# CASE REPORTS CONCERNING LEGAL PRINCIPLES OF BOUNDARIES

Nova Scotia Reports 1965-69 (Vol. 1-5)
Nova Scotia Reports (Second Series) (Vol. 1-17; 1970-77)

Published by
The Association of Nova Scotia Land Surveyors
Halifax, Nova Scotia

Though this has book been a special keepsake
for almost thirty years,
it is appropriate now to return it to
the Association of NS Land Surveyors.

Within the Association's library
It will be emblematic of one of the many ways
our Association has encouraged and helped its members
to improve their knowledge of surveying and
thus increase their public usefulness.

Furthermore the book's original dedication is
a fine example of the outstanding calligraphic skill of
George T. Bates
who contributed his talents and energies unsparingly
to many of the Association's enterprises.

Wolfville, N.S.
2 October 2005

J. J. Doig

To

# Col. James F. Doig

## In Appreciation

The first copy of this text is presented to its author from the Association, as a token of appreciation for the obvious personal dedication that went into its production. This text will prove to be of great benefit to land surveying students and to law students for many years to come.

From all of us, Jim ~ a very sincere thanks!

Murray J. Banks
PRESIDENT.

NOVEMBER 3, 1978

# CASE REPORTS

# CONCERNING

# LEGAL PRINCIPLES OF BOUNDARIES

Nova Scotia Reports 1965-69 (Vol. 1 - 5)

Nova Scotia Reports (Second Series) (Vol. 1 - 17; 1970-77)

*Published by*

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- ACKNOWLEDGEMENTS -

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Ms. Dorothy E. Lowe typed all the material. This camera reproduction of her work is a testimonial to her skill and care.

This booklet contains edited reports of those cases concerning property boundaries which appear in Volumes 1 to 5 of the Nova Scotia Reports 1965-69 and Volumes 1 to 17 of the Nova Scotia Reports (Second Series).

The cases thus span a period of 12 years - 1965 to 1977.

Editing has been employed to save space. Generally, material not related to boundaries has been left out, as have been the names of counsel and the summaries of cases cited and of cases judicially noted. Omitted material is indicated by ellipses ( . . . ).

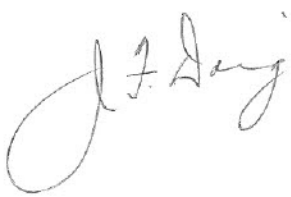
The full reports, for those who wish them, are available in law libraries.

The Association of Nova Scotia Land Surveyors has underwritten the production of this booklet. The aim has been to help all concerned in such matters gain a better understanding of the law relating to boundaries.

Since I selected and edited the material and then read the proofs, shortcomings or deficiencies are mine. I enjoyed the work and learned a lot that I hadn't known before.

J. F. Doig.

Lawrencetown
Annapolis County
25 August 1977



MacDOUGALL v. LAYES et al 2 N.S.R. 1965-69

Nova Scotia Supreme Court
Trial Division, Dubinsky, J.
February 18, 1969

TORTS - TOPIC 3031

TRESPASS - TRESPASS TO LAND - NECESSITY FOR POSSESSION - PROOF OF POSSESSION - SUPREME COURT HELD PLAINTIFF MUST TRACE HIS TITLE TO THE CROWN OR TO SOMEONE WHO HAD BEEN IN POSSESSION OF THE LAND - SUPREME COURT HELD THAT SINCE THE PLAINTIFF TRACED HIS TITLE TO SOMEONE WHO HAD BEEN IN POSSESSION, THE PLAINTIFF HAD POSSESSION ON WHICH TO BASE ACTION FOR TRESPASS - PARAGRAPHS 49 TO 55.

REAL PROPERTY - TOPIC 4700

TITLE - BOUNDARIES - DETERMINATION - SUPREME COURT HELD THAT IN DETERMINING THE BOUNDARY LINE BETWEEN TWO ADJOINING PROPERTIES, THE LINE WHICH CORRESPONDS WITH THE COURSES OF THE LINES OF ADJACENT PROPERTIES IN THE VICINITY IS THE MORE LIKELY TO BE CORRECT - PARAGRAPH 57.

This action arose out of a dispute over the boundary line between two properties. The plaintiff and the defendant owned adjacent farms. The defendant cut and removed timber from land which the plaintiff claimed was on the plaintiff's side of the boundary. The plaintiff brought an action for damages and trespass against the defendant. The Nova Scotia Supreme Court, Trial Division, allowed the action and awarded the plaintiff $425.00 damages.

The Supreme Court found that the evidence supported the plaintiff's contention on the location of the boundary line. The evidence included, inter alia, the documentary history of title of the two properties, community repute and the testimony of a surveyor about thelocation of traces on the ground of an old line fence.

The Supreme Court stated that in order to succeed the plaintiff was required to prove possession of the property. The Supreme Court stated that possession could be proved by tracing title to the Crown or to a predecessor in title who had possession. The Supreme Court found that the plaintiff not only had actually possessed the property himself for the purpose of cutting timber on it, but also traced his title to someone who previously had possession of it. Paragraphs 49 to 55.

. . .

1 This is an action in trespass. The plaintiff, Donald Beaton MacDougall, is the owner in fee simple of a certain lot of land situate at what is known as Lakevale in the County of Antigonish. In September of 1965, Peter MacNeil of Little Current, in the Province of Ontario, and his wife, Marjorie F. MacNeil, conveyed the said lot to the plaintiff by deed, which deed was recorded in the Registry of Deeds Office for the County of Antigonish at Antigonish, N. S., on the 7th day of September, 1965, as item 6266, in Book 102, pp. 205 et seq. The land conveyed is described as follows:

> ALL that certain lot, piece or parcel of land, situate, lying and being at West Lakevale, in the County of Antigonish, Province of Nova Scotia and bounded and described, nor or formerly, as follows, that is to say:
>
> BOUNDED on the North by lands of Hugh R. Boyd and by lands of Mrs. Allan MacGillivray;
>
> BOUNDED on the East by lands of Mrs. Allan MacGillivray;
>
> BOUNDED on the South by lands of John MacDougall and by lands of Frank Wallace; and

BOUNDED on the West by lands of Frank Wallace. Containing 60 acres, more or less and being the same lands conveyed by Deed dated the 19th day of June, A.D. 1942, from the Estate of Mary Helena MacIsaac to Peter MacNeil as recorded in the Registry of Deeds, Antigonish, N.S., in book 97 at page 41.

2 The first recorded reference to the said lot of land, as far as the evidence and exhibits are concerned, is to a sheriff's sale which took place in 1896. A Mr. Leonard C. Archibald, Administrator *de bonis non* of the estate of John Bishop, deceased, had obtained judgment in 1892 against one Donald MacDonald (Constable) of Lakevale, County of Antigonish, for a certain sum of money. After execution had been levied, and other due process carried out, the property of the judgment debtor was sold at public auction. Subsequently, by deed dated the 21st day of April, 1896, Duncan D. Chisholm, High Sheriff of the said County of Antigonish conveyed the judgment debtor's real estate to one Thomas Trotter of Antigonish, which deed was recorded in the said Registry of Deeds Office on October 13, 1896, in book 53, page 73.

3 The land thus conveyed is described as being bounded as follows:

On the North by lands of Allen Boyd and lands of Alexander MacDonald, and now in possession of Michael MacDonald; on the East by lands of the said Alexander MacDonald and now also in possession of the said Michael MacDonald; on the South by lands lately owned by Angus MacDonald (son of the said Donald MacDonald and now owned by John R. Boyd) and lands formerly owned by Donald MacDonald and Angus MacDonald both now deceased and now in possession of Nancy MacDonald and Margaret MacDonald, widow; on the West by lands of Hugh Wallace, containing fifty acres more or less.

4 From the exhibits tendered and admitted at the trial, I find that the above described lot of land was sold by Frederick R. Trotter, his wife Florence Trotter, Thomas Trotter and his wife Emma C. Trotter to Colin F. MacIsaac of Antigonish. The deed is dated June 24, 1887, (a typographical error and should read 1897), and was recorded in the said Registry of Deeds Office in book 57, page 217, on November 15, 1899.

5 From the exhibits tendered and admitted at the trial, I find further that Colin F. MacIsaac died on or about March 14, 1927, at Antigonish, N.S. By his last Will and Testament, dated October 22, 1924, and admitted to probate March 21, 1927, he left all his real estate to his wife, Mary Helena MacIsaac. By her Will, dated July 24, 1934, and admitted to probate on August 5, 1935, she nominated and appointed the Montreal Trust Company at Halifax, N.S. as executor and trustee and left all her estate to the Montreal Trust Company in trust, with full power and authority in the Trust Company to sell and dispose of all her estate when necessary.

6 The next item in the plaintiff's chain of title is the conveyance from the Montreal Trust Company to Peter MacNeil. This was by deed dated June 19, 1952, which deed was recorded in the said Registry of Deeds Office on August 16, 1956, in book 97, page 41. The description of the land in this deed goes as follows:

ALL that certain lot, piece or parcel of land and premises situate, lying and being at West Lakevale, in the County of Antigonish and bounded and described now or formerly as follows, that is to say: Bounded on the North by lands of Hugh R. Boyd and by lands of Mrs. Allan MacGillivray; on the East by lands of Mrs. Allan MacGillivray; on the South by lands of John MacDougall and lands of Frank Wallace and on the West by lands of Frank Wallace, containing sixty acres, more or less. The same being a lot of land conveyed to Colin F. MacIsaac by F. R. Trotter et al by Deed June 24th, A.D., 1897, and recorded at the Registry of Deeds at Antigonish, N. S. in Book 57 at p. 217 and having been devised to the said Mary Helena MacIsaac by the said Colin F. MacIsaac by his last Will and Testament, which in the Registry of Probate at Antigonish, N. S. and having been devised to the Montreal Trust Company as her Executor and Trustee by the said Mary Helena MacIsaac by her last Will and Testament dated the 24th day of July A.D. 1934 and recorded in the Registry of Deeds at Antigonish, N. S. in book 83, p. 379.

7 The immediately above described lot is the exact same lot conveyed to the plaintiff by Peter MacNeil as mentioned earlier. The plaintiff's paper title to the lot described in his deed thus goes back to 1896, although it is to be noted that in the Trotter and MacIsaac deeds, the land is described as being 50 acres more or less, whereas in the MacNeil and MacDougall (plaintiff) deeds, it is described as being 60 acres more or less. At the trial it was not made clear if the change in acreage was due to typographical error. It may be noted also that Hugh J. Sullivan, the Provincial Land Surveyor by Exhibit P/1, the plan of the lot which he prepared, shows it to contain 42.7 acres. As will be seen later, nothing really turns on the extent of the acreage in the plaintiff's lot of land.

8 The plaintiff's complaint, shortly put, is that the defendant cut timber on his, the plaintiff's, land by crossing over the plaintiff's eastern boundary. Furthermore, he alleges that the defendant removed timber which the plaintiff had cut and piled. The defendant, on the other hand, counterclaims against the plaintiff, and alleges that the plaintiff unlawfully trespassed on his, the defendant's land and removed quantities of cut and piled pealed pulp logs and other timber. I am grateful to respective counsel herein for having reached an agreement as to the value of the disputed timber which each of the parties had cut or taken and there remains for me to determine who is right as to where is the lawful dividing line between the lands of the two disputants.

9 This brings me naturally to an examination of the defendant's paper title. The defendant, Placide Lawrence Layes, purchased a lot of land in 1964 from John A. MacGillivray by Deed dated July 7, 1964, and recorded in the said Registry of Deeds Office as item 3342 on September 29, 1964, in book 101, pp. 494 et seq. The land conveyed is described as follows:

> ALL that certain lot, piece or parcel of land and premises situate, lying and being at Lakevale in the County of Antigonish, Province of Nova Scotia, and more particularly bounded and described as follows; that is to say: - Bounded on the North by land owned by Alexander MacDonald; On the East by land owned by Dan Angus Cameron; On the South by land owned by Angus Boyd; On the West by land owned by the heirs Messrs. Michael and Donald MacDonald and Mary MacDonald, and containing one hundred acres, more or less, said lands having been earlier conveyed to Allan MacGillivray by Deed recorded in the Registry of Deeds in Book 80 at page 464 and later conveyed by Mary Jane MacGillivray and William Whalen to John A. MacGillivray, by deed dated July 4th, 1955, which is recorded in the Registry of Deeds aforesaid in Book 100 at page 70.

10 His chain of title, as far as the evidence and the exhibits tendered and admitted are concerned, goes back to 1910. It begins with a conveyance of a lot of land situate at Lakevale, in the County of Antigonish and is from Michael MacDonald and Daniel MacDonald to Allan MacGillivray. The deed for this conveyance is dated June 13, 1910, and was recorded in the said Registry of Deeds Office on October 22, 1927, in book 80, p. 464. The land conveyed is described as follows:

> ALL that certain piece, lot or parcel of land lying and being situated at said Lakevale and described as follows, that is to say: Bounded on the North by land owned by Alexander MacDonald, Collin,; On the East by land owned by Dan Angus Cameron; On the South by lands owned by H. H. Crearer; On the West by land owned by heirs Messrs. Michael and Donald MacDonald and Mary MacDonald, and containing in all one hundred acres, more or less. Fifty acres of this land belonging to Michael MacDonald, and fifty other acres belonging to Donald MacDonald.

11 According to an exhibit tendered and admitted at the trial, I find that Allan MacGillivray died on December 25, 1942, and his last Will and Testament, which is dated March 16, 1932, was admitted to probate on May 23, 1953. By his last Will and Testament, Allan MacGillivray conveyed all his property to his wife, Mary Jane MacGillivray for her lifetime and on her death to his adopted son William Whalen.

12 By deed dated July 4, 1955, Mary Jane MacGillivray of Lakevale, County of Antigonish, widow, and William Whalen, also of Lakevale aforesaid, conveyed the immediately above described lot of land to John A. MacGillivray also of Lakevale. This deed was recorded in the said Registry of Deeds Office on November 28, 1961, as item 4550 in Book 100, p. 70. The description of the land conveyed reads as follows:

> ALL that certain lot, piece or parcel of land situate, lying and being at Lakevale in the County of Antigonish, and now or formerly described as follows, that is to say: Bounded on the North by land owned by Alexander MacDonald Colin; On the East by land owned by Dan Angus Cameron; On the South by land owned by Angus Boyd; On the West by land owned by the heirs Messrs. Michael and Donald MacDonald and Mary MacDonald and containing in all one hundred acres, more or less. The same being a lot of land conveyed to Allan MacGillivray, recorded in the Registry of Deeds in Book 80, page 464.

13 As stated above, it was the grantee of the immediately preceding described lot of land, John A. MacGillivray, who conveyed the said lot of land to the defendant Layes. I am satisfied from the evidence before me, that the land of the plaintiff and that of the defendant are close to one another. The descriptions given in all documents are very general. There is, it is true, a measurement to be found in the 1910 Allan MacGillivray deed which states, as to the East-West dimension of the 100 acres conveyed.

> . . . and in a central direction, that is East and West from the brook at North Lake towards the house as it today stands occupied by Messrs. Michael and Donald MacDonald and Allan MacGillivray to about twenty rods from the house in a westerly direction more or less.

Apart from this, there are no specific measurements given, no identifiable starting marks and nothigg to pinpoint the exact location of the land. The problem, therefore, is to determine if there is, in fact, a division line between the lands of the parties, and if there is, to locate that division line; and in any event to determine if there has been a trespass by either side. This brings me to an examination of the evidence produced by both parties. The evidence being somewhat extensive, I shall now set forth the relevant testimony on the point at issue between these two neighbours and from the evidence, I shall endeavour to reach an answer to the problem.

14 The first witness on behalf of the plaintiff was Hugh J. Sullivan, a duly qualified Provincial Land Surveyor. On instructions from the plaintiff, Mr. Sullivan made a survey of the MacDougall lot and prepared a plan thereof, Exhibit P/1. Exhibit P/2 is another plan which indicates the prolongation of the plaintiff's eastern boundary line (as found by Mr. Sullivan) in a southerly direction. As to this, the evidence was as follows:

> Q. Mr. Sullivan, perhaps you would tell us the manner in which you did your survey and could we start at the south west corner?
>
> A. Well, I actually started the survey on the eastern boundary.
>
> Q. All right, where?
>
> A. South of the actual property.
>
> Q. All right and I show you document marked P/1; to the top of P/2 there is a square rectangle marked Beaton MacDougall, is that the property shown on P/1? Is that a small scale of the property on P/1?
>
> A. It is.
>
> Q. All right, now you have a lot of markings below the south east corner, would you explain those to the court? What those are?
>
> A. Well, first I call that marked there, monument number one, with the spruce tree, roughly 12 inches in diameter and it had markings of an old fence which were boards to protect the tree from dying and there was an old fence pole there and there was a spike in this tree and monument number 2 is a birch tree, 10 inches in diameter and there was barbed wire around

this tree. The barbed wire continued in a southerly direction; there was an old fence continued southerly along the ground here.

Q. Now, monument number one was that, did that appear to you to be an old tree?

A. It was fairly old; I couldn't say exactly.

Q. Did the markings on the piece of board and part of the fence; did they appear old?

A. Yes, they did.

Q. Now, marking number two, monument number two, the birch tree with the barbed wire and the barbed wire fence extending southward, what can you say about the age of those?

A. It was a very old fence. It was upon the ground really.

Q. All right, and is that how you arrived at the southeast corner of the lot shown on P/1?

A. Yes.

Q. And is that continuation of, a projection of that line?

A. Yes, I produced that line northerly to establish the eastern.

Q. All right. Now, is the direction you produced it shown on P/1 along the eastern side line I see North 08° 20" East. I am looking at P/1?

A. Okay. Yes, that's correct, yes.

Q. And what does that represent?

A. Well, that is the bearings of the line between those two monuments and I continued it in a northerly direction.

Q. All right. And you continued it up until you come to the north east corner of the lot shown on P/1?

A. Yes.

15 The surveyor having fixed his line on the basis of the two monuments, projected it northward to the public road shown on the plans and beyond. Towards the north of the property he found evidence of a fairly good fence, the line of which on being produced easterly intersected with the prolongation of the eastern line, to give him the north-eastern corner of the lot. At that point, this northern fence line ran S81° 40' East. At a point westerly 648 feet from the north-east corner of the lot and at an easily discernible spruce tree (indicated on Exhibit P/1), the actual location of the fence ran S86° 00'West for a distance of 397 feet to a point. Thence the fence ran southerly (S 06° 10' West) until it met the northern boundary of the aforesaid public road. This fence was similar in construction, age and repair to the fence he found on the north western and northern boundary of the lot. Mr. Sullivan then crossed to the southern boundary of the public road and produced southerly the said fence line for a total distance, from the northwest corner of the lot, of 1897.5 feet to a point at the northwestern boundary of a brook. This point he marked with a post and stones to indicate the south-west corner of the lot. Then he went easterly for a distance of 961.7 feet to a fir tree which is shown on the plan to be located on the eastern boundary which he had established earlier. That gave him the south-eastern corner of the lot.

16 In passing, I might note that the total distance of the northern boundary, keeping in mind the slant taken by the fence line, is 1045 feet. This compares quite favourably with the straight dimension of 961.7 feet, shown as the southern boundary of the plaintiff's lot.

17 The witness related that there were other physical features which lent support to the line established by him as being the plaintiff's eastern boundary. For example he discovered evidence of a comparatively straight ridge of stones, somewhat to the west - approximately 15 to 20 feet - of the line he had established. Then there was the cattle path which ran from the said public road to approximately the north-east corner of the lot. The witness was asked how the cattle path lined up with the ridge of stones. He replied.

It ran pretty well parallel to the stones also, but it was pretty well on the line we established, pretty well on the line, I'd say it was on the line and off the line but it was pretty well on the line. . . . Due to the slashes it was hard to tell where the path was. We picked it up in different areas.

18 Finally the witness said that he lined up the eastern boundary with a curve in the river and with the cellar of an old barn. At that point, the evidence went thus:

A. Well, yes I did line it up with a curve in the river just north of that and there was an old barn north of that, yes. The barn is down now but there was an old cellar there and I lined it up with this.

Q. And stones?

A. And the stones and the markings.

BY THE COURT:

Would you mark on P/1 with a pencil just about where the brook was, you say and where this old barn was?

A. This would be an approximate location.

BY THE COURT:

The brook is just above the northeast boundary and further up north you have the barn?

A. Yes.

BY THE COURT:

And the cellar of the barn served as a marker for you, is that it?

A. Yes, some of the older people did say it should line up.

19 Exhibit P/1 shows a fence line extending northerly from the line shown as the northern boundary of the plaintiff's lot. Land on either side of this line is shown as that of Hugh R. Boyd on the West and of the defendant Lawrence Layes on the East. The witness was asked in cross-examination if there was anything to indicate that this fence line extended southerly from the plaintiff's northern boundary. He replied in the negative and, to a further question from me as to whether or not the fence was of recent construction, he said that he could not say but added that it was maintained fairly well. I shall refer later to this particular fence.

20 Donald Beaton MacDougall, the plaintiff, stated that at the time he purchased the property, he saw the path and stone ridge referred to by the previous witness. He had been shown this path by an uncle and he had followed the path along the stone ridge. He was assessed for the land, paid taxes on it and cut timber on it. He confirmed that it was his understanding that his eastern boundary was the same as shown by the surveyor. He had talked over the dispute with the defendant and with the latter's surveyor, and stated that said surveyor had not completed the survey which he had told the plaintiff he intended to make. The defendant and the witness were unable to agree on the proper location of the boundary line between them. The defendant had claimed to have bought the property of Donald MacDonald known as "Swamp" but the plaintiff pointed out to the Court that there had been another Donald MacDonald who had been a tailor and it was Donald (Tailor) MacDonald who had lived in the same house where the defendant now lives. He said that Exhibit P/4 is a Crown Grant sheet and that his land is included either in the 350 acre lot granted to Timothy McKeough or in the 200 acre parcel of land granted to John McKeough.

21 Cross-examination by Mr. Parker, the plaintiff acknowledged that his deed spoke of a 60 acre lot, whereas the surveyor's plan shows only 42.7 acres. The square marked in pencil earlier by the previous witness to the north of plaintiff's lot, was, according to the plaintiff the location of the barn. It was the MacGillivray barn and he remembered it well. Now there was only a hole in the ground.

22 John A. MacGillivray, aged 34, testified that it was he who conveyed the land to the defendant. He had been shown where his western boundary was by William Whalen, the man who sold the land to him. Following are some excerpts from Mr. MacGillivray's testimony.

Q. And what did he show you as your west line?

A. Well, the same as you described here before, a rock ledge through there and there was an old road through there; it's a path now but it was an old road, when I bought the place first.

Q. Were there any markings, a fence or anything?

A. Yeah, there was part of an old fence there but it's gone now. I was looking for it a little while back here but I couldn't find it. It was there when I bought the place.

Q. And was it a wire fence or board fence?

A. No, it was old barb wire, but it was pretty well beat out then at the time I bought it but I couldn't find it when I went back later on this year.

. . .

BY THE COURT:

Now then you tell me - the course of this wire fence, how did it compare with the path and the ridge of stones that we heard?

A. Well, from the survey - to the old wire; where I figured it was; where I was shown, it was around 10 feet in the difference. Between the survey now and where the owner before I had it showed me where the fence was.

BY THE COURT:

When you are talking about the survey now you are talking about what you heard the surveyor say?

A. That's right.

BY THE COURT:

The survey line.

MR. GRANT:

He cut a line through; the surveyor cut a line through.

BY THE COURT:

The surveyor's line, you say, is about what?

A. It's about 10 feet from where I was shown; the old original line.

BY THE COURT:

10 feet in which direction?

A. The surveyor's line is west of the line I was shown.

BY THE COURT:

Now, what about that old fence?

A. Well, that old fence was along that old ridge of rock that was along there before, you see. He showed me what was the line.

23 The witness stated that the old barn, indicated on Exhibit P/1, was in line with the old original line. The barn was on the west side of the property line. He remembered the old barn because it was he who had torn it down. He had been told at the time that the original line "lined up with the corner of the barn and over that rock ridge." On three occasions, at the time he sold to the defendant, he showed Layes

where the line was, where Whalen had indicated it to be and he said that Whalen had spent a good part of his life on that farm. His evidence on this point continued as follows:

> Q. You say you showed him the west line along the property the plaintiff now owns three times?
>
> A. Right.
>
> Q. And each time was it the area of the ridge of stones?
>
> A. Right.
>
> Q. Now, when you deeded to the defendant Layes, what did you consider the west line to be?
>
> A. I considered the west line to be what Whalen showed me.
>
> Q. That's the ridge of rock?
>
> A. That's right; that's right.
>
> Q. And what did you intend to deed to the defendant?
>
> A. Well, I intended to deed what I showed him there.

24 Mr. MacGillivray went on to say that he not only knew his vendor of the property, William Whalen, but he also knew Whalen's step-parents, Allan MacGillivray and his wife Mary Jane MacGillivray. He knew them all to occupy the house which he had occupied and which now was the defendant's home. He indicated that said house was located East of the barn. I shall refer below to the significance of the witness' statement that the MacGillivray house stood to the East of the barn.

25 Mr. MacGillivray was subjected to a strenuous cross-examination, the purpose of which was to cast doubt upon his view as to where lay his western boundary. He was asked at one point:

> Q. What would you say if I suggested to you that your western; that your boundary line here extends down something in this order?

(Counsel then pointed towards the centre of the plaintiff's lot of land in line with the aforementioned fence extending northward from the plaintiff's northern boundary). The witness replied:

> A. Well, you would be just taking the other fellow's land if you did that. I think there's old foundations across the road here (the public road shown on Exhibit P/1); there's old foundations of a house called Donald Swamp's there, that would be on the other farm instead of where it's suppose to.

He reiterated that where Whalen had told him the old line had been, was the corner of the old barn which he had torn down. During his occupation of the land, he had done some cutting of timber and had "cut up just about to the line there; right close to the line." As for the path, already referred to by the previous witnesses, Mr. McGillivray explained that at one time he had been told that it had been an old wagon road. It had been grown over and become smaller, but the cattle were using it.

26 Michael McNeil, a brother of Peter McNeil who sold the land to the plaintiff stated that he lived at Lakevale all of his 60 years. Years ago he used to help William Whalen "snig" logs, that is, to pull them from where they were cut to the place where the logs were piled. He remembered the old barn and that the boundary line ran from the old barn along the stone ridge. He had also "logged" the plaintiff's property and he felt that the line drawn by the surveyor Sullivan, was "pretty close to the ridge line". He remembered the mud path referred to and said that the trees were cut along this path. As for the orchard on the plaintiff's property, he would place that close to the centre of the property.

27 John B. MacDougall is a lifelong resident of the Lakevale area and lives about a quarter of a mile from the disputed area. He was on the defendant's property often when it was owned by William Whalen and he saw the path and the ridge of stones quite often. He described his own property as being to the south of the plaintiff's; Angus R. Boyd's land is East of his (i.e., the estate of John A. MacDougall) and South of that of the defendant. Shaw Boyd's property lies South of his and he stated that originally the Layes property ran southerly to the Shaw Boyd lands, i.e. to say, to what was the "base" line.

28. Mr. MacDougall testified to the existence of a giant stump on the line between the respective properties of the parties herein and said that this stump lay along the surveyor's line. He had farmed the John A. MacDougall property and confirmed that Allan MacGillivray had been their Eastern neighbour and McNamara their Western. At one time in 1938, he had moved inwards the then existing fence on their eastern boundary for 15 rods in order to protect some crop he was growing and he stated that some of that fence is still there. He confirmed that the north-eastern corner of the John A. MacDougall estate lot, or the south-east corner of the plaintiff's lot was on the southern side of the gully, as is shown on Exhibit P/1. He indicated an awareness of the two monuments shown on Exhibit P/2 and which had been taken as the basis of the survey made by Mr. Sullivan. Finally, Mr. MacDougall indicated on Exhibit P/1 the approximate location of Donald (Swamp) MacDonald's house and which he placed westerly from what he said was the dividing line between the two properties.

29 In cross-examination, he acknowledged that since 1940, there was no fence between the defendant's land and the plaintiff's. But on re-examination, he stated that at one time he had talked with Layes and the latter had agreed that the boundary was where the witness indicated it to be; and moreover, the defendant had then said that Frank Wallace had indicated to him that such was the boundary.

30 Simon McNeil, also 60 years of age and also living about a quarter of a mile from the disputed area, testified that he remembered the Donald (Swamp) MacDonald house and also the William Whalen house where the defendant, Layes, now lives. He worked with Whalen on log cutting and he knew of the rock formation or rock ridge path which, he said, went right along the two properties. He considered that the line compared favourable. In recent weeks he went over some of the area but had to give up because it was "jungled" and grown over with vegetation but he was able to detect the rock formation. In cross-examination, he too admitted that he saw no fence on the eastern boundary. He said, however, that years ago, on an occasion when Whalen and he were walking towards the line, Whalen told him that they were "getting close to the property line."

31 Allan MacDonald is 75 years old and has lived in Lakevale the better part of his life. He remembered the house of Donald (Swamp) MacDonald or, as he was also known, Donald Constable. The said house was located on the south side of the Big Marsh Road (the public road shown on Exhibit P/1) and the orchard was quite near the house. He knew Michael MacDonald and Donald MacDonald otherwise known as Donald the tailor. It was Michael MacDonald who brought up Allan MacGillivray and they lived in the house now occupied by the defendant, Layes. He was asked what was considered to be the boundary between the MacGillivray property now owned by Beaton MacDougall. Following are some of the things this man said:

> Yes, I remember of a line fence that you are talking so much of here, about the stone fence. I remember when the original fence was there. . . . well, just about where they are talking about the rocks, that's where the line was. That pole fence . . . I would say that that barn would be in line with this fence on the south side, we've just been talking about.

In cross-examination he was asked:

> Would it be fair to state that the old barn which was torn down and removed was in the area shown here to be a little square? (Counsel pointed to square on the plan, in blue ink, with letter B, which defence counsel intimated to be the true location of the old barn).

The witness answered:

> I would say that that old barn was in line with this what they call them stones but what I described as that line fence; that pole fence. I would say that barn would be just about in line.

32 He was asked whether he recalled the wire fence, shown on the plan Exhibit P/1, as extending northward from the northern boundary of the Beaton MacDougall property. He said that he could not recall a wire fence being there. The only fence that he was able to recall was the old pole fence that he used to climb over from the north base into the Big Marsh Road. That, he stated, "was the line between Allan MacGillivray and this Donald MacDonald, known as Donald the Swamp." He confirmed that the square drawn in pencil on Exhibit P/1 was a fair estimate of the location of Donald the Swamp's house. He also stated that the lot of land which John A. MacDougall had bought from John McNamara to the south of the plaintiff's land was about half the size of the plaintiff's lot and that it was the eastern and not the western half as one continued south from the Beaton MacDougall property. He was quite certain about that, for as he said, "I knew it very well; I went through there many times."

33 Mr. MacDonald stated he had been in the "old" house in which Michael MacDonald and Allan MacGillivray had lived and in which Donald the tailor was born. The so-called new house, converted from a store, was further north by some 100 feet. Neither of those houses was anywhere near the eastern or western boundary of the lot of Michael MacDonald or Donald the tailor or Layes, the defendant. The house was pretty near in the centre, he added.

34 Colin Boyd, who also lived in Lakevale all his life, said that he remembered the house of Michael MacDonald and Donald "the tailor" MacDonald. The barn, he said, was quite a distance from where the house used to be and he recalled the barn being north of the boundary line. He knew the place well for it was in the so-called new house (formerly a store) that he "made a debut as a fiddler". This converted store served as a dwelling house for Michael MacDonald, Donald "the tailor" MacDonald and Allan MacGillivray.

35 The defendant, Placide Laurence Layes, testified that he was a woodsworker, who had been brought up some four miles from Antigonish. Being married, with a family, he decided to have a home of his own and the heavily wooded property owned by John A. MacGillivray appealed to him. Mr. MacGillivray took him around a few times. He did not go up to Allan (Colin) MacDonald to check the north boundary, nor did he have the title searched prior to the purchase. Since then, however, he has made searches at the Registry of Deeds office. He introduced in evidence a true copy of Index Sheet 103, filed in the Crown Lands Records, Department of Lands and Forests, Halifax, N.S., which copy is dated November 13, 1968. This document was marked Exhibit D/2 and shows the Lakevale area. Exhibit D/3 is a photostatic copy of a Crown Grant found in Old Grants Book 20, page 88, which is on file in the Crown Lands Records, Department of Lands and Forests, Halifax, N. S. Among the grants contained in Exhibit D/3 is one to John McKeough, Sr., for 200 acres and this particular lot of land is shown in Exhibit D/2, as is also the one to Timothy McKeough for 350 acres.

36 As stated above, the defendant and John A. MacGillivray went around the property; and the defendant said that he knew what he was getting - namely, the property of the vendor John A. MacGillivray. He did not check on any pile of stones or cow-path because, as he put it "to me - it didn't mean much." It was his opinion that the ridge of stones was west of the line shown on Exhibit P/1. He said that the surveyor's line is not discernible from the fir tree (shown at the north-east corner of plaintiff's lot on Exhibit P/1) going northerly to the Big Marsh Road (the public road shown on that Exhibit) nor is it discernible, he said, going south of the Farmouth Road (shown on Exhibit D/2).

37 The defendant described his lumbering operations. He did some cutting in the vicinity of West Lakevale Road and towards the north-east part of the John McKeough property. He also cut lumber south of Farmouth Road. He stated that Alex Colin MacDonald had told him that he, the defendant, did not own the land. He was cross-examined about his view regarding the John McKeough grant:

Q. Did anyone show you any of the bounds of John McKeough?

A. Yes, John A. MacGillivray.

Q. Did he use the term John McKeough?

A. No.

Q. Anybody other than yourself use that term?

A. Propably not.

38 The defendant left little doubt that he considered himself to be the owner of the land laid out for John McKeough in the Crown Grant referred to. It is true that there was no evidence produced to show the chain of title from the Crown Grant to August 1801 to June 13, 1910, when Michael and Donald MacDonald conveyed 100 acres to Allan MacGillivray. The defendant's counsel, Mr. Parker, who left no stone unturned on behalf of his client, points, however, to the last Will and Testament of Allan MacGillivray which, in part, reads as follows:

> I give devise and bequeath to my beloved wife all my personal and real estate, that is, everything I now own consisting of some *200 acres* of land more or less . . .

Mr. Parker submits that Allan MacGillivray felt that he owned 200 acres, and that conforms to the land mentioned in the Crown Grant. Mr. Parker goes on to say:

> It is not unusual that descriptions speak of one hundred acres more or less; when in reality there was two hundred acres more or less in fact upon the ground in the lands conveyed.

39 I would hesitate to agree that even with the difficulty one experiences with old title deeds, that so great a disparity would exist between the description of the land in a deed of conveyance and which actually exists on the ground. Subject to what I shall say below about Allan MacGillivray's legal ownership to 200 acres of land, there is nothing inconsistent with his devising 200 acres to his widow and stepson, and with their selling 100 acres to John A. MacGillivray. That the widow and stepson would dispose of the 100 acre lot, which Allan MacGillivray had obtained from Michael and Donald MacDonald was not an unusual or uncommon thing to occur. They might have held on to the remaining 100 acres or might have disposed of those 100 acres to somebody else between Allan MacGillivray's death in 1942 and the date of the deed to John A. MacGillivray in 1955. The wording of Allan MacGillivray's Will is of little help to the defendant, who by his deed in 1964 received only the 100 acres which John A. MacGillivray had obtained from Mary Jane MacGillivray and William Whalen.

40 The defendant made mention of the fact that he had retained the services of a surveyor by name of Cameron; however, Mr. Cameron was not called to testify and no explanation was advanced for his not being produced as a witness. It would seem reasonable that the defendant's own surveyor might have been helpful to the Court in support of the defendant's contention.

41 A rather interesting piece of evidence was given by the elderly gentleman, Allan MacDonald, who came back to the stand to testify in rebuttal. He stated that nobody had lived on that portion of land between the lot shown on Exhibit P/1 as belonging to Hugh R. Boyd (now owned by this witness) and where stood the old barn. He related that this particular piece of land had belonged to one Alexander (Sandy) MacDonald, who was a brother of Michael MacDonald, Donald (tailor) MacDonald and Mary MacDonald. Alexander (Sandy) MacDonald was drowned and Michael MacDonald, Donald (tailor) MacDonald and Mary MacDonald were his heirs. The witness also stated that some 20 rods west from the house in which Michael, Donald (tailor) and Mary MacDonald had lived and in which the defendant now resides.

42 I was impressed with Allan MacDonald's clarity of recollection despite his advanced age and with his demeanous on the stand. His version as to where the old barn stood corroborates, in my opinion, where was indicated to be the western boundary of the lot of land in the 1910 deed from the MacDonald brothers, Michael and

Donald (tailor) to Allan MacGillivray. I am referring particularly to the excerpt from that deed which I quoted earlier.

43 There is something even more significant to me to be found in Allan MacDonald's testimony. Mr. Parker throughout the hearing maintained, to use his own words; that the basic problem involved in the case is that . . . boundaries were described in the most general and vague way." For example, Mr. Parker points to the defendant's western boundary being described in his deed as follows:

> On the West by lands owned by heirs of Messrs. Michael and Donald MacDonald and Mary MacDonald.

44 I myself was puzzled by the description of Layes' western boundary - not because of the way it reads in the defendant's deed, but because of the way it reads in the 1910 deed from Michael MacDonald and Donald MacDonald to Allan MacGillivray (registry reference 80/464). The defendant's deed (registry reference 101/494) recites that the lands conveyed therein are lands earlier conveyed to Allan MacGillivray by deed, the registry reference of which is 80/464. What puzzled me was why would Michael MacDonald and Donald MacDonald, who executed the 1910 deed in the presence of Rev. Donald Beaton, P.P., refer to lands owned *by their heirs;* however, a close examination of that deed and indeed of the deed from Mary Jane MacGillivray and William Whalen to John A. MacGillivray, as well as the deed from John A. MacGillivray to the defendant reveals that the wording is *not* as Mr. Parker put it on page 4 of his brief, "on the West by lands owned by heirs of Messrs. Michael and Donald MacDonald and Mary MacDonald." The word "of" does not appear after the word "heirs" in any of these deeds. In all three deeds, the land is described as being bounded" on the West by the heirs Michael and Donald MacDonald and Mary MacDonald." Of whom and of whose land were these three the heirs? The answer is supplied in Mr. Allan MacDonald's testimony. The two brothers and sister were the heirs of Alexander (Sandy) MacDonald, their brother who had come to his death by drowning. The land they inherited was that piece of land running from the eastern boundary of the lot shown in the name of Hugh R. Boyd (now Allan MacDonald's) to where stood the old barn. I am of the opinion that Alexander (Sandy) MacDonald also owned another lot of land as will appear from the next paragraph.

45 It is interesting to note the descriptions contained in the early deeds that had to do with the plaintiff's lot of land. From the sheriff's deed to Thomas Trotter (registry reference 53/73) I set forth the description earlier. Practically the same description appears in the Trotter to MacIsaac deed (registry reference 57/217). It will be remembered that the land is described in the sheriff's deed as being bounded.

> On the North by lands of Alexander Boyd and lands of *Alexander MacDonald now in possession of Michael MacDonald,* On the East by lands of the said *Alexander MacDonald now in possession of said Michael MacDonald* . . .
> (my italics)

46 It would be reasonable to assume that Michael MacDonald, one of the brothers of the late Alexander (Sandy) MacDonald went into possession of his brother's land. One may venture to suspect that sometime after Allan MacGillivray (who lived with the MacDonalds) received the 100 acres from Michael MacDonald and Donald (tailor) MacDonald, he too exercised acts of ownership over Alexander (Sandy) MacDonald's lands. This may well have led him to believe - rightly or wrongly - that he owned 200 acres which he mentioned in his Will. It is not without some interest, that one finds in the Peter MacNeil deed (registry reference 97/41) the following:

> Bounded on the north by lands of Hugh R. Boyd and by *lands of Mrs. Allan MacGillivray;* on the east by *Lands of Mrs. Allan MacGillivray* . . .
> (my italics)

47 I mention these facts because, due particularly to Mr. Allan MacDonald's testimony, I am satisfied and find as a fact that the 100 acres which Allan MacGillivray lawfully acquired by deed from the MacDonald brothers in 1910 - and which 100 acres the defendant Layes eventually acquired - *lay to the East* of the land owned by the late Alexander (Sandy) MacDonald, and *did not* include the drowned brother's land whether

the deceased had one lot or more than one. It is to be kept in mind that only Michael and Donald signed the 1910 deed but not Mary the sister who was an equal heir of Alexander (Sandy) MacDonald and the deed itself recites that Michael owned 50 acres and Donald owned 50 acres. As far as the evidence before me goes, there is nothing to show that Alexander (Sandy) MacDonald's heirs ever disposed of their dead brother's land. As indicated, with the passage of years, acts of possession may well have been exercised over that land, leading perhaps to a belief as to ownership therein. Doubtless too, the defendant is of that belief but as the defendant himself testified, Allan MacDonald told him that he, the defendant, did not own it.

48 The defendant Layes does of course legally own the 100 acres formerly owned and conveyed by Michael and Donald (Tailor) MacDonald. I am satisfied and find as a fact that the defendant's western boundary to *these 100 acres* is located at a point 20 rods distant westerly from where the defendant's house is presently located. Just how far southerly his lot extends is not altogether clear. His deed and the 1955 deed of John A. MacGillivray indicate that one, Angus Boyd owned land to the South, whereas the 1910 Allan MacGillivray deed refers to one, H. H. Crerar as owning the lands to the South at that time. John A. MacGillivray in his evidence said that Fred Boyd now owns the Angus Boyd lands. For the purposes of this action, however, I do not consider that the determination of the defendant's southern boundary is material.

49 Defence counsel submitted that the plaintiff is not entitled to maintain a trespass action, not having been in actual possession of the lands in question.

50 No authority is necessary, in my opinion, for the well established rule that a plaintiff cannot succeed on his claim for trespass unless he has proved possession. This possession may be either actual or, if not actual, may be possession which the law attaches to the title.

51 In ejectment actions a party can prove title only by tracing his title back to the Crown, or failing that to someone in possession. Ritchie, J., in *Tobin V. McDougall* (1913-14), 47 N.S.R. 470, at p. 471 said:

> There is no doubt that this is the rule. It was laid down many years ago in *Cunard V. Irvine*, James' Reports, 31, ((1853-55), 2 N.S.R. 31) and was recognized and followed in *McLeod v. Delaney* (1896-97), 29 N.S.R. 133. The rule is too firmly established in this province to be open to question.

52 Bliss, J., in *Cunard v. Irvine* (supra) at p. 36 said:

> A mere deed from a person who was never in possession, or what is the same thing, who has not been shown to have ever been in possession, and who derived no title from the Crown or from one who has been in possession, I think passes nothing. And this doctrine I find to be held in the United States Courts.

53 Dodd, J., at p. 39 said it this way;

> The question is not whether a party having a legal title, and being out of possession, can convey, but whether, when a party claims title under another and that other does not show title, and has never been in possession, and the party to whom the conveyance is made has never entered upon the land or taken possession in any manner whatever; can he, under those circumstances, maintain ejectment?

54 When a party in a trespass action has to prove title in order to establish the possession which is implied by title, he has to follow the same rule. This seems to have been assumed rather than stated by the judges in or out of Courts but is, I think, clear from the observations of the trial judge and of Graham, C.J., and Harris, J., on the appeal, in the case of *McIsaac v. McKay et al.* (1916), 49 N.S.R. 476. It is also implied, I think, from the judgment of Graham, E.J., *in The Halifax Power Co. Ltd. v. Christie* (1914-15), 48 N.S.R. 264, at p. 271, where he said:

> Before I leave that case, I may mention that it is often relied upon for this doctrine: that a person in proving his title need not trace it back to the Crown, but may trace it back to some one who has been in possession of the land. That has always been a useful thing because, from loss of deeds and neglect to register, and looseness in the descriptions in grants, the land marks having disappeared, a very large proportion of the titles could not be traced back to the Crown.

55 I am satisfied that the evidence discloses that the plaintiff was in possession of the land to cut timber on it, and that Peter MacNeil, who sold the land to the plaintiff, had been in possession of it and that Peter's brother, Michael MacNeil, had done lumbering work on it. Particularly I am satisfied that there is a preponderance of proof that Donald (Swamp) MacDonald, otherwise known as Donald the Constable, a predecessor to the plaintiff's title, had been in actual possession thereof and had lived in the house located near the orchard on the property. The plaintiff is entitled to maintain this action, because he is only bound, on the basis of the cases cited above, to trace his title to someone who had been in possession of the land. He need not trace it back to the Crown.

56 Not only is there a preponderance of evidence as to a predecessor's possession of the land, but there is also a preponderance of proof to enable me to hold that the plaintiff has established his eastern line. Considering all of the evidence placed before me, a goodly portion of which I have endeavoured to indicate above; keeping in mind particularly the clearly defined two monuments found on the eastern boundary of the *adjoining* John A. MacDougall estate lands; the fir tree at the south-eastern corner of plaintiff's lot, which fir tree is in line with the monuments; the old and well trodden cattle path "pretty well on the line" which had been made by the surveyor Sullivan; the comparatively straight line or ridge of stones, wherever it became discernible not far from the surveyor's line; the finding by the previous owner of defendant's land, John A. MacGillivray at the time of MacGillivray's purchase of the land, of remnants of a fence along the stone ridge; the confirmation by an elderly and knowledgeable resident of the area of that fence - a pole fence - and its having been considered to be the line; the acknowledged respect of that line by a previous owner of defendant's land, William Whalen, who had indicated the boundary of line to Simon McNeil and who had pointed out the boundary line to John A. MacGillivray who, in turn, on at least three occasions had indicated the same boundary line to the defendant, Layes; the location of an old barn (now torn down) which was described as being on the line and also being "20 rods west of the house of Michael MacDonald" - the same distance as is given in the 1910 Allan MacGillivray deed to indicate the western boundary of Allan MacGillivray's land (now the defendant's); the giant stump found along the surveyor's line; the still existing signs of part of a fence, which years ago had been moved inwards 15 rods from the eastern line of the adjoining John A. MacDougall estate lands and the statement, not challenged, that there are still pieces of the fence on the eastern boundary of the adjoining MacDougall estate lands extending southerly "to the base"; and finally the defendant's own admission to John B. MacDougall that the boundary line was where MacDougall had indicated it to be and where Frank Wallace said it was - all combine to establish substantially the eastern boundary of the plaintiff's lot.

57 I am bound to say that if I had nothing more before me than the existence of the two monuments on the eastern boundary of the adjoining John A. MacDougall estate lands, I would probably have considered that sufficient. In determining the division line between two adjoining properties, the line which corresponds with the courses of the lines of adjacent properties in the vicinity is the more likely to be correct. See *McIsaac v. MacKay et al.* (1915-16), 49 N.S.R. 476, and the unreported decision in our Court of Fielding, J., (now retired) in *Redmond Brothers Limited v. Elliott M. Robertson* (1968), S.C. No. 19103.

58 I am satisfied and find as a fact that the eastern boundary of the plaintiff's lot of land is along the line established by the surveyor, Sullivan. It is fixed by a line running northerly from the two monuments found on the eastern boundary of the adjoining John A. MacDougall estate lands to the fir tree shown on Exhibit P/1. That is the south-eastern corner of the lot and the eastern boundary of the plaintiff's lot then runs N8° 20' E for 1984.0 feet until it strikes the fence line

Continued on Page 26.

Nova Scotia Supreme Court
Appeal Division, McKinnon, C.J.N.S.
Cooper, J.A., and Bissett, J.
March 21, 1969.

REAL PROPERTY - TOPIC 7080

EASEMENTS AND LICENSES - RIGHTS-OF-WAY - WAY OF NECESSITY - WHETHER OWNER OF LAND HAD A RIGHT-OF-WAY OF NECESSITY OVER NEIGHBOUR'S LAND - OWNER HAD ALTERNATE BUT DIFFICULT ACCESS TO HIS PROPERTY - APPEAL COURT HELD WAY OF NECESSITY CAN ONLY EXIST WHERE THERE WAS NO ALTERNATE MEANS OF ACCESS - APPEAL COURT HELD GRANTEE NOT ENTITLED TO WAY OF NECESSITY - PARAGRAPH 36.

REAL PROPERTY - TOPIC 7160

EASEMENTS AND LICENSES - MISCELLANEOUS EASEMENTS - RIGHT TO CONSTRUCT RIGHT OF-WAY - RIGHT-OF-WAY NEVER CONSTRUCTED AND DOMINANT OWNER ADVERSELY ENCROACHED ON PROPOSED BOUNDS OF RIGHT-OF-WAY - ACQUIESCENCE BY GRANTEE - APPEAL COURT HELD RIGHT TO CONSTRUCT RIGHT-OF-WAY WAS ABANDONED - PARAGRAPHS 37 TO 49.

REAL PROPERTY - TOPIC 7200

EASEMENTS AND LICENSES - EXTINGUISHMENT OF EASEMENTS - IMPLIED RELEASE - ABANDONMENT - GRANTEE'S NON-USE AND ACQUIESCENCE IN ADVERSE INTERFERENCE WITH RIGHT OF-WAY BY DOMINANT LANDLORD OVER LONG PERIOD OF TIME - APPEAL COURT HELD RIGHT-OF-WAY ABANDONED BY GRANTEE - PARAGRAPHS 37 TO 49.

REAL PROPERTY - TOPIC 7200

EASEMENTS AND LICENSES - EXTINGUISHMENT OF EASEMENTS - IMPLIED RELEASE - ABANDONMENT - EFFECT OF REFERENCE TO RIGHT-OF-WAY IN SUBSEQUENT GRANTS - APPEAL COURT HELD REFERENCE TO RIGHT-OF-WAY COULD NOT REVIVE A RIGHT-OF-WAY WHICH HAD IN FACT BEEN ABANDONED - PARAGRAPH 50.

This appeal arose out of the defendant's attempt to exercise a right-of-way over the plaintiff's property. In 1891 a predecessor in title of the plaintiff granted to the predecessor in title of the defendant a right to construct a carriage road over a strip of land at the end of the plaintiff's property adjacent to the defendant's property, with a right-of-way over the road when constructed. The carriage road was never built and over the years the predecessors in title of the plaintiff built stone walls across the strip and built buildings which partially encroached upon it, with no complaint from the owners of the defendant's property. In 1966, the plaintiff constructed a fence on the strip. The defendant proceeded to remove the fence as an obstruction to the right-of-way. The plaintiff brought an action for damages and for a perpetual injunction against the defendant. Coffin, J., of the Nova Scotia Supreme Court, Trial Division, in an unreported judgment, dated April 22, 1968, allowed the plaintiff's action and awarded the plaintiff $82.42 damages and granted a perpetual injunction restraining the defendant from interfering with the strip of land. The appeal court in the judgment set out below dismissed the defendant's appeal.

The appeal court held that the grant in 1891 was a grant of a right to construct a right-of-way and not a grant of a right-of-way. The appeal court held no such right-of-way had ever come into existence, since the carriage road was never constructed. In view of the fact that no action had been taken by the defender or his predecessors in title to bring the right into existence by constructing the road, the appeal court held that it was too late after 75 years to exercise the right to construct.

The appeal court held that references to the right-of-way in subsequent grants of the defendant's property could not revive the right which had been abandoned prior to the subsequent grants.

In obiter dictum, the appeal court stated that, even if there had been a grant of a right-of-way in 1891, it had been abandoned. The appeal court stated that mere non-use of the right-of-way was not sufficient to establish abandonment; however, the owner of the defendant's property had also acquiesced in the activities of the owners of the plaintiff's property which were adverse to the right-of-way, namely the construction of walls and buildings. This acquiescence, together with non-use, constituted abandonment of the right.

. . .

COOPER, J.A.:

1 The plaintiff brought action against the defendant for trespass to her real property at Jollimore, Halifax County, and known as 10 Kirk Road, claiming damages for the trespass and for the destruction of part of a fence and punitive damages. She also sought a perpetual injunction restraining the defendant from entering upon or interfering with the property.

2 The defendant pleaded that he was the owner of a parcel of land at Jollimore to which access is available by a right-of-way of the width of a carriage road over the northern portion of lands of the plaintiff and that the plaintiff wrongfully obstructed this right-of-way in or about the month of November, 1966, by causing fence posts to be erected. He also counter-claimed for punitive damages and a perpetual injunction restraining the plaintiff from obstruction of the right-of-way.

3 The defendant based his claim to the right-of-way on a deed from Amos Slaughenwhite and his wife to Henry Martin Bradford ("the 1891 deed"). Slaughenwhite was a predecessor in title to the plaintiff and Bradford a predecessor in title to the defendant. The deed is dated June 17, 1891, and was recorded in the Registry of Deeds at Halifax on June 9, 1891, in Book 283, page 161. The deed contains the following:

> Also a free and uninterrupted right for the said Henry Martin Bradford, to construct and build a carriage road of the width of an ordinary carriage road, to lead from the northwest corner of the lot hereby conveyed to the said Henry Martin Bradford, through and over the property now owned by the said Amos Slaughenwhite, along the southern boundary of said Yeadon property until it meets the road leading from said property of Amos Slaughenwhite to the main road, together with a free and uninterrupted right-of-way and passage upon, along and over the carriage road hereby to be constructed with full power of ingress, regress and way to and for the said Henry Martin Bradford, his heirs and assigns and his agents, servants and tenants, and the occupiers for the time being of the land hereby conveyed and all other persons for the time being, with or by the leave of them or any of them over and upon and along the said carriage road hereby to be constructed, and also with full liberty for the said Henry Martin Bradford, his heirs and assigns, to pass and repass from time to time hereafter, through upon over and along the said carriage road hereby constructed, with or without horse, cattle, and other animals, carts, carriages, wagons, sleighs, sleds and other conveyances, goods and other things to and from the land and premises first above described from and to the said main road or public highway.

4 The defendant also relied on the fact that subsequent documents of title to his property refer to the alleged right-of-way.

5 The deed to the defendant is one from Janet Alexandra Marshall, and Geoffrey James Marshall and his wife, is dated April 1, 1963, and was recorded in the Registry of Deeds in Halifax on April 11, 1963, in Book 1892, page 207. It contains the following wording respecting the right-of-way:

> ALSO a free and uninterrupted way (appurtenant to said lands) unto the Grantee, his heirs and assigns with the right to construct and build a carriage road of the width of an ordinary carriage road to lead from a point three feet south from the north west corner of a lot hereby conveyed through

> and over the property now or formerly owned by one Amos Slaughenwhite along the southern boundary of said Yeadon's property until it meets the road leading from said property of Amos Slaughenwhite to the main road, together with a free and uninterrupted right-of-way and passage upon and along and over the carriage road hereby to be constructed with full right of ingress and egress and way to and for the Grantee, his heirs and assigns, and his and their agents, servants, and tenants and the occupiers for the time being of the land hereby conveyed and all other persons with or by leave of them over, upon and along the said carriage road hereby to be constructed and also with full liberty for the Grantee, his heirs and assigns to pass and repass from time to time hereafter through, upon, over and along the said carriage road with or without horses, cattle and other animals, carts, carriages, wagons, sleighs and other conveyances, goods and other things to and from the land and premises first above described from and to the main road or public highway.

6 There is also in evidence a deed dated March 13, 1913, and recorded in the Registry of Deeds on March 14, 1913, in Book 424, page 563, between Amos Slaughenwhite and his wife and R. Evatt Mathers, predecessor in title to the plaintiff. It contains these words:

> Subject, nevertheless, to a right-of-way or passage six feet wide as deeded by the said Amos Slaughenwhite and Louisa Slaughenwhite his wife, to one H. Martin Bradford, by deed of date June 18th, 1891, and recorded in Book 283 page 161 in the Registry of Deeds office in Halifax aforesaid extending along the southern boundary of the McIllreith property from the west boundary of the lot under description, . . .

7 A copy of a solemn declaration dated December 9, 1944, made by R. Evatt Mathers declares that Mathers had by indentures bearing date December 4, 1944, conveyed land and premises on the North West Arm in the County of Halifax to Dorothy Martin, wife of Gerald E. Martin, that he had been requested by the purchaser to state whether he had at any time given a right-of-way to one Reynolds (a predecessor in title to the defendant) or any other person "other than the rights-of-way described in said deed and expressly reserved therefrom". Paragraph 4 of this declaration reads:

> 4. I say that I have never conveyed any right-of-way other than those mentioned in said Indentures referred to in paragraph 1 of this Declaration. The only right-of-way in favour of Mr. Reynolds' property is that granted to H. Martin Bradford by the deed dated June 16th, 1891, and reserved from my deed to Mrs. Dorothy Martin.

8 The plaintiff contended that what was granted by the 1891 deed was not a right of way but merely a right to Bradford, the grantee, to construct and build a right of way and that this right had never been exercised and had been lost by effluxion of time. In the alternative the plaintiff contended that if a right-of-way had been granted by the 1891 deed, it had been abandoned.

9 The defendant contended that the right-of-way had been granted by the 1891 deed and the non-user of the right-of-way did not amount to abandonment of it.

10 The action was tried before Coffin, J. He said in his decision that there was no doubt that there was a grant of something in 1891 to Mr. Martin Henry Bradford. He went on to say that if he held that there was an outright grant of a right-of-way then "I am forced to this conclusion that the mere non-user by the defendant over the years was not sufficient to result in an abandonment of the right-of-way . . .". He then said that if, on the other hand, he came to the conclusion -

> that what was once given was a right to construct a road within the terms of *Swan v. Sinclair* (infra), then I must conclude there were benefits Mr. Bradford may have obtained in the 1891 conveyance, but neither he nor his successors in title took any steps to carry out the terms of the document and confirm such a right-of-way as would now be in existence in favour of the defendant Harold Sutherland.

and he follows immediately thereafter with the words: "After careful consideration it is my view that this is the case." He awarded the plaintiff $82.40 for the cost of repairing that portion of the fence destroyed by the defendant and granted her a perpetual injunction. The decision was filed on April 22, 1968, and the Order for Judgment is dated April 30, 1968.

11 The defendant has appealed from so much of the decision as holds that the plaintiff is not liable to the defendant for his damages and from the whole of the Order for Judgment. The plaintiff has cross-appealed and sets out in her Notice that the learned trial judge erred in law in holding that if there was an outright grant of a right-of-way over the land held by the plaintiff (a) there was a mere non-user of the right-of-way by the defendant and his predecessors in title over the years and (b) that non-user was not sufficient to result in an abandonment of the right-of-way.

12 Mr. James D. McKenzie, a provincial land surveyor of many years experience, surveyed the plaintiff's property and his plan of survey dated January 24, 1966, is in evidence as Exhibit P-1. He had more difficulty in locating the northern boundary line but finally fixed it where he did on P-1 partly because he was instructed by the plaintiff that any doubt was to be resolved as against herself, that is, he was to take the position of giving the abutting owner the benefit of any doubt. Mr. McKenzie showed on P-1 by a green coloured strip running along the northern boundary line the area of the disputed right-of-way to the defendant's land which is located to the north and east of the plaintiff's land. This green strip is approximately 672 feet in length by calculation from measurements of portions of it appearing on P-1 and by scaling the remainder. It is 6 feet in width. Its western terminus is Kirk Road and its eastern terminus is at the northern end of the western boundary of the defendant's property. Marine Drive, a private road, runs into the right-of-way area, its western boundary being 197.4 feet from the eastern terminus of the right-of-way area. Mr. McKenzie also drew a plan, Exhibit P-2, showing a blue area. The northern margin of the blue area is the most northerly position Mr. McKenzie considered possible for the northern boundary line of the plaintiff's property to be and the blue colouring represented a 6-foot strip to the southward corresponding in length and width to the green strip. He drew a third plan, Exhibit P-3, showing a northern boundary line of the property in the most southwardly location he considered possible and a yellow strip 6 feet wide running along and south of the boundary line and corresponding in length to the green and blue strips.

13 The learned trial judge accepted the evidence of Mr. McKenzie as to the lines and his conclusion as to the northern boundary of the plaintiff's property. I also accept this conclusion so that the northern boundary line of the plaintiff's property is as shown on Exhibit P-1. I, therefore, do not deem it necessary to concern myself further with Exhibits P-2 and P-3.

14 Mr. Earle Canfield, a carpenter, built a fence along the northern boundary of the plaintiff's property, locating it by the surveyor's stakes. Mr. McKenzie told him that these stakes were on the line . Mr. Canfield, in building the fence, dug holes, put in cement and inserted the posts into the cement. Two by six spruce bars were fitted to the posts.

15 On November 19, 1966, Mr. Russell Allen Finley, the plaintiff's husband, as a consequence of receiving a telephone call, went down to the area of the Finley garage, a corner of which is on the area claimed by the defendant as his right-of-way and which I hereinafter refer to as "the green strip area", and is approximately 160 feet west of the eastern terminus to which I have referred. He found the defendant engaged in chopping the fence down along the area just north of the garage. The bars of the fence were knocked off first and then eight or nine of the posts were chopped off right at the concrete. The defendant also said that he had people engaged to take down three trees that were east of the garage. These trees were, to the best of Mr. Finley's knowledge, on his wife's property. The plaintiff forthwith commenced this action and obtained an injunction restraining the defendant from cutting down trees and the line fence pending final determination of the action.

16 The plaintiff, in addition to being the owner of the property shown outlined in red on Exhibit P-1, which she acquired through the estate of her mother Dorothy Martin, who died in 1959, is also the owner of another lot of land designated as 24 on Exhibit P-1. The southern boundary of lot 24 is contiguous to the northern boundary of the main property of the plaintiff for a distance of 308.1 feet commencing at the western boundary of Marine Drive and extending to the south-eastern corner of property of one Charles Stafford. I refer particularly to lot 24 in view of the fact that counsel for the plaintiff endeavoured to establish that there was a right-of-way going partly through lot 24 and that it was this second right-of-way, if any, that the defendant was entitled to use, although counsel for the plaintiff conceded that it had not been used for many years and that "we have not been able to find any grant of this second right-of-way." In my view the evidence does not support the theory that the defendant acquired any right over this second right-of-way so-called. The most that can be said about it is that there is evidence of a pathway over the northern portion of lot 24 and that it or portions of it had been used from time to time through the years by pedestrians.

17 There is also evidence that the defendant and predecessors in title to the defendant gained access from time to time to the defendant's property from the most southerly portion of the plaintiff's property, but I agree with the learned trial judge's conclusion that ". . . the access from the southerly portion of the plaintiff's property was always obtained by consent."

18 The easterly boundary of the defendant's property is the shore of the North West Arm. A public tow-path runs along the shore. It has never been used for anything but pedestrian traffic except for occasions when Mr. Marshall, an immediate predecessor in title to the defendant, came across the property of John Lynch with his motor vehicle and along a portion of the tow-path to get to his house. Mr. Lynch's property is located immediately to the north of the defendant's property. Mr. Lynch finally terminated Mr. Marshall's use of his property.

19 In the end, the defendant is landlocked into his property, except for the access given by the tow-path and the water, unless he can succeed in establishing what he has alleged in his defence, namely that he has a right of access to his land "by a right-of-way of the width of a carriage road over the northern portion of lands of the plaintiff . . .". This, in my view, means over the green strip area. The resolution of this issue requires interpretation of the words relating to such a right of way contained in the 1891 deed and subsequent documents of title and a consideration of the evidence to determine whether, as expressed in the reply of the plaintiff -

> if the predecessors in title ever enjoyed a right-of-way in the width of a carriage road, or at all, over the northern portion of lands of the plaintiff, that such right-of-way has been extinguished by: (a) acts of the predecessors in title of the plaintiff adverse to the enjoyment of the right-of-way which said acts were acquiesced in by the predecessors in title of the defendant; (b) the usage of alternate means of access to the property of the defendant by the predecessors in title of the defendant.

20 The learned trial judge comprehensively reviewed the evidence of witnesses who testified as to the nature of the terrain of the green strip area and as to obstructions thereon. This evidence covered a very lengthy period from 1901 up to the time the action was commenced. I do not deem it necessary to repeat the review of this evidence, but I direct my attention to what, in my opinion, has been established by it.

21 In the first place I am satisfied that, as found by the learned trial judge, no carriage road or any road was ever constructed along the green strip area. A number of witnesses testified that no one had ever used the area as a path or walkway. In fact, the only witness that said that it had been used was Mr. John Hussey. He said "people did go up and down that road, from Reynolds' home. They had guests, the Slaughenwhites used to come down and visit the Reynolds. They came down through behind the Mathers' garage, down to the Reynolds' house and back up that way." Mr. Maynard M. Reynolds acquired the property in 1906 and the abstract of title thereto

shows that it was in the ownership and possession of himself and members of his family at least until 1944.

22 However, it is apparent from Mr. Hussey's evidence that the Reynolds did not use the green strip area to gain access to their property. He said that in 1929 the Reynolds were living in the property which is now the defendant's and Dr. Mathers was living in the Finley house. The Reynolds gained access to their house at that time by walking along the shore. They brought in coal and groceries by the "diagonal road" which came in at the southwest corner of the Mathers' property. This use of the diagonal road for bringing in coal and groceries was quite a regular occurrence.

23 Mr. Hussey also said that he had walked the green strip area himself. However, he only saw people walk along the area about half a dozen times over a period of 25 to 30 years and when pressed in cross-examination he said "there was only the Slaughenwhite's I saw walking down." and in reply to the next question "Only the one family?" he replied "They were friends with the Reynolds." It is also in evidence that the Slaughenwhites lived to the north of the plaintiff's property and east of the western terminus of the green strip area.

24 After careful consideration of all the evidence on the point as to whether or not the green strip area had ever been used as a right-of-way, I conclude that it was never so used and the most that can be said is that persons may from time to time have walked over portions of it. There is no evidence whatsoever of any carriage or motor vehicle ever having been driven along it and, in fact, it would have been impossible for that to have been done because of the physical obstructions to any such use.

25 These obstructions are trees and boulders, rough ground, walls, a portion of the plaintiff's garage and part of a shed at one time used for storage of ice and later as a woodshed. Mr. McKenzie said when asked as to the age of the trees that at least two or three of them in his opinion would be at least 40 years old and possbily more than 50. He refers to good sized boulders in one part of the green strip area. Exhibit P-1 shows stone walls. One of these is on the western portion of the plaintiff's property and a section of it crosses diagonally the green strip area. It is approximately 2 feet in height. It holds back higher ground acting as a retaining wall. It is an irregular wall, not straight, and its western end is at a gate post which is on the green strip area and is the northern of the two gate posts through which the plaintiff's driveway to her house runs. The southern end of another wall, which I shall hereinafter refer to as the "second wall", crosses the green strip area approximately to the southern margin of the area and at that point is "only a foot or so high, perhaps two" - Mr. McKenzie's evidence. It tapers down to that height from a 7 or 8 foot height. Its southern end is located approximately 300 feet to the east of the western terminus of the green strip area.

26 At a point approximately 125 feet east of the southern end of the second stone wall, the northwest corner of the shed to which I have referred, owned by the plaintiff and roughly about 9 or 10 feet square, encroaches slightly on the green strip area. Approximately 142 feet east from the northwest corner of the shed, the northwest corner of the plaintiff's garage encroaches on the green strip area. The garage is located between the eastern boundary of Marine Drive and the eastern terminus of the green strip area. The exact extent of the encroachment is not given, but from careful examination of Exhibit P-1, I agree with the learned trial judge when he refers to "a very substantial encroachment by the corner of the garage." It should also be mentioned that there is a steep grade from the garage to the eastern terminus of the green strip area.

27 Mr. Clyde W. North, 71 years of age, went to work in 1917 for Dr. Mathers, a predecessor in title to the plaintiff. He gave evidence that the second stone wall was there at that time; that the shed was built in 1918 or 1919 - "it was built while I was there." It was in the same location when he saw it on the day before he gave his evidence as it was when it was built. Mr. North said the garage was on the property when he was there in 1917 and when asked about its location said "well, near as I can tell, it's approximately the same location." He went on to say that the doors were facing southerly whereas now they are facing west.

28 Mr. Roy Jollimore testified that both shed and garage have been in the same location to his knowledge since 1926.

29 Mr. Stanley Parsons said that it would be quite difficult to get around the northwest tip of the garage because ". . . I can recall that between that corner of the garage and the wall and the trees there that one can hardly get a wheelbarrow through there with any ease. It was difficult. And right in between, right in the back of the garage, there is quite a lot of rubbish and debris." And again "And again was never a path there other than where we used to wheel the wheelbarrow to carry out the dead foliage and so on to make a compost heap."

30 Mr. William Joseph Jessup, in his 83rd year when he gave his evidence, came to Jollimore in 1901 and has lived there since 1907. He was asked about the stone walls and said he believed they were built between 1914 and 1919 - "the biggest part of them anyway," His father was "the man that built all that property when Dr. Mathers took it over." In any event, when he came back from overseas in 1919 part of the walls were there.

31 I now direct myself to the questions of law arising in this appeal. The first of these is whether a right-of-way was granted by the 1891 deed or merely the right to consturct a right-of-way. I have no doubt that what was given was merely a right to construct and build a right-of-way.

32 In arriving at this conclusion I have first looked at and considered the words quoted above from the 1891 deed and considered them in the light of a reading of the whole document. The object of interpretation of a deed, as of other written instruments, is to discover the intention of the author. But what the intention must be gathered from the deed itself - see *Halsbury*, 3rd ed., Vol. 11, pp. 381, 382. The relevant words of the 1891 deed appear to me to be clear and unambiguous in granting Bradford a right to construct only. What else can the words "also a free and uninterrupted right for the said Henry Martin Bradford to construct and complete a carriage road of the width of an ordinary carriage road . . ." mean? After construction of the carriage road, then Bradford, his heirs and assigns were to have "a free and uninterrupted right-of-way upon, along and over the carriage road hereby *to be constructed* . . . " (Emphasis added). Reference is made again in the document to the carriage road "hereby to be constructed". Thereafter follow words enlarging the right to pass and repass to do so with or without horses, cattle and so on along the "said carriage road hereby constructed". I do not consider that the words "hereby constructed" so appearing can have the effect of enlarging the right to construct into a grant.

33 In *Shore v. Wilson* (1842), 9 Cl. & F. 355; 8 E.R. 450, Parke, B., (quoted in *Norton on Deeds*, 2nd ed., p. 67) said:

> For the purpose of applying the instrument to the facts, and determining what passes by it, and who takes an interest under it, a second description of evidence is admissible, (the first being evidence of the meaning of a foreign language and of technical terms) viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorization for this position are also numerous; they are referred to in Vice-Chancellor Wigram's excellent Treatise on the Admission of Extrinsic Evidence, under the Fifty Proposition (p. 53, 3rd ed.; p. 67, 4th ed.; p. 58, 5th ed.). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written.

See also *Callard v. Beeney*, (1930) 1 K.B. 353, and in particular Wright, J., at p. 360.

There was adduced evidence in this case, insofar as it was possible to do so, relating to circumstances existing when the 1891 deed was given. None of this evidence in my opinion was such as to alter the meaning to be placed on the words used in that deed. Indeed, it is inferentially very clear from the evidence that no roadway or pathway existed in the green strip area in 1891, thus giving added force to the interpretation that all that was granted with respect thereto was a right to construct and build a right-of-way.

35 Counsel for the appellant argued that all essential characteristics of an easement were set out in the 1891 deed and that the words "hereby to be constructed" were used in an adjectival sense and were in effect subordinate to the words introduced by "together with" so that what was granted was a right-of-way and not a mere right to construct a right-of-way. I cannot so read the document. Its plain effect in my view is to grant a right to "construct and build a carriage road" and after that was done the grantee, his heirs and assigns would have a right of passage over the road.

36 Counsel for the appellant also contended that the circumstances that the defendant was "functionally landlocked," as he put it in argument, must be considered in arriving at the proper interpretation of the 1891 deed. I do not think that this circumstance assists the appellant. Difficulty to access to the property may have been the principal reason for the right given to Bradford but it cannot change the meaning of the words in that deed. I only add, because evidence was led and argument advanced as to a way of necessity, that the defendant's claim is not for such a way but is related solely to entitlement for a right-of-way over the green strip area. In any event I refer to *Fullerton v. Randall* (1919), 44 D.L.R. 356. Ritchie, E.J., delivered the judgment of the Court and quoted with approval 11 Hals. 289 as follows:

> A right-of-way of necessity can only exist where the grantee has no other means whatsoever of reaching his land. If there be any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity.

37 The next question is whether or not the right to construct and build a right of way over the green strip area granted by the 1891 deed has been lost by effluxion of time. I have no doubt that it has. The case of *Swan v. Sinclair*, (1925) A.C. 227, and in the Court of Appeal (1924) 1 Ch. 254 is very much to the point. The facts in that case were:

38 A row of houses was put up for sale by auction in 1870. One of the conditions was that a strip of land 15 feet wide running across all the lots at the backs of the houses should be made into a roadway and that the purchaser of each lot should have a right-of-way along the road when made. At the time when the action was brought in 1923 the road had not been constructed, and garden walls or fences lay across its proposed site between each pair of lots. In 1883 the then owner of lot 1 had levelled up the site and by so doing had caused a sheer drop of 6 feet to occur between that lot and 1 to 2. The plaintiff wanted to build a garage on lot 2, and the question arose whether he was still entitled to a right-of-way over the strip of land at the back of lot 1.

39 In the Court of Appeal the case was argued solely on the question as to whether or not there had been an abandonment of the right-of-way. Warrington, L.J., at p. 268 said:

> The law is, I believe, correctly stated by Alderson, B. in *Ward v. Ward*, 7 Ex. 838, 839. He says: 'The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user.

40 Warrington, J.J., went on to say at p. 269:

> In the present case the user of the road has been rendered impossible by not only the continuance of obstructions existing at the date of the grant, but also by the creation of a fresh one by the raising, in 1883, of the level of the land over which the way would pass. It seems to me that these circumstances, adverse to user, and sufficient in themselves to explain the non-user, combined with the great length of time during which no objection has been made to their continuance, nor effort made to remove them, are sufficient to riase the presumption that the right has been abandoned, and has now ceased to exist.

41 Sargant, L. J., also decided that abandonment had been made out. Pollock, M.R., dissented.

42 When the case reached the House of Lords, Viscount Cabe, L. C., at p. 234 pointed out that no such roadway as was proposed had been either formed or used up to the time in the year 1922 when the appellant made a breach in the wall separating lot 1 from Church Road, erected gates there and caused a car to be driven through those gates and over the strip of land on lot 1 into lot 2; nor was there evidence "that any person interested in any of the several lots ever desired or requested that it should be formed or made any attempt to use it as a means of access to his premises." He said at p. 237:

> My Lord, I do not doubt that Lawrence J. and the court of Appeal came to the right conclusion. Even if the right-of-way claimed had been effectively granted to the appellant's predecessors in title in the year 1871, the non-user of the way for upwards of fifty years, coupled with the fact that throughout that time the appellant and his predecessors acquiesced in the continuance of the walls running right across the proposed roadway and (since 1883) in the additional obstruction caused by the filling up of the strip of land on lot 1, would, according to the decisions in *Moore v. Rawson* 3 B. & C. 332; *Bower v. Hill*, 1 Bing. N.C. 549; and *Reg. v. Chorley* 12 Q.B. 515, have been good ground for inferring a release or abandonment of the easement. But the present case is not of that simple character. The conveyances of lots 2 and 3 do not contain a clean grant of the right of way claimed, but only a grant of such right-of-way as was mentioned in the conditions of sale; and in the same way, lot 1 was granted subject, not to a right-of-way, but to the provisions of the conditions of sale. There was no covenant by the several purchasers with the vendors to pull down the walls and form a roadway, nor was there any deed of mutual covenants entered into between the several purchasers. The effect of the transactions was at the most to create a contractual relation between the several purchasers and the vendors, under which the purchasers might perhaps have been called upon within a reasonable time after the execution of the conveyances and the determination of the existing tenancies, to clear the land and form the road; but until that had been done there could be no effectual creation of the easement of passage. In these circumstances it appears to me that the lapse of time is fatal to the appellant's claim. For the period of fifty years or thereabouts no person sought to enforce the contract, if contract there was, or to enter upon the enjoyment of the easement; and this being so, it appears to me that it must inevitably be inferred that the arrangement made in 1871 has by common consent been released or abandoned and cannot now be revived.

43 Viscount Finley at p. 240 put the whole matter thus:

> In both the Courts below the case was dealt with on the footing that a right of way had been created as an incorporeal hereditament by the various conveyances in conformity with the scheme under the condition at the auction. Both Courts held (the Master of the Rolls dissenting) that this right of way had been abandoned and thereby extinguished. I do not desire to throw any doubt upon the correctness of this view, but it is not necessary to consider it, inasmuch as early in the argument in your Lordships' House it became apparent that no right-of-way had, in fact, ever come into existence.

> The scheme contemplated that it should come into existence when the road at the back of the premises had been made and the other provisions of the conditions had been complied with. As this never took place, the right of way remained a mere possibility of the future. After so great a lapse of time it would be impossible for the owners of any of these lots to assert as against the owners of other lots a right to have the scheme carried out by making the road and keeping it open for traffic, as had been indended. . . . Right-of-way there was none. There was at the outside merely a contract that certain things should be done and that then there should be a right-of-way.

And Lord Wrenbury said at p. 243 that "if in 1871, when the conveyances were executed, the grant to each purchaser had been a grant of a right of carriage way to be enjoyed in present over a strip of land over which it was physically possible for a carriage to pass, a question would have arisen which is not the question in this case" and referred to the facts in the case as being that "the grant to each purchaser was a grant of a right of carriage way to be enjoyed in future over a strip of land upon which work had to be done before a carriage could pass over it."

44 In considering the instant case in the light of what was said by the law Lords in the Swan case, I am led inescapably to the conclusion that there was a release or loss of the right to construct and build a carriage road over the green strip area. Nothing was done to enforce this right for a period of over seventy years and it is far too late now to enforce that right. It has gone. In this I agree with the learned trial judge. The appeal, therefore, in my opinion must fail.

45 As I have already mentioned the respondent has cross-appealed alleging error in law on the part of the learned trial judge in holding that if there was an outright grant of a right-of-way (a) there was a mere non-user of the right-of-way by the defendant and his predecessors in title over the years, and (b) that non-user was not sufficient to result in an abandonment of the right-of-way.

46 I reiterate that in the course of his decision the learned trial judge said:

> If I hold that this is an outright grant of a right-of-way, then I feel that I am forced to this conclusion that the mere non-user by the defendant over the years was not sufficient to result in an abandonment of the right of way, although, in the present case, there is much more detailed evidence of interference with the alleged right-of-way, at least in the past forty years, than there was in the Harris case.

The Harris case is *Baker v. Harris*, (1903) 1 D.L.R. 354, to which I hereinafter refer.

