Appellant continued as a tenant in the residence located on the west half. Most of the other farm buildings and the access road to the residence were located on the east half (the area in dispute in this action).

On the east half, appellant operated a private airport consisting of two grass runways. The first runway was constructed in the late 1950's and early 1960's; the second runway was constructed between 1966 and 1972. Its construction required extensive ditching, grading and filling. Appellant maintained the runways by regular mowing, fertilizing and seeding. Sometime before 1960 a small hangar had been constructed. A wind-sock, visible from the highway, was flown from a silo on the disputed property. On an average, between ten and twelve aircraft used the airport, which was in use year-round, although use during the winter was restricted. The balance of the disputed property was used by appellant and his family for recreation and other purposes. A large pond was created by a dam, and the driveway was built up with rock fill into an all-weather road. One field was fenced by appellant for pasturing horses. Appellant took wood for heating his residence from a wood lot. Appellant had placed signs warning

horsemen against riding over the runways, and had attempted to prevent snowmobilers and other persons from using the land, and, in particular, the runways.

Appellant, a lawyer, was aware of the consequences of the final order of foreclosure and the subsequent splitting of the property in 1968, but had decided to use the property in dispute until excluded.

The trial Judge found that, at some later time, probably towards the end of the ten year limitation period, appellant had formed an intention to acquire possessory title to the property.

Respondents had never entered or used the disputed property, and apart from two land appraisers, no one representing them had entered the property after 1968. Respondents were holding the property for sale, and had refused a number of offers to purchase between 1967 and 1978. Respondents paid all municipal taxes on the land after 1968. In 1975, respondents had accepted compensation for a small strip of the land adjacent to the highway which had been expropriated, and they had appeared through counsel at rezoning hearings affecting the property. In 1978, respondents became aware of the use being made of the property by appellant, and brought this action. The trial Judge made a declaratory order that respondents held the property free from any right, claim or interest of appellant, and dismissed appellant's counterclaim for a declaration of possessory title. Appellant appealed.

Held - The appeal should be dismissed.

To extinguish a title by means of adverse possession, the claimant to a possessory title must have had, throughout the statutory period, actual possession and the intention of excluding the true owner from possession. The claimant must also have effectively excluded the true owner from possession. Each of the three tests must be satisifed, and time begins to run aginst the owner only from the date when the last of the three conditions has been satisfied.

Adverse possession is possession which effectively excludes the true owner from possession. It is established when the claimant's use of the land is inconsistent with the owner's enjoyment of the soil for the purposes for which the owner intended to use it. It cannot be acquired by depriving the owner of uses he never intended or desired to make of it. In

this connection, it is only the use which the owner desired to make of the land during the claimant's period of occupancy that is relevant, not some future use that the owner might desire to make of the land. Here, the use made of the land by appellant during his occupation was not inconsistent with the use the owners intended to make of the land during that period, namely to hold the land for sale at a satisfactory price.

Cases considered

Austin (John) & Sons Ltd. v. Smith (1982), 35 O.R. (2d) 272, 132 D.L.R. (3d) 311 (C.A.) - applied.

Fletcher v. Storoschuk (1982), 35 O.R. (2d) 722, 22 R.P.R. 75, 128 D.L.R. (3d) 59 (C.A.) - applied.

Giouroukos v. Cadillac Fairview Corp. (1982), 37 O.R. (2d) 364, 24 R.P.R. 226, 135 D.L.R. (3d) 249 (H.C.), reversed (1983), 44 O.R. (2d) 166, 29 R.P.R. 224, 3 D.L.R. (4th) 595 (C.A.) - considered.

Harris v. Mudie (1883), 7 O.A.R. 414 - considered.

Keefer v. Arillotta (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182 (C.A.) - applied.

Ledyard v. Chase, 57 O.L.R. 268, [1925] 3 D.L.R. 794 (H.C.) - applied.

Leigh v. Jack (1879), 5 Ex. D. 264 (C.A.) - followed.

Lewis v. Todd, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 34 N.R. 1 - applied.

Pflug v. Collins, [1952] O.R. 519, [1952] 3 D.L.R. 681, affirmed [1953] O.R. 140, [1953] 1 D.L.R. 841 (C.A.) - followed.

Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex, [1975] Q.B. 94, [1974] 3 All E.R. 575 (C.A.) - followed.

Williams Bros. Direct Supply Stores Ltd. v. Raftery, [1958] 1 Q.B. 159, [1957] 3 All E.R. 593 (C.A.) - followed.

Wright v. Olmstead (1911), 3 O.W.N. 434 (Div. Ct.) - applied.

Statutes considered

Limitations Act, S.C. 1834, c. 1.

Limitations Act, R.S.O. 1980, c. 240, ss. 4, 15.

Real Property Limitation Act, 1833 (U.K., 3 & 4 Will. IV), c. 27.

Authorities considered

Megarry, R.E., "Manual of the Law of Real Property (4th ed., 1969), p. 529.

Megarry and Wade, "The Law of Real Property (4th ed.), p. 1013.

Canadian Abridgment (2nd) Classification
Limitation of Actions II. 2. c.

APPEAL from a judgment, reported (1982), 39 O.R. (2d) 534, granting a declaration that defendant had no rights in certain land, and dismissing a counterclaim for a declaration of possessory title.

G.J. Smith, Q.C., and R.E. Hawkins, for appellant.
R.F. Wilson, Q.C. and P. Dillon, for respondents.

April 6, 1984. The judgment of the Court was delivered by

BLAIR J.A.: - This appeal concerns a claim for possessory title to land. Specifically, the issues are whether the use made of the land by the appellant, the trespasser, was inconsistent with the use of the respondents, the legal owners, and whether the appellant had the required animus possidendi, the intention to exclude the respondents from possession. The Honourable Mr. Justice Carruthers rejected the appellant's claim and this appeal is taken from his decision [reported at] (1982) 39 O.R. (2d) 534.

FACTS

The relevant facts, as found by Carruthers J. in his full and careful discussion of the evidence, can be briefly set out. The appellant, in 1956, became the tenant of an approximate 100 acre parcel of land owned by Louis Mayzel, located on the north side of the Queen Elizabeth Highway near Oakville. The land was mortgaged by Mayzel to a mortgagee who was a trustee for a group of investors consisting of the respondents or their predecessors in title. On September 26, 1967, the mortgagee registered a final order of foreclosure against the parcel. As a result of subsequent negotiations between the mortgagee and Mayzel, title to the west half of the 100 acre parcel was conveyed to a company controlled by Mayzel. Title to the east half, the lands in dispute in this appeal, remained in the mortgagee and in 1968 was conveyed to the respondents.

The appellant continued as a tenant of Mayzel. The residence he occupied throughout is located on the west half but most of the other farm buildings and the access road leading to the residence are located on the disputed east half.

The appellant operated an airport consisting of two grass runways on the disputed property. The first runway was laid out in the late 1950's and early 1960's; the second runway was

constructed between 1966 and 1972 and required extensive ditching, grading and the addition of dozens of large truckloads of fill. The appellant maintained the runways by regular cutting and the addition of fertilizer, loam and seed.

A wind-sock, visible from the highway, was flown from a silo on the disputed property. Sometime before 1960 the appellant constructed a small building for use as a hangar. An area of approximately five to seven acres was provided as a parking space for aircraft. There was also an automobile parking lot.

The airport was not operated commercially for use by the public but was restricted by the appellant for the private use of himself and his friends. Those using it were charged one bottle of Scotch whisky a month and were required to sign a release. The airport had no aircraft servicing facilities, radio or navigational adis. At the time of the trial, the number of aircraft using the airport averaged between ten and twelve. It was used year round with the exception of a period of up to four weeks in the spring and the fall when conditions were muddy. Winter use was limited because there was no equipment to clear or roll snow. The airport was listed in publications and maps of various organizations including the Federal Department of Transport, Flying Farmers, Emergency Measures Organization and the military services.

