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The NOVA SCOTIAN SURVEYOR

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The following excerpts from Law Reports have been submitted by Lt. Col. J.F. Doig, Principal of the Nova Scotia Land Survey Institute. These should be of interest to the Land Surveyor and it is the intention to print in a later issue some further references to cases and Surveyors Law.

Editor

EXPROPRIATION

S2 447

O'MULLIN vs EASTERN TRUST COMPANY N.S.R. 48 p. 223
1914 - HALIFAX

Per Graham, E.J.:

"The property, 99 Pleasant Street, has been expropriated by the Government of Canada, under the Expropriation Act, by the deposit of a plan and description, and therefore it has a good title".

ADJOINERS

S 2 452

ALMON ET AL vs WOODILL (1885) 18 N.S.L.S.R. at page 13
(Halifax, Bedford Basin)

A lot of land conveyed by defendant to plaintiff by way of mortgage was described as bounded by lands of A. and B. which had previously been conveyed to them, being originally part of the same lot. The lines of the lot conveyed to the plaintiff were described by measurement but the termini were stated irrespectively of the measurements, thus "250 feet or until it comes to property of B." The measurements were wrong and resulted in the frontage on the street being much less than represented.

Held, that the measurements were mere matter of description and that there was no breach of the covenant of seisin.

ADJOINING OWNERS

S2 451

HUNTER vs ROUNE (1870) 8 N.S.L.R. Vol. II at p. 113

"Plaintiff and defendant were adjoining proprietors, their respective lots being by an ordinary post and board fence. This fence was blown down, and defendant employed persons to build a new one, which differed from the old in that the posts had "shoes". The excavations necessary for the posts and "shoes" were made by defendant partly on his own land and partly on plaintiffs land".

> "Held, that defendant had no right to excavate or build upon the plaintiff's land."

PETERS vs DODGE N.S.R. 45 p. 33 (1910) (Bridgetown)

HELD per Russell J.:

> " I think the law is clear that if the tree in question was a line tree, it was the common property of both Peters and Dodge, and the latter had no right of his own motion to cut it down."
>
> The following statement was made in passing:
>
> "Cases have arisen as to roots and branches, and the law seems to be well settled as stated in the Connecticut case of Lyman vs Hale 27 a.m. Dec. 728 that a tree standing wholly on one's land, but extending its roots into and its branches over the land of another, belongs nevertheless to the former.

S2 459

CAIN vs UHLMAN (1887) 20 N.S.L.R. at p. 148

".....The witness whose evidence was rejected testified that he was a practical mill builder, that he had erected water power mills, and that in doing such work he had to take levels to get a height but that he did not know how to use a theodolite".

"Held, that the evidence should have been received."

Per MacDonald, C.J. at .151:

"Now it is quite probable that a theodolite is the best, most correct and convenient instrument for taking levels, but its absence does not by any means make it impossible for a practical man like the witness, Esty, to arrive at correct conclusions as to the respective levels of the different points of a stream by other means with which he was familiar and which he had been accustomed to use with approximate correctness in the exercise of his trade and business. It would be for the jury, I conceive, to estimate the value to be attached to his testimony, and the efficiency of the apparatus used by him."

REX vs HUBLEY 57 NSR p. 539

Harris, C.J.:

It appears that Dr. A.E.G. Forbes, a witness for the accused, on being called refused to give evidence as an expert unless he was first paid fees as an expert witness. He was allowed to leave the stand, but after an adjournment granted at the request of the counsel for the accused for the purpose of considering the question; the witness was recalled and again refused to give expert testimony unless payment of fees was guaranteed. The learned judge did not compel the witness to give evidence, and reports that he was not asked to do so and says that had he been asked he probably would have compelled the witness to testify.

COURSE AND DISTANCE

S2 443

TWINING vs STEVENS (1863) 5 N.S.L.R. Vol. I p. 367

General Statement: "Where the position of the natural boundaries described in a grant cannot be ascertained, and there is no proof of the original survey, the limits of the grant cannot be extended by implication beyond the courses and distances mentioned in it."

The general background was that a survey had been made in the area, the surveyor himself was dead at the time of trial. Trees had been blazed at that time but surveyor's assistants were not sure of which ones, and locations of same. Plaintiff was claiming a fir stump as corner; defendant was claiming a hemlock stump some 17.5 chains south of fir stump as corner.

GATES vs DAVIDSON ET AL (1884) 17 N.S.L.R. P. 431 (Kentville)

Plaintiff had to prove title. His place of beginning was identified and his Description in the grant then read: "running south 52 chains to a large pine tree marked 'J.G.', and thence west, etc."

To reach the locus the line should be extended about 50 chains more. To that increased distance the surveyor's line on the ground extended, but there was no pine tree so marked either at the distance expressed in the description or at the end of the surveyor's line.

At the latter point, however, a spruce tree was marked 'H.G.' and 'J.G.'. The plan attached to the grant represented the lot as a different shape from that claimed, and the area expressed in the grant was inconsistent with the plaintiff's contention.

First trial before Rigby, J. (in his charge to jury):

"The Gates' grant was the oldest and must prevail as against a subsequent grant covering the same lands".