47 In the result the learned trial judge did not hold that there was an outright grant of a right-of-way by the 1891 deed and, therefore, I do not think it can be said that he made a finding as to abandonment of the right-of-way. His decision is confined in its effect to the loss of the right to construct and build a right-of-way which he found was all that was granted by the 1891 deed. I do not, therefore, deem it necessary to deal with the cross-appeal being as it is grounded upon a conclusion which the learned trial judge never in fact reached.

48 However, I think that I should set out my views as to whether, upon the assumption that what was granted by the 1891 deed was a right-of-way and not merely a right to construct and build a right-of-way, there was abandonment. I do so particularly because this question was raised and argued at some length.

49 In the first place there was here much more than mere non-user. The green strip area was obstructed by two stone walls which have been in place for at least forty years. In addition there are other obstructions, namely, the shed and garage of the plaintiff, to the extent I have mentioned, and these have existed over many years. In addition predecessors in title of the defendant sought and obtained permission from predecessors in title of the plaintiff to obtain access to the property now owned by the defendant over the plaintiff's property by another route. All these

matters indicate to me an intention to abandon any right-of-way over the green strip area. I, therefore, conclude that if there was an outright grant of a right-of-way by the 1891 deed, the right-of-way has been abandoned. As was said by Lord Chelmsford, L.C., in *Crossley & Sons Ltd. v. Lightowler*, (1867) 2 Ch. App. 478, at p. 482.

> The question of abandonment of a right is one of intention, to be decided on the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind.

I refer also to what was said by Warrington, L.J., in the Swan case on the question of abandonment quoted above, - see also *Bell v. Golding* (1896), 23 O.A.R. 485, and *Gale on Easements*, 13th ed., pp. 341, 2.

50 It was argued by counsel for the appellant that because the alleged right of way over the green strip area had been referred to in documents of title subsequent to the 1891 deed, as I have already mentioned, entitlement to the right-of-way had thereby been kept alive. As pointed out by Sargant, J.J., in the Swan case, supra, at p. 275 of the Court of Appeal Report - "according to the ordinary practice of "conveyancing", the conveying party in each case would, of "course, avoid any risk they might incur under any implied "covenants for title by assuming that the easement in question "had been abandoned and affecting to convey without any mention "of it." - Sargant, L.J., went on to say that -

> "even if a mention of the right-of-way in any such conveyance might operate to keep an existing right alive, it could not, in my view, revive an abandoned right; and in my judgment, in the circumstances of this case, abandonment had taken place by the end of last century at latest.

and see Viscount Cave, L.C., at p. 238 of the House of Lords report. In this case if it could be said that the right-of-way had not been abandoned by 1913 when Amos Slaughenwhite conveyed to R. Evatt Mathers, it had in my view certainly been abandoned by 1944 when Mathers conveyed to Dorothy Martin and any reference to it in the deed to Dorothy Martin and in the solemn declaration to which I have referred would not have the effect of reviving it.

51 Counsel for the appellent also relied strongly upon *Baker v. Harris*, (1930) 1 D.L.R. 354. In that case there was a mutual right-of-way, expressly granted, enjoyed by the owners of adjoining residential properties. The right-of-way was 75 feet in length but only 60 feet had been used for a number of years. In 1927 the plaintiff contemplated acquiring a motor car and this raised the necessity of using the right-of-way to its full depth of 75 feet as a means of access for the car to her rear premises. There had been a fence between the properties running from a gateway which had been placed across the right-of-way. This gateway was at the distance of 60 feet along the right-of-way and the fence ran from it to the rear limit of the properties and was intended to be on the dividing line between them. The fence fell down about the end of 1927 and the defendant, against the plaintiff's forcible objection, had the division fence rebuilt. The action followed in which the defendant set up that the plaintiff had lost by abandonment or otherwise her right to use as a right of way any portion of the mutual right-of-way described in the deeds which lay to the west of the gate, that is, the last 15 feet. Kelly, J., found that there was no abandonment or surrender by the plaintiff of her right to use the right-of-way to its full extent of 75 feet. His decision was affirmed on appeal.

52 Grant, J.A., at p. 360 referred to the fact that by several conveyances in the chain of title from 1907 down to 1919, the right-of-way is expressly granted and indicates that this feature is entitled to weight as indicating an absence of intention to abandon the right-of-way. He continues:

> However that may be, the evidence adduced, which was in some respects conflicting, and upon which an experienced and able trial judge has made his findings, did not in his opinion justify the inference that the right-of-way had been abandoned. In this conclusion we entirely concur.

53 However, I think that the case of *Baker v. Harris* is clearly distinguishable on its facts from the present case. A major portion of the right-of-way had been used for many years and the question at issue was merely whether the plaintiff had lost her right to use the remainder of the right-of-way - see Kelly, J., at p. 358. In the present case no portion of the right-of-way over the green strip area had ever been used nor in fact could it be used because of the nature of the terrain. In any event, as pointed out by Lord Chelmsford in the Crossley case, supra, the question of abandonment is one of intention. The Court in the Baker case found no such intention but in the present case I think that for the reasons I have given, intention to abandon has been clearly established.

54 In the result, therefore, I would dismiss the appeal with costs to the respondent.

*Appeal dismissed.*

Continued from Page 14.

shown on the northern boundary of the lot, projected easterly. The post and stones shown on the plan at the intersection of both lines represent the north-eastern corner of plaintiff's land.

59 It may be to the defendant's advantage to divest himself of the notion that his 1964 deed took in the John McKeough grant and to endeavour to ascertain whether or not he has acquired rights by possession, through his acts and those of his predecessors, to the lands of Alexander (Sandy) MacDonald. There was no attempt to establish this before me.

60 I am satisfied that the defendant Layes committed the trespasses, as is alleged by the plaintiff, and I allow the plaintiff's action against the defendant with costs. The action against the defendant John A. MacDonald has been discontinued. I assess the plaintiff's damages against the defendant Layes at the amount agreed to between counsel, viz., $425.00. This defendant's counter-claim is dismissed with costs. There will be only one Brief and Counsel fee taxed.

*Judgment for plaintiff.*

Nova Scotia Supreme Court
Trial Division, Gillis, J.
December 12, 1969

REAL PROPERTY - TRESPASS - INTERPRETATION OF WILL DEVISING REALTY IN EQUAL PORTIONS TO TWO SONS - WHETHER DIVISION OF REALTY EQUALLY BETWEEN TWO SONS SHOULD BE DIVIDED BY QUANTITY OR BY VALUE.

TRESPASS - REAL PROPERTY - INTERPRETATION OF WILL DEVISING REALTY IN EQUAL PORTIONS TO TWO SONS - WHETHER DIVISION OF REALTY EQUALLY BETWEEN TWO SONS SHOULD BE DIVIDED BY QUANTITY OR BY VALUE.

REAL PROPERTY - LOCATION OF LOT LINES - EVIDENTIARY VALUE OF OLD FENCES.

Trial Court awarded the plaintiff landowner $100.00 damages for trespass and also granted the plaintiff a declaration with respect to title and possession of certain lands in dispute.

The Court held that the devise by Will and division of the lands in question did not include certain lots because the grantor had lost title to these lots by adverse possession. The Court held that the surveyor who testified for the defendant erroneously included these lots in his calculation and division of the property. In addition, the Court held that the land was to be divided by quantity and not by value. The defendant proposed the division based on value.

. . .

The plaintiff claims title to Lot A1 as a successor in title to Thomas Henry Naugle of the southern portion of the lands of William Naugle and by possession by himself and his predecessors in title for more than twenty years.

The plaintiff alleges that he went into possession of the said lands, started to erect a fence, put in a line of posts and staked out the whole of the lot. He cut trees and brush, burned the brush and dug four holes in preparation for sewer and water installations and marked out the foundation area for a house he planned to build.

The defendant, in September, 1968, came upon the said lands, erected several posts in a line upon the land. He had first engaged the Surveyor, Donald V. Purcell, who had carried out some field work and apparently indicated the position in which the fence posts were placed. The defendant, in effect, admits coming upon the said land, erecting the posts and such other actions as were incidental thereto.

The action is in trespass.

The plaintiff claims damages for trespass and a declaration of title in him of the whole of the said lands shown and referred to as Lot A1. The defendant claims to be the owner of the northern portion of said Lot A1 as successor in title to Freeman John Naugle and by virtue of the Will of William Naugle and the various other deeds already referred to and, as well, by possession of the northern half of Lot A1 by himself and his predecessors in title for more than twenty years.

The defendant has argued that the plaintiff cannot maintain the action because he has not proved title to the Crown or to someone in possession. I do not accept the objection as valid. Of all the tests set out in *Elliott v. Jardine* (1961), 45 M.P.R. 104, I am satisfied that the plaintiff held title and that he was in actual possession of the said lands between 1966 and 1968, and at the time the defendant entered upon the said lands. In my opinion this actual title plus possession allows the plaintiff to maintain his action against the defendant and it is upon the defendant to show title in himself by possession or through the rightful owner. Additionally, it is pointed out that there is some evidence of possession in Thomas Henry Naugle which the Court could accept in disposing of the objection favourably to the plaintiff, as I do.

Notwithstanding the allegations of possession in and the several deeds to Thomas David Naugle, I am of the opinion that decision upon the conflicting claims of the parties to lands, east of Cow Bay Road, including Lot A1, will rest upon interpretation of the Will of William Naugle and determination of the area and description of lands, east of Cow Bay Road, to which he held title at his death. As to the first of these questions, interpretation of the said Will, it is clear that the Court must give expression to the intention of the testator. In the facts and circumstances of this case, the only source of assistance that the Court can turn to in construing the Will, is the Will itself.

I am of the opinion and find that the intention of the Testator, William Naugle, was to divide the land held by him by *area* and *quantity* into two equal portions, without reference to value and quality, the north portion to go to his son, Freeman John, and the south portion to his son, Thomas Henry Naugle.

In reaching this decision I acknowledge the assistance of the opinions in *Hooey v. Tripp*, (1912) 2 D.L.R. 136, and the annotation following at p. 143 et seq., particularly at p. 147. I do point out that in that case, however, quality was a consideration and certain of the findings of fact could come only upon evidence of value. I can find nothing in the Will of William Naugle that brings me to the conclusion that value was a consideration for the testator. Additionally, I have no evidence of the comparative values of the respective portions or any parts thereof.

I am of the opinion, also, that the brothers, Freeman John Naugle and Thomas Henry Naugle, by exchange of quit claim deeds, having made a division of the lands west of Cow Bay Road, I should not be concerned with that area. Upon the surface, at least, it appears that a satisfactory division has been made by agreement. That agreement, however, does not assist toward establishment of title in one or the other of the lands east of Cow Bay Road with which I must deal, as a whole, in resolving questions of title and boundary of Lot A1.

As to the area and description of lands, east of Cow Bay Road, to which William Naugle held title at his death, the case for the plaintiff proceeds upon a division by area but before division of the rectangle formed by the parallel lines that might have been the ideal north and south boundary lines of the lands of William Naugle, the base line on the east and Cow Bay Road on the west, there would be excluded the lands of Harriet Naugle, hereinbefore defined, and, as well also, the lands within the rectangle alleged to have passed by prescription to James Latter and W. DeYoung. In reference to Latter, the evidence of K. W. Robb is that the Latter property is fenced and that the fence has been there for many years. The plaintiff has given evidence that James Latter has had the land fenced since he was a small boy. There is nothing in the evidence adduced by the defendant that contradicts the possession by Latter of the lands within his fence or to contradict the proposition that Latter had continued in actual adverse possession which was exclusive, continuous, open and notorious for more than 20 years.

MacQuarrie, J., in *Ezbeidy v. Phalen* (1958) 11 D.L.R. (2d)660, at page 665 discussed the elements of title by long adverse possession, such as is alleged in the case at bar, in the following terms:

> ". . . there is first of all a presumption that the true owner is in possession, that the seisin follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession. If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidents of ownership of the property, that possession in time ripens into title: cf. Lord Advocate v. Lord Lovat (1880), 5 App. Cas. 273.

In Des Barres v. Shey (1873), 29 L.T. 592, Sir Montague Smith, delivering the judgment of the Judicial Committee, said, p. 595: 'The result appears to be that possession is adverse for the purpose of limitation when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant.' Cf. Halifax Power Co. v. Christie (1915), 23 D.L.R. 481, 48 N.S.R. 264.

What the person in adverse possession gets is confined to what he openly, notoriously, continuously and exclusively possesses. Possession of a part is not possession of the whole as between an actual possessor and an actual owner.

Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possession. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed."

From the evidence, I am satisfied and do find that the facts relating to possession of lands within the rectangle, above referred to, by James Latter satisfy all the elements required for passing of title by way of that possession; that possession was sufficiently long in time and of such a nature throughout as to cause the title thereof to pass by reason of that possession to James Latter. I am, therefore, satisfied and find that at the date of his death, William Naugle did not hold title to that area of land shown upon the plan of K. W. Robb, exhibit P/3 as number 3 cross hatched in red and identified as lands of James Latter. I further find that in calculating the area of lands east of Cow Bay Road, in the way that he did, the surveyor, K. W. Robb, was correct in excluding the said lands from such area of calculation.

As to the other portion cross hatched in red on the said exhibit P/3 and identified by the number 4 circled in red near the boundary line of lands of the heirs of W. DeYoung, I have for consideration the uncontradicted evidence of the plaintiff that the land was in the possession of DeYoung for over 20 years, the opinion of the surveyor as to the age of the stone wall and fences found by him the circumstance that this area was part of DeYoung's cleared and cultivated field, and, as well also, the evidence of the witnesses for the defendant who have stated that their father knew that DeYoung was in possession but did not accept that DeYoung held title to the said lands. From this evidence I conclude and find that the nature of use by DeYoung and the fences, was such as the only inference that can be drawn is that DeYoung drew this land into his open and exclusive possession, that same was adverse, that by reason of the said possession title had passed from William Naugle and that at the date of his death he did not hold title thereto.

I am, therefore, satisfied that the surveyor, K.W. Robb, was correct in excluding from his calculations the area of land last referred to and that for the purpose of calculating the area of lands of William Naugle the same was properly excluded.

In my opinion, the case for the defendant fails because of two fundamental errors made by the surveyor, Purcell. First, he was inclined, throughout his work to accept survey markers or pins placed by another surveyor, at an earlier time, in preference to stone walls and fences marking the lines. This is important in relation to the boundary line between lands of James Latter and lands formerly of William Naugle, for the result of the error of accepting pins placed by another surveyor is to accept a line and denies the fence that cuts through lands fenced by Latter and extends easterly and southerly, if one is to accept all of the rest of the evidence, into the lands of Wells to the south and is at variance with parallel lines marking the north and south boundaries of William Naugle's land and that of adjoining property owners. It seems to me that the case *McIsaac v. MacKay* (1915), 49 N.S.R. 476, has clearly established that as between an old fence line and any survey made after the original monuments, if any, have disappeared, the fences are by far the best evidence of what the lines of a lot actually are and further that, in so far as possible, regard should be had for the parallel lines setting the boundaries of adjoining property owners.

The second fundamental error on the part of the surveyor, Purcell, was that he was of the opinion that the work of survey here should be divided into four separate parts, one part of which included Lot A1. This procedure of survey is not compatible with the intention of the testator, William Naugle, or division by area. If a division by value was indicated this method might have some application. Having found that the intention was a division by area and not by value, I find that the surveyor, Purcell, was in error dividing the work of survey into four parts as he has done.

The work of the surveyor, Robb, was, in my opinion, correct in the circumstances and impressive in its result.

I accept the proposal for division by area, contained in the evidence of the surveyor, Robb, and find that the dividing line between the lands of Freeman John Naugle, deceased, now of Thomas David Naugle, the defendant, and lands of Lavinia Naugle, as to most of the lands east of Cow Bay Road, and of John A. Naugle as to Lot A1, to be the yellow line shown on exhibit P/3, the plan of K. W. Robb, from the centre of the points marked CB down to the most southeasterly corner of portion "A" or lands formerly of Harriet Naugle (marked by the letter Z in blue upon exhibit P/2) and from thence to run upon the brown line shown on exhibit P/3 to Cow Bay Road. I accept the evidence of Robb that the net result of such a division is 13.29 acres to each of the north and south portions of the lands of William Naugle, east of Cow Bay Road, and therefore an equal quantity and area of land to each. In making this division, Robb also had regard to the fence lines and parallel lines of abutting owners. I find this to be a correct procedure and endorse the method used by him.

The result is that the action of the plaintiff will succeed. He will have damages of $100, and judgment for this amount and his costs to be taxed. The order may include a declaration of title in him based upon the foregoing findings.

*Judgment for the plaintiff.*

LOCKWOOD v. BRENTWOOD PARK INVESTMENTS LIMITED 1 N.S.R. (2d)
LOCKWOOD v. CITY OF HALIFAX et al
LOCKWOOD v. RAYMOND L. KAISER LIMITED

Nova Scotia Supreme Court, Appeal Division,
McKinnon, C.J.N.S., Dubinsky, J. and Gillis, J.
February 19, 1970

WATER AND WATER COURSES - RIPARIAN RIGHTS - INJUNCTION - TORTS - COURT HELD THE DEFENDANT LIABLE TO THE PLAINTIFF FOR DAMAGES FOR UNJUSTIFIABLE INTERFERENCE WITH THE RATE OF FLOW OF A STREAM CROSSING THE PLAINTIFF'S RESIDENTIAL PROPERTY - HELD INJUNCTION NOT PROPER REMEDY IN CIRCUMSTANCES.

. . .

PRACTICE - APPEAL FROM JUDGE SITTING WITHOUT A JURY - STATEMENT OF PRINCIPLES TO BE FOLLOWED BY AN APPEAL COURT ON A MOTION FOR A NEW TRIAL.

COSTS - ALL PARTIES PARTIALLY SUCCESSFUL ON APPEAL - APPELLANTS AWARDED 75% AND RESPONDENTS AWARDED 25% OF THEIR RESPECTIVE COSTS ON APPEAL.

DAMAGE AWARD - INTERFERENCE WITH RATE OF FLOW OF STREAM CROSSING A RESIDENTIAL PROPERTY - LOSS OF AMENITIES - $2,400 GENERAL DAMAGES.

The Appeal Court affirmed the findings of fact made by the trial judge that the defendants unjustifiably interferred with the riparian rights of the plaintiff with respect to a stream which flowed through the plaintiff's residential property. The defendants constructed works upstream which decreased the rate of flow of the stream across the plaintiff's property. However, the Court of Appeal held that the proper remedy was damages and dissolved the injunction granted by the trial judge. The Appeal Court discussed cases setting out the circumstances where damages are the proper remedy and cases setting out the circumstances where an injunction is the proper remedy.

. . .

The judgment of the Court was delivered by DUBINSKY, J.

DUBINSKY, J.: These three appeals are from the decision of Coffin, J., (now Coffin, J.A.) dated August 3, 1967, and from the Order based thereon, dated June 10, 1968. Hearing of the appeals took place on December 5, 1969.

By Order of the trial judge dated November 4, 1964, the three cases were tried together. There was considerable evidence taken and it was exhaustively dealt with by the trial judge in a comprehensive decision which was reported in (1967), 64 D.L.R. (2d) 212. It will, therefore, be unnecessary insofar as this opinion is concerned, to do other than state the main facts appearing in the evidence or as found by the trial judge.

The plaintiff, Bernard Lockwood, is the owner of a residential piece of property on Dutch Village Road, in the City of Halifax, and this property extends in an easterly direction to the right of way of the Canadian National Railways. To the north of the plaintiff's land is a lot of land owned by MacCulloch & Co. Ltd., and to the south is the Bethany United Church property. Mr. Lockwood lived on the premises since 1929 but it was in 1934 that he purchased the property from its then owner, J. B. Mitchell. In the beginning he owned more land than he now has, having sold some parcels thereof to MacCulloch & Co. Ltd. and others. To the north of the MacCulloch lot, lie the lands of the defendant, Brentwood Park Investments Ltd., on which this defendant erected its high rise apartment buildings. Adjacent to Brentwood Park stands another high rise apartment building which was erected by the defendant, Raymond L. Kaiser Limited, and is owned by Mr. Kaiser for whom it was built. Next to Mr. Kaiser's lot of land and still in a northerly direction, lies the land of Mumford Development Limited on which the defendant, Raymond L. Kaiser Limited, built yet another high rise apartment building for its owners, Mumford Development Limited.

Towards the eastern boundary of the plaintiff's present lot and running in a northerly and southerly course across the entire lot, is a small stream or brook called Leppert's Brook. This is clearly indicated on Exhibit H/4, for example. I said that it is a small stream. There appears to be no reference in the evidence (at any rate, I was unable to find any such reference) as to what is the approximate distance from bank to bank of the watercourse for as much of it that passes through the plaintiff's lands. However, looking at the several snapshots of Exhibit P/2, which according to Mr. Lockwood are scenes of the brook on his property, it can readily be seen that in most places, one could jump easily from bank to bank. As already stated by me, the plaintiff's property was originally more extensive than at present, and included a strip of land running along the brook and for some six feet westerly thereof and extending southerly from the point "A" shown on Exhibit H/4. As the plaintiff stated in his evidence, he "wanted to have control of the brook" from a point which he said "is now Lexington Avenue" to the boundary line of Bethany United Church. When in 1944, he sold to MacCulloch's that strip of land on both sides of Leppert's Brook, he caused the purchaser to enter into an agreement, providing that the company would not, through any of its operations, dam, divert or abstruct the flow of the brook or pollute its waters.

. . .

Mr. Lockwood had no trouble with the flow of water in the brook for quite a few years. During the spring thaws the stream built up quite substantially but there was no flooding. The banks of the stream were always adequate to contain the water even in the maximum flood period. At one point in his evidence, he had this to say:

> "The flow of the brook at that time was substantially as it's been ever since until the interference with the brook by the Brentwood people. It has practically never varied no matter what developments were made on the Country side, the flow of the brook has remained the same. High in the winter in the run offs, high in the snow melting and sometimes fairly low in the summertime or dry spells."

. . .

The evidence on the present course of the brook is that after being joined into one course within the cemetery property, it follows the original course of the north branch of the brook to the east boundary of the cemetery property where it enters a structure called a weir construction and maintained by the City of Halifax and located on the west side of Olivet Street at a point just before Leppert's Brook crosses the street. The weir is designed to conduct a portion of the water of the stream in a southerly direction into a pipe running southerly along the west side of Olivet Street to approximately the point where the south branch of the stream originally crossed Olivet Street. At that point it is conducted through a similar pipe diagonally under Olivet Street in a southeasterly direction and is then conducted by underground pipe installed by the defendant, Raymond L. Kaiser Limited, to discharge into another structure or weir also built and maintained by the City of Halifax and located on the parking area east of the apartments, close to the dividing line between the properties of the defendants, Brentwood Park Investments Limited and Raymond L. Kaiser Limited.

Early in 1962, the plaintiff began to experience a greatly diminished flow of water in the stream past his property, a condition which continued to the present time. He made frequent protests about this to the parties whom he deemed responsible. He attributes the present condition of the brook's flow of water to the acts of the three defendants. As far as the City of Halifax is concerned, he complains that as part of its overall sewer system it built these two structures referred to above. As for the other two defendants, his complaint is that each party is dealing with a water or flooding problem affecting their respective properties and allegedly due to Leppert's Brook performed acts of a diversionary nature during the construction of their respective high rise apartments. More specifically does he complain that these two defendants installed 18-inch conduit pipes which, though designed to permit the unrestricted

flow of water, in fact were totally inadequate for the purpose in mind and that these 18-inch pipes were installed over his vigorous objections and against his verbal and written warnings. In other words, his grievance is based on the interference with the bed and course of the stream, the obstruction or diversion of the stream by failure to provide adequate means of conducting the natural and normal flow of the stream through the defendants' properties. The combined effect of these sewer structures or weirs and the said 18-inch pipes is that a very considerable volume of water which formerly used to flow freely past his land along its natural watercourse was not being diverted into the city's sewer system at two places before it could reach his premises.

The plaintiff and members of his family had for many years enjoyed watching the stream as it coursed by the Lockwood premises in its natural state, a situation which is no longer available to them due, as he contends, to the acts of the three corporate defendants.

Certain preliminary objections were raised at the opening of the trial and were further raised on the appeals. The trial judge dealt with these objections at pp. 214-218:

> "The first of these was raised by the City of Halifax who alleged in a defence the alternative that if the defendant had anything to do with diminishing the flow of the watercourse which was denied, then such acts of the defendant were done during the year 1961 and more than six months have elapsed between the doing of the acts and the bringing of this action. Thus the defendant set up the plea that the six months' limitation period in s. 947(2) of the Halifax City Charter, 1931, applied. The city further pleaded that in the further alternative if the acts of the city were of a continuing nature which was also denied, the defendant did not receive the requisite 20 days' notice in writing required by s. 947(1) of the Halifax City Charter, for the six months' period immediately preceding the bringing of this action."
>
> . . .
>
> Another objection was raised under the Water Act, R.S.N.S. 1954, c.312. The defendants took the position that the plaintiff had no right of action because all interest in Leppert's Brook was vested in the Crown under the Water Act, s. 2, which provides:
>
> > 2. . . . every water course and the sole and exclusive right to use, divert and appropriate any and all water at any time in any water course is vested forever in the Crown in the right of the Province of Nova Scotia, and shall be deemed conclusive to have been so vested since the sixteenth day of May, 1919 . . .
>
> This section must be considered in the light of s. 1(c) as amended by 1962, c. 54, s. 1:
>
> > (c) 'water course' includes every water course and the bed thereof and every source of water supply, whether the same usually contains water or not, and every stream, river, lake, pond, creek, spring, ravine, and gulch; but in Sections 2 and 3 shall not include small rivulets or brooks unsuitable for milling, mechanical or power purposes.
> >
> > By 1963, c. 42, s. 1 is repealed but s. 1(c) is retained in the form I have quoted as s. 1(k)."

The trial judge found that the acts complained of were of a continuing nature. He pointed out that the plaintiff was seeking redress not merely because of certain installations which he found offensive, but more particularly for the diminution in that part of the brook passing through his property of the flow of water due to these installations. This situation, the plaintiff alleged, had continued from the time these installations were built to the date of trial and was still continuing.

For the reasons set forty by him, the trial judge overruled the preliminary objections. Submissions made by respective counsel for the appellants relative to these objections have not persuaded me that the trial judge was in any error on these rulings.

The evidence makes clear that the structures and/or 18-inch pipe installed by or on behalf of the respective defendants, do not interfere with the normal flow of the brook along the plaintiff's land during times when there is little rain. However, in times of freshet, heavy rain or heavy run-off, these installations cause the excess flow of water to be directed into the municipal sewer with the result that it does not flow past the plaintiff's land in as great a volume as it did prior to the installations.

The trial judge puts it this way at pp. 223-4, D.L.R.:

> "It is clear from the evidence of both Mr. and Mrs. Lockwood that their big complaint is that by virtue of the works of the two structures in particular, in times of rain or flood or surplus of water, whereas the water used to come down they say through their own brook with adequate force they now get no advantage from these flood water because any extra flow is carried off through the respective weirs and taken by way of the city sewers."

At pp. 226-7, he says the following:

> "There is no doubt that any of the water that flows into the sewer system of the city is permanently lost and never does return to the Leppert Brook stream which flows through the property of the plaintiff.
>
> Thus the complaint of the plaintiff is that the defendants interfered with the natural courses of the stream which originally flowed through Brothers Field when they excavated the property in the first place, when they diverted the stream from its easterly course to a direct, almost a right-angled course at Olivet Street, when they provided structures and weirs which separated the flow of water so that when there was a flow over a certain amount it did not find its way into the brook flowing through the plaintiff's property, but in fact found its way into the sewer. The plaintiff does admit that in dry weather there is not too much difference between the flow into the Olivet Street structure and that which comes through his own property, but the main difficulty he has is that in time of freshet, heavy rain or heavy run-off he does not get the advantage which he used to have of a full flow of water through his brook, thus keeping the brook clean, but that all the advantages which he previously had from the extra water supply are lost because such extra water is diverted into the sewer system of the City of Halifax."

The trial judge did not say specifically wherein and to what extent he found each of the defendants to blame. It is implicit, however, in his having granted an injunction against all three - an injunction which he postponed "until the defendants have had a reasonable time to provide an adequate flow of water from Leppert's Brook in flood period through the watercourse on the plaintiff's property" - that he found each of them had interfered with the rights of the plaintiff. The basic issue before him was whether the installations made by the defendants had caused the flow of water in Leppert's Brook to be diverted or obstructed or interfered with to such an extent as to give rise to an action by the plaintiff, an occupier of a portion of the bank along which the brook flowed.

Coffin, J., dealt extensively with the legal question involved here. For the purpose of this opinion, I shall content myself by repeating only three of his references. The first of these is from *Halsbury's Laws of England*, 3rd ed., vol. 39, pp. 516-7:

"A riparian owner has an incident to his property in the riparian land a natural and proprietary right, not dependent on prescription, grant or acquiescence of the riparian owner above, but arising *jure naturae*, to have the water in any natural channel, which is known and defined on "which his land abuts or which passes through or under his land, flow to him in its natural state both as regards quantity and quality, whether he has made use of it or not."

At pp. 520-1:

"The right of a riparian owner to the flow of water is subject to certain qualifications with respect to the quantity of water which he is entitled to receive since his right is subject to the similar rights of the other riparian owners on the same stream to the reasonable enjoyment thereof and each riparian owner has a right of action in respect of any reasonable and therefore unauthorized use of the water by another riparian owner.

. . .

A riparian owner's right to the reasonable enjoyment of the stream includes the right to take water therefrom for all ordinary or domestic purposes connected with the riparian tenement, such as, drinking and culinary purposes, cleaning and washing, feeding and supplying the ordinary quantity of cattle on his land, and if the taking of water for these purposes exhausts the water in the stream altogether the lower riparian owners may not complain. A riparian owner who does not require to take water for domestic purposes, however, may be restrained from taking the quantity he could take for those purposes and using it for other purposes.

A riparian owner's right to the reasonable enjoyment of the stream also includes the right to take water therefrom for extraordinary purposes but the "taking of water for such purposes is subject to certain restrictions, namely, the user must be reasonable, the purposes for which the water is taken must be connected with the riparian tenement and the water taken must be returned substantially undiminished in volume and unaltered in character."

The second reference that I make in this connection to the judge's decision is to be found at pp. 231-2, D.L.R., where he says:

"On the question of reasonable use the remarks of Parke, B., in Embrey v. Owen (1851), 6 Ex. 353 at pp. 368-9, 155 E.R. 579, are relevant:

'It was very ably argued before us by the learned counsel for the plaintiffs had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however, inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and, if continued, would be the foundation of a claim of adverse right in that proprietor.

. . .

But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights is, and what is a violation of them.

. . .

> The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: . . . But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.
>
> This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state, if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.
>
> It is only therefore for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use if will; even, as the case above cited from the American Reports shows (Webb v. Portland Mfg. Co., 3 Sumn. Rep. 189), though there may be no actual damage to the plaintiff.

Then at p. 372, Ex.:

> It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiffs' right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream.'"

The trial judge also quoted at p. 232, D.L.R., from *Farnham on Waters and Water Rights* (1904), vol. II, p. 1578, on the subject of reasonable use:

> "The right of the riparian owner to use the water extending to the making of a reasonable use, the question to be settled in each case is, What is reasonable use? That is primarily a question of fact, to be settled by the jury in view of all the circumstances of the case. But there are certain general rules which have been laid down by the courts to aid the jury in arriving at a conclusion. And first, to be reasonable, the use must work no unnecessary injury to others living along the stream. The next things to be considered are the character of the particular use in its relation to the size of the stream and the custom of the country, and, finally, the necessities of the one making the consumption . . . The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities, with but little interference with the stream, such as drinking and other household uses, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes. The purpose of the law is to secure equality in the use of the water by riparian owners as near as may be, by requiring each to exercise his rights reasonably, and with due regard to the rights of other riparian owners to apply the water to the same or to other purposes."

Having dealt with the above and other authorities, the trial judge summarizes his review as follows at p. 236, D.L.R.:

> "It is clear from the mass of authorities cites in this case that the lower riparian owner is entitled, under ordinary circumstances, to the free and undiminished flow of water; that for extraordinary purposes the upper riparian owner may use the water provided he cause no serious diminution in the flow and provided the use which he makes is reasonable. Applying these authorities then to the present case, the plaintiff must satisfy the Court that the defendants have wrongfully interfered with the flow of water, that the diminution of the flow has been substantial, that the plaintiff has suffered thereby and that the use of the water made by the defendants has been unreasonable. He must also show that the damage which he has suffered is not of a mere trivial nature; if he is to succeed in his claim for an injunction he must further show that the loss that he has sustained cannot be satisfactorily compensated by an award of damages and he must also show that the plea for an injunction will not work any irreparable hardship on the defendants."

and also at p. 236, D.L.R., he concludes:

> "It appears to me that to reach the conclusion that the reduction of flow has been trivial *would require a complete disregard of the plaintiff's evidence.*"
>
> (my italics)

Since he then went on to enjoin the defendants, it follows that as between the plaintiff's testimony that the flow of water past his land was now trivial in comparison to what it was before the various installations, and the defendants' evidence to the effect that their usage of the water was reasonable and that despite their installations, the flow past the plaintiff's property was unreduced, the trial judge chose to accept the plaintiff's version. In other words, he made a finding of fact against the defendants, and which in the light of the applicable law, made them liable for their actions.

From the mass of evidence which the trial judge heard in this case and which, as already mentioned, he reviewed exhaustively, he made a crucial finding of fact. It may well be asked what is the position of the Appeal Court in the face of this finding of fact?

. . .

The decision which I consider being of high authority and which I propose to follow in this case is *Powell and Wife v. Streatham Manor Nursing Home*, (1935) A.C. 243. That was a case tried before a judge sitting alone. At p. 249, Viscount Sankey, L.C., had the following to say:

> "It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. . . . There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses . . . In my opinion, the duty of an appellate Court in these circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which

> are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

Lord Atkin said on p. 255:

> "I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the Court is still a Court of Appeal, and in exercising its function is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong; it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellant Court can never recapture the initial advantage of the judge who saw and believed."

It goes without saying that a trial judge notwithstanding the advantages he possesses over an appellate court in seeing and hearing the witnesses, may make an erroneous finding of fact. On the other hand, it is also true, I suggest, that there are certain types of cases in which the trial judge is in a particularly better position than would be a Court of Appeal, to determine a question of fact. I consider the present case to be of such a type. In circumstances such as were described in this case, the Appeal Division should be slow to upset the finding of fact made by the trial judge who saw and heard the witnesses. Certainly there was nothing that I read in the transcript of evidence, nor anything that I read in the written Briefs submitted by respective counsel for the appellants nor anything that was said by them in their oral submissions, which could lead me to believe that the trial judge was wrong in the conclusion he reached insofar as the facts were concerned. Accordingly, the appellants must fail on this aspect of the case.

However, when one comes to consider the remedy granted to the plaintiff by the trial judge, one cannot help but say that he was in error. With great deference, I believe that this is not a case wherein the drastic remedy of injunction was properly open to the plaintiff.

I have carefully considered the brief of Messrs. Dickey and Hayes and Mr. Dickey's strong submission. Nevertheless, I remain unconvinced that the circumstances here justified the granting of the order for an injunction. Cozens-Hards, J., in *Llandudno Urban Council v. Woods*, (1899) 2 Ch. D. 705, in declining to grant an injunction referred to it thus at p. 710:

> "That is a formidable legal weapon which ought to be reserved for less trivial occasions."

It may be unjust to describe the plaintiff's complaint as trivial. It is equally unjust to ascribe to it a significance out of all proportion in our urbanized society of today.

I may be misinterpreting the learned trial judge's estimation of the situation but my reading of the closing portion of his judgment leaves me with the feeling that he was not impressed with the seriousness of the plaintiff's situation. He said at p. 237:

> "I do not think this is a case for money damages. There is no proof of actual loss of money value to this property. The plaintiff's own letter to the City Assessor of January 2, 1960, indicates that the brook does not increase this value.

> It is the effect of his actual enjoyment of the property which concerns the plaintiff and for this he is entitled to *some* relief."
>
> (my italics)

Having decided that some relief would take the form of an injunction, the trial judge was not impelled to give that relief at once, which ordinarily is done when injunctions are granted, but postponed the granting of the injunction for one year from the date of the proposed order.

It is also in order to examine somewhat more closely the plaintiff's own thinking about the brook and I turn firstly to that letter of January 2, 1960, Exhibit H/11, which the trial judge mentioned. Writing to Mr. John Thomson, the Halifax City Assessor, the plaintiff said:

> "Should there not also be an allowance for the brook which runs through the property - this brook is a necessary drainage for city properties - so much so that the city were recently surveying it as I gathered with the thought in mind that more surface water might be funnelled into it by the city.
>
> Then, also I would point out that the City has a right of way (water) which runs across the full property between the house and Dutch Village Road."

These words were written by the plaintiff long before the circumstances arose which brought on this prolonged litigation. When being cross-examined by Mr. Chipman, for example, and being pressed to acknowledge that by this letter he sought a reduction in his assessment, the plaintiff maintained that such was not its purpose. However, it is my conclusion that the letter of January 2, 1960, indicated that the plaintiff at that time, at any rate, did not consider the brook to be "a thing of beauty" but rather a detriment to his property for which he did seek a lowering of this assessment.

That the brook was indeed a detriment is borne out by the evidence of Mr. Medjuck, according to the record, is experienced in real estate and building and development work. His opinion of the brook is to be found on p. 258 of the transcript of the evidence when he said:

> "The curtailing and removal of the water to flow into Mr. Lockwood's property would do nothing except increase its real estate value."

If in fact that was Mr. Lockwood's opinion about the brook in 1960, obviously he expressed a different thought about it when he gave his testimony. To put it in the plaintiff's best light, his view was expressed thus on p. 159 of the transcript:

> "May I add, while you have seen fit to bring up that subject, the brook to us is a thing of beauty. It's not a thing of value. We do not place dollars and cents value on the brook, we only place value on the beauty which we get and the satisfaction which we get from making it more beautiful and enjoying (sic) which we and our friends have got out of the brook over the years. You can have a beautiful thing."

At p. 174, he said this of the brook:

"If I were interested in values on my property, I wouldn't have it 5 minutes."

I do not propose to embark on any lengthy dissertation of cases wherein the courts gave damages as a remedy, in contrast to those cases in which the remedy granted was an injunction. But reference to some cases, particularly those mentioned by the trial judge and in the respondent's Brief, is inescapable.

. . .

It may well be questioned whether the law pertaining to riparian occupiers which developed in England and became enshrined in its history of the past 100 years or more, should be applied to a situation such as the present in an urban Canadian centre like the City of Halifax, which is literally "bursting at its seams"? Alternatively, it may be asked whether legal rights of riparian occupiers, which were meaningful some 50 or more years ago, can have any real meaning in today's society. The Legislature has taken over the rights to all watercourses save such small streams and rivulets like Leppert's Brook and it would seem that civil control through legislative action over what is now excluded from the definition of watercourses is a matter of necessity. Be that as it may, the trial judge has held that the plaintiff's legal rights to the brook had been infringed, and I have already made clear why I cannot hold otherwise. I must add, however, there were the locale of this case in England or were it before me in the Halifax of 50 years ago, I would still hold that on the facts the remedy of injunction was not open to the plaintiff.

There remains to be said that as I read and read again the evidence of Mr. and Mrs. Lockwood, I cannot help but feel that their thoughts concerning the brook are inextricably woven about the events of yesteryear when they were young and their children were small. One may well feel for them as they look back in nostalgic reverie to those happy days when their children and later on their grandchildren played delightedly in and about the meandering brook. But every parent or grandparent, looking at snapshots or home movies of children or grandchildren when they were little ones, does so with a pang of regret that those wonderful years are gone forever. Gone they are and they cannot be recalled except in memory. The memory of the past will stay with them and renew at least half of their joys.

Keeping in mind the decisions summarized above, with great deference it is my respectful opinion, as already indicated, that the facts in this case are such that an injunction is unwarranted. Accordingly, the injunction granted by the learned trial judge is dissolved.

The plaintiff has claimed general damages against each of the defendants. There was, however, no proof established before the trial judge of actual pecuniary loss. In *Wise v. Kaye*, (1962) 1 A.C. 632, (1962) 1 All E.R. 257, Sellers, L.J., discussing the accepted elements of damage which result from physical injury, included the "loss of amenities". This phrase "loss of amenities" has appeared quite regularly in recent cases and it has been held to cover, for example, the lost pleasure in being unable to pursue a certain hobby or being barred from participating in a sport which the injured person had enjoyed prior to the accident.

Mr. Dickey himself made use of this phrase when on the opening day of the trial, April 27, 1965, in reply to a question from the court as to whether the water was put to any use, said, "No, it's not used for any purpose of commerce. It's purely a complaint that the amenities and natural beauty of the property have been very materially adversely affected". I too would ascribe this phrase to the loss of the pleasure which the plaintiff had formerly enjoyed when the brook flowed in greater volume past his land. For the loss of these amenities, I assess the plaintiff's damages against all three defendants jointly in the amount of $2,400.00.

The matter of costs now falls to be determined.

. . .

I am of the opinion that the appellants herein have succeeded in what I consider the major aspect of their appeal. I therefore allow them 75% of their costs on appeal and I allow the respondent, 25% of his costs on appeal. I am also of the opinion that on the trial it was the plaintiff-respondent who succeeded on the main issue at the trial, namely, establishing the infringement of his legal rights. I therefore allow him 75% of his costs on trial and I allow the defendants-appellants 25% of their costs on trial. The trial judge's Order as to costs on the trial will be amended accordingly.

. . .

*Appeal allowed in part.*

Nova Scotia Supreme Court, Appeal Division,
McKinnon, C.J.N.S., Coffin and Cooper, JJ.A.
August 11, 1970

REAL PROPERTY - TRESPASS - INTERPRETATION OF WILL DEVISING REALTY IN EQUAL PORTIONS TO TWO SONS - APPEAL COURT HELD REALTY SHOULD BE DIVIDED BY QUANTITY AND NOT BY VALUE.

REAL PROPERTY - LOCATION OF LOT LINE - APPEAL COURT HELD THAT OLD BOUNDARY FENCES ARE BETTER EVIDENCE OF LOT LINES THAN SURVEYS MADE AFTER THE MONUMENTS HAVE DISAPPEARED.

Appeal Court dismissed the appeal and affirmed the judgment of the trial court which awarded the plaintiff, respondent $100 damages for trespass and also granted the plaintiff, respondent a declaration with respect to title and possession of certain lands in dispute.

Appeal Court held that under a devise by Will of equal portions of certain lands that the lands should be divided by quantity and not by value.

Appeal Court held that as between old boundary fences and any survey made after the monuments have disappeared, that the fences are the best evidence of the original lot lines.

. . .

COFFIN, J.A.: I shall refer to the parties as the "appellant" and "respondent". They were brothers, the sons of the late Thomas H. Naugle, and the respondent sued the appellant claiming damages and trespass for wilful refusal to allow the respondent to enter the lands in question and a declaration that they are the property of the respondent.

In a mortgage dated July 11, 1891, and recorded July 13, 1891 in Book 283 Page 238, from William Naugle and his wife, Ellen Naugle to Francis McDonald, appears the following description:

> "Commencing on the eastern side of the Public Road leading from Dartmouth towards Devil's Island at the northwest corner of Cleary's; thence northeast along Cleary's southern line, three hundred and twenty (320) rods more or less to the rear or base line so called; thence south along said base or rear line sixteen rods till it comes to the northeast corner of Mazague's property; thence westerly along the north line of said Mazague's property three hundred and twenty (320) rods to the public road aforesaid; thence north along eastern side of said public road sixteen rods to the place of beginning, being the property Willed to said William Naugle and Joseph Edward Naugle by their late father Joseph E. Naugle late of said Eastern Passage, deceased, saving and excepting thereout, nevertheless the lot of land and premises now occupied by Harriet Naugle, wife of James Naugle, left her by Will of said Joseph E. Naugle."

The same description is in a quit claim deed from Francis MacDonald and his wife to William Naugle and Ellen Naugle, dated July 28, 1903, and recorded on August 8, 1903 in book 357 page 672.

The problem between the parties has arisen from the following clause in the Will of the late William Naugle:

> "(3) After my decease, I direct that a line shall be run across the centre of the land owned by me at Eastern Passage aforesaid from the shoreroad so called to the eastern boundary of such land, thereby dividing the land into

two equal halves, and I give and devise to my son Freeman Naugle that half lying to the north of said line and to my son Thomas Naugle that half lying to the south of such line."

This Will was made on January 11, 1927, it was admitted to probate on February 23, 1927.

Some effort was made to carry out its terms by quit claim deed dated May 6, 1927, registered June 1, 1927 in Book 615 Page 363. Thomas Naugle and his wife conveyed to Freeman Naugle what appears to be the northern 134 feet of the property.

By the same type of deed registered May 10, 1957, in Book 1467 Page 326, Freeman J. Naugle purported to convey to Thomas Henry Naugle 138 feet on the eastern side line of the shore road and also the southern half part of the woodland lying east of the Cow Bay Road.

The abstract discloses two lots conveyed away by William Naugle, but the trial judge found that these conveyances did not affect the result of the action. He accepted the evidence of the plaintiff and the findings of both surveyors - K. W. Robb and Donald V. Purcell ". . . as to the location, area and description of the lands of Harriet Naugle in the year 1927". He found the lands of Harriet Naugle as the area marked "Portion A", cross hatched in red and identified by the number 5 written and circled in red upon the plan of K. W. Robb, exhibit P/3.

I quote from the decision:

"I find also that the boundary line between lands of the said Harriet Naugle and lands of William Naugle to have been the line marked upon the ground by fence posts and wire, and upon the plans of K. W. Robb, exhibits P/2 and P/3, shown by a green line drawn in two courses between the points marked on the plan, exhibit P/2, as letter C written and circled in red and letter Z written and circled in blue."

After referring to the quit claim deed from Thomas Naugle to Freeman Naugle, he said further:

"I observe here that literal application of the last written description of land to the ground, it describing the northern one-half of lands of William Naugle, would include lands of Harriet Naugle, which in fact must be an obvious exception from the conveyance."

A further quit claim deed from Thomas Henry Naugle and his wife to Freeman John Naugle registered on May 10, 1957, in Book 1427 Page 330, purported to convey 129 feet on the eastern side of the shore road and also the northern half part of the "woodland" lying east of the Cow Bay Road bounded on the east by a base line southerly by William Wells and northerly by Jeremiah Cleary et al.

In referring to the last two quit claim deeds, he said:

"At this point it will be noted that the said deeds purport to convey lands of a width of 138 feet, between the Shore Road and Cow Bay Road to Thomas Henry Naugle, who, by the Will if William Naugle was to have 'that half lying to the south of the centre line' while Freeman John Naugle was the grantee of lands 129 feet in width. There is evidence, which I accept, which establishes an agreement between the brothers as to these widths of their respective portions, west of the Cow Bay Road, so as to allow inclusion in the north half, at or near the boundary of the Shore Road, of a certain building which was to go to the said Freeman John Naugle. It will be noted that no division of the lands lying east of Cow Bay Road and running to the base line was made or attempted by the quit claim deeds. Further, the said quit claim deeds do not except or in any way take into consideration the area of the lands of Harriet Naugle which I have found to have been in the northern one-half of the total area of the lands."

Thomas Henry Naugle died December 19, 1955, and on March 15, 1963, by deed recorded in Book 1888 Page 400 the heirs of Thomas H. Naugle conveyed to Lavinia Naugle the lands in Book 1467 Page 326, and she in turn on the 13th of October, 1966, by deed registered on December 23, 1966, in Book 2151 Page 615, conveyed to the respondent John A. Naugle the following described property:

"ALL and singular, that certain lot, piece, parcel or tract of land situate lying and being on the eastern side of the Cow Bay at the Eastern Passage, in the County of Halifax, Province of Nova Scotia, and being lot A1, as shown on a plan of subdivision of portion of lands of the Heirs of Thomas Naugle dated the 19th day of September, A.D. 1966, and drawn by K. W. Robb & Associates Limited, Provincial Land Surveyors and which lot may be more particularly described as follows:

BEGINNING at an iron pipe set on the eastern boundary of the Cow Bay Road, which iron pipe marks the southwestern corner of a thirty (30') foot right-of-way reserve, as shown on said plan, and is distant thirty-three (33') feet, when measured at right angles from the centre line of the Cow Bay Public Road, and which iron pipe marks the northwestern corner of the lot herein described.

THENCE to run along the southern boundary of the said thirty (30') foot right-of-way reserve on a bearing of north sixty-one degrees twenty-three minutes east (N61° 23'E) two hundred and nine decimal four seven (209.47') feet to an iron pipe set on the western boundary of other lands of the heirs of Thomas Naugle.

THENCE to run along a portion of the western boundary of other lands of the heirs of Thomas Naugle on a bearing of south twenty-eight degrees thirty-seven minutes east (S28° 37'E) sixty-seven decimal two seven (67.27') feet to an iron pipe set on the northern sideline of lands occupied by James Latter.

THENCE to run along a portion of the northern boundary line of lands occupied by James Latter and following the course of an old wire fence on a bearing of south fifty-two degrees zero zero decimal eight minutes west (S52° 00.8'W) two hundred and two decimal zero seven (202.07') feet to an iron pipe set on the eastern boundary of the Cow Bay Road, which iron pipe is distant thirty-three (33') feet, when measured at right angles from the centre line of the said Cow Bay Road.

THENCE to run along the eastern boundary of the Cow Bay Road on a bearing of north thirty-four degrees twenty-two decimal five minutes west (N34° - 22.5'W) for a distance of one hundred decimal six eight (100.68') feet to the place of beginning.

ALL bearings are magnetic A.D. 1958."

By deed dated August 2, 1954 and recorded August 3, 1955 in Book 1339, p. 755 heirs of Freeman Naugle conveyed to Thomas David Naugle, lands purporting to be the northern half part of the property without excepting the lands of Harriet Naugle. A deed of correction dated March 16, 1957 was recorded in Book 1523 p. 356, conveying lands described in 1467, p. 330. A third deed added two heirs of Freeman Naugle and two of Thomas Naugle.

Kenneth W. Robb, the surveyor called by the plaintiff, presented his plan P/2, and stated that in his view the area outlined in green showed the accepted lines at the time the William Naugle Will was made in 1927, and to support the south line he referred to an irregular stone wall, a fence, old stumps and wires - "old broken off fence posts, . . .".

In his opinion these markings were in the ground in excess of 40 years.

As to the north line, he referred to a wire fence running north-easterly towards Cow Bay Road to a granite rock which is "quite old and obviously been there and accepted for some time". This granite rock is west of the Cow Bay Road.

Then running north-easterly he found an old stump and wire and the remains of a wall at the end of which was a 2 x 2 wooden stake.

As he crossed to the east side of the Cow Bay Road he followed an old fence.

He made a turn north-westerly 42' to an old tree, westerly along the brook to the prolongation of the old wire fences, then went generally easterly and north-easterly to the base line.

On the south line between the base line and Caldwell Road he found an old wall and fence, and he excluded the area south of this boundary.

Crossing the Caldwell Road he found no evidence of a line so he continued westerly parallel to the old wire fence on the north boundary of the Naugle estate until he reached "the eastern or rear boundary line of lands of James Latter". The Latter property had been fenced for many years. He drew his line around the Latter property, "following the old fence. . ." to the eastern boundary of the Cow Bay Road.

He then followed his centre line westwardly across the Cow Bay Road to the north-west corner of the Brett property. Thence he turned south-easterly 55 feet to the "old evidence marking the south line and marked A encircled in red on Exhibit P/2".

He showed the plaintiff's land as A1 just north of the Latter property.

He referred to lots which had been conveyed. For example, the south line of the MacKenzie lot is the prolongation easterly of the south line of the estate as it ran from the Shore Road.

What Mr. Robb endeavoured to do was to divide the Naugle estate equally based on area.

He first excluded certain properties by reason of occupation of previous conveyance, namely the portion east of the Caldwell Road and south of the old wall and fence; the Latter property; the Matilda Naugle of Harriet Naugle lot; the lot on the Shore Road. He placed his line so as to divide that portion east of the Cow Bay Road into two equal halves, containing 13.29 acres each.

On cross-examination he was asked.

> "Q. . . . Now, your opinion as to the location of a centre dividing line on the property, dealing only with the area east of the Cow Bay Road . . . is based upon the fact that this crosshatched Lot 4 comes out of a portion of it, that the crosshatched Lot 5 comes out of a portion of it, and that Lot 3 comes out of it, and, . . . you've taken what's left and you have divided it in two to give equal acreage to the northern portion and the southern portion?
>
> A. Trying to keep a generally parallel line between the two portions - as close as I could get it - yes."

Mr. Donald V. Purcell, called on behalf of the defendant, treated the survey in four separate and distinct parts - "from the base line out to the Caldwell Road - from the Caldwell Road down to the east boundary of Matilda Naugle's property - from that boundary down to the Cow Bay Road - and then from the Cow Bay Road to the Southeast Passage Road".

In establishing the south boundary he found a fence near the Shore Road, an iron pin about half way between the Shore Road and the Cow Bay Road. He prolonged the fence line through the iron pin. He then picked up three pins, Z1 on the west

side of the Cow Bay Road, Z2 directly across the road and Z3 just north of the James Latter property. He admitted these pins were not old but was of opinion that they were set by a surveyor.

He agreed that the prolongation easterly of a line through these three pins would cut off the northern portion of the James Latter property.

He did not accept the stone walls as the southern boundary but took the iron pin and fence; because the pin "seemed to have been set by another surveyor".

In the result he took as his southern line for the portion from the Shore Road to the Cow Bay Road a line shown by the wire fence to "Y", running right through the Bernard Whittey property.

Then east of the Cow Bay Road he accepted a line through the three iron pins to a point opposite the east boundary of Matilda Naugle's property, thus cutting off a portion of James Latter's property.

It was from this line that he set the stakes for the defendant. He took that line and the south line of Matilda Naugle and placed his division line between the two.

He did not run the line through Z1, Z2 and Z3 to the base line but agreed on cross-examination that if carried through, it would encroach deeply on other property, shown as "Reginald Wells".

The following exchange appears in the cross-examination:

"Q. Well, then, what actual relation does Z1, Z2 and Z3 have to the lands of William Naugle?

A. Well, that they were put there by a previous surveyor as being the south boundary.

Q. A previous surveyor -

A. Who I'm assuming is Reid - set by Reid.

Q. Well, they may have been set for many, many reasons but maybe not for running a line. Maybe they have no -

A. Right, they may not be the south boundary, but I accept them as being the south boundary.

Q. Because they're the only evidence you found?

A. Right."

John A. Naugle, the plaintiff, remembered the old stone wall and as far as he recalled it had never been moved. The hauling road had been used by the Wells' family since he was a boy.

He was asked about James Latter's land and said that it had been fenced from his boyhood. Mr. Naugle was 53 years of age at the time of the trial.

Ellen Brett, 59 years old, remembered the old stone wall.

As for the areas marked field, old wall and fence, the plaintiff said they were taken 20 - 25 years plus, and were built by Mr. DeYoung.

The learned trial judge remarked on the fact that the case for the plaintiff proceeded upon a division by area -

". . . but before division of the rectangle formed by the parallel lines that might have been the ideal north and south boundary lines of the lands of William Naugle, the base line on the east and Cow Bay Road on the west, there would be excluded the lands of Harriet Naugle, hereinbefore defined, and, as well also, the lands within the rectangle alleged to have passed by prescription to James Latter and W. DeYoung. In reference to Latter, the evidence of K. W. Robb is that the Latter property is fenced and that the fence has been there for many years. The plaintiff has given evidence that James Latter has had the land fenced since he was a small boy. There is nothing in the evidence adduced by the defendant that contradicts the proposition that Latter had continued in actual adverse possession which was exclusive, continuous, open and notorious for more than 20 years."

In my view there was a preponderance of evidence before the trial judge and he was not wrong in his finding that at the date of his death William Naugle did not hold title to the James Latter property the lands of Harriet Naugle and the portion near the boundary line of lands of the heirs of W. DeYoung.

The trial judge found "two fundamental errors made by the surveyor Purcell".

1. He accepted markers or pins placed by another surveyor in preference to stone walls and fences.

On this point I also agree and quote from Graham, C.J. in *McIsaac v. McKay et al* (1916), 49 N.S.R. 476 at p. 480:

"After reading the evidence, I think the McLellan line is more accurate than the other. It is in accordance with the course of the division fence running from the front at the shore towards the rear, where it was likely to be correct, and has the course of all the lines of adjacent lands in the vicinity.

In respect to the importance of an old fence line, I quote the following from a judgment of Cooley, J.

In Diehl v. Zanger, 39 Mich. 60 Cooley, J. said:

'As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the best evidence of what the lines of a lot actually are and it would have been surprising if the jury in this case, if left to their own judgment, had not regarded them.'"

I have already indicated that the result of extending a line eastwardly through the three pins found by Mr. Purcell would be not only to cut off a substantial portion of the Latter property but also to encroach on the Wells' lands.

2. His second criticism was of Mr. Purcell's method of dividing the survey into four separate parts:

"having found that the intention was a division by area and not by value, I find that the surveyor Purcell was in error dividing the work of survey into four parts as he has done."

I cannot disagree with this finding. The will in question uses the expression "thereby dividing the land into two equal halves".

The trial judge referred to *Hooey v. Tripp*, (1912) 2 D.L.R. 136. The annotation to this case at p. 147 mentions *Dart v. Barbour*, 32 Mich. 267 as authority for the principle that -

"'Half' as used in a deed conveying the half of a certain tract of land, will be held to mean the half in quantity and not the part lying on one side of a line drawn midway between and parallel to the side lines."

Continued on Page 52.

Nova Scotia Supreme Court, Appeal Division,
McKinnon, C.J.N.S., Coffin and Cooper, JJ.A.
November 27, 1970

REAL PROPERTY - DESCRIPTION IN DEED - DISCREPANCY DEED AS BETWEEN DISTANCES AND BOUNDARIES - APPEAL COURT HELD DISTANCES CONTROL WORDS REFERRING TO BOUNDARIES AND NUMBER OF ACRES.

DEEDS - RECTIFICATION OF DESCRIPTION - DISCREPANCY DEED AS BETWEEN DISTANCES AND BOUNDARIES - APPEAL COURT HELD DISTANCES CONTROL WORDS REFERRING TO BOUNDARIES AND NUMBER OF ACRES.

Appeal Court allowed the appeal and awarded the plaintiff $1.00 for trespass to land. The Appeal Court ordered that a deed between the plaintiff and the defendant be rectified to state the measurements of a lot intended to be conveyed as evidenced by the terms of the agreement for sale. The Appeal Court held that the defendant is bound by the measurements as stated in the rectified deed and that the defendant cannot rely on the original property description which referred to boundaries and acreage.

. . .

APPEAL from a judgment of Bissett, J., (1970), 1 N.S.R. (2d) 319, dismissing the plaintiff's action for trespass and rectification of the description of deed.

. . .

The judgment of the Court was delivered by Coffin, J.A.

COFFIN, J.A.: This was an action seeking damages for trespass and an order rectifying the description in a deed from the plaintiff Ian James Allen and his wife to the defendant Dorothy J. DeWolfe.

This deed was executed and delivered on the 27th of August, 1965 and the property is described as follows:

> "BOUNDED ON the north by the Main Post Road leading from Wolfville to Windsor;
>
> ON the east by the Main Road leading from Gaspereaux to Grand Pre;
>
> AND ON the south and west by lands now or formerly owned or occupied by Thomas Ross, containing two acres more or less;
>
> BEING AND INTENDED TO BE the same lands as conveyed to James Ian Allen, the Grantor herein, by Carrie M. Pineo by deed dated July 11, 1951 and recorded in the Resitry of Deeds at Kentville in Book 179 at Page 675."

The agreement of sale was dated August 9, 1965 and referred to the same book and page.

I shall refer to Ian James Allen as the appellant and Dorothy J. DeWolfe as the respondent.

The Appellant's evidence was that when he discussed the proposed sale with Mr. and Mrs. DeWolfe, he said he would sell them "ten feet from the well and up until it came to the linden tree which made it a straight block of land".

This well is near the southern side line of the main highway about 10 feet east of the property shown as the "lands of R. Stirling" on the plan tendered by the appellant.

If the linden tree on the western line of the Melanson Road be accepted as the anchor for the southern boundary, as the appellant contends, the lot will have a depth of approximately 196 feet. Thus the lot will have an area of very slightly over one acre. The respondent Mrs. DeWolfe denied that she was shown the southern boundary as alleged by the appellant.

She agreed that she had been shown the well near the main highway and the marker 10 feet from the well.

Her evidence is that she asked Mr. Allen how far back the land would go and he replied: "That way, for two acres in a square" which he modified by telling her it was a square oblong.

The learned trial judge appears to have accepted her evidence in that point.

I say at the outset that the preponderance of evidence indicates that the rear or southern boundary of the Pineo lot, so called, is, as contended by the appellant, a line running from the linden tree in a westerly direction.

In reaching that conclusion, it is not necessary to depend on the appellant's testimony.

Frederick F. Graham said that the southern boundary of the Pineo lot ran between the two barns and was fenced; just "a little north of that tree, past the barn". Thus the line, he said, was "to the north of that tree, and ran between those barns".

William McBay had told Mr. Paul DeWolfe that the line was three feet from "that barn, on his property".

He put the line three feet south of the barn on the Pineo property. According to the plan and the pictures this would put the line very close to the linden tree.

At the trial Mr. Waterbury and Mr. How agreed that the "line to the Pineo property, as described in the deed from Mrs. Carrie May Pineo to Mr. Allen has not changed over the years, and that they were exactly the same area since away back in the nineteen hundreds".

But this conclusion is not enough to justify setting aside the decision of the trial judge.

He considered that point:

> "Wherever the old-time residents may consider the south line of the Pineo land to have been, the fact is the plaintiff, at the time of the deed to Mrs. DeWolve, also owned the land immediately to the south and west to what were Pineo lands. The question then is: did he sell two acres or only one acre and where it is located."

The trial judge accepted the test of quantity and basing his reasoning on the plan of August 4, 1966 prepared by G. D. Spencer, P.L.S., awarded the respondent Dorothy J. DeWolfe the disputed area to the south together with damages.

The appellant argued six grounds on the hearing of the appeal:

(1) The location of the boundary fixed by the learned trial judge is not borne out by the evidence.

(2) He erred in finding as he did that only about one acre of land was conveyed in the deed from Allen to DeWolfe.

(3) He misdirected himself in holding that "in a very general description as in this Deed the quantity of land, I think, is a very governing factor."

(4) He erred in directing conveyance to the defendant of a portion of lands other than those referred to in the agreement of sale.

(5) He erred in placing the burden on the plaintiff.

(6) He erred in finding as he did that the defendant had not trespassed upon the land of the plaintiff.

I do not accept Ground (2) in the form presented in the agreement. It is based on mathematical calculations and involves speculation on such matters as the width of the highway. Section 14(1) of c. 248, R.S.N.S. 1967, *The Public Highways Act*, provides that:-

"Every common and public highway shall, until the contrary is shown, be deemed to be at least sixty-six feet in width."

In my view there is no clear evidence before us that the contrary has been shown within the meaning of this section.

I propose to deal with the other arguments by considering Ground (3) first, then (1) and (4) together, and finally Grounds (5) and (6).

Ground (3) involves the theory of quantity.

The words of the trial judge which are vital to his decision are these:

"In a very general description as in this deed, the quantity of land I think, is the governing factor."

This conclusion was challenged by the appellant.

A statement appears in the opinion of White, J. and the parenthesis and note beneath in *Munroe v. Pinder Lbr. & Mllg. Co. Ltd.*, (1927) 1 D.L.R. 1200, at p. 1212:

"Mr. Winslow very strongly urged against this construction of the deed, that the quantity of land conveyed is stated to be 88 acres, more or less, whereas in fact the parcel of land conveyed under such an interpretation would comprise in the vicinity of 260 acres. When, in a deed, the boundaries of land conveyed are uncertain, "the number of acres which the land is stated to contain may become an important and very often the decisive element in determining what are the true bounds of such land. But, when the boundaries of the lot conveyed are defined in the deed as, for the reasons I have stated, I think is the case here, no erroneous statement as to acreage comprised in the land can change such specified boundaries.

(A quotation here from Sheppard's Touchstone, also quoted in Elphinstone, which White, J., has not supplied.*

* We think the quotation is from Elphinstone on Rules for the Interpretation of Deeds, 1885, p. 158:- '"Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected:" Shep. Touch. 247.' But we have been unable to find this in any available edition of Sheppard's Touchstone. - Ed."

I also quote McDonald, C.J. in *Almon v. Woodill* (1885), 18 N.S.R. 13 at p. 17:

"Now there is no allegation that the title of the plaintiff to all the land between the Almon line on the east, and the Beals and Fitzmaurice lots on the west is defective, and unless there is a covenant in the deed, express or implied, binding the defendant to the quantity and measurements stated in the deed, there is no breach of the covenant and the plaintiff must fail.

> There is no express covenant of that character in the deed nor is such a covenant express or implied declared upon. 'Nothing is better settled as a general rule in the construction of deeds than that in case of a discrepancy in the description of the premises between the distances and the boundaries, the former are controlled by the latter, on the ground that the latter must yield to the greater certainty, and where land is conveyed by a particular description and with an enumeration of the quantity of acres, the latter is held to be matter of description merely and cannot be deemed an implied covenant for quantity." Rawle on Covenants, 523, and cases there cited. 'As therefore, the descriptive boundaries control the quantity it has been repeatedly held that the covenants for title apply to the premises contained within these boundaries and not to any enumeration of acres;'"

The Pinder case, which was affirmed by the Supreme Court of Canada in (1927) 3 D.L.R. 1180 was mentioned by Harrison, J. in *Humphreys v. Pollock*, (1953) 3 D.L.R. 730 at p. 747.

The respondent, Dorothy J. DeWolfe must contend with the fact that the rear or south line of the Pineo lot is well established, as I have already indicated. In view of the principle enunciated in Munroe v. Pinder and Almon v. Woodill, she cannot assert title to the southern portion of the lot merely because there is a discrepancy in the acreage.

With deference I must disagree with the learned trial judge on this point and I am of opinion that Mrs. DeWolfe cannot succeed in her claim to the southern portion which is marked on the plan P/4 as "lands claimed by D. DeWolfe".

Having said this, I accept Ground (1) of the appellant's argument in so far as it affects the southern boundary.

I now turn to Ground (1) as it relates to the western boundary and the general argument under Ground (4).

Although the plan on which the trial judge based his decision had been placed in evidence by the appellant, he has now raised an objection to this plan. He said that the western line of the Pineo lot is not a line 10 feet west of the well near the main highway, but is in fact an extension southerly of a line drawn through the western eave of the canteen on the Salsman property.

The appellant conveyed the lot on which the canteen was built by a deed dated May 20, 1960 to Fred W. Salsman and Frank C. Welch. It was described as a portion of the lands conveyed by Melissa Ross and others to Ian James Allen by deed of June 28, 1956. It measured in depth on its westerly side 130 feet, on its easterly side 80 feet and on the main highway 470 feet.

In making this argument the appellant must reconcile his own evidence that he showed Mr. and Mrs. DeWolfe the land and took his place of beginning at a point 10 feet from the well. To do this he urges that the description in the deed to Mrs. DeWolfe makes it clear that he was conveying the Pineo lot.

The testimony of Frederick F. Graham and William McBay places the western boundary of the Pineo property, in the words of Mr. Graham, to the left of the canteen "as you were facing the road from the canteen," and in those of Mr. McBay - through the "finish of the canteen" - "on the west side".

The appellant says that there were in fact two Rose properties, and this view is supported by the abstracts of title. One of these is the Thomas Rose property to the west, the eastern boundary of which is the western boundary of the Salsman or Stirling lot. The other was referred to as the 9 acre lot and includes the land described at length in the second abstract on file, which was conveyed by Melissa Rose et al to Ian James Allen by the deed dated June 28, 1956, recorded in Book 188, page 419. The abstract shows the Stirling lot as being excepted. It is from this 9 acre lot that a large portion of the Stirling lot was taken.

The land in question "containing two acres more or less" - the Pineo lot - lies to the east of the northern portion of the 9 acre lot. A portion of the Stirling property is carved from the Pineo area. It would run from the marker 10 feet west of the well near the main highway west to the prolongation of the line already mentioned through the western eave of the canteen, about 150 feet on the main highway. That portion of the land would not go to Mrs. DeWolfe under her conveyance as it had already been conveyed to Mr. Salsman and Senator Frank C. Welch.

In the abstract of title of the Pineo lot, conveyed by the appellant to Mrs. DeWolfe, appears a mortgage to the Mortgage Corporation of Nova Scotia in which dimensions are given as "6.58 chains in length and a breadth of 3.95 chains". This would result in a length of 434.3 feet and a breadth of 260.7 feet. If one uses the plan and scales a rectangle bounded on the south by the southern boundary of the Pineo lot as established by the evidence, on the north by the highway, on the east by the Melanson Road and on the west by the western boundary line running through the western eave of the canteen, he will find that the length on the highway is approximately 425 feet and the depth 225 feet. There is not too much disparity between the results of such a scaling and the measurements set forth in the abstract. Allowing for some variation in the width of the roads, this reference to the dimensions in the mortgage gives support to the appellant's argument and to his position that at least a portion of the Stirling property came from the Pineo lot.

If the information in the abstract be plotted, having in mind these measurements, it is impossible to escape the conclusion that what the respondent Dorothy J. DeWolfe actually received in her deed was an irregular lot.

It was the land shown on plan P/4 marked "lands of D. DeWolfe" together with part of the property marked "lands of Jack Allen" to the west thereof. The lot so conveyed is bounded on the north by the main highway and the southern boundary of the Salsman or Stirling lot, on the south by the southern line of the Pineo lot which I have already described as determined by the evidence, on the east by the Melanson Road and on the West by the eastern boundary of the Salsman property and the western line of the Pineo lot also determined by the evidence.

It was indeed the Pineo lot less the portion thereof already conveyed to Salsman et al.

I am therefore of the opinion that the appellant succeeds under Ground (4) and with respect that the trial judge did err in directing a conveyance of land south of the line to which I have referred.

The argument on Ground (5) turns on the consequences of the inclusion of a substantial portion of the Stirling property in the Pineo lot. This phase of the argument was in effect an answer to an anticipated claim by the defendant-respondent for the loss of that portion of the Stirling property.

I do not see any problem here. There never was any suggestion that Mrs. DeWolfe thought that she was buying the Stirling lot, nor did the appellant ever indicate that it was part of the sale.

In any event, the agreement of sale provided that any objection to title must be made within 20 days and no such objection was lodged.

I accept Ground (6) that the defendant-respondent did in fact trespass on the appellant's land, but in view of the fact that the appellant himself did not really know what he was conveying and the whole transaction was fraught with confusion, I would award him only nominal damages of $1.00.

Having in mind these new matters which were raised on the appeal and to which I have referred at length, we were invited by the appellant to send the matter back for a new trial. There is some basis for this request because the trial judge did not have adequate information before him to assist him in establishing the western line. Davis, J. in *Dow v. Can. Surety Co. and Blonde,* (1937) 1 D.L.R. 145, which involved a building contract, made this comment on p. 159:

> "Now after the whole matter has been heard again on appeal to this Court it would be most unfortunate for all parties if there had to be a new trial. But what can we do? The evidence was never really directed to the vital issue. When a trial for any reason becomes abortive it is a privilege and the duty of the Court to come to the assistance of the parties to prevent the defeat of rights that may actually exist (to adapt the words of Lord Shaw of Dunfermline in Cameron v. Cuddy (1913), 13 D.L.R. 757, at pp. 759-60)."

On the other hand, if the interests of justice can be served on the basis of the material before us, it would save the parties much in costs if we give some directions at this time.

I am of opinion that we now can give such directions and I dispose of the appeal as follows:

(1) I allow the appeal for the claim for trespass and award damages of $1.00.

(2) I dismiss the counterclaim for damages but I direct that the deed be rectified and that a rule be taken awarding the respondent that area of land which has been described in general terms in this opinion as being all the Pineo lot with the exception of that portion already conveyed to Salsman and Welch.

I further direct that a detailed description drawn by a surveyor and agreed upon by the parties be set forth in the rule.

(3) In view of the fact that success was divided, I would direct that each party pay his or her own costs of the trial and of this appeal.

*Appeal allowed.*

Continued from Page 46.

In the result I am of opinion that the preponderance of evidence supports the line as established by the trial judge, that he has made no error in law and that the appeal should be dismissed, with costs to the respondent.

*Appeal Dismissed.*

Nova Scotia Supreme Court
Trial Division, Gillis, J.,
September 24, 1970

REAL PROPERTY - POSSESSORY TITLE - TRIAL COURT REFUSED TO GRANT THE PLAINTIFF A CERTIFICATE OF TITLE UNDER THE QUIETING TITLES ACT AND HELD THAT THE DEFENDANT HAD ESTABLISHED A VALID POSSESSORY TITLE TO THE LAND IN QUESTION.

EVIDENCE - ANCIENT DOCUMENTS - TRIAL COURT HELD ADMISSIBLE DOCUMENTS FROM THE CROWN LANDS OFFICE FOR THE PURPOSE OF PROVIDING A CHAIN OF TITLE TO CERTAIN LANDS.

WORDS AND PHRASES - "POSSESSION" DEFINED FOR PURPOSES OF ADVERSE POSSESSION OF LAND.

The trial court dismissed the plaintiff's claim for a certificate of title under the Quieting Titles Act. The trial court held that the plaintiff had failed to prove the chain of title showing the plaintiff had title to the lands in question.

The trial court held that the defendant had conclusively shown a good possessory title to the lands in question. The trial court granted the defendant a certificate of title pursuant to Section KK(1) of the Quieting Titles Act.

. . .

GILLIS, J.: The plaintiff claims a certificate of title under the *Quieting Titles Act*, R.S.N.S. 1967, c. 259. The Attorney General of Nova Scotia is the first named defendant as by statute required. The defendant, Scott Paper Company, was added as a defendant on its application and claims to have title and possession of the lands in respect of which the plaintiff claims the certificate.

. . .

By Crown grant dated August 27, 1863, registered September 16, 1863, there was granted to Elijah Armstrong lands described as follows:

> *A lot of land containing 100 acres situate lying and being in the County of Kings and bounded as follows: Beginning at the centre of the Twelve Mile Bridge over the outlet of Lake Paul: Thence running easterly by the northern line of the property of the heirs of the late John Morton 30 chains to a maple tree: thence north 28 chains and 70 links to a large birch tree; thence west 40 chains to Beaver Dam on the same outlet: thence southerly by the outlet to the place of beginning.*

Previously, Edward Erskine Armstrong, by deed dated April 1, 1863, registered July 1, 1863, conveyed to one William McIntyre lands described as follows:

> *The following tract of land situate in Aylesford aforesaid and south of Lake Paul and abutted and bounded as follows: Beginning at the Twelve Mile Bridge so called, runnung easterly on lot of land granted to the late John Morton, Esq. twenty chains or to a maple tree blazed on four sides W.M.: thence north to a large birch tree blazed on four sides standing on a line of a lot laid off to W.F. Webster: thence west crossing the Aylesford Road 20 chains or to the Beaver Dam at the outlet to Lake Paul: thence southerly by said outlet or river to the aforesaid bridge and place of beginning containing 200 acres more or less reserving the right-of-way for roads if required as stated in the grant of said lot.*

Elijah Armstrong was the son of Edward Erskine Armstrong, and the latter, at the time of the deed and grant herein referred to, held office as principal deputy

surveyor, County of Kings, an appointment having to do with surveys of Crown grants. It is established that in said office he was required, by statute then in force, to keep a copy of the general plan of lands for the County and to preserve all documents and plans connected with the lands of the said County. Edward Erskine Armstrong, the evidence has established, surveyed the land for the grant to his son, Elijah Armstrong, drew the field notes from which the description in said grant was drawn and made the return on petition to the Crown Lands Office. Said return is dated April 22, 1863, a time subsequent to the said deed by only twenty-two days. It follows, and I find, that Edward Erskine Armstrong had knowledge of the grant to his son, the said Elijah Armstrong, and of the description of lands therein. The evidence is also, and I find, that Elijah Armstrong was a witness to the execution of the said deed to William McIntyre and had, I find, knowledge of its content and purpose. In the circumstances, these events, the drawing, execution and registration of the deed to McIntyre, followed by the grant from the Crown seem difficult of explanation but nevertheless I find it reasonable to say that, in the light of these and subsequent events that by some confusion, at the time of the deed from Edward Erskine Armstrong to William McIntrye, both he, the said Edward Erskine Armstrong, and Elijah Armstrong believed that the lands in question were, in fact, the lands of Edward Erskine Armstrong. The evidence is clear and I find that the 200 acre lot which Edward Erskine Armstrong conveyed to William McIntyre by the said deed included the 100 acres of land described in the Crown grant to Elijah Armstrong. In effect, the deed to McIntyre included all of the lands described in the Crown grant.

The plaintiff claims to be the successor in title, although several times removed, of Elijah Armstrong and his case rests upon the allegation that, on the death of Elijah Armstrong on March 22, 1916, intestate, Elijah Armstrong held title to and was in possession of the lands described in the Crown grant to him. On the death of Elijah Armstrong, the argument of the plaintiff contends that the title of lands described in the Crown grant descended to the brother of Elijah Armstrong, one Edward J. Armstrong, and two sisters, Mary B. Armstrong and Amelia Healy. Subsequently, Amelia Healy died in 1929, intestate, leaving her surviving as her heirs-at-law, a son, Thearon Healy, and daughters, Mildred Maddiford, Lydia North and Minnie Walton. The other sister, Mary B. Armstrong, passed away in 1934, unmarried and intestate, leaving her surviving as her heirs-at-law, the brother, Edward J. Armstrong, and the said children of Amelia Healy.

I find at this point that, title to the lands described in the grant to Elijah Armstrong, if in the successors of Elijah Armstrong at all, was in Edward J. Armstrong and the said children of Amelia Healy.

The submission of the plaintiff, from this point on-ward, is that by an interpretation of the Last Will and Testament of Edward J. Armstrong, all of his interest in the lands granted to Elijah Armstrong, passed to the said Thearon Healy; that subsequently, by the Last Will and Testament of Thearon Healy, upon his death in 1962 all of his interest therein passed to his wife, Lulu Marguerite Healy. By deed dated October 21, 1965, the said Lulu Marguerite Healy, by quit claim deed conveyed all of her interest in the said land to the plaintiff. It is worthy of note that the said Lulu Marguerite Healy did not, in said deed, warrant title to the said land and that following the description of lands in said deed there is added a recital as follows:

> *Being and intended to be the lands granted to Elijah Armstrong the 31st day of July, A.D., 1863 and recorded in the office of the Registry of Deeds for Kings County in grant book 1 at page 131. The grantor herein conveying the same as sole beneficiary under the Last Will and Testament of the late Thearon Healy who at the time of his death the sole heir-at-law of the late Elijah Armstrong.*

The said deed to the plaintiff was duly registered in the Registry of Deeds for the County of Kings on October 21, 1965. Additionally, as part of the evidence herein, although not referred to in the abstract of title originally filed, the plaintiff submits for the consideration of the Court a deed dated February 5, 1969, made between Harry Maddiford, Elaine Maddiford and Bessie North of the one part and the plaintiff of the other part. In this deed it is recited that the grantors were, with the late

Thearon Healy, the sole surviving heirs-at-law of the late Elijah Armstrong and the successors in title to the share of the said the late Thearon Healy in the said lands. This deed was registered on the day of trial of the action.

