CASE REPORTS

CONCERNING

LEGAL PRINCIPLES OF BOUNDARIES

VOLUME 2

Nova Scotia Reports (Second Series) (Vol. 18 - 178)

Published by

The Association of Nova Scotia Land Surveyors

Introduction

In 1977, The Association of Nova Scotia Land Surveyors published "Case Reports Concerning Legal Principle of Boundaries," a collection of case reports related to issues of boundaries and land surveying. The colleted cases were taken from the Nova Scotia Reports and covered a time span from 1965 to 1977. The book became affectionately known as "the blue book" based on the colour of the binding. J.F. Doig edited the book and in his comments in the introduction he said:

> "The aim has been to help all concerned in such matters gain a better understanding of the law related to boundaries."

Not surprisingly, the aim of this publication is the same.

In January, 2001, the Association of Nova Scotia Land Surveyors authorized the production of a new publication which would update the blue book and deal with cases which had been decided in the Courts of Nova Scotia from 1977 to date.

I have thoroughly enjoyed editing this book and, to echo Jim Doig's comments from the original, I learned a lot.

Some comments about the book are in order.

I have been advised that the words of the Judges recorded here are in the public record, that is, neither the Crown nor the Judges claim copyright to that material. The copyright to the remainder of this book has been assigned to the Association of Nova Scotia Land Surveyors.

The summaries of the cases have been written by me. They are intended to serve as introductions to the cases, not as full examinations. The reading of case reports is often a very daunting exercise, because they are very formal and usually contain no graphics to help get the reader oriented to the facts. The summaries and particularly the included sketches are intended to allow the reader to get into the flow of the actual case report more easily.

I have attempted to maintain balance in writing the case summaries. It was certainly not my intention to take sides in cases where one land surveyor "won" and one "lost." Land surveying is an art, not a science. Hopefully, we all learn when the boundary opinion of one of us is preferred to that of another.

Some reported cases which deal with boundary issues have been omitted, simply because they are not instructive reading. This is generally because the case involves a lot of discussion of facts and evidence and very little discussion of the principles of law which guide the Judge. In some other cases, the decision is simply impossible to understand without access to plans and other exhibits which were not included in the case report.

The cases have been indexed into a number of categories. Many appear in more than one category since they deal with more than one issue.

The digital version of this book includes the cases in two formats - wordperfect 8 files and pdf files. The pdf files can be read with Adobe Acrobat Reader, which may be downloaded free from the Adobe website at www.adobe.com. Simply download the appropriate version of the Acrobat Reader program and then click on the file you want to read. The pdf index file allows you to navigate among the cases by clicking on the case names which are linked to the case files on the CD.

I wish to thank the Association of Nova Scotia Land Surveyors for the opportunity to be involved in this project. I also wish to thank my wife Pam for her many hours of patient proofreading.

James S. Dobbin
Bridgetown, N.S.
May 15, 2001

Topical Index to Cases

Procedure for Retracement Surveys

Conventional Line Agreements

Dedication and Acceptance

Adverse Possession/Colour of Title

Prescription

Easements

Presentation of Evidence

Estoppel

Negligence

Interpretation of Descriptions

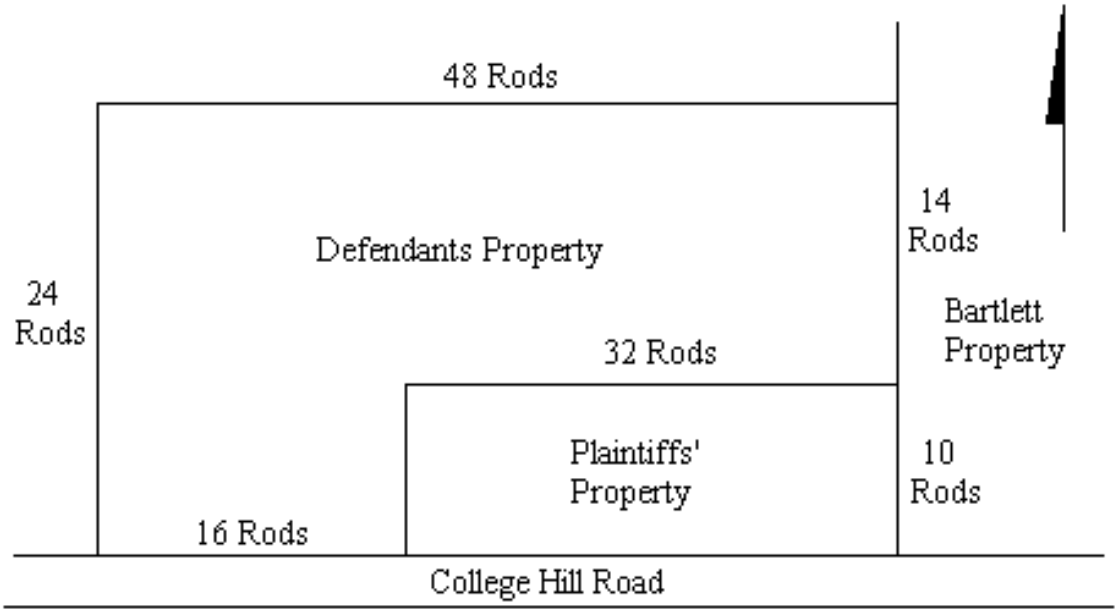
Water Boundaries

Professional Issues

Alphabetical Index to Cases

NELSON AND NELSON v. VARNER 20 N.S.R. (2d) 181
Nova Scotia Supreme Court, Trial Division
Morrison, J.
February 18, 1975.

The Plaintiffs and the Defendants owned adjoining properties on College Road at Bible Hill, Colchester County. The properties were configured as shown on the following sketch:



In the 1940's, both properties had been owned by a Margaret O'Connell (the mother of the female Plaintiff) as one parcel. At that time, she subdivided the property and conveyed the Defendants lands to him, while retaining the 32 Rod by 10 Rod parcel for herself. She subsequently conveyed this parcel to her daughter and her son-in-law (the Plaintiffs.) At the time of the subdivision in the 1940's, Margaret O'Connell's husband and the Defendant laid out the rear line of the Plaintiffs' property by measuring distances and they put in stakes along the line. They then constructed a wire fence which was strung between the stakes and some trees which were on the line. That fence remained for many years and both sides respected it and occupied up to it.

In 1972, the Defendant decided to convey a building lot along the road and beside the Plaintiffs' land to his son. His son retained a Nova Scotia Land Surveyor to lay out the new lot. When the land surveyor completed the fieldwork and prepared a plan the Defendant strongly objected to the position of the northern and eastern boundaries of the Plaintiffs' land as shown on the plan. Relations between the

parties apparently deteriorated and eventually, the Plaintiffs sued the Defendant for trespass and for a declaration fixing the location of the boundary between them as shown on the surveyor's plan.

The land surveyor testified as to the method he had used to establish the boundaries of the Plaintiffs' property. He indicated that he had been able to determine the western boundary of the adjoining Bartlett property. He then measured 33 feet from the centre line of the road along the Bartlett western line and used that as his starting point for the survey. From the starting point, he measured 10 Rods as the depth of the Plaintiffs' land. He then laid out the rear line of the Plaintiffs' land parallel to the road and from there, the rest of the parcel. The northern line of the Plaintiffs' land as established by the land surveyor was some 10 - 12 feet north of the remains of the fence. The surveyor admitted that he had made an error in converting the length of the rear line of the Plaintiffs' land from rods and as a result, the west line of the Plaintiffs' land was positioned 7 feet too far to the west.

The Judge reviewed the evidence and rejected the method used by the land surveyor. The Judge found that there had been significant work on the north side of the College Hill Road in the 1960's and determined that the method used by the land surveyor would result in his placing the north line of the Plaintiffs too far to the north if the alignment of the road had been shifted as a result of that work.

The Judge then found that the building of the fence had amounted to a conventional line agreement between the respective owners in the 1940's. The Judge determined that the parties had respected the fence line from the time it was built until the time of the survey. He reviewed cases which dealt with conventional lines and found that the present case met the requirements set out in those cases.

The Judge then discussed cases which dealt with the evidence to be used to relocate original boundary lines, particularly those that dealt with the use of fences to locate the original boundaries. This part of the Judge's reasoning is unclear. It would certainly have been open to him to find that the fence was what the parties had used to demarcate their common boundary, and so the fence would now amount to original monumentation of the boundary. Instead, the Judge continued to speak of conventional line agreements and it seems that he was confusing the two issues.

Finally, the Judge found that the Defendant had established that the fence was the boundary between the parcels based on adverse possession.

The Judge issued an order that the fence was the boundary, awarded the Defendant $10.00 in damages and awarded costs against the Plaintiffs.

NELSON AND NELSON v. VARNER
Nova Scotia Supreme Court, Trial Division
Morrison, J.
February 18, 1975.

This is an action for trespass on property, commenced by the plaintiffs seeking damages for the said trespass on their property by the defendant, and also for a declaration fixing the rear boundary line of the plaintiffs' property. The defendant counterclaimed for trespass and injury to the land and for conversion.

The property in issue in this matter is situate on College Road, Bible Hill, Colchester County, Nova Scotia. A surveyor's plan of the property in issue showing the relevant portions of both the plaintiffs' property and the defendant's property was admitted into evidence as Exhibit P/3, by agreement of both counsel.

The defendant, William E. Varner, received a conveyance of property from Margaret Janet O'Connell by deed dated August 28, 1944. This deed has been admitted into evidence by agreement of both counsel and marked as Exhibit P/2. The description on that deed is as follows:

> ALL THAT CERTAIN lot, piece or parcel of land situate, lying and being on the North side of the Old Pictou Road at Bible Hill aforesaid, bounded and described as follows: BEGINNING at a stake, a distance of ten (10) rods in a Northerly direction from the Southwest corner of lands owned or in the possession of Charles H. Bartlett on the North side of the said Road; thence running Northerly along said Bartlett lands fourteen (14) rods to a stake; thence running in a Westerly direction parallel with the said Old Pictou or College Road distance of forty-eight (48) rods to a stake; thence Southerly a distance of twenty-four (24) rods or to the said Old Pictou Road; thence East a1ong said Old Pictou Road sixteen (16) rods to a point thirty-two (32) rods from the southwest corner of said Charles H. Bartlett's lands; thence northerly parallel with the said Charles H. Bartlett's lands ten (10) rods to a stake; thence easterly parallel with the said
> Old Pictou Road thirty-two (32) rods to a stake the place of beginning,
>
> Being a portion of the same lot of land conveyed to the said Margaret J. O'Connell by Ada E. Melvin dated the 21st day of April, A. D. 1944 and registered in the Office of the Registry of Deeds for the County of Colchester at Truro aforesaid in Libro 209, Folio 473.

The defendant apparently erected a dwelling-house and has lived on this property since that time.

Margaret Janet O'Connell is the mother of the female plaintiff, Mary Nelson. Mary Nelson is the wife of the other plaintiff, Robert Nelson. Margaret Janet O'Connell on August 28, 1957, conveyed certain lands which lay immediately adjacent to College Road, Bible Hill, in the County of Colchester, to the plaintiffs. A copy of this deed was admitted into evidence by agreement of both counsel as Exhibit P/1. The description on that deed is as follows:

> ALL that certain lot, piece or parcel of land situate, lying and being on the North side of the Old Pictou Road, (now called College Road) at Bible Hill in the County of Colchester and Province of Nova Scotia, and now or formerly bounded and described as follows: BEGINNING at the Southwest corner of lands owned or in the possession of one Charles H. Bartlett on the North side of College Road; thence running Northerly along the said Bartlett lands a distance of One Hundred and Sixty-five (165) feet, more or less to a stake; thence running in a Westerly direction on a line parallel with the North side of College Road a distance of Five Hundred and Thirty-five (535) feet, more or less to a stake; thence in a Southerly direction on a line parallel with the East line of the lands herein conveyed, a distance of One Hundred and Sixty-five (165) feet, more or less, to the Northern boundary of the said College Road; and thence in an Easterly direction along the northern boundary line of the said College Road a distance of Five Hundred and Thirty- five (535) feet, to the place of beginning; being and intended to be a portion of the lands conveyed by Deed to the said Margaret Janet O'Connell by Ada E. Melvin and recorded in the Registry of Deeds Office in Truro, N.S., in Libro 209, Folio 473.

The plaintiffs' land was bounded on two sides by lands belonging to the defendant, that is, to the north and to the west. In this particular action it is the north or rear common boundary line between the plaintiffs' property and the defendant's property that is now in dispute. Exhibit P/3 clearly shows the lands of Robert Nelson and indicates the north and west the lands of William Varner. Subsequent to the commencement of this action the defendant, William E. Varner, conveyed all of his property, in and around the Nelson property, to his son, Alex Varner. This was done in November of 1973. This deed was submitted into evidence by defence counsel as Exhibit 14.

At the commencement of trial counsel for the plaintiffs moved to add Alex Varner as a second defendant to the action. This motion was not opposed by defendant's counsel and the motion was granted.

In the spring of 1972, the defendant William Varner agreed to grant his son, Alex Varner, a building lot from the defendant's main lot. Alex Varner on his own initiative made arrangements with a surveyor, Mr. K. P. MacDonald, to have his lot surveyed. Since the proposed lot that Alex Varner sought would be adjacent to the western boundary of the plaintiffs' land, Alex Varner approached the plaintiffs regarding the survey. It was agreed at that time that in addition

to surveying Alex Varner's lot the surveyor would also survey the two common boundary lines between the plaintiffs' lot and that of the defendant, William Varner. These arrangements were made without consultation with the defendant, William Varner, and he did not personally engage the surveyor nor did he authorize his son to do so for him. The surveyor came out to the locale and he did the survey without actually consulting any of the principals involved.

He finished his survey on April 7, 1972, and had the printed surveys ready at that time. A copy of this survey was picked up by William Varner, but at the time he picked it up he voiced objection to the placing of the northwest corner of the Nelson lot and expressed strong disagreement with the result of the survey. In the summer of 1972, the plaintiff, Robert Nelson, constructed a wire fence along the west boundary of his land and along one-third of the north boundary of his land as these boundaries were shown on MacDonald's plan, Exhibit P/1. The defendant tore down this fence and threw the wires and posts back on what he believed to be Nelson's land.

Apparently, an old fence line had been constructed in the year 1944 to indicate the boundary line between the lands of Margaret J. O'Connell, and subsequently the plaintiffs, and the lands of William Varner. This was an old wire fence which used existing trees in many areas as fence posts. This line would be approximately ten to twelve feet south of the Plaintiffs' northern boundary line as fixed by the surveyor. The western boundary line, as shown on Exhibit P/3, was in error due to a mathematical error in translating rods into feet. It was admitted by the surveyor that he was in error by 7 feet and that actually the western boundary line as shown on Exhibit P/3 is seven feet too far to the west. This means that the western boundary line of the lands of the plaintiffs actually seven feet easterly of the line shown as the western boundary line of Exhibit P/3. In other words, there a seven-foot gap between Lot No. 1, as shown on Exhibit P/3, and the western boundary line of the plaintiffs' lands. This seven-foot gap, of course, would belong to the defendant, William Varner, and now would belong to his son, Alex Varner.

At the time of the survey the surveyor disregarded the old line fence which had become rather dilapidated but signs of which still remained.

The matters to be resolved in this action are in my opinion as follows: (1) Where should the rear common boundary line between the properties of the plaintiffs and the defendant be properly placed? and (2) Has either party suffered damages and, if so, how much?

Evidence was led by the defence to establish that an old line fence was established as a common boundary line between the lands of the defendant, William Varner, and the lands of Margaret J. O'Connell. Apparently when Margaret J. O'Connell purchased the property Mr. Varner supplied part of the purchase price to her. Consequently, at the time that Mrs. Margaret J. O'Connell obtained her deed she made out another deed to William Varner conveying him the balance of the property, while retaining a rectangular portion of the land for herself containing approximately two acres fronting on College Road.

The evidence given by defence witnesses, Smith O'Connell and William Varner, which is uncontradicted, establishes that some time after August 28, 1944, and very close to that date, Mr. Ben O'Connell, husband of Margaret J. O'Connell, together with the defendant, William Varner, and with O'Connell's son, Smith O'Connell, decided to lay out a northern boundary line of the plaintiffs' land to divide the two properties. They measured off the northern boundary line by using a pole sixteen and one-half feet long, which would be equal to one rod. These three men then put in stakes along the line so laid out, and the line fence was erected in the fall of 1944 along this staked out line. In subsequent years, both the Varners and the O'Connells respected this boundary line, and on one side of the boundary line Mr. William Varner kept a horse and cow, and sometimes pigs, and chickens, and on the southern side of the line Mr. and Mrs. O'Connell had horses and a cow, and a garden patch. Both parties appeared to respect and observe the limitations imposed by this line fence. It was pointed out in evidence by both Mr. Varner and Smith O'Connell that on the eastern boundary line of the O'Connell property a jog to the northwards occurred in the line fence to allow Mr. Ben O'Connell to gain access to a brook in that area for the purposes of watering his stock. This jog, it was maintained by the defendant, is still to be respected.

The problem arises from the fact that the surveyor made his survey from the dimensions contained in the deed from Margaret J. O'Connell to the plaintiffs. He used the centre of College Road as his starting point, and having ascertained the centre point of College Road he then measured northwards as described in the deed to the Nelsons from Margaret J. O'Connell.

The result of his survey was that his line was on the average eleven or twelve feet to the northwards of the old line fence.

The surveyor in referring to the survey of the Nelson property, shown on Exhibit P/1, fixed the start point at the southeastern boundary of the lands of Charles Bartlett "on the north side of College Road". In his testimony Mr. MacDonald explained how he determined the start point on the north side of College Road. By investigation he found certain indicia which enabled him to determine the location of the western boundary of the lands of Charles Bartlett. He extended that line by surveying across College Road. He then found the centre point of College Road along the extended line of the western boundary of the Bartlett lands. He then measured north along that line 33 feet to the northern side line of College Road. He took that as the start point and measured north 165 feet where he placed a post or stake. He then measured westerly in a line parallel to the north side of College Road a distance of 535 feet where he placed another post or stake.

According to the testimony of both William Varner and Smith O'Connell the Provincial Department of Highways had encroached upon the southern boundaries of properties abutting College Road on the north side. These properties include Smith O'Connell's property, that of William Varner, and, according to their testimony, that also of Robert Nelson. Even the plaintiff, Robert Nelson acknowledges that a slice had been taken from his lawn; hovever, not a large slice in his estimation. This work had been done in the early 1960's and completed by 1962.

The evidence was that any widening of College Road took place only on the northern side line. This contention is buttressed by the evidence of Smith O'Connell who testified that there was a certain fence which formed the northern boundary of other Bartlett lands lying to the south of College Road and to the south of the plaintiff's property. Mr. O'Connell said that this fence had existed in its present location both before and after the widening operation on College Road. This would indicate that no widening took place to the south side of College Road and that any widening took place to the north side of College Road. The surveyor, MacDonald, admitted that if there had been a displacement of the north side of College Road subsequent to the date of the deed to the Nelsons it would affect the northern line of his survey. He further admitted that he did not take any such displacement into consideration at the time of his survey.

If the road was widened on the north side this would displace the north side of College Road in a northerly direction by the amount of the widening of College Road. Therefore, if Mr. MacDonald began his survey on the north side of College Road without allowing for the displacement on the north side he would not be starting his measurements at the same start point as was done in 1944 when the fence line was measured and marked off. This would account for the difference in Mr. MacDonald's placement of the northern boundary of the Nelson property which would be displaced north of the fence line by approximately the same distance of the displacement of the north side of College Road during the widening operation.

I find on the preponderance of evidence that there was widening on the north side of College Road in the early 1960's. By the surveyor, MacDonald's own evidence it appears clear that if this displacement had been taken into consideration, his start point for the survey would have been in error. In 1944, this start point would have been farther south, and consequently the northern boundary of the plaintiffs' land would have been farther south. This, of course, would mean that the survey line would be extremely close to the old line fence. Since the surveyor's line is probably in error the only reasonable boundary line left is the old line fence.

Even if I found that the surveyor's line was accurate, I would be compelled to find on the evidence that a subsequent conventional line had been established by the erection of the line fence in 1944.

In the case of **Spencer v. Benjamin** (1975), 11 N.S.R. (2d) 123, Macdonald, J.A., said at p. 14 of the opinion as follows:

> 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.'

MacDonald, J.A., made further reference to **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.'

I refer also to **Naugle v. Naugle** (1970), 1 N. S. R. (2d) 554 (Nova Scotia Supreme Court per Gillis, J.) affirmed on appeal (1971), 2 N.S.R. (2d) 309. In that case the learned trial judge said at p. 560 of 1 N.S.R. (2d):

> 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.

In the case of **McIsaac v. MacKay** (1915), 49 N. S. R. 476 (Nova Scotia Supreme Court in *banco*) the Nova Scotia Supreme Court considered the matter of a long-standing fence. Chief Justice Graham said at p. 480:

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.'
> ....
>
> The defendant makes nothing by contending that because a brush fence at the rear is crooked therefore it is not a line fence and the line must be some place else. The safe

> rule is to follow the course of the fence in the well used and cultivated portion of the farm and regard the parallel fences of adjoining proprietors.

In the case of **McNeil & Hingley Ltd. v. Hill** (1928), 60 N.S.R. 179 (Nova Scotia Supreme Court in *banco*) the Nova Scotia Supreme Court came to consider a common boundary line which had been agreed upon by adjacent owners and was now of long-standing. Citing from the headnote the Court held:

> In an action for trespass to timber lands, in which the question arose as to the boundary line on the ground between certain lots, the evidence showed that a certain boundary line had been recognized for over thirty years as the true boundary, by the adjacent owners.
>
> *Held*, that under the circumstances of the case, the plaintiffs were bound by the line so recognized.

In the case at bar the plaintiffs cannot now contend that the fence line however dilapidated or in disrepair or even crooked is not now the boundary line when it was recognized as such since the plaintiffs came to reside upon the property shortly after World War II up until the survey of 1972. The plaintiff, Robert Nelson, has stated in his evidence at trial and on discovery that he considered the property north of the fence line to belong to William Varner. There is also considerable uncontradicted evidence that Varner exercised ownership rights over the land and
used it for normal purposes, respecting the old line fence as the boundary of his land.

The old line fence was an existing boundary line, and was although the fence had not been properly maintained in late years, nevertheless clear signs of the fence were still there. The witness, Smith O'Connell, who would be a half brother to the plaintiff, Mary Nelson, testified that there was a line there clearly to be observed and easily marked. In these circumstances I find it peculiar that the surveyor did not take occasion to question the major parties involved to determine the purpose of this fence line.

The question of adverse possession has also been raised by defence counsel and on this point also I find the defendants must succeed.

Section 9 of the **Limitation of Actions Act** being c. 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.

MacIntosh, J., of the Trial Division of this Court, in the case of **Spencer v. Benjamin**, S. T. No. 00078, discussed the matter of adverse possession. At p. 4, of his decision, in Vol. 37 of the decisions of the Nova Scotia Supreme Court, Trial Division, he said as follows:

The late MacQuarrie, J., in **Ezbeidy v. Phelan** (1958), 11 D.L.R. (2d) 660, 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, . . . and a person who claims by long adverse possession only, such as the plaintiff must rely on here, 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.
> ....
>
> 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.'

It is stated at p. 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).

I must point out that there is considerable evidence to the effect that both parties to this dispute observed and respected the old line fence as a true boundary line. Mr. and Mrs. Nelson both admitted that the remains of the old line fence were there when they went on the property in 1945.

Robert Nelson, in particular, said that he respected the line fence and that he picked berries and utilized the land to the south of the line fence and indicated that he would not go over the line fence because he would not go on some other person's property. There is also evidence from Smith O'Connell and William Varner to indicate that the land was in constant use and occupation by William Varner through the years from 1944 to the time of commencement of this action and that the lands were used for various purposes, pasturing horses and cows, pigs and chickens and berry picking, as well as for recreational purposes, but that on all occasions the old line fence was respected as the northern boundary line by the plaintiffs and their predecessors. It seems to me that the defence has clearly established that the defendant, William Varner, had open, continuous and adverse possession of the property to the north of the old line fence. Both parties through the years accepted that line fence as being the common boundary line between the properties.

I find that the defendant, William Varner, had open, continuous and adverse possession of the lands to the north of the old line fence from the end of August, 1944, up to the time that he conveyed the property to his son in November, 1973. The boundary line was observed and respected by the original parties to the agreement whereby the fence was constructed, and actually by the plaintiffs themselves up until the time that the surveyor established his line. The defendant, Alex Varner, has continued the uninterrupted possession of the land since November 1973.

Therefore it is my finding that the common boundary line between the lands of the defendant, Varner, and the plaintiffs, Robert Nelson and Mary Nelson, on the north of the plaintiffs' property be fixed as being the line of the old line fence which was erected in 1944. A declaration to this effect shall be included in the order.

I do not think that the defendant suffered any serious damages from the Nelsons' actions. The evidence indicates that when the Nelsons erected a wire fence that Varner cut the fence down and pushed the materials on to the Nelson property. I find damages in this particular situation to be nominal and fix damages at Ten Dollars. The defendant shall have judgment in the sum of Ten Dollars and costs of the action to be taxed.

Judgement for the defendant.

RE RISSER'S BEACH See 20 N.S.R. (2d) 479
Nova Scotia Supreme Trial Division
Jones, J.
May 5, 1975.

This case was an application under s. 17 of the **Expropriation Act** for clarification of the boundaries of three properties that had been expropriated by the Province of Nova Scotia at Risser's Beach, Lunenburg County.

At issue was the location of an old road. One of the properties which had been expropriated was bounded on two sides by the "old shore road" and the descriptions of the other two properties also depended on the determination of the location of the old road.

The case dealt with two interesting issues:

- what evidence the Judge could consider in attempting to locate the old road, and
- how that evidence should be used to help the Judge decide where the road was located.

What Evidence Could Be Considered?

The Judge confirmed that the main task of a Court (or a land surveyor) in interpreting a deed is to give effect to the intention of the parties. In order to determine that intention, the first thing to be done is to read the document in question. If the document is ambiguous, the Court must then determine whether the ambiguity is patent or latent. A patent ambiguity is one that is apparent on the face of the document. While the examples given in the sources cited by the case are not extremely helpful in explaining what is meant by this, a more useful example might be where a parcel was described by metes and bounds, but there were only two courses given. Clearly, it would be apparent from reviewing the description that an ambiguity exists - it is a patent ambiguity. On the other hand, an ambiguity might be a latent one. A latent ambiguity exists where the document itself appears to be free from doubt, but evidence exists that tends to cast some doubt on what the document meant. The example given is where a deed conveys "Blackacre," but evidence exists which shows that there are two "Blackacres."

The Judge also confirmed that the common law indicates that extrinsic (that is secondary or subordinate) evidence may only be used to help interpret deeds where the ambiguity is latent. If the ambiguity is patent, no extrinsic evidence may be used to help interpret it. In this case, the properties were defined by reference to "the old shore road." The Judge indicated that, on the face of it, the document was clear. It was only when one tried to find the "old shore road" that the ambiguity became apparent. Therefore, the ambiguity was latent and extrinsic evidence could be used to help interpret the description.

This somewhat confusing distinction appears in several subsequent cases.

How Did the Judge Use Extrinsic Evidence to Interpret the Description?

The Judge used a wide variety of evidence to help interpret the description - in other words to locate the old shore road. The Judge considered the testimony of land surveyors, long time residents of the area, old plans and other documents relating to the issue and aerial photographs. Much of the evidence was contradictory and confusing. In the end, the Judge's final finding was perhaps not as important as the approach that was taken. The Judge was left with a choice between two possible orientations for the old road and opted for the one which made more sense.

It is also important to note that the Judge complimented the land surveyors for their efforts in assisting the Court.

RE RISSER'S BEACH
Nova Scotia Supreme Trial Division
Jones, J.
May 5, 1975.

This is an application under Section 17 of the **Expropriation Act** 1973, to determine the boundary between certain parcels of land at Risser's Beach in Lunenburg County. The Beach area was expropriated on January 16, 1973. Section 17(1) of the **Expropriation Act** 1973 provides as follows:

> Where the expropriating authority at any time after the registration of the expropriation document at the appropriate office of the registrar of deeds is in doubt as to the persons who had any right, estate or interest in the land to which the expropriation document relates, or as to the nature or extent thereof it may apply to the court to make a determination respecting the state of the title to the land or any part thereof and to order who had a right, estate or interest in the
> land at that time and the nature and extent thereof.

Mr. Everett Rieser, Mr. Keith Baker and Mr. Wallace Richard owned the lands expropriated. Mr. Wallace Richard was not represented on the hearing. He appeared on the last day of the hearing and gave evidence on his own behalf. The hearing was held at Lunenburg.

The Baker property is described in the deeds as being bounded "on the south in part by the shore and in part by the old shore road; and on the west by the old shore road." The Old Shore Road determines the boundaries of the Baker and Richard lots in relation to the Rieser property. The parties agree to the admission of a number of plans, photographs and documents which depicted various locations of the old road.

Mr. Harold Hebb is a land surveyor practising in Bridgewater. He has practised for 28 years. In late 1974 and early 1975 he made surveys of the area in an effort to locate the old road. He was accompanied by Mr. Everett Rieser and Mr. Ralph Leslie. They pointed out to him the location of the old road as shown on the copy of the expropriation plan, Exhibit 9. He travelled the area with them to locate the road. The route is shown on Exhibit 9 as Y to Z. Mr. Hebb directed that a series of trenches be dug across the area at various locations. The holes were necessary in order to locate any evidence of old highway construction. The test holes proved to be negative. There was no evidence in the area to indicate a road to Mr. Hebb. There were trees in the area approximately six to fourteen inches in diameter. There was an old field at the western end of the Baker property. Mr. Hebb had examined the property between 1958 and 1961. He was unable to locate the old road at that time. Mrs. Georgina Risser attempted to point out the road to him at the time. It was in the same location referred to by Mr. Rieser. He could not locate the road and abandoned the survey. Mr. Hebb had reviewed various plans and deeds pertaining to the area in his attempts to establish the old road.

Mr. Harold MacPhee is employed by the Department of Lands and Forests. He tested five trees along the route pointed out by Mr. Hebb. One tree was sixty feet from the area, measured at right angles going away from the beach. That tree was 65 years old. The remaining trees ranged from 25 to 45 years in age. The trees toward the main highway were larger in size.

Mr. Linden Gray is employed by the same Department. He is a trained land surveyor and forest ranger. He is familiar with aerial photographs of the beach. Exhibit 10 shows a road going at right angles towards the beach from the main highway. Exhibits 10 and 11 were taken in 1965. Exhibit 12 is an aerial photograph taken in 1955. It shows a road along the shore parallel to the beach. Exhibits 10 and 13 show an area marked from C to D at an angle to the beach. The photographs indicate a somewhat open line going towards the beach. This is in the area claimed by Mr. Rieser as the location of the road. Mr. Enos Publicover is a retired sea captain from LaHave. He is 100 years old. Mr. Publicover retains all his faculties despite is advanced age. He had some difficulty in identifying the plans and photographs during cross-examination. The one point that was clear in Mr. Publicover's mind was that the road went along the beach just above the high water mark.

Mr. Ralph Leslie has lived in the area all his life. He is now 91 years of age. He went with Mr. Hebb to point out the area of the road. He followed the old road at an angle to the beach. The road went along the bottom of a field. He stated that the road never went along the beach.

Ainslie Leslie is Ralph Leslie's son. He examined the area with Mr. Hebb and his father and Mr. Rieser. He followed what he considered to be the old road. It went around a field and then on an angle to the shore where it eventually came out by the water. The road did not run along the beach, to his recollection.

Mr. Carl Richard is familiar with the beach. He testified that the road went at an angle to the beach and kept working towards the shore. He went along the road as a boy some 45 years ago.

Mr. Everett Rieser was born in 1906. He has lived in the area of the beach all his life. He knew the late Ceorgina Risser. He pointed out the old road to Mr. Hebb. He walked up and down the road in the 1940's and 1950's. It turned by the field at the western end and then ran parallel to the beach. The shore side of the road was clear of trees. He drove a car on the road in 1929. He continued to use the road up to 1955. Mr. Rieser stated that the roadway is now covered with trees. The witness pointed out the highway on Exhibit 9. He claimed the land between the old road and the shore. He gave permission to Mr. Fred Mossman to camp in that area in the 1950's. There was a fence around the field where the old road turned towards the beach. The roadway shown on the plans, going directly to the beach, was not the public road. This road was used for hauling seaweed from the shore. Some 40 years ago trees started to grow on the beach. The area was previously covered with sand and grass.

Mrs. Needa Benjamin is a daughter of Georgina Risser. Her son, Keith Baker, is a claimant in this action. She was born in 1901 and was first married in 1924. The only road that Mrs. Benjamin knew

as the old shore road is the one on Exhibit 7 which goes directly to the beach. There was an opening on the sand bank where the road passed to the beach. The was a bank and a marsh on the west side of the road. There was fencing along the road. The road went along the beach to the big rock. Her father cleared a pasture to the east of the road and erected fences. The fence ran along the road. The clearing referred to by the other witnesses was the area where her father planted a garden. She estimated the garden covered a quarter of an acre. The road was outside the sandbank.

Mr. Keith Baker was brought up in the area. The only road to the beach was the one shown on Exhibit 7. The road is still there in the same location. While there were many paths to the beach, he only knew of one road. There was a fence along the road when he was a child. There are some traces of the fence posts left in the area.

Mr. George Swansburg is employed as a surveyor with the Department of Lands and Forests. He did the surveying for the expropriation proceedings. He endeavoured to locate the old road. He located what in his opinion was the old road. Mr. Swansburg compared his location with the road as shown on Exhibits 4 and 5. Those plans are dated 1874 and 1885. He also examined the descriptions in the old deeds and the aerial photographs. He indicated the location of the road on Exhibit 8. He was familiar with the March plan which is Exhibit 7. Mr. March was a land surveyor. He lived to a very advanced age. The witness could find no rocks or foundation for the road. It appeared that one side was dug out of the bank. The best evidence was on the western end of the road. He had no knowledge of a garden in the area. Mr. Swansburg found traces of a fence along the western side of the existing road to the shore.

Mr. Wallace Richard stated that the old road followed the beach bank. He pointed out the location to Mr. Swansburg. The location is shown on Exhibit 8. Mr. Richard is now 61 years of age. He travelled the road when he was young. He knew that John Risser had a field to the west. He did not know of a road in the area referred to by Mr. Swansburg. There was a fence by the field. The measurement of his eastern line extends below the high water line.

Exhibit 7 is a copy of the plan prepared by Mr. March in 1946. The only road indicated is the one on the western end of the Risser property running directly to the beach. The boundaries of the Risser property and the Richard property on the south is the beach. Exhibits 5 and 6 show the road to West Dublin, proceeding in an easterly direction towards the shore. They also indicate the entrance to a road leading directly to the shore. These plans were used by Mr. Swansburg. A petition by the area residents requesting repairs to the shore road leading from Risser's Beach to Romkey's Back Cove was filed with Municipal Council in 1902. The petition recites that the road was destroyed by storms. A plan accompanying the petition shows the road along the beach between Clift Rock and Coute Rocks. It also shows a road going to Risser's Beach.

Mr. Keith Baker acquired title to lands in the area by a deed from Georgina Risser dated October 7, 1963. The description is as follows:

> All the right, title, interest, claim, property and demand of the Grantor of, in and to all that certain lot, piece or parcel of land situate, lying and being at or near Petite Riviere, in the area known as Rissers Beach, in the County of Lunenburg and Province of Nova Scotia, which are bounded on the North by the New Road leading to West Dublin as referred to in the Deed from Walter Rieser to John Rieser hereinafter mentioned; on the East by lands of Phoebe Wallace, Ethel Richard and Myrna Whalen; on the South in part by the shore and in part by the old shore road; and on the West by the old Shore Road. Excepting lands formerly of Edith Taylor and believed to be now of Wallace Richard and the Public highway. Without in any way restricting the foregoing, the lands hereby conveyed are a part of the lands conveyed by Walter Rieser to John Rieser by Deed dated the 22nd day of May, A.D. 1909 and recorded at the Registry of Deeds at Bridgewater, N.S., on the 18th day of January, A.D., 1913 in Book 76 at Page 528 under No. 355.

The deed of 1909 to John Rieser provides:

> thence in a Westerly direction a1ong said old shore road in its various courses and turnings to the place of beginning, viz. the junction of the two roads...

A deed dated August 20, 1915, from John and Georgina Risser to Ethel Taylor describes the boundary as being along the beach. A deed dated September 1, 1909, from the Romkeys to Owen et al. refers to the boundary on the "south by the old main road to Petite Riviere as it originally ran along the shore, and known as the old road."

The primary issue in this case is a determination of the area conveyed to Mr. Baker. 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 interest 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 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 face 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 found 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 the 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 ex- plain 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.

The following passage appears at page 627 in the text **Canadian Law of Real Property**, by Anger and Honsberger:

Where the principa1 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 to *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, is 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] AC 92.)

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;...

The evidence is far from satisfactory and conflicting in many areas. Weighing the evidence as a whole, I accept the March plan of September 2, 1946, as properly outlining the lands of Georgina Risser and Mr. Wallace Richard. I also find that the old road went directly to the shore as shown on the March plan and thence easterly along the shore. I will not attempt to analyse all of the evidence in the manner set out in the very thorough submissions of counsel.

In listening to the evidence of Mr. Hebb and Mr. Swansburg I was very impressed with the care which both of these men used in examining the evidence. Mr. Hebb was quite emphatic that he could find no evidence of the road as indicated by Mr. Rieser. He had examined the property in 1958 and 1961. He was obviously impressed with the care which Mr. March used in preparing his plan. While Mr. Swansburg was satisfied that the road ran on an angle to the shore, he relied heavily on the location of the road as shown on Exhibits 4 and 5. Those plans are primarily plans of division. There is no reference on the plans to the "old shore road". There is an indication of a road to the beach. I can find little in the evidence to support the contention that the road to Dublin shore is the old shore road. The expropriation plan shows a different road to the north as having been constructed in 1886. Two witnesses for Mr. Rieser indicated the road vas being used in the 1920's and 1930's. I am unable to find any evidence to support this contention even allowing for overgrowth in the ensuing years. I accept the opinion of Mr. Hebb in preference to the view expressed by Mr. Swansburg.

I also accept the evidence of Mrs. Benjamin and Mr. Keith Baker. The only road that Mrs. Benjamin ever saw was the road to the shore. I accept her evidence that her father occupied the lands along the road shown on the March plan to the shore. She was an intelligent witness who answered clearly in a forthright manner. On the other hand, I found the evidence of Mr. Ralph Leslie and Mr. Rieser

somewhat vague on a number of issues. I cannot accept their evidence and that of other witnesses called to support them as to the location of the shore road. I am satisfied that Mr. Everett Reiser never occupied this area or exercised any real control over it.

With some caution, I accept the evidence of Mr. Publicover that the old road ran along the beach. While the exact location of the road may have changed the aerial photographs tend to confirm a road along the beach. This is also supported by the old deeds and descriptions. The reference in the Baker deed is to the "shore and the old shore road". The language supports Mr. Baker's contention that the road was on the shore. The description in the Richard deed extends past the shore and into the water.

There was a reference by Mr. Hebb to a declaration by the late Georgina Risser. After listening to Mr. Hebb I concluded that this declaration was of no real evidentiary value apart from any question as to its admissibility. It was clear that Mr. Hebb considered that it was of no assistance to him even though he had been retained by the declarant. In the absence of further evidence of all the circumstances surrounding the statement I do not think that it has any real probative value.

Mr. Baker and Mr. Richard are entitled to an order that the old shore road went directly to the beach as shown on the March Plan of 1946 and thence easterly along the shore and that the Baker and Richard lands extended to the shore as shown on that plan.

I will hear the parties on the matter of costs, if necessary, on the application for the order.

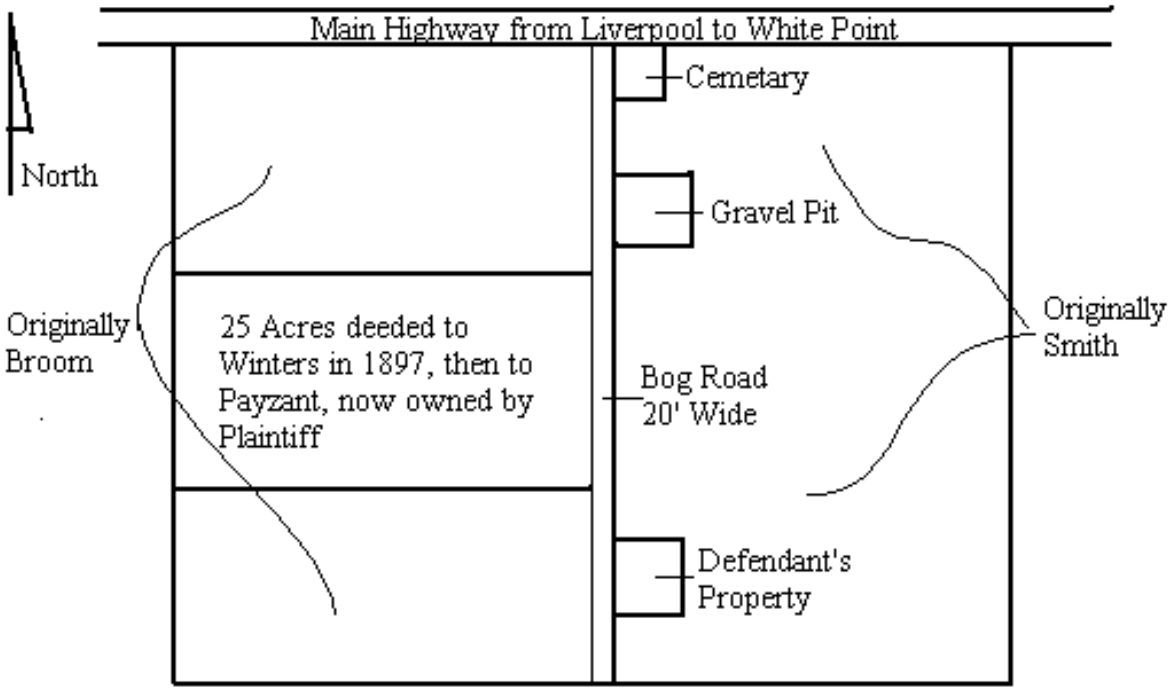
Order Accordingly.

HERMAN v. WHYNOT See 21 N.S.R. (2d) 201

Nova Scotia Supreme Court, Trial Division
Hart, J.
June 3, 1976.

This case dealt with the status of a 20 foot wide roadway. The Plaintiff claimed that the Defendant had no right to use the roadway while the Defendant claimed that he did.

The respective properties of the parties were located as follows:



The Broom and the Smith families were at one time the respective owners of large rectangular properties extending southwardly from the main road. In 1897, the Brooms conveyed a 25 acre parcel to Winters. The Plaintiff now owned that property. When the parcel was conveyed to Winters, the Brooms established a 20' roadway as shown in the sketch and granted Winters a right of way across it to the main road. That 20' roadway had become known as the Bog Road.

The Defendant now owned a portion of the Smith property as shown. No explicit right of way was included in the conveyance to the Defendant, but he had been using the Bog Road for access to his property. The Plaintiff wanted the Defendant to stop using the Bog Road.