Appeal per Thompson, H.

"The absence of the monument from the place where the grant would lead us to look for it may authorize us to look for it within a reasonable distance from that point, but the plaintiff is not content with a reasonable distance - he goes looking for a monument a distance unreasonably far, in view of the distance expressed in the grant..... and after all does not find it."

"The grant is strong against the plaintiff's theory in three respects; it declares that the lot "is particularly marked and described in the annexed plan" and that plan again specifies the length of the line in question as 52 chains; Then the plan shows the lot to be one of entirely different shape from that which must be delineated to suit the plaintiff's description, and, finally the contents of the grant are stated both in the grant and the plan as being 228 acres while the lines claimed by the plaintiff would embrace double the quantity.

S2 453

SELDON vs SMITH (1877), 36 L.T. 168 p. 169

Cockburn, C.J. said "To my mind it makes no difference whether there was enclosure or not. Enclosure is the strongest possible evidence of adverse possession but it is not indispensable".

LEIGH vs JACK (1879), 5 Ex D. 264 p. 271

Cockburn, C.J. said "If a man does not use his land either by himself or by some person claiming through him, he does not necessarily discontinue possession of it."

DES BARRES ET AL vs SHEY (1871) 8 N.S.L.R. p. 327

"W., under whom defendant claimed, entered into possession of a lot of land in 1834, under a judgement recovered against T., in an action of ejectment, and continues in possession for a period of 30 years. In 1846 T. conveyed to the plaintiff, who, in the following year, went upon the land, and had it surveyed."

"Held per Johnstone, E.S., Dodd, J., and Ritchie, J., that the entry and survey by plaintiff were not a sufficient interruption of the adverse possession of W. to prevent the operation of the Statute of Limitations."

Per Ritchie, J., Sir W. Yound, C.J., dubitante.-

"T. having been out of possession and W. in possession under his judgment, when the former made his deed to the plaintiff, no title passed under it."

"The judgement obtained by W. against T. in 1834 did not settle title, simply gave W. possession of the land."

(There is authority (Callahan, Ohio State) for precept that in some jurisdictions title cannot pass while another is in possession, even though his possession period has not ben fulfilled.)

BORDEN vs JACKSON N.S.R. 45 p. 81 (1910) Township of Horton

Plaintiff resided upon a portion of the land described in his deed and in common with his predecessors in title, had for many years made use of a wood lot (5 or 6 miles away) in connection with his farm for the purpose of getting fire wood, fence poles and seine stakes. He had had the lot surveyed, warned trespassers off and had put others in charge for this purpose.

HELD: That the facts stated were sufficient to show such a possession under colour of title as to enable plaintiff to maintain trespass against an intruder.

SWINEHAMMER ET AL vs HART N.S.R. 46 p. 194 (1912)

In order to acquire title by possession to woodland there need not be an actual possessio pedis as to the while area, but there must be something to show definitely the limits of possession claimed.

Blazed lines at the sides, kept up for the most part by adjoining owners, and the running of lines by a private surveyor, are insufficient for this purpose for want of publicity.

Where neither party is able to trace title back to the Crown, and one party relies wholly on possession and the other on acts of possession coupled with a deed defining the bounds, the latter title will prevail over the former.

In the above, defendant was given title to rear portion of lands and plaintiff was confirmed in title to front portions.

McGIBBON vs McGIBBON N.S.R. 45 p. 552 (1912)

Adverse possession extending over a period of sixty years is sufficient to give the holder title as against the Crown or anyone claiming under the Crown.

In making up the period of sixty years adverse possession, the possessions of two or more parties who have been in possession continuously, and without any break, may be tacked.

HALIFAX GRAVING DOCK CO. LTD., vs EVANS N.S.R. p. 56 (1914) DARTMOUTH

HELD:

a) An inaccuracy in a plan did not control the dimensions expressed in the deed. (distance from street line to fact of a breastwork not called for in deed, shown as 55' but by actual measurement is 55' 5".)

b) Recitals in old deeds are evidence.

c) When there is difficulty in fixing beginning boundary the calls may be reversed and the lines traced the other way.

Per Graham, E.J.

"True the words more or less occur (55 feet more or less) but in a survey in which inches are taken into consideration, the words "more or less" are not very elastic".

.....

"It is shown that the defendant exercised repairs on it (breastwork) 19 years before the trial, not earlier. This period is too short for our statute."

DUNCANSON vs ATWELL ET AL N.S.R. 48 p. 115 (1914) (Kentville)

Per Sir Charles Townsend, C.J.:

"Whether the plaintiff's deeds really include, by actual measurement, the land in dispute becomes immaterial in view of the continued and notorious possession they had and had at the time

of trespass".

THE HALIFAX POWER CO. LTD. vs CHRISTIE N.S.R. 48 p. 265 (1915)

It is not necessary to prove fencing or cultivation to established possession of woodland. Indentification by the usual method of blazing, together with such acts of ownership as the land is capable of, is sufficient.

Neither is it necessary to trace title back to the Crown. It is enough to show that it was derived from someone actually in possession.