The last referred to piece of evidence, although its recitals do not specifically say so, must be confirmation of the finding of the Court that all of the children of the late Amelia Healy shared in the title to the said lands granted to Elijah Armstrong, if any such title be in his successors in title. However, this last referred to document and the evidence adduced by the plaintiff does not make clear whether the parties who executed this deed are indeed all of the heirs of Amelia Healy apart from the said Thearon Healy. I have no evidence to make clear, whether and if so when, Mildred Maddiford, Minnie Walton and Lydia North have passed away and if they have, whether testate or intestate, and whether the persons who executed the last referred to deed are all of the heirs of them. This is a distinct defeat in the evidence necessary to determine the interest of the plaintiff, if any, in the said lands.

Also, as I will find later in these writings, the Court cannot accept the construction of the Will of Edward J. Armstrong, urged by the plaintiff, and herein lies another deficiency in the chain of title suggested by the plaintiff.

The other claimant to the said lands, the defendant, Scott Paper Company, claims to derive title to the said lands by a chain of title beginning with the said deed to William McIntyre. This defendant contends, and I have found that, while the grant to Elijah Armstrong describes 100 acres of land and the deed from Edward Erskine Armstrong to William McIntyre describes 200 acres, the deed to McIntyre included all of the land described in the Crown grant. This is the conclusion to be taken from the testimony of James D. MacKenzie, a Nova Scotia Land Surveyor. I have accepted the opinion of MacKenzie in making this finding. This defendant says further, that there is evidence of possession in William McIntyre and that its title can be proved by unbroken chain back to McIntyre, a person in possession.

In support of its contention of possession of said lands in William McIntyre this defendant has provided evidence from the Crown Lands records, Department of Lands and Forests, Province of Nova Scotia. This evidence consists of a letter and plan entered as part of the petition of William McIntyre for a Crown grant. Therein the said William McIntyre, as part of the letter written by his own land, wrote "The old grant is out over twenty years and I *have held the land in possession* over 18 years." (Italics mine). The correspondence referred to is dated September, 1881, and it is clear that subsequently thereto on April 28, 1882, the petition of William McIntyre for a Crown grant was approved and as a result a grant was made to McIntyre by the Crown. The evidence that I have referred to here is produced from the proper source, the Crown Lands records, Department of Lands and Forests. It is very definitely asserted in the correspondence that he, William McIntyre, held in possession the lands of the Elijah Armstrong grant, and in addition to the words of this assertion the hand drawn plan attached makes more clear that in referring to "possession" he was referring to his possession of the lands of the Elijah Armstrong grant.

The correspondence produced from the records of the Crown Lands Office, and the subsequent action taken by the Government authorities of that day, in the face of claims to possession of the Elijah Armstrong grant by other parties, stands as evidence of possession by McIntyre of the whole of the lands in that grant. The letters and plan attached, being part of the Crown Lands records, I accept as an ancient document. As to the effect of such documents see Phipson on Evidence, 11th ed., paras. 338-339, an extract from which is the following:

> *Ancient documents (i.e., over twenty years old) produced from proper custody and by which any right of property purports to have been exercised are admissible, even in favour of the grantor or his successors, in proof of ancient possession.*
>
> *Such documents are sometimes thought to be admissible by exception to the hearsay rules: but this is incorrect. They are received not as proving the truth of the facts stated, but merely as presumptive evidence of possession. . . .*

*The grounds of admission for this purpose are twofold - necessity, ancient possession being incapable of direct proof by witnesses: and the fact that such documents are themselves acts of ownership, real transactions between man and man, only intelligible upon the footing of title, or at least of a bona fide belief in title, since in the ordinary course of things men do not execute such documents without acting upon them.*

The effect of possession of the said lands by William McIntyre I will deal with later.

The further chain of title relied upon by the said defendant, Scott Paper Company, is indicated by the following documents:

1. *Mortgage dated October 1, 1875, William McIntyre, Catherine McIntyre, his wife, to Margaret Haliburton King. This mortgage, describes the within referred to lands, inter alia, in the words of the description in the deed from Edward Erskine Armstrong to the said William McIntyre.*

2. *Mortgage dated April 2, 1878, William McIntyre to Thomas R. Harris. The said lands are described only by reference to lands conveyed to the said William McIntyre by Edward Armstrong by deed dated April 8, 1863, and indicates particulars of registration thereof to correspond with the original registration in the Registry of Deeds.*

3. *Sheriffs deed dated April 6, 1882, upon foreclosure of mortgage in Item 1 pursuant to suit, advertising and public auction. Conveys lands described in deed to William McIntyre to Thomas R. Harris.*

4. *Deed dated December 9, 1882, Thomas R. Harris to Lawrence Gaul. Describes lands as in Item 1.*

5. *Deed dated March 2, 1920, Lawrence Gaul to Davison Lumber and Manufacturing Company Limited describes land both by reference back to Item 4 and description as in Crown Grant to Elijah Armstrong.*

6. *Deed Dated April 29, 1922, Davison Lumber and Manufacturing Company Limited and liquidation to Hollingsworth & Whitney Limited. Describes lands by reference to Item 5.*

7. *In 1958 the name of Hollingsworth & Whitney Limited was changed to Scott Canadian Timberlands Limited.*

8. *Deed dated June 3, 1963, Scott Canadian Timberlands Limited to Scott Paper Company. Describes lands as in Items 5 and 6.*

There is no evidence of possession of the said lands by Elijah Armstrong, Edward J. Armstrong, Amelia Healy and Mary B. Armstrong. There is no evidence that they were assessed for municipal taxes or paid same. There is no evidence of any acts whatever by them consistent with title or possession of the said lands. I find against possession in these persons or any of them.

Lulu Marguerite Healy was the principal witness for the plaintiff. She is 76 years of age and married Thearon Healy 40 years ago. Her husband did not work upon the Lake Paul land in any way. He did visit the land in the way of walking upon it and from his car, indicated it to the witness. In 1958 or 1959, he made some vague attempt by consulting solicitors, to stop the defendant, Scott Paper Company, from cutting wood from the land. The witness knew then, for the first time that her husband was claiming the land. Apparently he based his claim upon his possession of the document of the grant of Elijah Armstrong which he took from "a secret drawer" kept by Edward J. Armstrong, in his lifetime and upon the will of this man, which he believed passed title to him. There were no acts of possession by Mrs. Healy. She sold the land to the plaintiff for $500. Other evidence would indicate the actual value to be from $2,500 to $5,000.

The evidence of Paul Healy is significant only in that he said that, as executor of the Will of his father, Thearon Healy, he "considered" the Lake Paul land in making the inventory of his father's estate. I do not accept his evidence in this regard and find that this land was not included in the inventory of the estate.

The evidence of the plaintiff indicates only that he had a subcontractor enter upon the land to cut timber and discontinued this work. I presume at the insistence of the defendant, Scott Paper Company.

I have already dealt with and found possession in William McIntyre. The further evidence of possession by the defendant, Scott Paper Company, and its predecessors in title, comes from several witnesses who testify as to events within their memories.

Carson Lutes by permission of Hollingsworth & Whitney Limited, and upon payment of stumpage to that company, worked upon the land in 1955 or 1956. He cut and removed windfalls following the Hurricane Edna. Thearon Healy told him not to remove the logs after he was through cutting. Notwithstanding, the logs were removed.

Paul Robar, in 1964, cut Christmas trees on the land by permission of the defendant, Scott Paper Company; however, Jack Johnson, an employee of this defendant, told him not to continue and that title was disputed. He discontinued his work. This witness had always understood that the defendant, Scott Paper Company, was the owner. Earlier, in 1940, he worked on the land with Alfie McDowell, who cut hardwood for Hollingsworth & Whitney Limited. At that time I find cutting was done over an extensive area of the lot.

George Alfred Lake is a forester and a District Supervisor for the defendant, Scott Paper Company. The plaintiff came to see him in 1967 and expressed his opinion that he owned the land. He was adivsed by the witness that the land was owned by the Company.

Donald S. Hyslop is a forester and land surveyor and holds the office of Land Management Superintendent for Scott Paper Company. He demonstrated from a map of the holdings of Hollingsworth & Whitney Limited in 1922-1926 and from the 1925 field notes of that Company that the land in contention was shown to be within the holdings of that Company. At that time, the exhibits indicated that corner boundary markers, consisting of the red posts installed in the ground were indicated to be in place. Neither these nor any evidence of them can now be found. The witness also established that Scott Paper Company and its predecessors paid municipal taxes on the land. I believe and accept the testimony of this witness and take it into consideration upon the question of possession by the defendant, Scott Paper Company and its predecessors from 1922 to the present.

Alvin Bertram Lutes is 73 years of age and has lived at Lake Paul all of his lifetime. He states that "the company had its lines on the land". He has personal knowledge of a road into the land, built in 1928 or 1929 by Murray Wentzell, an employee of Hollingsworth and Whitney Limited. He has no knowledge of any of the Armstrongs coming upon the land. Twelve or fourteen years ago, he first knew of Thearon Healy's claim to the land. He went to the office of "the Company" in Bridgewater with Thearon Healy who said "he wanted to know if the company had title". Healy offered to sell the land to him but the testimony here is "I didn't buy because of the trouble".

Murray Wentzell is a witness who I believe. He logged on the Lake Paul lands 40 years ago on a subcontract from Hollingsworth & Whitney Limited. The timber cut was scaled by scalers employed by that company. His memory was clear that cutting was done extensively south of the Lake Paul Road. He did not remember the extent of cutting north of the road. One week before the trial date he went back to the lands with the witness Hyslop and found the location of camps, hauling roads and some cutting places and indicated these places to Hyslop. He understood the land was then owned by Hollingsworth & Whitney Limited. My conclusion from this evidence is that the lot in contention was completely cut over at that time.

In my opinion the acts of possession established by the witnesses called by the defendant, Scott Paper Company were, in the circumstances, from 1922 to the present day, such as the land was capable of. I find that no other person exercised acts of ownership and possession. Specifically, I find that Edward J. Armstrong and Thearon Healy did not do so.

I have carefully considered the whole of the Last Will and Testament of the said Edward J. Armstrong in my consideration of the matters at issue herein. I set out only the parts thereof that are of immediate concern to its construction. In my opinion these are:

> *I give, devise and bequeath all my real and personal estate of which I may die possessed, in the manner following, that is to say:*
>
> *To my nephew, Thearon Healy of Church Street aforesaid, I give all my interest in the farm property at Church Street upon which I now reside on the south side of the said Church Street and also the land adjoining on the north side of said street and the woodland connected with said farm. Also seventeen and one-half acres of dyke on the Grand Dyke, also my farming implements.*
>
> . . .
>
> *I give to Joseph Clark Healy and R. Paul Healy, sons of said Thearon Healy, and Bessie North, Daughter of said Lydia North, all my interest in real estate or property of any kind in or near the city of Winnipeg, Manitoba, in equal shares.*
>
> *I give all the interest which I now hold or may subsequently become possessed of in the Armstrong tract of land situate in the County of Hants or adjoining counties to said Thearon Healy, Minnie Healy, Lydia North and Mildred Maddiford, share and share alike.*
>
> *All the rest, residue and remainder of my property in the house or elsewhere, or otherwise mentioned, to be divided equally among my said three nieces and said nephew.*

In construing the Will, I accept that the guiding principle is that the intention of the testator, ascertainable from the express language of the instrument is to govern. Ordinary words are to be read in their grammatical and ordinary meaning. The terms of the Will, taken as a whole, must be considered. Extrinsic evidence is not admissible to enable the court to construe the Will, that is to gain the intention of the testator. That intention must be found from the words of the Will. Extrinsic evidence is admissible to ascertain the identity of the thing devised, that is, to identify the subject matter. See *Higgins v. Dawson*, (1902) A.C. 1.

It is my opinion and I find that the words of the Will here are clear and unambiguous. The question remains: what is the "Woodland connected with said farm?" In answer thereto, I will have regard to the words of the Will and to the extrinsic evidence tending to establish and deny that by the said "woodland" the testator meant the lands in contention.

The lands in which the testator resided are situate on Church Street, Port Williams, County of Kings. The land described herein is at Lake Paul, approximately thirty-five miles from that location. The land at Port Williams consisted of approximately forty acres of farm land adjacent to which is a lot of eighteen acres which was sometimes referred to as woodland. The evidence is that the eighteen acre wood lot was referred to by the Armstrong family as a wood lot or woodland. There is no admissible evidence that Elijah Armstrong or Edward J. Armstrong performed acts consistent with title to and possession of the land at Lake Paul. There is absolutely no evidence of any assertion of title of the Lake Paul land on the part of Edward J. Armstrong in his lifetime. From all of the evidence necessary to conclusion here, I conclude that the property described by the testator, Edward J. Armstrong, in his Last Will and Testament was the woodland connected to the farm, that is the lot of

land immediately adjacent to the forty acre farm. I make this conclusion from the extrinsic evidence which I use to identify the subject matter as well as from the grammatical and ordinary meaning of the words "woodland connected with said farm". I accept the contention of the defendant, Scott Paper Company, that the ordinary meaning of the word "connected" is "joined" or "linked". I also have regard to the fact that the word in the Will is "woodland" and not the plural "woodlands" so as to refer to two lots of woodland, that is the one connected with the farm and the one at Lake Paul. In my mind, it is significant that the word is written in the singular and not in the plural. In reference also to the whole of the Will, when otherwise referring to lands owned by him and not located near the home in which he resided, the testator was specific enough to indicate in the one case "all my interest in real estate or property of any kind in or near the city of Winnipeg, Manitoba" and "all the interest which I now hold or may subsequently become possessed of in the Armstrong tract of land situate in the County of Hants or adjoining counties". Similarly, in reference to the dyke lands, the reference is to "seventeen and one-half acres of dyke on the grand dyke". It is therefore my opinion and finding that, if Edward J. Armstrong had any interest in lands at Lake Paul, same fell into the residue of his estate and by the terms of his Last Will and Testament was devised to the persons described in the clause by which the residue is devised. Only in that way, as one of several persons, did Thearon Healy take some interest in the title of Edward J. Armstrong, if any he had.

I think it clear that, in a claim for a certificate of title under the *Quieting Titles Act*, the claimant may establish, and the Court may grant to the claimant, a certificate for, whatever title is in him as is shown by the evidence. The plaintiff, in this case, claims a certificate of absolute title and represents that he has proved title back to the Crown by way of the said grant to Elijah Armstrong by the descent or transfer by operation of law of title to the land to the heirs-at-law upon the deaths, intestate, successively of the said Elijah Armstrong, Amelia Healy and Mary E. Armstrong. Also, by the provisions of the Last Wills and Testaments of Edward J. Armstrong and Thearon Healy upon their successive deaths. In this alleged chain of title from the grant in 1863 through to 1965 there can be found no deed or Will which specifically describes or refers to the land of the grant. It is said by the plaintiff that all of the interests in the said land and title were conveyed to him by the deeds from Lulu Marguerite Armstrong to him dated October 21, 1965, and from Mary Maddiford, Florence Maddiford and Bessie North, recited to be, with the said lots Elijah Armstrong, to him dated February 5, 1969. Some defects, in the evidence in this regard and in the title claimed to have been established, I have already pointed out.

The title claimed being indefinite, and left in a state of uncertainty by the evidence, I would, without more, refuse to grant any certificate of title to the plaintiff; however, the finding against the plaintiff can be put upon a much more substantial and, in my opinion, conclusive ground.

Apart from the deficiencies in the alleged title of the plaintiff that I have already commented upon, adversely to the plaintiff's claim of title, I am of the opinion and find that the title of Elijah Armstrong, if any he had, has been long since extinguished by the application of the provisions of the *Limitation of Actions Act*, R.S.N.S. 1967, c. 168 and its predecessor statutes of similar provision and effect.

The applicable sections of the said statutes are the following:

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

10. *In the Construction of this act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:*

*(a) Where the person claiming such land or rent, or some person through whom he claims, has, in respect to the estate or interest claimed, been in possession . . . and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received:*

*(b) Where the person claiming such land or rent claims the estate or interest of some deceased person who continued in such possession or receipt in respect to the same estate or interest until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death:*

. . .

*21. At the determination of the period limited by this act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.*

If one presumes, for the purpose of this consideration, that Elijah Armstrong had title by virtue of the Crown grant to him, his right to possession of the lands described is implied by that title. By law, then, Elijah Armstrong was entitled to make entry thereon or to bring action to recover the land from the time of the Crown grant to him. I have found that at the time of the Crown grant to Elijah Armstrong, William McIntyre was in possession of the land. No act of entry, no act consistent with title and the right to possession of the said land was asserted by Elijah Armstrong, and no action to recover possession was taken by him, in the twenty years following the Crown grant or even during the whole of his lifetime, down to his death in 1916, a period of approximately fifty-three years, during which time it is inferred from the evidence the possession of McIntyre and his successors in title continued. Upon these facts, I find the right and title of Elijah Armstrong in and to the said lands has been extinguished.

And I go further. I accept the statement of MacQuarrie, J., in *Ezbeidy v. Phalen* (1958), 11 D.L.R. (2d) 660, at pp. 665-6, made on the authority of *Lessee of Cunard v. Irvine* (1853), 2 N.S.R. 31, as follows:

*Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed.*

*Where the contest is between the true owner on the one hand and a person having colour title on the other hand, that is, a person having a claim which is good on the face of it, such as a prior unregistered deed, that person has a much lighter burden to discharge than a mere squatter, because he always has the mental attitude, or is presumed to have it, which is a necessary ingredient to possession. He does not have to prove that discontinuous acts are not simply disjointed acts of trespass as a squatter must show, and in this case possession of a part is constructive possession of all of the land comprised or covered by his colour of title.*

I have accepted the evidence of possession of the lands in question here in William McIntyre and that the possession in McIntyre after 1882 continued in his successors in title. It is clear that McIntyre's possession, whether by his colour title or his assertion of acts consistent with title, ripened into title and that title which began in his colour title and possession continued in his successors down to the pre-

sent day to the defendant, Scott Paper Company, and that such title is clearly shown by the documents brought into Court and proved by this defendant.

Therefore, it is my finding, not only that the right and title of Elijah Armstrong in and to the said lands has been extinguished, but that the colour title and possession of William McIntyre and his successors has ripened into a title which today is vested in the defendant, Scott Paper Company, and that title is in all of the lands described herein.

And if I be wrong upon the foregoing, I find that upon the death of Elijah Armstrong in 1916, Edward J. Armstrong alone, or he, Amelia Healy and Mary B. Armstrong alone, or he, Amelia Healy and Mary B. Armstrong together claiming title to the land of the deceased, and they and each of them, from the year 1916 down to their successive deaths, the last of them having passed away in 1940, having made no entry and having brought no action to recover possession during these years that thereby the title which is now claimed for them was extinguished.

And apart from the foregoing considerations, I find, upon the evidence, that since 1922 or thereabouts that Hollingsworth & Whitney Limited and its successors in title, including the defendant, Scott Paper Company, have been in actual or constructive possession of the lands, open and notoriously, without interruption and adversely to all claimants.

I find a good possessory title in the defendant, Scott Paper Company.

The defendant, Scott Paper Company has served notice that it would apply for an order granting to it a certificate of title. I am of the opinion that it has, thereby, claimed such a certificate. Section 11(1) of the *Quieting Titles Act* provides:

> *Where after the trial or determination of all issues of law and fact between the parties it appears that a party claiming a certificate of title is entitled to some property right in the land (whether it is the property right claimed or not) the court or a judge may order that certificate of title be issued to the claimant for the property right to which he has been found entitled.*

I am satisfied that the said defendant is entitled to a certificate of title. Having determined that the only other claimant, the plaintiff, has no interest in said lands, and that said lands are bounded on all sides by other lands of this defendant, the certificate may have reference to lands granted to Elijah Armstrong, by grant dated August 27, 1863, or in some such terms. In the circumstances no more complete description will be required.

The result is that the claim of the plaintiff for a certificate of title is dismissed. The defendant, Scott Paper Company, will have a certificate in a form suitable for registration under the *Registry Act*.

The Defendants, The Attorney General of Nova Scotia and Scott Paper Company, will have their costs to be taxed in separate bills and judgment therefore against the plaintiff. Costs will be on the party and party scale for all defendants.

*Judgment for the Defendant.*

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Maddonald, JJ.A.
January 9, 1976

REAL PROPERTY - TOPIC 7293

EASEMENTS - EXTENT OF RIGHT - RIGHT TO RECONSTRUCT A ROAD - THE DEFENDANT RECONSTRUCTED A 1,250 FOOT ROAD WHICH LED TO THE DEFENDANT'S SUMMER COTTAGE - THE ROAD WAS OVER THE PLAINTIFF'S LAND - THE EASEMENT WAS CREATED IN 1872 AND THE DEFENDANT HAD THE RIGHT TO USE THE ROAD FOR BOTH PEDESTRIAN AND VEHICULAR TRAFFIC - IN 1974 THE DEFENDANT WIDENED AND GRADED THE ROAD - THE DEFENDANT WIDENED THE ROAD TO 15 FEET BUT IN SEVERAL PLACES HE WIDENED THE ROAD TO 25 FEET - THE NOVA SCOTIA COURT OF APPEAL HELD THAT THE PLAINTIFF WAS NOT ENTITLED TO RESTRAIN THE DEFENDANT FROM RECONSTRUCTING THE ROAD - THE NOVA SCOTIA COURT OF APPEAL HELD THE DEFENDANT LIABLE TO THE PLAINTIFF FOR $400.00 FOR DAMAGES FOR WIDENING THE ROAD IN A FEW PLACES TO 20 TO 25 FEET.

INJUNCTIONS - TOPIC 1844

INTERLOCUTORY OR INTERIM INJUNCTIONS - FAILURE AT TRIAL TO JUSTIFY ISSUE OF AN INTERIM INJUNCTION - LIABILITY OF THE PLAINTIFF FOR DAMAGES RESULTING FROM THE INJUNCTION - THE PLAINTIFF OBTAINED AN INTERIM INJUNCTION WHICH RESTRAINED THE DEFENDANT FROM CONTINUING THE RECONSTRUCTION OF A ROAD OVER AN EASEMENT OF THE PLAINTIFF'S LAND - THE DEFENDANT HAD THE RIGHT TO USE THE ROAD FOR ACCESS TO HIS SUMMER COTTAGE - AFTER A TRIAL THE NOVA SCOTIA SUPREME COURT REFUSED TO GRANT THE PLAINTIFF A PERMANENT INJUNCTION - THE NOVA SCOTIA COURT OF APPEAL HELD THAT THE PLAINTIFF WAS LIABLE TO THE DEFENDANT FOR DAMAGES ARISING OUT OF THE ISSUE OF THE INJUNCTION AND THE INTERRUPTION OF THE RECONSTRUCTION OF THE ROAD.

This case arose out of the reconstruction of an old road by the defendant on the plaintiff's land. The defendant had the right to use the road for access to his summer cottage. The easement enjoyed by the defendant was created in 1872 and the defendant had the right to use the road for both pedestrian and vehicular traffic - see paragraph 50. The old road was clearly defined and was 1,250 feet long - see paragraph 33. In 1974 the defendant hired a contractor to widen and grade the old road. The defendant widened the road to approximately 15 feet but in several places he widened the road to 25 feet. After the reconstruction of the road was approximately two-thirds complete the plaintiff obtained from the Nova Scotia Supreme Court an interim injunction which restrained the defendant from further reconstruction of the old road. After a trial in January of 1975 the trial court refused to grant the plaintiff a permanent injunction. The trial court awarded the plaintiff $400.00 for damages for the widening of the road in a few places to 20 to 25 feet. The trial court refused to grant the defendant damages arising out of the interruption of the reconstruction of the road because of the "precipitous" actions by the defendant. The judgment of the trial court is set out below - see paragraphs 22 to 91.

On appeal to the Nova Scotia Court of Appeal the defendant's appeal was allowed and the defendant was awarded $1,000.00 in damages. The Nova Scotia Court of Appeal held that the plaintiff was liable to the defendant for damages arising out of the issue of the injunction and for the costs of interruption of the reconstruction of the old road. The Nova Scotia Court of Appeal fixed the defendant's damages at $1,000. The Nova Scotia Court of Appeal affirmed the damage award of $400.00 in favour of the plaintiff.

. . .

This appeal was heard by the Nova Scotia Court of Appeal at Halifax, Nova Scotia on November 24, 1975. Judgment was delivered by the Nova Scotia Court of Appeal on January 9, 1976.

The judgment of the Nova Scotia Court of Appeal was delivered by MacKeigan, C.J.N.S.

1 MacKeigan, C.J.N.S.: This matter has had a long and expensive history before the courts.

2 The respondent in the first instance denied any right of the appellant to use an easement across the respondent's lands to the appellant's summer home and in 1970 began action to restrain the appellant from crossing its lands and for damages for trespass. Mr. Justice Hart, (1973), 4 N.S.R. (2d) 336, found that the appellant had a right-of-way across the respondent's land and dismissed the action. The Appeal Division, (1973), 4 N.S.R. (2d) 313, confirmed his decision.

3 In October 1974, the respondent began the present action, claiming a permanent injunction restraining the appellant from construction of a road or "in any way changing the path that has existed . . . since 1968", and asking damages for trespass and punitive damages. The respondent alleged that the earlier case had merely given the appellant the right to use "the road as it exists on the ground", varying "in width from 2-6 feet along its course", rough, overgrown, and unimproved for many years. It complained that the appellant had "unlawfully" started to bulldoze a road 10-12 feet in width and even 18 feet wide in some places.

4 The respondent applied immediately for an interlocutory injunction restraining the appellant until trial "from any further construction or alteration in any manner whatsoever of the path". Mr. Justice Jones granted the injunction on October 22, 1974. The Appeal Division on November 27, 1974 (2 A.P.R. 614), dismissed an appeal from the interlocutory injunction, with costs of the injunction and of the appeal to be costs in the cause, and noted that any damage caused the appellant by delay would be recovered if on the trial the respondent's right to the injunction was not affirmed.

5 The appellant defended the action, affirming his right to use and maintain the right-of-way. He counterclaimed for damages for unlawful interference with and interruption of his lawful work of construction.

6 The case was tried on January 7 and 30, 1975, by Mr. Justice Morrison, who on March 17, 1975, by lengthy written decision held the appellant entitled to build a road fifteen feet wide fit for reasonable use by motor vehicles. He found, however, that the appellant had in some places made the road too wide and thus:

> . . . exceeded the use to which he had a right to put the roadway and thereby caused some damage to the plaintiff's property in the excavation work done on Lot 18, and widening the road to 20 and 25 feet, however, this damage to my mind can be remedied by damages and would no longer require the use of an injunction.

He said that "I do not consider the damages to the plaintiff's land to be serious" and assessed them at $400.00, which the appellant was ordered to pay together with the costs of the action.

7 As to the counterclaim, Mr. Justice Morrison said:

> The defendant himself, because of the fact that his work was stopped by means of the injunction, and the contractor, Mr. Dauphinee, being compelled to remove all of his vehicles, will be put to considerable expense in having these vehicles put back into operation at the site. The defendant will also suffer from delay caused by the stoppage in construction; however, he must bear the consequences of his own precipitous actions.

By later order he dismissed the counterclaim without costs.

8 The learned judge had earlier explained what he meant by the appellant's "precipitous actions". He had said:

> It would appear to me that Mr. Lawrence, the defendant, simply told Dauphinee to build him a road without specifying any measurements. I think that in authorizing Dauphinee to proceed and build a road in the manner in which

> he did Mr. Lawrence acted precipitously. He apparently felt that he had a right to build any type of road that he wished along the old road without having any regard to the rights of the owner of the land on each side of the roadway.

9 The appellant appealed from the assessment of $400.00 damages against him of the costs of the action, which, of course, included the costs of the earlier interlocutory proceedings and appeal. He also appealed from the dismissal of his counterclaim and sought assessment of damages on it, and costs.

10 I do not think we can disturb the award of $400.00 damages. It is possible that the learned judge wrongly took into account excavation work on the part of Lot 18 owned by one Schnare and not owned by the respondent. This is not, however, clear, and we must assume that the learned judge did not make any such error in his otherwise comprehensive review of the facts.

11 With great respect I disagree, however, with the learned trial judge in his refusal to award the appellant any damages on the counterclaim, despite his specific finding that damages were suffered. I respectfully cannot agree with his statement that the appellant's actions were "precipitous" and therefore in some way blameworthy so as to deprive him of any remedy.

12 The so-called precipitous actions were acts which the appellant has been found entitled to take, namely, to have Dauphinee build a road of approximately 15 feet wide. His only error was to fail to caution Dauphinee to be careful to avoid making it 20 to 25 feet wide in a few places. This error was one which the learned judge has properly found can be remedied by payment of $400.00 damages, an infinitesimal amount in the light of the respondent's attempts, throughout this long litigation, to prevent the appellant carrying out any rebuilding of the road at all.

13 The respondent in essence failed to stop the work proposed and has failed to show its rights were infringed, except to the minimal degree shown by the damages awarded. In such circumstances the respondent, having taken the chance of greatly interfering by injunction with the appellant's rights, must pay the consequences, namely the damages suffered by the appellant by the interruption of his work.

14 The same principle should apply as where an undertaking has been given by counsel for the plaintiff, as in this case, to respond in damages, if any resulted from the injunction having been wrongly obtained. The law is clearly as stated by Baggallay, L.J., in *Griffith V. Blake* (1884), 27 Ch. D. 474 (C.A.), at p. 476:

> If the defendants turn out to be right, it appears to me that they can, under the undertaking, obtain compensation for all injury sustained by them from the granting of the injunction.

See *Vieweger Construction Co. Ltd. v. Rush & Tompkins Construction Ltd.*, (1965) S.C.R. 195 at pp. 260-208. In *American Cyanamid Co. v. Ethicon Ltd.*, (1975) A.C. 396 (H.L.), Lord Diplock at p. 406 noted that the plaintiff must always

> pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do.

15 Damages were not assessed and are difficult to assess because of the lack of evidence. Rather than remit the matter for such assessment, or directing a special inquiry as to damages under the respondent's undertaking (which, strictly speaking, might be the proper procedure: *Norstrant v. Drumheller* (1920), 51 D.L.R. 373 (Alta. C.A.), per Beck, J., at p. 378), I think it best, in view of the long and expensive litigation, to make our best estimate now.

16 The learned trial judge noted that the appellant "will be put to considerable expense" in having Dauphinee's vehicles removed from the scene following the injunction and then brought back after its dissolution, and that he would "also suffer from delay caused by the stoppage."

17 We have no evidence of any specific expense or other loss except evidence of Dauphinee. He claimed it would cost "an extra two or three thousand dollars" to bring back his bulldozers, which have to be carried on the highways only at certain times and by special trailers, and to restore the road work to the state it was in when he had to stop. He also claimed that perhaps as much as $800.00 would have to be added to cover what it cost to move the equipment out after the interlocutory injunction was issued. His evidence as to costs was vague and unsatisfactory. He was unable to itemize his costs or even remember exactly how much he had charged the appellant for work already done.

18 The appellant himself suffered inconvenience by the delay in getting the road in, but he gave no evidence which permits us to place any dollar value on it.

19 After carefully reviewing the evidence, I am of the opinion that $1,000.00 would be a fair assessment of damages on the counterclaim.

20 Turning to the question of costs, I would direct that there be no costs of trial on either the claim or counterclaim but the appellant should have his costs of the interlocutory proceedings before Mr. Justice Jones and the subsequent interlocutory appeal before this Court.

21 This appeal should be allowed with costs to the appellant, and damages of $1,000.00 allowed on the counterclaim against which will be set off the $400.00 awarded the respondent on the claim, and the costs below disposed of as already proposed.

*Appeal allowed.*

ASPOTOGAN LTD. v. LAWRENCE

Nova Scotia Supreme Court, Trial Division
Morrison, J.
March 17, 1975

STEWART McINNES, for the Plaintiff
EDMUND SAUNDERS, for the Defendant

This case was tried by MORRISON, J., at Halifax, Nova Scotia on January 7 and 30, 1975. Judgment was delivered by MORRISON, J., on March 17, 1975.

22 MORRISON, J.: This is a claim for a permanent injunction restraining the defendant, his servants, agents, workmen or any other person from further use of a bulldozer or constructing a road on lands of the plaintiff situate at or near the district of Deep Cove, in the County of Lunenburg, Province of Nova Scotia, and for damages for trespass and for the destruction of the plaintiff's property. The defendant counterclaimed for damages for the unlawful interference with and interruption of the work of the defendant, his servants or agents, by the plaintiff, its servants or agents.

23 Before proceeding further it is necessary to give a brief resume of the background to the subject matter of this action. In 1970, by Supreme Court action No. 15433, the plaintiff commenced an action against the defendant for damages for trespass and a permanent injunction restraining the defendant and others from crossing the plaintiff's lands which surround the defendant's property fronting on Deep Cove, in the County of Lunenburg, and known as Lot No. 20 on plan of division of lands at Deep Cove and Blandford, prepared by J. J. Thomson, Surveyor, at Chester, N. S., and dated December 13, 1873. This matter was heard by Mr. Justice Hart of this Court, and is reported in (1973), 4 N.S.R. (2d) p. 336.

24 In that action Mr. Justice Hart found, at p. 348, as follows:

> I am satisfied that the road leading from the main highway to the mill was at the time of the partition agreement fairly well defined and was one of the 'roads' referred to in both the Will of John Meisner and the partition agreement. I further believe that it was the intention of the four brothers,

who signed the partition agreement, to attach to each of the lots numbered 20, 19, 18 and 9 the right of all parties, their heirs and assigns to use this roadway leading from the highway to the mill.

When the plaintiff purchased lots 18 and 19 in 1929, Mr. Eaton and the plaintiff's legal advisers had actual notice of the partition agreement attached to the plan of partition of the Meisner property, and, in my opinion, at that time there was also ample indication on the ground of the existence of a travelled way running from the mill site to the East Chester to Blandford highway. I find, therefore, that lots 18 and 19 are vested in the plaintiff, subject to a right of the owner of lot 20, his servants, agents, workmen or guests to cross over the plaintiff's lots for the purpose of obtaining access to and from the defendant's property. The road as it exists on the ground must be left open for use by the owners of lots numbered 20, 19 and 18 and 9.

25 For the purposes of the trial of this action the plaintiff and the defendant agreed that all of the evidence and all of the exhibits presented in the trial of this matter before Mr. Justice Hart, in the case referred to above, would be evidence of the case at bar.

26 It should be noted here that the decision of Mr. Justice Hart was confirmed by the Appeal Division of the Nova Scotia Supreme Court. The decision of which was written by Mr. Justice Coffin and reported in (1973), 4 N.S.R.(2d) at p. 313. In that case, Mr. Justice Coffin said as follows, at p. 335:

In the result I am of opinion that the respondent (defendant) has established an easement of way by express grant over the mill road and the appeal should be dismissed with costs.

27 The plaintiff and the defendant have also agreed as follows:

1. A copy of the original plan of J.J. Thomson, Surveyor, showing the division of lands at Deep Cove and Blandford, dated February 13, 1873, will be admitted without further proof as evidence of its contents and of the partition agreement set forth on its face relating to the plan. It was further agreed that the partition agreement was executed under seal by Henry Meisner on December 13, 1873. The partition plan is not recorded in any registry in the County of Lunenburg.

2. That the plaintiff has legal title to all of lot 19, two-thirds of lot 18 and to all of lot 17, as shown on the plan of division of lands in Deep Cove and Blandford prepared by J. J. Thomson, Surveyor, at Chester, and dated December 13, 1873, subject to the rights of ingress and egress to lot 20 that the defendant established over the plaintiff's land pursuant to the decision of His Lordship, Mr. Justice G. L. S. Hart, in *Aspotogan Ltd. v. Harry William Lawrence* (1973), 4 N.S.R. (2d) 336, affirmed on appeal in (1973), 4 N.S.R. (2d) 313.

3. The defendant is the beneficial owner of lot No. 20, on the J. J. Thomson plan.

4. The unsigned abstracts of title produced by the parties for purposes of the trial before Mr. Justice Hart show the title to lot 17 and 19, lot 20 and lot 18 on the Thomson plan.

28 All of the lands in dispute were once owned by one John Meisner. The Will of John Meisner was probated on September 1, 1872, and devised the lands in question to four sons of John Meisner, namely, Henry, Jacob, Martin and Isaac, and which also contained the following clause:

It is my will that my aforesaid sons do allow to each other the free use of roads and as are now used by them.

29 Mr. Justice Hart founded the right of the defendant to use the right-of-way as access to his property on this Will of John Meisner and also on the wording of an agreement between Henry Meisner, Jacob Meisner, Martin Meisner and Isaac Meisner, which is set forth on the plan of division made by J. J. Thomson, surveyor, and dated December 13, 1873, which reads as follows:

> KNOW ALL MEN. By these presents that we Henry Meisner, Jacob Meisner, Martin Meisner and Isaac Meisner (Sons of John Meisner and of Blandford deceased) Farmers of Blandford and in Indian Point (East) in the County of Lunenburg and Province of Nova Scotia: - being the owners in common of two several lots of land situate at Deep Cove and Shoal Cove Lake in Blandford in the County aforesaid:
>
> Do hereby mutually and severally covenant and agree to the partition of the said two lots of land in the shape form and manner shown on and by the plan of said lands hereto annexed. Nevertheless saving and reserving for ourselves our heirs and assigns perpetually our several rights and privileges in the grist mill and dam, now standing on the lot numbered twenty on the said plan, also our common right in the dam crossing the Brook above the road on the lot marked number nine on the annexed plan. Also the right of entry at all times upon the said lot number nine for the purpose of getting gravel free of charge to repair the said dam. All the roads in use on the lands thus hereby divided shall be kept open for the use of all the parties hereto.
>
> Finally we agree to have hold and occupy each for himself his heirs and assigns forever the lots of land shown on said plan where on our names are severally jointly and respectively written.
>
> In witness whereof we have hereunto our hands and seals subscribed and affixed the thirteenth day of December A.D. 1873:-
>
> Signed and Sealed in Presence of J. J. Thomson
>
> Henry Meisner
> Jacob Meisner
> Martin Meisner
> Isaac Meisner

For our purposes the key sentence in this agreement is "All roads in use on the lands thus hereby divided shall be kept open for the use of all the parties hereto."

30 A copy of the aforesaid J. J. Thomson plan was admitted into evidence as Exhibit 3. This plan, as has been pointed out, has written on it the partition agreement of the four brothers.

31 I would conclude from the decisions of Mr. Justice Hart, and Mr. Justice Coffin for the Appeal Division of the Nova Scotia Supreme Court, that the defendant does have an easement by express grant of a right-of-way across the lands of the plaintiff, specifically lots 18 and 19 on the Thomson plan, for access to Lot No. 20. The documents granting this easement do not define the width or the purposes of extent to which this right-of-way may be used. In the decisions of Mr. Justice Hart and Mr. Justice Coffin, the Court refrained from giving any width or purposes to the said right-of-way.

32 Most of lots 17, 18, 19 and 20 are thickly wooded. The witness, Mrs. Greta Gates, described lots 17, 18 and 19 as park-like forest land, in which state the plaintiff was anxious to keep them. All four lots with the exception of some wood cutting which was done in earlier years and the road in issue herein are undeveloped woodlands.

33 In October 1974, the defendant Lawrence instructed one Harry Dauphinee, a landscaping excavator, to reconstruct the old road leading across lots 18, 19 and 20. The construction of the road was left up to Dauphinee. Using the contours of the old road, which Dauphinee said was clearly defined, he commenced construction of

the road and actually reconstructed 775 feet of this road when work was stopped. The total length of the old road was 1,250 feet.

34 On October 17, 1974, an interim injunction was obtained by the plaintiff restraining the defendant, his servants, agents, workmen or any other person from any further construction or alteration in any manner whatsoever of the path leading from the old public highway between Blandford and Chester across the lands of the plaintiff to the defendant's lands on the shore of Deep Cove. On October 22, 1974, an order continuing the interim injunction was granted until such time as a trial of the matter could be heard.

35 Counsel for the plaintiff has suggested that the matters in issue in this matter are as follows:

> 1. Whether the defendant has the right to construct over the existing right of way a road capable of supporting vehicular traffic; and
>
> 2. Whether if the defendant has the right to construct a road as aforesaid, then how wide can the road be?

36 In an appeal from an interlocutory injunction issued in this matter by the Honourable Mr. Justice Jones restraining the appellant until trial from "any further construction or alteration in any manner whatsoever of the path leading from the old public highway between Blandford and Chester across the lands of the plaintiff to the defendant's lands on the shore of Deep Cove, Lunenburg County", the Appeal Division of the Supreme Court of Nova Scotia said as follows, per MacKeigan, C.J.N.S., on p. 5 of that decision:

> To grant an injunction, a judge must ordinarily have strong *prima facie* evidence that the plaintiff's rights are being interfered with by the defendant, in a manner that will cause irreparable injury to the plaintiff if the defendant is not restrained (21 HALS. (3rd ed.) paras. 763-765). The plaintiff in the present case has a right to prevent excessive user by the defendant of his easement (12 HALS. (3rd ed.) para. 1260). To determine whether such excessive user is occurring or is threatened it will be necessary to determine many questions of fact and law, which are not settled and which should be resolved at trial, including probably the following:
>
> (1) What is the nature of the appellant's easement? How wide is the road which he may use? For what type of access may he use it? For ox team? For motor vehicles as the modern equivalent of ox teams?
>
> (2) In law may he restore the road to a condition which will permit him to exercise his right to use it? (As in *Dalhousie Land Company Limited* v. *Bearce*, 6 M.P.R. 399 (N.B.C.A.), per Hazen, C.J., at pp. 407-408; see generally *Gale on Easements*, 14th ed., pp. 270-286. If so, exactly what may he do? He obviously will not be permitted to cut a 100-yard swath through the woods and build a paved super-highway - but how much less work, if any, may he do?
>
> (3) Was the appellant guilty of excessive user of the right-of-way? If so, what damages were suffered?
>
> (4) If he was not so guilty, what damages has he suffered by reason of the injunction?

37 In order to deal with the issue as to whether or not the defendant has the right to construct over the existing right-of-way a road capable of supporting vehicular traffic I must endeavour to determine for what purpose the road or right-of-way was granted in the first instance.

38 A plan of the lands at Deep Cove showing the contours and length of the right-of-way in dispute was prepared by James MacKenzie, a provincial land surveyor, and was produced in evidence as Exhibit 1. Mr. MacKenzie, testified that this plan had its basic origin in the 1873 Thomson plan, previously referred to. The right-of-way

extends from the old public highway as shown on Exhibit 1, a distance of 1,250 feet to the waters of Deep Cove. It is located just to the south of the Mill Brook so called, which empties into Deep Cove about the centre of lot No. 20 on the said plan. As was established in the previous trial before Mr. Justice Hart, the brook had considerable significance because during the 19th century it provided the only source of power for the operation of a grist-mill, which was situated at the mouth of the brook on the shores of Deep Cove. This was an era when the water-wheel was in regular use. The testimony of some of the older witnesses told of bringing grain to the mill by barrel to be ground for feed for the cattle. As Mr. Justice Hart said, at p. 338 of his decision as reported in 4 N.S.R. (2d) at p. 336:

> Most of the grain was brought by water rolled up the shore of the mill. Some was brought by highway in ox teams and carried down a well defined road lying approximately parallel to the stream on its southern side and running from the highway to the mill. It was necessary to take the barrels of grain across the sluiceway as the mill was located on the opposite side of the stream and a wooden bridge had been constructed for this purpose.

39 The grist-mill ceased to operate about the turn of the century, but it remained standing on Lot No. 20 for a good many years thereafter. It would seem then that at the time John Meisner made his Will and also at the time that the four brothers made the partition agreement that the grist-mill in 1873 would have been in steady use. There is no question in my mind but that the reservation of this particular roadway, which existed at that time, was to ensure access to the grist-mill on the shores of Deep Cove by all of the brothers Meisner. This was the main purpose of the road and this was the real reason why John Meisner and, subsequently, his four sons wanted the right to the use of the right-of-way to be protected for all members of the family so that they might have a land access to the grist-mill. I am also satisfied that the road was used as an access road for logging purposes by all of the brothers.

40 It must logically follow therefrom that the road would be required so that goods might be hauled to and from the mill along this roadway. William Meisner, who was 78 years of age in 1970, testified (at the 1970 trial) that he remembers people using the road, that is, the right-of-way in issue, with oxen and ox carts proceeding to and from the grist-mill. He also recalled hauling spar timbers down the old road and loading them on ships for transport elsewhere. He also testified that there was a barn and lumber camp operated by old Isaac Meisner, further up the old road, and he remembers taking logs down the road to this mill for sawing into barrel staves, when he was 14 or 15 years old.

41 Clifford Meisner, who was aged 80 when he gave evidence in 1970, testified that he went down the road one day by ox cart with his father when he was five or six years of age. He said that it was with a pair of oxen hauling a wagon load of barley, with steel-tired wheels.

42 Irving Charles Seaboyer, who was 80 years of age in 1970, testified that he recalled the old road leading to the grist-mill and that it was about eight to ten feet wide. Two-wheeled carts hauled by oxen used to haul the grain down to the mill in the month of September and October. During the winter ox drawn bobsleds used to haul logs to the sawmill. He also said that in the early 1900's that the road was in better condition then than now.

43 Weighing the evidence of these witnesses and bearing in mind the fact that there was a grist mill at Deep Cove at the end of the roadway and a sawmill somewhere along its length, I am satisfied that old John Meisner and his four sons intended that this roadway be used for commercial purposes as well as for private or pleasure purposes. To my mind this would include the use of necessary vehicles for transporting materials to and from the grist-mill and the sawmill. At that time no doubt the normal vehicle in use would be horses, or oxen and teams.

44 Later on, around 1920, a concrete block plant was constructed near the site of the old grist-mill on Lot 20, near the shores of Deep Cove. A shingle mill was

operated at the same site for two or three years prior to 1926. Insofar as the concrete block plant is concerned it operated for four or five years but most of its supplies and its finished product were transported to and from the plant by barge. Insofar as the shingle mill is concerned logs were hauled to this mill by ox team during the winter months along the old roadway.

45 Mr. Willard Martin Baker, aged 52 in 1970, testified that his father operated the shingle mill. He described the road, which is the right-of-way in dispute herein, as being rough and rocky and perhaps eight to ten feet wide. He did say that he did not personally haul logs over this road, but he had used the road as a means of access to his woodlots.

46 George Cleveland, aged 59 in 1970, testified that he saw teams of oxen taking logs down the old road to the shingle mill in the wintertime. He also used a portion of the old road to haul logs to the old highway, using what he described as "an old International truck cut off into what they call a 'bug' and a trailer with car wheels on the trailer."

47 It is clear from the evidence of these witnesses that there was an old grist-mill located on Lot No. 20, the lands of the defendant, for many many years. I am satisfied that the grist-mill referred to in Exhibit 3, is the grist-mill which was located on Lot No. 20. A portion of Exhibit 3 is the agreement made between Henry Meisner, Jacob Meisner, Martin Meisner and Isaac Meisner, which is set forth on the plan of division made by J. J. Thomson, surveyor, dated December 13, 1873. I refer to the following portion of that agreement:

> Nevertheless saving and reserving for ourselves our Heirs and Assigns perpetually our Several Rights and privileges in the grist-mill and dam, now standing on the lot numbered twenty on the said plan, also our common right in the dam crossing the brook above the road on the lot marked number nine on the annexed plan. Also the right of entry at all times upon the said lot number nine for the purpose of getting gravel free of charge to repair the said dam. All the roads in use on the lands thus hereby divided shall be kept open for the use of all the parties hereto.

48 I am also satisfied that the old road was in existence at least as long as the grist-mill itself and would probably date back to the early 1800's. The old road in the beginning was a means of access to the grist-mill and dam.

49 The witnesses already referred to described the use to which the road was put in connection with the old grist-mill. The road apparently did not go to the shore of Deep Cove but ended just short of where the old grist-mill was situate. Use was made of the road in subsequent years by those people who wished to get materials to the grist-mill and subsequently to the shingle mill and the sawmill.

50 Mr. Justice Hart and, subsequently, the Appeal Court of Nova Scotia found that the old road was a right-of-way by express grant. I conclude that the main purpose of this grant (but not the only purpose) was to give a right-of-way for all purposes associated with the use of the grist-mill. This would include the right to traverse the road by foot, with oxen, or with any conveyance necessary for the haulage of materials to and from the grist-mill. In my opinion this means that the road across lots 18, 19 and 20 was meant to be an all-purpose road, at least a road that could be used for all reasonable purposes.

51 In this respect it will be necessary to consider to what extent the road could be up-dated to make use of modern vehicles. I refer to *Halsbury's Laws of England*, vol. 12, 3rd ed. at pp. 578-579 (para. 1255), where it is provided as follows:

> 1255. Construction. In general the grantor of a right-of-way is under no liability to construct the way. The grantee of a right-of-way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective. Thus, if a right-of-way for carriages is granted over a field to the grantee's house, the grantee may enter the

field and make over it a formed roadway suitable for supporting the ordinary traffic of a carriage way; but the grantee may only construct such a way as is suitable to the right granted him, and the necessary works must be executed in a reasonable manner, and with ordinary skill and prudence. The methods of construction which the grantee may employ are not confined to the methods existing at the time of the grant.

52 Paragraph 1256 from the same reference reads in part as follows:

The person entitled to the use of the way must do such repairs as he requires, and he has a right of entry upon the servient tenement for that purpose. The right of repair is not limited to making good the defects in the original soil by subsidence or other natural causes, but includes the right of making the road reasonably fit for the purpose for which it was granted. The servient owner is not prevented from doing acts on his land the result of which may be to render the repair of the way more expensive.

53 The plaintiff in the present case has a right to prevent excessive user by the defendant of his easement. See *Halsbury's Laws of England*, vol. 12, 3rd ed. at p. 581 (para. 1260):

1260. Action. The person entitled to a right-of-way may also sue for an injunction to restrain obstruction of the way or for damages. If he in fact suffers no damage by the obstruction, nominal damages only will be awarded, and an injunction will be refused.

A person who in purported exercise of a right-of-way makes an excessive user of the servient tenement commits a trespass, and may be restrained from so doing at the instance of the servient owner. What amounts to excessive user depends on the scope of the right according to the true construction of an express grant or according to the user established by the prescription as the case may be. A trespass committed in the manner described, however, gives no cause of action to persons who are not entitled to use the way and are not interested in the servient tenement.

54 *Gale on Easements*, 14th ed., says as follows at p. 44:

The grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Where the use of thing is granted, everything is granted by which the grantee may have and enjoy such use. The ancillary right arises because it is necessary for the enjoyment of the right expressly granted.

. . .

The question of ancillary easements commonly arises in connection with repairs. . . .

Repair for this purpose includes making and improving the subject of the easement; alteration to meet altered conditions; also replacement.

55 Page 269 of the same reference reads, in part, as follows:

In the case of an express grant the language of the instrument can be referred to. It is for the court to construe that language in the light of the circumstances, and, in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against a grantor must be applied. In particular, in construing a grant the court will consider (1) the *locus in quo* over which the way is granted: (2) the nature of the *terminus ad quem;* and (3) the purpose for which the way is to be used.

56 And at p. 270:

It seems that, subject to any qualifying words in the grant, the authorized mode of quality of user (with or without vehicles, etc.) is as general as the physical capacity of the *locus in quo* at the time of the grant will admit, unless in any particular case (which must be rare) some limitation on mode of user can be gathered from the surrounding circumstances.

57 In *Dalhousie Land Company Limited v. Bearce*, 6 M.P.R. 399 (N.B.C.A.), Hazen, C.J., at pp. 407-408, says as follows:

It is clearly of no use for the defendant to have a right-of-way if he cannot make use of it because he is prohibited from any interference with natural obstacles upon the land over which the right is granted. Nor can it be permissible for the grantee to use the servient tenement in such a way as to cause real injury to its owner. In *Newcomen v. Coulson* (1877), 5 Ch. Div. 133, at p. 143, 41 L.J. Ch. 459, Jessel, M.R., says

> 'Now it was conceded to be the principle of law that the grantee of a right-of-way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective, that is, to enable him to exercise the right granted to him. That includes not only keeping the road in repair but the right of making a road.'

Or as put by Rooke, J., in *Gerrard v. Cooke* (1806), 2 Bos & Pul. N.R. 110, 127 E.R. 565:

> 'the grantee may use the way in the manner which is most convenient to himself if he does not thereby produce inconvenience to the grantee.'

58 Further on in the decision, on p. 408, Hazen, C.J., says as follows:

There was absolutely no evidence of any other than a purely theoretical, one may well say, imaginary inconvenience to the plaintiff. . . . The retaining wall was not built as an obstacle but simply to prevent a greater falling down of the plaintiff's soil. Had it been done by the plaintiff and the defendant had complained of it the jury's answer would have been equally applicable as it would then have been the act of a prudent and reasonable owner upon his own land.

59 I refer also to *Pickard v. Kernick*, (1929) 1 D.L.R. p. 493 - See the dissenting judgment of Latchford, C.J., at p. 499:

In *A. G. S. Nigeria v. Holt & Co. (Liverpool) Ltd.*, (1915) A.C. 599, at p. 617, it was contended that the easement claimed was unknown to the law. Delivering the judgment of their Lordships, Lord Shaw of Dunfermline said:

> 'The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce v. Hay* (1852), 1 Macq. 305, by Lord St. Leonards, L.C., who observed: "The category of servitudes and easements must alter and expand with the changes that 'take place in the circumstances of mankind'."

60 In *Keefe v. Amor*, (1965) 1 Q.B. 334, the Court of Appeal held that on the construction of the transfer of a dwelling house "together also with a right-of-way over" a strip of land some 20 feet wide and coloured brown on the plan annexed to the transfer, the right extended to vehicular traffic of any sort and was not limited by the *physical characteristics of the site at the time of the grant.*

61 In *Todrick v. Western Omnibus Co. Ltd.*, (1934) Ch. 190, 206, Farwell, J., said as follows, in part:

> In considering whether a particular use of a right of this kind is a proper use or not, I am entitled to take into consideration the circumstances of the case, the situation of the parties and the situation of the land . . . when the grant was made.

62 In the case of *White v. Grand Hotel Eastbourne, Limited* (1912), 106 L.T. 785, and, (1913) 1 Ch. 113 (C.A.), where the dominant tenement had been converted (in effect) from a private dwelling-house into a hotel and the court had to consider an oral and general grant of a right-of-way, it was decided that user for the purposes of the hotel was justified. Joyce, J., accepted the proposition laid down in *Finch v. Great Western Railway* that -

> Where there is an express grant of a right-of-way to a particular place to the unrestricted use of which the grantee of the right-of-way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant.

His decision was affirmed by the Court of Appeal. Cozens-Hardy, M.R., said:

> The plaintiffs' main point was . . . that it was only a right-of-way for what I may call domestic purposes as distince from trade purposes; and that it was only for such use as could reasonably be expected to be in the contemplation of the parties at the time when the defendants' house, St. Vincent Lodge, was a private residence, and ought not to be altered now that St. Vincent Lodge is turned into a (hotel) garage. We heard that point fully argued by Counsel for the appellants and we have come to the conclusion that there is no ground for limiting the right-of-way in the manner suggested It is not a right-of-way claimed by prescription. It is a right-of-way claimed under a grant, and, that being so, the only thing that the court has to do is to construe the grant; and unless there is some limitation to be found in the grant, *in the nature of the width of the road or something of that kind,* full effect must be given to the grant, and we cannot consider the subsequent user as in any way sufficient to cut down the generality of the grant.
>
> (my italics)

63 In *Smith v. Morris,* reported in (1935) 2 D.L.R. at p. 780 (Ontario Court of Appeal), an easement was granted as accessory to a dwelling-house. The width of the easement was specified as being ten feet. The first sentence of the headnote of that case reads as follows:

> An easement by grant is to be interpreted according to the intention of the parties at the time of the grant having regard primarily to the words of the grant itself and the surrounding circumstances are also relevant as evidence to interpret the rights implied in the particular case with the idea in mind that the easement granted is not a mere theoretical right on paper but a real physical enjoyment of the right conferred.

The judgment of the Court was delivered by Masten, J. A., he said as follows at p. 783:

> In the present case the words granting the right-of-way to the defendant are general. The defendant's lot is occupied as a dwelling-house and the right-of-way from Cortland St. is, under the circumstances, to be such as will satisfy the ordinary requirements of approach to the rear premises of a dwelling, and under present habits of life in the City of Toronto, *would include the right to bring an automobile to a garage at the rear of the defendant's premises.*
>
> While the burden imposed on the servient tenement is not to be increased by the action of the owner of the dominant tenement, regard must be had to

the fact that the predominant idea is that the dominant tenement shall really enjoy the easement granted, not as a mere theoretical right on paper, but by a real physical enjoyment of the right conferred.

(my italics)

64 Further at p. 784, Masten, J.A., said as follows:

. . . and I think that he is entitled, if he can do so without injury to the other lands of the plaintiffs, to make the way feasible by motor and to establish such a grade as will permit him to bring his motor to the rear of his premises.

65 It should be noted that reference is made here to the fact that if he can do so without injury to the other lands of the plaintiff. The injury referred to here, in my opinion, would be of a permanent nature. There would of necessity be some temporary inconvenience to the lands of the plaintiff during the process of construction but I would think it fair to assume that this type of injury, such as the accumulation of stone or dirt at the side of the construction would be cleared up at the completion of the job without any permanent injury to the lands of the plaintiffs.

66 In the case of *Cannon v. Villars* (1878), 8 Ch. Div. 415, Jessel, M.R., states as follows, commencing on p. 420:

As I understand the grant of a right-of-way *per se* and nothing else may be a right of footway, or it may be a general right-of-way, that is a right-of-way not only for people on foot but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument. Now one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right-of-way is granted. If we find a right-of-way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage not only of foot passengers, but of horsemen and carts. Again, if we find the right-of-way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right-of-way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right-of-way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used.

Where you find a road constructed so as to be fit for carriages and of the requisite width, leading up to a dwelling-house, and there is a grant of a right-of-way to that dwelling-house, it would be a grant of a right-of-way for all reasonable purposes required for the dwelling-house, and would include, therefore, the right to the user of carriages by the occupant of the dwelling-house if he wanted to take the air, or the right to have a waggon drawn up to the door when the waggon was to bring coals for the use of the dwelling-house. *Again, if the road is not to a dwelling-house but to a factory, or a place used for business purposes which would require heavy weights to be brought to it, or to a wool warehouse which would require bags or packages of wool to be brought to it, then a grant of right-of-way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and waggons at reasonable times for the purpose of the business. . . . of course where you find restrictive words in the grant, that is to say, where it is only for the use of foot-passengers, stated in express terms, or for foot-passengers and horsemen, and so forth, there is nothing to argue.* I take it that is the law. *Prima facie* the grant of a right-of-way is the grant of a right-of-way having regard to the nature of the road over which it is granted and the purpose for which it is intended

> to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right-of-way, or a right-of-way restricted to foot-passengers, or restricted to foot-passengers and horsemen or cattle, which is generally called a drift way, or a general right-of-way for carts, horses, carriages, and everything else.
>
> (my italics)

67 In the case at bar the express wording of the grant refers to "roads". There was at the time of the grant a grist-mill situate on the shores of Lot No. 20 and a road that led to this grist-mill. There is evidence also that this roadway was used by ox carts, which at the time of the grant was one of the ordinary methods of transporting goods. The road itself was a rough road because the nature of the use to which it was put did not make it necessary for it to be a smooth passage-way; however, it is clear that the roadway was intended for use for and was actually used by those people who wished to make use of the grist-mill and therefore was open to any type of vehicle which would haul or transport goods to and from the grist-mill.

68 In these circumstances where there is no restriction in the words of the grant as to the method of use, and there is evidence of the use to which the grist-mill was put, then I think it is fair to assume that the right-of-way was meant to be a road that would be sufficient for the purposes of the business which was being operated at the time, specifically, a grist-mill. Subsequently, there was also a saw-mill and a shingle mill in the area, serviced by the old road.

69 There is no restriction in the grant limiting the width of the roads referred to. It seems entirely reasonable that at the time of the grant, it was visualized that the roads would be wide enough to accommodate traffic that, depending on the use of the lots through the years, would become necessary.

70 To the question - Can the defendant upgrade or repair the right-of-way, which it has been determined he has the right to use, to make it fit for the operation of modern motor vehicles? The answer is, Yes, as long as he does this in a reasonable manner. He cannot, in my opinion, make excessive use of the right to repair and maintain the roadway, but as long as this repair or upgrading is done in a reasonable manner in line with the purpose of the original grant then the defendant may do so. There are no restrictive or qualifying words in the grant as to the authorized mode or quality of user. Reasonable access by the defendant to lot 20 would be reasonable access using modern methods of transportation.

71 The next question, of course, is, Has the defendant in the actions which he took to reconstruct the road to Lot No. 20 exceeded the reasonable use which was intended in the original grant of the right-of-way?

72 Mr. James MacKenzie, a provincial land surveyor, who walked the construction area where the old road was being reconstructed and who made a plan of the roadway, which was introduced into evidence as Exhibit 1, testified on behalf of the plaintiff. In referring to Exhibit 1 he gave the width of the new roadway being constructed at various points. He described the construction of the roadway and indicated that from point 0+00 on Exhibit 1 to the point marked "D" was a distance of 775 feet. This was the length of the old road which had been reconstructed up to the time of cessation of work. The total length of the old road from 0+00 to 12+55 on Exhibit 1 would be 1,250 feet.

73 Mr. MacKenzie said that at 1+55 on Exhibit 1, the newly repaired road was 12 to 13 feet wide; at 4+00 the road was 18 feet wide; at 4+25 the new roadway was 25 feet wide, and at 4+50 the road was 25 feet wide. The scale of the plan, according to Mr. MacKenzie, was one inch equals forty feet. At 4+75 the width of the roadway was 18 feet; at 5+50 the roadway was 20 feet wide, from 7+00 to 7+50 the roadway was 20 feet wide, 7+50 would be approximately where the construction ceased.

74 Mr. MacKenzie also said that the widest point of the road was 25 feet at a point marked "C" on the said Exhibit 1, which would be at approximately 4+25.

75 The witness MacKenzie also testified that large boulders of rocks were moved off to the side of the road and also that trees were uprooted and piled on the lands of the plaintiff. In addition, he testified that on his plan, just to the south of the point marked "C", that is at 4+25, that there was excavation on Aspotogan Lot No. 18 where the surface had been scraped off. He also indicated that there had been considerable removal of top soil from Lot No. 17, which was also the lands of the plaintiff.

76 He also said that to the north of 4+25 there are boulders and rocks and earth (presumably left as a result of the road construction) practically to the edge of the brook. Also from points 4+50 to 7+50 boulders were pushed off which would add a foot or two to the north side of the road. There were also a number of trees piled at this point.

77 Some question as to the validity of the north boundary line of Lot No. 17 on his plan was raised by defence counsel on cross-examination. The witness MacKenzie admitted that the shore line could apparently be in error and that the southern boundary of Lots Nos. 18, 19 and 9, and therefore the northern boundary of Lot 17, could not be determined exactly on the material he had before him in Court. The witness testified that he used as a guide line a blazed line near Lot No. 19, but he did admit that the proper way to fix this boundary line would be by survey. I am satisfied that the northern boundary line of Lot No. 17 and the southern boundary lines of Lots 9, 18 and 19 might very well be inaccurately shown on Exhibit No. 1. This, consequently, effectively nullifies any proof of excavation that may have been done in this area. This would apply to references of the witness MacKenzie to excavation on and over the boundary line of Lot No. 17.

78 The witness also admitted that the boundary line of Lot No. 18 could be out as much as 10 feet.

79 Harvey Dauphinee was the man who was in charge of reconstructing the old roadway. He gave evidence on behalf of the defendant. He testified that he was authorized by Mr. Lawrence to go on this roadway and to build a suitable road to his cottage. There was clearly an old roadway there and it just needed to be improved. Mr. Lawrence did not stay at the scene but simply left the job in the hands of Mr. Dauphinee.

80 Mr. Dauphinee indicated that he noticed wood cuttings in the immediate vicinity which were four or five years old. There was also trees along the side of the road that he noticed piled there. He did not cut or knock down any trees at all. There were a few wind-falls on the ground which they moved off the roadway with his bulldozer. He did say that they grubbed off some shrubbery and he did use some shale on the side of the road, about halfway down the road. He testified that this shale was on property belonging to Floyd Snair.

81 Mr. Dauphinee testified that they started on the roadway about 250 feet in from the entrance to the old highway and that at that point where he started the roadway was about 25 feet wide, but he said that he did not widen this as it had been widened in the past before he ever started there. For the first 250 feet, apparently, it was simply just a matter of pushing rocks aside and putting in a little fill, that is, he was putting a cap on the rough terrain. He indicated that rest of the roadway constructed was 14 to 15 feet wide; however, in some places, in order to have the road hold up it would have to be a pretty good width because of the depth of the materials, and where he encountered wind-falls and old trees he filled right over them. He did admit that they left a pile of earth just where they ceased construction around the point marked "D" on Exhibit 1, and there was considerable debris, rocks and so on, along the way, but this would all have been cleared up when the road was completed.

82 The normal method used would be to come back over the road and clean up the debris that was left along the way. He estimated that his price for constructing the road would be approximately $1,000 a day. He said that in certain areas the road had to be approximately 15 feet wide because if it was not made that wide it would not

hold up, and he indicated that he did not exceed 15 feet in width anywhere along the roadway. He also testified that to prevent settling he would put shale on top of the roadway and then have his employees drive over it with their vehicles so as to compact it. The whole road would be compacted down.

83 The actual construction of the road was left up to him by Lawrence. Lawrence simply gave orders to construct a road in to the cottage. Dauphinee indicated that he would grade the road so that the water would run off it. His machines did not damage any trees while turning around or in any other manner.

84 There is some contradiction between the witness MacKenzie and the witness Dauphinee but I accept Mr. MacKenzie's evidence to the extent that where he says the road was 20 and 25 feet wide in certain places that this actually was so. I cannot accept all of the dimensions or courses shown on his plan since he did admit under cross-examination that the shore line as shown on Exhibit 1 might not be accurate nor is the northern boundary of Lot no. 17. I accept Dauphinee's evidence as to the construction methods used, including the fact that he did not uproot or cut any trees and dealt only with deadfalls.

85 It would appear to me that Mr. Lawrence, the defendant, simply told Dauphinee to build him a road without specifying any measurements. I think that in authorizing Dauphinee to proceed and build a road in the manner in which he did Mr. Lawrence acted precipitously. He apparently felt that he had a right to build any type of road that he wished along the old road without having any regard to the rights of the owner of the land on each side of the roadway.

86 It is true that the land of the plaintiffs is semi-wilderness, but this is the state in which the plaintiff wished to keep it. The fact that the newly constructed road would improve access to the area is exactly the situation which the plaintiff wished to avoid. The plaintiff has a right to prevent the excessive use of the right-of-way by the defendant.

87 I have already indicated that, in my opinion, the defendant Lawrence would have a right to reconstruct the road in a reasonable manner so as to make it fit for reasonable use by a modern motor vehicle; however, in proceeding in the manner in which he did, I feel that the contractor made an excessive use of the right granted to Mr. Lawrence. I find it difficult indeed to arbitrarily assess a width to which the roadway might be constructed, but in order to resolve this matter I must do so.

88 I have no doubt that the work authorized by Mr. Lawrence must be classified as excessive user where the roadway was extended to 20 and 25 feet in width, thereby causing some damage to the plaintiff's lands; however, I would think that in line with modern usage a roadway 15 feet wide would suffice for the efficient use of modern vehicles so that they might travel to and from Mr. Lawrence's cottage site. I can readily appreciate Mr. Dauphinee's problem in constructing a road when he says that a road would have to be approximately 15 feet wide in order that it would not deteriorate shortly after it was constructed. In my opinion a roadway 15 feet wide extending along the course of the old roadway, previously referred to would provide a satisfactory right-of-way and I find that the defendant has the right to construct such a roadway, and to use modern construction machines to do so, without, however, causing any injury to the plaintiff's land.

89 I do not consider the piling of rocks or of loose earth injury to the plaintiff's land when it is the intention of the defendant to remove such material at the conclusion of the construction work. Such materials will not cause any damage to the plaintiff's property in its present state.

90 In the circumstances described by Mr. MacKenzie, however, the defendant exceeded the use to which he had a right to put the roadway and thereby caused some damage to the plaintiff's property in the excavation work done on Lot 18, and widening the road to 20 and 25 feet; however, this damage to my mind can be remedied by damages and would no longer require the use of an injunction. The defendant himself, because of the fact that his work was stopped by means of the injunction and the contractor, Mr. Dauphinee, being compelled to remove all of his vehicles, will be put

Continued on Page 85.

Nova Scotia Supreme Court, Trial Division
Dubinsky, J.
May 28, 1971

TORTS - TOPIC 1525

PUBLIC NUISANCE ON A HIGHWAY - WHO MAY BRING AN ACTION - THE PLAINTIFF LANDOWNER CLAIMED DAMAGES AND AN INJUNCTION AGAINST THE DEFENDANT FOR BLOCKING A PUBLIC RIGHT OF WAY - THE PLAINTIFF OWNED LAND ABUTTING THE PUBLIC RIGHT OF WAY - WHETHER THE PLAINTIFF SUFFERED SPECIAL OR PARTICULAR DAMAGE - THE TRIAL COURT HELD THE PLAINTIFF SUFFERED PARTICULAR DAMAGE AND THEREFORE WAS ENTITLED TO MAINTAIN THE ACTION - THE TRIAL COURT GRANTED INJUNCTIVE RELIEF - PARAGRAPHS 22 TO 24.

HIGHWAYS - TOPIC 175

ESTABLISHMENT OF A PUBLIC RIGHT OF WAY - IMPLIED DEDICATION OF THE SOIL TO THE USE OF THE PUBLIC - THE EVIDENCE AT TRIAL ESTABLISHED THE EXISTENCE OF A PUBLIC ROAD FOR AS LONG AS ANYONE COULD REMEMBER AND ALSO THAT NO LIVING PERSON KNEW HOW THE ROAD CAME TO BE USED - THE TRIAL COURT HELD THAT THE ROAD WAS A PUBLIC RIGHT OF WAY - PARAGRAPHS 18 TO 21.

HIGHWAYS - TOPIC 15

DEFINITION - PUBLIC RIGHT OF WAY - THE TRIAL COURT DEFINED A PUBLIC RIGHT OF WAY - PARAGRAPH 13.

WORDS AND PHRASES

PUBLIC RIGHT OF WAY - PARAGRAPHS 13 AND 15.

WORDS AND PHRASES

EASEMENT - PARAGRAPH 17.

This case arose out of a claim for damages and for an injunction by the plaintiff landowner against the defendant for obstructing a road leading to the plaintiff's property. The trial court found that the defendant placed obstructions on the road which prevented the plaintiff from using the road and the court enjoined the defendant from placing any obstruction on the road in the future.

The trial court held that the plaintiff was not entitled to an easement over the road but that the road was a public right of way. The trial court stated that the evidence established that the plaintiff was unable to determine the original owner of the land out of which the road area was created. In addition, no living person knew how the road came to be used as a road and there were no records pertaining to the road. All the witnesses at the trial stated that in their memory the road had always been used as a road. Accordingly, the trial court held that there was an implied dedication by the owner of the land as a public right of way.

The trial court stated that the obstructions placed on the highway by the defendant were a public nuisance and that only persons suffering special or particular damage could commence an action with respect to such a nuisance. The trial court held that the plaintiff suffered particular damage quite apart from the general inconvenience endured by the plaintiff in common with the public at large. Accordingly, the plaintiff was entitled to maintain an action against the defendant for obstruction of a highway - paragraph 24.

IRVING PINK, Q.C., for the plaintiffs.

No one for the defendants.

1 DUBINSKY, J.: The plaintiff, Mitchell Newell, is the owner of a lot of land on the northern side of a roadway called Long Point Road at Newellton, Cape Sable Island, in the County of Shelburne, Nova Scotia. The plaintiff, Dorothy MacKinnon, a married woman, is the owner of a lot of land adjoining that of Mr. Newell and on the same side of Long Point Road. The defendants, Edwin Smith and his wife, Avis Smith, own a lot of land on the opposite side of Long Point Road in close proximity to the land of the plaintiffs. I shall later set forth fully the dimensions of the lots owned by the parties to this action.

2 In the Statement of Claim, the plaintiffs allege that on or about August 1, 1968, the defendants began to wrongfully block the roadway which runs between the plaintiffs' land and that of the defendants, in order to prevent access to the plaintiffs' land and as soon as the plaintiffs would remove the blockings, the defendants would replace them. The plaintiffs in addition to claiming damages for trespass and improper blocking of the roadway, ask the Court to grant an injunction to restrain the defendants, their servants and agents from continuing or repeating the acts of obstruction.

3 The plaintiffs were represented by Irving Pink, Q. C., of Yarmouth, N. S., and an Appearance had been entered on behalf of the defendants by a solicitor, Mr. Gerald B. Freeman of Liverpool, N. S. Subsequently, Mr. Freeman notified both his clients and Mr. Pink that he was no longer acting for the defendants. No change of solicitors took place and no Defence was filed. When the case opened in Barrington on Tuesday morning, May 18, 1971, I inquired if the defendants were in attendance in the courtroom. There being no response to my inquiry, I instructed the sheriff to go outside and to ascertain if Mr. and Mrs. Smith were present in the building. The sheriff returned and reported that they were there but could not come upstairs as Mr. Smith was elderly and had a heart condition and that Mrs. Smith had some leg trouble. To ensure that there would not be any possible injustice done to the defendants, I went down stairs and spoke to both Mr. and Mrs. Smith.

4 When I asked them if they wished to be heard, they said that they saw no reason for their being there and that "Mr. Freeman had fixed up everything." I endeavoured to point out to them that such had not been done and that Mr. Freeman had in fact, withdrawn from the case and according to a letter on file from his office, he had notified them of this withdrawal on March 4, 1971. I asked him if they wished to have another lawyer represent them, but they kept insisting that "Mr. Freeman had fixed up everything." I told them that I would hear the facts of the case even though they were not present and they then left the court house.

5 On returning to the courthouse, I advised Mr. Pink of my conversation with the defendants and pointed out that evidence should be taken. Counsel for the plaintiffs readily agreed, saying that he had been prepared to do that. He had been aware, he said, that it was difficult to reason with the defendants but did not wish to take any advantage by their not having filed a Defence or not being represented in Court.

6 The evidence disclosed that on July 4, 1934, the plaintiff, Newell, bought a lot of land from one Arthur B. Smith, the dimensions of which are described as follows in the deed:

> ALL that certain piece or parcel of land, situated at Newellton in the County of Shelburne and bounded and described as follows:-
>
> Beginning on the Northeast side of the Main Highway at a rock marked C on the Northwest side of Long Point Road, then along the said Main Highway in a Northwesterly direction one hundred and two feet to a stake; thence in a Northeasterly direction twenty-five feet to a stake; thence in a Northwesterly direction thirty-three feet to the lands of School Section #23; thence in a Northeasterly direction along said lands of School Section #23, fifty-eight to a stake; thence continuing along the said lands in a Northwesterly direction ninety-nine feet to the lands of Bradford Atkinson; thence along the said lands of Bradford Atkinson in a Northerly direction to a rock marked A; thence in an Easterly direction to a rock marked B at the Sea Shore; thence along the Sea Shore in a Southeasterly direction to the

lands of Bradford Smith; thence in a Southerly direction along the said lands of Bradford Smith to the Long Point Road; thence along the said Long Point Road to the Main Highway, and point of beginning.

7 Robert L. Hunt, a Nova Scotia Land Surveyor, testified for the plaintiffs. He had made a survey of the plaintiffs' lands and tendered plans that he had prepared. According to his survey, this plaintiff's lot had the following description:

BEGINNING at a point on the Northeastern side of the Main Highway at Newellton, aforesaid, at a point 33 feet distant from the centre of the paved highway, at the intersection of the said Main Highway and the Long Point Road so-called; THENCE North 51 degrees 22 minutes 21 seconds East along the Long Point Road so-called One Hundred and Twenty-seven point Thirty-five (127.35') feet to an iron bolt and lands of Dorothy MacKinnon; THENCE North 15 degrees 6 minutes 58 seconds West along a wire fence and lands of Dorothy MacKinnon Six Hundred and Thirty-six point Fifty-six (636.56') feet to an iron bolt; THENCE North 50 degrees 28 minutes West along the shore line One Hundred and Forty-six point Thirty (146.30') feet to a further iron bolt and lands of Arthur Atkinson; THENCE south 47 degrees 47 minutes 20 seconds West One Hundred and Sixty-one point zero six (161.06') feet to a rock with an "X" on it and lands of Bradley Atkinson; THENCE South 18 degrees 14 minutes 13 seconds East along lands of Bradley Atkinson and Maurice Atkinson Four Hundred and Ninety-two point ten (492.10') feet to an iron bolt and lands formerly known as the Newellton School property; THENCE South 55 degrees 54 minutes 45 seconds East along lands formerly known as the Newellton School property Ninety-nine point Seventy-one(99.71') feet to an iron bolt; THENCE south 35 degrees forty-one minutes 35 seconds West Seventy-nine point Sixteen (79.16') feet to an iron bolt and the Northeastern side of the main paved highway; THENCE following the main paved highway South 50 degrees 40 minutes 50 seconds East One Hundred and Forty-one point Sixty-one (141.61') feet to an iron bolt and the place of beginning.

8 The plaintiff, MacKinnon, bought three lots of land on June 2, 1945, from A. Bradford Smith, one of which is the lot relevant to this action. It is described in the deed as follows:

ALSO all that certain lot, piece or parcel of land and premises situate, lying and being at Newellton aforesaid in Class No. 5 and bounded and described as follows: COMMENCING at the road leading to Long Point, so-called, on the line dividing the above described lands from lands formerly of Jethro W. Smith, thence by said line northwestwardly to the seashore; thence westerly by the seashore to land formerly of Arthur B. Smith now of Bradford Atkinson, thence in a southeasterly direction by said Atkinson's land and land of Mitchell Newell to the said road and the place of beginning. The above being the same lands and premises conveyed to said A. Bradford Smith by Mitchell B. Smith and wife by deed dated June 13th, A.D. 1911, and duly recorded in the Registry of Deeds at Barrington in book J page 271.

