CASE LAW WORKSHOP

Selected Cases Relating to Misdescription

(The underlined citations are those for which material is provided.)

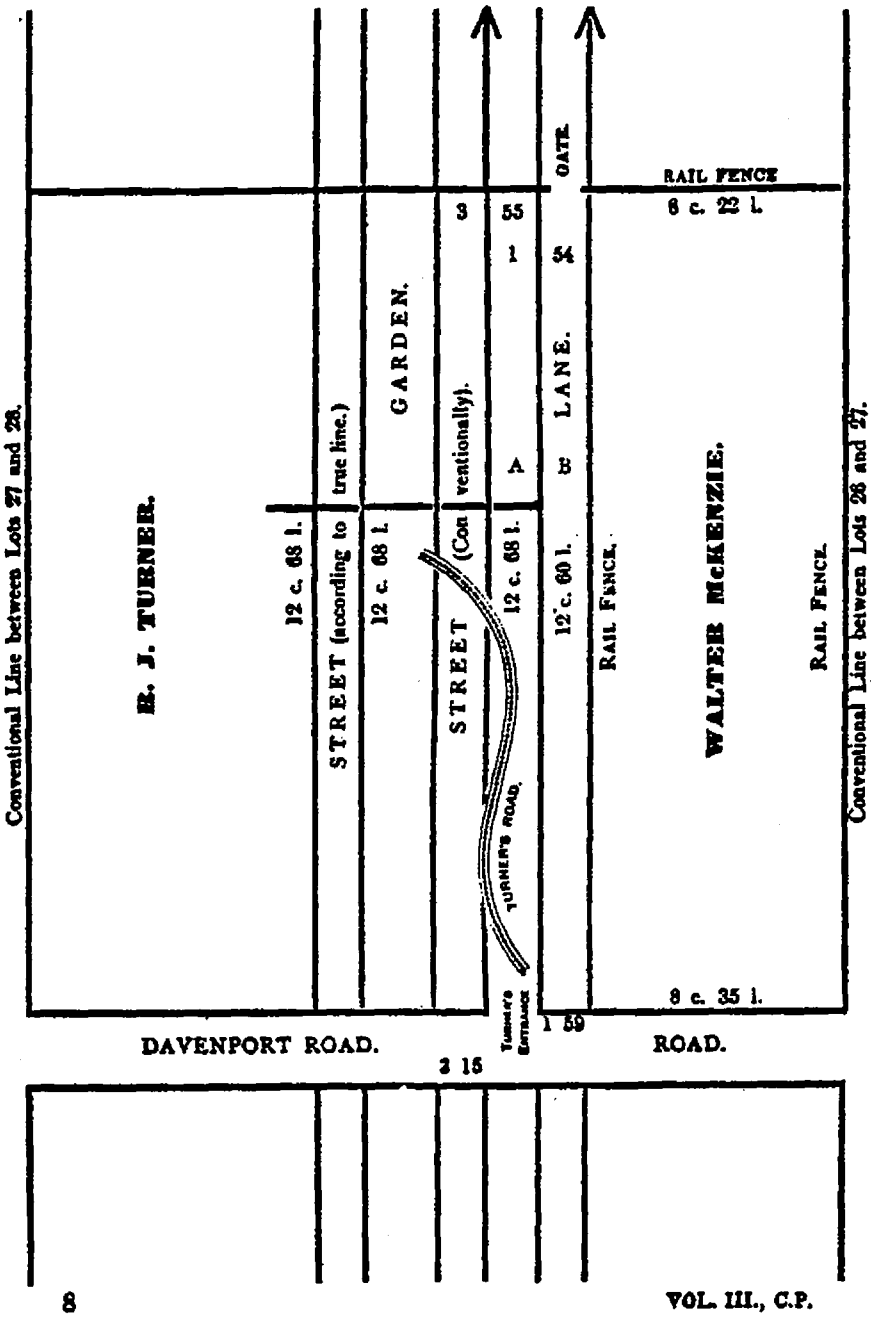
THE HON. JOHN HENRY DUNN AND WALTER MCKENZIE V. ROBERT JOHN TURNER.

Deed—Description of land conveyed.

An oblong tract of land 20 by 100 chains, containing 200 acres, was subdivided into smaller lots, with a lane laid out and staked, as was supposed, through the centre of the tract, which it really was according to the then understood boundaries of the 200 acres. Part of the tract lying to the east of the lane was sold and conveyed; and in the deed of the part so sold, reference was made to a plan which shewed the lane as laid out through the centre of the whole tract, and the said lane was therein declared to be the western boundary of such piece. And in the same deed a right of way was granted to the purchaser in and over the said lane or way, being 83 links in width, "and which said way is already staked and laid out for the benefit of the occupiers of the said lot." Afterwards it was discovered that the eastern and western boundaries of the whole 200 acre lot, as of all the lots adjoining, should lie more to the west than was formerly supposed; and that, if therefore those boundaries were shifted to their proper places, as had been done by the owners of adjoining lots, the lane as originally laid out and staked, could not still continue to be in the centre of the lot when shifted. Held, in an action of ejectment by the purchaser of the piece to the east of the lane, that his western limit could not extend beyond the east side of the lane as staked out before the execution of the deed.

This was an action of ejectment brought by the plaintiffs to recover possession of the following property, situate in the township of York in the county of York, being composed of part of the lot number twenty-seven, in the second concession from the bay in the township of York aforesaid; commencing on the northerly limit of the public road known as the Davenport Road, on the said lot, and at the intersection with the said limit of the line of old rail fence at present forming the westerly fence of the said John Henry Dunn and Walter McKenzie, and which point of intersection is about eighty feet easterly from the entrance gate of the said Robert John Turner, upon the north side of the said road; then from such point south seventy-four degrees, west one chain thirty-nine links, more or less, to the easterly limit of a certain street or lane eighty-three links in width, agreed upon as running up the centre of the said lot; thence along the said limit of the said street or lane north sixteen degrees twenty-one minutes, west twelve chains sixty-eight links, to the range of the north line of the said Robert John Turner's garden fence, thence north seventy-four degrees, east one chain fifty-four links, more or less, to the old rail fence as aforesaid; thence along the said rail fence south fifteen degrees forty-one minutes, east twelve chains sixty links, more or less, to the place of beginning, and containing by admeasurement one acre

three rods and thirteen poles, as shown by the following diagram, taken from the one before the court:



The said defendant appeared to the action and defended for the whole of the said property, and the cause was brought down to trial at the last assizes for the united counties of York, Ontario, and Peel, when a verdict was taken for the plaintiffs upon the following admissions: It was admitted, for the trial of this cause, that the plaintiffs claimed that portion of land in the above diagram designated A and B, in the writ of summons mentioned, and above described; and that they were entitled to recover the same if, according to the construction of the deeds to the defendant of lot number twenty-seven, and from the defendant to Adam Wilson of part of the said lot, the lane dividing the said lot from north to south be fixed to run through the centre of the said lot, and not to be fixed to the spot where the same was originally staked and laid out (without prejudice to any rights in equity any of the parties might have): and also that by adverse claim the plaintiffs have lost a strip all along the east side of their lot, the same having been claimed and afterwards settled as a part of lot number twenty-six: that it was then claimed the said lot number twenty-seven should go as far to the west as the said lot number twenty-six had gone: that the owner of lot number twenty-eight consented to the same if he in his turn could compel the owner of twenty-nine to yield up as much to him in recompense of what he should lose: that the owner of number twenty-eight afterwards recovered against the owner of twenty-nine the distance which he claimed to be part of his said lot number twenty-eight: that the defendant since the commencement of this suit had taken possession of the ground so yielded up by the owner of number twenty-eight as a part of lot number twenty-seven.

The plaintiffs contended the said line should be removed to the centre of the said lot.

The defendants contended that the same should remain as it was originally laid out and staked.

These admissions were only made for the purposes of this suit.

A verdict was taken for the plaintiffs subject to the

opinion of the court upon the said deeds, or copies, or extract of such parts as the parties might agree to be sufficient, and upon the above admissions.

Upon reference to the exhibits, they appeared to be the following:—

1. The indenture of the —— day of —— 1845, made under the Court of Chancery, by which Thomas Bell and others conveyed to the defendant, for the considerations therein expressed, lot number twenty-seven in the second concession from the bay in the township of York, containing 160 acres more or less, as the same was particularly delineated and laid down on the map drawn in the margin thereof and coloured pink; and also all the road or way running through the centre of the said lot number twenty-seven, extending from the road running between the first and second concessions from the bay in the said township of York to the road running between the second and third concessions, and which said road or way thereby conveyed or intended so to be, was then staked out and divided, and was laid down on the said map or plan and therein coloured and was of the width of eighty-three links, excepting and always reserving out of the conveyance therein contained unto the owners or occupiers for the time being of any parcel or tract of land, part of the said lot number twenty-seven, full and free liberty and right of way and passage with horses, carriages, &c., in, over and upon the said road or way thereby conveyed, upon certain trusts therein expressed and contained respecting the same, &c.

2. An indenture of bargain and sale dated the 15th of October, 1846, consideration 165*l.* and 5*s.*, &c., recites certain other deeds of conveyance of portions of the aforesaid lot number twenty-seven, including the deed above mentioned; and that Adam Wilson had contracted to purchase those parts of the said lot number twenty-seven known on the aforesaid plan as numbers twelve and thirteen on the east side of a certain way laid out on the same plan, and running from north to south through the centre of the said lot number twenty-seven, containing by admeasurement eleven acres and a half more or less, and more particularly des-

cribed as "commencing at a stake now planted at the easterly side of the said lot number twenty-seven where lot number twenty-six in the said second concession and the public road running in front of the said parcel number twelve on the north side of the said road meet; then northerly along the easterly limit of the said lot number twenty-seven on a course north sixteen degrees west eleven chains sixty-nine links, to a stake; then on a course south seventy-four degrees west nine chains fifty links, to the way running through the centre of the said lot; then southerly along the westerly (should be easterly) side of the same way on a course parallel with the easterly side of the said lot twelve chains sixty-four links, to the public road aforesaid running in front of the said parcel number twelve; thence on a course north sixty-eight degrees east along the north side of the said public road to the place of beginning. And also the right of way for the said Adam Wilson, &c., and all claiming under him, with horses, carts, carriages, &c., and on foot or otherwise as he or they might think fit, at all times and seasons, &c., in, over and upon that certain part of the said lot number twenty-seven, and running from the front of the said lot on the second concession to the rear thereof on the third concession from the bay, and being in width eighty-three links, *which said way is already staked and laid out for the benefit of the occupiers of the said lot.*" To hold in fee.

It was admitted the plaintiffs claimed under this deed.

The original deeds and plans therein referred to were not before the court, but only draft copies of the deeds, and a plan which the court assumed as correctly corresponding with the original in those parts which were material to the action.

Wilson, Q. C., for the plaintiffs, contended the first monument called for—viz., a stake at the south-east angle of the tract—was not planted correctly; wherefore the true course, and not the stake, should govern: that it was supposed to be placed correctly, but was not: so also, that the lane was supposed to be in the centre of the lot, but was not; and that it was only adopted as the west boundary of the plain-

tiffs' tract upon that assumption: that to hold otherwise would be against the plain intention of the parties; and the effect would be to curtail the plaintiffs' quantity by reason of a part supposed to be purchased by them being taken off by the adjoining lot on the east: that the intention should prevail, and the manifest intent was, that the lot should be divided by a lane into two equal parts; and the plaintiffs to receive a portion of the south-east half, commencing at the south-east angle of the tract: that the intent was to transfer a tract nine chains and fifty links, which forms the east side of the lot to the centre lane, which was not done; and that the general intent should prevail; that the artificial boundaries called for do not fulfil the intention, and must therefore be overlooked; and must yield to the plain paramount intention, which ought not to yield to false descriptions and misplaced stakes: that the plan referred to in the deeds shewed the intention to be as he contended—Fewster v. Turner, 6 Jur. 144; Lambe v. Reaston and wife, 5 Taunt. 207; Wilkinson v. Malin and others, 2 Tyr. 544.

Vankoughnet, Q. C., for the defendant, said it was of no moment where the description was to begin, for the tract was clearly to be bounded and limited, not by a supposed central lane, but by a lane already laid and staked out for the very purpose of defining the west limit of the east half of the lot: that, had the stakes supposed to be at the south-east angle of the tract between a chain or two west of it, and upon the lot granted, instead of too far east of it, plaintiffs would be entitled to all east of it up to the west lot. At all events, that the deed as to intent was to be considered as at the time of execution, at which period the stakes were supposed to be accurately placed, and were intended to govern; and that such intent could not be altered or affected by reason of subsequent disputes or discoveries respecting the true limits of lot No. 27, and the adjacent lots. He referred to Doe ex dem. Miller v. Dixon, 4 O. S. 101; Doe ex dem. Murray v. Smith, 5 U. C. R. 225; Doe ex dem. Notman v. Macdonald, Ib. U. C. R. 321; Doe ex dem. Gildersleeve v. Kennedy, Ib. U. C. R. 402; Doe ex dem. Smith v. Galloway,

5 B. & Ad. 43; Scralton v. Brown, 4 M. & C. 485, 505; Marshal v. Hophins, 15 East. 309; Llewellyn v. The Earl of Jersey et al., 11 M. & W. 183.

MACAULAY, C. J.—It appears to me the plaintiffs' westerly limits cannot extend beyond the easterly side of the lane or way that had before the execution of the deed been already staked and laid out for the benefit of the occupiers of the lot.

The lot is a large oblong tract of 200 acres of land, being twenty chains wide and one hundred deep. This lot was sub-divided into smaller tracts to be sold, with a lane or road up the middle; and might become the property of many owners on both sides of the way, which was to be common to all. Each and all were to be bound by it on both sides of such way, as already laid out. It was supposed to be in the centre, and really was according to the then understood boundaries of the lot number 27. But it was not, after all the lands had been conveyed away in sub-divisions according to the plan, the occupiers, or owners on one side could insist upon the lane being altered so as to encroach upon the lots on the other side—all would be liable to disturbance at any time within twenty years; and the very object and precaution of laying and staking out the road as the division between east and west ranges of lots before they were disposed of, would be frustrated and rendered useless.

It is not merely a description by reference to a plan, which plan is to be applied to the ground according to the exact limits of lot No. 27, to be ascertained according to the statute 12 Vic., ch. 25. The tracts are described in reference not only to a plan, but to the stakes planted to mark the south-east and north-east angles of the tract, and the lane and way, which is expressly declared to be the boundary of such tract on the west. And the right of way already staked and laid out for the benefit of the occupiers of the said lot is expressly granted by the deed to Mr. Wilson, on the 15th October, 1846, in, over and upon that part of the said lot No. 27, 83 links in width, which had been so staked and laid out.

Reverse the case, and suppose the stakes called for as being on the easterly limit of lot No. 27, and at the south-east and north-east angles of the tract conveyed, were really to the west of that line instead of to the east, could the owners of the half lot west of the lane insist upon its being moved east upon the owners of the east half; or if not, would the plaintiffs be entitled up to the true division line between lots Nos. 20 and 27, or would the space between that line and the line of the stakes still belong to the defendant as former owner of the east half of the lot? I apprehend that in that event the true division would contract the stakes—the predominant intention being to convey from the easterly limit of lot No. 27 towards and up to the lane in the centre thereof. What the effect of a very wide deviation might be—as, if the lane was laid out through the easterly quarter, or eighth, or sixteenth part of lot No. 27, divided from north to south—it is unnecessary to consider; but I am not prepared to say it would, in my view, make any difference.

McLEAN, J.—By the deeds it appears that the late Peter McDougall had divided the Lot No. 27, as he then held it into parcels, dividing the lot by a lane or way from north to south, at what was considered the centre of the lot (the lane or way being then staked out and marked upon the ground eighty-three links in width), and to be used by all parties who might purchase any of the parcels of ground adjoining it. Subsequently it was discovered that the line between Lots Nos. 26 and 27 had not been properly established; and that a quantity of ground, equal in width to what the plaintiffs now claim, part of No. 26, was included within the limit of No. 27 as laid out by McDougall. The owner of No. 26 brought ejectment, and recovered the land claimed by him. The owner of No. 28 then agreed to give up to the owner of No. 27 the same quantity of land, provided he could recover an equal quantity from the party in possession of No. 29. Having recovered in ejectment, he gave up, as part of No. 27, ground of the same width as that which was lost on the eastern boundary: the ground thus given up has been taken possession of by defendant, and he holds

from the lane or way referred or to the western limit of No. 27. The plaintiffs seek to recover their proper breadth, and there appears to be land enough in the lot to give to all what they are entitled to. The defendant, who purchased according to the division of the lot and the plan of it made by McDougall, resists the plaintiffs' right to recover on the ground that, whether they have their complement of land or not between the lane or way staked and laid out at what was considered the centre of the lot and the present eastern limit, the plaintiffs cannot legally claim the land composing the lane or way, or any land beyond it. The premises were all transferred to the defendant under the direction of the Court of Chancery, and he was a trustee for such parts as were not included in his own purchase. As such trustee he conveyed to Adam Wilson, Esq., the block or parcel of land known as No. 12 in the sub-division, north of the Davenport road and adjoining the eastern limit as it then stood, the stakes and boundaries being marked on the ground. The deed bears date the 15th day of October, 1846, and describes the premises as commencing at a stake *now* planted at the easterly side of the said Lot No. 27, where Lot No. 26 in the said 2nd concession and the public road running in front of the said parcel No. 12 on the north side of the said road meet; thence northerly along the *easterly* limit of the said No. 27, in a course north sixteen degrees west eleven chains and sixty-nine links *to a stake*: then in a course south seventy-four degrees west nine chains and fifty links *to the way* running through the centre of the said lot; then southerly along the westerly (should be easterly) side of the same way, in a course parallel to the easterly side of the said lot, twelve chains sixty-four links, to the public road aforesaid running in front of the said parcel No. 12; then along the north side of the said public road to the place of beginning. And by the same deed a right of way is conveyed to Mr Wilson in, over, and upon that certain part of the said Lot No. 27 running from the front of the said lot in the 2nd concession to the rear thereof, being in width eighty-three links, and which *way is already staked and laid out for the benefit of the occupiers* of the said lot.

By the deed to the defendant the way is granted and conveyed to the defendant, and it is therein stated that *it had then been staked out and divided;* and a right of way is expressly reserved to the owners and occupiers for the time being of any parcel or tract of land, part of the said lot No. 27. For the convenience of all parties who might purchase any portion of No. 27, the way through the supposed centre of the lot was established; and by the reservation in the deed to the defendant all are entitled to enjoy it. That way was staked out and marked on the ground, and all purchasers could see the particular ground upon which they had a right to pass and repass to their own premises. Their right to use that way cannot now be affected by any alteration in the boundaries of the whole lot. Their way must still remain where originally staked out, though it now appears that it is not, as it was intended, in the centre of the lot, and that the description of it as in the centre of the lot is a mis-description in the deed. If the plaintiffs were entitled to recover in this action, the right of way which all purchasers stipulated for would be taken from them, and they would have to take another piece of ground in lieu of it, one chain and thirty-nine links further west. The parties having acquired a right to the particular piece of ground marked by metes and bounds, cannot now be deprived of that right; and, however hard it may be on the plaintiffs to be deprived of a considerable portion of the land purchased by them, especially when the land is actually contained in the lot, I do not think they can obtain relief in this action. The defendant has more than his fair complement of land under his purchase; but I cannot see he has any belonging in strictness to the plaintiff. My opinion therefore is, that the defendant is entitled to judgment.

SULLIVAN, J., concurred.

Judgment for defendant.

NOTE.—On Wednesday, 8th December, 1852, Mr. *Wilson* applied for a new trial, suggesting that deeds prior to those in evidence, might affect the question of boundaries. On the following day Mr. *Gwynne*, for Mr. McKenzie, renewed the application; and Mr. *Wilson* asked a nonsuit.—The court expressed themselves ready to adopt any course by consent; but otherwise

did not see that the request could be granted. Mr. *Gwynne* argued that the defendant was *estopped* from denying that the tract was bounded by a lane in the middle of the lot No. 27; and, as was understood, said that if the present stakes were not on the true lines—in other words, if the centre of the 83 links as thereby indicated, is not the true centre line of lot No. 27—they were to be disregarded; and that a lane in the centre wherever that might be, is called for by the deed and plan, and could not be contradicted or controlled by any expression therein, or by the stakes previously planted, if incorrectly placed, because the defendant is estopped or precluded from setting up any lane not in the centre, whether previously staked out or not. The Chief Justice remarked that if he understood him correctly, he did not accede to such a view of the case, but thought the lane as already laid out (which must be assumed and then supposed to be central), was intended to, and must govern and control. He did not think the defendant was estopped any further than the plaintiffs were estopped, and that both were estopped from setting up any other lane in any other part of the lot No. 27 different from that which had been staked out, and which was specifically called for and referred to in the deed.—He also observed that he was not disposed to think the plaintiffs concluded by the result of this ejectment under the late act, 13 & 14 Vic., ch. 114, sec. 8, any more than under the old practice; and that, if at all events, the plaintiffs cannot bring another action—they might appeal the present one to the Court of Appeal. He said that all the facts material to the question were fully stated; and that he did not see that any deeds between other parties as former holders of lot No. 27, could affect, control, or govern the deed from the defendant to Mr. Wilson, so far as respects the question of the contract thereby conveyed being bound on the west by the way, which at the time of the execution thereof had been already laid out for the benefit of the occupiers of the said lot.

OVENS v. DAVIDSON.

Survey—Boundary line commissioners—Validity of work done by subordinate.