The appellant and his family used the balance of the property for recreation and other purposes. He built a dam creating a large pond in one corner of the property. The driveway was built up by the addition or rock fill to an all-weather road capable of carrying heavy trucks. Fill was also deposited elsewhere on the land. The appellant fenced one field for pasturing Mayzel's horses. He took wood from a wood lot for heating his residence. All this work was done at virtually no expense to the appellant: estimated at only $200. The fill was supplied by a company constructing a nearby highway. The runways were built and maintained by local farmers whom he permitted to grow crops on the property.

The learned trial Judge found that any fencing done by the appellant was primarily, if not solely, for the purpose of containing Mayzel's horses and not preventing other persons from coming on the property. He attempted to protect the runways by placing signs warning horsemen against riding over them. From time to time he also attempted to prevent snowmobilers and other persons from using the land and, in particular, the runways.

The appellant was a member of the Bar of Ontario. The learned trial Judge found that he was well aware of the consequences of the final order of foreclosure and the split of the property into two halves in July 1968. The appellant

testified that, upon learning of the final order of foreclosure, he decided to use the lands "as he had in the past - as long as they were mine to use, until I was excluded by a judge's order or some other authorized command". The trial Judge also found that sometime later, probably much closer to the end of the ten year period, he had "fashioned a design to acquire possessory title to the land in dispute".

The respondents never entered or used the disputed property and apart from two land appraisers, no one representing them went on the property after 1968. The learned trial Judge found that there was no dispute about the use the respondents intended to make of the property, which was to hold it for sale at what the respondents considered the right price, and that the appellant knew of this intention. The property was valuable because of its location and was estimated to be worth $1.2 million at the time of trial. The respondents received a dozen unsolicited offers of purchase between 1967 and 1978 but none was acceptable.

After 1968, the respondents paid all municipal taxes. Appraisals were made of the land in 1974 and 1977 but the appraisers, if they were aware of the use being made of the land by the appellant, did not report it to the respondents. In 1975, a small strip of land adjacent to the Queen Elizabeth Highway was expropriated by the Ontario Ministry of Transport and, after negotiation, the respondents accepted a payment of $12,784 in 1976 in full settlement. The respondents retained counsel in 1978 at a cost of approximately $5,000 for representation before the Ontario Municipal Board at rezoning hearings affecting the property.

The respondents were unaware of the appellant's use of the property until it was drawn to their attention by a prospective purchaser in 1978. Following this discovery, the respondents commenced this action which resulted in the declaratory order of Carruthers J. that they held the property free from any right, claim or interest of the appellant.

ISSUES

The appellant's claim is founded on the Limitations Act, R.S.O. 1980, c. 240, which provides, in effect, that the title of an owner to land is extinguished by the adverse possession of another person for a period of ten years: ss. 4 and 15. The limitation period of ten years is prescribed in the somewhat convoluted and archaic language of s. 4 as follows:

> "4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make

> such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it."

Whether a prescriptive title has been acquired is a question of fact which must be determined in the light of the circumstances of each case. The legal principles which govern this determination were recently restated in this Court by Wilson J.A. in Keefer v. Arillotta (1976), 13 O.R. (2d) 680 at 692, 72 D.L.R. (3d) 182 and in Fletcher v. Storoschuk (1981), 35 O.R. (2d) 722, 22 R.P.R. 75, 128 D.L.R. (3d) 59, where she said at p. 725:

> ". . . a person claiming a possessory title as against the legal owner must not only establish actual possession for the statutory period but he must establish that such possession was with the intention of excluding the true owner and that the true owner's possession was effectively excluded for the statutory period."

It is clear that a claimant to a possessory title throughout the statutory period must have:

(1) had actual possession;

(2) had the intention of excluding the true owner from possession, and

(3) effectively excluded the true owner from possession.

The claim will fail unless the claimant meets each of these three tests and time will begin to run against the owner only from the last date when all of them are satisfied: see Wright v. Olmstead (1911), 3 O.W.N. 434, 20 O.W.R. 701 (Div. Ct.), per Mulock C.J. at p. 435 and Wells J. in Pflug and Pflug v. Collins, [1952] O.R. 519 at 527, [1952] 3 D.L.R. 681, affirmed by this Court [1953] O.R. 140, [1953] 1 D.L.R. 841. The possession must be "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner": see Fletcher v. Storoschuk, supra, at p. 725: Ledyard v. Chase, 57 O.L.R. 268, [1925] 3 D.L.R. 794, per Riddell J. at pp. 269-70. In the latter case Riddell J. concluded at p. 270 by saying:

> "Sherren v. Pearson,. 14 Can. S.C.R. 581, lays down the

> principle again, and adds that this possession must not be equivocal, occasional, or for a special or temporary purpose."