9 According to Mr. Hunt's survey, this lot had the following description:

BEGINNING at the Southeastern corner bound of land of Mitchell Newell, on the Northern side of the Long Point Road so-called at an iron bolt; THENCE North 51 degrees 45 minutes 40 seconds East along the said Long Point Road so-called Two Hundred and sixty-eight point twenty-three (268.23') feet to a further iron bolt and lands formerly of Jethro Smith; THENCE North 16 degrees 11 minutes 30 seconds West along a stone wall One Hundred and Sixty-two point Forty-eight (162.48') feet to a further iron bolt; THENCE North 19 degrees 51 minutes 25 seconds West along the said stone wall Two Hundred and Two point Fifty-six (202.56') feet to an iron bolt and the shore line; THENCE North 58 degrees 26 minutes 25 seconds West along the shore line One Hundred and Seventy-two point Forty-six (172.46') feet to a bolt; THENCE North 84 degrees 12 minutes 30 seconds West along the shore line One Hundred and Sixteen point Twenty-two (116.22') feet to an iron bolt and land

> of Mitchell Newell; THENCE South 15 degrees 6 minutes 58 seconds East along land of Mitchell Newell, a wire fence and to the first mentioned bound and the place of beginning.

10 It will be noted that there is some discrepancy between the description in the Mitchell Newell deed and the description of his property as surveyed by Mr. Hunt. The measurements in the Dorothy MacKinnon deed and those set out for her in the Hunt plan are easily reconcilable. However, nothing turns on the discrepancy between the Newell deed and plan. The Newell and MacKinnon lots, both by deeds and plan, adjoin one another on the one side of Long Point Road, whether that side be called the northern side, the northwestern or the western side of Long Point Road. They do not touch the defendants' lot which is on the opposite side of the road.

11 I am satisfied by a preponderance of evidence and find as a fact that the defendants did place obstructions across Long Point Road, thereby preventing the plaintiffs from having access to or egress from the road as was their custom for years. Not only did the defendants obstruct the road, but they also made verbal threats of harm to the plaintiffs should they attempt to remove the roadblocks. Mr. Newell, who is an elderly man, stated that he was in fear of the female defendant. His problem was that he could not drive to a barn which was located on his property. Mrs. MacKinnon, who would like to sell some of her land, found that prospective buyers lost interest in view of the obstructions placed on Long Point Road, and which obstructions continued up to the date of trial, May 18, 1971. The plaintiffs have clearly proven this part of their case.

12 What is not so clear is the exact nature of Long Point Road. Firstly, is it a private right of way used and enjoyed by adjoining landowners, such as are the plaintiffs and defendants in this case, or is it a public right of way to be used by all of the Queen's subjects? Secondly, if it is a public right of way, did the plaintiffs have the right to institute this action?

13 In determining the answers to the above questions, I found very helpful an interesting little booklet *Rights of Way and Access to the Countryside* by J. F. Garner (2nd ed., 1969). Following are a few excerpts from this work:

14 At p. 8, the author states:

> Rights of way are either public or private.
>
> In *Hawkins v. Rutter*, (1892) 1 Q.B. 668, Lord Coldridge, C. J., observed that 'the term "easement" has somewhat loosely and perhaps inaccurately, but still with sufficient accuracy for some purposes, been said to define a public right of way, but that in strictness it was generally only applicable to a private right, which is an 'easement', an incorporeal right in the nature of a privilege which has been created by grant or by reservation or by prescription; see also per Cozens-Hardy, M. R., in *Woodman v. Pullbach Colliery*, (1915) A.C. 634. In English usage therefore only private rights of way are thought of as being easements, a public right of way lacking the essential requirement of a dominant tenement for the benefit of which the right is exercisable.

15 Under the heading *The Creation of Public Rights of Way*, the following appears on pp. 17-22:

> Public rights of way arise in two ways: they are either provided for by statute, or they are created by dedication of the soil to public use by the owner and acceptance by the public. It is sometimes claimed that the right may arise by prescription; but the principles of the common law of prescription and the *Prescription Act*, 1832, do not apply to public rights of way, but only to private rights, and it is desirable, in order to avoid difficulty in a case where long user may be the basis of a claim, to prove facts which would justify the presumption of dedication. 'Where there has been evidence of a user by the public so long and in such a manner that the owner of the

fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact *may* find that there was a dedication by the owner, whoever he was. . . .

. . .

Apart from ways created by statute, no right of way can be created except by dedication and acceptance - the latter simply meaning user by the public. Such user need not necessarily be immediate. Some length of time may elapse before the public actually begin to make use of the road and thus secure the right of way; but delay extending over a long period may be a matter of importance should any question of dedication and acceptance arise at some later period. . . .

Dedication may be either *express* or *implied*. Express dedication can be shown only when the actual facts and circumstances under which a landowner granted a right of way over his land to be used by the public at large can be disclosed. Generally, where the facts are known . . . no question is likely to arise. It is only when there is a difference of opinion as to whether a right of way exists that evidence becomes necessary from which it may be presumed that there was an intention on the part of the owner to dedicate this right to the public. 'It is necessary to show, in order that there may be a right of way established, that it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right, and from this apparent acquiescence of the owners a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication' (per Blackburn, J., in *Greenwich Board of Works v. Maudslay* (1870), L.R. 5 Q.B., at p. 404 . . .

(my italics)

16 Section 10 (1) of the *Public Highways Act*, R.S.N.S. 1967, c. 248, provides as follows:

Except in so far as they have been closed according to law:

(a) all allowances for highways made by surveyors for the Crown;

(b) all highways laid out or established under the authority of any statute;

(c) all roads on which public money has been expended for opening, or on which statute labour has heretofore been performed;

(d) all roads passing through Indian lands;

(e) all roads dedicated by the owners of the land to public use;

(f) every road now open and used as a public road or highway; and

(g) all alterations and deviations of, and all bridges on or along any road or highway;

shall be deemed to be common and public highway until the contrary is shown.

17 Garner, *op. cit.*, pp. 102-103, discusses private rights of way and states:

The distinction between a 'public' and a 'private' right of way is that the former right is common to all subjects of the Queen, whereas the latter is a right vested in some particular individual or individuals and not in the public at large. According to the learned author of the 'Easements' section

of *Halsbury* (3rd ed., vol. 12, p. 569), a private right of way may be defined as 'a right to utilize the servient tenement as a means of access to or egress from the dominant tenement for some purpose connected with the enjoyment of the dominant tenement, according to the nature of that tenement.' He cites *Ballard v. Dyson* (1808), 1 Taunt. 279, and *Cannon v. Villars* (1878), 8 Ch. D. 415, as containing the judicial dicta from which the nature of a private right of way may best be gathered.

The essential qualities of any easement (including a private right of way) have been described in *Re Ellenborough Park*, (1966) Ch. 131 as being that:-

'(a) there must be a dominant and a servient tenement;

(b) an easement must accommodate the dominant tenement, i.e., be connected with its enjoyment and for its benefit;

(c) the dominant and servient owners must be different persons; and

(d) the right claimed must be capable of forming the subject-matter of a grant'

(per Danckwerts, J., at p. 140, upheld in the Court of Appeal at (1956), Ch. 153).

18 Counsel for the plaintiffs, Pink, Q.C., expressed the opinion that Long Point Road was a private right of way, the rights to which had been acquired by the plaintiffs and their predecessors in title by open, continuous and uninterrupted user thereof for a period in excess of twenty years. This view commended itself to me at the beginning of the case but as the evidence unfolded, I reached the conclusion that this country dirt road, which on the plan is shown to be but 10 feet wide (some witnesses described it as being wider), is actually a public road. The evidence of two witnesses was very helpful.

19 Mitchell Newell, one of the plaintiffs, is 77 years of age. He stated that Long Point Road was in existence as long as he could remember and had been used for years by people going back and forth to what is called Long Point. Bradford Smith, who sold the property to Mrs. MacKinnon, the other plaintiff, is in his 85th year. Despite his advanced age, I found him to be a most convincing witness. He was asked about Long Point Road and his reply was:

> Well, I can remember back when I was about 12 or 13 years old, anyway, and it was always open down through there for people to go from my wire fence run down through to the other side of the road and everybody went back and forth down there. At least 75 years, I'll say.

The witness went on to give the names of some of the people who during past years lived at various places along this road. They all used the road, going to and from their homes and during all the years, he never knew of the road being blocked. He saw oxen and carts, horses and carts and hayracks loaded with hay going over the road. He moved away from the area in 1941 but goes back there "every once in a while."

20 If it were that the plaintiffs had a private right of way over what is now known as Long Point Road, the road area must be treated as the servient tenement to the plaintiff's' dominant tenements. But no evidence was produced before me as to who is now or who was at any time in the past the owner of this servient tenement. Indeed, I gathered from Mr. Pink's submission that it had not been possible for the plaintiffs to determine who years ago owned the land out of which the road area was carved. No one living knows as to how the road came to be used nor are there any records pertaining to it. All the witnesses can say is that it was always used as a road by all and sundry and as already noted, according to two elderly witnesses, this had been the situation for 70 years or more. Deeds and other documents dated years ago refer to Long Point Road.

1 Accordingly, having satisfied myself that Long Point Road is a public right of way, I then had to consider whether the present action taken in this Court was the proper procedure in the circumstances and, if it were the proper step to take, was it taken by the proper parties. It may be noted that a s. 39 of the *Public Highways Act*, R.S.N.S. 1967, c. 248, provides as follows:

> (1) Any person who
>
> (a) places an obstruction on a highway;
>
> (b) places an obstruction in a drain, gutter, sluice or watercourse on a highway;
>
> (c) prevents by a dam or obstruction water flowing from the highway on to the adjoining land whether or not he is the owner or occupant of such land; or
>
> (d) causes water to flow over the highway;
>
> is liable to a penalty of not more than fifty dollars and in default of payment thereof to imprisonment for not more than fifteen days.
>
> (2) The cost of removing any such obstruction or dam and of repairing any damage caused by it or by water may be recovered from such person by, and in the name of the Minister as in an action of debt.

22 I recognize that much can be written on who may take steps - and what the nature of the proceedings may be - to deal with the problem of a nuisance to a highway. However, for the purposes of this case, I am content to refer merely to an excerpt from *Salmond on Torts* (15th ed., 1969) at pp. 108-110, which states:

> A nuisance to a highway is a criminal offence and may be made the subject of an indictment at common law. It may also be restrained by injunction at the suit of the Attorney-General acting ex officio or at the relation of a local authority or any private person interested in the matter. But it is not *per se* actionable at the suit of a private person - a rule established for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause. No such action will lie save at the suit of a person who can show special and particular damage suffered by himself and distinct from the general inconvenience endured by him in common with the public at large. So in this branch of the law it is plain that it is not enough for the plaintiff to show that the damage was reasonably foreseeable. The terms 'special' and 'particular' are used, apparently indiscriminately, in this field of the law, to describe the nature of the damage which the plaintiff must prove. The latter term is preferable: the plaintiff need not prove that the damage which he has suffered is extraordinary. Again, the particular damage for which an individual can sue in his own name is not limited to special damage in the sense of actual pecuniary loss, but may consist of proved general damage - e.g., inconvenience and delay, provided that it is substantial, direct, and appreciably greater in degree than any suffered by the general public. The damage must be of a substantial character, not fleeting or evanescent.

23 Both Garner and Salmond cite a number of cases touching upon the point. I propose merely to refer to one, viz., *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316. At pp. 320-321, Kelly, C.B., said as follows:

> The substantial point for our decision in this case is whether this action is maintainable. The rule of law on the subject, which is well laid down in the case of *Ricket v. Metropolitan Railway Company* 5 B. & S. 156; 34 L. J. (Q.B.) 257, is, that in order to entitle a plaintiff to maintain an action, he must show a particular damage suffered by himself over and above that suffered by all the Queen's subjects. I will refer to one or two

authorities in support of this proposition. The leading case is that of *Iverson v. Moore*, 1 Ld. Raym. 486; and it is laid down there by Lord Holt that there must be a particular damage done to a particular person in order to found an action, otherwise there would be danger of a multiplicity of actions. It was observed, indeed, during the argument, that people must be careful not to violate the law, and if they do so, they must take the consequences. Observe, however, to what this argument may lead. It often, for some reason or other, becomes absolutely necessary to set up an obstruction in a highway. For example, commissioners of sewers, gas companies, or commissioners for draining, paving, or lighting may be obliged for a time to obstruct a highway. Now, suppose it were to turn out that there was some want of authority for the appointment of the commissioners, or some unintentional deviation from the statutory powers conferred on them, they would of course be liable to an indictment for wrongfully obstructing the highway. But if we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought.

24 I am satisfied that both plaintiffs have suffered particular damage and substantial inconvenience as a result of the unlawful acts of both defendants and that their damage is quite distinct from the general inconvenience endured by them in common with the public at large. They are entitled to damages, but in view of the age of the defendants and their poor state of health, I feel that justice will be done if I direct that the defendants remove forthwith the obstructions placed by them on Long Point Road and that the defendants and each of them be enjoined from placing any obstruction on the said road in the future. When the order pursuant to this decision will have been taken out, I direct that the sheriff of the County of Shelburne serve a copy of this order on the defendants personally and to ensure that they know what it contains, the sheriff will read it to them slowly and clearly.

25 On the question of costs, I repeat that the defendants are up in years and infirm. However, if the plaintiffs wish to have their costs, I will hear counsel on the matter.

*Judgment for the plaintiffs.*

Continued from Page 77.

to considerable expense in having these vehicles put back into operation at the site. The defendant will also suffer from delay caused by the stoppage in construction; however, he must bear the consequences of his own precipitous actions.

91 I do not consider the damages to the plaintiff's land to be serious; however, I consider that it was necessary for the plaintiff to initiate this action to restrain the defendant from encroaching further on the plaintiff's lands. The injunction will be dissolved, the defendant will be permitted to construct a roadway not to exceed 15 feet in width along the course of the old road. I fix the plaintiff's damages at $400. The plaintiff will have judgment for $400 and costs of the action.

*Judgment for the plaintiff in part.*

Nova Scotia Supreme Court, Appeal Division
Coffin and Cooper, JJ.A. and MacIntosh, J.
July 12, 1973

RESTITUTION - TOPIC 2505

QUANTUM MERUIT - BENEFIT ACQUIRED BY DEFENDANT BY ACTS OF THE PLAINTIFF WHICH ACTS WERE DONE AT THE REQUEST OF THE DEFENDANT - THE PLAINTIFF GAVE THE DEFENDANT A QUOTATION OF $4,500 FOR AN AERIAL SURVEY - AN EMPLOYEE OF THE DEFENDANT SUPERVISED THE SURVEY WORK WHICH RESULTED IN MORE WORK THAN WAS ORIGINALLY SPECIFIED BY THE DEFENDANT TO THE PLAINTIFF - THE PLAINTIFF CLAIMED $9,582 - THE TRIAL COURT AWARDED THE PLAINTIFF $7,582.

. . .

The judgment of the court was delivered by Coffin, J. A.

. . .

9 In considering the merits of the application, I propose to mention some of the evidence.

10 The defendant, Atlantic Air Survey (1963) Limited, had entered into a contract with the Province of New Brunswick to do survey work in the Northeastern areas of that province, the overall price for the job being $17,000. The defendant's President, Mr. Stanley E. Daykin, communicated with Mr. Ralph Graham Brown, the President of the plaintiff company Seaboard Surveys Limited, giving Mr. Brown a brief statement of the work required and asked him for a price. Mr. Brown gave him a price on the basis that the work would absorb three weeks at $1500 or $4500. These communications were apparently by telephone, but Mr. Daykin then wrote Mr. Brown confirming the employment of Seaboard as a subcontractor.

11 After three weeks it became apparent to the plaintiff that there was much more work required than had at first been indicated and it could not be done in that period. The plaintiff continued and finished the work in five weeks and submitted an account for $9,582.91. There was some effort to settle this balance by compromise. Mr. Daykin suggested that Mr. Brown reduce the amount by $2,000, largely apparently because of alleged delays by faulty equipment. This would leave a balance of $7582.91. He further suggested that an application be made to Mr. Frank Maddox for an additional $3,082.91. Mr. Maddox was engineer in the highway division for the Department of Public Works, Province of New Brunswick. In the letter in which these suggestions were made Mr. Daykin referring to this sum of $3,082.91 said:

> . . . which I think we can justify on the grounds of additional points selected to ease photo identification and the greater care necessitated by the establishment of 13 New Brunswick monuments.

This suggestion did not succeed because as Mr. Maddox said he couldn't discuss it, the people whom he represented having had no contract with the plaintiff. In his discovery Mr. Daykin said that Mr. Ralph Brown had quoted him a price of $4,500 on the basis of three weeks' work. He agreed that control points were to be set up by the defendant's surveyor and that there were difficulties with the location of these points. The work took from October 24, to November 25, 1967. He further agreed that Seaboard instead of doing 42 photo control points actually did 77, but he said that it was not until the job was finished that Atlantic Air Survey was advised that there were any excess costs. Mr. Daykin's position was that Atlantic's quotation to the Province of New Brunswick contained Seaboard's price, dollar for dollar, and was completely dependent for one portion of the claim on the quotation. Had Seaboard indicated there was a possibility of a different price, the quotation to the province would have been increased considerably.

12 Mr. Brown, on the other hand, testified on discovery that his conversation with Mr. Daykin indicated that they would have 27 miles of traversing of approximately one mile tangents and 42 control points. At the completion of the job, the plaintiff's records indicated that it had in fact occupied 146 stations, measured 115 distances, measured over 53 miles of traversing and there were 77 control points designated and outlined by Mr. Clarke, who gave the instructions on the survey on behalf of the defendant to the plaintiff.

13 In his direct evidence at the trial, he said that where photographs may be taken previously the control points capable of identification are picked out. The aerial photographs plus the survey tied in with objects shown on the photo, producing a control map of the area. He said that he based his estimated cost on a traverse of 27 miles with traverse points at one mile interludes, which meant selecting points of visibility one mile apart. In other words, 27 miles with 27 stations *or tangents. There were to be 42 control points. Instead of this, Mr. Brown said* that they had to measure angles at 126 stations or points on them, measure the distance on 115 separate tangents and make 77 tie or photo control points. He said that they had to occupy 146 stations from where the angles were measured whereas they had assumed they would have 28 to 30 stations to occupy and approximately 27 tangents. On cross-examination, Mr. Brown said that difficulties similar to this had arisen on other occasions and they had had no trouble collecting for extra work required.

14 Mr. Charles Topple, who was in charge of the work on the ground, made the following comparison:

| Information on which Original Quotation Based | | Actual Work Done |
|---|---|---|
| Traverse | 27 miles | 54 miles |
| *Tangents measured* | 27 | 115 |
| Angles to be measured | 27-30 | 146 |
| Photo control points "tied in" | 42 | 77. |

Mr. Daykin's evidence on discovery, which was also referred to in his cross-examination, included the following:

> Q. So you would agree with me, then, that what was requested of Seaboard to do was something like 27 miles of traverse?
>
> A. No. The total length of the job was 27 miles, but the traverse would be either 43 or 47 miles.

*The comparison which I have just set out would need to be modified in the light of* that information.

15 The position of the plaintiff was that the difficulty was caused largely by the points selected by Mr. Clarke. I quote from the direct examination of Mr. Topple:

> Q. Now, would you, perhaps with the aid of exhibit #1, explain to me why there would be 115 tangents to get 146 angles?
>
> A. Well, the job was made up on a series of traverses, originating from an unknown point of where it started into another unknown point of distances, or perhaps an open place, which we consider an open traverse. In either case there's one more angle required at the end. In other words, in reference to this we have one, two, three, four, five stations that would have to be occupied and which angles to turn. Then we have one, two, three, four--four distances.

16 Without going into the detail of the work at greater length, it appears to me that the main difference of opinion between Mr. Brown and Mr. Daykin arose from the quotation of the original price. Mr. Brown says that he was giving an estimate in reply to a telephone call whereas Mr. Daykin says that he had asked for a firm price. He further said that he had no knowledge of the additional costs until he received the bill and that no matter how sympathic he was with the plaintiff's position, he couldn't pay the extra amount because he was locked in by his contract with the province of New Brunswick.

17 Mr. Garnet Clarke's evidence mentioned bad weather at the beginning of the work and breakdown in electrical equipment. He did feel that the first phase should have been completed more quickly and than in any event the whole job would have been done within three weeks if it had not been for instrument failure and weather conditions. He admitted that he was surprised that the traverse included so many stations which he said resulted in 143.

18 I should say that the defendant sent two cheques to the plaintiff, one on March 14, 1968, for $2,000 and another on March 21, 1968, for $2500. These were not cashed by the plaintiff because of certain endorsements which they contained.

19 The trial judge expressed the opinion that the burden of proof of the performance of extra work "by the plaintiff at the request of the defendant lies upon the former."

20 After reviewing the evidence, the trial judge found that the plaintiff did more work than was originally contemplated and that the main reason for this was that Mr. Clarke on the side directed the work which was actually performed. He quoted Mr. Daykin's evidence at the trial:-

> Q. Let me refer you to the Discovery again. Page 18: - Q. Don't you feel they (meaning Seaboard) are entitled to more than $4500.00 for having done on their own admission additional work? Your answer as recorded is: Perhaps; yes.
>
> A. I think that would be my answer now, 'perhaps; yes.'

He accepted this answer as an admission that the plaintiff was owed more than $4500 because of extra work. Finally, the trial judge said "This extra, in my opinion, brought about a variation in the original contract. It thus follows that the plaintiff is entitled to be paid on a *quantum meruit* basis which would be a reasonable sum for the work done.

21 The trial judge then settled the balance as being $7,582.91.

22 After reviewing this evidence, reading the affidavit in support of the application of Mr. Angus L. MacDonald, the affidavit in reply of Mr. Thomas B. Davis and after a careful consideration of the potential merits of an appeal, it is our view that the application should be granted for an order vacating, striking out and setting aside the notice of appeal filed herein by or on behalf of the Defendant Appellant on or about the 21st day of June, A.D. 1973.

23 It is also our opinion that in view of the fact that the application was made in good faith and that Mr. Davis has taken full responsibility for the delays, the application should be granted without costs to either party.

*Application granted.*

SEABOARD SURVEYS LTD. v.
ATLANTIC AIR SURVEY (1973) LTD.

Nova Scotia Supreme Court, Trial Division
Bissett, J.
January 25, 1973.

ANGUS. L. MacDONALD, Q.C., for the plaintiff,
THOMAS B. DAVIS, for the defendant.

24 BISSETT, J.: The plaintiff's claim against the defendant is for the sum of $9,582.91 for services rendered.

25 The defendant says in his defence that the services rendered were in relation to sub-survey work in the Dalhousie area in the Province of New Brunswick. The defendant further says that for this work there was an agreed maximum sum of $4500 and that this has been paid and there is now nothing owing from the defendant to the plaintiff.

26 In the month of October, 1967, Mr. Daykin, the President of the defendant, contacted by telephone Mr. Brown, the President of the plaintiff. In this conversation Mr. Brown was asked to quote a price for certain horizontal control surveys. The plaintiff was to do this work as a sub-contract to a main contract the defendant had with the New Brunswick Department of Public Works. Following the conversation the plaintiff submitted a maximum price of $4500, which the defendant accepted. In October and November, 1967, the plaintiff began and completed the work, which was done under the supervision of Mr. Garnet Clarke, an employee of the defendant. In the month of December, 1967, the defendant received from the plaintiff a bill for $9,582.91. This the plaintiff refused to pay. The defendant did, however, send to the plaintiff two cheques on March 14, 1968, the sum of $2000, and on March 21, 1968, another sum of $2500. These cheques the plaintiff did not cash because of the endorsements thereon.

27 It is quite clear from the evidence that the initial agreement between the parties was that the plaintiff was to do the required work for at most $4500. The plaintiff now says that the work actually performed at the request of the defendant exceeded the work which was in the contemplation of the parties when the agreement for the price of $4500 was made. I am of the opinion that the burden of proof of the performance of extra work by the plaintiff at the request of the defendant lies upon the former. It is now necessary to examine the evidence to see how it stands in this respect.

28 It is also quite clear from the evidence that at the time the agreement was made between the parties, Mr. Daykin, of the defendant, advised Mr. Brown, of the plaintiff, that Mr. Garnet Clarke, an employee of the defendant, would be on the work site and determine for the plaintiff the details of the survey, that is the location of the control points and the air photo ties.

29 When Mr. Brown estimated the work could be done for about $4500 he also considered the work time would be three weeks or less. This was communicated to Mr. Daykin, of the defendant, by Mr. Brown, of the plaintiff. On October 7, 1967, Mr. Daykin accepted Mr. Brown's proposition by letter dated October 7, 1967.

30 The work began on or about October 23, 1967, when the plaintiff dispatched a three man survey crew with all equipment to the Campbellton-Dalhousie area in New Brunswick. Mr. Garnet Clarke was present as the survey progressed and indicated the work which he required done. This work which Mr. Clarke indicated according to the evidence took five calendar weeks and 750 manhours.

31 From the evidence of Mr. Topple, a surveyor for the plaintiff, it appears the plaintiff in its traverse covered 54 miles instead of 27 as initially agreed, measured 115 tangents instead of 27, measured 146 angles instead of 27 to 30, and did 77 photo control points instead of 42.

Continued on Page 95.

Nova Scotia Supreme Court, Trial Division
Hart, J.
September 15, 1971.

REAL PROPERTY - TOPIC 5725

EXTINGUISHMENT OF TITLE - STATUTE OF LIMITATIONS - ADVERSE POSSESSION - CONTINUATION AND DURATION OF POSSESSION - INTERRUPTION OR BREACH OF CONTINUITY - ENTRY BY ORIGINAL OWNER - PLAINTIFF'S FAMILY HAD OCCUPIED LAND FROM 1925 TO 1969 - SECTIONS 19 AND 21 OF THE LIMITATION OF ACTIONS ACT PROVIDED FOR ADVERSE POSSESSION AFTER FORTY YEARS - IN 1960, THE LEGAL OWNER HIRED A SURVEYOR AND WALKED OVER THE LAND OCCUPIED BY THE PLAINTIFFS - THE TRIAL COURT STATED SUCH ACTION BY THE LEGAL OWNER DID NOT CONSTITUTE AN ENTRY TO BREAK THE CONTINUITY OF POSSESSION OF THE PLAINTIFF - THE TRIAL COURT HELD THAT PLAINTIFFS HAD ACQUIRED TITLE TO THE LAND IN QUESTION - SEE PARAGRAPHS 22 AND 23.

WORDS AND PHRASES

ENTRY - MEANING OF WORD "ENTRY" IN LAW OF ADVERSE POSSESSION OF LAND.

This action arose out of a claim for damages with respect to trespass to property and for a declaration with respect to title to land. The plaintiff's family had occupied the land in dispute from 1925 to 1969. In 1960, the legal owner hired a surveyor and walked over the lands occupied by the plaintiffs. The legal owner took no further action with respect to the land until 1969, when he sold it to the defendants. The trial court stated that the action taken by the legal owner in 1960 did not constitute an entry onto land to break the continuity of possession of the plaintiffs. The trial court held that the plaintiffs had obtained title to the land by virtue of their adverse possession pursuant to ss. 19 and 20 of the Limitation of Actions Act - see paragraphs 22 and 23.

. . .

1 HART, J.: In this action the plaintiffs' claim damages against the defendants for alleged acts of trespass on their lands at St. Bernard, in the County of Digby, and a declaration that title to those lands is vested in them.

2 The evidence shows that James N. Stanton occupied a house and property at the junction of the main Digby to Yarmouth highway with the Township line road to Ohio during the early years of this century. On January 23, 1912, Mr. Stanton conveyed his property to Reverend Edward LeBlanc setting forth the following description of the lands in the Deed:

> ALL those certain lots, pieces or parcels of land situate, lying and being at St. Bernard in the said County of Digby and bounded as follows:
>
> Lot No. 1 Situate at St. Bernard and bounded as follows:
>
> STARTING on the Main Post Road at the Northeast angle of land of John C. LeBlanc;
>
> THENCE running Easterly along said Main Post Road to the Township line Road;
>
> THENCE along said Township line Road in a Southeasterly direction to lands of Charles H. Doucett;
>
> THENCE Southwesterly along said lands of Charles H. Doucett to lands of Oliver LeBlanc;

THENCE Westerly along said lands of Oliver LeBlanc to the Northwest corner thereof;

THENCE Southwesterly along said land of Oliver LeBlanc to Bastarache Line;

THENCE along said Bastarache line in a Northwesterly direction to land of the heirs of Gasper LeBlanc;

THENCE in a Northeasterly direction along said land of the heirs of the late Gasper LeBlanc to said land of John LeBlanc;

THENCE in an Easterly direction along said land of John G. LeBlanc to the Southeastern corner thereof;

THENCE in a Northeasterly direction to place of beginning.

1 On October 25, 1912, Reverend Edward LeBlanc conveyed the same lot to William J. Gaudet and Mr. Gaudet occupied the Stanton property for the next few years.

4 On October 21, 1921, William J. Gaudet conveyed a portion of the lands, which he had purchased from Reverend Edward LeBlanc, measuring 182 feet on the front with a depth of 132 feet, to his brother, Joseph O. Gaudet, and this conveyance was followed by a second conveyance from William J. Gaudet to his brother, Joseph O. Gaudet, on September 6, 1923, in which the entire lot originally conveyed from Reverend Edward LeBlanc to William J. Gaudet was now conveyed to Joseph O. Gaudet;

5 In 1925, Joseph Gaudet decided to build a new foundation and place the old Stanton house in a new location further to the west than it originally stood. After the foundation had been constructed but before the house was moved, Mr. Gaudet received a complaint from Mrs. John LeBlanc, of New Edinburgh, to the effect that he was building on her family lands, which lay to the west of the Stanton property, and as a result of this allegation Mr. Gaudet sought legal advice at the office of Mr. Landry in Yarmouth. According to the evidence of Mr. Gaudet's wife, Rose, some arrangement had been made by her husband to purchase the LeBlanc property, which Mrs. LeBlanc was unfamiliar with, and no further claim was asserted by Mrs. LeBlanc thereafter.

6 The Stanton house was then moved to the new foundation at the new site and Mr. and Mrs. Joseph Gaudet occupied the house and property from that time on. Their first child was born in the house in 1925.

7 When Mr. and Mrs. Gaudet moved into their new home the lands on the northwest side were rough and swampy. Mr. Gaudet cleaned up this section by removing the rocks and boulders and raising the level of the area to the same height as the remainder of the field around the Stanton property. In 1926, he planted a spruce hedge all along the highway frontage of the property and back along what he considered to be the division line between his property and the next property to the northwest. The entire area, which he was then occupying, was enclosed with a barbed wire fence, including the hedge, so that farm animals would be secure. Ornamental trees were planted near the highway in front of the new house and a lawn was maintained. The remainder of the enclosed area was used for hay and for the rotation of the Gaudets' vegetable garden during the succeeding years.

8 About 1954, one of the defendants, Edwin Theriault, purchased the property to the northwest of the Gaudet property and has made his home there since that time. When he purchased his property the spruce hedge was about three feet wide and three feet high and marked very clearly the division between his property and that occupied by the Gaudet family. The hedge was trimmed regularly by Mr. Gaudet and his son, Paul, who is one of the plaintiffs in this action and the land enclosed by the hedge and wire fence was being kept in a very neat and tidy condition.

9 Mr. and Mrs. Joseph Gaudet continued to occupy the property until Mr. Gaudet's death in 1960. Before he died, however, he executed a deed in favour of himself, his wife, Rose Alma Gaudet, and his son, Paul Emile Gaudet, the two plaintiffs in this action, as joint tenants, and upon his death the title to the property passed to the two survivors. Mrs. Gaudet continued to live in the property for about a year and then went to stay with her son in New Brunswick for awhile and then to live with her daughter at Belliveau's Cove, about a mile away from her family home. During the summer months when her son took his vacation she would return to the family property but she is now 84 years of age and for the last four or five years has not stayed at the property but merely visited it on occasion. Her son is with the Canadian Armed Forces and has been stationed overseas and therefore has spent very little time at the property in recent years as well. He has, however, visited it during vacation and kept the hedge trimmed until about three years ago. He says he intends to return to the house when he retires from the services in a few years time.

10 In 1965, Edwin Theriault was burning on his property when the fire got out of control and destroyed about fifteen of the trees in the spruce hedge. After the plaintiff heard this she called Mr. Theriault's wife, and subsequently Mr. Theriault arranged to replace these trees.

11 I am satisfied from the evidence as a whole that since 1925 the Gaudet family occupied the entire area of land, which Mr. Gaudet fenced and which he marked on the highway and northwestern side by a spruce hedge. This occupation has continued up until the time of alleged acts of trespass to the property in 1969, although the family has ceased to occupy the property on a full time basis. The occupation since 1962 has been that of a summer home and this occupation was well evidenced by the fact that the house was maintained intact and the hedge was kept trimmed. Hay was made each year on the fields surrounding the house with the permission of the owners. The defendant, Edwin Theriault, and other members of the community knew the property as the Rose Gaudet place.

12 In 1960, Mr. James LeBlanc (sometimes known as James White) returned to Nova Scotia from the United States. He had been born at New Edinburgh, Digby County, 81 years ago, as the son of John LeBlanc. He left Nova Scotia when 18 years of age, but returned in 1910 when his father died and stayed until 1911 when he returned to the United States to make his permanent home. By his father's Will, he and his brother, Siffois, received certain pieces of property, two lots being at St. Bernard near the Stanton lot, and when he came back in 1960 he wanted to settle matters connected with his father's estate between himself and the heirs of his now deceased brother. This required the sale of several parcels of land in different parts of the County and during the course of making these arrangements he had a surveyor run the lines of the St. Bernard property, which lay on the north side of the main highway. He also felt that his late father's property extended to the south of the highway over the lands on which Mr. Gaudet had built his home lying between the property of Edwin Theriault and the original Stanton lot.

13 In the course of settling the affairs of the estate of John LeBlanc several lots of land including the interest the estate had in property at St. Bernard were sold to the defendants, Ben Boudreau and Herbie Boudreau. The conveyance was taken in the name of Herbie Boudreau, but he was in fact acting as trustee for the two defendants. The Boudreaus paid the sum of $800 for the LeBlanc lands lying on the north side of the highway as well as their interest in any lands lying to the south. This sale took place in June of 1969.

14 Ben Boudreau is a dealer in lumber, land, cattle and has been a resident of Digby County for all of his life. He claimed that when he bought the LeBlanc property he considered that it extended on both sides of the highway and included the property on which the Gaudet house stood on the south. When questioned about the apparent occupancy of this property by others than the LeBlancs he took the position that it was no longer occupied. He said that the hedge had been allowed to go untrimmed and that the steps in the house were very dilapidated. From his inspection of the property he felt that the house was unoccupied and says that he was advised by his solicitor that if the property was unoccupied any building on the lands would pass with the title to the lands. In order to ensure his position Mr. Boudreau made

a search in the records of the Registry of Deeds and discovered that the Gaudets did not have a recorded deed to the portion of the property which came from the LeBlancs, and with this information he felt that his claim to the property was safe.

15 Ben Boudreau met Paul Gaudet for the first time shortly thereafter at a social club where they were introduced. He says that he told Paul he had bought the LeBlanc property and asked him whether he would be interested in buying it from him. According to Mr. Boudreau, Mr. Gaudet said that he would be, but when a price of $1,000 was mentioned he felt that it was not worth it. Paul Gaudet explained in his testimony that he understood Mr. Boudreau to be talking about the LeBlanc lands to the north of the highway and not their family property at the time, and I accept this evidence in preference to the interpretation presented by Mr. Boudreau.

16 Mr. Boudreau then set out to sell the LeBlanc property and in doing so had a talk with Edwin Theriault with whom he conducted many of his business affairs. He told Mr. Theriault that he would sell the property lying immediately to the east of his, but that he must first offer it to Paul Gaudet for $1,000. He arranged to have this offer made, which was, of course, turned down by Mr. Gaudet, and then he sold one-half of the width of the property to Mr. Theriault for the sum of $500, having first erected a fence along what he considered to be the centre line of the LeBlanc property on the south side of the highway. He had also ploughed the area between the new fence and the Edwin Theriault property as it was beginning to grow up in alders and he wished to preserve it as a bayfield.

17 The transfer of the property to Edwin Theriault took place in October of 1970 and shortly thereafter Mr. Theriault cut down the spruce hedge along the line between his property and the former Gaudet property and also along the highway over the disputed area. He says he then seeded the field and levelled it off and that it is now growing with six inch clover, whereas when he bought it the field was run out. He says that he cut down 50 or 60 trees when he removed the hedge.

18 Mr. Theriault was questioned as to why he would purchase this property from Ben Boudreau when he knew that the Gaudets had occupied the land for so many years. He said that he had always known that there was some LeBlanc land between him and the Gaudets and that he in fact had tried to purchase the land from James LeBlanc but that Mr. Boudreau had offered him a higher price. He was therefore left in a position where he had to deal with Mr. Boudreau in order to acquire the additional property that he wished to add to his.

19 The evidence given by Ben Boudreau at this trial is in conflict with that of the other witnesses. Although he is familiar with the area he tried to persuade the Court that the Gaudet property had never been well kept and that there was no evidence of occupation apparent. Many other witnesses from the community were called who testified how over the years the property had been kept in a very neat and tidy condition and was always known to be occupied by the Gaudet family. He says that Mr. James LeBlanc did not tell him of any difficulty with the title to the property when it was sold, whereas Mr. LeBlanc says that he was only selling the vacant strip of land to the west of the Gaudet home and never intended to interfere with the Gaudets ownership of the part of the property on which their home was erected. Mr. Boudreau says he only found out that he had bought a law suit after he had made the purchase. Ben Boudreau, as I mentioned earlier, tried to convince the Court that the plaintiff, Paul Gaudet, had accepted his ownership of the Gaudet house and property and was prepared to consider buying it from him. This is in complete conflict with the plaintiff's version of the short conversation that took place between the two men. Mr. Gaudet says that he understood Boudreau only to be discussing that part of the property lying to the north of the highway.

20 Where there is conflict between the evidence of Ben Boudreau and the evidence of the other witnesses I accept the evidence of those other witnesses. Mr. Boudreau impressed me as a man who was intent upon making the facts suit his purpose so that a profit could be realized from his activity.

21 From the evidence as a whole I am satisfied that the plaintiffs do not have paper title to the land on which their home was located in 1925. The house was moved to the strip of land that had been LeBlanc land lying between the Stanton property to the east and the lands later sold to Edwin Theriault to the west. It may very well be that Joseph Gaudet did purchase these LeBlanc lands or a fractional interest in them at the time, since there is evidence of a deed from James LeBlanc and his brother, Siffois LeBlanc, to William Gaudet in 1919, but this deed was never executed. The record does not therefore show any of the LeBlanc land passing by conveyance to the Gaudets.

22 I am also satisfied that Joseph Gaudet and his wife and son had been in continuous possession of that portion of the LeBlanc property lying on the southern side of the highway upon which their residence was established from 1925 till 1969, when the acts of trespass on those lands occurred. Any right of action for recovery of the LeBlanc lands by the LeBlanc heirs, including any right vested in James LeBlanc, who was absent from the Province from 1911 until 1960, has been extinguished by virtue of ss. 19 and 21 of the *Limitation of Actions Act*, R.S.N.S. 1967, c. 168, which sections are as follows:

> 19 No entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, first accrued, was under any of the disabilities in the next preceding Section mentioned, or by any person claiming through him, but within forty years next after the time at which such right first accrued; although the person under disability at such time has remained under one or more of such disabilities during the whole term of such forty years, or although the term of ten years from the time at which he ceased to be under any such disability, or died, has not expired.
>
> 21 At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

The only association that James LeBlanc had with the lands in question after his return to Nova Scotia in 1960 was on the occasion when his surveyor was laying off the property on the north side of the road. He and the surveyor did walk onto the lands on the south side and he sent his surveyor to the house to see if anyone was home. There was no answer and he made no further inquiries. He made no further entry upon the land until 1969, when he sold this property to the Boudreaus. The right of James LeBlanc and his brother, Siffois, before him, through whom Siffois' heirs subsequently claimed, to make an entry upon the lands in dispute or to recover possession of these against the occupiers would have accrued in 1925, when the Gaudets assumed possession. This right became extinguished when no such action was taken within forty years and the entry made by Ben Boudreau in 1969 upon these lands was therefore trespass. The possession of the disputed lands by the Gaudets during that period of forty years had been adverse to the LeBlancs and was exclusive, continuous, open and notorious so that any person having an interest in the property would have been aware of it and placed in a position where some action would have to be taken if the plaintiffs' right to possession of the whole area was to be challenged.

23 The type of possession required to extinguish an owner's right of entry upon land has been considered in many cases. Some more recent discussions may be found in *Naugle v. Naugle* 1 N.S.R. (2d) 554; *Elliott v. Jardine* (1961) 45 M.P.R. 104; *Ezbeidy v. Phalen* (1958) 11 D.L.R. (2d) 660.

24 I turn now to the matter of damages. The evidence reveals that the defendant, Ben Boudreau, entered the plaintiff's lands, erected a fence on one side and ploughed the area lying between the fence and the Theriault property. The cost of removing this fence has been estimated at $30, but the evidence indicates that no actual damage has been suffered as a result of the ploughing of the field since the field was beginning to grow up in alders and the ploughing was required. There is

evidence that the defendant, Ben Boudreau, was acting in partnership with the defendant, Herbie Boudreau, when committing these acts of trespass and I, therefore, assess special damages in the amount of $30 and general damages in the amount of $100 against the two defendants jointly.

25 The evidence reveals that the defendant, Edwin Theriault, removed 150 feet of fully grown spruce hedge from the plaintiffs' property and that he levelled and seeded the field. There was some loss of ornamental trees as well. The evidence as to the cost of replacing the hedge and the ornamental trees and the value of the improvement, if any, made to the field by seeding is very nebulous and I, therefore, take these items into consideration when awarding general damages which I assess in the amount of $300. The plaintiffs shall also have their costs of action to be taxed in one bill against the three defendants.

*Judgment for the plaintiffs.*

Continued from Page 89.

32 I have no doubt from the evidence that the plaintiff did more work than was originally contemplated. The main reason for this was that Mr. Clarke on the site directed the work which was actually performed.

33 Mr. Daykin was asked at the trial as follows, p. 161 of the transcript of the evidence:

> Q. Let me refer you to the Discovery again. Page 18: Q. Don't you feel they (meaning Seaboard) are entitled to more than $4500 for having done on their own admission, additional work? Your answer as recorded is: Perhaps; yes.
>
> A. I think that would be my answer now, 'perhaps; yes.'

34 Thus Mr. Daykin admits that the plaintiff is owed more than $4,500 because of extra work. This extra work, in my opinion, brought about a variation in the original contract. It thus follows that the plaintiff is entitled to be paid on a *quantum meruit* basis which would be a reasonable sum for the work done.

35 On March 6, 1968, Mr. Daykin wrote Mr. Brown suggesting that the plaintiff's account be reduced by $2000. The matter would have been settled at this figure if the New Brunswick governmental authorities had been prepared to pay more than the $4500. This they would not do; however, this refusal does not help the defendants. I am prepared in fixing the amount due the plaintiff to accept the figure suggested by Mr. Daykin as reasonable and find the amount due the plaintiff to be $7,582.91.

36 The plaintiff will have judgment against the defendant for the sum of $7,582.91 and the costs of the action to be taxed.

*Judgment for the plaintiff.*

Nova Scotia Supreme Court, Trial Division
Gillis, J.
December 3, 1971

REAL PROPERTY - TOPIC 4780

TITLE - BOUNDARIES - DESCRIPTION, ELEMENTS AND CONSTRUCTION - FENCES - THE FENCE SEPARATING PLAINTIFF'S EASTERN BOUNDARY LINE AND DEFENDANT"S WESTERN BOUNDARY LINE WAS BROKEN AND CROOKED - THE FENCE ON DEFENDANT'S EASTERN BOUNDARY LINE WAS INTACT AND STRAIGHT - THE TRIAL COURT STATED THAT THE BOUNDARY LINE BETWEEN THE PLAINTIFF AND THE DEFENDANT COULD BE ASCERTAINED BY MEANS OF REFERENCE TO THE DEFENDANT'S EASTERN BOUNDARY LINE - THE TRIAL COURT ALSO STATED THAT THE DEFENDANT'S EASTERN AND WESTERN BOUNDARY LINES WOULD UNDER NORMAL CIRCUMSTANCES BE PARALLEL - SEE PARAGRAPH 36.

REAL PROPERTY - TOPIC 4753

TITLE - BOUNDARIES - DESCRIPTION, ELEMENTS AND CONSTRUCTION - MAPS, PLANS AND FIELD NOTES - A SURVEYOR INDICATED THE LOCATION OF THE BOUNDARY LINE BETWEEN TWO PROPERTIES BY MEANS OF NOTES WRITTEN ON A SURVEY PLAN OF DEFENDANT'S PROPERTY - THE DEED OF DEFENDANT'S PROPERTY REFERRED TO THE PLAN - THE TRIAL COURT STATED THAT THE NOTES WRITTEN ON THE PLAN FORMED PART OF THE DESCRIPTION OF THE DEED - SEE PARAGRAPH 38.

REAL PROPERTY - TOPIC 4794

TITLE - BOUNDARIES - DESCRIPTION, ELEMENTS AND CONSTRUCTION - RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS - CONTROL OF MONUMENTS AND MARKS - THE DISTANCES REFERRED TO IN A DEED OF A PIECE OF PROPERTY DID NOT APPEAR TO CORRESPOND WITH THE DISTANCE BETWEEN A HIGHWAY AND THE BASE LINE OF A PROPERTY - THE TRIAL COURT STATED THAT THE DISTANCE BETWEEN THE HIGHWAY AND THE BASE LINE OF THE PROPERTY PREVAILED OVER DISTANCES MENTIONED IN THE DEED OF THE PROPERTY - SEE PARAGRAPHS 40 TO 42.

REAL PROPERTY - TOPIC 4800

TITLE - BOUNDARIES - DESCRIPTION, ELEMENTS AND CONSTRUCTION - RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS - CONTROL OF QUANTITY - A DESCRIPTION IN A DEED STATED THAT THE PROPERTY COMPRISED THREE ACRES - THE REST OF THE DESCRIPTION OF THE PROPERTY INDICATED THAT IT CONTAINED LESS THAN TWO ACRES - THE TRIAL COURT APPLIED THE RULE FALSA DEMONSTRATA NON NOCET CUM DE CORPORE CONSTAT - THE TRIAL COURT STATED THAT THE ERROR WITH RESPECT TO THE QUANTITY OF LAND DID NOT INVALIDATE THE REST OF THE DESCRIPTION - SEE PARAGRAPH 43.

This case arose out of an action for damages and an injunction with respect to trespass to land. The plaintiff and the defendant each claimed to be owner of a piece of land. The trial court allowed the plaintiff's action and awarded the plaintiff $250 damages and granted the plaintiff an injunction.

. . .

1 GILLIS, J.: The plaintiff claims to be the owner and in possession of certain lands in the Town of Liverpool, in the County of Queens, title to which was conveyed to it from Minnie B. Gardner by deed dated September 10, 1965, registered September 13, 1965. The description of lands written in said deed reads as follows:

> ALL that lot of land situate, lying and being in said Liverpool and described as follows:
>
> BEGINNING at a stake standing by the northwest side of the public road leading from Liverpool to White Point; thence north 40 degrees west 2 chains and 45 links to a pole fence; thence south 56 degrees west 1 chain and 45 links; thence south 38 degrees east 3 chains and 25 links to the aforesaid road and thence northeasterly along said road to the beginning and contains 4/10ths of an acre more or less . . .

2 The description as hereinbefore and in said deed written was prepared from a survey and plan of survey made by Robert Hunt and Roger F. Melanson, both Nova Scotia Land Surveyors. The survey was carried out on May 12, 1962.

3 The evidence establishes an undisputed chain of title in and possession of the said lands, successively, in William F. Winters, his widow, Elizabeth Winters, his son, William G. Winters and later his daughter, Minnie B. Gardner, some or all of them herein sometimes referred to as "the Winters family", from 1910 or thereabouts until 1965. The plaintiff has been in possession of and has used the lands as a parking lot since 1965.

4 Title to the neighbouring lands is now in the defendant and his wife, the former Violet G. Whynot, as joint tenants, by virtue of a deed from Lester L. Clements, the duly constituted and appointed attorney for Eric Whynot and Jeannette Whynot, dated October 9, 1962, registered October 10, 1962. That deed describes two lots of land as follows:

> ALL that certain parcel of land situate, lying and being on the western side of the road leading from Liverpool to White Point, Queens County, Nova Scotia, and bounded and described as follows:
>
> BEGINNING on the line of said road at a cement block and running along the line of said road a distance of 50 feet southerly; thence 90 feet in a straight line in a westerly direction; thence 34 feet in a straight line in a northerly direction to a cement block; thence 75 feet in a straight line to the place of beginning;
>
> ALSO that certain lot, piece or parcel of land situate, lying and being in the Town of Liverpool and more particularly bounded and described as follows:
>
> BEGINNING at a post on the northwest side of the main post road leading from Liverpool towards White Point and at the south corner of the Henry Smith property; thence following the southwestern line of said Henry Smith north 35°10' west 41 rods more or less to the base line to a stake;
>
> THENCE at right angles south 54°50' west 12.4 rods to a pile of stones on a rock; thence south 35°10' east 46.5 rods to an iron stake in the margin of the White Point Road aforesaid; thence following said White Point Road north 41°35' east 12.7 rods (or 209 feet) to the place of beginning, *containing three acres as per plan attached to a deed from Eleanor Millard et al to Lennie B. Arthur dated the 25th June, 1948 and recorded in the office of the Registry of Deeds at Liverpool, N.S. in Book 82, pages 365-66.*

(my italics)

5 Titles to the said two lots, lying adjacent to each other, were first consolidated in the one person, one Lennie Bertha Arthur, as a result of the following transactions:

6 The first lot, above and in said deed described, was conveyed from Henry W. Smith to Lennie Bertha Arthur by deed dated September 12, 1946, registered September 16, 1946. I accept and find, without doubt, that the title to and possession of the same was in the said Smith Title to and possession of the second lot, above and is said deed described, passed to one Robie Millard by deed from L.W. Drew, High Sheriff for the County of Queens, dated October 18, 1924, registered October 18, 1924. The said Robie Millard went into and remained in possession thereof until his death, and subsequently thereto by deed dated June 25, 1948, registered June 28, 1948, the title was conveyed from his widow, Eleanor Millard, and his son and wife, R. Eric Millard and Elizabeth Millard, as the heirs-at-law, to the said Lennie Bertha Arthur.

7 Title passed, by several steps, down from Lennie Bertha Arthur to the said Eric Whynot and Jeannette Whynot, above referred to. The chain of title and possession through the several owners is not in dispute.

8 The lands hereinbefore described, both of the plaintiff and of the defendant and his wife, are situated on the northern side of Highway No. 3 or White Point Road, as it is sometimes called, in the Town of Liverpool. The lands, the title to and possession of which is claimed by the plaintiff, lie directly across the highway from its bookbinding plant, which lies on the southern side of the highway.

9 The residence of the defendant and his wife is located on the said lands, title to and possession of which is claimed by them. Since the plaintiff has been in possession of the lands first described herein, the defendant, apparently for himself and his wife, by virtue of the deed second referred to herein, has claimed title to and possession of a portion of them and in attempting to gain the possession thereof, committed certain acts constituting trespass upon the said lands. The alleged acts, constituting trespass, have been established by the evidence adduced by the plaintiff and in the result, upon all of the evidence, are not denied by the defendant. What is in dispute is the location of the boundary line between the said lands of the plaintiff and the lands of the defendant and his said wife. The essential question in this action is: What and where is the line constituting the boundary line between the lands of the respective parties being respectively the eastern boundary line of lands of the plaintiff and the western boundary line of the lands of the defendant and his wife?

10 The plaintiff claims an injunction restraining the defendant from trespassing upon its lands and from obstructing the ingress and egress of the plaintiff and persons who would enter thereon by its permission to and from the said lands, and damages and costs.

11 The defendant, seeks to justify the said acts, constituting trespass, by reason of his and his wife's alleged title to and possession of that portion of the lands upon which the said acts were committed.

12 The plaintiff, by the witnesses, William Graham Winters, 55 years of age, whose memory of the location and use of the lands of "the Winters family" extends back nearly 50 years; and Andrew Winters, 73 years of age, whose memory extends back over 60 years and, who are the sons of William F. Winters, who died in 1930, has established to my satisfaction:

1 That the lands, title to and possession of which is now claimed by the plaintiff, were in the possession of "the Winters family" and that title thereof was held successfully by the persons hereinbefore set forth, from 1910 (in which year the said William F. Winters acquired title from R. E. Smith) until 1965. These persons consistently referred to the said lands, as the barn lot of the Winters' lands. That there was in 1899, when same was owned by R. E. Smith and until 1907, in the memory of Andrew Winters, a house on the said land. Andrew Winters was born in that house. It was located 11 or 12 feet from the pointed rock "A", referred to many times herein.

The said house was destroyed by fire in 1907. Later, and through the possession of "the Winters family" from 1910 onwards, the only building upon the lands was a barn located some distance west of the house. This barn was destroyed by fire in 1955. The land was used by "the Winters family" for pasturing cows and horses and also for the pasturing of other cattle kept for butchering.

2 That the eastern boundary line of said lands was for many years and as far back as 1917-18, marked by a wire fence which intersected the highway in the neighbourhood of the large pointed rock "A", located near the highway. William G. Winters, in description of the location of said pointed rock, said that it was "on the eastern corner of the barn lot just outside of the barn lot." I find from this evidence that the fence posts found by the surveyors, Hunt and Melanson, in 1962, were in the eastern boundary line of the barn lot. These persons state that the fence "missed" the pointed rock "A" by three feet. The indication was that the boundary line fence passed three feet west of the pointed rock "A". The testimony of others, including R. Eric Millard, as later related, will indicate that the said boundary line passed two feet each of the said pointed rock "A". In contrast also is the fact that the surveyors Hunt and Melanson took that line down 1.5 or 1.3 feet west of the pointed rock "A". What is clear and I find, without question, is that the boundary line in dispute proceeds past and near to the pointed rock "A" and that same lies in the same place today. The location of the boundary line suggested by the defendant, is many feet removed from this point.

3 That the stone wall "E", later referred to herein, formed part of the western boundary line of lands of Henry Smith and that from the northern extremity of said stone wall to the highway a fence was formerly erected upon said line.

13 Robert Eric Millard is a Nova Scotia Land Surveyor and Superintendent of Works, Town of Liverpool. He is 66 years of age and his memory extends back more than 55 years. His knowledge of the lands in dispute, to which he attests, comes from several sources, and being such a knowledgeable expert, his opinions have special value. His father was the Robie Millard first referred to herein, he and his mother, Elizabeth Millard, as the heirs-at-law of the said Robie Millard, conveyed title of the second lot described to Lennie B. Arthur. He knew, in 1948 and remembers today, the boundary lines between his father's lands and lands of Henry Smith on the east, and lands of the Winters family on the west. Also, at the time of making the deed to Lennie Bertha Arthur, he did a survey and drew a plan thereof dated June 23, 1948, which plan is attached to and incorporated in said deed by reference and is recorded with said deed in the Registry of Deeds. Let it be noted here that earlier deeds of said land described it by reference to the abutting owners and as to the boundary in dispute the reference is to "land owned and occupied by William Winters."

14 In Court, this witness described the work of survey done by him from his memory and by reference to the said plan.

15 By reference to his knowledge and memory, this witness stated that the lands, being the second description, were used by his father as pasture, presumably from the time of the deed to him. The land, west of its western boundary line was occupied by the Winters family for as far back as he can remember. The line was, from 1917 or 1918 until 1948 at least, marked by a common board and wire fence, which was maintained by his father and the Winters family. He did not know who of the Winters family held the title, but in his memory, back until he was ten years of age, several of them in succession were in possession of and used these lands. Throughout the years until 1955, when it was destroyed by fire, there was a barn on these lands.

16 The fence marking the common boundary line intersected the northern boundary line of the highway. Near that intersection, not on the highway boundary but slightly back (northwest) of it, the fence proceeded on the east side of the pointed rock "A", then and now in the same place. The land west of the boundary line near to and east of the pointed rock "A" was formerly of the Winters family and is now of the plaintiff, and, the land east of said boundary line was that of his father.

17 The eastern boundary line of his father's land, to the east of which lay the Henry Smith lands, was marked, in part, by the stone wall "E", still in place today and, in part by a barbed wire fence on wooden posts. The Henry Smith lands until 1946, were, in width along the highway the original 66 feet plus 29 feet conveyed from Catherine Nickerson. In 1946, 50 feet of that width immediately east of the boundary line was conveyed to Lennie Bertha Arthur.

18 The fences referred to by the witness were in place in 1948.

19 To the knowledge of this witness, the first lot described in the deed of the defendant and his wife is that 50 feet width along the highway easterly, that is immediately east of the boundary line marked by the stone wall "E: and the fence referred to in this part. The second lot in the opinion and to the knowledge of this witness contains the lands from the stone wall line westerly to the common boundary line near to and east of the pointed rock "A".

20 The plan of survey made by this witness, dated June 22, 1948, is Exhibit 19 in these proceedings. Essentially the work of survey was done by following fence lines then existing, noting and recording the compass bearings of them and the distances. The first course laid out was upon the compass bearing of the stone wall "E": and proceeded to the base line described in the evidence as the base line between the two hundred acre lots and the five acre lots. He proceeded from there, westerly, along the base line to a pile of stones known by him as the northwest corner of the Lennie Bertha Arthur lands. He found the pile of stones and added to it. From there he proceeded southerly along the line fence marking the boundary between lands formerly of his father, the said Robie Millard and lands of the Winters family to the northern boundary line of the highway where he placed an iron bar. The highway has since been widened in that area. The witness has not seen the iron bar since. The boundary line came down two feet east of the highest point of the pointed rock "A". He made note of this upon the plan, Exhibit 19, by a mark indicating reference to that boundary line and the note "two feet east of pointed rock." The witness admits a mistake in the plan by writing the third course thereof as S. 35°10'W., instead of S. 35°10' E., as it should have been. I do not regard the mistake as significant. It is merely a slip or typographical error.

21 From the plan, Exhibit 19, was drawn the second description. In the description no reference was made to the pointed rock "A". I take from this witness that he was satisfied that he found and marked, and drew upon the plan, Exhibit 19, and from there wrote in the second description the correct boundary line between the lands of Robie Millard, then being conveyed to Lennie Bertha Arthur, and lands of the Winters family. That same is the western boundary line of lands of the defendant and Violet G. Whynot. His opinion thereon is stated with certainty.

22 The dispute between the parties, is however, caused or intensified by the fact that the lands of the second description do not measure three acres, more or less, as stated in the description. I will return to the effect of this. I point it out at this time so as to show that I have taken this defect into consideration but notwithstanding have formed the opinion that good and effective survey work was done by the witness Millard and that he was a knowledgeable and credible witness.

23 The witness, Neiff Joseph, is a Nova Scotia Land Surveyor, one of two who were retained by the defendant at one point or another in his investigation and study of his property lines and boundaries. Part of Mr. Joseph's task was to try to run out the plan, Exhibit 19. In pursuance thereof this witness traversed the lines but did not complete a survey. In the work that he did, he related the stone wall "E" to the railroad in the area and found it to be the division line between lands of Henry Smith and lands formerly of Robie Millard. Upon all of his work he came to the opinion that the lands of the defendant and his wife consisted of widths along the highway respectively of 50 feet east of the stone wall "E" and its prolongation to the highway boundary and 209 feet west thereof. He found that the western boundary line of the land of the defendant and his wife, by measurement of distance and by try lines upon compass bearings to be east of the pointed rock "A": This witness attests that there is, in fact, a cement post on the highway boundary as suggested in the

first description. This post was shown to him by the defendant and by measuring 50 feet from there westerly along the highway boundary he reached a point in the line in prolongation of the stone wall "E". The pointed rock "A" is approximately 209 feet from there when measured further easterly along the highway boundary.

24 Apart from measuring this distance the investigation made by this witness consisted of taking the bearing of the stone wall, which he accepted as being S. 38°53'E. (which, in his opinion, because of differences in compass settings between the compass used by Millard in 1948 and that used by him in 1970, and by declination, might very well be the same as that of S. 35°-10'E. found by Millard in 1948). He accepted that the lot was laid out with two parallel lines east and west. By proceeding westerly the width specified by Millard and then going northerly on the parallel course he came to a pile of stones and from there, on the parallel course, found five or six blazes on small pine trees. By cutting one of them open and checking growth rings the witness confirmed the blazes upon these trees to have been made in 1948. He found no signs of any fence, however. On his test line from the blazes in the direction of the highway, he came down ten to twelve feet east of the pointed rock "A". While this witness did not conclude the survey, he was satisfied that he found part of the defendant's western boundary line and that it proceeded east of the pointed rock. As he said, every check he made, both by distance and compass bearing brought this line down to the highway east of the pointed rock "A".

25 Two other observations made by the witness Joseph are of importance. It was his opinion that the fence on the common boundary line between lands formerly of Robie Millard and those of "the Winters family" was exceedingly crooked because of rocky and uneven terrain and, secondly, that the lands formerly of Robie Millard were a much smaller piece of land than suggested in the deed to Lennie Bertha Arthur and subsequent deeds, the actual width is approximately the same on the ground as in the deeds but the depth is short on the ground so that in the result, in the lands of the second description the defendant and his wife have slightly less than two acres instead of three acres, as one might assume by the words of the written description.

26 Robert Hunt and Roger F. Melanson gave testimony as to their survey of the plaintiff's lands. They were satisfied that they found part of the western boundary line of lands of the Winters family in a stone wall south of the highway. This is not the stone wall "E" already referred to, but another south of the said No. 3 highway. They projected the mean centre line of that stone wall across the highway and to a point 214.5 feet northerly, then proceeded 95.7 feet westerly where they found a line of old fence posts in line with the eastern boundary line of what they felt to be the Winters' land. The line of these fence posts was followed to a point 33 feet from the centre line of the highway from which point they proceeded back along the highway boundary to the place of beginning north of that highway. The witness, Robert Hunt, could not, from memory or notes, say where the eastern boundary line of the Winters' land came down relative to the pointed rock "A". He is quite definite that the line was marked by the remains of a fence, however. In their investigation and work of survey, at that time, these surveyors found three piles of stone in a line 600 feet north of the highway and were of the opinion then, and at time of trial, that these piles of stone marked the base line boundary. They were accustomed to seeing such piles of stones marking such a boundary line. At the time of their survey these surveyors consulted Eric Whynot, then the owner of the lands now of the defendant and his wife. Mr. Whynot made no objection to the location of the boundary line as set by them. At the respective corners of the lands, then of the Winters family, they set iron pipes in the ground.

27 In April, 1971, at the request of the defendant, the surveyor, Melanson, did a series of try lines. These were done in an attempt to establish his boundaries. At that time, Mr. Melanson found that the pointed rock "A" was approximately one and one-half feet east of the iron pipe put down by he and Melanson in 1962 as the southeast corner of the Winters' property. Following his investigation Melanson built up a working plan upon which the western boundary line of lands of the defendant and his wife was placed in the approximate area where Millard had placed it, that is, 259 feet westerly from the cement block referred to in the first description. He then conferred with the defendant upon his work that far. The defendant did not agree with the findings and the survey was never completed.

28 The witness Melanson acknowledged that the plan drawn by he and Hunt provided the description of the plaintiff's lands for the deed first referred to herein. Nevertheless, he was now prepared to accept the Millard line as the western boundary line of the land of the defendant and his wife. This witness also admits that there would be a gap of five or six feet (depending on the width of the rock "A", I judge) between the eastern boundary line of the lands of the plaintiff as laid out and surveyed by he and Hunt and thereupon conveyed to the plaintiff, and the western boundary line of the defendant and his wife, if the Millard line is accepted as he would now do. The witness says that he would be prepared to accept the result of the measurement of the distance along the highway from the concrete block and the bearings established by Millard in his final conclusions as to the location of the common line between lands of the Winters family and that of the defendant and his wife.

29 Edward Bruce Ritchie is a Nova Scotia Land Surveyor of considerable practical experience gained in survey work since 1928. In particular reference to the matters at issue in this case he has had two sources of knowledge and opinion. He was retained by the plaintiff to check the work of the surveyors, Hunt and Melanson. This he did by reference to the plan made by them and the plaintiff's deed. He was satisfied that they, and he, found the western boundary line of lands formerly of the Winters family, now of the plaintiff. He found an iron marker on the railway line south of the highway, found the stone wall referred to by Hunt and Melanson, produced the line of the said stone wall north of the highway, checked the distances and bearings and found all of the markers placed by Hunt and Melanson, excepting the last at the corner near the pointed rock "A". The markers that he found were located within the permissible degree of error. With the markers, distances and bearings checked and calculated, he determined that the eastern boundary line of the plaintiff's land ran down to the highway at a distance 1.3 feet west of the pointed rock "A" and that the development work of the plaintiff was west of that line.

30 This witness was also, at one time retained by the Town of Liverpool to determine the location of the base line referred to herein. This work has never been completed and consisted only of a series of try lines related to certain piles of rock which might indicate part of that base line. The actual base line has not been finally established. At the request of the defendant, he viewed a certain pile of rocks which the defendant insisted was the northwestern corner of his lands. At that time the defendant said to him "that's my corner." The witness attests that he did not say so. He did not then and does not know now that the said pile of rocks was in fact the corner that it was suggested to be.

31 I find:

That the stone wall "E" formed part of the boundary line between lands of Henry Smith and lands formerly of Robie Millard;

32 That the lands first described in the deed of the defendant and his wife were the lands conveyed from Henry Smith to Lennie Bertha Arthur and thence down to the defendant and his wife; that same line immediately east of the line of the stone wall "E" and are 50 feet in width when measured along the highway boundary; that the intersection of the eastern boundary line of the same with the highway boundary was and is marked by a cement block;

33 That the lands second described in the deed of the defendant are 209 feet in width when measured along the highway boundary from the line of the stone wall "E";

34 That the western boundary of line of the lands of the defendant and his wife intersects the highway at a point 259 feet from the said cement block;

35 That there was one common fence on the boundary line between Robie Millard and the Winters' family; that it was exceedingly crooked; that Hunt and Melanson, in their original survey of the plaintiff's land, fell into error by accepting part thereof as establishing the line of the fence through its whole length, without regard for the parallel line to be established by reference to the stone wall "E: and without regard to the width of the land, now of the defendant and his wife, which

could have been ascertained by them. It seems clear now and I find that, by checking both distance and applying the bearing of the stone wall, these surveyors would not have fallen into this error and would have recorded a different result upon their original survey;

36 That by law regard must be had for fences and that as nearly as possible parallel lines must be established. *See McIsaac v. McKay et al.* (1915-16), 49 N.S.R. 476. That Millard, in his original survey, and Joseph in his opinion, followed a correct method of survey in accepting the stone wall "E" and the fence as being upon parallel courses:

37 That the true and correct common boundary line between lands of the defendant and his wife and lands, formerly of the Winters' family, will intersect the highway boundary at a point 259 feet west of the said cement block and proceed upon a line two feet easterly of the highest point of the pointed rock "A". Reaching this finding I accept and apply the evidence of R. Eric Millard and his notes upon the plan, Exhibit 19, as supplemented by the opinion of Neiff Joseph and the final acknowledgment of Melanson. It is not to reject the evidence of William G. Winters and Andrew Winters but to say that Millard in 1948 had the better opportunity and knowledge of the location of the line and to accept the result of application of distances, bearings and parallel lines.

38 There are many authorities supporting the use of the notes upon the plan as evidence. One statement of the principle is found in *Fullerton v. Brundige et al.* (1887), 20 N.S.R. 182, wherein Ritchie, J., at p. 185 told:

> 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.

See also authorities set forth in Anger and Honsberger, *Canadian Law of Real Property* at p. 634 et seq., and opinion of Kellock, J., in *Humphreys v. Pollock*, (1954) 4 D.L.R. 721.

39 That the course of the western boundary line of lands of the defendant and his wife is upon the bearing of the stone wall "E" and in this respect I accept the opinion of Neiff Joseph that same is S. 38°53' E.

40 That the portion of the lands of the defendant and his wife, that is the lands formerly of Robie Millard, are otherwise bounded by the highway boundary line and the base line, wherever it be. The depth, notwithstanding the distances set forth in the plan and deed, will be governed by the highway boundary and the base line, wherever it is.

41 Upon the principle involved here see *Humphreys V. Pollock* (*Supra*), opinion of Rand, J., at p. 724, as follows:

> The principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate.

42 While a base line may not be a monument in the strict sense, it can be ascertained, albeit with investigation and work, with certainty. It must be dominant to any later and subordinate measure or mark.

43 That the reference to three acres, more or less, is the deed to the defendant and his wife is to be rejected by application of the principle *falsa demonstratio non nocet*. The description and the plan may be incorrect, in some measurements, but it is clear and I find, that the boundaries consisting of two parallel lines, a highway boundary line and a base line are certain. No erroneous statement as to

Continued on Page 123.

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Cooper, JJ.A.
July 23, 1974

REAL PROPERTY - TOPIC 7038

EASEMENTS, LICENSES AND PRESCRIPTIVE RIGHTS - CREATION OF EASEMENT BY IMPLICATION OF LAW - RIGHT-OF-WAY CREATED BY A RESERVATION IN A DEED WHICH CONVEYED PART OF THE SERVIENT TENEMENT - THE PLAINTIFF ACCEPTED A DEED WHICH RESERVED A RIGHT-OF-WAY TO THE DEFENDANT - THE APPEAL DIVISION HELD THAT A GRANT OF A RIGHT-OF-WAY BY THE PLAINTIFF TO THE DEFENDANT WAS TO BE IMPLIED FROM THE ACCEPTANCE OF THE DEED BY THE PLAINTIFF - THE APPEAL DIVISION DISMISSED THE PLAINTIFF'S ACTION FOR TRESPASS - SEE PARAGRAPHS 72 TO 80.

REAL PROPERTY - TOPIC 7082

EASEMENTS, LICENSES AND PRESCRIPTIVE RIGHTS - RIGHTS-OF-WAY - WHETHER THE DOMINANT AND SERVIENT TENEMENT MUST BE CONTIGUOUS - THE APPEAL DIVISION HELD VALID A RIGHT-OF-WAY WHERE A BODY OF WATER SEPARATED THE DOMINANT SERVIENT TENEMENTS - SEE PARAGRAPH 62.

REAL PROPERTY - TOPIC 4928

TITLE - BOUNDARIES - EVIDENCE - MISTAKE - THE APPEAL DIVISION HELD ADMISSIBLE ORAL AND DOCUMENTARY EVIDENCE OF A MISTAKE IN A DEED WITH RESPECT TO THE BOUNDARIES OF THE LAND CONVEYED - SEE PARAGRAPHS 24 TO 33.

EVIDENCE - TOPIC 3651

DOCUMENTARY EVIDENCE - MAPS AND PLANS - THE PLAINTIFF CLAIMED DAMAGES FOR TRESPASS - THE APPEAL DIVISION HELD ADMISSIBLE A ROUGH PLAN OF THE RELEVANT REAL PROPERTY LINES AS AN AID TO UNDERSTANDING THE TITLE DOCUMENTS - SEE PARAGRAPHS 8 TO 11.

. . .

The judgment of the Appeal Division was delivered by COFFIN, J. A.

1. COFFIN, J.A.: This is an appeal from the decision of Dubinsky, J., filed on the 15th day of February, 1973. The action was for damage and trespass against the defendant-respondent for wrongfully and wilfully entering upon the appellant's land and cutting trees and driving posts thereon and for a declaration that their lands are the property of the appellant.

2. The property in question is at Porter's Lake near what was known as Chezzetcook Narrows in the County of Halifax. By deed dated August 30, 1945, recorded in the Registry of Deeds at Halifax in Book 902, page 649, Margaret I. Wright, formerly Margaret I. Dares conveyed to Annabelle Lillian Brennan, the respondent, several parcels of land at Middle Porter's Lake. At the end of the description appears the following words:

> ALSO ALL that one-sixth interest or share in the right-of-way or road leading from the south side line of the Main Road, leading to Chezzetcook and running southerly along the western boundary of property of William LaPierre and the shore line of Porter's Lake to the northern bank of the canal separating the South Point, so called from the Main Land.

3. There was evidence that Mrs. Brennan and her family used the right-of-way to gain access to her main property from 1945 until the action taken by the appellant.

. . .

6 The deed to Earl W. Myers from William V. Hogan dated December 15, 1958 contained two parcels of land. In that deed appeared the following reservation:

> SUBJECT TO a right-of-way for Annabelle Lillian Brennan (of Dartmouth in the County of Halifax and Province of Nova Scotia, wife of Dr. M. D. Brennan) her heirs and assigns and her and their tenants and servants and all persons authorized by her on them with or without animals or vehicles at all times and for all purposes over and along the lot of land firstly described in this deed to the lot of land secondly described in this deed, which right-of-way is described as follows: - The right-of-way or road leading from the South side line of the Main Road leading to Chezzetcook and running Southerly along the Western boundary of property of William LaPierre and the shore line of Porter's Lake to the Northern bank of the canal separating the South Point, so called from the Main Land.

. . .

8 One ground in the notice of appeal was that the trial judge erred in allowing Noella Fisher to give expert opinion evidence. Mrs. Fisher is a daughter of the respondent and a member of the Bar of this Province. It was she who prepared the various abstracts of title and also identified the portion of the relevant lots by means of a plan which she with the assistance of her husband had prepared to help her "sort out" the lines or the approximate lines of the properties involved in the abstract.

9 Although he objected to the evidence at the trial, Mr. Weldon, acting for the appellant, acknowledged that as a visual index, the plan could be of assistance to counsel. He objected to it as a plan.

10 The trial judge allowed the use of the document with this comment:

> ... but if it's an aid and it's of some assistance - you'd like to get on with the case and so would I. I assure you that I will not take the metes and bounds of this diagram, or these diagrams, in any decision-making that I will have to do. I will look to the documents that are before me.

11 I am of opinion that there was no error in the judge's position regarding Mrs. Fisher's evidence and that it was admissible and could be considered by him in examining the title documents of the parties to this dispute.

12 The title appears to come down with reasonable clarity to a deed from Daniel Dares, Sr. and his wife to Frederick Dares and Daniel J. Dares - December 2, 1864 - book 148, page 421.

. . .

17 By deed dated April 6, 1925, recorded in Book 868, page 111 Daniel J. Dares conveyed to Roy G. Dares and Carl W. Dares, the Brennan land referred to in some of the documents as Schedule "A", as well as other lands. On July 11, 1939 - 868/214, Roy G. Dares and Carl W. Dares and their wives conveyed the same property to Margaret I. Dares (Margaret I. Wright), who in turn conveyed it to Mrs. Brennan in 1945.

18 The trial judge did not deem it necessary to trace the appellant's title back to the six holders to whom I have referred, but began with the conveyance from William M. Dares, the son of James Edward Dares, to William G. Foley by quit claim deed dated November 29, 1934, book 687, page 703. Mr. Foley conveyed to Dr. William V. Hogan by deed dated October 29, 1945 and recorded in book 916, page 145. Then as I have said, Dr. Hogan conveyed to the appellant in 1958.

19 Despite his opinion that there was a break in the documentary chain of title in the Registry, the trial judge after referring to the 1958 deed said that he was satisfied and found that the appellant's title to the lots subject to the right-of-way was good.

20 He did refer to the fact that in 1921 one William LaPierre owned land north and south of the main road conveyed to him on March 17, 1921 by deed recorded in book 682, page 781. I quote from his decision:

> William LaPierre owned the above described lands until 1932 when he conveyed them to Nova Rebecca Proctor by deed dated October 6, 1932. See Registry reference 682/1105. This clearly explains why in deed which he executed on April 6, 1925 (868/211), Daniel J. Dares refers to William LaPierre. As already intimated, I have drawn the inference from the evidence before me that at some stage in the past, the six co-owners of the undivided whole area in question came to an understanding as to who owned what portions. I am satisfied and find as a fact that when Daniel J. Dares conveyed the five lots mentioned in that deed to Roy Dares and Carl Dares, including Lot A so-called on the island or South Point, he had the unquestioned right to do so. Finally, I am satisfied and find as a fact that he also had the full right to convey his one-sixth interest in the road or right-of-way to the two grantees and which he positioned as leading from the main road to Chezzetcook and 'running along the western boundary of William LaPierre . . .'

. . .

24 One very important submission made by Mr. Weldon on behalf of the appellant was that if a right-of-way did exist as decided by the trial judge, it ran through the Mercer property and that when the respondent conveyed to Mr. and Mrs. Douglas Mercer, the totality of the title passed and, therefore, any right-of-way was terminated by a merger of the dominant and servient tenement. There was a new conveyance correcting this situation, but the appeallant argues that that is merely a self-serving document and inadmissible. The plans on file indicate that the properties in question are on the south side of the public road leading to West Chezzetcook. Immediately south of that highway and bounded on the west by Porter's Lake is the Mercer property. South of that again is the property of the appellant, Earl W. Myers. On the southern boundary of the Myers' property is the so-called canal, which is only a matter of two or three feet in width and south of that canal are the properties of the respondent, Annabelle L. Brennan.

25 Douglas A. Mercer purchased his property in 1965. He said that a survey in 1966 indicated that Mrs. Brennan had given him too much property and the deed made mention of a right-of-way. I quote from his evidence:

> A. Found that the conveyances . . the original conveyance was not correct.
>
> BY THE COURT:
>
> I see.
>
> A. In as much as there was too much land deeded to me more than was agreed upon. And secondly that no reference was made to the right-of-way.

26 Mr. Mercer also acknowledged that his boat house was on the right-of-way with the permission of the respondent.

> Q. If the Brennans asked you to move the boat house, if they wished to construct a road, would you do so?
>
> A. Yes.
>
> Q. Why?
>
> A. Well, at the time I built that boat house, I got Mrs. Brennan's permission with the understanding that you know . . it could be moved, so I'm not going back on the understanding I gave way back when.

27 The modern conveyancing relative to the Mercer property should perhaps be set out in detail.

| | | |
|---|---|---|
| 1. | Deed<br>2062/882<br>23rd July, 1965 | Annabelle L. Brennan<br>- to -<br>Douglas A. Mercer &<br>Maxine D. Mercer<br>as joint tenants |
| 2. | Right of First Refusal<br>23rd July, 1965 | Douglas A. Mercer &<br>Maxine D. Mercer<br>- to -<br>Annabelle L. Brennan |
| 3. | Deed<br>2561/430<br>23rd June, 1972 | Douglas A. Mercer &<br>Maxine D. Mercer<br>- to -<br>Annabelle L. Brennan |

Recites deed of July 23, 1965
Recites error in description of parcel 3 in that more land was conveyed than was intended and a right-of-way intended to be reserved was omitted.