Held, that a line run by a subordinate and adopted by the principal (surveyor) is the work of the latter, and must be treated as such.

2. That it is by the work as executed on the ground, and not as projected before execution, or represented on a plan afterwards, that the boundaries are to be determined.

The plaintiff complained of a trespass to the east half of No. 3, 2nd concession north of Black river, township of Marysburgh. The defendant pleaded not guilty, and that the close in which, &c., was not the plaintiff's, contending that it was a part of gore A. in the said township.

At the trial a verdict was rendered for the plaintiff, subject to the opinion of the court on the whole evidence.

The plaintiff relied upon a survey recently made by provincial land surveyor John Emerson, under the following circumstances:

On the 7th of May, 1857, certain inhabitants of the township of Marysburgh, being owners or occupiers of land in tho 2nd concession, and nearly all who were affected by this line, petitioned the municipal council of the township, representing that there was more or less uncertainty or doubt about the limits between the rear of that concession and gore A. That about 1839 an application was made to the boundary line commissioners to establish the limits, &c., of the said concession, which in that year was pretended to have been done according to law, but which was informal and defective, on account of the surveyor employed not actually placing a monument at the north-easterly angle of the said

concession, as they (the boundary line commissioners) supposed from his report he had done, and prayed the council to apply to the government to have the same so far surveyed as that stone monuments might be placed at the several governing points of the said concession, by competent authority, especially on the rear of the said concession.

Upon this petition the municipal council, on the 13th of June, 1857, resolved that there be a survey made in the 2nd concession, north of Black river, in the township of Marysburgh.

On the 8th of October, 1857, the Commissioner of Crown lands wrote to Emerson, stating that the Governor-General, on the application of the municipality of Marysburgh, had ordered the above mentioned survey to be made in accordance with the statute 12 Vic., ch. 35, and instructing him to perform it. Copies of the plans, field-notes, and other documents having reference to this boundary line were forwarded to him for his information and guidance. He was directed to make diligent search for, and also to adhere to, the lines drawn and posts as planted in the original survey, or legally established by the boundary commissioners, and on completing his operations in the field, to prepare plans shewing the positions of the permanent monuments he should place. The residue of his instructions was not material to the point in dispute.

On the 26th of February, 1859, Emerson made his report, in which he stated that he made an examination of the survey Mr. Elmore had made under the authority of the boundary line commissioners, and found that Elmore had planted some monuments on the front and rear ends of the line between lots 12 and 13, in the 2nd concession, thus establishing a governing boundary line for the side lines of all the lots in that concession; that Elmore planted a stone monument in front of said concession, at the south-east angle of lot No. 1. That he considered these three monuments, which were planted by Elmore himself, under the authority of the boundary line commissioners, and before he made his return of the survey to them, to be unalterable, and he was governed by them in his survey of the concession line in rear of the

2nd concession. He then stated that Mr. J. O. Conger, who in 1839 was an apprentice of Elmore's, averred, that he ran the concession line in rear of the concession for Elmore, commencing at a post at the north-east angle of No. 12, and not at the stone monument previously planted by Elmore at the north end of the line between Nos. 12 and 18, and ran the line easterly till it intersected the rear of the 2nd concession south of the Bay of Quinte, and planted a post; that no stone monument was planted on his (Conger's) line until July, 1855, when he planted one at the rear of the 2nd concession, between lots 2 & 3; that the same stone monument was removed to another place, and that on the 25th of August, 1856, he (Conger) and Elmore planted a stone monument in the same place that he would have planted it, if he had done it at the time the survey was completed. The report further stated that Elmore, finding that Conger did not commence to run this line at the stone monument planted by him, but at a post in the rear of the side line between lots Nos. 11 & 12, in 1854 or 1855, ran another concession line, commencing at that stone monument, easterly till it intersected the allowance for road in rear of the 2nd concession south of the Bay of Quinte, and planted a stone monument at the end of that line, which differed from the line run by Conger, and neither line was correct, because "not parallel to the concession line in front of said concession." That the stone monument represented on Elmore's plan as having been planted on the rear or north end of the line on the east side of No. 1, 2nd concession, was not planted by Elmore or Conger, from which he (Emerson) concluded that Conger's line, which he ran from the rear of the 2nd concession, was not the line established by the commissioners, not having been completed at the time the commissioners gave their decision, no monument having been planted for many years afterwards. That he (Emerson) considered any survey made by Elmore or Conger after the boundary line commissioners had given their decision, and after their plans had been received, would not be established by the commissioner's authority. That Conger's line not being parallel to the concession line in front, if not established by the authority of

the commissioners, is not the correct boundary between the 2nd concession and the gore; and Elmore's line is equally objectionable, not having been run *until* 1854 or 1855, and not being parallel to the front of the 2nd concession. The report then stated that Emerson ran a straight line from the stone monument in front to that in rear, between Nos. 12 & 13, and chained its length, 106 chains 30 links, exclusive of road allowances. He then ascertained the angle which a straight line run from the stone monument in front of the line between lots Nos. 12 & 13, to the stone monument at the south-east angle of lot No. 1, would make with the line between lots 12 & 13, he proceeded to the stone monument in rear of that line, and laid off the concession line for the rear of the 2nd concession truly parallel to the concession line in front, and produced the line easterly until it intersected the line on the south side of the allowance for road in the rear of the second concession, south of the Bay of Quinté, and planted a stone monument at the east end of that line, and chained its length 190 chains 43 links, and then ran the side line on the east of No. 1, commencing at the stone monument at the south-east angle of that lot, parallel to the governing line between lots 12 & 13, and planted a stone monument at the end of that line at the north-east angle of No. 1, and chained its length, 72 chains 26 links, exclusive of road allowances, and thus succeeded in completing the boundaries of said concession. With this report he sent a plan of his survey.

On the 12th of March, 1859, the Commissioner of Crown lands wrote that Emerson's returns of surveys having been examined and found correct, he enclosed copies thereof to the municipality of Marysburgh, with the certificate and order for paying him.

The report of the boundary line commissioners referred to, in the foregoing report, and dated the 31st of October, 1859, set forth an application by the inhabitants of the second concession north of Black river in Marysburgh, requiring them to establish and determine a governing line for the side lines of lots therein, and to establish a line in rear of

said concession, and that they having heard the evidence adduced, and duly considered the same, did adjudge and decree, 1st, that the line between lots 12 & 13 in the said concession "as at present surveyed, and stone monuments erected thereon," shall be a governing boundary, &c. Secondly, we do order that the line run from the stone monument planted in rear of lot No. 2, in the said concession, shall be taken and considered as the true and correct line in rear of that part of the said second concession.

A copy of Emerson's plan, and of the plan of Elmore's survey, approved by the boundary line commissioners were filed.

Emerson swore that at his survey, the plaintiff and defendant, and several owners of lands both in this 2nd concession north of Black river, and the gore, were present. They did not desire him to take any evidence but Conger's, and he (Emerson) proceeded to run the lines according to Conger's information. He did not put Conger upon oath, as he was a provincial land surveyor He directed Conger to confine his evidence to what he and Elmore had done upon the survey for the boundary line commissioners before Elmore had made his return to them. He found monuments planted at that survey, three as detailed in his report. Conger stated that these were the only monuments that Elmore had planted before he made his return, and Emerson planted two others, as shewn on his plan, one at the north-east angle of lot No. 1, and the other at the north limit of lot No. 3. He ran from the stone monument planted by Elmore at the north-west angle of No. 12, a line parallel to the front of the 2nd concession, until it intersected the allowance for road on the south side of the 2nd concession south of the Bay of Quinté. He also ran a line from the monument at the south-east angle of No. 1, parallel with the side line between lots 12 & 13, until it intersected the road allowance last mentioned, and there planted a monument. He stated that he followed his instructions strictly, and that his survey corresponded with Mr. Elmore's as far as he (Elmore) performed his work; that his (Emerson's) survey supplied what Elmore left incomplete. He produced a tracing furnished to him

from the Crown lands office of the boundary line commissioners' plan of survey, and said that his plan adopted precisely the line shewn on this tracing, in front of the 2nd concession, between the monuments at the south-west angle of No. 12, and the south-east angle of No. 1. The trespass was proved, if Emerson's north line is the true line.

A nonsuit was moved for, 1st, because the statute under which Emerson was directed to act, does not apply to disputes between concessions and gores, but between concessions only.

2. That the petition to the municipal council was not proved to have been signed by the parties whose names appeared to it.

3. That it was not sufficiently shewn that the application for the survey proceeded from the municipal council; the act 18 Vic., ch. 83, sec. 8, does not authorise the municipal council of the township to petition for the survey.

4. That the survey by Emerson was not according to law, as he took Conger's statement without putting him on oath.

The objections were overruled, in order to reserve the whole legal question for the court.

On the defence, Conger swore that he had run the line in dispute, *i.e.*, the line marking the rear of the 2nd concession north of Black river, in 1839. He started from a point one chain north of a monument planted at the north-west angle of the gore. Elmore directed him to measure 105 chains 27 links on the line between Nos. 5 & 6, in the 2nd concession, starting from the front of the concession, and to draw a line from the first mentioned starting point, through the point formed by measuring 105 chains 27 links to the allowance for road south of the 2nd concession south of the Bay of Quinté. He did so, and at the point where his line intersected this allowance for road, he planted a square wooden stake not marked in any way. This line he stated was nearly parallel to the front of the concession, from its starting point to the line between Nos. 5 & 6. There would be a difference of 1 chain 9 links between those two points from the parallel, that is south of a parallel line, continuing

to the east, his line approached the front line 1 chain 59 links nearer than a parallel line would have been. He was at that time an apprentice of Elmore. He understood Elmore intended the line should have been parallel. Subsequently there was a monument planted by Elmore at the point where he had placed the wooden stake. This was done in 1856. He explained Elmore's reason, which has no bearing on this case; but he stated positively this monument was planted in the place where he had put the stake. On cross-examination he said that Elmore instructed him to commence running the line at the stone monument between Nos. 12 & 13. When they planted the stone monument in 1856 they did not find the old stake planted in 1839; they ascertained the point by the blaze of his old line, and measuring the width of the road in front of the 2nd concession south of the Bay of Quinté.

Peterson, also a surveyor, swore that Conger had on different occasions pointed out to him the old line between the gore and the 2nd concessions, confirmed, as he said, by the boundary line commissioners.

It was also proved that in 1845 Elmore recognised Conger's line as the one between the gore and the 2nd concession.

Conger also stated that he proposed to Elmore in 1889 to go and plant a stone monument where the wooden stake was placed, Elmore said he had employed a farmer in the neighbourhood, one Minkes, and had paid him to do it, and he was, as Conger believed, satisfied that Minkes had planted this monument when he, Elmore, made his return to the boundary line commissioners. Elmore's plan, as returned, shewed the lines in front and rear of the 2nd concession to be parallel.

C. S. Patterson, for plaintiff. Surveyor of boundary commissioners in 1839 returned that he had planted monuments, which in fact he did not. He planted three, he returned that he planted four, which was not the case. 18 Vic., ch. 88, sec. 8.

Richard's, Q. C. The line run by Conger, under Elmore's direction, is visible on the ground. The statute gives no authority to the government to override any line which is

traceable, and declared by law to be final or unalterable. Raile v. Cronson, 9 U. C. C. P. 9; Reg. v. Rose, 12 U. C. Q. B. 637.

DRAPER, C. J.—This plan returned by Elmore is marked by him as the "Plan of that part of the 2nd con., north of Black river, in the township of Marysburgh, shewing the manner in which it has been surveyed, and also the places at which the stone monuments have been erected upon it." It shews the three monuments mentioned by Emerson, one where the line on the rear of the 2nd con., north of Black river, intersects the road south of the 2nd con., south of the bay of Quintè, and another at the north-east angle of No. 1. On the face of the plan is the following certificate: "We do hereby certify that we have established a governing line for the side-lines in the 2nd con., north of Black river, Marysburgh, *and established a line* in rear of the said concession agreeable to this plan." Signed, &c.

Now the only line in rear of the said con., which had been run under Elmore's direction, was that run by Conger, and the question is whether that line is, under the circumstances, established by the boundary commissioners.

On the part of the plaintiff, it is argued that it is not so established. The following appear to be the principal reasons:

1st. That Elmore did not run this line himself, and that Conger's running it by his direction, but in his absence, did not make it a part of Elmore's survey under the authority of the B. L. Commissioners.

2nd. That Elmore's intention was that the line should be run parallel to the line in front of the concession; that Conger did not run it in accordance with that intention, and therefore it was not run under Elmore's authority.

3rd. That Elmore's plan led the commissioners to suppose the front and rear of the 2nd con. were parallel lines, and that the boundary line commissioners intended to establish such a rear line as the plan shewed, and not such a line as Conger ran.

4th. That no stone monument at the east end of the line,

in rear, where it intersects the *other* concession road, was *in fact* planted, as Elmore's note on his plan represents, wherefore such a monument could not be confirmed, for it did not exist.

5th. That though Elmore returned his plan, shewing his survey complete, he had not in fact completed it, and therefore the decision of the boundary line commissioners can establish no more than what he had then done.

As to the first of these reasons, I have no doubt if Elmore did in fact employ and direct Conger, his apprentice, to run the line in question, and adopted the line when run by Conger, as his own work, and so reported it, and returned it on his plan, it must be treated as his work, and if approved and confirmed by the commissioners, is as much binding as if he had actually run it himself. No other line but this was run, and there certainly was evidence enough to show Elmore's direction and subsequent adoption of it, and when he returned the plan of the whole work as complete, he in effect returned this line as a part of his survey.

Coming to this conclusion, I can give no greater effect to the fact that the line was meant to be parallel to the front of the concession, but was not in truth so parallel, than if Elmore had himself run the line just as it is. In such event the same rule must, I apprehend, govern us, as if it were the case of an original survey. It is by the work as executed on the ground, not as projected before execution or represented on the plan afterwards, that the actual boundaries are determined, and therefore I do not think this reason can prevail. I am of course assuming that the surveyor in his work and plans has not been acting *malâ fide*, what effect that might have we are not now called upon to consider.

The same answer must, in my opinion, prevail, as regards the intention or belief of the boundary line commissioners in confirming the plan and survey as represented by it. Experience in courts of law affords ample proof that the surveys on the ground, and the plans of them received and acted upon in the Crown land office, differ to a much greater extent than in this instance.

I do not feel that there is any thing in the fourth reason,

though the Municipal Council in their petition, and Mr. Emerson in making his survey and giving his evidence, relied upon it, inasmuch as he evidently drew a difference between what Mr. Elmore had done, and what is represented on his plan, for he adopts and follows the three stone monuments which Elmore himself planted, and rejects the line run by Conger under Elmore's direction, and the *terminus* of that line, because no stone monument was planted there for many years. The certificate of the commissioners makes no direct reference to any of the monuments, but it states in express terms that they had "established a line in rear of the said concession agreeable to this plan," which, as I think, established the line run by Conger by the direction of Elmore.

Whether Elmore completed his survey, is of course a question of fact. If I am right in my conclusion that the line run by Conger is a part of Elmore's survey, then it was completed, and as I have adopted this conclusion this reason fails also, which in effect displaces Mr. Emerson's survey as one which completed what Elmore had left undone.

It follows, in my opinion, that the boundary line commissioners in 1839, decided the question which the plaintiff raises in this action, and that their decision is final. It is the evident intention of the government, in accordance with the law, to maintain this decision, or if there were no traces, by which the boundaries so established could be ascertained, to fall back upon the original survey. Emerson was accordingly directed to adhere to the lines drawn and the posts as planted in the original survey, or legally established by the boundary line commissioners. Mr. Emerson has, I fear, been led into a mistake by the language of the petition of the Municipal Council, and by the use of the word "*legally*." He has rejected Conger's line, the only one of which there was proof and which Elmore adopted and returned, because he has assumed it was not *legal*, inasmuch as Elmore was not present when it was run; that it was not legally established, and that it is incorrect in his opinion, because it is not truly parallel with the front line of the concession. There is nothing to show that the line run at the original survey was thus parallel on the ground, and if there

be neither trace nor monument of the original survey, there is nothing to show that if the statutory directions applicable to such a case were followed, Emerson's line on which the plaintiff relies, would be right. No doubt, theoretically, the front and rear lines of a concession should be parallel, but in practice every one knows the contrary is often the case:

I think it our duty to lean against overturning lines and boundaries, which have been pronounced upon as established for many years, and apparently acquiesced in, unless upon the clearest grounds, and in my opinion the evidence is amply sufficient to sustain the decision of the boundary line commissioners.

The *postea* should be delivered to the defendant.

Per cur.—*Postea* to defendant.

MARRS V. DAVIDSON.

Survey—C. S. U. C. ch. 93, sec. 28—Double-front concessions—Description of land—Trespass—Leave and license.

The 12 Vic. ch. 35 sec. 37 (Consol. Stat. U. C. ch. 93, sec. 28) which prescribes the rule for drawing the side lines in double-fronted concessions, applies to townships theretofore surveyed.

Held,—following Warnock v. Cowan, 13 U. C. R. 257, and Holmes v. McKechin, 28 U. C. R. 52, 321—that the lands having been described in half lots is made by that section part of the definition of a township with double front concessions.

Held, also, that the rule prescribed applies to all lands in such concessions, not to the grants of half lots only, and that it is brought into application by the granting of any half lots.

Semble, however, that the section is on both points open to doubts, which it is desirable to remove by Legislation.

Where land was described as commencing at a post planted four chains and fifty links from the north-east angle of a lot—*Held*, that the post (the existence and position of which were satisfactorily established) was the point of commencement, though its distance from the true north-east angle was inaccurately given.

The declaration charged the trespasses, breaking down fences, &c., as committed on divers days and times. Defendant pleaded leave and license, which the plaintiff traversed. It appeared that part of the fence was removed under a license, and the remainder after it had been revoked, the interval from the first to the last removal being two or three years.

Held, that the plaintiff was entitled to succeed, though it would have been otherwise if the declaration had only charged the trespasses as committed on the same day, for the defendant could then have applied the license to the only trespass charged.

TRESPASS to part of lot No. 9, in the third concession of Emily, commencing where a post was planted by or on behalf of B., in or before 1848, at the distance of four chains and fifty links from a point which was then known as the north-

east angle of said lot No. 9; then south 74° west 4 ch. 50 l.; then south 16° east to the centre of said lot; then north 74° east, 4 ch. 50 l.; then north 16° west to the place of beginning—breaking down fences, &c.

Pleas.—1. Not guilty. 2. Leave and license. 3. Land not the plaintiff's.

The trial took place at Lindsay, in November, 1866, before Morrison, J.

The case, after taking all the evidence and some legal objections, went off thus: It was agreed there should be a verdict for the plaintiff and 1s. damages, with leave to defendant to move for a nonsuit or a verdict to be entered for the defendant. The points for the plaintiff were that the concession was a single fronted one, and so the north-east angle as formerly understood was right; but that, whether the angle was there or was one chain further east, which it would be if the concession was a double-fronted one, that the plaintiff starts from the post mentioned by Mr. Boulton in his deed, and was therefore entitled to succeed. The defendant contended to the contrary, and also insisted that his plea of license was proven. The Court was to draw inferences of fact, and the plaintiff had leave to apply to reply or to new assign, if the Court should think the plea of leave, &c., proved, but that on the evidence a sufficient answer was made out.

In Michaelmas term, 1866, *Hector Cameron* obtained a rule calling upon the plaintiff to shew cause why a nonsuit or a verdict for defendant should not be entered, pursuant to leave reserved, on the ground that the concession in question is a double-fronted concession, and the evidence shews that according to the true survey the land in question does not belong to the plaintiff; also, that the starting point of the description of the plaintiff's land must be at the distance of four chains and fifty links from the true north-east corner of the lot; and also that the plea of leave and license was established by the evidence.

In Hilary Term, *C. S. Patterson* shewed cause.

The facts of the case, with the authorities and arguments, are sufficiently stated in the judgment.

DRAPER, C. J., delivered the judgment of the Court.

On the 5th of August, 1840, the Crown granted to the Hon. G. S. Boulton the north half of lot 9, in the third concession of Emily, and on the 3rd of November, 1848, he conveyed to one Mitchell fifteen acres, parcel of this half lot, by a description, "commencing at a post planted four chains and fifty links from the north-east angle of the said lot," No. 9. Before making a conveyance of any part of this half lot, Mr. Boulton employed a surveyor to mark the boundaries of the subdivision he was making, as he had sold a piece of land the description of which commenced at the north-east angle of this lot, to the Rev. Mr. Shaw, by deed dated the 20th of February, 1844, and had given a strip of the same width as Shaw's for the church, and reaching to the southern limit of the half lot; and Mr. Boulton gave evidence that, among other posts, there was one planted to mark the north-east limit of the piece conveyed to Mitchell.

For some months after the conveyance to Mitchell, there was no statutory regulation as to concessions having double-fronts, and until the passing of the 12 Vic. ch. 35 (30th May, 1849) the posts which had been planted to mark the front angles of lots were by law unalterable boundaries, and the side lines were to be run from those posts. The side line between this lot and the adjoining, No. 10, appears (the evidence is not direct) to have been run accordingly, and the north-east angle to have been thus ascertained. But the thirty-seventh section of this Act declared that in those townships in which the concessions had been surveyed with double-fronts, and the lands had been described in half lots, the side lines should be drawn from the posts at both ends to the centre of the concession, and each end of the concession shall be and is declared to be the front of its respective half of such concession, and that a straight line adjoining the extremities of the side lines of any half lot in such con-

cession, drawn as aforesaid, shall be the true boundary of that end of the half lot which has not been bounded in the original survey.

