FENCES AS EVIDENCE

Continuing Education Program
Association of Ontario Land Surveyors

INDEX

THE VIEW OF THE FENCE

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WHITBY

THE VIEW OF THE FENCE

Bryan T. Davies

When this seminar was envisioned this paper was to be given by a lawyer familiar with the role of the surveyor. I suppose some would say that that may be a mutually exclusive situation. In any event, today you have a surveyor with very little legal experience but one who has seen many fences, of many different types, fences that have certainly had a great effect on the role of the land surveyor in Ontario.

Fences have played a part in history ever since man learned to protect himself from other men and wild animals when he ventured from the cave.

Fences have continued to be used for protection from intruders and intruding eyes, and for penning in of cattle or horses.

The word fence is derived from the Latin "fendere", meaning to ward off, suggesting containment of some kind, although the word "fence" undoubtedly is direct from the Middle English word "fens", an aphetic or shortened form of "defens".

Fence is defined in the Oxford English Dictionary as:

> "An enclosure or barrier along the boundary of any place which it is desired to defend from intruders"

While the Columbia Encyclopaedia is a little more modern, saying:

> "A humanly erected barrier between two divisions of land used to mark a legal or other boundary..."

Fences have also shown up in print other than in the rather dry prose of the dictionary. Robert Frost, who lived from 1874 to 1963, is well-remembered as the author of the expression "Good fences make good neighbours". I wonder how many know that a Canadian, Thomas McCullough, uttered an almost identical expression "Good fences make good friends", in 1822.(1)

In "Tom Sawyer", Mark Twain used a fence to demonstrate the power of suggestion and G.K. Chesterton voiced a sensible admonition when he wrote "Don't ever take a fence down until you know the reason it was put up". We shall see how painful this lesson can be later on.

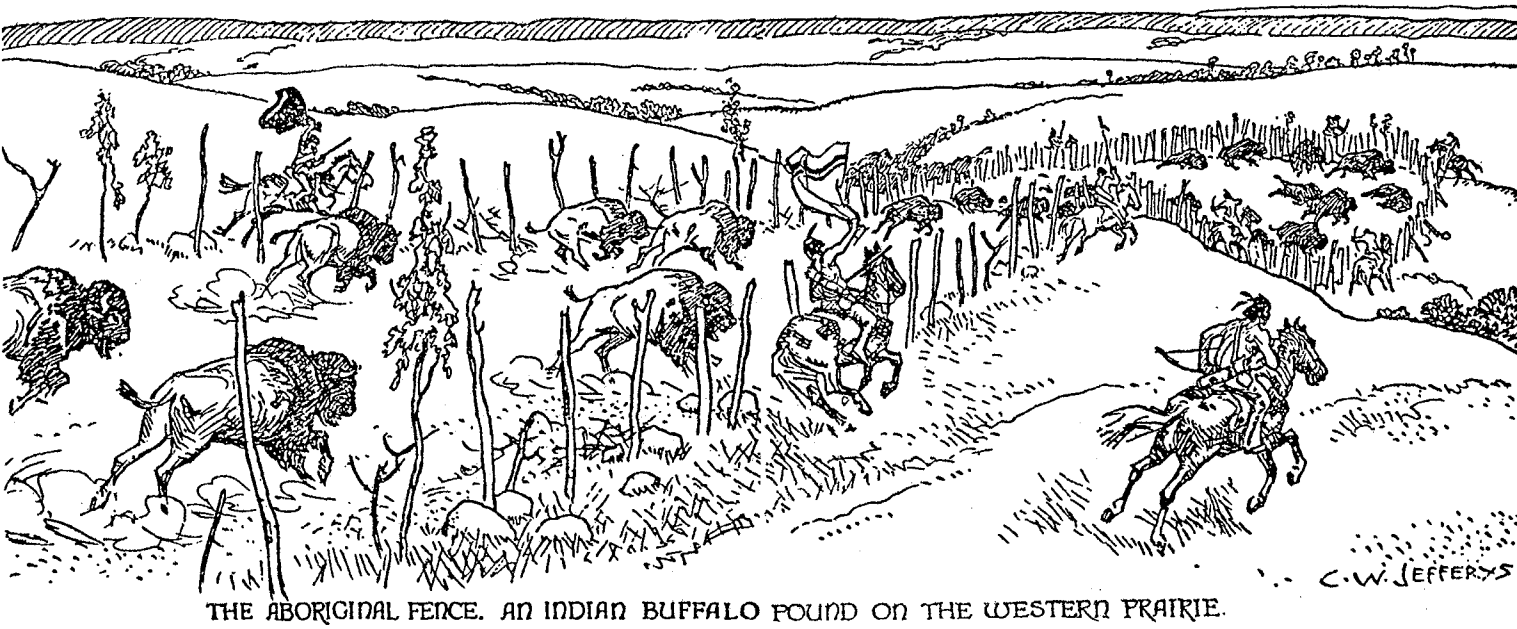
I believe, however, that my favourite "fence" quotation is by Jean Jacques Rousseau who said "The first man who, having fenced in a piece of land, said 'this is mine', and found people naive enough to believe him, that man was the true founder of civil society".(2)

I think we can safely say that that first man was also the instigator of the civil liability suit.

(1) Canadian Quotations

(2) Bartlett's Familiar Quotations

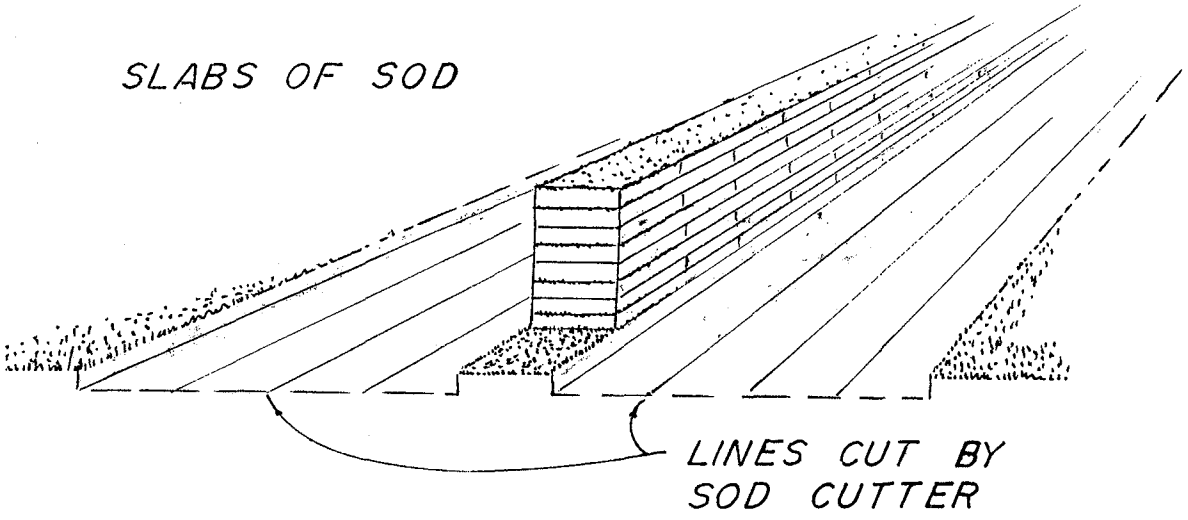
The purpose of this paper is to present to a limited extent, the fence as it is seen as evidence in a lawsuit but before we get to evidence and some case law, I would like to explore the development of the fence in Canada, its construction and use.



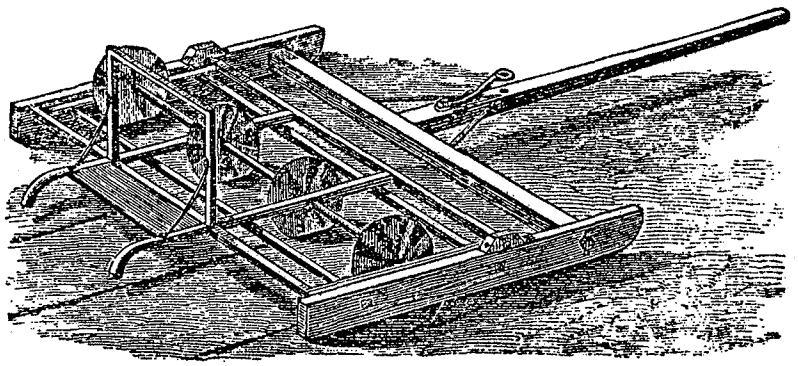
THE ABORIGINAL FENCE. AN INDIAN BUFFALO POUND ON THE WESTERN PRAIRIE.

The earliest form of fencing used in North America were the lines of stakes and brush used to funnel the buffalo into a bottle-neck known as a pound, where they were easily brought down by bow and arrow. The great Cree Chieftain, Poundmaker, so famous in our western history, was named for his craftsmanship in making buffalo "pounds". Figures 1a and 1b show the method of herding very well.

2 A



2 B



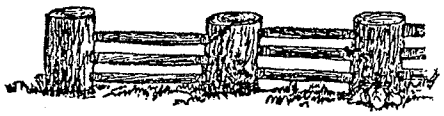
PRAIRIE SOD CUTTER

Obviously the Indians used materials close at hand for their construction. In Ontario, which was covered by bush, materials were also easy to come by but on the prairie it was a different story. Sod was the only material available and it was used to build the first houses and to build fences. Figure 2a shows the method of laying the sod while figure 2b shows a sod cutter which sliced into the soil to a depth of about 4 inches, the sods being lifted and laid much like brick or block walls. A plough would generally be used to pile earth against the base of the wall on both sides. Sometimes stakes with barbed wire would be placed on top of the sod fence.

3A

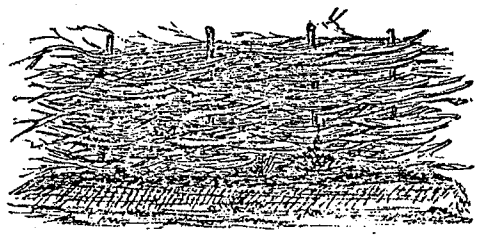
STUMP FENCE

3B



LOG POST FENCE

3C



WICKER FENCE

3D

BRUSH FENCE

3E

RAIL & STONE FENCE

Ontario is probably the most fenced province in Canada with many fields resembling the postage stamp fields of England. When the land was cleared the first fences of brush (Figures 3c and 3d) were erected to attempt to encircle the settler's clearing and keep his livestock in. This, in fact, did not work too well unless the brush fences were "forty feet wide and damned high".(3)

STUMP FENCES

The first fences that the settlers built along property lines were stump fences made, of course, from the stumps pulled from the ground. Figure 4 shows stump fences piled along the road allowance while Figure 5 shows how well preserved a stump fence can be perhaps 150 years after being hauled from the earth by a team of oxen.

(3) Fences, Symons, P. xii

STUMP FENCE

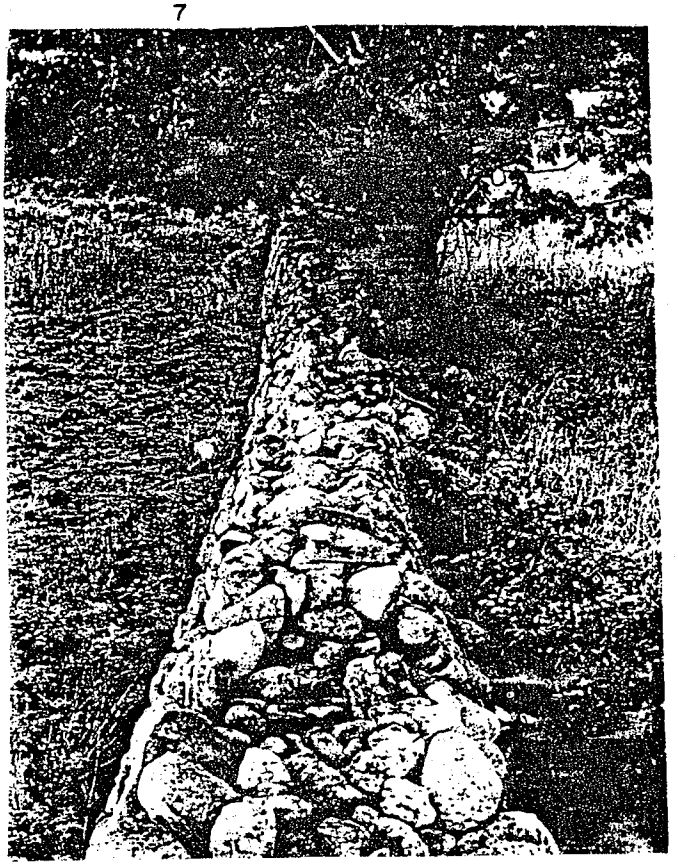
Figure 5 shows how well preserved a stump fence can be perhaps 150 years after being hauled from the earth by a team of oxen.

DRY STONE FENCES

Stone walls were seldom built in such a neat fashion along lot lines, although the two walls in Figure 6a and 6b show the kind of dry stone wall that was occasionally constructed at a great cost for the time.

At this time, I would like to point out the beautiful line drawings by C.W. Jeffreys and found in Harry Symons book "Fences".(4)

7

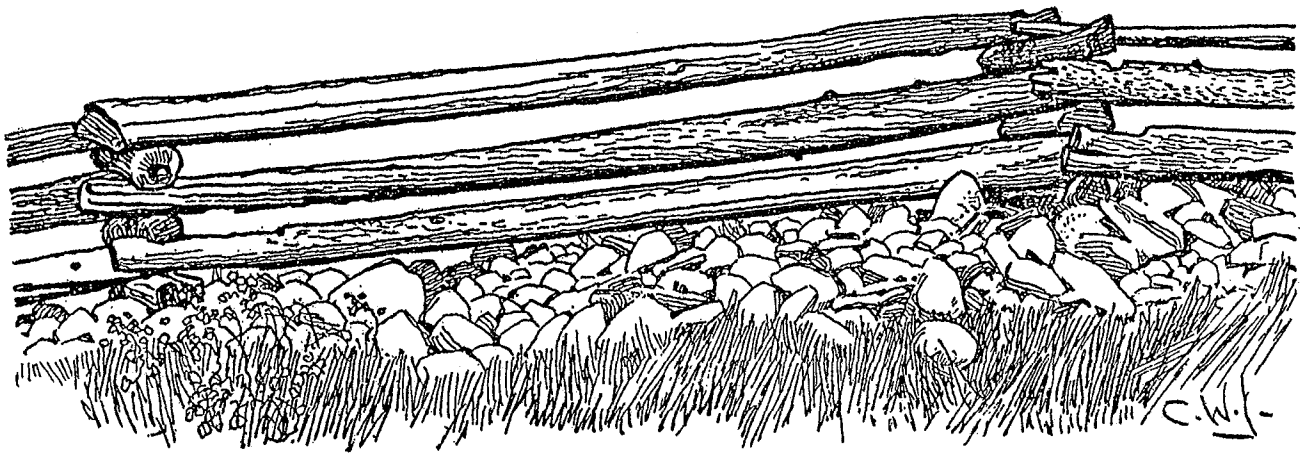


DRY STONE FENCE

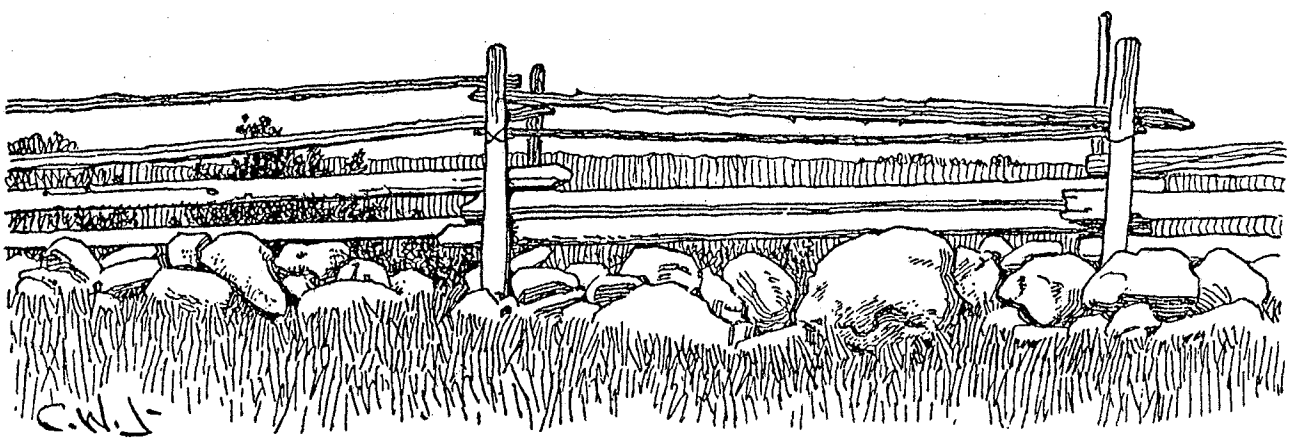
Figure 7 is much more representative of the stone fences found in the stonier parts of Ontario. The amount of work to dig up, transport and pile the stones in a stone wall 100 feet long must have been prodigious.