Further recites that the parties wish to rectify the deed and the grantors have agreed to recovery the lands to Annabelle L. Brennan

| | | |
|---|---|---|
| 4. | Deed<br>2561/435<br>8th July, 1972 | Annabelle L. Brennan<br>- to -<br>Douglas A. Mercer &<br>Maxine D. Mercer |

new description with a reservation of a right-of-way in favour of Annabelle L. Brennan.

28 The appellant's position is that the first conveyance to the Mercers effectively conveyed any interest in the right-of-way to them and thus the easement was abandoned.

29 The trial judge said this:

> The evidence of Mr. Mercer, which I accept, supports my view that a mistake had taken place and that the parties never intended that the defendant be deprived of her right to pass from the main road across the Mercer property. . . .
>
> In any event, the recent conveyance in 1972 (since this trial began) between the Mercers and the defendant - Exhibits 23 and 24 (Registry references 2561/430 and 2561/435) were intended to clear up the obvious mistake in the conveyance of 1965.

30 Here we have not only the verbal evidence of Mr. Mercer that there was a mistake but also the conveyance with the recitals setting out the error.

31 In *Matthews v. Goode* (1924), 56 N.S.R. 543, where there was an ambiguity as to a property line, Harris, C.J. at p. 345 said:

> The subsequent conveyances are of great importance upon the question as to what the parties had in mind at the time of the sale to and the purchase by Burrows, and what was meant by the words of description: and it is also apparent that these subsequent conveyances at least throw light on the various acts relied upon to show possession of the disputed area.

32 The trial judge also referred to Phipson on Evidence, (1970), 11th ed. page 809-810, s. 1802 and the words of North, J., in *Olley v. Fisher* (1887), 34 Ch. d. 367, and 369;

> I am quite clear that the evidence is admissible, not for the purpose of interpreting the written contract as it stands, but to show that the written contract ought to be different from that which it actually is.

33 The trial judge accepted the evidence of Mr. Mercer and the deed reciting the error and in my opinion there was no error in principle in his so doing.

. . .

59 As to whether there was a dominant and servient tenement, the respondent has established an interest in Lot "A" - so-called to the satisfaction of the trial judge. He found as a fact that the land on the island immediately abutting the canal is lot "A" as referred to in the appellant's deed of 1945.

60 After referring to the evidence of a brother of Earl Conrod and also of Dr. Brennan, he said:-

> But quite apart from what they said, it is patently evident that the right-of-way described as 'running along the shore line of Porter's Lake to the northern bank of the canal separating the South Point, so-called, from the Mainland' was for the benefit of the owner of land on the island immediately adjacent to the canal. By the same deed that he granted this right-of-way, Daniel J. Dares conveyed to the grantees thereof, a lot of land on the island. Even the letter 'A' is significant. It is frequently used instead of the word 'First'. It may not be out of place to note that the record also refers to another lot on the island indicated by the letter C. See Registry references 571/706, 1157/1081 and 1208/5.

61 He also referred to the 1934 deed from William M. Dares to William G. Foley (626/17) as significant.

62 The fact that there was the canal just north of the respondent's property is of no consequence. We dealt with this point in some detail in *Aspotogan Limited v. Lawrence*, (1973), 4 N.S.R. (2d) 313, at pp. 328 and 329 quoting *Todrick v. Western National Omnibus Company, Limited*, (1934) 1 Ch. 561, at 572 and 573.

63 In my opinion the trial judge was right in finding the dominant tenement and also in concluding that there was a servient tenement.

64 The evidence of Kenneth W. Robb was that the right-of-way as indicated on his plan Exhibit 15 was the one in question:

> I think it's fairly clear from the description that that's the right-of-way.

65 I agree with the respondent's submission that the deed from Hogan to Myers indicates that the servient tenement is the Myers' property.

66 I shall refer only briefly to Ground 18 - that the trial judge erred in his understanding, interpretation and application of the principles of *Finlay v. Sutherland* (1969), 2 N.S.R. 1965-69 197, 4 D.L.R. (3d) 586. That case has no application here. The right given was not a right-of-way per se, but the right to construct a road. Not only had the predecessors in title failed to so construct a road, but obstructions had actually been placed on the road.

67 Here, in the situation at Porter's Lake, the trial judge accepted the evidence of the actual 1945 conveyance to the respondent of a one-sixth interest in a road, and the evidence of her husband of the use made thereof and of Mr. Mercer of his understanding of his own position.

. . .

72 As to the Hogan conveyancing, basically the respondent's submission is that Dr. Hogan excepted the right-of-way out of the conveyance to Myers. He was thus during his lifetine in a position to grant it to the respondent and his executor and heir-at-law could do so after his death.

73 In *Miller v. Tipling* (1918), 43 D.L.R. 469, a grantor conveyed a lot to the grantee subject to a right-of-way in favour of adjoining property. Riddell, J., said at pp. 477 and 478:

> ...where the instrument conveying the servient tenement purports to reserve an easement (or as here to except an easement) in favour of the owner of the dominant tenement, the true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee . . .

74 I should mention the real point in Miller v. Tipling. The conveyance was made subject to a right-of-way for the grantor and for "the owners or occupants of the adjacent premises to the north...". What was actually decided was that the right-of-way in the reservation was limited to its owners or occupants of the land to the north as it was to this land that the easement was appurtenant.

75 Gale on Easements, 12th ed., p. 50 quotes *May v. Belleville*, (1905) 2 Ch. 605, where White Lodge was sold under an agreement. I quote the text at p. 51:

> The conveyance of White Lodge to the purchaser contained a reservation to the vendor, his heirs and assigns, of all rights-of-way theretofore exercised in respect of Coxhill over White Lodge. This conveyance was executed by the vendor, but not by the purchaser. In an action by the vendor against an assign of the purchaser, it was held by Buckley, J., that the purchaser was bound in equity by the reservation, that the Statute of Frauds did not apply, and that the assign of the purchaser necessarily had notice of the reservation, and was bound thereby, and an injunction was granted restraining the defendant from interfering with the right-of-way.

76 We were also referred to Goddard on Easements, 7th ed., and I quote from pp. 157 and 158:

> An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land, for it is neither parcel of the land granted, which is necessary to enable it to be excepted, nor does it issue out of the land, as it should, to render it capable of being the subject of a reservation. It is, however, a very common thing to speak of an easement being reserved, or of the reservation of an easement. If an easement be incorrectly described in a deed as being reserved to a grantor of land, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly-created easement by the grantee of the land to the grantor. And even though a conveyance reserving an easement be not executed by the purchaser of land, the circumstances of the case taken in connection with the words of the deed and the reservation therein expressed may be such that a grant of the easement by the purchaser is to be implied and will be carried into effect. If an exception or reservation be made in favour of a person not a party to the deed, it would operate as a grant to him, though it could not be good as an exception or reservation.

77 In my view the authorities support the conclusion that there was a right-of-way as a result of the documentation set out in the decision of the trial judge. I agree with the submission of Mr. Hallett on behalf of the respondent that the respondent is entitled to enjoy the right-of-way as a tenant in common and to have the obstructions therein removed.

78 The trial judge accepted ten feet as the appropriate width:

> A width of ten feet will ensure that it will be adequate for one vehicle. I do not think that the road being limited to one vehicle will create any hardship.

79 In reaching his conclusions as to the type of way, he referred to *Peterson, J., in Attorney-General v. Hodgson,* (1922) 2 Ch. 429, at 438:

> The right which was granted was a right to pass along the roads on foot or on horse or in carriages. There is not, I think, anything in the deed which shows that the right of carriage way is restricted to carriages which are impelled by any particular kind of traction; nor is there in my opinion any ground for saying that the word 'carriage' ought to be restricted to a carriage drawn by horses. A motor-car is, I think, a carriage within the meaning of this grant.

80 He also mentioned *Loyal Prince of Wales Lodge v. Sinfield* (1891), 40 N.S.R. 30. There the deed contained after the habendum a reservation of right-of-way and Ritchie, J., after citing authority that a "right-of-way cannot in strictness be made the subject either of exception or reservation" had this to say at pp. 31 and 32:

> No case was cited to me, nor have I been able to find any, in which a reservation such as this was held inoperative because the grantee had not signed the conveyance, but there are many cases in the United States courts in which full effect has been given to similar reservations, notwithstanding the deeds were not executed by the grantee. (see 10 Mass. 183; 102 Mass. 107; 6 Cush. 132; 7 Met. 179), and many others may be found to the same effect. . . .
>
> The case is not without difficulty, but even if it cannot be assumed, . . that the counterpart of the indenture was executed by the grantee, I think the plaintiffs, by accepting the deed, were bound by the reservation it contained, and the defendant was justified in removing the obstructions to the right-of-way.

81 The headnote refers to a reservation to the "grantee" of a right-of-way. this is obviously incorrect.

82 In the result, it is my view that the respondent has established the right-of-way, that the decision of the trial judge was not wrong and that it should not be distrubed.

83 I would dismiss the appeal with costs.

*Appeal dismissed.*

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Cooper and Macdonald, JJ.A.
January 30, 1975

REAL PROPERTY - TOPIC 4747

TITLE - BOUNDARIES - DETERMINATION OF A BOUNDARY BY AGREEMENT OF THE PARTIES - THE PLAINTIFF CLAIMED THAT THE DEFENDANT WAS TRESPASSING ON THE PLAINTIFF'S LAND - THE DEFENDANT JUST PRIOR TO HIS PURCHASE OF A 70 ACRE LOT ACCOMPANIED THE PLAINTIFF AND THE SELLER OF THE 70 ACRE LOT TO THE SITE TO DETERMINE THE BOUNDARY ABUTTING THE PLAINTIFF'S PROPERTY - THE APPEAL DIVISION DISMISSED THE PLAINTIFF'S ACTION FOR DAMAGES AND FOR AN INJUNCTION - THE APPEAL DIVISION STATED THAT THE DEFENDANT ACTED TO HIS DETRIMENT UPON THE PLAINTIFF'S REPRESENTATION AS TO THE BOUNDARY WHICH PRECLUDED THE PLAINTIFF FROM CLAIMING A MISTAKE - SEE PARAGRAPHS 23 AND 24.

REAL PROPERTY - TOPIC 5705

EXTINGUISHMENT OF TITLE - ADVERSE POSSESSION - CONTINUITY OF POSSESSION - WHAT CONSTITUTES CONTINUOUS POSSESSION - A LOT OF WOODLAND WAS USED FOR LOGGING OPERATIONS - SEE PARAGRAPH 40 - THE TRIAL DIVISION HELD THAT THE LOGGING OPERATIONS WERE ACTS OF POSSESSION SUFFICIENT TO ESTABLISH POSSESSORY TITLE - SEE PARAGRAPH 55.

PRACTICE - TOPIC 7020

COSTS - PARTY AND PARTY COSTS - ENTITLEMENT TO PARTY AND PARTY COSTS - SUCCESSFUL PARTY - THE APPEAL DIVISION REVERSED A REFUSAL BY A TRIAL JUDGE TO AWARD COSTS TO A SUCCESSFUL DEFENDANT IN A CASE INVOLVING A LAND BOUNDARY DISPUTE - SEE PARAGRAPHS 25 TO 27.

This case arose out of a dispute over the boundary between the plaintiff's land and the defendant's land. The boundary was located in woodland. The defendant just prior to his purchase of his property accompanied the seller and the plaintiff to examine the location of the boundary. The defendant's predecessor in title used the land in question for logging operations for over 20 years. The Trial Division dismissed the plaintiff's action and held that the defendant established possessory title to the land in question. The judgment of the Trial Division is set out below immediately following the judgment of the Appeal Division - see paragraphs 29 to 58.

On appeal to the Appeal Division of the Nova Scotia Supreme Court the appeal was dismissed and the location of the boundary as determined by the Trial Division was affirmed. The Appeal Division stated that the boundary was agreed to by the plaintiff at the time the land was purchased by the Defendant. The Appeal Division stated that the defendant acted to his detriment when the defendant relied on the plaintiff's representation with respect to the boundary and such reliance precluded the plaintiff from claiming a mistake - see paragraphs 23 and 24.

. . .

This appeal was heard by the Appeal Division on December 11 and 12, 1974. Judgment was delivered by the Appeal Division on January 30, 1975.

The judgment of the Appeal Division was delivered by MacDONALD, J.A.

1 MacDONALD, J.A.: The matter in dispute in these proceedings in a broad sense is 70 acres of woodland located at Londonderry in the County of Colchester. Both the appellant Allen Spencer and the respondent Frank Benjamin claim ownership of these lands.

2 The appellants Dennis and Lyle Spencer are grandsons of the appellant Allen Spencer and had, or have, an oral agreement with their grandfather to purchase his lands at a price of $10.00 an acre. It is because of this oral agreement that they are parties in the action.

3 By warranty deed dated February 8, 1947 and registered at the office of the registrar of deeds for Colchester County on May 18, 1972, Thomas R. Black and Harry K. Johnson and their wives conveyed to the appellant Allen Spencer certain lands located in Londonderry, Colchester County. The deed described the lands as comprising 238 acres more or less. In 1973 these lands were surveyed by George E. Hingley, a Nova Scotia Land Surveyor, who testified that the lands as calculated from the deed description would comprise approximately 175 acres. His survey plan of the lands shows an area of 183.4 acres.

4 On November 22, 1968, William Cochrane and his wife conveyed to the respondent by quit claim deed certain lands situate at Londonderry containing, according to the description, 70 acres, more or less, save 8 acres previously conveyed to Charles Stewart. This deed was registered at the office of the registrar of deeds for Colchester County on November 27, 1968. It is this 70 acre piece of land that is the subject matter in dispute. More particularly, the issue really is the location or position of the southern boundary of the lands of the appellant Allen Spencer.

5 In the spring months of 1973 the respondent commenced logging operations on the 70 acre tract of land. It is patently clear that such activity triggered these proceedings.

6 On may 7, 1973, the appellants commenced an action against the respondent, claiming:

(1) a declaration that Allen Spencer was entitled to possession of the 288 acres, more or less, described in the conveyance to him from Black and Johnson.

(2) damages for trespass.

(3) an injunction restraining the respondent from carrying on his logging operations.

(4) an order for ejectment.

This action was defended by the respondent on the grounds that:

(1) the respondent was the owner of 70 acres, more or less, as conveyed to him by William Cochrane and that this lot did not form part of the lands of the appellant Allen Spencer.

(2) that in any event the respondent had established possessory title by adverse possession of the 70 acre lot.

(3) that Section 17 of the *Registry Act*, Chap. 265 R.S.N.S. 1967 prevailed against the defendant.

8 The plaintiff, Allen Spencer, identified his lot on Exhibit number one which is a plan of the survey conducted of his lands by the aforementioned George E. Hingley. This plan shows the lands of the appellant Allen Spencer as comprising 183.4 acres and lying to the east of and abutting the Cumberland Road. This plan also shows the relation of such lands to others adjacent and adjoining. The respondent introduced Exhibit number nine which is a plan or sketch of the location of the 70 acre piece of land as prepared for the respondent by Emerson C. Keen, a Nova Scotia Land Surveyor. Exhibit number one is dated June 29, 1973 and exhibit number nine bears the following:

Plan showing findings of May 31, 1973, Frank Benjamin survey....

9 There is some question as to whether exhibit number nine can be truly called a survey plan; in view however of what I consider to be the pivotal issue in this appeal, namely the existence or non-existence of a conventional line, I do not consider it necessary to resolve such question.

10 Exhibit number nine shows the lands of the respondent as lying to the east of and abutting the Cumberland Road. This plan also shows the "lands claimed by Spencer" as lying to the north of those of the respondent. In between what is shown as "lands of Frank Benjamin" and "lands claimed by Spencer" and abutting both, is a strip of land marked "claimed by Benjamin". This strip extends eastwardly from the Cumberland Road and bears a southern boundary measurement of 2339.6 feet and an eastern boundary measurement of 830 feet. The northern boundary of this piece of land is entitled "Found old blazed line claimed by Benjamin". It is this line that the respondent says is the northern boundary of his lands and the southern boundary of those of the appellant Allen Spencer. The latter says that it is the *southern* boundary of the "claimed by Frank Benjamin" lot as shown on exhibit number nine that is the *northern* boundary of the respondent's lands and thus the southern boundary of those of the appellant Allen Spencer. The evidence of the surveyor Emerson C. Keen is to the effect that the 70 acre lot of land is made up of those lots he has shown on exhibit number nine as being "lands of Frank Benjamin" and "claimed by Frank Benjamin".

11 The evidence is clear that before the respondent purchased the 70 acre lot of land from William Cochrane he visited the lands on two occasions, once with the appellant Allen Spencer, with whom he was previously acquainted, and a day later with Allen Spencer and Mr. Cochrane. The respondent contends that the purpose of these visits was to acquaint him with the location of the northern boundary of the Cochrane land which would also be the southern boundary of the lands of the appellant Allen Spencer. The respondent says such boundary was identified to him as being what is shown on exhibit number nine as "found old blazed line claimed by Benjamin". As to this aspect of the matter the learned trial judge made the following finding of fact:

> Prior to buying he travelled the lines on two occasions, once with the plaintiff and later with the plaintiff and Cochrane. On each occasion the northern boundary travelled was a blazed line, as indicated in Exhibit 9 and marked 'Found Old Blazed line claimed by Benjamin'.
>
> Having heard their evidence and observed their demeanour on the witness stand, I accept the version of the defendant and the witness Cochrane where it conflicts with that of the plaintiff. I find that these witnesses travelled the line marked on Exhibit 9, marked as 'Found Old Blazed line claimed by Benjamin' and that this line is the defendant's northern boundary.

12 It is difficult, if not impossible, to accurately determine from the evidence of the two surveyors the exact location of either the southern boundary of the Spencer lands or the northern boundary of those claimed by the respondent. This being so, it would appear to me that the learned trial judge in that portion of his decision just quoted, was really making a finding that a conventional line existed. Therefore, the evidence of the various witnesses as to what exactly occurred on the two occasions the respondent visited the area in question with the appellant Allen Spencer must be carefully scrutinized to see if it supports a finding that the northern boundary of the lands claimed by the respondent, and thus the southern boundary line of the lands of the appellant Allen Spencer, has been established by means of a conventional line as being shown on exhibit number nine as, "found old blazed line claimed by Benjamin".

13 The respondent testified as to his visits to the lands with the appellant Allen Spencer as follows:

> A. I can remember following down this brook, first brook; crossing over it, back over it - you know; and we went south until we came to this north line of Cochrane's -
>
> Q. Yes?
>
> A. - and we came out to the Cumberland Road - to
>
> Q. How did you know it was the north line of Cochrane's?
>
> Q. He mentioned that day about 'This man, I think, wants to sell here - Mr. Cochrane'..and we just kept walking along and talking out to the Cumberland Road from there and cruising.

. . .

Q. How visible was the line?

A. Well, I just don't recall that from then - I didn't pay enough attention. I knew it was a line when we come to it, we could see the blazes right there, but from there out I wouldn't say because I didn't pay any attention to it.

. . .

Q. Now, did you and Mr. Spencer have any conversation about the sale of his lot?

A. He told me that he thought that he would sell, so I said 'I'll call Cochrane tonight if you'll go with us. Would you care to go with us next day?' and I'd have his side of the story on his side of the line and I'd have Cochrane's on the other and I thought that that would be a pretty good idea where I didn't know the land, and so on.

. . .

Q. How did Mr. Cochrane get out to the land the next day?

A. I took him out next day and I think we stopped and took Allen along with us.

Q. Yes?

A. And we stopped at the north line there.

Q. Now, when you picked up Allen, was there anything said about where you were going?

A. I can't recall that but I know that we would say we were going out to the woods.

Q. Where did you go then?

A. We went out to the lot and stopped at the north line there.

Q. Now, by 'the north line' what do you mean reference to Exhibit 9?

A. Cochrane's - this north line.

Q. That's the line marked 'Found Old Blazed Line Claimed by Benjamin' on Exhibit 9?

A. Yes.

Q. All right, sir. Where did you go from there?

A. We continued down the line.

Q. What were you doing?

A. The blazes were clear once you found them. There was quite a bit of underbrush starting to grow up. And I had the compass in my hand and followed them. A fairly straight course, I thought it was, that day.

Q. Do you recall who led?

A. I think Cochrane was ahead, more or less, and he would probably be off the line a little and cruising along, but I stayed on the line.

Q. Yes. How far in did you go that day?

A. And we continued right through to this corner.

Q. By 'this corner' what do you mean?

A. That's the northeast corner.

Q. By that do you mean the end of the line marked 'Found Old Blazed Line'?

A. Yes.

Q. Were you all together as you came there or -

A. We were all together there, yes. I remember looking especially for that corner. It wasn't visible. There was no trees standing around that. I remember there was a bare spot there. And Allen said 'I cut this other lot in behind and maybe I cut the corner tree down.', he said. So, we looked for a line coming this way.

Q. By 'this way' you mean what?

A. South, so that we could tie the two together and this one come up to the corner and the other one, you see - that give us the corner.

Q. Yes?

A. And we was quite satisfied on that.

14 In cross examination the respondent was questioned as to how he knew the position of his lands, to which he replied.

My first recollection was the day that Mr. Cochrane and Allen Spencer showed me the lines.

15 The following also appears in the cross examination of the respondent:

Q. Did you check into the title of the lands to the north of you, then, before you were making this purchase, or when you were looking around on these lands to the east side of the Cumberland Road" Did you ever check into this?

A. I took Allen's word. I guess that was all I had.

16 William R. Cochrane testified as follows:

Q. And how did you come to go from Truro to the property in question?

A. With Mr. Benjamin.

Q. When you went out there first, sir, where did you go? Did you go directly to the property or did you go somewhere else first?

A. We picked Mr. Spencer up.

Q. That is which Mr. Spencer?

A. Mr. Allen Spencer.

Q. Now, at this point you can say what was said because there's somebody there. Now what did you do when you picked up Mr. Allen Spencer?

A. *Well, we went up and we stopped at the north line there.*

Q. *What was the purpose of it? Did you discuss the purpose of going there?*

A. *Well, it was to - I suppose Mr. Benjamin wanted to make sure that Mr. Spencer was agreeing with him that was the right place.*

Q. That's what you're supposing?

A. That's right.

Q. Was there any conversation to that effect, sir?

A. I don't really remember.

Q. Where did you go then? Where did you go?

A. *Well, we walked along the north line. We followed the north line along.*

Q. Was anything done between the three of you as you went in?

A. Well, there was a few spots. *Mr. Spencer cut a few spots.*

Q. How did he cut them, sir?

A. With an axe.

Q. Which property were you looking at. One or both?

A. Just looking at the one.

Q. Was there any conversation about the other property?

A. That is, north of that?

Q. Yes.

A. Not to my knowledge.

Q. Any conversation between Mr. Spencer and Mr. Benjamin, to your knowledge, of the property to the north of the line?

A. I don't think there was any, no.

Q. How far in did you go that day, sir?

A. We went right around the property.

17 The appellant Allen Spencer gave the following evidence in cross examination.

Q. Now, sir, as you went in there that day with Cochrane and Benjamin, I take it that you took your side of the line and they took theirs?

A. They were along their line part of the time and part of the time they was down cruising through my timber is the way I felt about it.

Q. But you, however, took your side of the line. Is that right, sir?

A. I took my side of the line, I suppose. Both sides was mine, I figured.

Q. I see. But you did refer to it as your side of the line, that is, 'My side of the line.' - is that right?

A. Yes. I stayed to the north because there's where it was cleared, to the north.

Q. Did you refer to it that day as 'My side of the line'?

A. Oh, I don't know.

Q. Did you ever refer to it as 'My side of the line'?

A. I don't know when or how or where it went to. I knew nothing about it at the time.

Q. Do you recall the day that you gave evidence, sir, in my library?

A. Yes.

Q. And you recall, of course, that that was under oath and taken down?

A. Yes.

Q. And do you recall saying this - page 8, question 50 - I asked you:

'Which line? North line?

And you answered:

' The north line that they claim now. So, I'd never - oh, well, the wife and I knew there wasn't, because I had heard that Archie and them had stripped a bunch of us, *so I went that day with them and I took my side, north side of the line.*'

And then I said:

'Whose north side?'

And you answered, and I read it in part:

*'My north side of theirs, they called it, the north side of Archie Davidson's lot that Bill Cochrane was supposed to own then'.*

Do you recall saying that, sir?

A. Yes.

. . .

Q. Again, referring back to the time that you gave evidence in my office, and you will recall that I asked you this question:

*'That line that you followed in there that day, was that Bill Cochrane's north line?*

And you said to me:

*'That was called Bill Cochrane's north line then'.*

Is that right, sir?

A. Yes, I suppose. Yes.

. . .

Q. *They came to you and asked you to show them where Bill Cochrane's north line was?*

A. Yes, and he says now that he asked me to show him my line and Bill Cochrane's. My line was never mentioned.

Q. Yes. Just Bill Cochrane's?

A. Bill Cochrane's line.

Q. And so you all, then, went off through your property?

A. I stayed on my side of the line, yes.

18 The appellant Dennis Spencer testified that "about a year ago" his grandfather, the appellant Allen Spencer, showed him the location "of the line he had shown to Benjamin and Cochrane". This witness indicated the position of such line as starting at a point on the Cumberland Road where the north line as alleged by the respondent begins. Dennis Spencer then marked by an orange line on exhibit number one the direction of this line from such starting point. The line he drew indicated a line angling to the *north* of what the respondent alleges is his northern boundary. The following appears in his evidence:

Q. And the orange mark you made on Exhibit #1 is where your grandfather says that he showed Cochrane and Benjamin a line?

A. Yes, that's correct.

Dennis Spencer said he walked in this line and found some blazes. He said that the line was not well marked and "there are blazes in the woods everywhere".

19 The appellant James Lyle Spencer testified that the orange line marked on exhibit number one by his brother Dennis Spencer runs more to the *northeast* than the line shown on exhibit number nine as "Found old blazed line claimed by Benjamin". The position of the orange line shown on exhibit number one and placed there by Dennis Spencer was marked on exhibit number nine by James Lyle Spencer by means of a dotted red line. This line has a place of beginning just south of the intersection of the line marked "found old blazed line claimed by Benjamin", and the eastern side of the Cumberland Road. From such point of beginning it runs northeast across such line and into what is marked "lands claimed by Spencer".

20 In my opinion the evidence, coupled with the finding of fact, made by the learned trial judge favours the interpretation that the purpose of the visit to the woods was to show the respondent where the north line of the Cochrane property and the south line of the Spencer property was. There is evidence to support a finding that the line so shown was that marked on exhibit number nine as "found old blazed line claimed by Benjamin" and indeed, this is the finding in effect made by the learned trial judge.

21 The Supreme Court of Canada in *Grassett v. Carter* (1884), 10 S.C.R. 105, per Henry, J., at pp. 129-130, said:

> There is no doubt in my mind on the evidence, that that line was agreed upon. The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and erects a house or an expensive fence, or holds and improves the land, the other party is estopped from saying that the line is not the right one. If, however, nothing is done on the land, and there is no change of position in any way, it is, I take it, within the power of one party or the other to prove that a mistake was made in the running of the lines or the adoption of them. In this case, before the house was put up by Dr. Temple, the defendant might have been authorized to show that the line was not the correct one.

22 In *Sutherland v. Campbell* (1923), 25 O.W.N. 409, Hodgin, J.A., speaking for the first divisional court in Ontario, said:

> When it is asserted that a line between the lands of two persons has become a conventional line superseding the true line, some situation making it inequitable and improper that the true line should be the measure of the right of the so-called trespasser must be shown. This may be an agreement for consideration or a standing by while the other party changes his position.

23 I am of the opinion that there was evidence in support of the findings of fact made by the learned trial judge. In addition, based on the findings of fact of the learned trial judge and the evidence I am of the opinion that the appellant Allen Spencer, by words and actions, led the respondent to believe that the line marked "found old blazed line claimed by Benjamin" as shown on exhibit number nine, was the southern boundary of his lands and the northern boundary of the lands then allegedly owned by William Cochrane. It is true that when such representation was made the respondent was not then the owner of the 70 acre tract of land. However, Mr. Cochrane, the then purported owner of the lands, was there and the appellant Allen Spencer knew that the respondent was contemplating purchasing such lands. Whether or not the appellant Allen Spencer made an honest mistake in making such representation as to the position of the line is no longer material because at the time he made such representation he obviously intended it to be acted and relied on; and the respondent has acted upon such representation to his detriment, not only in purchasing the lands from Cochrane, but in going to the trouble and expense of starting a logging operation thereon.

24 Even if the true southern boundary line of the lands of the appellant Allen J. Spencer is south of that alleged by the respondent, I am of the opinion that it would now be inequitable and improper to confirm or recognize such line for the reasons given above. I am, therefore, of the opinion that the line marked on exhibit number nine as 'found old blazed line claimed by Benjamin" is now a conventional line marking the southern boundary of the lands of the appellant Allen J. Spencer, and as found by the learned trial judge, the northern boundary of the lands of the respondent. It follows that the respondent is entitled to a declaration to that effect. In view of such opinion I feel it is not necessary to consider the issue of possessory title by adverse possession as alleged by the respondent because such can now no longer be an issue between the parties here.

25 The respondent has cross appealed against the dismissal of the appellants' action without costs. He contends that costs should have been awarded to him. The learned trial judge said:

> As this trial was necessary to determine the plaintiff's southern boundary, I choose to exercise my discretion in not allowing costs to either party.

26 Although technically it might be said that the action was necessary to determine such boundary, in actual fact it was framed as one for damages for trespass; for an injunction to restrain the defendant from carrying on his logging operation: for a declaration as to possession of lands and for an order for ejectment. These were the issues the respondent had to meet.

27 It is true that costs are in the discretion of the trial judge. It is also true that costs normally follow the event. In the present case the learned trial judge gave as his reason for refusing costs to the respondent the fact that the action was necessary to determine the southern boundary of the appellants' land. As I am of the opinion that he was in error in so finding I would allow the cross appeal of the respondent.

28 In the result the appeal is dismissed and the cross appeal is allowed and a declaration granted to the respondent as hereinbefore set forth. The respondent shall have his costs both on appeal and on trial.

*Appeal dismissed.*

SPENCER ET AL. v. BENJAMIN 11 N.S.R. (2d)

Nova Scotia Supreme Court, Trial Division
MacIntosh, J.
February 28, 1974.

HUGH R. LATIMER, for the plaintiffs,
DAVID W. CRUCHY, for the defendant.

This case was heard by MacINTOSH, J., at Halifax, Nova Scotia on December 18, 1973. Judgment was delivered by MacINTOSH, J., on February 27, 1974.

29 MacINTOSH, J.: The plaintiffs' action is for damages for trespass, a declaration as to title, an injunction and an order of ejectment. The dispute involves the location of the plaintiffs' southern boundary to a 50-acre woodlot at or near Londonderry Township, Colchester County, Nova Scotia. A portion of this 50-acre lot is taken up with blueberry fields.

30 The plaintiffs claim title by virtue of a conveyance dated February 8, 1957 and recorded on May 18, 1972, with lands described therein as follows:

> ALL that certain lot or tract of land situate, lying and being in the Township of Londonderry and bounded and described as follows:
>
> BEGINNING at a stake marked E.C.C. on the bounds of the Cumberland Road at the Southwest angle of a lot of land owned by Albert McLuaghlin and running South 77 degrees East (the Magnet 1905) along the lands of the said Albert McLaughlin 67 chains more or less to a Birch Tree marked E.C.C.; Thence Southerly along the lands of Albert McLaughlin aforesaid, 36 chains more or less to a stake marked E.C.C. at the Northeastern angle of the section lot; Thence along the line of the said Section Lot North 77 Degrees West (the Magnet 1905) 31 chains more or less to a stake marked E.C.C. on the bounds of the Cumberland Road; Thence following the course of said Road Northerly to the place of beginning, containing 238 acres more or less, inter alia.
>
> AND BEING part of lands conveyed to Harvey Chisholm by St. Paul's Parish by deed dated the 17th day of November, A.D., 1905, and recorded at Truro aforesaid, in Book 126, page 230. And conveyed by the said Harvey Chisholm to Ella Peppard, Annie Norris, Maude Chisholm and Janie Chisholm by Deed dated November 14th, 1914, and registered at Truro aforesaid, in Book 155, Page 358.

31 The defendant claims title to a conveyance dated November 22, 1968 and recorded November 26, 1968, and described the lands conveyed as follows:

> THAT lot of land situate in Londonderry, County of Colchester and Province of Nova Scotia, bounded and described as follows:

> BEGINNING at a stake and mound of stones on the Eastern Boundary of the Cumberland Road;
>
> THENCE Easterly until it strikes the line of the land of the late Harvey Chisholm Estate;
>
> THENCE along the Chisholm land forty-four (44) rods striking the line of land owned by the late Frederick Fletcher;
>
> THENCE along the line of said Fletcher land and Edward Spencer's land until it strikes the Cumberland Road;
>
> THENCE along said road to the place of beginning, containing seventy (70) acres, more or less.

32 G. E. Hingley, the provincial land surveyor called by the plaintiffs, introduced a plan of the area which is on file as Exhibit 1. This plan was prepared from the records at the Registry of Deeds office. He established the eastern line of his survey from a marker installed for Scott Paper Company, an owner of lands in the immediate area of the lot in question. No verification of the accuracy of this marker was made by this surveyor. The north line of the lot he established by projecting the line of a wire fence on the west side of the Cumberland Road to the east side of the said Road where the lands in question are situated. His bearings were taken from the Scott Paper Company line. He testified that if there was an error in this line then the position of the south line of the lot would be changed.

33 The acreage shown on the survey plan is 183.4 acres whereas the deed calls for 238 acres. The surveyor indicated that the lot measured from the deed description would involve approximately 175 acres.

34 Counsel for the defendant, on cross-examination, elicited from his witness that there was room for confusion in attempting to equate the documentary evidence with what appeared on the ground. At another state, he admitted he was not sure of the location of the property.

35 The defendant raises two main arguments to establish his right to the lands in dispute. Firstly, that he has established possessory title outside of any documentary title he might have had, secondly, that Section 17 of the *Registry Act*, being Chapter 265, R.S.N.S. 1967, applies to defeat the plaintiffs' claim.

36 The late MacQuarrie, J., in *Ezbeidy v. Phelen* (1958), 11 D.L.R. (2d) 665, at page 665, discussed the matter of title by long adverse possession as follows:

> As to (3) where there is a contest between a person who claims by virtue of his title, as the defendant does here, and a person who claims by long adverse possession only, such as the plaintiff must rely on there, there is first of all a presumption that the true owner is in possession, that the seisin follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession. If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidents of ownership of the property, that possession in time ripens into title: cf. *Lord Advocate v. Lord Lovat* (1880),5 App. Cas. 273.
>
> In *Des Barres v. Shey* (1873), 29 L.T. 592, Sir Montague Smith, delivering the judgment of the Judicial Committee, said, p. 595: 'The result appears to be that possession is adverse for the purpose of limitation, when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant." Cf. *Halifax Power Co. v. Christie* (1915), 23 D.L.R. 481, 48 N.S.R. 264.

> What the person to adverse possession gets is confined to what he openly, notoriously, continuously and exclusively possesses. Possession of a part is not possession of the whole as between an actual possessor and an actual owner.
>
> Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed.
>
> Where the contest is between the true owner on the one hand and a person having colour title on the other hand, that is, a person having a claim which is good on the fact of it, such as a prior unregistered deed, that person has a much lighter burden to discharge than a mere squatter, because he always had the mental attitude, or is presumed to have it, which is a necessary ingredient to possession. He does not have to prove that discontinuous acts are not simply disjointed acts of trespass as a squatter must show, and in this case possession of a part is constructive possession of all the land comprised or covered by his colour of title: *Cf. Lessee of Cunard v. Irvine* (1853), 2 N.S.R. 31.

37 Section 9 of the *Limitation of Actions Act*, being Chapter 168, R.S.N.S. 1967, reads as follows:

> 9 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

38 It is stated at page 787 of Anger and Honsberger's *Canadian Law of Real Property*:

> Whether or not there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute [*Godson Contracting Co. v. Grand Trunk Ry.* (1917), 13 O.W.N. 241). Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another; 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, are to be taken into account in determining the sufficiency of possession (*Kirby v. Cowderoy*, 5 D.L.R. 675, (1912) A.C. 599, reversing (1911), 18 W.L.R. 314; *Johnston v. O'Neill*, (1911) A.C. 552).

39 R. C. Matheson, a provincial forest ranger, testified as an expert on the age of trees and tree blazes. He stated that he had walked the north line as claimed by the defendant and shown on Exhibit 9. He found this line to be marked by three blazes made between 30 and 40 years ago. He also testified that one could stand on the Cumberland Road, looking easterly, and see this line.

40 W. R. Cochrane purchased the same lands as covered by the defendant's deed, in 1945, from one Davidson. He stated that he logged the lands and had no trouble with his northern neighbours, Johnson & Black, from whom the plaintiffs' purchased. He testified further that he and Johnson & Black each logged up to the line now claimed by the defendant Benjamin as his north boundary. He also stated that in 1935 he went to the millsite operated by the then owner of these lands, Davidson. This millsite, he recalled, was located within 100 to 150 feet of this north line. Last summer he visited the area and discovered the remnants of this millsite.

41 When he sold to the defendant in 1968 he travelled the lot, accompanied by the plaintiff Allen Spencer and the defendant. The purpose was to remove any doubt as to the position of the north line. They went in on the north line now claimed by the defendant. No objections were made by the plaintiff.

42 On cross-examination, he stated that in 1945 a wooden pin in stones could be seen from the Road, marking the northwest corner of his lot. At that time the stake was very old and located inside the stones. He sold eight acres of his land to one Stewart as a blueberry lot, as appears on Exhibit 9 which is a plan prepared by the defendant's surveyor, Keene. The bearings for this blueberry lot were established by reference to the alleged north line of the defendant.

43 Alex MacLeod, a provincial log scaler, and woodsman of considerable experience, recalled that in 1934 he travelled the lines of the lot described in the defendant's deed accompanied by three others. By making use of blazed tree lines on the eastern side of the lot and the 44 rod eastern boundary measurement described in the defendant's deed, they found a blazed north line as claimed by the defendant.

44 E. C. Keene is a provincial land surveyor called by the defendant. He prepared Exhibit 9. This exhibit is the result of his findings on the ground related to the deeds in the defendant's abstract of title.

45 In his opinion, the axle shown on the plaintiff's plan, Exhibit 1, is the same as the position of the line marked "Found old blazed line claimed by Benjamin" in Exhibit 9 which, of course, is the northern boundary claimed by the defendant. He was also of the opinion that the Scott Paper Company post, used by the plaintiffs' surveyor to prepare Exhibit 1, is placed too far south. He testified that the "Found Iron Post" on Exhibit 9 is the same as point C in Exhibit 1, and in his opinion had been recently installed. This is the line being claimed by the plaintiffs as their south line.

46 S.A. Davidson testified he purchased the lands of the defendant in 1934 from one Hugh MacLeod Peppard. He stated that the "old Blazed Line claimed by Benjamin" in Exhibit 9 was clearly discernible at the time he had the lot and logged it. He stated that the lands to his north, south and east were owned by the estate of Harvey Chisholm, the plaintiffs' predecessors in title. The lines of the property were run in 1934. At that time an heir of the Chisholm estate shared in the cost of the survey. His logging operations were completed in 1934. He never went back to do any further work on the land, nor did he do any fencing or engage a caretaker to watch over his lands. He maintained that the northern boundary of his lot, as indicated in Exhibit 9, is exactly the same now as in 1945.

47 He conveyed the property to the witness Cochrane in 1945.

48 The plaintiff Allen Spencer is an 83 year old lumberman who has resided in the area all his life.

49 At the time he obtained his deed from Johnson & Black in 1947, he testified that the defendant's alleged north line was not visible.

50 He maintained that the southern line went through the blueberry field sold to Stewart, as indicated in Exhibit 9.

51 His version of the running of the lines in 1968 differs from that of the witness Cochrane. He stated that the defendant asked him to show him Cochrane's lines. He testified that they went down a line they, that is, Benjamin and Cochrane, had marked out. He said he never told them whose line it was. The line is not visible today. On cross-examination, when asked if the defendant and Cochrane requested him to show them Cochrane's north line he answered as follows: "Yes, I stayed on my side of the lines. I felt it was my property on both sides of the line."

52 The defendant Benjamin testified he purchased from the witness Cochrane in 1968.

53 Prior to buying, he travelled the lines on two occasions, once with the plaintiff and later with the plaintiff and Cochrane. On each occasion the northern boundary travelled was a blazed line, as indicated in Exhibit 9 and marked "Found Old Blazed line claimed by Benjamin".

54 Having heard their evidence and observed their demeanour on the witness stand, I accept the version of the defendant and the witness Cochrane where it conflicts with that of the plaintiff. I find that these witnesses travelled the line marked on Exhibit 9, marked as "Found Old Blazed line claimed by Benjamin" and that this line is the defendant's northern boundary.

55 I find further that since 1935, when these lands were logged by the witness Davidson and then through the witness Cochrane and up to the defendant Benjamin, there has been "open, notorious, continuous and exclusive" possession by the defendant and his said predecessors. Their acts of possession, that is, their logging operations, is the course of conduct one might reasonably expect an owner of a woodlot to follow with a due regard to his own interests.

56 That in determining the required years of adverse possession, the possession of two or more parties who have been in possession continuously and without any break, may be tacked. See *McGibbon v. McGibbon* (1913), 46 N.B.R. 552.

57 In the result I find the defendant, in addition to any documentary title he might have, has established a possessory title to the lands outlined in Exhibit 9 as lands "Claimed by Frank Benjamin". Having so found, there is no need to rule on the other matters raised by the defendant.

58 As this trial was necessary to determine the plaintiffs' southern boundary, I choose to exercise my discretion in not allowing costs to either party.

*Action dismissed.*

Continued from Page 103.

acreage can change them. *Allen v. DeWolfe et al.* (1971), 2 N.S.R. (2d) 463, is an application of the principle. In Anger and Honsberger (*supra*) it is stated at page 626:

> Apart from the question of mutual mistake, there is an old legal maxim respecting interpretation of deeds that is commonly referred to as *falsa demonstratio non nocet* but which, in full, is *falsa demonstratio non nocet cum de corpore constat*. It may be freely though inadequately translated as 'a false demonstrative particular or reference does not prejudice what was clear before.' . . . In its application to property, the maxim means that, if there is a sufficient description in a conveyance to ascertain definitely what is intended to pass, a subsequent erroneous addition or error in the description does not vitiate the conveyance and may be rejected . . . .

44 The acts, constituting trespass, having been committed on the lands of the plaintiff, the defendant is guilty of trespass and the plaintiff will have the relief claimed. An injunction in the terms asked will be granted but limited to lands as in the plaintiff's deed described. It should not be upon that portion of lands between the eastern boundary line, as in plaintiff's deed described, and the western boundary line of lands of the defendant and his wife as found herein. Title in that portion may not be in the plaintiff. Certainly at best it is a very questionable title.

45 The plaintiff's damages are assessed at $250. The plaintiff will have judgment for that sum and its cost to be taxed.

*Judgment for the plaintiff.*

Nova Scotia Supreme Court, Trial Division
MacIntosh, J.
July 29, 1975

SALE OF LAND - TOPIC 8856

REMEDIES OF PURCHASER - RECISSION WHERE THE VENDOR WAS UNABLE TO CONVEY TITLE TO THE PROPERTY REFERRED TO IN AN AGREEMENT FOR SALE - THE VENDOR AGREED TO SELL TO THE PURCHASER A SMALL INN ALONG WITH WATERFRONT AT HUBBARDS, NOVA SCOTIA - A PUBLIC HIGHWAY RAN ALONG BESIDE THE WATERFRONT TO BE CONVEYED - THE CENTRE OF THE HIGHWAY WAS LESS THAN 25 FEET FROM THE MEAN HIGHWATER MARK THROUGHOUT THE LENGTH OF THE WATERFRONT TO BE CONVEYED - THE TRIAL DIVISION ALLOWED THE PURCHASER'S CLAIM FOR RESCISSION OF THE AGREEMENT FOR SALE - THE TRIAL DIVISION STATED THAT BY VIRTUE OF THE PUBLIC HIGHWAYS ACT THE WATERFRONT REFERRED TO IN THE AGREEMENT FOR SALE WAS PART OF A PUBLIC HIGHWAY AND COULD NOT BE CONVEYED BY THE VENDOR.

. . .

This case was heard by MacINTOSH, J., on June 17, 1975, at Halifax, Nova Scotia. Judgment was delivered by MacINTOSH, J., on July 29, 1975.

1 MacINTOSH, J.: Counsel for the vendor and the purchaser under an agreement of sale of real property have made separate applications in Chambers for a determination of the issues arising from said agreement.

2 The vendor seeks a declaration that the purchaser is bound to complete the purchase.

3 The purchaser seeks a declaration that the agreement of sale has been determined and for an order that the monies paid to the vendor by the purchaser pursuant to the agreement be recovered.

4 By agreement of purchase and sale dated July 31, 1974 the parties contracted for the sale of "The Anchorage", Hubbards, Nova Scotia.

5 The Anchorage is a small inn comprised of a central building, cottages, a wharf and waterfront.

6 The public highway runs between the main part of the property and the wharf.

7 The foreshore in front of The Anchorage property is of use solely as a location at which the wharf can be fixed. There is no beach or land area between the shoulder of the road and the water's edge. Throughout its length is the mean high-water mark more than twenty-five feet from the centre of the paved highway.

8 The agreement of sale is as follows:

. . .

> 1.03 The Purchaser shall be allowed twenty (20) days to investigate the title, which he shall do at his own expense and if within that time he shall furnish the Vendor in writing with any objection to title which the Vendor shall be unable or unwilling to remove, the Purchaser may cancel this Agreement. . . .
>
> 1.11 Time shall be of the essence of this Agreement.

. . .

9 The memorandum filed by Counsel for the purchaser, dated June 19, 1975, sets out the following acts as agreed:

1. 'The Anchorage' as described in the Agreement of Purchase includes the waterfront and wharf.

2. Timely objections were given.

3. There is no grant of waterlot or license under the Navigable Water Protection Act for the erection and maintenance of the wharf.

4. The availability of proof of possessory title was indicated shortly after objections were delivered, but no proof was delivered until after notice of cancellation.

. . .

5. The waterfront property in question is within the 66 foot roadway deemed by the Public Highways Act.

10 Having heard naught to the contrary, I accept these as agreed facts.

11 Whether or not the purchaser was entitled to cancel the agreement would depend on whether or not the vendor was able at the relevant time to convey the property known as "The Anchorage", free from all encumbrances.

12 It is acknowledged that the wharf and waterfront were intended to be included in the property to be sold.

13 In support of a claim of ownership Counsel for the vendor points out that commencing in 1910 deeds of conveyance of this property included the following words: "... together with all rights of the said devisee to the lands or foreshore in front of said herein described property." Subsequent deeds contained these words in more or less the same form. Where these rights arose if unknown and unexplained. There is no evidence of any Crown Grant.

14 Two statutory declarations have been filed in further support of the vendor's contention, one by the vendor and another by the vendor's predecessor in title. The latter takes the following form:

I, WHILIMINA D. DAUPHINEE, of Hubbards in the County of Halifax, Province of Nova Scotia, do solemnly declare:

1. THAT I am presently 89 years old and have lived in Hubbards all my life;

2. THAT my husband Basil J. Dauphinee purchased The Anchorage Property from Margaret Buckley in 1924 by Deed recorded in the Registry of Deeds at Halifax in book 576 at page 1097;

3. THAT my husband conveyed the property to me in 1931 by Deed recorded in the Registry of Deeds at Halifax in book 797 at page 149;

4. THAT I conveyed The Anchorage Property to Frederick T. Publicover in 1943 by Deed recorded in book 884 at page 921;

5. THAT from the late 1920's until 1943 I lived on the property;

6. THAT I always considered the land between the road and the water in front of The Anchorage Property to be part of that property and no one to my knowledge ever disputed that point;

7. THAT the wharf in front of The Anchorage Property extending into Hubbards Cove is the latest of a series of wharves at that location owned and maintained by the owners of The Anchorage Property;

8. THAT the Anchorage wharf has been in existence for as long as I can remember and according to the best of my information and belief has existed

for over one hundred years.

AND I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

15 The *Public Highways Act*, Chapter 248, R.S.N.S. 1967 contains the following provisions:

> 10 (2) Every common and public highway, together with the land within the highway's boundaries, is vested in Her Majesty the Queen, her heirs and successors.
>
> 14 (1) Every common and public highway shall, until the contrary is shown, be deemed to be at least sixty-six feet in width.
>
> 16 Possession, occupation, user or obstruction of a highway or any part thereof by any person for any time whatever, whether before or after the coming into force of this Section, shall not be deemed to have given or to give to any person any estate, right, title or interest therein, or thereto, or in respect thereof, but the highway or part thereof shall, notwithstanding such possession, occupation, user or obstruction be and remain a common and public highway.

16 From these provisions it becomes abundantly clear that a portion, at least, of the wharf and foreshore of The Anchorage are located on a public highway. Title by adverse possession is denied the vendor by Section 16 above.

17 Nor, in my opinion, is title in the foreshore the result of the above-mentioned quotation contained in the deeds of conveyance.

18 The vendor is therefore unable to convey the property contemplated by the agreement of sale, free from all encumbrances.

19 In the result the purchaser's application is granted and that of the vendor dismissed.

*Judgment for the plaintiffs.*

Nova Scotia Supreme Court, Trial Division
Hart, J.
July 10, 1975

REAL PROPERTY - TOPIC 5632

TITLE - ADVERSE POSSESSION - PROOF OF TITLE BY POSSESSION - CONSTRUCTIVE POSSESSION - THE PLAINTIFF CLAIMED OWNERSHIP OF CERTAIN PROPERTY WHICH HAD NEVER BEEN GRANTED BY THE CROWN - THE PLAINTIFF OFFERED SOME DOCUMENTARY EVIDENCE OF TITLE - THE PLAINTIFF ALSO SHOWED THAT HE HAD USED THE PROPERTY TO SUPPLY WOOD FOR HIS BOAT BUILDING BUSINESS AND TO SUPPLY PULP WOOD, FIRE WOOD AND CHRISTMAS TREES FOR SALE - THE TRIAL DIVISION HELD THAT THE PLAINTIFF ESTABLISHED CONSTRUCTIVE POSSESSION OF THE LAND - THE TRIAL DIVISION STATED THAT THE PLAINTIFF ESTABLISHED HIS CLAIM TO TITLE TO THE LAND - SEE PARAGRAPHS 8, 23 AND 24.

This case arose out of conflicting claims to a ten acre lot of land. The plaintiff claimed title from his successor in title from 1924 plus continuous constructive possession since that date. The defendant claimed title from 1948 by inheritance through their family. The land in question was never granted by the Crown despite 200 years of occupation. The plaintiff showed he had used the property to supply lumber for his boat building industry and also for supplying pulp wood, fire wood and Christmas trees for sale. The Trial Division, in finding for the plaintiff, stated that the plaintiff established constructive possession sufficient to support his claim.

. . .

This case was heard by HART, J., at Halifax, Nova Scotia, on June 23 and 24, 1975. Decision was given by HART, J., on July 10, 1975.

1 HART, J.: This proceeding arises as a result of conflicting claims of the plaintiff and defendants to a ten-acre piece of land lying on the northwest corner of Sober Island, in the County of Halifax. This piece of land has never been granted by the Crown. The plaintiff claims title through a deed dated April 25, 1960, from the heirs of persons in possession over a number of years and also claims to have been in possession of the property himself since 1933. The defendant, Duncan Logan, claims title to 4.8 acres of the disputed property through a predecessor in title who entered upon the property in 1949 and built a house, which has been continuously occupied by members of the defendant's family since 1956. The defendant, Harold Logan, claims 3.64 acres of the disputed property through a predecessor in title who entered upon the property and built a house in 1948 and lived there with his family until 1959. The house was left on the lot until 1966 and the property has been vacant since that time.

2 The evidence reveals that Sober Island lies at the southeastern extremity of Sheet Harbour. There is a semi-circular peninsula at the northern end of the island and this is the closest part of the island to the mainland. A bridge was erected in the early 1920's which permitted the highway on the eastern side of Sheet Harbour to continue on to the island and carry down through the peninsula to the southern part of the island.

3 The northern portion of the peninsula containing about 64 acres was granted to John Wessell in 1893, and this divided the peninsula into a northern granted portion and a southern ungranted portion of approximately the same size. The roadway running to the southern part of the island divided the ungranted portion of the peninsula into an eastern and western section with about one-quarter of the area lying to the east of the road and the balance to the west. The neck of the peninsula was formed by the Salmon Cove on the southwest and Mud Cove on the southeast, and a small road, known as the Salmon Cove Road, runs from the point where the highway intersects Mud Cove in a westerly direction to the head of Salmon Cove.

4 The area of land bounded on the north by the Wessell grant, on the east by the Sober Island highway, on the south by the Salmon Cove Road and the shores of Salmon Cove, and on the west by the waters of Sheet Harbour was known as the David Logan property in the late 1880's, and according to witnesses had been in possession of the Logan family since the 1700's although no grant had ever been received. There is no record of any conveyances but the evidence reveals that David Logan divided the property between his two sons, John and William, with William succeeding to the western portion and John to the remainder.

5 David Logan's daughter was married to John Harnish, and they were living on a portion of the John Logan property. In 1923, John Logan and his wife Lucy became quite ill and unable to look after themselves, and an agreement was worked out whereby they would be taken care of by John Harnish for the rest of their lives in exchange for the transfer of the John Logan property to John Harnish. No written record of this agreement was kept, but in 1924, after John Logan died, John Harnish assumed ownership of the property.

6 In 1933, the plaintiff, Roy Levy, married Thelma, the daughter of John Harnish, and they took up residence on the John Harnish property. According to the evidence, John Harnish gave the northern portion of the property, which he had acquired from John Logan, to the plaintiff and he built a home for himself and his wife on this section.

7 The plaintiff's earliest recollections of the Logan property were in 1918 when he used to help John Logan cut firewood and pulp. Later, he used to help John Harnish, and after he married his daughter and moved on the property this sort of assistance continued. When John Harnish became ill and unable to pay his taxes he turned over the lower portion of the property to the plaintiff. The plaintiff says that he then became the owner of the full John Logan lands and has continued to use and occupy them until the present day.

8 The plaintiff was initially a fisherman but later became a boat builder and in recent years has spent most of his time in that occupation. He said that he obtained about thirty per cent of the materials he used in his boat building business from the lands he was occupying, and that they were particularly suited for this purpose. He also established a mill on the property in 1940 and sold off materials for lobster traps. He also cut pulpwood, firewood and Christmas trees on the property.

9 In 1940, James Henry Harnish obtained a grant to a triangular piece of land lying to the east of the highway and south of the Wessell grant. This was the property in which John Harnish had grown up and lived before he moved to the John Logan property. It is also the property where Samuel Harnish lived at this time.

10 In 1943, William Harnish, son of Samuel Harnish decided to build a house on the western side of the highway on what the plaintiff considered to be the eastern extremity of the Logan property which he had obtained through John Harnish. The plaintiff felt that there may have been some permission granted by John Harnish to his nephew for the use and occupation of this building lot and, therefore, did nothing to prevent it. William Harnish has lived there until this day. He says he simply occupied what he knew to be Crown lands and built his house. He knew that Roy Levy owned land to the rear of him but was not certain as to where the two parcels met.

11 In 1948, Harold Harnish, another son of Samuel Harnish, had been living with John Harnish on the Logan property. At this time, the plaintiff took over ownership of the John Harnish property and Harold Harnish left John Harnish's home and built a small house at the corner of the highway and the Salmon Cove Road. He cleared only a small area and moved another building there and used this building as a home for himself and his family for the next eleven or twelve years. Harold Harnish says that he was a stevedore at the time and did not occupy any more than the land immediately surrounding his house. The plaintiff says that Harold Harnish was occupying lands that belonged to him but he made no effort to have him removed, and simply assumes that the land reverted to his ownership when Harold Harnish vacated the property in 1959 and removed the house prior to 1966.

12 In 1949, Samuel Harnish, Jr., built a house between William Harnish's house at the corner. He occupied a lot on the western side of the highway for this purpose and clearned an area about 200 feet square. When the house was finished Samuel Harnish, Sr., moved in and occupied it.

13 The plaintiff claims that he did not begrudge Samuel Harnish the use of a building lot and, therefore, made no effort to prevent his use of the land.

14 In 1956, John William Logan returned to Sober Island after having lived for the past fourteen years on Sheet Rock Light. In 1953, he and his sons had built a shed on the south side of the Salmon Cove Road as a storage place for their supplies and an overnight resting place while going to and from the lighthouse. The plaintiff considered this shed to be on his property but took no objection to its being constructed there. It was not far away from the fish houses and boat building plant of the plaintiff, all of which were located on Salmon Cove.

15 On June 28, 1956, John William Logan received a deed from Samuel V. Harnish and his wife Lillian to the property that had been built by Samuel Harnish, Jr. This deed described the property as measuring 150 feet in depth and 120 feet in width, all of which was enclosed by a pole fence, and the property lay on the western side of the Sober Island highway. John William Logan only lived on the property for a short period of time before he died in 1958. The property was then passed on to his son, Duncan Logan, one of the defendants, by conveyances executed by his brothers and sisters, and recorded in 1959 and 1964.

16 In 1957, the plaintiff applied to the province for a grant of the whole of the former John Logan property, but since there were other persons occupying the part of the property lying along the Sober Island Road this request was refused. Apparently, John William Logan was also attempting to get some sort of title from the Crown to the property he had purchased from Samuel Harnish because a surveyor was sent out by the Department of Lands and Forests in the year 1958, and some lines were laid out dividing the property between what the Crown considered to be the various claimants. An area of seven and seven-tenths acres was laid out around the William Harnish house. This area was bounded on the east by the Sober Island Main highway, on the north by the John Wessell grant, on the west by the claim of Leroy Levy and on the south by the claim of Duncan Logan. An area was laid out for Duncan Logan containing four and eight-tenths acres, running from the main highway back to the Salmon Cove Road, adjacent to the shed which the Logan family had built for use while they were on the lighthouse. A third area was left as a result of the laying out of the other lines, and this lies at the corner of the Sober Island main highway and the Salmon Cove Road, This piece has an area of approximately 3.64 acres and surrounds the place where Harold Harnish had maintained a house from 1948 to 1959.

17 William Harnish, Duncan Logan and Harold Harnish were interested in obtaining releases from the Crown of any interest it may have in the respective properties. It was obviously Duncan Logan who indicated to the surveyors that his claim extended back far enough into the property to enable him to join on to the shed, which was located on the Salmon Cove Road. It is also abvious that the need to extend the Duncan Logan lot over 800 feet to the west of the main highway in order to enable it to join up with the location of the shed at the shore, was the reason that the area allocated to William Harnish was so large. The surveyors simply extended the rear line of the lot laid off for Duncan Logan to the Wessell grant rather than have a job in the line.

18 The strange thing about the activities of the surveyors representing the Crown is that they apparently accepted the instructions given by the claimants on the Sober Island Highway and failed to check with the plaintiff as to the extent of his claim, although he had filed an earlier application for a grant covering the whole territory. The only contact the surveyors had with the plaintiff was abrupt, and from it they took the impression that he was satisfied with what they were doing. On the contrary, he had just been sued by James Harnish in an attempt to recover one and one-half acres of the land which he was occupying to the west, and that action had been settled in his favour. When he discovered the surveyors on the property he simply informed them

that the matter had been settled and assumed that they abandoned their plans. The Department, however, proceeded with what it considered to be an agreed division and issued a certificate disclaiming any right on behalf of the Crown to the lot laid out for William Harnish in 1965 and to the lot laid out for Duncan Logan in 1967.

19 William Harnish, Duncan Logan and Harold Harnish were, of course, pleased with the action of the Department in abandoning any claim of the Crown to such large parcels of land, as this enhanced their right to claim the property. None of them, however, seriously attempted to show that they had in fact occupied the lots set aside by the surveyors to any greater extent than the area immediately surrounding the houses which they had located on the three properties. The plaintiff, on the other hand, has produced credible evidence of many witnesses to show that he was in constructive possession of most of the area which the defendants and William Harnish now claim. The plaintiff was careful to say, however, that his constructive possession of the John Logan property did not extend to the highway. He claims it did extend to the Salmon River Road where he used all of the property for piling the pulpwood and other materials removed from the back lands, but that he never went all the way to the main Sober Island highway because it was being used by the Harnishes for house lots.

20 When the various disputes began to arise over the title to the land in the late 1950's, the plaintiff obviously realized that he had better take some steps to perfect his title. He acquired a deed from his wife, Thelma Levy, and Lottie Markie, the only children of John Harnish, on October 12, 1959. On May 17, 1960, he obtained a deed from Thomas Logan, the son of William Logan, to the property on the western end of the peninsula. The description in the deed from the daughters of John Harnish is as follows:

> ALL that certain lot, piece or parcel of land situate, lying and being at Sober Island, in the County of Halifax and Province of Nova Scotia, and more particularly described as follows:
>
> Bounded on the East by lands now or formerly of John W. Logan, Harold Harnish and William Harnish;
>
> Bounded on the North by lands now or formerly of Walter Westhaver;
>
> Bounded on the West by lands formerly of Thomas Logan and recently conveyed to the said Roy Levy;
>
> And bounded on the South by the waters of Salmon Cove.

21 It is quite apparent from this deed that the draftsman of the description intended to except from the land being conveyed the three lots which were at that time occupied by William Harnish, Harold Harnish and the family of John W. Logan. It is my opinion that the intention of the grantors of this deed was to convey all of the former John Harnish property except a narrow strip along the western side of the main highway, sufficient to permit the use of the properties occupied by the Harnishes and the Logans as residences. This deed would convey only the title of John Harnish as passed on to his heirs by operation of law, and to determine whether or not the intention of the deed was in fact carried out would necessitate a finding that John Harnish and his predecessors in title were in fact in possession of all the property described in the deed.

22 In addition to any title the plaintiff may have acquired through the deed from the heirs of John Harnish, we must consider the extent of occupation exercised by the plaintiff himself since entering the lands in 1933.

23 I am satisfied from the evidence as a whole that John Logan and, subsequently, John Harnish were in constructive possession of the whole of the property in dispute up until the time that a partial entry was made along the western side of the Sober Island Road by the Harnishes. The deed from the heirs of John Harnish to the plaintiff therefore conveys the entire Logan lands except the strip along the western side of the main road occupied in 1959 by the Harnishes or their successors in title. This

conveyance will, of course, be subject to any right that may be exercised by the Crown but this aspect of the matter is not in issue in this proceeding. We are dealing here with conflicting claims of possession of ungranted Crown lands between the plaintiff and defendants.

24 I am further satisfied from the evidence that the plaintiff exercised possession and control of the whole of the Logan lands since they were turned over to him by John Harnish with the exception of the lots being occupied by the Harnishes on the western side of the main road.

25 I am further satisfied from the evidence that William Harnish, Samuel Harnish and Harold Harnish from the time they entered the Logan lands only exercised possession of small areas surrounding the houses which they erected. It must be remembered that William Harnish is not a party to this proceeding and that we are only dealing with the conflicting claims of the plaintiff and defendants to the Logan lands.

26 The evidence establishes that Samuel Harnish, Jr., entered the property on the western side of the Sober Island Road between 1946 and 1949 and completed a house for occupation by his father at that time. This property was passed on to John William Logan by deed in 1956 and, subsequently, to the defendant, Duncan Logan, and has been in continuous occupation by members of the John W. Logan family since that time. The description in the deed conveyed a lot measuring 120 feet on the western side of the Sober Island highway by a depth of 153 feet, and referred to the property as being enclosed in a pole fence. In my opinion this description covers the land that was occupied by Samuel Harnish and his successors in title over the past twenty-five years.

27 I am further satisfied from the evidence that Harold Harnish occupied a small area around the house, which he located at the corner of the main road and Salmon River Road, from 1948 until approximately 1966, when the buildings were removed. This area was excepted from the deed conveying the interest to the heirs of John Harnish to the plaintiff and was never during the subsequent time actually occupied by the plaintiff. The boundaries of this area have not been clearly defined, but the evidence reveals that Harold Harnish only occupied the immediate area around the house that he placed on the property, and this is what he intended to pass on to the defendant, Harold Logan.

28 In the result I am satisfied that the plaintiff has established that he has acquired title from the heirs of John Harnish to all of the former Logan lands except a strip lying on the western side of the main Sober Island highway. The description in his deed refers to the property being bounded on the east by the lands now or formerly in occupation of William Harnish, John W. Logan and Harold Harnish. The description, in my opinion, refers to the areas actually in occupation by the Harnishes and their successors in title at the time the deed was prepared in 1959. The plaintiff also exercised his own possession and control of this area for over twenty years after he succeeded to the rights of John Harnish but, from his testimony, this possession did not extend into the area actually being occupied by the Harnishes and Logans on the main road. The actual location of the line where the plaintiff's occupation and possession ceased and the defendants' commenced is vague, so I will fix a point at which it is reasonable that the property interest should be divided, and this line will run parallel to the main road and 200 feet to the west of it.

29 As between the plaintiff and defendants, the defendants have a superior claim to the lands lying between this line and the highway, and the plaintiff has a superior claim to all of the former Logan lands lying to the west of this line.

30 The plaintiff has established that the defendants did in fact trespass upon lands in his possession and occupation but no damage has been established. The plaintiff will, therefore, be entitled to recover from the defendants the sum of One Dollar, together with costs of action to be taxed. The plaintiff will also be entitled to an injunction preventing further trespass.

31 The defendants have not established any trespass by the plaintiff on the lands to which they have exclusive possession and control, and the counterclaim will therefore be dismissed but without costs. Both the plaintiff and defendants will be

Continued on Page 139.

Nova Scotia Supreme Court, Trial Division
HART, J.
November 26, 1973

REAL PROPERTY - TOPIC 7058

EASEMENTS - CREATION BY PRESCRIPTION OR IMPLICATION OF LAW - DOCTRINE OF LOST GRANT - THE PLAINTIFF AND THE DEFENDANT WERE ADJOINING LAND OWNERS - A HAUL ROAD OVER THE PLAINTIFF'S LAND HAD BEEN CONTINUOUSLY AND NOTORIOUSLY USED BY THE DEFENDANTS AND THEIR NEIGHBOURS FOR MANY YEARS - THE PLAINTIFF SET UP BARRICADES TO STOP THE DEFENDANTS FROM USING THE ROAD - THE DEFENDANT OFFERED EVIDENCE OF CONTINUOUS AND UNINTERRUPTED USAGE FOR MORE THAN 40 YEARS - THE TRIAL DIVISION STATED THAT THE DEFENDANTS HAD ACQUIRED AN EASEMENT OVER THE ROAD BY PRESCRIPTION OR THE DOCTRINE OF LOST GRANT - THE TRIAL DIVISION STATED THAT THE LAW WILL PRESUME A GRANT WAS MADE BUT HAS BEEN LOST WHEN A RIGHT CAPABLE OF LEGAL ORIGIN HAS BEEN EXERCISED FOR MORE THAN 20 YEARS BY THE DOMINANT OWNER WITH THE KNOWLEDGE OF THE SERVIENT OWNER - THE TRIAL DIVISION STATED THAT THE PRESUMPTION ARISES FROM CONTINUOUS USAGE AND IS NOT BASED ON A REAL GRANT - SEE PARAGRAPHS 26 TO 29.

This case arose out of an action between adjoining land owners to determine if the defendant had the right to use a road located on the plaintiff's property. The road had been commonly used by many people for a long period of time as a short cut from the main highway to the shore of Mader's Cove. The defendants subdivided their land resulting in the increased usage of the road. The plaintiff barricaded the road to stop the defendants from using it. The testimony of the people living in the immediate area showed that the road had been continuously and notoriously used for over 40 years.

The Trial Division held that an easement over the road had been created in favour of the defendants. The Trial Division stated that the easement could have been established by prescription or by the doctrine of lost grant. The Trial Division set out the nature and effect of the doctrine of lost grant.

. . .

This case was heard by HART, J., at Bridgewater, Nova Scotia on October 30 and 31, 1973. Judgment was delivered by HART, J., on November 26, 1973.

1 HART, J.: In this proceeding the plaintiff and defendants are owners of adjoining lands near Mader's Cove, in the County of Lunenburg. Until recently the plaintiff permitted the defendants to cross his lands to get to the shore road and at Mader's Cove over what has been described as an old cart road, but when the use being made of this road by the defendants became too extensive the plaintiff decided to block the road and prevent further passage. The defendants felt that they had a right to travel over the road and a series of incidents followed in which the plaintiff placed obstacles in the road and the defendants removed them. The real questions in issue are whether or not the defendants have a right to cross the plaintiff's property, and, if so, the extent to which that right may be exercised.

2 The lands now owned by the parties originally comprised approximately three lots as shown on a plan laid out for the township of Lunenburg, and referred to as the Mahone Bay lots, over 200 years ago. All of these lots contained approximately 30 acres and ran in relatively narrow strips from the shores of Mahone Bay westerly to the road leading from Mahone Bay to Lunenburg. For the purposes of this decision I will refer to this road as the main road. Another public highway follows along the shore and rejoins the main highway some distance to the north and to the south, and I will refer to this road as the Cove road. The township lots therefore ran easterly and westerly between the main road and the Cove road and there are no plans or public records showing any other public roads connecting these lots in a northerly and southerly direction. It is undisputed, however, that many years ago a cart road was developed

which crossed not only the lots owned by the plaintiff and defendants but several properties to the north and south and made a connection between the main highway and Mader's Cove. This road was obviously a great convenience to the owners of the properties in the area as it created a much shorter route from the Cove to the main highway, and gave the owners of the various properties access directly to Mader's Cove where many of them maintain boats and wharves for fishing purposes. It is this cart road which is the subject of this action, and the defendants maintain that they have a right to use it to cross the plaintiff's property in order to get to and from Mader's Cove.

3 All of the lands owned by the defendants and a strip of land approximately 100 feet in width, running along the northern portion of the plaintiff's lands, were originally part of the George Smeltzer property. After his death, two of his sons apparently considered that they owned all of the property and entered into a partition agreement in 1867, dividing the lot into a northern and southern half and making the following reference to a roadway: - "The present roadway now used from the public highway over and through said lots of land hereby divided are to remain open and free from any encumbrance whatsoever 'except a swinging gate or gates' for the use and convenience of both parties, their heirs and assigns at all times hereafter.' These same lands were the subject of a plan of division made in 1874 where the property was divided into six lots and shared by seven heirs of George Smeltzer. The agreement executed by the heirs approving the division was not recorded until 1904, but it contained the following provision: "and it is moreover hereby stipulated, that all the Cart Roads passing over and through the lands hereby divided, shall be kept at all times, open, free and unobstructed, (save and except by swing gates), for the use of the several parties hereto, their Heirs and Assigns forever." A road is shown on the plan of division crossing all six lots and joining another road on what was then the Rost property to the south. The northern five of these divided lots now belong to the defendants and the southermost lot, along with the Rost property, is the land now owned and occupied by the plaintiff.

4 To the extent that the properties of the plaintiff and the defendants have a common predecessor in title to the six lots forming the 1874 division, I am satisfied that the roadway as it exists on the ground today must be kept open for free passage of any of the owners of the lots or their successors in title and may not be obstructed in any way except by the installation of swing gates. Neither the plaintiff or the defendants may prevent one another from passing over this portion of the roadway. I will deal later with the use which may be made of the roadway.

5 There is no mention in the back title to the plaintiff's property lying to the south of the 1874 division of any specific roads or rights-of-way, nor was any evidence produced to show any right in the plaintiff to pass over the roadway when it leaves the southern side of his property and crosses other properties to reach the Mader's Cove road. It will be necessary to look to the evidence of user of this part of the cart road to determine whether or not the defendants may cross the plaintiff's property as of right within the bounds of this roadway.

6 Ellison Smeltzer lived on the southern portion of the defendant's property for more than 60 years. He grew up in the home of his father, George William Smeltzer, who owned Lots 2 and 3 of the 1874 division, and after he was married he lived on the same property for 19 years with his wife. Mr. Stephen Roach, a very elderly gentleman, occupied the property to the south, while the property adjacent to the north was occupied by his uncle, Noah Smeltzer. To the north of Noah Smeltzer was the George Deal property and the Joseph Sawler property.

7 Ellison Smeltzer says that the road was in existence for more than the 60 years during which he has been familiar with the property, but he does not know when it was originally opened up. He describes the road as a "landowners' road" from the shore through all the other properties. He says it was used when they had anything to haul or whenever they had a use for it. They all used it to get from one place to another and to go to the shore where they all had boats. Their visitors used it to get to their places. If you wanted a bus to town you walked over the road to get it. The road went over George Deal's property and across Joseph Sawler's property

out to the main highway, and practically everybody used it when they wanted to get to the highway.. There was never any difficulty and it was used as a short cut.

8 Mrs. Smeltzer tells us she went back there to live in 1926, and remained for 19 years. She tells how the owners all had roads to go up to their land and how the men used to haul rockweed from the shore over this roadway for their gardens. She says they all agreed to it like a family, and the roads were for the people to get up to their lands because the lands "all run straight." Mrs. Smeltzer says that no one said anything because they were all friends and neighbours, and she can never remember any difficulty over anyone using the road. She tells of crossing the Rost's (Plaintiff's) property to get to the shore and of going in the other direction past Noah Smeltzer's, George Deal's and Joseph Sawler's properties when going to Lunenburg.

9 Mrs. Ellison Smeltzer says that Noah Smeltzer had a car a year or two before they moved back there. He used his car to go to the shore without question, but in the winter time had a garage down near the main highway for his car.

10 Mrs. Smeltzer describes the road as being just a hauling road from the shore up to Noah Smeltzer's place and only a foot path beyond there across the Deal and Sawler properties. She tells of how all of these men used it for hauling sea grass and rockweed to their properties from the shore, but has not described the manner in which the hauling was done. She walked the entire road regularly as did all the neighbours and says that she was never obstructed in any way.

11 Sidney Sinclair Sawler tells of living on what has been described as the Sawler property from 1910 to 1937. He tells of how Noah would take apples to the shore in the fall to trade with the fishermen and would haul seaweed back to his property. He says he walked that road all his life from the time he was 13 years old and did not have any difficulty with any of the neighbours. He remembers Noah Smeltzer driving over the road with his car and says that the road was in fair condition with not much grass growing on it. Mr. Sawler says that George Deal used to keep a sailboat in the Cove and used the road to go back and forth and to bring sea grass in. He says that Noah Smeltzer also kept a boat and used the road regularly. The road is one and a half miles long, as against a five mile trip around by the Cove road, and people used the road as a convenience for themselves and their ox teams. The road was never blocked off before.

12 Mrs. Lena Smeltzer was called next. She is the wife of Seldon Smeltzer and they lived for more than 40 years on the Mader's Cove Road. Their property adjoins the plaintiff's property, and Mrs. Smeltzer is now 61 years of age.

13 Mrs. Smeltzer says that the road was always there. It was "one straight road" from the Cove road to the plaintiff's place and then carried on across Tanner's, Whynacht's and Sawler's properties. By Tanner's (the defendant's) property, she was referring to property formerly owned by Ellison and Noah Smeltzer, and by Whynacht's, she was referring to property formerly owned by George Deal. She said that the road was a good hauling road 40 years ago, wide enough for a wagon and a cart. It had mainly a gravel surface and ran from the Cove road to the main highway. Mr. Smeltzer says that the course of the road is not changed, except that a new road was made, some years back, from Noah Smeltzer's place directly to the main highway and this removed the need to follow across the Deal and Sawler properties.

14 Mrs. Smeltzer testified that there were four swinging gates along the road; one at the junction of the Cove road, one next to the plaintiff's garage, one on the line between Ellison Smeltzer and Stephen Rost, and one at the end of the Noah Smeltzer property. She states that these gates were used to keep cattle in when these properties were still being farmed, but that most of the gates had disappeared some years ago. Mrs. Smeltzer says that when the plaintiff purchased the Rost property he decided that he wanted an open roadway and removed the gate down by the Cove road. The gate up by his garage was thereafter left open, as was the gate on his northern line.

15 Mrs. Lena Smeltzer tells us that people used this road as a short cut to the main highway. Practically everyone used it, including the children going to and from

school. It was used for hauling firewood, logs, hay, rockweed and sea grass by all of the people in the area, including those who had wood lots beyond the main highway and wished to haul their wood back to the Cove. According to Mrs. Smeltzer the road was used by oxen, ox carts and cars when she first went there. She says Noah Smeltzer had a car, which his daughter Elva drove, and Laurie Rhodenizer, his son-in-law, had a car as well. This road down to the Cove was the only way they could get in and out by car until they later built a road directly down to the main highway. Many strangers used the road during the past 40 years without being in any way interfered with. She says that she never asked permission of anyone to use the road, because it was, in her opinion, an open road - one that was never blocked off until the plaintiff blocked it earlier this year.

16 Mrs. Lena Smeltzer states that Mr. Rost died at 103 years of age, shortly after he sold his property to the plaintiff. He used to visit her regularly and she recalls discussing the road with him. He used to say that he did not care who used the road and would never block it to anyone.

17 Not only did Mr. Noah Smeltzer use the road regularly for all purposes, but Mr. Laurie Rhodenizer, his son-in-law, used it for his car and tractor as well. He went to work every day at the Morrow property in the Cove and passed by Mrs. Smeltzer's home on the way. Mrs. Smeltzer sums up her testimony by saying that she never heard any complaint about closing the road from anyone at any time.

18 She travelled across to the main road to catch the bus and others travelled down to the Cove where they had their mail boxes and their fishing boats. Everybody was friendly and good neighbours.

19 Laurie Rhodenizer, who is now 62, started visiting Noah Smeltzer's daughter when he was 18. They subsequently married and he lived on the Noah Smeltzer property from 1933 until 1957. Mr. Rhodenizer says that in order to get to the shore they used the road and crossed over the property of Ellison Smeltzer, Stephen Rost and Seldon Smeltzer by ox cart and wagon. They did not use it in the spring because the road was not in very good condition. In 1929, Noah Smeltzer bought a car which his daughter drove, and the road required repairs. He and Noah used to take an ox team down to Seldon Smeltzer's beach and bring up gravel and put it on the roadway in front of Seldon Smeltzer's, Stephen Rost's, Ellison Smeltzer's and Noah's properties. The road could then be used by a wagon or a car without difficulty and was between 10 and 11 feet wide.

20 Laurie Rhodenizer bought a car in 1932 and used it over the road. In later years when he took employment in Halifax and travelled back and forth quite regularly, he built a new access road from Noah's place to the main highway, but this was not completed before he moved away. Previously, he had kept his car in a garage down by the main highway during winter when the road was not plowed out.