SOULIS vs ARMSTRONG N.S.R. 51 p. 315 DIGBY 1917

In the year 1891 defendant took over a business previously carried on by his father and went into possession of the shop in which business was carried on and the land adjoining occupied in connection therewith, and erected a fence on the South line of the land occupied in connection with the business giving a frontage of 45 feet.

Subsequently, in 1894, defendant with other heirs gave a deed to his mother of land owned by defendant's father and received in return (in 1896) a deed of the land on which the shop stood and land adjoining giving him a frontage of only 34 feet.

In 1899 the mother gave a deed of the rest of the land to the present plaintiff.

After the making of the deed to his mother, defendant continued in occupation of the land as originally enclosed and used by him for a period upwards of twenty years.

HELD, that the deed could not be read as conveying more than 34 feet mentioned, but that the defendant was entitled to succeed by reason of his twenty years continuous possession against plaintiff.
S2 455
COCHRAN vs SANFORD N.S.R. p. 558 Windsor (1922)

"..... He claims to be entitled to a right-of-way over the said road (a) by enjoyment for upwards of twenty years (b).....".

GRANT vs MORTON 57 N.S.R. p. 313 Lunenburg Co. 1924

Rogers, J. quoting 34 SCR p. 627:

"A true owner of lands is not bound to use them in any way. He may prefer to heave them vacant. While they are vacant he still retains the legal possession, and he only ceases to be in legal possession when and during the time that he is ousted from it by a trespasser or squatter, who has acquired and maintained what the law holds to be actual possession. If the squatter claims to have ousted him by constructive possession, he must prove a continuous, open, notorious, exclusive possession of at least part of the lands, the whole of which he lays claim to under colourable deed."

LANDRY ET AL vs ROSS 58 NSR p. 364 1926

Harris, C.J. quoting Sherren vs. Pearson 14 SCR 581:

"Owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoilation. The spoiler, however, does not, by managing without discovery, even for successive years, to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoilation.

CAMPBELL vs CAMPBELL 4 MBR p. 502 East Wentworth 1932

In 1911 Reuben Campbell set off a lot lf land and put the defendants, his son and the son's wife, into possession for the purpose of enabling them to build a house thereon, and told them at the time that they could have the place as long as they wished to stay there. No deed or writing was made. Campbell assisted his son, the defendant to enclose the lot with a fence. The son built a house on the lot with the approval and the knowledge of Campbell. Campbell later died and by his will he devised to his wife a life-estate in his real property with remainder to the plaintiff herein. The defendants continued in undisturbed possession of the lot until 1928, after the death of Campbell and his wife. The owner of the remainder brought this action to obtain possession of the land.

.....

The court, exercising its equitable jurisdiction, held that the gift was complete and that the lot belonged in equity to the defendants, and that the plaintiff could not, under the circumstances, avail herself of the defence of the Statute of Frauds or claim that the defendants were not entitled to the land.

S2 444

ETTINGER vs ATLANTIC LUMBER CO. LTD. NSR 51 p. 523 (1917) Kennetcook

Per Sir Wallace Graham, C.J.:

A river is a natural boundary controlling other boundaries.

The highest class of boundary, a natural monument, cannot be rejected in favour of a blazed line on the ground, not called for in the documents and which does not correspond to the line on the grant.

Blazed trees junior to the survey for the grant, and not called for in the grant, are not in law evidence.

McPHERSON ET AL vs DONALD CAMERON (1868) 7 N.S.L.R. p. 208 (Land on eastern side of S.W. branch of Mabou River.

General Statement: "If courses and distances are given to reach an object, and they will not reach that object, the rule is to go to the object as the most certain and to alter courses or distances accordingly."

"In an action of ejectment defendant relied upon a certain beech as being a corner boundary of his lot, but neither the course nor distance mentioned in his grant would take him to it, without the alteration of one or the other. It being clearly proved that this beech had always been considered the corner of defendant's lot.

"Held, that defendant's line should be extended beyond the length mentioned in his grant, until it struck the beech in question."

ARCHIBALD et al vs MORRISON 7 N.S.L.R. Vol. I p. 272 (Land lying between St. Peter's Bay and Bras D'Or Lake).

General Statement:

"The terms "due North" and "due South" in the description of a deed, if not controlled by accompanying words, mean north and south by the magnet, and not by the meridian."

"Where a plan is attached to a trant or deed and referred to in the usual terms it is to be considered as incorporated with the instrment, and must be construed along with it."

"The description contained in a grant of lands gave one of the boundaries as follows:- 'Thence along shore to a point due north of a small pond six chains from an old fort.' This pond by admeasurement shortly before trial was found to be at its eastern end nine and at its western end eleven chains from the fort.

"Held, that this discrepancy must be rejected as falsa demonstratio, and the pond being a natural monument, its actual position should control and correct the description in the deed."

DAVISON vs BENJAMIN (1874) 9 N.S.L.R. Vol III p. 474
(Kentville)

"Several crown grants from which plaintiff deduced his title purported to convey a specified number of acres, described as contained within lines commencing at a fixed point, and running specified distances to other points indicated by marked trees and other monuments, which appeared upon plans annexed to and referred to in the body of the grants."