The Plaintiff claimed that he owned the title to the Bog Road, either by grant or through adverse possession. Since the Defendant has never been granted a right to use the Road, the Plaintiff claimed that he should be able to stop the Defendant's use.

The Defendant claimed that the Bog Road had become a public highway through the process of dedication and acceptance, or, in the alternative, that his predecessors in title had acquired an easement over the Road through the process of prescription, and that this right has been passed on to him.

The Judge did not accept that the Plaintiff's predecessors in title acquired the fee simple in the road, but confirmed that they only acquired an easement, which they passed on to the Plaintiff. Further, the Judge reviewed the evidence of adverse possession of the Road by the Plaintiff and his predecessors and found that no adverse possession had been proved.

The Judge then discussed the issue of dedication and acceptance. The Judge found that sufficient evidence exists to establish that the Broom family intended to dedicate the Road to be public and that the public through long use of the Road had accepted. The Judge thus found that the Road was a public highway.

The Judge finally indicated that even if dedication and acceptance had not been established, that the Defendant had acquired an easement over the Road through the process of prescription.

HERMAN V. WHYNOT
Nova Scotia Supreme Court, Trial Division
Hart, J.
June 3, 1976.

The plaintiff in this proceeding seeks to prevent the defendant from using a twenty foot road or right of way, known as the Bog Road, established many years ago as a means of access to the plaintiff's property from the main highway running between Liverpool and White Point. He claims that only he and the owners of property on the west side of this Bog Road have the right to use it, and that the defendant, who owns property on the eastern side, must find some other means of access to his residence.

The plaintiff obtained title to his property by deed dated October 29, 1962, which contained the following description:

> All that certain lot, piece or parcel of land situate, lying and being near the Town of Liverpool, in the said County of Queens, bounded and described as follows:
>
> Beginning at a stake twenty feet distant from the Southern line of property now or formerly of Robert Smith, and running thence South fifty-two degrees West sixty rods more or 1ess to a stake on the Northern line of land belonging nov or formerly to estate of James C. Hemeon; thence North thirty-eight degrees West along said Hemeon land sixty-one rods more or less to a fir tree; thence North forty-seven degrees East four rods to a spruce tree; thence North sixteen degrees West twenty rods to a fir tree; thence South seventy-eight degrees East sixteen rods to a stake; thence North fifty-eight degrees East thirty-nine rods to a stake standing twenty feet from the Southern line of the Church of Eng1and cemetery; thence South thirty-eight degrees East seventy rods more or less to the place of beginning containing twenty-five acres more or less;
>
> Also a certain right-of-way twenty feet wide to be used and held in common with James Broom, Richard Broom, John S. Broom, Gasper Broom and Jacob Broom, their heirs and assigns, over their property from the White Point Road to the eastern boundary of the lot of land above described along the southern line of the Church of England Cemetery and Robert Smith's property and *also the right or privilege of flowing the lands* of the said James Broom, Richard Broom, John S. Broom, Gasper Broom, and. Jacob Broom adjacent to the lot of land herein granted and not elsewhere;
>
> Being and intended to be and include the same lands conveyed to the said Margaret Ryan by the McClearn Ice Company Limited by deed dated the 9th day of April, 1956, and by Rona Payzant, Joseph Otto Payzant and Gladys Hazel Payzant by deed dated the 25th day of October, 1962.

The defendant obtained title to his property by deed dated May 31, 1974, which contained the following description:

> ALL that certain lot of land situate in the District of Western Head, Queens County, Nova Scotia, described as follows:
>
> BEGINNING at an iron post on the eastern side of Bog Road (so called);
>
> THENCE to run easterly and at right angles to said road 150 feet or to a stake;
>
> THENCE southerly and parallel to said road 100 feet or to a stake;
>
> THENCE westerly 150 feet or to a stake on the eastern margin of said. road;
>
> THENCE northerly along the margin of said road 100 feet or to the stake and place of beginning.
>
> Being and intended to be a portion of the lands sold to the Grantors herein by Furman Whynot on July 24th, l969, recorded in Book 109, page 419.

The plaintiff says that the defendant acquired no right to use the Bog Road from his predecessors in title, and that he is entitled to prevent the defendant's use of the road since he is the owner of it. He claims his ownership, firstly, by grant through his predecessors in title and, secondly, by prescription should his claim to paper title not succeed. The defendant takes the position that the Bog Road (so called) was dedicated to the public many years ago, and that he has the right to use it as a public way. He further claims that his predecessors in title had acquired a right of way over the Road by prescription as a result of many years of continuous exercise of this right.

Before the turn of the century there were two well-defined properties lying to the south of the main highway running from Liverpool to White Point. Both properties were rectangular in shape and ran southerly about three-quarters of a mile from the highway. The easterly lot was owned by Robert Smith, and the westerly lot by the Broom family. There was a clear line of division between the two properties, and today it represents the eastern side line of the twenty foot Bog Road, referred to earlier.

The Smith property was mainly used for farming and had its own access roadway to the main highway. The northwest corner of the property lying at the junction of the highway and the Bog Road became the Church of England cemetery and continues in this use today. The remainder of the property passed to the hands of the MacDonald family who continued the farming operation. In 1923, the Department of Highways obtained about an acre of the property lying two hundred feet south of the Church of England cemetery and a gravel pit was established. The rest of the property was sold off to various owners after the second world war, and in 1969, Thomas Whynot and Lawrence Westhaver became

the owners of a portion at the southerly end of the property. They have since decided to sell off building lots and sold one to the defendant, who built his home and commenced using the Bog Road as his means of access to the highway.

The members of the Broom family agreed to sell the central portion of their lot to Joseph Winters in 1897. Since they still maintained the property to the north and south of the twenty-five acres being sold they established a twenty foot road adjacent to the Smith property and only conveyed the land to the west of this twenty foot road to Mr. Winters. They did give him a right of way over the twenty foot road along the property which he was purchasing and along the other property which the Brooms retained leading out to the main highway, and it is this right of way which subsequently acquired the name “Bog Road."

The Broom family also conveyed to Mr. Winters the right to “flow” the lands which they were retaining, and this was because the lands that Mr. Winters was buying had a large cranberry bog, which required the use of dams for cultivation.

The plaintiff claims that this conveyance from the Broom family to Joseph Winters, his predecessor in title, was intended to grant the fee simple in the bed of the right of way to Mr. Winters, and that he is now the owner of that portion of the right of way or Bog Road running along his property. I am unable to accept this position and find that the title to the Bog Road remained in the Broom family at the time of the conveyance to Mr. Winters. I further find that the intended extent of the user of the right of way is set out in the covenants of the deed from the Brooms to Mr. Winters as follows:

> ...it shall be lawful for the said Joseph Winters, his heirs and Assigns, his and their Agents and servants and all other persons for the benefit and advantage of the said Joseph Winters, his heirs and Assigns in common with the said James Broom Richard Broom John S. Broom Gaspar Broom and Jacob Broom their heirs and Assigns and their Agents and Servants from time to time at all times henceforth and at their will and pleasure and whether by day or by night for all or any purposes whatever to go over and return with horses carts cattle carts wagons and carriages of every kind and description laden or unladen or on foot and also to drive all manner of cattle and beasts whatsoever in along over and throughout the right of way hereinbefore referred to and also that it shall be lawful for the said Joseph Winters, his heirs and Assigns and his and their Agents and servants at any and all times to flow the lands of the said James Broom, Richard Broom John S. Broom and Gaspar Broom and Jacob Broom adjacent to the lot of land hereby sold and conveyed without any liability for damages caused by such flowing...

The plaintiff next claims that his predecessors in title acquired ownership of the bed of the Bog Road in front of his property by adverse possession over a period of more than twenty years. There was always a fence along the division line between the Smith and Broom properties, and a fence was erected by

Joseph Winters along the western side of the Bog Road, which marked the eastern boundary of his property, and a pole gate was maintained at the southern end of the Winters' property where the Bog Road continued into the remainder of the Broom lands. The evidence also reveals that there was a gate maintained near the northern end of the Winters' property, which closed off the Bog Road for a period of time, but I am satisfied that this gate had only a limited use and only remained for a few years.

There was, of course, no right in the plaintiff's predecessors to prevent any of the members of the Broom family or their successors in title, or their servants or agents, from using the road, and Mr. Winters' use of the road was by right under his deed rather than in an adverse manner against the owners of the title to the bed of the road. I find therefore that the plaintiff has not acquired ownership of the Bog Road by prescription, and his only right is to the use of the road in the manner described in the deed from the Broom family to Joseph Winters back in 1897. In reaching this conclusion I have also considered the evidence of the use made of the property by Ireneaus Payzant, who owned the property from 1909 until his death in 1954. He is the person who is alleged to have kept a gate at the north end of the right of way until about 1923 when it disappeared, but the same reasoning that applies to Joseph Winters applied to Mr. Payzant. He may have attempted to restrict the use of the right of way to those persons he considered entitled, but his use of the same road was by right and not adverse to the true owners thereof. Mr. Payzant was in fact very generous with the use of the roadway and his property, and seemed to encourage people to use them both. The evidence does not reveal that at any time during his long occupancy of the plaintiff’s property did he ever prevent anyone from using the Bog Road. He also welcomed members of the community on his property for berry picking, skating and other social activities of the time.

In 1930, Mr. Payzant gave a twenty one year lease of the property to the McClearn Ice Company, who erected an ice-house in conjunction with the pond. For years thereafter members of the public came to and from the ice-house to obtain their supplies, and no effort was made to restrict their use of the Bog Road. The lease included the right of way which Mr. Payzant had obtained from his predecessor, and this was a substantial extension of the user of the road.

A year or so after Mr. Payzant's death the house in which he had lived was burned to the ground and the property remained unoccupied until the plaintiff took possession in 1962. During this period no one made any effort to restrict the use of the Bog Road. In my opinion there is no evidence which would indicate that any of the predecessors in title to the plaintiff acquired title to the Bog Road by adverse possession from the time the property was originally conveyed to Mr. Winters.

I now to the contention of the defendant that the Bog Road has been a public highway, and that as an abutter he has full right to its use. The relevant portion of s. 10 of the **Public Highways Act** is as follows:

> 10(1) Except in so far as they have been closed according to law:
> ....

(e) all roads dedicated by the owners of the land to public use;
...
shall be deemed to be common and public highway until the contrary is shown.

What is meant by "dedication" was discussed by the Court *in banco* of this Province in **DeYoung v. Giles** (1915), 49 N.S.R.398; 26 D.L.R. 5. In that case, the defence was that the alleged act of trespass was performed on a roadway previously dedicated to the public, and Harris, J., said at p. 403:

> 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.

Although the Broom family originally laid out the twenty foot road as a private road, I am satisfied from the evidence as a whole that they later expressed an intention to dedicate it to public use. In 1907, when Richard Broom conveyed his interest in the part of the Broom property lying to the south of the Joseph Winters lot, he added to the description: "a twenty foot road granted running from White Point Road across the lots." In 1909, when John S. Broom conveyed his interest in the Broom property to the north and south of the Joseph Winters lot to John and James Aulenback, he made reference to "also a privilege of the twenty foot road from White Point Road to the said back land." Eventually all of the interest of the Brooms in the land north and south of the Winters lot became vested in Bruce Dagley, who testified at the trial. Mr. Dagley has been familiar with this area most of his life and has always considered the Bog Road to be a public or common road.

The evidence also reveals that the Bog Road has been used by members of the public for many years without obstruction. There were from time to time companies hauling gravel from the various properties located along the road, as well as the operation of the ice company. There was evidence of the members of the public using the road to go hunting, fishing, skating, berry picking and parking, with no indication that these activities had been interfered with by any of the predecessors in title to the plaintiffs. At one time Ireneaus Payzant's son, Otto, occupied the MacDonald farm on the other side of the Bog Road and used a gate as a convenient access for himself and his cattle. There is evidence that Thomas Whynot hauled gravel from the MacDonald property on the eastern side of the Bog Road during the twenties and has continued to use the road for his gravel business since became owner of part of the MacDonald property in 1969. The plaintiff alleges that Thomas Whynot had permission from Mr. Payzant to do this work, but Mr. Payzant has been dead since 1954 and there is no evidence that any other permission was granted to him since that time.

The Department of Highways established their gravel pit on the eastern side of the road in 1923, and although they had a right of way over the Smith farm property to the main highway, they used the Bog

Road. Once again it is alleged that their use was with permission of Mr. Payzant in exchange for maintenance of the roadway, but I am satisfied from the evidence that the use of this roadway by so many different persons and companies would have given the impression to members of the public that it was a public road.

There is also evidence that some materials have been provided by the Department of Highways for fixing the bridge along the road, and that some snowplowing has been done over the years by the Town of Liverpool in order to assist several of their employees living on the road. The Town also had an interest in maintaining the dams on the plaintiff's property to exert flood control and also had use of the Department of Highways' gravel pit from time to time. Once again it is suggested that these activities were with permission or by agreement, but I am satisfied that long before the time the plaintiff occupied his property the Bog Road had become dedicated and used as a public roadway and no permission would have been necessary.

Had I reached the conclusion that the Bog Road was not a public road I would have found that the defendant had established a right to use the road by prescription. Open, adverse and continuous use of the roadway by Thomas Whynot, the predecessor in title to the defendant, has been established by the evidence for a period in excess of twenty years.

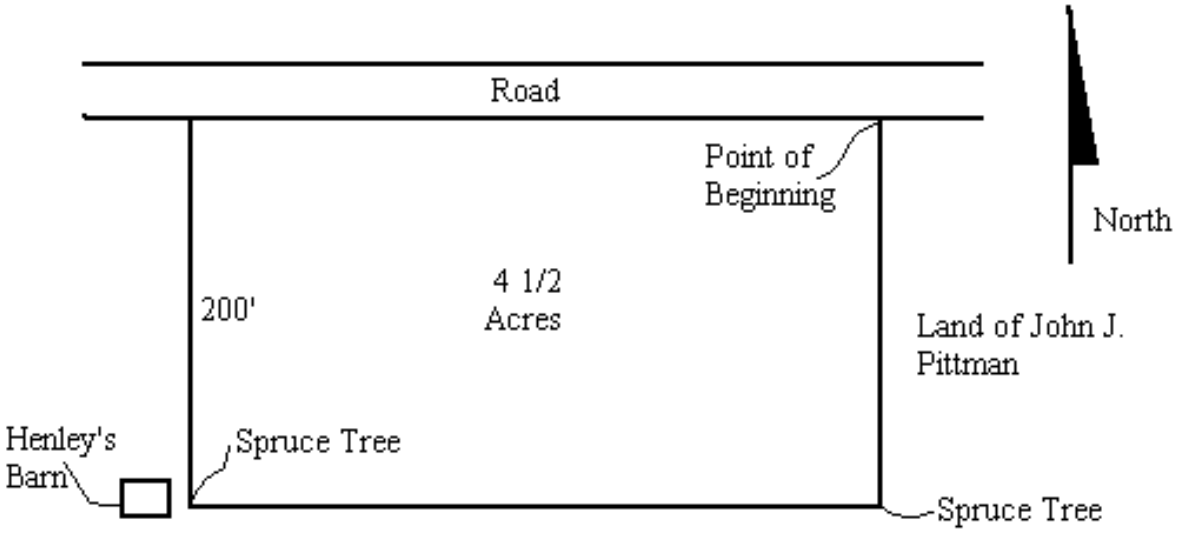
The result is that the plaintiff's action will be dismissed with costs to be taxed. The counterclaim of the defendant will be allowed, but the damages will be assessed at only one dollar since the defendant was the author of his own misfortune by having placed his truck in a position to block the plaintiff's passage along the roadway. The defendant is entitled to his costs of the counterclaim to be taxed.

Judgment for defendant.

PITTMAN v. HENLEY, IVANY and IVANY See 23 N.S.R. (2d) 32
Nova Scotia Supreme Court, Trial Division
Dubinsky, J.
May 6, 1976.

The Plaintiff had purchased land from the Defendant Henley at Upper Musquodoboit in 1969. Although there was a dispute as to exactly how the land to be sold was determined, the Judge found that a brother-in-law of the Plaintiff (Muise) and the Defendant Henley met and discussed what land was to be sold and agreed that it would comprise an entire field. Muise and a friend (LeBlanc) went to the field with Henley with a fifty foot tape and Henley directed the marking of some trees and the measuring of the field. Somehow the area of the measured and marked field was determined to be 4 ½ acres. A deed was prepared, signed and delivered and the land was paid for. The total price was $225.00 based on $50.00 per acre. The Plaintiff built a building on the field the following year.

The land described in the deed is shown in the following sketch:



In 1971, it came to light that the field actually contained 9 acres, not 4 ½. Some attempts were made to correct the situation. An offer was made to pay Henley for the "additional" land at the rate of $50.00 per acre, but the offer was refused. The Plaintiff was asked to return his deed but he refused.

Henley then sold a lot that came from the original field to the other Defendants Ivany. They built a building in it. The Plaintiff sued both Henley and the Ivanys based on a number of claims, but the Judge indicated that the essence of the claim was for a declaration from the Court that the Plaintiff owned all of the 9 acres, including the land on which Ivany's building had been built.

The Judge first reviewed the concept of *falsa demonstratio non nocet*. Under this principle, if a description in a deed is clear and it can be ascertained what was intended to be conveyed, an error in the description, either before or after the clear section, will be rejected by the Courts. The Judge found that the metes and bounds description of the property was clear and that the reference to an area of 4 ½ acres was clearly a mistake which could not be used to set aside the metes and bounds description. The Judge reviewed several cases where there was a conflict between a clear description and a call for a certain area which did not correspond to the clear description. In those cases, the call for an area had been rejected by the Courts.

The Judge also discussed the specific description in this case and determined that the references in it to the highway and the marked trees were references to original monuments. In such cases, the Judge held that where there was a variance in a description between references to monuments and references to distances and directions, the monuments would be considered as superior evidence of the location of the boundary than the distances or directions.

The Judge declared the plaintiff to be the owner of the lands which he claimed. The Judge further indicated that while the Ivanys were acting in good faith when they purchased a lot from Henley, they would have to remove their building or come to some arrangement with the plaintiff to purchase the land on which it stood.

PITTMAN v. HENLEY, IVANY and IVANY
Nova Scotia Supreme Court, Trial Division
Dubinsky, J.
May 6, 1976.

In this action, the plaintiff has several claims. He is seeking an injunction against all three defendants to restrain them from certain actions in relation to his land, a declaration that the defendants have no right to enter on his land, damages from the defendants for conversion of his land, recovery from the defendants, William Ivany and Audrey Ivany, of possession of a certain portion of his land and mense profits against all three defendants. In essence, however, the plaintiff is seeking a declaration that he is the owner of all the land described in a certain Warranty Deed from the defendant Isaac Henley and his wife, Addie Henley, as grantors to him, the plaintiff, Percy Pittman, as grantee.

The deed which is at the root of this proceeding - Exhibit No. 2 – is dated November 27, 1969, and was recorded in the Registry of Deeds office at Halifax, Nova Scotia, on February 3, 1970. The description in this deed reads as follows:

> ALL that lot of land situate in Pleasant Valley, Upper Musquodoboit, and bounded and described as follows:
>
> BEGINNING on the south side of the Pleasant Valley Road at the point where the west line of land owned by John J. Pittman meets the highway;
>
> THENCE southerly by Pittman west 1ine to the spruce tree at the corner;
>
> THENCE westerly in a straight line to a spruce tree standing immediately east of the barn of the Grantor;
>
> THENCE northerly two hundred feet more or less to a stake on the south margin of the highway;
>
> THENCE by the highway easterly to the place of beginning, comprising 4 ½ acres more or less.

Fred Muise, brother-in-law of the plaintiff (who is now deceased) testified to the following effect. He, accompanied by one Clifford LeBlanc, went to see the defendant, Isaac Henley, on behalf of the plaintiff, his brother-in-law, to discuss with Mr. Henley the purchase of a lot of land for Mr. Pittman. That was sometime in 1969. They began to measure off a piece of land and the witness and LeBlanc did the measuring with a fifty foot tape under the direction of the defendant. Mr. Muise asked the defendant if "he wished to sell the whole field." The defendant said that he was willing to do so and, accordingly, they measured off the dimensions of the entire field. As stated above, Mr. LeBlanc and

the witness held the fifty foot tape and Mr. Henley pointed out where the stakes were to be and the witness said that it was Mr. Henley who "marked the trees." Mr. Henley named the price, $50.00 per acre, and they calculated the area to be about four and one-half acres, which made the purchase price $225.00.

The witness went on to say that the defendant Henley subsequently arranged for the deed to be prepared. Mr. Muise did not do anything about the deed himself, but he delivered the cheque for $225.00 to Mr. Henley. The following spring he helped the plaintiff to erect a building on the land. Later on, he said, someone else started to build on the land of his brother-in-law. He said that the defendant had "put in a bunch of stakes" and then a building was put up by the defendants Ivany. He stated that the defendant Henley spoke to him at some time in 1973 or 1974 to the effect that "Percy Pittman had too much land". Thereupon the witness offered the defendant Henley the difference in price but he would not accept it. At that time, too, the defendant informed him that he had obtained the information as to the proper acreage from his, the defendant's, son. He said that a plan – Exhibit No. 5 – which his late brother-in-law had obtained had come into his possession and he acknowledged that if the plan is correct, the description in the deed is erroneous. He also stated that Mr. George Burris, who had drafted the deed, had come to see him about the matter prior to the plaintiff's death. Mr. Burris wanted the original deed back for the purpose of changing it on the ground that there was more than four and one-half acres included in the land.

Clifford LeBlanc, who had accompanied the previous witness, Fred Muise, when the measurements took place, confirmed the evidence given by the previous witness. He said that he had marked a spruce or fir tree and that the defendant, Mr. Henley, had marked a tree with an axe. He corroborated Mr. Fred Muise's testimony to the effect that the defendant Henley "selected the points".

The evidence of Isaac Henley, the defendant, was to the effect that Fred Muise and Clifford LeBlanc came to see him about a piece of land for the plaintiff. Muise told him that "he wanted four acres and a half and we went out and started measuring the field. No one calculated the acreage". He and his wife went to Mr. Burris and gave him instructions to prepare the deed. He had kept no record of the measurements. It was not until 1971 that he found out the mistake from his son. He brought the matter to the attention of the plaintiff who wanted a survey made. With the knowledge and approval of the plaintiff, Mr. Henley hired a surveyor, a Mr. Keen, who made a survey. He then went to Mr. Burris and had a second deed prepared in accordance with the survey but Mr. Muise refused to accept the deed. The witness said that Mr. Muise became aware that an error had been made on the field and he wanted to buy the rest of it but the witness would not sell it to him. He denied having driven in any posts or having pointed out anything. He felt that Messrs. Muise and LeBlanc had found corners “by guess”. He stressed on cross examination that he did not know how many acres were in the field at first.

Evidence was given by Mr. William Harrison. He said that sometime in 1974 he had been talking with Mr. Muise and said to him, "You got your four and one-half acres" and that Mr. Muise replied, "Yes, but we wanted the whole field".

I may say in passing Mr. A.L. Graham was present as counsel for the defendants Ivany. Before the commencement trial, Mr. Graham announced that his clients were not taking any part in the case and were content to abide by the decision of the Court. This was confirmed by Mr. Weldon on behalf of the plaintiff and it was agreed between counsel that were the plaintiff to be successful, there would be no costs against the defendants Ivany.

In the chapter called Title and under the subheading "Inaccuracy in Part of Description - Generally", Anger and Honsberger's **Canadian Law of Real Property** (1959) has the following to say at pp. 626-627:

> 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". The maxim applies to descriptions of both property and persons but its application to persons mostly occurs in wills and is dealt with in Section 39. 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 (**Dowtie's Case, Att'y-Gen'l v. Dowte** (1584) 3 Co. Rep. 9b, 76 E.R. 643; **Roe d. Connolly v. Vernon** (1804) 5 East 51, 102 E.R. 988; **Llewellyn v. Jersey (Earl)**, (1843) 11 M. & W. 183, 152 E.R. 767; **Morrell v. Fisher**, (1849) 4 Exch. 591, 154 E.R. 1350; **Cowen v. Truefitt Ltd.**, [1899] 2 Ch. 309, C.A.; **Woodrow v. Connor**, (1922) 52 O.L.R. 631). The characteristic of the cases within the rule is that the description, so far as it is false, applies to no subject at all and, insofar as it is true, applies to one only. The rule is not confined to cases where the first part of the description is true and the latter in untrue, it being immaterial in which part of the description the *false demonstratio* occurs (per Lindley M.R. in **Cowan v. Truefitt Ltd**, *supra*, p. 311).

In the pages 631 *et seq.*, there are references to a number of early Canadian cases which illustrate well the above principle. There is an old case which is not referred to in this book, **Cottingham et al. v. Cottingham et al.** (1885), 11 O.A.R. 624. Part of the headnote reads as follows:

> In proceeding to a sale of lands under a decree of the Court of Chancery in 1876, one parcel was advertised as containing 100 acres, and was bid off by one A. at $31 per acre, which in the agreement to purchase signed by A., as well as in the conveyance to

> him, was described as "100 acres more or less, composed of the east part of lot 9", &c: he paying or securing according to the conditions of sale, the sum of $3,100. In reality the portion so sold contained 124 68/100 acres, a fact neither party to the transaction was aware of when sold. There was no provision in the conditions of sale for compensation. The purchaser became aware that there was an excess on the same day, immediately after the sale, but the vendors not until long afterwards, though before the execution of the conveyance. In the report on sale several of the sales were referred to as at so much per acre, while the one in question was mentioned as a sa1e at a bulk sum of $3,100.

The Court held that the agreement was for the purchase was of the entire lot. Burton, J.A., said at pp. 640-641:

> Cases are of course to be found where the Court has rectified a conveyance, on the ground that it included property never intended to be dealt with; but I am unable to find any case where the vendor intended to sell the entire farm, but made a mistake as to the quantity comprised in it, in which after conveyance, relief has been granted. But in the present case there is no question as to the identity of the property sold, and I do not think that even a decree for rescission could at this late period be properly granted, although it is not necessary to say how that would be, that not being the form of relief sought...
>
> I do not think that it makes any difference that the sale was made under the authority of the Court, or that infants are interested. The property offered for sale was described as containing 100 acres; all parties knew what the property was. The solicitors conducting the thought it was being sold. for $3,100, that being the sum at which the vendors were willing to dispose of the farm and the purchaser to take it. All parties having acted in ignorance of the actual acreage at the time of the sale, and no fraud being shewn, I think no case for relief has been made out and the petition should have been dismissed.

A more recent case, also not referred to in Anger and Honsberger's book, but mentioned in DiCastri's **Canadian Law of Vendor and Purchaser** (1968) is **Gray v. Chadwick** (1922), 49 N.B.R.144. There the headnote reads as follows:

> An agreement for the sale of land read in part as follows: The vendor agrees to sell and the purchaser agrees to buy nine acres of land situate, lying and being in the said Parish of Lancaster owned by the vendor as marked by stakes on the front of the farm of the vendor, it being the full front of said farm excepting thirty feet on the westerly side thereof, for the sum of $ 5,000.00.

> The plaintiff who was the purchaser, after executing the agreement, found that the land contained only 7.14 acres, and brought action for the performance of the contract with an abatement of the purchase price. The Court found that the sale was not on an acreage basis, but was a sale of the land as marked by the stakes, that the plaintiff had received the land he had bargained for and must pay the defendant the balance of the purchase price.

Sir Douglas Hazen, C.J., said at p. 151:

> The defendant's contention is that the bargain was to sell to the plaintiff, and he bought the portion of the land contained within the stakes, and that although nine acres is mentioned, that is merely descriptive, and the land that was included within the boundaries that had been placed up to the time and known to both parties was clearly the piece that was meant in the agreement for purchase and sale, and that the maxim: *falsa demonstratio non nocet cum de corpore constat* -(which means that a false description by way of addition does not matter where the thing itself is otherwise sufficiently described and ascertained) must apply...

DiCastri, *op cit* ,states at p. 266 the following:

> *Falsa demonstratio non nocet*. In the absence of fraud, a false description by way of addition may be disregarded, where the land is otherwise sufficiently described in or ascertainable from the contract and any relevant admissible parol evidence: *falsa demonstratio non noncet*.
>
> *Warranty as to quantity.* A statement of quantity in a description of the land sold does not *prima facie* import a warranty. Warranty is always a question of intention and the existence of that intention is a matter of fact to be determined by the totality of the evidence.

Mr. John Akerman, counsel for the defendant, Isaac Henley, with commendable propriety, acknowledged that if I accepted the testimony of Mr. Muise, the plaintiff's action must succeed. I am bound to say that having carefully examined the testimony given on behalf of the plaintiff by Mr. Muise and the testimony given by the defendant Henley, that where there is any conflict between the evidence given by these two witnesses, I choose to accept the version of Mr. Muise.

With regard to the discrepancy of the acreage of the land, I am satisfied on the totality of the evidence that the sale in the present case was for the whole field and not one by acres, even though the price was calculated on the number of acres stated by the vendor to be in the lot. There was no mistake whatsoever between Mr. Muise, acting on behalf of the Plaintiff, and the vendor as to what was intended to be sold. It is clear that Mr. Henley was in error as to the number of acres contained in the

measurements that he had supervised in preparing and that this error came to light a couple of years after the sale. At the time of sale, however, the vendor, Henley, was fully aware of the courses of the land that he was selling to the plaintiff and I find that the plotting of the description was done under his direction and with his assistance. Even though he later discovered that he was mistaken as to the acreage and that there were in fact nine acres and not four and one half acres in the field that he sold, I am prepared to hold on the basis of the maxim *falsa demonstratio non nocet* and pursuant to the decisions of **Gray v. Chadwick** (*supra*) and **Cottingham et al. v. Cottingham et al.** (*supra*) that the purchaser bought and the vendor sold what each had bargained for.

A closer look at the description in the 1969 deed may not be out of place. The beginning point, in my opinion, was accurately fixed – "at the where the *west line* of land owned by J. Pittman *meets the highway*" (Italics are mine.) The first course is exact inasmuch as it runs "southerly by Pittman west line". There may be some question as where is "the spruce tree at the corner" which is the end of the first course but there is no ambiguity whatsoever, in my view, that the second course is accurately described. It runs "westerly in a *straight line* to a *spruce tree* standing *immediately east of the barn* of the Grantor". (Italics are mine.) The third course, in my opinion, is also clear even though the number of feet attributed to it may be erroneous because it ends at "a stake on the *south* margin of the highway". (Italics are mine.) Finally, the fourth course is undoubtedly correct because it runs "*by the highway easterly* to the place of beginning. (Italics are mine.)

There no doubt in my mind that the highway (Pleasant Valley Road) can be considered as a monument and the barn of the grantor, as well as the spruce tree standing immediately east of the barn, can be treated as monuments. Useful reference can be made to the case of **Saueracker et al. v. Snow et al.**, (1974), 14 N.S.R.(2d) 607; 11 A.P.R. 607; 47 D.L. R.(3d) 577, a decision of my brother, Jones, J. wherein he referred to **Blackadar v. Hart** (1917), 35 D.L.R. 489. In that case, Sir Wallace Graham, C.J., stated at p. 492:

> But the 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 in a description a variance between the monuments and 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.

The plaintiff's claim is therefore allowed and there will be judgment entered declaring Percy Pittman to be the sole owner of the land described in his deed of November 27, 1969, on the basis of the transaction that took place between his agent, Mr. Muise, and the vendor, the defendant Henley. The pleadings, however, disclose that subsequently – after the difficulties herein arose – the plaintiff was prepared to pay an additional sum of $225.00 to the defendant Henley and the pleadings further show

that this amount was paid into Court. I would express the hope that Mrs. Joan Muise, the executrix of the plaintiff's estate, will carry out her late brother's wishes in this regard and that this money will be paid to the defendant Henley.

I may say that I am satisfied that the defendants Ivany acted on the erroneous impression that Mr. Henley, the defendant, who conveyed their lot to them on June 18, 1974 - containing approximately one acre – was legally entitled to do that. It was after they obtained their deed that construction was commenced on their lot. I am satisfied that the defendants Ivany did not act in contemptuous disregard of the rights of the plaintiff and therefore I approve of counsel's arrangement that there be no costs taxed against them. I would express the hope that the plaintiff's estate might reach some form of accord with the defendants Ivany whereby the latter might be able to retain the lot wrongly conveyed to them by the defendant Henley. If that is not possible, however, I direct that the defendants Ivany do within six months from the date of the order herein remove the building on that lot and cause to be executed by them a quit claim deed to the plaintiff's estate for the said lot. I do not consider it necessary to deal with any of the other demands of the plaintiff contained in the Statement of Claim herein.

The costs of this action, when taxed, are to be paid by the defendant, Isaac Henley, and if the $225.00 referred to earlier is paid to him, that sum may be set off from the taxed costs. There will be no costs against the defendants Ivany as agreed upon between counsel.

Judgment for plaintiff

LEVY v. STEVENS See 26 N.S.R. (2d) 236
Nova Scotia Supreme Court, Appeal Division
Coffin, Cooper and Macdonald, JJ.A.
May 25, 1978.

and

LEVY v. STEVENS See 26 N.S.R. (2d) 250
Nova Scotia Supreme Court, Trial Division
Cowan, C.J.T.D.
July 5, 1977.

Two decisions are included here - the first is a decision of the Appeal Division, and the second is the decision of the Trial Division which had been appealed.

The Plaintiff and the Defendant both owned land at Parsons Head (or Puffycup Point or Poffinkaupt) in Lunenburg County. The properties in the general area, including both that of the Plaintiff and the Defendant had been shown on a Plan of Division and Agreement dated 1865. That plan divided the lands and showed various roadways. It also contained on its face an agreement among the various owners relating to the use of the roadways shown on the plan. The portion of the agreement which dealt with the roadways was worded:

> "...saving and reserving unto ourselves, our heirs and assigns, the right in common with each other to all ways, roads and pathways in and over the said tracts of land, respectively, in manner and form, the same as have hitherto been used."

The Plaintiff had been using an existing roadway for access to her property. The Defendant blocked off the roadway by means of gates and refused to allow the Plaintiff to use the roadway. The Plaintiff commenced the action and asked the Court for a declaration that she was entitled to an easement over the roadway.

At trial, the Plaintiff established that the current roadway was, in fact, one of the roadways shown on the 1865 Plan and Agreement. The Defendant argued that

- the permitted uses of the easement should be limited, or, alternatively,
- that the easement had been abandoned by the Plaintiff.

The Judge reviewed these arguments.

The Use of The Easement Should be Limited

There were two aspects of this argument. First, the Defendant claimed that the words "the same as have hitherto been used." meant that the Plaintiff could only use the easement in the same manner as it was used up to 1865, presumably with carts pulled by animals and for agricultural purposes rather than residential purposes. Second, the Defendant claimed that the Plaintiff was about to subdivide her property and sell off cottage lots and the increase in use of the easement would change the very nature and character of it and that such a change should not be permitted.

As to the first argument, the Judge held that the words "the same as have hitherto been used" were meant to define which roadways were to be included in the agreement, not to restrict the use which might be made of them. As to the second argument, the Judge noted that the Plaintiff's husband testified that there was no intention to develop the property and sell cottage lots. The Trial Judge appeared to discount this argument as speculative.

The Easement Had Been Abandoned by the Plaintiff

As to the question of whether the easement had been abandoned by the Plaintiff, the Judge noted the requirement that there must be a clear indication on the part of the owner of an easement that they have abandoned it. The Judge held that a "mere cessation of use for a limited time does not amount to a discontinuance which causes a loss of the right to use." The Judge found that the easement had not been abandoned.

The Judge issued a declaration that the Plaintiff was entitled to use the easement.

The Defendant appealed.

The Appeal Division reviewed the Trial Judge's findings and agreed with all of them.

A considerable portion of the Appeal Division's decision dealt with the issue of the nature of the use of the easement which the Plaintiff was entitled to. There are some valuable discussions in the decision as to what would constitute a change of use of an easement which the Court would not permit.

LEVY v. STEVENS
Nova Scotia Supreme Court, Appeal Division
Coffin, Cooper and Macdonald, JJ.A.
May 25, 1978.

COFFIN, J.A.: This appeal arises out of an action by the respondent Marie Betty Levy against the appellant Cordelia Stevens claiming a right of way over the lands of the appellant and also a permanent injunction restraining the appellant from blocking or otherwise impeding the respondent's use of the right of way.

The facts are set out in the decision of Cowan, C.J.T.D. The lands of the respondent were purchased from Fred Nowe in 1970 and the deed to him covered a lot of land 5.37 acres in area at the southern tip of a peninsula in the County of Lunenburg, which was known as Puffycup Point or Poffinkaupt or Parsons Head.

The description of the right of way in the deed included the words "a right-of-way at all times and for all purposes in common with others having a similar right over the existing roadways as they are now used from the public highway to the lot of land hereinbefore described."

I emphasize the words "as they are now used" because these words are very important in considering the argument of the appellant.

The alleged right of way is shown on the plan of survey of Errol S. Hebb, a Nova Scotia land surveyor, dated October 22, 1976, and described as "Plan of Survey showing property of Bernard C. Levy at Mason's Beach, formerly known as Poffinkaupt or Parson's Head, Lun.Co., N.S." The plan indicates a driveway of varying widths from 10 feet near the appellant's dwelling house to something over 12 feet further south. It passes through a number of properties as it makes its way in a southerly direction toward the land of the respondent.

These properties are, as one proceeds southerly, the lands of: Cordelia Stevens, the appellant; Ross Mason; Cordelia Stevens again; Ross Mason again; Fred Nowe; and the respondent.

One of the exhibits was a certified copy of a plan of division of the Estate of George Dorey and endorsed thereon was an agreement dated February 10, 1865. Chief Justice Cowan remarked that this plan indicated the point of land in question and showed the various lots with the names of the various owners written thereon. The agreement endorsed on the plan was in the following words:

> We, the within named Joseph Dorey of South, in the County of Lunenburg, and Henry Mason of Mason’s Island, in the County aforesaid, have consented and agreed to the within Plan and division of the within tract of land, commonly known and distinguished by the name of Poffinkaupt or Parson's Head, and to hold to ourselves, our heirs and

> assigns forever those pieces or parcels of land whereon our names are respectively written and affixed and according to the metes, bounds and lines set forth and mentioned on said Plan, saving and reserving unto ourselves, our heirs and assigns, the right in common with each other to all ways, roads and pathways in and over the said tracts of land, respectively, in manner and form, the same as have hitherto been used.

Again I emphasize the words "in manner and form, the same as have hitherto been used".

The trial judge also pointed out that the evidence indicated that following the completion of the plan and agreement, the lands in question were occupied by various owners and that certain of the lands were used for raising crops, including hay, and some for logging purposes.

After his review of the evidence, the trial judge made this finding:

> I find that the Plan of Division and the Agreement, Exhibit Two, constituted an express grant of rights of way to the two parties to that agreement, Joseph Dares or Dorey and Henry Mason, and their successors in title. The extent of the rights of way so granted depend on interpretation of the phraseology of the Agreement, which refers to 'the right in common with each other to all ways, roads and pathways in and over the said tracts of land, respectively in manner and form, the same as have hitherto been used'.

He further found that the main road or right of way was the one shown on exhibit Number One by Mr. Hebb and Mr. Berrigan, who also signed the certificate attached to the plan and that the right of way was not restricted, but was "a grant of a right of way to and from the respective lands of the parties in accordance with the uses to which those lands may from time to time be put". It was his opinion that no restriction could be placed on the reservation, that the phrase "as we have hitherto been used" referred to the location of the various roads and paths in the area and that what was given was a general right of way. He further remarked that the vehicles used would be wagons and sometimes they would be drawn by oxen, but that indicated on restriction because a right of way in 1865 included the right to use the right of way with vehicles common at the time of use and not at the time of the grant.

It was his opinion that the extent of the use was that kind to which the lands are adapted, including residential purposes whether on a year round basis or seasonally. Nor was the use restricted to the kind of use to which the rights of way were put at the time of the conveyance to the respondent:–

> They are not restricted to hauling hay and hauling wood and giving access to lands for the purpose of cultivation and removal of crops, etcetera. The words 'as they are now used' refer to the location of the right of way rather than to the kind or extent of use.

Mr. Hebb's evidence was that he had done some survey work in the area in 1966 when Mr. Ross Mason was selling some property to Mr. Hugh Strachan. The following exchange appears in his evidence:

> Q. Were you stopped from crossing that road, any objections made at either time?
> A. In 1966 we didn't travel over that road but in 1970 we were obstructed when we entered but when we went to travel out from the survey site we were prevented from going any further by several gates and in one case there was a chain across the road and a lock on the chain.
> Q. You say these gates and chains weren't up when you went in; were they closed after you?
> A. Yes, they were closed after we entered.

Ross Mason was 76 years of age at the time of the trial. His property at Masons Beach had been in his family for over 100 years. When he sold to Mr. Strachan, he gave him another right of way, which was entirely on Mr. Mason's land. He was familiar with the road in question:–

> Yes. It goes right through the whole works of the property that is on that area; that is, Mr. Nowe's and Mrs. Stevens got a lot back here too, you know, back behind Hughie Strachan's here, and the road comes right through from out end of the point right out through to the main highway where Mrs. Stevens lives.

His family always used the road hauling wood, firewood and in haymaking:–

> You know, they had wagons in that time...

They did not use the road when it was wet, but did when it was dry. There had never been any question before about using it.

He was asked if there would be any other way of getting down to the end of the point:–

> No that's the only road, that's the only one (there) is. That, that leads to the Point. It's the only one that was ever used that I know of.

He acknowledged that Mrs. Stevens had stopped him about three years before the trial. He did not "bother" with the road since. He was asked if he had other ways of getting on his land and he replied:–

> Oh I can get anywheres I want to go as far as that goes because I own the land that's there but there's no road leading anywheres but there.

Fred Nowe, who was 67 years of age, said his property had also been in his family for over one hundred years. He knew the road but had not used it for eight or ten years. He used it for hauling wood sometimes with oxen and sometimes with a car and trailer when he was hauling hay. His father before him used it for the same purpose. No one had ever stopped Mr. Nowe or his father from using the road. Mrs. Stevens' predecessors in title had never objected. He confirmed that the right of way in the deed from himself to Mrs. Levy was the one past Mrs. Stevens' house. It was just the people who owned the adjoining land who used the road and there was no other way for the Levys to cross his land other than by this road "if he brought a vehicle".

On cross-examination Mr. Nowe agreed that it might have been sixteen years since he hauled wood over that road. He reserved his opinion as to whether or not he would use the road in the future. After being pressed by Mr. Cook that he had no purpose for using the road any more himself he replied:

> That don't say that I don't want to use it some other time.

Mr. Levy said that when they bought the land, he understood from people in the area that the top of the hill had been used as the right of way and he could see evidence of fences and the wheel ruts to indicate that. He was permitted to use the road for about two years and then the wire fences were erected and he vas completely blocked off and there was no way of settling the matter with Mrs. Stevens. He remembered the Stevens being on the right of way because they came down one day and pulled him out when he was stuck.

He denied on cross-examination that he wanted to divide the land and sell house or cottage lots. I shall refer to this later.

Cordelia Stevens said that the road coming up over the hill was the road to her house. She pictured the right of way as being only with permission. She had never, since she bought the property eighteen years before, seen anyone hauling wood. Mr. Nowe hauled hay with his car and his little trailer, but "he always asked my husband for permission and it's a good ten years since he hauled anything, you know, like hay".