(4) Fences, Symons, Illustrations by C.W. Jeffreys

8 A

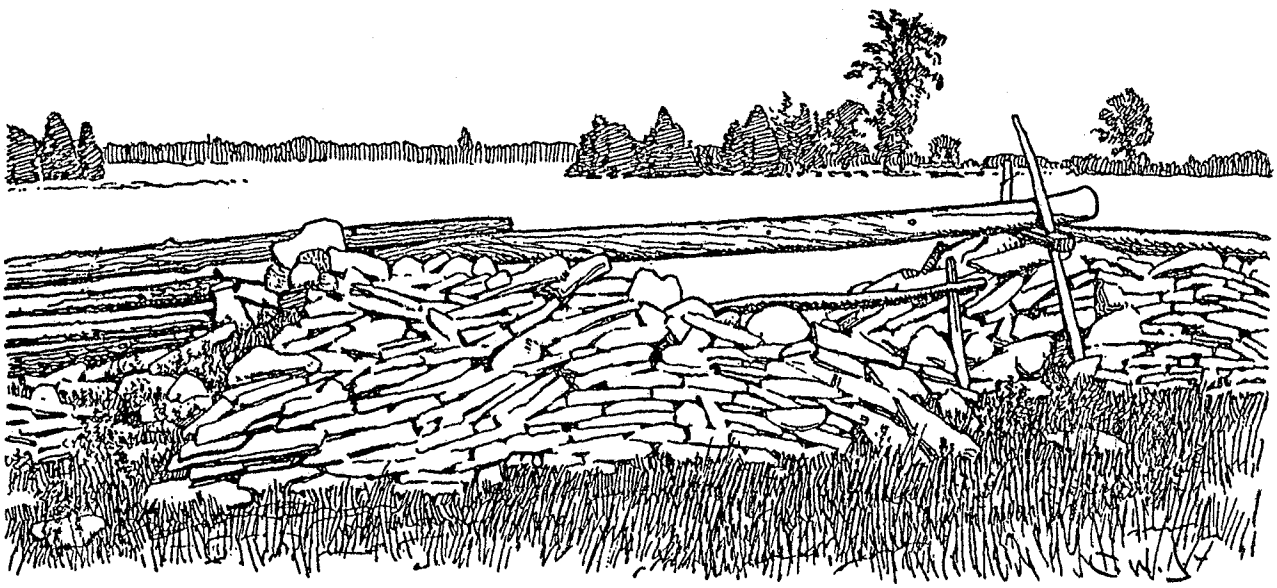


8 B



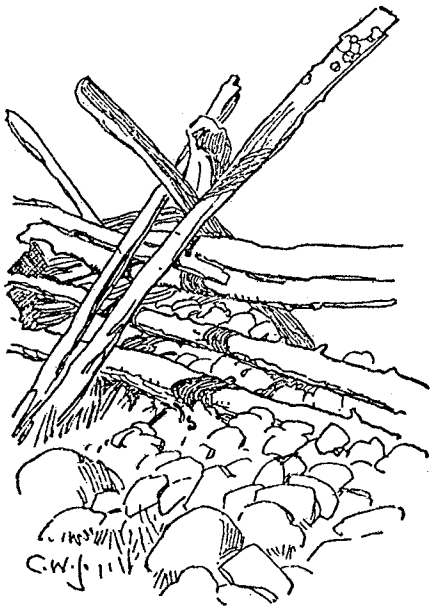
LOG AND STONE FENCES

9



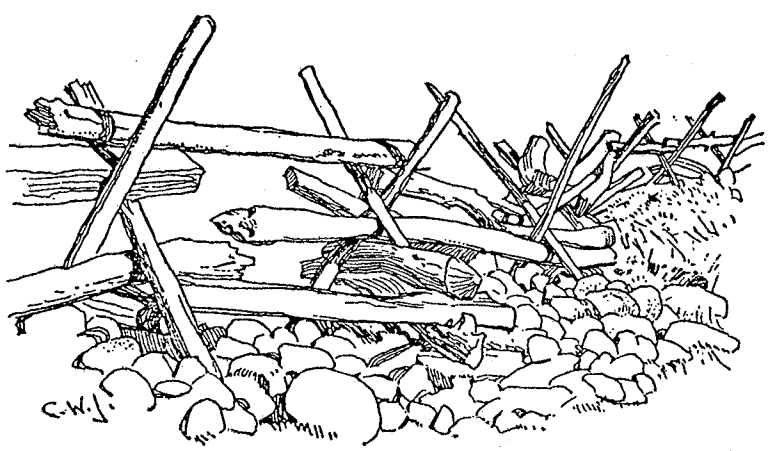
LOG AND STONE FENCE

10 A



RAIL AND STONE FENCE

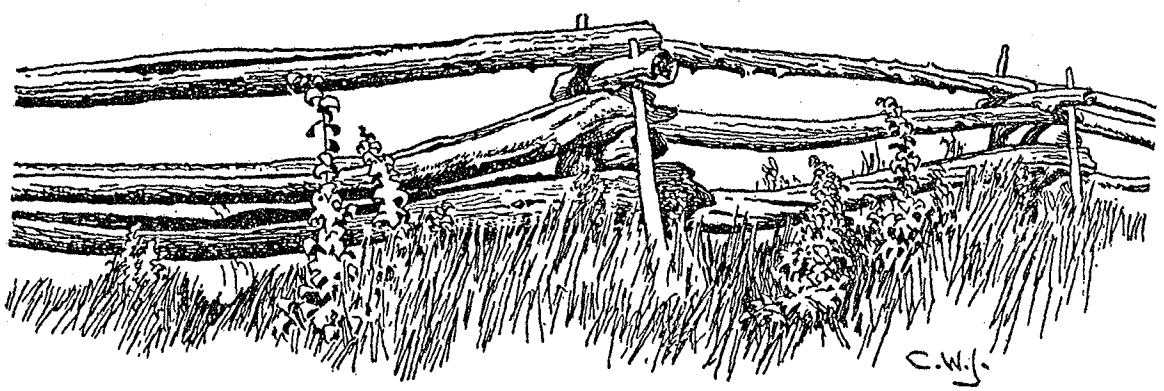
10 B



RAIL AND STONE FENCE

II A

II B

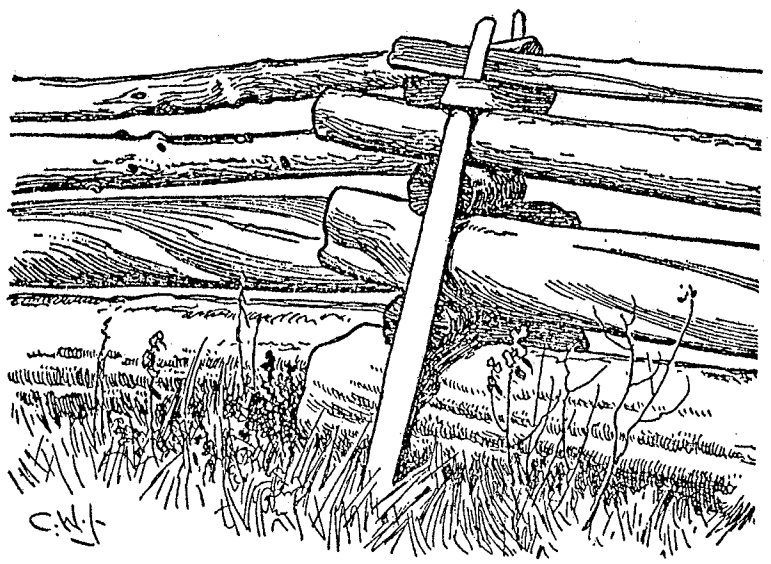


LOG FENCES

12 A

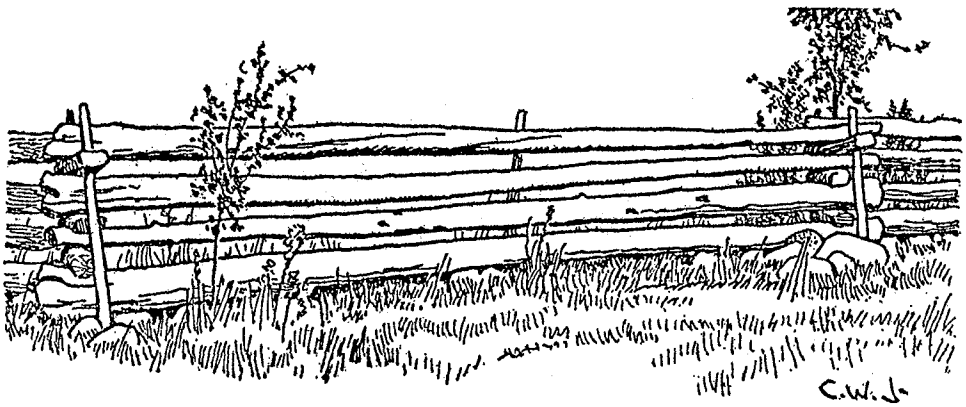
LOG FENCE

12 B

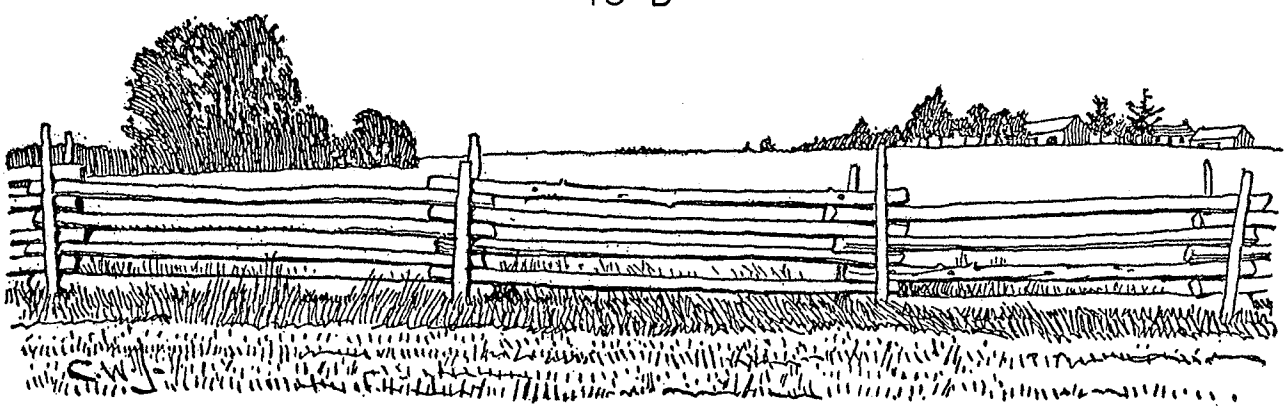


SLEEPER DETAIL

13 A

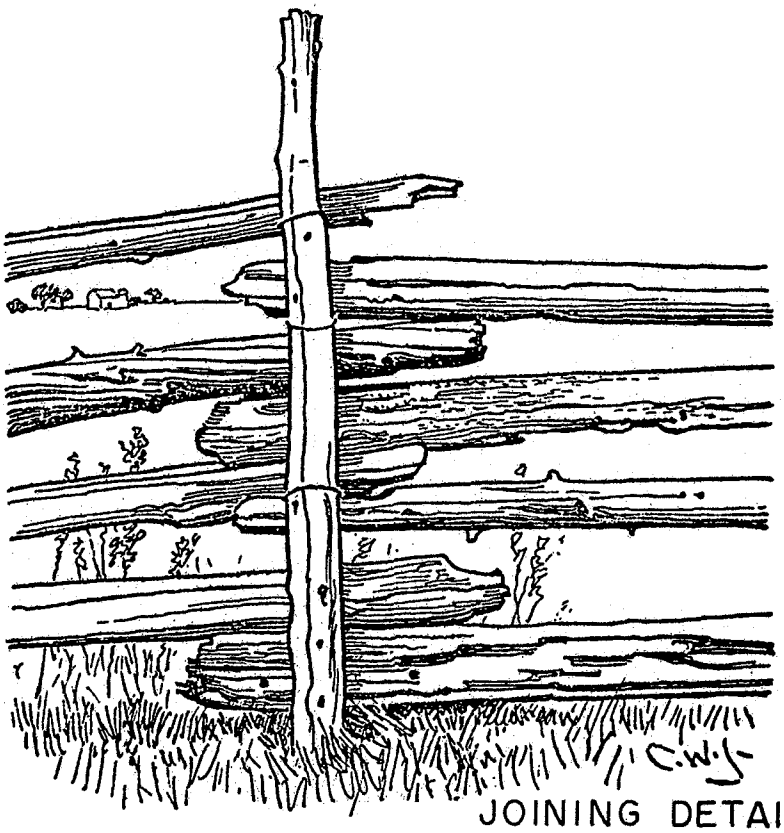


13 B



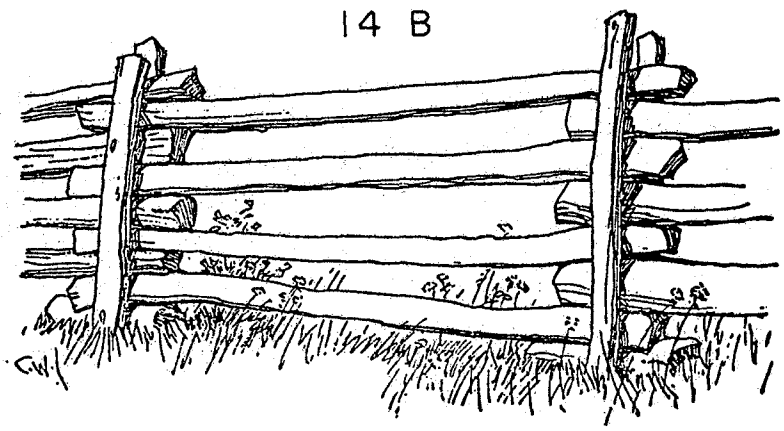
LOG FENCES

14 A



JOINING DETAIL

14 B



LOG FENCE

Fences made of logs, 50 to 60 feet long, peeled of bark and set on sleepers at their ends and sometimes supported on stone walls, were the first fences that were placed along what the owners knew, thought or agreed to be their boundary lines.

The earliest fences were not necessarily too close to the line, as clearing and cultivating were the primary concern as well as the enclosing of stock.

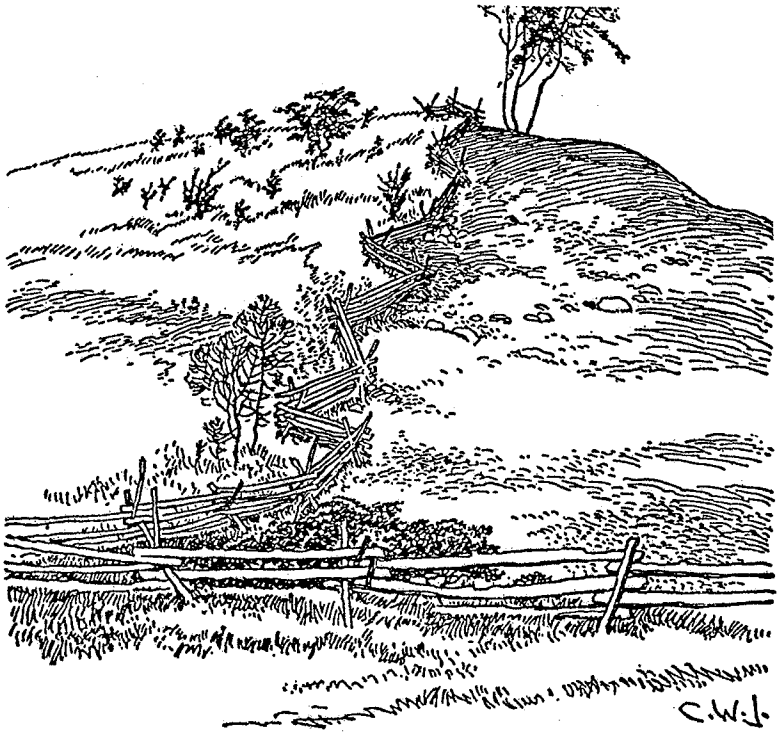
As the land and the country developed, line fences, barriers and boundaries of all kinds assumed greater and greater importance and the boundary lines needed to be more accurately established.

An extract of a letter from David Gibson, Deputy Surveyor, dated 1827,(5) written to a friend in Scotland illustrated how the settlers had their side lines run:

> "... a surveyor of highways has seven shillings and sixpence per day from the time he leaves home to the time he returns, and has always to have a surveyor of land with him. He can call whom he pleases, so I can call myself.... and when surveying for private people I have fifteen shillings per day and five shillings for every 50 chains I run along the side lines of their lot.... I can run two lines (200 chains) per day with freedom ...."

(5) Pioneering in North York, Hart, P. 11

15



SNAKE RAIL FENCES

After the full-log types, one of the earliest fences in Ontario was the snake-rail fence built of split rails, usually of white cedar. In rolling and broken country, this type of fence was a prime favourite. Figure 15 shows a typical snake fence wriggling over the hill.

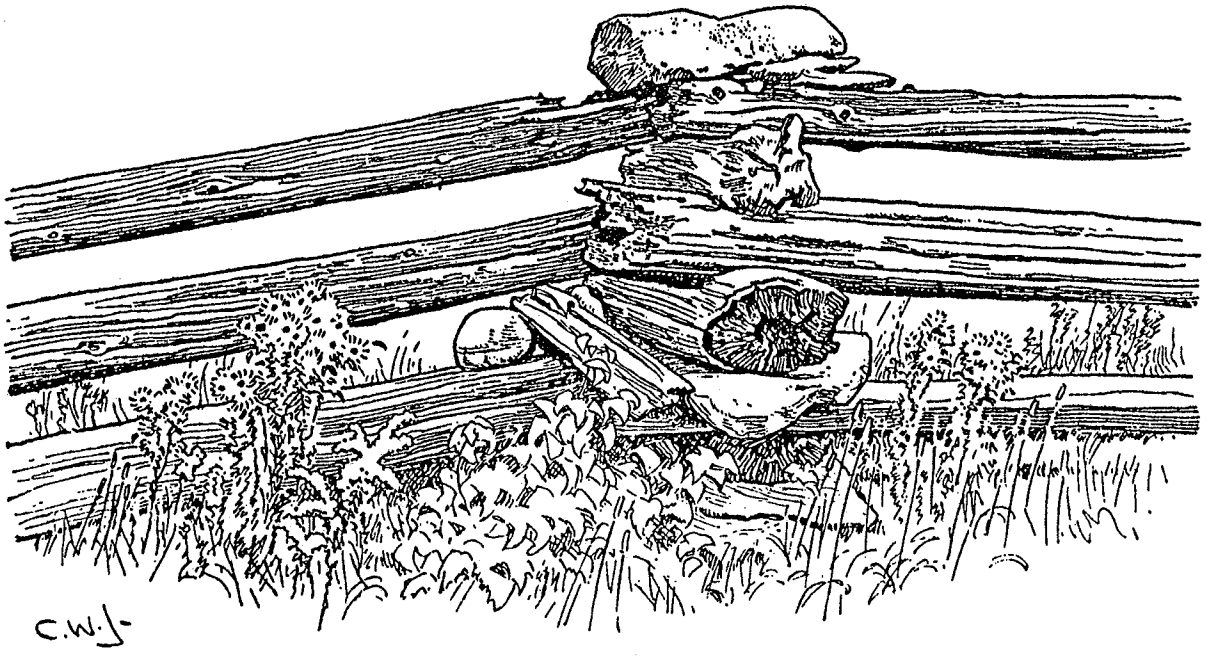
A well built snake-rail fence can easily last 100 years as evidenced by the well-preserved specimen shown in Figure 16.

16

SNAKE - RAIL FENCE

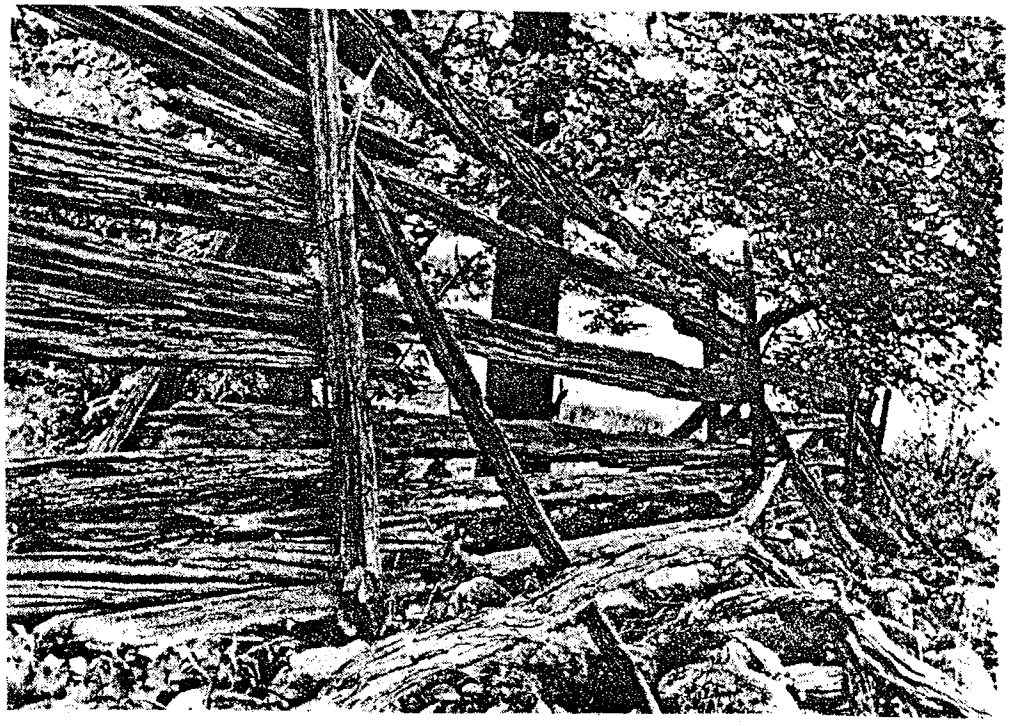
The major problem with the snake-rail fence is that it took up a lot of space that could be properly used for cultivation, weeds grew in the corners, and the shaded bottom logs quickly rotted. In addition, if the joints are not well tied down, the fence falls prey to the pushing of cattle.

17



RAIL FENCE DETAIL

18



SPLIT RAIL FENCE

The natural evolution of the snake-rail fence was to the straight split-rail fence of which Figure 18 is a good example. This type of fence became the standardized line fence until the development of the wire fence, and particularly the barbed wire fence.

19 A

1853
MERIWETHER'S
COLD-WEATHER
WIRE

19 C

1890

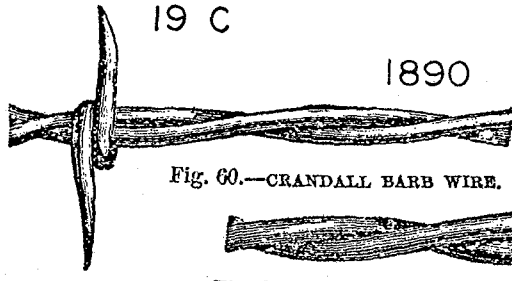


Fig. 60.—CRANDALL BARB WIRE.

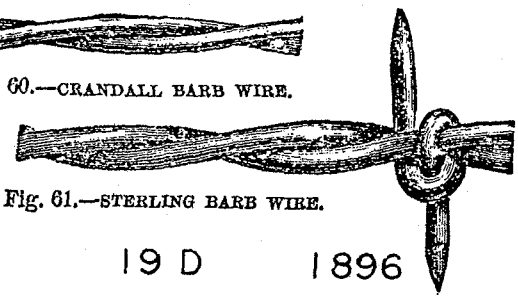
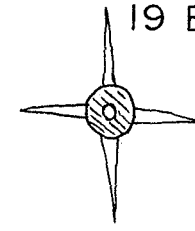


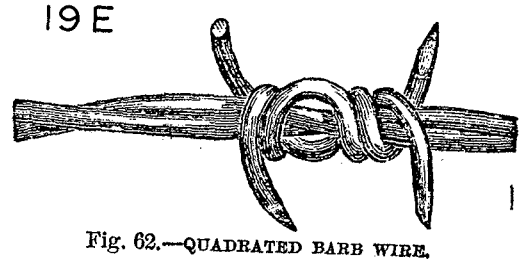
Fig. 61.—STERLING BARB WIRE.

19 D 1896

19 B



19 E



1876

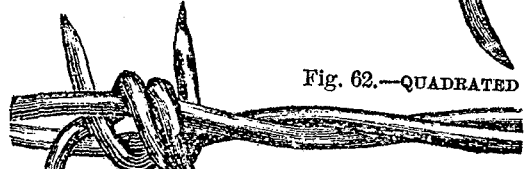
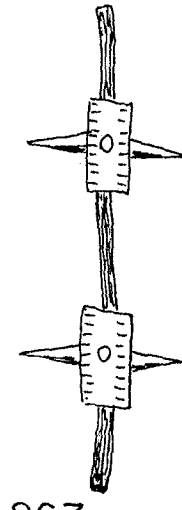


Fig. 62.—QUADRATED BARB WIRE.

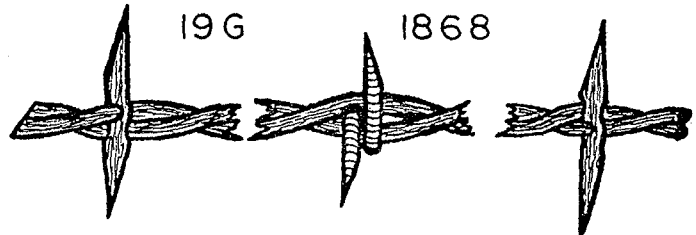
Fig. 63.—IOWA FOUR-POINTED BARB WIRE.

19 F 1876



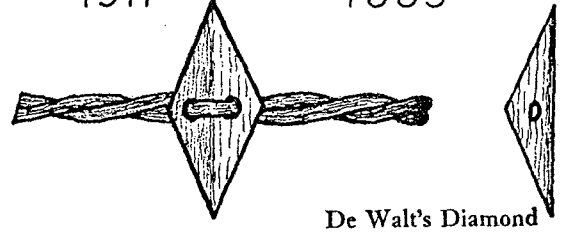
1867
SMITH'S
SPOOL AND
SPURS

19G 1868



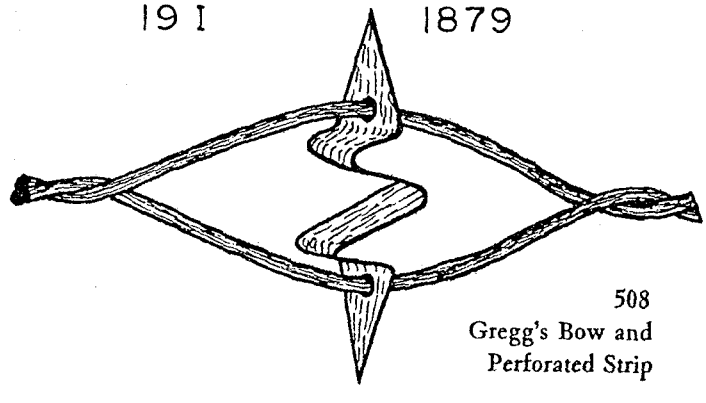
Kelly's Thorny Fence, Mixed-barb Variation 507

19H 1885



De Walt's Diamond 509

19 I 1879



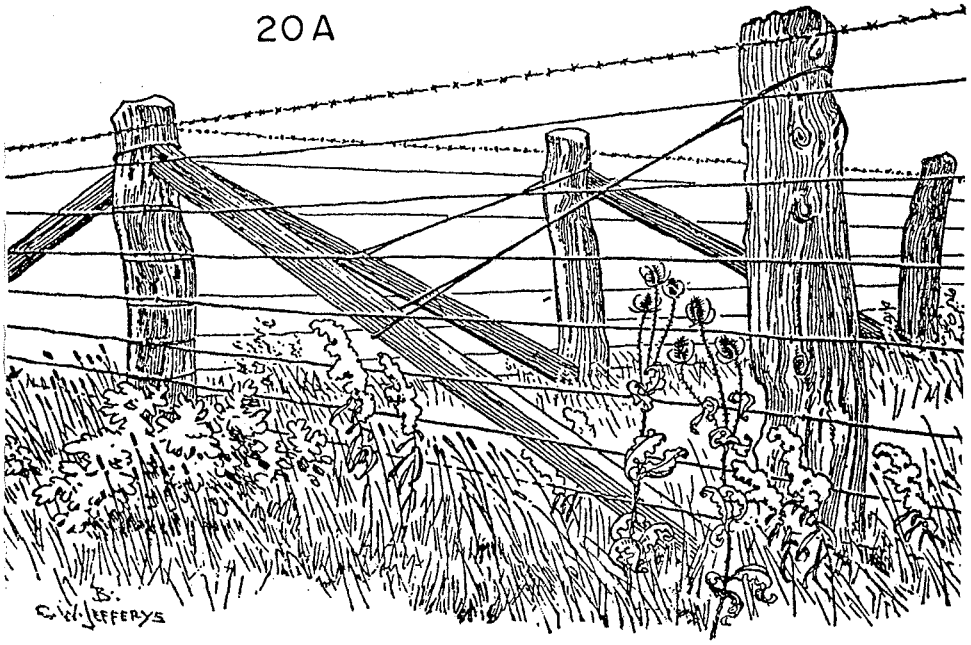
508
Gregg's Bow and
Perforated Strip

It is said[6] that 3 inventions profoundly influenced the development of the west; the revolver, the repeating rifle and the windmill. As history has unrolled itself, it has become obvious that a fourth could be added - barbed wire. In the mid-1850's the conflict between the homesteader and the rancher caught the buffalo, mustang, longhorn and Indian in a "wiry" entanglement that brought them close to extinction. Bloody clashes took place over fences and the supply of wire was an immense source of profit to eastern inventors. Hundreds of patents were issued from 1853 when the first practical cold weather barbless wire was invented and 1867, when the first barbed wire was patented to at least as modern a time as 1959 when a combination barbed-electric wire was invented. Figures 19a and 19b show these earliest devices and a cross-section of some two strand fence is shown.