The principal question in dispute was whether this was a concession with double-fronts.

For the plaintiff it was insisted that the Statute, 12 Vic. ch. 85, (Consol. Stat. U. C. ch. 93) could not have an *ex post facto* operation, and that at the date of the deed to Mitchell the north-east angle of the lot could only be ascertained by running a line on the proper course from the front of the concession: that this appeared to have been done, and that the Statute could not make that erroneous which had been in accordance with existing law. It was also insisted that a township with double-front concessions must, according to the Statute, have the posts on both sides of the allowances for roads between concessions, and that the lands therein should have been described in half lots.

We have no doubt that the Statute did apply to townships theretofore surveyed, even though according to its precise letter there would be ground for questioning its application to townships to be thereafter surveyed. And there was abundant proof that this township was, so far as the planting posts on both sides of the concession roads went, one that came within the literal meaning of the Statute. We have felt more difficulty on the other question, as to the lands being described in half lots.

This expression has been assumed to be part of the definition of a township with double-front concessions. In *Warnock* v. *Cowan* (13 U. C. R. 257) which was decided by the late Mr. Justice Burns and myself, it was so treated, as also in the judgment of this Court in *Holmes* v. *McKechin* (28 U. C. R. 52, 321). Nevertheless, though perhaps not open to question in this Court, it may be doubted whether this clause of the Statute should not be read thus: "In those townships in Upper Canada in which the concessions have been surveyed with double-fronts (that is, with posts or monuments planted on both sides of the allowances for roads between the concessions) and the lands in which townships

have been described in half lots, the division or side lines shall be drawn," &c—treating the words which are placed in a parenthesis as containing the whole definition of concessions with double-fronts. The words "and the lands have been described in half lots" would point out in what cases the side lines are to be run from the front and rear of the concessions to the centre, namely, whenever a half lot is granted, and the rule, though the Statute does not say so, would apply equally to a quarter lot.

In the twenty-sixth section of the Consolidated Act, it is provided that the front of each concession of Upper Canada where only a single row of posts has been planted on the concession lines, and *the lands have been described in whole lots*, shall be that end or boundary of the concession which is nearest to the boundary of the township from which the concessions are numbered. We have here the same phrase "the lands have been described." In this section twenty-six both descriptions, that of a single row of posts having been planted and the grant of the lands in whole lots, are combined, for the determining in what cases the front of the concession is to be governed by the rule given. Why should a different method obtain as to construing the other section?

We think, though not without some hesitation, that the right construction was adopted in the former cases.

No uniform system of granting lands in this township of Emily, which would show how the survey was treated in reference to the division into half lots, seems to have been followed in the public offices. From the evidence it appears that in 1823 the north-east quarter of No. 10, 3rd concession, was granted, and the description commences in the centre of the concession. In 1824 there were grants of the north-west quarter of No. 20, in the 3rd concession, and of the north-west quarter of No. 7, in the 1st concession, and of the north-east quarter of No. 6, in the 3rd concession, and of the north-east quarter of No. 6, in the 5th concession. All these descriptions commence in the centre of the concession. In 1825, No. 6 in the 7th concession was granted as a whole lot. The description begins in front of the

concession, at the south-west angle of the lot, (the lots number from west to east) and runs thence to the rear of the concession, not referring to any post; and in the same year the north half of No. 18, 2nd concession, was granted, and the description commenced in the centre of the concession. In 1834, the west half of No. 3, in the 5th concession, was granted, though, according to the double-front concession principle, the lots were divided into north and south halves. In none of the foregoing grants is there any reference to the posts planted on the north of the respective concessions, and in 1856, a grant was made of the west half of No. 2, 3rd concession, without any description at all.

We do not think it possible to construe this section (28 of the Consol. Stat.) as prescribing a rule which is not to apply to all the lands which lie in concessions which have been posted on each side as the section describes. The rule cannot, we think, be limited to the grants of half lots. The inconsistency and inconvenience that would arise from that construction, and as a consequence holding that where a whole lot is granted the side line can be run from the post at the front angle, without regard to the system of survey or to the post planted in rear, can be readily illustrated by assuming No. 9, to be granted, and described as a whole lot, and the north halves of No. 8 and 10 to be separately granted. In nine cases out of ten, probably in a larger proportion, a line run from the front angle parallel to the governing side line, to the rear of the concession, will not strike the post planted in rear. In the present case the difference is about one chain, the post in rear being so much further east than the termination of the line run from the front angle. But the side lines of the north halves must begin at the posts planted in the rear of the concession, and go parallel to the governing line to its centre, and the result will be that the north half of No. 10 will be a chain distant from the side line of No. 9, which it ought to join, and a strip of land a chain wide will be included in the patents for No. 9 and for the north half of No. 8. It is impossible that a construction which will produce such results can be the true one, and we

see no other way to avoid it but by holding that where the concessions have double-fronts, this, and the express words of the Statute, *divide* the lands into half lots; and when, as in the present case, the concessions run nearly east and west, the division is into north and south halves; and that the granting of any north or south halves of lots brings the section into application, even if it must not necessarily apply from the nature of the survey and posts planted; and that any description in the patents at variance with the actual survey and the statute must give way.

I feel all the difficulty of so treating the language of the Act, and have in my own mind combatted many arguments that have suggested a different result; but at last we find it the only solution of the matter which we can reasonably adopt; for if it be held that the words, "the lands shall have been described in half lots," mean that the grants shall set forth the bounds, courses, &c., then this difficulty presents itself, that the practice of issuing patents without any such description commenced in the land granting department of Upper Canada several, perhaps fifteen, years or more before the Statute 12 Vic. was passed, and has been more or less followed ever since. If these words mean that the grants, though omitting to express the boundaries, should describe the lands as such a half lot, or some aliquot or other portion of such a half lot, *ex. gr.* as the east half of the north half; or in granting a whole lot should describe it as consisting of the east and west halves thereof, or the north and south halves, according to the direction of the double posted concession lines;—then, as we see in this case, as the case of *Holmes* v. *McKechin* shewed, and as individual and general experience reminds us, no such rule has been uniformly followed, and such a construction would almost render the statutory provision a dead letter. The Legislature found it necessary, by the 9th section of the 18 Vic. ch. 83 (Cons. Stat. U. C. ch. 93, sec. 29) to remove one doubt as to the application of the law; perhaps a similar course may be deemed advisable to remove the doubts to which the words of the preceding section (28) have given rise.

acts of trespass as committed at the same time. The evidence shewed that part of the fence was moved two or three years ago, and that defendant had used the land since. The residue of the fence was moved only in the spring of 1866, when some ploughing was also done. On the earlier occasion, it was proved that the plaintiff and defendant staked out the line the whole length to which the fence was to be removed. It was also shewn that one Dixon had purchased from Mr. Boulton a strip of land a chain wide on the west side of the north half of this No. 9, and had put up a fence on the supposed east limit of this strip. Most probably the side-line between Nos. 8 and 9 had been erroneously run from front to rear, as had been the case between Nos. 9 and 10, and Dixon's fence had been put up according to that line. Afterwards he moved this fence one chain further east, thus taking part of the land which defendant now claims under a conveyance made in 1849 by Mr. Boulton of the north half of No. 9, except about three acres conveyed to the Reverend W. M. Shaw, another parcel to the Church Society, another parcel to William Mitchell, and also one chain on the west side of the said north half, being in fact the strip conveyed to Dixon. The defendant seems to have acquiesced in the removal of Dixon's fence, and to have claimed a similar right as against the plaintiff. The plaintiff admitted the correctness of the line which ran from the post planted in rear of the third concession, and said that unless defendant moved on to him he could not move on to the next lot east, *i.e.*, the Church property; and then the staking took place, the north part of the fence was moved, and the defendant made use of the strip of land as his own. But in the fall of 1865 the plaintiff forbid the defendant from moving any more of the fence, and in the following spring he forbid defendant's man from ploughing this strip, after which the residue of the fence was moved and some ploughing done. At or about the time when the first moving the fence took place there was a negotiation between the vestry of the Church and the plaintiff. According to the true line, it was found that a part of the parsonage-house was to the

west of their lot as it was described, and to remedy this it was proposed that the plaintiff should convey a quarter of an acre to them where the house infringed, and in consideration that they should give him an acre and a half of the rear part of their land, and a surveyor was instructed to mark it out, and then the plaintiff was to move the residue of his fence one chain further east. This proposal was not carried into effect, and the plaintiff's east fence has not been moved. Apparently it was after all this that the plaintiff forbid the defendant, as already stated. The defendant objected, that as only one trespass was charged he had a right to apply the leave which he had received from the plaintiff to cover it; and the plaintiff asked permission to amend if necessary, and the case went off at *Nisi Prius* as has been set forth.

The plea of license is an admission of the plaintiff's right to the land; and as the act of moving the fence was to be done upon that land, the license was revocable. But the plaintiff has only put the giving the license in issue by joining issue on the plea; and there was leave given in the the first instance to the removal, and to the defendant's entry on the land as his own, for the plaintiff was a party to the staking the line with that object.

The declaration as now amended charges the trespass to have been committed on divers days and times, and on the general replication, traversing it wholly, he is entitled to succeed, for the license was revoked before the last portion of the fence was removed.

The plaintiff is, therefore, entitled to our judgment, and the rule must be discharged.

Rule discharged.

REPORT OF CASES

IN THE

COURT OF COMMON PLEAS.

HILARY TERM, 31 VICTORIA, 1868.

Present:

THE HON. WILLIAM BUELL RICHARDS, C.J.
" " ADAM WILSON, J.
" " JOHN WILSON, J.

McGREGOR v. CALCUTT.

Survey of towns and villages—Work upon the ground—Plan—C. S. U. C. ch. 93, sec. 35.

Under the latter part of sec. 35 of ch. 93 C. S. U. C., the work upon the ground in the original survey of towns and villages, to designate or define any lot, shews its true and unalterable boundaries, and will over-ride any plan of such lot.

TRESPASS, *quare clausum fregit.*

The land in question was composed of lot No. one, west of and adjoining Lake Street, and south of and adjoining Robinson street, in the Village of Peterborough East, (now Ashburnam) in the County of Peterborough, according to the survey of Deputy Provincial Surveyor Driscoll.

Plea—Not guilty.

The cause was tried at the Spring Assizes of 1867, held before J. Wilson, J., at Peterborough.

Plaintiff at the trial put in his deed from one Mark Burnham to him, dated 29th July, 1857. By this deed the

land was described as follows: "Containing by admeasurement three roods of land, be the same more or less, being composed of lot number one, west of and adjoining Lake Street, and south of and adjoining Robinson Street, according to the survey of Deputy Provincial Surveyor Driscoll."

Several witnesses were called, who assisted Driscoll in making the survey and in running the line between plaintiff's and defendant's lot. They stated that they ran over the bank and into the low ground, and assisted to put down posts for plaintiff across the bottom of the lot in the bog, and extending to the dry land north and south.

The plaintiff contended that defendant took off his lot thirty feet on one side and eight feet on the other.

The registered plan shewed no western boundary of the lot.

The jury, by consent of parties, went and viewed the premises.

It was contended for the defendant that Driscoll's plan shewed that the western boundary was three chains from the street; that the northern boundary shewed no distance, but a street stopping apparently at less than three chains; and that the western boundary did not appear to go west beyond the foot of the hill.

The defendant proved by Mr. Burnham that he owned the land, and his father before him; that Birdsall made the original plan and survey; that the traces of the survey had disappeared, and he directed Driscoll to survey for him.

In reply, plaintiff put in the deed from Zaccheus Burnham to him, dated 23rd July, 1844, of town lot No. 2, west of Lake Street and south of Robinson Street, commencing at the south-east angle of the lot where a post had been planted, &c.

The defendant's counsel objected to the reception of the deed from Zaccheus Burnham, as evidence in reply. The Judge, on being asked to construe the deed, stated he should hold that the map and survey on the ground must be considered by the jury, and they would be asked under the

evidence to say where the western boundary of plaintiff's land was. The defendant's counsel contended that the deed should be construed by the map, which was conclusive evidence of the survey under the Statute, and not by the work on the ground. The learned Judge thought the work on the ground over-rode the map.

The jury found a verdict for plaintiff, damages $1.

In Easter Term last *Hector Cameron* obtained a rule to set aside the verdict, and for a new trial, on the ground, amongst others, of misdirection on the part of the learned Judge, in ruling that the length of the boundary and size of the plaintiff's lot were not conclusively determined by the deed to him and the survey of Driscoll, as shewn by the registered plan; and in leaving it to the jury to determine the questions at issue, on evidence of work done on the ground, and in stating that such work over-rode the plan.

The rule was enlarged to Michaelmas Term last, when *S. Richards*, Q. C., shewed cause: The verdict was according to the right of the case, and ought not to be disturbed. The Statute (C. S. U. C. ch. 93) ought to receive the same interpretation, whether applied to town or township lots.

Hector Cameron contra: The plan ought to govern, for when made to register, then the real intent of the owner of the land became known, and by it the lot is only three chains deep. The language used in the 35th section of the Upper Canada Surveyors' Act differs materially from that employed in the section referring to cities, towns, &c., laid out by the Crown, in the 17th section, and also differs from that used in section 14, relating to townships as well as cities and towns. When referring to the surveys of Government lands, the lines, blocks, gores, commons, posts, (at the angles of lots) surveyed and planted under the authority of the Executive Government, are declared to be the true and unalterable boundaries, &c., of the townships, blocks, lots, &c., respectively. The words of the 17th section, as applicable to

towns, shew that the posts to mark the lots shall be the true and unalterable boundary of such lot, &c.

The 35th section speaks of all lines which have been run, and the courses thereof given in *the survey, and laid down on the plan thereof.*

The plan in these surveys is of great importance, and on it must be laid down the roads, streets, lots, &c., and the width and length of all lots, the courses of the side lines, with such information as will shew the lots, concessions, tracts or blocks of land of the township where the town or village is situated. Under 41st section a certified copy of the map or plan is to be taken as evidence of the original plan and survey of such town or village in all Courts in Upper Canada.

The description in plaintiff's deed means lot No. 1, according to Driscoll's plan.

RICHARDS, C. J., delivered the judgment of the Court.

The 35th section of cap. 93, of Con. Stat. U. C., in relation to survey of lands owned by private persons into a town or village plot, differs in some of its provisions from the 17th section, where lands owned by the Crown are surveyed into city, town or village lots; and this difference partly arises from a wish to provide that private parties may change their plans of survey and division of lots, &c., when third parties have not acquired an interest in such lots and plans; and the first part of the enacting clause of the section directs that all allowances for roads, streets, or commons, which have been surveyed in such towns and villages and laid down in the plan thereof, and upon which lots of land, fronting on, or adjoining such allowances for roads, streets or commons, have been or may be sold to purchasers, shall be public highways, streets or commons. It further provides that all lines, which may have been or may be run, and the courses thereof given in the survey of such towns and villages and laid down in the plans thereof, and all posts or monuments, which have been or may be placed or planted in the first survey of such towns and villages, to

designate or define any such allowance for roads, streets, lots or commons, shall be the *true* and unalterable lines and boundaries thereof respectively.

The 37th section of the Statute permits the owner of a village or town, or any original division thereof, to amend or alter the first survey and plan of the town or village, or original particular division thereof, provided no lots of any land have been sold fronting on or adjoining any street or common where such alteration is made.

Under the latter part of the 35th section it appears to me that the posts or monuments planted in the first survey of the town or village, to designate or define any lot, shall be the true and unalterable boundaries of such lot. It does not say, as shewn on the plan, or according to the plan, but that the post planted to designate the boundary shall be the true and unalterable boundary. I think, therefore, that the learned Judge was right in telling the jury if the post in dispute was planted in the survey as the boundary of the western and of the northerly line of the lot in question, that it would continue to be such boundary, whether the plan shewed it to be so or not.

I do not mean to say that the owner of the land might not shew that this post was not finally planted as the corner of the lot; that after it had been planted he changed his plan of survey and placed another post to define that particular lot; but I do not think the Judge could properly tell the jury that merely because the plan filed did not shew the lot to extend back the distance that would carry it to the post, therefore it only extended the distance mentioned in the plan.

The deed itself grants the lot to plaintiff according to the *survey* of Provincial Surveyor Driscoll, not according to the plan of such surveyor filed in the County Registry Office, if that would make any difference.

I think, therefore, there was no misdirection on the point suggested, as to construing the effect of the deed.

Rule discharged.

PALMER V. THORNBECK ET AL.

Township of Scarborough—24 Vic. ch. 64, 25 Vic. ch. 38—Effect of survey under—Proof of original monuments—Statute of Limitations.

In ejectment to try a question of boundary, the plaintiff claimed the north half of lot 31. Defendants limited their defence to a piece described by metes and bounds, giving notice that they claimed it as part of lot 32. *Held*, that the plaintiff was not entitled to succeed on proving his title to lot 31; but that it was for him, seeking to change the possession, to shew that the piece in dispute was part of that lot.

In this case it appeared that over twenty years ago a fence was mutually erected by plaintiff and defendants' father, who then occupied lot 32, as a line fence along the course of an old blazed line, though for what purpose such line had been run did not appear. The fence continued to be used as a line fence until 1862–3, when, in consequence of the survey made under the 24 Vic. ch. 64. and 25 Vic. ch. 38, the plaintiff claimed that the line was incorrect, and he procured the surveyor, who had made the survey, to run the line. The surveyor divided equally the space in the block containing these two lots between the road monuments planted several years previously by himself at the front angles of the side road allowances; but there was no evidence to shew how he ascertained the position of such side roads in making that survey, or of any search for the original monument. In 1865–6, after this new line had been run, the plaintiff pulled down a piece of the old fence and removed it to the new line, where it remained for two or three days, until put back by the defendants to the original line, where it has so remained ever since.

Held, that these statutes did not interfere with any original posts, if existing: that the evidence was insufficient to shew plaintiff's right to claim according to the statutable survey, and a new trial was granted.

Per GWYNNE, J.—That the onus was on the plaintiff of proving the original monument marking the front angle of the lot, or its loss, and that there was no satisfactory evidence of its position, before the mode adopted of dividing the space between the road monuments could be adopted.

Per HAGARTY, C. J.—That on proof, which was wanting here, of the statutable directions having been obeyed in laying out such side lines and planting the monuments, then that plaintiff would be entitled to the statutory division, and the onus of proving an original monument, marking the front angle of the lot, was on the defendants.

Per GALT, J.—That under those statutes, the onus of proving the existence of original monuments was cast upon the person asserting it.

Semble, that the plaintiff's entry in 1865–6 was sufficient to stop the running of the Statute of Limitations.

THIS was an action of ejectment brought to recover a piece of land described in the plaintiff's writ, as the north half of lot 31 in concession B., in the township of Scarborough.

The defendants limited their defence to a piece which they described by metes and bounds, commencing on the

south side of the allowance for road between concession B. and concession C. of the said township, where the line fence, which at present and has heretofore formed the boundary line between the north half of lot No. 31, and the north half of lot No. 32, meets such limit of said concession road allowance; thence westerly along the south limit of the said road allowance, eighteen feet, to a line run by provincial land surveyor, Passmore, for the plaintiff in the month of May, 1865; thence southerly along such surveyed line, 50 chains 50 links, more or less, to the centre line of the block dividing the north half from the south half; thence easterly along such centre line 33 feet to the fence before mentioned, which has heretofore existed and at present forms the division line between the property of the plaintiff and the property of the defendant; thence northerly along the centre line of the said fence, 50 chains 50 links, more or less, to the place of beginning, containing two acres.

The defendants, with the notice limiting their defence to the piece of land above described, served a notice under the statute, that they claimed that the portion of land to which they had so limited their defence was not a part of lot No. 31 as claimed by the plaintiff, but that it was part of lot No. 32 in concession B. of the township of Scarborough, of which they claimed to be seised; and besides denying the plaintiff's title thereto, they claimed also title by twenty years' possession in themselves, and those under whom they claimed.

The cause was tried before Morrison, J., without a jury, at Toronto, at the Fall Assizes of 1876, when a verdict was entered for defendant.

The facts, so far as material, are set out in the judgment.

In Michaelmas term, November 22nd, 1876, *J. K. Kerr*, Q. C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff.

In the same term, December 4th, 1876, *McMichael*, Q. C., shewed cause. There was no necessity for the defen-

dant to have gone into his defence, as the onus was on the plaintiff to prove that the piece in question formed part of lot 31. However, the line drawn by the surveyor was not drawn in accordance with the statute. Sec. 6 of 25 Vic. ch. 38, must be read in connection with sec. 3 of 24 Vic. ch. 64, and the mode pointed out in the first named Act is only to be adopted when the original monuments cannot be found, or their position ascertained; and there is no evidence here of any such search. The plaintiff is bound by the Statute of Limitations. The entry in 1865 or 1866, does not constitute such an entry as would cause the statute, which had already began to run, to cease running.