21 Mr. Rhodenizer states that there were four gates in the places mentioned by Mrs. Smeltzer, and that they were all swinging gates and "worked wonderful." They had a mail box down at the Cove road, and his wife went down every day to get the mail. He says that Noah used the road "thousands of times". He goes on to list the number of people in the area who used the road regularly, without question, for going to school, or to the bus, or to town, or for hauling with horses' teams and trucks. He relates how the plaintiff used the road past Noah's place with his car after he came to the area, and says that he was only prevented from using the road once. On that occasion, the plaintiff put up a gate in another place and it was not a swinging gate, so he opened it and it fell down. Mr. Rhodenizer says that he told the plaintiff that he had better fix it so that they could get through. He says that he used the road because it was there and that he was never stopped after that one occasion. It was the only road to the shore and the only convenient way in which the people of the area could get to the shore and bring sea manure back to their properties. When he worked in the Cove it was necessary for him to cross the road to earn his living, and he never asked permission of anybody because the road had always been there. When the plaintiff first moved to the Rost property, he asked Mr. Rhodenizer to assist him in fixing up the road, which he did, in exchange for the offer of assistance to fix the

road further up towards Noah's place, but he says that the plaintiff failed to help him with the rest of the road.

22 The plaintiff, Lindsay Langille, purchased his property from Stephen Rost in 1947, some 26 years ago. At this time Ellison Smeltzer was living on the property next door, to the north, and Noah Smeltzer and Laurie Rhodenizer were living on Noah's property. Noah was about 70 years of age at that time. The plaintiff says that they came across his property once in a while but not in the winter or spring because you could not get over the road with a car. He says he repaired the road so that he could use it for farm work, cattle and hauling hay, etc. There were two gates, one down at Smeltzer's by the Mader's Cove Road and another before he got into his property. He says there was another gate up by Ellison's land and one by Joseph Sawler's property. He says that they used paths over his property, "some in the summer time", and his step-daughter used to go over Noah's to get to school. He made a plow, four feet wide, to keep the road open in the winter time, but, later, when they closed the road to three feet he got legal advice and tore down the obstruction. Laurie Rhodenizer says that this smaller gate was not an obstruction to the roadway but merely to a walking path which the ladies had used previously.

23 The plaintiff says that he stopped Mr. Rhodenizer from coming across his property in 1955 because he would not close the gates, and that the new road to the highway was then constructed across Noah's property, and he says that Mr. Rhodenizer did not come across his property any more until Noah sold to the defendants. I do not accept the plaintiff's evidence on this point where it conflicts with that of Mr. Rhodenizer, who said that he removed the obstruction placed across the road, which was not a swinging gate and, subsequently, used the road as he wished.

24 The plaintiff tells about how he used to use this road right across the Cove to the highway with his horse and wagon before he moved to the property. He admits that he was never obstructed from doing so, except that he had to keep the swinging gates closed, which did not cause any difficulty. Apparently, the plaintiff did not question the right of many people in the area to use this road until very recent years when the defendants started expanding their property by building homes and apartments on it and caused much heavier traffic to be routed across the road then had occurred in the past.

25 From the evidence as a whole, I am satisfied that an implied grant of right-of-way exists which gives to the owners of the defendant's lands a right to cross the plaintiff's property for the purpose of getting to and from the Cove road. The right exists over the cart road as it is now found on the ground to the full extent of its width of 11 feet. The right is to pass and re-pass with horses, animals, teams or vehicles, or on foot for the purpose of getting to or from the Cove road, and it includes the right to extend the use of the roadway to the servants, agents, tenants, workmen and invitees of the owners of the defendant's property. Supplies and other materials necessary for the enjoyment of the defendant's property may be carted over the roadway, provided the vehicles used do not exceed its width, and it may not be obstructed except by the establishment of swinging gates for the purpose of preventing cattle from escaping the land adjoining the right-of-way.

26 Although there is no express grant of this right-of-way contained in the records of title to the property of the parties to this action, I have no hesitation in reaching the conclusion from the evidence that such a grant should be implied. The dominant tenement is that owned by the defendants and the servient tenement is that of the plaintiff. Whether this result is based upon the doctrine of lost grant or the doctrine of prescription makes little difference since both apply. I am satisfied that the evidence not only raises a presumption of original grant of easement but also establishes open and uninterrupted user of the way by the devendants and their predecessors in title for a period of more than 60 years.

27 The doctrine of lost grant is discussed in Gale on Easements, 14th ed. at p. 141, as follows:

> Although the Lords do not expressly discuss the general question as to what evidence is admissible to rebut the presumption of lost grant, the effect

of their judgment is to affirm the opinion of Thesigner and Cotton, L.JJ. It follows that the presumption cannot be displaced by merely showing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides it when given, and the court will make any possible presumption necessary to give that long enjoyment a legal origin. It appears, however, to be still the law that an incapacity to grant the easement will rebut the presumption in question and negative the claim so far as it rests on the fiction of a lost grant. It would not be reasonable to presume a grant when the evidence of user does not support in extent the right claimed. It is clear that the claim may be resisted on any ground which would prevent the right from being acquired by prescription from time immemorial.

In *Tehidy Minerals Ltd. v. Norman*, (1971) 2 Q.G. 528, Buckley, l.j., delivering the judgment of the Court of Appeal, stated the effect of *Angus v. Dalton* (1877), 3 Q.B.D. 85, as follows:

'In our judgment *Angus v. Dalton* decides that, where there has been upwards of twenty years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the twenty-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made.

'If this legal fiction is not to be displaced by direct evidence that no grant was made, it would be strange if it could be displaced by circumstantial evidence leading to the same conclusion, and in our judgment it must follow that circumstantial evidence tending to negative the existence of a grant (other than evidence establishing impossibility) should not be permitted to displace the fiction. Precisely the same reasoning must, we think, apply to a presumed lost grant of a *profit à prendre* as to an easement.'

Application of doctrine of lost grant

It should be noted here that in modern times the courts have had frequent recourse to this doctrine and have repeated and applied in various ways the words of Lord Herschell in *Phillips v. Halliday*, (1891) A.C. 228:

'Where there has been long continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title.'

The doctrine of modern lost grant has been resorted to as an alternative not only to prescription at common law but also to prescription under the Prescription Act. 1832.

28 The same doctrine is discussed in Goddard, The Law of Easements, 8th ed. at p. 156:

In other cases than those of prescriptive claims to easements, a grant of an easement is sometimes implied after uninterrupted user for twenty years, and as the grant cannot be produced or proved, the law will allow a presumption that it has been lost. It has been said that the doctrine of presumption of lost grant amounts to this, that if a right which is capable of having had a legal origin is proved to have been exercised for a number of years, the law ought to presume that it had such an origin. The only legal origin for an incorporeal right is a grant; therefore, if a grant cannot be produced it must be presumed that there was a grant once which, in years gone by, has been lost. It is not presumed that the deed of grant

was made or lost at any particular date beyond this, that as the user must have continued for twenty years at least, it is presumed that the grant was made at some date anterior to the twenty years. Implication of a grant after user for twenty years is not so common now as a mode of claiming easements as it was before the passing of the Prescription Act (2 & 3 Will. IV. c. 71), for the claim by prescription under that Act is generally adopted in preference; the old mode was now, however, abolished by the Act, and it may still be, and sometimes is, used in cases, in which the evidence required to prove a prescriptive title is defective.

29 The application of this doctrine in this country has been pointed out in the case of *Ring v. Pugsley* (1878), 18 N.B.R. 303, where Duff, J., says at p. 316:

It is true that the doctrine of prescription, as it existed in England, cannot be applied to this Province. Vide *Rex. v. Good*, Chip. MS. 35; *Jones v. Jones*, 2 Kerr, 265, (per Chipman, C.J.). But the mode of establishing a right to an incorporeal hereditament by presuming a lost grant, after an uninterrupted enjoyment of it for twenty years, has already been frequently recognized and acted upon here. In *Jones v. Jones*, it was held that a right of way over another person's property could be so established. So, in *McLean v. Davis*, 6 Allen, 266, it was held that an easement to appropriate the water of a stream in a particular manner (as by a dam to turn it in a certain direction) might be acquired by an exclusive enjoyment of it for twenty years, and that the right, when so acquired, would pass with the inheritance.

And the principle of these decisions is equally applicable to the creation of an easement in light. The latter, although differing from the others in some particulars, agrees with them in this, that in relation to the servient tenement, it can be acquired, only by grant express or implied. And the comparatively recent adoption in England of the doctrine of a presumed grant in connection with the acquisition of an incorporeal hereditament of this kind did not involve the introduction of any new rule, but only the application of an old principle of the common law, to a cognate subject.

Duff, J., continues p. 317:

It is perhaps not easy to reconcile the language of the different authorities on the subject. But I think that they all agree in this - that where the enjoyment of the alleged easement has been uninterrupted for a period of twenty years, with the knowledge of the owners of the servient tenement, who have the means of resisting it, and where the evidence of enjoyment is uncontradicted and unexplained, the presumption becomes practically conclusive, and the jury should be told to find the existence of the grant.

Finally at p. 320, he states:

Neither are the circumstances that Mr. Seely never gave a grant of the right in question, and that no grant of it is on record, of any importance. The presumption of a grant is raised entirely from the fact of the uninterrupted possession for twenty years, unexplained and un-rebutted; and it is raised, as is said, where no one pretends to believe that a grant was actually made.

30 Section 31 of the *Limitation of Actions Act*, c. 168, R.S.N.S., 1967, deals with *"Prescription in case of easements"*:

31. No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed

> by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for the purpose by deed or writing.

31 There is no doubt that the cart road running across the plaintiff's property has been enjoyed by the defendants and their predecessors in title for a period of excess of 40 years, and no deed or other writing expressly conferring consent or agreement to this use has been established.

32 For these reasons this proceeding brought by the plaintiff against the defendants will be dismissed with costs to be taxes.

*Judgment for the defendants.*

Continued from Page 131.

entitled to a declaration of title to the areas which I have determined. In the case of the defendant, Duncan Logan, the declaration may bind the Crown since he has received a certificate from the Crown disclaiming interest to any portion of the lands which he claims. In the case of the plaintiff and the defendant, Harold Logan, a declaration will be subject to any rights of the Crown unless a release of these rights can be obtained. Unless it is otherwise agreed between the defendants the division line between the defendants' properties will be as shown on the plan of survey of subdivision of lands of Duncan Logan prepared by Ivan P. Macdonald, N.S.L.S., October 7, 1974, and the prolongation thereof to the 200-foot depth.

*Decision for the plaintiff.*

Nova Scotia Supreme Court, Appeal Division
McKinnon, C.J.N.S., Coffin and Cooper, JJ.A.
August 15, 1972

EASEMENTS - EXPRESS GRANT - WHETHER THE DOMINANT TENEMENT MUST BE REFERRED TO IN THE GRANT OF RIGHT OF WAY - APPEAL COURT HELD ADMISSIBLE EVIDENCE OF THE USE OF THE RIGHT OF WAY AT THE TIME OF THE GRANT TO SHOW THE LOCATION OF THE LAND BENEFITED (DOMINANT TENEMENT) BY THE RIGHT OF WAY - APPEAL COURT DECLARED VALID THE DEFENDANT'S RIGHT OF WAY AND DISMISSED THE PLAINTIFF'S ACTION FOR AN INJUNCTION.

EASEMENT - ABANDONMENT OF AN EXPRESS GRANT OF A RIGHT OF WAY - APPEAL COURT STATED THAT THE MERE NON-USE OF A RIGHT OF WAY DOES NOT EXTINGUISH IT - APPEAL COURT STATED THAT IN ORDER TO EXTINGUISH A RIGHT OF WAY THE CIRCUMSTANCES OF THE FAILURE TO USE THE RIGHT OF WAY MUST SHOW AN INTENTION TO ABANDON IT ON THE PART OF THE PERSON ENTITLED - PARAGRAPHS 56 TO 59 AND PARAGRAPH 94.

The appeal court dismissed the appeal and affirmed the judgment of the trial court which dismissed an action for a permanent injunction. The plaintiff requested an injunction to restrain the defendant from crossing the plaintiff's lands. Both the plaintiff and defendant derived their title from four brothers who entered into a partition agreement on December 13, 1873 stated in part:

> "All roads in use on the lands thus hereby divided, shall be kept open for the use of all parties hereto."

The appeal court declared the defendant had a valid right of way over the plaintiff's lands even though the land benefited or the dominant tenement was not specified. The appeal court stated that the evidence given at trial of the use of the right of way at the time of the partition agreement made it clear that the dominant tenement or land to be benefited was the land of the defendant. The partition agreement was executed subsequent to a Will divising the land to the four brothers which Will stated in part:

> "14. It is my Will that my aforesaid sons do allow to each other the free use of roads and as are now used by them."

The appeal court stated that the Will and the partition agreement along with explanatory evidence given at trial established an easement by express grant in favour of the defendant.

The appeal court stated that the defendant and his predesessors in title did not lose the benefit of the right of way by mere non-use. The appeal court stated that in order to extinguish the right of way that the circumstances of the failure to use the right of way must show an intention to abandon on the part of the person entitled to the right of way.

. . .

The judgment of the court was delivered by Coffin, J.A.

COFFIN, J.A.:

1 This is an appeal from the decision of Hart, J. in an action in which the appellant sought a declaration that it was entitled to the exclusive possession of Lots 18, 19 and 9 on a plan of division of lands in Deep Cove and Blandford in the County of Lunenburg, prepared by J.J. Thomson, Surveyor, at Chester, dated December 13, 1873. The appellant sought a permanent injunction restraining the respondent and others from crossing the appellant's land. The respondent owned Lot 20 on the same plan. Lot 20 is on the shore of Deep Cove and Lots 18, 19 and a portion of Lot 9 are between Lot 20 and the Chester to Blandford highway. There is a stream running across

these lots and entering Deep Cove and there is no apparent access to Lot 20 from the highway on the plan.

2 As pointed out by the trial judge, for the greater part of the nineteenth century a gristmill had been in operation on Lot 20 on the northern side of this stream and there was evidence of older witnesses of bringing grain to the mill to be ground, most of which was brought by water but some was carried in ox teams along the highway and taken down a defined road parallel to the stream on its southern side which ran from the highway to the mill. A dam was constructed near the main highway to ensure a supply of water for the mill and each morning the mill operator would open the dam and close it at night. The mill operator would use the road to get from the mill to the dam.

3 There was evidence that people in the area would use that roadway for hauling firewood and lumber from their wood lots beyond the main highway which was also done by ox teams.

4 The trial judge also found that the gristmill ceased to operate about the turn of the century but it remained standing on Lot 20 for many years -

> The evidence concerning the use of the road to the mill was limited to the recollection of elderly witnesses of events which occurred when they were very young and must therefore of necessity be rather scanty. I am satisfied from their evidence, however, that there was a reasonably well defined means of access from the main East Chester to Blandford highway to the gristmill on Lot 20, and that this roadway was open for use by all residents of the area as a hauling road and a means of access to their lots on the far side of the main highway.

5 The trial judge further found that by 1926 all active operations on Lot 20 had ceased "and the only evidence of subsequent use of the mill road was by trappers who trapped the stream and local residents who used the road as a means of access from Deep Cove to the main highway or as a hauling road for firewood, and even this limited usage stopped in the mid fifties when most local residents acquired trucks and found it easier to travel to their wood lots by that means rather than by water and the mill road.

6 After remaining unoccupied Lot 20 was purchased in 1962 by Christopher Paul Masland who built a cottage thereon that year. He used the mill road by foot. He did observe some wire blocking the road and signs indicating "Private Property" in 1966. His evidence was that he removed the wire and did not heed the signs. In 1967 his tenants were advised not to cross the appellant's property but this advice was disregarded. Mr. Masland sold Lot 20 to the respondent in 1968. He advised that respondent of the dispute but the respondent continued to use the mill road as a footpath and ignored the "No Trespassing" signs.

7 The lands in question were originally owned by John Meisner. By his Will he gave his three sons, Henry, Martin and Isaac the grist-mill, reserving to Casper and Jacob the use of it but only for the purpose of grinding their own grain.

8 The residue he left to his four sons, Henry, Jacob, Martin and Isaac.

9 By agreement dated December 13, 1873 and inscribed on the J.J. Thomson Plan, Henry, Jacob, Martin and Isaac Meisner agreed to the partition of the lands in the manner shown on the plan -

> Nevertheless saving and Reserving for ourselves our Heirs and assigns perpetually our Several Rights and privileges in the Grist-mill and Dam, now standing on the lot Numbered Twenty on the said Plan, also our Common Right in the Dam crossing the Brook above the Road on the Lot marked Number Nine on the annexed Plan. Also the Right of Entry at all times upon the said Lot Number Nine, for the purpose of getting gravel free of charge to repair the same Dam. All the roads in use on the Lands thus hereby divided, shall be kept open for the use of all the parties hereto.

10 The trial judge pointed out that because of this reference to the grist-mill and to the "roads in use on the lands" Mr. Cyrus Eaton and his legal advisers and Mr. Ben Meisner, who is the son of Isaac Meisner, first visited Lots 20, 19 and 18 and discovered that the grist-mill had not been in operation for a good many years. Mr. Meisner apparently advised him that the ox road leading to the mill was only for the Meisner family use and Mr. Eaton's evidence was that there was no discernible road or pathway in existence at the time of his visit and that the entire area was grown up with brush and trees. He accordingly assumed that there was no hauling road running across Lots 18, 19 and 20 at the time. This first visit of Mr. Eaton was in 1927 and the appellant purchased Lots 8 and 19 in 1929.

11 There are 23 Lots in Deep Cove delineated on the plan and no roads are shown thereon except the public road leading from East Chester to Blandford and running through the whole property from north to east. We are concerned directly with a corner of Lot 9 and with Lots 18, 19 and 20. They are between the public road to which I have referred and the waters of Deep Cove. The stream which I mentioned flows through them, crossing the road and discharging into the water of Deep Cove. A corner of Lot 9 is adjacent to the road, and proceeding toward the water alongside the brook, one must cross Lot 18, then 19 to Lot 20 on which the grist-mill was constructed.

12 The words in the Partition Agreement - "All the roads in use on the lands thus hereby divided shall be kept open for the use of all the parties hereto" conformed with the Will and specifically Clause 14 -

> 14. - It is my Will that my aforesaid sons do allow to each other the free use of roads and as are now used by them.

13 We do not know what number of roads there were on the lands set out on the Thomson plan because that plan indicates no roads except the Chester-Blandford Highway to which I have referred.

14 I review the testimony of the various witnesses which supports the factual narrative as set out in the trial judge's decision.

15 Clifford Alvin Meisner lived at East River, Lunenburg County, all his life, having been born in 1890. When he was five or six years old he went with his father with oxen and wagon on the road to the grist-mill which was run by Isaac Meisner. The road, he said, was rough. They were taking barley to be ground for feed for the animals. It appeared to him that the road they took had been cut for some time. He had some doubt whether it was the same road which he viewed the day before the trial but he agreed on cross-examination that it was near the brook - ". . . after we left the road here we followed the brook".

16 Madge Meisner, the wife of Clifford, identified a picture of the "little old grist-mill and sort of a stone quarry there that Reverend Feaver sort of operated". She had taken the picture over 50 years ago. She also produced a snapshot of "the little old place where Reverend Feaver made his cement blocks." She had walked down the road to the shore which was a rough pathway.

17 Maxwell Gates described the path as following a line parallel to the brook over Lots 18 and 19. He had travelled the path quite often from a period beginning 26 to 27 years ago. He used it when he ran his traps 13 or 15 days each November. No one interfered with him. The mill road, he said, had not changed much over the past 27 years. It went right to the area where Lawrence's cabin is constructed.

18 He was asked -

> Q. I see. What, if anything, can you say - or tell the court about ever having missed a year in the last 27 years?
>
> A. I never missed a year.
>
> Q. Never missed a year of trapping?
>
> A. No.

19 Willard Martin Baker was the son of Joseph Martin Baker who operated a shingle mill at Deep Cove - the crusher and shingle mill appear in one of the pictures in evidence. He remembered travelling an old road from the crusher to the Blandford - East River highway. He said his father probably operated the shingle mill up to 1925. He had travelled the road himself since 1925 probably a hundred times. He thought it was about 15 years since he stopped using it. He used it when he went to "our lot" to cut firewood and logs in the wintertime. He said that they had two lots, one on the Blandford-East River highway and the other back by Hollahan Lake which he identified as roughly a mile and a half from Deep Cove. There may be some question about this detail because Mr. Eaton said that it was over five miles away and the plan of the area seems to indicate that such was the case. I quote from his evidence:

Q. How would you use the road there? Where would you go from your own home, which is in Upper Blandford?

A. We would walk right direct down to the Deep Cove on the west side and most sometimes we would have a boat for to go across and some when the ice was thick enough we walked across the ice.

Q. And after you walked across the ice?

A. We would walk up this road from Deep Cove to the old Blandford highway.

He only used it about two months in the winter time, none in the summer. In the winter he said about 20 to 25 times. He described the road as being from 8 to 10 feet wide and he was never stopped from using it.

20 George Franklyn Cleveland helped to "Boat shingle shavings" when he was eight or ten years old. He used to walk up the road to the mill dam bog to pick cranberries after landing at the old wharf "in front of where Mr. Lawrence's cabin is now . . ." It was from 8 to 10 feet wide "possibly around eight feet wide, because it was only a cattle hauling road." -

Q. What do you mean, sir, when you say it was a cattle hauling road?

A. Well, you know, the width of a yoke of oxen and a set of bobsleds with a track of about four feet, and you would have to have a little clearance on each side.

Q. Yes, and would it be hauled by a team or oxen?

A. Hauled by a team of oxen; that's all that was used in them days.

He said that using the road to pick cranberries and cut firewood went on until he had a vehicle of his own and that was in 1946. He remembered the grist-mill and the Reverend Mr. Feaver's establishment there. He identified the grist-mill and marked on the plan with a "G", "C" and "S", for the grist-mill, concrete plant and shingle mill.

21 He had seen teams of cattle in the winter time taking logs down the old mill road. They would be hauled by oxen and sleds and the sled tracks were about four feet wide. He had a one-third interest in Lot 18 and in the '50's would haul lumber from Lot 18 to the East River - Blandford highway out the old mill road, using an old International trailer with car wheels - called "a bug". The truck-trailer, he said, was the width of a car. He first acquired this portion of Lot 18 in 1944. A little over a year ago when Mr. Lawrence's cabin burned, he went down the mill road. He was a member of the Blandford Fire Department. The road then was wide enough for four men to carry the portable pump. He said the shingle factory was last used about 45 years ago and with that, the commercial activity on the lot ended.

22 William A. Meisner, 78 years of age, remembered the grist-mill and the Feaver crusher. Both he and his father had used the mill to grind grain for feed for the cattle. He could have been 20 years old when he first became familiar with it.

Q. Can you tell us whether there was - or were ever any roads running in this area of the grist-mill and the -?

A. Well, that road that goes up to the old highway, why, that was always the road that was there ever since I can remember from.

The road ran just a little above the grist-mill right up to the old main road. He had seen logs hauled by oxen and cart or wagon. He remembered cutting long timber or spiling on a little lot they sold to Cyrus Eaton, which they hauled down to the mill road with a pair of oxen and a woodshod sled.

23 Isaac Meisner brought logs down to the sawmill. They would come from above the old Blandford highway. He hauled along the old Blandford road then branched down the mill road. The mill road was the same as Isaac Meisner's road -

Well, what we called Isaac Meisner's was what we called the old mill road. We went down that way. That's the way we got down. There is no other way that I can understand you can get down.

24 The spiling was taken out in the winter time. He was 14 or 15 when he saw this being done. In cross-examination he was asked:

Q. You used to haul logs down there 45 or 50 years ago. Was it?

A. I guess it is.

Q. And that's the last time you used it?

A. That's it. You got it right.

25 Irvine Charles Seaboyer is 80 years old and he identified the Lawrence property as Lot 20. When he was ten years old they used to take grain to the old grist mill. He saw Isaac Meisner operating the grist-mill. He was asked about the road in the area and he replied - "Same as these other witnesses gave you, the old mill road". The grain and the like were hauled by oxen. It was an old road - 8 to 10 feet wide - oxen and two-wheeled carts did the carrying. It was used in September and October, in the winter it was also used for travelling, for example, to run into the woods to shoot rabbits. The man who operated the mill went up in the morning to open the gates of the dam and at the end of the day, went up to close them. To do this he used the mill road. The logs were hauled to the sawmill in the winter time.

26 His observations were from the time he was about 10 years of age until 1925 or 1926. The sawmill, he said, was very old, probably a hundred years old. The concrete mill and the shingle mill, he thought, were constructed around 1920. The concrete mill ran for three or four years and the shingle mill two or three years. He helped build the concrete plant, worked on it after it was there and assisted in building the dam. He has not been over the road since 1940 but last fall went down the road and did not consider it in good condition at the present time. He sold his land to Mr. Eaton, or actually to the law firm of Messrs. Burchell, Smith, Parker & Fogo in 1929. He worked for Mr. Eaton for 11 years approximately from June 1, 1929 to May 1, 1940. In those days he thought the mill road was better.

27 Christopher Paul Masland purchased Lot 20 in 1962 from Mrs. Miriam Evans and sold it three years later to Harry Lawrence. He reached the property either by walking or by boat. There were never any attempts to stop him but in 1966 some wire was erected and signs. He knocked these down once or twice. He mentioned that a plumber from Chester would go down in the spring and fall to connect and disconnect the water and that Earl Publicover from Blandford who worked on the generator used the road a few times. He was last on the property two and a half years ago. He wrote a letter concerning the right-of-way to Mr. Eaton, or to his manager, Mrs. Cecil Gates. This letter was referred to by counsel for the appellant. As I understand Mr. Masland's evidence, he was writing about a right-of-way to get a power line down there. Mrs. Gates had told him that she thought he could get the power line but he later received a reply to his request that Mr. Eaton would not permit any further development in the Deep Cove area. When he sold the property to Mr. Lawrence he explained to him the problem about the right-of-way. He did admit that the start of the path was not too easy to find.

28 Harry William Lawrence purchased the property in 1968. He said he walked in by the path or road that was there. A fire destroyed the building that was there in 1970 and he build a new summer house for which the heavy materials came in by boat - ". . . a lot of materials we carried in over the path. During the wintertime I even had a skidoo down there that I used to go and take some stuff in." He denied that he had ever touched or improved the path. He paid no attention to the signs.

29 I referred to Mr. Cyrus Eaton's evidence in my reference to the trial judge's decision. He said that the path was really not recognizable until after Mr. Masland had sold the property. There were a great many hauling roads affecting Lots 21, 22 and 23 - just logging roads, where people had been in the custom of bringing logs and materials from the area down to the shore of the Cove, but in his view there was none where the respondent is now claiming the right-of-way. He was referred to the words in the document of partition that the roads "shall be kept open for the use of all the parties . . ." and agreed that those words had been brought to his attention by his solicitors and he said "we spent considerable time dealing with the technicalities of that problem, including the consulting of the Prime Minister and the Minister of Highways and others that were having to do with these problems."

30 Mr. Roy Schnare was called in rebuttal. He was familiar with the property from 1926 to 1940. He said that there was no road, it was just a very poor path -

Q. And the last time you were there was 1962?

A. Well, I don't know when the last time was but I wasn't there since that place has been bought.

Q. No, the last time you were there, was the path much different than it was between the years 1928 to 1940?

A. Very little, you know, because the rocks were grown over with moss and stuff like that. It was just a trail, I'd call it, and a poor trail.

31 The appellant says that there was no express grant. He says that the words in clause 14 of the Will "free use of roads as are now used by them" and in the Agreement "shall be kept open for the use of all parties hereto" are too vague and in fact offend against the rule in *Ackroyd v. Smith* (1850), 10 C.B. 164, 138 E.R. 68, in that they endeavour to create an easement in gross.

32 Ackroyd v. Smith was summarized in *Gale on Easements*, Twelfth Edition, at p. 20 -

> . . . the defendants in an action of trespass *quare clausum fregit* pleaded a conveyance to A of a certain close together with the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing *for all purposes* over the *locus in quo*, a Conveyance by A to themselves of the same close and its appurtenances, and a user by themselves 'for their own purposes'. On demurrer, the plaintiff had judgment on the ground that the right claimed, not being limited to purposes connected with the use and enjoyment of the close, could not be annexed to land so as to pass to a grantee as appurtenant to it. As pointed out by Romer, L.J., (*Todrick v. Western Nat. Omnibus Co.*, (1934) Ch. 561, at p. 582), the defendants in Ackroyd v. Smith were in a dilemma: 'If, according to the true construction of the deed, the way was granted for purposes solely connected with the close of land, they had not stated that they were using the land for those purposes. If, on the other hand, according to its true construction the right of way granted was a right to use the road for all purposes, whether connected or unconnected with the particular close, then it was contended on the part of the plaintiff that that was an easement unknown to the law, that is to say it was what is sometimes called an easement in gross and was not, therefore, an easement appurtenant to the land in question and had not passed to the defendants'.

33 I quote Cresswell, J. in Ackroyd v. Smith, supra, in the English Reports at p. 77:

> Now, the privilege or right in question does not inhere in the land, does not concern the premises conveyed, or the mode of occupying them; it is not appurtenant to them. A covenant, therefore, that such a right should be enjoyed, would not run with the land. Upon the same principle, it appears to us that such a right, unconnected with the enjoyment or occupation of the land, cannot be annexed as an incident to it: nor can a way appendant to a house or land be granted away, or made in gross; for no one can have such a way but he who has the land to which it is appendant: . . . If a way be granted in gross, it is personal only, and cannot be assigned. . . . It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it: nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee. . . .
>
> This principle is sufficient to dispose of the present case. It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land. And it seems to us that a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter.

34 The appellant here contended that as no servient tenement was even mentioned, what was being attempted was the creation of an easement in gross. To me the solution is not that simple. The partition agreement created mutual conveyances of certain specific parcels of land and there is no doubt that the predecessor in title of the respondent received Lot No. 20 under that document. I agree that careful conveyancors in the past have made certain that the dominant tenement was clearly defined in the document granting the easement but, I am of opinion that even if this not be done, it can still be an easement if it is clear, in the case of a right-of-way, for example, that that right-of-way is appurtenant to the dominant tenement.

35 We know that in the present case this mill road was used many years ago by the owner of Lot 20 to get back and forth from the Blandford Road and from the dam to Lot 20. There is no evidence that there was any other road servicing Lot 20, although we do have the testimony of Mr. Eaton to which I have referred that there were several other logging roads which were used by his neighbours over the years. I am quite satisfied that any of these roads would certainly not be appurtenant to Lot 20 on the evidence that is now before us, but the question with which we are faced is whether the mill road itself was made so appurtenant to Lot 20 by the Will and by the partition agreement that it can be said that there was an express grant of an easement which is assignable.

36 We were referred to *Todrick v. Western National Omnibus Company, Limited*, (1934) 1 Ch. 190, in which Ackroyd v. Smith, supra, was discussed.

37 There the defendant claimed a right-of-way and action was taken by the plaintiff whose access to his own property was interfered with because at the terminus of the right-of-way approaching the defendant's own property, the defendant had constructed a ramp of concrete. The plaintiff raised two main points (1) that the defendant had no easement because the terminus of the road over which he claimed a right-of-way did not in fact reach and was not contiguous to its own property and (2) that in building the ramp and using the roadway for motor omnibuses the defendant had made an excessive use of the right-of-way. The plaintiff succeeded on the second point having to do with excessive use, but it is the reasoning adopted by the Court on the first point that is relevant to the problem raised in the present appeal.

38 The matter came on before Farwell, J. and his decision is reported in (1934) 1 Ch. at p. 194. At pp. 204 and 205 he concluded that the alteration which had been made in the right-of-way, although it had been intended to be appurtenant to what was referred to as the blue-land, which was the alleged dominant tenement, did not bound on it at all and at best was merely a personal license reserved to the vendor and when he parted with the property, the use of the way came to an end.

39 The Court of Appeal did not agree on this point. Lord Hanworth ( (1934) 1 Ch. 561) at p. 572 commented on this decision of Farwell, J.:

> In other words he holds that for practical passage of carts and horses and persons there is no contiguity between the blue-land and the land over which the grant of the right-of-way is made, and for that reason he held that there was no right-of-way.
>
> I am unable to go as far as that. It is not suggested that there is any authority which lays down the proposition that in order that there should be a right-of-way the dominant land which is to enjoy the right-of-way must be contiguous to the land over which the right-of-way is to be enjoyed. I do not find that this proposition is established by Ackroyd v. Smith. . ., a case which is not easy to understand but which, I think, is properly and fully explained by Mellish, L.J. in *Thorpe v. Brumfitt*, L.R. 8 Ch. 650, when he said that the words 'for all purposes' were interpreted in the judgment of the Court then delivered by Cresswell J. as being so wide as to include purposes that had no connection with the occupation of the piece of ground to which the right-of-way purported to be attached. Cresswell J. had said . . .: 'It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it, nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee.' I do not think it is necessary to examine that case further, because it does not really assist us in the question we have to determine.

Lord Hanworth, M.R. went on to say at p. 573;

> I think the true test which we have to apply is that which is broadly stated in *Gale on Easements*, 11th ed., p. 19: 'So in English law an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit.'

He went on to conclude that although the defendant might have some difficulty in obtaining access to some intervening portion, this should not militate against his enjoyment "of a right which is of such a nature that it is beneficial to the blue land which he occupies, and has a natural connection with the property as being for its benefit in the sense that it provides a speedier and easier access to the highway . . ., to which he may wish to pass."

40 In *City Meat Market (Sault) Ltd. v. Hagen* (1970), 9 D.L.R. (3d) 58, two partners divided an area of land and one of them purported to give to the defendant a right of way for persons and vehicles over and along an area particularly described and the document under which this right was given was in the form of a lease under the Short Forms of Leases Act of Ontario. The first partner having conveyed his portion of the land to the plaintiff, the plaintiff insisted the document could not be construed as granting an easement since the law does not recognize an easement in gross and there was in the circumstances no dominant tenement to which the right-of-way may be appurtenant. Stark, J. at p. 62 indicated that the defendant maintained that all the requirements of an easement were met and that while the agreement did not specify itself the dominant tenement, the circumstances under which it was entered clearly indicated that the dominant tenement was the adjoining land upon which the service station stood and to which gasoline pumps were an adjunct. I quote at p. 64:

> Alternatively, the defendant succeeds in his defence that the 1953 agreement did in fact constitute an easement. All the requirements of an easement are present unless it is the law that the failure to specify the dominant tenement in the actual terms of the grant is fatal. I do not believe that that is the case. The decision of *Laurie v. Winch*, (1953) 1 S.C.R. 49; (1952) 4 D.L.R. 449, a decision of the Supreme Court of Canada, is authority for the proposition that, as summarized in the (D.L.R.) headnote:

> 'Where a deed purports to grant "a right-of-way" over a certain lot, and it does not specify a dominant tenement and does not . . . indicate the terminal of the right-of-way, parol evidence is admissible as to the material facts existing at the time of the grant so as to explain the deed.'

That decision is also authority for the proposition that parol evidence 'is likewise admissible (where a right-of-way *simpliciter* is granted) to show the surrounding circumstances in order to determine the nature and extent of the intended user'.

41 Stark, J. distinguished *Naegele v. Oke* (1916), 37 O.L.R. 61; 31 D.L.R. 501, by pointing out that in the Naegele case the agreement could not constitute an easement "since the agreement was not made between the owners of the adjoining lands but was simply an informal arrangement made between the spouse of one owner and the son of the other."

42 We were referred by the appellant to *Woodman v. Pullbach Colliery Company Limited* (1914), 111 L.T.R. 169, which involved an action for nuisance. With deference this case does not appear to me to be conclusive in the present appeal. There the plaintiff carried on a business of slaughter house and sausage factory under a lease made subject to rights and easements in favour of a colliery company whose lease included, among other things, power to put up such works, erections and buildings and to carry on such industries and trades on the freehold premises thereby demised as the lessees were empowered to carry on by their memorandum of association. Under this lease the defendants erected a plant within 150 yards of the plaintiff's buildings with result that dust was carried in large quantities damaging the plaintiff's produce. It was held that "you cannot have a dominant tenement without some definition of what is the tenement which goes by the name of the servient tenement" - that there was no reference in the deed which enabled one to answer the question. Cozens Hardy, M.R. pointed out what was given in the deed in question was the right to carry on business authorized by the memorandum but not to cause thereby a legal nuisance to his neighbours.

43 In *Simpson v. Godmanchester*, (1897) A.C. 696, it was held that an easement was none the worse because the exercise of it also benefited lands belonging to other persons.

44 In *Closs v. Ferguson* (1923), 24 O.W.N. 199, Middleton, J. considered a situation where the owner of a lot granted the defendant's parcel "with the privilege of a road to the said Duncan Ferguson, his heirs and assigns forever". The right-of-way was not mentioned in subsequent conveyances but the learned judge quoted *Gale on Easements* and the principle that when a grantor parts with his whole holdings, the rights-of-way will pass as appurtenances. He acknowledged that the road had not been used, but continued:

> . . . but there was no evidence of an intention to abandon. When a right-of-way has its origin in express grant, it is not lost by mere non-user. There must be evidence of some intention to abandon this property right: *James v. Stevenson*, (1893) A.C. 162.

45 In *Conn v. Zostantos*, (1950) O.W.N. 277, Laidlaw, J.A. found against an alleged right-of-way and emphasized the fact that the Court cannot infer that there was a dominant tenement and that it is of the essence of an easement that a dominant tenement be specified and that the grantee of the easement shall have an estate or interest in the dominant tenement at the time of the Grant. It should be acknowledged, however, that in that case he indicated there was no evidence that at the time of the deed purporting to reserve a right-of-way the grantor had any estate in any lands to which the right-of-way might be appurtenant.

46 The principle that an easement must be appurtenant to a dominant tenement vested in the person claiming the easement was affirmed by Wilson, J. in *In re The Municipal Act, British Columbia Telephone Company v. District of West Vancouver* (1953),

9 W.W.R. (NS) 468, at p. 473, but he was considering a submarine cable in underwater lands in the municipality.

47 McRuer, C.J.H.C. in *Laurie v. Bowen*, (1950) 4 D.L.R. 577, gave an exhaustive review of the authorities. He referred to Conn v. Zostantos and in the result, agreed that it was not always necessary to specify the dominant tenement in the deed granting the easement although he felt that as a matter of good conveyancing practice, the dominant tenement should be mentioned in the instrument. He concluded that where the dominant tenement is not specified in the grant and where the grant does not make clear the nature and purposes of the easement, consideration must be given to the use made thereof at the time it was granted and the right-of-way which was proved to be appurtenant to a certain lot, could not add to the burden of the servient tenement such as creating a subdivision and using the right-of-way, to quote his words at p. 585, "as a veritable highway to the beach . . ."

48 In *Laurie v. Winch*, (1953) 1 S.C.R. 49, after the decision of McRuer, C.J.H.C. had been reversed by the Ontario Court of Appeal, the Supreme Court of Canada partially restored the decision of the Chief Justice, but Kellock, J. did say that while the lands were at the date of the grant being used for agricultural purposes, there was no reason why they might not subsequently be subdivided into building lots and he did not think that it was within the contemplation of the parties to the conveyance of 1925 that the farm would always remain a farm.

49 It was better practice to describe the dominant tenement in the conveyancing but if it were not done, the dominant tenement could be proved by evidence of the existing facts at the time of the original grant of the easement.

50 As to the necessity of defining the dominant tenement, I refer to *Johnstone v. Holdway*, (1963) 1 Q.B. 601, where Upjohn, L.J. acknowledged at p. 610 that no one doubts that in a properly drawn conveyance containing a grant of reservation of a right-of-way, the dominant tenement should be identified but went on to say that counsel urging that position ". . . was quite unable to refer the court to any authority or text book which supported his view that the dominant tenement must as a matter of law and not merely as a matter of careful drafting be identified precisely in the deed creating the easement and his argument seems contrary to the authorities to which we have been referred." And at p. 611, in discussing *Thorpe v. Brumfitt* (1873), 8 Ch. 650, he made this comment:

> It is quite plain that James, L.J. took the view that you must look at the view that you must look at the whole of the relevant facts which must have been known to the grantor and grantee at the time of the grant of the right-of-way and take into consideration the whole object of the transaction.

51 Johnstone v. Holdway was cited with approval by Danckwerts, L. J. in *The Shannon, Limited v. Venner, Limited*, (1965) 1 All E.R. 590 at p. 594.

52 It must be borne in mind that the words used in the partition agreement are "all the roads in *use* . . ." and in clause 14 of the Will - "the free use of roads and as are now *used* by them."

53 I mention this because in *Smeltzer v. Barkhouse* (1888), 20 N.S.R. 409, the Court was considering a deed which included the words ". . . together with all the . . . ways . . . to the same belonging." Townshend, J. found that these words were not sufficient and he quoted *Barlow v. Rhodes* et al., 1 C. & M. 439, an 1833 case, where the words used were "with all ways thereto belonging, or in any wise appertaining,". At p. 414 he quoted Bayley, B.-

> If you convey the close, with all ways thereto belonging and appertaining, the easement will not pass except in a case of a way of necessity, when such right-of-way passes without any words of grant of ways. . . . There are, however, apt words for the purpose of passing such an easement; and if you will only insert the words *'or herewith used and enjoyed* the right would pass.'

At p. 415 he quoted *Bankshire v. Grubb*, 18 Ch. D. 616, where Fry, J. held:

> A grant by the owner of two tenements of one of them 'together with all ways now used or enjoyed therewith' will pass to the grantee a right-of-way over a clearly defined path, constructed over the other tenement, and, at the date of the grant, actually used for the purposes of the tenement which is granted, even though the path did not exist prior to the unity of possession.'

54 The same principle is expressed in *Gale*, Twelfth Edition, p. 87. Footnote (f) on p. 87 points out that by virtue of the *Law of Property Act*, 1925, s. 62, the words are to be read into every conveyance executed since 1881. Our own *Conveyancing Act*, c. 56, R.S.N.S. 1967, s. 5(d) says:

> (d) a conveyance of any property right in land includes the buildings, easements, tenements, hereditaments and appurtenances belonging or in anywise appertaining to that property right.

55 A review of the authorities and an examination of the evidence leads me to the conclusion that the two documents - the Will and the agreement by way of petition created not a mere license but an easement over this mill road. The evidence as to the user at the time of the grant makes it clear in my opinion that the dominant tenement was Lot 20 and there was only one road serving Lot 20 and in my view the owner of Lot 20 at the time of the execution of the partition instrument was the owner of the dominant tenement and the two documents, the Will and the instrument, were effective to convey an easement over that mill road.

56 I am also of opinion that nothing that occurred since could be treated as an abandonment of that easement.

57 On the question of abandonment, I accept the reasoning of the trial judge.

58 *Gale on Easements*, Twelfth Edition, p. 486 referred to the case of *Ward v. Ward* (1852), 7 Ex. 838 and also found in (1852), 155 E.R. 1189, and stated that in that case:

> . . . a right-of-way was held not to have been lost by mere non-user for a period much longer than twenty years, it being shown that the way was not used, because the owner had a more convenient mode of access through his own land. Anderson, B., said: 'The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user.'

59 It is true that in *Finley v. Sutherland* (1969), 4 D.L.R. (3d) 586, the conclusion was that there was an abandonment but there was evidence of actual obstruction of the alleged right-of-way such as the building across it of stone walls, a shed and a garage.

60 In my opinion there was no abandonment.

61 In the result I am of opinion that the respondent has established an easement of way by express grant over the mill road and the appeal should be dismissed with costs.

62 Argument was presented on the appeal on three other points, namely, whether or not there had been a right-of-way by implication of law, a right-of-way by prescription or a public right-of-way. In view of my conclusion that there was a right-of-way by express grant, it is unnecessary to deal with the other three points.

*Appeal Dismissed.*

Trial Court Judgment
Nova Scotia Supreme Court, Trial Division,
Hart, J.
August 18, 1971

STEWART, McINNES AND JOHN G. COOPER for the plaintiff,

RONALD N. PUGSLEY, DONALD H. McDOUGALL and H. R. COWAN for the defendant.

HART, J:

63 In this action the plaintiff seeks a declaration that it is entitled to the exclusive possession of Lots 18, 19 and 9, shown on a plan of division of lands in Deep Cove and Blandford prepared by J. J. Thomson, Surveyor, at Chester and dated December 13, 1873, and asks for a permanent injunction restraining the defendant and others from crossing the plaintiff's lands which surrounded the defendant's property fronting on Deep Cove and known as Lot No. 20 on the same plan.

64 At the outset of the trial the parties agreed to certain facts and they were verbally indicated to the Court as follows:

1 The plaintiff has legal title sufficient to support an action in trespass to all of Lot 19 and two-thirds of Lot 18, as shown on the J. J. Thomson plan, subject to any rights of ingress and egress to Lot 20 that the defendant may establish over the plaintiff's lands at the trial.

2 The defendant is the beneficial owner of Lot No. 20 on the J. J. Thomson plan.

3 The defendant has since April 30, 1968, been travelling over the plaintiff's property as a means of access from the old public highway running between East Chester and Blandford to the defendant's lot on the shore of Deep Cove.

4 No damages are being claimed by the plaintiff.

5 A copy of the original plan of J. J. Thomson, Surveyor, showing the division of lands at Deep Cove and Blandford, dated February 13, 1873, is admitted without further proof as evidence of its contents and of the partition agreement set forth on its face, relating to the plan. It is further agreed that the partition agreement was executed under seal by Henry Meisner, Jacob Meisner, Martin Meisner and Isaac Meisner on December 13, 1873. The partition plan is not recorded in any registry in the County of Lunenburg.

6 Three unsigned abstracts were produced by the parties as showing the relative links in the chain of title to Lots 17 and 19 on the Thomson plan, Lot 20 on the Thomson plan and Lot 18 on the Thomson plan.

65 Counsel for the plaintiff relied upon the admissions and closed his case. Counsel for the defendant then called evidence to support the defendant's contention that he had a right to cross the plaintiff's lands as a means of access to his property on the shores of Deep Cove.

66 The evidence revealed that there is a stream which crosses under the East Chester to Blandford highway and flows roughly through the centre of Lots 9, 18, 19 and 20 on the Thomson plan and discharges into Deep Cove. It is the only stream of any size in the area and its ability to produce water power governed the use of the lands through which it ran during that period of history when the water wheel was in regular use.

67 The stream had its outlet to the sea about the middle of the shore frontage of Lot 20, and for the greater part of the nineteenth century a grist mill had been in operation on the northern side of the stream. The testimony of some of the older witnesses told of bringing grain to the mill by barrel to be ground for feed for the

cattle. Most of the grain was brought by water and rolled up the shore to the mill. Some was brought by highway in ox teams and carted down a well defined road lying approximately parallel to the stream on its southern side and running from the highway to the mill. It was necessary to take the barrels of grain across the sluiceway as the mill was located on the opposite side of the stream and a wooden bridge had been constructed for this purpose.

68 To ensure a steady supply of water for the operation of the mill a dam was constructed up near the main highway and it was necessary for the mill operator to open the dam each morning and close it again at night during the period the mill was operating. The road over which the ox carts hauled grain to the grist mill was also used by the operator as a means of access between the mill and the dam.

69 During the winter months the people of the area used the roadway to haul firewood, lumber and spars from their wood lots beyond the main highway. This hauling was done by ox team as well, and since the width of an ox cart was about four feet the roadway did not have to be very wide. If a branch got in the way it was broken off and with the snow on the ground the smoothness of the bed of the roadway was not an important factor.

70 Although the grist mill ceased to operate about the turn of the century it remained standing on Lot 20 for a good many years thereafter. The evidence concerning the use of the road to the mill was limited to the recollection of elderly witnesses of events which occurred when they were very young and must, therefore, of necessity be rather scanty. I am satisfied from their evidence, however, that there was a reasonably well defined means of access from the main East Chester to Blandford highway to the grist mill on Lot 20, and that this roadway was open for use by all residents of the area as a hauling road and a means of access to their lots on the far side of the main highway.

71 Mr. William A. Meisner, who is now 78 years of age, recalled taking grain to the grist mill with his father by ox cart and said that he remembered old Mr. Isaac Meisner, the operator of the mill, going up what he called the Isaac Meisner Road to open the dam. He also recalled hauling spar timbers down this old road and loading them on three masters for transport to Parrsboro about 1906 or 1907. He also says that there was a barn and lumber camp operated by old Mr. Meisner further up the old road, about 1911 or 1912, and he remembers taking logs down the road to this mill for sawing into barrel staves.

72 Mr. Irvine Charles C. Boyer, who is now 80 years of age, also remembers taking grain to the mill in two-wheel carts and says that the road was eight to ten feet wide and in better shape than it is today. He also remembers the little sawmill run by water power further up the stream at which Mr. Meisner made the barrel staves and says that logs were hauled to this mill over the mill road by ox cart during the winter months. He remembers that this mill road was used by local residents who would haul their boat up on the shore and walk to the main highway to go to East Chester to catch a train or go back in the woods berry picking.

73 About 1920, a concrete block plant was constructed on the south side of the stream near the grist mill on Lot 20. This plant operated for four to five years, but most of its supplies and its finished product were transported to and from the plant by barge.

74 A shingle mill was operated at the same site for two or three years prior to 1926. This mill was operated by Joseph Martin Baker and logs were hauled to the mill by ox team during the winter months. Some of the logs were hauled by Mr. Baker, and others by local residents. Both the shingle mill and the concrete block plant were operated by water power from the stream.

75 By 1926 all active operations on Lot 20 had ceased and the only evidence of subsequent use of the mill road was by trappers who trapped the stream and local residents who used the road as a means access from Deep Cove to the main highway or as a hauling road for firewood, and even this limited usage stopped in the mid fifties when most local residents acquired trucks and found it easier to travel to their wood lots by that means rather than by water and the mill road.

76 Lot 20 remained unoccupied until 1962 when it was purchased by Christopher Paul Masland. Mr. Masland built a cottage on the lot in 1962, when he subsequently occupied himself and rented to others. Although he brought the materials for the cottage in by water, he used the mill road as a means of access by foot. In 1966, he observed some wire blocking the old mill road and some signs posted along the road indicating "Private Property". He removed the wire and says that the signs had no effect on him. In 1967, the tenants who were occupying Mr. Masland's property were advised by letter not to cross the plaintiff's property to get to Lot 20, but this letter was simply disregarded. There was some communication between Mr. Masland and representatives of the plaintiff but no agreement was reached regarding access to Lot 20 over the plaintiff's property.

77 In the Spring of 1968, Mr. Masland sold Lot 20 to the defendant. Prior to the sale he disclosed to the defendant the details of the dispute over the right of the owner of Lot 20 to cross the plaintiff's land. The defendant, however, adopted a similar position to that of Mr. Masland and has continued to use the mill road or footpath, as it should more accurately be described, as a means of access to his property for himself and his guests. He has chosen to ignore the "No Trespassing" signs placed along the path by the agents of the plaintiff.

78 The plaintiff called evidence in rebuttal to establish the very limited use of this pathway since it acquired the property in 1927. The main witness was Mr. Cyrus Eaton, who is the beneficial owner of all of the shares of the plaintiff company.

79 Mr. Eaton described how he returned to his native Province of Nova Scotia in 1927 to establish a summer residence. He went to the Deep Cove area with his legal advisers, his architect and contractor and arranged to purchase a large tract of land surrounding the Deep Cove inlet. He subsequently built his summer home on the south side of Deep Cove and acquired all of the shore frontage on the north side of the Cove, with the exception of Lot 20, to ensure privacy. The land on the north side of the cove has been left in its natural state and is used by Mr. Eaton and his guests for walking.

80 Before purchasing Lots 18 and 19, Mr. Eaton and his legal advisers were familiar with the unrecorded J. J. Thomson plan of division, which sets forth the agreement between the sons of John Meisner for the partitioning of all of the lands on the north side of Deep Cove. This agreement is as follows:

> KNOW ALL MEN. By these presents that we Henry Meisner, Jacob Meisner, Martin Meisner and Isaac Meisner (Sons of John Meisner and of Blandford deceased) Farmers of Blandford and in Indian Point (East) in the County of Lunenburg and Province of Nova Scotia: - being the owners in common of two several Lots of Land situate at Deep Cove and Shoal Cove Lake in Blandford in the County of aforesaid:
>
> Do hereby Mutually and Severally Covenant and Agree to the partition of the said Two Lots of Land in the Shape Form and Manner shown on and by the Plan of Said Lands hereto annexed. Nevertheless saving and Reserving for ourselves our Heirs and assigns perpetually our Several Rights and privileges in the Grist Mill and Dam, now standing on the Lot Numbered Twenty on the said Plan, also our Common right in the Dam crossing the Brook above the Road on the Lot marked Number Nine on the Annexed Plan. Also the right of Entry at all times upon the said Lot Number Nine for the purpose of getting gravel free of charge to repair the said Dam. All the roads in use on the Lands thus hereby divided Shall be kept open for the use of all the parties hereto.
>
> Finally we Agree to Have, Hold and occupy each for himself his Heirs and Assigns forever the Lots of Land Shown on Said Plan where on our names are Severally jointly and respectively written. In witness whereof we have here-

unto our hands and Seals Subscribed and affixed the thirteenth day of December A.D. 1873:-

Signed and Sealed
in Presence of
J. J. Thomson

Henry Meisner
Jacob Meisner
Martin Meisner
Isaac Meisner.

81 Because of the reference to the grist mill and to the "roads in use on the lands", Mr. Eaton and his legal advisers and Mr. Ben Meisner, the son of Isaac Meisner, went to the vicinity of Lots 20, 19 and 18 on his initial visit to the site. He discovered that the grist mill had not been in operation for a good many years and was advised by Mr. Meisner that the ox road leading to the mill was only for the Meisner family use. He testified that there was no discernible road or pathway in existence at the time of his visit and when Mr. Meisner took them up to the dam site the entire area was grown up with brush and trees. He did not consider that there was a hauling road running across Lots 18, 19 and 20 at the time.

82 The plaintiff acquired Lots 18 and 19 the year following Mr. Eaton's initial visit but did not purchase Lot 20 because the company operating the concrete block plant had gone into bankruptcy and the question of title was uncertain.

83 Each year since building his summer residence at Deep Cove Mr. Eaton has returned for one week in May and one week in October and the entire months of July and August with his family. He says that he and his family and guests have walked over the lands on the northern side of the Cove extensively over the years and have never noticed any use being made of any roadway or path from Lot 20 to the highway during that period of time until very recently.

84 At the conclusion of the hearing, upon motion of counsel, the Court was invited to take a view of Lots 18, 19 and 20, and I visited the scene with counsel the following morning. He walked from the East Chester to Blandford highway to the shore of Deep Cove along the southern side of the stream. The route we followed over Lots 18, 19 and 20 could not today be described as a roadway but did come within the description of a well defined path. The path differed in character from the wooded areas on either side and there were no trees or stumps of trees in the pathway to obstruct our progress. I found the path to be consistent with the evidence given by the older witnesses of its use many years ago as a means of access from the highway to the grist mill and other operations conducted at the mouth of the stream.

85 The defendant contends that a public way has been established over what has been called the old mill road or Isaac Meisner's road, and that such public way has not been extinguished by non-user in recent years. He claims that he as a member of the public has the right to use this public way as a means of access from the highway to his property on the shore.

86 Whether or not a public way has been established over the lands of others is, of course, a question of fact. The Court must be satisfied that there was an intention on the part of the owners of the lands over which the public way is alleged to run to dedicate the way to the use of the public and also an intention on behalf of the public to accept such dedication. The principles which the court should bear in mind in approaching such a question are clearly and extensively set forth in *Weatherston v. Kanigsberg* (1961), 28 D.L.R. (2d) 199, by the Court of Appeal of this Province.

87 After reviewing the many authorities set forth in that decision and considering all the evidence before the Court concerning the use of the old mill road over the years, I find that a public way has not been established. The vast majority of persons using the grist mill and subsequently the concrete plant at the head of the stream came and went by water, and the few who came by land were simply using a convenient private pathway leading from the highway across lands owned by brothers having an interest in the grist mill. Others who used the pathway for hauling wood during the winter months or the means of access to the highway and the lands above were, in my opinion, exercising the privilege extended to residents of rural areas to cross

other people's lands for the sake of convenience. The fact that these people from time to time during different seasons used the old mill road under these circumstances does not reveal to me any intention on the part of the owners of the lands being crossed to dedicate them once and for all to the use of the public.

88 The defendant further contends that there is attached to the ownership of his property by express grant a right-of-way of access over Lots 18 and 19. In support of this proposition he refers to the Will of John Meisner, dated December 1, 1968, probated September 1, 1872. And John Meisner was during his lifetime the owner of all of the lands on the northern side of Deep Cove and of the grist mill as well. The Will is as follows:

. . .

> 11. - It is my Will that my five sons Henry, Casper, Jacob, Martin and Isaac Meisner shall have an equal right in the fishery at Deep Cove and also give bequeath unto them one hundred feet of ground in depth or length from high water mark all around the said shore of said Deep Cove. It is also my Will and do hereby direct that in case any of my said sons wish to dispose or sell his right or share of said fishery, in that case only to sell it to his brother or brothers. 12. - I give and bequeath unto my three sons Henry, Martin and Isaac Meisner the grist mill at Deep Cove reserving unto my two sons Casper and Jacob the free use of it, but only for the purpose of grinding their own grain in it. 13. - I give and bequeath to my four sons Henry, Jacob, Martin and Isaac Meisner to them their heirs and assigns all the rest residue and remainder of my real estate situate lying and being in the County of Lunenburg; likewise I give and bequeath unto them all the remainder of my household furniture and of all my personal estate share and share alike. 14. - It is my Will that my aforesaid sons do allow to each other the free use of roads and as are now used by them. 15. - I grant each of my sons the liberty to sell the property made over to them in this my last Will and Testament to any body, except the fishery in Deep Cove and my son Isaac Meisner's property must be sold as aforesaid.

. . .

89 On December 13, 1873, the four sons of John Meisner, Henry, Jacob, Martin and Isaac, entered into the partition agreement concerning the lands left to them by their father, which I have earlier set forth in full. The defendant contends that the Will of John Meisner and the partition agreement entered into by his four sons show an intention to attach to each parcel of land assigned to each son the right to travel over all roads in use on the lands as a whole. He contends that this interpretation is particularly applicable to the old mill road since all the parties to the partition agreement received a share of the grist mill and the dam and access to Lot 9 for the purposes of maintaining the dam and the mill operation.

90 Henry, Jacob, Martin and Isaac Meisner were farmers at the time their father died, and it is obvious from reading his Will that he wanted to divide his large farm holdings among his children in such a way as to permit them to carry on with individual farming operations. He left the grist mill to three of his sons but reserved the right of the other two to grind their grain at the mill without charge. He also expressed a desire that all of his sons would have the free use of all roads that were at that time being used in the area.

91 The four sons of John Meisner apparently felt that some further document was necessary to clarify the lands which each was to receive under the Will and they entered into the partition agreement of December 13, 1873. They were careful to reserve the rights of all sons in the grist mill and dam, not only for themselves but for their heirs and assigns and made a similar reference to the roads in use on the lands being kept open for the use of all parties.

92 I am satisfied that the road leading from the main highway to the mill was at the time of the partition agreement fairly well defined and was one of the "roads" referred to in both the Will of John Meisner and the partition agreement. I further

believe that it was the intention of the four brothers, who signed the partition agreement, to attach to each of the lots numbered 20, 19, 18 and 9 the right of all parties, their heirs and assigns to use this roadway leading from the highway to the mill.

93 When the plaintiff purchased Lots 18 and 19 in 1929, Mr. Eaton and the plaintiff's legal advisers had actual notice of the partition agreement attached to the plan of partition of the Meisner property, and, in my opinion, at that time there was also ample indication on the ground of the existence of a travelled way running from the mill site to the East Chester to Blandford highway. I find, therefore, that Lots 18 and 19 are vested in the plaintiff, subject to a right of the owner of Lot 20, his servants, agents, workmen or guests to cross over the plaintiff's lots for the purpose of obtaining access to and from the defendant's property. The road as it exists on the ground must be left open for use by the owners of lots numbered 20, 19, 18 and 9.

94 The plaintiff contends that even if a right to cross such property was at any time vested in the owner of Lot 20 that such right has been abandoned by non-user. In support of this proposition he argues that from 1928, when the plaintiff purchased the property, until 1962 virtually no use was made of the old mill road. To extinguish an existing right-of-way by non-user the circumstances of the failure to exercise the right must be indication of an intention on the part of the person entitled thereto to abandon that right. No precise rule can be followed as may be seen from the discussion of the subject in *Gale on Easements*, 10th ed. at p. 485, which is as follows:

> The precise period requisite to extinguish a right-of-way, by mere non-user, does not appear to have been determined by any express decision of the English Courts. In *Bower v. Hill* (1835), 1 Bing, N.C. 555, Tindal, C.J., indeed said that an obstruction to a way of a permanent character, if acquiesced in for twenty years, would be evidence of a renunciation and abandonment of the right. But the weight of authority is against this *Dictum*. In the earlier case of *Seaman v. Vawdrey* (1810), 16 Ves. 390, where a right of access to mines had been reserved by a conveyance of 1704, but had never been exercised, it had been held that the right had not been released by this non-user. 'The non-user of this right proves nothing', said Grant, M. R. In *Doherty v. Beasley* (1835), 1 Jones Exch. Rep. (Ir.) 123, where plaintiff brought an action against defendant for obstructing plaintiff's right-of-way over defendant's close, and defendant pleased in effect that plaintiff had not used the way for twenty years, Joy, C.B., said that the question really came to this: Was the plaintiff obliged to use the way, and if he did not make use of it for twenty years was he to be excluded by a plea such as the defendant's? 'We think not. The question is not whether the non-user may not be evidence . . . but whether it is *per se* an absolute bar. We think that we must allow the demurrer', said the Chief Baron. In *Cook v. Bath* (1868), 6 Eq. 177, Malins, V.C., held that thirty years' non-user without more was insufficient to extinguish a right-of-way.

and also at p. 487:

> In *Ward v. Ward* (1852), 7 Ex. 838, a right-of-way was held not to have been lost by more non-user for a period much longer than twenty years, it being shown that the way was not used, because the owner had a more convenient mode of access through his own land. Alderson, B., said: The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user.

The fact that the old mill road was not used to any extent from the time that the plaintiff purchased Lots 18 and 19 in 1929 until Lot 20 was purchased by Mr. Masland in 1962 was really simply a consequence of the cessation of operations upon Lot 20. The grist mill had ceased to operate some years before, and after 1926 when the concrete plant and the shingle mill folded no other commercial activity was carried on

Continued on Page 176.

Nova Scotia Supreme Court, Trial Division
Jones, J.
June 5, 1974.

REAL PROPERTY - TOPIC 4724

TITLE - BOUNDARIES - ELEMENTS AND RULES OF CONSTRUCTION - LATENT AMBIGUITY - EXTRINSIC EVIDENCE - DEED DESCRIBED BOUNDARIES OF A LOT AS BEGINNING AT A CORNER MARKED BY A STONE AND EXTENDING FROM THE STONE ALONG A SHORE - THE STONE WAS ACTUALLY 146 FEET FROM THE SHORE AND WAS ON AN OLD WIRE AND POLE FENCE WHICH RAN ALONG A SIDELINE TO THE SHORE - DEFENDANTS CLAIMED THAT THE DEED DID NOT GRANT THE PROPERTY TO THE SHORELINE BUT ONLY TO THE STONE - THE SUPREME COURT HELD THAT THE DEED CONTAINED A LATENT AMBIGUITY, WHICH COULD BE REMOVED BY EXTRINSIC EVIDENCE OF ACTUAL MARKERS, SUCH AS FENCES, AND FIXED BOUNDARIES, SUCH AS THE SHORE - SEE PARAGRAPHS 20 TO 22.

REAL PROPERTY - TOPIC 4755

TITLE - BOUNDARIES - DETERMINATION OF SHORELINE - ACCRETION - THE SUPREME COURT STATED THAT, WHERE A BOUNDARY BECOMES EXTENDED BY ALLUVIAL ACCRETION, THE ACCRETION BELONGS TO THE OWNER OF THE LAND SO EXTENDED - SEE PARAGRAPHS 23 AND 24.

REAL PROPERTY - TOPIC 4794

TITLE - BOUNDARIES - DETERMINATION OF - MONUMENTS AND MARKERS - FIXED - EFFECT - DEED DESCRIBED BOUNDARIES OF A LOT AS BEGINNING AT A CORNER MARKED BY A STONE AND EXTENDING ALONG A SHORE - THE STONE WAS ACTUALLY 146 FEET FROM THE SHORE AND WAS ON AN OLD WIRE AND POLE FENCE WHICH RAN ALONG A SIDELINE TO THE SHORE - DEFENDANTS CLAIMED THAT THE DEED DID NOT GRANT THE PROPERTY TO THE SHORELINE BUT ONLY TO THE STONE - THE SUPREME COURT HELD THAT THE FIXED MARKERS OF THE SHORE AND THE FENCE WERE DETERMINATIVE OF THE BOUNDARIES WHEN THEY DIFFERED FROM THE DESCRIPTION IN THE DEED - THE SUPREME COURT HELD THAT THE GRANT INCLUDED THE SHORELINE - SEE PARAGRAPHS 28 TO 35.

REAL PROPERTY - TOPIC 4754

TITLE - BOUNDARIES - FIXED - SHORE - THE SUPREME COURT HELD THAT A SHORE IS TO BE REGARDED AS A FIXED BOUNDARY - SEE PARAGRAPH 32.

DAMAGES - TOPIC 4212

TORTS AFFECTING LAND AND BUILDINGS - GENERAL - TRESPASS - DEFENDANTS WRONGFULLY BUILT A ROAD ACROSS THE PLAINTIFFS' BEACH AND DESTROYED THE BEACH - THE SUPREME COURT STATED THAT THE MEASURE OF DAMAGES FOR TRESPASS TO LAND COULD BE EITHER THE COST OF REPLACEMENT OR REPAIR OR THE AMOUNT OF DIMINUTION OF VALUE - THE SUPREME COURT ORDERED FURTHER SUBMISSIONS ON THE QUESTION OF DAMAGES - SEE PARAGRAPHS 36 TO 43.

This case arose out of the plaintiffs' claim against the defendants for damages for trespass to land. The plaintiffs bought a large lot of land from one of the defendants which lay between the highway and the ocean. The deed described the boundaries of the lot as "beginning at the southwest corner of lot No. 56 at a rock marked SS; running thence . . . along the shore". The rock was actually 146 feet from the shore and was on an old wire and pole fence, which ran along the sideline to the shore. The defendants subsequently acquired from the plaintiffs' grantor deeds which purported to convey to them the shore frontage to the lot. The defendants then bulldozed a road across the shore frontage. The plaintiffs brought an action in damages for trespass against the defendants. The defendants claimed that the deed to the plaintiffs did not grant the shore frontage to the plaintiffs but only granted that portion of the property from the road to the stone. The Supreme Court allowed the action and held that the defendants had committed trespass on the plaintiff's property. The Supreme Court held that the plaintiffs acquired the whole lot, including the shore frontage. Damages were not assessed, because counsel had not fully addressed

themselves to the matter of damages. The matter of damages was adjourned for further submissions.

. . .

This case was heard on May 21, 1974, before JONES, J., of the Nova Scotia Supreme Court, Trial Division. On June 5, 1974, JONES, J., delivered the following judgment:

1 JONES, J.: This is an action for a declaration of title and for damages for trespass to certain lands at Villagedale, Shelburne County, Nova Scotia.

2 The plaintiff, Mr. Alex H. Cherry is from Scarsdale, New York. He has an association with Nova Scotia dating back to 1941. He became interested in acquiring a vacation property in the Barrington area of Shelburne County in 1966. He knew Mr. Herbert Newell of Baccara. In the summer of 1969 Mr. Newell advised Mr. Cherry that the defendant Mr. Cecil Snow was interested in selling his property at Villagedale. Mr. Cherry testified that he came to Nova Scotia some weeks later and inspected the property with Mr. Newell and Mr. Snow. Mr. Snow advised him the property ran from the road to the shore. Mr. Cherry described it as a meadow which provided a broad view of the Bay. Mr. Cherry inspected the shore. He noted a small sandy beach on the end. He was informed by Mr. Snow there was deep water on the south end of the property.

3 The other two plaintiffs, Mr. Saueracker and Mr. Agee, are from the United States and are friends of Mr. Cherry. Mr. Cherry anticipated the other two plaintiffs might be interested in acquiring the property with him. He was anxious about the waterfront for swimming and boating purposes. There was a house and barn on the property. Mr. Cherry resolved to purchase the property alone if necessary. The purchase price agreed upon was $7,500.00. He instructed Mr. James Harding, Barrister of Shelburne, to search the title. Mr. Harding certified the title on September 24, 1969. Mr. Cherry subsequently agreed with Mr. Saueracker and Mr. Agee that all three men would purchase the property. A deed from Cecil and Lillian Snow to the three plaintiffs was executed on September 24, 1969. The description in the deed is as follows:

> ALL and singular the land and premises situate, lying and being at the place known by the name of the Hill on the eastern side of Barrington Bay in the County of Shelburne, Province of Nova Scotia; and is part of a lot No. 57 (fifty-seven), which was laid out to Barnabas Baker, one of the original Grantees, for his first division lot in the Township of Barrington, abutted and bounded as follows: BEGINNING at the Southwest corner of Lot No. fifty-six (56) at a rock marked SS; running thence South half West forty-two rods (42) along the shore; thence East by North to the back line of said lot; thence by said line and the division line between said Lot No. fifty-seven (57) and the lots of land adjoining it, to the first mentioned bound, and being the same lands devised to the Grantor herein, Cecil Snow, in a Will of George Snow, dated 17 April, A. D., 1917, and recorded at the Registry of Deeds, Barrington, N. S., in Book L, Page 496.

4 According to Mr. Harding's abstract, Ebenezer Smith conveyed the land to George Snow on November 4, 1872. That deed contained the same description as the deed to the plaintiffs. In his Will, dated April 17, 1917, George Snow devised the property to his wife Susan until her death or remarriage and then to his son Cecil Snow.

5 In 1971 when Mr. Cherry returned to the property he discovered that a road had been bulldozed across the entire property along the seashore. The sand beach had disappeared and the embankment was gouged out to create a hazard. Mr. Cherry insisted he had purchased the property for the shore frontage. In his view, the value of the property had been destroyed.

6 Mr. John Saueracker testified that he and Mr. Agee inspected the property on September 20, 1969. They were accompanied by Mr. Newell. Mr. Snow was on the

property with his son-in-law, Mr. Elia Huskins, one of the defendants. They examined the property, including the shorefront. The witness noted the small sandy beach. The south end of the property was rocky. Mr. Cecil Snow referred to a rock marked "SS" on the boundary. Mr. Saueracker's daughter found the stone in a thicket. The stone was some distance from the existing shore on the north boundary. Mr. Snow assured he witness that the boundary continued to the shorefront. There was a discussion regarding boating and swimming on the shorefront. Mr. Saueracker testified that he took movies of the property, including the beach, to show to his wife. He noted the farmhouse and barn on the property. He anticipated making repairs to the farmhouse as a temporary measure. In February, 1970, Mr. Saueracker returned to Villagedale. He discussed with the defendant Mr. Fred Nickerson the possibility of repairing the house. There was some discussion at that time concerning boating and swimming on the property. Mr. Nickerson told the witness he tried to purchase the property from Mr. Snow previously, without success. Due to the costs involved, the plaintiffs decided not to repair the house.

7 Mr. Saueracker returned to the property with his wife in the summer of 1971. He wanted his wife to see the property. As they proceeded down the slope they came to the embankment. The road had been built and the beach was gone. There were stakes along the road. The embankment was over the witness' head, being 10 feet or so in height. Mr. Saueracker testified the main value of the property was the beach frontage. The land sloped to the beach when he first saw the property. Exhibit 6 is a photo of the beach showing the roadway and bank in 1971.

8 Mr. Herbert Newell testified on behalf of the plaintiffs. He remembered taking Mr. Cherry to the property in 1969. Mr. Cecil Snow was present. They drove into the field and from there walked to the edge of the grass. Mr. Snow pointed out the lines. The north line extended to the waters of Barrington Bay. There was a pond on the north line with a fence extending down to the beach. It was clear from the conversation that the plaintiffs were buying waterfront property. There was an old stone wall at the front of the property.

9 Mr. Stanley Lamrock lives in Villagedale. He is familiar with the property. The north fence, according to this witness, went almost to the shore, crossing the little pond. He also recalled that there was a fence along the shore. The fences were made of wooden poles. He did not recall a wall along the top of the bank.

10 A survey plan dated August 18, 1971, was submitted in evidence. This plan was prepared by Mr. Harold E. Burton, a land surveyor. Mr. Burton was formerly associated with Pereira & Associates Limited, consulting engineers and surveyors, of Yarmouth, Nova Scotia. It purports to show the lands of the plaintiffs. There are two lots, one being on the eastern side of the Villagedale Road containing 26.5 acres. Except for the highway frontage, this land is enclosed by a wire fence. The area on the west of the highway and fronting on the shore contains 30.5 acres. It is irregular in shape. The north boundary extends from the highway to the seashore, along a wire fence and a pole fence. At a point 146.7 feet from the seashore along this boundary is the stone marked "SS". The plan also shows the remains of an old stone wall along the embankment and what purports to be the approximate location of the old shoreline. The existing shoreline of Barrington Bay is outlined on the plan.

11 Mr. Ronald Dearman is a land surveyor with Pereira. He examined the lands and checked the Burton plan. He did not take any measurements. Mr. Dearman found it difficult ot follow the description in the deed to the plaintiffs. In his opinion, one would have to follow the evidence on the ground. This would entail carrying the north boundary to the shore and then going along the shore to the south boundary. The stone wall on the embankment does not traverse the entire property. The high water mark was indefinite along the shorefront. The new road ran along the shore. There was a drop of 8 to 10 feet from the field to the road.

12 The rock marked "SS" was overgrown and had been there for many years. Mr. Dearman acknowledged that the bearing of the old wall was the nearest point to the direction in the deed description. The distance of 42 rods along the shore is less than the measurement in the Burton plan.

13 The defendant Mr. Fred Nickerson is 72 years of age and resides at Villagedale. He resided in the area as a youth but lived for many years in the United States. He testified that he was familiar with the property for many years. There was a pond on the north boundary. He stated that the stone wall was always along the front of the property. The old beach line was shown on the Burton plan. This witness stated the land between the wall and the shore was new land, having resulted from accretion. In making inquiries, Mr. Nickerson concluded that the plaintiffs had only purchased the lands east of the wall and that their description did not include the waterfront. He made some searches at the Registry of Deeds. Mr. Nickerson acknowledged discussions with the plaintiffs regarding repairs to the house. He denied any discussion with the plaintiffs otherwise, regarding the property or shore frontage. Mr. Nickerson knew the plaintiffs had purchased the Cecil Snow property and thought it included the land to the shore. He examined the description in the plaintiffs' deed. Mr. Nickerson knew Mr. Snow occupied the land to the beach.

14 The defendant Mr. Elia Huskins is married to Cecil Snow's daughter. In a deed dated September 30, 1970, he purported to obtain title from Cecil Snow to the shore frontage. Mr. Huskins offered to sell this piece of land to Mr. Nickerson in October 1970. A deed dated October 19, 1970, is on record. Mr. Nickerson paid Mr. Huskins $1,000.00 for the land. Mr. Nickerson had some difficulty in recording his deed because of the conveyance on record to the plaintiffs. He denied that he was responsible for the conveyance from Snow to Huskins.

15 Mr. Elia Huskins testified that he was present when Mr. Saueracker inspected the property with Mr. Snow. He stated Mr. Snow's hearing was not good at the time. The young girl found the rock marked "SS". Mr. Huskins discussed the course along the stone wall. Based on his understanding of the situation. Mr. Huskins subsequently obtained the conveyance of the shore frontage from Mr. Snow. He paid $50.00 for the conveyance. He subsequently approached Mr. Nickerson. Mr. Huskins stated there were cattle fences along the north and south lines of the property. In his view, the property was improved by the road along the shore. Mr. Huskins acknowledged that the plaintiffs wanted all of Mr. Snow's land. He did not deny that this included the shore frontage.

16 Mr. Robert Hunt surveyed the property purchased by Mr. Nickerson on November 6, 1970. Exhibit 3 is a copy of the plan he prepared. He started at the rock marked "SS" and followed the stone wall. He noted the fence on the north boundary of the property. He extended the fence to the shore to represent the northern boundary. Mr. Hunt did not check the other conveyances.

17 Mr. Malcolm Butler resides at Annapolis Royal. He has a summer residence on Barrington Bay. He testified that there was always a bank at the edge of the Snow property. The shore frontage was very rough. He did not see any sand beach in front of the property. While the bank is higher, in his view it is now easier to cross the beach. The shore frontage was only accessible on the north and south sides of the property.

18 Counsel agreed that Cecil Snow inherited the property from his father under the Will. Counsel were unable to locate any plan of the original allotment on record. The original allotment to Barnabas Baker shows a reservation of three rods from the high water mark for a public road. Counsel admitted that the roadway on the shore was constructed by the defendant Mr. Nickerson after he obtained the conveyance from Mr. Huskins.

19 The plaintiffs brought an action against the three defendants on March 17, 1972. The plaintiffs claimed that they purchased the entire interest of Cecil Snow in the property, including the shore frontage. They further claimed that the conveyance to the defendant Elia Huskins was made fraudulently and in bad faith to the knowledge of the defendants. The plaintiffs claimed a declaration of title to the lands, including the shore frontage. They also sought damages for trespass to the lands. The defendants failed to file any defence to the action and interlocutory judgment was entered. The defendant Fred W. Nickerson was subsequently granted leave to file a defence.

20 The primary issue in this case is a determination of the area conveyed by Cecil Snow to the plaintiffs. The general principles applicable to the interpretation of a deed are set forth in paragraphs 13 and 24, Volume 5, of the Canadian Encyclopedic Digest, Second Edition, as follows:

> 13. *Construction. - General Rule.* The court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty still remains after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.
>
> 24. *Extrinsic Evidence. Patent and latent ambiguities.* An ambiguity apparent on the fact of a deed is technically called a patent ambiguity - that which arises merely upon the application of a deed to its supposed object, a latent ambiguity. The former is bound in the deed only, while the latter occurs only when the words of the deed are certain and free from doubt, but parol evidence of extrinsic or collateral matter produces the ambiguity - as, if the deed is a conveyance of 'Blackacre', and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. Parol evidence therefore in such a case is admissible, in order to explain the intention of the grantor and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself. A subsequent Will cannot be used to construe an earlier deed of settlement nor as evidence that testator intended to include an additional person among the beneficiaries under the settlement.
>
> *Extrinsic evidence as to latent ambiguities generally.* Extrinsic evidence is always admissible to identify the persons and things to which the instrument refers.
>
> Provided the intention of the parties cannot be found within the four corners of the document, in other words, where the language of the document is ambiguous, anything which has passed between the parties prior thereto and leading up to it, as well as that concurrent therewith, and the acts of the parties immediately after, may be looked at, the general rule being that all facts are admissible to interpret a written instrument which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as tend only to show that the writer intended to use words bearing a particular sense are to be rejected.