Barbed wire came to Ontario in the late 1860's and by 1873 wire fence seemed here to stay.

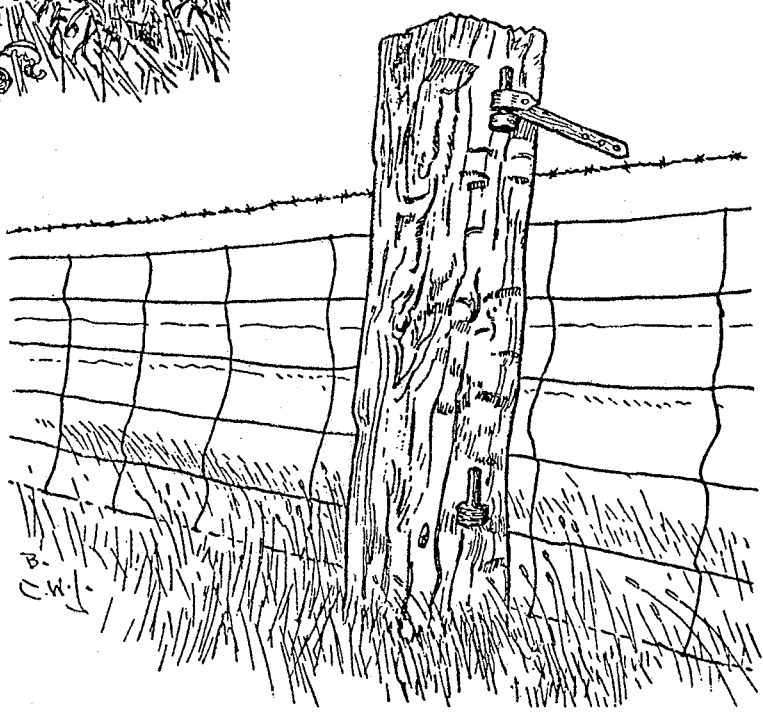
(6) Barbs, Prongs, etc., Clifton, P. 3

20A



EARLY WIRE FENCE

20 B

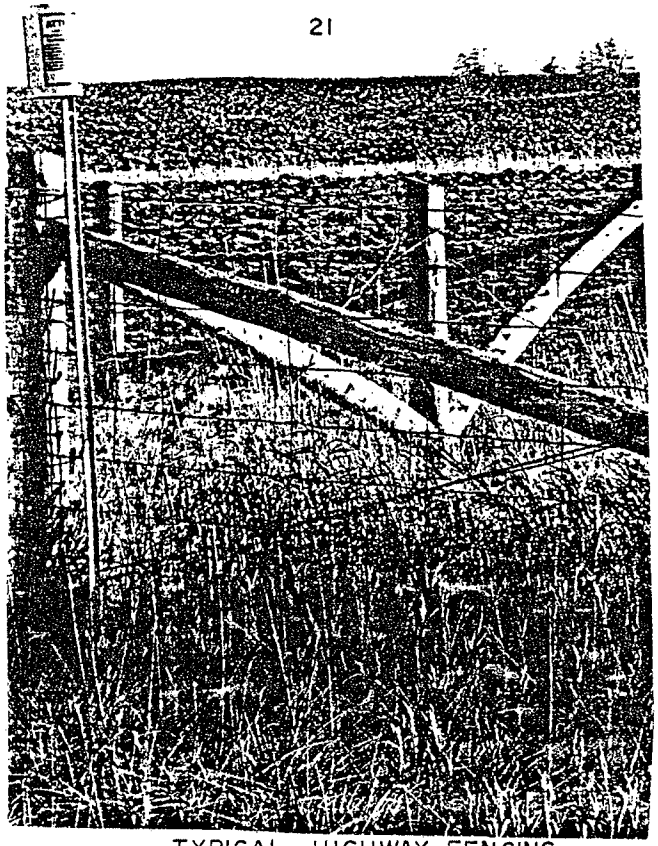


MODERN WIRE FENCE

Various combinations of log stone and barbed wire were tried and the wire fence has now evolved to the point where Figures 20a and 20b depict the majority of farm fencing today.

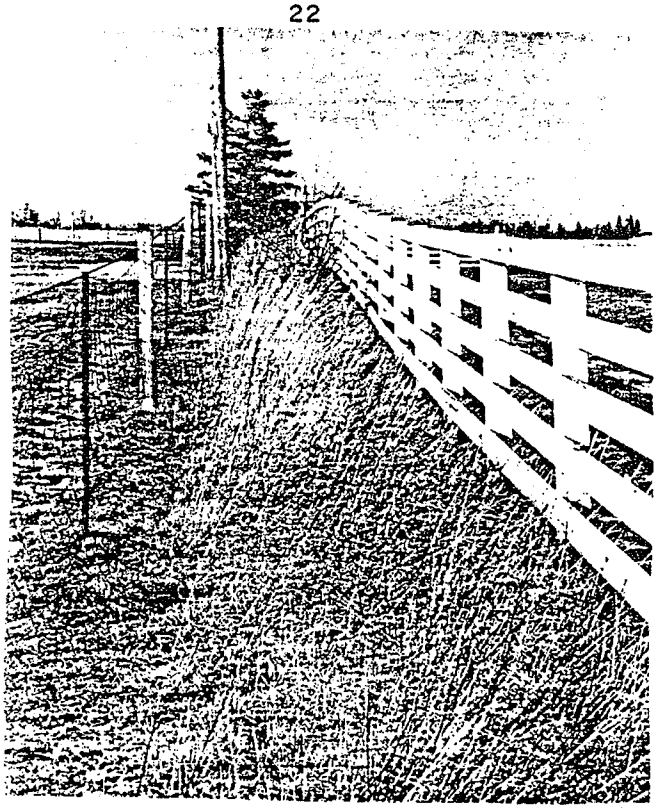
The woven wire provides an effective barrier while the barbed wire on top will discourage cattle from rubbing on it and people from climbing it (except surveyors, that is. You can tell who they are by the patches in their jeans).

21



TYPICAL HIGHWAY FENCING

22

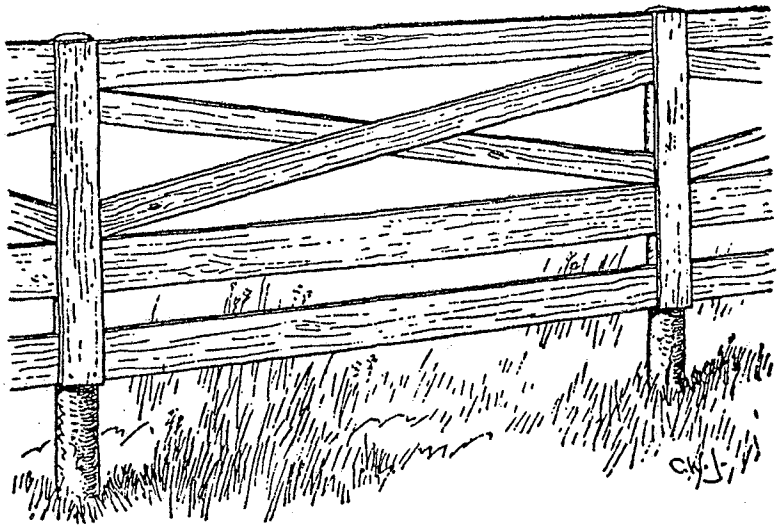


WOVEN-WIRE BOUNDARY FENCE WITH ORNAMENTAL BOARD FENCE ENCLOSING A PADDOCK

Figure 21 shows woven wire fencing on wood posts marking the highway limits while the familiar "bell" marker provides opportunities for lawsuits.

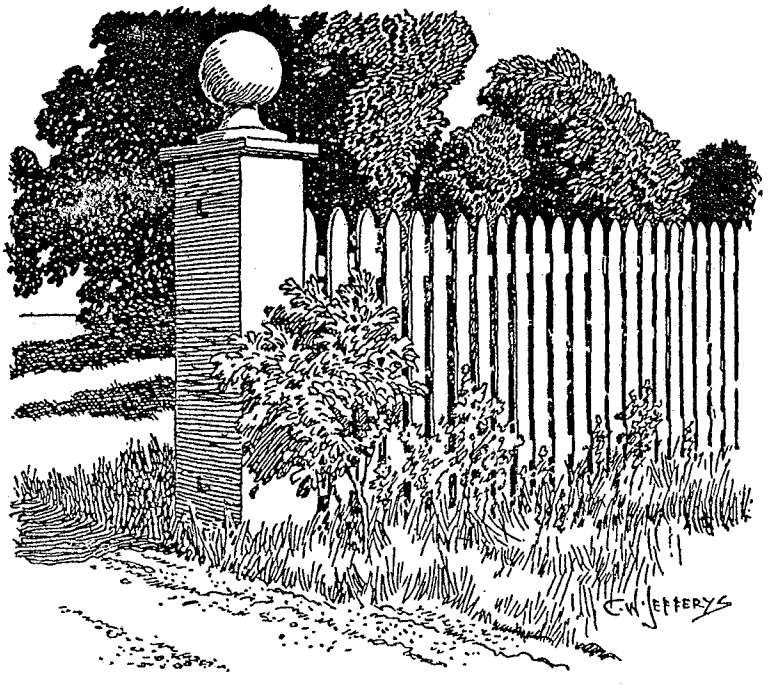
Figure 22 shows the usual post and wire fence along what might be a property boundary with an ornamental board fence adjacent to the field. Double fencing is sometimes most confusing when the type of fence is similar, but these should pose no problem in identification.

23 A



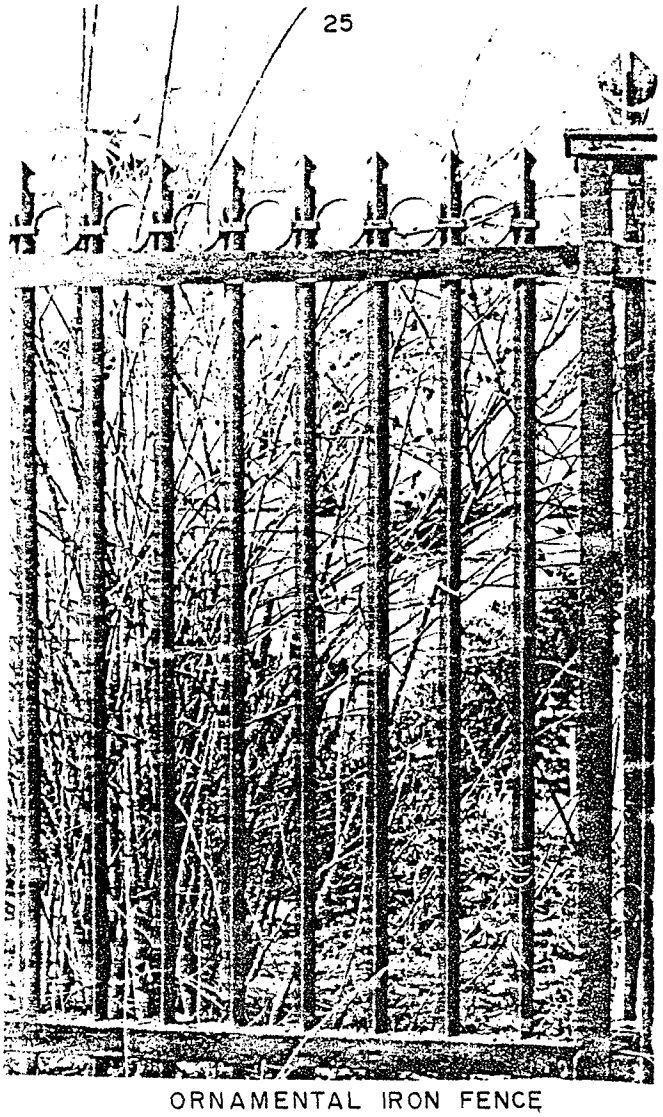
BOARD FENCE BUILT IN 1866

23 B



VICTORIAN PICKET FENCE

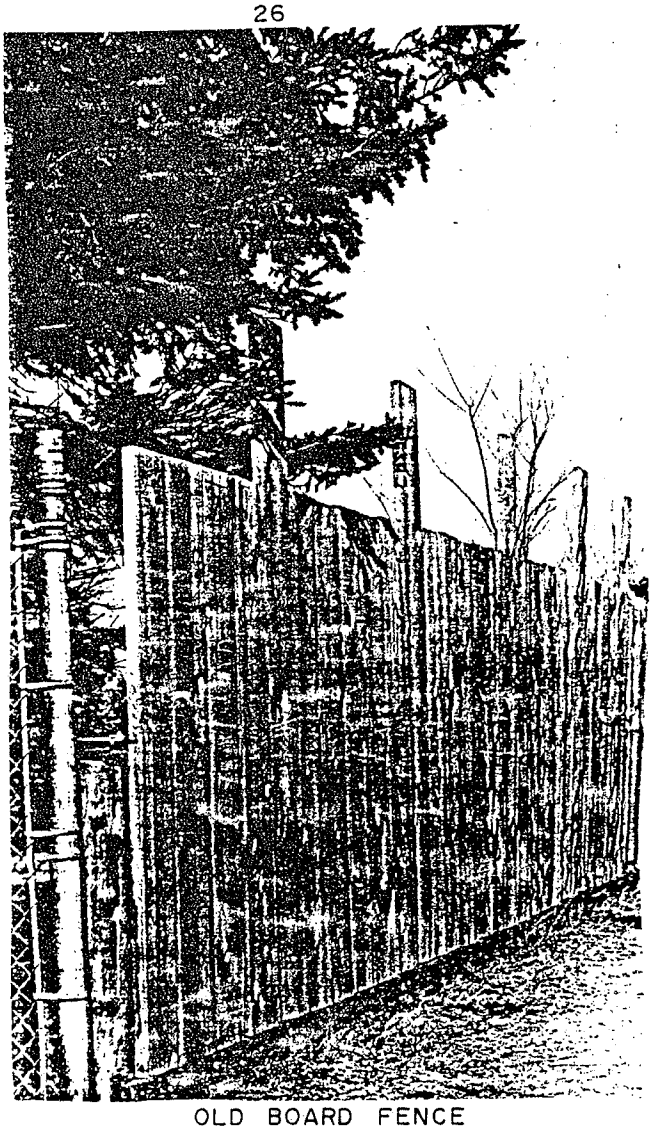
Figures 23a and 23b show fine examples of board and picket fences from the Victorian era while Figure 24 is an example of very elaborate (and expensive) post and board fence, probably built during the early part of this century.



ORNAMENTAL IRON FENCE

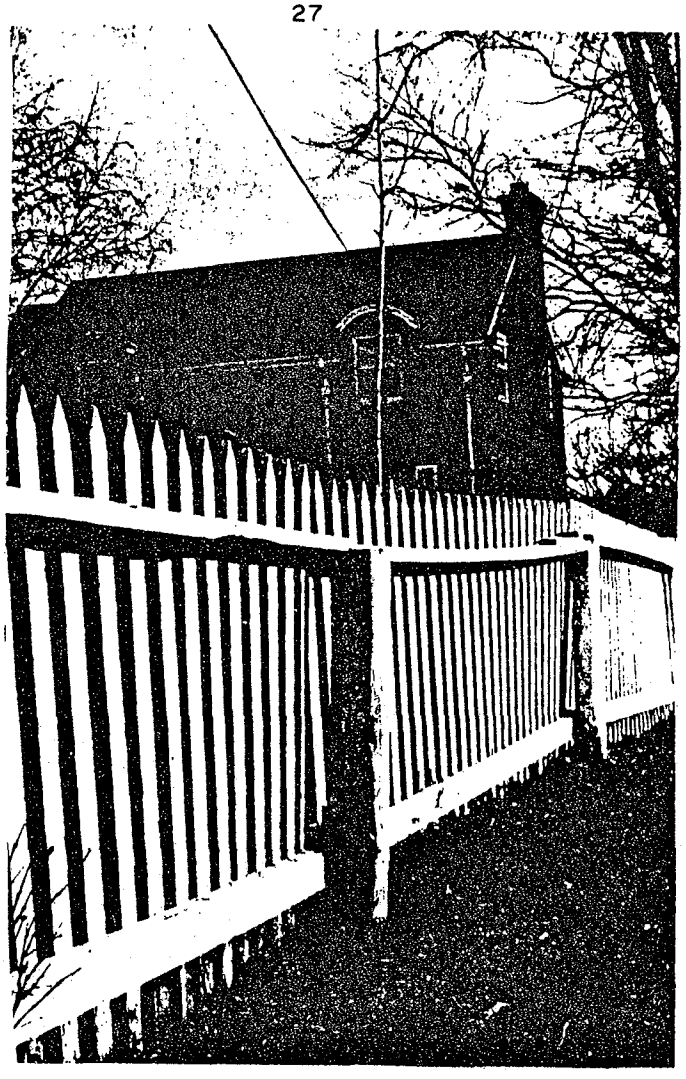
Figure 25 shows the kind of ornamental iron fence, such as is built around Osgoode Hall in Toronto, but was far too expensive for the ordinary purse.

26



OLD BOARD FENCE

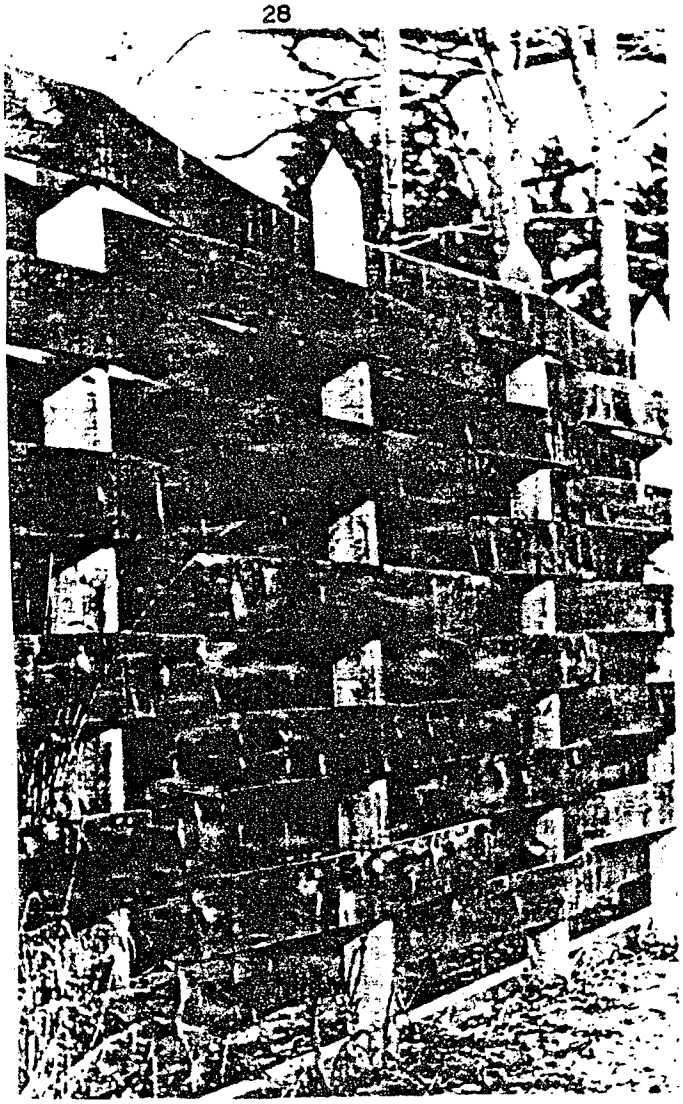
27



WOOD POST FENCE WITH PICKETS

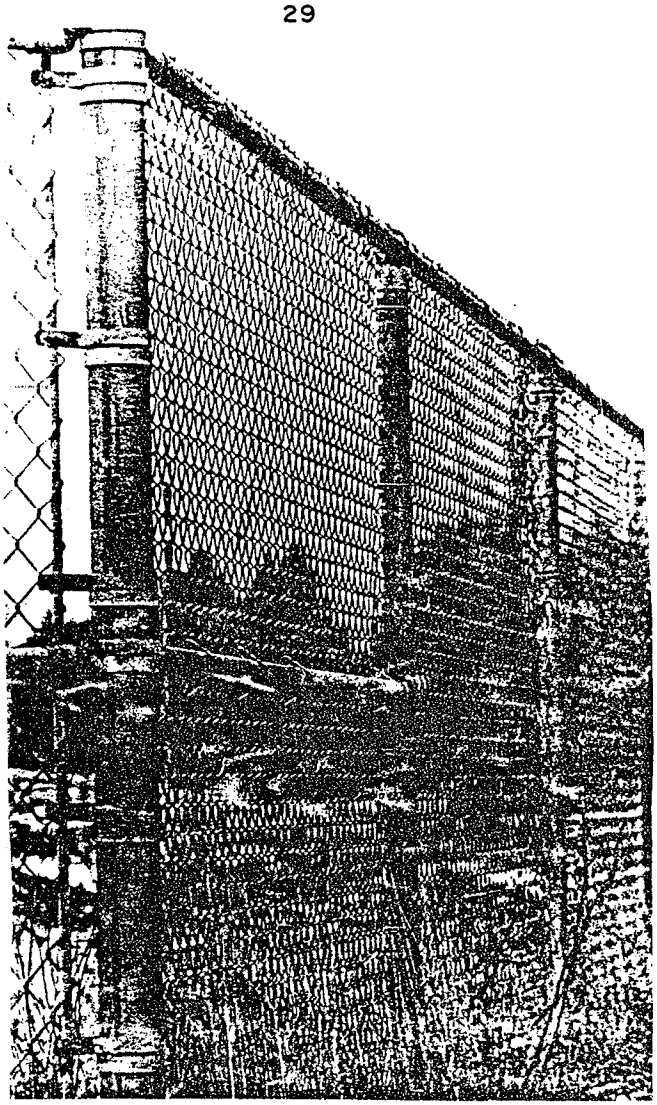
Figure 26 is representative of the Board fences built along property lines in the cities and towns of Ontario 60 years ago, and which still remain, in good condition, in many of these towns, while Figure 27 is typical of the picket fence built between residential properties in more recent times, although the ubiquitous chain-link fence has become the most popular today.