She also stated that where it was suggested the road should go through, she had a garden and also the septic tank and pipes were in that area.

She insisted that Mr. Levy had told her there was going to be a public road there and that he was building cottages to rent.

Chief Justice Cowan asked the appellant, Mrs. Stevens, some interesting questions:–

> Q. Mrs. Stevens, looking at this plan in front of you, you have two pieces of land, is that right, divided by lands of Ross Mason?

A. Yes.
Q. How do you get from the lot on which your house is to the other lot out towards the point?
A. Well we go across Mr. Mason's land.
Q. What right do you have to go across?
A. Well, I don't know, we're supposed to.
Q. What do you use? Do you use the right of way shown on the plan?
A. Yes.
Q. When your son went down to the Point to cut firewood, what did he use?
A. I don't know what he took back, myself.
Q. He walked over the road, you know that.
A. Oh yes, he went over the road.
Q. Sure. He went across Ross Mason's land, Fred Nowe's land?
A. Yes.
Q. So he assumed it was a right of way out to the Point?
A. Well I guess he assumed, well, other people was going.
Q. Where did it end? That right of way proceeding from the Point, northerly –
A. Well, I don't know. I ain't familiar with that so I don't know.
Q. Okay. You may step down.

The appellant took issue with the finding of the Chief Justice that the words "as have hitherto been used" did not restrict the use of the right of way to those which were in existence at the time that the agreement was signed being the hauling of hay and other produce and the hauling of wood.

In support of this argument that the use of the right of way was restricted to bringing out raw materials from the respondent's property, Mr. Parish cited certain authorities.

For example, in **Allan v. Gomme** (1840), 11 Ad.&E. 759; 113 E.R. 602, an action for trespass for breaking into the plaintiff's close, the defence was that the defendant was entitled under a right of way and passage over the close "to a stable and loft over the same, and the space or opening under the said loft and then used as a woodhouse, and to the chaise-house then standing and being on the side of the said close..."

The defendant converted the loft and the space under it to a cottage and claimed he had a right of way appurtenant to that cottage.

The case is referred to in **Gale on Easements** (14th Ed.), at pp. 274 and 275 and I quote the comments there made including the extract from p. 607 of the report:

> The judgment of the court was delivered by Lord Denman C.J., who, while conceding that the words 'now used as a woodhouse' were to be taken merely as ascertaining the

> place where the open space of ground was, was of opinion that the defendant was confined to the use of way:
>
> 'to a place which should be *in the same predicament* as it was at the time of the making the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words "now used as a wood-house" merely used for the ascertaining the locality and identity of the place called a space or opening under the loft; and we think he might have the benefit of the way to make a deposit of any articles, or use it, in any way he pleased, provided it continued in the state of open ground. But we think he could only use it for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed. Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that Browne had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture, or in corn, and had subsequently filled the land with small cottages or had built a factory, or established gas works, it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings.'

Kain v. Norfolk and another, [1949] 1 Ch. 163, interpreted a 1919 conveyance of agricultural glebe land and adjoining rectory, which included a grant of the "right at all times hereafter with or without horses carts and agricultural machines and implements to go pass and repass" over a defined area.

Jenkins, J., at the outset pointed out that the right of way depended upon an express grant and therefore "its extent and the user which it permits must be determined by the construction of the document granting it, that is to say, the conveyance of 1919 to the first defendant".

It had been argued that the word cart restricted the type of conveyance and could in no way be considered to include the use of the right of the way by such vehicles as lorries.

Jenkins, J., at p. 169 said that he proposed to limit himself to the question whether the use of this right of way by motor lorries was an excessive usage. He then stated:

> In my judgment it is not. I think a reasonable construction should be placed on this grant, and I think it should be construed as meaning that the grantee his executors, assigns, and so forth, and tenants, can pass and repass over the way, either on foot or with vehicles in the nature of carts or with agricultural machines or implements. A cart for this purpose, in my judgment, is primarily a vehicle adapted to carry materials, goods, and so forth, possible in contradistinction to a vehicle adapted for carrying passengers, and I do not think the particular mode of propulsion of the cart or vehicle is for the present purpose of any materiality at all.

He thus found that there was no excessive user in carrying material by lorries. It appears from the foregoing extract that Jenkins, J., held the view that a cart was in his judgment primarily a vehicle adapted to carry materials and goods "possibly in contradistinction to a vehicle adapted for carrying passengers...".

In **Pearsall and Pearsall v. Power Supermarkets Ltd.** (1957), 8 D.L.R.(2d) 270, Judson, J., in the Ontario High Court held that a right of way expressly appurtenant to one piece of land cannot be extended and used for purposes of an adjoining parcel even though both properties will come into common ownership. He said at pp. 271 and 272:

> At its creation the right-of-way was appurtenant only to the 28 ft. 6 ins. strip. There was an attempt by the predecessor in title of the defendant, by some conveyancing juggling, to which the plaintiff was not a party, to make the right-of-way appurtenant to the 36 ft. 6 ins. parcel. This attempt fails. The law is stated in **Purdom v. Robinson** (1899) 30 S.C.R. 64 at p. 71 in these terms:
>
> 'That a right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect of any other property is shown by many reported cases of which two cited by the respondent may be particularly referred as establishing the proposition. In **Skull v. Glenister**, 16 C.B.N.S. 81, this was one of the questions decided and Erle C.J. says:
>
> 'This right of way was appurtenant to the land demised by the Wheelers to the defendants. The defendants are therefore bound to make use of this way for purposes exclusively connected with their holding of these demised premises.'

As the parcels were held in common, Judson, J., went on to say that in his opinion the injunction could restrain the defendant from using the right of way in connection with both parcels.

In **Collins v. Slade** (1875), 23 W.R. 199, the lessee was granted a right of way which was used at the time of the lease in relation to the lessee's business as a coach manufacturer and as the report points out, was used solely for the purpose of the trade. The gate at the end of the passage was locked from 8:00 P.M. each day, except Saturday, when it was closed from 11:00 P.M. to 6:00A.M. on the following Monday morning. "This locking of the gate was necessary for the protection of Collins's property, as he used part of his portion of the premises as a lay stall and for storing hay, etc."

Years later, these business premises were converted into a place of entertaining, which of course greatly increased the proposed use of the right of way. Bacon, V.C., said at p. 200:

> There can be no pretence for saying that the servitude which by reason of this grant is imposed upon the plaintiff's property is to be in any degree extended, nor can the

> defendant claim any right to amplify the grant which is made. If he had only used it as William Slade used it, he could only have used it between the specified hours, he could only have used it subject to the right of the plaintiff to lock up the gates during the rest of the day.
>
> But what has the defendant done? He has done something which would increase the weight of the servitude upon the plaintiff, and which would enlarge the rights which his predecessor stipu1ated to have, because, instead of having a right of way to and from the gateway as enjoyed, by William Slade, he would have a right of way all over the area of the passage, and for the purpose of bringing through a crowd of persons to attend the entertainments which he gave in the coach manufactory, now turned into a theatre or music hall. He can have no such right.

These cases which I have just mentioned were cited to support the proposition that a right of way by express grant was limited to the words of the grant and the burden on that easement could not be increased.

The point arose out of some evidence of Mrs. Cordelia Stevens, the appellant. She described a conversation between herself and the respondent, when they were discussing the respondent's right to go over this area in which the respondent had said among other things:–

> And another thing he told me, he said, it's no good, he told me, for to kick up a fuss, because he says, this here is going to be a public road in time, because he said, 'I'm building cottages to rent'. Now that's what the man told me.

The respondent's husband Bernard Levy, who actually took care of the transaction on the purchase of the land was asked about this on direct examination:–

> Q. You've 5.37 acres?
> A. Right.
> Q. What do you want to use all that land for?
> A. I had no particular reason at the moment.
> Q. I understand that you want to divide it and sell house lots or cottage lots in that area?
> A. That is not true.

He was further questioned about it on re-examination when his own counsel asked him what kind of a right of way he thought he was getting:–

> Q. There was reference made to a, did you make any inquiries as to the kind of right of way – did you assume at the time you purchased the land a right of way would be there of a kind that you could use to travel over to your summer home?
> A. I assumed it was probably a narrow right of way which would just permit me to get a car in through. Or vehicle.

That answer does not indicate that he was taking an extreme position at the time of the trial.

I agree with the trial judge that the right of way would not be restricted to vehicles used in 1865.

In **Laurie v. Winch**, [1952] 4 D.L.R. 449 (S.C.C.), Kellock, J., at p. 456, said that while the dominant tenement was at the date of the grant of right of way, being used for agricultural purposes, there was in fact no reason why it might not in future be subdivided.

> I think, therefore there is nothing in the circumstances to restrict the plain words of the grant to the use being made of the farm lane at that time. Further, upon the severance of the dominant tenement into several parts, the easement attached to those parts.

In that case the farm lane had been obliterated and the gates having disappeared, Kellock, J., stated that if the parties failed to agree, he would direct a reference to define the location of the right of way.

The **Winch** case was referred to by Aylesworth, J. A., in **Malden Farms Limited v. Nicholson**, [1956] 3 D.L.R.(2d) 236, but in that case a right of way which was intended strictly as a private right of way became used as access to a commercial beach area, and it was held that that was an illegal extension of the right given in the grant of easement and should be restrained.

In **Gale on Easements** at p. 274 this comment appears:

> It would seem, also, that user of an authorised kind, *e.g*. with vehicles, may be had, at least if that particular kind of user is expressly authorised, to any increased extent which the physical state of the *locus in quo* will for the time being allow.

Halsbury's Laws of England (4th Ed.), p. 72, para. 150, puts it this way:

> So also a grant of a right of way along a piece of land capable of being used for the passage of cars, to a place which is stated on the face of the grant to be intended to be used for a purpose necessarily or reasonably requiring the passing of cars, must be intended to be effectual for the purpose for which the place was designed to be used, or was actually used at the time of the grant.

In **Smith v. Morris**, [1935] 2 D.L.R. 780, Masten, J. A., at p. 782 set out the principles as expressed in **Cannon v. Villars** (1878), 8 Ch.D. 415, at pp. 420-1, and at p. 783 he made this comment:

> 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.

I also agree with the trial judge's finding that there was no intention on the part of Fred Nowe to abandon the right of way and that a mere cessation of use for a limited period does not result in the loss of the right to use.

On this point I refer to the decision of Hart, J.A., when he sat as the trial judge in **Aspotogan Ltd. v. Lawrence** (1972), at pp. 349 and 350 and to the judgment of this Court in (1972) 4 N.S.R.(2d) p. 313 at p. 335; 39 D.L.R.(3d) 339 at p. 355.

I am satisfied that the respondent is entitled to a right of way as delineated on Exhibit No. 1, being a plan of survey of Errol B. Hebb and Lester W. Berrigan:

> Showing property of Bernard C. Levy at Masons Beach, formerly known as Poffinkaupt or Parsons Head, Lun. Co., N. S.

dated the 22nd day of October A.D. 1976, this right of way having been found by Cowan, C.J.T.D. to have been created by express grant in the agreement attached to a "Plan of Division of the Estate of the Late George Dorey, dated the tenth day of February, One Thousand eight hundred and sixty-five". This right of way is expressed as one not to exceed twelve feet in width.

The appeal should be dismissed with costs.

Appeal dismissed.

LEVY v. STEVENS
Nova Scotia Supreme Court, Trial Division
Cowan, C.J.T.D.
July 5, 1977.

In this case the Plaintiff claims a right of way over lands in part owned by the Defendant. The Plaintiff purchased lands from Fred Nowe in 1970 and received a Deed, Exhibit Nineteen, conveying a lot of land 5.37 acres in area at the Southern tip of a peninsula known as Puffycup Point or Poffinkaupt or Parsons Head, in the County of Lunenburg. The Deed conveys "a right of way at all times and for all purposes in common with others having a similar right over the existing road ways as they are now used from the public highway to the lot of land hereinbefore described". The location of the lands of the Plaintiff and of the right of way and of the lands of the Defendant are shown on Exhibit One, a plan of survey dated October 22nd, 1976, prepared by Errol S. Hebb, a Nova Scotia Land Surveyor, based on survey work done by himself and by Lester W. Berrigan, another Nova Scotia Land Surveyor who worked Mr. Hebb.

The evidence of Mr. Hebb and Mr. Berrigan was that Exhibit One shows a right of way which proceeds in a Southerly direction from the public highway, leading from Lunenburg to First South. The right of way is shown proceeding through a number of properties which, in order from the public highway at the North, are owned by the following:– the Defendant, Cordelia Stevens, being her dwelling house lot; Ross Mason; second lot owned by Cordelia Stevens, the Defendant; and second lot owned by Ross Mason; lot owned by Fred Nowe; and the lot owned by the Plaintiff. The location of the right of way passing through the dwelling house lot of the Defendant is shown as ten feet (10') wide and at the present time there is a wire fence across the line of the right of way and a gate which effectively prevents vehicular traffic from proceeding over the location of the right of way from the public highway to a further wire fence, being the boundary between the dwelling house lot of the Defendant and the most Northerly lot of Ross Mason. The location of the right of way is close to the dwelling house of the Defendant and just the East of that house. The right of way then proceeds a Southerly direction and varies in width from ten to twelve to fourteen feet. At approximately one thousand feet (1000') from the public highway there is an intersection in "Y" form with a truck road which leads off the right of way in a Northeasterly direction. This truck road is located entirely on lands of Ross Mason. The Defence of the Defendant is that the right of way claimed by the Plaintiff does not exist and does not in any event cross any lands owned by her.

Exhibit twenty-two is a certified copy of a Plan of Division of the estate of one George Dorey. Endorsed on the Plan of Division is an agreement dated February 10th, 1865. The Plan of Division shows the point of land in question and shows the various lots with names of various owners written on these lots and the agreement endorsed on the Plan reads as follows: "We, the within named Joseph Dorey of South, in the County of Lunenburg, and Henry Mason of Mason's Island, in the County aforesaid, have consented and agreed to the within Plan and division of the within tract of land, commonly known and distinguished by the name of Poffinkaupt or Parson's Head, and to hold to

ourselves, our heirs and assigns forever those pieces or parcels of land whereon our names are respectively written and affixed and according to the metes, bounds and lines set forth and mentioned on said Plan, saving and reserving unto ourselves, our heirs and as- signs, the right in common with each other to all ways, roads and pathways in and over the said tracts of land, respectively, in manner and form, the same as have hitherto been used." The agreement is then signed by Joseph Dares (which was apparently the name under which Joseph Dorey sometimes went) and Henry Mason and the Plan of Division and Agreement are recorded in the office of the Registrar of Deeds for the County of Lunenburg. The evidence indicates that following the completion of this Plan and Agreement, the lands in question were occupied by the various owners and that certain of the lands were used for cultivation and certain of the lands were used for raising crops, including hay, and certain of the lands were used for logging purposes.

A number of aerial photographs were introduced as exhibits. Exhibits eight and nine are aerial photographs taken in 1951. Exhibit Number Ten is an enlargement of one of these photographs. Exhibit Four is a more recent aerial photograph. The photographs clearly show that, at the times when the respective photographs were taken, there was a clearly defined roadway which led from the roadway which is now the public highway from Lunenburg to First South in a Southerly direction to a point just North of the tip of the point of land in question where it then curved to the West and proceeded down to a gravel beach on the West side of the point of land.

The evidence of Mr. Hebb and of Mr. Berrigan was to the effect that the right of way, which they showed on Exhibit One, was in the same location, or is in the same location, as the right of way shown on the aerial photographs referred to above.

I also heard the evidence of Ross Mason who is seventy- six (76) years of age and Fred Nowe who is sixty-seven (67) years of age. Ross Mason is the owner of lands, part of which are shown on the survey plan and on the photographs. He has lived all his life in the area and for twenty- seven (27) years owned the property shown on the plan as belonging to him. His father, Thomas Mason, owned the land in question before his death at the age of seventy-four (74) and his father before him owned some of the land in question. Ross Mason's land borders on the lands of Nowe and Stevens. Ross Mason said that he sold a piece of land to Hugh B. Strachan, which is shown on the Plan, Exhibit One. He also sold land to one Herman and a separate roadway was constructed over the lands of Ross Mason to give access to the lands of Herman and Strachan. This road was built some fifteen (15) years ago. Mr. Mason said that he remembered the road on the top of the hill which is the right of way in question. He said that it goes through the whole of the properties in that area from the end of the point to the lands of Mrs. Stevens, the Defendant, and the public highway. He said that he always used the road in summer and in winter hauling wood and he made hay on his lands and used wagons to haul out the hay. He said that there was only one road that leads from the public highway to the point and that he had not used it for the last couple of years. He said that he had some discussions with the Defendant, Mrs. Stevens. She stopped him from using the road and said that there were other roads which he could use. She said that the right of way in question was closed. She had her son standing in

front of his truck. That was the first time that he was stopped. He said that this happened three years ago. He had other means of access over his own lands and did not force the issue. Some years ago a man named Ray Silver wanted to haul gravel off the gravel beach to the West of the point. This was on lands owned by Fred N owe and Fred Nowe had given Silver permission to haul the gravel away. Mr. Mason said that he gave Silver permission to come off the right of way in question at the point indicated on the Plan, Exhibit One, where there is an indication of a road branching to the Northeast and the notation "truck road continues". Mr. Mason said that he let Silver bulldoze the road to haul out the gravel and when he was finished he closed off that road and no one was allowed to go through it. He said that he g ave no one else the right to use the road which was constructed for the use of Herman and Mr. Strachan. That was the way he wanted it. Fred Nowe's evidence was to the effect that he received the land in question from his father and had owned it since 1940. His father had bought it at auction and had come dovn through his grandfather on his mother's side. Apparently she was a Dorey. He is familiar with the right of way shown on Exhibit One, which is the right of way in dispute and said he had used it in the past but had not used it for some eight or ten years. He used it frequently at times for hauling wood. At one time he used oxen. He also used motor vehicles. He hauled hay with a trailer and a car. He said that he had never been stopped from using the right of way. He knew the predecessor in title of the Defendant, Mrs. Stevens, and there was no objection from that predecessor in title. He said to his knowledge everybody in the area used that right of way all his lifetime. In the last eight or ten years he did not have much use for the road and did not use it. At times, he said, there were things in the road. There were cars parked on it and wood was dumped in the road in the area near the Defendant's house. He had sold the land in question to the Plaintiff and his understanding of the right of way referred to in Deed from him to the Plaintiff was that it was the right of way which went past Mrs. Stevens' house and he assumed that the Levys, as purchasers of part of the land, could use that right of way. He said that there was no other way to the land he had sold to the Plaintiff and there was never any other road that led to that lot. He said that part of the right of way passed property which he owned and that he never stopped any of the landowners from using the property. He said that at one time he used to plant crops there and if anything was planted, he would go there to plant the crops and take the crops away. He said that he made hay on the land and that he used the road when he needed it. He agreed that it was some time since he had hauled wood over the road. He put an oil furnace in his house some eighteen years ago but he did not know whether that was eighteen or twenty years ago. He said he did haul hay past the Stevens house and could not say when he ceased to haul the hay. He agreed that he abandoned making hay on the land, and had abandoned cutting wood on the land for the time being, but he said that while he was not using the road, he never intended to give up or abandon the right to use the road.

Evidence was given by Bernard Gordon Levy, husband of the Plaintiff. He said that he had arranged the purchase by his wife of the lands in question and he understood that there was a right of way to the land over the right of way shown on Exhibit One from the public highway through the lands of the Defendant. He said he had walked over the land in which the right of way was located and saw evidence of fences and wheel ruts. He said that the first summer his wife owned the property, they used the property all summer and he had a trailer on the property. He trucked in gravel to build up

places where the road was muddy and soft. He said he discussed this with Mrs. Stevens and told her that he was mainly going to use the land in the summer time. She did not seem pleased but did not stop him. This carried on for approximately two years. He was then away for some considerable time and when he returned he found that the road was blocked off and wire fences were placed up. He was not able to use the right of way after that. He talked with Mrs. Stevens about other ways of obtaining access to his lot. She made reference to a right of way along Mason's line fence, and this reference was contained in the Deed which she had received to her property, but there was no indication of where this right of way was and he could not find an alternative right of way, nor did she ever suggest or agree that she would grant him an alternative right of way. He approached Ross Mason and attempted to obtain a right of way over the roadway used by Herman and Strachan but permission to use this right of way was refused. He said that, on one occasion, he had his motor vehicle over the right of way and became stuck in the mud and one of the Stevens boys, a son of the Defendant, pulled him out. He gave permission to the son to cut fence posts on the Levy lot and these fence posts were hauled out over the right of way to the Stevens property. He said that there were considerably large ruts in the right of way in 1970 and 1971, indicating that the right of way had been used. This was near the location of the Defendant's dwelling house. He said he filled these ruts up with a truck load of gravel. He said he wished to have a right of way and was willing to have the right of way moved to a place more convenient to the Defendant, but the Defendant had not agreed to give him a right of way that would cross her land at any location.

Evidence was given by the Defendant to the effect that she and her husband purchased the property in question eighteen years ago. She denied that she ever saw anyone hauling wood over the right of way past her house. She said that Mr. Nowe did several times haul hay but said that he always asked her husband and that he had hauled no hay in the last eight or ten years. The location of the proposed right of way passes close to her house and some six years ago plumbing was put in the house, a septic tank was located underground at or near the location of the right of way and pipes from the tank to the house were under the area claimed by the Plaintiff as part of the right of way.

At the request of counsel I took a view of the property in question and saw the fence and the gate which bar access to the portion of the right of way lying to the South of the Defendant's property and close to the suggested location of the right of way to the Defendant's house. The Defendant agreed that the Plaintiff had used the right of way at first but said that he told her that this was going to be a public road in time, that he proposed to build cottages to rent. Mr. Levy, in his evidence, denied that this was so and said that he wished merely to use the property as a summer residence. The Defendant said that she was not willing to give the Plaintiff a right of way at any time that would pass over her property. She did agree later in re-examination that if a right of way could be found over the lot to the South of the dwelling house lot, and separated from it by the Ross Mason cultivated field, she would rather have the right of way pass over that than pass by her house. There was no indication as to whether a right of way over that lot would give access to the public highway and there was no indication as to who would provide the right of way or put it in condition to be used. The Defendant agreed that she and her family used the right of way to the South of the Southern boundary of her dwelling house lot over the lands of

Ross Mason, to gain access to the other lot to the South and that her son, when he cut fence posts on lands of the Plaintiff, used the entire right of way to gain access to the Plaintiff's lot and to return to the dwelling house lot of the Defendant.

I find that the Plan of Division and the Agreement, Exhibit Two, constituted an express grant of rights of way to the two parties to that agreement, Joseph Dares or Dorey and Henry Mason, and their successors in title. The extent of the rights of way so granted depend on interpretation of the phraseology of the Agreement, which refers to "the right in common with each other to all ways, roads and pathways in and over the said tracts of land respectively in manner and form, the same as have hitherto been used". I find that the main road or right of way was the right of way as located on Exhibit Number One by Mr. Hebb and Mr. Berrigan, and that the use of that right of way is not restricted but is a grant of a right of way to and from the respective lands of the parties in accordance with the uses to which those lands may from time to time be put. It was submitted that the use of the words "as have hitherto been used" restricted the use of the rights of way to the hauling of hay and other produce and the hauling of wood. In my opinion, no restriction can be read into the reservation and grant of the rights of way of this kind. The phrase "as have hitherto been used" refers in my opinion to the location of the various roads and paths and ways in the area. What was given by the document, Exhibit Two, was in my opinion a general right of way. It is true that, at that time, the vehicles used would be wagons and the means of propulsion would be oxen but this does not mean that the use of the right of way is restricted to these vehicles and to that means of propulsion. The grant of a right of way made in 1865 carries with it the right of way by using vehicles which are in common use at the time of use and not at the time of grant. Similarly, the kind of use to which the dominant tenement, in this case the lands of the Plaintiff, are to be put are not necessarily restricted to the use to which those lands were put in 1865. The extent of use, unless there is an express restriction or implied restriction in the words of grant, is the kind of use to which the lands are adapted and this seems to me includes use for residential purposes whether on a year round basis or on a seasonal basis. Similarly the use of the words "a right of way at all times and for all purposes in common with others having a similar right of way over the existing roadways as they are now used" as used in the Deed to the Plaintiff, Exhibit Number Nineteen, do not amount to a restriction to the kind of use to which the rights of way were put at the time of the conveyance to the Plaintiff. They are not restricted to hauling hay and hauling wood and giving access to lands for the purpose of cultivation and removal of crops, etcetera. The words "as they are now used" refers to the location of the right of way rather than to the kind or extent of use.

I therefore find that at the time of the Plan of Division and Agreement of 1865, being Exhibit Number Two, there was a right of way over the lands now owned by the Defendant and the only question is whether that right of way has been extinguished. One method of extinguishing of a right of way is by abandonment but it is clear that a mere diminution of use or cessation of use for a period does not amount to an extinguishment or abandonment of the right of way. There must be a change in the nature of the dominant tenement to indicate that the right of way is no longer of any value and is not being used or there must be a clear intention to abandon. I find in this case that there was no intention on the part of Fred Nowe to abandon the right of way which he had and used over the lands of the Defendant. His

evidence clearly indicates that he felt that he still had the right to use the right of way and would use it in future. He did cease to use it as frequently as he had before for the reasons which he gave but he clearly intended to retain his right to use the right of way for access to his land and this was a right which he could pass on to the Plaintiff as a purchaser of part of that land. A mere cessation of use for a limited period does not amount to a discontinuance which causes a loss of the right to use. Apparently, if the right is acquired by prescription it can be lost by the cessation of use but only after this has continued for 20 years. The evidence indicates that the right was used as recently as three years ago. The septic tank, built by the Defendant, was built only six years and, while a fence has been erected, this was done in recent years and certainly since 1974. The evidence of Mr. Nowe was that he last attempted to use it in that year.

I find therefore that the right of way was not abandoned and that it still exists. The Plaintiff is entitled to succeed with regard to her claim and a declaration will issue that the Plaintiff has a right of way with or without vehicles for all purposes and at all times over the right of way shown on Exhibit Number One from the Northeast boundary of the Plaintiff's lot to the Southern boundary, the public highway, leading from Lunenburg to First South, and an injunction in appropriate terms will issue restraining the Defendant from interfering in any way with the use by the Plaintiff of the right of way. If it is thought necessary so to provide, gates may be maintained and locked. Keys will be provided to the Plaintiff and if the parties can agree on appropriate provisions with regard to this, I will include these in the Order; otherwise I will settle the terms of the Order to provide that the use of the right of way will be unrestricted. There was some suggestion that the Defendant would permit a right of way to be established over the lot of land to the South of the dwelling house lot and separated from it by the Ross Mason land. If this is to be done, the burden is, of course, on the Defendant to come up with a solution and to suggest a location for the new right of way and the terms on which it is to be provided. There is no obligation on the part of the Plaintiff to find another right of way, and while the Plaintiff has endeavoured to find other rights of way and has used every reasonable means of finding other rights of way, there seems to be no way in which this can be done, as other landowners cannot be forced to grant rights of way over their property or over existing roads.

The Plaintiff will have her costs of the action.

Judgment for plaintiff.

CROSSLAND v. DOREY See 27 N.S.R. (2d) 139

Nova Scotia Supreme Court, Trial Division
Morrison, J.
December 16, 1977.

This is a case about conventional line agreements. The Plaintiff Crossland and the Defendant Dorey owned adjoining properties at Woodstock in Lunenburg County. The Plaintiff owned lands on the south of the common boundary line and the Defendant owned lands to the north.

The descriptions contained in the various deeds were very vague and confusing. The Judge discussed the fact that the whole area had originally been subdivided into three hundred acre grants. Following that, there were three different divisions of those large grants and the Judge indicated that it would be very difficult to determine with any certainty where the boundaries should be.

In 1963, the Defendant Dorey purchased his lands. Shortly thereafter, there was a dispute with Freeman Crossland, the Plaintiff's uncle and predecessor in title. Dorey contacted Errol Hebb, N.S.L.S. and asked him to survey the boundary in issue. Mr. Hebb visited the land in September of 1964 and met with both Dorey and Freeman Crossland. In addition, Floyd Crossland, the Plaintiff was present. Mr. Hebb made some investigations and proposed a boundary that he felt represented fairest division of the properties based on the stated acreage in the respective deeds. When this proposed line was shown to the parties, the Defendant Dorey complained about its location and Freeman Crossland agreed to a new line that resulted in him giving up some 5 to 10 acres of land from the proposed line. That agreed line was marked and Hebb had both Freeman Crossland and the Defendant Dorey sign an agreement in his field book confirming their agreement. Floyd Crossland acted as a witness to the agreement. About one month later, Freeman Crossland conveyed his land to the Plaintiff Floyd Crossman. The parties lived up to the agreed line and respected it until 1977 when the Defendant Dorey cut over it onto the land of the Plaintiff Crossland. Crossland sued for damages for trespass, for a declaration that the 1964 agreed line represented the correct boundary between the parties and for an injunction restraining the Defendant from further acts of trespass. The Defendant counterclaimed for damages for trespass by the Plaintiff.

After reciting the above facts, the Judge reviewed the evidence of the use and possession of the respective properties both before and after the 1964 agreement. The Judge found that a conventional line agreement had been reached between Dorey and Freeman Crossland and that this agreed to boundary line was relied upon by Floyd Crossland after he acquired title from Freeman Crossland.

The Judge reviewed several prior cases that deal with the requirements for a conventional line to come into existence and confirmed that this case met all of those requirements. The Judge issued an injunction restraining the Defendant from further acts of trespass and awarded damages for the value of the wood cut by the Defendant. The counterclaim of the Defendant was dismissed.

CROSSLAND v. DOREY
Nova Scotia Supreme Court, Trial Division
Morrison, J.
December 16, 1977.

This is an action for damages in trespass. The plaintiff also seeks an injunction to restrain the defendant or his agents from continuing such trespass, and also for a declaratory judgment fixing the boundary line between the Plaintiff and the defendant. The defendant has counterclaimed damages for trespass.

The Plaintiff, Floyd Crossland, is the successor in title to one Freeman S. Crossland who obtained a certain portion of land situate at Woodstock, in the County of Lunenburg and Province of Nova Scotia. It should be pointed out here that the area in question is sometimes referred to as "Woodstock", sometimes as "Walden", sometimes as "Clearland", and sometimes as "Spondo". All of these terms describe the same area in Lunenburg County.

The description of the lands conveyed to Freeman S. Crossland by warranty deed dated the 2nd of November, 1939, and recorded at the Registry of Deeds at Bridgewater, Nova Scotia, on the 10th day of September, 1964, in book 131 at page 383, is as follows:

> FIRST LOT: All that certain piece, parcel or tract of land situate, lying and being in Woodstock, in the County of Lunenburg and Province of Nova Scotia, containing about thirty five acres more or less, and bounded on the West by a lot formerly owned by one Spidle, East by what is known as the Mosers Lot, North by Lot formerly owned by Eleazer Veino, South by land formerly owned by Elam Veinot and being a certain lot conveyed to George D. Keddy and J. Augustus Keddy by Henry S. Jost, Assignee, by deed hearing date the 19th day of July, A.D., 1880, and registered in the Registry of Deeds office at Lunenburg the 18th day of September, A.D. 1880 in Book 34, folio 124 No. 91, and being the same lot of land as conveyed to Jame Aulenbach from George D. Keddy, dated the 2nd day of January, A.D. 1912, and registered in the office of the Registry of Deeds, Bridgewater, N.S. in Book 75, at Page 735 under Number 488.
>
> SECOND LOT: All that certain piece, lot, or parcel of land situate, lying and being in Woodstock in the County of Lunenburg and being part of three hundred acre lot number 10 letter "A" in the Third Division and bounded as follows, – Beginning at the South corner bound of Reuben Veinot's lot, thence running North thirty-five degrees West 19 1/2 rods to the West corner bound; thence North 60 degrees East 300 rods to the North corner bound; thence South 35 degrees East 19 1/2 rods to the East corner bound; thence South 60 degrees West 300 rods to the place of beginning and containing 35 acres more or less, and being that lot of land conveyed to Nathan Lantz and Augustus Lantz by Elim Veinot and Lucinda Catherine Veinot his wife by deed

> bearing date the 22nd day of December, A.D. 1884 and recorded in the Registry of Deeds office at Lunenburg, N.S. the 17th day of April, 1886, in Book 39 at Page 599, and being the same lot of land as conveyed to James Aulenbach by Nathan Lantz and wife and Augustus Lantz and wife by deed bearing date the 15th day of January, A.D. 1912, and recorded in the Registry of Deeds office at Bridgewater, N.S. in Book 75 at page 733 under number 487.
>
> Both of the above described lots having been devised to the said Ozem Aulenbach by the Last Will and Testament of James Aulenbach, late of Mahone Bay, deceased, by Will probated in the Probate Court for the County of Lunenburg on the 30th day of August, A.D. 1934.

Freeman S. Crossland then conveyed the above described two lots of land to his nephew, the plaintiff, Floyd Crossland, by deed dated 19th of October, 1964, and recorded at the Registry of Deeds at Bridgewater, Nova Scotia, on the 30th of December, 1964, in Book 132, at page 95.

The defendant's claim rests on a deed dated the 14th day of November, 1963. This deed purports to convey land from Lindsay Whynacht, Fay Fader and her husband, James Fader, Phyllis Crowe and her husband, David Crowe, as grantors, and Clifford Dorey of Western Shore, in the County of Lunenburg, as grantee. The land is described as follows in that conveyance (exhibit 9(6)):

> ALL and singular that certain piece or parcel of land situate at Woodstock, in the County of Lunenburg and Province of Nova Scotia, which can be more particularly described as follows: – Being part of Three Hundred Acre (300) Lot Number nine, (9), Letter 'A' in the Third. Division and bounded on the North by land formerly of Frederick Ham, on the South by lands formerly of George and Augustus Kedy and containing fifty (50) Acres more or less and having been conveyed to the said Austin Whynot by Samuel Winacht and wife by Deed, dated July 1st 1916, and recorded at Bridgewater, in Book 81, at Page 341, under Number 256, *and being the Second Lot* as described in a Deed by John Creighton, High Sheriff, of the County of Lunenburg to Lawrence Slauenwhite by Deed, dated April 6th, 1933, A.D., and recorded in the Office of the Registrar of Deeds at Bridgewater, Nova Scotia, in Book 101, at Page 524, under Number 806.

The defendant also claims ownership of a one hundred acre lot of land to the north the above described deed.

The predecessor in title to the plaintiff took possession of seventy acres of land in the Woodstock area on the authority of the deed which he obtained from Aulenback in 1939, and the defendant took possession of lands adjacent to those occupied by Freeman S. Crossland by authority of the deed dated November 14, 1963, described above.

Several plans were introduced into evidence. Exhibit 3, a plan introduced by the plaintiff, and exhibit 4, a plan introduced by the defendant, agree upon the location of the disputed area of land. Exhibit 4, the defendant's plan, clearly shows the disputed line whereby Floyd Crossland has fixed his boundary.

When the defendant, Dorey, obtained title to the above described lot of land he found himself shortly afterwards in a dispute with Freeman S. Crossland, the plaintiff's predecessor in title, over the northerly boundary of the Crossland land and the southerly boundary of the defendant's land.

Because of this both men discussed the location of the boundary line and they agreed to obtain a surveyor to try and determine the accurate boundary between the two properties.

The defendant, Clifford Dorey, contacted Errol Hebb, a registered Nova Scotia land surveyor, who has been surveying land for thirty years in the Lunenburg County area. Mr. Hebb said that he was contacted by Mr. Clifford Dorey, the defendant, to do a survey in the Spondo Lake area to determine the boundary line between two adjoining properties owned by the defendant, Dorey, and by Freeman S. Crossland.

On September 16, 1964, Mr. Hebb arrived at the scene and consulted with both parties. They each produced up to date deeds, according to Mr. Hebb, and they both assured him they were the owners of the properties. Mr. Dorey then showed him the most northerly boundary of his land and Mr. Freeman Crossland showed him the most southerly boundary of his lot of land. Mr. Hebb understood that Dorey had a one hundred acre lot to the north, known as the "Ham" lot, and south of that the fifty acre lot, which has been described above. The southern boundary of the fifty acre lot is the one that would abut the northern boundary of the Crossland lot. Mr. Crossland had land which was supposed to consist of two thirty-five acre lots, making a total of seventy acres.

Mr. Hebb also testified that the area in question had been subdivided two hundred years ago into three hundred acre lots one mile in length and thirty-seven and a half chains in width, but since then it has been broken into any number of lots. Actually, there were three divisions of the land, and descriptions often refer to the first, second and third division, and the areas are described by letters "A", "B", etc.

This has led to some very confusing descriptions and some errors in the various deeds that can only be reconciled by comparing the lots on the ground and the boundaries of these lots with the descriptions in the deeds. Mistakes were freely admitted by both sides in the descriptions of the various deeds that were introduced.

In any event, on September 16, 1964 Mr. Hebb surveyed the area, and basing his search on Mr. Dorey's reference to his northern line he fixed his southern line so that it would provide him with one hundred and fifty acres of land. Similarly, he used Mr. Crossland's southerly boundary as indicated to him by Mr. Crossland as a base line, and then fixed the northerly boundary of his line. He showed both men where the line should be, but Mr. Dorey, the defendant, was not satisfied. After considerable

discussion and argument, Mr. Crossland agreed to give up some portion of what he felt to be his land in order to get a line fixed. They then agreed upon a line which would reduce Mr. Crossland's holdings by something between five to ten acres. They both agreed on this line and the two men showed Mr. Hebb where to run a line. He started to run his line from west to east. After he finished Mr. Hebb testified that both men said that they agreed on this line, and he indicated to them that he wanted confirmation of this agreement. So he wrote out an agreement in his field book, together with a sketch of the area, and then had both men sign it, and he and the plaintiff, Floyd Crossland, who happened to be there, witnessed the signatures.

After the agreement was signed Mr. Hebb then blazed a line. One corner post was on the eastern base line and he put a temporary marking on the west boundary line, and both men indicated that they would put up a marker themselves. They each paid him one-half of his account in cash immediately. The defendant, Dorey, in his testimony indicated that he did sign the agreement, but it was after Mr. Hebb had run the line the western boundary up to the highway, that is, a short distance along the line, and he had not seen Freeman Crossland's deed at the time. Mr. Hebb said that he saw the defendant, Clifford Dorey, sign the agreement, which was introduced into evidence as exhibit 1, and he also saw Freeman S. Crossland sign it.

Mr. Hebb was shown exhibit 10, the deed to the plaintiff, Floyd Crossland, which conveyed the two lots described above, and he said that these were the lots that he surveyed for Freeman Crossland.

A copy of exhibit 1 was introduced into evidence by agreement of both counsel, and reads as follows:

> Sept. 16/64
>
> AGREEMENT
>
> We the undersigned, Clifford R. Dorey & Freeman S. Crossland both residing in Western Shore and Mahone Bay, respectively, County of Lunenburg, Province of Nova Scotia, owners of adjacent properties at Walden, County and Province aforesaid, hereby agree between ourselves, our Heirs Assigns, to the line letter "AB" shown in this field book and as surveyed on Sept. 14 & 16th, 1964 by Errol B. Hebb, P.L.S. No. 7, is the correct and satisfactory division line between our respective properties.
>
> In Witness, whereof, we have hereunto subscribed our names this 16th day of Sept. A.D. 1964.
>
> Signed in the presence of)
> Errol B. Hebb)Clifford R. Dorey
> Floyd R. Crossland)Freeman S. Crossland

On the opposite page of Mr. Hebb's field book is a sketch of the area on which he drew the division line. The division line "AB" is the line that he blazed as of that date.

Mr. Hebb revisited the same area in June of 1977 along with Lester Berrigan, an associate surveyor, and Floyd Crossland and another assistant. At that time he observed the line that he had surveyed in 1964, and he said that it was there in exceptionally good condition with very little deterioration. The corner post of the eastern end of the property was still there and a line was clearly marked and blazed. He also observed that the land up to the boundary line on the north, that would be the Dorey lot of land, had been completely stripped of trees and vegetation. In other words, in his opinion, it had been completely logged up to the line, but no over the line.

He also saw signs of recent cutting in the area on the Crossland side of the line.

The plaintiff maintains that a conventional line had been agreed upon between themselves as owners of adjacent properties and that this line had been surveyed by Mr. Hebb. The line is the line "AB" shown on exhibit 1, and is the line which was surveyed by Errol B. Hebb on September 16, 1964. This is the same line shown as the "Hebb" line on exhibit 3 and exhibit 4, the two plans, which were introduced in evidence.

Subsequent to the making of this line, which the plaintiff had witnessed, the plaintiff purchased these lots of land from Freeman S. Crossland on the 19th of October, 1964.

Apparently, there was some sort of a quarrel between Dorey and the plaintiff around the year 1964 over the boundary line, but after that there was no trouble over the location of the boundary line in dispute until the year 1977. In 1977, the defendant, Dorey, proceeded across the line with heavy equipment and proceeded to cut on certain marked areas on the Crossland side of the so called "Hebb" line. The defendant admits that he did cross over into this territory and did cut on these lands, although not to any great extent. He maintains that it was his land and he was entitled to do so despite the fact that the Hebb line had been surveyed and fixed in 1964.

The major issue in this case is, what is the true location of the north boundary line of the Crossland lands, and pertaining thereto, of course, what is the effect of the line surveyed by Errol B. Hebb in 1964?

There is no question in my mind but that if one were to rely solely upon the descriptions in the various deeds in the chains of title of both the plaintiff and defendant one would end up in a complete state of confusion. The descriptions are not sufficiently detailed, and considerable confusion has arisen because of the number of divisions of the land and the descriptions of the lots of land conveyed. In order to determine true ownership of the land one would have to rely, I would think, chiefly on the boundaries of the neighbouring lots and also to the boundaries of those areas of land claimed and used as a result of

the delivery of the paper title by way of deeds. In other words, what area of land was actually used by the parties when deeds were given to them and what use was made to the land and for how long?

I conclude from the evidence of a number of witnesses who have testified, that the plaintiff's predecessor in title, Freeman S. Crossland, occupied and used the land shown on exhibit 3 and exhibit 4 from 1939 for the purposes for which it was obtained, and that is as a woodlot. Freeman Crossland's son, Ronald Crossland, testified that he recollects his father obtaining the land and he actually worked as a logger on that land for a number of years. He worked there with John Hirtle, Clarence Dorey and Lindsay Carew. He said that at that time Lindsay Whynacht owned the property to the north of his father's land, now owned by Dorey. He said they used to cut up to the old line in those days, which was farther north than the line surveyed by Errol Hebb.

Clarence Dorey, an uncle of the defendant, also testified and said that he knew Freeman Crossland and also the plaintiff, Floyd Crossland. He said he worked in logging on the Crossland land for Freeman Crossland in 1946. He said it was the same land now owned by Floyd Crossland. At that time, Lindsay Whynacht was a neighbour on the north (This is the land now occupied by the defendant, Dorey). Brenton Lantz owned the land on the south and east of the Crossland land. Mr. Dorey looked at exhibit 3, which was the plaintiff's plan, and he said that Lindsay Whynacht occupied the lands now shown on exhibit 3 as belonging to Clifford Dorey. He also identified the Brenton Lantz land on exhibit 3.