"Held, that the monuments, being ascertained, must control the quantities purported to be granted, and the distances mentioned in the grants, notwithstanding the fact that the number of acres included in that case would be enormously in excess of the number which the grants purported to give. The least objectionable of all difficulties is to make quantities whether too great or too small, yield to actual monuments on the ground."

Per Sir W. Young, C.J. - "The grants might have been attacked by the crown for excess but, in the absence of such proceedings, the land included could not be re-granted to a stranger. Under the usage of the court, parol evidence is admissable to show the actual position and surveys of lands included in grants of wilderness and woodlands."

	Lot	Deed	Actual
Discrepancies in Areas	A	400 Ac	672 Ac
	B	100 Ac	772 Ac
	C	100 Ac	760 Ac
	D	100 Ac	400 Ac

S2 445

FIELDING ET vs MOTT ET AL (1885) 18 N.S.L.R.

Thompson, J., p. 356:

"We have in this description a unique boundary given as the place of beginning: "A birth tree marked 'A.D', and being on the east side of Salmon Riber, East Halifax." The subsequent erroneous addition where the tree is stated to be above the bridge "about five miles", will not vitiate the description, or prevent us from taking the A.D. tree as the boundary, even though we find it less than five, or even less than four miles above the bridge. The person who marked the tree and gave the description identified it. Had it appeared that, about five miles above the bridge, there was another A.D. tree, a different question would have arisen - as to the admissability of parol evidence to control the expression "about five miles" by evidence to identify the lower tree."

THE ATTORNEY-GENERAL vs DOMINION COAL CO. LTD.
N.S.R. 44 p. 438 (1909)

Per Townshend, C.J. :

"Natural monuments are preferred to courses and distances by

the courts because it is supposed that the parties made their grant in view of the premises and were more likely to have made a mistake in their courses and distances than in respect to a natural monument. But if no one was ever there, surveying the area, that rule with its reason fails.

.....

Here, I think, it may be said that the dimensions are of the essence of the instrument".

Note: A mining lease was involved - not to be over 2 1/2 miles long and 1 square mile in area.

And further quoting Tuxedo Park vs Starling, 60 N.Y. app Div. 352:

"Where courses and distances are to form a fixed line or to enclose a fixed quantity they will control natural monuments".

BOEHNER vs HIRTLE N.S.R. 46 p. 267 (1912) LUNENBURG

Graham, E. J. quotes:

(c) In Van Wyck V. Wright 18 Wend., 168

"I consider the law so well settled that a conveyance is to be construed in reference to its distinct and visible locality calls as marked or appearing on the land in preference to quantity, course, distance, map or anything else, that it would be a waste of time to refer to the numerous authorities on the subject."

BLACKADAR ET AL vs HART N.S.R. 51 p. 449 Millville, Kings County

It was further objected on the part of the defendant that the description in some of the conveyances tendered were vague and uncertain, as monuments referred to were no longer to be found on the ground.

HELD, that this was a mere objection to the form of the conveyance tendered, entitling defendant to require delivery of deeds containing a modern description, but not entitling him to damages for breach of contract.

Per Sir W. Graham, C.J.:

"It was one of the late E.E. Armstrong's surveys.....

A rule has been adopted in America and followed in Nova Scotia that where there is in a description a variance between the monuments and the courses and distances, one rejects the courses and distances as false description in favour of the monuments. There is a very good reason given for this rule, namely, that a mistake may easily occur in writing out descriptions, or the surveyor may have been mistaken in either, whereas in respect to a monument the presumption being that

the surveyor was at least on the ground could not so easily be mistaken in respect to the monument. That rule was applied to surveys of this same surveyor in this locality, owing to his recklessness with the Crown land. (Davison vs Benjamin 9 N.S.R.).....

S2 446

Archibald Foster is a surveyor of experience. He was called by the plaintiff and .....

Q. I see the lot was run by E.E. Armstrong; have you had experience in your surveying as to his lots?

A. Yes.

Q. Are his surveys accurate?

A. He was considered liberal. I have found that they overrun largely.

S2 440

McGREGOR vs WEBBER N.S.R. 51 p. 230 (1917) Digby

I think it is exceedingly dangerous, when one of the parties is dead, to accept too implicity the testimony of the other as to a conventional line which supercedes the boundaries of documentary title deeds. It (Line claimed) is a line which would run through a building then and now on the property now owned by the defendant and that is improbable. It was a mere line through the air between objects already on the ground and no marks made which would lend it authority. The evidence on the ground namely, the building mentioned and the old abutment is evidence the other way.

REID vs SMITH (1868) 7 N.S.L.R. Vol. I p. 262

General Statement: "There being some uncertainty as to the line dividing the lands of two adjoining owners, they mutually agreed to have a survey, and, for that purpose, each appointed a surveyor to represent him. These surveyors, attended by the parties and others, met on the spot and, having read the deeds, fixed, by mutual consent of the parties, a certain line as the boundary between the two properties."

"Held, on the principle of Woodberry vs Gates, 2 Thompson, 255, and Davidson vs Kinsman, 1 James, 1, that an estoppel was thereby created, which prevented the parties, or those claiming under them, from setting up any other boundary."