28



"BASKET-WEAVE" SUBDIVISION FENCE

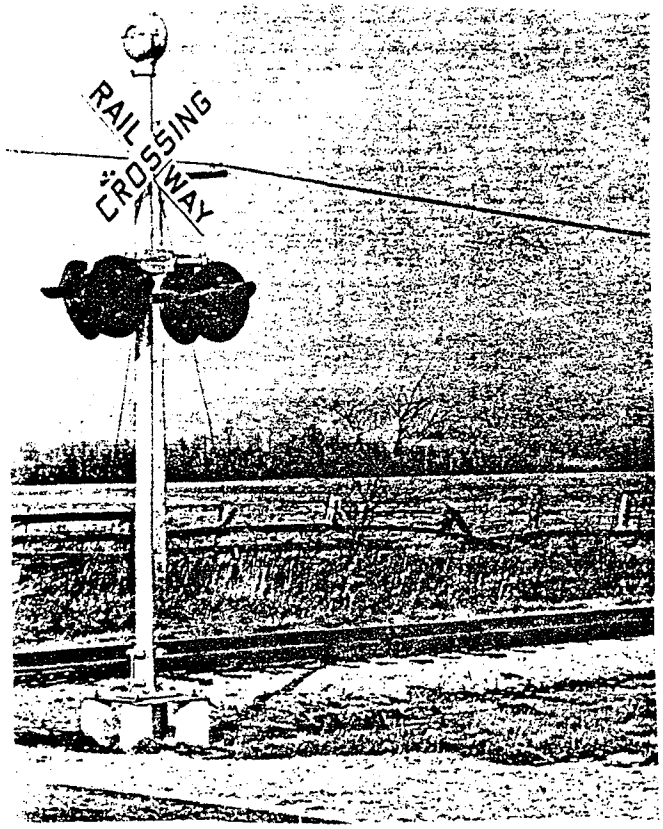
29



"CHAIN-LINK" FENCE

The fences shown in Figures 28 & 29 are typical of the type of fencing that dramatically increase the cost of surveys. One is solid, high and probably conceals a vicious dog, while the chain link fence with its concreted corner posts has probably destroyed any credibility that the remaining monuments might have.

30



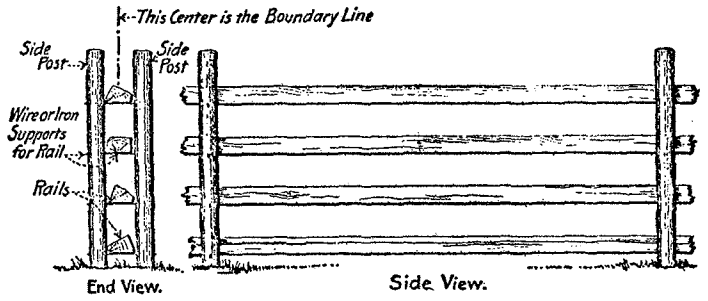
RAILWAY RIGHT-OF-WAY FENCE

Figure 30 shows a railway line, the company to remain anonymous, with a rather dilapidated fence on the far side. Federally and Provincially chartered railways are obligated by the Canada Railway Act and the Railway Act (Ontario) respectively, to erect and maintain a fence on the railway. I am sure we have all had occasion to ponder the attitude of the railway companies regarding fences when the time comes to establish the mutual boundaries.

Both Railway Acts use the expression "On the Railway"(7) and my first impression is that this means not outside the railway limit. The problem, of course, is one of definition of the limit and that could be the subject of a paper all on its own.

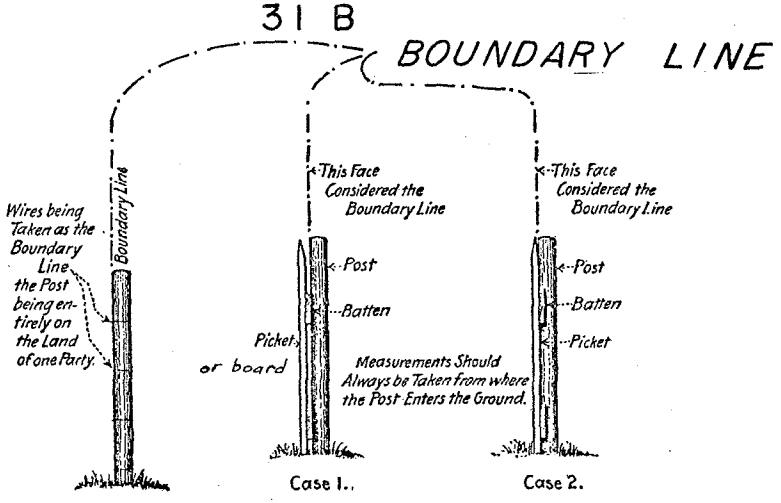
(7) Canada Railway Act, R.S.C. 1970, Ch. R-2, Sec. 214
Railway Act, R.S.O. 1950, Ch. 331, Sec. 114

31 A



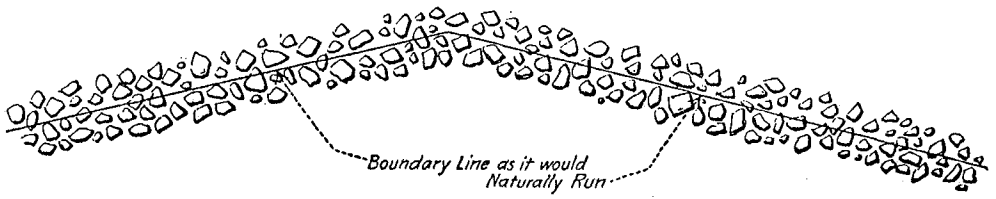
RAIL OR LOG FENCES

31 B



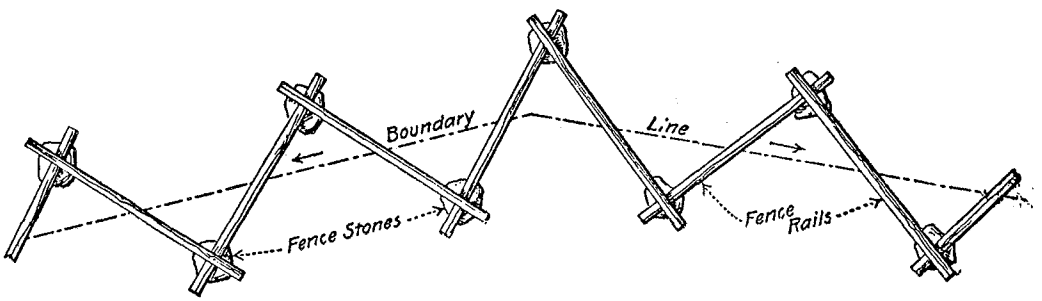
FENCES WITH WIRE OR PICKETS ON ONE SIDE

32 A



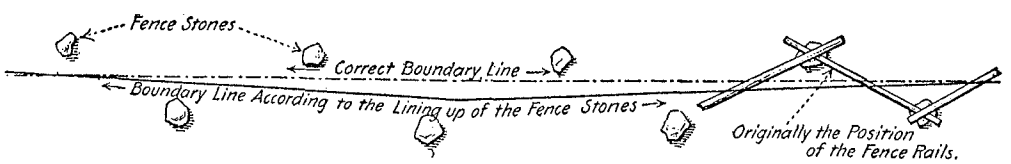
BOUNDARY THROUGH A STONE WALL

32 B



BOUNDARY LINE THROUGH A SNAKE - RAIL FENCE

32 C



RECONSTRUCTING A FENCE, IF ONLY
EVIDENCE OF THE JOGS, IS AVAILABLE

Now that we have hopefully learned a little more about fences and their construction, we can review the rules of evidence before proceeding to examine some cases.

As I am sure you all remember from your survey law courses that "evidence" can be defined as "all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation".(8)

Now in court, there are some 15 types of evidence considered and it must be pointed out that evidence is not proof, it is the consideration of the evidence and the conclusions that may be drawn that may produce the proof. Some types of evidence are:

- oral
- documentary
- real
- extrinsic
- indirect or circumstantial
- parol
- primary

In a civil action, the burden of proof is on the plaintiff and the decision is based on a preponderance of evidence and not, as in a criminal proceeding, beyond a reasonable doubt. This is virtually counting up the pieces of evidence, dividing them pro and con, and the bigger number wins.

(8) Osborne's Concise Law Dictionary, Burke, P. 137

While the above is technically correct it should be pointed out that "weight" of evidence is also considered and also that because of the enormous amounts of money involved in recent lawsuits, civil actions are moving away from the "preponderance of evidence" concept towards the "reasonable doubt" aspect of the criminal court room.

The admission of evidence is allowed in court by either the "Canada Evidence Act" (R.S., c307) or "The Evidence Act (Ontario)" (R.S.O.1970 c151), depending on the jurisdiction. A surveyor will hopefully only be in court as an expert witness and as such will be allowed to give "opinion evidence" which is quite different from any other type of witness. You will be allowed far more latitude and your knowledge of the value of fences may be admitted under the rules.

Of course when you do give opinion evidence you must remember the duties of the expert witness which can be summarized as follows:

A) All questions put to him should be answered clearly and intelligently.
B) He should be absolutely unbiased and honest.
C) He should have real expert knowledge of his particular subject.
D) He should be prepared to discuss the opinions of other authorities and state why he agrees or disagrees with them.
E) His testimony should be limited to things and opinions that he can defend before experts in his particular field.

Surveys in Ontario are made according to the Surveys Act (R.S.O. 1970, c453) and the attendant regulations.

Section 9 of the Surveys Act respecting original surveys and section 54 respecting plans of subdivision both state that lines, boundaries or corners established in the original or first survey are true and unalterable and are defined by the original posts or blazed trees, whether or not they are the same distances between posts as shown in the original plan and field notes, the subdivision plan or in any deed.

Under parts II to VII of the Act, instructions are given as to how a surveyor shall re-establish a lost corner or boundary. In the various types of townships the first consideration is the obtaining of the best evidence available respecting the lost point before proceeding to any theoretical reconstruction.

This same method of procedure for plans of subdivision is outlined under Section 55 of the Act.

This, of course, means that the position of original posts governs and our job is to establish, using the best evidence, where this was. This very often means having to prove that the fence is located today in the position of the original line.

The laws of evidence that we as surveyors would use to arrive at our conclusions are as follows:(9)

1 NATURAL BOUNDARIES - about which one is least likely to make a mistake;

(9) "What is a Survey?", Setterington, 1981

2 ORIGINAL MONUMENTS - that is, monuments that are undisturbed and can be proven to be in their original position;

3 EVIDENCE OF POSSESSION AND LOCATION OF THE MONUMENTS - that is, possession that can reasonably be related back to the original survey. This could include fences, lines of trees, etc.

4 MEASUREMENTS - as contained in the original deeds or plans.

You will note that the right type of possession has precedent over measurements.

This principle is one of long standing in the law and relates to what I believe to be, along with the "Home Bank v. Might Directories" case, the most practical and useful precedent that we surveyors have, that is the rule accepted by the state of Michigan in "Diehl v. Zanger (1878), 39 Mich. 601". In this landmark case, Mr. Justice Cooley stated the following:

A) Any re-survey made after the original monuments have disappeared is for the purpose of determining where they were, not where they ought to have been;

B) A long established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments have disappeared;

ERRATA:

Page 36 has been repeated on Page 37. No page is missing.

Paragraph C) on page 38 opposite was scrambled and should read as follows:

"Nothing is better understood than that few of our early plats (plans) will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities .... and the visit of the surveyor might well be set down as a public calamity; "

... believe to be, along with the "Home Bank v. Might Directories" case, the most practical and useful precedent that we surveyors have, that is the rule accepted by the state of Michigan in "Diehl v. Zanger (1878), 39 Mich. 601". In this landmark case, Mr. Justice Cooley stated the following:

A) Any re-survey made after the original monuments have disappeared is for the purpose of determining where they were, not where they ought to have been;

B) A long established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments have disappeared;

C) Nothing is better understood than that few of our early plats (are true and unalterable and are defined by the original posts or blazed trees, whether or not they are the same distances between posts as shown in the original plan and field notes, the subdivision plan or in any deed.

D) The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them;

E) Monuments control courses and distances - an inflexible rule in real estate law.

In 1914, Chief Justice Meredith of Ontario, entirely agreed with the above principles stated by Justice Cooley and based his judgement in "Home Bank v. Might Directories Ltd." on them. This case has become a landmark case in Canada.(10)

We are now getting to the subject of the fence as evidence. First, we have to decide just what part of the fence is to be used for the line, if indeed that is the intention.

(10) Home Bank v. Might Directories Ltd., (1914) 31 O.L.R. 340, 20 D.L.R. 977(C.A.)

If there is to be consideration given to using the fence as a lot line or boundary line between owners, it is essential to obtain as much information about the fence as possible, e.g.,

- how old is it;
- is evidence available as to where it was intended to be;
- was it placed on a surveyed line;
- what are the usual practices regarding the position of fences on lines;
- other surveyors notes

It has been my experience that when determining the line on stone, log or rail fences, one should use the centre line of the structure as in Figure 31a, and when fences with wire, boards or pickets are on one side only, the face of the posts should be used.

Naturally, if the owners can provide evidence as to the intent and procedure involved during construction, this should be included in your evaluation of the evidence.

Figures 32a and 32b show the re-establishment of fence lines under different circumstances - note that the line in the snake-rail fence bisects the rails as much as possible.

Three expressions that are commonly found in boundaries case-law are "Conventional Boundary", "Estoppel", and "Adverse Possession".

Conventional Boundary

A conventional boundary is one established by agreement between adjacent owners regarding their mutual boundary. This may or may not be the township lot line or registered plan lot lines, that obviously will depend on the evidence. But under certain conditions, a conventional boundary will become the property line and perhaps the lot line.

Conventional lines may not be used to convey land as that would be a fraud under the Statute of Frauds(11) which requires that such transfers must be in writing. The conventional line is for the purpose of providing an agreeable boundary between corners.

A conventional line can only be made by the owners and not one owner and a prospective owner.(12)

(11) Statute of Frauds, R.S.O. 1970, Ch. 444

(12) Smith v. Anderson (1942), 16 M.P.R. 287

There are numerous cases which outline these principles but perhaps the following excerpt from "MacMillan v. Campbell et al"[13] by Mr. Justice Harrison of the Supreme Court of New Brunswick (Appeal Division) is the most persuasive.

Justice Harrison said:

> "The most important fact is that the parties should have agreed on a boundary line between their adjoining lands. It is not necessary that there should have been a dispute: it is not necessary that such boundary should be marked by a fence, so long as it is clearly defined by blazing or spotting or by monuments or otherwise; it is not necessary that this conventional line should have been acquiesced in for any special period after the agreement. The essential matters are the making 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."

(13) MacMillan v. Campbell et al, 28 M.P.R.112, (1951) 4 D.L.R. 265 (N.B.C.A.)

Estoppel

As was suggested above, estoppel is the doctrine of law which prohibits a person from denying the truth or necessity of complying with some statement formerly made by him, or the existence of facts which he has by words or conduct led others to believe in.

That is, if a person, by a representation purported to be the facts of the matter, induces another person to change his position on the faith of it, he cannot afterwards deny the truth of his representation.

There are a number of forms of estoppel, but the one which concerns surveyors is "estoppel 'in pais'", or "equitable estoppel". An example of this would be the person who builds on land supposing it to be his own, and the real owner, observing his mistake, abstains from setting him right and leaves him to proceed in his error. He has been "estopped" from asserting his ownership in the land.

In addition, a person who, in selling a parcel of land, wilfully mis-states the position of his own property line and thereby leads a purchaser to believe that he is acquiring land which was not included in the deed is "estopped" from afterwards claiming such land as his own and is subject to a judgement to correct the deeds.

Adverse Possession

Adverse possession has been defined as:

> "The possession which would be such as in the nature of the land would be suitable and reasonable"(14)
> or
> As Lord MacNaghten said in 'Johnston v. O'Neill'(15)
>
> "Possession must be considered in every case with reference to the peculiar circumstances... the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests - alll these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of possession."

and also in this connection, the judgement of Mr. Justice Rogers in "Mason et al v. Lewis Miller & Co. Ltd." is of interest:

> "The co-tenant may have had title; but the operations of the Todds over 40 years ago, followed again over 35 years ago by the Youngs, and again over 25 years ago and the assumption of full control by them, through the maintenance of their blazed lines, the usual

(14) Ibid

(15) Ibid

method of marking proprietorship of wild lands, and making of and operating roads all over the land and the general supervision of the woods foreman over these lots as part of the extensive holdings of which they formed a part, all bear convincing testimony as to the continued open and notorious possession of the defendants' predecessors to the exclusion of the claimants and their predecessors. The Todds began their occupation by unequivocally using the lands exclusively for their obviously intended purposes and thereafter they did such acts as would be expected of owners of such lands in due course. Clearly the owners of lumber lands are not expected to cut over them except at intervals, dependent upon regrowth and consistently with their general purpose to operate on sound business principles."

It appears that the key phrases in considering whether adverse possession has been gained or not are:

- character and value
- natural use
- blazed lines in wild country
- open and notorious
- acts of expected owners

Of course, regard must be had to the Statute of Limitations[16] which sets out the time required to have adverse possession ripen into the fee in the land, i.e., 60 years against the Crown, 20 years for a right-of-way or easement and 10 years to recover land being possessed, although recourse should be made to the provisions of the Statute in effect at that time.

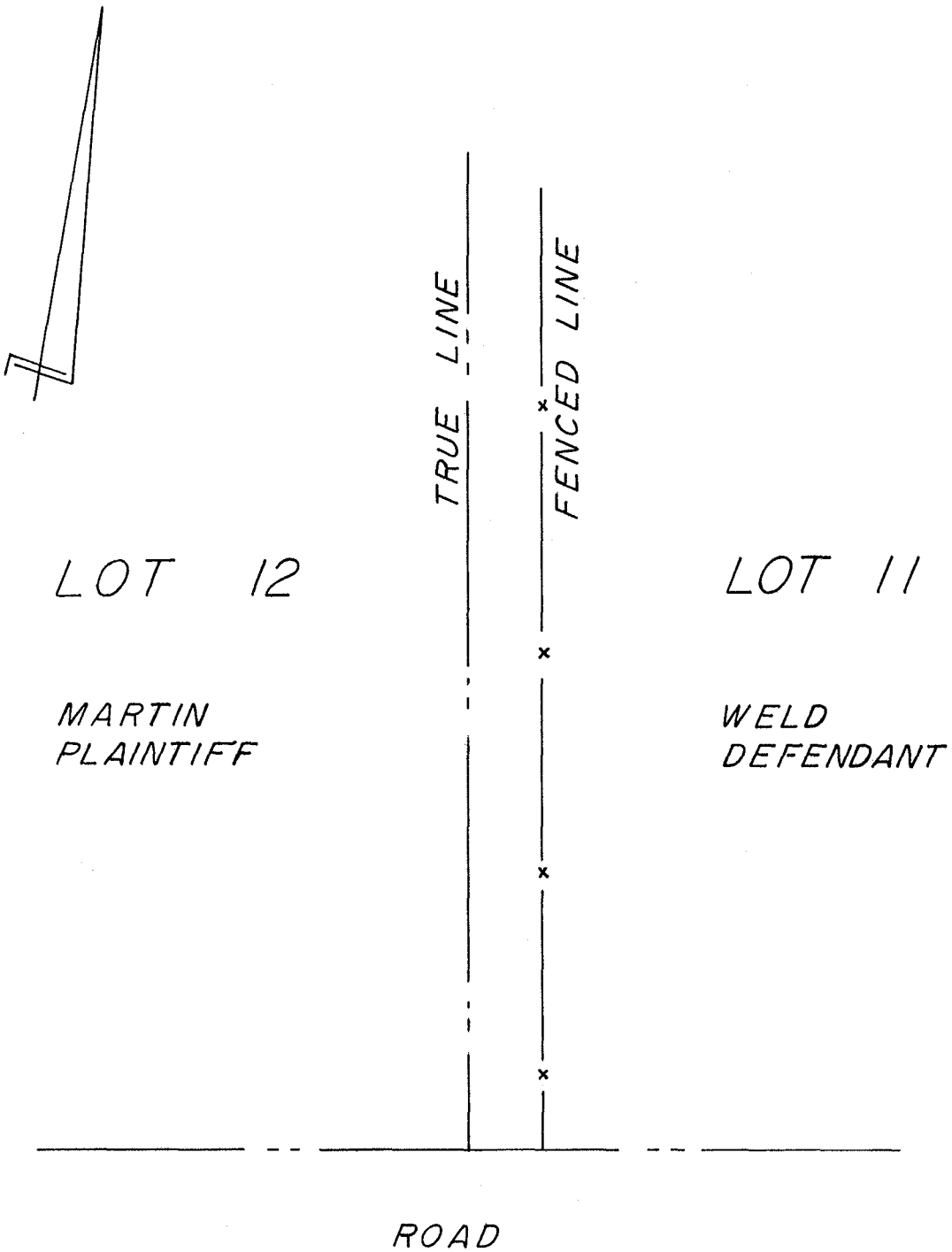
In order to demonstrate some of these principles, I would like to present a few cases that have been reported and considered of importance in boundary law. In discussing any case in a common law jurisdiction it is important to understand that the law is interpreted by judges using either a quasi-legislative role or an interpretive one.