Mr. Dorey said he lived in the area all his life and knew all of the people involved. He said that Ozem Aulenback owned the land before Freeman Crossland did. When he worked on Freeman Crossland's land he stayed at a camp which Freeman Crossland set up on the property in question and he worked there for about three and a half months. Freeman Crossland was the cook. He also said that the Obadiah Eisner land bore no relationship whatsoever to the Lindsay Nhynacht land. The Eisner land was in a different area.

John Hirtle also testified that he worked for Freeman Crossland on the Freeman Crossland property, as shown on exhibit 3. He said that a group of loggers worked there together for Freeman Crossland from Christmas until spring for two or three months each year from the winter of 1946-47 to 1949.

At that time he said the property to the north of the Crossland property was owned by Lindsay Whynacht, to the south was a fellow named Lantz. He said the boundary lines used to be shown to them by Mr. Freeman Crossland when they worked there so that they would not cut on someone else's property, and he was consequently familiar with the boundary lines. At that time he resided in the camp Mr. Crossland set up near the main road. Mr. Hirtle visited the land in the spring of 1977 and he noticed that Floyd Crossland had built a good gravel road over the land.

In those days Mr. Hirtle was not aware of Freeman Crossland having any disputes with anyone over his boundary lines. He said that he had never heard of Lawrence Slauenwhite owning any of the land to

the north of the Crossland property. As far as he knew and remembered it was owned by a man named Whynacht.

Lester Carver also testified that he knew both Freeman Crossland and Floyd Crossland. He said he worked on the Freeman Crossland property between 1950 and 1955. He worked there along with Clarence Dorey, John Hirtle, and others. He recalls that Freeman Crossland himself did the cooking for the logging camp. Mr. Carver said that to the north of the Crossland property was the land of Lindsay Whynacht. This is the land now occupied by the defendant, Dorey. To the south was the property owned by a man named Lantz. He also testified that after he worked for Freeman Crossland he also did some logging work for Mr. Whynacht on the land that bordered Freeman Crossland's land to the north. Mr. Carver testified that he stayed at a camp on the Freeman Crossland land and that it is the same property that Floyd Crossland has now. He never heard of Obadiah Eisner or any land owned by Obadiah Eisner.

Judging by these witnesses it would seem that Freeman Crossland and his successor in title, the plaintiff, Floyd R. Crossland, owned and occupied the land shown as Crossland land on exhibits 3 and 4. This is the area at least which Freeman Crossland assumed he was getting when he obtained his deeds, and this is the land he occupied without dispute up to his dispute with Clifford Dorey. All of the evidence indicates that he occupied it, used it for logging purposes, put roads over it and treated the land as his own openly and continuously from 1939 until he conveyed it to the plaintiff. It would seem that whoever his neighbour was to the north respected the northerly boundary line up until Clifford Dorey occupied that land..

When Dorey obtained his land in 1963-64 a dispute arose over the boundary line, and it is not surprising that both men then decided to try and have their boundary line fixed by a surveyor or at least to fix a line that they could both agree upon as being the boundary line in order to avoid future disputes. This was and is a very common practice in rural areas where the owners of two adjacent properties have difficulty determining their boundary lines.

I can imagine nothing clearer and more decisive than the action of the two men in contacting a recognized surveyor, Mr. Hebb, and then going with that surveyor to the area in dispute to have the boundary line fixed.

The evidence of Mr. Dorey does not contradict the evidence of Mr. Hebb to any significant degree. It seems to me that he was on the site, he was there for a purpose, that is, to have the boundary line fixed. Mr. Freeman Crossland was there at the same time and Mr. Hebb fixed the boundary line. Indeed, it would seem, according to the evidence of Mr. Hebb, that Mr. Dorey actually fared off better than Mr. Crossland in the fixation of the boundary line. It was actually Mr. Crossland who gave up what he felt was some portion of his land in order to have a clearly defined boundary line.

According to Mr. Hebb, Mr. Dorey seemed very well satisfied with the arrangement that was made at that time and the line was clearly marked in the presence of both men, that is, the plaintiff and the defendant, and both took part in blazing the line and putting in the monuments, which are still there today and clearly definable. The only logical conclusion, it seems to me, is that a conventional line was fixed by the two parties and was for all intents and purposes respected by both parties for ten to twelve years from 1965 to 1977. There is evidence from the two surveyors, Mr. Hebb and Mr. Berrigan, that there was almost complete cutting of timber to the north of the Hebb boundary line on the Dorey property, but not over that boundary line until the evidence of recent cuttings in the year 1977 were discovered. However, it would appear that for that period of time, apart from the first dispute in 1964-65 between Dorey and Floyd Crossland and Dorey's son, that the line was respected by Mr. Dorey and his agents. This is evidenced by the fact that the cutting of trees and logs was effected up to the boundary line fixed by Mr. Hebb but not over it, that is, this was the case up until 1977. Consequently, we have a line that was clearly demarked and defined at the request of both parties and in their presence, and which was respected by both parties up until the year 1977.

The plaintiff Floyd Crossland obtained the deed to Freeman Crossland's land in October, 1964 and had it recorded on December 30, 1964. He was fully aware of the boundary line fixed by the surveyor Hebb in September, 1964 having participated in the laying of the line. Armed with this knowledge and relying on that line he set out to improve the woodlot.

He started to construct a solid, useful road across the land he had acquired in 1967. Over each succeeding year he added to and improved the road. He estimated that by 1977 he had spent $5,000.00 on this road construction, not counting the many months of his own labour.

Each year the plaintiff cut out the dead and diseased trees. This improved the quality of growth on the land and Crossland felt with the building of the road and his management of the forest he had developed a very good woodlot. Over the years he had developed a better quality tree which he could use in the sawmill of which he was part owner. This was the purpose for which he had acquired and developed the lot.

I am satisfied that Crossland accepted the line that had been agreed upon and he relied on this line when he improved the land.

In the case of **Spencer v. Benjamin**, 11 N.S.R.(2d) 123, Macdonald, J.A., said at p.14 of the opinion as follows:

> 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.'

MacDonald, J.A., made further reference to **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 part changes his position.'

I refer also to **Naugle v. Naugle** (1970), 1 N.S.R.(2d) 554 (Nova Scotia Supreme Court per Gillis, J.) affirmed on appeal (1971) 2 N.S.R.(2d) p.309. In that case the learned trial judge said at p.560 of 1 N.S.R.(2d):

> It seems to me that the case **McIassc 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 a adjoining property owners.

In the case of **McIassc v. MacKay** (1915), 49 N.S.R. 476 (Nova Scotia Supreme Court in *banco*) the Nova Scotia Supreme Court considered the matter of a long-standing fence. Chief Justice Graham said at p.480:

> 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 a judgment, had not regarded them.'

In the case of **McNeil & Hingley Ltd. v. Hill** (1928) 60 N.S.R. 179 (Nova Scotia Supreme Court *in banco*) in the Nova Scotia Supreme Court came to consider a common boundary line which had been agreed upon by adjacent owners and was now of long-standing. Citing from the headnote the Court held:

> In any action for trespass to timber lands, in which the question arose as to the boundary line on the ground between certain lots, the evidence shewed that a certain boundary line had been recognized for over thirty years as the true boundary, by the adjacent owners.
>
> *Held*, that under the circumstances of the case, the plaintiffs were bound by the line so recognized.

I am satisfied that the Hebb line laid out in September 1964 was accepted and recognized by Dorey and the two Crosslands for over twelve years. I am also satisfied that the plaintiff in reliance upon this line improved his lands. I do not think that the defendant can now claim that the line is not the correct boundary.

It seems to me that this is a clear case of the establishment of a conventional line, and I am satisfied that the Hebb line of 1964, as surveyed by Mr. Errol Hebb and shown on exhibit 1 and also on exhibit 3 and 4 is the northern boundary line of the Floyd Crossland property, and the plaintiff shall be entitled to a declaration that this is the northern boundary line of his lands.

The defendant will be enjoined from any further trespassing on this property. With regard to the question of damages it seems to me that the defendant admitted cutting on the Crossland property in this area, but not to any great degree. I am not satisfied as to the proof of the value of the timber taken off this land by the plaintiff. The evidence is somewhat vague. However, I would estimate that lumber to the value of at least $350.00 was taken off the land. In addition to this the plaintiff was put to some expense in erecting post holes to try and put up a barrier and obtaining rocks to block up the roadway, which he had built. I would estimate this his expenses in this respect would be approximately $50.00 and I would assess damages against the defendant in the amount of $350.00 for the removal of timber and $50.00 necessary expenditures made by the plaintiff.

The counterclaim is dismissed. The plaintiff then will have judgment against the defendant in the amount of $400.00 and his costs of action on both the claim and counterclaim to be taxed.

Judgment for the plaintiff.

JOHN FRANCIS BENT, Plaintiff v. THE NOVA SCOTIA FARM LOAN BOARD, JOHN R. HORSNELL and BERTHA B. HORSNELL, Defendants, and JOHN R. HORSNELL and BERTHA B. HORSNELL, Third Parties Unreported

SUPREME COURT OF NOVA SCOTIA TRIAL DIVISION
Grant, J.
August 30, 1978

Bent purchased a farm at Weston, in the Annapolis Valley from the Horsnells. The Nova Scotia Farm Loan Board provided financing and prepared much of the paperwork. Some time after the purchase, Bent claimed to have discovered that the farm had 83 fewer acres than he had been led to believe and he sued.

The facts were relatively straight forward. At no time did any of the Defendants mislead Bent about the acreage in the farm. They consistently indicated that the acreage quoted was taken from the deed descriptions only and was not based on survey. Bent himself had examined the farm many times before the purchase and had seemed satisfied with the area. At no time did Bent have a survey of the farm prepared. The law as cited by the Judge was very clear that if a purchaser does not take the opportunity to have a survey prepared before purchase, they have no recourse after the transaction is completed if the area is found to be smaller than they thought.

The case did raise a couple of interesting points.

First, Bent hired James Gillis, N.S.L.S., to give an opinion as to the total acreage of the farm. Bent was apparently not willing to pay for a survey on the ground, so Gillis attempted to arrive at an opinion as to the area in the farm by use of aerial photographs and a planimeter. The Court was clearly unhappy with the method used by Gillis, particularly when no evidence could be led as to how accurate the opinion was. Gillis' testimony was not helpful to Bent's case. Perhaps the wisdom to be taken is that land surveyors should be very reluctant to act for parties involved in a lawsuit when they want an opinion "on the cheap."

Second, the Judge refered continually to the fact that the land in question was hilly and that, as a result, the "surface area" of the farm would be somewhat greater than the area "on a plane." While this is obviously true, it apparently was not made clear to the Court that all areas calculated and quoted by land surveyors would be "plane areas."

JOHN FRANCIS BENT, Plaintiff v. THE NOVA SCOTIA FARM LOAN BOARD, JOHN R. HORSNELL and BERTHA B. HORSNELL, Defendants, and JOHN R. HORSNELL and BERTHA B. HORSNELL, Third Parties
SUPREME COURT OF NOVA SCOTIA TRIAL DIVISION
Grant, J.
August 30, 1978

This action concerns the purchase and sale of a farm property at Weston, Kings County, with financing being provided by the Nova Scotia Farm Loan Board (Board). The original action was brought by the plaintiff against the defendant Board. I granted an order at the opening of the May, l978, term of this Court in Kentville adding the defendants Horsnell as defendants. Prior to that they had been brought in as third parties by the Defendant Board for contribution and indemnity.

The plaintiff is 38 years of age, married, and presently living at Weston aforesaid. He was born and educated in England where he attended an agricultural college. He then went to Australia in 1961 where he worked on farms of 3,000 – 4,000 acre blocks with fields consisting of 200 to 1,000 acres. These fields apparently were all rectangular and, under the system in Australia, were surveyed. From Australia he went to New Guinea and while there engaged in correspondence with the Nova Scotia Department of Agriculture. He came to Nova Scotia in June of 1974 and met with certain agricultural officials. He later came to the Annapolis Valley where he met with Mr. Morris Kennie, who was then supervisor of the Board for western Nova Scotia. He was told there were some farms available including the farm of the defendants Horsnell. The plaintiff was looking for a farm which had potential for a beef operation and potatoes and spring grain.

Exhibit 13 is a document, completed for the Board entitled "Owner's Offer to Sell", executed by John Horsnell and Bertha Horsnell in which they offered to sell the farm for $150,000.00 cash. It described the farm *inter alia* as "By Deeds this property contains 584 acres..." The plaintiff said he saw this document at Mr. Kennie's office. However, he was not given a copy of Exhibit 13.

The plaintiff went to the Horsnell farm the same day and met with the defendant John R. Horsnell.

Exhibit 1 is the plaintiff's application for a loan from the Board. Although it is the plaintiff's application, the part describing the particulars of the farm on pages 2A and B were filled in by Mrs. Muriel Horsnell, the wife of the defendant John R. Horsnell. On the first page the application shows that the Plaintiff attended an agricultural college for two years to a diploma level and that he did mixed and dairy farming in England, beef and grain in Australia, and plantations (cocoa) in Papua, New Guinea.

In the preliminary discussions between the plaintiff and Mr. Kennie, there was no emphasis on the acreage. The plaintiff prepared Exhibit 18 which is a cash flow statement, presumably to justify a loan sufficient to purchase the property. In due course the application was approved. However, of the acreage, 150 acres was to be obtained by lease with eventual purchase.

After the application was submitted and before approval, the plaintiff went over the boundary lines, talked at length with the neighbours and was satisfied with the boundary lines. He did not retain a solicitor. The Board retained John Cochrane of the Kentville law firm, Taylor, MacLellan and Cochrane. The plaintiff said he did not consider Cochrane to be his solicitor. He said no one told him to get a solicitor, nor did anyone tell him not to. He was asked by Mr. Cochrane to check the boundaries and an aerial photo was sent to him. In his several meetings with the defendant John R. Horsnell, the fences were outlined to him. In due course he informed the solicitor that he was satisfied as to the boundaries and that there was no foreseeable squabble with his neighbours.

On the 14th of November, 1974, the transaction was completed at solicitor Cochrane's office. He was not represented at the closing and he did not assume that Mr. Cochrane was acting on his behalf at the closing.

In the spring of 1975 he started to prepare the land and entered into a contract with the Graves company. One of the fields was to be planted in peas. He alleges that John R. Horsnell told him this field contained 100 acres but while planting he concluded it was only 60 acres. It related primarily to its distance along the McLean Road so-called. The plaintiff later measured the lands along the McLean Road and found that he had been wrong. The plaintiff, however, concluded that the farm did not have the acreage that he originally thought it contained. He then called solicitor Cochrane who said there was nothing he could do about it but referred him to the Board. The plaintiff then contacted Mr. Allister Marshall of the Board. He understood there was 351 acres capable of cultivation; he now believes there is about 100 acres less than that. So he alleges he is missing approximately one-third of the cultivated land on the farm. He said a surveyor whom he had employed told him there was about 83 acres missing.

The plaintiff alleges that it is necessary for him to have this extra acreage to generate the income he needs to make his payments to the Board. He said that had he known of this deficiency in acreage he would not have paid as much for the farm as he did. He said, however, that the price was for the farm as a unit and there was never any mention of a per acre price. He said that the Board made no representation to him as to its acreage, nor did Mr. Kennie. He also said there was no express warranty by the Horsnells that the farm contained a certain acreage.

The plaintiff spoke of a problem he had relating to his frontage on McLean Road. He said he had measured it five or six times but arrived at a different measurement each time. At no time did he use a tape measure. He complained to John R. Horsnell that there was only six-tenths of a mile frontage on the McLean Road. John R. Horsnell insisted that there was nine-tenths of a mile frontage and, after actually measuring it, the plaintiff apparently determined that there was nine-tenths of a mile frontage.

The Plaintiff knew the lands had not been surveyed prior to sale. He had been given copies of the descriptions and read them before the sale. There are eight lots described in the Agreement of Sale; most of which gave a reference approximate acreage or a certain number of acres, more or less. The

plaintiff made no inquiries of John R. Horsnell of acreage. In his discussions with the Board he spoke of purchasing "the Horsnell farm". He considers the farm now to be worth "a fair bit," more than he paid for it. He also had the aerial photograph to examine.

Mr. James Gillis is a Nova Scotia land surveyor and has been such since 1973. He was employed by the plaintiff and prepared Exhibit 27 which is a plan of the Horsnell farm. No survey was done on the ground. He used a plan which apparently had been prepared by the Department of Lands and Forests some time ago. It was his opinion that this plan was made from a 1967 aerial photograph. Then in conjunction with 1975 and 1976 aerial photographs and the plan, Exhibit 27 was prepared. He considered the Department of Lands and Forests' map would have less than a five per cent error. The plan has no compass bearings, nor does it show any measurements. In certain instances old line fences were disregarded, and Mr. Gillis acknowledged that it was not plotted 100 per cent correctly. After plotting, he used the polar planimeter to trace the area; he thought this would be accurate within two to three degrees. He considered this to be a relatively inexpensive way to do a survey and would cost $300.00 to $400.00. He said it would give him the approximate acreage. He acknowledged that a complete survey would be a hundred times more accurate. He had no personal knowledge of the accuracy of the Department of Lands and Forests' map. Exhibit 27 shows no elevations.

The Lands and Forests' plan from which Exhibit 27 was taken gives no distances, nor compass bearings. Each lot, as described in the deed, was not surveyed and Exhibit 27 purports to be a composite plan, roughly plotted. Mr. Gillis said the descriptions in the deed sometimes conformed to the plan and sometimes did not. He spent one and a half days on the ground and one day in research. In his experience few farmlands in this area are accurately surveyed, however, most descriptions are general.

Part of the lands contained in the Horsnell farm are on the North Mountain which is very steep. Therefore, it appears to me that an aerial photograph can be very misleading in that it projects the lands as being flat and shows a plane surface, whereas, in fact the lands may have substantially more ground surface due to hills and indentations.

I consider the methods used by surveyor Gillis to be unreasonably inaccurate because here we are faced with an exercise, the very nature of which requires that we know accurately the acreage the farm contains and, if there is a deficiency, exactly where it is and its extent. That is the whole basis of this action and, where we are dealing with a property now said by the plaintiff to be worth possibly $200,000.00, an expenditure of $2,000.00 to obtain the required accurate information does not seem unreasonable.

John Cochrane has been a member of the Bar of Nova Scotia since 1963 and is a partner in the Kentville law firm, Taylor, MacLellan & Cochrane. He was retained by the Board in this instance and was not retained by either the vendor or the purchaser, that is, the plaintiff or the Horsnells. He met the plaintiff in the fall of 1974. During the course of the transaction neither the plaintiff nor the Horsnells

had solicitors. He was retained by the Board to search the title, which he did. Exhibit 5 is a letter dated the 24th of October, 1974, with copies to the plaintiff and the Horsnells, asking that they examine the descriptions carefully and if any error or discrepancy was found to immediately contact him. The documentation was prepared by the Board itself, which included a deed from the Horsnells to the Board and an Agreement of Sale and Lease between the plaintiff and the Board. The Board did not have the land surveyed, nor did Mr. Cochrane request that a survey be done. As instructed by his client, Mr. Cochrane checked the titles to the various lots from their descriptions. Neither the plaintiff nor the Horsnells, in their evidence, said that they relied on solicitor Cochrane or considered that he was acting as their solicitor. Mr. Cochrane had no recollection of any discussion of acreage. Following the closing of the transaction he reported his client, the Board. Sometime thereafter the plaintiff came to him and expressed dissatisfaction over the acreage. Mr. Cochrane referred him to the Board, which I find was the proper mode of action.

On December 9th, 1974, solicitor Cochrane reported to the Board. His report, in the form of a letter, is Exhibit No. 9 and includes the following:

> "In all other respects I believe everything has been completed to the satisfaction of both parties and a copy of the aerial photograph etc. supplied to Mr. Bent so that he has been well familiarized with the description and boundaries of all the lots in question...."

Mr. Cochrane said that the Board assists in purchasing and leasing farm properties and stock and provides the financing for the same. Mr. Cochrane had with him his file including notes which he had taken at the time various services were rendered. It was his conclusion that the parties had a common understanding of the description of the lots in question. It was his opinion that all the parties were completely satisfied and he considered the plaintiff to be an alert and intelligent adult.

Mr. Morris Kennie has been employed by the Board for l9 years and in 1974 was the supervisor for western Nova Scotia. His duties included interviewing applicants, processing applications and doing appraisals. The applications are approved by the Board and not by him. It was his opinion that the Board assisted in the financing of purchasing and leasing farms in the province at a good interest rate and without penalty for early payment. His first contact with the plaintiff was early in July of 1974 when the plaintiff attended at his office in Kentville. The plaintiff was, looking for a farm; he wanted a "fairly large unit for hogs and beef cattle". Mr. Kennie told him of the Horsnell farm and of one other. The plaintiff went to inspect the Horsnell property and shortly thereafter returned to say he was interested in the Horsnell property. The information Mr. Kennie gave the plaintiff was from the "Owner's Offer to Sell", Exhibit 13. Mr. Kennie gave the plaintiff a blank "Application for Loan" form with instructions to complete the form and return it to him. It is Exhibit l. Mr. Kennie forwarded the completed form to the Board's office in Truro. Exhibit 2 is the report and summary of an appraisal completed by Mr. Kennie for the Board. Copies were not given to the plaintiff or the Horsnells.

Exhibit 26 is a letter from the Board to the plaintiff indicating the approval of the loan and the terms thereof.

Exhibit 16 is a letter written by the plaintiff to the Board accepting the terms of the loan.

The Board retained solicitor Cochrane to search the title. The Board prepared the documentation which, with the cheque, were sent to the solicitor for the closing. Mr. Kennie had no further involvement other than he reviewed the title report of solicitor Cochrane. He took no part in the closing or in the preparation of any documents.

In the spring of 1977 he learned of the plaintiff's dissatisfaction. Mr. Kennie knew of the Horsnell farm but was not familiar with it before this transaction. The plaintiff had told him he wanted a large farm with substantial acreage, which he considered to be 300 to 600 acres. The information on the breakdown of the acreage was given to him by John R. Horsnell. He considered that where part of the farm was in the valley and part on the mountain it would be difficult to determine its acreage.

Mr. Kennie said that sometimes the solicitor acting for the Board may also act for the purchaser. However, in this instance the plaintiff in his evidence did not say that he considered solicitor Cochrane to be acting for him also. After he learned of the plaintiff's complaint, he attended at the Horsnell farm and met with John R. Horsnell and his wife. Mr. Horsnell informed him that the plaintiff had approached him about the frontage on the McLean Road and that he had given him an explanation. Mr. Horsnell had no further contact from the plaintiff. He described the Horsnells as being cooperative. After a lengthy discussion with the Horsnells, Mr. Kennie concluded that there was not any substantial reduction in acreage by deeds. He had attended at the Horsnell farm before when he had made his appraisal. At that time the plaintiff was also present and he, the plaintiff, and John R. Horsnell inspected the boundaries of the lands and the buildings.

Mr. Kennie questioned the accuracy of using aerial photos on land that was not level to determine its acreage. Mr. Kennie knew that Mr. Horsnell's estimate of acreage was from his deeds. He knew there was not any accurate plan or survey available. He considered that acreage is based on the surface of the land and if the land was rolling or hilly, aerial photographs would not be accurate. It was his opinion that acreage was usually determined on the surface and not on the plane. Mr. Kennie was not told by the plaintiff that it was essential that the farm have a certain acreage. He had no discussion with the plaintiff on per acre cost.

It was Mr. Kennie's opinion, from his experience, that in the Annapolis Valley farms are usually sold on a unit basis rather than on a per acre basis. He calculated the total value of the Horsnell farm to be $169,000.00 for mortgage purposes and he attributed a market value of $160,000.00. He considered the $150,000.00 to a fair price notwithstanding the larger or the smaller acreage. He concluded the farm had been sold on a unit price, that is, the farm sold as a unit. It was his opinion that John R. Horsnell was surprised when a complaint had arisen.

I found Mr. Kennie to be a knowledgeable and experienced man in his field. I found him to be straight forward and truthful in his answers to the questions put to him.

Bruce Haville has been a Nova Scotia land surveyor since 1954. He attended Acadia University and the survey school at Lawrencetown. He now operates Valley Surveys Limited in Berwick. He has had substantial experience in surveying in Kings County, including farmlands, woodlands and other types of lands. He would prefer to use a closed survey using actual field measurements. He concluded this would be the only way to achieve an accurate survey. It was his opinion that the plan of surveyor Gillis was not very accurate but agreed it was an economical way to survey. He as inclined to place no reliability on the descriptions and their estimates of acreage. It was also his opinion that you could get a longer distance on grades than a level plane. The variation would depend on the steepness of the incline. It was his opinion that people generally take it as the surface of the land and not on the plane. Part of the lands of the Horsnell farm, in his opinion, contained a "very steep rise". In some places it would be more than 20 per cent. He felt there could be a significant difference between the surface shown on an aerial photo and that actually on the ground.

Both surveyors said they had used the polar planimeter on Exhibit 27. However, the instrument was not before me, nor was any explanation given as to the manner in which it makes its calculations.

Exhibit 27 has no distances, no elevations, and the roads shown on the plan are not to scale. Looking at it with the naked eye, the Welsford or Back Road appears to be twice the width of the New or McLean Road, yet they are both said to be 66 feet wide.

John Horsnell is 67 years of age and has lived all his life in the area of Aylesford, Kings County. The Horsnell farm is owned by he and his sister, Bertha Beryl Horsnell. A part of the farm had been his father's property where he had lived to his adult life. He worked on the farm as a boy and later helped as best he could. He had farmed the property for approximately 30 years using the same fields each year. From time to time he and his father acquired additional lands as they became available. He had not had a survey done. As he purchased the lands, he would make a visual determination of each lot before purchase. In addition to farming he did some trucking and custom tractor work including ploughing, harrowing, seeding and shovelling. This he did for 25 or 30 years. He also hauled milk to Halifax for 21 years.

Mr. Horsnell attended at the offices of the Board in Kentville where he informed Mr. Kennie that he was prepared to sell the farm for $150,000.00. He told him the acreage according to the deeds. The plaintiff attended at his property and he told the plaintiff he wanted $150,000.00 for the lands. He told him they were not surveyed and the acreage was from the deeds. He said that prior to purchase the plaintiff had visited the lands in excess of fifteen times; sometimes the two of them drove and at other times they walked around portions of the land. He pointed out the boundary lines to the plaintiff and they went to the brow of the mountain and looked down into the valley. He explained to the plaintiff that one of the lots on the mountain was described as containing 50 acres but he did not think there was

that acreage there. He told the plaintiff that he had never measured it. He completed Exhibit 13, the "Owner's Offer to Sell". He was prepared to sell only if he could get the price he wanted. He recalled a discussion of a portion of the farm which had been purchased for, one Tupper, and was generally referred to as the Tupper Farm. He said there was 70 or 80 acres presently in use which could be expanded to 100 acres. He said that in his discussions with the plaintiff he spoke about "selling the farm". He said that he had made his financial records available to the plaintiff and to the Board and that together they had reviewed all the descriptions in the deeds. He said that he, the plaintiff and Mr. Kennie drove over the lands and inspected the various fields. He gave the Board everything they requested. He also gave the plaintiff everything he requested including crop production figures.

Mr. Horsnell said that when the plaintiff came to the area he had no place to live and was not working. He helped the plaintiff find living accommodations and employment. It was his opinion that the plaintiff was satisfied before the closing and in fact John R. Horsnell let him use some of the lands before the transaction was closed. The plaintiff ploughed some of the land using Horsnell's equipment. The plaintiff took possession of part of one of the barns to put his sow in, a couple of months before the closing. Mr. Horsnell said that at the closing the plaintiff was asked if he was satisfied and he answered that he was. At that time he and the plaintiff got along the "best". He gave the plaintiff four heifers, four sows and a bull after the closing. He also left enough hay to feed the heifers till spring. At that stage he saw the plaintiff "real often". The plaintiff ploughed out his driveway.

In the summer of 1976 the plaintiff visited John R. Horsnell and at that time the plaintiff was "worked up". There was some discussion of the length of their property on the McLean Road. The plaintiff alleged it was only a half mile long and John R. Horsnell said it was a mile long. Later, the plaintiff returned and confirmed that it was a mile long. He told the plaintiff that he felt that aerial photos would be inaccurate because of the grade on some of the lands. Mr. Horsnell's knowledge of the acreage was primarily through the Deeds. He said he informed the plaintiff on several occasions that the acreage was taken from the deeds. However, the plaintiff did not seem concerned about the acreage.

John R. Horsnell was quite surprised when Mr. Kennie arrived sometime after the closing of the transaction.

Certain farm machinery has meters and guages which assist in determining acreage. Mr. Horsnell said that he did not rely on these instruments. Mr. Horsnell said that he did not deliberately attempt to mislead the plaintiff but in fact helped him in every way possible. The friendship which existed between the plaintiff and the Horsnells, prior to and immediately after the closing of the transaction, no longer exists. He acknowledged that he was not a scientific farmer.

As John R. Horsnell grew older he seeded less each year and put more of his cultivated land into hay for his cattle.

Muriel Horsnell, the wife of John R. Horsnell, recalls first seeing the plaintiff in July of l974. He wanted to look the farm over and her husband accompanied him around the farm. Later, the plaintiff returned and brought the “papers” with him. He showed her what he had to fill in and what she had to fill in. She completed Exhibit 13, "Owner's Offer to Sell". It was her recollection that the plaintiff had brought this paper with him and he was very anxious to have it done quickly as he was in a hurry. That evening she and John R. Horsnell filled out Exhibit 13 from the deeds. They knew the orchard was approximately 35 acres; they estimated the hay land at 233 acres and 83 acres for cultivated pasture; and they attributed one-half of the balance to woodland and the other half to pasture land. She completed page two of Exhibit 1. This document was also given to her, she thought, by the plaintiff. When these documents were given to the plaintiff she told him the acreage was by estimation from the deeds. She was present when Mr. Kennie came to do the appraisal. She explained to him how difficult it was to divide the acreage and that it was done from the deeds. As she and her husband and sister-in-law grew older the amount of the cultivated lands they used for hay land increased because it was easier to manage.

Bertha Horsnell was born in 1908. She signed Exhibit 13. Both she and her brother, John R. Horsnell, were owners. She was present during the talks involving the sale of the farm; the acreage went by the deeds and they were to get $150,000.00. They understood the deeds gave the acreage by estimation, more or less. She said it was never her intention to mislead the plaintiff, nor did she think that her brother intended to mislead him. Over the years she had to take an active part in the farming including driving the tractor and other equipment but she had never attempted to calculate the acreage by the use of this machinery. She recalled when the plaintiff came to her house and alleged that they only had a half mile frontage on the McLean Road. She knew it to be a mile long and she recalled her brother, John R. Horsnell, telling the plaintiff to go back and measure the land and that he would find it was one mile and not a half mile long.

The Horsnells, for at least two generations, had used the farm and its accumulated acreage as a family farm where farming was a way of life. John R. Horsnell had done custom tractor work and trucking over the years in addition to the farm work and from the evidence it would appear he was not a man of science but accumulated the farm acreage through hard work. The plaintiff is an experienced farmer having attended an agricultural college and farmed in Australia and New Guinea before coming to Nova Scotia. From the evidence I adduced he is a scientific farmer to whom the farm will be a business.

With the plaintiff's background and education I find it difficult to believe that he would not have noticed the fact that there was almost a third of the cultivated land missing. After all, he did attend on a continuing basis at the farm before the transaction was closed; he was shown the various bounds of the lots; he was taken around the farm by Mr. Horsnell; and roamed over the lands at will.

I am satisfied from the evidence of the Horsnells, that if there is less acreage than the deeds purport to show, that there was no intention upon the part of the part of the Horsnells to mislead, if in fact the plaintiff has been mislead.

I am not satisfied with the accuracy of the conclusion on the acreage taken from Exhibit 27.

The plaintiff had ample opportunity to have the land surveyed, had he wanted to do so. I find that he was told by the Horsnells that the estimation of acreage was taken from the deeds only and that there had been no survey done.

There is no allegation by the plaintiff that he relied on the Board or Mr. Kennie, or its solicitor, Mr. Cochrane, for expertise, legal or otherwise. He considers the farm's value now to be substantially more than at the time he purchased.

I find that the purchase was for the farm as a unit and not for any specific number of acres. As far as the size of the farm is concerned, the plaintiff had the opportunity to inspect the property in detail which he did do on at least 15 occasions and was perfectly at liberty to take whatever steps he wanted to ascertain its exact acreage.

I am not in a position to make a finding on the acreage of the farm or of any of the lots, other than the orchard which apparently is 35 acres. I consider it impossible to find that there is approximately one third of the cultivated acreage missing because I believe the plaintiff would have noticed this during his inspections. All of the descriptions give references to boundaries which are clearly defined; a great many of them give the bounds as being the lands of the adjoining owners. As well, he had the aerial photograph.

I find that the lands as described in the documents referring to the Horsnell farm deal with ground level distances and not with plane distances

The plaintiff alleges that the Horsnells misrepresented the acreage. I find that the evidence does not support that allegation. I find that the Horsnells referred to the acreage as being acreage by deed and I am not satisfied upon the evidence what the actual acreage is.

I am satisfied that the purchase price of $150,000.00 was for the farm as a unit and not for any particular number of acres.

The Plaintiff also alleges that the Board purchased the property from the Horsnells at a price higher than market value. I am not able to agree with that proposition because I am not satisfied how many, if any, acres are missing or what type of land is included in such acreage if it is missing.

Alternatively, it is alleged that the Board acted as fiduciary agent for the plaintiff and owed the plaintiff the duty to advise him carefully, fully and honestly, and to take proper care, skill or diligence in the purchase of the property. I find that the Board provided the money for the purchase of the property and did not breach its duty to the plaintiff, if any. As I understand it, the Board's primary concern was to see that it was adequately secured for the money it was putting into the transaction. I find that the

Board was not the plaintiff's agent in the purchase of the property but merely the source of the proceeds.

It is alternatively alleged that the Board through its agent, Mr. Kennie, was negligent in its duty to the plaintiff. The plaintiff did not allege that he relied on Mr. Kennie. His evidence was that he had been told by Mr. Kennie that the Horsnell farm was for sale and that he immediately went to the farm and examined it. He then considered it for a while and later told Mr. Kennie he would like to apply for sufficient money to purchase it. He discussed the price with the Horsnells, who were not prepared to dicker. He doubted if he would have been able to purchase the property considering his own personal resources but he decided to apply anyway. The valuation by Mr. Kennie was for the purposes and information of the Board only. There was nothing in the evidence of the plaintiff to indicate that he relied on Mr. Kennie or that he considered Mr. Kennie to be his agent. I find that Mr. Kennie was not the agent of the plaintiff, nor was he negligent in his role in this transaction.

I have been referred to **Hansen v. Franz** (1917), 57 S.C.R. 57. In that instance the description to a Deed referred to 271 acres; there subsequently turned out to be only 164.80 acres. Fitzpatrick, C.J.C., at page 58-59:

> "Through an error in the survey the property is described as containing 271 acres when as a fact it has been subsequently ascertained to contain only 164.80 acres. It is admitted that there was an innocent mistake common to both parties."
> .....
>
> "Nothing is more clearly established in the practice of conveyancing, and it is so laid down in all the books, than the rule that after completion of the conveyance the purchaser who has had the opportunity of raising objection to any least deficiency in the quantity agreed to be conveyed has no further remedy."
> .....
>
> "I can find in this case no evidence whatever either of an intention on the part of either party that there should be any warranty or that such was given. The testimony carries the matter no further than the written document which is the very ordinary statement of quantity in the property agreed to be sold and which it is admitted the appellant had the best reason for believing was correct. If we were to hold that there was ground for decreeing compensation in this case, I do not know how it could be refused in any case at all, as the established rule would be reversed and the conveyance with payment of the purchase money would cease to be a final settlement of the sale."

and Anglin, J., at page 80:

> "But whether the transfer itself or the preliminary agreement is looked to, I am of the opinion that the words 'containing two hundred and seventy-one acres' or 'containing two hundred and seventy-one acres more or less' are merely a part of the description, probably to be regarded as *falsa demonstratio* (see cases collected in 10 Hals., p. 407, n. (g)), and not importing a covenant or warranty as to the quantity which could found a demand either for compensation or for damages after the completion of the contract."

I dismiss the Plaintiff's action against the Defendants, but under the circumstances, without costs. The Third Party action by the Defendant Board against the Third Parties is also dismissed, but under the circumstances, without costs.

MACLEAN and MACLEAN v. REID See 30 N.S.R. (2d) 499
Nova Scotia Supreme Court, Appeal Division
Cooper, Macdonald and Pace, JJ.A.
December 11, 1978.

This case dealt with a situation where an individual was given permission to occupy land and then continued to possess the land. The question was - when can such a person claim adverse possession? After all, they had permission to take possession of the land, so how can they claim that their possession was adverse to the rights of the true owner?

The subject property had been purchased by the parents of David Reid (the defendant/ respondent) and Clarence Reid in 1915. In 1935, the parents conveyed the property to Clarence. David had lived on the property for his entire life up to that point and in 1936, Clarence told him that he could stay there as long as he liked. David continued to live on the property with some very short absences. He farmed and improved the property and paid the taxes. Clarence joined the forces in 1940 and following the war, he moved to Ireland permanently. In 1971, Clarence sold the land to the MacLeans (the plaintiffs/appellants). The MacLeans sued to have David removed from the land. The Trial Judge found that the MacLeans knew about David's claim to the land and that they were not *bona fide* purchasers. The Trial Judge determined that David could remain on the property for as long as he lived.

The MacLeans appealed this ruling and David Reid also appealed the finding that he was not the absolute owner of the land.

The Court of Appeal determined that the Trial Judge had not properly addressed David's claim that he was now the absolute owner of the land based on adverse possession. The Court reviewed the facts and found that David was a tenant at will because Clarence had told him that he could stay as long as he wanted. At tenant at will is someone who is occupying land with the permission of the owner. The owner can revoke the tenancy at will at any time and take back the land.

Where the tenant at will is possessing the land with the permission of the owner, the idea that adverse possession might apply seems odd. However, there is a provision in the **Limitation of Actions Act** which provides that once a tenant at will occupies land for one year, the twenty year time period for adverse possession begins to run. Therefore, if the tenant at will possesses the land for a total of twenty-one years, they may claim adverse possession.

The Court of Appeal found that David had been in "actual, exclusive, continuous, open, visible and notorious possession of the land" for a period of longer than twenty years after the one year following his entry as a tenant at will. He was therefore entitled to the land. The MacLean's appeal was dismissed and David Reid's appeal was allowed.

MACLEAN and MACLEAN v. REID
Nova Scotia Supreme Court, Appeal Division
Cooper, Macdonald and Pace, JJ.A.
December 11, 1978.

At issue in this appeal is in effect the title to, ownership, or possession, of a farm property comprising approximately fifty acres located at Dean's Settlement, Upper Musquodoboit, Halifax County. The respondent, David Reid, is now about sixty-eight years of age and has resided on the property his entire life (it being the Reid homestead property) with the exception of a six-month period in the 1960's and another period around 1950 when he was working in Pictou County. On the latter occasion he returned to the homestead on weekends.

The property was conveyed to the father of the respondent in 1915. By deed dated June 10, 1935, and registered on January 15, 1936, the parents of the respondent conveyed the lands to the latter's brother, Clarence Reid. Clarence Reid and his wife in turn deeded the property to the appellants Edward and Leona MacLean by conveyance dated November 8, 1971, and registered on July 31, 1972. The appellants brought action against the respondent asking for an order requiring the latter to vacate the lands; an injunction restraining him from entering the lands and damages. The respondent raised as his principal defence that he had acquired title to the property by adverse possession. In other words, that Clarence Reid's title to the property was extinguished by virtue of the **Limitation of Actions Act**, R.S.N.S. 1967, 168, because the respondent had been in possession of the property as a tenant at will of Clarence Reid for a period in excess of twenty-one years. The respondent counter-claimed against the appellants for relief similar to that claimed against him by them.

The respondent testified that his brother Clarence told him in 1936 that "I could stay there [on the property] as long as I liked". The trial judge, the Honourable Mr. Justice A.M. MacIntosh, found that the appellants were not *bona fide* purchasers for value without notice of the respondent's interest in the lands and held that the latter had an interest therein equivalent to a life tenancy. From such decision the appellants appeal and the respondent cross-appeals.

In his reserved decision the learned trial judge said in part:

> The plaintiff testified as to the movements of Clarence Reid vis-a-vis the Reid farm from the time he received the deed, i.e., 1935, until their purchase of same in 1971. Where there is any conflict of evidence, I accept the defendant's version as to the brother's whereabouts and his own dealings with the homestead.
>
> The defendant stated that he has spent all his life to the present time on this family farm. From 1935 until 1968 he farmed the property, raising cattle, sheep, poultry, grain and vegetable crops. He bought and paid for all the farm machinery. He kept the cattle in a lean-to he built onto the barn. He also purchased a horse stable and moved it onto the

> property. From 1935 onwards he paid the municipal taxes. From 1935 to 1940 the defendant's brother, Clarence Reid, worked as a woodsman, returning to the farm on weekends. He never farmed the property. In 1940 he joined the Canadian Army and proceeded overseas. At the conclusion of hostilities he returned home for a short while, leaving to reside permanently in Ireland sometime during 1946. Nothing was done by him relative to the farm until 1971 when he conveyed whatever interest he possessed to the plaintiffs. The defendant stated that he was told by his brother that he, the defendant, could remain on the farm all his life time. He never knew that his brother had title by deed.
>
> .....
>
> In pursuance of his agreement with his brother, the defendant stayed on the farm property, operating, maintaining and improving same, and while they were living, provided a home for his mother and sister. This period of time commenced in 1935. In 1971 the brother conveyed whatever interest he had in the property to the plaintiff.
>
> In my opinion, applying the equitable principle of part performance, there is sufficient evidence to take the matter out of the provisions of the **Statute of Frauds** requiring such agreements to be in writing.
>
> Having observed the plaintiff and listened to his testimony, I am convinced he was aware or should have been aware that the defendant had an interest in these lands. In other words, he was not a bona fide purchaser for value without notice as set forth in our **Registry Act**.

The learned trial judge made no mention in his decision of the respondent's claim that he had acquired title to the lands by adverse possession. That issue is therefore at large before us and, in my opinion, for reasons I shall give, is decisive of this appeal. The pertinent sections of the **Limitation of Actions Act** are 9 and 10(f) which provide:

> 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.
>
> 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:

> (f) where any person is in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person through whom he claims, to make an entry, or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined....

At the time of the conveyance to Clarence Reid his father was not living on nor farming the lands. After receiving the deed to the property Clarence Reid did not farm the lands but did live there on weekends.

At the time of the conveyance of the lands to Clarence Reid the respondent was occupying and working them. Upon being told by Clarence that he could stay on the lands as long as he liked the respondent did so. The learned trial judge has accurately detailed the nature of the respondent's occupation of the lands and the activities he there carried on.