HAGARTY vs JAMES PRYOR ET AL Alderman of the City of Halifax, (1872) 8 N.S.L.R. Vol. II p. 532

"Defendants removed plaintiff's porch as a nuisance, and justified as being a committee of the City Council duly authorized to remove anything which was a nuisance, encroachment or annoyance on any of the streets.. The evidence showed that the porch, which encroached upon the public street several feet, had been in existence just as it was when pulled down, for a period of 60 years. There was no evidence as to the origin or dedication of the street, and it did not appear whether the street or the porch was the more ancient."

"Held, that in the absence of evidence as to the original laying out of the street, its dedication to the public should be taken as subject to the encroachment in question, and that the verdict for the defendants should be set aside."

Note: The house in question had been occupied at one time by the Bishop of Nova Scotia (Inglis) and was situated on the west side of Pleasant Street."

PUGH vs PETERS ET AL (1876) 11 N.S.L.R. p. 139 (Halifax)

Plaintiff and the two defendants purchased a field, divided the front portion into lots according to a certain plan, laying off two lots as a proposed street, connecting an existing street with the undivided

rear portion of the land, and furnishing the only access to that rear portion from any existing street.

The defendant, P., purchased the undivided rear portion and two of the front lots, one on each side of the proposed street, the said lots being described in the deed as bounded on the North and South respectively by the street in question.

HELD, that the plaintiff was estopped, as a grantor in the deed to defendant, P., from denying that a right-of-way was granted over the land designated in the deed and on the plan under which sales were made as proposed streets.

HELD, also, that although the land designated on the plan as proposed streets was subject to a right-of-way to the rear and to any portion of the adjoining lots, yet that, as the title to it remained in the plaintiff and defendants, it was subject to partition under Chapter 102 of Revised Statutes.

ROBERT vs MARR, 1 Taunt, 495

Lord Mansfield: "If you have told one in your lease, this piece of land abuts on a road, you cannot be allowed to say that the land on which it abuts is not a road."

S2 441

ROACH vs WARE (1886) 19 N.S.L.R. p. 330

"M.R., being about to make a conveyance of land to V.R. went on the land in company with V.R., and fixed the starting point from which the line was to run. A deed was made accordingly. After the death of M.R. plaintiff, his widow, with the consent of V.R. got a surveyor to run the line which was done from the starting point indicated by M.R. but in consequence of an error of the surveyor on a course five degrees different from that mentioned in the deed. V.R. was not present when the survey was made (absent at sea) but subsequently assented to the line as run in ignorance of the fact that a mistake had been made. V.R. conveyed to defendant, according to the description in his deed.

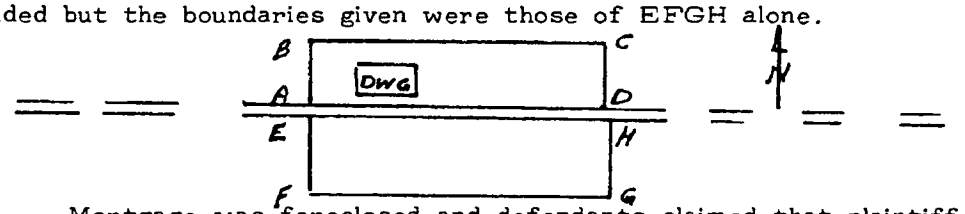
Held, that the assent given by V.R. to the line as run by the surveyor was not sufficient to establish a conventional line."

Per MacDonald, J.:

"Surely it cannot be contended that he even intended to agree to a line running five degrees to his prejudice away from the correct one, or that he would not have opposed it if he knew that Vanbuskirk had made such a gross mistake against his interest. In the absence of anything to estop him from disrupting such a line it would be shocking injustice to deprive him of his land because a surveyor made such a mistake, not communicated to him, even if he made stronger admissions or gave a clearer assent than he is proved to have made or given here, while relying upon the correctness of the surveyor's work, which turned out to be so clearly erroneous".

FULLERTON vs IBPITSON ET AL (1878) 12 N.S.L.R. p.225

Defendants took plaintiff upon land offered as a security for a mortgage and pointed out boundaries. Defendants showed both parcels as theirs. Mortgage described land as that on which defendants resided but the boundaries given were those of EFGH alone.



Mortgage was foreclosed and defendants claimed that plaintiff had no title to their house lot.

Held;

a) Defendants not estopped from saying that land in question was not in the mortgage.

b) Verdict for plaintiff sustained as it was clearly the the intention to include the portion on which defendants resided.

James, J.:

ESTOPPEL: When one person, by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest, is allowed in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

S2 442

c) "He (plaintiff) has proved distinctly and incontrovertibly from the defendants own lips and from his own recollection that it was the intention of both parties that the whole property both North and South of the road should be included in the mortgage. And so we must construe it".

WODD vs GIBSON (1897) 30 N.S.L.R. p. 15 (Town of Windsor)

The trial judge found that the defendant, by a user of more than twenty years, had acquired the right to have the eaves of his barn project over the line of the plaintiff's land.

This decision was upheld, giving the defendant nothing more than an easement, the evidence showing that the land, so far as the surface was concerned, had been throughout in plaintiff's possession, and used by him.