J. K. Kerr, Q. C., contra. The plaintiff on the mere production of title to lot 31 was entitled to recover, and it rested upon defendant to shew that the land in question formed part of lot 32. The line run by Passmore is the true line, and the plaintiff is entitled to all the land up to that line. The old line was never looked upon by the parties as the division line, but was only to exist until the true line was run. The Statute 25 Vic. ch. 38 sec. 6, even though it be read with the previous Act 24 Vic. ch. 64 sec. 3, in the absence of proof of the existence of the original monuments, peremptorily requires the line to be run, as was done here, namely, by dividing equally the space in the blocks, &c., even though the plaintiff may have been in possession of the land as part of lot 32, or according to the original monuments it might have formed part of lot 32, and so granted by the letters patent. The onus of proof of the existence of the original monuments is upon the defendants. The defendants have acquired no title under the Statute of Limitations. The effect of sec. 6 25 Vic. ch. 38, is to vest the land in the plaintiff, notwithstanding previous to its passing the defendants may have been in possession for the statutory period; or at all events the statute would only commence to run from the passing of the Act. Moreover, the plaintiff's entry in 1865 or 1866 caused the statute to run only from that period: *Clements* v. *Martin*, 21 C. P. 512; *Williams* v. *McDonald*,

33 U. C. R. 423; *O'Hearn* v. *Donelly*, 13 C. P. 513; *Dennison* v. *Chew*, 5 O. S. 161; *Potter's* Dwarris on Statutes, 56, 117; *Brisbin* v. *Farmer*, 16 Minn. 215; *Barwell* v. *Tullis*, 12 Minn. 572; *Cook* v. *Kendall*, 13 Minn. 324; *Holcombe* v. *Tracy*, 2 Minn. 241; *Sedgwick* on Statutes, 2nd ed., 613; *Doe dem. Bennett* v. *Turner*, 7 M. & W. 226, 9 M. & W. 644; *Doe dem. Shepherd* v. *Bayley*, 10 U. C. R. 310.

February 5th, 1877. GWYNNE, J.—The issue joined herein, raised, firstly, the question of the situs of the boundary line between lots 31 and 32; and, secondly, if that should be decided in the plaintiff's favour, the question of twenty years' possession barring the plaintiff's title, if he had any.

The plaintiff, at the trial, produced letters patent, issued in July, 1830, granting to him in fee the north half of lot No. 31, in concession B. in the township of Scarborough, and his counsel there rested his case.

For the defendant, it was urged that the plaintiff had proved no case: that upon the issue joined, it lay upon the plaintiff to shew that the piece of land in dispute is part of plaintiff's lot, No. 31.

The learned Judge was of opinion that the plaintiff had shewn a *primâ facie* case.

If the case had rested here, and no other evidence had been offered, I entertain no doubt that the plaintiff should be nonsuited, or the verdict should be rendered for the defendants.

On an issue so raised, as to the true boundary line between lots, the *onus probandi* lies upon the plaintiff who seeks to change the possession.

The language of Sir J. B. Robinson, C. J., in *Irwin* v. *Sager*, 21 U. C. R. 373, is precise upon the point. Changing the numbers of the lots in that case for those in this, his language, at p. 377 is: If the defendants were simply to deny that their neighbour, the plaintiff, had any title to lot 31, and go to trial upon that, he would fail at the trial, as

soon as the real state of the title to lot 31 was made to appear. But there is no difficulty in both parties putting the question between them on the proper footing for trial. The defendants have no doubt that the plaintiff means to insist that lot 31 covers land which they, the defendants, deny that it does cover, and they have only to state what land it is of which they admit they are in possession, and for which they mean to defend as being part of lot 32, and therefore theirs, and no part of lot 31, which they admit belongs to the plaintiff.

In *Doe dem. Strong* v. *Jones*, 7 U. C. R. 385, the same learned Judge says, at p. 388: "In all ejectments brought on account of disputed boundaries, the plaintiff has to shew beyond any reasonable doubt that he is entitled to a verdict for some land at least of which the defendant is in possession."

The production of letters patent granting lot 31 to the plaintiff, proved him to be entitled to that lot, wherever its metes and bounds might be; but it left the question at issue between the plaintiff and the defendants untouched, which question was, is the piece of land for which the defendants defend part of that lot 31, as the plaintiff has asserted it is, or not? Upon principle and upon authority, therefore, if no other evidence had been offered than the letters patent for lot 31, the plaintiff must have failed; but the defendants' counsel, yielding to the ruling of the learned Judge, called evidence for the defence.

This evidence, I think, establishes beyond all reasonable doubt that a fence was erected as a line fence between the north halves of lots 31 and 32, while the former lot was in the occupation of the present plaintiff, and the latter in that of the defendants' father: that the plaintiff and the defendants' father, as they cleared their land, mutually erected this fence: that a portion of it was erected much over twenty years; and that it was all erected over twenty years before the commencement of this suit we may fairly conclude, for the plaintiff himself, who has lived on this north half of lot 31 for fifty years, will not undertake to say that

it has not been, and that it was is sworn to by at least ten witnesses.

In erecting the fence, I think the evidence shews that the parties proceeded along the course of an old blazed line; when or for what purpose such blazed line may have been run did not at all appear, but in making the fence, that blazed line seems to have been pursued, although the plaintiff appears not to have been always satisfied that it was the true line. . What caused his doubts, or when first they arose, does not clearly appear; but I think the fair conclusion from the evidence is, that they did not assume any definite shape until Mr. Passmore surveyed the township in 1862-3, under the provisions of 24 Vic. ch. 64 and 25 Vic. ch. 38, when, as the plaintiff himself says, he was able to see by the township survey that Thornbeck had land he ought not to have, and he got Mr. Passmore to run the line. Before he had said that he and Thornbeck put up the fence, and he considered it as defining the limits of their lots; but he added that they were to have the line run, and that they were finally to make up the fence according to the line when run. Thornbeck is dead, so that we cannot have his evidence upon this point; and in this action, which is against the heirs of Thornbeck deceased, much stress cannot be laid upon this portion of the plaintiff's evidence, in view of the provisions of the Ontario Act, 38 Vic. ch. 10 sec. 6.

If there had been any evidence that the line between these lots had been actually run upon the original survey, the fact that the fence had been erected along a blazed line would, I think, justify the inference that it was along the original blazed line. The old fence varies so little from the line run by Passmore, which in some places runs along the old line, and in other places crosses it, and both lines run so nearly from the same point in the front of the concession, and the deviations in the rear half do not seem to be greater than might be accounted for by the difference between a line run through the bush fifty years or more ago by compass, and one run ten years ago, instrumentally,

when the land was all cleared. But the onus to prove the true line lay not on the defendants, and their evidence seems to have been given for the purpose of establishing title by twenty years' possession, even if the piece of land in dispute should be considered part of lot 31.

In reply to this evidence of the defendants the plaintiff proved the fact of the survey of the township by P. L. S. Passmore, under the above mentioned Acts, and that afterwards the plaintiff procured Passmore to run the line between the lots 31 and 32. What Passmore did was to divide the block, consisting of these two lots, in equal parts, so running the line, without ascertaining or determining whether or not there was an original post planted on the original survey designating the front angle of the lots, or whether the line had been run through upon the original survey, or whether or not the old fence was upon the original line if run. The plaintiff's contention being that the true construction of the 6th section of 25 Vic. ch. 38, is that the blocks between side roads as determined by the survey under the Act, such blocks consisting of two lots, are imperatively to be divided into equal lots, whether the old monuments and lines between lots as run upon the original survey are in existence and plainly discernible or not.

The plaintiff also gave evidence that in 1865 or 1866, he pulled down a piece of the old fence, and removed it to the Passmore line, which, however the defendants again within two or three days put back to the old line, and have since maintained it as it was first erected. The plaintiff's contention as to this was, that for two or three days the fence remained where he had removed it to before the defendants removed it back again, and he contended that this entry broke the running of the Statute of Limitations, and that the time can only be counted from the time that the defendants moved back again the fence to the old line, which, according to the evidence, appears to have been sometime in 1865 or 1866, and this action was commenced on the 27th June, 1876, before the coming into force of the Ontario Act 38 Vic. ch. 16.

The plaintiff's contention is, that under the 3rd section of 24 Vic. ch. 64, in connection with the 6th section of 25 Vic. ch. 38, the lines between lots, whether there be or be not any original monuments existing defining the boundaries as laid down upon the original survey, are to be run and laid down upon the ground, by dividing equally the space in the blocks between the monuments planted at the side line road allowances under authority of the Acts; and that although the defendants may have been in possession, as part of lot 32, of a piece of land by such division made part of lot 31—nay, that although in truth and in fact, according to the original monuments planted upon the original survey, such piece of land was always undoubtedly part of lot 32, and so held by grant from the Crown—it shall be recovered by the plaintiff as, and shall be taken to be, part of lot 31 granted to him by the letters patent issued in 1839.

The defendants, on the contrary, contend that whenever original monuments, or their situs, can be found upon the ground defining the limit between lots as surveyed upon the original survey, they must govern as the starting points in front, and that the lines as originally run, if run and they can be found, must govern, and that in such case the direction contained in the 6th section of 25 Vic. ch. 38 does not apply.

They also contend that as the plaintiff is the person who affirms that the piece in dispute is part of lot No. 31, and he is seeking for that reason to disturb the defendants' possession, it lies upon him to prove that no trace of the monuments planted or lines run, if run upon the original survey, can be found, before he can claim a division of the block in which these two lots are, under the Acts referred to.

As to this point the plaintiff offered no evidence, relying upon the construction, which he now contends for, of the 6th section of the latter Act, as peremptory applicable in all cases.

The defendants also rely upon the Statute of Limitations as a bar to the plaintiff's recovery, even if the piece in dispute is to be taken as part of lot 31.

The plaintiff, on the contrary, contends that the effect of the latter portion of the 6th clause of 25 Vic. ch. 38, is to vest the piece in the plaintiff, notwithstanding that the defendants might have acquired title by the Statute of Limitations, or at least that the statute was to be regarded as running only from the passing.

The defendants' counsel abstained from arguing the point as to the construction of the *non obstante* part of the 6th section of the Act, not that he abandoned the title claimed to be acquired under the Statute of Limitations, but that he relied chiefly upon his construction of the 25 Vic. ch. 38 as to the running of side lines, and the absence of any evidence upon the part of the plaintiff to shew any occasion for adopting any other line than that which was determined on the original survey; and in the absence also of all evidence upon his part to shew that such original survey established the line as contended for by the plaintiff.

The first observation which seems naturally to present itself in considering the plaintiff's contention is, that there does not appear to exist any such urgent necessity as should induce the Legislature to enact such a sweeping interference with vested rights as that in a case where the limit between lots as designed and laid down upon the ground upon the original survey, (which intended to make the lots equal) and according to which the letters patent, granting the respective lots issued, can be found and traced, a division of those lots should nevertheless be made in such a manner as to transfer to one person a strip of land which had been, it may be for forty or fifty years, the undoubted property of another, granted to him by letters patent, issued in pursuance of the original survey.

The statute 24 Vic. ch. 64 fixed the side line road allowances, then already opened, as they were opened, and as they should be defined on the ground under the Act, as unalterable side line road allowances, although they should run upon courses different from those contemplated on the original survey. After the survey directed by the Act of those side line road allowances throughout the township

should be effected, then the 3rd section provided that whenever a survey should be made of any line for side-road allowance, which had not been opened previous to the passing of the Act, or any division line or limit between lots, the lines should be drawn from the post or monument planted in the original survey at the front angle of such road allowance, or lot respectively, and that if such original post or monument should be lost, and no satisfactory evidence of the position of the same should exist, then that the surveyor should proceed as in similar cases under the law in this behalf.

Before this Act was put into operation, it seems to have been thought desirable to provide also for determining the unopened side road allowances, at the same time as those opened, should be marked and defined upon the ground. Accordingly, the 25th Vic. ch. 38, was passed in 1862, and thereby a special provision was made for determining the unopened side road allowances. The directions given by the statute for that purpose are, that the surveyor making the survey directed by the former Act, shall commence from such posts or monuments as were planted or marked on the original survey for the front angles of such road allowance; or, if such original land marks could not be found, then the surveyor should obtain the best evidence the nature of the case admits of respecting such post, limit, or allowance for side road; and if the same could not be satisfactorily ascertained, then he was directed to measure the distance between the nearest opened roads established by the former Act, or between a side road so established, and the nearest undisputed post limit; and upon taking such measurement, so as to establish the roads in such a manner as to leave an equal breadth for the lots on each side thereof to the nearest established road or original monument. In other words, to lay out the new road allowances so as to make the lots between them, or between one of them and the nearest established road or original monument, of equal breadth.

Now, it is to be observed that the principle here estab-

lished recognizes all the original monuments planted on the original survey. The deviation from the original survey, which is sanctioned, is the course of the side lines, which is made to conform to the courses of those already established and opened.

Again, it is to be observed that some of the posts or monuments which, in establishing the site of unopened side lines, the surveyor is directed to regard as fixed and unalterable, may be posts planted on the original survey between lots.

For the purpose of determining side-road allowances between such a post and the nearest established road allowances, these monuments are fixed, determined, and unalterable. They must, therefore, also be so, as it appears to me, for the purpose of defining the line between the lots, the front angles of which they were planted on the original survey to designate.

This consideration, in my judgment, throws much light upon the intention of the Legislature in the sixth section.

Now, in the case before us, we do not know whether or not original monuments were found determining on the ground the situs of the road allowances east of lot 31 and west of lot 32. For all that appears, these side-line road allowances may be for the whole length of these lots, run precisely in the same position as they were established upon the original survey.

Mr. Passmore himself, with reference to the old fence, upon which the defendants rely as the original boundary, says, that upon the line of it he saw three stumps marked north and south, having three notches. These, he says, represented old line trees. The fence, he says, evidently had been built on some survey; and he could not undertake to say that it was not made from the original monuments.

Now, if this should be the state of the case, I cannot see any principle upon which the line should be determined otherwise than in accordance with the original survey.

If the line was run through upon the original survey,

that line should still, as it appears to me, remain. If it was not originally run through, but was only marked with a post in front, then perhaps the Act would require that the line should be run from the monuments in front in conformity with side road allowances now established, at the east side of lot 31, and the west side of lot 32. But I cannot, I confess, see anything to justify the ignoring the original monument, if its site can be established, as the point from which the line is to be run. The whole principle of the Act is to recognize the original monuments as still binding, and therefore the sixth section of the Act, upon which Mr. Kerr so much relied, must, as it appears to me, be given a construction consistent with that principle.

That section enacts that: The side-lines or limits between lots, as mentioned in the third section of the Act hereinbefore mentioned, shall be drawn so as to give an equal breadth to the lots contained between the monuments hereinbefore established.

That was simply a direction confirmatory of the design of the original survey, which no doubt was to give equal spaces between the side line road allowances. But why in this section is any reference made to the third section of the former Act? If it was intended that, although original monuments were to be respected and maintained as planted on the original survey in all cases, except where they were planted to designate the front angles between lots, and in running the line between lots, it would have been easy and simple to have said, "The side lines and limits between lots shall in all cases be drawn so as to give an equal breadth," &c., without any reference to the former Act. The reference to the third section of the former Act, when giving directions as to running the lines between lots, must have been for some purpose, and the purpose appears to me to be plain when we do refer to that third section; for there we find the direction to be to draw such limit from the post or monument planted upon the original survey to mark the commencement of such line or limit; and should such original post be lost, and no satisfactory evidence exist of

the position of the same, that then the surveyor should proceed as in other similar cases under the law in that behalf, namely, by measuring and dividing the space between the nearest original monumeuts.

Now, by the now provision, this principle being maintained for the purpose of determining the side-line road allowances by the 3rd sec. of 25 Vic., and those road allowances being made unalterable, there was no occasion to go further in running lines between lots than to the nearest side line road allowances; and as there are only two lots between each, the space is to be divided equally; but if the original monument is in existence, that is to be the starting point; it is not to be disturbed, and the principle, both of the original survey, the scheme of which also was equal division between side-line road allowances, and of the Act, is maintained. This direction, as to dividing equally between road allowances, is, as it appears to me, substituted for the direction in the 3rd sec. of 24 Vic., when the monuments are lost, and satisfactory evidence of their position does not exist.

To stand by the monuments planted on the original survey is the first principle of the general law, and I think also of these Acts. If they are lost, the next is, equal division between side-line road allowances established by the Acts, and which are established upon the basis of original monuments when found being invariably respected and maintained.

The proper conclusion, as it appears to me, to be arrived at in the case is one similar to that arrived at by the Court of Queen's Bench in *Babaun* v. *Lauson*, 27 U. C. R. 309, namely, that upon this evidence we cannot say that the plaintiff, upon whom the *onus probandi* lay, has made out a clear case that the piece of land for which the defendants defend is part of the plaintiff's lot 31, and the plaintiff therefore should be nonsuited.

I think therefore, that the proper rule to make will be, to enter a nonsuit, unless the plaintiff shall elect within one month to take out a rule for a new trial upon payment of

costs, to enable him to supply, if he can, the evidence in which the case as it at present stands is defective.

The case having been almost wholly argued upon both sides upon the construction of the statute, we are not called upon, in the view which I have taken, to decide the point raised under the Statute of Limitations; but as it seems to me that the claim made by the plaintiff is only a little more than the straightening of an old crooked line, and as the line as proposed by the plaintiff gives to both parties an equal quantity, and as I think the parties will find it to their advantage to come to an amicable arrangement of the dispute, I have no objection, with a view to furthering that end, to express my present impression to be that what the plaintiff did for the purpose of retaking possession in 1865 or 1866 will be found to have the effect of stopping the running of the Statute of Limitations, if upon the piece of land being found to be a part of lot 31, they should have to rest their title upon statutory possession. That a portion of the piece in dispute would be found to be on lot 31, I think highly probable, even if the line should be run from the point in the front angle of the lot which the defendants claim to be the site of the original monument, and which is the point from which the old fence commenced to be run at the south end of the lot, unless it can be proved that the line itself was run through from front to rear upon the original survey, and that the old fence was erected throughout upon such line.

In my judgment, therefore, the rule should be to enter a nonsuit, unless the plaintiff shall within one month elect to take a rule for a new trial upon payment of costs.

HAGARTY, C. J.—It is impossible to feel free from doubt as to the proper conclusion to be arrived at on the very unsatisfactory evidence before us. The land in dispute is trifling in extent, and it is much to be regretted that the litigation should be prolonged.

The plaintiff both at trial and in term rests his right to recover wholly on his construction of the statute.

The defendant objects that it was incumbent on the plaintiff to give some evidence, either that there was no original monument marking the commencement of the side-line, or that it was lost and no satisfactory evidence existing of its position.

Mr. Passmore, who made the statutable survey of the road allowances, and afterwards ran this side-line, can give no evidence of any search or enquiry for any such post. He also tells us of an old fence, and of notched stumps and blazes: that the fence had evidently been built on some survey; and that he could not say that the surveyor had not the original monuments proved when he made his survey; and that line may have been made from the original monument.

I understand him to say distinctly that in running this side line he confined himself strictly to making an equal division of the two lots, by a line drawn equi-distant from the road monuments, several years previously planted by him, and parallel to the courses of such roads.

We have no explanation from Mr. Passmore of the course adopted in ascertaining the position of the side-roads, whether they had been already opened up and travelled, as mentioned in the first Act, or not opened, or marked off for the first time, under the provisions of the second Act, nor from what monuments (if any) he measured east or west of these roads.

All the evidence pointed to an old side-line having been run from a known starting point or monument.

Now any such monument must have been within a very few feet of what it is now contended is the equidistant point from the side roads.

If such a monument existed, or its situation provable, it is hard to believe that the Legislature ever intended that it should be interfered with.

The first Act clearly shews that such was not the intention, and we must require very clear words in the second Act to satisfy us that any other intention was subsequently entertained.

Section 4 in the second Act, in providing for the survey of side-roads not previously opened, directs the measurement of the distance between "the nearest opened," &c., "side-road, *or* between the side-road so established and the nearest undisputed post limit or monument, as the case may be."

In all this we see no intention of ignoring any original monument.

Then the sixth section directs the side-lines or limits between lots, as mentioned in the third section of the first Act, shall be drawn so as to give an equal breadth to the lots contained between the monuments hereinbefore established.

Taking the two Acts together, I cannot hold that the Legislature intended any original monument to be ignored.

I think the plaintiff here ought not to call on us to hold him entitled to an absolute mathematically exact division of these lots, without proving with reasonable clearness how the roads were laid out, the evidence of his own surveyor strongly pointing to an old survey and fencing of a line, in all probability based upon the original survey and monuments.

I wish to be understood as of opinion that as soon as the plaintiff shewed, if he could shew, how the roads had been established and the statutable directions obeyed, that then he would be entitled to the exact divisions for which he contends.

If the surveyor who laid out the roads had given any evidence to shew that he had ascertained their position, either as being roads already opened and travelled, or, if new roads, then that he had to the best of his ability ascertained their position by reference to the nearest original monuments, I should be satisfied.

But nothing of this kind appears in the evidence as reported to us.

But it may be that we should hold that when the plaintiff has once proved an actual survey and planting of monuments at the side-roads, that the *prima facie* infer-

ence ought to be, that he is entitled to the exact statutable division, and that it then rests on the defendants to shew something to rebut such result, *e. g.*, the existence or proof of situation of an original monument supporting his contention.

The difficulty here is, that the surveyor who made this statutable survey is the witness whose evidence creates the strong doubt as to the plaintiff's right to recover, or to move the old boundary, or that the side-roads were laid out as the Act directs.

It is very probable that if the case be again tried the plaintiff may prove all that is required to uphold his contention.

I must again repeat that it is on the uncertainty of the statements as to the survey as reported to us that I form my opinion.

I am inclined to go further, and hold that if a plaintiff merely proves the fact of the planting of the monuments at the roads, he has made a *prima facie* case. But here the whole doubt and difficulties are created in his attempt to give such proof.

I think under all the circumstances we should direct the case to be tried again, and that the costs should abide the event, as I think both were in fault in eliciting the proper evidence.

As to the Statute of Limitations, I at present agree with my brother Gwynne.

GALT, J.—After the best consideration I have been able to give to this case, I think there should be a new trial, with costs to abide the event.