In delivering the judgment of the Supreme Court of Canada in **Ocean Harvesters Ltd. v. Quinlan Brothers Limited** (1974), 1 NR 527; 5 Nfld. & P.E.I.R. 541; 44 D.L.R.(3d) 687 Mr. Justice Dickson said at pp.529-531 N.R., 543-545 Nfld. & P.E.I.R., 688, 689 and 690 D.L.R., with respect to ss.3 and 8 of the Newfoundland **Limitation of Actions (Realty) Act**, R.S.N. 1952, c.152, which are similar to ss. 9 and 10(f) of the Nova Scotia **Act**, that:

> The effect of these sections, which had their origin in the **Real Property Limitation Act**, 1833 (U.K.), c.27, was to do away with the earlier doctrine of adverse possession and, in the case of a tenancy at will, cause the statute to begin to run, at the latest and notwithstanding the permissive character of the occupation, at the expiration of one year from the commencement of the tenancy: **Lynes v. Snaith**, [1899] 1 Q.B. 486. For the statute to run, however, a person other than the owner must be in possession, as a tenant at will. A tenancy at will is created when one person permits another to occupy lands on the agreement, express or implied, that the tenancy is determinable at the will of either. While exclusive possession may not always give rise to a tenancy (**Errington v. Errington et al.**, [1952] 1 All E.R. 149; **Cobb et al. v. Lane**, [1952] 1 All E.R. 1199), I think it beyond question that a tenancy cannot be created in the absence of exclusive possession. *Exclusive* possession by the tenant is essential to the demise and the statute will not operate to bar the owner unless the owner is out of possession. In an early judgment of this Court, **Gray v. Richford et al.**, (1878), 2 S.C.R. 431 at p.454, Strong J., quoted Baron Parke in **Smith v. Lloyd et al.** (1854), 9 Ex. 562, 156 E.R. 240, to this effect:
>
> > There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.

and added at p.455

> In short, the Statute has no application, except so long as the title and possession are separate, when the possession is in the rightful owner Statutes of Limitation are not required.

The same thought had been expressed a few years earlier by Erle, C.J., in **Allen v. England** (1862), 3 F. & F. 49 at p.52, 176 E.R. 22, in these words:

> But, in my judgment, every time Cox [the landowner] put his foot on the land it was so far in his possession, that the statute would begin to run from the time when he was last upon it.

More recent dicta will be found in a decision of the High Court of Austra1ia, **Radaich v. Smith et al.** (1959), 101 C.L.R. 209, in which Windeyer, J., made the following observations at p.222 which, with respect, I would adopt:

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant.

The inquiry in the present case must be to determine whether North Eastern had a legal right to exclusive possession of the premises, the subject-matter of the litigation.

The accurate headnote to **Lynes v. Snaih**, [1899] 1 Q.B. 486, as reported in [1895-99] All E.R. Reprint at pp.997-998 reads as follows:

> On the death of his son, the owner of a row of cottages permitted the defendant, who was the wife of the deceased son, to occupy one of the cottages rent free, telling her that she could 'live in it always rent free.' For thirteen years the defendant occupied the cottage rent free; her name was in the rate book and she paid the parish rates; she did most, if not all, of the internal repairs at her own expense; and she never made a written acknowledgment of the owner's title to the cottage. The owner paid the water rates, property tax and insurance premium. On four occasions during the defendant's possession the owner, when he was executing external repairs to adjoining cottages, carried out similar repairs to the defendant's premises. On these occasions he entered the premises with the defendant's knowledge, but without asking for or obtaining the

> defendant's consent. He also carried out internal repairs on one occasion in the same manner. Apart from paying some fees for the education of the defendant's children and medical fees for one of the children and paying for its burial, the owner left the management of the cottage to the defendant. On the owner's death the cottages were left to trustees on trust for the plaintiff, who was the owner's step-daughter, for life and she claimed possession and caused a notice to quit to be served on the defendant.
>
> HELD: on the facts the defendant was not a guest of the owner, but a tenant at will, and that tenancy had not been determined by the owner entering without her consent to carry out repairs; moreover, since the defendant had been in continuous occupation for thirteen years, the plaintiff's right to the property was barred under s.7 of the **Real Property Limitation Act**, [1833 repealed] as amended by the **Real Property Limitation Act**, [1874, repealed].

The headnote to **Casey v. Canada Trust Co.** (1960), 25 D.L.R.(2d) 764, a decision of McRuer, C.J.H.C., of Ontario reads as follows:

> Deceased bought a house in his own name for his son and daughter-in-law to live in and they occupied the house in December, 1939, the son living there until his death in 1946 and his widow continuing to reside therein until the death of the deceased in 1959. The widow brought action for declaration that she was the legal owner of the house as against deceased's executor. *Held* that the son and daughter-in-law occupied, and the latter continued to occupy, the premises as tenants at will and accordingly, by virtue of ss.4, 5(7) and 15 of the **Limitations Act**, R.S.O. 1950, c.207, the right and title of deceased with respect to the premises was extinguished at the expiration of 10 years after the expiration of 1 year from the commencement of the tenancy (or 11 years in all), there being no subsequent tenancy at will created by a fresh agreement between the parties and which would have the effect of stopping the running of the limitation period. Consequently even if the widow must depend on the period during which she occupied the property exclusively in her own right as tenant at will, that is from 1946, the title of deceased was extinguished 11 years later in 1957 when she still occupied the property until the original tenancy. In the result she is entitled to a declaration that she is the legal owner in fee simple of the property in question.

The factual situation in **Train v. Metzgar**,(1974), 51 D.L.R.(3d) 24, a decision of the Ontario High Court, is summarized in the headnote as follows:

> The p1aintiff, the adopted son of the defendant, altogether with his wife built a house and took possession of certain property owned by the defendant and his wife and lived there for some 15 years. The arrangement under which possession was taken was a loose family arrangement whereby the plaintiff was to pay certain expenses including

> insurance, taxes, upkeep and heating and was to be allowed possession of the property. Thereafter the defendant purported to sell the property to M. The plaintiff brought an action for a declaration that he was entitled to a conveyance of the property pursuant to a verbal agreement with the defendant, or alternatively that he had acquired title to the property by prescription. Prior to the trial of the action both the defendant and plaintiff had died....

After referring *inter alia* to ss.4 and 5(7) of the **Limitations Act** R.S.O. 1970, c.246, which are, with the exception of the period of years, similar to ss. 9 and 10(f) of the **Limitation of Actions Act**, of this Province, the trial Judge, Holland, J., said (pp.28- 29):

> As can be seen the operation of the Act is negative in that it extinguishes the right and title of the registered owner and leaves the possessor in possession with a title resting on the absence of the right of others to eject him: Anger and Honsberger's **Canadian Law of Real Property** (1959), p.785; **Gray v. Richford and McConnell**, (1878), 2 S.C.R. 431 at p.454. The onus rests upon the plaintiff to prove possession and this requires that the land in question be described with reasonable certainty: see **A.-G. Can. v. Crause**, [1956] O.R. 675, 3 D.L.R.(2d) 400. Such possession must be actual, exclusive, continuous, open or visible and notorious. There is no question but that the late Albert Train and his wife occupied the house and part of the north part of the lot from some time in 1955 forward. There was at no time any physical division between the north and south parts of the property. There was, however, in my view, an understanding as to such division. An attempt was made to subdivide the property. A survey was prepared in July, 1968, showing such subdivision and this survey is attached to and forms part of ex. 48. It seems clear to me that the late Albert Train and his wife have been in actual, exclusive, continuous, and open possession of the house and that part of the property shown in the survey containing .423 acres.
>
> The late Albert Train and his wife built the house and took possession of the property under a loose family arrangement. Albert Train was a tenant at will. By reason of s.5(7) of the **Limitations Act** above referred to, the 10-year period commences to run at the expiration of one year after the commencement of the tenancy, which would be 1956: **Noble v. Noble** (1912), 27 O.L.R. 342, 9 D.L.R. 735. See also **Truesdell v. Cook** (1871), 18 Gr. 532. In that case an owner of land put his father in possession under a parol agreement that his father should clear and cultivate the land, taking the benefits and profits. Strong, V.-C., held that the father was a tenant at will and took title by right of possession.
>
> For the above reasons it is my view that the plaintiff, as administratrix of her husband's estate, is in possession of the house and property consisting of .423 acres, with title

gained by the fact of such possession by herself and her late husband and the plaintiff is entitled to the necessary declaration in connection therewith.

Returning to the present case the facts indicate:

1. *That* when Clarence Reid received the deed to the property in question the respondent was then in occupation of it as he had been all his life.

2. *That* in 1936 Clarence Reid told the respondent that he could live on the property as long as he liked.

3. *That* the respondent paid the rea1 property taxes on the property from 1935-36 to approximately 1966 and made certain improvements and did the other things alluded to by the trial Judge.

4. *That* the respondent did not pay rent to his brother Clarence nor was any demanded of him.

5. The respondent testified that about two years or 'a little better than that' before the trial (January 21, 1977) he received a letter from his brother Clarence that he was planning on selling the land.

6. The appellant Edward MacLean testified that he purchased one piece of property from Clarence Reid in 1966 and that with respect to the property here involved Clarence wrote him in 1970 and "wanted to sell it to me".

7. Attached to the deed from Fred Reid and his wife to Clarence Reid., dated June 10, 1935, is a note dated May 17, 1971, written by either Clarence Reid or his wife. This note states:

To Whome [sic] it may concern

I, Clarence Reid, have sold the property in this will to:
Edward McLean
R.R. No. 1, Upper Musquodoboit,
Ha1ifax Co.,
Nova Scotia,
Canada
Signed Clarence Reid
Ballyduff
Thurles
Co. Tipperary
Ireland.

Obviously Clarence Reid thought he could convey the property to Mr. MacLean by attaching the foregoing note to the original deed to himself. Mr. MacLean advised him that the transfer could not be affected in such manner and had the deed of November 8, 1971, prepared and executed by Clarence Reid and his wife.

8. The appellant Edward MacLean had lived in the Dean Settlement area since the 1920's and was well acquainted with David Reid. Mr. MacLean testified that in 1935 Fred Reid, the father of David and Clarence lived across the road from the lands in question and in fact never occupied them thereafter.

9. The appellant Edward MacLean testified that he knew that the respondent David Reid lived on the lands in question from at least 1935 to the time of trial.

10. The appellant Edward MacLean said in evidence that he has been paying taxes on the property since 1966.

Section 12 of the **Limitation of Actions Act** of this Provinces provides:

12. No person shall be deemed to have been in possession of any land, within the meaning of this Act merely by reason of having made an entry thereon.

I refer to this section because there is evidence that Clarence Reid spent weekends at the property during the years 1935 to 1940 and certainly made an entry on it upon his return from overseas in 1945. There is absolutely no evidence that the permission given by Clarence to David that the latter could stay on the lands as long as he liked was ever revoked or rescinded by Clarence unless the letter referred to earlier wherein he advised David that he was planning to sell the property could be construed as a determination of the tenancy.

In **McCowan v. Armstrong** (1902), 3 O.L.R. 100, Meredith, C.J.C.P., said at pp.104, 105 and 106:

> The defendant has continued in possession of the farm ever since he entered on it, occupying it for his own benefit, and having the exclusive enjoyment of the profits of it. His possession, occupation, and enjoyment of it differed in no respect, as far as was apparent to others, from those of an owner in possession; he paid no rent and rendered no service or other return for it, and gave no acknowledgement of his father's title.
>
> While he has been in possession he has made valuable permanent improvements in clearing, draining, fencing, and otherwise improving the farm, as well as in the erection of buildings upon it; these improvements represent at least half the present value of the farm, though they cost more than that; and they have all been made at the expense of the defendant, except that in the first year or two of his possession the father gave him some timber which was required for a building which the defendant was then erecting.
>
> On this state of facts, I am of opinion that the right and title of the testator to the lands in question had, long before his death, by force of the **Real Property Limitation Act** (R.S.O. 1897 ch. 133) become extinguished.
>
> The defendant became, upon his entry with the permission of his father, a tenant at will, and the father's right of entry is to be deemed to have first accrued either at the determination of that tenancy or at the expiration of one year next after the commencement of it (which ever first happened): sec. 5, sub-sec. 7; and as it does not appear thus far that the tenancy was ever in fact determined, the father's right of entry was barred at the expiration of eleven years from the commencement of the tenancy, and his right and title to the lands was then extinguished.
> ....
>
> Had the testator made an entry sufficient to put an end to the tenancy at will within eleven years before the commencement of the action, it would not have availed to stop the running of the statute against him unless it was also shewn that a new tenancy had been created before the statute had operated to extinguish his right and title; **Doe d. Dayman v. Moore** (1846), 9 Q.B. 555 per Patteson, J., at p.558; **Doe d. Goody v. Carter** (1947), ib. 863; **Day v. Day** (1871), L.R. 3 P.C. 751; **Woodfall's Landlord and Tenant**, 16th. ed., p.244; **Foa on Landlord and Tenant**, 3rd ed., p.620 *et seq*; Sm L.C., 10th ed., vol.2, p.662 et seq.

The facts to which I have alluded, considered in light of the authorities cited, lead me to the conclusion that the respondent David Reid became a tenant at will of his brother Clarence in 1936 and that such tenancy by operation of s.10(f) the **Limitations of Action Act** was determined one year later. If I am in error as to the time of determination of such tenancy because Clarence Reid made a re-entry onto

the lands and possibly took possession of them in 1945 then, in my opinion, at that time a new tenancy at will was created which was determined by statute no later than 1947.

I would now refer to s.21 of the **Limitation of Actions Act** which provides:

> 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.

In my opinion the respondent David Reid was a tenant at will of Clarence Reid from no later than 1946. That tenancy expired by operation of s.10(f) of the **Limitation of Actions Act** a year later in 1947. From that time on the respondent had, to the knowledge of the appellants, actual, exclusive, continuous, open, visible and notorious possession of the lands in question. This possession extinguished the right and title thereto of the registered owner, Clarence Reid, and consequently of the appellants, no later than 1968. The result is that the respondent is entitled to possession of the lands in question with a title resting on the absence of the right of others to eject him.

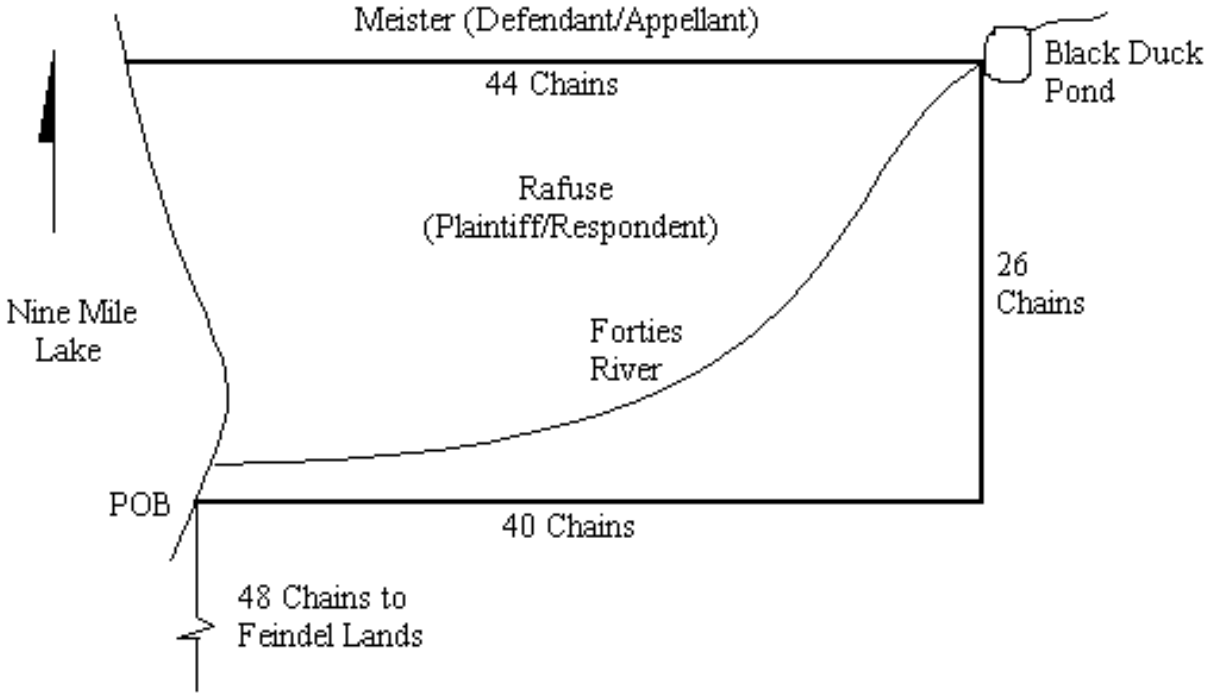
By agreement between the parties only the issue of title or ownership of the lands was submitted to the trial judge. The question of damages was reserved. The latter, we are told, relate primarily to the profits realized, and to be realized, from a blueberry crop grown on approximately thirty acres of the lands.

In the result I would dismiss the appeal with costs, allow the cross-appeal with costs, such costs to be taxed in one bill, and remit the matter to the trial judge for an assessment of the damages of the respondent.

Appeal dismissed

RAFUSE and RAFUSE v. MEISTER See 32 N.S.R. (2d) 217
Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Cooper and Pace, JJ.A.
May 11, 1979.

The Rafuses (the Plaintiffs/Respondents) and Meister (the Defendant/Appellant) owned adjoining Crown Grants near Sherbrooke Lake (formerly Nine Mile Lake) in Lunenburg County. The lands were located as shown in the following sketch:



The Rafuses had applied to have the title to their lands quieted under the **Quieting of Titles Act**. The lands that they claimed amounted to 217 acres, while the original grant specified an area of only 100 acres. They claimed that their northern line (the boundary with Meister) was located approximately one quarter of a mile further north than the 26 chains specified in the Crown Grant. That claim was based on two arguments, first, that the northern boundary of their grant was actually originally located further north than the specified 26 chains, and second, that they had acquired title to the disputed lands by adverse possession (specifically through the process of colour of title.) At the trial, the Plaintiffs had been successful and the Trial Judge had issued a certificate of title under the Act for 217 acres. The Defendant appealed.

The Court of Appeal first considered the location of the original boundary. The Court was heavily influenced by the plan which had been attached to the original Crown Grant. That plan showed the northeast corner of the Plaintiffs' Grant as being located on the shore of a small pond which was a widening of the Forties River. A pond (Black Duck Pond) was also shown on the current survey of the

property. The Appeal Court particularly noted that it was located 26 chains north of the agreed southern boundary of the Plaintiffs' land. After reviewing all of the survey evidence, the Court determined that Black Duck Pond was the same pond shown on the plan attached to the original grant and that the northern boundary of the Plaintiffs' lands was thus fixed by it.

The Court of Appeal then dealt with the adverse possession issue. The Court held that the doctrine of colour of title could not apply to support a claim of adverse possession beyond the northern boundary which it had determined. The Court also held that there was insufficient evidence of acts by the Plaintiffs which would amount to adverse possession of the lands in dispute.

The Court of Appeal allowed the appeal and fixed the northern boundary of the Plaintiffs' land 26 chains north of the southern line.

RAFUSE and RAFUSE v. MEISTER
Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Cooper and Pace, JJ.A.
May 11, 1979.

The appellant and the respondents are adjoining land owners on land situate on the eastern shore of Nine Mile Lake (now Sherbrooke Lake) in Lunenburg County, Nova Scotia. In these proceedings the parties disputed the position of the boundary line between their properties. The respondents commenced action under the **Quieting Titles Act**, R.S.N.S. 1967, c.259, in the County Court for District Number Two and the appellant intervened as a defendant. The trial was held before His Honour Archibald Burke and by a decision in writing dated February 7, 1978, the trial judge found that the respondents were entitled to a Certificate of Title to the lands which they claimed. It is from this decision that this appeal is taken.

The facts are that the respondents claim to be the owners of land having its origin of title in Crown Grant Number 7470, and the appellant claimed to be the owner of the adjoining land under Crown Grant Number 8489. Each Crown Grant stipulated an acreage of 100 acres. The respondents claimed title to 217.65 acres. The disputed boundary is the northern boundary of the respondents' land which is the southern boundary of the appellant's land.

The respondents' land was granted by order of the Governor-in-Council on the 14th day of June 1866, and was described as follows:

> a lot of land, containing 100 acres, situate, lying and being in the County of Lunenburg and bounded as follows:
>
> beginning at a pine tree standing on the eastern shore of Nine Mile Lake at a distance of 48 chains northerly at right angles from the northern line of Jacob Feindel's,
>
> thence east 40 chains to a pine tree, thence north 26 chains to a pine tree, thence west 44 chains to a stake and stones on the eastern shore of the Lake aforesaid, thence southerly by the different courses of the Lake to the place of the beginning.

This description was consistently followed in each succeeding conveyance through to the present time. A plan attached to the respondents' Crown Grant shows the Forties River flowing through the land commencing in the northeast corner of the Grant and proceeding in a southerly direction to at or near the southern boundary where it curves and proceeds in a westerly direction and enters Nine Mile Lake. At or near the northeastern corner of the land at a point where the river enters the land, there is an enlargement in its banks forming a pond.

It is agreed by both counsel that the southern boundary of the respondents' land is accurately shown in the plan (hereinafter referred to as Exhibit 5), and therefore a starting point is established. I find it is of significance that the location of the aforesaid pond is 26 chains north of the southern boundary.

The appellant, through his counsel, contends that by accepting the southern boundary as being accurate and by commencing at the shore of the lake at the southwest corner and proceeding in an easterly direction 40 chains and then in a northerly direction 26 chains, you arrive at the northern extremity of the pond on the Forties River, which is the northeastern corner of the respondents' land. This, the appellant contends, confirms the description in the respondents' Crown Grant and is supported by fixed geographical monuments such as the lake and the pond. The respondents, in turn, contend that the plan of the Crown Grant is inaccurate and that the pond referred to is located far north of this location.

All of the original markings and monuments no longer exist. To place the location of the pond more northerly as suggested by the respondents would be to ignore the fact that the respondents' eastern boundary is 26 chains in length. It is my opinion that this pond is what is referred to in the evidence as Black Duck Pond and that at a point slightly north of Black Duck Pond is located the northeastern corner of the respondents' land, from which point the respondents' northern boundary then proceeds in a westerly direction parallel with the southern boundary to the shore of Nine Mile Lake. This northern boundary not only coincides with the physical features of the land, but is also substantiated by the respondents' surveyor placing "approximate location of the Grant division line" in the same location.

Errol B. Hebb, a provincial land surveyor, testified that he was employed by the respondents in the spring of 1976 to do a survey of the land in question. He stated that he and Lester Berrigan, P.L.S., commenced the mechanical part of their survey in accompaniment with the respondent Richmond Rafuse, Wayne Rafuse and John Rafuse, and that the respondent Richmond Rafuse showed him the northern boundary of the land upon which the survey was to be done. Hebb further stated that this northern boundary was clearly marked by blazes on trees and that he did not make further enquiry as to the position of the boundary, but relied entirely upon what he was told by the respondent. This survey was later reduced to a plan which was admitted in evidence as Exhibit 5. This Exhibit shows the northern boundary line as being approximately one-quarter of a mile north of the line marked "approximate location of the Grant division line" and would cover land to a total acreage of 217.65 acres.

In direct examination of Mr. Hebb, the following questions and answers appear:

> Q. Mr. Hebb, is there visible evidence of that north line on the ground?
>
> A. Yes.
>
> Q. What type of evidence was that?

A. There was a survey line that had been renewed several times, approximately 30 odd years old.

Q. What was the visible evidence though?

A. The visible evidence was the typical survey boundary line markings, blazed trees both sides of the centre line.

In cross-examination of the witness, Earl B. Hebb, the following questions and answers appear:

Q. When you did this survey, who directed you to this blazed line?

A. This was shown to me by Wayne Rafuse, John Rafuse and Richmond Rafuse as their boundary.

Q. Did you make any enquiries of bordering property owners to see if they agreed with that blazed line before you commenced?

A. No, no.

Q. You simply accepted what Rafuse told you?

A. Yes, and what we found on the ground.

Q. Did you find any stakes, surveyor stakes, on that line, or just blazes on the trees?

A. Blazes on the trees.

Q. No surveyor's stakes?

A. No.

Mr. Hebb did not know the person or persons who had made the blazes on the trees nor was he able to ascertain any ancient monuments on the line. He states that the approximate age of the blazes was, in his opinion, 30 odd years.

Sometime after this action commenced, and the appellant had made application to the Court to be joined as a party defendant, Mr. Hebb returned to the land. It would appear that the purpose of his visit was to recheck his survey and to determine whether there existed in the location designated "approximate location of Grant division line" any physical signs of a line or any ancient monuments. He

was satisfied after his search that none existed and that the Crown Grant describing the respondents' land was in error.

Richmond Rafuse testified that he and Stewart Rafuse retained the services of a surveyor by the name of Mr. Foster in the year 1950 and that they commenced the survey on the southwestern corner of the land. He stated they then proceeded east, a distance of 40 chains, from whence they went in a northerly direction, 26 chains, and stopped. The surveyor refused to proceed further north since to do so would be to proceed beyond the lands described in the Crown Grant. This survey was never reduced to a plan. The most northerly point of this survey was at or near the northern extremity of Black Duck Pond.

Richmond Rafuse also gave evidence that the respondents had blazed the north line sometime before 1950 and that they had cut logs on the land from 1913 to 1950. He also stated that in the 1940's, the respondents had a logging camp on the land and would stay at the site for long periods during the winter months. He stated that the respondents had paid municipal taxes levied on the land from 1930 to the present time.

Stewart Rafuse gave evidence that he and Richmond Rafuse cut wood on the land for a number of years and that they had discontinued their operation in 1950. He said that the north line had been surveyed by Mr. Joe Frank, a neighbour of the respondents, sometime before the Foster survey had been made, and that they had blazed trees during this survey. Mr. Frank was not a qualified surveyor. However, the witness stated that Frank was familiar with survey work, and had used a transit to carry out the blazing operation on the north line.

In recalling the Foster survey, the witness stated that Mr. Foster had chained up the east boundary 26 chains and had stopped and that Foster had stated at the time:

> "There's where the line should be." and "Here's your line. It's a good blazed line."

and that Foster refused to survey further to the north. The refusal of Foster to survey beyond this point did not please the respondent and no plan was prepared from the survey.

The appellant's surveyors gave evidence that in their opinion the northern boundary of the respondents' line was the land described as "approximate location of Grant division line" as shown on Exhibit 5. This would place the northeastern corner of the land in the area of the northern extremity of Black Duck Pond.

Exhibit 5 shows a small brook entering the Forties River at Black Duck Pond and this brook is the only one entering the Forties River in its course through the respondents' land.

The trial judge in rendering his decision stated:

> The parties agree that the northern line of the plaintiff's grant is shown as meeting Sherbrooke Lake at a peninsula beyond Mr. Hebb's survey and the original grant shows a small inlet on the lake containing three small islands, as mentioned by the defendant. There is a discrepancy as to the number of islands involved, on the reading of the factums, *but the plaintiff base their claim on the known existence of a brook entering a bank on the Forties River*, on the basis of the crown grant plan and the plaintiffs' grant plan, indicating no other stream entering the pond in issue.
>
> I find that the claim for a Certificate of Title on this issue has been proved. (Italics are mine)

I have considered all of the evidence, and I cannot find a brook entering the Forties River other than at Black Duck Pond. With the greatest respect for the trial judge, it is my opinion that the trial judge erred in not accepting the known geographical location of the brook entering Black Duck Pond, which was a part of the Forties River and, by so doing, he placed the northern boundary of the respondents' land approximately one-quarter of a mile to the north. I am of the opinion that the northern boundary of the respondents' land follows the line shown on Exhibit 5 designated "approximate location of Grant division line" and I so find, however, this does not end this appeal. The trial judge having accepted the respondents' contention as to the location of the respondents' northern boundary line said:

> ...On the second issue of Colour of Title, I also find for the plaintiff.
>
> The defendant alleges there were many days and some years when the plaintiffs were not in the area, but this cannot conclusively defeat the plaintiffs in view of the large area of land involved.
>
> On the basis of the whole of the evidence, I find that the plaintiffs' land contains 217.65 acres, with the northern boundary lying as contended by the plaintiffs, and alternatively, the plaintiffs' assertions of Colour of Title, has been proved.

In **Black's Law Dictionary** (Revised 4th Edition), "colour of title" is defined:

> The appearance, semblance, or *simulacrum* of title. Also termed 'apparent title.' Any fact, extraneous to the act or mere will of the claimant, which has the appearance, on its face, of supporting his claim of a present title to land, but which, for some defect, in reality falls short of establishing it.

In **Canadian Law of Real Property** by Anger and Honsberger, the general rule as to the possession necessary when a person enters the land with colour of title is stated at p.793 as follows:

> As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be a good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised. in the deed (**Harris v. Mudie** (1882), 7 O.A.R. 414; **Templeton v. Stewart** (1893), 9 Man. R. 487).
>
> The possession necessary under a colourable title to bar the title of the true owner must be just as actual, open, exclusive, continuous and notorious as when claimed without colour of title, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is such partial occupation (**Wood v. LeBlanc**, (1904) 34 S.C.R. 627; **Sherren v. Pearson**, (1887) 14 S.C.R. 581; **Hudlin v. Ashley Colter Ltd.**, [1954] 2. D.L.R 257, 33 M.P.R. 6).
>
> Though possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title if open, exclusive and continuous for the whole statutory period, carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession and it is not exclusive possession if other parties lumbered on the land continuously or at intervals during any portion of such period (**Wood v. LeBlanc**, supra).

In **Harris v. Mudie** (1882), 7 O.A.R. 414, Mr. Justice Burton at p.428 said:

> Under a good deed his possession would be co-extensive with the boundaries given in the deed, and under one which proves for some reason to be defective, if although against the true owner he is a trespasser, his entry would give him a right to maintain trespass against anyone making a subsequent entry without right.

Colour of title is co-extensive with the boundaries contained in the deed and does not extend to land beyond those boundaries. The doctrine, colour of title, is confined to cover those situations where a person enters upon lands under a document of title which purports on the face of it to cover all of the land the purchaser intended to purchase and for some reason unknown at the time to such person, the title is defective, in which case his possession of part of the land will be deemed constructive possession to all of it. Mr. Justice Burton in **Harris v. Mudie**, supra explains the position of one who takes under colour of title as follows:

> When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir-at-law or devisee under a will, or under a deed from a married woman

> defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and come within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a *bona fide* claim, and ought not lightly to be extended to a purchaser from a squatter or other person having no title, where the party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner; and clearly not to cases where he knows the grantor has no title.

In **Wood v. LeBlanc** (1903-04), 34 S.C.R. 672, Mr. Justice Davies said at p.635:

> Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to *all the lands within the boundaries of the deed but only when and while there is that part occupation*. And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held *while so engaged and in actual occupation of part* to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres *within the bounds of his deed*. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be actual continuous possession, at least of part. (Italics are mine.)

In the case before us, the boundaries in the respondents' document of title do not extend northerly beyond the line referred to in Exhibit 5 designated, "approximate location of Grant division line", and thus the respondents cannot claim under colour of title, and the doctrine of constructive possession is not available to them. With the greatest respect to the learned trial judge, it is my opinion that by applying the doctrine of colour of title to the land north of the location of the Grant division line he erred.

There remains the question whether the respondents can maintain their claim that the land in dispute was held by them in adverse possession to the true owner for a sufficient period of time to satisfy the **Limitation of Actions Act**, R.S.N.S., 1967, c.168. Section 9 of the *Act* 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. R.S., c.153, s.9.

The onus of proving that possession has been such as to entitle the respondents to the protection of the **Statute** is upon them that assert such possession, **Handley v. Archibald** (1899-1900), 30 S.C.R. 130.

In **Ezbeidy v. Phalen** (1958), 11 D.L.R.(2d) 660, MacQuarrie, J., at p.665 stated:

> ...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 here, 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. 593, 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 freehold in the claimant." Cf. **Halfax 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 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 the land comprised or covered by his colour of title: cf. **Lessee of Cunad v. Irvine** (1853), 2 N.S.R. 31.

See **Spencer et al. v. Benjamin** (1975), 11 N.S.R. (2d) 137; 5 A.P.R. 137; **Naugle v. Naugle** (1970), 1 N.S.R. (2d) 554; **Legge v. Scott Paper Company** (1972), 3 N.S.R. (2d) 206.

The appellant testified that he had logged the area north of the Grant division line and south of the north boundary alleged by the respondents from 1952 – 1965. He stated that he was present when Mr. Foster surveyed the Rafuse land and that Foster had stopped his survey of the east boundary at the northern proximity of Black Duck Pond and Foster had told the respondents in his presence, "That is where the line goes."

The trial judge made no express findings in regard to adverse possession, and thus the burden falls upon us to determine if, in fact, such has been established. I have considered all of the evidence, and I find that the respondents acts of possession over the disputed land are not sufficient to satisfy the requirements of the **Limitation of Actions Act**. The evidence reveals that the respondents cut firewood and timber on the lands described in their deed from approximately 1913 until the early 1950's and that during this time they would make infrequent intrusions north of the Grant division line for the same purposes. The duration of this wood cutting would be for a week or two some years; and as much as several months other years. This wood cutting operation would be carried out during the winter and some winters the respondents would not cut at all. After the early 1950's the respondents gave permission on several occasions to other people to cut Christmas trees and other small quantities of timber, but did not continue further wood cutting themselves. In the fall they would hunt over part of the land.

In 1950 the appellant and his father lumbered the lands in dispute and erected a logging camp thereon. This operation continued until the mid 1960's when their work ceased.

In coming to the conclusion I have, I have taken into consideration the decision of Rogers, J., in **Mason et al. v. Lewis Miller & Co. Ltd.**, 58 N.S.R. 6, wherein the learned Justice stated on pp.12 and 13:

> The co-tenant may have had title; but the operations of the Todds over 40 years ago, followed again over 35 years ago by the Youngs, and again over 25 years ago and the assumption of full control by them, through the maintenance of their blazed lines, the usual method of marking proprietorship of wild lands, and making of and operating roads all over the land and the general supervision of the woods foreman over these lots as part of the extensive holdings of which they formed a part, all bear convincing

> testimony to the continued open and notorious possession of the defendants' predecessors to the exclusion of the claimants and their predecessors. The Todds began their occupation by unequivocally using the lands exclusively for their obviously intended purposes, and thereafter they did such acts as would be expected of owners of such lands in due course. Clearly the owners of lumber lands are not expected to cut over them except at intervals, dependent upon regrowth and consistently with their general purpose to operate on sound business principles.
>
> See **Cully v. doe d. Taylorson**, 11 Ad.& El. at pp.1015 – 1019; **Lord Advocate v. Lord Lovat**, 5 A.C. 288; **Glynn v. Howell**, (1909) 1 Ch. 666, at pp.677 & 678, **Halifax Power Co. v. Christie**, 48 N.S.R. per Graham, C.J., p.267 *et seq.*

In the present case the respondents acts of possession were slight and sporadic and fell far short of the possession necessary to establish their claim of adverse possession or to invoke the operation of the statute.

In the result and for the reasons given, the respondents are entitled to a Certificate of Title pursuant to Section 14 of the **Quieting Titles Act**, such certificate to show the northern boundary line as being the line designated in Exhibit 5 as "approximate location of Grant division line." All of the other boundaries of the respondents' land as shown in Exhibit 5 are confirmed.

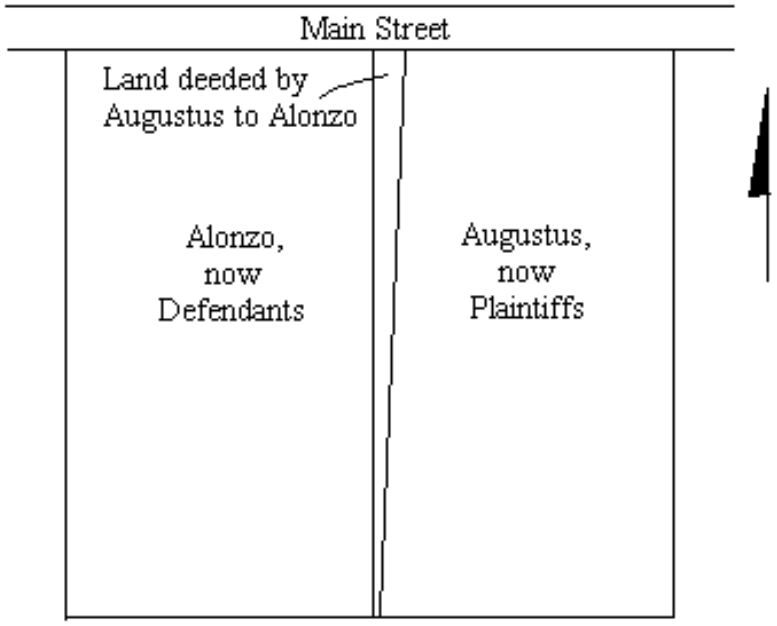
The appeal is allowed with costs.

Appeal allowed.

O'NEIL v. STEELE See 33 N.S.R. (2d) 514

Nova Scotia Supreme Court, Trial Division
Grant, J.
January 24, 1979.

The Plaintiffs and the Defendants owned adjoining properties at Bridgeport, near Glace Bay. Both properties had at one time been owned by William O'Neil and the Plaintiffs and the Defendants were decedents of two branches of the O'Neil family. When William O'Neil died in 1900, he divided his property in two and left one half to a son Alonzo and one half to a son Augustus. Shortly thereafter, Augustus conveyed to Alonzo a "roughly triangular" piece of land, apparently to move the boundary line a bit further away from the house located on Alonzo's half. The following sketch shows the layout of the land.



The dispute over the location of the boundary between the properties had simmered from the 1950's to 1975 when this action was started.

The Judge reviewed the testimony of a large number of witnesses. Much of that testimony dealt with the location of a hedge which had been located between the two properties and had been cut down in 1955.

The Judge made the following findings:

- That Augustus and Alonzo had reached a conventional line agreement in 1900 and documented it by the conveyance of the triangular piece from Augustus to Alonzo.
- That there was no adverse possession based on activities before 1955.
- That there was not sufficient evidence of adverse possession from 1956 to the start of the lawsuit in 1975. Further, that a twenty year period had not elapsed from 1956 to 1975.
- No finding was made as to the location of the hedge, or whether or not it would have constituted the boundary line.

The Judge dismissed the Plaintiffs' claim for trespass, essentially finding that the boundary was as defined by the deeds in 1900.

O'NEIL v. STEELE
Nova Scotia Supreme Court, Trial Division
Grant, J.
January 24, 1979.

This is an action concerning the location of the eastern boundary line of the plaintiffs' property where it meets the defendants' western boundary. The plaintiffs claim damages for trespass, and injunction and a declaration as to title. The defendants claim a declaration as to title and an injunction.

The lands were all included in a Crown grant dated the 23rd of December, 1864, to one John O'Neil. John O'Neil subsequently deeded in 1867 to William O'Neil. William O'Neil had at least three children, Augustus O'Neil, the father of the plaintiffs; Alonzo O'Neil, who never married and who willed his lands to his sister, Anne J. Graham, from whom the defendants claim title.

The plaintiffs and female defendant are all cousins. This dispute has been more or less active since the early 1950's. At that time these plaintiffs commenced an action which they subsequently discontinued.

William O'Neil had lands on the south side of Main Street, Bridgeport, near Glace Bay, of about 10 chains in width. In his will, Exhibit 7, William O'Neil devised the eastern one-half of land, with five chains frontage on Main Street, to Augustus O'Neil (Augustus). He devised the western one-half of land, also with five chains frontage on Main Street, to Alonzo O'Neil (Alonzo). The Will was probated on the 28th of June, 1900. He appointed his son, Alonzo, his sole executor but devised the real property direct in his Will.

On the 20th of October, 1900, Alonzo, as executor of the estate of William O'Neil, conveyed to his brother, Augustus, the eastern half of the lot. In paragraph 4 of the Abstract of Title, Exhibit 7, the deed recites the Will of William O'Neil and that the Will authorized and empowered Alonzo, the executor, to give deeds of conveyance and that the deed is in pursuance thereto. The will does not appear to vest any property in the executor, nor to direct or authorize any conveyances.

However, I feel I am justified in implying that the execution and recording of the deed expressed the intention of the parties.

On October 22nd, 1900, Augustus conveyed back to Alonzo a small, somewhat triangular lot between the two properties. Both of these deeds contain descriptions with metes and bounds expressed in degrees, chains and links. It appears to me that these deeds were not of a casual nature but were the result of a survey. I find Alonzo and Augustus thus fixed the boundary line between their respective lots.

Part of the land in this triangular lot is included in the lands under dispute.

The triangular lot has 24.7 feet frontage on Main Street, runs back 792 feet and is 4.9 feet wide at its rear line. A lot with 101 feet frontage on Main Street and approximately 180 feet deep has been sold and all the interested parties have joined in that conveyance. That portion of the land is no longer a part of the problem.

There are no buildings on the lands remaining in dispute, nor is there road frontage. I attended with counsel to view the locus and although it apparently has great value to the parties, it appeared to me to have minimal value. Exhibit 1 is a plan prepared by Earl Verner, a Nova Scotia land surveyor, dated August 1, 1955. Verner said he was engaged by Mrs. Augustus (Anastasia) O'Neil. He plotted the land contained in the deeds and, in addition, superimposed some hedge lines. He located the Augustus O'Neil house but did not locate the Alonzo O'Neil house, although it was still standing at that time. He described the hedge between the Augustus and Alonzo O'Neil properties which is referred to as hedge 3 on his plan. It was a dense and wide hedge and almost impenetrable at certain places. He concluded that it had been there for some years. At the southern end of the hedge he also found some old fence posts. However, the fence posts are not shown in his plan, nor are they in his field notes. I have some doubts as to whether or not his recollection should be preferred over his plan and field notes.

Mr. Verner described the hedge in some detail. It was very dense for the first 300 feet and then began to diminish.

James Young, age 47, is a professor at the College of Cape Breton and grew up in that area. He was friendly with the plaintiffs and their brothers and knew both Alonzo and Augustus. He described the hedges in the old days in some detail. It was his observation that hedge 3 appeared to be the dividing line between the two properties. He described how, in the old days, they all used to play ball behind the houses.

The plaintiff Gerald O'Neil is 48 years of age, works for the railway and lives in Glace Bay. It was his opinion that the Verner survey had been done for the defendants. However, I reject this because it probably would have shown the Alonzo house and would have shown the hedge lines in more detail. As it is on Exhibit 1, the hedges appear to be shown by roller markings and not accurately plotted. It appears to be drawn to advance the plaintiffs' claim which would hardly be done if it was prepared for the defendants.

Gerald O'Neil described how in 1955 the defendant Angus Steele (Steele) came on the property and did some ploughing. He stopped him. The defendant's lawyer, the late Donald Gillis, arrived at the scene and after some discussion the defendant completed his ploughing.

In 1956 the plaintiff Gerald O'Neil took some action to reestablish his claim to ownership including the planting of trees and reestablishing a lawn. In 1975 Carl MacDonald bull-dozed an area for a foundation for the house which eventually was built, near the disputed area, by the defendants' son. He

described in detail how this was done. Eighteen photographs were introduced which show certain views of the lands including the landscaping and other topographical features.

Gerald O'Neil described how his family had always considered hedge 3 to be the boundary line and how they had observed this over the years. The plaintiffs' father, Augustus O'Neil, died in 1946 and Alonzo O'Neil died in 1952. In 1955, when the dispute first erupted, the defendant Angus Steele put a line of fence posts on what he apparently considered to be his east line which Gerald O'Neil promptly destroyed.