Both parties agreed that the appellant's legal right to be on the disputed lands was terminated by the registration of the final order of foreclosure on September 26, 1967. Thereafter, he occupied the lands as a trespasser for a period of more than ten years. Carruthers J. held that the appellant's claim to a possessory title failed because he had not satisfied the second and third tests set out above. I propose to discuss these tests in reverse order dealing first with exclusion from possession and then the intention to exclude.

1. Was the Use of the Land Made by the Appellant Inconsistent with That of the Respondents? The question of "adverse possession".

The person claiming a possessory title must demonstrate that his possession effectively excluded the possession of the true owner. The term "adverse possession" shortly describes this test. It no longer bears the technical meaning it did before the enactment of the Limitations Act, S.C. 1834, c. 1, which adopted the language of the Real Property Limitations Act, 1833 (U.K., 3 & 4 Will. IV), c. 27. Before 1833, some acts of possession were deemed to be acts on behalf of the owner and hence not "adverse". As a consequence of the reforming statutes of the 1830's, adverse possession is established where the claimant's use of the land is inconsistent with the owner's "enjoyment of the soil for the purposes for which he intended to use it": Leigh v. Jack (1879), 5 Ex. D. 264 at 273 (C.A.) per Bramwell L.J., and see Megarry and Wade, The Law of Real Property (4th ed., 1975), p. 1013.

Recent decisions in this Court have established that not every use of land will amount to adverse possession excluding that of the owner. Madam Justice Wilson summarized the effect of these decisions in Fletcher v. Storoschuk, supra, at p. 724 as follows:

> . . . acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use and enjoyment of it intended to be made by the owner: see Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273 at 288; Kirby v. Cowderoy, [1912] A.C. 599 at 603. The mere fact that the defendants did various things on the . . . land is not enough to show adverse possession. The things they did must be inconsistent with the form of use and enjoyment

> the plaintiff intended to make of it: see Leigh v. Jack (1879), 5 Ex. D. 264; St. Clair Beach Estates Ltd. v. MacDonald et al. (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; Keefer v. Arillotta (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182. Only then can such acts be relied upon as evidencing the necessary 'animus possidendi' vis-a-vis the owner.

Examples of the application of this principle are provided by several decisions of this and other Courts. In Keefer v. Arillotta, supra, this Court held that use of an eight foot strip of land lying between the properties of the parties for parking by the party having a right-of-way over it did not deprive the other party, the legal owner, of his title. The legal owner was still able to make such seasonal and occasional use of the property as he wished. Speaking for the majority of the Court, Wilson J.A. stated at p. 691:

> "The use an owner wants to make of his property may be a limited use and an intermittent or sporadic use. A possessory title cannot, however, be acquired against him by depriving him of uses of his property that he never intended or desired to make of it. The animus possidendi which a person claiming a possessory title must have is an intention to exclude the owner from such uses as the owner wants to make of his property."

Wilson J.A. acknowledged that the persons claiming possessory title had exceeded their rights but said at p. 691:

> "The test is not whether the respondents exceeded their rights under the right of way but whether they precluded the owner from making the use of the porperty that he wanted to make of it: Re St. Clair Beach Estates Ltd. v. MacDonald et al. (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650. Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner. This has been held to be the test for adverse possession since the leading case of Leigh v. Jack (1879), 5 Ex. D. 264."

In Fletcher v. Storoschuk, the owner, who was a farmer, had erected a fence 18 feet within his boundary line to prevent his cattle from bothering persons to whom he had sold adjoining building lots. One adjoining owner planted trees along the strip adjoining his property, grew buckwheat to keep down the weeds and planted a garden. The farmer objected when the householder built a cement pad on the strip to house

the filter for a swimming pool. Wilson J.A. held that the use previously made of the buffer zone between the farmer's pasture and the residential property of the householder was not inconsistent with the farmer's use which was to prevent cattle from wandering too close to the residential lot lines. She said at p. 725:

> "In my view, the acts found by the trial judge to have been performed on the strip of land by the defendants posed no challenge to the use of it intended by the plaintiff. They lacked that quality of inconsistency with the intended use of the owner required to constitute adverse possession for purposes of the statute."