21 The following passage appears at page 627 in the text Canadian Law of Real Property, by Anger and Honsberger:

> Where the principal words of the description lack the certainty necessary for the rejection of the subordinate description as a *falsa demonstratio* and the subordinate description can be read as limiting the principal description, it will be construed accordingly (per Lord Cranworth in *Slingsby v. Grainger* (1859), 7 H.L.C. 273, 283, 11 E.R. 109). In all such cases, extrinsic evidence of the surrounding circumstances is admissible to prove facts in order to ascertain the content. Lord Chelmsford said: 'Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that

the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude a portion of land, where the words are capable of either construction.' And Lord Wensleydale said; 'In deeds, as well as Wills, the state of the subject at the time of execution may always be inquired into' and 'when the evidence of all material facts is exhausted, and there is still ambiguity, no parol evidence of the grantor's intention, as distinguished from extrinsic facts, can be admissible, except in the single case of there being two subjects, or two objects, to which the terms of the instrument are equally applicable' (*Waterpark (Lord) v. Fennell* (1859), 7 H.L.C. 650, 678, 684, 11 E.R. 259).

Acts of user before a grant or conveyance are cogent evidence of the identity of what is granted, for they lead up to and explain what was intended to be conveyed (*Van Diemen's Land Co. v. Table Cape Marine Board,* (1906) A.C. 92.

22 In *Ogilvie v. Grant,* 41 N.S.R. 1, Townshend, J., stated at page 7:

The vagueness of description in plaintiff's deeds, compels us to resort to extrinsic evidence to ascertain, not what Peter Ogilvie said he intended to convey to his son William, but, applying the words used to the subject matter, what do they convey; . . .

and at page 9:

The learned trial judge, against the objection of defendants' counsel, received evidence of the grantor's (Peter Ogilvie's) statements to the plaintiff as to the land he intended to convey, or thought he had conveyed to him, and on such evidence has to a considerable extent based his decision. He refers to *Roe v. Selden,* 22 Q.B.D. 233, and *Gerrish v. Towne,* 3 Gray 82, as authorities for the admission of such parol evidence. An examination of those cases will show that they in no respect differ from the well established rules in respect to the admission of parol evidence of the intention of the parties to a deed. These rules are to be found very fully expressed by Parke, B., in *Shore v. Wilson,* 9 Cl. & T. 355, at p. 555, where he says:

'For the purpose of applying the instrument to the facts, and determining what passes by it and who takes an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court whose province, it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous. They are referred to in *Vice Chancellor Wigram's* excellent treatise on the admission of extrinsic evidence, under the fifth proposition, (p. 53, 3rd ed.; p. 67, 4th ed.) From the context of the instrument and from these two descriptions of evidence with such circumstances as by law the court in that evidence may, of itself, notice, it is its duty to construe and apply the words of that instrument, and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument or before or after that time, is admissible, the duty of the court being to declare the meaning of what is written in the instrument; not of what was intended to have been written.'

Authorities without number might be cited to illustrate this very well settled rule of law.

Where the words used are ambiguous, no doubt, parol evidence may be given of the surrounding circumstances attending the execution of the deed to enable the court to interpret the language, but not what the parties say themselves they intended.

23 With reference to accretion along the shore, the rule is clear. The authors state at page 640 of the Canadian Law of Real Property (supra):

> Where land is conveyed and described as bounded by a shore or is actually so bounded, the rule of common law is that, if such boundary becomes extended by aluvial accretion due to the 'gradual, slow and imperceptible' retirement of the water or deposit of alluvium, the accretion belongs to the owner of the land so extended and not to the Crown.

24 I merely refer to this passage to show that whatever accretion there may have been to the seashore belonged to Mr. Cecil Snow. I do not think it has been established that there was accretion along the shorefront or, if so, to what degree. Mr. Snow occupied the land to the seashore.

25 It is clear the description in the plaintiffs' deed is meagre and, when applied to the lot, ambiguous. In the first instance the rock marked "SS" is 146.7 feet from the shore. The direction from that point is "South half West forty-two rods (42) along the shore." The direction is uncertain and whatever its meaning does not lead along the shore. In these circumstances I must endeavour to interpret the language of the deed having regard to the extrinsic evidence.

26 Two plans were introduced by the parties. In each case the surveys were completed subsequent to the plaintiffs' deed. The primary evidential value of these plans, Exhibits 1 and 3, is to show the location of the lines and monuments on the ground as they existed at the time of the sale. The plaintiffs also produced a letter of instructions from Mr. Cherry to his solicitor. While I have no doubt as to the truth of the letter's contents, I am not aware of any principle on which it is admissible as against the present defendants. The letter merely confirms the evidence given by the plaintiff Cherry. In the present action it must be excluded as hearsay and self-serving.

27 This brings me to the evidence of the witnesses. I accept the evidence of the plaintiffs' witnesses. From the evidence of these witnesses I am satisfied that Mr. Snow occupied the entire area as shown on the Burton plan, including the shore frontage. There were fences on the north and south sides of the property and these lines were pointed out to Mr. Cherry and Mr. Saueracker at the time of the sale by Mr. Snow as the property boundaries. I also find that all of the defendants knew the plaintiffs bought the entire property, including the shore frontage. Mr. Cherry and Mr. Saueracker made it abundantly clear to Mr. Snow that they were interested in the shore frontage. I am satisfied on the evidence that there were fences on the north and south boundaries of the property which led to the shore frontage. The old wall only covered part of the property. Mr. Snow occupied these lands by virtue of his father's Will. The same description was used in the original deed. Mr. Snow purported to convey to the plaintiffs the same lands devised to him in the Will. Having regard to the area enclosed, this evidenced an intention to convey all of his lands.

28 Turning to the monuments on the ground one finds the fences, the stone marked "SS", and the seashore. These monuments are fixed. Our Court of Appeal has dealt with the rules applicable to fixed monuments in many cases. I propose to deal with only a few of those cases which express the principles applicable.

29 In *Fraser v. Cameron*, 2 N.S.R. 189, Haliburton, C.J., stated at page 191:

> But if, as the plaintiff's own witnesses have proved, the lots were staked and laid out by the owner, and sold to the then purchasers by those stakes placed at each of the four corners, and were taken possession of and held by the purchasers by the boundaries then established, can we at this distant day disturb those boundaries by nice measurements? Our neighbours are safe guides in questions of this nature, and in *Howe et al. v. Bass*, 2 Mass. R. 282, Parker, J., observes, 'When a party is about purchasing land he naturally estimates its quantity, and of course its value, by the fences which enclose it, or by other fixed monuments which mark its boundaries, and he purchases accordingly.' And in *Pernam v. Wead*, 6 Mass. R. 133, Parsons, C. J., said, 'With respect to courses, from errors in surveying

> instruments, variations of the needle, and other causes, different surveyors often disagree. The same observations apply to distances, from the inaccuracy of measures, or of the party measuring, and computations are often erroneous.'

Mr. Justice Dodd stated at page 193:

> In the construction of a deed as to the intention of the parties to it, the rule to find such intent as stated by Greenleaf on Evidence, sec. 302, is to give most effect to those things about which men are least liable to mistake, and upon this principle the things usually called for in a grant, that is the things by which the land granted is described, are there marshalled. First, the highest regard is had of natural boundaries, secondly, to lines actually run and corners actually marked at the time of the grant. In this case we are without natural boundaries, but we have that which stands next to natural boundaries, according to the authority I have just referred to, that is, lines actually run and corners actually marked, which is proved by the testimony of McKay, the first purchaser of lot No. 1 from Forbes, and who made the survey and marked the corners but a very short time previous to the date of the deed to McKenzie of lot No. 2.

30 In *Blackadar et al. v. Hart*, 51 N.S.R. 449, Sir Wallace Graham, C.J., stated at page 458:

> But the learned trial judge has dealt with the difficulty in the usual way. A rule has been adopted in America and followed in Nova Scotia that when there is 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 that rule, namely, that a mistake may easily occur in writing and 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 v. Benjamin*, 9 N.S.R. 474, at pages 480 and 485.
>
> Now here there is a natural monument, viz.; South River Lake, and the only way one can get near South River Lake on the ground is to take the description of the lot A as contended for by the plaintiffs. The learned judge's conclusion is to my mind unanswerable, namely, 'If the Gaius Balcom lot goes to the South River Lake then lot A is included in the grant G 2, i.e., the Gaius Balcom grant.'

31 In *McIsaac v. McKay et al.*, 49 N.S.R. 476, Graham, C.J., stated at page 480:

> After reading the evidence, I think the McLellan line is more accurate than the other. It is in accordance with the course of the division fence running from the front at the shore towards the rear, where it was likely to be correct, and has the course of all the lines of adjacent lands in the vicinity.
>
> In respect to the importance of an old fence line, I quote the following from a judgment of Cooley, J. In *Diehl v. Zanger*, 39 Mich. 60. Cooley, J., said:
>
> 'As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the best evidence of what the lines of a lot actually are and it would have been surprising if the jury in this case, if left to their own judgment, had not regarded them.'

32 In *Esson v. Mayberry*, 1 N.S.R. 186, the Court made it clear that the shore is to be regarded as a fixed boundary. Hill, J., stated at page 189:

> It has been urged that the one hundred feet given in the grant of Mrs. Donaldson from the eastern angle of Mr. Wallace's lot, are not limited and restricted by the words 'to the shore,' but that the plaintiff has the right to his complement of feet though they should carry you beyond the shore. But this cannot be so. Where a grant or deed gives a starting point from which you are to run so many feet to a natural fixed and determined boundary, the boundary is the *ne plus ultra*. A mistake in the measurement cannot operate against that about which there can be no mistake. Besides in this case such a construction would, independently of being against all principle, be absurd, and in reality give the plaintiff nothing; for, granting him entitled to his one hundred feet, and to run beyond the shore to complete it, still the grant directs the line to run from thence south-easterly 'by the shore.' Now, certainly running in the water would not be running by the shore, and we must, therefore, retrace our steps from the extreme west point of the one hundred feet directly to the shore, in order to enable us to run by it southerly, as the grant directs. This, in fact, would give the plaintiff no more than if he stopped at the shore, unless indeed it might be the imaginary line itself.

Bliss, J., stated at page 191:

> Now, in this last place, by the *courses of the shore* is meant the line of high water mark, and nothing else can be meant, for it runs from one point at high water mark to another. In this part, therefore, the lots in letter W are distinctly bounded by the shore at high water mark. Can we then suppose that when other parts of these lots are also bounded *by the shore* - the proper and correct meaning of which would extend it up to high water mark that any other than the same correct meaning is to be affixed to that word, and that it is to bear two different significations in one and the same description of one and the same continuing line? It is true the line from the street is described as *one hundred feet to the shore*, but the shore is the substantial part of the land described; and if there by any inconsistency between the measurement as stated and that, the former must be rejected in favour of that which is fixed and certain.

33 In *McPherson et al. v. Donald Cameron*, 7 N.S.R. 208, the defendant maintained that the beach was the corner boundary of his lot. Neither the course or distance mentioned in his grant reached that point without the alteration of one or the other. In delivering the judgment of our Court of Appeal, Dodd, J., stated at page 212:

> The beach will give to the defendant about eleven chains more on his eastern line than his grant mentions, provided the birch is the starting point of his grant, and between four and five chains if the spruce is the starting point. The beach by the verdict is found to be the corner of the *Cameron* lot, to which the defendant's grant bounds him. The question is now he is to get there, for neither the course nor the distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake; *Davis v. Rainsford*, 17 Mass., 210. On this principle the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled: *First*, the highest regard had to natural boundaries; *Secondly*, to lines actually run *and corners actually marked* at the time of the grant; *Thirdly*, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; *Fourthly*, to courses and distances, giving preference to the one or the other according to circumstances; *Greenleaf on Evidence*, p. 441, n. 2, and the case there referred to.
>
> When the plaintiffs obtained their grant the beach was then known as the corner boundary of the *Cameron* lot, and it was also known and established when the survey was made by *Giles*, the surveyor, upon which we may presume the *power* grant passed, as the survey was made for *Shey*, the original proprietor of the lot, in his testimony he says, I was present 40 years ago

> when *Giles* made the survey for me, and made a corner near the beach, but if a beach or birch I cannot say.

and further on page 213 he continues:

> The beach is a natural boundary, and we must, after the finding of the jury, and that there was evidence to justify that finding, treat it in our judgment as the corner boundary of the *Cameron* lot, and which the defendant's grant makes it, also a corner for him. Then, adopting the principle that the highest regard is to be had to natural boundaries, we must find some means, if the corner of the grant at the extent of 53 chains from the eastern corner of the lot will not strike the beach, either to alter the course or extend the line from the 53 chains until the course in the grant will go to the beach; it is evident, as I have already said, the courses and distances referred to will not do so, and the principle I have referred to from *Greenleaf* justifies a departure from one or the other, according to circumstances.
>
> *Kent,* in his *Comm.*, 4th vol., p. 466, says:
>
> 'In the description of the land conveyed, the rule is that known and fixed monuments control courses and distances, and where natural, and ascertained objects are wanting, and the courses and distances cannot be reconciled, the one or the other may be preferred according to circumstances.' We find the same enunciated by *Selden, J.*, in *Baldwin v. Brown,* 2 Smith's N. Y. Appeal Reps. He there said it is undoubtedly a general rule that where lands conveyed are described by courses and distances, and also by reference to natural objects, or fixed and permanent monuments, if there is a discrepancy between the two, the former description must yield to the latter.

34 The boundary fences and the shore were established when the plaintiffs accepted a conveyance from Mr. Snow. These were fixed monuments which must be accepted in preference to the courses and distances in the description. The only way to follow the shore line is to project the north boundary along the fences to the shore as outlined in the Burton survey. Both surveyors acknowledged that this was the only feasible way to interpret the description and that the shore line was the proper course to follow. Having regard to the description in the deed and the extrinsic evidence, I am satisfied that Mr. Snow conveyed his entire interest in the property to the plaintiffs as outlined in the Burton plan. This conveyance was registered and known to the defendants. In the result no interest passed in the subsequent conveyances to the defendants Mr. Huskins and Mr. Nickerson. It follows that the plaintiffs are entitled to a declaration of title and that Mr. Nickerson has committed a trespass on their lands.

35 The order should provide that the deed from Cecil Snow to the plaintiffs conveyed all the interest of Cecil Snow to the lands at Villagedale down to and including the shore frontage.

36 The plaintiffs claim damages for trespass and special and general damages. The principles applicable to the measure of damages for trespass to land are set out in McGregor on Damages, Thirteenth Edition, at page 711, as follows:

> (a) *In general.* It was for long said that the normal measure of damages was the amount of the diminution of the value of the land, a proposition based on what was generally considered to be the leading, but somewhat ancient, case of *Jones v. Gooday,* where the alternative measure of cost of replacement or repair, i.e. the sum which it would take to restore the land to its original state, was rejected. The facts of the case were that the defendant had cut a ditch in the plaintiff's field and carried away the soil. Lord Abinger, C.B., said he could not assent to the proposition that the plaintiff whose soil had been taken away was entitled to the 'amount which would be required to restore the land to its original condition. All that he is entitled to is to be compensated for the damage he has actually

> sustained.' And Alderson, B., said that, if the plaintiff was right, one who let sea in on land worth 20 pounds would have to pay for excluding it by expensive engineering operations.

The author goes on to point out that in more recent cases courts have allowed the costs of replacement or repair.

37 The first principle has been approved by our Court of Appeal in *Simon v. Gastonguay et al.*, 2 M.P.R. 470. Mellish, J., in speaking for the Court, stated at page 477:

> The learned trial judge seems to have assessed the damages on a correct principle. That is, he has apparently measured the damages as representing the diminished market value of the land in question by reason of the trespass. This value is to be determined by taking into account all the uses to which the building might reasonably be put at the time of the trespass.

38 In *Lloy v. The Town of Dartmouth*, 30 N.S.R. 208, the Court held that the proper measure of damages was the difference between the value of the property before and after the injury. The Court rejected the cost of restoration as the proper measure of damages. Meagher, J., indicated that there could be cases when damages should be measured by the cost of restoration.

39 No evidence was produced on the trial by the plaintiffs to show the depreciated value of the property. The burden of providing damages is on the plaintiffs. I refer in this regard to McGregor on Damages, (supra), at page 935. Mr. Cherry stated that the embankment had become a hazard and the beach had disappeared. In his view the value of the property had been destroyed. Mr. Saueracker confirmed Mr. Cherry's evidence. The beach constituted the principal value of the land according to this witness. The embankment and the sand beach would have to be restored.

40 Mr. Nickerson stated that he spent a considerable sum of money in constructing the road and filling in the area along the shore. Mr. Huskins maintained that Mr. Nickerson improved the property. He stated that the embankment would have to be sloped and seeded in order to restore the property. In his view this could be done in a very short time.

41 Mr. Butler stated that the beach was levelled and filled. He found that it was much better for walking.

42 Having regard to the principles to which I have referred, I am not satisfied that Counsel fully addressed themselves to the appropriate issues when dealing with the matter of damages. I am satisfied a serious trespass was committed and that the property depreciated in value from the plaintiffs' point of view. Whether the extent of their material loss has been established is in issue. The trespass was, in fact, committed by the defendant Nickerson. The other two defendants were not directly parties to that trespass. Whether they would be liable in contract or by virtue of any of the covenants in the deeds has not been established.

43 In the circumstances I think it is appropriate to receive further submissions from Counsel before determining the matter of damages. I am satisfied that I have a discretion to this end so that all issues can be finalized. I refer in this regard to 2 Canadian Abridgement, Second Edition, page 411.

44 If the parties can agree on the matter of damages then they are free to do so in the Order.

45 I will deal with the matter of costs when all issues have been resolved.

*Judgment for the plaintiffs.*

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Cooper and Macdonald, JJ.A.
November 24, 1975.

REAL PROPERTY - TOPIC 7884

TITLE - REGISTRATION OF INSTRUMENTS - THE SUBSEQUENT INSTRUMENT - REGISTRY ACT, S. 17 - WHAT CONSTITUTES AN INSTRUMENT - A DEED CONVEYING LAND WAS EXECUTED IN 1936 BUT WAS NOT REGISTERED UNTIL 1974 - THE GRANTOR OF THE DEED DIED IN 1960 AND THE ESTATE CONVEYED THE SAME LAND TO THE PLAINTIFF BY DEED WHICH WAS REGISTERED IN 1973 - WHETHER THE CONVEYANCE TO THE PLAINTIFF WAS AN "INSTRUMENT" WITHIN THE MEANING OF S. 17 OF THE REGISTRY ACT BECAUSE AT THE TIME THE DEED WAS SIGNED IT WAS A NULLITY - THE NOVA SCOTIA COURT OF APPEAL HELD THAT THE 1936 DEED WAS INEFFECTIVE BECAUSE OF THE PRIOR RECORDING OF A DEED BY THE PLAINTIFF IN 1973 - THE NOVA SCOTIA COURT OF APPEAL STATED THAT A DEED IS AN INSTRUMENT FOR PURPOSES OF S. 17 OF THE REGISTRY ACT IF THE GRANTOR HAS APPARENT POWER TO CONVEY THE LAND.

PRACTICE - TOPIC 78

ACTIONS - COMMENCEMENT OF ACTIONS - CHOICE OF METHOD OF COMMENCEMENT OF ACTIONS - ORIGINATING NOTICE - NOVA SCOTIA PRACTICE - CIVIL PROCEDURE RULES, RULE 9 - THE PLAINTIFF COMMENCED AN ACTION FOR A DECLARATION THAT A DEED WAS INEFFECTIVE BECAUSE OF THE PRIOR REGISTRATION OF THE PLAINTIFF'S DEED WITH RESPECT TO THE SAME LAND - THE TRIAL DIVISION HELD THAT THE PROCEEDING SHOULD HAVE BEEN COMMENCED BY ORIGINATING NOTICE (ACTION) AND NOT BY AN ORIGINATING NOTICE (APPLICATION INTER PARTES) - SEE PARAGRAPHS 11 TO 15.

WORDS AND PHRASES

INSTRUMENT - MEANING OF THE WORD "INSTRUMENT" AS FOUND IN S. 17 OF THE NOVA SCOTIA REGISTRY ACT.

This case arose out of an application for a declaration that a deed was ineffective because of the registration provisions of s. 17 of the Nova Scotia Registry Act. A deed conveying land was executed in 1936 but the deed was not registered until 1974. The grantor of the deed died in 1960 and the estate of the grantor conveyed to the plaintiff the same land that was conveyed in the 1936 deed. The plaintiff purchased the land for valuable consideration and the plaintiff registered its deed in 1973 without notice of the 1936 deed. The defendants alleged that the conveyance to the plaintiff was not an "instrument" within the meaning of s. 17 of the Registry Act because at the time the deed was signed it was a nullity. The Trial Division of the Nova Scotia Supreme Court allowed the plaintiff's action and declared that the 1936 deed was ineffective because of the prior registration of the plaintiff's deed in 1973. The judgment of the Trial Division is set out below - see paragraphs 11 to 44.

On appeal to the Nova Scotia Court of Appeal the appeal was dismissed and the judgment of the Trial Division was affirmed. The Nova Scotia Court of Appeal stated that a deed is an instrument for purposes of s. 17 of the Registry Act if the grantor has apparent power to convey - see paragraphs 8 and 9.

. . .

This appeal was heard by the Nova Scotia Court of Appeal at Halifax, Nova Scotia, on November 21, 1975. Judgment was delivered by the Nova Scotia Court of Appeal on November 24, 1975.

The judgment of the Nova Scotia Court of Appeal was delivered by MacKEIGAN, C.J.N.S.

1 MacKEIGAN, C.J.N.S.: This appeal requires us to construe s. 17 of the *Registry Act*, R.S.N.S. 1967, c. 265, which reads:

> Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument.

2 The late Reverend Charles Forest in 1936 by deed conveyed the land in issue to John Hilaire Landry, who, however, did not record it at the Registry of Deeds at Arichat until January 3, 1974, when Landry's deed to the appellant, Jemco Holdings Limited, was also recorded.

3 In the meantime Father Forest died in 1960. On April 2, 1973, his sister, Marie Rose Forest, describing herself as heir of Father Forest, executed a deed to Sharon B. DeYoung which was recorded July 26, 1973. On August 15, 1973, a copy of Father Forest's Will, probated in 1960, was recorded in the Registry of Deeds and showed that Miss Forest was in fact executrix and residuary legatee. Sharon DeYoung on August 23, 1973, executed a deed to the respondent, Medlee Limited, which was recorded on August 31, 1973.

4 The issue is whether s. 17 makes the appellant's deed ineffective by reason of the prior recording of the respondent's deed, subject to the respondent establishing that it is "claiming for valuable consideration and without notice". Chief Justice Cowan, the learned Chief Justice of the Trial Division, has ruled in favour of the respondent on that issue and has directed a trial on the issue of notice and consideration. This appeal is on the preliminary issue.

5 Leave to appeal on this interlocutory matter should be granted.

6 Counsel for the appellant relied strongly upon *Aulenback v. Aulenback*, (1949) 2 D.L.R. 365 (N.S.C.A.), in support of his basic argument that the deeds from Miss Forest to DeYoung and from DeYoung to the respondent were not protected by s. 17 because neither was, he contended, an "instrument" as defined by s. 1(e) of the *Registry Act* as meaning, *inter alia*, "every conveyance or other document by which the title to land is changed or otherwise affected". In *Aulenback* a town tax deed in error included in its description land of a neighbour of the defaulting taxpayer. Graham, J., for a majority of the Nova Scotia Court, in rejecting the application of what is now s. 17, said at p. 368:

> As I have already said, the town had no power to sell the plaintiff's land. That being so, the tax deed is not an instrument affecting the title of plaintiff's land within the meaning of the above section. The deed under which the defendant claims the land was invalid from the beginning; and as the learned trial Judge said: 'It is no better than if a stranger conveyed lands he had not owned and in which he had no interest.'

7 I respectfully agree with the learned Chief Justice in distinguishing *Aulenback* when he said, after referring to the above quotation:

> In the present case, the plaintiff claims under documents executed by persons who, according to the documents on record in the office of the Registrar of Deeds, had the right to convey the lands in question.

He later said (and I underline the word "mere"):

> In my opinion, the *mere* fact that an instrument, at the time of its execution, is a nullity or defective in some respect, does not prevent the operation of s. 17 of the *Registry Act*, to render ineffective an earlier, unrecorded instrument and thus render effective the later defective instrument. In the ordinary case, where A owns land and gives a deed to B, and later gives a deed of the same land to C, it is clear that both deeds being

> unregistered, the deed to C, being later in time, is defective and, perhaps, a nullity. If, however, the deed to C is registered before the registration of the deed to B, B's deed is rendered ineffective and C's deed takes full effect, in accordance with its terms, and the defect previously existing is cured by the operation of s. 17 of the *Registry Act*.

8 I construe *Aulenback* to mean that a deed is not an "instrument" unless the grantor has apparent power to convey, as did Miss Forest and DeYoung in the present case, so far as appeared from the documents on record in the Registry of Deeds when their respective deeds were recorded. I agree with counsel for the respondent that they were not "strangers" but persons who, but for the unrecorded deed to Landry, would have the right to convey.

9 The meaning of s. 17 and the philosophy underlying it are thoroughly and authoritatively discussed by Meagher, J., in *Burns v. Young* (1900), 40 N.S.R. 199. I quote the following from p. 202:

> The grantor having already conveyed away his title, the grantee in the later deed, it may be correct to say, took nothing by it until he registered it, but, upon registration, through the agency and force of the registry act, the earlier deed is entirely avoided, so that effect must be given to the later deed, when recorded, the same as if the prior deed never existed.

And at p. 205:

> In other words, in the purview of the statute relating to registry, the lands, for the purposes of a valid conveyance to a bona fide purchaser, without notice, are to be regarded as the lands of the grantor until a deed conveying them has been recorded.

And at p. 207:

> Our Registry Act was enacted for the express purpose of enabling one, by an examination of the records, in the registry office, to ascertain therefrom the true state of the title to property. It was intended to afford protection to parties who purchased in good faith, and without notice, *from those having, by the records, an apparent title to the land.*
>
> (Italics added)

10 I would dismiss the appeal, with costs in the cause in the action.

*Appeal dismissed.*

MEDLEE LTD. V. JEMCO HOLDINGS LTD.
AND LANDRY

Nova Scotia Supreme Court, Trial Division
Cowan, C.J.T.D.
September 18, 1975.

LAWRENCE K. EVANS, for the plaintiff
JAMES E. GOULD, for the defendant, Jemco Holdings Limited,
JOHN HELAIRE LANDRY, in person.

This case was heard by COWAN, C.J.T.D., at Arichat, Nova Scotia on September 16, 1975. Judgment was delivered by COWAN, C.J.T.D., on September 18, 1975.

11 COWNA, C.J.T.D.: By Originating Notice (application Inter Partes), the plaintiff claimed a declaration that it is the owner in fee simple of certain lands in the County of Richmond, and that, in effect, a deed dated January 21, 1936, recorded in the office of the Registrar of Deeds for the registration district of the County of Richmond, on January 3, 1974, conveying the same lands in which Reverend Charles Forest was the grantor and the defendant, John Helaire Landry was the grantee should

be declared to be ineffective in view of the earlier registration on July 26, 1973, of a deed dated April 2, 1973, from Marie Ross Forest, as the only heir of the late Reverend Charles Forest, to Sharon B. DeYoung, a predecessor-in-title of the plaintiff company.

12 Medlee Limited and Jemco Holdings Limited were represented by counsel on the hearing before me. The defendant, John Helaire Landry, was present in person. Counsel for the defendant, Jemco Holdings Limited, took a preliminary objection to the form of the proceedings. He submitted that a proceeding such as the present one should be commenced by originating notice (action).

13 Civil Procedure Rule 9 provides as follows:-

> Mode of commencing a proceeding:
>
> 9.01. Subject to rule 9.06(2) every proceeding, other than a proceeding under Rule 57 and Rules 59 to 61, shall be commenced by filing an originating notice and a copy thereof in the prothonotary's office, and the notice is deemed to have been issued on the day it is filed. (E. 5/1)
>
> (Amend. 12/12/74)
>
> Commencing a proceeding (Application)
>
> 9.02. A proceeding, other than a proceeding under Rule 57 and Rules 59 to 61.
>
> (a) in which the sole or principal question at issue is, or is likely to be a question of law, or one of construction of an enactment, will, contract, or other document:
>
> (b) in which there is unlikely to be any substantial dispute of fact;
>
> (c) which may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment;
>
> shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding, (E. 5/3/4/5)
>
> Use of petition in certain proceedings
>
> 9.03. The following proceedings shall be commenced by a petition,
>
> (a) a matrimonial cause under the *Divorce Act* (Canada) under Rule 57;
>
> (b) a winding up of a company under the *Winding up Act*, (Canada) under Rule 59;
>
> (c) a proceeding under the *Controverted Elections Act* (Nova Scotia) under Rule 60;
>
> (d) a proceeding under the *Dominion Controverted Elections Act* under Rule 61.
>
> Commencing any other proceeding
>
> 9.04. Every other proceeding, which is not within the provisions of rules 9.02 or 9.03, shall be commenced by filing an originating notice (action) in Form 9.04A.

14 Counsel for Jemco Holdings Limited submitted that, in this proceeding, there was likely to be a substantial dispute to fact and he filed his own affidavit, referring to the abstract of title exhibited to the affidavit of the plaintiff's solicitor,

and he produced a copy of a statutory declaration of the defendant, Landry, dated January 3, 1974, recorded on January 3, 1974, in the office of the Registry of Deeds for the registration district of the County of Richmond. This statutory declaration contains statements indicating that the defendant, Landry, purchased the lands in question from the Reverend Charles Forest in the year 1936; that he cut wood on the lands in every year since the year 1936, and that no-one, with the exception of the defendant, Landry, and his predecessors-in-title, ever made a claim to the lands and that the claim of the defendant, Landry, was based on open, notorious, undisturbed and undisputed occupation of the lands since the date of the deed to him of 1936.

15 In my opinion, the preliminary point taken by counsel for Jemco Holdings Limited is well taken, and this proceeding should have been started by originating notice (action). However, it was agreed by all parties on the hearing before me, that I should deal with a further point raised by counsel for Jemco Holdings Limited, and that if I ruled against Jemco Holdings Limited with respect to the second point, I should give directions for delivery of pleadings, etc., in order that the proceeding might continue as if started by originating notice (action).

16 The second point raised by counsel for Jemco Holdings Limited was that Marie Rose Forest, the predecessor-in-title of Sharon B. DeYoung, and of the plaintiff, could claim title to the land in question only under the Will of the late Reverend Charles Joseph Forest. That Will was dated August 3, 1960, and the testator, who had earlier conveyed the lands in question to the defendant, John Helaire Landry, by deed dated January 21, 1936, died on August 22, 1960. It was submitted on behalf of Jemco Holdings Limited that the Will of the testator operated only with respect to property owned by him at the date of death, that is, August 22, 1960; that at the date of death, he was no longer the owner of the lands in question; that the Will was not effective to convey any interest in the lands in question to Marie Rose Forest, the Executrix and residuary beneficiary under the Will, and that, in addition, a Will is not an "instrument" for the purposes of the *Registry Act*, R.S.N.S. 1967, c. 265.

17 The *Registry Act* provides, by s. 17, as follows:-

> 17. Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument.

18 Section 1(3) of the *Registry Act* provides as follows:-

> (3) 'instrument' means every conveyance or other document by which the title to land is changed or in any wise affected, and also a writ of attachment, a certificate of judgment, a lease for a term exceeding three years, and a vesting order; but does not include a grant from the Crown, a Will, or a report of commissioners appointed to make partition.

19 The *Registry Act* of Nova Scotia, unlike similar acts in other provinces, does not require registration of Wills. It does provide, by s. 16, that:-

> 16. Every registrar shall, without requiring any proof thereof, register the copy of any Will deposited with him by any registrar of probate, and enter the name of the testator in his index, but the failure to comply with the requirement of this Section shall not defeat any title.

20 The *Probate Act*, R.S.N.S. 1967, c. 238, provides that the form of application for probate in common form of a Will, being Form A to s. 27 of the Act, shall show the value of the whole property in respect of which the application is made, and, separately, the value of the personal property and effects and the value of the real property, and particulars of the registration district or districts in which the real property is situate. Section 142 provides, in part, as follows:-

142(1) The Registrar shall, as soon as an original Will is proved in the registry, make an exact and literal copy thereof, and shall certify such copy under his hand, and cause the same to be registered by the registrar of deeds in each registration district in which any land of the testator devised thereby is situated.

21 For the purpose of deciding the second question raised by Jemco Holdings Limited, the following facts are admitted, or are assumed to be proved:-

22 The lands in question were conveyed to the Reverend Charles Forest by Charles Forest, Sr. and his wife, by deed dated August 1, 1925, recorded on December 18, 1933, in Book Z1 at Page 610.

23 By deed dated January 21, 1936, but not recorded until January 3, 1974, in Book 22 at Page 513, the Reverend Charles Forest conveyed the lands in question to the defendant, John Helaire Landry.

24 On August 3, 1960, the Reverend Charles Joseph Forest (previously referred to in the various documents and herein as "Reverend Charles Forest") made his Will, appointing his sister, Marie Rose Forest, sole Executrix. He gave, devised and bequeathed all his property, both real and personal, to his sister, Marie Rose Forest, *upon trust* to pay certain sums of money to various persons and institutions and the Will then continued as follows:-

ALL the rest, residue and balance of my estate to be paid and delivered to my said sister Marie Rose Forest for her own use absolutely.

Fourth: I remind my sister that my estate includes life insurance policies (5), credit union insurance, deposit Royal Bank of Canada - Arichat and loan accounts payable to me by various persons.

25 The testator, Charles Joseph Forest, died on August 22, 1960, and Letters Probate with respect to the Will were granted to the Executrix, Marie Rose Forest, on September 2, 1960, by the Court of Probate for the County of Richmond. At the time of the hearing before me, none of the parties had checked the estate file in the Court of Probate at Arichat, Richmond County, and it was not known whether the inventory showed any real estate as being owned by the testator. I adjourned the hearing briefly and the Registrar of Probate, Arthur A. Bower, produced an envelope in the estate, #406, being the estate of the Reverend Charles Joseph Forest. The papers in the file included the petition for probate, indicating a total value of all property as being under $15,000.00, and that this consisted entirely of personal property, there being no real property. The inventory filed on or about September 15, 1960, accounted for $14,823.00 of personal property of various kinds, but there was no reference to any real property. No copy of the Will was recorded in the Registry of Deeds for the County of Richmond, until August 15, 1973, when a copy was recorded in Book 20 at Page 139.

26 By deed dated April 2, 1973, Marie Rose Forest, described as the only heir of the late Reverend Charles Forest, conveyed the lands in question to Sharon B.DeYoung, the deed being recorded in the office of the Registrar of Deeds for the County of Richmond on July 26, 1973, in Book 19 at Page 544. Registration of the deed to Sharon B. DeYoung was followed, as indicated above, by the registration of the Will of the late Reverend Charles Joseph Forest on August 15, 1973.

27 By deed dated August 23, 1973, recorded in the office of the Registrar of Deeds for the County of Richmond on August 31, 1973, in Book 20 at Page 470, Sharon B. DeYoung conveyed the lands in question to the plaintiff, Medlee Limited.

28 On January 3, 1974, the deed dated January 21, 1936, from the Reverand Charles Forest to the defendant, John Helaire Landry, was recorded in the Registry of Deeds in Book 22 at Page 513.

29 On January 3, 1974, the declaration of John Helaire Landry, referred to above, made on the same date, was recorded in the Registry of Deeds in Book 22 at Page 517.

30 By deed dated January 3, 1974, the defendant, John Helaire Landry, conveyed the lands in question to Jemco Holdings Limited, and this deed was recorded on January 3, 1974, in Book 22 at Page 520.

31 On March 12, 1974, there was recorded in the office of the Registrar of Deeds, in Book 23 at Page 401, a statutory declaration of Marvin Lee, an officer of the plaintiff, Medlee Limited, referring to the deed of that company, dated August 23, 1973, and stating that the lands in question, described in that deed, "were acquired by Medlee Limited for valuable consideration and without notice of any unrecorded instrument affecting the title to these lands".

32 Counsel were not able to refer me to any case decided in Nova Scotia, in which the point now raised was considered by the Court. Counsel for Jemco Holdings Limited cited the case of *Aulenback v. Aulenback*, (1949) 2 D.L.R. 365 (N.S.C.A.), in which case the plaintiff's predecessor-in-title, James Joudrey, had been the owner of a lot of land fronting on St. Philips Street in the Town of Bridgewater, 20 feet wide and 80 feet deep. This lot had formerly been the north-west corner of a quarter-acre lot, owned and occupied by William Weagle, who sold that part to James Joudrey in 1913. Joudrey built a house on the lot and lived there until he died in 1946, Joudrey did not register his deed in the Registry of Deeds until 1944. He had been assessed continuously regarding real and personal property on St. Philips Street, from 1923 until he died, and had paid all taxes assessed with respect to his property. Soon after his death, the devisee of his property sold it to the plaintiff and, when the plaintiff attempted to take possession, the defendant, claiming that it was part of William Weagle's land, which had been sold for taxes, and later conveyed to the defendant by the purchaser at the tax sale, obstructed the plaintiff and tried to prevent him from taking possession of the lot in question.

33 After selling the lot to Joudrey, Weagle had continued to live on the remaining part of his lot and was assessed for real and personal property as before he sold part of the real property to Joudrey. He did not pay taxes from 1920 until he died. On December 4, 1926, the Town of Bridgewater sold the lands described in his original deed, for his arrears of taxes and, in due course, the Town gave a deed to the purchaser, who was the defendant's agent, purporting to convey the whole of Weagle's original lot, including the lot sold in 1913 to James Joudrey. The defendant registered his deed in 1929 and was assessed from 1927 to 1930 inclusive, for property described as "Weagle House and lots in Philips St." The lots were only generally indicated on the assessment roll and, when the tax sale took place, the Town Clerk obtained a description of Weagle's original lot from the Registry of Deeds and this, of course, included Joudrey's lot. It was found that Joudrey's property was not included in Weagle's assessment, and so was not liable to be sold for Weagle's taxes.

34 The court held that s. 155 of the *Assessment Act*, R.S.N.S. 1923, c. 86, did not validate the tax deed of Joudrey's land. That section was as follows:-

> Such deed shall be conclusive evidence that all the provisions of this Chapter with reference to the sale of the land therein described have been fully complied with, and every act and thing necessary for the legal perfection of such sale have been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all incumbrances whatsoever.

35 Graham, J., at p. 367, said:-

> The deed to which that section applies is a deed of land on which taxes were in arrears and it does not apply to a deed of land which was not assessed for such taxes, nor to a deed of land on which a separate tax had been assessed and paid, which land was mistakenly included in the description of land sold for taxes.
>
> In *O'Brien v. Cogswell* (1890), 17 S.C.R. 420, Strong, J. commenting upon the effect to be given the above provision of the statute, said that it must be construed 'in such a way as not to give them the violent and unjust operation contended for, according to which land which may have been illegally

assessed for taxes might be sold and conveyed behind the back of the owner without the slightest notice having been given to him.' (pp. 432-3). That being so, he held that according to the *prima facie* meaning of the words of the section it only made the deed conclusive evidence of full compliance with all 'proceedings preliminary to the sale not to proceedings relating to the assessment or levying of the tax' (pp. 431-2), that is, it applies only to proceedings which are to be taken after the roll goes into the hands of the executive officer for the collection and enforcement of the tax.

I agree with the learned trial Judge's conclusion, which is in accord with the decision in the above case, that s. 155 did not validate the tax deed in so far as it purported to transfer the land now held by plaintiff; and that properly construed, it did not give defendant any title to plaintiff's land.

I also agree that s. 18 of the *Registry Act* R.S.N.S. 1923, c. 144, does not support the defendant's case: 'Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrumental affecting the title to the same land, be ineffective unless such instrument is registered in the manner provided by his Chapter before the registering of such subsequent instrument.

As I have already said, the town had no power to sell the plaintiff's land. That being so, the tax deed is not an instrument affecting the title of plaintiff's land within the meaning of the above section. The deed under which the defendant claims the land was invalid from the beginning; and as the learned trial Judge said: 'It is no better than if a stranger conveyed lands he had not owned and in which he had no interest.'

36 I note that James Joudrey, the predecessor-in-title of the plaintiff, did not register his deed until 1944, while the defendant registered, in 1929, the deed to him from the purchaser at the tax sale.

37 Counsel for Jemco Holdings Limited relied on the *Aulenback* case, supra, in support of his argument that the Will of the late Reverend Charles Joseph Forest was not an instrument affecting the title of the lands in question, within the meaning of the section referred to, now s. 17 of the *Registry Act*. It seems to me, however, that there is a distinction between the two cases. In the *Aulenback* case, supra, the Town had no power to sell the plaintiff's land. As indicated by the trial judge in that case, the tax deed from the Town was invalid from the beginning and was no better than if a stranger had conveyed lands he had not owned and in which he had no interest. In the present case, the plaintiff claims under documents executed by persons who, according to the documents on record in the office of the Registrar of Deeds, had the right to convey the lands in question. This is not a case where there is a contest between the grantee under an earlier, unrecorded deed and the devisee under a later recorded Will. In such a case, the claim of the grantee under the earlier recorded deed would prevail, for various reasons. The deed itself would be perfectly valid, as between the parties to it, and would be effective to convey the lands in question. The recording of the later Will could not defeat the claim of the grantee under the deed, since s. 17 of the *Registry Act* does not operate in favour of the devisee. The instrument in question, being a Will, is not an "instrument" for the purposes of s. 17 of the *Registry Act*. In addition, the devisee is not a person claiming "for valuable consideration".

38 However, when Marie Rose Forest purports to convey the lands in question to Sharon B. DeYoung by the deed dated April 2, 1973, that deed, in my opinion, becomes a "subsequent instrument affecting the title to the same land" and, on being registered on July 26, 1973, has the effect of rendering ineffective the earlier, unrecorded deed dated January 26, 1936, from the Reverend Charles Forest to the defendant, Landry, provided that Sharon B. DeYoung is a person claiming for valuable consideration, and without notice. Similarly, when Sharon B. DeYoung purports to convey the lands in question to the plaintiff, Medlee Limited, by the deed dated August 23, 1973, that deed becomes an instrument affecting the title to the same land and the registration

of that deed, on August 31, 1973, renders ineffective the deed to Landry of January 21, 1936, provided that the plaintiff, Medlee Limited, claims for valuable consideration, and without notice. If the Landry deed is rendered ineffective with respect to the deed to Sharon B. DeYoung, it is also ineffective with respect to the deed to the plaintiff, Medlee Limited.

39 In my opinion, the mere fact that an instrument, at the time of its execution, is a nullity or defective in some respect, does not prevent the operation of s. 17 of the *Registry Act*, to render ineffective an earlier, unrecorded instrument and thus render effective the later defective instrument. In the ordinary case, where A owns land and gives a deed to B, and later gives a deed of the same land to C, it is clear that both deeds being unregistered, the deed to C, being later in time, is defective and, perhaps, a nullity. If, however, the deed to C is registered before the registration of the deed to B, B's deed is rendered ineffective and C's deed takes full effect, in accordance with its terms, and the defect previously existing is cured by the operation of s. 17 of the *Registry Act*.

40 So, also, if the deed from A to C is by way of gift, C, by registration of his deed, could not render it effective as against B. If, however, C gives a deed for valuable consideration to D, who takes without notice of the deed from A to B, D can, by registration of the deed, render B's deed ineffective as against him.

41 In the result, therefore, I am of the opinion that the deed dated January 21, 1936, from the Reverend Charles Forest to the defendant, John Helaire Landry, is ineffective as against Medlee Limited, provided Medlee Limited can establish that it claims for valuable consideration and without notice of the deed to the defendant, Landry. The burden is on the plaintiff to establish both matters by proof in the proper form.

42 I, therefore, direct that this proceeding will continue as if commenced by originating notice (action); that the plaintiff will have ten days from the date of issue of the order based on this decision in which to file and serve a statement of claim, and that the defendants may file defences in the usual way, and that, after closing of the pleadings, the proceeding may be set down for hearing in the usual way.

43 I indicated that I would be prepared to hear evidence at any time and place convenient to the parties.

44 The plaintiff will have the costs of this application.

*Judgment for the plaintiff.*

Continued from Page 156.

at the site. The property was apparently up for sale over this period of years and was not occupied by its owner. There is nothing in these circumstances to indicate an intention on the part of the owner to abandon the right of access to Lot 20 from the main highway and I do not find, therefore, that the non-user of the right-of-way over this long period of time has extinguished the right.

95 The action will be dismissed with costs.

*Action Dismissed.*

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Macdonald, JJ.A.
December 31, 1975

DEEDS AND DOCUMENTS - TOPIC 2525

OPERATION AND EFFECT OF DEEDS - THE PROPERTY CONVEYED - SUFFICIENCY OF THE DESCRIPTION OF THE PROPERTY CONVEYED - A DEED FROM A HUSBAND TO A WIFE CONVEYED "ALL THE WOODLAND OWNED BY THE SAID EDGAR J. WHITFORD (THE HUSBAND) AT THE TIME OF HIS DEATH" - NOVA SCOTIA CONVEYANCING ACT - THE NOVA SCOTIA COURT OF APPEAL DECLARED THE DEED INVALID - THE NOVA SCOTIA COURT OF APPEAL HELD THAT THE PROPERTY DESCRIPTION WAS NOT SUFFICIENTLY PRECISE IN ORDER TO SATISFY THE CONVEYANCING ACT - THE NOVA SCOTIA COURT OF APPEAL STATED THAT A VALID CONVEYANCE MUST TRANSFER IMMEDIATELY AN INTEREST IN REALTY WHICH MUST BE IDENTIFIABLE BY THE DEED - SEE PARAGRAPH 10.

WORDS AND PHRASES

WILL - MEANING OF THE WORD "WILL" AS FOUND IN S. 2 OF THE WILLS ACT.

WORDS AND PHRASES

CONVEYANCE - MEANING OF THE WORD "CONVEYANCE" AS FOUND IN THE CONVEYANCING ACT.

This case arose out of an agreement for the sale of land and the validity of an objection to title made by the buyer. An application was made pursuant to s. 3 of the Vendors and Purchasers Act - see paragraph 25. The impugned conveyance was a deed from a husband to a wife which conveyed "all the woodland owned by the said Edgar J. Whitford (the husband) at the time of his death". The trial court held that the conveyance was invalid both as a deed and as a Will - see paragraph 16 to 35. The trial court declared that the buyer made a valid objection to title and declared the agreement for sale void.

On appeal to the Nova Scotia Court of Appeal the appeal was dismissed and the judgment of the trial court was affirmed. The Nova Scotia Court of Appeal stated that the property description was not sufficiently precise in order to satisfy the Conveyancing Act. The Nova Scotia Court of Appeal stated that a valid conveyance must transfer immediately an interest in realty which must be identifiable by the deed - see paragraph 10.

. . .

This appeal was heard by the Nova Scotia Court of Appeal at Halifax, Nova Scotia on December 11, 1975. Judgment was delivered by the Nova Scotia Court of Appeal on December 31, 1975.

The judgment of the Nova Scotia Court of Appeal was delivered by MacKEIGAN, C.J.N.S.

1 MacKEIGAN, C.J.N.S.: This appeal involves whether, as held by the Honourable Chief Justice Gordon S. Cowan on an application under the *Vendors and Purchasers Act*, R.S.N.S., 1967, c. 324, it is a valid objection to title under an agreement to sell real property that a key link in the proffered chain of title is an instrument which purports to convey "all the woodland owned by the said Edgar J. Whitford at the time of his death".

2 By a deed dated December 20, 1961, Edgar J. Whitford purported to convey to his wife, Adelaide L. Whitford, seven blocks or lots of land, six of which were described by metes and bounds or by the names by which specific properties were apparently known. One, however, was described in the general words I have quoted.

3 In late 1963, Mr. Whitford died. Probate of his Will was granted, by which he devised the general residue of his estate to his said wife and his daughter, Ruth M. Chandler, in equal shares. By deed dated October 15, 1964, Mrs. Whitford conveyed to Harry Bond, Jr., the lands covered by the agreement of sale between the appellants and the respondents, which lands are some of the "woodland owned by the said Edgar J. Whitford at the time of his death".

4 The 1961 deed to Mrs. Whitford was in the form of a standard warranty deed, containing words of grant, a habendum, and the usual covenants, and was *prima facie* adequate to convey to Mrs. Whitford the other lands specifically described in it.

5 The parties agree that, if Mrs. Whitford did not receive title to the woodlands by the deed, she at least received by her husband's Will an undivided one-half interest in the lands. This would make her deed to Bond *pro tanto* good to that extent, but would leave half the title missing and, thus, would still make valid the respondents' objection to title.

6 Much argument was directed to whether or not the disputed grant of the woodland to Mrs. Whitford was a testamentary disposition and thus allegedly inoperative because it was not properly witnessed and probated as a Will. The grant of all woodland owned by the grantor "at the time of his death" undoubtedly, in respect of the woodland, makes the deed an instrument by which Mr. Whitford tried to "dispose of" property "to which he is entitled . . . at the time of his death", making it a "Will" within the meaning of s. 2(1) of the *Wills Act*, R.S.N.S. 1967, c. 340. Mr. Whitford clearly intended to give property which could not be ascertained or identified until his death, and intended not to give any such property before his death, leaving him free in his lifetime to sell any of his woodland or acquire more woodland.

7 The very characteristics which made the instrument an attempted Will as to the woodland, *viz.* the postponement until death of identification of the subject matter and of the transfer of any legal interest in it, are those which show it is not a conveyance of any title in anything.

8 First, we must question whether, quite apart from the basic matters, a deed which describes its subject with such complete generality as "all my woodland" has sufficient particularity of description to constitute a registrable deed at all. The grantor has not indicated what land he considers "woodland" and has not indicated in what registration district or districts it is situate or even in what province or country! It is true that the beginning of Whitford's general description refers to "land sitaute . . . in the Municipality of Chester", but at least one of the lots specifically described in the instrument is in Bridgewater and not in Chester.

9 The *Conveyancing Act*, R.S.N.S. 1967, c. 56 by s. 1(2) defines "convey" and "conveyance" as follows:

> (a) 'convey' means create a property right or change it between persons;
>
> (b) 'conveyance' means an instrument which expresses an intention to convey thereby a property right.

Section 2(1) provides:

> 2(1) A conveyance that identifies the parties and property, and specifies the property right to be conveyed, and which is validly executed, is effective to convey that property right.

10 To operate as a conveyance of land an instrument must obviously transfer to the grantee *immediately and forthwith* (i.e. at the time of execution and delivery of the instrument) a legal interest in real property and that real property must be at that time identified or identifiable by the instrument. The interest transferred need not be the full title to the land and need not be an estate in possession. See *Real Property Act*, R.S.N.S. 1967, c. 261, s. 26(1). Thus, for example, A may grant to B a remainder in Black Acre, following an intervening life estate or term of years granted to C or reserved to A himself. And, Mr. Whitford in 1961 could have deeded to his

wife specific woodland reserving to himself a life estate, the right to use and enjoy the property until his death. Had he done so, he would have given her then, good title to the specific land, subject only to his life estate.

11 The essential difference between a conveyance on the one hand, and, on the other hand, an agreement of sale, or a declaration of trust agreeing to settle land when and if acquired, or a Will, is that a conveyance operates as an immediate transfer of a legal or equitable interest in specific property, as distinct from a promise to transfer a property right at a future date, a promise which may or may not be enforceable.

12 Counsel for the appellants argued, alternatively, that we should delete from the description in issue the words "at the time of his death" as being ineffective words of limitation, thus leaving a possibly good conveyance, subject to the vagueness of the description, of "all the woodland owned by the said Edgar J. Whitford". He cited *Eisenhauer v. Eisenhauer*, 16 M.P.R. 438 (NSCA), where the court upheld an absolute conveyance by A to his grandson B, of certain lands and discarded as "completely unworkable" a limitation contained in a separate and later sentence in the deed, which placed obligations on A's son C until B became twenty-one years of age.

13 Here the phrase which could be deleted is not a severable limitation but is an integral part of the whole description, and cannot be deleted without completely changing what the grantor intended. Its deletion would substitute an immediate transfer of title, whereas the grantor intended no transfer of title until his death.

14 I must conclude that the learned Chief Justice correctly held the objection to title to be valid. I would dismiss the appeal but without costs since counsel for the respondents filed no factum and informed the Court that the respondents supported the appellants in seeking reversal of the decision appealed from.

15 The order of Chief Justice Cowan provided that:

> IT IS ORDERED that the objection made by the purchasers' solicitor is a valid objection and unless the vendor is able to remove the objection by having a determination made which is binding upon Ruth M. Chandler, or obtaining a Quit Claim Deed or other disclaimer or interest from Rugh H. Chandler, or the purchasers waive the objection, the agreement of Purchase and Sale, is null and void.

Both parties state that the qualification on the declaration of nullity, as to the possibility of curative action or waiver, need not be continued, since no such action or waiver is expected to occur and it is desirable that the present matter be definitely settled. That being so, I would not only dismiss the appeal but also direct that the order be varied by deleting the above paragraph and substituting:

> It is ordered and declared that the objection made by the purchasers' solicitor is a valid objection and that the agreement of purchase and sale is null and void.

*Appeal dismissed.*

COUNTWAY v. HAUGHAN AND CHATAWAY

Nova Scotia Supreme Court, Trial Division
Cowan, C.J.T.D.
April 23, 1975.

EDMUND R. SAUNDERS, Q.C., for the plaintiffs,
DEREK M. WELLS, for the defendants.

This application was heard by COWAN, C.J.T.D., at Halifax, Nova Scotia on April 22, 1975. Judgment was delivered by COWAN, C.J.T.D., on April 23, 1975.

16 COWAN, C.J.T.D.: This is an application for determination under the provisions of the *Vendors and Purchasers Act*, R.S.N.S. 1967, c. 324, as to the validity of an objection to the title of the plaintiffs to lands at Stanford Lake Road, Lunenburg County, N.S., which the plaintiffs agreed to sell to the defendants and the defendants agreed to purchase from the plaintiffs.

17 The objection to title made by the defendants is contained in a letter from their solicitor to the solicitor for the plaintiffs, dated September 27, 1974, reading as follows:

> I have completed my title search to the property being conveyed by Iris Countway to Messrs. Chataway and Haughan. I have one objection to title, and it is one that has come up before and one which we have had many problems in trying to remedy.
>
> The problem stems from a deed from Edgar J. Whitford to his wife, Adelaide Whitford, which is dated the 20th day of December, 1961, and recorded at the Registry of Deeds Office at Chester on the 3rd day of January, 1964, and recorded in Book 28, at Page 236 under No. 502. Part of the property conveyed in that deed included 'all the woodland owned by the said Edgar J. Whitford at the time of his death'. Probate of Mr. Whitford's Will was granted on January 2, 1964 and the deed in question was recorded January 3, 1964. The matter in question is whether or not this deed was in the manner of a testamentary disposition and, therefore, requiring two signatures in order to be effective.
>
> By his Will, Mr. Whitford divided his property equally between his wife, Adelaide L. Whitford, and his daughter, Mrs. Ruth Chandler. Adelaide Whitford is now deceased and Mrs. Chandler is presently living in Chester and is aware of the problem, but apparently refuses to sign a Quit Claim Deed. It may be that she would be prepared to sign one under the circumstances so that Iris Countway can sell her property. She should probably also be advised that it may be possible to sue the estate of her mother under the covenants contained in the Warranty Deed from Adelaide L. Whitford to Harry Bond, Jr., who in turn, conveyed the property to Iris Countway.

18 On the hearing of the application, there was filed a certified copy of the deed from Edgar J. Whitford to Adelaide L. Whitford, dated December 20, 1961. The deed is in the usual warranty deed form and purports to convey to the grantee in fee simple:-

> ALL that certain piece or parcel of land situate lying and being in the Municipality of Chester, bounded and described as follows:
>
> 1st piece is situate in or near the town plot of Chester aforesaid, and is bounded Westerly by the Halifax Post Road and Duke St.; South Westerly by the Public Street; Southerly by lands now owned by Mrs. Georgina Millett, Major John Morse, Misses Huey and Wilson, the said Public St. and land of Melford Bonds line; Thence Northerly along Melford Bonds land and to lands purchased by the Chester Municipal School Board, Thence Westerly along the Municipal property to the place of beginning. 2nd Also the two (2) Town Lots known as the 'Thompson Lots' adjoining the Liquor Commission property. 3rd piece is on the Western side of the Windsor Road so called and known as 'The Millett Property': Bounded Southerly by lands of Wilfred J. Zinck; Westerly by the 'Wake Up Hill' road; Northerly by a road leading to the 'Windsor Road'; and Easterly by the Windsor Road. 4th All the woodland owned by the said Edgar J. Whitford at the time of his death. 5th The property in Bridgewater known as the 'Obed Fancy' property bounded as follows, West bt Pleasant St. North by Victoria Road. 6th The property on the Windsor Road known as 'The Dave Armstrong' property. 7th A wharf privilege of 25 feet on the East side of Major John Morse's boat house property.

19 The deed bore the name of "Harry Bond, Jr." as witness and the certificate of Renfrew Francis Butler, a Commissioner of the Supreme Court of Nova Scotia states

that, on the 20th day of December, A.D. 1961, the witness appeared before the Commissioner and made oath and said that Edgar J. Whitford signed, sealed and delivered the deed in his presence. The deed is recorded in the office of the Registrar of Deeds for the registration district of Chester, Lunenburg County, on January 3, 1964, under No. 502 in Book 28 at Pages 236 and 237.

20 Edgar J. Whitford died late in the year 1963, and probate of his Will was granted to the Executors, Roy W. Chandler and Adelaide L. Whitford, January 2, 1964. The testator's Will was dated June 1, 1959, and contained a devise to his wife, Adelaide L. Whitford, and his daughter, Ruth M. Chandler, of the residue of his estate, in equal shares.

21 An abstract of title to the lands in question, prepared by the purchasers' solicitor, shows that the lands in question on this application were conveyed to Edgar J. Whitford by deed dated August 18, 1958. The abstract shows that, following the death of her husband, Adelaide L. Whitford conveyed certain lands referred to in the deed from her husband, dated December 20, 1961, not including the lands in question. One deed dated October 19, 1964, conveyed certain lands to Haddon Developments Limited; one dated January 10, 1964, conveyed lands included in those referred to in the deed of December 20, 1961, to George E. Zinck, and a further deed of May 14, 1965, conveyed lands to Ivan Corkum. By deed dated October 15, 1964, recorded in the office of the Registrar of Deeds at Chester, August 26, 1965, Adelaide L. Whitford conveyed to Harry Bond, Jr. the lands in question on this application. Harry S. Bond, Jr. and his wife then conveyed to Iris N. Countway, one of the plaintiffs, the lands in question on this application, by two deeds dated respectively March 18, 1966, and October 13, 1967. The lands in question consist of two lots of woodland, coming within the description in the deed of "All the woodland owned by the said Edgar J. Whitford at the time of his death".

22 The solicitor for the defendants, in his pre-trial memorandum dated April 21, 1975, made certain statements with regard to the lands conveyed by Adelaide L. Whitford, and these statements were accepted by the solicitor for the plaintiffs. These were as follows:-

> (1) That the deed to Haddon Developments Limited from Adelaide L. Whitford conveyed three pieces of woodland located along the Windsor Road, Lunenburg County, N. S.
>
> (2) That the conveyance to George E. Zinck, from Adelaide L. Whitford conveyed the Millett property, which was the third lot described in the deed dated December 20, 1961;
>
> (3) That the conveyance to Ivan Corkum from Adelaide L. Whitford related to the land known as the "David Armstrong property", which is the sixth lot described in the deed dated December 20, 1961;
>
> (4) That the first lot described in the deed dated December 20, 1961, was the home property which was occupied by Adelaide L. Whitford after the death of her husband, until her own death on October 21, 1966;
>
> (5) That it appeared that the only property that was sold by Edgar J. Whitford and his wife, prior to the death of Edgar J. Whitford, out of the lands described in the deed dated December 20, 1961, was part of the property known as the "Thompson Lots". The deed conveying that property was from Edgar J. Whitford and Adelaide L. Whitford as grantors.

23 If the deed of December 20, 1961, from Edgar J. Whitford to Adelaide L. Whitford was effective to convey all the woodlands owned by Edgar J. Whitford at the time of his death, Adelaide L. Whitford became the owner in fee simple of all such woodlands at the date of death of her husband, or on some earlier date, and, therefore, passed a good title in fee simple to the woodlands, title to which is now in question, to Harry Bond, Jr. by the deed dated October 15, 1964, and Harry Bond, Jr. passed a good title in fee simple to these woodlands to the vendor, Iris N. Countway by the two deeds, dated March 18, 1966 and October 13, 1967.

24 If, however, the deed of December 20, 1961, was not effective to vest title in fee simple to the woodlands in question in Adelaide L. Whitford, it is clear that, on the death of Edgar J. Whitford, these woodlands passed, in equal shares, to Adelaide L. Whitford and Ruth M. Chandler, under the Will of Edgar J. Whitford. The deed from Adelaide L. Whitford to Harry S. Bond, Jr. of October 15, 1964, would, therefore, be effective to pass only an undivided one-half interest in the woodlands in question, and this one undivided one-half interest would then pass to the vendor, Iris N. Countway, by the deeds from Harry S. Bond, Jr. of March 18, 1966, and October 13, 1967.

25 Section 3 of the *Vendors and Purchasers Act* provides as follows:-

> A vendor or purchaser of any interest in land or his representative may, at any time and from time to time, apply in a summary way to a judge or an *ex officio* master of the Supreme Court in respect of any requisition or objection or any claim for compensation, or any other question arising out of or connected with the contract and the judge or *ex officio* master may make such order upon the application as appears just, and refer any question to a referee or other officer for inquiry and report.

25 The agreement of purchase and sale between the parties in this case provides, as usual, that the purchasers are to have thirty days to investigate the title to the property, and that:-

> If within that time any valid objection to title is made in writing, to the Vendor, which the Vendor shall be unable to remove, which the Purchaser will not waive, this Agreement shall be null and void and the deposit herein shall be returned to the Purchaser, without interest, and without liability by the Vendor for any expenses incurred or damages sustained by the Purchaser.

27 In this application. I am to decide whether or not the objection to title made by the purchasers is a valid objection. In my opinion, the objection made by the purchasers is a valid objection in that the wording of the deed from Edgar J. Whitford to his wife, Adelaide L. Whitford, dated December 20, 1961, gives rise to a question as to whether or not the clause in the deed purporting to convey "all the woodland owned by the said Edgar J. Whitford at the time of his death" did, in fact, give a title in fee simple to Adelaide L. Whitford, with respect to the woodland and, in particular, the woodland now the subject matter of the agreement of sale between the parties to this proceeding.

28 I was invited by the solicitor for the vendor to decide that the deed in question was effective to convey a fee simple to the lands referred to in that clause, to Adelaide L. Whitford. In my opinion, however, if I did reach that conclusion, my decision to that effect would not be binding upon Ruth M. Chandler, since she is not a party to these proceedings. She could subsequently claim an interest in the lands, the subject matter of the agreement of sale, and, in my opinion, the purchasers cannot be forced to accept the risk of such a claim being made by Ruth M. Chandler in future. It is sufficient for the purpose of this proceeding for me to find, as I do, that there is a serious question as to the effect of the clause in the deed of December 20, 1961, referring to "all the woodland owned by the said Edgar J. Whitford at the time of his death".

29 Without deciding the question, I incline to the view that the portion of the deed of December 20, 1961, referring to the woodland owned by the grantor, Edgar J. Whitford, at the time of his death, did not operate as a deed to transfer the title to the grantee, Adelaide L. Whitford, and that the provision in question is void as being a testamentary disposition, not executed in accordance with the provisions of s. 5 of the *Wills Act*, R.S.N.S. 1967, c. 340. In *Habergam v. Vincent* (1793), 2 Ves. Jun. 204, at p. 230, 30 E.R. 595 at p. 608, Buller, J., said:-

> But it was argued for the plaintiff, that the testator did not intend to make a Will, when he executed this deed; and, therefore, it cannot operate as a Will. Whether the testator would have called this a deed, or a Will, is one question; whether it shall operate in law as a deed or a Will, is

> a distinct question; is that now to be considered. That is to be governed by the provisions in the instrument. A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession: but it must take place, as passing that interest to be conveyed, at the execution: but a Will is quite the reverse, it can only operate after death; and upon this instrument it is clear, testator had no idea, that this paper would have any effect till a distant period, long after his death and the expiration of the other estates.

30 See also re *Pfrimmer*, (1936) 2 D.L.R. 460, Trueman, J.A., at pp. 464-5, (Man. C.A.).

31 In the present case, the deed of December 20, 1961, could not, with respect to the lands in question, operate on the date of its execution and delivery, since it purported to convey all the woodland owned by the grantor at the date of his death. It could operate, if at all, with respect to the woodland, only as at the date of death and, therefore, it seems to me that it evidences, on its face, an intention on the part of the grantor to deal with property on his death. If that portion of the deed was intended to take effect on the date of its execution and delivery, contrary to my opinion, there is reserved by the grantor a right of revocation. The grantor, Edgar J. Whitford could, during his lifetime, sell and convey woodland. Any woodland so conveyed would not pass to Adelaide L. Whitford by means of the deed.

32 For the foregoing reasons, I am of the opinion that there is evidence, on the face of the document, of an intention to execute a document which is testamentary in nature, and it is clear that the provisions of s. 5 of the *Wills Act* have not been complied with.

33 It may be that if the portion of the deed purporting to convey the woodland owned by the grantor at the time of his death is ineffective, the other portions of the deed may be effective, but I express no opinion as to this.

34 An order will, therefore, issue to the effect that the objection made by the purchasers' solicitor is a valid objection and, unless the vendor is able to remove the objection by having a determination made which is binding upon Ruth M. Chandler, or obtaining a quit claim deed or other disclaimer of interest from Ruth M. Chandler, or the purchasers waive the objection, the agreement of purchase and sale is null and void.

35 There will be no costs of the application.

*Order accordingly.*

Nova Scotia Supreme Court, Trial Division
MacIntosh, J.
January 22, 1976.

DAMAGES - TOPIC 1300

EXEMPLARY DAMAGES - TRESPASS TO LAND - THE DEFENDANT CONSTRUCTED A BUILDING PARTIALLY ON THE PLAINTIFF'S LAND - THE DEFENDANT'S BUILDING TRESPASSED ON AN AREA OF APPROXIMATELY 35 SQUARE FEET - THE NOVA SCOTIA SUPREME COURT DESCRIBED THE DEFENDANT'S CONDUCT AS ABUSIVE AND CONTEMPTUOUS OF THE PLAINTIFF'S RIGHTS - THE NOVA SCOTIA SUPREME COURT AWARDED THE PLAINTIFF $5000 DAMAGES INCLUDING EXEMPLARY DAMAGES - SEE PARAGRAPHS 26 TO 35.

INJUNCTIONS - TOPIC 692

CONSIDERATIONS AFFECTING THE GRANT OF AN INJUNCTION - WHETHER DAMAGES ALONE ARE AN APPROPRIATE REMEDY - THE DEFENDANT CONSTRUCTED A BUILDING PARTIALLY ON THE PLAINTIFF'S LAND - THE DEFENDANT'S BUILDING TRESPASSED ON AN AREA OF APPROXIMATELY 35 SQUARE FEET - THE NOVA SCOTIA SUPREME COURT REFUSED TO GRANT AN INJUNCTION AND HELD THAT IN THE CIRCUMSTANCES AN AWARD OF DAMAGES ALONE WAS AN APPROPRIATE REMEDY.

REAL PROPERTY - TOPIC 5634

TITLE - EXTINGUISHMENT OF TITLE - ADVERSE POSSESSION - WHAT CONSTITUTES ACTUAL POSSESSION - THE NOVA SCOTIA SUPREME COURT STATED THAT ACTUAL POSSESSION CONSISTS OF TWO ELEMENTS, THE INTENTION TO POSSESS THE LAND AND THE EXERCISE OF CONTROL OVER THE LAND TO THE EXCLUSION OF OTHER PERSONS - SEE PARAGRAPH 8.

REAL PROPERTY - TOPIC 5640

TITLE - EXTINGUISHMENT OF TITLE - ADVERSE POSSESSION - EFFECT OF A DIVIDING LINE BETWEEN ADJOINING LANDS SUCH AS A FENCE OR ROAD OR RIVER - THE NOVA SCOTIA SUPREME COURT STATED THAT WHERE PERSONS ARE IN POSSESSION OF ADJOINING LANDS WHOSE VISIBLE DIVIDING LINE IS A FENCE OR ROAD OR RIVER AND SUCH PERSONS EXERCISE ACTS OF OWNERSHIP UP TO THE DIVIDING LINE, THEN EACH IS DEEMED TO BE IN POSSESSION OF THE LAND ON HIS SIDE OF AND UP TO THE DIVIDING LINE - SEE PARAGRAPH 16.

This case arose out of a claim for damages for trespass, exemplary damages and a mandatory injunction arising out of trespass to the plaintiff's land. The defendant constructed a building partially on the plaintiff's land. The defendant's building trespassed on an area of approximately 35 square feet. The court described the defendant's conduct as abusive and contemptuous of the plaintiff's rights. The Nova Scotia Supreme Court refused to grant an injunction and held that in the circumstances an award of damages alone was an appropriate remedy.

The Nova Scotia Supreme Court awarded the plaintiff $5000 damages including exemplary damages - see paragraphs 26 to 35.

The March 1976 issue of the Nova Scotia Law News reported that this case was under appeal to the Nova Scotia Court of Appeal.

. . .

This case was heard by MacINTOSH, J., at Halifax, Nova Scotia on January 5 & 6, 1976. Judgment was delivered by MacINTOSH, J., on January 22, 1976.

1 MacINTOSH, J.: The plaintiff claims for damages for trespass, exemplary damages and a mandatory injunction.

2 The plaintiff's residential property fronts on Pepperell Street in the City of Halifax. According to the plaintiff's deed, this 33' wide property extends back

100' until it would meet the adjoining property of the defendant which fronts on Quinpool Road and also has a depth of 100'.

3 The defendant has constructed a commercial building that would be within the boundary of the description contained in his deed. The cost of this building is approximately $600,000.00.

4 The problem herein arises over a fence supposedly marking the division line between the two properties.

5 The survey evidence indicates quite clearly that the fence was located on land now occupied by the defendant's new building.

6 Has the plaintiff established title by adverse possession to a portion of the lands covered by the defendant's deed?

7 The law in Nova Scotia is contained in the often quoted dicta of MacQuarrie, J. in *Ezbeidy v. Phalen* (1958), 11 D.L.R. (2d) 665.

> . . . there is first of all a presumption that the true owner is in possession, that the seisin follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the person is in possession. If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidents of ownership of the property, that possession in time ripens into title: cf. Lord Advocate v. Lord Lovat (1880), 5 App. Ca. 273.
>
> In Des Barres v. Shey (1873), 29 L.T. 592, Sir Montague Smith, delivering the judgment of the Judicial Committee, said, p. 595: 'The result appears to be that possession is adverse for the purpose of limitation when an actual possession is found to exist under circumstances which evince its incompatibility with a free-hold in claimant.' Df. Halifax Power Co. v. Christie (1915), 23 D.L.R. 481, 48 N.S.R. 264.
>
> What the person in adverse possession gets is confined to that he openly, notoriously, continuously and exclusively possesses. Possession of a part is not possession of the whole as between an actual possessor and actual owner.
>
> Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is the person who claims to be in possession must exercise these rights with the intention of possession. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed.

8 In Elliott v. Jardine, 45 M.P.R. 104, Parker J. at p. 11 quoted *Halsubry's Laws of England* (2d), vol. 33 at p. 11 and 12 as follows:

> Actual possession is a question of fact: it consists of two elements, the intention to possess the land and the exercise of control over land to the exclusion of other persons. The extent of the control which should be exercised in order to constitute possession varies with the nature of the land; possession means possession of that character of which the land is capable.

9 There appears no doubt that a fence existed, forming part of the rear division line of two properties.

10 Ethel Hennessy once owned and resided on the property now owned by the defendant. She purchased the property from her father in 1947. The fence was still

there when she left 20 years later and was in the same position as indicated on the survey plans, Exhibits 2 and 8.

11 The plaintiff recalls that the fence was repaired sometime in 1952 or 1953.

12 I find that the fence was as located by R. J. Donovan, P.L.S. and shown on survey plan, Exhibits 2 and 8. I also find that this fence has been there for a period of time in excess of 20 years.

13 Having determined the plaintiff's fence was located as indicated above, the defendant's title to this portion of his lands enclosed by the fence became an issue by virtue of the provisions of s. 9 and s. 21 of the Statute of Limitations, c. 168, R.S.N.S., 1967, which reads:

> (9) No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.
>
> (21) At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

14 To establish a successful claim by way of possessory title, in addition to meeting the statutory requirement as to duration, the claimant must also show that the quality of his possession was such as to give the rightful owners a right of action to recover their lands as distinct to a mere right of action for trespass.

15 The evidence of Mrs. Hennessy and the plaintiff establishes that the owners of the two lots have until now always considered the fence to be located on the division line between the two properties as called for in their respective deeds. The plaintiff has always used the land up to the fence as part of her backyard. In the area was a flower garden and rose bush. In my opinion, it was possession of that character of which the land is capable.

16 Counsel for the defendant has argued that the plaintiff to establish her claim must have had knowledge that she was depriving the defendant and its predecessors in title of the land. With deference, I adopt the dicta of Gwynne, J., in *Sherren v. Pearson*, 14 S.C.R. 605, wherein he states:

> Where persons are in possession of adjoining lands whose visible dividing line is a fence or road or a river (it matters not which), and exercise acts of ownership up to such dividing line, each is deemed to be in possession of land on his side of and up to such dividing line, although upon a survey it might be found that a piece of land on the other side of the fence or road or river from that on which the residue of his land lies and possession up to and according to the visible dividing line will perfect a title under the statute of limiations.

17. The claimant must show that she has dealt with the land as an ordinary owner might be expected to deal with it to the exclusion of all others for the statutory period.

18 This, she has done and, thereby, acquired good title to the area of land enclosed by the fence before it was removed by the defendant.

19 Having found that the plaintiff had good title, the question of an appropriate remedy is not without difficulty.

20 The exterior of the defendant's building has been completed. To grant a mandatory injunction ordering the removal of the building from the plaintiff's lands would involve the defendant in great costs. The area of land involved measures approximately 21' by 1.6', an area of approximately 35 square feet.

> . . . it is aximotic that the jurisdiction to grant injunction is purely discretionary.

21 *Hanbury's Modern Equity* (9th Ed.), at p. 596.

> Like all other equitable remedies the issue of an injunction is the discretion of the Court, an injunction cannot be demanded as a right and one will not be granted where damages would be a sufficient remedy.

22 *Winfield and Jolowicz on Tort,* (9th Ed.) at 596.

23 S. 39 (9) of the Judicature Act, S.N.S. 1972, states in part:

> A mandamus or an injunction may be granted in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made unconditionally or upon such terms and conditions as the court thinks just . . .

24 In *Gallant v. MacDonald,* 3 N.S.R. (2d) 142, Cowan, C.J.T.D. commented:

> It is true that, where the encroachment is slight and the cost of removal would be great, and the corresponding benefit to the adjoining owners small, or where compensation by way of damages can be determined and can be had, a court will ordinarily decline to compel removal and will leave the party complaining to his remedy at law in damages.

25 While the damage to the plaintiff's land is not extensive, the Court must not be placed in the position of sanctioning a wrong doing on the part of the encroacher. If in its discretion, the Court decides damages are the proper remedy, then they should be such that in no way can it be said that the Court has not properly considered all relevant factors. One of the relevant factors in determining appropriate damages must be the use to which the defendant has put the land. Here the additional land means additional rental income to the defendant. Rental for commercial property in this area has a maximum value of $10.00 per square foot.

> Lindley, L.J., said the law was settled by Jegon v. Vivian. He put the matter thus: 'The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes,'
>
> *MacGregor on Damages* (13 Ed.) at p. 724.

26 The plaintiff submits that exemplary damages be included in any amount awarded for damages.

27 The question of exemplary damages was discussed by Cooper, J. A., of this Court in *Atlantic Concrete Ltd. v. MacDonald et al,* 12 N.S.R. (2d) 210:

> The second issue is that relating to the award by the trial judge to B & D of exemplary damages in the sum of $2,000.00. The circumstances in which such an award may be made have been limited insofar as England is concerned by Rookes v: Barnard, (1964) 1 All E.R. 367 (House of Lords). Lord Devlin at p. 410 said that there were two categories of cases where such an award may be made; the first of these is oppressive, arbitrary or unconditional action by servants of the government, and the second those in which the defendant's conduct had been calculated by him to make profit for himself

which might well exceed the compensation payable to the plaintiff. The principles stated by Lord Devlin in the Rookes case were expressly reaffirmed by the House of Lords in Cassell & Co. Ltd. v. Broome, (1972) 1 All E.R. 801.

In Banks v. Campbell (1974), 45 D.L.R. (3d) 603 Chief Justice Cowan of the Trial Division of this Court said at p. 606:

> 'The restriction to the categories in which exemplary damages can be awarded has been criticized and it has been said that Rookes v. Barnard, supra, does not correctly state the law of some Canadian Provinces. See, for example, Unrau v. Barrowman et at. (1966), 59 D.L.R. (2d) 168, Davis, J., at p. 187 (Sask. Q.B.); MacKinnon v. F. W. Woolworth Co. Ltd. et al (1968), 70 D.L.R. (2d) 280 at pp. 289-90, 66 W.W.R. 205 (Alta. App. Div.) per Johnson, J.A.; McElroy v. Cooper-Smith and Woodman (1967), 62 D.L.R. (2d) 65 at p. 71, (1967) S.C.R. 425, 60 W.W.R. 85, per Spence, J.; see also the article "Punitive Damages in Tort", by G.H.L. Fridman, 48 Can. Bar Rev. 378 (1970); however, the House of Lords in Cassell & Co. Ltd. v. Broome (1972) 2 W.L.R. 645, (1972) 1 All E.R. 801, expressly reaffirmed the principles stated by Lord Devlin in Rookes v. Barnard, supra, and it seems to me that I should apply these principles in the present case.'

The learned trial judge in this case also referred to Rookes v. Barnard but in the end adopted what had been said by Schroeder, J. A., in Denison v. Fawcett (1958), 12 D.L.R. (2d) 537, which I repeat in part:

> 'Generally, however, such damages may be awarded in actions of tort such as assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment. If, in addition to committing the wrongful act, the defendant's conduct is "high-handed, malicious, conduct showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of a gentleman", (to quote a few examples taken from the authorities) his conduct is an element to be considered as circumstance of aggravation which may depending upon its extent or degree, justify an award to the injured plaintiff in addition to the actual pecuniary loss which he has sustained. I do not think that it can be stated with any precision what may be classed as aggravated circumstances but malice, wantonness, insult and persistent repetition have always been regarded as elements which might be taken into account.'