These are the extreme poles of the judicial spectrum. They range from the judgments of Lord Denning in the United Kingdom and the U.S. Supreme Court under former Chief Justice Earl Warren which tended to be extremely responsive to changing times, to those judges who are strictly bound by precedent and see that they have no discretion to modify the law for social conditions and changing attitudes.

An empirical study across Canada has revealed[17] that the typical judge sees his role as essentially an interpretive one although tempered by the dictates of fairness and justice. These judges recognize the position of the legislative function in the making of law in Canada.

(16) Limitations Act, R.S.O. 1970, Ch. 246

(17) The Canadian Legal System, Gall, P. 179



MARTIN v. WELD (1860)

Each judge is different, as those of you who have been in court will know, and his "style" of administering justice is based on how he or she regards the twin doctrines of "precedent" and "stare decisis".

While we are really not studying the Canadian legal system here, I believe that it is important to understand that judges will follow past decisions, or "precedents", when the facts are the same or very nearly so. Portions of past cases may be used and because even judges have opinions, different judges will arrive at different decisions using the same facts and this problem is resolved by the use of the doctrine of "stare decisis".

This doctrine requires that a judge of a particular court must follow the previous decision of the highest court within his particular provincial jurisdiction. The judge may also be "persuaded" by courts outside of his jurisdiction and he would give careful note to the level of that court. The date of the cases being used as precedents is important as it is generally assumed that the more recent the case, the more likely it is to prove the proposition. Sometimes the reputation of the judge will have an influence on the decision.

I think that it is important to understand these rules when considering any case that has been decided in any common law jurisdiction. Judgements usually refer to these "persuasive" cases and you will see how the law is built on the decisions of the past.

The case of "Martin v. Weld"[18] which was decided by the Court of Upper Canada, Queen's Bench in 1860 illustrates the problem of adverse possession and a "misunderstanding" or "common error" by both parties as to the position of the true boundary. The effect of the Statute of Limitations is also relevant in this case.

As you can see by the sketch there existed a fence line that had been accepted by both parties as their common boundary and the plaintiff, Martin, had been in possession since 1829, or about 30 years.

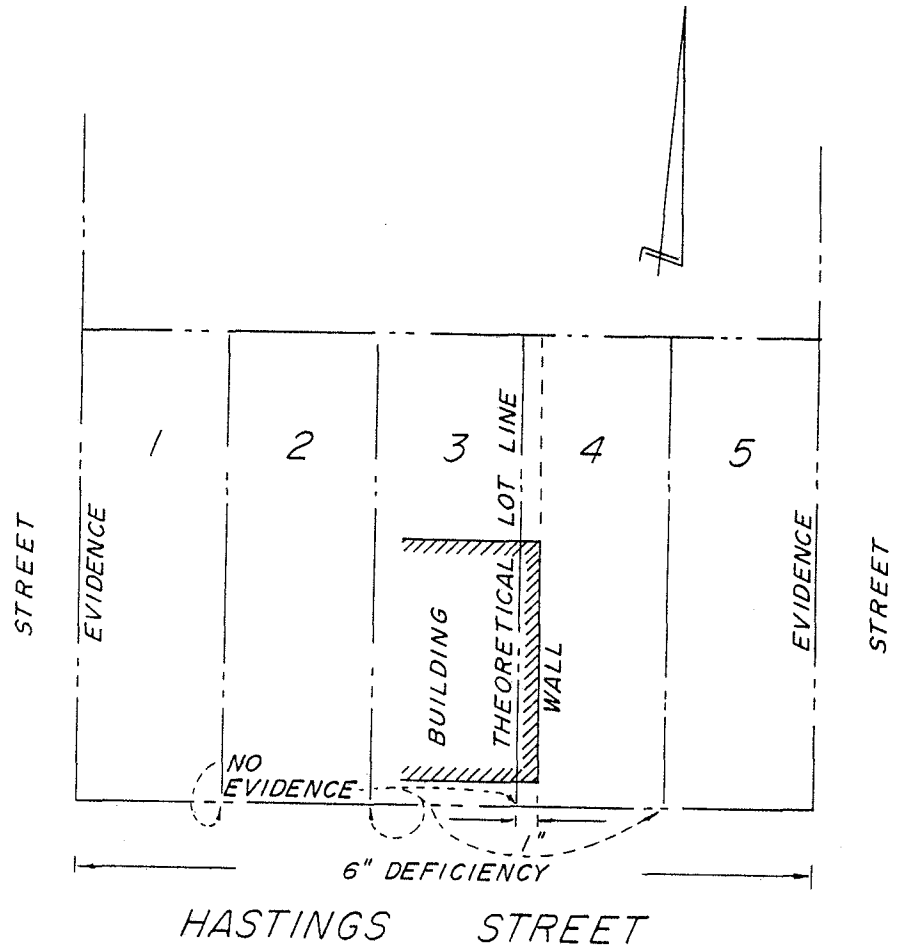
The defendant, Weld had a survey made and the true boundary was laid out. When the Plaintiff attempted to work on the old fence the neighbours came to blows.

In the trial before Richards J. with a jury, the jury found that the Plaintiff should succeed and he was awarded two pounds in damages. The decision was based on the possession of more than 20 years.

The Defendant, Weld, appealed on the basis that the trial judge had erred in his direction to the jury and in the law, the common error should allow correction.

On appeal, Chief Justice Robinson of the Ontario Court found that the appeal should be denied. The Justice stated that even though both owners were in a common error regarding the true line of division, the Statute of Limitations was still running and thus possession had been gained by the Plaintiff.

(18) Martin v. Weld, (1860) 19 U.C.Q.B. 631



BARRY v. DESROSIERS

Of course if it could have been shown that the line had been agreed to and that it would govern no matter what, then it would have been a conventional line, binding on both parties on the principle of "Estoppel in Pais".

"Barry v. Desrosiers"(19) is a 1908 decision of the British Columbia Court of Appeals and concerns the method of determining the lot line boundary when all internal survey evidence is gone in a block in the city.

(19) Barry v. Desrosiers, (1908) 9 W.L.R. 633, 14 B.C.R. 126 (C.A.)

The facts of this case showed that a fire had swept the block some 23 years previously and had destroyed all the survey posts. A resurvey using evidence at the ends of the block showed that the block was 6 inches shorter than shown on the plan. The surveyor divided the shortage "pro rata" to set the east limit of Lot 3 thus placing the Defendant's building about 1 inch over the line.

The trial judge found:

> "That the survey was not wrong but that the defendant had been mistaken the position of his boundary in the past when the building was built".(20)

The Plaintiff then appealed this decision claiming that the damages were only payment for what was in effect an expropriation of part of his land and he was really claiming damages to cover the cost of moving the building.

The Defendant's solicitor "riposted" that there is no evidence as to the exact location of the Lot 3 as there is no satisfactory explanation as to the 6 inch shortage and that the Plaintiff had no right to make such a claim until he reestablishes by proper evidence, the exact location of Lot 3.

Mr. Justice Clement made the following points in deciding in favour of the Defendant and overturning the lower court decision:

> 1. The lot stakes have disappeared and no attempt was made to fix their position;

(20) Ibid

2. No evidence was available to show how or where an error was made;

3. He knew of no principle of law in British Columbia which says that the error was one which extended uniformly along the whole block and that each lot should suffer equally.

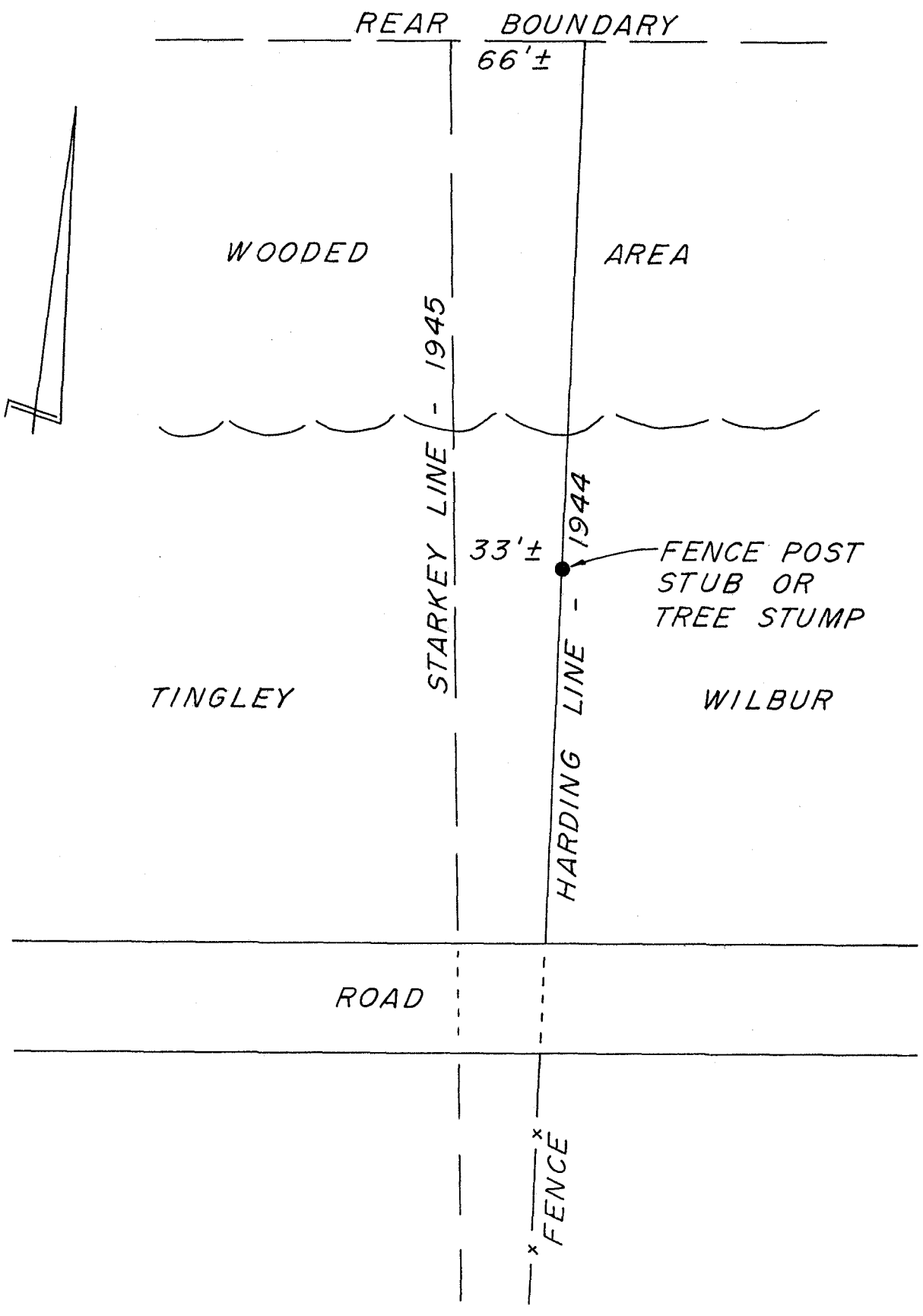
(In Ontario one should consider section 55 of the Surveys Act).

4. In the absence of such a statute, it is simply a guess as to which lot is incorrect and that the best evidence of the east limit of lot 3 is the building wall.

It is noteworthy that this decision satisfies the conditions of the Surveys Act in that the best evidence should be used before theoretical division is employed.

This case is very similar to "Home Bank v. Might Directories" in that a wall (it could have been a fence) was used as the best evidence of the original position of the line.

This case also points up the danger of indiscriminate proportioning or of simply laying out plan distances.



WILBUR v. TINGLEY

The case of "Wilbur v. Tingley",[21] decided in 1949 by the Appellate Division of the Supreme Court of New Brunswick, is an example of the acceptance by the court of a "conventional line" in an action for trespass.

Wilbur and Tingley, the plaintiff and defendant respectively in this case, were owners and occupiers of adjoining lots of land. While there was no defined line through the wooded area, they both agreed on a blazed line for convenience.

When Tingley cut some trees over this blazed line, a dispute arose and they agreed to get the line surveyed to the rear of the properties.

The plaintiff, Wilbur, employed one Harding, a Deputy Land Surveyor, and showed him an old fence south of the road running north and south and also a fence stub or tree stump north of the road said to be on the line.

The defendant, Tingley arrived at this time and assisted in the survey with other neighbours.

Harding projected the fence northerly across the road and found that it hit the stub. He then continued to the rear of the property. This line appeared to be agreeable to both parties, according to eyewitnesses to this survey.

(21) Wilbur v. Tingley, 24 M.P.R. (1949) 4 D.L.R. 113 (N.B.)

As some trees had been cut by Tingley over this line, he agreed, in writing, to pay Wilbur for them, and did in part with an undertaking to pay the balance at a later date.

A few days later, Wilbur decided that he was not satisfied and hired a second surveyor, Starkey, to re-run the line. This new line was found to be 33 feet west of Harding's line at the stub and approximately 66 feet west at the rear property line.

Wilbur then repudiated the agreement and brought this action for damages (lumber cut) between the "old" and new line subsequent to the agreement, and for the return of the monies paid earlier.

The trial judge found:

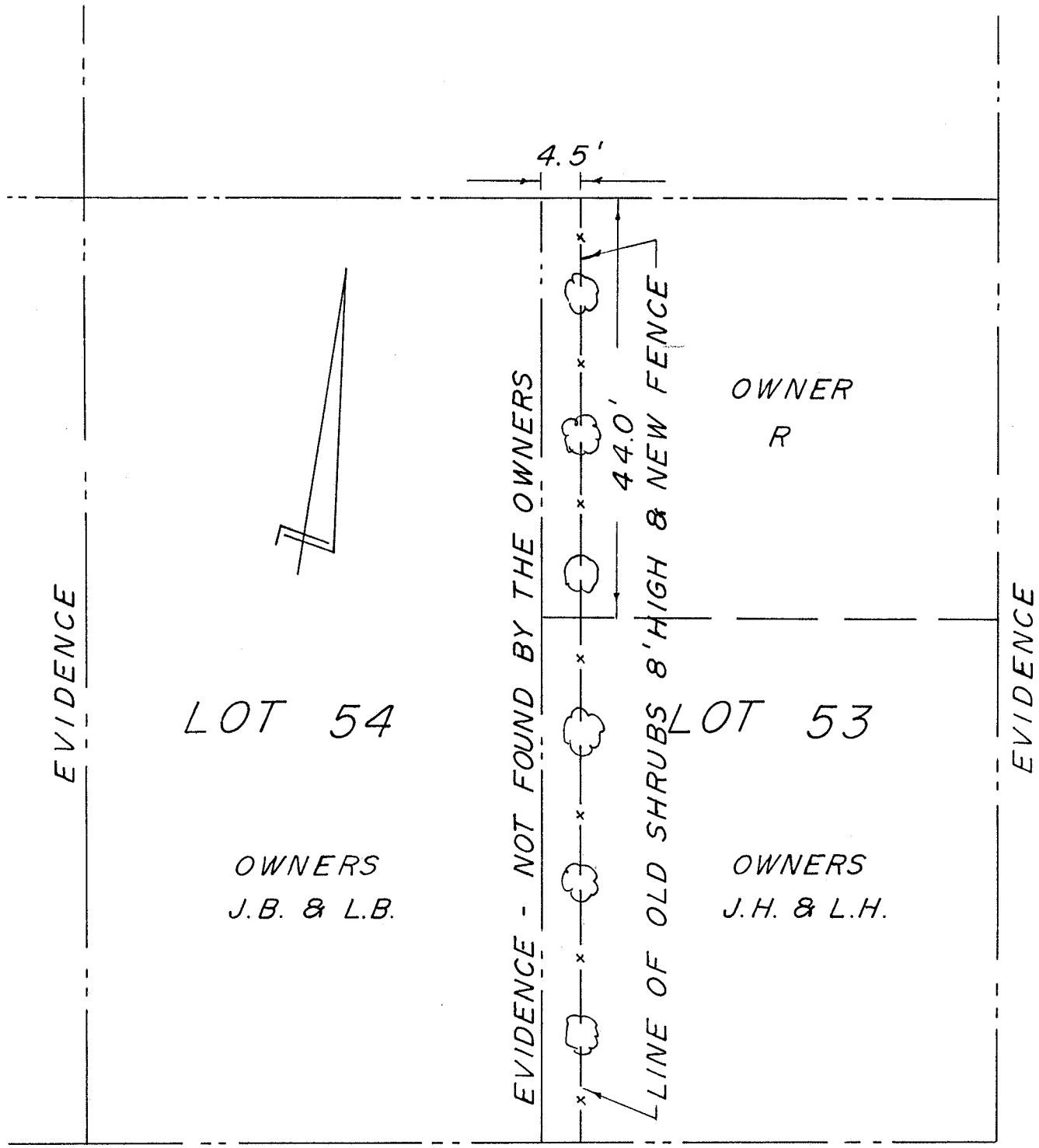
1. That the "Harding" line was incorrect
2. That the "Harding" line was not a conventional line
3. That the "Starkey" line was correct
4. That Wilbur was entitled to damages.

The trial judge had used 9 previous cases as precedents for his decisions, some within New Brunswick and some from other jurisdictions.

On appeal before Richards C.J., Harrison and Hughes, JJ., it was held that the trial judge wrongfully stated the requisites for the establishment of a conventional line. He had said that a conventional boundary must be fenced, occupied to by cultivation or recognized for a long time. In addition, he found, as a matter of fact, that the plaintiff had never agreed to the Harding line being conclusive when witnesses had clearly stated otherwise.

The concurring opinion by Mr. Justice Hughes is the most easily stated example of the test for a conventional boundary:

> "If the respective owners of adjoining lands are in dispute (Note: other cases have held that there need not be a dispute) as to the location of the boundary between them and they meet and agree upon a boundary line or have a boundary line located on the ground and marked and both parties acquiesce in that agreement, they have by thus doing, established a conventional line between their lands and the line so established becomes the actual and fixed boundary between their properties whether it is in fact the true boundary line or not;
>
> no length of time is necessary after and agreement is reached;
>
> the erection of a fence on the agreed line is not necessary;
>
> delay in objecting may and frequently does establish acquiescence;
>
> such agreement does not breach the statute of frauds as it does not require a conveyance of any land from one party to the other. It is simply an agreement acknowledging the correct location of the boundaries and settling a dispute."



BEA v. ROBINSON

The Appeal Court, as you may have guessed, stated that the "Harding" line must be regarded as a conventional line between the parties.

This case is of great interest for a number of reasons.

ONE, it clearly shows the difference between an acquiesced boundary and adverse possession;
TWO, the rule of "estoppel" is shown in that Wilbur was barred from repudiating his agreement;
THREE, the necessity for the doctrine of "stare decisis" is pointed out by the comments of the justices of the Appeal Court on the wrongful interpretation by the Judge in the Lower Court.

An Ontario case reported in 1977, "Bea v. Robinson"(22) is used to illustrate when an agreed upon line is not a conventional boundary and in fact had its "painful" moments.

As you can see from Figure 36, we have two subdivision lots with the rear 44 feet severed from lot 53 and fronting on the east street. A row of "old" 8 foot high shrubs existed in 1964 when the plaintiffs "B" purchased lot 54. No survey was obtained and "B" assumed that the line of shrubs was the lot line.

In 1966, "B" and defendant "R", on mutual agreement built a fence on the line of shrubs.

(22) Bea v. Robinson, Ontario High Court of Justice (1977); 81 D.L.R. (3d) 423, 3 R.P.R. 155

In 1975 "R" discovered the true boundary between the lots by survey and the fence was found to be 4.5 feet east.

The defendant's "R" and "H" demanded that the fence be removed and "B" refused. "R" and "H" then cut down the fence in September 1975 causing a fight in which "B" was injured. "B" sued to gain possession and for damages for assault.

The action was dismissed as to "B"'s claim for possession to an agreed line for the reasons outlined below, but the damages for assault were allowed.

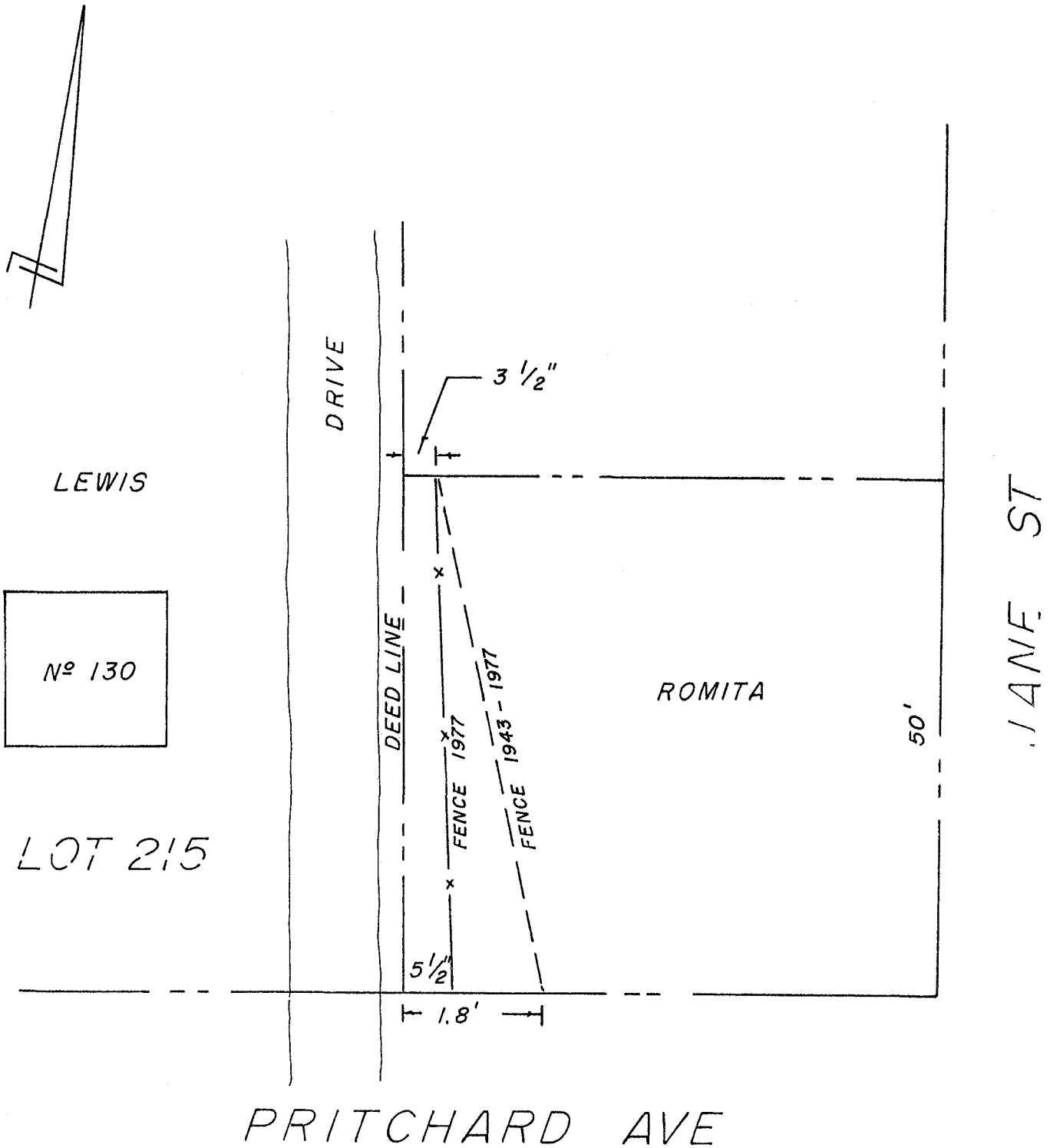
1. No adverse possession as there was not 10 years occupation;

2. The possession is not adverse as there had been an agreement;

3. No conventional line as the requirement that the true line be unable to be determined was absent. The true boundary was able to be determined the owners simply did not find out;

4. If the true line was found and differed from the agreed line then a transfer of title would occur contrary to the Planning Act, Secs. 29(2) and (7);

The lesson to be learned from this case appears to be that every effort must be made to find the true line before resorting to an agreed line. Of course, the agreed line may still be the best evidence of the lot line, but not in this case.