(Note here that the basis of this decision is the phrase "so far as the surface was concerned, had been throughout in plaintiff's possession" - i.e. he had used the land.)

REDDY vs STROPLE N.S.R. 44 p. 332 (1909) Guysborough

The title to the land in question depended on the reading of the description in the defendant's deed, the material portion of which was as follows: "Thence running in an eastwardly direction along the said highway until it comes to a crossway (a kind of culvert or bridge) in the public highway, and running in a southerly direction until it comes to the waters of Broad Cove, etc.".

There were two crossways on the highway. The dispute was over which was meant.

Held: 1) There was no authority for rejecting first crossway in favour of second.
2) The words "running in a southerly direction, etc." did not demand a straight course but only a southerly direction.
3) Defendant was not bound by an alleged conventional line agreed to between the parties "if found to be correct", in the absence of evidence to show that it was found to be correct, and where it appeared that, at the time the agreement was made, there was uncertainty in the minds of the parties as to which crossway was meant.
4) In interpreting the agreement (re the conventional line) both the agreement and the plan referred to in it must be considered.
5) Effect must be given to the instrument, where possible, against the grantor.

OGILVIE vs CROWELL N.S.R. 40 p. 501 (1904) near Lawrencetown, Halifax County

Per Graham, E. J.

"I am of the opinion that there was no public way, as the defendant claims; that there was no dedication. It has been a mere cart road. It was not a thoroughfare. There was not a public terminus at each end. There was a gate kept up near the highway on the plaintiff's land, and this had to be opened by people going to the shore. The plaintiff's land, with the seaweed, constituted the other terminus. There was no statute labour performed on it..... I find against the existence of a public way".

JOLLYMORE vs ACKER N.S.R. 49 p. 148 (1915)

Such elements of estoppel are supplied by evidence showing that former (adjoining) owners agreed upon and built a fence dividing the properties upon a line which indicated clearly that the adjoining owners being uncertain of the line had a surveyor run it out and by mutual consent built the dividing fence on the uncertain line indicated by the surveyor's stakes; that afterward this fence was renewed by the parties plaintiff and defendant and those under whom they claimed, and that the fence so renewed was treated as the dividing line, and that the plaintiff built a well on his side by reason of such conventional line.

A line agreed upon to prevent future disputes should be as effectual as a line agreed upon because of an existing dispute.

The facts of every case as they appear must be looked at.

MAPS AND PLANS

S2 456

BLANK vs ROMKEY N.S.R. 47 p. 127 (1913)

Appeal from decision of Graham, E. J., in favour of plaintiff in an action claiming damages for trespass.

Appeal allowed.

The plaintiff claimed that the plan referred to in the descriptions of the various lots in the subdivision was in conflict with the description of his Lot (No. 7).

Drysdale, J. said: "Taking the description as it is in the deed and applying it to (Lot) 7 as shown in the plan, viz., as all lying east of the creek, or inlet, you apply the description and its four sides as therein stated without trouble and accurately, whereas to take the plaintiffs contention as to (Lot) 7 being intended to take in a portion of the point, you not only do violence to the plan, but you cannot possibly apply your fourth course in the description. I think this is not, etc.....

There were good grounds for defendant having title to dispute land by possession in any case. This was confirmed by Drysdale, J. and Ritchie, J.

CHARLES D. ARCHIBALD ET AL vs. R.G. MORRISON
7 N.S.L.R. Vol. I at p. 272 (land lying between St. Peter's Bay and Bras D'Or Lake).

General Statement:

"The terms "due North" and "due South" in the description of a deed, if not controlled by accompanying words, mean north and south by the magnet, and not by the meridian."

"Where a plan is attached to a grant or deed and referred to in the usual terms, it is to be considered as incorporated with the instrument, and must be construed along with it."

"The description contained in a grant of lands gave one of the boundaries as follows: - "Thence along shore to a point due north of a small pond six chains from an old fort." This pond by admeasurement shortly before trial was found to be at its eastern end nine and at its western end eleven chains from the fort.

"HELD, that this discrepancy must berejected as falsa demonstratio, and the pond being a natural monument, its actual position should control and correct the description in the deed."

FULLERTON vs BRUNDIGE ET AL (1886) N.S.R. p. 185

Per Ritchie, J.:

The words contained in the deed, viz, "which said lot is particularly marked and described on the annexed plan", make the plan a part of the description, and I consider the law to be that when a plan is referred to in a deed as part of the description, all the particulars appearing on that plan are to be regarded as if they had been fully set out in the deed.

MILLETT vs BEZANSON ET AL N.S.R. 45 p. 152 (1911)

HELD: "While the report and plans of a Crown Land Surveyor leading to a grant cannot be used to contradict the terms of the grant they can be used for the purpose of ascertaining where the surveyor started and where he established his marks.

Also, that where a course is described as running from a fixed monument "North along the rear line of lots 16, 17 and 18,180 rods" the dimension 180 rods conclusively determines the distance to be run and not the reference to lot 18".