In 1946 Augustus O'Neil, Jr., a brother of the plaintiffs, commenced a foundation for a home he proposed to build between the two houses on the disputed land. However, after the excavation was completed the work was abandoned and his brother built elsewhere. This excavation, about 2 or 2 1/2 feet deep and 24 x 36 feet in size, remained there until it was bulldozed in 1976 in the excavation for William Steele's house.

Alonzo had been a grower and seller of shrubs, hedges, and trees and used his property as a nursery for this. Gerald O'Neil recalled his uncle, Alonzo, having he and his brothers and sisters trim hedge 3. He described the manner in which vegetable gardens, including rhubarb, had been maintained on the back lands.

Gerald O'Neil described his acts of possession of the disputed lands from 1956 to 1975. He considered his land extended up to where hedge 3 is shown on Exhibit l. It was generally considered that the original division between Augustus and Alonzo brought the boundary line too close to the old homestead which Alonzo occupied and therefore Augustus conveyed the triangular lot to Alonzo to rectify this (deed, paragraph 6, Exhibit 7).

The plaintiff Francis O'Neil is 60 years of age and also a son of Augustus. He lived at home until 1955. In 1975 he obtained a quit claim deed from his mother for a portion of the disputed lot. This is shown on a plan of John S. Pope, N.S.L.S., Exhibit 9. He recalled the manner in which the lands of Augustus and Alonzo had been used in the old days and he considered hedge 3 belonged to Alonzo and the boundary line was somewhat to the east of that. He described the location of hedge 3 as being 20 – 30 feet east of the Alonzo house. He recalled his brother, Augustus, digging a foundation in about 1945 with the intention of building a house. However, as he could not get clear title to the land he went elsewhere. His plan, prepared by John S. Pope being part of Exhibit 9, shows a hedge running north and south through his land but this hedge is shown as being to the east of the lands in dispute. Francis O'Neil obtained two deeds from his mother, both of which are contained in Exhibit 9. One is a warranty deed and lies to the east of the disputed area. The other is a quit claim deed and lies the west and includes the disputed area. Francis O'Neil took issue with the Verner plan and was of the opinion that the true boundary line between the two lots was hedge 3 and that the deed to Augustus O'Neil took in the property up to hedge 3.

Howard O'Neil, age 65 of Glace Bay, is a cousin of the plaintiffs and the female defendant. His land is shown on Exhibit 1 and his east and west boundaries are hedges. He and his east and west neighbours both agree on that. He visited frequently at the homes of Augustus and Alonzo and he remembered hedge 3 for over fifty years. He thought it ran up to Alonzo's house. In the old days he had done farmwork for both Augustus and Alonzo. He knew there had been a dispute simmering since about 1956. He considered hedge 3 to be the dividing line.

Mrs. Anne J. Graham is 90 years of age and is the sister of Alonzo and Augustus and the mother of the female defendant. She was born in the Alonzo O'Neil house. After her father's death, Alonzo received the homestead property and Augustus received the property to the east of it. Alonzo and Augustus had been in business together. They had a general store in Bridgeport where they sold dry goods, furniture and groceries. She described it as a very large store. Alonzo went on to be the mayor of Glace Bay and she described how they had both been very fine men and had been great friends. She described the fact that each had been very interested in gardening and Alonzo had sold hedges and shrubs for ornamental purposes. At one time there were foxes, cows and horses on the properties. She did not think there was any feature dividing the two properties but she felt it was just left open. She was married in 1912 and moved a few miles away. Augustus was married in 1912 and lived with her while he was building his new home which is still on the plaintiff's property. She said Alonzo was a wonderful gardener. She recalled a foundation being built between the properties. She considered it was being built on lands that the builder did not own. She inherited the Alonzo property on his death and in 1955 deeded it to her son-in-law, Angus Steele.

Andrew O'Neil of Glace Bay is 65 years of age and is also a cousin. There is a hedge between his property and that of Howard O'Neil. He has lived there since 1951. The hedge was there when he moved there. From 1947 to 1949 he lived upstairs in the Alonzo house. He described the use of the property and the hedges. He understood that hedge 3 was the boundary line between the two properties. He had clipped hedge 3 for Alonzo many times.

Steve Andricyk is 64 years of age and lives opposite the Gerald O'Neil property. The location of his house is shown on Exhibit 1. He used to work for Alonzo but is now retired. He built his house in 1941. He considered hedge 3 to be the boundary line. He worked for Alonzo during the summers of 1930 to 1932. He thought hedge 3 was about 50 feet west of Augustus' house. He saw the hedge being cut down in 1956. He recalled the excavation being dug as a foundation for a house and it was none of his business and he did not know any of the details. He thought it was west of Augustus' house near hedge 4 shown on Exhibit l.

Duncan MacNeil, age 66 of Glace Bay, lived in the Augustus O'Neil house from 1946 to 1956. He described hedge 3 as being 25 to 30 feet east of the Alonzo house. He described how the plaintiff Gerald O'Neil used the property, mowed the lawn and cut the hay. He considered hedge 3 to be the boundary line. He also recalled the hole dug in the lawn.

Cornelius O'Neil, age 62 of Glace Bay, is the son of James O'Neil and a nephew of Alonzo and Augustus and a cousin of the participants. He lived on Main Street from 1916 to 1942, about a half a mile from Gerald O'Neil. He said there was a hedge line between the Alonzo and Augustus O'Neil properties which ran back about 300 feet from the road and it was 20 or 30 feet east of Alonzo's house. He considered it to be the boundary. He said that he cut fence posts for Alonzo which he thought were used to the south of the hedge line towards the bog. He said Alonzo used to plant hedges, sell them and transplant them. He had a horse and a fenced in area for the horse.

Augustus O'Neil is 53 and a son of Augustus O'Neil, and a brother of the plaintiffs. He described how he with a horse and scoop dug a foundation where he proposed to build a house. However, he could not get "a clear deed". He said this was because there was a mortgage on the property. He said he was told by his father to build it to the west of the Augustus house, which he started to do. After he got the excavation completed he learned there was a mortgage. He, therefore, built elsewhere. He described how his brother, Gerald, had utilized the land to the east of hedge 3. He described in detail the hard times experienced during the depression and how it was necessary for his father to put a mortgage on the property. Exhibit 27 is a mortgage on the property but it is dated in 1945. Prior to digging his foundation he did not have a survey done. After he completed it he did not fill it back in and the hole was there for 10 or 15 years. He did not get a deed from his father to the lot.

I think it improbable that he ceased with the building of his house because of the mortgage. Surely his father would have considered that when he gave him permission to build. I find it more probable that he ceased building because the ownership to that land was in dispute. He was going to get a building lot from his father with 60 feet frontage on Main Street and 200 feet deep. He described its location as being 18 feet east of hedge 3.

William O'Neil, age 63, is a son of Augustus O'Neil. He was building a home on the north side of Main Street while his brother Gus was building on the south side of Main Street. He said he told Gus to quit building as long as there was a mortgage on that property. He said it was hard to put the sand back after the foundation had been scooped out. He considered hedge 3 to be the boundary line. He described the use of the land in detail over the years.

Nick Oldale is a member of the faculty of Mineral Technology at the College of Cape Breton. He interpreted the aerial photos, Exhibit 11, taken in 1953 and Exhibit 10, taken in 1947. He identified hedge 3 on the aerial photograph, Exhibit 11, running approximately 500 feet south from Main Street. Mr. Verner had examined the aerial photographs and was not prepared to interpret them, nor was Orin Clark, a land surveyor of Little Bras d'Or.

The defendant Angus Steele is 62 years of age and described how in August of 1955 he bought the property from his wife's mother. This deed is Exhibit 12. The description takes in the Alonzo O'Neil property and the east line is the east line of the conveyance from Augustus O'Neil to Alonzo O'Neil in 1900. He had been at the property frequently before he acquired it. He described the rows of lilac,

hawthorne, willow, maple and other trees and shrubs. He said the Alonzo house was taken down in 1954 prior to his purchase. It was his recollection that in the 1930's hedge 3 was not there.

Angus Steele said that in the fall of 1955 he had Earl MacDonald do some ploughing for him. He also had the hedge, shown as number 3 on Exhibit 1, cut. It was his recollection that solicitor Donald Gillis had arranged for Mr. Verner to do a plan at the time he got his deed from Mrs. Graham. He said it resembled Exhibit 1, as no doubt it would because it showed the same lands. While MacDonald was ploughing, Gerald O'Neil objected and Steele called solicitor Gillis who came out to the land. Gillis indicated where he considered the boundary line to be, and Earl MacDonald then continued on with his ploughing. The plowed area included the area where Gus, Jr., had started his basement. MacDonald ploughed from the east to the west line, back about 150 feet from the road. At that time it was mostly grass or hay and there were no hedges in the area ploughed. Steele then placed stakes along what he considered to be the east line of his lands. These stakes were, shortly thereafter, removed by Gerald O'Neil.

From 1955 to 1975 Steele attended on the land periodically. Sometimes his wife and children would go and they would pick cherries or pears from the trees on the land. He said it appeared to him that the plaintiff Gerald O'Neil was encroaching in cutting the grass.

In 1975 Steele deeded a building lot to his son William who had Louis Yates bulldoze an area for his foundation. The excavation left by Augustus, Jr., was filled in. Steele considered this to be within the property lines of the land he had deeded to his son William. Steele said that the survey stakes were put in by Carl MacDonald, a land surveyor, and the bulldozing was conducted within those stakes. Exhibit 9 includes the plan of the MacDonald survey of the lot deeded to William Steele. This contains a line AB showing a line of trees or a hedge which is alleged to be hedge 3. While the excavating for William Steele was being done, the plaintiffs alleged ownership up to the line AB on Exhibit 9. The solicitor for William Steele had the foundation placed 10 feet to the west so it was not on the actual land in dispute. Steele said Mr. Yates was not hired by him but, he assumed, by his son William. He said Mr. Yates bulldozed some willow trees which had been planted on what he considered to be his land. The soil from that area was taken to the area of his son William's lot for grading. He denied that Gerald O'Neil cut the grass in the front of the disputed area because the old excavation was still there.

Earl MacDonald, age 48, did the ploughing in mid September of 1975 for the defendant Angus Steele. He had a small pacer tractor, 45 horse power, and a single furrow plough. He did the ploughing under the direction of the defendant Angus Steele. His ploughing was interrupted when the plaintiff Gerald O'Neil was in conference with the defendant Angus Steele. Shortly thereafter Donald Gillis came to the scene and, after some discussion with the people there, indicated that he could proceed to do the ploughing, which he did. He was directed by Mr. Steele where to plough. He estimated he did about 15 hours work. He said he ploughed no hedges or trees because his plough and tractor did not have the capacity to do that. He said he did cut through a green area which could have been a lawn. He

said it was mostly wild hay and stubble and probably was cultivated years back. He removed no top soil.

I find that Alonzo and Augustus O'Neil agreed on their common boundary, that is, the western boundary of the Augustus O'Neil lot and the eastern boundary of the Alonzo O'Neil lot, as line "T, V, M" on Exhibit 1; that being the boundary contained in the deed dated the 22nd of October, 1900. Mr. Verner was of the opinion that the starting point, described as the southeast corner, should read the southwest corner. It was his opinion it was a typographical error and I agree with this and so find.

A conventional line agreement is ordinarily an agreement where adjoining landowners agree on the location of a common boundary line. It may be written or in some cases courts have sustained such verbal agreements. See **Spencer et al. v Benjamin** (1975), 11 N.S.R.(2d) 123; 5 A.P.R. 123. MacDonald, J.A., said at page 135:

> The Supreme Court of Canada in **Grassett v. Carter** (1884), 10 S.C.R. 105, per Henry, J., at pp. l29-130, 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 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.'

See also **Nelson v. Varner** (1977), 20 N.S.R.(2d) 181, 27 A.P.R. 181.

I find that the net result of the devises contained in paragraph 3 of the Abstract, Exhibit 7, and the exchange of deeds described in paragraphs 4 and 6 of the said Abstract is an agreement between Augustus and Alonzo as to their common line. This common line established by the two owners determines the common boundary line by paper title.

Over the years the two brothers, who were in business together as merchants, no doubt permitted free movement and use back and forth across the line as one would expect. I have no doubt that Gerald O'Neil and his brothers mowed the lawn up to hedge 3 on uncle Alonzo's property. Our law would be in a sorry state if an uncle had to rush out each time his nephews mowed across the line lest the nephews acquired title to the lawn they mowed. Yet, I find that over the years by such casual occupation of the lands, the plaintiffs and their brothers mistakenly assumed that they were acquiring

title to this land. As the years went by and uncle Alonzo became older and did not pursue his business of selling shrubs and trees, the use of his land by his nephews continued.

However, when Gus, Jr., decided to utilize a portion of uncle Alonzo's land by putting in a foundation, a stop was put to that and a large excavation remained untouched for close to 20 years. For people who had taken great pride in planting and maintaining shrubs, hedges and lawns the presence of this excavation for that length of time seems almost inconceivable, yet it was done. I think it is a fair inference, and I so draw it, that Gus, Jr., stopped the building of his house not because of any mortgage but because it was at least partially on uncle Alonzo's land.

I have no doubt but that the plaintiffs and their brothers have an honest belief that the lands in question belonged to their father and now belong to them.

In 1952 on Alonzo's death, under his Will, his property passed to Anne Graham. No doubt the problem started here. The acts of encroachment commenced against the ownership of uncle Alonzo continued on against aunt Anne. However, I believe the same reasoning would hold that the nephews' mowing of the lawn and cutting of the hay were acts of kindness to elderly relatives rather than acts from which ownership should flow.

In 1955 Anne Graham deeded to her son-in-law, the defendant Angus Steele, and in due course he attended on the property and the friction started. He cut down the hedge, shown as hedge 3 on Exhibit 1, which at that time was an old hedge. None of the evidence adduced by the plaintiffs suggests that the ownership of the hedge was not always in Alonzo. Therefore, Alonzo's successor in title had every right to cut the hedge or trim it or do whatever he wanted to with it. This he did. He also employed a surveyor and a lawyer and set out stakes on the eastern boundary of his lands. The plaintiff Gerald O'Neil promptly destroyed these stakes. Angus Steele then exercised other acts of possession by ploughing the lands, or a portion of them, and cutting or trimming hedges and bushes.

At that time the plaintiffs commenced an action which they eventually discontinued.

I find that the agreement between Augustus and Alonzo, as evidenced by the title documents, bound the two of them and any acts of possession which the plaintiffs asserted prior to 1955 were insufficient to vest title in them.

The defendant Angus Steele asserted his ownership in the fall of 1955 and following that the plaintiff Gerald O'Neil apparently determined that he would reassert his title to these lands and occupy them. He planted shrubs, lawns and trees within the disputed area in 1956.

From 1956 until 1975 Gerald O'Neil cut the lawn, cut the hay, sometimes burned it, put in bushes, presumably trimmed them, and planted trees and presumably tended them. He alleges this was done in the disputed area to the east of where the hedge had stood in 1955.

During this period the defendant alleges that he attended on the premises from time to time and picked fruit. As well, his wife and children attended too.

It was a vacant lot of land where the old house had been torn down in 1954 and the lands were not used. The plaintiff Gerald O'Neil encroached some on the eastern boundary of the defendants' lands. The defendants lived in their home some distance away. What would one consider to be the normal use of such a lot of land with a few feet frontage on a paved street? It would probably have some building lot potential if combined with adjoining lands. Had the defendants desired to have a garden there they could have, but surely they are not required to. Angus Steele paid sewer frontage on the disputed land. After having destroyed the defendants' fence line the plaintiff did not put one up himself. Although this pot boiled from 1955 to 1975, there were no other acts of hostility.

In 1975 when Angus Steele conveyed a building lot to his son, he kept sufficient land to enter into the back part of his lot. When the excavating for his son's house was taking place the acts of trespass complained of took place.

The question arises as to whether or not the plaintiffs from 1956 to 1975 have acquired sufficient possessory title to bar the defendants' right of entry.

Section 9 of the **Limitation of Actions Act** being c. 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.

MacIntosh, J., of the Trial Division of this Court, in the case of **Spencer v. Benjamin**, 11 N.S.R.(2d) 137; 5 A.P.R. 137, S.T. No. 00078, discussed the matter of adverse possession. At p. 4, of his decision, in Vol. 37 of the decisions of the Nova Scotia Supreme Court, Trial Division, he said as follows:

> The late MacQuarrie, J., in **Ezbeidy v. Phelan** (1958), 11 D.L.R.(2d) 660, 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,... and a person who claims by long adverse possession only, such as the plaintiff must rely on here, 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.
> .....
>
> 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.'

It is stated at p. 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 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).

There appears to be no doubt but that the plaintiffs considered their father's title and also their own to extend to the vicinity of hedge 3. However, hedge 3 was destroyed in 1955 and there are varying descriptions by various witnesses as to its location. All agree to its location in a general way but not even the Verner plan shows it in detail. I am not prepared to make a finding as to the exact location of hedge 3 from Exhibit 1 alone because of its lack of detail and precision. The John S. Pope plan contained in Exhibit 9 shows a hedge but that hedge is not hedge 3 but is to the east of it.

The J. Carl MacDonald plan of September 17, 1975, also included in Exhibit 9, a plaintiffs' exhibit, shows a line AB described as the "hedge line disputed between Steele and O'Neil". Various witnesses referred to the MacDonald plan and agreed that it was the hedge represented by hedge 3 on Exhibit l.

MacDonald located it with some precision, being 32.25 feet west of the line established in the deed from Augustus to Alonzo in 1900, number 6 of Exhibit 7. MacDonald has the hedge running parallel with that line on an angle south 35^0 00' west. However the hedge line 3 had been gone for 20 years before the MacDonald plan was prepared. On Exhibit 1 it is shown at a very different angle.

Counsel for each side advanced the theory that as each party was occupying a portion of his land then that occupation extends to the full extent of that land. There are circumstances under which that doctrine can be readily applied. However, I do not believe the nature of the titles, use or occupation of this land lends itself to that theory.

The acts of the plaintiff from 1956 to 1975 have been only of a casual use, but it is the same use that they put to their other adjoining lands. However, even if the use of the plaintiffs has been continuous, open, notorious and exclusive, it has only been for 19 years which I find is insufficient to meet the requirements of the provisions of the **Limitation of Actions Act** such as to bar the entry of the defendants.

I dismiss the plaintiffs' claim. I allow the defendants' counterclaim. I am prepared to grant an order declaring the location of the said line.

The defendants shall have their costs of the action to be taxed in one bill of costs with one brief and one counsel fee.

Action dismissed.

ZINCK v. ATTORNEY GENERAL OF NOVA SCOTIA, HATT, WALTERS, BUTLER, HORNE, ISNOR, FERRIS, DELONG, BOND, DOREY and EISENHAUER See 34 N.S.R. (2d) 12
Nova Scotia Supreme Court, Appeal Division
Cooper, Jones and Macdonald, JJ.A.
August 13, 1979.

-and-

ZINCK v. ATTORNEY GENERAL OF NOVA SCOTIA, HATT, WALTERS, BUTLER, HORNE, ISNOR, FERRIS, DELONG, BOND, DOREY and EISENHAUR See 34 N.S.R. (2d) 23
Nova Scotia Supreme Court, Trial Division
Grant, J.
August 11, 1978.

This dispute involved a ten acre parcel of land at Robinson's Corner, Lunenburg County. The Plaintiff Zinck had applied to have the title to a 35 acre parcel quieted. The Attorney General was named as required under the **Quieting of Titles Act**, but took no part in the proceedings. The individual Defendants claimed title to a 10 acre part of the lands as heirs of Mary Eliza Millett who had died intestate in 1915. There was also a claim that the individual defendants were entitled to an interest in the parcel based on an interpretation of the **Collection Act**.

A 10 acre parcel had been acquired by Wakefield Millet (husband of Mary Eliza) in 1880. He subsequently conveyed that parcel to Benjamin Mitchell who then conveyed it to Mary Eliza Millett in 1892. That chain of title then ended. In the early 1900's, the property was conveyed to a predecessor of the Plaintiff under the provisions of the **Collection Act**. Apparently, Wakefield Millett had owed the predecessor some $265 and the lands of Millett had been assigned under the Act for payment. The land was conveyed to David Whitford and subsequently to the Plaintiff. These facts supported two claims by the Defendants:

- First, that the 10 acre parcel was not owned by Wakefield Millett at the time of the assignment under the **Collection Act** and thus could not have been transferred. Title had remained in Mary Eliza Millett and the Defendants were her lawful heirs.
- Second, if the land had been properly conveyed under the **Collection Act**, then David Whitford (and his successors in title) continued to hold the lands in trust for Wakefield Millett (and his heirs) and they could be "redeemed" by payment of the $265 debt.

At trial, the Judge dismissed both claims. The Defendants appealed.

The Court of Appeal confirmed that the conveyance under the **Collection Act** was final and that the Defendants could no longer claim an interest in the property under that process.

The Court of Appeal also confirmed that the Plaintiff and his predecessors in title had established a valid claim to the property by adverse possession. The Court discussed the nature of possession which would be necessary to support adverse possession and confirms that the Plaintiff had met that test. The discussions of the nature of adverse possession are thorough and valuable for application in other cases.

The Court of Appeal did not have to address the issue of estoppel which had also been used by the Trial Judge to find for the Plaintiff.

ZINCK v. ATTORNEY GENERAL OF NOVA SCOTIA, HATT, WALTERS, BUTLER, HORNE, ISNOR, FERRIS, DELONG, BOND, DOREY and EISENHAUER
Nova Scotia Supreme Court, Appeal Division
Cooper, Jones and Macdonald, JJ.A.
August 13, 1979.

This is an appeal from the decision of Mr. Justice Grant of the Trial Division, whereby he found that George E. Zinck, the respondent here, was entitled to a certificate of title under the **Quieting of Titles Act**, R.S.N.S. 1967, c. 259, (the Act) to a tract of land at Robinson's Corner, in the County of Lunenburg, Province of Nova Scotia, containing an approximate area of 35.67 acres and as described in schedule A to the order giving effect to the decision.

The respondent commenced his action for a certificate of title by originating notice (action) issued March 2, 1976, naming the Attorney General of Nova Scotia as defendant in accordance with the Act. On August 23, 1976, the appellants were joined in the action as defendants. The Attorney General thereafter took no part in the proceedings, either at trial or in this appeal. The appellants are the heirs-at-law and next-of-kin of Mary Eliza Millett, who died intestate.

The land, of which the ownership is in dispute, is confined to a 10-acre lot. I refer later on to its location and the basis upon which the appellants claim title to it. It is sufficient for me to say now that the 10-acre lot was said to form a part of the whole tract of 35.67 acres.

The entire land was conveyed to the respondent by Adelaide L. Whitford, widow of Edgar J. Whitford, by deed dated January 10, 1964, and recorded in the Registry of Deeds at Chester in Lunenburg County on January 13, 1964. It is therein described as being on the western side of the Windsor road 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 said Windsor Road (which appears to be a continuation of the "Wake-up Hill" road) and easterly by the said Windsor road, and as containing 50 acres more or less. It is rectangular in shape and was surveyed by Errol B. Hebb, a Nova Scotia Land Surveyor. A copy of the plan of survey dated April 17, 1972, is in evidence as exhibit 2. The acreage found by the surveyor was not 50 but 35.67.

The evidence adduced at the trial revealed that Adelaide L. Whitford was the grantee of a number of parcels of land and a wharf privilege by deed dated December 20, 1961, and recorded on January 3, 1964. The grantor was Edgar J. Whitford, her husband. The land was the third of the lots described in the deed. I should mention here that the fourth parcel was described as:

> Fourth, All the woodland owned by the said Edgar J. Whitford at the time of his death;...

In **Countway v. Haughan et al.** (1976), 15 N.S.R. (2d) 143; 14 A.P.R. 143, Cowan, C.J.T.D., on an application under the **Vendors and Purchasers Act**, R.S.N.S. 1967, c. 324, dealt with the question whether the fourth numbered paragraph of the deed, which I have quoted, created a valid objection to title. He said at p. 148:

> 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...

On appeal, reported in 15 N.S.R.(2d) 138; 14 A.P.R. 138, MacKeigan, C.J.N.S., said at pp. 139, 140:

> 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.

Apparently the **Countway** case raised some doubt in the respondent's mind as to whether he had obtained good title to the lands which had been conveyed to him. It was to resolve any doubt on this score that he commenced his action under the Act. There is nothing before me to overcome the *prima facie* effect of the deed to Adelaide L. Whitford as to the lands other than the woodlands, and I am of the opinion that it was effective to convey such lands to her.

Edgar J. Whitford had acquired the lands, along with other lots, by deed from James E. Whitford and his wife dated May 19, 1928, and recorded on August 30, 1928. The lands were conveyed to James E. Whitford by two deeds. The first deed is from the executors of C. Edwin Kaulback dated January 2, 1908, and recorded on January 4, 1908. The description follows:

> ...situate on the west side of the Road leading from Chester to Windsor known as 'Hardacre Farm' lately occupied by Wakefield Millett, bounded and described as follows:
>
> On the East by the Windsor Road, on the North and West by Wicup Hill Road; on the South by property of the said James E. Whitford, containing 19 acres, more or less.

The second deed is from David Whitford and his wife to James E Whitford dated November 7, 1901, and recorded on September 12, 1902. The description of the land thereby conveyed is set out in the decision of Mr. Justice Grant, but I repeat it:

> ALL that certain lot, piece or parcel of land and premises situated on the West side of the Windsor Road in the Township of Chester and bounded on the East by said Windsor Road on the North by land of C. E. Kaulback formerly of Casper Oxner, on the West by Wickup Hill road and on the South by land of Bakers, ALSO all our right, title and interest in the House, Barn and House Lot as shown on Plan of Partition drawn by I. J. Thomson, Land Surveyor, and Agreement made between Casper Oxner and David Whitford and dated the 13th day of June, A.D., 1873, said lot of land being the Southern half of that certain lot conveyed by Jacob Millett and Sarah Millett by Deed dated the 7th day of September, A.D., 1856 and recorded in the Registry Office at Lunenburg, at Book 21, Page 567.

David Whitford had apparently acquired the land by assignment under s. 28 of the **Collection Act**, R.S.N.S. 1900, c. 182. This document recites that Whitford had recovered judgment against Wakefield Millett, that there remained due and owing on it the total amount of $265.27, that Millett had been examined under the **Collection Act** and that the Commissioner had ordered that Millett execute an assignment of all his real and personal property, except such as might be exempt from levy or execution, to Whitford in trust for the payment of the amount due upon the judgment. The words of assignment then follow and the habendum clause reads:

> TO HAVE and TO HOLD the same unto the said Party of the Second Part his heirs and assigns to his and their sole use forever in trust for the payment of the sum of $265.27 being the amount due on said Judgment and all costs to date.

Counsel for the appellants contends that, as put in his factum, "The Whitfords must be taken to be holding the land in trust for the payment of the judgment against Wakefield Millett". I reject this contention. The grantee of the assignment, that is, David Whitford, in my opinion, could convey the lands to realize from a purchaser the amount necessary to pay his judgment. He would be accountable for any surplus to the assignor, but the purchaser would not be under the necessity of seeing that this trust vas carried out – the **Trustees Act**, R.S.N.S. 1900, c. 151, s. 48 (now s. 53 of the **Trustee Act**, R.S.N.S. 1967, c. 317).

The result of what I have thus far set out is that the respondent, in my opinion, has established a paper-title to the lands containing 35.67 acres for at least 70 years subject only to Wakefield Millett living in a house on the property until his death or as long as he wanted to, a matter to which I shall later refer.

I now turn to the claim of the appellants. It is, as I have said, confined to a 10-acre lot only of the whole 35.67 acres. I find some difficulty in determining the location of the 10-acre lot but, as I understand it, there is general agreement that it extends from the Windsor road to the Wakeup Hill road and lies at the southern end of the whole property so that its southern boundary would also be the southern boundary of the entire lot. There is some suggestion in the record that at one time the land had been divided into 10-acre parcels.

The basic document on which the appellants rely is a deed from James William Millett (son of Jacob) and his wife to Wakefield Millett dated November 23, 1880 and apparently recorded in 1881. The description is as follows:

> All that certain South part of a lot of land situate on the Windsor Road and known as the Hard Acre Lot and described as follows:
>
> BOUNDED on the North by Casper Oxner and running along said line from the Windsor Road to Wickup Hill road; On the West by said Road running Southerly to Valentine Baker's line bounded on the South by land of said Baker and running Easterly till it meets the Windsor Road bounded on the East by the said road and running Northerly until it meets Casper Oxner's line containing 10 acres more or less;

Wakefield Millett (no wife joining) conveyed the 10-acre lot to Benjamin Mitchell by deed dated August 29, 1892, and recorded on August 30, 1892. It then went from Benjamin Mitchell and his wife by deed dated August (no day appears), 1892, and recorded on August 30, 1892, to Mary Eliza Millett, described as the wife of Wakefield Millett. There are no other documents of title to this piece of land in the record. Mary Eliza Millett, as I have said, died intestate in 1915 and her husband in 1937 or 1938, and I repeat that the appellants are the heirs-at-law and next-of-kin of Mary Eliza Millett.

The respondent, upon the assumption that the 10-acre lot was located within the lands now determined as containing 35.67 acres, claims title to the 10-acre lot by adverse possession. Indeed, his claim to the whole 35.67 acres is based, in the alternative to documentary title, on adverse possession. The evidence as to the occupation and use made of the whole property was reviewed by Mr. Justice Grant but I think it necessary for me to refer to his review and findings.

Mr. Justice Grant found that when Errol B. Hebb surveyed the property there was a fence around the complete perimeter and that the southern boundary, that is, "bounding on Wilfred Zinck" was a well-established fence. The lands were used for hay and pasturing of cattle. Aerial photograph, exhibit 6, taken in 1943 and an enlargement of it, exhibit 5, was interpreted as showing some bushes, a grassy field and some cultivation. The surveyor found a water tap in the area west of the Windsor road and, as I understand it, to the north of the assumed location of the 10-acre lot. The tap was enclosed by a fence of 30 to 40 feet perimeter. The learned trial judge observed that the aerial photographs, exhibits 3 to 6, showed a white area near the water tap, "which was probably where the house of Wakefield Millett stood some years ago". He continued:

> The subject property was fenced and these fences were erected and maintained by James Whitford and his son, Edgar Whitford. When Arthur Evans was a youth the lands were used by the Whitfords in pasturing their cattle. Wakefield Millett only used the house and a small area around it. The Millett house burned and Millett then moved

away to live with his daughter, Mrs. Elwyn Isnor. He gave no evidence of Mrs. Wakefield Millett occupying the house.

Mr. Evans recalled that George Zinck had used the property and, as well, that George Zinck's father had used it.

About ten years ago George Zinck had the land bulldozed, cultivated and seeded. Then his cattle were put on it to graze.

The Arthur Evans referred to was born in 1906 and was a lifelong resident of Robinson's Corner. His house was very near the subject property. He remembered Wakefield Millett. He also remembered Millett living in a small house near where the white area was shown on the aerial photographs. He said that the property was fenced and that these fences were erected and maintained by James Whitford and his son Edgar. Mr. Evans further said that no one except the Whitfords had ever used the land during his time; although Millett did live in the small house. Arthur Evan's evidence as to the use which had been made of the property by the Whitfords was confirmed by Fannie Millett, a sister of the respondent.

The respondent also testified as to the use made of the property and like matters. He was born in 1909 and when he was nine years of age moved up to just opposite the property in question on the east side of the Windsor road where he remained until around 1940. He is referred to in the statement of claim as residing at Blandford, in the County of Lunenburg. James Whitford and his son Edgar were occupying the property when the respondent first moved to the house opposite the property in 1918. They used it for pasturing cattle and maintained fences. Wakefield Millett used no land but just lived in "this old house that was there and he said he had a right to live in this old house so long as he wanted to stay there". The trial judge made a significant finding as to this conversation. He expressed himself as being satisfied that Millett had told the respondent that the land belonged to Whitford and that he, Millett, had a right to live there as long as he wanted to.

The respondent further testified that nobody used the property except the Whitfords. He had paid the taxes on it since he bought it. He planted on it, raised grain on it "and that of course naturally seeded down to grass and we made the hay on it then and in the Fall I pastured it with cattle". He arranged for a survey of the property because there was a question about the highway being 33 feet or 50 feet and I wanted to know "where that was" and so decided to have the whole property surveyed. At the time of the trial he had rented the property out to South Shore Community Services for five years as farm land.

Wakefield Millett left his house on November 1, 1931. It had burned down on the night of October 31, 1931 – Halloween. The respondent's brother took Millett up to Mrs. Elwyn Isnor's, his daughter's place. He never came back and died, the respondent thought, around between 1936 and 1938. Mr. Zinck also told of the water tap. He said that he had installed it about 1966 for water for the hogs and cattle on his property across the road where he had a barn. The respondent had the ground plowed

around 1922 and for three or four years afterwards and thereafter it was used as a pasture. He spoke again of what Millett had told him, namely, that the Whitfords owned it and that he, Millett, could live in the house "as long as he lived or until sometime he moved, but the night of the fire we took him away, he said now they can have it all. That 's it. There was nothing there left, only a foundation".

I have previously in these reasons expressed my opinion that the respondent had established a documentary or paper-title to the entire lands as described for at least 70 years, subject only to Wakefield Millett living in a house on the property until his death or as long as he wanted to. Millett abandoned this house in 1931, moved to his daughter's and died in 1937 or 1938, and I have no doubt that it fell to the Whitfords, predecessors in title to the respondent, in 1938 at the latest.

Mary Eliza Millett, the wife of Wakefield, as I have said, obtained a deed to the 10-acre lot in 1892. There is no evidence of any occupation of the 10-acre lot by her. There is also no evidence of any claim having been put forward by any of the appellants following her death in 1915 and until the present proceedings were commenced. This leads one to speculate if the 10- acre lot, the only land in dispute here, was indeed the southerly portion of the whole of the lands of 35.67 acres. It seems, however, as I have indicated, to have been agreed by the parties that the 10-acre lot was within the boundaries of the 35.67-acre parcel and I must deal with the matter of title to it on that basis.

I have no doubt that the respondent, apart from all else, has established title to the 10-acre lot pursuant to the provisions of the **Limitation of Actions Act**, R.S.N.S. 1967, c. 168. I quote ss. 9 and 21 of that **Act**:

> 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, ...
>
> 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 to 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 right to bring action here accrued in my opinion on the death of Mary Eliza Millett in 1915 – see s. 10(b) of the **Statute** and **Halsbury's Laws of England** (3rd Ed.), vol. 24, para. 441. The evidence in my view is clear that the respondent's predecessors in title had, since 1915, exercised such acts of possession over the 10-acre lot (along with the rest of the entire land) as to extinguish the right of the appellants or any of them to that lot and establish a possessory title in the respondent.

The nature and character of possession that is necessary to extinguish the title of the true owner is stated in Anger and Honsberger, **Canadian Law of Real Property** (1959), at p. 789:

> The possession that is necessary to extinguish the title of the true owner must be 'actual, constant, open, visible and notorious occupation' or 'open, visible and continuous possession, known or which might have been known' to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is 'equivocal, occasional or for a special or temporary purpose'.

This statement is supported by reference to a goodly number of cases, as I said in the course of my reasons for judgment in **Taylor v. Willigar et al.** (1979), 32 N.S.R.(2d) 11; 54 A.P.R. 11. I particularly referred to **McConaghy v. Denmark** (1880), 4 S.C.R. 609, and **Sherren v. Pearson** (1887), 14 S.C.R. 581.

The sufficiency of acts of possession must, in my view, be determined by the nature of the land in question. Here it consisted of land suitable for pasturing and to some extent of cultivation and these were the uses to which the land was put. In addition, and of importance, the land was completely fenced, certainly since 1915 and indeed well before that time, as I understand the evidence. The fences were maintained throughout all the years. We were referred to **Godson Contracting Co. v. Grand Trunk Rw. Co.**, [1917] O.W.N. 241 (Ontario High Court). Action was there brought for a declaration of title to land adjoining an old road allowance. Mr. Justice Middleton said at pp. 241, 242:

> ...the possession shewn by the defendant was sufficient to establish a possessory title. The enclosing lands as part of the entire estate and the asserting of dominion over them and using them as they were used - - cultivating where capable of cultivation, caring for and pruning trees in the ravine, cutting timber for fuel, drawing gravel from a gravel-pit, and other acts deposed to--all went to shew that kind of possession which the statute contemplates -- an actual, continuous, and exclusive possession. According to the decided cases, it is largely a question of fact in each case, and in each case due regard must be had to the exact nature and situation of the land in question. Here all was done that could be done by an owner residing in the main dwelling-house, who had paper-title to the land. All within the main fences was his holding, and he used it in accordance with its fitness for various purposes.

I should add that Mr. Justice Grant found that, if the appellants had any rights to the land which were not barred by the **Limitations of Actions Act**, they were estopped from exercising any such rights. It is not necessary for me to refer to the doctrine of estoppel and I express no opinion upon that aspect of the trial judge's decision.

Finally, in the Court below the trial judge ordered that the Attorney General recover its costs as against the plaintiff-respondent to be taxed on the basis of solicitor-and-client, no doubt pursuant to s. 18 of the **Quieting of Titles Act**. He did not award any costs to the respondent, who has filed a notice of

contention to the effect that the decision of the trial court should be varied by us so as to award costs at trial to him. Section 18 provides that the costs of the action and any proceedings thereunder shall be in the discretion of the court or judge except with respect to the Attorney General. I must assume that Mr. Justice Grant exercised that discretion when he failed to award costs to the respondent and I am loath to disturb such exercise. No reason, however, was given by Mr. Justice Grant why the ordinary rule that a successful party is entitled to his taxed costs should not have been given effect. With respect, I fail to see why the respondent should not have been awarded his costs in the Court below.

In the result I would dismiss the appeal with costs throughout to be taxed on the party-and-party scale.

Appeal dismissed.

ZINCK v. ATTORNEY GENERAL OF NOVA SCOTIA, HATT, WALTERS, BUTLER, HORNE, ISNOR, FERRIS, DELONG, BOND, DOREY and EISENHAUR
Nova Scotia Supreme Court, Trial Division
Grant, J.
August 11, 1978.

This is an action under the **Quieting of Titles Act**, R.S.N.S., c. 259, concerning certain lands at Robinson's Corner, Lunenburg County.

Service vas made on the defendant, The Attorney General of the Province of Nova Scotia, but no defence was filed on his behalf nor was he represented at the trial.

The named defendants were joined pursuant to an order herein dated the 23rd of August, 1976.

The plaintiff purchased the lands in question by warranty deed dated the 10th of January, 1964, from Adelaide L. Whitford, widow of Edgar J. Whitford. The deed is described on page 40 of the Abstract of Title filed herein and the description therein is as follows:

> ALL that certain lot, piece or parcel of land situate, lying and being at or near Chester aforesaid on the Western side of the Windsor Road, and known as the 'Millett property' and more particularly bounded and described as follows:
>
> BOUNDED Southerly by lands now or formerly of Wilfred J. Zinck;
>
> Westerly by the 'Wake-up Hill' Road;
>
> Northerly by a road leading to the said 'Windsor Road';
>
> And Easterly by the said Windsor Road;
>
> Containing 50 acres more or less, being and intended to be lot No. 3 conveyed by the said Edgar J. Whitford to the Grantor by deed bearing date the 20th December, 1971 and registered at the Registry of Deeds at Chester, aforesaid, on the 3rd day of January, 1964 in Book 28 at page 234 being document No. 502.

Exhibit 2 is a plan prepared by Errol Hebb, N.S.L.S., the 17th of April, 1972. The lands surveyed contain 35.67 acres. They are bounded on the east by the Windsor to Chester highway; on the west and north by the Wakeup Hill Road, so-called; and on the south by lands of Wilfred Zinck.

These lands are included as Lot No. 5 in a deed from James E. Whitford et ux. to Edgar J. Whitford dated the 19th day of May, 1928, said deed being Exhibit 8.

The lands (or some of them) came into the possession of James E. Whitford in two deeds; one from the executors of C. Edwin Kaulback dated the 2nd of January, 1908, the description therein being as follows:

> All the estate, right, title, interest, claim and demand of the said James Albert Kaulback and Rupert C.S. Kaulback, Executors as aforesaid, in, to or out of all that certain piece or parcel of land situate on the West side of the Road leading from Chester to Windsor known as 'Hardacre Farm' lately occupied by Wakefield. Millett, bounded and described as follows:
>
> On the East by the Windsor Road; on the North and West by Wickup Hill Road; on the South by property of the said James E. Whitford, containing 19 acres more or less,...

The other deed came from David Whitford et ux. and is dated the 7th of November, 1901, and conveys the following:

> ALL that certain Lot piece or parcel of land and premises situated on the West side of the Windsor Road in the Township of Chester and bounded on the East by said Windsor Road on the North by land of C.E. Kaulback formerly of Casper Oxner, on the West by Wickup Hill road and on the South by land of Bakers, ALSO all our right, title and interest in the House, Barn and House Lot as shown on plan of partition drawn by J.J. Thomson, Land Surveyor and agreement made between Casper Oxner and David Whitford and dated the thirtieth day of June A.D. 1973, said lot of land being the Southern half of that certain lot conveyed by Jacob Millett and Sarah Millett by deed dated the seventh day of September A.D. 1856 and recorded in the Registry Office at Lunenburg at Book 21, Page 567.

The latter deed stems from an assignment under the **Collection Act** by Wakefield Millett to David Whitford dated the 1st of August, 1901.

There is some documentary evidence to the effect that the lands in dispute were once divided into several lots, perhaps four, each of approximately ten acres. Some of the conveyances contained in the Abstract deal with the undivided portions thereof as well.

Reference is made in several deeds to lot numbers and to a plan of partition and agreement drawn by a land surveyor and dated the 13th of June, 1873. Unfortunately neither the agreement nor the plan is recorded or filed, nor available.

There are numerous deeds in the Abstract dealing with several other lots; all of them are somewhat helpful but I find that the effect of the sum total of them is to add confusion and uncertainty.

Counsel advanced theories relating to some of the conveyances but there is no conclusive documentary evidence which can be reconciled with the Hebb plan.

When Errol Hebb surveyed the lands in 1976 there was a fence around the complete perimeter.

The south boundary, i.e., "bounding on Wilfred Zinck", was a "well established fence". The lands were used for hay and pasturing of cattle. Exhibit 6 is an aerial photograph taken in 1943. Exhibit 5 is an enlargement thereof showing the subject lands. This Exhibit is interpreted as showing some bushes, a grassy field and some cultivation. There are no buildings shown.

Exhibit 4 is an aerial photo taken in 1955 and Exhibit 5 is a blowup of that portion of Exhibit 4 dealing with the subject property.

Mr. Hebb found a water tap in the area to the west of the Windsor Road. It is marked with an "E" on the Plan, Exhibit 2. It was enclosed by a fence of 30 – 40 feet perimeter.

The aerial photos, Exhibits 3 to 6, show a white area near the water tap which was probably where the house of Wakefield Millett stood some years ago. It is thought to show its foundation or the area where it stood.

Mr. Hebb could find no evidence of any foundation or any division lines within the bounds of the property either at the time of his survey or on the aerial photos, except for the white area seen on the photos.

Mr. Arthur Evans was born in 1906. He has lived at Robinson's Corner all his life. His property is shown on the plan, Exhibit 2, near the lot in question. He remembered Wakefield Millett living in a small house near where the white area is shown on the aerial photos and he placed a "Y" representing its approximate position on Exhibit 2. This house was about 200 feet west of the Windsor Road.