LEWIS v. ROMITA

Care should be taken to ensure that the provisions of the Planning Act are adhered to when deciding on the worth of a fence as a lot line and this will be the subject of a future discussion.

In the above case, "Bea v. Robinson", we saw among other things that a mutual agreement as to a common boundary negated the provisions of the Statute of Limitations. In the case of "Lewis v. Romita"(23) reported recently (judgement - February 7, 1980) we can see that it is most important that an agreement between two owners must be clearly written and included in some registered document to avoid costly legal actions.

As shown in Figure 37, the plaintiff, Lewis owns lot 215 on the north side of Pritchard Avenue and abuts the defendant Romita's land which fronts on Jane Street. The plaintiff purchased her land with her late husband in 1943 and has lived there continuously to this date; the defendant purchased his land in 1975. At that time the fence was located as shown in broken line on the sketch, that is, 1.8 feet east of the lot corner as determined by survey and not disputed.

During renovations made by the defendant in 1977 the fence was moved, somehow, closer to lot line at the south end being now 5-1/2 inches east and remaining in the same place at the north end - 3-1/2 inches east.

(23) Lewis v. Romita, Ontario High Court of Justice (1980)

The area in dispute is therefore a triangle of land being about 14 inches (1.14 feet) on its base and the matters in the case revolved around the respective rights of the plaintiff and the defendant in the above noted triangle.

The plaintiff claimed damages in the amount of $10,000 for trespass, an order restraining the defendant from going on any part of her land, a declaration that she is the absolute owner and a mandatory injunction requiring the defendant to put the fence back to its pre-1977 position.

The claim for damages was withdrawn the morning of the trial and photographs tendered as exhibits showed that the effect of moving the fence was to narrow the strip of vegetation between plaintiff's driveway and the fence. No evidence was offered to suggest any interference with the plaintiff's use of her property.

This would appear to be a very trifling matter, and in fact the court agreed with defense counsel that it indeed was, but no authorities were cited to support the defense contention that the maxim, "de minimus non curat lex", that is, "the law does not concern itself with trifles", should be applied in a case involving ownership of land.

It would also appear that the courts will involve themselves in even the smallest of land disputes and therefore one should never assume that his decision to ignore a difference of a few inches is inconsequential.

It as also said in the agreed statement of facts that there was an agreement which stated:

> "The owner of the defendant's lands prior to the defendant had agreed to the location of the fence."

This is obviously rather vague and as we shall see was of little help to the defendant, the defendant was obviously going to claim that the fence was one of convenience only and was not intended to be the property line.

The plaintiff claimed that she had acquired possessory title of the land in question by reason of use and occupation for the 34 years from 1943 to 1977 when the fence was moved.

The learned judge quoted the requirements to establish possessory title as stated by Mr. Justice Lerner in "Raab v. Caranci" (1977), 24 O.R. (2d) 86 at 90, 97 D.L.R. (3d) 154 and affirmed by 24.O.R. (2d) 832 n., 104 D.L.R. (3d) 160n (C.A.).

Mr. Justice Lerner, citing other precedents, stated as follows:

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

You must note that all of these requirements must be met throughout the entire ten year period as provided by Sections 4 and 15 of the Limitations Act.

We will recall that Section 4 requires that the owner must attempt to repossess the land within the ten year period and Section 15 states that if that period has passed then his right of recovery has lapsed.

Obviously both sections have been satisfied by the 34 year possession period.

Defense counsel, in rebuttal tried to make the point that the written agreement quoted above would defeat this claim for adverse possession; this argument was not agreed with by the judge.

It is obvious that some written agreements, for example one which stated that plaintiff could use the land for ease of getting out of a car but it belonged to the defendant or his predecessor, would negate any claim to possession, but this agreement did not so state.

Firstly the plaintiff was not a party to the agreement.

Secondly the agreement was not very detailed.

The onus is clearly upon the defendant to prove that the agreement contained sufficient evidence to negate the claim of possession.

If the fence was located in a mutually agreed position and thought to be on the boundary with both parties ignorant of the true line then adverse possession would not be negated. This is the only reasonable construction to use.

In this case the judge supported his decision in favour of the plaintiff by using, in addition to the case quoted, two other cases previously referred to in this paper, "Bea v. Robinson" (1977) and "Martin v. Weld" (1860), thus demonstrating the judicial use of precedents.

An important lesson to be learned from this case and the previous cases outlined is that a surveyor should never blindly accept fences as lot lines, nor should he simply lay out deed or proportion. Investigation of the age, ownership and purpose of the fence both in the field and in the registry office (deeds and deposits) will enable you to do a far better job for your client, his neighbours and the surveyor who follows you.

I believe that all of the above points out that fences and other occupational evidence must be given full weight by the surveyor when determining boundaries. Let us strive to obtain all the evidence before resorting to the easy job of proportioning or laying-off. Remember the "Gospel" according to Cooley.

In conclusion, I would like to say "thank you" to Ken Brooks of our office for his illuminating sketches and titles, to my secretary, Betty Marshall, for her typing and to Bob Gaspirc for turning the pages.

Credit is also due to Michael Smither, whose book "Fences in Ontario" provided some fine examples of fences and posthumously, to Harry Symons and S.W. Jeffreys for the marvellous information in Mr. Symons' book "Fences".

I hope that I have been able to provide you with some insight on the subject of fences and the law, and that I shall be able to research and publish additional material for the use of the profession regarding highways and railways in the near future.

Thank you.

BIBLIOGRAPHY

Barbs, Prongs, Points, Prickers and Stickers, by Robert T. Clifton, University of Oklahoma Press, 1970;

Boundaries, A.O.L.S., The Carswell Co. Ltd., Toronto, 1968;

Boundaries and Landmarks, by A.C. Mulford, D. Van Nostrand, New York, 1912;

Canadian Legal System, The, by Gerald L. Gall, Carswell Co. Ltd., Toronto, 1977;

Evidence and Procedures for Boundary Location, by Curtis M. Brown & Winfield H. Eldridge, John Wiley & Sons, London, 1962;

Fences, by Harry Symons, McGraw Hill Ryerson Ltd., Toronto, 1958;

Fences in Ontario, by Michael J. Smither, Municipal World Limited, St. Thomas, 1979;

Fences, Gates and Bridges, by George A. Martin, Stephen Greene Press, Brattleboro VT, 1887, reprinted 1974;

Osborne's Concise Law Dictionary, 6th Ed., by John Burke, Sweet and Maxwell, London, 1976;

Pioneering in North York, by Patricia W. Hart, General Publishing Co. Ltd., Toronto, 1968;

What is a Survey?, by N.L. Setterington, address to Law Society of Upper Canada, January, 1981;

ILLUSTRATION CREDITS

"A" - Fences, Symons

"B" - Fences, Gates and Bridges, Martin

"C" - Fences in Ontario, Smither

"D" - Barbs, Prongs, etc., Clifton

"E" - Boundaries and Landmarks, Mulford

THE LINE FENCES ACT

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LINE FENCES ACT

Michael J. Smither

Almost two hundred years ago when the first line fence legislation was introduced in Ontario, it addressed a major economic concern.

As simplistic as this legislation may seem to us today, that legislation empowering overseers of highways to determine the height and sufficiency of any fence in its conformity to resolutions agreed upon by the inhabitants, most certainly would have rivalled in impact to those early settlers the recently announced $1.5 billion BILD economic program.

To those early settlers the fencing of the lands was:

- absolutely imperative to defend their claims to the settlement (many of which had never been surveyed);

- to protect their crops against domestic animals, such as hogs, which were frequently by law permitted to run at large; and

- to protect their livestock against wild animals whose natural habitat had been disrupted by man's arrival.

Notwithstanding these necessities, the construction of fences was an expensive, time-consuming overhead which competed directly with the settler's ability to:

- clear his lands;

- construct buildings for both himself and his livestock; and

- raise his crops within the very short growing season.

Time spent on construction and maintenance of fences was therefore a major factor in deciding whether the settler succeeded and indeed whether he and his family survived.

As Mr. Justice McEvroy stated in 1889 in his book "The Ontario Township":

> 'The need for fence-viewers arose from the fact that disputes were constantly arising about line fences, i.e., fences which separated one man's land from the farm lying adjacent to it.
>
> When one settler had fenced his farm on four sides, the next settler came and by fencing to that of his

neighbour, he was quite as well off as the first settler, although he had done only three-quarters as much work.'

A seemingly quite insignificant situation today with our backhoes and prefabricated fencing, available labour force and welfare state to prop us up even when we fail, but to that early settler, it was conceivably a matter of life and death.

Where the Act does not apply

Even though circumstances have changed dramatically since that time the new line fence legislation enacted in 1979:

- represented the first major change in such legislation
in considerably more than one hundred years; and

- nevertheless retained the original concept of line fence legislation as a single purpose statute.

This is a crucial point to keep in mind. The Line Fences Act, 1979

- applies only to line fences (i.e. fences separating one man's land from that of his neighbour); and

- this legislation may not apply in circumstances in which other legislation is applicable.

Special fences - special properties - In many cirmcumstances today fencing duties are imposed by a provincial statute or municipal by-law upon one owner of the adjoining properties. In such circumstances it is arguable that the legislation imposing the responsibility will be paramount and that the duty cannot be shared with the adjacent property owner by the expediency of calling in the fence-viewers to arbitrate pursuant to The Line Fences Act.

In 1928 in the case of Dennis v. Trustees of School Section 28, Township of York it was held that where a duty and a right to make a determination has been imposed upon a school board for the fencing of school properties, The Line Fences Act did not apply.

If this principle is applied as I believe it should be, to other circumstances in which a separate duty exists, then it is arguable that The Line Fences Act may not be applicable in any circumstances in which a duty is imposed with respect to a special type of fence or with respect to the fencing of special properties or in other circumstances in which a duty is imposed by planning legislation.

For example under a:

- property standards by-law; or

- fencing around pits or excavations, or

- around private swimming pools, or

- around cemeteries, or

- enclosing certain parts of a riding horse establishment, or

- enclosing a salvage yard.

Ultimately these may be questions for the courts to decide. However, before becoming involved in a line fence dispute I believe it is imperative that all the parties and the fence-viewers and anybody else concerned, including an Ontario Land Surveyor, should establish with certainty that the Act does in fact apply in those circumstances.

Other exclusions from the new statute are:

- Federal Crown Lands;

- Ontario Crown Lands "...that at no time have been disposed of by the Crown in the right of Ontario by letters patent, deed or otherwise...";

- lands that constitute a public highway; and

- in those few municipalities in Ontario where a by-law has been passed by the council "...for determining how the cost of division fences shall be apportioned"; and

- most important to you as surveyors, in any

circumstances in which there is a dispute as to the true position of a boundary affecting the construction of the fence.

Where the Act does apply

Subject to those exceptions, the new Act now applies in:

- all municipalities, whether rural or urban; and

- when the necessary regulations are passed, also in territories without municipal organization.

The statute is applicable, subject to the exception of public highways, to:

- lands owned by a municipality or local board; and

- all patented Crown Lands in the right of Ontario.

Right to erect a fence

The new legislation clearly recognizes the right of an owner of land to construct and maintain a fence to mark the boundary between his land and adjoining lands.

The uncertainty, contained in the former Act, that implied that

there was a statutory duty to erect and maintain such a fence, has been removed. (Section 3)

However, while a property owner may erect a fence, which is in conformity with the law, upon his own land without consulting his neighbour, where he chooses to have it placed upon the common land which is the boundary line he must be prepared to share his neighbour's opinion, or an arbitration of it, as he would share the land.

Principal Procedures

The statute provides explicit procedures to be followed in the several different circumstances which may arise in its application. These include:

- agreement between owners;

- arbitration of disputes as to the construction, reconstruction and maintenance of fences (Appendix "A");

- appeals against an award of the fence-viewers arising from such a dispute (Appendix "B");

- certification procedures where work has not been carried out in accordance with an award (Appendix "C");

- certification procedures where payment has not been made by a party in accordance with an award (Appendix "D");

- procedures for recovery of costs which have been certified (Appendix "E");

- determination procedures where work has been improperly done (Appendix "F"); and

- procedures for the payment and recovery of the costs of proceedings (Appendix "G").

Unfortunately while the Act appears to have been extremely well drafted from a legal standpoint and procedures are eminently workable and complete, they do not:

- spring readily from the page of the statute in clear chronological order;

- are complicated by the need to have reference to regulations prescribing the types of forms to be used; and

- are further complicated by the fact that in many instances no forms are prescribed to meet the requirements of the statute.

In fact, the procedural structure of this statute will more

closely resemble the interlocking circles of the Olympic flag than it does a straight line chronological progression.

Individual analysis of those procedures is a time-consuming project. It has however been dealt with in detail in the seven appendices "A" to "G" setting out the step-by-step procedures under the Act, contained in PART VI of the book "Fences in Ontario", a copy of which you have received at the commencement of this seminar.

If you turn to page 153 of the book for Appendix "A" you will see also that the procedures referred to include reference to the prescribed form number, the Municipal World form number (these forms are being used extensively throughout the province) and also to the relevant section or sections of the statute and the time allotted for completing the procedure.

If you will turn to page 156 at the end of the first procedures in Appendix "A" you will see also that a closing reference is made to the alternative interlocking procedures to be followed depending upon whether the award is to be appealed or alternatively enforced under one of the other procedures.

Each of the other appendices follows a similiar format describing both the procedure or the alternative procedure to be followed and the subsequent steps to be regarded when that procedure is completed.

The procedures set out in the book have been in widespread use throughout this province since it was first published one year ago.

By having reference to these recommended procedures, in conjunction with the statute, published commencing at page 5 of the book, I believe that you can save a considerable amount of time and avoid the possiblility of missing a vital step in the process.

Without going into the procedures in detail let me now highlight a number of important points.

Agreement by owners

While the statute confers upon an owner the right to request the attendance of fence-viewers it first contemplates that the owner and the adjoining owner will attempt to seek an amicable agreement. (Section 16 and 22 (3))

It is important to recognize that to be enforceable, any such agreement must be:

- in writing; and

- in the prescribed Form 14 or 15.

Of particular importance to land surveyors is the requirement that the form contain a:

- description of the owner's lands and a description of the

adjoining owner's lands which are "...sufficient for registration in the appropriate Land Registry Office".

As with all other documents which may be registered under the Act no duty is imposed on either party to register an agreement. However, such a document "may be registered and enforced as if it were an award of fence-viewers".

Dispute between owners

In circumstances in which no agreement can be reached between owners and a dispute arises as to the construction, reconstruction and maintenance of a line fence the procedures set out in Appendix "A" of the book will apply.

To commence these proceedings either owner may notify the clerk of the local municipality in which the land is situate that he desires to have the fence-viewers arbitrate in the matter.

While the Act is silent as to the method of giving notice and as to the form of notice, the regulations made under the Act require that the notice be in writing in the prescribed form.

Again, of immediate consequence to surveyors, is the requirement that the form contain a description of both the lands of the owner and the adjoining owner which must be "sufficient for registration in the appropriate Land Registry Office".

The intention here clearly is to place responsibility for an accurate description upon the party making the application.

Upon receipt of the application the municipal clerk, or a person designated under the Act by council, will assume full responsibilities for:

- giving the required notices;

- in the prescribed form; and

- in the manner prescribed by the statute.

Jurisdiction of fence-viewers

Before embarking upon an arbitration the fence-viewers must determine whether or not they have jurisdiction to arbitrate in the dispute. This may be contingent upon a number of factors some of which cannot be spoken to with great certainty.

Prior to calling in the fence-viewers the municipal clerk should ensure that:

- the notices, required by statute, have been sent to respective parties; and

- that the boundary line between the properties is not in dispute (the form of "owners request for fence-viewers (dispute)" contains a statement to this effect, placing the onus upon the applicant); or

- whether the circumstances are influenced by planning or other legislation which may void the fence-viewers jurisdiction.

Failure to give proper notice and the existence of a duty or obligation upon one of the parties for the construction of a fence may bar jurisdiction to the fence-viewers.

Disputed boundary lines

In a number of instances attempts have been made to call in fence-viewers in circumstances in which a boundary line is in dispute. Fortunately, the courts have long since decided that the Act does not confer authority upon fence-viewers, or a judge upon appeal to settle questions of title to lands or to determine the location of a disputed boundary line.

If there is a dispute as to where the true boundary is, and the parties cannot agree, such dispute can only be settled by the courts under authority outside of The Line Fences Act. This point was well settled by the courts in 1908 in the case of Delamatter v. Brown and was followed in Griffin v. Catfish Creek Conservation Authority in 1978 and again in the case of Jacobs and DiTomasso, decided in July, 1980 under the new statute.

To avoid the possibility of matters moving to an advanced stage in proceedings before disputes as to a boundary line are identified the initial Form 1, to be filed by the owner requesting fence-viewers, requires the applicant to make a

statement that "the boundary line between our lands is not in dispute."

If the owner requesting fence-viewers is unwilling or unable to make this statement the clerk should reject the request for fence-viewers and advise the owner to seek professional advice to resolve the dispute before invoking the proceedings under the Act.

Duty of fence-viewers

Where fence-viewers are called upon to arbitrate in a dispute the Act stipulates that the fence-viewers;

- shall examine the premises, and

- if required by either adjoining owner shall hear evidence; and

- may examine the owners and their witnesses under oath.

Of crucial importance, the Act further requires that, in making the award the fence-viewer shall have regard to:

- the suitableness of the fence to the needs (formerly wants) of each of the adjoining owners or the occupants of the lands;

- the nature of the terrain on which the fence is or is to be located; and

- the nature of fences in the locality; and

- may have regard to any other factors they consider relevant.

The Act further imposes a duty upon the fence-viewers to have regard to any by-law in force in the municipality under The Municipal Act.

The prescribed Form 4 "Fence-viewers Award (dispute)" includes a statement to the effect that the fence-viewers "...having examined the lands and duly acted in accordance with The Line Fences Act, 1979 award as follows".

It is arguable that by this statement the fence-viewers are indicating that they have had regard to all the factors necessary and that they have so certified in their award. However it is necessary that the records maintained by the fence-viewers setting out the evidence considered, clearly indicate that regard has been had to all of the relevant factors.

In cases decided under other legislation, though in similiar circumstances, the courts have held that a failure to obey a statutory dictate to have regard to all factors will void the proceedings.

Apportionment of responsibility

One of the most significant features of the new legislation is found in section 7 which provides a more definite method whereby the fence-viewers are to establish the apportionment of responsibility.

In essence the new legislation is saying that:

- the fence-viewer shall designate responsibility for the work on a 50/50 basis between owner and the adjoining owner, unless

- the fence-viewers, in the circumstances of the case, consider an award in those terms "to be unjust", in which case the fence-viewers may make such award in respect of the construction, reconstruction, repair or maintenance of the fence that they consider appropriate (Chapter 11 - Page 50).

While it may be convenient for fence-viewers simply to make the designation on a 50/50 basis they should always have regard to the fact that their determination is subject to review by the courts and that in many circumstances a 50/50 apportionment would in fact be unjust. Such an apportionment should be viewed as only one of the possible alternatives.

See also Section 23 (3) as to the limitation that the Crown not be required "...to be responsible for more than one-half of the fence or to pay the adjoining owner an amount exceeding 50% of the cost of the fence".

Appeal against award

An owner dissatisfied with an award may now appeal to the judge of the Small Claims Court. (Section 9 (1))

Prior to the 1979 statute the appeal was to the judge of the County or District Court who was required to follow the practice and procedure on appeal "...as nearly as may be, as in the case of a suit in the Small Claims Court".

While the change in the judge may seem of minor consequence, in fact it has created a number of problems which appear to arise from:

- the fact that owners, acting on their own behalf, and even legal counsel, appear to be unfamiliar with the new Act;

- the fact that certain Small Claims Court judges are also unfamiliar with the requirements of the legislation and their responsibilities under it; and

- confusion as to the role of fence-viewers when an award has been appealed.

The Act imposes a duty upon the judge of the Small Claims Court to hear and determine the appeal and states further that he:

- may set aside, alter or affirm the award, or

- correct any error therein, and

- may examine the parties and their witnesses on oath, and

- may inspect the premises, and

- may order payment of cost by either party and fix the amount of the costs.

The decision of the judge is final and the award, as altered or affirmed, shall be dealt with in all respects as it would have been if it had not been appealed from. (Section 9 (5))

The jurisdiction of the Small Claims Court is unlimited as to the amount of the award.