I fully concur with my brother Gwynne that the *onus probandi* that the land in dispute belongs to him rests on the plaintiff; but I am of opinion that in this case, the onus of proving the existence or non-existence of an original monument has been cast upon the party asserting such to be the case, and that it makes no difference whether such party is plaintiff or defendant, under the peculiar provi-

sions of section 3 of of 24 Vic. ch. 64, and the 6th section of 25 Vic. ch. 38.

The 3rd section enacts that any division line or limit between lots in the said township, (Scarborough), shall be drawn from the post or monument planted in the original survey at the front angle of such road allowance or to mark the commencement of such line or limit, or should such original post or monument be lost, and no satifactory evidence exist of the position of the same, the surveyor shall proceed as in other similar cases under the law in this behalf.

Had it not been for the subsequent statute, the plaintiff would have been called upon to prove that the line between him and the defendant had been drawn from the post or monument planted in the original survey, or that it had been lost, and no satisfactory evidence could be given of its existence, before he would have been entitled to proceed to an equal division of the land between the two roads; but by the 6th sec. of 25 Vic., the side-line or limits between lots as mentioned in the foregoing section shall be drawn so as to give an equal breadth to the lots contained between the monuments hereinbefore established.

I confess that this enactment appears to me to have been intended to apply to all cases, whether there was an original monument or not, but, at any rate, that it casts the proof of such original monument on the party asserting its existence.

In other words—the plaintiff would be entitled to succeed upon proving an equal division between the monuments referred to in the statute, unless the defendant could prove the existence of an original monument between the lots.

As I have already stated, I do not at present express the opinion that such proof would establish the defendant's case, but I am satisfied that he cannot succeed without it.

Rule absolute.

EPSTEIN v. LYONS,
(1914) 7 O.W.N. 323, 428,
affirming 5 O.W.N. 875 (C.A.)

APPELLATE DIVISION.

NOVEMBER 27TH, 1914.

EPSTEIN v. LYONS.

Title to Land—Ascertainment of Boundary-line between Tiers of Lots—Evidence—Ownership of Legal Estate—Mortgage—Foreclosure—Possession — Non-user — Right of Way—Easement—Injunction—Conveyance to Assignee for Benefit of Creditors—Title Outstanding in Assignee.

Appeal by the defendants from the judgment of KELLY, J., 5 O.W.N. 875.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

E. D. Armour, K.C., for the appellants.

G. Lynch-Staunton, K.C., and W. A. Logie, for the plaintiffs, the respondents.

THE COURT dismissed the appeal with costs.

(1914) 7 O.W.N. 428.

DECEMBER 12TH, 1914.

EPSTEIN v. LYONS.

Title to Land—Ascertainment of Boundary-line between Tiers of Lots—Evidence—Ownership of Legal Estate—Mortgage —Foreclosure—Possession — Non-user — Right of Way— Easement—Prescription—Injunction — Conveyance to Assignee for Benefit of Creditors—Title Outstanding in Assignee.

Judgment upon the defendants' appeal from the judgment of KELLY, J., 5 O.W.N. 875, was pronounced by a Divisional Court composed of MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A., on the 27th November, 1914, and the result is noted ante 323.

Reasons for the judgment were given later by MAGEE, J.A.:— The defendants appeal from the judgment of Kelly, J., which declares that the easterly boundary of the plaintiffs' lot 3 on James street in Hughson's survey in the city of Hamilton, is a line drawn parallel with and 153 ft. 6 in. distant easterly from James street, and that the plaintiffs are entitled to the use of an alleyway along the south side of lot 3 on Hughson street, in the same survey, in common with all others entitled thereto, and restraining the defendants from erecting any fence, wall, or other obstruction on the easterly part of the plaintiffs' said lands, and ordering the defendants to remove the wall by them erected thereon and to restore the ground to its previous condition, and restraining the defendants from using any part of the plaintiffs' said lot 3 to afford access to or as a right of way appurtenant to the defendants' lands, being part of lot 2 on James street.

The learned trial Judge has set out so fully the facts that it is unnecessary to refer to them in detail.

The plaintiffs claim as owners of lot 3 on James street. That lot was acquired by Mark Hill in 1871, and was mortgaged by him to Edward Martin on the 14th February, 1887. Hill, on the 10th December, 1888, assigned all his property to F. H. Lamb in trust to sell and convert and pay expenses and pay his creditors, and any surplus to Hill. It does not appear that Lamb did anything under this assignment unless to register it.

On the 26th December, 1890, by a deed, which recites that on the 9th May, 1889, Hill had assigned his property to David Blackley for the benefit of his executors and had afterwards compromised with his creditors, Hill and Blackley conveyed lot 3 on James street to one Farewell, with a right of way over the southerly strip of 11 feet 4 inches of lot 3 on Hughson street, which adjoins lot 3 on James street, but reserving a right of way in common over the easterly twelve feet of lot 3 on James street.

On the 23rd May, 1899, Martin obtained judgment for possession and foreclosure in an action against Farewell, the action being referred to the Master at Hamilton. On the 6th June, 1899, the Master reported that he had added F. H. Lamb and others as defendants, and, they not having appeared, he had declared them foreclosed, and he appointed the 16th December, 1899, for payment of the mortgage-debt by Farewell. On the same 16th June, 1899, he, as Deputy Registrar, certified that all the defendants stood foreclosed by his order, as Master, of that date. The order is not produced.

Objection is taken to the regularity of these proceedings for foreclosure; but, inasmuch as Martin had the legal estate, he was entitled to possession, and the plaintiffs, as claiming under him, are also entitled thereto. He entered into possession at once, and had a fence put across the north end of the eleven-foot strip now in question, at the back of the lot; and any objection to the proceedings for foreclosure or to the absence of foreclosure of any parties interested are now removed by length of possession.

The defendants claim the eleven foot strip referred to as being part of lot 3 on Hughson street in Hughson's survey. If this were so, lot 3 on James street would have been laid out eleven feet shorter than all the other five lots fronting on James street in the same block, and lot 3 on Hughson street correspondingly shorter than all the others fronting on Hughson street. Apart from this being wholly unlikely, it is contrary to the old Mackenzie map of the town of Hamilton, published in 1836, as "reduced and compiled from various surveys by Alexander Mackenzie, surveyor," and the other map "reduced and com-

piled from various surveys in 1837 by Joshua Lind, surveyor." Both are produced from the registry office, where they have been for many years, and are recognised by surveyors, solicitors, and conveyancers as authentic maps and the best information available; and in the case of one block, where the numbers in Lind's and Mackenzie's maps differ, owing possibly to a later survey in one, the Registrar has opened an index shewing both numbers.

These maps shew the block divided by a straight line joining the boundary between the lots fronting on James street and those fronting on Hughson street. Mackenzie's map, in its "references," states: "The lots circumscribed thus" (giving a colour) "the property of James Hughson;" and so with lots of other owners; and this block, with others, has apparently that colour, though faded. Then the deed from Hughson on the 3rd December, 1840, of lot 2 on James street in this block, made while he was still the owner of lot 3 on Hughson street, recognises this map, for the lot is conveyed "as described on Mackenzie's map of Hamilton aforesaid." The deeds of lot 1 on James street on the 5th March, 1836, and of lot 3 on James street on the 1st October, 1838, to which latter Joshua Lind, of Hamilton, surveyor, was subscribing witness, give each of those two lots a length of 2 chains 24 links and a frontage of 1 chain 8 links; the words "more or less" being added in the case of lot 3. These frontages are those stated on Mackenzie's map.

Then there is the evidence of Mark Hill, practically unchallenged, that, when he purchased lot 3 on James street in 1871, there was a fence existing at the rear end, which was on the line now claimed by the plaintiffs. This line coincides with the actual division lines at lots 2, 5, and 6, and is not shewn to differ from that at lot 1 or that at lot 4.

On the question of possession, Hill says that he pulled down that fence of 1871 soon after he acquired lot 3 on Hughson street, which was on the 30th September, 1888, and did not erect another either on the same or any other line. After acquiring that land for the purpose of obtaining an outlet to Hughson street, the only object of tearing down the fence would be to give access that way, and it would seem he would have no reason for erecting another close fence eleven feet further west, in a position to shut off from his buildings the very outlet which he had been planning for. Up till the deed to Farewell in 1890, both lots were beneficially owned by Hill or his assignees, and there could be no adverse possession. In 1899, Martin, the mort-

gagee, took possession, and later put the fence across the north end of this 11-foot strip in dispute. It is not without significance that the shed or lean-to near that fence, and between the plaintiffs' and the defendants' stable, was, according to witnesses for the defendants, attached to the plaintiffs' stable, and extended across to within two or three feet of the defendants' stable—which does not indicate an abandonment of claim to the strip.

The learned trial Judge has dealt so fully with the evidence as to the existence of a fence and non-access through it, that it would be bootless to refer to it in detail. Over 60 witnesses were called. He had the opportunity of seeing them; and a perusal of the evidence given does not lead one to differ from his conclusion on the question of fact, that the plaintiffs and their predecessors in title were not out of possession. The plaintiffs are, therefore, entitled to succeed as to the ownership of that 11-foot strip.

That carries with it the absence of any right to the defendants to enter upon it from the door which they opened in the eastern end of the north side of their new building of 1911, on the north part of lot 2 on James street. There was no opening from lot 2 to that strip previously. Mark Hill deeded to them such rights, if any, as he had reserved in the deed to Farewell; but that was not a right for lot 2, which belonged to Pronguey; and, even if it were any, the rights of Hill are overridden by the mortgagee title of Martin.

There remains the question of the plaintiffs' right to a way from lot 8 on James street to Hughson street over the southerly 11 ft. 4 in. strip of lot 3 on Hughson street. That right of way was not covered by Martin's mortgage, and Martin's title to it depended on his deed from Farewell. Farewell's title depended on the deed to him from Hill and Blackley, made after Hill had granted both lots to Lamb in December, 1883. No explanation is given as to why Hill made the two assignments. Considering the lapse of time and the absence of any sign of action by Lamb, and the fact that Hill was allowed to lease and receive rents from and convey the part of lot 3 on Hughson street, the fair inference from the statement that he compromised with his creditors would seem to be that his creditors were all settled with by him, and therefore that he became entitled to have his real estate re-conveyed to him by Lamb, who became and was a bare trustee for him before the date of the deed to Farewell. It would not be too much, indeed, to presume that there was a

reconveyance by Lamb to either Hill or Blackley, which has disappeared, just as Hill's assignment to Blackley has disappeared. If there was such a reconveyance, then Farewell's title was complete. Even without it, the plaintiffs, as claiming under Farewell's deed to Martin, would be the beneficial owners of the way and entitled to exercise it and to prevent its interruption by the wall built across it by the defendants.

Apart from such a question and from the effect to be given to the reference to the way in the deed from Hill to the defendants, the plaintiffs and those under whom they claim have been, by themselves and their tenants, using the way as of right for more than twenty years before action: after Lamb's estate in lot 3 on Hughson street accrued in 1888, and after the deed to Farewell in 1890.

The appeal should be dismissed with costs.

KELLY, J. FEBRUARY 11TH, 1914.

EPSTEIN v. LYONS.

Title to Land—Ascertainment of Boundary-line between Tiers of Lots—Evidence—Ownership of Legal Estate—Mortgage—Foreclosure—Possession—Non-user—Right of Way—Easement—Injunction—Conveyance to Assignee for Benefit of Creditors—Title outstanding in Assignee.

Action to restrain the defendants from erecting any fence, wall, or other obstruction upon the rear of the plaintiffs' lands, to compel the removal of a wall already built, and to restrain the defendants from using any part of lot 3 on James street, Hamilton, for the purpose of access to the defendants' lands, being part of lot 2 on James street, and for damages.

The action was tried without a jury at Hamilton.

G. Lynch-Staunton, K.C., and W. A. Logie, for the plaintiffs.

E. D. Armour, K.C., for the defendants.

KELLY, J.:—On the 14th February, 1887, Mark Hill, who was the owner of lot 3 on the east side of James street, in Hamilton, mortgaged it to Edward Martin. Lot 3 is in a block bounded on the north by Cannon street (formerly Henry), on the east by Hughson street, on the south by Gore street, and on the west by James street. This block comprises 6 lots fronting on James street and 6 lots fronting on Hughson street, the lots on each street numbering consecutively from south to north.

It is admitted by counsel that lot 3 on James street and lot 3 on Hughson street abut each other.

On the 30th September, 1888, Hill obtained a conveyance of lot 3 on the west side of Hughson street. On the 10th December, 1888, he made a general assignment of his assets to F. H. Lamb for the benefit of his creditors, the assignment being executed, not only by him, but also by other persons said to be his creditors. On the 9th May, 1898, he made another assignment for the benefit of his creditors to one Blackley.

On the 26th April, 1890, Blackley and Hill conveyed to Adolphus Farewell lot 3 on James street and a right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street, reserving to Hill, for the use of himself and Farewell and their heirs, etc., a right of way over the easterly 12 feet of lot 3 on James street.

On the 11th May, 1899, Farewell granted to Edward Martin a right of way over the southerly 11 feet and 4 inches of lot 3 on Hughson street; and on the 16th June, 1899, Martin obtained a final order of foreclosure in respect of lot 3 on James street as against Farewell, the original defendant in the foreclosure proceedings, and F. H. Lamb and others, who had been made parties defendant in the Master's office.

On the 22nd October, 1904, the executors of Edward Martin conveyed to the plaintiffs the southerly 34 feet and 8 inches of lot 3 on James street and a right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street, reserving to themselves for the benefit of the remainder of lot 3 on James street a right of way 11 feet 4 inches in width, extending along the northerly boundary of the easterly 68 feet of the land then conveyed, thence southerly along the rear of the lot to its southerly boundary, and thence easterly along the southerly boundary of lot 3 on Hughson street to the west side of Hughson street.

On the 17th February, 1905, the executors of Martin conveyed to Jane Burgess the remaining part of lot 3 on James street and the right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street and the right of way (reserved by the above-mentioned conveyance from the Martin executors to the plaintiffs) over the above-mentioned 68 feet and the rear 11 feet 4 inches of the southerly part of the James street lot.

In January, 1912, the plaintiffs acquired title to the part of lot 3 on James street so conveyed to Jane Burgess, following which the executors of Martin released to them the right of way over the 68 feet and over the easterly 11 feet 4 inches of that lot.

On the 24th December, 1903, the North American Life Assurance Company granted to the defendants the northerly 22 feet 7½ inches of lot 2 on James street (being immediately south of lot 3 on James street); and on the 29th October, 1910, Mark Hill conveyed to the defendants the rear part of lot 3 on Hughson street. . . .

On the 30th May, 1913, Hill made a further conveyance to the defendants of part of lot 3 on Hughson street. . . .

[This was for the purpose of a better description of the lands conveyed.]

The dispute which resulted in the present action is largely traceable to two sources; first, the uncertainty that seems to prevail as to the true location of the boundary line between the lots fronting on James street and those fronting on Hughson street; and, secondly, from the contention set up by the defend-

ants that, even if the location of that line is such that the lands in dispute are really a part of lot 3 on James street, the plaintiffs and their predecessors in title have been out of possession for such time as defeats their title.

The only record from the registry office put in at the trial of any plan of the lots in this block was two maps, or copies of maps, which are and have been for a long time in use in that office. These are not original plans. . . .

These maps or plans seem to have been, to some extent at least, recognised by conveyancers and surveyors. The evidence of the Deputy Registrar, who has held his present position since 1890, is that there is no registered plan shewing lot 3 on James street or lot 3 on Hughson street. It is contended for the defendants that these . . . maps do not properly establish the location of the lot-lines or the size of the lots, and that they are not proper sources of information. It is quite apparent from surveys and measurements recently made that the distance from the easterly line of James street to the westerly line of Hughson street, as these lines now appear on the ground, is several feet in excess of the distance indicated by the earlier conveyance of these lots. . . .

The first matter to be determined is the location of the dividing line between the lots on James street and those on Hughson street. . . .

The defendants' contention is, that the dividing line between these lots is nearer to James street than is claimed by the plaintiffs. The dividing line, on the ground, between the properties immediately to the south of these two lots and also between some of the properties to the north, particularly on the south side of Cannon street, is and always has been, so far as any witness has been able to speak, practically in a direct line with what is contended by the plaintiffs is the true dividing line between lot 3 on James street and lot 3 on Hughson street.

On the south side of Cannon street this dividing line is a line running southerly between two old and substantial buildings, and it continues southerly across lots 6 and 5 to the southerly limit of lot 5, its existence between the two properties being of long standing. Surveys made in recent years shew this line as being at Cannon street, 153 feet 6 inches east of the east limit of James street as laid out on the ground, and 150 feet 6 inches west of the west limit of Hughson street as laid out on the ground. The easterly boundary, long existing, of the property to the south of lot 3 on James street is 153 feet and 6 inches from the east limit of that street as laid out on the ground. The

conveyance of this property to the defendants describes it as running from James street 153 feet and 6 inches more or less to the rear of lot 2. The easterly limit of the defendants' building on lot 2, erected by them, is that distance from James street. . . .

Mr. Armour, for the defendants, urged that, the earlier conveyances of lot 3 on James street having described the lines running east and west as being 2 chains and 24 links, the dividing line between the two tiers of lots should be placed arbitrarily at that distance from James street; and that, the measurements, from east to west, of lot 3 on Hughson street not being given in the old conveyances, the latter lot should be taken to comprise and include all the land east of a line 2 chains and 24 links from James street. The force of that argument is affected by other considerations arising from the form of the description. . . .

I think the evident intention was that lot 3 on James street should run back, not an arbitrary distance of 2 chains and 24 links, but 2 chains and 24 links more or less to its south-easterly angle and north-easterly angle, wherever those points really were. Dividing the distance from James street to Hughson street on the ground, as ascertained by recent measurements, in the same proportion as the earlier conveyances state the area of lot 3 on James street bore to that of lot 3 on Hughson street, would result in locating the line of division at or very near what is now contended by the plaintiffs to be the true easterly limit of the James street lot.

In the absence of more positive evidence, and taking the evidence before me of long-established physical boundaries of many of the lots, some to the north and some to the south, the long recognition of the dividing lines between these lots by successive owners, the difference between the superficial area of lot 3 on James street and lot 3 on Hughson street, coupled with the evidence of the conditions which existed in these latter lots, I think a reasonable view is, that the true line of division between these lots is to be found by continuing the existing boundary-line between the old buildings fronting on Cannon street southerly to what was and now is the easterly limit of the property adjoining to the south lot 3 on James street, that is, at the north-easterly angle of the defendants' present building, or 153 feet and 6 inches east of the present easterly limit of James street. . . .

The question of the rights of the parties in respect of the easterly portion of lot 3 on James street, as I have so defined it, is one involving equal difficulty. The defendants erected

on the northerly part of their James street property a building running to the easterly limit of lot 2 as defined upon the ground, and at the east end of the northerly side of this building placed a door leading to the north. In 1913 they erected a wall running from this building northerly to the south-easterly corner of the building now upon the northerly part of the plaintiffs' lands. This building of the plaintiffs, according to Blondie's evidence, extends 143 feet and 5½ inches easterly from the present east side of James street. The wall erected by the defendants has had the effect, not only of severing the rear portion of the southerly part of lot 3 from the land to the west of it, but also of depriving the plaintiffs of the means of access to the westerly part from the southerly 11 feet 4 inches of lot 3 on Hughson street, over which they claim to have a right of way, and it is to restrain the defendants from so building and maintaining this wall and to assert the rights of the plaintiffs that the action is brought.

The defendants rely to some extent upon the conveyance of the 30th May, 1913, from Hill to them. This conveyance does not, however, purport to grant any part of lot 3 on James street, but is taken on the assumption that the true boundary-line between that lot and lot 3 on Hughson street lies to the west of what I find to be its real location; so that the most the defendants can claim under that conveyance is the title of Hill, whatever it was, to the westerly portion of lot 3 on Hughson street, and his right, title, and interest, if any, over the rear 12 feet of lot 3 on James street. Hill had, however, long prior to making this conveyance, parted with all of lot 3 on James street except any right that might have remained in him to pass over the rear 12 feet thereof. . . .

A further position taken by the defendants is, that Martin's title was not perfected by the foreclosure, inasmuch as Lamb's interest in the mortgaged property was not properly gotten in by these proceedings. This is based on the contention that Lamb, being a grantee of the equity of redemption, was not the holder of a lien, charge, or incumbrance, and was not properly made a party defendant in the proceedings. Whatever may be said in favour of this contention under other conditions, I think the legal estate of which Martin was possessed having become vested in the plaintiffs is sufficient to overcome the objection, so far at least as concerns the plaintiffs' right to maintain this action in respect of the easterly part of the James street lot. Lamb made no further conveyance of the mortgaged property, nor does it appear that he was at any time in possession. . . .

There remains to be considered the further contention of the defendants that the plaintiffs and their predecessors in title have lost through non-user their title to and rights over the part of lot 3 on James street which lies east of the east wall of their present building on the northerly part of that lot and its production southerly. . . .

I think the reasonable view is, that, from the time the James street driveway was closed at least, there was no such cessation of use or occupation of the rear portion of lot 3 as to debar the plaintiffs and their predecessors in title from their interest therein and their right to pass over the Hughson street alleyway. I have reached the same conclusion with regard to the time prior to the closing of the James street driveway. . . .

I must accept the evidence offered for the plaintiffs. . . . Many of their witnesses are in a position to speak of the conditions, and what they say is consistent with other circumstances which one cannot overlook. I have to conclude that the defendants have failed to prove that the plaintiffs, who have the paper title, have forfeited through want of use or failure to occupy it.