The trial judge found such conduct in Mr. LeVatte's attitude, which he characterized as 'callous and arrogant'. Mr. LeVatte was president and general manager of the appellant. The trial judge said:

> 'I award exemplary damages against the defendant LeVatte as an expression of the Court's aversion to conduct herein of its president and general manager and, I fix the amount of these damages at $2,000.00.'

I do not think that the evidence herein is sufficient to lead to the conclusion that this case falls within Lord Devlin's second category. *Furthermore, and on the assumption that the principles upon which exemplary damages are wider in this jurisdiction than Lord Devlin's categories,* I am not satisfied that there was here on the appellant's part 'high-handed, malicious, conduct showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of a gentleman.

(italics mine)

28 It would follow from this case, that in this jurisdiction a determination on exemplary damages is not restructed to the categories enunciated in *Rookes v. Barnard* but includes those principles outlined by Schroeder, J.A., in *Denison v. Fawcett*, supra.

29 The second category referred to by Lord Devlin in *Rookes v. Barnard* is found in (1964) A.C. 1227:

> Where a defendant with a cynical disregard for the plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

30 The evidence here indicates that the defendant's excavator sought the latter's direction when the excavation neared the fence. The defendant's representative approached the plaintiff. He was unable to resolve the matter to his satisfaction. The fence was then removed and the lot excavated beyond the fence to the rear line as set forth in the defendant's deed. All this was done despite the plaintiff's protestations against having the fence removed.

31 I accept the plaintiff's version of her dealings with the representative on behalf of the defendant company. I can form no other conclusion other than the actions of this representative were ill mannered, abusive and contemptuous of the rights of the plaintiff. The fact that there may have been some question to be resolved as to title is no justification for such behaviour. This representative of the defendant company is not without experience as a developer. My conclusion from the evidence is that he attempted to run roughshod, so to speak, over the plaintiff, and without recourse to standard legal procedures. The plaintiff, a woman of no little determination, refused to give way and this court action has resulted.

32 Had the defendant respected the plaintiff's rights, it would have been involved in substantial redesign and realignment of its building. The cost of such changes plus the loss of rental income from the additional space as opposed to damages caused thereby to the plaintiff, made the trespass a potentially profitable operation.

33 I find the defendant has aggravated the situation to an extent warranting the imposition of exemplary damages. I come to the conclusion by applying either the second category of cases as outlined by Lord Devlin in *Rookes v. Barnard* or by the application of the dicta of Schroeder, J.A. in *Denison v. Fawcett*.

34 The plaintiff has not sought special damages.

35 I fix the damages including exemplary damages, at the sum of $5,000.00.

36 The plaintiff shall have judgment in the sum of $5,000.00 together with her costs to be taxed.

37 I further direct that on payment of the above sums, the plaintiff execute a release of her interest in the lands encroached upon by the defendant's building.

*Judgment for the plaintiff.*

Nova Scotia Supreme Court, Trial Division
Jones, J.
November 19, 1974

REAL PROPERTY - TOPIC 7191

Easements - Extinguishment of easements by operation of law - Effect of statutory expropriation - A portion of an area reserved in a subdivision for the use in common by the subdivision lot owners was expropriated for a street - The Supreme Court held that the expropriation did not extinguish the easement in the area remaining unexpropriated - see paragraph 21.

REAL PROPERTY - TOPIC 7287

Easements - Extent of right - What constitutes a reasonable use - A subdivision reserved an area for "the use, in common, with all owners" of the lots of the subdivision - The defendant, whose lot adjoined the common area, prevented other owners from using the area as a parking area - The Supreme Court held that the easement was unrestricted and the area could be used for any reasonable common purpose, including parking.

SUMMARY:

This case arose out of the plaintiffs' action by way of originating summons against the defendant for a declaration of their rights under an easement and an order by way of injunction preventing the defendant from interfering with those rights. The plaintiffs and the defendant were lot owners in a subdivision, the plan of which reserved an area for "the use, in common, with all owners" of the subdivision lots, The defendant, whose lot adjoined the common area, prevented other owners from using the area as a parking area. The plaintiffs brought an action against the defendant for a declaration and an injunction. The Supreme Court allowed the action. The Supreme Court held that the easement was unrestricted and the area could be used for any reasonable common purpose, including parking.

. . .

This case was heard on November 15, 1974, at Halifax, Nova Scotia, before JONES, J., of the Nova Scotia Supreme Court, Trial Division. On November 19, 1974, JONES, J., delivered the following judgment:

1 JONES, J.: This is an action to determine the rights of the parties with respect to an easement. While the originating notice is not entirely clear, the plaintiffs are seeking a declaration as to their rights under the easement and an order by way of injunction preventing the defendant from interfering with those rights.

2 The basic facts as contained in the documents are not in dispute. A row of 12 attached homes on Brunswick Street in the City of Halifax, and known as Churchfield Barracks, was subdivided by a plan of subdivision prepared by George L. Bates and dated September 9, 1949. Each unit was assigned a lot the width of the dwelling. Entrance to the subdivision is gained from the street known as Portland Place. A right-of-way runs along the front of each unit to the south end of the residences, then makes a semi-circle around unit number one and returns to Portland Place along the rear of each unit. The rear right-of-way is parallel to the one in front of the units. At the south end of the plan where the right-of-way turns is an area marked "A" on the plan and designated "open area for parking, etc.". On the north end of the plan adjoining Portland Place and lying between the two rights-of-way is an open area marked "B" on the plan and designated "entrance area". This is the area in dispute. The entrance area is outlined in green on a plan dated February 5, 1973, prepared by Donald Purcell.

3 The parties have agreed the plan properly shows the boundaries of the entrance area. In 1963 the City of Halifax expropriated some 20 feet of the entrance area adjoining Portland Place in order to widen the street.

4 The plaintiffs Richard and Nina Conrad purchased Lot No. 7 Churchfield Court on December 21, 1971. The following paragraphs are contained in the description in their deed:

> TOGETHER WITH the right to pass and repass, by night and by day with carts, horses and vehicles in, over and along the right-of-way as shown on said plan and outlined thereon in Red;
>
> ALSO TOGETHER with the use, in common with all other owners or occupants of lots Numbers Seven to Twelve inclusive in the said Churchfield Court, of the area marked 'Entrance Area', as shown on said plan and outlined thereon in Yellow, and marked 'B'.
>
> RESERVING, NEVERTHELESS out of the first above described lot, to the use of all other owners or occupants in the said Churchfield Court, that part of the said Lot Number Seven marked right-of-way, contained within the boundaries of the said Lot Number Seven, and outlined thereon in Red.

5 The plaintiff Lawson Gaetz acquired Lot No. 10 by deed dated August 1, 1956. His deed contains the same provisions referred to in the Conrad deed.

6 Mr. Ivanov acquired Lot No. 11 by deed dated May 16, 1951. His deed contains the same provisions relating to the rights-of-way and the entrance area.

7 The following provisions are contained in the deeds to lots numbered one to six inclusive:

> TOGETHER with the right to pass and repass, by night and by day with horses, carts or vehicles, in, over and along the right-of-way as shown on said plan and outlined thereon in Red;
>
> ALSO together with the use, in common with all other owners or occupants of Lots Numbers One to Six inclusive in the said Churchfield Court of the area marked 'Open area for parking, etc.' as shown on said plan and outlined thereon in yellow, and marked 'A';
>
> RESERVING NEVERTHELESS out of the first above described lot, to the use of all other owners or occupants in the said Churchfield Court, that part of the said Lot Number Five marked right-of-way contained within the boundaries of the said Lot Number Five, and outlined thereon in Red.

8 Mr. Matonis purchased Lot No. 12 on August 3, 1971. The description comprises the area on which the residence stands, the rights-of-way and the entrance area. The description then contains the following paragraphs:

> TOGETHER WITH the right to pass and repass, by night and by day, with horses, carts or vehicles, in, over and along the right-of-way as shown on said plan and outlined thereon in red;
>
> RESERVING HOWEVER, out of the first above described lot, to the use of all other owners or occupants in the said Churchfield Court that part of the said Lot Number Twelve marked Right-of-way, contained within the boundaries of the said Lot Number Twelve, and outlined thereon in red.
>
> ALSO reserving out of the first above described lot for the use of all other owners or occupants of Lots Numbers Seven to Twelve inclusive in the said Churchfield Court, the area marked 'Entrance Area' as shown on said Plan and outlined thereon in Yellow and marked 'B'.

9 Mrs. Conrad testified for the plaintiffs. She is Mr. Ivanov's daughter. Mr. Ivanov has occupied unit No. 11 for 23 years. She frequently visited her parents. She testified that she parked in the Entrance Area on those occasions. The Area was also used for clotheslines and recreation. Mr. Matonis parked in the Area before he purchased Lot No. 12. According to Mrs. Conrad, the defendant was the first owner to prevent the residents from using the Area. He has forbidden the Conrads to park in the Area. He has also excluded workmen and servicemen from parking in the Entrance Area. The clotheslines were strung from poles bordering on Portland Place and attached to the side of the Matonis residence. These were apparently removed when the street was widened. Mrs. Conrad maintained that there was sufficient room in the Area for parking residents' vehicles. She denied that the Entrance Area was formerly enclosed with a fence. Residents continued to park in the Area after the expropriation.

10 Mr. Conrad confirmed his wife's evidence. He stated that he has been prevented from parking in the Area by the defendant.

11 Mr. Ivanov is Mrs. Conrad's father. He has resided in the subdivision for 23 years. There was no problem about parking in the Entrance Area until Mr. Matonis purchased Lot No. 12, according to this witness. He could not recall any gate or fence in the Area.

12 Counsel agreed to the admission of an affidavit by Lawson Gaetz. Paragraphs 9 to 11 of the affidavit are as follows:

> 9. THAT the aforementioned Mr. Walter Matonis, the Defendant in this action, has prevented my use in common with all other owners or occupants of Lot Number 7 to 12 inclusive in the said Churchfield Court, of the area marked 'Entrance Area' as shown on said Plan of Churchfield Court and outlined in yellow and marked 'B', which plan is attached hereto and marked Exhibit 'B';
>
> 10. THAT Mr. Walter Matonis, the Defendant herein, by his actions as described in paragraph 9 hereof, has made it impossible for me to use the aforementioned 'Entrance Area' as a parking space for my motor vehicle;
>
> 11. THAT Mr. Walter Matonis, the Defendant herein by his actions described in paragraph 9 hereof, has made it impossible for various service men and professional people to use the aforementioned 'Entrance Area' when necessary for my use.

13 The defendant was called on the trial. He has resided in the subdivision since 1948. He purchased Lot No. 12 in 1971. He stated that Mr. Garnier, the previous owner of No. 12, was the only person who parked in the entrance area. He denied that he parked in that area. He stated there were clotheslines in the area. Mr. Matonis testified that the area had been fenced. In his view, since the expropriation there is not sufficient room left to park six cars. Mr. Matonis was disturbed because he is assessed for the entire area.

14 The plaintiffs contend they are entitled to use the entrance area for the purpose of parking vehicles by virtue of the right to use the entrance area conferred on them by their deeds. The defendant maintains that no parking rights were conferred on the residents by the deeds. He also contends that any such rights were extinguished by the expropriation.

15 The principles to be applied in interpreting easements are set out in Volume 11, *Halsbury's Laws of England*, Second Edition, paragraph 575, as follows:

> If a right-of-way be claimed under an express grant which is actually existing, the nature and extent of the right depends upon the proper construction of the language of the instrument creating it. It is for the Court to put the true construction upon the words used in the grant, guided, in the absence of any clear indication of the intention of the parties, by the maxim that a grant must be construed most strongly against the grantor.

> The construction of the grant depends on the circumstances surrounding the execution of the instrument. Thus, a grant of a right-of-way *per se* and nothing else may be a right of footway or a general right-of-way or a right to any other kind of way, according to the circumstances of the case. Amongst these circumstances the nature and description of the lands or buildings comprising the dominant tenement, and the nature of the *locus in quo* over which the right is granted as it existed at the date of the grant, are always very material considerations.

16 In *British American Oil Co. Ltd. v. Toronto Terminals Railway Co.* (1927), 32 O.W.N. 234, in interpreting a grant of a right-of-way, Kelly, J., stated at page 235:

> A document should receive that construction which will best fit the intention of the parties to be collected from the whole of it; and, though this conveyance does not expressly say that the right-of-way is reserved as appurtenant to the lands retained by the grantor, and though the learned Judge has found no case in which the terms of the document are the same as in this case, it appears to him that the parties thereto intended that the right-of-way should attach to and be for the benefit of the lands retained, and that it does so attach.
>
> Reference to *Halsbury's Laws of England*, vol. 11, p. 287, para. 562; *Gale on Easements*, 9th ed., p. 2; *Finch v. Great Western Railway Co.* (1879), 5 Ex. D. 254, 263.
>
> If there is no limit in the grant, the way may be used for all purposes: *United Land Co. v. Great Eastern Railway Co.* (1875), L.R. 10 Ch. 586, 590.

17 In *Laurie v. Winch* (1953) 1 S.C.R. 49, the Supreme Court of Canada was considering a right-of-way. Kellock, J., in giving judgment for the Court, stated at page 53:

> As stated by Lord Chelmsford in *Waterpark v. Fennell* (1):
>
> 'Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that the words were intended to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude land, where the words are capable of either construction.'

18 Lord Wensleydale, in the same case, at p. 683, said:

> 'In the course of the long and elaborate discussion which this case underwent in the Irish Court, some observations were incidentally made which are liable to be misunderstood as to the limits within which parol evidence is receivable to explain deeds, as if it could be done only in cases of doubt. . . . The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor.'

and at page 56:

> With respect to the nature and extent of the easement granted, it is to be observed that the grant is one of a right-of-way simpliciter with no express restriction as to use. Just as the circumstances existing at the time of the grant may be looked at for the purpose of ascertaining the intention of the parties as to the dominant tenement and as to the location and termini of the way, the circumstances may also be looked at for the purpose of construing the conveyance as to the nature and extent of the rights conveyed.

In *White v. Grand Hotel*, (1913) 1 Ch. 118; 110 L.T. 209, while the easement there in question was the subject of an express grant, there was no documentary evidence of its exact terms. The action was by the owner of the servient tenement to limit the user of the way, the dominant tenement having been changed from a private residence, at the time of the grant, to a hotel. It was held, that there being no limitation to be found in the grant in the nature of the width of the right-of-way or anything of that kind, full effect must be given to the grant and the way could not be restricted to such use as existed at the time of its execution.

19 I have also referred to *Gale on Easements*, Twelfth Edition, at page 324.

20 Having regard to the grants before me, it is clear that units one to six inclusive were intended to have parking privileges in the parking area marked "A". Considering the nature of the units and the layout of the subdivision, the entrance area is the only remaining area where similar rights could be conferred on the owners of Lots Nos. 7 to 12. As the subdivision plan was made in 1949 it can be assumed that the subdivider was fully cognizant of the need for parking facilities. There is nothing in the grant pertaining to the entrance area to restrict use. The words "entrance area" are descriptive of place and not necessarily use. The right is to use the area *marked* "entrance area". The right of entrance was conferred upon the occupants along the rights-of-way. There are no words of limitation in the grant of the right to use the area. In my view this amounts to a grant of a right of use for all reasonable purposes required for each of the dwellings numbered 7 to 12 inclusive. This would include the right to park the occupants' vehicles and to have service vehicles use the area. The exercise of these rights must be reasonable, having regard to the rights of all parties concerned.

21 The view which I have expressed is consistent with the evidence of user as submitted by the plaintiffs. I accept the evidence of the plaintiffs' witnesses that the area was used for parking for many years, including a period before the plan of subdivision. Occupants also used the area for drying clothes and for recreation. This continued until the defendant acquired Lot No. 12. I find on the evidence that the defendant has prevented the plaintiffs from using the area marked "Entrance Area" in accordance with their rights.

22 Counsel for the defendant submitted that the easements over the entrance area were extinguished by virtue of the expropriation. While an easement can be, of course, extinguished by the exercise of statutory powers that is not in fact the situation in this case. The area has been reduced considerably; however, not greater effect should be given to the expropriation than is necessary. A considerable area remains. While the rights of all parties have been reduced, they are still capable of being exercised within the remaining area.

23 The plaintiffs are entitled to a declaration that they are entitled to use the area marked "Entrance Area" on the Plan of Subdivision of Churchfield Court for all reasonable purposes required for each of their dwelling houses. The plaintiffs are also entitled to an order prohibiting the defendant from interfering with the exercise of those rights.

24 The plaintiffs are entitled to their costs to be taxed in one bill of costs.

*Judgment for the plaintiffs.*

ANDREWS and ANDREWS v. R. A. DOUGLAS LTD. and TOWN OF NEW GLASGOW, TOWN OF TRENTON, TOWN OF STELLARTON and PICTOU COUNTY DISTRICT PLANNING COMMISSION, Third Parties

17 N.S.R. (2d)

Nova Scotia Supreme Court, Appeal Division
Coffin, Cooper and Macdonald, JJ.A.
September 30, 1976

PRACTICE - TOPIC 8803

Function of judge and jury - Judge - Credibility of witnesses - Reasons for disbelief - The Appeal Division held that, where there was a conflict of testimony, the trial judge did not have to set out his reasons for rejecting the testimony of certain witnesses - see paragraph 44.

EVIDENCE - TOPIC 2402

Special modes of proof - Presumptions - Unfavorable inference from failure of party to testify - 1 of 2 plaintiffs failed to testify at trial - Medical testimony stated that the plaintiff was too ill from a heart condition to testify in court - The Trial Division excused the failure of the plaintiff to testify and did not draw an unfavorable inference from it - see paragraphs 23 and 87 to 90.

HIGHWAYS - TOPIC 164

Establishment of highways and rights-of-way - Dedication - What constitutes - Public use - A gravel roadway over one end of the plaintiffs' urban lot was used for many years by the public as a street and was serviced by the town as such - The plaintiffs referred to it as a road or street - The Appeal Division affirmed a finding of the Trial Division that the plaintiffs had dedicated the roadway as a street by permitting public use - see paragraphs 9, 37, 93 and 104 to 110.

PRACTICE - TOPIC 7164

Costs - Liability for party and party costs - Liability for defendant's costs payable to third parties - Plaintiffs' action against defendant and defendant's action against third parties dismissed - The Appeal Division affirmed the order of the Trial Division that the plaintiffs were not liable for the defendant's costs to the third parties - see paragraphs 77 and 120.

PRACTICE - TOPIC 8800

Appeals - General principles - Function of appeal court regarding findings of credibility by trial judge - The appeal Division held that an appeal court will not interfere with the findings of fact by a trial judge based on credibility unless he made a clear error in principle or misapprehended or failed to give proper attention to relevant evidence - The Appeal Division affirmed the fact findings of the Trial Division - see paragraphs 40 to 44.

REAL PROPERTY - TOPIC 4794

Title - Boundaries - Determination of - Relative importance of conflicting elements - Monuments - A deed described one course of a property as running a certain distance and direction to an embankment - The description could not be followed on the ground to reach the embankment - The Trial Division held that, where there is a variance between the embankment, which was a monument, and the courses and distances, the monument should govern - see paragraphs 94 and 101 to 103.

TORTS - TOPIC 1005

Nuisance - General principles - What constitutes actionable nuisance - The defendant constructed a sewerage line close to the plaintiffs' house - The plaintiffs

alleged that the operation of a back-hoe and other machinery close to the house caused structural damage to the house - The Appeal Division affirmed the holding of the Trial Division that to be actionable a nuisance must do more than merely interfere with the plaintiffs' enjoyment of the property and that the plaintiffs must prove that the construction caused structural damage to their property - The Appeal Division affirmed the finding of the Trial Division that no damage was proved - see paragraphs 45 to 58 and 113 to 118.

TORTS - TOPIC 2554

Vicarious liability - Independent contractors - Construction contractor - The defendant contractor constructed a sewerage line for a municipality - the line passed close to the plaintiffs' house and the plaintiffs alleged that the operation of the defendant's machinery damaged their house - The Trial Division held that, even if the defendant's activities damaged the house, the municipality was not liable for the acts of its contractor, because the nature of the work was not inherently dangerous - see paragraphs 119 to 120.

TORTS - TOPIC 3016

Trespass - Trespass to land - Defences - Consent - The defendant constructed a sewerage line without the plaintiffs' permission across land which the plaintiffs claimed - The plaintiff told the foreman that he did not wish to impede the construction, but requested that the defendant speak to him about it - The plaintiff permitted the defendant to park vehicles on his property during construction - The Appeal Division affirmed the finding of the Trial Division that the plaintiff consented to the defendant's construction of the line on the property and that no trespass was committed - see paragraphs 38, 45, 59 and 111 to 112.

TORTS - TOPIC 3016

Trespass - Trespass to land - Defences - Consent - Joint tenants - Whether the consent of both joint tenants required - The plaintiff wife and husband were owners in joint tenancy of a property - The defendant constructed a sewerage line without the plaintiffs' permission across the property - The plaintiff husband told the foreman that he did not wish to impede the construction, but requested that the defendant speak to him about it - The husband permitted the defendant to park vehicles on the property during construction - The plaintiff wife knew that construction was going to take place and expressed her disapproval to the authorities concerned, but went on a trip before and during the construction - The Appeal Division affirmed the finding of the Trial Division that in the circumstances the consent of the husband constituted consent for both joint tenants - see paragraphs 59 to 74 and 112.

Summary:

This case arose out of the plaintiffs' claim in trespass against the defendant in connection with the construction of a sewerage line. The defendant constructed a sewerage line under a contract with the towns of New Glasgow, Trenton and Stellarton and the Pictou County District Planning Commission. The line ran close to the plaintiffs' house across property which the plaintiffs claimed was part of their lot but which the defendant understood was a street. The plaintiffs brought an action against the defendant in trespass for damages. The defendant added by consent the Towns and the District Planning Commission as third parties. In a judgment reported in part immediately following the judgment of the Appeal Division below, the Trial Division dismissed the plaintiffs' action against the defendant and the defendant's claim against the third parties - see paragraphs 78 to 121. The Trial Division found that the line ran through the plaintiffs' property, but that the plaintiffs had dedicated the land as a street. The Trial Division held that there was no trespass. The Trial Division found that the plaintiffs failed to prove actionable nuisance, in that it was not proved that the operation of the defendant's machinery damaged the plaintiffs' house. The plaintiffs appealed to the Appeal Division.

The Appeal Division dismissed the appeal and affirmed the decision of the Trial Division.

. . .

This case was heard at Halifax, Nova Scotia, on March 18 and 19, 1976, before COFFIN, COOPER and MacDONALD, JJ.A., of the Nova Scotia Supreme Court, Appeal Division. On September 30, 1976, COFFIN, J.A., delivered the following judgment of the Court:

1 COFFIN, J.A.: The action which has given rise to this appeal was brought by the appellants against the respondent R. A. Douglas Limited (Douglas) for trespass on lands of the appellants by laying a sewer pipe therein. The appellants claimed damages, including punitive damages, and a mandatory injunction. The other respondents were joined as third parties to the action by consent at the time of trial. Douglas claimed indemnification from the third parties in the event that it was found liable to the appellants. The trial judge dismissed the appellants' action against Douglas and dismissed the claim for indemnification against the third parties. The appellants have appealed from the dismissal of their action and Douglas has cross-appealed from the dismissal of its indemnification claim.

2 The land, including the portion allegedly affected by the work, was conveyed to the appellants as joint tenants on May 28, 1955 by W. T. Hayden, Q.C., as executor of the Will of the late Nettie H. George and is fully described in the learned trial judge's decision. The property bears civic number 27 Arch Street, New Glasgow. The appellants were tenants in the house from October 26, 1954, until the purchase and have lived there without interruption ever since.

3 As I have said, the claim was for trespass and it was alleged that the excavation and causing a sewer pipe to be laid "in close proximity" to the appellants' house created a danger to it, interfered with plans to have it divided into flats, caused the water line of the house to be relocated above the frost line and structural damage.

4 Generally the evidence discloses that the front of the house faces north and Mr. Yurkiw, an expert called by the respondent Douglas, pointed out in his evidence that a verandah had been constructed on that side. The area in question where the sewer pipe was laid is immediately to the west of the house and on a portion of the lot conveyed in the above-mentioned deed.

5 A plan introduced in evidence, Exhibit 24, from the Engineering Department, Town of New Glasgow, shows Arch Street as a short street running approximately east and west to the Acadia Coal Company right-of-way. The evidence was that the appellants' property was east of that right-of-way in an area now known as Arch Street, the property being bounded generally on the west by the coal company embankment and on the east by the high water mark of the East River. There was an archway under the embankment where Arch Street joined what is shown on this Exhibit as the "Acadia Coal Railway". This provided access, albeit limited access, to the property in question.

6 Later there was a cut made in the embankment, approximately fifty feet south and west of Arch Street at Milne Street which provided free access to the area.

7 The trial judge said:

> To begin with, I am satisfied and find as a fact that the strip of land in dispute herein is included in the lot conveyed to the plaintiffs by deed dated May 28, 1955.

8 He set out the issues early in his decision:

> 1. Did the defendant company trespass on the plaintiffs' property?
>
> 2. Whether or not there was a trespass, did the defendant company cause damage to the plaintiffs' property?

3. What damages did the plaintiffs suffer?

9 Counsel for the appellants argued before us that once the finding was reached that the area of land in which the sewer line was laid was included in the deed to the appellants it followed without question that the appellants were in possession of the area. A *prima facie* case of trespass was thus established and the burden then shifted to the respondents to overcome the *prima facie* case.

10 The respondent first sought to discharge this burden by establishing that the area of land in question was a public street. Evidence as to the user of the area was called by the appellants and by the respondents. The appellants' witnesses testified that the user of the area had always been restricted to private persons and had never extended to the public. On the other hand, five witnesses called by the respondents testified that the public had in fact used the area as a street or roadway. The trial judge resolved this conflict by accepting the evidence of the respondents' witnesses. Counsel for the appellants contended that in accepting the evidence of the five witnesses over that of the appellants' witnesses it did not mean that he had chosen to throw out all the evidence adduced by the appellants. I am not sure, however, that he did not do just that in this matter of public against private user. He said on the question of credibility:

> Where the evidence of the aforesaid five defence witnesses is in conflict in *this regard*. . . .
>
> (italics are mine)

and held that:

> . . . there has been undoubtedly a dedication to and user by the public of the strip of land in dispute herein as a roadway or right-of-way for many years.

11 The trial judge quoted *DeYoung v. Giles* (1915), 26 D.L.R. 5; 49 N.S.R. 398, where Harris, J., said at p. 403 that whether there has been a dedication and user is a question of fact.

12 The appellant Doris Helen Andrews said that from the very beginning, she repudiated the suggestion of a public street. It was in early July that she first noticed some construction work. She called the Town of New Glasgow and warned the Clerk of the potential trespass. He referred her to Kingsley Lewis, Administrative Officer of the Pictou County Planning Commission. She told him of the situation. He did not come to see the property, but rather went to the offices of the Town Engineer and satisfied himself that the area in question was a public street. He acknowledged that Mrs. Andrews definitely disputed the right of anyone to come on the property of her husband and herself. Mr. Lewis failed to so advise Douglas.

13 The appellant argued that the trial judge made no finding of credibility here.

14 The trial judge made a finding of credibility as between Douglas' superintendent Mr. DeMings and the Andrews family.

15 Mr. DeMings referred to a conversation with Mr. Andrews:-

> Q. In the course of your proceeding, did you encounter any of the residents in that area?
>
> A. The first one was Mr. Andrews.
>
> Q. And what was the nature of your contact with him?
>
> A. I can't remember exactly, word for word, but I don't think I saw him until we got up fairly close to his residence and at that time, through a discussion with him, I think the matter came up that he thought he owned the property between his house and the railway right-of-way, which was a complete surprise to me because it was designated as Warren Street on our plan.

Q. Warren Street?

A. Yes. On the plans that we had it showed the street and designated it. And he also said that there hadn't been any provision made for going through there but he in no way would be going to stop us; he didn't want to hold up the job in any way, that he felt that someone should make some arrangement with him for going through there, so at that time I referred him to the Planning Commission, told him we were just doing as we were instructed and that, as far as I knew, it was a street; I had no reason to believe it wasn't. That was about the only -

Q. Was there any discussion with Mr. Andrews concerning whether or not there was permission for you to go on the land?

A. Nothing further than this, no. Mr. Andrews was very co-operative at all times when we were working in that area.

16 Mr. DeMings was questioned on his discovery evidence, acknowledging that Mr. Andrews had told him he owned the property:-

Which was actually a surprise to us. We assumed it was a right-of-way as that's what our drawings showed.

17 This conversation was before the work on the property was completed.

18 Counsel for the appellants then, still in direct examination, continued the questioning:

Q. Perhaps I could put it this way: did he tell you that before you had completed the excavation of laying of sewer and back-fill of the sewer line on his property?

A. Yes, that's correct.

Q. Yes.

A. Yes, it was before we went in, completed.

Q. After he told you that, did you say anything to him?

A. Well, I just - no, I didn't. I think I did say that if we didn't that the - we - it wasn't our responsibility to provide easements and that as far as we knew this was a right-of-way through here, a public street, and this is the way it was shown and we were directed to lay the line. Now, do you recall those questions and answers?

A. Yes.

THE COURT -

Now, just a minute. What are you going to ask him?

Mr. G. W. MacDONALD -

My question to him, My Lord - I had asked him before if he said anything to Mr. Andrews at the time and I understood him to say no.

THE COURT -

Well, I am ruling that there is no inconsistency between what he said before and what he is saying this afternoon.

19 Mr. MacDonald argued before us that there was clearly an inconsistency. In

effect all Mr. Andrews was saying to Mr. DeMings was that if Douglas had a right to come on the property, it was not to do any damage.

20 Mr. MacDonald pointed out that immediately after Mr. Douglas received Mr. DeMings' telephone call he went to the Town Engineer's Office. Mr. MacDonald suggested that he would not do so if he thought he had the right to go on the property.

21 The evidence of Mr. Douglas on this appears a bit confused:-

> Q. What I'm trying to get, Mr. Douglas, and I'll take over now. You then went, you say, to the Town of New Glasgow or you talked to the town engineer after your discussion with DeMings?
>
> A. No, no, not after the discussion with Andrews did I talk to the town engineer. This was before I saw.

22 In any event he agreed that the question had been raised by DeMings to him as to whether or not the area was a street and he took it upon himself to talk to the town engineer.

23 Mr. Andrews did not testify at the trial. There was medical evidence as to why he couldn't give evidence and this was accepted by the trial judge.

24 Some of the questions and answers in the discovery evidence of Mr. Andrews are:-

> Q. Of course, and they asked if they could come in?
>
> A. No, I invited the foreman in.
>
> Q. Yes.
>
> A. ... to see the wall before they went through.
>
> Q. Yes, and what did the foreman say?
>
> A. He ... when he came out of the cellar, he said that he was going to get hold of somebody that ... to come over and look at and ... but ...
>
> Q. That gentleman?
>
> A. No, no, somebody come over to look at it and they'd probably brace it and I got one understanding that there was no permission for nothing now. I mean, that, that was the understanding right there. I told them right there when we came out of the cellar.
>
> Q. What did you tell them, what were your words?
>
> A. I just told them there was no permission, nothing and he went, ... and then Bob Douglas and that fellow there come back.

25 Andrews' position that he would not give permission was supported by his son, John Andrews, Brookland Henderson, and Lydia Stone.

26 My difficulty here is that on this issue that Mr. Andrews told Mr. DeMings that he would not prevent them from going ahead, we are faced with this unequivocal statement by the trial judge:-

> Where there is conflict on this issue between the testimony of Mr. DeMings on the one hand and that of the plaintiffs, Mrs. Andrews at the trial and Mr. Andrews on discovery, their son, John A. Andrews, and Mrs. Stone, mother of Mrs. Andrews, on the other hand, I accept that of Mr. DeMings. I find that Mr. Andrews gave the defendant full consent to enter on the property to do its work.

27 The appellants argued that in any attempt by the respondents to show that the strip of land where the sewer line was laid had become a public street, they must rely on s. 145 of the *Towns Act*, R.S.N.S. 1967, c. 309, which is the section vesting public streets in the town.

28 Mr. Kenneth Cameron was a former manager of the Coal yard in New Glasgow on Clyde Street from December 1940 to May 1962. He talked about three properties on the east side of the railway along the river and thought that the owners were Mrs. George, Mr. Chisholm and Mr. Henderson.

29 Mr. Cameron said that there was a roadway on the left hand going up to the properties:-

> ... they had to go down through our coalyard to get up to those properties when I first went there, and as long as I worked there for 22 years.

30 He said on cross-examination that it went up past the George property and "... you could take a right turn and go through an arch."

31 He said, with respect to coal trucks making deliveries:

> Q. And if the customer were not Andrews or George or Chisholm or Henderson ... those coal trucks would never go down that way, would they?
>
> A. Definitely not. There would be no reason. ...
>
> Q. They would come in, as I understand it, Mr. Cameron they would get the load of coal, they would get weighed and they would go back up Clyde Street, unless they were going to deliver a load of coal to one of those three people, is that right?
>
> A. Naturally.

32 Mr. Cameron was pressed as to what traffic he saw. He said he never kept a record of it. He did say that he had seen "other cars going down there". He was asked how many times, and said he did not keep a record, but when urged by the Court replied:-

> Well I would say on an average, a couple of times a day, other than delivery.

33 The respondents produced several witnesses on user: - Howard MacKay referred to the plan Exhibit 24 and said it was really a tourist map, so that although it showed some streets it was not all definitive. On cross-examination he was asked about Arch Street.

> Q. Well between 1972 and 1974 someone concludes there is a street there, is that right?
>
> A. Well, I don't think there is a street there ... there's a travelled way that is used and that is known as Arch Street, but it is just a general thing.

34 In reply to questioning by the Court, he remembered as a boy seeing coal coming from the coal chutes with horse and wagon being taken up through the Andrews property, which he thought was then the George property. He couldn't in fact say that this happened on more than one occasion.

35 The trial judge reviewed the evidence of several people on the question of dedication. Frances MacDonald, who had been employed by the Town of New Glasgow is a grader operator, described how he had ploughed the area from the coal chute to Henderson's property. The Town Deputy Chief MacKay Smith for 22 years a police officer in New Glasgow indicated the patrols made by himself three or four times a week from Military Lane to Arch Street, north through the Andrews' property to Clyde Street,

where the old chutes were, or coming in the other direction down Clyde Street south by the coal chutes to Arch Street. Finally, the trial judge referred to the evidence of Mr. Cameron.

36 The appellants attached this evidence and said the trial judge had acted on a wrong principle because among other things services rendered by the Town, which had been described by the witnesses, had ended at least eight years before the incident in question. The appellants said that the trial judge ignored inconsistencies in the evidence that MacKay Smith had not made a tour for thirteen years, that Mr. Cameron's employment ceased in 1962, and that the plan, Exhibit 24, did not show Arch Street extending to the particular area in question.

37 The trial judge certainly did find the following facts:

> 1. The strip of land in dispute was included in the lot conveyed to the plaintiffs by the deed of May 28, 1955.
>
> 2. He considered the 1913 high water mark to be in the same place as the 1975 high water mark. I quote:
>
> I have no hesitation in discarding distances in favour of 'monuments' or 'landmarks' where there is conflict. I hold therefore that regardless of distance, the second course in the deed runs *to the embankment*, a monument, that the third course runs along the embankment South 57° West for one hundred and twenty-six feet to a point on the embankment and that the fourth course runs easterly to the point of beginning (regardless of the sixty-one feet mentioned in deed).
>
> 3. Having concluded that the land in dispute was included in the plaintiffs' lot, he found that Douglas did not trespass. He based this finding on two points. In the first place he was satisfied by the preponderance of evidence that the area in question "previously and *up to the time* of the alleged trespass had been treated as a public way." He took this from the evidence of the witnesses Howard MacKay, George Keough, Frances MacDonald, Gary Smith, and Kenneth Cameron, and also from the evidence of John A. Andrews, the son, and he also emphasized the fact that in the 1955 deed, the property was described as being "all that certain lot, piece, or parcel of land situate, lying and being on *Arch Street* in the said Town of New Glasgow." It was here that he stated that where the evidence of the five witnesses was in conflict with the evidence of the plaintiff Doris Andrews, her son John Andrews, Mrs. Harold Jack and her husband Harold Jack, and the other witnesses called for the plaintiffs, he accepted the evidence of Messrs. MacKay, Keough, MacDonald, Smith and Cameron over that of the others. He thus held that there was a dedication for many years.

38 The trial judge's second reason for not accepting the appellants' argument in favour of trespass was the conduct of Mr. Andrews himself in his dealings with Mr. DeMings and I have stated his comments in regard to the evidence of both earlier in these reasons.

39 There have been many statements on the position of an appeal court when the trial judge has made a finding on credibility.

40 Counsel for the respondent Douglas referred us to *Betcherman v. E. A. Pierce & Co.* (1934) 2 D.L.R. 449, where Lamont, J., said at p. 45:

> In whatever language the rule has been stated in the many judgments in which it has been discussed, the judgments all agree that the Trial Judge, who has seen the witnesses and heard their testimony, and observed their demeanour in the witness box, is in a much better position than an Appellate Court Judge to pass upon the credibility of those witnesses. Therefore, unless it appears that the Trial Judge has misunderstood the evidence or overlooked the weight and importance of facts either undisputed or indubitably established by documents or otherwise, his findings of facts based upon the credibility of the witnesses should not be set aside.

41 The appeal court will not interfere with the findings of fact by a Trial Judge based on credibility unless he had made a clear error in principle or misapprehended or failed to give proper attention to relevant evidence - see *Stubbs v. City of Dartmouth* (1973), 4 N.S.R. (2d) 862, at p. 873; *Shay v. S. Cunard & Co. Ltd.* (1975), 9 N.S.R. (2d) 192, at p. 200; *Dartmouth Investment Ltd. v. Western Plumbing and Heating Co. Ltd.* (1975), 12 N.S.R. (2d) 578, at p. 587.

42 I agree that not always does an Appeal Court following slavishly findings on credibility. For example, O'Halloran, J.A., in *Faryna v. Chorny,* (1952) 2 D.L.R. 354, at p. 357 said:

> A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a cast must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

43 In my view that problem does not apply here. The witnesses in the present case were dealing with facts with which they were familiar and the trial judge described in very specific language the versions which he considered correct and relevant, and accordingly the witnesses whom he was prepared to accept.

44 We were urged to find that the trial judge should not have rejected the evidence of the appellants and of others supporting their position without stating his reasons clearly and we were referred to *Ontario Central Airlines Ltd. v. Gustafson* (1957), 8 D.L.R. (2d) 584, where some of the authorities were mentioned by F. G. MacKay, J.A., at pp. 590 and 591. What was being considered in that case, however, was "uncontradicted evidence".

45 I have stressed at some length the issues raised by the parties, including that of dedication, but in my view the real question in this case is whether or not there were proven damages. The trial judge found as a fact that the Andrews' home is within the metes and bounds description of the deed. It may well be that the appellants did consent to the Douglas Company coming on the property, but at the most, it was a limited consent. I don't think for one moment it can be argued that they consented to the workmen entering their property and doing work so negligently that it damaged the house. But whether the area in question constituted a public right-of-way or not, the company would still not have the right to perform duties even for the town in such a way as to damage the building of the appellants by doing the work negligently. There is certainly no suggestion in any argument made before me that the house itself was not the property of the appellants.

46 In the final analysis, it is necessary to turn to the question of whether or not damage was caused to the appellants' dwelling house by the work of the respondent company and if so, what was the amount of these damages.

47 The trial judge dealt with this point in the last few pages of his decision. He emphasized the fact that the plaintiffs' house was 59 years old at least and that it was probably sold in 1916 for $410. He acknowledged that improvements had been made over the years - "but the fact remains that it is an old house." He accepted the evidence of Gary Smith, an adjuster, who inspected the house on July 31, 1973, prior to the work being done and he remarked that the evidence of Gary Smith was independent and that Smith "stood to gain not one iota by reporting the situation differently from what he found it." On this inspection Smith found the interior of the

house in good condition, but areas in the basement walls showed the cement to have deteriorated. Smith made a second inspection after the sewer line had been laid. With respect to this inspection, the trial judge said:

> On May 2, 1974, he paid a return inspection visit to the house and saw no change in the condition of the basement wall from what it was on July 31, 1973, nor did he see there anything visible, in the way of damage, that could be attributed to the excavation work done by the defendant. Mr. Andrews, when questioned by Mr. Smith, advised him that there had been no structural damage done whatsoever.

48 The trial judge was impressed by the fact that this evidence of Gary Smith was supported by what was said by Vernon DeMings, general superintendent of Douglas, who had spoken with Mr. Andrews immediately after the work had been completed, "and also some months later that year, when his workmen were putting more gravel on the plaintiffs' driveway." These are the words of the trial judge:-

> On each occasion, he had asked Mr. Andrews as to any damage that might have occurred and was assured by this plaintiff that there had been no damage. Moreover, Mr. DeMings was with Mr. Gary Smith on the latter's visit to the plaintiffs' home on May 2, 1974, when once again Mr. Andrews stated that there had been no damage done.

The trial judge found both these witnesses to be credible and he emphasized his opinion that he had not the slightest doubt that Mr. Andrews assured them that no damage had occurred as a result of the excavation work carried on "close by to this house".

49 The trial judge then used words which I think are very important on this whole issue of credibility:-

> In the face of the several statements attributed to the plaintiff, John William Andrews - none of which had been contradicted - and made by him before this action was commenced, the testimony relative to damage now given at the trial by the plaintiff, Doris Helen Andrews, and by her son, John A. Andrews, is simply not credible and I do not accept it. Moreover, in view of what Mr. Andrews said on the aforementioned occasions, the testimony of the expert witness, Dr. Potyondy, loses its potency.

50 In the result he found that the appellants has failed to discharge the burden of proving damage by a preponderance of evidence. I quote the trial judge's final statement on this point:-

> I would add that Mr. Andrews' statements only served to confirm the impression I received from the testimony of Mr. DeMings as to the care exercised by the defendant's workmen as the work proceeded past the plaintiffs' property. I would also infer that the same care was taken by Mr. DeMings and his crew throughout this major undertaking designed to improve materially the quality of life for all citizens of the communities involved.

51 In addition to the appellants and their son, there were three other witnesses who gave evidence on the question of damages, namely, Gary Smith and Mr. Yurkiw called by the respondents and Dr. J. G. Potyondy called by the appellants.

52 I have already mentioned the testimony of Mr. Smith but deem it advisable to refer to his report, Exhibit 18, on the first page of which he said:

> There were no visible signs of shifting, settling, bulging or additional cracking that could in any way be attributed to excavating activities as carried out by R. A. Douglas Limited.

53 On the second page of his report appear these words:

> In summation, it is the writer's considered opinion that no structural damage whatsoever was caused to the house situate at 27 Arch Street. New

> Glasgow during or after the course of excavation and installation of the sewer line and no compensation in any amount for structural repairs or improvements is warranted.

54 Mr. Yurkiw found that the foundation wall was for the most part of old construction, originally a type of rubble wall. The north wall was well protected by the large verandah and although it showed signs of deteriorating, it was still standing. On the south side of the residence, there was a lean-to founded on a new concrete foundation with the old rubble wall being a free standing unit. This wall, he said, shows evidence of bulging and cracking. On the east, the old rubble wall has been removed and replaced with a new concrete wall "to about midlength and the remaining portion has been partially removed and a new concrete wall constructed outside of the old wall boundaries."

> Considering the structure as a whole, approximately sixty per cent of the old rubble wall has been replaced with concrete during the life time of the dwelling. Based on the writer's examination, the northern one-third of the west wall would have been the next wall requiring replacing.

He did not find evidence of damage to the upper floors of the residence as a result of soil disturbance. The soil in the vicinity of the dwelling was in a dense state and the walls of the excavation he said "stayed on a more or less vertical cut during the time that the trench was open, the service line placed and the trench backfilled." It was his opinion that the contractor had used exemplary construction procedure, that there was no apparent disturbance of the foundation wall nor of the soil adjacent to the basement during the construction phase and he found no evidence of distress caused to the building by the contractor's operation.

56 Mr. Potyondy on the other hand had several criticisms of the work which was done. In his view the sewer line was placed too close to the house causing expansion of the soil during the excavation, the backfilling increased the lateral earth pressure by 60 per cent and as a result of this, there was a settling in the foundation wall, a displacing of the floor system and the possibility that other parts of the house might be subjected to these movements and further damages.

57 He also anticipated possible roof damage and the exposure of electrical wiring. He felt that the water pipe had been placed at too shallow a depth and that any failure of the sewer line could cause flooding of the basement because the depth of the pipe was the same as the depth of the basement and because of the proximity of the pipe to the foundation wall. He was also concerned over the fact that the sewer pipe carried combined sewer, and at heavy rainfall it could be flooded endandering the safety of the house, and further that any flooding of the river increased the flood damage to the house through the sewer pipe.

58 All this evidence was before the trial judge and he quite clearly accepted that of Mr. Yurkiw and Mr. Gary Smith. It is my opinion there is nothing before us to justify a disturbance of the finding of the trial judge, that no damages in the sense of physical damage to the dwelling of the appellants had been established.

59 The final matter for consideration is whether the respondent Douglas committed a trespass on the lands of the appellants for which the latter are entitled to compensation by way of damages despite the finding of the trial judge that there was no proven damage to the house. The trial judge decided that the evidence did not establish such trespass and he made a finding of facts that Mr. Andrews gave Douglas "full consent to enter on the property to do its work." He disagreed with the submission of counsel that the consent of both joint owners was required before legal entry could have been made.

60 Generally running through the arguments of the various respondents on this point, is the theory that Mrs. Andrews had ample opportunity to instruct her husband before she went away in view of negotiations which she had already undertaken with some of the parties and in view of this fact, his actions in authorizing Douglas to enter on the premises was in itself evidence that he was acting with the authority of his wife.

61 As to the position of a joint tenant, the appellants can take some comfort from some of the other cases on landlord and tenant. For example, in *Humphrey v. Stenbury*, (1909) 1 Ch. 244, there was a lease to Ernest George Humphrey and Ellen Ann Humphrey, but the notice of termination of the lease was given by E. G. Humphrey alone. The proviso in the lease dealing with the termination contained the restriction that if "the lessees" should be desirous of terminating the lease at the end of the first three years of the term, six months' previous notice in writing should be given.

62 It was under this express provision that it was held that the notice should have been given by two. Warrington, J., referred to the case of *Doe v. Summersett*, which is reported as *Doe dem. James Aslin and Finch v. Summersett* (1830), 1 B & Ad. 135; 109 E.R. 738. Warrington, J., said that that case had no bearing because there "a person held certain premises as tenant from year to year from certain lessors who were joint tenants, and a notice to quit was given to him by one of them on behalf of all." He then went on to say at p. 246 and p. 247:

> That case only decided that at law in the absence of express terms a notice to quit by one joint tenant is good. The case turned upon the effect of a tenancy from year to year and the nature of the estates of joint tenants at common law, and is not the same as this case, in which the question is whether the notice to quit is good within the terms of the proviso in the lease. The terms of the proviso are express; both lessees must be desirous and express their desire to determine the lease. A notice therefore by one of them cannot be a notice by both to determine the lease.

63 It appears to me that the *Humphrey* case in its exposition of *Summersett* supports the position of the respondents that there was indeed consent on the facts in this appeal.

64 Lord Tenterden, C.J., in the *Summersett* case at p. 739 said this:

> Upon a joint demise by joint-tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint-tenants gives a notice to quit, he effectually puts an end to that tenancy; the tenant has a right upon such a notice to give up the whole, and unless he comes to a new arrangement with the other joint-tenants as to their shares, he is compellable so to do.

65 I acknowledge that the case is at best an analogy, because there were very real reasons at common law why the rule should be as it was in the *Summersett* case. For example, Lord Tenterden continued.

> The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious; for however willing a man might be to be the sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it; and if upon such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint-tenants must have the same right. It cannot be optional on one side, and on one side only.

66 In *Jones v. Phipps* (1868), L.R. 3 Q.B. 567, Sir Maxwell Graves managed the property, which was actually vested in trustees, and there it was held that on the facts, an inference could be drawn that the notice to quit which he gave had the sanction of those trustees and it was unnecessary to show the agency on the face of the document itself - the notice to quit. Lush, J., said at p. 573:

> It is clear that the notice must be such as the tenant may act upon with safety, that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord. The notice in this case does fulfill these conditions.

67 This case is the nearest of this group of authorities to the submission of the respondent. What the respondent is saying is that Mrs. Andrews went away and the Court had the perfect right to draw an inference that in consenting to the entrance of Douglas on the property, Mr. Andrews was consenting not only for himself, but for the other joint tenant, namely his wife.

68 An example of a case going the other way is *Leek & Moorlands Building Society v. Clark and others*, (1952) 2 All E.R. 492, where it was held that in the absence of express authority, it was not competent for one of two joint tenants to surrender rights held jointly. The other cases which I have mentioned were discussed, and under the particular facts of *Leek & Moorlands v. Clark*, Somervell, L.J., said at p. 496:

> It is also to be noted that in Viola's case the court was asked to infer an authority in the husband to act on behalf of his wife. It declined to do so. In the present case there is an express finding of absence of authority.

Viola's case is *Humphrey v. Stenbury*.

69 I quote further from p. 496:

> Even if we are wrong in what we have said with regard to a right to determine within the period of the lease as distinct from a right to terminate a periodic tenancy, we would have thought it plain that one of two joint lessees cannot, in the absence of express words or authority, surrender the rights held jointly. If property or rights are held jointly, *prima facie* a transfer must be by or under the authority of all interested.

70 The trial judge found no trespass. He remarked that Mr. Andrews had assured Mr. DeMings that he in no way was going to prevent him from going ahead.

> In fact, he told them they could park their vehicles in his driveway and anywhere they saw fit around the house and, as already indicated, one night he even moved his own car to the next driveway in order to accommodate them.

71 I have already referred to the respondents' argument that Mr. Andrews was the apparent spokesman and that Mrs. Andrews knew what was to take place.

72 It appears that there was enough before the trial judge to bring the factual situation within the reasoning of *Jones v. Phipps, supra*. This is not an ordinary case of a joint tenant attempting to bind his co-owner prejudicially. I recognize the limitation on consent by a mere co-owner, the effectual consent has been recognized particularly by the American authorities. For example:

> A licence by a cotenant is a good defence for entry on land, although it justifies a taking of part of the realty only to the extent of the licensor's interest; ...
>
> 63 *Corpus Juris*, 958, para. 117; 87 C.J.S., p. 1005.

73 From a review of all the evidence, it is impossible to escape the conclusion that Andrews in giving his consent was purporting to do so not only on behalf of himself but also his wife. Whatever rights Mrs. Andrews may have as against her husband, this consent was adequate authority for the respondent Douglas to enter upon the lands. Mrs. Andrews was out of the Province, leaving her husband ostensibly in control of the property and the only one available to give consent. Surely Douglas was entitled to assume that Andrews had the authority to so give consent not only on behalf of himself, but also on behalf of Mrs. Andrews.

74 Accepting this interpretation of the facts, there was enough before the trial judge on the question of consent to justify his reaching the conclusion he did. That being so, there was no trespass and the findings of the trial judge on this aspect of the case should stand.

75 There may be some doubt as to the finding of dedication, but on the conclusions which I have already reached, it is my opinion that the question of dedication is not vital, and hence it is not necessary to decide this issue.

76 In view of the conclusion I have reached, it is also unnecessary to consider the cross-appeal of Douglas.

77 In the result, the appeal should be dismissed with costs and I would dispose of the costs throughout in the manner in which the trial judge dealt with the costs at the trial.

*Appeal dismissed.*

ANDREWS and ANDREWS v. R. A. DOUGLAS LTD.
and TOWN OF NEW GLASGOW, TOWN OF TRENTON,
TOWN OF STELLARTON and PICTOU COUNTY DISTRICT
PLANNING COMMISSION, Third Parties
Nova Scotia Supreme Court, Trial Division
Dubinsky, J.
May 2, 1975.

HAROLD F. JACKSON, Q.C., and GEORGE W. MacDONALD, for the plaintiffs,
WILLIAM J. GRANT, Q.C., and D. A. CALDWELL and D. R. CHIPMAN, Q.C. for the defendant,
ROBERT B. MacDONALD, Q.C., for the Town of New Glasgow,
ROBERT A. STROUD, for the Town of Trenton,
JOHN B. BAKER, Q.C., for the Town of Stellarton,
ROBERT J. WHITE, for the Pictou County District Planning Commission.

This case was heard by DUBINSKY, J., at New Glasgow, Nova Scotia on December 18, 19 and 20, 1974, and at Halifax, Nova Scotia, on February 25, 26 and 27, 1975. Judgment was delivered by DUBINSKY, J., on May 2, 1975.

78 DUBINSKY, J.: This is an action in trespass. By deed dated May 28, 1955, the plaintiffs herein obtained title to property located on Arch Street in the Town of New Glasgow, County of Pictou, Province of Nova Scotia. I shall hereinafter refer to this property as the "plaintiffs' property." The deed is between W. T. Hayden, Q.C., as Executor of the Will of the late Nettie H. George, and the plaintiffs as joint tenants. The description in the deed is as follows:

> ALL that certain lot, piece or parcel of land, situate, lying and being on Arch Street in the said Town of New Glasgow, and being more particularly bounded and described as follows:
>
> BEGINNING at an iron pin on the western shore of the East River at high water mark and running from thence northerly forty-two degrees east along the shore at high water mark, seventy feet to a point; thence to run still along the same high water mark northerly twelve degrees east fifty four feet to an iron pin on the western shore of the east line of the Railway embankment of the Acadia Coal Company, Ltd.'s, line; thence south fifty-seven degrees west one hundred and twenty-six feet along the eastern embankment of the said Railway line; thence south fifty-two degrees east sixty-one feet to the place of beginning, being and intended to be the same lands as were conveyed by deed of Daniel Chisholm, Chief of Police to George Cashen, dated Sept. 15th, 1913, and recorded in the office of the Registrar of Deeds at Pictou, N.S., in Book 168, page 80, and later conveyed by Deed Lizzie and Henry Mamy to Freeman George (now deceased) and Nettie Helena George, as Joint Tenants, dated Sept. 1st, 1929, as recorded in said office in Book 329, page 7, and as conditionally conveyed by Nettie H. George to Harold and Goldie Jack, by Deed dated August 9th, 1952, registered in Book 360, page 174, and reconveyed by Deed from Harold Jack and Goldie Jack, dated October 10th, 1953 as registered in said Registry Office on October 14th 1953, in Book 370 page 122.

79 The plaintiffs had lived in the house located on the property as tenants from October 26, 1954, until the date of the purhcase, May 28, 1955, and have lived there continuously ever since.

80 The defendant, R. A. Douglas Limited, and the Pictou County District Planning Commission, which I shall hereinafter refer to as the "Commission", entered into an agreement on July 9, 1973, under which the said defendant undertook to construct a portion of a sewer line in the Town of New Glasgow. It is now alleged (see the Statement of Claim) that subsequently the following took place on the plaintiffs' property:

> In or about August 1973, the defendant, its servants or agents, broke and entered upon the lands of the Plaintiffs and excavated large portions of the land and caused a sewer pipe to be laid in close proximity to the Plaintiffs' home, thereby creating a danger to the home and interfering with the plaintiffs' plan to have the home divided into flats, caused the water line serving the Plaintiffs' home to be relocated above the frost line, caused structural damages to the Plaintiffs' home, interfered with the Plaintiffs' enjoyment of their lands and caused other damages to the Plaintiffs.
>
> The Defendant never requested permission from the Plaintiffs to enter upon the Plaintiffs' land and refused to vacate the lands when ordered to do so by the plaintiffs but continued to carry out work on the Plaintiffs' lands.

81 The plaintiffs contend that:

> The wrongful entering by the Defendant onto the Plaintiffs' lands and the laying of the sewer pipe in the plaintiffs' lands by the Defendant constituted and continues to constitute a trespass;

and accordingly, the plaintiffs claim:

(i) Special damages;

(ii) General damages;

(iii) Punitive and exemplary damages;

(iv) An order requiring the Defendant to remove the sewer lines from the plaintiffs' lands and restore the lands to their original condition.

82 An Originating Notice (Third Party) dated November 12, 1974, was served on the Town of New Glasgow, Town of Trenton, Town of Stellarton and the Pictou County District Planning Commission. I shall hereinafter refer to the aforesaid as the "third parties." Each of the third parties subsequently filed a Defence. It is to be noted, however, that the Defence of the defendant, R.A. Douglas Limited, was filed on September 24, 1974. Rule 17.02(1) of the Nova Scotia *Civil Procedure Rules* states as follows:

> 17.02(1) Where a defendant claims against any person, who is a co-defendant or who is not a party to the proceeding, that the latter is or may be liable to him for all or any part of the plaintiff's claim against him, the defendant may, before he issues his defence or appears on a hearing under an originating notice, issue and serve an originating notice (third party) without the leave of the court, and thereafter with leave.

83 There was no leave obtained from the Court to issue the Originating Notice (Third Party). The defendant did, belatedly, ask for leave but in the first instance, I refused to grant such leave. On the contrary, I signed an Order directing that the Originating Notice (Third Party) and the Defences filed on behalf of the third parties be struck out.

84 It appears, however, that following this Order, agreement was reached between the respective counsel acting for the plaintiffs, defendant and third parties whereby it was agreed that the third parties could be brought into this action and that they might file Defences and participate fully in the trial of the action. An

order to that effect was granted by me on December 18, 1974.

85 Three issues fall to be decided in this case. Firstly, did the defendant company trespass on the plaintiffs' property? Secondly, whether or not there was a trespass, did the defendant company cause damage to the plaintiffs' property, and thirdly, if indeed there was damage done, what damages did the plaintiffs' suffer?

86 Quite a number of witnesses testified before me in the course of this six-day trial, but it is my intention to refer in some detail only to the testimony of a few of these.

. . .

(DUBINSKY, J., then reviewed the evidence):

. . .

87 The male plaintiff, John William Andrews, did not give evidence during the trial although he had been examined earlier on discovery. In *Connor et al. v. MacCulloch et al.* (1973), S.H. 02307 (unreported), I discussed the rule generally followed by the Courts where a party fails to testify. *Corpus Juris Scundum*, Vol. 31A, s. 156 (4) under the heading of "Failure of Party to Testify", states as follows:

> While there is some authority to the effect that the failure of a party to testify creates no unfavorable inference, as a general rule the non-appearance of a litigant at the trial or his failure or refusal to testify respecting facts and circumstances which would appear to be material to the case which such party is endeavouring to establish, and peculiarly within his knowledge creates an inference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention. Thus, the failure of a party to testify may invite the indulgence against him of every inference warranted by the evidence presented by his adversary.

88 In *Royal Trust v. T.T.C.*, (1935) 3 D.L.R. 420, at p. 422, S.C.R. 671 at p. 422, S.C.R. 671 at p. 675, Davis, J., says:

> The absence of any evidence from either the motorman or the conductor on the street car is not without significance, and we are entitled to draw reasonable inferences from such oral testimony as was given at the trial.

89 There have been quite a number of cases dealing with the same point, one of the more recent being *Sandison v. Rybiak et al.* (1974), 39 D.L.R. (3d) 366, where Parker, J., said at p. 373.

> Where a defendant can, by his own testimony, throw light upon matters in issue necessary to his defence and fails to go onto the stand the Court is entitled to infer that his evidence would not support such a defence.

90 Mr. Andrews' failure to testify was accounted for by his physician, Dr. Henry John Townsend, who said that this plaintiff's heart condition was such that he could not give evidence in Court or even in the privacy of his home. I must confess to some puzzlement as to the medical testimony presented. Mr. Andrews had apparently called for and brought a witness to Court in Pictou. Moreover, he drove his car to Halifax the night before the case was to be heard there and returned the next morning to New Glasgow. Speculate though I may, I cannot disregard Dr. Townsend's unequivocal remark when it was suggested to him that Mr. Andrews might, without serious danger to himself, testify in Court or at home as long as the doctor were present. He said, "No, I wouldn't take the responsibility." That is sufficient for me and removes any inference that I might otherwise have drawn from Mr. Andrews' non-appearance as a witness.

. . .

91 I readily concede that despite this quite lengthy summation of the evidence,

I must have left out certain portions which one or another of the parties probably feels should have been touched upon. Nevertheless, I am satisfied that I have summarized enough of the testimony of this six-day trial to enable me to reach a conclusion which in my view, with respect to contrary opinion, is justified in the circumstances.

92 I have endeavoured to read all the cases cited by the several counsel in this case as well as examining others which I considered pertinent. On the question of title and possession, I have particularly noted *Cunard v. Irvine* (1853), 2 N.S.R. 31; *Cameron v. MacDonald* (1956-59), 3 N.S.R. 240; *The Halifax Power Company Limited v. Christie* (1914), 48 N.S.R. 284; *McIsaac v. McKay* (1916), 49 N.S.R. 476; *Ezbedy v. Phelan* (1958), 11 D.L.R. (2d) 660; and *Elliot v. Jardine* (1961), 45 M.P.R. 104.

93 Among the cases dealing with the question of dedication, the following were perused by me: *Harrison v. Harrison* (1883), 16 N.S.R. 338; *G.T.R. v. Toronto* (1906), 37 S.C.R. 210; *Macoombe et al. v. Town of Welland* (1907), 30 O.L.R. 335; *DeYoung v. Giles* (1915), 26 D.L.R. 5; 49 N.S.R. 398, *Bailey v. City of Victoria* (1920), 60 S.C.R. 38, *Wright v. City of Sydney* (1944), 18 M.P.R. 20; and *Williams and Wilson Limited v. Toronto and A. G. Ontario*, (1946) 4 D.L.R. 278.

94 I looked at several cases dealing with the question as to a variance in a description between monuments or other landmarks on the one hand and courses and descriptions on the other. Particularly have I examined *Doyle v. MacPhee* (1895), 24 S.C.R. 65; *Blackadar v. Hart* (1917), 35 D.L.R. 489 (a decision of our Court); *Boyd et al. v. Fudge et al.* (1964), 46 D.L.R. (2d) 679; and *Saueracker et al. v. Snow et at.* (1974), 14 N.S.R. (2d) 607, 47 D.L.R. (3d) 577 (a decision of our Court).

95 Finally, on the questions of damages and injunction I have reviewed a number of leading cases as well as having examined those cited by counsel. Included in this list were such cases as *Carr-Harris v. Schacter and Seaton* (1956), 6 D.L.R. (2d) 225; *Rookes v. Bernard*, (1964) 1 All E.R. 367; *McElroy v. Cowper-Smith and Woodman* (1967), 62 D.L.R. (2d) 65; *Govzenko v. Lefolli*, (1967) 2 O.R. 262; *Bonham-Carter v. Hyde Park Hotel, Limited* (1948), 64 T.L.R. 177, *Grouse v. Wright*, (1923) S.C.R. 214; *Gallant v. MacDonald* (1970), 3 N.S.R. (2d) 137 (a decision of our Court); and *Shelfer v. City of London Electric Lighting Company*, (1895) 1 Ch. 287.

96 That well reasoned decisions can be of considerable help to a judge is undoubted and, indeed, I intend to quote the language found in one or two of the above-cited cases. But I am not unmindful of what Lord Wright said in *Tidy v. Battman*, (1933) All E.R. 259, at p. 260:

> I think it is a pure question of fact . . . no one case is ever like another . . . I think it is very unfortunate that matters that are purely matters of fact should be confused by importing into them principles of law which I am sure very properly have been applied in helping in the decision of other cases on other sets of facts.

I also have in mind a similar word of caution expressed by Ritchie, J., in *The Minister of Transport for the Province of Ontario v. Canadian General Insurance Company*, (1927) S.C.R. 234, at p. 238:

> . . . the issue falls to be determined according to the facts of each particular case and that precedents are accordingly of little value.

97 Was there a trespass committed in this case? To begin with, I am satisfied and find as a fact that the strip of land in dispute herein is included in the lot conveyed to the plaintiffs by deed dated May 28, 1955. I have reached this conclusion not by adopting the plan or reasons put forward by Mr. Kenneth W. Robb. On the contrary and with deference to this experienced surveyor, I reject the opinion expressed by him as to how one should plot the dimensions of the plaintiffs' property. Having satisfied himself that there was no documentary evidence to indicate a right-of-way over the Andrews' property, Mr. Robb apparently set about establishing a description which would bear out his conviction that there was no such right-of-way.

98 Thus, he began by disregarding the beginning point mentioned in the deed. Never in his career had he used a high water mark as a starting point, he said, and it cannot be gainsaid that the pin mentioned in the deed is no longer there. Moreover, there was to be found on the eastern boundary of the Acadia Coal Company railroad right-of-way the iron pin that was noted by him on his plan - Exhibit 15 - and by Mr. Parker on his two plans - Exhibits 3 and 5. Although the pin "on the western shore of the East River at high water mark" which is mentioned in the Andrews deed is no longer there, I do not think it was so difficult to determine where it had been.

99 There is no doubt about the FIP on the railroad right-of-way embankment. The Freeman George deed tells us to go 60 feet "from the base of a hawthorn tree growing at the southwest angle of the lot now occupied by Freeman George" (Andrews lot) and along the railway line "to an iron pin there placed." There is, of course, no iron pin there now. But if we stop at the end of 60 feet and then go "South 44° 100 feet . . . or . . . to high water mark on the western shore of the River", we do come to another existing FIP. In order to find the approximate location of the pin (now missing) referred to as the beginning point in the Andrews deed, all one must needs do is to follow the course of the river at high water mark from the FIP or southeastern corner of the Freeman George lot for 60 feet. There is not the slightest doubt in my mind that by doing so, one comes to the stone or brick wall referred to several times by previous witnesses. It is my view that one *can* ascertain the starting point of the plaintiffs' deed, *viz.* at a certain point on the western shore of the East River at high water mark.

100 The problem, of course, is that once having determined the beginning point or approximate beginning point of the Andrews lot and then having gone North 42° East for seventy feet and thence North 12° East for fifty-four feet, one does not come (to quote the 1955 Andrews deed and the 1913 deed from Daniel Chisholm to George Cashin) "to an iron pin on the western shore and at the Eastern line of the Railway embankment of the Acadia Coal Company's railway line." (Incidentally, the 1913 deed has a clearer description than the 1955 deed.) In other words, by following the bearings and the exact distances given in these deeds, one does not reach the railway embankment. There can be no doubt that if the dimensions in the 1919 deed from Daniel Chisholm to Freeman George are accepted as correct - and I do - the southwest corner of the Andrews lot must be on the eastern margin of the Acadia Coal Company railway line. To add to the difficulty, if one goes South 52° East 61 feet, one does not reach the aforementioned place of beginning. I presume that it is because of this apparent difficulty that Mr. Robb was led to conclude that there was an original high water mark some twenty feet to the west of the 1975 high water along the eastern boundary of the Andrews lot.

101 Notwithstanding Mr. Robb's reasoning, I am not satisfied that the evidence establishes a so-called original high water mark. Rather, I consider the 1913 high water mark to have been in the same place as the 1975 high water mark. I have no hesitation in discarding distances in favour of "monuments" or "landmarks" where there is conflict. I hold therefore that regardless of distance, the second course in the deed runs *to the embankment*, a monument, that the third course runs along the embankment South 57° West for one hundred and twenty-six feet to a point on the embankment and that the fourth course runs easterly to the point of beginning (regardless of the sixty-one feet mentioned in deed).

102 This point has been considered by our Court many times. For example, in *Blackadar v. Hart* (1917), 35 D.L.R. 489, Graham, C.J., for the Court *en banc* said at p. 492:

> A rule has been adopted in America and followed in Nova Scotia that when 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 that 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. (My italics)

103 More recently in the Trial Division, my brother, Jones, J., dealt with the matter in *Saueracker et al. v. Snow et al.* (1974), 47 D.L.R. (3d) 577. The headnote taken from the report of that case says:

> In construing a deed effect is to be given to those things which men are least likely to mistake. As a result when there is a variance between monuments and courses and distances in a deed, courses and distances are to be rejected as false descriptions and the monuments are to govern. *Boundary fences and a shore are fixed monuments to be accepted in preference to courses and distances.*
>
> (my italics)

104 Having concluded that the land in dispute was included in plaintiffs' lot, the next question is whether a trespass has taken place herein. Having examined the evidence carefully, I have come to the conclusion that the defendants did not commit a trespass against the property of the plaintiffs. I say this for two reasons.

105 Firstly, I am satisfied by a preponderance of evidence and I find as a fact that the area in question previously and *up to the time of the alleged trespass* had been treated as a public way. Not only is this abundantly clear from the evidence of such witnesses as Howard MacKay, George Keough, Francis MacDonald, Gary Smith and Kenneth Cameron, the last of whom could not be treated as anything but a completely independent witness, but it also emerges from the testimony of John A. Andrews, son of the plaintiffs. Although I found incredible his assertion that he had not gone down the basement during the time when the work was in progress or on his mother's return, nevertheless I did find it significant that on several occasions he referred to the disputed area as a roadway or road. When this was brought to his attention, he said, "I've always referred to it all my life as the road." Even Mrs. Andrews herself, in the course of her testimony, at least on one occasion referred to the disputed area as "our Street." Significantly too, the description of the lot in the plaintiffs' deed of 1955 begins thus: "All that certain lot, piece or parcel of land situate, lying and being *on Arch Street* in the said town of New Glasgow."

(my italics)

106 Where the evidence of the aforesaid five defence witnesses is in conflict in this regard with that of the evidence of the plaintiff, Doris Helen Andrews, her son, John A. Andrews, Mrs. Harold Jack and her husband, Harold Jack, and other witnesses called for the plaintiffs, I accept the evidence of Messrs, MacKay, Keough, MacDonald, Smith and Cameron over that of the others.

107 The authorities are abundantly clear that in order to raise a presumption of a public right to use a roadway, it is not necessary to produce evidence of a grant or conveyance. A public right is inferred to exist from the public user. I hold that there has been undoubtedly a dedication to and user by the public of the strip of land in dispute herein as a roadway or right-of-way for many years.

108 There are many authorities on this point and I have mentioned some earlier. At this time, I merely wish to quote from *DeYoung v. Giles* (*supra*) at p. 403 where Harris, J., said:

> The question is whether there has been a dedication and user. This is a question of fact. The intention to dedicate a highway may be openly expressed in words or writing, but as a rule it is a matter of inference. No formal act of acceptance by the public is required, but acceptance may be inferred from public user of the way, and the authorities lay it down that open and unobstructed user by the public for a substantial time is the evidence from which a jury may infer both dedication and acceptance.

109 I would add that the words of Drysdale, J., in the same case at p. 409 are particularly fitting to the present case. He said:

> The evidence in this case is strong that the way in question is and for long has been treated as a public way. So much in this the case that I think

the acts in question - really acts carrying out what was considered repairs to the public highway - must have been considered rather a shock to the parties performing the work when they were treated as a trespass.

110 Counsel for the plaintiffs on p. 12 of their final very comprehensive Brief urged that if dedication had in fact been established, that the public right-of-way has been abandoned for the past eight years. Services have been stopped since then and there is now a fixed barricade preventing public access to the plaintiffs' property. I cannot accept this submission. The circumstances herein as of August, 1973, were not such as to bring them within the well-reasoned decision of Cooper, J.A., in *Finley v. Sutherland* (1969), 4 D.L.R. (3d) 586. The barricade now there was put up after Mrs. Andrews returned from the west.

111 Secondly, I am satisfied that there was no trespass because Mr. Andrews' conduct at the time in question negated any suggestion of trespass taking place on his property by Mr. DeMings and his crew of workmen. Apart from the fact that Mr. Andrews expressed the opinion that he owned the property between his house and the railway right-of-way and that someone should come to him to discuss the matter, he assured Mr. DeMings that in no way was he going to prevent them from going ahead. In fact, he told them they could park their vehicles in his driveway and anywhere they saw fit around the house and, as already indicated, one night he even moved his own car to the next driveway in order to accommodate them. Where there is conflict on this issue between the testimony of Mr. DeMings on the one hand and that of the plaintiffs, Mrs. Andrews at the trial and Mr. Andrews on discovery, their son, John A. Andrews, and Mrs. Stone, mother of Mrs. Andrews, on the other hand, I accept that of Mr. DeMings. I find that Mr. Andrews gave the defendant full consent to enter on the property to do its work.

112 As for plaintiffs' counsels submission on pages 13 *et seq.* of their Brief that the consent of both joint owners was required before a legal entry could have been made on plaintiffs' property, I respectfully disagree. *Country View Limited v. City of Dartmouth* (1972) S.H. No. 00823, an unreported decision of my brother, Cowan, C.J.T.D., and other cases on this point cited by plaintiffs' counsel do not, in my view, support their contention.

113 That there was no trespass committed against the plaintiffs' property by the defendant does not end the matter. There being no trespass here, the next question is whether or not there was a nuisance and whether the nuisance was actionable. There is little doubt that to be actionable, a nuisance must do something more than merely interfere with a plaintiff's enjoyment of his property. It has long been recognized that those of us who dwell in urban communities have to put up with temporary interference in the enjoyment of our property. Modern life with its constant surge to expansion and improvement could not go on if such was not the case. But when material damage to a person's property results, a completely different situation arises. The distinction was exceptionally well drawn by Lord Westbury, L.C., in *St. Helen's Smelting Co. V. Tipping* (1865), 11 H.L.C. 642; 11 E.R. 1483, over a century ago and I consider this case to make good law and common sense today.

114 It must be proven that the plaintiffs suffered structural damage to their property and that this was due to the nuisance created by the operation of the backhoe and other machines in the vicinity of or adjacent to the house of the plaintiffs. The burden, of course, is on the plaintiffs.

115 To begin with, it is my view that the plaintiffs' house is fifty-nine years old at least. On September 15, 1913, the lot on which the house is built was conveyed by Daniel Chisholm to George Cashin. The consideration shown is $1.00 which was very likely a nominal figure. (This practice in conveyancing obtains to this date.) Whatever was the price for the lot, the fact is that when George Cashin conveyed the property on April 1, 1916, to Lizzy Mamy, the consideration shown is $410.00 which, in my view, could not possibly have been the price for a lot alone in those years but must have been for the house that had been erected thereon. Undoubtedly, the Mamys and the Freeman Georges and the Andrews made improvements and renovations to the structure over the years, but the fact remains that is it an old house.

116 Gary Smith, the adjustor, visited and inspected the house on July 31, 1973, prior to any work being done alongside of it by the defendant's workmen. He found, as already stated, that the interior of the house was in excellent condition with no visible cracks or breaks. He found, however, areas in the basement walls which showed the cement to have been badly deteriorated. On May 2, 1974, he paid a return inspection visit to the house and saw no change in the condition of the basement wall from what it was on July 31, 1973, nor did he see there anything visible, in the way of damage, that could be attributed to the excavation work done by the defendant. Mr. Andrews, when questioned by Mr. Smith, advised him that there had been no structural damage done whatsoever.

117 Gary Smith, in my opinion, stood to gain not one iota by reporting the situation differently from what he found it. However, his testimony does not stand by itself. As already noted, Vernon DeMings, the defendant's general superintendent, had spoken with the male plaintiff immediately after the work had been completed and also some months later that year, when his workmen were putting more gravel on the plaintiffs' driveway. On each occasion, he had asked Mr. Andrews as to any damage that might have occurred and was assured by this plaintiff that there had been no damage. Moreover, Mr. DeMings was with Mr. Gary Smith on the latter's visit to the plaintiffs' home on May 2, 1974, when once again Mr. Andrews stated that there had been no damage done.

118 I found Vernon DeMings and Gary Smith to be credible witnesses and I have not the slightest doubt that Mr. Andrews assured them that no damage had occurred as a result of the excavation work carried on close by to this house. In the face of the several statements attributed to the plaintiff, John William Andrews - none of which had been contradicted - and made by him before this action was commenced, the testimony relative to damage now given at the trial by the plaintiff, Doris Helen Andrews, and by her son, John A. Andrews, is simply not credible and I do not accept it. Moreover, in view of what Mr. Andrews said on the aforementioned occasions, the testimony of the expert witness, Dr. Potyondy, loses its potency. Notwithstanding the strong submission made by plaintiffs' counsel on page 21-29 of their Brief, I find that the plaintiffs have failed to discharge the burden on them of proving damage by a preponderance of evidence. I would add that Mr. Andrews' statements only served to confirm the impression I received from the testimony of Mr. DeMings as to the care exercised by the defendant's workmen as the work proceeded past the plaintiffs' property. I would also infer that the same care was taken by Mr. DeMings and his crew throughout this major undertaking designed to improve materially the quality of life for all citizens of the communities involved.

119 Accordingly, the action of the plaintiffs against the defendant is dismissed with costs to be taxed. As between the defendant and third parties, there was comparatively little evidence led as to the respective areas of responsibility. I am bound to say that had I found liability against the defendant on account of negligence, I doubt very much if I would have attached liability to the third parties. The principle upon which an employer is liable for damage caused by his independent contractor is well known and has been stated in countless cases. See for example, *The City of St. John V. Charles Donald*, (1926) S.C.R. 371, where Anglin, C.J.C., said at p. 383:

> The employer is never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in the carrying out of the contract; and it is not universally true that he is responsible for injury occasioned by improper or careless performance of the very work contracted for; he is not so where the work is not intrinsically dangerous and, if executed with due care, would cause no injury, and the carrying out of it in that manner would be deemed to have been the thing contracted for. His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done in so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precaution would be indisputable. That duty

> imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it. That, I take it, is a principle applicable in such a situation whatever be the nature otherwise or the locus of the work out of which it arises.

120 In the present case, I do not consider the nature of the work to have been so inherently dangerous as to have called for the application of the above principle. It is far different from the situation which obtained in the *City of St. John* case (*supra*) (where dynamite was involved) or that which arose in *Chappel's Limited v. Municipality of the County of Cape Breton* (1963), 36 D.L.R. (2d) 58 (where a blow torch was used). The *Chappel* case was ultimately decided on another point. Moreover, I have perused the contract between these parties - Exhibit 21 - and I fail to find any ground for liability of the third parties in the circumstances disclosed in evidence. I therefore dismiss the defendant's proceedings against all the third parties with costs to be taxed against the defendant. There will, however, be only one Brief and one Counsel Fee taxed by the Third Parties. It is not for me to speculate as to whether or not it was essential or reasonable to have brought in the third parties in this action. I merely wish to say that I see no reason why the plaintiffs should bear the costs of any party other than those of the defendant. In other words, I do not propose to grant a so-called "Bullock order" herein. See my views expressed in *Wellington v. Oldum et al.* (1971), 4 N.S.R. (2d) 223; 19 D.L.R. (3d) 121. Thus, the defendant cannot recover from the plaintiffs the costs which it will have to pay to the third parties.

121 I would be remiss if I did not record my thanks to all counsel for their very helpful Briefs.

*Judgment for the defendant.*

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