Problems on appeal

On a number of occasions complaints have been received since the enactment of the new legislation about the practices and procedures in the Small Claims Court.

On at least two occasions decisions have been rendered which were unenforceable. For example:

Failure to require construction of a fence - In a decision heard

in the Small Claims Court in the County of Simcoe, Tonissoo and Ayers the judgment failed to maintain the integrity of the original fence-viewers award which had required the construction of a fence.

The judge concentrated on determining a more appropriate apportionment of the costs but made them applicable "...if a fence is required separating the two adjoining properties".

In the absence of a clear direction by the court requiring the construction of the fence the award could not be enforced.

This decision was handed down on October 6, 1980 and I understand complicated negotiations are still underway between the parties to resolve this matter.

Failure to extend time for completion of award - In another instance affecting a decision in the City of Mississauga, the award was appealed and the period for completion of the work, set out in the award as required by statute, expired before the appeal was handed down.

The court failed to provide for an extension of the time and once again the appeal decision was ineffectual.

Fence-viewers "functus officio" after award given - In other instances on appeal, fence-viewers have been requested to attend before the Small Claims Court, and in at least one instance had been subpoenaed to do so.

These circumstances immediately raised the question as to whether or not the fence-viewers should be represented by legal counsel and who should pay the cost of such representation.

However, there was a much more fundamental question that should have been determined. Why were the fence-viewers being required to attend before the court at all?

In many instances a tribunal, of the nature of fence-viewers, is considered to be "functus officio" once they have performed their statutory function, in this case the making of the award.

In my opinion it would be as inappropriate to subpoena fence-viewers to appear before the Small Claims Court on an appeal as it would be to subpoena the judge of a lower court to appear before the Court of Appeal to explain his decision.

While the Act is silent on this point, clearly the fence-viewers are "functus officio" with respect to the making of the award and notwithstanding the fact that they are entitled to a notice of the hearing of the appeal (Section 9 (3)), in my opinion they have no place in the proceedings on the appeal. Any attempt to subpoena them to attend should be immediately challenged.

Land surveyors responsibilities

In some circumstances I understand that land surveyors have been appointed to act as fence-viewers. However, except in those

circumstances, the role of the land surveyor under the new legislation is a very limited one.

Employment by owner - Throughout the Act the necessity for accurately describing land is placed upon either:

> - owners entering into an agreement respecting a line fence (Section 16 and 22); and
>
> -upon an owner requesting the attendance of fence-viewers (Section 4 (1)).

In both these instances your professional advice may be necessary.

Employment by fence-viewers - The fence-viewers, however, may only employ an Ontario land surveyor in one circumstance. That arises in a situation in which:

> "Where, from the formation of the ground by reason of streams or other causes, it is, in the opinion of the fence-viewers, impractical to locate the fence upon line between the lands of the adjoining owners..."

In such circumstances they may locate the fence either wholly or partly on the land of either of the adjoining owners where it seems to be most convenient.

Where this occurs they may employ an Ontario land surveyor to have the location of the fence described by metes and bounds.

Such location does not in any way affect title to the land. (Section 7 (4) and (5))

The procedures to be followed for the payment of land surveyor's fees are set out in Section 17 (2) (3) and (4) of the Act and the procedures to be followed are described in more detail in Appendix "G" of the book.

Attendance upon appeal - Unlike the fence-viewer, who is part of the initial decision-making process when making his award, a land surveyor may be requested, or subpoenaed, to attend before the Small Claims court as a witness where an award is appealed. In such circumstances the Ontario land surveyor is entitled to the same compensation as if subpoenaed in a Small Claims Court. (Section 17 (1))

As our experience with the new statute grows:

- both our understanding of its procedures and limitations; and

- our ability to apply it effectively will increase.

Though it is a continuance of some of the oldest legislation in this province it nevertheless remains somewhat of an indictment of man's intolerance towards his neighbour. Hopefully, in most circumstances questions concerning line fences will be resolved amicably between the parties without recourse to this Act, though that is more likely to occur, where your professional services are retained.

APPENDIX "A"

Responses to written questions submitted following the presentation of this paper.

Conventional line - Comment on a conventional line being established on an award of fence-viewers where the line is marked at both ends, but no fence was ever built. The award is on deposit in the Registry Office. Is this a legal boundary? (The line was established prior to the present Act.)

The essential element in establishing a conventional line is the making of an agreement between the respective owners.

The fence-viewers have no authority to make such an agreement on behalf of the parties and consequently cannot establish a conventional line. In the absence of an agreement between the owners to establish a conventional line the fence-viewers award would appear to have effect upon the title to the properties.

Conflict of interest - If a surveyor wears two hats - of a surveyor and a fence-viewer - is there a conflict of interest?

The Act is silent as to conflict of interest and The Municipal Conflict of Interest Act, 1972 (and the proposed new statute, The Municipal Conflict of Interest Act, 1981) are not applicable to fence-viewers.

In the absence of any prohibition in the Ontario Land Surveyor's Code of Conduct or other rules established by the Association there would appear to be no legal impediment prohibiting the fence-viewers from retaining the services of one of their members to conduct a survey in the limited circumstances contemplated in section 7 (5) in which the fence-viewers may employ a surveyor. However, as justice preferably should always be "seen to be done..." it would be prudent to avoid such a situation where another surveyor is available to carry out the survey. It should be noted also that the employment of a surveyor pursuant to Section 7 (5) is permissive.

Line Fences Act unworkable - I spoke to several clerks this past week about The Line Fences Act. They said that it was generally unworkable. People are dissatisfied with awards and appeals seem to go endlessly. Please comment.

In my opinion The Line Fences Act, 1979 represents a major improvement in this legislation. While the procedures in the statute are obscure they are nevertheless complete and if reference is had to the step-by-step procedures set out in the book "Fences in Ontario" they are eminently workable. Furthermore, appeals cannot go on endlessly as the "...decision of the judge is final..." (See Section 9 (5))

Type of fence to be specified - May fence viewers say what type of fence shall be erected?

Yes. The award of fence-viewers "shall specify...the description of the fence, including the materials to be used in the construction, reconstruction, repair or maintenance and keeping up of the fence..." (See section 7 (1) (c))

Line of convenience - Please define a line of convenience.

Presumably this is in reference to the circumstances in which the fence may be located off the boundary line "...where it seems to be more convenient..". While for practical purposes it would be prudent for the fence-viewers to establish such a line in consultation with the owners affected, the final determination as to the line is a matter solely within the discretion of the fence-viewers, subject to an appeal to the judge by any owner who is dissatisfied with the award. (See Section 7 (4) and (5))

Description for registration - Whose responsibility is it to determine whether a description is suitable for registration?

The statute places the onus upon the owners entering into an agreement or alternatively upon the owner requesting the attendance of fence-viewers to provide a description "...sufficient for registration in the appropriate Land Registry Office". (See Section 16, 22 (3), prescribed forms 14 and 15 and Section 4 (1), prescribed form 1)

In circumstances in which a description does not appear to be sufficient for registration the municipal clerk would be well

advised to reject the application and request the owner to seek clarification of the acceptability of the description before proceeding.

Survey subsequently invalidated - effect on award of fence-viewers

Responsibility for costs would have to be determined, having regard to all the facts in those circumstances. Under the new statute the onus is placed upon the owner making the request for fence-viewers to provide a description "...sufficient for registration in the appropriate Land Registry Office" and also to certify that the boundary line is not in dispute.

If an insufficient description is given or the fence-viewers proceed upon the advice of the applicant, in circumstances where the boundary line is in dispute, it is arguable that the courts would find that the person making the application was liable for all costs incurred as a result of his improper statement.

Boundary line in relation to placing of wire - If a fence is constructed with 50% wire on one side and 50% on the other may we assume that the line is along the centre line of that fence?

While, in circumstances in which the practice of "face the centre post - the fence on the right is your responsibility" has been followed this may be a reasonable assumption, it should not be considered conclusive and other evidence as to the line should be

sought. See "Fences in Ontario", page 85 for a discussion of this practice.

Wooden fence - determining boundary - Would the same situation exist if the fence was a wood fence?

All the evidence available should be weighed in determining the boundary line. For an example of circumstances affecting a flat board fence and other fences along boundaries see "Fences in Ontario", at page 61.

Unopened road allowance - In the circumstance in question a property, upon which is a pine tree plantation, is separated by an unopened road allowance, from a property upon which cattle are pastured. Who is responsible for fencing to prevent the cattle straying into the pine tree plantation?

In the absence of fences the owner of the cattle has a common law duty to restrain them. A leading authority states:

> "At common law the owner of animals is bound to keep them from his neighbour's lands and an owner is not required to protect his property from them... it is also unlawful to permit them to run at large on the highways...The Municipal Act it will be seen, empowers local authorities to alter the law in this respect."

The Law of Canadian Municipal Corporations by Ian MacF. Rogers, Q.C., Second Edition, paragraph 173 at page 949 and 950.

The duty of the owner of cattle to restrain them, and the fact that this duty cannot be offset by a failure of an adjoining owner to maintain that part of the line fence for which he was responsible, is well enunciated in the judgement of Thompson C.C.J., in the case of Acker v. Kerr (1973), 42 D.L.R. (3d) 514;2 O.R. (2d) 270 (Co.Ct.). For a discussion on this subject see "Fences in Ontario" chapter 6, at page 31.

Further, The Line Fences Act, 1979, provides in Section 18 (1) that:

> "Where there is an unopened road allowance lying between the lands of two owners not enclosed by a lawful fence, it is the duty of the fence-viewers, when called upon, to divide the road allowance equally between the owners of the lands, and to require each owner to construct, keep up and maintain a just proportion of the fence to mark the division line, but nothing in this section in any way affects or interferes with the rights of the municipality in the road allowance or is deemed to confer any title therein upon the owners or either of them."

It should be noted that no proceedings should be initiated under this section unless:

- the road allowance is unopened;

- is not enclosed by a lawful fence; and

- effective September 12, 1979, the date upon which The Line Fences Act, 1979 came into force, such proceedings may not proceed without the approval of the council of the municipality in which the original allowance for road is situate.

If the enclosure is made by other than a lawful fence and a by-law has been passed for prohibiting the building or maintaining of fences upon highways the owner may be compelled to remove it.

See "Fences in Ontario" chapter 25, at page 104 for a discussion on this subject.

THE APPLICATION OF LEGAL PRINCIPLES TO AN ASSESSMENT OF FENCES IN A PRACTICE IN NORTHERN ONTARIO

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THE APPLICATION OF LEGAL PRINCIPLES TO AN ASSESSMENT OF FENCES IN A PRACTICE IN NORTHERN ONTARIO

P.A. Blackburn

In considering the topic of fences it is significant firstly to note that this seminar was designed to provide input from both the northern and southern areas of the Province.

To many, Northern Ontario represents all that unfenced wilderness lying north of Severn Bridge but to one who practices in Northeastern Ontario, encounters with fences and problems associated therewith are experienced presumably in a manner basically consistent with other areas of the Province, with notable differences in some instances, however, being related to age of fencing, type of development and rate of development.

This portion of the Province has historically been referred to as New Ontario, and those portions thereof reported in the original township outline surveys to be considered suitable for settlement were subsequently subdivided into township lots and concessions employing the 1000 acre and 640 acre sectional systems.

Although both systems of land registration in Ontario are available in this area, the majority of patents and leases issued for the purpose of alienating an interest from the Crown were registered under The Land Titles Act, with description of the lands alienated being entered in respective parcel and leasehold parcel registers.

In an endeavour to quickly span the years from date of the original township subdivision survey to date of any significant amount of settlement and fencing relating thereto, it is appropriate to note that settlement commenced slowly following the original township surveys but gained momentum once access was established through construction of primitive colonization routes and subsequently railroads. Access prior to this time was dependent basically upon water routes and overland packing trails. Early development revolved primarily around activities associated with the timber industry, with settlement progressing therewith to include agricultural and mining interests. With property ownership and development, particularly as it relates to agricultural and residential pursuits, comes the need for establishment of fencing and the inherent problems associated therewith including where to fence, what to fence and how to fence.

Unlike many portions of southern Ontario, age of development and fencing in Northeastern Ontario cannot be counted in terms of centuries, or for that matter, in terms of very many generations. Much of the area cannot boast of any appreciable amount of development at all, and rate of development in Northeastern Ontario, by comparison, has been quite low. Although many areas of highly developed agricultural lands do exist, significant also to the subject of fences is the fact that many homesteads representing appreciable attempts at development during the earlier years of this century have now been abandoned following depletion of timber reserves on the lots, and unsuccessful, small

scale agricultural ventures. Bearing in mind that this evidence of lot structure is no less valuable to Surveyors, the evidence at this date relating to the abandoned holdings is often found in the form of overgrown, fallen and generally unmaintained fencing nearing a state of physical obscurity. Also characteristic of Northeastern Ontario is the vastness of the area through which the sparse population is scattered, and directly as a result thereof, the large area covered both during early years of development and currently by private practitioners.

Survey records, most often in the form of superior calibre field notes of survey, reflect dates commensurate with date of development throughout the area and relate in particular to many of the lots and aliquot parts thereof developed for agricultural purposes. Common observations when regularly comparing and reviewing information contained in records prepared by early practitioners in this area, suggest that:

- many lot lines and aliquot part lines were run by Surveyors employing methods found acceptable during that era, although contrary in part to methods advocated by The Surveys Act in effect today relating to lines being established for the first time;

- the surveys were dated in many cases shortly after the date of patent and lend credence to the belief that settlers were concerned about locating true boundaries of farm lots prior to fencing and land clearing;

- calibre of endeavour and dedication demonstrated by the few and

very distinguished surveyors responsible for the majority of work conducted during the early development era is abundantly apparent by the results achieved and by the care taken when attempting to perpetutate and reference key evidence;

- despite limited travel facilities and inconvenience obviously experienced during this era, the principal practitioners managed to provide service over a broad area, and, through their efforts and records permit excellent opportunity during current practice involvement to perpetuate much of the original survey fabric;

- fences are regularly noted in the early field notes of survey and often a brief but appropriate explanation is provided with respect to the origin, status and reliability of the fence. Often fences found having irregular alignment can be related by early field notes of survey and current measurements to alignment of the original township survey fabric;

- many parcels of land created as severances from the original township lots were established and monumented by survey with methods, results and key reference ties clearly illustrated in the field notes of survey, even though no plans may have been drawn, or in the alternative, no reference to a survey or plan may appear in the respective registered description;

- field notes of survey relating to abutting surveys completed years subsequent to the initial severance surveys often clearly illustrate fences built in conformity with staking found in place for the initial severances, despite discrepancy being found in the description tie from the initial severance to the lot corner.

When applying legal principles to an assessment of fences, the fences usually being assessed have been divided into three groups as follows:

- fences on lot lines not run in the original survey,

- fences on lot lines run in the original survey or during lot surveys, and

- fences and legal descriptions.

When occupational evidence such as a fence exists in the approximate position of where an unrun line would be were it established in accordance with the appropriate method as set out in The Surveys Act, obtaining "the best evidence the case admits of" includes finding answers to the questions relating to:

- how old and regular is the fence?

- how did the fence originate?

- is the fence old enough or did it replace a fence of sufficient age that it can be reasonably assumed that the fence was initially constructed at a time when evidence of the original survey was still available at the lot corner?

- does the direction of the fence suggest that the original fence may have been located on a line

surveyed in accordance with the law and practice of that day even though a record of any such survey has not been found and included in the research information?

- do the adjoining property owners or other persons who have resided in the area for a long time and who have knowledge of the particular fence, recognize and acknowledge the fence as a lot line?

The answers to these questions, and others appropriate to particular circumstances, are assessed and are duly recorded in survey returns in support of the decision regarding status of the fence. It is significant to suggest that hard and fast rules for the interpretation of evidence in cases such as this cannot be laid down, and that every case is found to have conditions peculiar to it alone, and must be resolved on the basis of the particular evidence.

Data relating to the fence encountered on the unrun line is collected methodically by the party chief with particular concern that comments relating to the status of the fence made by local people, and in particular by the parties abutting the fence line, be noted. Having thoroughly researched the file, and with well established knowledge of the area, often decisions are made by the surveyor based on information noted during the course of a survey by experienced technical personnel. Regularly, however, complications are experienced requiring further site attendances and extensive investigation by the surveyor. Possibly a recent experience would be appropriate wherein research conducted on the

file would suggest that the lot line in question should not fall in this category at all, but in the category relating to fences on lines run in original surveys or during subsequent lot surveys.

Two plans dated within a few years of each other showed monumentation along the lot line. The first plan, being a plan of survey, illustrated a large severance from the lot on the west side of the line. The second plan, being a reference plan, illustrated a large severance from the lot on the east side of the line. No reference was made on the second plan to points of monumentation on the first plan. Since we were involved with the entire length of the line, the work was commenced with the thought that the line would be re-established making reference to existing monumentation by the two prior plans. This thought was soon made obsolete upon finding that the monumentation by the first and second surveys did not correspond even closely, in fact monumentation overlapped to the extent that lands purportedly within the severances from the respective adjoining lots overlapped by approximately sixty feet. Also found on the ground, well obscured by alder slash, was a very old fence running for the depth of the lot, with exception of the first few feet near the front of the lot, and running within the sixty foot overlap area common to the two purported severances.

The fence line was cut out and found to be straight throughout. The line of fence was projected to intersect the retracement line established along the front of the lot and the point of intersection was found to correspond well when comparing measured and original distances for one lot width each side of the line.

Furthermore the direction of the fence line was found to correspond within minutes of the theoretic bearing of the lot line. The abutting owners were aware of the location of their respective corner bars, but until now had not been aware of each others corners, or that the fence possibly constituted best evidence for establishing the lot line. They were aware of the fence but had discounted it in favour of the respective lines as monumented by surveyors retained for the severance surveys.

You will conclude at this point that, based on the monumentation to date, each owner stood to gain considerable land by discounting the fence line. In an endeavour to resolve the issue, the respective surveyors were provided with an account of findings to date with anticipation that evidence assessed could be re-assessed and the final position of the line agreed upon. The surveyor involved with the first severance corresponded from his office in Southern Ontario stating that no field notes or report was available relating to the matter. Details of discussion with the surveyor involved with the second severance, although seemingly appropriate to many areas of disciplinary activity by our Association, will not be reviewed at this time and may be summed up in his statemnt to the effect that I should forget that he was there'. So much for professional responsibility and the protection of the public that we are authorized and trusted to serve.

Following further assessment of the evidence, the lot line was treated in the same manner as an unrun line, only in this case ties were taken to all monumentation as found, a Report of Survey position of the fence as best evidence of the lot line, and the

adjoining owners were provided with a full account of our endeavours and mutually agreed without reservation at the conclusion of the statemtns to that effect signed by the adjoining owners. Rectification of the respective parcel registers was effected based on results as described, without benefit of assistance from the surveyors involved with the prior severances.

With respect to fences on or in the vicinity of lot lines run in the original survey or during lot surveys, a much more direct authority is attached to the fence. Remarkably favourable and consistent comparisons are regularly found between measurements illustrated in old survey records throughout the area and measurements presently being obtained to fences serving as monuments to these surveys. Problems encountered relating to these fences invariably occur not in assessing the legal status of the fence, but in dealing with numerous subsequent surveys that have disregarded the fence as evidence of lot structure.

Throughout one era of development, survey methods adhered to and results of record by some surveyors suggest constant use of The Surveys Act during establishment of lot boundaries and aliquot parts thereof regardless of existing fences, whether or not the position of the fences resulted from surveys dating back to days of original development.

Registered plans resulting from these surveys, on occasion, involved rights-of-way extending across entire townships, and forming the basis for surveys, plans and descriptions of new parcels. Problems relating to assessment of evidence come into

sharp focus upon arriving at the conclusion, following research and preliminary field investigation for a comparatively small survey, that data in old field notes corresponds directly to location of fencing and bears no appreciable resemblance to the theoretic lines established.

On the premise that the professional is held responsible to exercise his profession with skill or accept the consequences of legal liability and discipline, and on the premise that assessment of evidence must be carried out in the same manner as it might be assessed in a court of law, the existing old fences in these cases are accepted as better evidence of the lot boundary and aliquot part lines than the line positioned theoretically.

Inconvenience, extra cost and scheduling problems are often experienced under these circumstances. Normally, scheduling does not permit time necessary for amendments to the theoretic involvement and therefore costs are apparent, and the client experiences inconvenience in the pursuit of his endeavour.

Invariably, the issue is dealt with by re-establishing that portion of the lot structure relevant to the survey at hand, making direct reference to the old field notes of survey, and disregarding the theoretic lot retracement of record. The remainder of the theoretic boundaries are left unamended unless the surveyor responsible acknowledges the need for amendment and acts accordingly, or until individual small surveys are completed affecting other portions of the theoretic survey.

Adherence to evidence in the form of fencing on lines surveyed and supported by records of survey is the accepted principle regardless of evidence established by theoretic methods. Substantial costs are sometimes involved, much to the discouragement of the client and the surveyor, but unless the issues are squarely faced and dealt with as they occur, the problems associated therewith multiply. Although remuneration is not inconsistent with the modern concept of professionalism, the dominant motive in the practice of a profession is the service to the client, which subordinates the pursuit of making money.

When considering fences and legal descriptions, most often relating to parcels out of township lots, consideration is directed towards the manner in which the intent expressed in the metes and bounds description was established. Under The Registry Act, ambiguous descriptions are often encountered. Fences existing along well established and observed boundaries regularly serve as monuments to and best evidence of the agreement made between the two parties originally.

Under The Land Titles Act, registered descriptions, particularly throughout an era prior to introduction of Assistant Examiners of Surveys as part of the Ministry of Consumer and Commercial Relations office staff complement, were treated often in a manner suggesting that every description was perfect and related exactly to the situation on the ground regardless of fences or any other form of occupation not cited in the description. Although numerous discussions evolve with respect to interpretation of legal descriptions, it is significant and essential to

differentiate in all cases between adverse possesion and misdescription.

Current practice is to illustrate registered and measured values on reference plans for the purpose of relating parcel register values to physical evidence of survey controlling the parcel boundaries, inasmuch as fences found to be originating from early surveys, but in conflict with details of metes and bounds parcel descriptions, are used as evidence of the parcel boundaries if the fences are mutually agreed upon by the abutting owners. Registered owners of lands abutting the fenced boundaries shown on the plan are requested to sign the plan to the effect that they do mutually agree to the boundaries illustrated. The registered and measured ties shown on the new reference plan serve as a method of updating details of registered title, and provide a logical and recommendable alternative in many instances to the method of holding registered description ties as the gospel in all cases, and involving The Planning Act and numerous conveyances of parts identifying the slivers of land lying between boundaries by description vs occupation.