The subject property was fenced and these fences were erected and maintained by James Whitford and his son, Edgar Whitford. When Arthur Evans was a youth, the lands were used by the Whitfords in pasturing their cattle. Wakefield Millett only used the house and a small area around it. The Millett house burned and Millett then moved away to live with his daughter, Mrs. Elwyn Isnor. He gave no evidence of Mrs. Wakefield Millett occupying the house.

Mr. Evans recalled that George Zinck had used the property and, as well, that George Zinck's father had used it.

About ten years ago George Zinck had the land bulldozed, cultivated and seeded. Then his cattle were put on it to graze.

Mr. Evans said that no one else ever used the lands during his time except the Whitfords and the house which was occupied by Mr. Millett. He remembered that Wakefield Millett had two children; Violet, who apparently never married; and Mrs. Elwyn Isnor, who died in 1959 leaving a widower and several children, one of whom is now deceased. They are the defendants. Mr. Evans said that to his knowledge no one had ever logged the land and it had grown up in shrubs and bushes but not in trees.

Fannie Millett was born in 1914 at Robinson's Corner. She is the sister of the plaintiff. She lives on the east side of the Windsor Road, approximately opposite where the house of the late Wakefield Millett formerly stood. She remembered James and Edgar Whitford keeping their cattle pastured there. She remembered Wakefield Millett occupying the small house there. She said Millett never farmed. She said that no one else used the lands or any part of them. The Whitfords maintained the fences all around the perimeter of the lands marked A, B, C and D on the plan, Exhibit 2.

To keep cattle from the house, Wakefield Millett had a fence encircling his house at a distance of three feet.

Mrs. Millett said that George Zinck has used the land since 1964. He has bulldozed the land, broken it up and seeded it.

Mrs. Millett recalled that on Halloween night in the year 1931, Wakefield Millett's house burned and he then went to live vith his daughter and never returned to Robinson's Corner. He died in 1937 or 1938. Mr. Millett stored his things in the Zinck barn and took them with him when he went to live with his daughter, Mrs. Isnor.

Mrs. Millett thought Wakefield Millett had been a cooper years before. He had a small shed containing some tools between his house and the Windsor Road. This shed was torn down before Wakefield Millett's house burned. When she was a child, she recalled playing ball in the field near that house and also picking berries nearby. She recalled the Whitfords pasturing their cattle there every year.

The plaintiff, George Zinck, was born in 1909 and has lived at Robinson's Corner since age 9. His home is opposite the place where the Wakefield Millett's house formerly stood. He recalled James Whitford and his son, Edgar Whitford, occupying the lands and using the same as pasture lands from 1918 to 1940. He recalled them fencing the lands and maintaining the fences.

Wakefield Millett told the plaintiff that the property belonged to Mr. Whitford but that he, Wakefield Millett, had the right to live there as long as he wanted to. Wakefield Millett fenced his house to keep the cattle from it. I believe there was such a conversation and that the plaintiff's recollection of it is accurate.

The plaintiff has paid the taxes since 1964. He now has the land rented. In 1966 he installed a water tap with a line to the well at his house. He has maintained the fences since he purchased the land.

About 1922 the lands were ploughed for two or three years thereafter. When he purchased the lands, the taxes were paid in full. The property is now assessed at $21,000.00. He has no present intention of selling it. He said at the time of purchase he paid $3,000.00, which at the time was considered to be a very high price for it.

It was his understanding that at one time Wakefield Millett had owned some of the lands in question, but due to some court proceedings he had lost it to the Whitfords.

He instructed his solicitor to commence this action because of some uncertainty and apprehension he had about the title after a court decision in **Countway v. Haughan et al.** (1976), 15 N.S.R.(2d) 143; 14 A.P.R. 143.

This was a case involving paragraph 4 of the deed from Edgar J. Whitford to Adelaide Whitford dated the 20th of December, 1961; the same deed from which his immediate predecessor took title.

That case involved an application under the **Vendors and Purchasers Act** to determine if paragraph 4 of that deed created a valid objection to title.

Cowan, C.J.T.D., held that it did and that paragraph 4 thereof was testamentary in nature and did not conform to the provisions of the **Wills Act** in that there was but one witness.

Paragraph 4 of that deed is as follows:

> Fourth, All the woodland owned by the said Edgar J. Whitford at the time of his death;

At page 8 in the decision Cowan, C.J.T.D., said:

> 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.

This case went on appeal and MacKeigan, C.J.N.S., speaking for the Appeal Division of this Court dismissed the appeal. He said at page 138, 15 N.S.R.(2d), thereof:

> 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.

No evidence was adduced before me on the execution of that deed. Its validity is not raised specifically in the defence. I am satisfied that it is *prima facie* valid as it relates to the lands in question here.

I am satisfied upon hearing the plaintiff that Wakefield Millett told him that the lands belonged to Whitford and that he had the right to live there as long as he wanted to. It was only in response to the plaintiff's action herein that the defendants assert a claim of ownership. That is, until this action was commenced nothing was done by the defendants, or any of them, or their predecessors in title, to assert ownership to the lands or any portion thereof.

Russell DeLong, age 66, of Chester Basin, is the widower of Francis Pearl DeLong, a daughter of Mr. and Mrs. Elwyn Isnor, who was a granddaughter of Wakefield Millett and his wife, Mary Elizabeth Millett. Mrs. Isnor died in 1959; the same year Mrs. DeLong died.

Mr. DeLong had been told that Wakefield Millett owed Whitford a small sum of money and let him pasture his cattle there to pay off the debt.

In examining the conduct of Wakefield Millett before and after the fire which destroyed his home, I am satisfied that it is more consistent with him retaining the right to live in the house than owning the property subject to the right to the Whitfords to pasture their cattle there.

If he had retained ownership of the lands or a portion thereof, why did not he or his family (including the DeLongs) assert some claim thereto?

The plaintiff claims through paper title going back to 60 years of uninterrupted possession subject only to Wakefield Millett living in the house. The property was occupied as one would ordinarily and reasonably occupy pasture land in rural Nova Scotia. It was fenced and the fences were maintained. Cattle were pastured there annually. Part of it was tilled and seeded from time to time. Since 1964 the use has changed and the land has all been bulldozed and seeded and is now leased by the plaintiff.

Whatever the exact specific arrangement between Wakefield Millett and/or his wife and the Whitfords is not known and presumably will never be known. It can, in my opinion, be reasonably implied from the conduct of Mr. and Mrs. Millett and the explanation given by Wakefield Millett to the plaintiff that Wakefield Millett considered that the Whitfords owned the land. The occupation through which the plaintiff claims has been continuous, adverse, open and notorious.

Mrs. Mary Elizabeth Millett died in 1915 at age 54. Her daughter, Mrs. Isnor, died in 1959. Therefore, any claim Mrs. Isnor had arising from her mother's ownership would be barred by the **Limitation of Actions Act**, R.S.N.S. 1967, c. 168 (Section 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. R.S., c. 153, s.9.

A somewhat similar situation was considered by Jones, J., in **Taylor v. Attorney General of Nova Scotia et al.** (1978), 32 N.S.R. (2d) 23; 54 A.P.R. 23, affd. 32 N.S.R. (2d) 11; 54 A.P.R. 11.

I find as a fact that Wakefield Millett probably died in the year 1937. Any claim Mrs. Isnor had arising from his interest (if he had any) would likewise be barred.

As to the doctrine of estoppel and its application to the defendants, if they had any rights to the land which were not barred by the **Statute of Limitations** I find they are estopped from exercising the same.

Several of the deeds refer to the "Hardacre Lot"; this no doubt goes back to a conveyance from James Hardacre to Sarah Magdalen Millett in 1841, on page 19 of the Abstract.

There is no reference to any deed to James Hardacre. However, the lot he deeded to Sarah Magdalen Millett is 40 acres and is bounded by the Windsor Road, the road leading to the Widow Floyd's and other lots. It could well be the lot in issue.

In a deed dated 1856, shown on page 21 of the Abstract, Benjamin J. Millett and James W. Millett convey their interest in the Hardacre property so-called, to Sarah Millett.

In a deed dated 1856, shown on page 23 of the Abstract, Jacob Millett and Sarah Millett (his wife) convey all their interest in the same lands to Susan R. Whitford and David Whitford (her husband).

In a deed dated 1868, shown on page 30 of the Abstract, James Millett conveyed a one fourth interest in the same lands to Benjamin Millett. The lands are referred to as being the Hardacre lands.

In a deed dated 1873, shown on page 31 of the Abstract, Benjamin Millett et ux. conveyed his one fourth interest in the same lands to Casper Oxner.

In a deed dated 1876, shown on page 32 of the Abstract, the heirs-at-law of Sarah Millett conveyed all their interest in the property to Elizabeth Duncan, widow of John Duncan. This deed recites that Sarah Millett possessed and occupied one fourth of the Hardacre farm. It further recites that James Hardacre deeded the property to Sarah Millett, Christopher Millett, Benjamin Millett and James Millett; one fourth to each for James Hardacre's maintenance. There is no information if the division was in common or into individual lots.

However, the deed shown on page 19 of the Abstract shows only Sarah Magdalen Millett as grantee, with no reference to the other three persons. Yet, later in a deed on page 21 of the Abstract, Benjamin J. Millett and James W. Millett convey their interests to Sarah Millett.

There is no disposition of the share of Christopher Millett, if he ever had one.

As well there is no conveyance from Elizabeth Duncan after the title came to her in 1876.

However, James Millett again disposed of his one fourth interest to his brother Benjamin Millett (Abstract, page 30) who later conveyed to Casper Oxner (Abstract, page 31).

Mary Elizabeth Millett (wife of Wakefield Millett) was conveyed 10 acres of the South part of the Hardacre Lot from Benjamin Mitchell et ux. by deed dated August, 1892 and shown as Item 4 in the defence. These 10 acres had been conveyed by James William Millett et ux. to Wakefield Millett by deed dated 23 November 1889 and shown as Item 1 in the defence. By deed dated 29 August 1892 and shown as Item 2 in the defence, Wakefield Millett conveyed to Benjamin Mitchell, who in turn, in 1892, conveyed it to Mary Elizabeth Millett.

Mary Elizabeth Millett died in 1915. Wakefield Millett left the property in 1932 and died in 1940. There is no evidence of any occupation by Mary Elizabeth Millett.

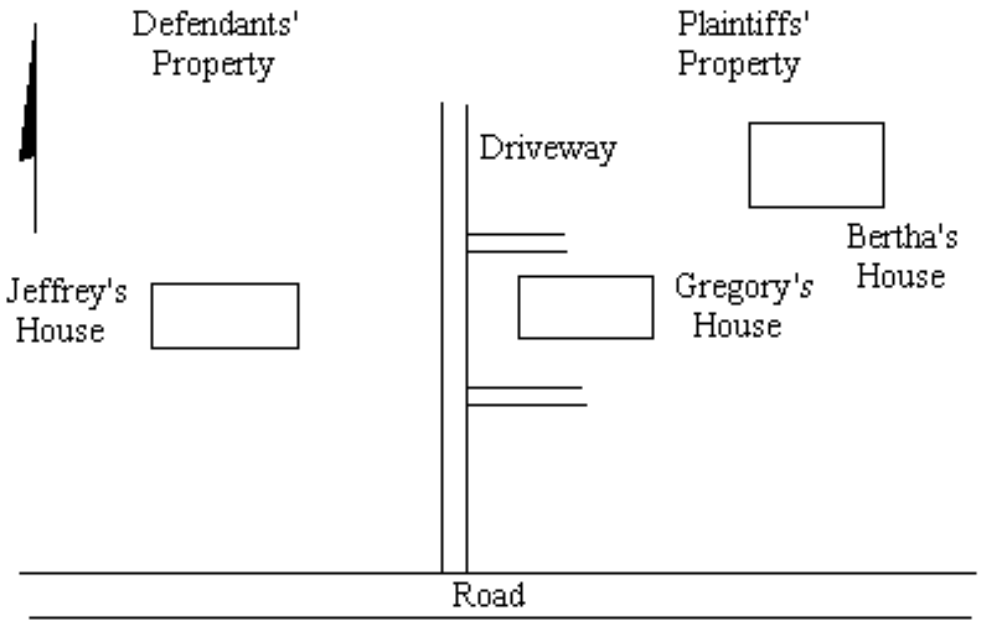
I am prepared to grant the certificate but without costs.

Judgment for plaintiff.

BOUCHER, BOUCHER and BOUCHIE v. BOUDREAU and BOUDREAU See 34 N.S.R. (2d) 225

Nova Scotia Supreme Court, Trial Division
Grant, J.
January 17, 1979.

This case dealt with a boundary dispute between properties at Petit de Grat in Richmond County. The parties were all related. The following sketch shows the location of the properties in relation to one another.



The dispute related to the location of the boundary between the properties and the right to use the driveway. The Defendants claimed that the boundary was slightly to the east of the driveway from the main road. The Plaintiffs Boucher had recently constructed a house (Gregory's House on sketch) and the Defendants had allowed the Plaintiffs to use the driveway during construction. Following that, the relationship between the parties broke down and the Defendants cut off the two small driveways leading from the main driveway by ditching and a fence. The Plaintiffs Boucher did not have a convenient access to their home after that and the lawsuit was started.

The Judge reviewed the evidence of a number of witnesses concerning the boundaries and use of the properties. The Judge found that the written descriptions of the properties were of little assistance in determining the issue. The Judge discussed the use of murielles as boundary markers in Acadian

communities. A murielle is a low stone wall generally made from stones removed from the property and placed on the boundary lines.

The Judge accepted testimony from a number of witnesses (including a land surveyor) that a murielle had existed between the properties a short distance to the east of the driveway. He found that the murielle marked the boundary line.

The Judge also found that adverse possession had not occurred so as to alter that boundary.

The claim by the Plaintiffs was therefore dismissed.

BOUCHER, BOUCHER and BOUCHIE v. BOUDREAU and BOUDREAU
Nova Scotia Supreme Court, Trial Division
Grant, J.
January 17, 1979.

This is an action by the plaintiffs against the defendants for damages for trespass, for an injunction and for a declaration of title. It concerns a driveway between the properties of the plaintiffs and the defendants.

The defendants counterclaim for damages for trespass, for an injunction and for a declaration of title. The 29 year old plaintiff Gregory Boucher (Gregory) is the husband of the plaintiff Carmelita M. Boucher and a grand-son of the plaintiff Bertha Mae Bouchie (Bertha). He is a cousin of the defendant Joseph Jeffrey Boudreau (Jeffrey).

The plaintiff Bertha, by deed dated the 18th of May, 1946, received in common with her late husband two lots of land; one of which is not relevant to this action and the other being the lot upon which her house is situate, being three quarters of a chain in width and eighteen chains long (paragraph 4, plaintiffs' abstract).

In 1953 she obtained a tax deed from the Municipality of the County of Richmond for her husband's one-half interest. Again, this lot is described as being three quarters of a chain wide and eighteen chains long but is difficult to reconcile with the lands upon which her house is located (paragraph 5, plaintiffs' abstract).

The plaintiff Bertha then deeded a lot off to Gregory which, on the 21st of August, 1975, he conveyed to himself and his wife as joint tenants. These deeds are shown in paragraphs 7 and 8 of the plaintiffs' abstract. They purport to give a lot 500 feet long and 90 feet wide. They are bounded on the west by lands of the defendant Jeffrey.

Gregory said Exhibit 1, a plan made by Stewart E. MacPhee, N.S.L.S., dated the 8th of February, 1978, shows his and his wife's lands, his grandmother's lands, and the location of his and his grandmother's house. It also shows the location of the defendants' lands but not the location of Jeffrey's house on the lands.

Gregory came to live at his grandmother's house when he was approximately three months old. He lived there until he built his own place in 1974 but did serve on the lake boats periodically over several years.

In 1974 he started building his house. Jeffrey had started building his house approximately two to three months before him. Jeffrey's house was prefabricated and went up quickly.

A roadway was constructed between the two lots of land and from 1974 until December, 1977, Gregory used this driveway to get to and from his house while it was under construction. At this time Gregory constructed two access roads leading from the driveway servicing both the houses, running to the east, one to the front of his house and the other to the rear of his house. During the summer of 1977 he operated a small canteen which was a converted school bus. He stored the provisions for the canteen in his basement in a deep freeze.

During the summer of 1977 Doug Shaw came to the property with a backhoe and made a ditch along the east side of the driveway leading up to their houses and appeared to have the intention of digging through the access roads leading off to Gregory's house. Gregory told Shaw not to dig and Shaw obliged. Later, one Edward Gallant came with a backhoe and Gregory told Gallant that if he dug up his access roads he would shoot the tires off his backhoe. Gallant did not dig up the access roads and Gregory continued to use them. A couple of days later the defendants put a fence, consisting of three stakes with boards, across the access road. Two weeks later Mr. Shaw came with the backhoe and dug up the access roads. This left the plaintiff Gregory with no access to his house. Shaw, at that time, had a motel with a dining room which was in competition with the canteen of Gregory.

Gregory described the manner in which his grandmother had utilized the property when he was growing up. She had two wells, a root cellar and gardens. She had a large vegetable garden in the area where the driveway was put in by the defendants. He said his grandmother's garden was bulldozed at the time the drive leading to the houses was constructed. His grandmother is now 83 or 84 years of age. At the time the driveway was built there was no dispute between the parties. From 1974 until 1977 the driveway was used by all concerned without incident. He said he had never interfered in any way with the use of the driveway by the defendants. Prior to their dispute over the driveway he and Jeffrey, who is his cousin, had hunted together from time to time and were friendly. Gregory said he was prepared to enter into an agreement with his cousin for the use of the driveway and to share its maintenance. The canteen was operated in the name of the plaintiff Carmelita M. Boucher from whom he is presently separated. She did not give evidence. Gregory is presently working in New Brunswick but is home frequently. He said that after his driveway was dug up he had no access to his property by vehicle, other than through his grandmother's backyard which, because of rocks, was impassable by car.

Stewart MacPhee of Antigonish is a Nova Scotia land surveyor. He prepared Exhibit 1, a plan of the lands of the plaintiffs. This plan was prepared in 1978. He alleged that it showed the lands obtained by the plaintiffs by deed and by possession. It is very difficult to follow the descriptions the plaintiffs' deeds and to reconcile these descriptions with the plan.

Exhibit 1 shows the location of the defendants' lands. However, this was done by incorporating the plan, Exhibit 4, prepared by Brian Anderson, N.S.L.S., dated May 20th, 1974. Exhibit 1 shows the location of certain artificial monuments, i.e. iron pins or bars, some of which were established by Anderson at the time of his survey. Exhibit 5 is an aerial photograph of the area. However, at that time,

the only house in that general area was the one of the plaintiff Bertha Mae Bouchie. On interpreting the photograph Stewart MacPhee described what he considered to be her garden.

Brian Anderson is a Nova Scotia land surveyor of Port Hawkesbury. He prepared Exhibit 4 which was a plan from which the defendants' deed was prepared. He attended on the land and found certain iron stakes in the ground and evidence of ancient fences.

He described the custom of the Acadians when on clearing their lands the owners would rake the rocks to the edge of the boundary of their lands and formed murielles (stone walls). He described such a murielle along the west bound of the defendants' lands which is shown on Exhibit 4. As well, he said that the east boundary of the defendants' lands likewise had such a murielle although it was not as high as the one on the west side line. This, however, is not shown on his plan. Nevertheless, he said he had a clear recollection of such a murielle being there and that it was comparatively straight and he considered it to be the eastern boundary of the defendants' lands. This line is shown on Exhibit 1 as being the lines C, D and E.

Anderson said that when he was on the land to do the survey, the defendants' foundation had been bulldozed and there was a lane leading up to that area which would accommodate a truck. He said he had difficulty in plotting the descriptions in the plaintiffs' title deeds on the plan or on the land.

Loretta David gave evidence. She is a daughter of Bertha Mae Bouchie. Some years ago the lands to the west, a part of which is now incorporated in the defendants' lands, were owned by her uncle Ernest Boudreau, who is a brother of her mother. She recalled the defendants building their house and the plaintiff Gregory building his house. The driveway was used by both until they had the row. She recalled the bulldozer operator coming into the house and asking her mother if he could bulldoze the driveway. At that time she thought it would be on the lands of the defendants. However, in bulldozing the driveway, he utilized the area where her mother's garden had been kept for many years.

Loretta David has lived on the property since 1922. She said her mother had a substantial garden each year. She grew peas, beans, carrots, onions, potatoes and other vegetables. They had also had cattle, a horse, some pigs and hens. She recalled that after his access had been severed Gregory had tried to use the area in her mother's backyard but he had gotten his vehicle stuck there. It was her opinion that part of the problem was that Gregory did not get along with the defendant Rosaline Boudreau.

Joseph Joshua is 72 years of age and a retired fisherman of Petit de Grat. He lives about 100 yards from the property in question. He recalled the driveway being constructed in 1974. In 1940 he planted potatoes for Bertha in the area where Gregory's house is now located. From time to time he remembered seeing Ernest Boudreau (Jeffrey Boudreau's father) planting in that general area. He recalled there being a gate on the property to the west of the plaintiffs' property, when that property was owned by Ernest Boudreau. He thought the present driveway was on the land that had been owned for many years by Ernest Boudreau.

Godfrey David, age 51, is of Petit de Grat and is married to a sister of Bertha Mae Bouchie. He lives nearby and it takes him about fifteen minutes to walk to Bertha's house. He visits frequently and passes by frequently. He never saw a garden around Bertha's property.

George Sampson of Petit de Grat purchased the property lying to the west of the plaintiffs' property from Ernest Boudreau in 1965. This deed is shown in paragraph 2 of the defendants' abstract of title. He conveyed to the defendant Joseph Jeffrey Boudreau in 1974. This deed is paragraph 4 of the defendants' abstract. He recalled that when he purchased the property in 1965 the garden of Bertha Mae Bouchie was partly on his driveway. In the summer of 1966 he was approached by Loretta David who asked permission of him to use the ground that year and she planted a garden 10' by 20'. He thought Loretta David was seeking permission on behalf of Bertha. He said the old driveway was where the present one is now located. He considered the driveways to be on the land which he formerly owned. He did not attend when Anderson did his survey in 1974.

Edward Gallant, age 34, is a backhoe operator. In August of 1977 he received word that the defendants wanted a drain dug. He attended and was instructed by Mrs. Boudreau on what Jeffrey wanted done. He dug the drain down to Gregory's access road. Gregory came out and told him to stop, threatening to shoot his tires off if he did not stop. He stopped. He dug the remainder of the ditch but did not dig up Gregory's access road. He understood that Douglas Shaw later dug a ditch through Gregory's access road.

Nicholas Boudreau, age 41, was present when Anderson commenced his survey. Nicholas Boudreau is the owner of lands lying to the west of the defendants and being shown on Exhibit 4 (the Anderson survey) as lands now or formerly of Widow Sampson. He described a murielle dividing the Sampson lands from the defendants' lands, that is, the defendants' west boundary. This would be on the east boundary of his lands.

Albany Boudreau is 71 years of age. He is a brother of Bertha Mae Bouchie. He lives approximately a half mile from her house. He remembered Eddie Bouchie, the husband of Bertha Mae Bouchie, having a potato garden which he thought was in the area where Gregory's house is now located. He recalled that there was a wagon road running north from the highway along the east side of the Sampson lands, that is, the lands now owned by the defendants. He considered the wagon road to be on the lands of Ernest Boudreau, later conveyed to George Sampson and eventually to the defendants. He understood that Bertha and Ernest both claimed the lands on which Bertha had her garden. At one time he planted a garden where Jeffrey's house is located and at that time he received permission from his brother, Ernest, to do so. He recalled Bertha planting garden each year until she became 65 and went on pension, which was 15 or 20 years ago. He said she planted every year until she got too old to do so. He recalled that there was a large rock on the side of the road at the junction of Ernest's property and Eddie's property. He recalled using the lane for some years but only to help out Ernest. He said he seldom used it by cart but generally by foot. He said that some fishermen used it; the

Joshuas and Alexie Benoit. They used it as a short cut. He recalled the land being used for 30 or 40 years. However, it was never used with horses and its last use was 15 or so years ago.

Albany Boudreau recalled that Bertha had married Edward (known as Ned) after the year of the big flu which he said was over 50 years ago. Albany Boudreau said that people who used the lane received permission from Ernest Boudreau and it was known as "Ernest's road". He said there was a murielle between the two properties. He recalled there being one gate but there were two lanes; one for carts and one for people on foot.

Ernest Boudreau is 76 years of age, is a brother of Bertha Mae Bouchie and the father of Jeffrey Boudreau. He owned the defendants' land from 1929 to 1946. He sold to George Sampson who later sold to the defendants. He said that there had been a murielle between his property and Bertha's property and it was considered to be the boundary between the two properties. There had also been a roadway from the highway, northerly along his property which had been used for going to the back property with an ox to cut hay. This road was on the lands now owned by the defendants. He used to plant potatoes on his land although it was rocky. He would plant them wherever he could. He used to plant in the area where the defendants' house is located and from there east to the murielle. There was also a murielle on the west line of his property, separating his property from the property of the widow Sampson. He recalled that his sister Bertha had a garden over the years generally in the area where Gregory's house is located. He did not think that his sister Bertha ever used his land or requested permission to use it as a garden. He recalled many years ago when two of the fishermen had used the lane leading up through his lands but at that time no one requested permission to use the lane.

Ernest Boudreau said the road leading up to the defendants' house was built to take the prefabricated house to its foundation. He said he did not ask Bertha's permission for the defendants to build the road but had some discussion with Bertha at that time when she said that the defendants could build such a road. He recalled Joe Joshua passing through his fields on a short cut to the wharves. Alexie Benoit did the same. The two fished together and used the short cut. He said there was only one road for carts and for people on foot. He recalled Joe Joshua planting potatoes for Eddie (Bertha's husband) on the land where Gregory's house is now located.

Etienne Samson is a contractor of Louisdale. He bulldozed the first roadway for the defendants. This was necessary to transport the prefabricated building to the foundation. He excavated for the foundation and backfilled after the foundation was put in. He said there was a drainage problem which required a ditch and he did some ditching there. He also did the excavation for Gregory. He thought he probably took some fill from around Jeffrey's house for backfill and for the driveway. When he bulldozed the driveway, he followed an existing path which he thought was for carts or wagons. He was hired by Jeffrey Boudreau and paid by him. As well, he did some work for Gregory later. He built the access road from the main driveway into Gregory's house. He had no problem with Gregory, his wife, Bertha, or anyone.

The defendant Jeffrey Boudreau is 30. In 1973 he had an excavation bulldozed by Etienne Samson. In 1974 the foundation was put in and a Kent home was erected. Gregory Boucher, a cousin, built in 1974 and finished in 1976. His house was completed first and Gregory's was finished in 1976 or so. The first driveway was done roughly to allow a truck to drive up for the erection of the concrete forms and later the prefabricated home. The driveway was improved later. When the plaintiff Gregory started to build he started to use the driveway. He gave Gregory permission to use it while he was building his house and until he had his own driveway built. Gregory put one access road from the main driveway to the front of his house and then another to the rear. The second diversion disturbed the flow of water and caused it to flow over the newly constructed roadway. In the winter this froze and made a solid layer of ice. They both agreed to have a drain dug and each would pay half. There was an argument about the drain and Gregory agreed to get a culvert. He came home one day and his wife was very upset saying that Gregory had insulted her. It was suggested that Gregory put in the drain pipe. Matters deteriorated and he consulted a solicitor in Sydney who advised him to put up a fence across Gregory's driveway, which he did. Mr. Gallant would not come back to complete the ditch but Mr. Shaw did. Since the ditch has been dug there has been no problem with ice or the overflow of water. He now does not want the plaintiff Gregory to use the driveway. He said that Gregory now gets to his house through his grandmother's yard. He said that there was a murielle, being a round mound or hill made of rocks and clay, visible all the way up along his eastern boundary. In some places it was six inches to a foot high. He recalled going there with his wife in 1973 to pick out a building lot. He said there were two murielles, one on the east boundary and one on the west boundary. The one to the west was higher and very visible. He said in 1973 there was a path going from the road north along his lands and his present roadway is where that path was. He said there was no sign of any garden there at that time. There was, however, a small garden to the east which he understood belonged to his aunt Bertha.

He explained that he was apparently building with the assistance of a C.M.H.C. mortgage and C.M.H.C. required that he own the driveway coming into his house and not merely have a right of way over someone else's land. This caused a delay in processing his mortgage. He acknowledged that he agreed that Gregory could use the driveway for a limited period of time. He said the murielle disappeared with the bulldozing of the lane and the ditching of it.

The defendant Rosaline Boudreau is 30 years of age, mother of four children, and described the building of the home in 1974. Prior to building she and her husband had walked along the property. She recalled first in 1973 they went up the path and picked out the place where they thought the house would be best located. She said on the east was a murielle, being an area of rocks and clay which looked like a line. She considered that to be the boundary line. On the west, as well, there was an old rock fence. The line on the west was higher and started about 200 feet north from the road and ran back along the boundary.

She said that at the time the road was completed the murielle on the east side of the lot was bulldozed out. She thought Gregory moved in a year after they did.

She said that on December 17, 1973, Samson did their driveway and excavation. On July 3rd, 4th and 5th Gregory had his foundation dug out. In 1976 Gregory put in a second access road and took fill from behind his house to do so. In January and February of 1977 there was a thaw. She called Gregory and told him they would have to get a drain dug and he would have to put in a culvert. He agreed to do so. She called Shaw to see if he would dig the drain but he concluded that it was frozen underneath and it could not then be dug. Gregory told her he had the pipe and it was agreed that the drain be dug. She explained it could not be done then because it was frozen. Gregory agreed to pay half. On the 3rd of August, 1977, Gallant dug the drain and cut the second access road. Gregory then arrived and said that he could not get the culvert from Napoleon LeBlanc which surprised her because she thought he already had it. There was then a scene and Gregory threatened to shoot the tires off the digger. There was a heated exchange of words in which Gregory was extremely rude to her. Two weeks later Shaw came and completed the drain. Later Gregory suggested they try and get the road listed with the Department of Highways and then the servicing would be done by the department free. Napoleon LeBlanc was with the Department of Highways and would be the person to see to get the culvert and drain dug. In any event, it was not listed as a highway.

The discovery of the plaintiff Bertha was filed as Exhibit 15 by consent of counsel. She apparently was unable to attend in court. I was prepared to go to her home and take her evidence but counsel agreed that the discovery could be filed. I did not have an opportunity, therefore, to see or hear her and cannot comment on her credibility. She is the grandmother of Gregory Boucher. She had lived on the property for 57 years. She was married to Edward Bouchie on November 12, 1920 and lived on the property ever since. Her husband Edward died in 1946. She described her garden and said it was where the present road to Jeffrey's house is. She said they passed through her garden to build the road to his house. She said that her brother Ernest asked if Etienne Samson of Louisdale could build the road and pass on her land because they did not have enough of their own land for the road. As both Jeffrey and Gregory were building houses at that time she agreed that the road could be built on her land and that they could both use it. She described her garden as being about 80' by 60'. She was not asked about a murielle and whether or not there was one separating her lands from her brother's lands to the west.

Gregory Boucher was recalled on discovery and he said, to his knowledge, there never was a murielle between the two properties.

Nezaire Bouchie, a son of Bertha, was born and brought up in her house. He knew what a murielle was but said there never had been one between the two properties. He was born in 1932 and lived his first 17 years there and had been back and forth over the years as a member of the army and a seaman on the Great Lakes.

Loretta David on rebuttal said that she knew what a murielle was but said there was no murielle between the properties of Bertha and Ernest.

On examining the plaintiffs' title deeds I cannot find that the descriptions fit into the lands shown on Exhibit 1, the plan. These described lands bound on the shore which, as I understand it, is quite some distance from the disputed lands. However, even if the descriptions in the plaintiffs' title deeds refer to this property, the width of the lands described in the deeds is substantially less than that shown on Exhibit 1.

I, therefore, am not able to find that the plaintiffs have good proper title to the disputed lands.

I am also not able to conclude that the plaintiffs have acquired a possessory title to the lands in dispute. The plaintiff Bertha did some gardening in that area but the evidence on this is not, in my opinion, such that I can find the plaintiffs have acquired title sufficient to bar the entry of the defendants or their predecessors in title. If anything, the lands were enjoyed in common by the various members of this family.

The deed described in paragraph 1 of the defendants' Abstract appears to be the lands shown on Exhibit 4.

The defendants trace possession back to 1929. The statutory declaration of Victoria David, contained in paragraph 3 of the defendants' Abstract, purports to show possession beyond 1908. However, she did not give evidence.

In my opinion the most important evidence relating to the boundary line between the two properties is that of the murielle.

The defendant, Ernest Boudreau, (a predecessor in the defendants' title) says there was such a murielle. George W. Sampson, another predecessor in title, gave evidence but was not asked about it. These people, however, are somewhat more than disinterested parties. The plaintiff Gregory says that there was no such murielle ever there to his knowledge. This is also said by Loretta David and Nezaire Boucher, but they could hardly be described as disinterested. Albany Boudreau spoke of it. He appeared disinterested although related to all sides.

The plaintiff Bertha was not asked about it.

However, it appears to me that the surveyor Anderson is probably impartial. He did his work in 1974 and appears to have no continuing interest. Presumably he would have been paid long ago. He is apparently not a particular friend of any of the parties. Although his plan does not show the murielle on the east boundary and he did not think his field notes did either, yet he had a vivid recollection of its existence which I feel is reliable.

Courts in this province have long adhered to the principle that evidence of boundary lines such as ancient fences, stonewalls, etc. are given substantial weight in attempting to determine land boundaries.

I consider, and I find, there was such a murielle along the eastern boundary of the defendants' lot and that it was the boundary line between the two lots, established long ago by their respective owners, and I find that the boundary line is the line shown on Exhibit 1 as CDE. I find this to be the plaintiffs' western boundary and the defendants' eastern boundary.

In **Naugle v. Naugle** (1971), 2 N.S.R.(2d) 309, the Appeal Division considered evidence of a long existing fence line and on p. 319, Coffin, J.A., said:

> "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 judgement had not regarded them.'

I therefore find that the driveway of the defendants is within the bounds of their own lands and therefore they did not trespass on the plaintiffs' lands in the erection and maintenance thereof. As well, I find that the drainage ditch erected immediately to the east thereof is also within the bounds of the defendants' lands.

I do not feel it necessary to grant an injunction restraining the plaintiffs from using the roadway. However, if it turns out that it is necessary that I do so I would hear the parties relating thereto.

I am prepared to grant the declaration relating to the boundary between the lands. I find that the plaintiff Gregory acted under a bona fide belief that he had a right to use the driveway and a right to the enjoyment thereof. His use of the roadway was under a form of arrangement between the parties which unfortunately broke down. There was an episode where uncomplimentary remarks were addressed to the female defendant. However, these were at a time when emotions were running high and at such a time one could reasonably anticipate that uncomplimentary remarks probably could be expected.

I find the defendants have suffered no damage from any acts of the plaintiffs or any of them. I award no general damages, no special damages and no punitive or exemplary damages.

The defendants shall have the costs of their successful defence and their successful counterclaim to be taxed in one bill of costs with one brief and one counsel fee.

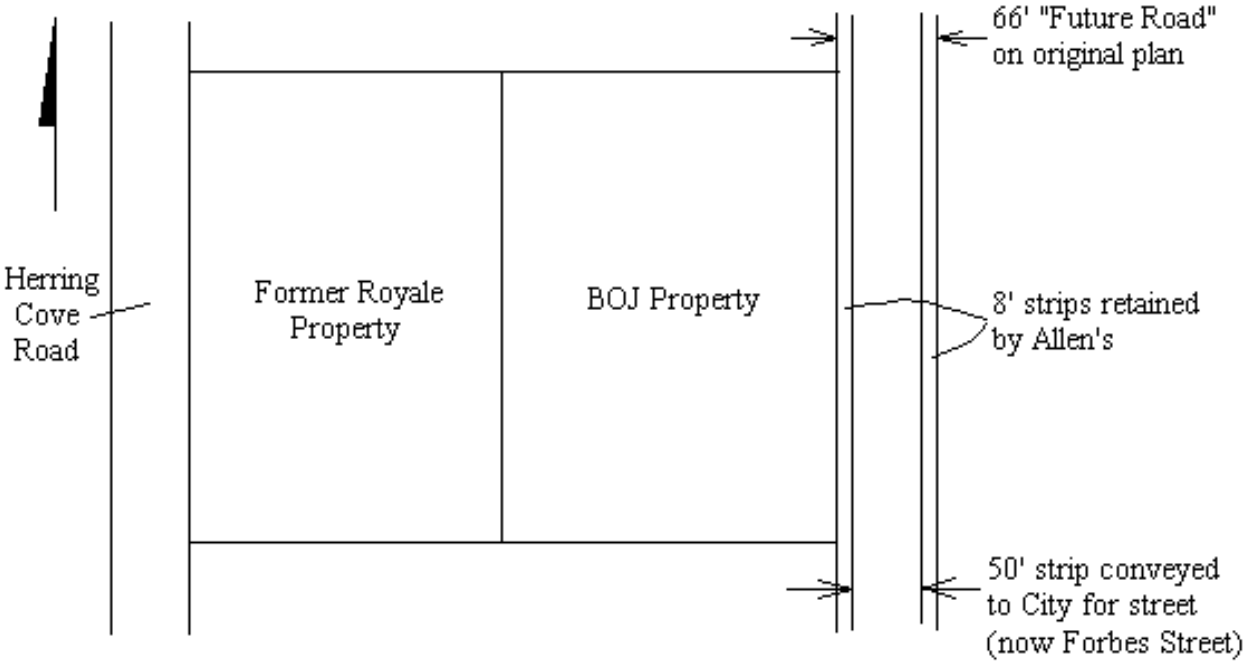
Judgment for defendants in part

B.O.J. PROPERTIES LTD. v. ALLEN'S MOBILE HOME PARK LTD. See 36 N.S.R. (2d) 362

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and MacDonald, JJ.A.
November 19, 1979.

This case dealt with the issues of rights of way of necessity and implied rights of way. B.O.J. Properties Ltd. (BOJ) owned land in the Spryfield area of Halifax. Allen's Mobile Home Park Ltd. (Allen's) owned an 8 foot strip of land between the BOJ property and the public highway.

The properties were laid out as shown on the following sketch:



The BOJ property was shown on the original (1954) subdivision plan as bordering on the western side of a 66' "future road." The lot was conveyed using a description which read "bounded on the East by Bridget Ave." but at the time of that original conveyance, Bridget Ave. (later Forbes Street) was not public. No explicit right of way over Bridget Ave. was granted in the original conveyance. Later, Allen's bought the 66' strip for access to other property it owned. It approached other owners fronting on the strip to have them contribute to the cost of developing the street, but none agreed. Allen's then developed the street as a 50' wide street and conveyed (through another company) the 50' street to the Province as a public street. It retained the 8' strips on each side of the public street. Presumably, it later refused BOJ permission to cross the 8' strip of land for access to the public street.

BOJ had sued Allen's claiming a right of way over the 8 foot strip to the highway and were successful at trial. The Trial Judge had ruled that BOJ had a right of way of necessity over the strip. Allen's appealed.

Allen's raised four issues on the appeal:

- The status of a Tax Deed in the chain of title of the BOJ property. Allen's claimed that the Tax Deed could not convey any right of way interest in the 8' strip because there were no outstanding taxes owing on the strip.
- If there was a right of way of necessity, where was it located.
- If a right of way of necessity had existed over the 8' strip, did it cease to exist when at one time both the BOJ property and the adjoining property to te west (bordering on Herring Cove Road) were owned by one owner.
- If there was a right of way of necessity, how wide was it.

About half of the judgement was devoted to the first issue. The Appeal Court held that the Tax Deed was not defective.

The remainder of the judgement dealt with the issue of the right of way. The Appeal Court had some real difficulties with the third issue raised by Allen's. Simply put, Allen's was arguing that when one owner had owned both the BOJ property and the adjoining Royale property, the BOJ property had access to Herring Cove Road and thus there was no longer any necessity to support a right of way of necessity. The Appeal Court had to decide if later, when the ownership of the two properties was separated, the right of way of necessity was revived. The Court reviewed a number of somewhat conflicting cases and decided that in this case, it was revived. The Court based that finding on the wording on the plan which provided for a "future road" provided sufficient indication that the right of way was to be revived. Following that finding, the Court made a completely separate finding that the original conveyance of the BOJ property included with it an implied easement over the whole of the 66' "future road."

Based on these findings, the Court did not need to deal with the issues of the width or location of the right of way of necessity - it encompassed the whole of the 8' strip in front of the BOJ property.

B.O.J. PROPERTIES LTD. v. ALLEN'S MOBILE HOME PARK LTD.
Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and MacDonald, JJ.A.
November 19, 1979.

This is an appeal from the decision of Mr. Justice Jones of February 22, 1979 and the order of Cowan, C.J.T.D., based thereon, dated March 20, 1979.

Under the order the respondent was found entitled to pass and repass over an eight-foot wide strip of land, owned by the appellant, lying between Forbes Street and certain lands owned by the respondent in the Spryfield area of the City of Halifax. At issue is whether the respondent has the right to pass and repass over that eight-foot wide strip of land in order to get to its own lands.

This strip was part of a sixty-six foot wide piece of land purchased by the appellant in 1961 and shown on a plan of Mary Hartlen's land dated May 4, 1954 as "future road". The appellant acquired such land to construct a road to its trailer park. The other property owners who abutted on the sixty-six foot strip would not contribute to the cost of building the road. The appellant therefore built a road only fifty feet wide, leaving an eight-foot strip on either side undeveloped.

The appellant by deed dated May 1, 1961 conveyed to Spryfield Mobile Home Park Limited the fifty-foot wide road, but not the eight-foot wide strip of land on either side thereof. Spryfield Mobile Home Park immediately conveyed the road to Her Majesty the Queen in right of the Province of Nova Scotia represented by the Minister of Highways; a road now in fact known as Forbes Street and formerly known as Bridget Avenue.

The respondent's land is referred to as Lots 1 and 2 on the Purcell-1976 plan. I set out below an extract from this plan which shows these lots, Forbes Street, the eight-foot wide strip between Forbes Street and Lots 1 and 2 (B.O.J.) and Lots 1 and 2 of Donald Royale fronting on the Herring Cove Road. [extract omitted - see summary of case above for sketch.]

Lot 2 (B.O.J.) was conveyed to the respondent by Reginald Wilson Scothorn and his wife on September 5, 1969. It is described in such deed as being bounded on the east by Bridget Avenue; on the north by lands formerly of Vincent Musolino, on the west by lands of Reginald Scothorn and on the south by lands of Claude Kelly. The Scothorns acquired the property on May 2, 1966 from Olive M. Larsen, who, in turn obtained it by means of a tax deed from the Municipality of the County of Halifax dated July 2, 1964. In the tax deed the property was also described as bounded on the east by Bridget Avenue. At the time of the tax sale the property was assessed for taxes to Gerald Peter Larsen who had obtained it from Margaret E. Henry on August 1, 1956, she in turn having received a conveyance of it in October, 1944 from Bridget Roche, Edward J. Roche, Francis R. Roche and Mary T. Hartlen, heirs at law of the late Thomas Roche.