In John Austin & Sons Ltd. v. Smith (1982), 35 O.R. (2d) 272, 132 D.L.R. (3d) 311 (C.A.), the vendor, on the sale of property in 1964, reserved the right to enter the land and cut timber. The purchaser used the property for hunting and other recreational purposes. In 1974, the vendor for the first time entered the land and began to cut timber. The purchaser endeavoured to prevent him but this Court held that the vendor was entitled to enter upon the land. Arnup J.A. said at p. 281:

> "Where the owner of land containing standing trees conveys away the land, excepting from the grant the standing trees, he has retained the fee simple in the trees, together with the right to go on the land, with such equipment as is reasonably necessary, to cut and take away the trees. It is inappropriate in such circumstances to speak of the right of entry 'accruing' or of 'a right of action to recover any land' as 'accruing' so as to bring into operation s. 4 of the Limitations Act. The plaintiff in this case is the owner of the trees, with the right of entry to go and get them, because it has never parted with any rights of ownership. Until someone - whether the owner of the rest of the land or a stranger - does some act that is adverse to the plaintiff's ownership, the 10-year period under s. 4 has not begun to run."

Arnup J.A. went on to hold that the purchasers had done nothing until 1974 "which was adverse to or inconsistent with the plaintiff's ownership of the trees" and that the statutory period could only begin to run from that time.

In her judgment in Keefer v. Arillotta, Wilson J.A. relied on the English Court of Appeal judgment in Leigh v. Jack, supra. In that case, the grantor had retained a strip of land

adjacent to the land conveyed to the grantee intending it to be used as a street. For more than 20 years the grantee had used the strip as a refuse dump for his foundry. The Court held that the grantee had not obtained a possessory title because the use to which he put the land was not inconsistent with that of the owner. Bramwell L.J. stated at p. 273:

> "I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment." [Emphasis added.]

In Williams Bros. Direct Supply Stores Ltd. v. Raftery, [1958] 1 Q.B. 159, [1957] 3 All E.R. 593 (C.A.), land was bought for development in 1937 and a row of shops with apartments above them was built. The builder's intention to develop the land at the rear of the shops was interrupted by the war. From 1940 onwards, an occupant of an apartment used a parcel of this land as a garden and the tenant who succeeded him continued to do so until 1949 when it was overrun with weeds. He then began to raise greyhounds and erected a shed. The Court of Appeal held that the use of the land was not inconsistent with the owner's rights and did not amount to dispossession. Morris L.J. said at p. 173 that it was:

> ". . . impossible to say that there was actual possession in the defendant of a nature that ousted the plaintiffs from possession, or excluded them from possession: there was no intention on the plaintiffs' part to do other than keep the land until they could use it . . ."

The use the developers wished to make of it was development at the right time and in this connection Sellers L.J. said at p. 173:

> "The true owners can, in the circumstances, make no

> immediate use of the land, and as the years go by I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user."

Another instance of land being held for development is found in Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd., [1975] Q.B. 94, [1974] 3 All E.R. 575 (C.A.). In that case an oil company, in 1961, purchased a strip of approximately 1.33 acres next to the proposed site of a new road with a view to development when the new road was built. A company operating a holiday camp had previously purchased an adjacent farm. From 1961 to 1971, the camp company pastured cattle on the property using it as if it were its own land and in one year grew a crop of wheat on it. In 1971 the camp company took over the whole strip for the purposes of its operations, cutting grass, collecting litter and using it as a front for the camp but not placing any structures on it. In 1972, after the lapse of the English limitation period of 12 years, the camp company claimed a right to a possessory title which the Court of Appeal rejected. Since the land was being held for development, the acts of the camp company did not oust the oil company from possession because the acts were not inconsistent with the purposes for which the land was held. Ormrod L.J. said at p. 591:

> "In my judgment, the acts of the plaintiffs in cutting the grass or hay, grazing cattle and occasionally ploughing the defendants' strip of land, in no way prejudiced the defendants' enjoyment of it for the purposes for which they had originally acquired it, namely, for development as a garage or filling station when the time was ripe. In the context of this case it seems to me immaterial whether or not the plaintiffs had an animus possidendi, or that they believed the land to be theirs and treated it as such. Their trespass, relative to the defendants' practical interests in this land, can properly be regarded as trivial. . . . In my judgment, therefore, the plaintiffs have not proved adverse possession against the defendants."