S2 457

BOEHNER vs HIRTLE N.S.R. 46 p. 267 (1912) Lunenburg

Graham, E.J. quotes:

a) In 5 Cyclopedia of Law and Procedure p. 923 it is said:

> Where maps, plats and field notes are referred to in descriptions of land they are to be regarded as incorporated into the descriptions, and in the case of a conflict of calls the usual rules of construction are to be applied, and those calls which are most certain and definite, or most in accord with the true intent of the parties, are to be adopted."

b) In 4 Am. and Eng. Ency. p. 777 it is said:

> "When the plan and monuments made by an original survey do not coincide the monuments govern, and this is also the case when the monuments are by another (survey) ? and the plan only is referred to in the deed."

d) In Thomas V. Patten 13 Maine 39:

> "Where the number of the lot on a plan referred to in the deed is the only description of the land conveyed, the courses, distances and other particulars in that plan are to have the same effect as if recited in the deed.
>
> It is a well settled rule that where an actual survey was made and monuments were marked or erected, and a plan was afterwards made intended to delineate such survey and there proved to be a variance between the survey and the plan the survey must govern. But no such rule of construction has obtained where the survey was subsequent to the plan."

HALIFAX GRAVING DOCK COMPANY LTD. vs EVANS

N.S.R. 47 p. 56 (1914) DARTMOUTH

HELD:

a) An inaccuracy in a plan did not control the dimensions expressed in the deed. (distance from street line to face of a breastwork not called for in deed, shown as 55' but by actual measurement is 55' 5".

b) Recitals in old deeds are evidence.

c) When there is difficulty in fixing beginning boundary the calls may be reversed and the lines traced the other way.

Per Graham, E.J.

"True the words more or less occur (55 feet more or less) but in a survey in which inches are taken into consideration, the words "more or less" are not very elastic".

.....

"It is shown that the defendant exercised repairs on it (breastwork) 19 years before the trial, not earlier. This period is too short for our statute."

GIBSON vs CLINKWORTH ET AL 51 N.S.R. p. 343 1917 Bri Bridgewater

The description in the conveyances for some time after the original allotment was by number, which could only be ascertained and located by reference to the plan of allotment, the only evidence of which at the time of action was the township plan.

HELD, that such plan, which was the foundation of the allotment, must be resorted to and regarded.

HELD, also, that the finding of the trial judge in favour of the line as run by a surveyor who did not regard such plan, must be supported.

S2 458

BANKS vs BEALS 59 N.S.R. p. 503

Lands owned by plaintiff and defendant were described as bounded in the one case on the north and in the other on the south side of the "Canaan Road". The road, in the original grant and the plan attached thereto, was shown to run in a straight line between the lands of the two opposite proprietors. The line as laid out ran through a deep gully and for convenience the road at that point was diverted to one side, returning to the described straight line further on.

HELD, that the line as shown on the plan controlled the line by which the parties bounding upon the road had held.

DAVISON vs BENJAMIN (1874) 9 N.S.L.R. Vol. III p. 474
(Kentville)

"Several crown grants from which plaintiff deduced his title purported to convey a specified number of acres, described as contained within lines commencing at a fixed point, and running specified distances to other points indicated by marked trees and other monuments, which appeared upon plans annexed to and referred to in the body of the grants."

"Held, that the monuments, being ascertained, must control the quantities purported to be granted, and the distances mentioned in the grants, notwithstanding the fact that the number of acres included in that case would be enormously in excess of the number which the grants purported to give. The least objectionalbe of all difficulties is to make quantities whether too great or too small, yield to actual monuments on the ground."

Per Sir W. Young, C.J. - "The grants might have been attacked by the crown for excess but, in the absence of such proceedings, the land included could not be re-granted to a stranger. Under the usage of the court, parol evidence is admissable to shew the actual position and surveys of lands included in grants of wilderness and woodlands."

	Lot	Deed	Actual
Discrepancies in Areas	A	400 Ac	672 Ac
	B	100 Ac	772 Ac
	C	100 Ac	760 Ac
	D	100 Ac	400 Ac

BLACKADAR ET AL vs HART N.S.R. 51 p. 449 Millville, Kings County

It was further objected on the part of the defendant that the description in some of the conveyances tendered were vague and uncertain, as monuments referred to were no longer to be found on the ground.

HELD, that this was a mere objection to the form of the conveyance tendered, entitling defendant to require delivery of deeds containing a modern description, but not entitling him to damages for breach of contract.

Per Sir W. Graham, C.J.:

"It was one of the late E.E. Armstrong's surveys .....

A rule has been adopted in America and followed in Nova Scotia that where there is in a description a variance between the monuments and the courses and distances, one rejects the courses and distances as false description in favour of the monuments. There is a very good reason given for this rule, namely, that a mistake may easily occur in writing out descriptions, or the surveyor may have been mistaken in either, whereas in respect to a monument the presumption being that the surveyor was at least on

the ground could not so easily be mistaken in respect to the monument. That rule was applied to surveys of this same surveyor in this locality, owing to his recklessness with the Crown land. (Davison vs Benjamin 9 N.S.R.).....

Archibald Foster is a surveyor of experience. He was called by the plaintiff and.....