The plaintiffs also ask an injunction restraining the defendants from using any part of lot 3 on James street for the purpose of affording access to lot 2 on James street, part of which is owned by the defendants. No such right is expressly given to the defendants by the conveyance to them of that lot or as appurtenant thereto. Any right they possess to pass over the rear part of lot 3 on James street was acquired in the conveyance from Hill to them of the rear portion of lot 3 on Hughson street by which they also acquired "the right, title, and interest of the grantor" (Hill), "if any, over the rear 12 feet of lot number 3, fronting on the east side of James street in the same block, as reserved in instrument number 46171, duly registered in the registry office for the county of Wentworth, in common with the owners, tenants, and occupants of the remainder of said lot number 3."

What was reserved by instrument number 46171 was "a right of way 12 feet wide along the easterly boundary" of lot 3 on James street, "such right of way to be used as right of way for" Hill, who then purported to be the owner of lot 3 on Hughson street, and Farewell, to whom Hill was then conveying lot 3 on James street, subject to the right so reserved. It is evident that whatever easement was created over the rear 12 feet of the James street lot was intended for the use and benefit of the owners of that lot and of the westerly portion of lot 3 on Hughson street, and was so confined.

That it cannot be used by the defendants as incident to their ownership of lot 2 is, I think, established by authority: Purdom v. Robinson, 30 S.C.R. 64, and cases there cited.

Entertaining this view, I have not thought it necessary to consider the proposition put forward, that Lamb, the assignee of Hill, was a necessary party to any conveyance by Hill made after the time of his assignment.

Judgment will be in favour of the plaintiffs in accordance with the above findings, and for $5 damages and costs.

FIRST DIVISIONAL COURT. APRIL 3RD, 1917.

WESTON v. BLACKMAN.

Title to Land—Dispute as to Ownership of Small Strip—Ascertainment of Boundary-line between Town Lots—Survey—Evidence — Fences — Original Monuments — Inference — Possession of Strip—Limitations Act—Estoppel.

An appeal by the defendants from the judgment of the Judge of the County Court of the County of Perth in favour of the plaintiff in an action in that Court, brought to determine the ownership of a strip of land, and tried without a jury.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

R. G. Fisher, for the appellants.

J. W. Graham, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the controversy was as to the ownership of a small strip of land, of trifling value, forming part of a lot in the town of St. Mary's. The County Court Judge found that a triangular piece of land, having a width in front of 3 feet 8¾ inches, and extending from the street-line to a point in the rear of lot 27 (the respondent's lot), formed part of that lot.

The case was to be dealt with as if the respondent had claimed the land not only by having the paper title to it, but also because if the paper title to it was in the appellants, their title was extinguished by the operation of the Statute of Limitations.

The learned Judge determined that question in favour of the respondent, holding that the deceased Hugh Smyth, of whose estate the respondent was administratrix, and his predecessors in title, had had possession of a somewhat large piece of land from a time prior to 1897 until the appellants, in 1913, erected a fence, taking it or part of it into their lot, and that as far back as 1907 or 1908 the title of the owner of it, if it formed part of lot 26, became extinguished by the operation of the Limitations Act; and it was adjudged that the respondent was the owner and entitled to the possession of this parcel.

The evidence of Mr. Farncombe, an Ontario Land Surveyor, who made a survey at the instance of Smyth, was in itself insufficient to establish the true boundary-line between the two lots. Mr. Farncombe found no original stakes or monuments

at any point, and made his survey on the assumption that certain posts or monuments, which were clearly not original ones, were in the true position for marking the points which they were intended to indicate.

Mr. Farncombe's evidence was, however, supplemented by evidence that many years ago fences were built, dividing the lots in question and the lots in rear of them, and that the owners of these lots recognised them as being, and treated them as marking, the boundary-line between the lots; and there was evidence that the fence ran through from Church street to Wellington street, the next street north, in a straight line. It was proved also that, according to the plan in the registry office, the line between lots 26 and 27 on Wellington street and the lots of the same numbers on Church street was a continuous straight line from street to street; while the line for which the appellants contended departed from the straight line to the extent of about 5 feet.

The boundary-line for which the respondent contended was, upon the findings of fact as to the old fence, shewn to be the true boundary-line between her lot and the appellants'. The facts so found warranted the inference that the old fence was built when the original monuments were in existence and on the true boundary-line: Home Bank of Canada v. Might Directories Limited (1914), 31 O.L.R. 340.

But, even if the strip in question formed part of lot 26, the possession of Smyth and his predecessors was sufficient to extinguish the title of the owner of that lot to it, as found by the County Court Judge.

No case of estoppel was made out; nothing could be added to the reasons which the Judge gave for that conclusion.

Appeal dismissed with costs.

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KINGSTON v. HIGHLAND. BARRY, J.

(IN THE KING'S BENCH DIVISION.)

KINGSTON v. HIGHLAND

Boundaries—Monuments—Description of land—Surveyors.

Where land has been surveyed and boundaries marked and has been occupied and transferred according to such boundaries for a number of years, the boundaries so agreed to by adjoining proprietors will be upheld even though they do not agree exactly with the description in the deeds of such land.

Action of replevin and for trespass to land. Tried before Barry, J. without a jury, at the Northumberland County Circuit, on the twenty-ninth and thirtieth of May, 1919. The facts sufficiently appear from the judgment.

Hon. Robert Murray, K. C., for the plaintiff.

Allan A. Davison, K. C., for the defendant.

1919. July 18. The following judgment was delivered by

BARRY, J. The statement of claim in this action contains two counts; the first, a count in replevin, for the return or the value of 200 spruce, fir and hemlock saw logs, and a quantity of spruce and fir pulp logs, estimated at the number of fifty, and $200 damages for their taking or detention; the second, a count in trespass, for breaking and entering lands of the plaintiff, situate in the parish of Derby in the county of Northumberland, and taking and carrying away the same saw and pulp logs, for which the plaintiff claims $300 damages. The defendant denies both the taking and the trespass, and sets up in defence that the land upon which the alleged trespass was committed, was and is the freehold of one Susan A. Demers, by whose authority and permission he did the acts complained of. The action was

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tried before me without a jury, at the Northumberland Circuit, on the twenty-ninth and thirtieth days of May last.

In the year 1841, the Crown granted to one Richard Jardine 100 acres more or less of land situate in the parish then called Nelson, but which now, on account of the erection of new parishes and the consequent change of old parish lines, is called the parish of Derby. The lot is designated both in the grant and on the plan attached thereto as lot E in the Second Tier. It is an irregularly shaped piece of land of the following dimensions: 120 rods on the eastern side; 252 rods on its northerly side; 20 rods on the westerly side; and 216 rods on the south.

In 1842, Richard Jardine conveyed to his brother John Jardine, the northerly half of the lot, containing 46 acres more or less, with the usual allowance of ten per cent for roads and waste. The half conveyed was to have sixty rods front, *i. e.*, on the east, or one-half the frontage of the whole lot, and the line on the south side, *i. e.*, the dividing line between the half conveyed and the half retained, was to run towards the rear so far and in such a direction or course, as to enclose the said forty-six acres on the north side of Lot E.

In 1866, Richard Jardine conveyed the remainder or southerly half of Lot E to Thomas Kingston, who occupied it twenty-seven years or until he died about twenty-six years ago. The plaintiff is a son of the late Thomas Kingston who died intestate, was born on the place forty-five years ago, and lived there until he was thirty years of age. Although he does not himself live on his father's half of the lot at present time, he is in possession of it and looks after the conservation of the property both in his own right and the right of his brothers and sisters, children and heirs of the late Thomas Kingston; as against them, I do not understand him to claim any adverse title.

The foregoing facts are not disputed; neither is it disputed by the plaintiff that John Jardine died seized and possessed of of the northern half of lot E, nor that Susan A. Demers

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is his daughter, or that she did not have the right to give and did give the defendant permission to lumber on her late father's part of the property. The sole question to be determined in this action turns upon the answer to the question of fact, where is the division line between the northern and southern halves of Lot E, and did the defendant in operating the land, encroach or cut beyond the southern boundary of the northern half of it.

That very soon after Richard Jardine conveyed part of the lot to his brother, there was a divison line established between the half sold and the half retained, seems to me to have been conclusively established by the evidence. All the older witnesses speak of such a line, and the question is not so much whether there was and is such a line, as where it is located.

Speaking of the conditions in regard to the line, as they existed when he was ten years old, the plaintiff says that between the northern and southern parts of the lot there was a line consisting of a fence in the front, and a spotted line, in continuation of the fence, blazed through the woods westwardly, clear to the rear or Clark line; and the plaintiff says further that he knows today the locality of that line, and that it is plainly to be seen by anyone who may take the trouble to look for it; and that his father on the south and John Jardine on the north worked up and down to it. He has on occasions repaired and rebuilt parts of this fence; the line is straight from front to rear with no zig-zags or bends in it.

John Kingston, who is eighty-seven years of age, and a brother of the late Thomas Kingston, gave evidence in the plaintiff's case. Although feeble physically, he seemed to me, having regard to his advanced years, to be remarkably clear in his recollection of things of the past, and I confess to having been impressed by his testimony. So far as I know, he has no interest in this litigation, excepting perhaps the interest which one would naturally expect an uncle to have in the business affairs of his nephew. He says he

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knows the locus well; that, in fact, he had charge of it for seven years. Richard Jardine lived on one side of the dividing line, his brother John worked on the other. The two brothers ran the line themselves, and the witness says he never knew John to cut a bush across it. There was on the line where the land was chopped down, a wood fence, till they commenced clearing; then they made a stone fence; and through the woods, towards the rear, not quite a mile but three-quarters of a mile any way, there is a well spotted visible line. "Shortly after the line was run," the witness says, "Richard Jardine told me, don't you do anything over that line; that is the line my brother John and me ran to be the dividing line between us."

Three sons of the original grantee also gave evidence. These were John, Michael and James Jardine. John speaks of a clearly defined and spotted line that he saw twenty-nine years ago, with a fence in front between the north and south halves of the lot—a stone fence with rails on top—extending one-half way back to the Clark line, and a spotted line in prolongation of the line in front.

Michael Jardine also speaks of a line that existed thirty years ago when he lived there, consisting of a line in front and, in continuation of the fence, a spotted line on the trees to the rear. After the cutting which is complained of in this action, in the company of the plaintiff, he traced and located what he believed to be the old line.

And James Jardine also gave evidence of an old line, the remains of a fence and old spots on the trees which he traced out forty years ago.

Susan A. Demers, a daughter of John Jardine, 1st, and the party through whom the defendant claims the right to cut where he did, says that she told him that there was a line there before he was born, and explains that by the expression line she meant a fence; and she adds, "I suppose there was a dividing line between the two men, father got one-half and uncle Richard the other; it was always spoken of as one-half." She knew where the fence was but not

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where the line was—which seems to me to be a distinction without a difference.

William A. Fish, a surveyor of forty years practise, and a man of large experience in running lines, was called for the defence, and gave evidence of the circumstances under which he went upon the land and run a line, and what he found and what he did not find there. He was employed by the defendant to run it, and was given the division deed between Richard and John Jardine to go by. When he went upon the land to run the line, he says, he went upon a line which, so far as he knew, never had a surveyor upon it before; and he did not go there to retrace or re-establish an old line, but to run a new one in accordance with the description in the deed which had been given him by the defendant. After an occupation and a partial cultivation for over seventy-five years on both parts of the lot, that would seem to me to be, if I may be permitted to say so, an extremely unwise and unusual course of procedure. And, indeed, Mr. Fish admits that never in his recollection did he do the like before. The plaintiff, who was with him, showed him the spots which he claimed as the line and told him he was not running on the old line. Mr. Fish says that he saw no division line as he went west, and because the line which the plaintiff pointed out to him, about the middle of the lots from front to rear, was nine rods north of the line he was running, he concluded that it could not be the dividing line of the properties. Now in that I think Mr. Fish erred; for it is undoubtedly true that, even without any surveyor, it is quite competent for adjoining proprietors to establish their dividing line where they choose, for the very obvious reason that its location is no one's business but their own.

The land was granted in 1841 and divided in 1842. If parties, the owners of either part of the lot, now after a lapse of seventy-eight years, call in a sworn surveyor to ascertain the true lines, the duty of the surveyor is to find if possible, the place of the original line, the stakes, marked

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trees and monuments which determined the boundary line between the proprietors in the first instance. However erroneous may have been the original survey, or even if there were no survey at all, technically speaking, the monuments that were set, the trees that were marked and blazed, must, nevertheless, govern, even though the effect be to give to one proprietor a much greater acreage than his deed would seem to entitle him, and give to the adjoining proprietor very much less. In the case of successive purchasers, or owners, they are entitled to no more or less an area than their predecessors in title; for parties buy or are supposed to buy in reference to the earlier lines or monuments, and are entitled to what is within their lines and no more.

While the witness trees remain, there can generally be no difficulty in determining the locality of the line. When the witness trees are gone, so that they no longer record evidence of the monuments, it is surprising how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men whose theoretical education is supposed to make them experts, who think, that when monuments are gone, the only thing to be done is to place new monuments where the old ones should have been, and where they would have been, if they had been placed correctly. This is a serious mistake. The problem is now the same that it was before— to ascertain by the best lights of which the case admits, where the original lines were. The original lines must govern, and the laws under which they were made must govern, because the land was granted, was divided, and has descended to successive owners under the original lines and surveys; it is a question of proprietary right.

The general duty of a surveyor in such a case is plain enough. He is not to assume that a line is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very

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satisfactory evidence of the original boundary, when no other is attainable; and the surveyor should enquire when it originated, how and why the lines were then located as they were, and whether claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, cases have happened where surveyors have disregarded all evidence of occupation and claim of title, and plunged whole neighborhoods into quarrels and litigation by assuming to establish lines at points with which the previous occupation does not harmonize.

It is often the case that where lines or parts of lines are found to be extinct, all persons concerned have acquiesced in lines which were traced by the guidance of some land-mark which may or may not have been trustworthy; but to bring these lines into discredit, when the people concerned do not question them, not only breeds trouble in the neighborhood, but must often subject the surveyor himself to annoyance, since in a legal controversy, the law as well as common sense must declare that a supposed boundary line or a supposed division line, if long acquiesced in, is better evidence of where the real line should be, than any survey made after the original monuments have disappeared.

It seems to be the fashion now-a-days, and one much to be deplored, for operators when they go into the woods, to commence their operations by spotting lines and trees indiscriminately; they spot trees for the choppers; they spot trees for the swampers; they spot out yarding roads and main hauling roads, and what not. And if these newly spotted lines cross at sharp angles the division lines of lots previously laid out, or what is worse, run parallel or nearly parallel to them, the result is that the newly spotted lines often breed confusion and give rise to litigation in precisely the same way as the litigation has arisen in the present case. For I do not for a moment doubt the truthfulness of the witnesses for the defendant, who depose to finding present on the locus, the spotted lines which they have mentioned. But those lines were not in my opinion, the division line

between the northern and the southern halves of Lot E. That I am correct in this opinion is, I think, well exemplified by the evidence of William Sauntry, who came into court with a written record of the number of spots, and the number of paces between them, the directions in which they ran and the variations north and south, and the bends and turns of the line he was describing—the line which, unfortunately, the defendant regarded as the one by which he might cut and had to admit at the close of his testimony, that no sane man would regard as a division line the spots which he described.

But the defendant went into this operation with his eyes open; he was made acquainted beforehand by the plaintiff of the location of what the latter claimed to be the true division line and warned not to go beyond it; and in disregarding this warning, I think he was altogether too precipitate, and would have been better advised had he taken some little trouble to investigate the plaintiff's claim of title and possession before utterly ignoring it.

It follows that, in my opinion, the plaintiff is entitled to recover in this action. I find as a fact, that the true division line between the two half-lots is the line deposed to by the plaintiff and corroborated by several witnesses; also, I find that the saw logs and the pulp logs, for which compensation is sought by the plaintiff, were cut south of the dividing line and upon the plaintiff's land. There remains the question of damages.

Except by the cross-examination of the plaintiff, the defendant offered no evidence in mitigation of the damages claimed; he either would not or could not tell us the extent of his operations south of the division line; the only evidence I can put my finger on, in regard to the quantum of damages, is that offered by the plaintiff himself, and that has not been contradicted; it is therefore the only measure of damages that I can apply. A verdict will be entered for the plaintiff for $300, and the defendant must pay the costs of the action.

Verdict for plaintiff with costs.

HOUSON v. AUSTIN,
(1923) 24 O.W.N. 277, reversing 23 O.W.N. 603 (C.A.)

SECOND DIVISIONAL COURT. MAY 1ST, 1923.

HOUSON v. AUSTIN.

Trespass to Land—Cutting down Ornamental Trees—Dispute as to Boundary between Adjoining Lots — Evidence — Monument — Uncertainty as to Position of—Original Plan—Field-notes—. Statute Establishing Resurvey, 33 Vict. ch. 66 (Ont.)

Appeal by the defendant from the judgment of Mowat, J., 23 O. W. N. 603.

The appeal was heard by Riddell, Latchford, Middleton, and Logie, JJ.

W. N. Tilley, K.C., and J. G. Kerr, K.C., for the appellant.

O. L. Lewis, K.C., for the plaintiff, respondent.

Riddell, J., reading the judgment of the Court, said that a plan, No. 244, was made by W. G. McGeorge, P.L.S., in 1882, of certain land in Chatham, which shewed, inter alia, lots 3 and 4 adjoining—lot 4 being to the west. The plaintiff's lot was No. 4, and the defendant's wife owned No. 3. The defendant, asserting that a certain row of trees was on No. 3, cut them down, and this action of trespass was brought.

The only question for determination was, whether the trees were on lot 4.

Robertson, the original owner, conveyed lots 3 and 4 to the predecessors respectively of the defendant's wife and the plaintiff, by deeds made and registered on the same day in 1882.

There was nothing in the way of possession to vary or modify the paper boundary of these lots; and, unless a certain alleged agreement had such effect, the plan No. 244 must be looked at to determine the boundary, as the descriptions in the conveyances give the lands as lots 3 and 4 according to this plan.

The Court was not furnished with the field-notes of plan 244, and consequently did not know the place of beginning of the original survey.

It was obvious, however, that the governing line was the west side of Lacroix street—it was upon that line that the bearing was given on the plan. The west side was straight

on the plan, as was the east side; and at two points on the plan the distance between the two plans was marked as 100 feet. If the west side is straight, and is parallel to the east side at least as far north as Wellington street, and 100 feet distant, there can be no doubt that the defendant is right.

But the conclusion is said to be opposed to a conclusion to be drawn from "An Act to legalise, confirm, and establish the Resurvey of the Town of Chatham," 1869, 33 Vict. ch. 66 (Ont.), which makes a survey made in 1864 "the true and unalterable survey" of Chatham.

From the field-notes, so far as the Court was furnished with them, it was not possible to draw any conclusion as to the place in or near Lacroix street where any post was planted; and consequently the Court gave leave to both parties to adduce further evidence from the Crown Lands Department. Both parties joined in producing the original plan and all the field-notes before the Court, and had put in as evidence copies of such parts thereof as they thought material.

From this evidence it was made clear that the sides of Lacroix street were straight and that the post at the angle of King and Lacroix streets was on a line with the other posts on the east side of Lacroix street.

The plan and field-notes were conclusive that there was no jog in the east side of Lacroix street, and that the sides of the streets were all straight lines.

The result was that the position of the post at the corner of King and Lacroix streets must have been changed since the survey.

The Court was bound, by the statute, to this original survey, and there could be no doubt that the proper line of the street was as contended by the defendant.

The appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

MOWAT, J. JANUARY 31ST, 1923.

HOUSON v. AUSTIN.

Trespass to Land—Cutting down Ornamental Trees—Dispute as to Boundary between Adjoining Lots—Evidence of Surveyors—Monument—Uncertainty as to Position of—Practical Observance of Boundary by Owners—Acquiescence—Title by Possession—Damages.

An action for trespass in cutting down 13 ornamental trees and for an injunction against future depredation.

The action was tried without a jury at Chatham and St. Thomas.

O. L. Lewis, K.C., for the plaintiff.

R. L. Brackin, K.C., and J. A. Nevin, for the defendant.

Mowat, J., in a written judgment, said that the actual damage was not great, but the case involved the determination of a dispute as to the boundary between two residential lots in the city of Chatham, owned respectively by the plaintiff and defendant. In the deed to the plaintiff the land conveyed was described as being composed of lot 4 on King street according to registered plan 244; and in the defendant's deed the description was, lot 3 on King street as shewn upon a plan of subdivision of part of lot 23 in the first concession formerly in the township of Raleigh as plan 244. Neither lot was described by metes and bounds.

The contention was as to the boundary-line between lots 3 and 4. The two lots were part of a tier fronting on the river Thames between Inches avenue and Lacroix street. If measured westerly from the easterly limit of Lacroix street, the boundary would be 4 feet west of the fence of John A. Morton, which was replaced by the row of spruce trees; but, if measured from a stone monument at present in position in the middle of King street beneath the permanent road-surface, now 4 feet easterly from the limit of Lacroix street, the boundary would be approximately in the position of the running board fence, slightly to the west of which was substituted the hedgerow of trees cut down by the defendant. It was contended for the defendant that the monument had been removed 4 feet easterly from its original position; but there was no definite evidence as to

the former position of the monument; and the case fell into that class of cases represented by Home Bank of Canada v. Might Directories Limited (1914), 31 O. L. R. 340, where it is held that uncertainties of surveys must give way to practical use of the ground and the dealings with it by owners.