Carruthers J. made firm findings of fact to which he applied the principles established by these decisions. He found that there was no dispute as to the use which the respondents intended to make of the lands which were held for sale at the appropriate time for the right price. He added at p. 552 ". . . very little would be inconsistent with the use the plaintiffs were making of the lands in dispute during the ten year

period". He found that the use made of the lands by the appellant was not inconsistent with that of the respondents. There was ample evidence to support this finding. The appellant made no attempt to exclude the respondents from the lands by fencing or other means. He kept the facilities to a minimum without any attempt to make them permanent. He consciously refused to make them commercial. Nothing was done on the land which conflicted with the respondents' purpose of holding it for sale for development. Carruthers J. found at p. 552 ". . . the facilities could be abandoned quickly and easily and with little loss".

In this case Carruthers J. had to decide whether he should take into account not only the respondents' use of the property as owners during the period of Ham's possession but also any future use. This could be a question of significance where land is held for development and where, conceivably, acts of the trespasser which did not interfere with the owner's use while the land lay idle might nonetheless interfere with its future development. He held at p. 547 that "it is the use being made of the land during the running of the limitation period that is significant, not some intended future use, if one exists, that is different".

In reaching this conclusion he refused to follow the contrary decision of the High Court in Giouroukos v. Cadillac Fairview Corp. (1982), 37 O.R. (2d) 364, 24 R.P.R. 226, 135 D.L.R. (3d) 249, reversed on other grounds by this Court (1983), 44 O.R. (2d) 166, 29 R.P.R. 224, 3 D.L.R. (4th) 595. In that case, the successive proprietors of a restaurant had used adjacent property as a parking lot for many years. The property was part of a parcel which had been acquired for future development as a supermarket in conjunction with a shopping centre. Pending this development the owner had leased the property but neither the owner nor the tenants made any use of the parking lot. Van Camp J. held that the restaurant proprietor had acquired a possessory title because his use would have conflicted with the use which the owner intended to make of the land in the future. She said at p. 372:

> "In the case before me, the two uses are not consistent. The plaintiff uses it as a parking lot that would prevent any use in the future by the defendants for building and it would also prevent their use of it as their parking lot. It is difficult to think of any contemplated use by the defendants even as a buffer zone, which was not suggested, that would not be inconsistent with that of the plaintiff and to which the use by the plaintiff would not be adverse." [Emphasis supplied.]

In my respectful opinion, Carruthers J. was right in limiting his consideration to the use made by the owner during the period of the trespasser's possession and excluding any consideration of future use. In doing so he followed the decisions to which I have referred and in each of which it is clear that the Courts directed their attention only to the owner's use during the trespasser's occupancy.

The source of confusion of use during the trespass with future use is easily explained. Where, as here, the owner makes no active use of the land at all, his user can best be described not in terms of things actually done on the land but rather in terms of the purpose of holding land is described as its "intended use". The words "intended use" in these cases leads to confusion with future use as opposed to actual use during the limitation period. The difficulty is not one of legal doctrine but rather one of expression. In my opinion, it would be more appropriate in these cases to speak always of the use which the owner made or intended to make of the land in dispute when the trespasser occupied it.

The obvious result of this and other cases I have cited has been stated in Megarry's manual of The Law of Real Property (4th ed., 1969) by P.V. Baker, in these words at p. 529:

> "If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title . . ."