Q. I see the lot was run by E.E. Armstrong; have you had experience in your surveying as to his lots:

A. Yes.

Q. Are his surveys accurate?

A. He was considered liberal. I have found that they overrun largely.

wade

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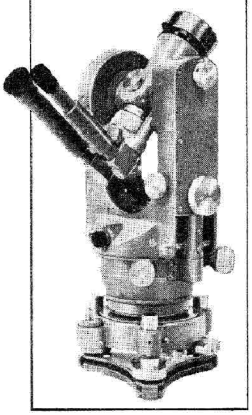
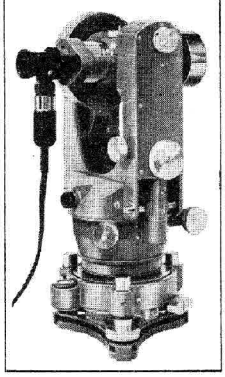


Wild T1-A Double Centre Theodolite with the Wild GOA Autocollimation Eyepiece



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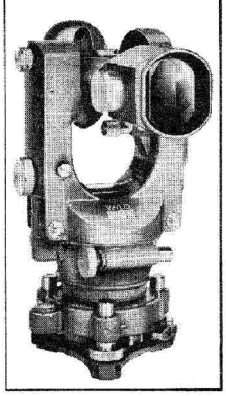

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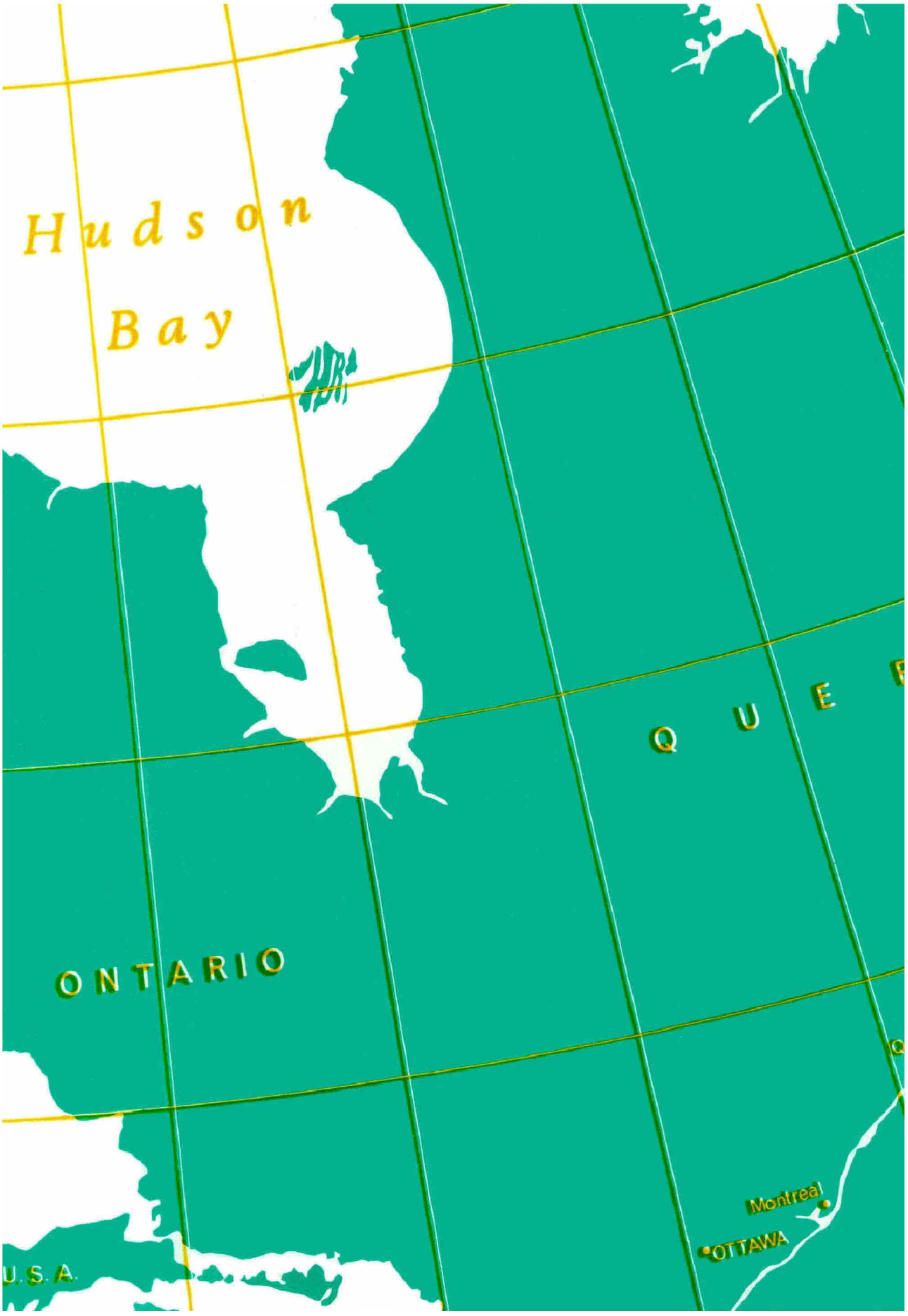
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