Applying this method, the site of the running board fence of Morton was most likely to have been the boundary-line between lots 3 and 4; and, McKeough, the plaintiff's predecessor in title, having planted the spruce trees well within his boundary, as Morton and he then considered it to be, it must be found that the trees were not on the land of the defendant but on the land of the plaintiff.

The row of trees being taken by both McKeough and the plaintiff and also by the defendant, by his acquiescence for years, as the boundary between their lots, even if the 4 feet of land should be found on a surveying basis to belong to the present owner of lot 3, yet it is a strip which for more than 20 years has been in the possession of the owner of lot 4, openly, notoriously, and without dispute, until this action was imminent; and the plaintiff, the owner of lot 4, has acquired a title to it by possession.

It was contended that no real damage was done. The trees, if not on lot 3, overhung it, and the defendant could have lopped the branches, which would have destroyed the trees or rendered them unsightly. But the defendant did not do so—he cut down all the 13 trees, which was the trespass complained of.

The plaintiff cherished the trees, and was entitled to have his property secure and unmolested. He also made out some case for exemplary damages in that the trees were cut down furtively.

There should be judgment for the plaintiff for $525 and costs of the action.

HUMPHREYS et al. v. POLLOCK et al.

Supreme Court of Canada, Rand, Kellock, Estey, Locke and Cartwright JJ. October 5, 1954.

Trespass I—Deeds II C—Defence to trespass action that plaintiffs not entitled to disputed land—Disputed boundary—Metes and bounds description of Crown grant of land now owned by plaintiffs—Description referring to pine tree—Question of location—Reference in description to grants of adjoining land—

An action of trespass raising an issue of plaintiffs' title turned on the location of one of the boundaries of plaintiffs' land as described in the Crown grant. The description referred to a pine tree then standing and also to grants of adjoining land. The trial Judge held that plaintiffs had proved their title because the boundary could be fixed by reference to certain lines in adjoining grants. On appeal, a majority held that plaintiffs must fail because of want of proof of the location of the disputed boundary as alleged. *Held*, by the Supreme Court the judgment dismissing the action should be affirmed.

APPEAL by plaintiffs from a judgment of the New Brunswick Supreme Court, Appeal Division, [1953] 3 D.L.R. 730, reversing a judgment of Anglin J. and dismissing a trespass action. Affirmed.

J. F. H. Teed, Q.C., and *Eric L. Teed*, for appellant.
C. F. Inches, Q.C., for respondent.

RAND J.:—This is an action for trespass to lands, the trespass consisting in cutting timber. The dispute is over the northerly or fifth boundary of lands forming an irregular parcel owned by the plaintiffs and arises from the description in the grant from the Crown to the predecessors in title of the plaintiffs. The description reads as follows: "A tract of land situate in the Parish of Salisbury in the County of Westmorland in our Province of New Brunswick and bounded as follows to wit: beginning at the Northern angle of lot number thirty six in Block fourteen granted to Lauchlan McLean, thence running by the Magnet of the year one thousand eight hundred and fifty nine South thirty degrees East, along the North easterly line of said grant and it prolongation sixty four chains and fifty links thence North sixty degrees East, seventy nine chains; thence South thirty degrees East fifty four chains to the Northwesterly line of granted lands on Pollet River; thence along the same North twenty four degrees and thirty minutes East one hundred and twelve chains to a pine tree standing on the Southeasterly line of the grant to Martin Gay and associates; thence along the same South sixty degrees West, one hundred and forty five chains or to the Southerly angle thereof thence along the Westerly

line of the same North twenty degrees West, fifty six chains or to the Easterly angle of a grant to Robert Scott, Esquire, and thence along the Southeasterly line thereof South sixty degrees West, thirty three chains or to the place of beginning; Containing four hundred and ninety acres more or less, distinguished as lots numbers sixty nine, seventy and seventy one in Block fourteen and also particularly described and marked on the Plot or Plan of Survey hereunto annexed."

The grant to Gay and associates, made in 1783, contained over 9,000 acres and is southerly boundary was not at that time nor has it since been fully surveyed except on behalf of the plaintiffs for the purposes of this action . The respondents in this Court do not rest their case on the ground that the land in dispute belongs to them; their position is that it does not belong to the claimants. The issue, therefore, revolves around the interpretation to be given the description which I have set out.

Certain of the boundary lines and corners of that land which I shall call the Hutchison grant are not in dispute. The first boundary running south 30 degrees east is established on the ground as is also its southerly termination; the northerly end is in dispute, but with this we are not concerned. The second running north 60 degrees east is likewise agreed upon but not its easterly corner. The third runs south 30 degrees east until it strikes the back line of what are called the Pollet River lots and that latter line also is fixed. The length of the fourth boundary running north-easterly along the Pollett River line and the location of the fifth boundary running westerly are in dispute and it is on these two boundaries, or rather on the point of their intersection, that the claim hinges.

The question is: Does this fourth boundary extend north-easterly along the Pollet River line until the latter intersects the true southerly boundary of the Gay grant or is it limited by the distance and by the monument of a pine tree mentioned in the language of, and shown on the plan attached to and forming part of, the description in the grant?

The Pollet River line in its south-westerly direction intersects a road from the Petitcodiac River to the Pollet River, the general position of which is undisputed. In a plan, which I shall call A, of a survey made in 1859 of Lots 63 and 64 whose north-easterly boundary coincides with the third boundary of the Hutchison grant and is in turn bounded south-easterly by the Pollet River line, the distance along that line from the road to the south-easterly corner of Lot 63 which I shall call point X is shown to be 110 chains. In a further plan, which I shall

call B, of a survey made in the same year of Lots 69 and 70 which were intended to be but were not granted to the applicant for the survey but which later were incorporated as the easterly triangle of the Hutchison grant, the corner X is taken as the point to and from which the third and fourth boundaries of the Hutchison grant run. The distance of 112 chains from the point X mentioned in that grant is shown to run along the Pollet River line north-easterly from a maple tree at X to a pine tree where it is assumed to meet the southerly boundary of the Gay grant and westerly therewith to constitute the northerly line of the easterly triangle, extending a distance of 91 chains to its intersection at a post with a line drawn from the point X on a course north 30 degrees west, along the easterly boundary prolonged of Lots 63 and 64. Plan B shows all the lines of the triangle in red which indicates that a survey was made on the ground and the boundaries actually marked. The distance from the point X to the northerly boundary of the triangle is shown to be 65 chains, 54 chains of which, as shown on plan A, form the easterly boundary of Lots 63 and 64, with the prolongation 11 chains beyond.

The line of the second boundary of the Hutchison grant projected westerly forms the northerly boundary of Lot 25 and on Plan A the distance along that boundary from its easterly end westerly to the Pollet River road is shown to be 118 chains.

When these points, distances and courses are applied to the plan prepared for the claimants by Murdoch, an engineer, from a survey, the distance from the intersection of the third boundary drawn from X with the second boundary of the Hutchison grant westerly to the Pollet River road is approximately 118 chains, agreeing in this respect with Plans A and B. It appears that there is a fence on the same course as that of the third boundary which is roughly 10 chains west of the line drawn from the point X northerly; but if the line of the fence is taken to be the boundary as laid out on Plan A it increases the distance by over 10 chains of the length of boundary four along the Pollet River line, diminishes the length of the second boundary projected of 118 chains from the Pollet River road by about 10 chains, and increases the length of the third boundary northerly from the Pollet River line by about 7 chains. Plans A and B and the plan of the Hutchison grant are thus substantially consistent with the Murdoch plan where the lengths of the several boundaries shown on the original plans are measured from existing monuments or corners. This is a strong indication that these original boundaries were actually

surveyed although, undoubtedly, the distances on the ground are approximations of more or less.

From these considerations it is, I think, clear that in the Crown Land Office there was a mistaken assumption that the fourth boundary of 112 chains along the Pollet River line extended to the intersection of that line with the southerly boundary of the Gay grant. Mr. Teed's contention is that in such a case we must take that line to be a natural boundary and extend the 112 chains a further distance of 30 chains 60 links to a point on what is claimed to be that boundary. It is of some interest that what is more or less accepted as the westerly boundary of the Gay grant, assumed to coincide with the sixth boundary of the Hutchison grant, is actually a distance westerly of the true boundary of the Gay grant of between 30 and 40 chains but to use that true boundary as part of the description of the Hutchison grant, which is nowhere suggested, would undoubtedly clash with grants long since made of presently occupied lands. The identification of the fifth boundary with the Gay grant southerly line, as that is claimed to be by the appellant, apart from the question of the westerly boundary, would increase its length as stated in the description by approximately 25 chains, and would add to the 490 acres mentioned in the Hutchison grant approximately 271 acres, which by no stretch of the imagination could be included within the reasonable scope of the described chainage.

Certain critical boundaries are seen then to be fixed on the ground and the misapprehension that the northerly boundary so described coincided with the undetermined southerly line of the Gay grant cannot affect what was intended to be conveyed. The principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate. But here we have surveyed lines and distances between described monuments at the time existing which were mistakenly assumed to have a certain relation with another undetermined line. In that case I can see no room for doubt that, when the description in the grant and on the plans is interpreted as a whole, the specific dimensions, within the inevitable errors of measurements of early years when lands were plentiful and surveying difficult, fixed by marks and calculated as to acreage, cannot be disrupted by acting upon such a misconception. It is a case in which the survey with its distances and boundaries were intended to contain as well as define the land to be granted; the

identification of the two lines was at most a collateral coincidence. In the result it may be that between the southerly boundary of the Gay grant and the northerly boundary of the Hutchison grant there lies an area of ungranted land, but that fact cannot, in the circumstances, control the interpretation of such a specific description.

But Mr. Teed raises a further point. He argues that even assuming the general construction to be given to the Hutchison grant as I have put it, there has been cutting south of the northern line so established. The boundary along the Pollet River line from the southerly point X, being the end of the third boundary, is described as 112 chains in length. There is no pine tree to mark that distance that can be said to have been in existence in 1859 but a distance of 112 chains carries the line to 2.4 chains beyond the intersection with the fifth boundary as the latter is laid out by Rutledge. The angle between the two boundaries is known and a simple mathematical calculation shows that the distance northerly between the Rutledge line as run and as from the new point it should be run is approximately 1.46 chains or roughly 100 ft. This would add an area north of the Rutledge line of a depth of 100 ft. by a length of 144 chains.

The fallacy which, in my opinion, vitiates this contention lies in the fact that by accepting the 112 chains as an absolute length there would be either a disturbance of the assumed length of the third boundary, run from point X, 65 chains, or if that is kept as it is, the new northerly boundary would be on a different course, which nobody would suggest.

The length of the northerly boundary of what I have called the easterly triangle of the Hutchison lot is shown on Plan B as 91 chains. Mr. Teed reduces this to approximately 88.10 as being the true length on the ground. It is obvious that if the second side is kept at 65 chains the hypotenuse will be less than originally shown on Plan B, that is, will be less than 112 chains. namely 109.59, which gives him the 2.4 chains he claims.

Since the courses as well as the Pollet River line are fixed, we must infer either that the actual length from the point X to the Rutledge line which is shown on Plan B as 65 chains is short by something like 1.4 chains, 90 ft., or that the error lies in the fourth boundary as laid out on the Rutledge plan. On the Murdoch plan the scaled distance from the point X to the northerly line of Lot 64 is 54 chains, the same as shown on Plan A. That northerly line is established and the distance of the extended line of 11 chains is confirmed by all the surveys. As-

suming the error in some form to lie in the length of the boundary along the Pollet River line, it represents a discrepancy of 160 ft. in a distance of 8,000 ft. But the easterly line of Lots 63 and 64 is disputed; the appellants claim it to be 10 chains westerly of the Rutledge location and a fence running south part way along the line fixed by Oxley evidences the uncertainties of the owners. On this basis, Lot 57 has only 48.78 chains and Lot 63 only 47.90 chains along the Pollet River line as against 52 and 58 chains respectively on Plan A, and the fourth boundary is increased from 112 to 122 chains terminating at the Rutledge fifth boundary. The point X if placed 2.4 chains lower, or westerly, on the Pollet River line would yield the 112 chains for the fourth boundary and would increase the length northerly of 65 chains by 1.4 chains to reach the Rutledge line, the increase being confined to the easterly boundary of Lots 63 and 64, but it would narrow slightly the width of these lots according to Plan A. The length of the fifth boundary, shown as 145 chains on the Hutchison plan and verified to 144.4 chains by actual survey, remains unaffected by the change in location of the third boundary. If the latter remains as fixed by Rutledge and a distance of 112 chains is adopted, the entire fifth boundary is displaced northerly by a similar distance of 1.4 chains, and its length of 145 chains increased by 1.9 chains, affecting correspondingly the sixth and seventh boundaries. Since a complete reconciliation on the ground of all these distances is impossible and on the Rutledge basis the differences are relatively insignificant, the balance of probabilities is that point X is either to remain as it is, thereby reducing the fourth boundary to 109 chains or placed a distance of 2.4 chains lower on the Pollet River line. The former would accept the eastern boundary of Lots 63 and 64 as shown on Plan A. This gathers some support from the fact that the distances shown on Plan B, namely 65 chains, 91 chains and 112 chains as forming the eastern triangle, considering the courses which are indisputable, are mathematically wrong. Assuming the 65 chains as given, the remaining sides ascertained trigonometrically would be 87.6 and 109 chains. This indicates a rough survey of the latter lines rather than an office mathematical calculation. The latter, in addition to the results already mentioned, would give the appellant a distance of 1.9 chains farther west for the third boundary than the original plans provide. The uncertainty of the position of the point X may in part or whole be accounted for by the fact of the slightly irregular base line of the Pollet River road, or that it may, in the course of time, have

become somewhat shifted. The apparent difference of 160 ft. in 110 chains along the line from that road to the easterly boundary of Lots 63 and 64 becomes in that situation more explicable. These differences are within the margin of what is to be expected in the surveys of the earlier grants of what were then wilderness lands, and this reconciliation appears to present the least conflict with long-established lines and monuments.

But it is not necessary for us to decide the exact location of the third boundary. It is sufficient that the pronounced balance of probability shows, as it clearly does, the easterly angle of the fourth and fifth boundaries as fixed by Rutledge to coincide on the ground with that angle as shown on the Hutchison plan. This determines the location of the fifth boundary which constitutes the matter of the dispute, and it is not contended that beyond his line, marked by Rutledge, the respondents have trespassed.

There is one further observation to be made. In 1924 Pickard, an engineer, ran the sixth boundary of the Hutchison grant which extends northerly from the end of the *fifth* boundary. At that corner he placed an iron post which is there today within a few feet of the Rutledge line. It is from that post that the distance of 144.2 chains for the fifth boundary is measured as against 145 chains shown on the plan of the Hutchison grant.

From these conclusions it follows that the appeal must be dismissed with costs.

KELLOCK J.:—The questions arising in this appeal depend upon the proper construction of the Humphreys patent, which is dated May 8, 1860. That description proceeds by metes and bounds and concludes as follows: "and also *particularly described and marked* on the Plot or Plan of Survey hereunto annexed." (The italics are mine.) This plan is ex. D. 7.

In *Grasset* v. *Carter* (1884), 10 S.C.R. 105, Strong J., as he then was, expressed the principle here applicable at p. 114, as follows: "When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question *of* law by the judge, and not as a question of fact by the jury."

The description by metes and bounds is a follows:

"Beginning at the Northern angle of lot number thirty six in Block fourteen granted to Lauchlan McLean; (1) thence running by the Magnet of the year one thousand eight hundred and fifty nine South thirty degrees East, along the North easterly line of said grant and its prolongation sixty four chains and fifty links; (2) thence North sixty degrees East, seventy nine chains; (3) thence South, thirty degrees East fifty four chains to the Northwesterly line of granted lands on Pollet River; (4) thence along the same North twenty four degrees and thirty minutes East one hundred and twelve chains to a pine tree standing on the South-easterly line of the grant to Martin Gay and associates; (5) thence along the same South sixty degrees West, one hundred and forty five chains or to the Southerly angle thereof; (6) thence along the Westerly line of the same North twenty degrees West, fifty six chains or to the Easterly angle of a grant to Robert Scott, Esquire, and (7) thence along the Southeasterly line thereof South sixty degrees West, thirty three chains or to the place of beginning."

Then follow the words "containing four hundred and ninety acres more or less, distinguished as lots numbers sixty nine, seventy and seventy one in Block fourteen" and the language with reference to the plan set out above. I have added the above figures (1) to (7) for convenience, and shall denote the southerly terminus of the first course and the commencement of the second by the letter "P". The location of this point is not in dispute. The boundary which is in question is the northerly boundary, being course (5).

It is to be observed that all of the first four courses are measured by specific distances without any such words as "more or less" or an alternative as contained in the descriptions of courses (5), (6) and (7).

In July, 1859, a survey had been made of the easterly triangle of the lands in question. This survey shows the measurements of each of the three sides, and definite monuments on the ground are shown as existing at each corner. It is plain (and this was also the view of the appellants' surveyor) that Plan D. 7 was prepared from this earlier plan. The measurements of the portions of the plans which are common agree, although the only monument marked on D. 7 is the "pine" at the north-east corner of the triangle.

The appellants contend that the words "to a pine tree standing on the South-easterly line of the grant to Martin Gay and associates" at the corner just mentioned, are controlling, and

that, notwithstanding the specific measurement of 112 chains in the fourth course, the location of the south-easterly boundary of the Martin Gay line (and the northerly boundary of the Hutchison grant) is to be determined by a reference to the description in the grant of 1783 to Gay. It was on this theory that the appellants proceeded in the preparation of their Plan P. 26, which shows the line in question as the "Lingley line", having a length of 166.29 chains.

In my opinion this contention is not well-founded. The boundary in question is not to be ascertained by the terms of the grant of 1783 but by the terms of the Hutchison grant, namely, "the Southeasterly line of the grant to Martin Gay and associates" as "particularly described and marked on the Plot or Plan of Survey" annexed to the grant.

It may be observed also, that to give effect to the appellants' contention would be to extend the length of the fourth course of the Hutchison grant from 122 chains to 152 chains, 60 links, (over 2,000 ft.). There is no justification for locating the "pine" at the north-east corner of the grant at any such place, and there is nothing to suggest that there could have been such a large error in locating that monument at the time the survey was made in July of 1859. It is to be remembered that this country has been burnt over since 1859 and that the "pine" has no doubt been destroyed. It is impossible to accept the "stub" which the appellants' surveyor found in 1951 at the intersection of the "Lingley line" and the Pollet River line, over 2,000 ft. away, as the monument described by the surveyor in 1859.

I am willing to assume that the appellants have satisfactorily shown that the true Gay line, according to the description of 1783, is one thousand or more feet to the north of the "Rutledge line", but that fact is, in my opinion, irrelevant so far as this litigation is concerned. No doubt the south-easterly line of the grant to Gay, as described in the fourth course of the Hutchison grant, was assumed by the draftsman to be the true line of the Gay property, but whether or not that assumption was correct, the line, for the purposes of the Hutchison grant, was fixed by the terms of that grant and is to be located accordingly. When so located it is not and cannot be disputed that it is in the location indicated on ex. P. 26 as the "Rutledge line", measuring 144.42 chains. The measurement of this boundary given on D. 7 is 145 chains.

As already pointed out, the location of point "P" at the intersection of the first and second courses, is admitted. Super-

imposing the Plan D. 7 upon Plan P. 26 (both plans being drawn to the same scale), and using the point "P" as pivotal, the northerly line of D. 7 coincides exactly with the "Rutledge line" as shown on P. 26. The only relevant boundary which does not coincide is that constituted by the fourth course of the Hutchison grant, that boundary, as shown on D. 7, as it proceeds westerly from its easterly terminus, tending to run northerly of the corresponding line on P. 26. The only effect of placing the two plans so as to coincide with respect to this boundary would be to place the northerly boundary of the Hutchison grant to the south of the "Rutledge line". This would not help the appellants, and there is no reason for so doing.

It is also to be observed that when D. 7 is superimposed on P. 26 in the first position mentioned above, the line of the third course as shown on D. 7 is somewhat to the west of the line as drawn on P. 26 as well as on D. 5 (the Rutledge plan). This may well explain the difference between the 112 chain measurement of the fourth course of the Hutchison grant and the 109.59 chain measurement made on the ground between the intersection of the line of the third course with the Pollet River line, as shown by Rutledge, and the intersection of the "Rutledge line" with the Pollet River line.

In my opinion the appeal fails and must be dismissed with costs.

ESTEY and LOCKE JJ. concur with RAND J.

CARTWRIGHT J.:—For the reasons given by my brothers Rand and Kellock I agree with their conclusion that the appeal should be dismissed with costs.

Appeal dismissed.

Action No. 1448/1981

IN THE COUNTY COURT OF THE UNITED
COUNTIES OF PRESCOTT AND RUSSELL

B E T W E E N :

MOISE LAVIGNE AND CECILE LAVIGNE
Plaintiffs

-and-

NORMAND CLEROUX and GERMAINE TESSIER
Defendants

A N D B E T W E E N :

NORMAND CLEROUX and GERMAINE TESSIER
Plaintiffs by Counterclaim

-and-

MOISE LAVIGNE and CECILE LAVIGNE
Defendants by Counterclaim

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R E A S O N S F O R J U D G M E N T

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DELIVERED IN WRITING BY THE HONOURABLE JUDGE R. J. CUSSON
on October 23rd, 1984

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APPEARANCES:

Counsel for the plaintiffs;
Defendants by counterclaim — J. C. Gélinas, Esq.

Counsel for the defendants;
Plaintiffs by counterclaim — R. J. Kealey, Q.C.