It may be wondered why the more limited the use made of land by its owner, the greater is the apparent protection from claims for possessory title. The reason is plain. Whether possession is adverse depends in every case on the circumstances and particularly on the use being made of the land by the owner. As Ormrod L.J. said in the Wallis case, supra, at p. 590:

> "The same act or acts of trespass may be highly significant to the owner of a house and garden, yet utterly trivial to a property developer or an industrialist who has no immediate use for the land affected."

There is good sense in his conclusion on the same page that:

> "This seems reasonable since the interests of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred."

Carruthers J. dealt with a policy question raised by his decision at pp. 552-553:

> "Counsel for Ham complains that . . . this virtually means that possessory title cannot be obtained against 'development land' which is in the holding stage. This may very well be the case."

It suffices for this case to say that the appellant has not demonstrated acts of user which are inconsistent with the use of the respondents. It is as unnecessary, as it would be imprudent, to speculate on what acts of the appellant could have displaced the possession of the respondents in this case.

This result, however, is not surprising because there is no policy reason for concern about the rights of the appellant in this case or, indeed, any trespasser seeking to acquire possessory title to land held for development. The appellant deliberately embarked on a course of conduct which ultimately led to an intention to dispossess the respondents of their property. In my opinion, Justice Carruthers was correct in concluding that the purpose of the Limitations Act was not "to promote the obtaining of possessory title" by a person in the position of the appellant. The policy underlying the Limitations Act was stated by Burton J.A. in Harris v. Mudie (1883), 7 O.A.R. 414, as follows at p. 421:

> "The rule, as I understand it, has always been to construe the Statutes of Limitations in the very strictest manner where it is shewn that the person invoking their aid is a mere trespasser, . . . and such a construction commends itself to one's sense of right. They were never in fact intended as a means of acquiring title, or as an encouragement to dishonest people to enter on the land of others with a view to deprive them of it."

Robins J.A. speaking for this Court in the Giouroukos case, supra, reiterated this policy when he said at pp. 187-188:

> "When all is said and done, this is a case of a businessman seeking to expand significantly the size of his commercial land holdings by grabbing a valuable piece of his neighbour's vacant property. The words of Mr. Justice Middleton used in denying the claim of an adverse possessor to enclosed land in Campeau v. May (1911), 19 O.W.R. 751 at p. 752, are apposite:

> 'It may be said that this makes it very hard to acquire a possessory title. I think the rule would be quite different if the statute was being invoked in aid of a defective title, but I can see nothing in the policy of the law, which demands that it should be made easy to steal land or any hardship which requires an exception to the general rule that the way of the transgressor is hard.' "

2. Did the Appellant Have the Requisite Intention to Exclude the True Owner From Possession? The question of animus possidendi.

Mr. Justice Carruthers made a categorical finding that the appellant did not form an intention to exclude the respondents from possession until near the end of the limitation period. He said (pp. 547-548):

> "The evidence of Ham does permit me to conclude that at some time during the period following September 26, 1967, he fashioned a design to acquire possessory title to the lands in dispute. I do not accept, as Ham suggests, that this occurred the moment he was deemed a trespasser, the date of the registration of the final order of foreclosure. I think it was sometime much closer to the end of the ten-year period." (Emphasis supplied.)

This is a finding of fact and there is evidence to support it, most of which I have already referred to. It also supports his finding that the appellant's possession did not effectively exclude that of the respondents.

The two issues are intertwined. The finding that the appellant did not in fact exclude the respondents from possession makes it unnecessary to consider whether he had the intention of doing so and extremely difficult for him to prove that he did. In most cases, it is to be expected that the intention to exclude the true owner will be evidenced by acts which effectively exclude the owner's possession. No such inferences can be drawn in this case.

The appellant's occupancy of the land was not justified by any suggestion of colour of right or mistake as to title or boundaries. Occupation under colour of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all others which would, of course, include the true owners. Such was not the case in this instance.

The acts of possession and the intention to possess are not mutually reinforcing in this case where the learned trial Judge made such clearcut findings against the appellant on

both issues. There being abundant evidence to support his findings and no error in his application of the governing principles of law to them, it is not open to this Court to challenge or review them: see Lewis v. Todd [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 34 N.R. 1.

For the foregoing reasons, I would, therefore, dismiss the appeal with costs.

Appeal dismissed.