In cases where registered descriptions do not correspond to respective parcel boundaries as fenced, and abutting owners fail to agree on the boundaries to be used, recourse to The Boundaries Act is encouraged. On rare occasion a parcel is found fenced and occupied, but upon survey is found to be totally outside of the area described in the parcel register. In these instances the area fenced is treated as a new severance and new title is created, subject to first establishing Ministry of Housing severance approval relating to the area fenced. Fences are used

as limits of occupation when defining boundaries of forced roads for the first time both on the ground and on title, unless specific circumstances or documentation in the form of By-laws, etc., should dictate otherwise.

Tracing the origin of fences is a constant problem in assessing the legal status of fences. In concluding, I make reference to two instances which serve to underline difficulties in establishing origin, and ironically relate to situations occurring long before I had any aspirations about becoming involved with surveys.

As a boy growing up in a rural environment I had the opportunity by chance to listen to two abutting farmers methodically discussing where to build a fence for the first time involving the aliquot part boundary dividing their farms. The east boundary of the lot was assumed to be in the centre of the straight, level road running for miles north and south of the lot. It was decided that they should measure off half a mile northerly along the centre of this road from the intersection of roads in the vicinity of the southeast corner of the lot. Once that was accomplished, and using knowledge obtained from some source, they would build a right-angled frame to be set on saw horses for the purpose of lining up one side of the right angle with the east boundary of the lot by carefully sighting north and south along the centre of the road at the half mile point, and having satisfied themselves that the sighting was done properly, they would then use the alignment of the other arm of the right angle, without disturbing the position of the frame, and commence setting pickets for the purpose of running the boundary between their farms prior to fencing.

The fence was built with similar care, and has been faithfully maintained by each of the farmers since that time, and now bears appearance at least of a long established boundary, although I am sure, if approached properly, both farmers in this instance would be proud to relate how they had built the fence. I am certain, however, that they would also show the same eagerness to find out where the line really would be by survey, and would realign their fencing to respect the 'true' boundary without hesitation.

This example therefore may serve to indicate legal involvement potentially to be experienced by a surveyor automatically asuming that this particular fence constituted best evidence of the aliquot part line.

During another instance relating to origin of fencing occurring during the same era, I was attracted by chance at the site of an elderly and respected citizen of the township as he untangled a surveyor's chain. He volunteered that he was about to measure across a farm lot, and upon noticing that the chain would have to be held at both ends, I offered to help, not knowing that the elderly gentleman would quickly reply that this was serious work to be conducted by responsible people of mature age. Shortly after making that remark two assistants arrived and, following a short briefing, placed the chain and a long spruce pole in the back of the elderly man's half-ton truck. As they drove away the pole bounced off the truck and they then stopped and suggested that if I really wanted to help I could sit in the back of the truck and hold onto the pole. Upon reaching their destination, the men methodically began measuring across a farm lot purportedly to satisfy some minor argument relating to what

length of fence was to be maintained by each party to a common boundary. As the two men used the chain, the third man took the pole from the back of the truck and, having grasped the pole at approximately mid-distance from the ends, began walking along the line carefully flipping the pole end over end.

As it turned out, in their practical endeavour, the man with the pole performed an independent check on the measurements obtained with the chain, as the 3 inch diameter pole had been cut at a length of 16 feet 3 inches, and as the man used the pole in the end over end manner, he picked up the other three inches necessary to make a rod for each pole length.

Apparently these 3 gentlemen although not officially fence viewers as we would refer to under The Line Fences Act, often found occasion to demonstrate their particular expertise, hopefully for not too much pay, and again may well have originated the location of fences used as practical boundaries for many years, even though the fence lines were in many instances observed by the abutting owners as not necessarily the real boundary.

So as a word of caution, and on the premise that the difference between good and bad is effort, after you have faithfully researched all information pertaining to a boundary, and have assessed to the best of your ability the legal status of a fence, don't be surprised if some elderly gentleman arrives at the scene and suggests that this is serious work, to be conducted by responsible people of a mature age.

WHEN IS A FENCE A FENCE,
WHEN IS A FENCE A MONUMENT

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WHEN IS A FENCE A FENCE
WHEN IS A FENCE A MONUMENT

Peter J. Stringer

I went to a place just the other night,
A house set high on a hill
Where surveyors came to scrap and to fight
Over problems they just couldn't kill.

Well armed for the battle before them
They hooted and hollered with glee
The foe was about to be shaken
Their problems forever to flee.

The first one came in with "The Act" in his hand
The next a T-2 at his breast
The third held a sack where case law was crammed
The fourth came in pulling a fence.

The battle was fierce, it seemed straight out of Hell
'till finally they came to their sense
As peace settled over the house on the hill
Four surveyors sat on the fence.

1. "The surveyor is a fact finder. He goes to the land armed with all documentary evidence that is available and searches for

markers, monuments and other facts - the surveyor must come to a conclusion from these facts - which monuments can be accepted and which must be rejected. The ability to arrive at a conclusion, and answer such questions elevates the land surveyor from the status of a technican to that of a professional man. He is exercising independent judgement. He is constantly interpreting what the statutes say, but such interpretation is correct only to the extent to which the courts will uphold it. He is in the unfortunate position of being a middleman who must determine for a client what he thinks the court will accept." (Brown - Boundary Control and Legal Principles)

It would appear then, that our job is to determine when, in fact, a fence is a fence and when a fence is a monument.

The American Heritage Dictionary describes a fence as "an enclosure, barrier or boundary made of posts, boards, wire, stakes or rails". If we were to analyze this definition carefully, we would see that it embodies many fundamental principles which will aid us in deciding if a fence is a monument.

A fence is an "enclosure". It is intended to keep the dog under control. It encloses the land or holding which I consider to be mine. By putting up a fence I stand up before the whole world and announce that "this is my property - if you come over here you'll have to contend with me". As a boy, I was brought up on a small subsistence farm in the Bancroft area. I remember an incident that brought this point home to be very forcibly. I had

a black and white spotted pony which I called "Donny". He antagonized our neighbour to no end by rubbing his behind on the fence between our properties. One day he decided to do this while I was with him. Alas - the fence fell down and my pony, my best friend, was captured by our neighbour. I learned the lesson well. The fence was a boundary and we dare not trespass. My pony was kept by the neighbour until my Dad fixed the fence.

A fence is a barrier. It impedes the progress of the masses. It says "you may come this far, but now you must deal with me". No wonder the courts put such a strong emphasis on occupational evidence. Possession is 9/10 of the law. A fence is a boundary - it marks clearly the territory I intend to defend. This is the point I would like to develop in the next few moments. A fence is more than just a fence when we recognize it as a boundary marker or monument.

We do have a statute in Ontario which, in a way, recognizes the importance of fences to a land owner. It is called the "Line Fences Act" and, in fact, it has just recently been rewritten and revised. Section 3 states, "An owner of land may construct and maintain a fence to mark the boundary between his land and adjoining lands". People have always recognized the need to mark their boundary, and under this Act they are given statutory approval. In reading through the Act recently, I was surprised at the number of times they refer to the fence as "the line fence marking the boundary of the adjoining lands". It is not only the surveyors who must recognize the importance of fences - citizens and governments alike must stand up and take notice.

A fence viewer appointed under this statute to arbitrate over a fence dispute has no jurisdiction to resolve boundary disputes. He is able to make an award respecting the matter in dispute, such as the size, shape, cost or even the existence of a fence. One important point to note is that both owners must sign a form saying that the boundary is not in dispute. Do you feel that an acknowledgement such as this could affect the way in which you carry out your survey?

The criteria used in choosing fence materials has not changed substantially down through the years. People are still basically concerned about:

a) the cost of the fence,
b) the type and availability of fence materials,
c) whether or not the neighbours will like the fence and share in the cost of having it erected,
d) if the materials chosen reflect general trends for fences in the neighbourhood or block,
e) if the fence will be substantial enough to satisfy local by-law requirements,
f) if it will afford the family the desired privacy,
g) whether or not it is placed entirely on one property or on the property line,
h) whether or not a surveyor should be called to establish the line before it is built.

With these points in mind, we are able to examine an existing fence, old or new, and allow it to help us form an opinion as to

why and for whom it was constructed. If the fence is not able to speak for itself, you will undoubtedly want to question local, longtime residents about neighbourhood fences. They have their heads crammed with details that will aid you in your search for the truth. Take the time to inquire. It may save you much time and money down the road.

Let us look briefly at four situations in which fences play an important role in defining the location of a property limit.

In the first instance, original survey monuments in a subdivision have long since disappeared and all that remains are various forms of occupational evidence including fences, hedges and tree lines. All of the original field notes are lost; you have a five foot error in a block; you have in your hands a reference plan prepared by another surveyor who has laid out one lot in the middle of the block with no regard for occupational evidence. You, in the meanwhile, are displaying the usual discomforts associated with this type of situation - heart palpitations, sweaty palms, hands full of grey hair and sharp pains in the vicinity of your pocket book. What do you do?

If you can establish that a fence was erected when original monuments were in place and their position was well known, you have gone a long way in determining whether or not the fence is

a monument. This principle is supported in case law, eg., Diehl v. Zanger, 39 Mich 601. The surveyor, in this case, in re-surveying a well established subdivision of 20 years, set out the lots according to the original plan. The problem was that his survey differed consistently from occupational lines by 4 to 5 feet. The courts finally decided that the long acquiesced in boundaries (occupational limits) should stand. Justice Cooley, after soundly rapping the surveyor's knuckles by saying that he had missed the point altogether, remarked that:

> "The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. If they (the original stakes) are no longer discoverable, the question is where were they located; and upon that question, the best possible evidence is usually to be found in the practical location of the lines made at the time when the original monuments were presumably in existence, and probably well known. As between old fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot acually are".

To these comments I would hasten to add that a fence cannot be accepted as a lot line just because it sits in the approximate location of a lot line. We must be fully satisfied that if we were to follow back along the historical path of this fence, it would lead directly to the time and place where Mr. X, Ontario Land Surveyor, was grubbing about on his knees putting in a survey monument.

The comments of Justice Cooley should also alert us to the situation where we encounter a recent erroneous survey where monuments were planted at a significant distance from a fence that would otherwise govern because it was the best evidence of the original survey. In this situation, after consultation with the other surveyor, you may choose to accept the fence and ignore the incorrectly placed survey posts. Why would you bother to consult the other surveyor in this case? Well, he may know something about that boundary that you don't. For example, if the previous surveyor found an original monument in its original position and replaced it because it was decayed, then this new monument will govern as if it were the original monument and will, therefore, bear more weight than the fence as evidence of the original line.

The second situation involved fences which are constructed by the owners after a severance has been made without the benefit of a survey. The fence marking the line of severance is not the best evidence of the original survey because this property was never surveyed.

However, the fence may be the best evidence of the "intention" of the original parties who agreed on that particular line, and, therefore, it could be the boundary. An example of this situation is the case of Kingston v. Highland (1919 47 N.B.R. 324). The evidence presented in the case established beyond doubt that, not only did the original owner of the whole parcel decide on and mark a line between himself and his brother, but they and their successors had peacefully lived up to and maintained the dividing line. The courts decided that the

surveyor had erred in his reestablishment of the property line by deed description because... "it was undoubtedly true that even without the surveyor it is quite competent for adjoining properties to establish their dividing line where they choose".

In this case, an old fence and blazed line was held to be the boundary and the fact that the deed disagreed with the line was immaterial. Justice Barry points his finger at surveyors and says "Occupation, then, especially if long continued, often affords satisfactory evidence of the original boundary, (or may I add "the intent of the original parties") when no other is attainable; and the surveyor should inquire when it originated, how and why the lines were then located as they were, and whether claim of title has always accompanied possession, and give all facts due force as evidence".

The third situation where one may consider a fence a monument occurs when two parties agree to the establishment of a Conventional Boundary and then take some action, such as the construction of a house, garage, of perhaps even a fence, in respect of that conventional boundary. This is one point for which you must be very careful. Please note, that in this case a dispute is not necessary, and there is no specific time period or limitation. If there has been agreement to a line and some action in respect of that line, a conventional boundary could well have been established.

In the classic case, Grasett v. Carter, the requirements to establish such a line are discussed.

Ritchie C.J. states:

> "I think it is clear law well established... that where there may be doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that, that is the true dividing line between the properties."

And also by Hughes, J. in Wilbur v. Tingley:

> "No length of time is necessary after an agreement has been reached. The erection of a fence on the agreed line is not necessary. Delay in objecting may and frequently does establish acquiescence. Such agreement does not involve a breach of the Statute of Frauds. It does not require a conveyance of any land from one party to another. It is simply an agreement acknowledging the correct location of the boundaries and settling a dispute."

The fourth situation where one may consider a fence as a monument is in the case of - you guessed it - adverse possession. The comments on this subject that I have heard recently from various surveyors range from "Squatters' rights are a thing of the past", to, "every 10 years the boundary changes" and may I add,

everything in between. I will not belabour this point any more than to say that you can only have adverse possession when parties are aware of the position of a property line and one of those parties without force, without secrecy and without permission decides to extend his possession over that boundary and he, in fact, does possess that land continuously for at least 10 years. So when you go to the field and do the survey, no one is particularly surprised to find that the line you have re-surveyed differs from the old fence by 20 feet.

If you feel that this is clearly a case in adverse possession, speak to your client, advise him to see his lawyer and then prepare a plan which clearly indicates both the limits of occupation and deed lines or lot lines.

The point that I have been striving to make in outlining the foregoing, is that fences are important. Yes, they are very important. I asked a local surveyor, one whom I greatly admire, what he does in a situation where a deed limit is significantly different from an old fence line. He simply said, "I get very nervous". And well we might. A fence is tangible, visible and touchable. A court is very reluctant to push that aside in favour of a theoretical line.

If you are dealing on a daily basis with many of the problems I have outlined above, you may be feeling that much of what I have said is just "old hat". For any who would feel that way today, I would like to introduce a couple of age-old problems - namely fences governing road or railway right-of-way widths. These are topics which will undoubtedly give us fuel for discussion.

The re-establishment of railway boundaries can be a tricky business when it is found that fence limits do not agree with other forms of primary evidence such a survey monuments and old railway tracks. In the Spring issue of the Ontario Land Surveyor, 1976, Mr. W.J. Quinsey sets out the CNR's view of how a surveyor should approach the problem of conflicting evidence along railway limits. I feel strongly that some of his statements require close scrutiny. He states the following:

> 2. "Fences were constructed by Railway work crews under the direction of a section foreman or engineer who had a sketch or plan showing distances to the limits at certain plus stations. Fences were generally constructed about one foot inside the Railway's deed limit as a precaution against encroachment on the part of the Railway. When portions of fences on opposite sides of the right-of-way seem nearly as old as, or can be dated from the original construction of the railway, and when these portions are found by measurement between them to nearly contain the original plan or deed width, these portions are considered to be primary evidence for determining the original position of the right-of-way... Errors in the Railway's positioning and construction of fences have been made, some increasing and some decreasing the occupied width of the right-of-way... There are a few cases where there may be good evidence that the old existing limit fence was originally built by the Railway within their deed limits, and where the resulting strip of land beween

fence and deed limit has subsequently been both occupied by the adjoining owner and included by description in his registered ownership. In these cases... certain court decisions have ruled in favour of the Railways...to the effect that the Railway cannot be dispossessed of lands which are necessary for the purpose of railway. In other situations there may be conflicting evidence and uncertainty as to the original position of the Railway's deed or plan limit. In these cases where your method of re-establishment results in any portion of the railway's fence being outside of the Railway's deed or plan limit, we suggest that your plan of survey should show the said portion as being the railway boundary by occupation. We consider that the construction of a fence by the Railway work crew can be deemed an act of open, notorious possession on the part of the Railway in regard to any portions of the fence which might have been constructed outside of the deed limit. Even in cases where there is no uncertainty as to the Railway's deed limit, we suggest the fence be shown as the Railway boundary by occupation".

In a nutshell, the CNR is saying that their limits extend to the fenced limits or the deed limit, which ever has the effect of giving the greatest right-of-way width.

Before proceeding with an examination of these statements, it seems abundantly clear to me that we must answer two very important questions:

1. Has the CNR or any other railway company acquired any additional legal rights for the protection of its boundaries as a result of it being a Crown Corporation?

2. Should your basic approach to the use of fences in surveying change when we encounter limits of Railway lands?

The answer to the first question is, NO. The railway companies have not acquired additional legal rights for the protection of its boundaries. They do, however, have the authority to expropriate lands thereby acquiring full right title and interest in them without permission.

The answer to the latter question may depend on your daring spirit, your search for adventure, your client's financial stake in the matter, or the extent of your desire to see justice prevail.

I would estimate that in 99.9% of all cases where there could be a legitimate dispute over the position of a Railway boundary, there is not enough land up for grabs to make the dispute worthwhile. You should recognize this situation and point it out to your client. The railway will object to your plan even when the amount of encroachment of a railway fence over a deed limit is less than one foot. They object because they wish to prevent the possibility of future expense to the Railway in moving its own fence to the deed limit.

The Railway companies are not above the law and in the past have been forced by the courts to move their fences to agree with the

deed line. You must weigh the facts of the case very carefully, taking into consideration the financial and time constraints of your client while at the same time respecting the rights and power of the CNR. If your client wishes to have his options left open and you feel uneasy about accepting one limit ahead of another, prepare the reference plan in such a way that it shows the disputed portion of land as a PART on the plan.

As a general rule, I have reluctantly accepted the CNR's rather dogmatic stand on this matter. To some this may sound like heresy, and to others it may be observed as the only practical solution.

Idealism is best tempered with a practical approach.

The problems of railway rights-of-way are miniscule in relation to those encountered when re-establishing the limits of old roads.

Generally speaking, I do not accept a fence along a road as a monument as readily as a fence along a railway limit. This, of course, would depend on the type of road being surveyed.

One must be very careful in accepting fences along the limits of a road allowance because the distance between these fences often varies and seldom agrees with the width of the road allowance.

3. Initially, fences were probably erected to mark the limits of the road allowance, but in time the original fences deteriorated and had to be replaced. Rather than

remove the old fences the landowner merely erected the new fence in a new position. Seldom were these fences erected further onto the owner's land, but rather within the limits of the road allowance, hence the distance between them is usually less than the actual width of the road allowance.

One should take into consideration the age and condition of these fences, along with their relationship to the position of existing road grades and ditches, when using the fences to establish road allowance limits. Township by-laws often permitted owners to put fences out on a road allowance by a specific amount. A search of the by-law Book might yield some required information.

The type of survey system used originally to lay out the township should also be considered.

For example, if the distance between fences on the limits of a road allowance in a "Single Front" Township measured more or less than 66 feet, it is likely that 33 feet measured from the fence on the run line is closer to the position of the centre line of the road allowance than the position arrived at by splitting the fences.

Conversely, in "Double Front" or some sectional systems, fences on both sides of the travelled road along the road allowance would be equally important in the re-establishment of the road allowance. In such cases, "splitting the fences" is probably the best method of establishing the centre line of the road allowance.

When you consider forced roads the situation changes once again. In this case, the fence is very important because it is often the only evidence available for the re-establishment of the limit. It is an occupational limit as expressed by the adjacent owner. Case law seems very clear on this point, generally giving the benefit of any doubt to the private land owner. You must be certain, however, that the fence includes all those portions of the road being used. There is no basis for establishing them at any prescribed width such as 66 feet. Generally if they are defined by fences, the fence location will mark the limits of the road. This must be done with a certain amount of discretion. Before you can accept a fence as a road limit, you must establish beyond a reasonable doubt that it was intended to mark the road limit.

In the case of provincial highways which have been acquired by expropriation or deed, the fences are of little effect. Fences should only be used as a last resort and in consultation with M.T.C. personnel.

While acting as a surveyor for the M.T.C., I found many situations where fences did not agree with highway plan limits, however, in every case arrangements were made to have the fences moved to the deed line. The M.T.C. has a low priority right-of-way inspection program which involves the inspection of highway monuments and fences. If they are not in agreement or if monuments are missing, appropriate corrective measures are taken. From the 1930's the DHO had a program whereby widenings were taken, and in compensation for this, fences were constructed. However, the documentation for these transactions is very poor.

You should consult the M.T.C. if you suspenct that this has happened. They will generally act very quickly in rectifying the situation, or at least in advising you on the proper course of action.

How do the economic factors present in operating your private practice influence your treatment of, or attitude towards, fences? I have personally found that when surveying the aliquot part of a lot an old fence is like a breath of fresh air. I suppose the real question here is whether or not you and I are willing to spend the time and money to investigate problems with fences and property lines. Investigation can be expensive and bothersome. It can also be emotionally and financially rewarding to see a problem through to the end... especially if it ends up in court and you are on the winning side. Above all, do not jump on a "always theoretical" or "always fences" bandwagon. Find out the facts of the case and take the time to write them down. If you are still unsure as to which way you should go, ask another surveyor whom you respect for an opinion.

When I receive field returns from the crews I make it a point to question the Party Chief about fences. I expect a statement about the type, age, condition, and regularity of the fence. If I am dealing with a person who has not had sufficient experience in dealing with these matters, I will accompany him to the field for further inspection. As a general rule, if I start getting nervous, I check it out. This investigation will also include a call to my client's neighbours.

You have at your fingertips a very powerful tool for finding out

the truth about a boundary. Section 7 of the Surveys Act gives you the power to examine a person under oath. The affidavit should be clear, precise and to the point. For example:

AFFIDAVIT

Township of Tay)

County of Simcoe)

Province of Ontario) To Wit:

I, ..., of the Township of Tay make oath and say: -

That I am 74 years of age;

That the north limit of my property is marked by an old post and wire fence;

That this fence has been in the same position as that shown to ....., Ontario Land Surveyor, for over 30 years;

That to the best of my knowledge the position of this fence has never been in dispute.

Sworn before me in the)

Township of Tay, County of)

Simcoe, Province of Ontario)

this 21st day of February, 1981)

_____

Signature
John G. Doe

_____

P.J. Stringer, Ontario Land Surveyor

The time has come to pause and reflect for a moment on what has been said. When is a fence a fence and when is a fence a monument?

You make the same type of decision every day concerning other forms of evidence. Use the same tried and proven principles here as well. Arm yourself properly with the facts -- weigh them carefully, take a decisive step and document your conclusion.

I trust that these few words about fences have, in some way, helped you to formulate opinions about the proper approach to take when, tomorrow, you are confronted with a dirty, old, broken down fence. You may want to hang your hat on it.

Thank you.