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REASONS FOR JUDGMENT

CUSSON, CO. CT. J. : (Written)

The issues in this matter arise out of a dispute between neighbors over a parcel of land 9.15 feet wide by 80.0 feet in length, referred to throughout the trial as part two on reference plan 50R275, and a 15 foot by 20 foot parcel situated immediately north of the first mentioned parcel of land.

The plaintiffs claim ownership of these parcels of land, ask the Court to establish their proper location and in the alternative ask the Court to declare that they have acquired a right of way over them. Additionnally, they claim damage and mandatory injunction relief relating to a fence erected on part two by the defendants.

As in all disputes between neighbors over land boundaries, the trial evidence centered on the use made by the present owners and their predecessors of the disputed lands.

As is usually the case, deed descriptions used by the predecessors of the title to both properties are not founded on survey data. Rather, they refer to a commencement point being "the south-west angle of the said lot", which is the crux of the whole problem in this case.

The plaintiffs' deed registered as number 70808 on June 4th, 1980, purports to transfer to them a parcel 115 feet in length along Dollard Street, commencing from the south-west angle of the north half of the south half of Lot 20 in the Fourth Concession in the Township of Clarence.

If one examines the deeds of the plaintiffs' predecessors on title, one can readily observe that the same starting point is used to describe the parcel in question. The evidence at trial clearly demonstrates that until September 25th, 1973, neither of the properties involved in this case were surveyed, and accordingly

the deed descriptions to which I have referred can be traced together without descrepancies if one does not attempt to reconcile the deed descriptions with the actual ground usage. Indeed, many of the deed descriptions are supported by handmade sketches. One look at these handmade sketches readily leeds one to conclude that deed measurements were always used without reference to actual ground evidence. In this way, the 115 feet frontage of the plaintiffs' land on Dollard Street and the 85 feet on Dollard Street that the defendants' predecessor on title, J. Ubald Parent, was conveyed by instrument number 32631 registered on the 4th of December, 1972, fit exactly.

The fly in the ointment is that the defendants' deed from J. Ubald Parent purports to convey to them parts one, two, three, four and five on reference plan 50R275. This would effectively convey to the defendants, 94.15 feet on Dollard Street. The defendants' deed is the only deed on title in which the description used to convey the lands and premises refers to a plan of survey, namely plan 50R275.

To complicate matters, J. Ubald Parent, predecessor in title to the defendants, and Gilles Labrèche, the former owner of the plaintiffs' land, signed statutory declarations on the 17th of May, 1980 and the 4th of June, 1980, respectively, stating in effect that the predecessors to the plaintiffs always occupied their lands to the east limit of part two and that the predecessors of the defendants occupied their lands to the east limit of part two as well. This declaration by Mr. Parent, on June 4th, 1980, contradicts a previous declaration he made on the 6th of August, 1976, at the time his sale was completed to the defendants. In that declaration he claimed possession and actual occupation of all of the parts he conveyed to the defendants, including part two. Indeed at trial, J. Ubald Parent testified that he had made an error in that 1976 declaration and that the 1980 declaration had been made

to correct the error. He did, however, also testify that he had laid some drainage pipes on the easterly portion of part two and asserted that part of the lands shown on part two were used to drain the northern portion of his property.

The discrepancy with respect to the occupation of the eastern portion of the plaintiffs' lands and the eastern limit of those lands as described in the deeds were disclosed when Mr. F. H. Gooch, an Ontario Land Surveyor, prepared plan 50R275. This plan was registered in the appropriate registry office on the 25th of September, 1973, and it showed two east limits to the lands of the plaintiffs that is a deed line and an occupational limit being the east boundary of part two. It also shows a trees and shrub line immediately east of the east limit of part two. Therefore, after September 25th, 1973, the discrepancy between the instrument or deed description and the actual occupation of the lands became a matter of record in the registry office.

Mrs. Cécile Lavigne, in her testimony, admitted that she was aware that there was a possible problem as to the location of the east limit of the lands in question and stated that she was so advised by her solicitor when the purchase and sale was completed. Moise Lavigne, the other plaintiff, did not testify in the trial as he had been hospitalized for some time and continued to be so during the duration of the trial. I accept Mrs. Lavigne's testimony that both she and her husband were made aware of this problem by their solicitor when the purchase transaction was completed.

The use made of part two by the predecessors on title took up much of the evidence and there was obvious contradiction between some of the witnesses. It is certainly understandable that when previous owners or neighbors try to recall actual use made of certain lands some number of years back, that discrepancies will arise. What is surprising in this case, is that very

serious discrepancies arose as to the use made of the contested parcels of land by the present owners and parties to this action, namely within the last four years. For example, the evidence indicates that Hubert Pequette, a previous owner of the plaintiffs' land, constructed a brick shed on the disputed 15 X 20 foot parcel. It was maintained by all witnesses for the plaintiffs that the plaintiffs' predecessors on title had exclusive use of this shed to store garden implements and miscellaneous other items.

The defendants both contradict this assertion and suggest that there was some shared occupancy of this brick shed through some tolerance by the defendants shown both to the plaintiffs and the previous owner Gilles Labrèche. Both versions cannot be correct, and that is obvious.

Two surveyors were called to testify in this trial: Mr. Fred Gooch who prepared plan 50R275 and subsequently prepared a plan for the defendants on July 11th, 1980, and David P.J. Schultz prepared a plan of survey at the plaintiffs' request, which plan is dated January 13th, 1982.

Substantially, the evidence of both surveyors are consistent. Mr. Gooch indicates that when he attended at the premises to prepare his first plan, there was sufficient evidence on the ground for him to indicate an occupational limit on his plan, which he did. He points to a brick pillar that was situated at the south-east corner of part two, the trees and shrub line, the landscaping of the land to an elm tree, the elm tree among others. He indicates that when he returned to the same premises in July 1980, with a mandate to determine the west limit of the defendants' land, some of the evidence that he found in 1973 had disappeared, and he indicated it had disappeared to such an extent that he would not indicate an occupational limit on his plan.

David Schultz, on the other hand, attended the premises in January of 1982, when the ground was snow covered.

He asserted that he accepted as the east limit of the plaintiffs' land, the east limit of part two, based on the fact that Mr. Gooch had established that line as an occupational limit in 1973. His view was that even if some of that evidence eventually disappeared, it did not change the fact that up to 1973 and in 1973, that it indeed existed.

Mr. Gooch indicated that his measurements started from a cut cross on the sidewalk at the south-west corner of the plaintiffs' lands, and his research showed that this cut cross was placed there by a surveyor, Jean-Guy Payette, in the 60's. He could not be more precise as to the date. By using this starting point, the deed measurements and the occupational use, as he saw it in 1973, did not fit. Thus, part two was created to indicate that area of land between the east limit as described in the plaintiffs' deed and the east limit as occupied.

The evidence also indicates that there was no conflict between the defendants and the plaintiffs' predecessors on title. At least, no significant confrontation or aggressive actions were directed towards one another. Since the property was sold to the plaintiffs in June 1980 by Mr. Labrèche and his wife, and occupied by the plaintiffs, there has been violent confrontations. It has now escalated to the point that living next door to each other must be intolerable for all of them.

The defendants erected a fence along close to and parallel to the west limit of part two right up to the front of the shed situated on the 15 X 20 foot parcel. This single act by the defendants to assert some ownership over part two appears to have, more than anything else, triggered a series of confrontations that required, on many occasions, the intervention of peace officers to try and maintain some peace and order between them.

The final blow in a series of events surrounding this controversy occurred on August 31st, 1984, when a violent

storm caused two large limbs from an adjacent maple tree to descend on the brick shed, causing substantial damage to its roof and walls.

There is no doubt that this act of God, pleased the defendant to no end and he promptly set out, not only to remove the limbs in question, but to finish bringing down the shed. All of which of course, added to the aggravation inflicted on the plaintiffs by the situation.

It is with these several factors in mind that the Court must determine the issues raised by the parties in this case. Both counsel have argued from their respective points of view, what precedence the Court must give to the deed description and the evidence found on the ground. In this respect, both have submitted case law in support of their respective positions. At this point, it must be stated that I do not intend to refer to all the decisions submitted to me but rather to refer to those judgments that, in my view, have some application in this case.

It should be noted that there was no evidence adduced at trial as to where any original monuments, if any, were located. All bars shown by Surveyor Gooch on his plans were those he planted to produce the survey except for a cut cross in a sidewalk which he used as his start point. One would have to assume that this cut cross marks the starting of the descriptions in all the deeds on title. Unfortunately, this is the cut cross made by Surveyor Payette in the 1960's to which I have referred.

In the case of Home Bank of Canada v. Might Directories Limited, 31, O.L.R. 340, Chief Justice Meredith of the Ontario Court of Appeal concluded that in cases where boundaries are in dispute, where no original monuments or boundaries are established, the better evidence of a boundary can be found by establishing where the lines were made or established at a time when original posts or monuments were presumably in existence and known to those involved. He adopts the reasoning stated in the Diehl v.

Zanger case reported (1878), 39 Mich. 801, in which the state Supreme Court accepted old boundary fences over surveys made after the original monuments had disappeared as far better evidence of what the lines actually were. This decision was approved by the Ontario Court of Appeal in 1955 in a case called Bateman v. Pottruff, reported in 1955 O.W.N. 329. In dismissing an appeal in which a non-successful adjoining owner disputed the trial judge's acceptance of a surveyor's method of establishing a boundary between two properties, Mr. Justice Aylesworth approved the method used despite the fact that some of the basis for the determination of that boundary was hearsay evidence. His Lordship was satisfied that the numerous "cross checks" carried out by the witness revealed sufficient evidence that could in no sense be qualified as hearsay to substantiate a location of the boundary.

Finally, on the matter of boundaries, Mr. Justice Rand's decision for the Supreme Court of Canada in the Humphreys et al. v. Pollock et al. (1954) 4 D.L.R. 721, establishes that where discrepancies occur in deed measurements and monuments or boundaries, the boundaries prevail and the errors of measurement were incidental and to be disregarded. At p. 724 of the reported case, Mr. Justice Rand states as follows:

> "The principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate. But here we have surveyed lines and distances between described monuments at the time existing which were mistakenly assumed to have a certain relation with another undetermined line. In that case I can see no room for doubt that, when the description in the grant and on the plans is interpreted as a whole, the specific dimensions, within the inevitable errors of measurements

> of early years when lands were plentiful and surveying difficult, fixed by marks and calculated as to acreage, cannot be disrupted by acting upon such a misconception. It is a case in which the survey with its distances and boundaries were intended to contain as well as define the land to be granted; the identification of the two lines was at most a collateral coincidence. In the result it may be that between the southerly boundary of the Gay grant and the northerly boundary of the Hutchison grant there lies an area of ungranted land, but that fact cannot, in the circumstances, control the interpretation of such a specific description."

There is one further principle that deserves consideration in this case. Reference should be made to the case of Grasett v. Carter, 10 S.C.R. 105. This 1883 decision of the Supreme Court of Canada provides that where a boundary line cannot be established by original monumentation or otherwise, if an agreement as to the location of the line is accepted between two parties, such line, referred to as a "conventional line" or "conventional boundary", has precedence and the parties are estopped from denying that this line is the true dividing line between their properties. This decision was followed by the Supreme Court of New-Brunswick (Appeal Division) in the case of MacMillan v. Campbell et al., 28 N.P.R. 112. Mr. Justice Harrison in his judgment for the Court, adopts the conventional line or boundary rule but further adds that it is not necessary that there should have been a dispute as to the line between the parties before the agreement was reached or nor is it necessary that such a boundary be marked by a fence so long as it was clearly defined. As well the MacMillan decision stipulates that no special period of time is required after the agreement is reached in order to establish the conventional line in question. In summarizing his view, Mr. Justice Harrison states at p. 120 of the report:

> "The essential matters are the maintaining of the agreement and afterwards such an alteration of one party's position as would estop the other from disputing the conventional line. Thus, if one erects a building, relying on the conventional line, the other party is estopped to deny it. The erection of a fence or any expenditure of money or labour might also be sufficient."

I have found very useful an article presented to the Law Society of Upper Canada, Continuing Legal Education Seminar by Lorraine Petzold, O.L.S., Executive Director of the Association of Ontario Lands Surveyors, entitled "The survey and the real estate transaction." In her article, Surveyor Petzold comments on some basic elements of survey work. She states that the major portion of a surveyor's work is re-establishing boundaries and that in re-establishing lot lines, "a surveyor must consider the best evidence available and re-establish the boundary on the ground in the location where it was first established, and not where it was necessarily described, either in a deed or on a plan." Her words point out the basic misconception people have of the purpose and value of surveys. There is no doubt that where no boundaries have previously existed, a surveyor's work is to fix new boundaries, but where he is to provide a survey of existing properties with existing boundaries, his true work is to discover and indicate where these boundaries were. Her comments appear to me to be in line with the case law and have much application in our case.

In so far as evidence is concerned, Surveyor Petzold advances that there are four types of evidence available and lists them in the following order of priority:

1) Natural boundaries.

2) Original monuments.

3) Evidence of the original position of the monuments or line including possessory evidence.

4) Measurements shown on plans or stated in metes and bound descriptions.

In my view, the order of priority and importance she attributes to these four types of evidence is not only in line with existing case law but as well is logical and in line with common sense.

Bearing in mind the principles to which I have referred, it would seem to me that the east limit of the plaintiffs' land coincides with the east limit of part two on plan 50R275 and that the 15 X 20 foot parcel of land described in paragraph three of the plaintiffs' statement of claim is situated as shown on the plan of survey provided by David P.J. Schultz, under date January 13th, 1982, and filed as exhibit number twenty five in this matter.

The conduct of the parties to this action, after the conflict arose between them sometime in 1980, is of little importance in determining the proper boundary between their property. All of those actions are self serving in that all these actions are tainted with their desire to assert their position. In that respect, the building of the fence by Mr. Clêroux along the westerly limit of part two, the tearing down of part of the old fence on west side of the brick shed by Mr. Gratton and Mr. Lavigne, the cutting away of some of the shrubs and trees on part two and east thereof, and other similar activity only served to fuel the dispute and add additional stress to an already explosive situation.

I do not accept the evidence of Mr. Clêroux or Germaine Clêroux, the other defendant, that the defendants shared the use of the brick shed in question with their neighbors to the west. I accept the evidence of Mr. Paquette and Mr. Labrèche with respect to the erection of the shed by Mr. Paquette and the exclusive use of the shed as affirmed by Mr. Labrèche. Not only does this evidence make sense but it is in line with the uncontradicted evidence that Mr. Paquette built the brick shed on the parcel of

land which he felt had been transferred to him by Mr. Lalonde and which he felt he required to comply with the municipal requirement for the construction of his home. All of this followed submission by Mr. Lalonde of an application for severance approval to The Land Division Committee of Prescott-Russell to comply with planning legislation in force in Ontario at the time.

The best evidence of the proper location of the east limit of the lands fronting on Champlain Street, which lots all had similar 100 foot depths, is the old post and wire fence shown as an occupational limit on both of Mr. Gooch's plans. This limit is undisputed in all of the evidence. It is indicated that all of the lots fronting on Champlain Street at/or near Dollard Street were originally all 100 feet in depth. The additional 15 feet to form the 115 foot depth of the Lavigne property was transferred to the previous owner of the Lavigne property in a deed registered in the Russell Registry Office as number 16964, under date the 27th of April, 1929. A reading of that description clearly shows that the parties intended to transfer to the owner of the corner lot in question, an additional 15 feet lying east of the originally described parcel of land. It is in my view, not just coincidence that the east limit of part two coincides exactly (15 feet) with the width of the parcel transferred to the owners of the corner lot in 1929. It indicates to me that the owners at that time recognized the east boundary of part three as the boundary between the lots fronting on Champlain Street and the lands east of those lots. The conveyance of the 15 X 20 foot strip of land by J. Ubald Parent to Fernand Lalonde on the 27th of January, 1972, shows as well that this fenced boundary was still recognized to situate the 15 X 20 foot parcel immediately to the north of part two and was to coincide with the 15 feet wide parcel transferred in 1929 to the owners of the Lavigne property.

All of the transfers, including the transfer of

J. Ubald Parent to Mr. Lalonde in 1972, preceded the survey work done on the premises by Mr. Gooch. Accordingly, all those persons had at their disposal to effect the transfers, was the evidence on the ground and the deed descriptions as well as the hand drawn sketches attached to the deeds. These hand drawn sketches do no more than indicate the intention of the parties as they, in no way, reflect monumented measurements. I accept the evidence of Mr. Gooch, that in 1973 all of the evidence in place on the ground indicated that despite the deed description, the use or the occupation made by the owners of the corner lot to that date indicates that the occupation was to the east limit of part two.

The evidence found by Mr. Gooch in 1973, on the ground, confirms the evidence of the predecessors on title and those neighbors who re-counted the previous occupation of the Lavigne property by a bakery including part two and some area west of part two for a horse stable and a vehicle garage and access to them. The use by Mr. Paquette and Labrèche of part two with the remainder of the property as a lawn landscaped and maintained in the usual way is as well confirmed by Mr. Gooch. Indeed any changes in the use came when Mr. Cléroux fenced part two and attempted to establish his ownership of that parcel.

In line with the Home Bank of Canada, and the Bateman decisions, it is my view that the original east boundary of the lots fronting on Champlain Street, including the Lavigne property, was the old post and wire fence situated on the east limit of part three, as shown on both Mr. Gooch's plans. Since no original monumentation can be found, this old post and wire fence is the best evidence to be found as to the practical location of the line made at the time when the original monumentation were presumably in existence and well known.

With this finding then, the 15 X 80 foot strip of land that was transferred to the predecessors on the Lavigne's

title, extended to the east limit of part two on Mr. Gooch's plan. The 15 X 20 foot strip of land transferred to Mr. Lelonde by Mr. Parent is situated immediately north of the 15 X 80 foot piece of land transferred to the predecessors on title to Mr. Lavigne, and I find that all of the use made by the predecessors on title to the Lavigne property was such that their title was not extinguished by any use made by Mr. Parent on this part two, and therefore cannot confer on the defendants any proprietary interest in part two or the 15 X 20 foot parcel of land to which I have referred.

Accordingly, although the deed of land to the defendants indicates that there were transferred, among other lands, part two on Mr. Gooch's plan, it is my view that Mr. Ubald Parent did not own part two at the time he effected the transfer.

It is worth noting, at this time, that Mr. Parent, an eighty year old gentleman and a former secretary treasurer of the municipality in question, testified that although he signed the 1976 declaration asserting ownership of part two, that this was an error. He stated that he signed the subsequent declaration in 1980 to confirm this error. In his testimony at trial, he confirmed the evidence of Mr. Labrèche, and Mr. Paquette, as well as the evidence of others in relation to the existence of the bakery and the use made by the bakery of part two among other lands.

I must say that despite his eighty years, Mr. Parent appeared very lucid, very straight forward, and very candid in admitting the mistakes he had made. He no doubt felt remorseful for having made the mistakes that he made, and this showed when he was giving his testimony. No doubt the fact that he was a notary and was familiar with the preparation and registration of legal real estate documents added to his embarrassment. Nonetheless, when all of the evidence is analyzed, one has to conclude that the statements made by Mr. Parent in his 1976 declaration were erroneous as well as the inclusion of part two in the deed to the defendants.

For the reasons I have stated, therefore, an order will go declaring the plaintiffs owners of part two, plan 50R275 deposited in the Registry Office for the registry region of Russell, and that the plaintiffs are the owners of the brick shad as shown on the same plan, as well as the 15 X 20 foot parcel of land on which the brick shed stood until its recent demolition. The westerly limit of that 15 X 20 foot parcel of land coincides with the east limit of part three on plan 50R275.

The order also includes a mandatory direction to the defendants to remove the fence they have erected along the west limit of said part two, and this to be completed within 30 days of the issuance of this judgment. In the event that the defendants do not, for any reason, remove that fence within the time specified, the plaintiffs may thereafter, at their own expense, remove the fence in question and dispose of the materials as they see fit.

In so far as a motion which was returnable on the trial date, brought by the plaintiffs for contempt against the defendants in relation to an order of this Court, made July 12, 1984, I'm not prepared to make such finding even though the defendants were in the courtroom when the decision was pronounced and the order made, and the intention of the Court could not have been misconstrued. The order itself, on its face, may have been deficient and in this instance, I am prepared to give the defendants the benefit of the doubt that the words used in the written order may give rise to some possible confusion. The motion, therefore, will be dismissed.

One point arose in the evidence that no one anticipated. That is that Mr. Ubald Parent, during his tenure as owner of the defendants' lands, installed a drainage pipe along the east limit of part two. It was not determined exactly where these pipes are situated but it is obvious it could be and may vary well encroach on part two, as they were installed west of the shrub line

shown on Mr. Gooch's 1973 plan. The evidence is not clear but it appears to me reasonable to conclude that these pipes have been in place well over the necessary ten years to constitute a right of easement to the defendants for drainage purposes for the northern portion of their lands. Accordingly, an order will go confirming a drainage easement in favour of the defendants though the pipes presently installed at the east limit of part two. In all their respects, the counterclaims of the defendants are dismissed.

I indicated to both counsel, at the conclusion of their submissions, that although I would issue a written judgment in this matter and forward same to them, I would reserve my decision on the question of cost until they had an opportunity to make submissions to me following receipt of the decision in question. I also indicated to them, at the time, that such submissions should be made in my chambers following motions and that they should contact the court office to ascertain a mutually satisfactory date for their submissions.

DELIVERED UNDER MY HAND THIS 23RD DAY OF OCTOBER, 1984, A.D.

Robert J. Cusson
County Court Judge