The Royale lands as shown in the plan extract were owned by Reginald W. Scothorn and Edna May Scothorn from May 28, 1957 until April 26, 1972, when they were conveyed to Donald Royale's predecessor in title. Thus there was unity of title in the Scothorns of both Lot 2 (B.O.J.) and the Royale lands from May 2, 1966 to September 5, 1969.

The appellant submits that any right of way of necessity which might have been an attribute of Lot 2 (B.O.J.) was extinguished once unity of title occurred on May 2, 1966 because then there was ample and direct access to the Herring Cove Road from Lot 2 over what is now the Royale lands.

The issues raised by the appellant are:

> (1)Was the Tax Deed void because it purported to convey property owned by the appellant in addition to property which was liable to be sold for taxes?
>
> (2) Location of the way of necessity.
>
> (3)If a way of necessity existed over the eight foot strip of land owned by the appellant, did it cease to exist when Reginald W. Scothorn and his wife became the owners of both lot 2 B.O.J. Properties and Lot 2 Donald Royale lands, the latter bordering on the Herring Cove Road?
>
> (4) If the way of necessity existed over the eight foot strip, the width of such way of necessity.

In my opinion there is no merit in the tax deed argument. The trial judge accepted the reasoning of **Aulenback v. Aulenback**, [1949] 2 D.L.R. 365, that the municipality could not sell the appellant's interest in the eight-foot strip, but expressed the view that the Court did not intend to rule invalid the conveyance of the portions of the land which were in fact properly assessed.

Counsel for the appellant argued that the trial judge misinterpreted the meaning of one sentence in the decision of Graham, J.

The headnote summarized the facts:–

> A owned a lot and sold part of it to B, and thereafter A and B were separately assessed for their respective portions. A defaulted. in payment of taxes and the municipality purported to sell the whole of the lot, giving a deed to that effect to the purchaser at the tax sale.

Graham, J., at p. 367, referring to what was then the relevant section of the **Assessment Act**, s. 155, as to the effect of tax deeds, 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.

He said further at pp. 367-8:

> 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.

The sentence which is emphasized by the appellant appears two paragraphs later in the reasons of Mr. Justice Graham:

> The deed under which the defendant claims the land was invalid from the beginning.

Jones, J., said that this statement had to be read in the light of the earlier remarks. In so concluding, in my opinion, he was right.

We were referred to **Vivian v. Township of McKim** (1892), 23 O.R. 561, where the plaintiffs were assessed for lots without any deduction for road allowance, rights of way, railway, etc. and took the position that the whole assessment was bad. Robertson, J., had held that there was jurisdiction to assess and that correctness of assessment was a matter for the Court of Revision. He was upheld on appeal, Boyd, C., going so far as to say that having failed to seek reduction in the Court of Revision, the appellant was liable for the whole assessment "that stands good and must be paid".

In **Hebb v. Hebb**, [1944] 2 D.L.R. 255, property was purchased at tax sale by the defendant L.B. Hebb. On receipt of his tax deed, he returned it to the municipal clerk requesting that the land referred to as "Peninsula" be included. The clerk acceded to this request by adding to the description in the deed the words "The peninsula is to be included with this lot."

The words which were thus added to the description of lot 15 did not appear in the warrant, notice of sale in the newspaper – nor in the handbill. The plaintiff and his two brothers owned the 18 acres comprised in the peninsula, were cutting thereon, and on being informed that the defendant claimed the land through the tax sale brought action to remove the cloud on the title.

Archibald, J., at p. 262 held that the document was void – "insofar as it purports to convey to the defendant the lot of land known as 'The Peninsula'."

In dismissing the appeal to the full bench, Doull, J., at p. 264 pointed out that "The Peninsula" was a piece of land entirely outside the boundaries of Lot 15, and added:–

> Consequently, the deed must be held to be invalid so far as the peninsula is concerned unless there is some statute or rule which cures the defects which appear on the face of the proceedings.

Finally Doull, J., confirmed the order appealed from

> ...that the tax deed is null and void in so far as the same purports to convey and. vest in the defendant the lot of land known as and referred to as the 'Peninsula'.

The appellant relied on **Crestpark Realty Limited v. Riggins et al.** (1977), 21 N.S.R.(2d) 298; 28 A.P.R. 298, and **McKay v. Crysler** (1879), 3 S.C.R. 436.

In **Crestpark**, a certain lot A-19A was conveyed by tax deed, having been sold pursuant to a lien for sewer rates and not for arrears in taxes. There had been a lot A-19 but in 1968 a plan of re-subdivision was submitted, creating lots A-19A and A-19 out of what had been A-19. This plan had been approved tentatively, but it was not finally approved until September 25, 1972 after the notices were mailed.

Morrison, J., made the comment that up to October 26, 1972 the lien had been invoked against lot A-19 and all notices had been sent out in reference to that lot, but the warrant issued on that date directed the city to sell A-19A.

The trial judge (p. 314) was satisfied that there was a proper sewer lien on A-19, and finally at p. 317 he said:

> I have therefore reached the inescapable conclusion that the wrong lot of land was sold at the tax sale...Somewhere along the line Lot A-19 had become confused with Lot A-19A. The levy made against Lot A-19 cannot properly be transposed to Lot A-19A.

In my view this is entirely different from the situation resulting in the present appeal.

In **Ley v. Wright** (1877), 27 U.C.C.P. 522, to which we were referred by the appellant, the assessment, certificate and deed were for land described on the north part of a thirty-acre lot conveying land partly vested in the Crown, partly occupied by other owners and partly by roads. Gwynne, J., said that the assessment was clearly void as to those portions "... and the assessment being void as to a part must be void as to the whole..."

So in **Hill v. Macualay** (1884), 6 O.R. 251, there seems have been complete confusion in the assessments, the parcels some years having been assessed separately and some together. Ferguson, J., said at p. 258, in reply to the suggestion that the assessments could be divided:–

> ...I do not see how the division could be made, nor do I see how any such assessment can be sustained as good. Hill could not, I think, have insisted upon the treasurer's receiving from him the proper proportion of the taxes for which the whole lands were sold, even if he could himself have ascertained the proper sum, and for the same and perhaps additional reasons he could not, after the sale have redeemed his own lands without paying the taxes and percentage upon the whole, and I cannot see how, under such circumstances, default could have been made and taxes become in arrear within the meaning of the law on the subject....

He accepted the reasoning in **Beckett v. Johnston** (1881), 32 U.C.C.P. 301, at p. 323, **Ley v. Wright** (supra) and **Fleming v. McNabb** (1882-83), 8 O.A.R. 656.

In **Beckett v. Johnston**, Osler, J., at p. 322, said that there was a parcel containing 53 acres belonging to four different persons assessed for one sum, largely not subdivided, and two parts of which – "had been already assessed with the other land of their owners in the parcels to which they legitimately belonged."

In **Fleming v. McNabb** the headnote indicates that an assessment of four lots containing about 400 acres in the plaintiff's name included seven already sold to the knowledge of the assessor.

In **McKay v. Crysler,** supra, the Court was unable to ascertain whether or not there were any arrears of taxes.

Henry, J., at p. 462 on the matter of the rating itself said:

> I have read over repeatedly and carefully the whole of the evidence, and can find no part of it relating to the contents of the rolls, in the absence of which it is a matter of impossibility for any one to say, whether or not the land in question was, during any one year, subject to the rate imposed by section 3.

The respondent's factum suggested that these authorities were distinguishable:

> (1) As I have already said in **Crestwood** the lien covered two lots and one only was sold to satisfy the entire lien.
>
> (2) In **McKay v. Crysler** no taxes were proved to be owing.

(3) In **Hill v. Macaulay** and in **Fleming v. McNabb** the lands were sold for taxes owing on other lands separately assessed.

There is nothing before us to show that lot 2 was sold for taxes owing on other lands separately assessed.

(4) In **Lay v. Wright** parts of the land being sold at tax sale were owned by parties other than the assessed owner and it was not clear whether any of the lands were properly assessed. The respondent contends that in any event that would not represent the law in Nova Scotia.

In my view the trial judge was correct in his application of **Aulenback v. Aulenback** to the factual situation before him and his conclusion should be upheld that the tax deed did convey Mr. Larsen's interest in lot 2.

I shall consider issues 2, 3 and 4 together. In introducing the appellant's argument on the point of the existence of a right of way of necessity, the appellant's factum quoted Bliss, J., in **Gardner v. Horne** (1856-9), 3 N.S.R. 278, at p. 279:

> Now, what is that way which the purchaser of land so situated in a case like this claims and which the law gives him? It is a way over the land of the seller *to and from the nearest public highway*.

The appellant emphasized the point that the trial judge in this case under appeal said:

> It is clear from the evidence that no such way was assigned before the 1954 plan.

The appellant's contention is that the trial judge failed to consider that the land immediately south of the Bridget Roche property was owned by a Mary Hartlen, and Bridget Roche could not give a right-of-way over another person's property.

It took issue with the remark of the trial judge made immediately after his reference to the 1954 plan:–

> In my view, by drawing and filing that plan the Grantors assigned the necessary way over Forbes Street to both lots.

The appellant's position is that the plan was prepared by Bridget Roche and had never been seen by Mary Hartlen. There is support for this contention in the evidence of Mary Hartlen who said on direct examination that she had not seen the plan before.

She did acknowledge that it appeared to be a continuation of the 'future road' as set out in her plan.

The trial judge based his reasoning on a statement of Sedgewick, J., in **Stephens v. Gordon** (1893), 22 S.C.R. 61, at p. 99, that where no way is specified the grantor may assign a way but it must be reasonable, otherwise:

> ...the grantee may select a way, a way that is 'most direct and convenient', for himself, but one, the use of which will not unreasonably interfere with the grantor in the enjoyment of his rights upon the servient tenement.

The appellant's position here is based on the former availability of the Royale properties as a means of access to the Herring Cove Road. As I understand the argument, it is that when lot 2 and the Royale property were both owned by the Scothorns, the unity of title gave clear access to the Herring Cove Road to lot No. 2. Thus the necessity for the right-of-way was merged in the title and the right-of-way being limited to the necessity which created it, it ceased because the Scothorns could reach the Herring Cove Road by passing over their own land. How they subsequently divided the properties, is in the appellant's submission, irrelevant.

Support for this theory is found in **Holmes v. Goring** (1824), 2 Bing 76; 130 E.R. 233. Lord Best said at p. 237:

> A grant, therefore, arising out of the implication of necessity, cannot be carried farther than the necessity of the case requires, and this principle consists with all the cases which have been decided.

In **Barkshire v. Grubb** (1881), 18 Ch.D. 616, Fry, J., remarked at p. 620:

> I thought that the necessity must be judged of at the date of the conveyance. But the proposition laid down in **Holmes v. Goring** seems to have been only a *dictum* for there appears to have been no necessity at the date of the grant.

In **Proctor v. Hodgson** (1855), 10 Ex. 824; 156 E.R. 674, Parke, B., said at p. 675:

> The extent of the authority of **Holmes v. Goring** is, that, admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at that time that the Court was wrong: but that is not the question now.

In **Gardner v. Horne**, supra the conclusion is indicated in the headnote:

> A way of necessity is not superseded by the subsequent construction of a public road, to which the person claiming such right can have access through his own lands by a less convenient way.

Bliss, J., at p. 279 referred to **Holmes v. Goring's** reservation but remarked:

> But still some regard must, I think, be had to convenience – for inconvenience, pushed to an extreme, amounts to a necessity. In all such cases, the question, I take it, will be, whether, fairly and reasonably considered with reference to the situation of the land and the circumstances of the case, the necessity which created the way has been removed or not by that which is alleged to have put an end to it.

I accept the respondent's argument that **Fullerton et al. v. Randall et al.** (1918), 52 N.S.R. 354, and **Finlay v. Sutherland** (1965-69), 2 N.S.R. 197, should be distinguished from **Gardner v. Horne**, because they deal with the question when a right of way of necessity first arises.

Finley v. Sutherland considered several points.

In the first place much was made of an 1891 deed the words "also a free and uninterrupted right ... to construct a carriage road of the width of an ordinary carriage road ...". This was held to be no more than a right to construct and build a right of way, and since no action had been taken on this right and 75 years had passed, it was too late to exercise the right.

As to the area over which the particular right of way was being claimed, this court was of opinion that even if a right of way had been granted in 1891, it had been abandoned.

In the case now under appeal, on the issue that the right of way had been extinguished, the trial judge near the end of his decision refused to infer that the necessity ended with the unity of title:–

> It seems to me, as the defendant contends that the way of necessity censed to exist, it is incumbent on the defendant to prove that fact and it has not done so. I cannot infer that necessity ceased merely from the unity of title. We do know that there is now a residence on the Royale lot and that it is owned by a third party. There is no evidence that a way was available over the Royale land. The necessity still remains at present for access to Forbes Street. It is clear that necessity never ended with regard to Lot 1.

Interpretation of the authorities on this point is not without difficulty.

Gale on Easements (14th Ed.) Pp. 120 to 121, citing **Barkshire v. Grubb**, *supra*, at p. 620 and **Proctor v. Hodgson**, supra at p. 828 said:–

> In **Holmes v. Goring** the Court of Common Pleas considered that a way of necessity does not survive the necessity under which it arose, and that, if the person entitled to it acquires adjoining land which gives access to the dominant tenement, the right will cease. The case is not clear, however, and it may be that, at the time of the grant of the allegedly servient tenement, the necessity for a way over it had already ceased.

In the footnote it is stated that the facts in **Holmes v. Goring** were "unusual and complicated, and the leading judgment is difficult to analyse".

I notice, however, that at p. 309 the text again quotes **Holmes v. Goring** as authority for the view that

> ...a way of necessity is limited by the necessity which created it, and when such necessity ceases the right of way is extinguished.

Even if one accepts the authority of **Holmes v. Goring** or the position urged by the appellant, there still remains the question of the revival of the easement on the severance of the two properties (**Gale** (14th Ed.), p. 311). The difficulty is that the older cases make a distinction between a type of apparent and continuous easement, such as "... a customary right in the city of London to have a gutter running in another man's land ..." and something which is non- continuous.

The problem was discussed in **Anger and Honsberger** at p. 990:–

> During unity of ownership no way or easement can exist in the land (**Morris v. Edgington** (1810), 3 Taunt. 24; 128 E.R. 10). All easements whether of convenience or necessity are extinguished by unity; but upon any subsequent severance, easements which, previous to such unity, were easements of necessity, are impliedly granted anew in the same manner as any other easement which would be held by law to pass as incident to the grant (**Gale on Easements** (12th Ed. 1950), p. 166).

The tone is somewhat modified on p. 988, where the author points out that a continuous and apparent easement such as an eave or downspout will pass on the severance by implication of law. Then he goes on to say:–

> An easement which is in its nature not continuous and apparent such as an ordinary right of way will not pass on the severance of a tenement unless the grantor by appropriate language shows an intention that it should pass...

American and English Encyclopaedia of Law (2nd Ed.) vol. 10, pp. 432 et seq. considers the extinguishment of easements, but at p. 434 this statement appears:–

> *Severance of Estate Revives Easement* – Easements which are apparent and continuous, and which are technically extinguished by unity of title and are allowed to remain undisturbed, revive upon severance of the estate.

At p. 425 the note says:

> *Ways*, being discontinuous easements, are not within the rule of the English cases as stated in the text, and do not in general pass by implication.

It is suggested that there must be something in the conveyance to show an intention to create the right to use those ways *de novo*.

While I have reviewed these authorities on the extinguishment and revival of a right of way with some care and although the severance of the unity of possession may not in itself be conclusive to support the trial judge's decision, I am of opinion that the plans themselves are adequate evidence of an intention to create a right of way over the "future road".

The trial judge remarked that the plan outlining Forbes Street as fifty-feet wide was approved on July 3, 1961, that the reservation of the eight-foot strip is shown on the plan and that no doubt approval was required under the planning legislation then in force. This plan was attached to the deed from the Spryfield Mobile Home Park Limited to Her Majesty the Queen to which I have already referred.

He went on to say that how approval of such a plan was obtained was not clear, as it did not permit access by abutting owners and it was obvious that the eight-foot strips were not suitable for development. There was, he said, no evidence of a conveyance from the Roches to Miss Cahill but he was satisfied that such a conveyance existed. These remarks referred to lot 1 – the Musolino lot. There was no suggestion that it was ever owned by the Scothorns and so far as this lot 1 is concerned, the matter of extinguishment of the right of way does not arise. This is the lot deeded by Margaret Cahill to Vincent Musolino on August 1, 1950 and by his heirs to B.O.J. Properties Limited on July 15, 1969 and shown on the Purcell plan as lot No. l.

The appellant contended before us that whatever may be said of the effect of the plan of the Roche property, it certainly could not bind the Hartlen property. On the other hand, the plan of the portion of the Mary T. Hartlen lands of August 15, 1949 shows the "future road" running northerly from Linn Road between lots 33 and 34 up to the Bridget Roche property, and the 1954 plan shows the same Future Road on the plan of "Lot A" about to be conveyed by Bridget Roche to Joseph Specht. Here it is shown 66 feet in width.

The 1954 plan has a certificate of approval for Lot "A". Lot "A" is on the opposite side of the road from the Henry and Cahill lots, but the so-called Future Road ran between these lots and lot "A" and

between lots 33 and 34 on the Hartlen plan to the Linn Road, which connects Forbes Street with the Herring Cove Road.

The position of the respondent is that anyone buying lots 1 and 2 on the 1976 plan and examining the relevant plans would be assured that there was an outlet to the Linn Road and hence to the Herring Cove Road.

Returning to the statement on p. 988 of **Anger and Honsberger** suggesting that there should be something or some language to show an intention that the right of way will pass on severance, it appears to me that these plans show that very intention and show also that the right of way extended for the full width of lots 1 and 2. They supply the necessary evidence of such intention with the result that even if the unity of title in the Scothorns at one time had extinguished the easement, the right of way was revived by the subsequent severance.

Apart altogether from an easement of necessity, the conveyances and the plans indicate an implied easement over the area in question. The evidence, in my view, shows that the respondent and its predecessors in title had the benefit, from the first severance in 1944-45 of lots 1 and 2 from Thomas Roche lands, of a specific implied easement appurtenant to these lots over what was later Bridget Avenue or Forbes Street to Linn Road (now Lynett Road) and thence to the Herring Cove Road – not a mere unassigned way of necessity, but an implied and intended grant of a way by the Roche heirs, two of whom were Bridget Roche and her sister, Mary Hartlen, an easement specifically assigned to the road areas.

Following Thomas Roche's death in 1940, Mary Hartlen gradually developed the Linn Road subdivision. Prior to the 1949 Dunne plan, she had a previous plan from which she sold 1ot 30 at the corner of Linn Road and the Herring Cove Road in 1942 and in 1945 lot 32 to one Kelly.

The Kelly lot 32 on the north side of Linn Road bordered for 100 feet on the north the south side of what is now lot number 2 of the respondent, which had been acquired from the Roches by Margaret Henry in 1944. Lot 33, immediately east of lot 32, was at the northwest corner of the "Future Road" and Linn Road and extended along the western side of the "Future Road" 113 feet to the Henry lot. Lot 32 was conveyed to Kelly in 1949 following approval of the Dunne plan. In 1946 Mrs. Hartlen sold lots 4 and 6 located on the south side of Linn Road, opposite and slightly east of the entrance to the "Future Road".

The deed to Henry, and presumably also the missing deed of respondent's lot number 1 to Margaret Cahill (who was a Roche first cousin of the grantors), were executed by the four Thomas Roche heirs, as were most other deeds to lots in the Hartlen and Bridget Roche subdivisions. The Henry deed and Margaret Cahill's 1950 deed of lot 1 to Musolino do not refer to any street or road. They refer to no plan but the descriptions of these adjoining lots were obviously prepared by a surveyor, probably, W.H. Foster, P.L.S., who attested the deed to Henry.

Bridget Roche testified that a path, an old logging road, existed where the "Future Road" was located and that Henry and Cahill had agreed to "make their own right of way through". She was asked:

> Q. And where would they make their own right-of-way through?
>
> A. Well, through the path.
>
> Q. What is known as the future road?
>
> A. What is now known as the future road.

They just wanted the land "for a week end or for a picnic place".

I would assume that Bridget Roche, like Mrs. Hartlen, probably had in the 1940's some sort of plan of these lots and the lots on the Herring Cove Road sold by her. The Henry lot began only 113 feet along the "Future Road" from Linn Road, which had been roughly developed by 1946. The "Future Road" shown as 66 feet wide in 1949 along lot 33 into the Henry lot is also 66 feet wide in front of the Henry and Cahill lots on the 1954 plan of Bridget Roche's Lot A, prepared by W.H. Foster, P.L.S., referred to above.

The implied easement of Henry and Cahill thus from the beginning led to Linn Road over the path in front of the lots, a path doubtless at least eight feet wide, and probably shown wider on any plan of the Bridget Roche land. It was, in any event, extended to 66 feet in width by the act of the same grantors in preparing and filing the 1954 plan.

Thus a 66 foot easement appurtenant to the respondent's lots was established either by original implied grant, or at the latest, as Mr. Justice Jones held, by the assignment of a right of way of necessity by the grantors filing the 1954 plan. Nothing has been done to destroy that right in respect of the eight-foot strip now left between those lots and the public street.

In the result I would dismiss the appeal with costs.

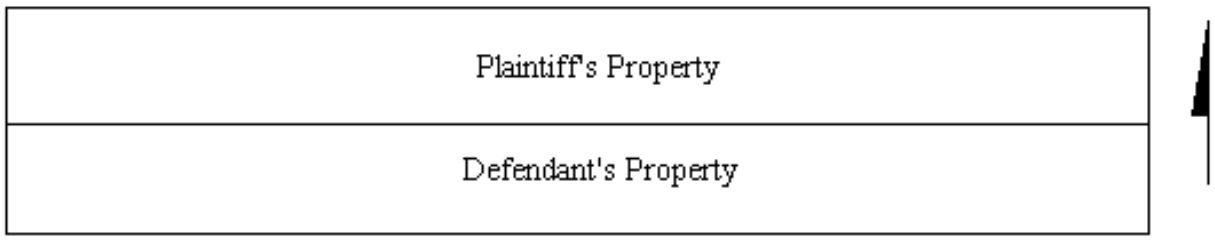
Appeal Dismissed

SULLIVAN v. LAWLOR and FELTMATE See 38 N.S.R. (2d) 332
Nova Scotia Supreme Court, Trial Division
Grant, J.
March 25, 1980.

-and-

SULLIVAN v. LAWLOR See 45 N.S.R. (2d) 325
Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Cooper, JJ.A.
May 4, 1981.

The Plaintiff and the Defendant Lawlor owned the northern and southern half respectively of an original 200 acre grant. The Defendant Feltmate was brought into the action because he had cut wood on behalf of the Defendant Lawlor, allegedly on the lands of the Plaintiff. (Certain ungranted lands to the west of the original grant were also claimed by the parties based on adverse possession, but the main thrust of the case did not deal with this claim.) The lands are shown on the following sketch:



The dispute arose over the boundary line between the two properties. It came to a head when the Defendant Lawlor had the Defendant Feltmate cut wood over the boundary line claimed by the Plaintiff.

The Trial Judge reviewed a significant amount of evidence. Much of that came from two land surveyors, one of whom was retained by each side. Additional evidence related to the use which had been made of each property over the years.

Sullivan, the Plaintiff's surveyor based his opinion on various found evidence, including blazes, rock walls and fence remnants as well as evidence of the parties, their predecessors in title and other knowledgeable persons as to the location of the boundary. The line established by Sullivan had a number of small bends in it over the length of the boundary line in dispute.

McPhee, the Defendant's surveyor also based his opinion on found evidence of fences and a stone wall. He emphasized that his line was straighter than that of Sullivan and more closely parallel with the southern boundary of the grant, which he had established.

The Trial Judge found that the predecessors in title to the parties had established a conventional line at the location established by Sullivan. He indicated that although there was no evidence of an express conventional line agreement, he was willing to infer from the conduct of the various owners over time that such an agreement had been made. The Trial Judge awarded damages to the Plaintiff for the wood which had been cut.

The Defendant appealed.

The Court of Appeal reviewed the facts and focussed on the Trial Judge's finding that a conventional line agreement had been made. The Court found that that finding was not supported by any reasonable evidence. The Court further found that McPhee's method of defining the line in dispute as being parallel to the southern boundary of the original grant was superior to Sullivan's method. The Appeal Court allowed the appeal and determined that the boundary was as shown by McPhee.

(Note that the northern half of the original grant was the first lt to be sold from the grant and the deed supporting that transfer would therefore be the first delineation of the boundary in dispute. That deed implies that the line in dispute is parallel with the northern boundary of the grant, not the southern one.)

SULLIVAN v. LAWLOR and FELTMATE
Nova Scotia Supreme Court, Trial Division
Grant, J.
March 25, 1980.

This is an action for damages for trespass to timberlands with a counterclaim for damages arising from the tying up of certain pulpwood cutting operations. As well, declarations of title are sought.

Most of the lands in question were granted to Andrew Neilson by a Crown grant in 1829. The lot was 200 acres and roughly rectangular. The description was as follows:

> "...Unto the said Andrew Neilson two hundred acres of land contained in the tract marked "E" on said plan abutted and bounded as follows that is to say Beginning at a fir tree marked AN standing at the South East angle of land surveyed for James Sullivan on the Western side of the north branch of Salmon River, thence running west ninety seven chains and fifty links, thence south twenty chains thence east one hundred and four chains to the river thence by the course thereof northerly to the place of beginning according to the annexed plan."

The sketch attached to the grant contains no metes and bounds description tied in with compass bearings. The subsequent deeds carry on with the same general type of description. The problem defining the lines has thus been perpetuated.

In 1833 Andrew Neilson (as he was then called) deeded off the northern half (*i.e.*100 acres) to John Jost et ux. The description was as follows:

> "...a certain tract or parcel of land situate lying and being on the western side of the northwest branch of Salmon River in the Province and County aforesaid, abutted bounded and described. as follows – Beginning at the upper bounds of the lot granted to the said Andrew Nelson on the western bank of the said northwest branch – thence west one hundred chains or until it comes to the end of said line – thence on the rear side of said land south ten chains or until it includes one half of the breadth of the said lot granted as aforesaid, thence east one hundred chains, or until it comes to the river, and thence by the river upstream to the place of beginning, containing one hundred acres more or less,"

The southern half (*i.e.* 100 acres) was deeded in 1852 by John Patrick Kelly (heir of William Kelly) to Jeremiah Kennedy. The description was as follows:

> "...That certain tract or parcel of land situate lying and being on the west side of the north west branch of Salmon River near Sullivans Lake so called. and is abutted

> bounded and described as follows *viz*. beginning at a stake and stones standing on the western bank of the aforesaid north west branch at the north west angle of Martin Sullivan's land thence west along the northern side line of said lands one hundred and four chains thence north ten chains or until it comes to lands owned by James Sullivan thence east along the southern side line of said James Sullivan's land one hundred chains or until it comes to north west branch aforesaid thence by the several courses of said branch downstream to the place of beginning containing one hundred acres more less the same being the southern half of two hundred acres of land originally granted to one Andrew Neilson and by him sold and conveyed to the aforesaid William Kelly."

The plaintiff is now the owner of the northern part of the lot and the defendant owns the southern part. As well, the parties have occupied lands to the west of the Neilson grant, which lands apparently were ungranted.

There are several plans of these lands and adjoining lands.

The problem boils down to the question of the line dividing the two lots, that is, the south line of the plaintiff's property and the north line of the defendant's property.

In the summer of 1979 the defendant Lawlor entered into an agreement with the defendant Feltmate to cut pulpwood. Some of the cutting was on the disputed area, so-called, and these proceedings were instituted.

Edward Hanifen, N.S.L.S., was employed in 1971 to do a survey. His plan, Exhibit 3, dated 11 January 1971, shows the south line of Edward Kelly's grant. This is about one quarter of a mile north from the line in issue here.

In 1967 Hanifen attempted a survey of the line dividing the lands of the plaintiff and one MacPherson (a predecessor in the chain of title of the defendant Lawlor). He ran it from a fence in the plaintiff's field westerly to Kelly Lake. He said that he could not find enough evidence to establish a boundary line, so he called it a "trial line". He could not find sufficient evidence, in his opinion, to support the plaintiff's claim of his south line in this area.

Hugh Sullivan, N.S.L.S., did a survey for the plaintiff from January 2 to January 5, 1980. His plan is Exhibit 4. On it he shows his finding of the plaintiff's south line from point A to point G. I shall refer to this as the Sullivan line. He started at the Salmon River on the east. He then ran west to the bounds of MacIsaac.

Going west from the river the line is agreed upon for the first 600 or so feet, that is, from the river, point A, to Sullivan Road, point B. According to the Sullivan survey this line follows bearing S 71? 42' 25"

W. Surveyor Sullivan considered the line from point A to point B to be the true line, as did surveyor MacPhee.

In the area from point A to point B there are remnants of a stone ridge on the line for over 300 feet.

At point B the line adopts slightly different bearings.

The Sullivan line then varies slightly on a line S 70? 24' 40" W to point C.

The line claimed by the defendant takes a course S 71? 40' 00". This was established by surveyor MacPhee and I shall refer to it as the MacPhee line.

The Sullivan line from point B to point C follows some physical evidence which surveyor Sullivan found on the ground which is shown in detail "R" on his plan. These include L1 and L2, being stone and fence remnants. L3, L4, L5, and L6 are stone piles, stone ridges and two wooden stumps (stubs). In addition, surveyor Sullivan found stone piles to the south of his line BC, which are shown on his plan as S1, S2, S3, S4 and S5.

In addition, surveyor Sullivan found some fence remnants (N1) on the MacPhee line and other fence remnants (N2) slightly north of the MacPhee line.

The distance from point B to point C is 1459 feet. These items of physical evidence were all found within the first 800 feet.

Surveyor Sullivan found no further physical evidence of a line until he went on bearing S 69? 33' 10" W across Kelly Lake to point E1; the distance from L6 to the lake is 2207 feet.

From point E1 to point E11 (shown in detail at the lower part of the Sullivan plan) surveyor Sullivan found 11 blazed trees on the bearing S 69? 33' 10" W. This he took as his line from point C 4448 feet to point F, being on the north side line of Old Giants Lake Road. He projected his line along the courses of the north side of this road until it intersects the east line of the MacIsaac lands.

In producing the MacPhee line surveyor Sullivan located a blazed birch tree on that line and four woods roads running generally north and south. In addition, wood road No. 2 on the Sullivan plan runs for several hundreds of feet easterly.

On the western end of the line in dispute the line of surveyor Sullivan is 208 feet south of the MacPhee line.

Surveyor Sullivan said that the blazes E1 to E11 were over 50 years old. He said he walked the MacPhee line and found only the one blaze shown on his plan.

When surveyor Sullivan did his survey there was two to three inches of snow on the ground.

From L6 to the lake surveyor Sullivan found fairly new growth on both sides of his line.

In cross-examination surveyor Sullivan said that in the area E1 to E11 he took "the mean line of the blazes and projected it easterly and westerly."

Alfred Sullivan is an employee of the Department of Lands and Forests. In 1973 he assisted the plaintiff in renewing the line between points E1 and E11. He found no evidence of this line west of E11. He did not project the line eastward beyond E1.

Between the lake and point F the timber was mostly older softwood, it was similar on both sides of the Sullivan line. Alfred Sullivan examined the area 200 feet on each side of the Sullivan line. He found blazes on occasional trees north of his line. He thought these blazes were 20 to 25 years old.

Alex W. Chisholm is a predecessor in title of the defendant's lot. He purchased it in 1960. He sold to Elmer MacPherson on 12 November 1964.

In the winter of 1961 he went over the lines. He took his pocket compass and followed the line to the lake and beyond.

To the east of the lake he found an old line and an old field fence. On the west side of the lake he found "an indication of a line", which he would have considered as the line. He said this "could be" the Sullivan line but "hard to say exactly". Mr. Chisholm never discussed the line with Michael Sullivan, the father of the plaintiff, who was then occupying the plaintiff's lands. Mr. Chisholm said he paid no particular attention to the boundaries of his lands. He did not use the land. He said he would have considered the blazed line (E1 to E11) as the boundary.

Hugh Murphy, age 74, did logging on the Sullivan lands in 1927 or 1930 to the north of the Old Giants Road. He stayed at a camp 25 to 30 feet north of that road. He said they never cut to the south of that road. He said he "was not watching" the lines.

A.B. MacIsaac, age 75, was raised on the MacIsaac lands to the west, see Exhibit 4. He lived there for his first 40 years. He was familiar with the owners of each of the properties in this dispute. He recalled Jack White erecting logging camps to the north of the Old Giants Lake Road. He considered Kennedy (a predecessor in title of the defendant) a good policeman of his lines. He did not know if White had any agreement with Kennedy.

The plaintiff is 59 years of age and is a barber in Antigonish. He was born and brought up on the property owned by his grandfather and left to him under his father's will (deed and will included in Exhibit 1).

The plaintiff said he considered the road to be his south boundary on the west area of his lot. Going easterly he considered the blazes from the road to the lake to be the boundary. He said he had cut Christmas trees to the south of the road but had paid Kennedy for them.

The plaintiff said he had no trouble with the lines until the defendant Lawlor purchased. The defendant Lawlor asked him about the line and he showed him the corner post on the base line (*i.e.* the line with MacIsaac).

The plaintiff said he got a letter from C.W. Grant to the effect that the defendant Lawlor had purchased the MacPherson lands and was going to have the line run. The plaintiff then got Joe McLellan, N.S.L.S. of Antigonish to run a line. McLellan did not give evidence, nor is his plan, if there is one, in evidence.

MacPhee ran a line following which in July, 1979, the defendant Feltmate cut the pulpwood. The plaintiff said his page wire fence was taken down and moved over to a new line. He had cattle on the lands at the time. This was in the area of wood road No. 1 shown on Exhibit 4. An effort was made to deal with the cut wood. As a result some was sold and the balance has been left at the site. This action followed.

The plaintiff said that in 1967 he engaged Hanifen to run the line. That was when MacPherson bought the lands to the south. He described the difficulties they encountered and as a result they did not run a line but merely a "trail" to the lake. The trail or line blazed by Hanifen was not accepted by the plaintiff as his south line. He had, however, told MacPherson that Hanifen was to run the line. He picked up a "trail" on the west side of the lake but could not find it on the east side of the lake.

Later the plaintiff had Alfred Sullivan assist to establish the line. At that time MacPherson was present. He renewed the old line on 24 May 1975. He described the Alfred Sullivan line as being a "trail" only, not a line.

At trial the plaintiff was obviously on medications. He explained that he was confused over certain dates because of this. Some of his evidence was contradictory and much of it hard to follow and quite general. For example, in cross-examination he said that both Kennedy and MacPherson sold stumpage to the north of the road. On re-examination he said that Kennedy did not.

Stewart MacPhee, N.S.L.S., in June and July of 1979 did a survey for the defendant Lawlor. He went on the site with the defendant Lawlor who showed him certain evidence of the line, on the ground. Exhibit 6 is the MacPhee plan dated 11 July 1979. He shows his selection of the defendant's north line as a heavy solid line.

MacPhee started at the river and worked westerly. He cut a line from the Sullivan road west to the lake. To the south of his line he found a fence at the top of a field – this fence ended at the lake.

Proceeding westerly from the Sullivan road MacPhee came to some page wire attached to a row of trees, an old pole fence and a stone wall. This ended at No. 10 on Exhibit 6. At No. 10 there was a recently constructed page wire fence veering southerly to No. 9. From there (No. 9) there was an aluminum cable fence to the lake. This fence appeared to MacPhee to have been recently attached to the trees.

The south line of the Neilson grant was on a bearing S 72? 05' 54" W. Proceeding westerly from the road the south line of the grant had a fence and a stone wall and to the west of the lake there was a further stone wall.

On the MacPhee line to the west of the lake MacPhee found blazes on three trees at intervals of several hundreds of feet. These are No. 3, 4 and 7 on Exhibit 6. These blazed trees are on the line containing the old fence attached to a line of trees and stone wall on a westerly projection of the line running between the river and the road.

MacPhee said the grant had been 20 chains wide but in 1833 it was equally divided, each lot being 10 chains wide.

MacPhee considered the line between the Salmon River and Sullivan's road to be the true line. He considered this bearing to be S 75? 41' 38" W. He considered his proposed dividing line to be reasonably consistent with the south line of the Neilson grant. He considered the south bound to be persuasive but not conclusive.

MacPhee preferred the evidence he used to establish his line over the evidence Hugh Sullivan used for his line. He considered the stones referred to in detail "R" on Exhibit 4 as "isolated piles of stones" rather than a "stone wall".

Elmer MacPherson sold the defendant's lot to the defendant Lawlor in 1978. He recalled going with the plaintiff and Hanifen to run the line. The plaintiff had asked him to attend. When they reached Kelly Lake (they had gone easterly from the Old Giants Lake Road) the plaintiff said he was not satisfied with where the line had been run and said it was wrong. While the plaintiff and Hanifen were going to cross the lake, MacPherson left.

Later the plaintiff called MacPherson and told him he was going to have another surveyor run the line. MacPherson said he never accepted the line as defined by the plaintiff. He said the lot got narrower as the Sullivan south line went further west, with that he disagreed.

Fred M. Hane of Country Harbour Mines bought standing timber from MacPherson in 1970. He cut on both the north and south sides of the Old Giants Lake Road. He said the plaintiff told him he was not sure where the line was so he discontinued cutting to the north of that road.

The defendant Kenneth Lawlor lives in Erinville. He was born and lived nearby. He was familiar with the boundaries. He sold pulpwood to the defendant Feltmate. He accompanied MacPhee when he ran his line. He said his understanding was that the timber to the north was cut more recently than to the south of the line. He saw older trees on the south portion. He had worked on the lands cultivating Christmas trees.

James Sullivan, age 64, is a brother of the plaintiff. He had cut logs on the plaintiff's property when it was owned and occupied by their father. He cut up to No. 3 on Exhibit 6. He considered the blazed tree (No. 3, Exhibit 6) to be on the line. He did not cut south of that line. He worked logging in 1937, 1938 and 1939. He worked in 1937 with his father, in 1938 with Frank Burns and in 1939 with a younger brother.

James Sullivan worked on the defendant's property for Kennedy. He agreed with the MacPhee line. He said the boundary line never crossed the Old Giants Lake Road. He said that in 1924 the line between the road and the lake was set out but it was not the line El to Ell on Exhibit 4. He said the line of blazes is not the line. He said that the woods road No. 2 on Exhibit 4 may run in an irregular fashion because of the terrain, including a swamp.

Wesley Feltmate is a pulp operator from Goshen. He purchased certain standing wood from the defendant Lawlor. He started to cut on June 16 or 19, 1979. On July 10 – 11 he started to cut to the north of the Hugh Sullivan line and was stopped by the plaintiff. The plaintiff contacted the buyer of the wood who refused to buy from the defendant Feltmate because it was "disputed wood".

Feltmate said that there is still 320 cords on the old road and 30 cords from Mrs. Lawlor's land (not the defendant Lawlor). He said he kept the wood cut across the Sullivan line separate. He alleges he lost the premium rate, a bonus payment and his equipment and crew were tied up until they got alternate woods to cut.

Mrs. Ivy Feltmate is the wife of the defendant and is the bookkeeper and timekeeper of his business. Her estimate of the loss from the episode is Exhibit 9.

Vincent Dadeau is a licensed pulp scaler. He was retained by the plaintiff to examine and scale the wood cut and the stumps. This he did on 3 October 1979. He found 226.94 cords had been cut of which 150 were from north of the road. He had no personal knowledge of the ownership of the land. The defendant Feltmate did not agree with the estimate of Dadeau. The defendant Feltmate said that only 40 – 50 cords were cut on the north side of the road.

In rebuttal the plaintiff said that the corner post at the MacIsaac line was on the south side of the Old Giants Lake Road.

The intention of Neilson and his early successors in title was to subdivide the grant into two one hundred acre lots. This they did in their conveyances.

MacPhee found the main south line of the Neilson grant (as it now is) to be on a bearing S $72^{?}$ 05' 54" W but the eastern part of it was on a bearing S 71^{0} 28' 02" W. The line includes fencing and stone walls.

MacPhee found the north line of the grant to be on a bearing S 73^{0} 00' 10" W.

To divide the grant into reasonably equal parts the dividing line should be similar to either the north or the south line of the grant.

MacPhee equated his dividing line roughly with the south line of the grant. He considered the south line to be persuasive.

No doubt there was a time when the location of the north and south lines of the Neilson grant would have been highly persuasive in finding the disputed line, relating to the paper title only. However, here 150 years later we are more concerned with the line as it now exists than as it was laid out long years ago.

The location of the eastern starting point of the dividing line is agreed upon by the parties.

Proceeding westerly from the starting point using the MacPhee plan the lines of Sullivan and MacPhee are the same for approximately 1600 feet. The balance of the line is in issue. Using the Sullivan plan only about the easternmost 600 feet is agreed upon.

There was evidence of remnants of fences and piles of stones. Some of these are consistent with the Sullivan line and others are consistent with the MacPhee line. Some are not consistent with either. In the area L1 to L6 the distance separating the two lines is very small. At L1 it is less than five feet. At L6 it is less than ten feet.

There was no evidence of cultivation of the lands other than some of the lands are still fields whereas most of it is now wooded. From time to time timber was cut on various areas of the lands by various people. The plaintiff had cattle in the area to the east of the lake.

Alex W. Chisholm was not sure of the line. In 1961 he went over it with his pocket compass. To the west of the lake he found an "indication" of a line. There were stubs (stumps) with blazes. He said this "could be the Sullivan Line". He said he never discussed the boundary with Michael Sullivan, the predecessor in title of the plaintiff.

Elmer MacPherson did not agree with the plaintiff on the location of the line.

There apparently was never any prior problem over the location of the line. Presumably each owner was satisfied with the occupation and use of the lands by his neighbour.

There was considerable evidence from witnesses for both parties that the boundary on the western part of the lot was the Old Giants Lake Road. At least it has been considered the boundary by many people over a considerable period.

The Neilson grant went 97 chains and 50 links from the Salmon River. To the west of this grant the next granted land apparently was the MacIsaac lands. The area between the western end of the Neilson grant and the eastern end of the MacIsaac grant was ungranted but over the years the several predecessors in title to the parties occupied the same. I find their occupation thereof has been sufficient to bar the right of entry of others, including the Crown, and has matured into good title. There was no evidence of possession of those lands adverse to that of the parties herein.

There is a woods (hauling) road running north from the Old Giants Lake Road to the lands of the plaintiff, used by the plaintiff's predecessors in title. This is shown on both plans – as woods road No. 2 on the Sullivan plan and as a hauling road on the MacPhee plan.

As well, the Sullivan plan shows the western boundary of the Neilson grant to be in that approximate location.

However, the fencing may have been to keep in or out certain cattle and may have served that use of the lands rather than to be a boundary line *per se*. Stone piles and stone walls are usually where cultivation took place and the stones were raked or moved out of the way and frequently each landowner raked to his line where the stones were left as the line. However, either is evidence of the occupation of the lands if not of the establishment of lines.

All of the blazes between Kelly Lake and the Old Giants Lake Road (E1 to E11) were not picked up by Hanifen or presumably by McLellan. As well, the plaintiff considered the line of Alfred Sullivan to be a "trail" only and not a boundary line.

I must consider the use of the properties by their respective owners.

The plaintiff's grandfather, James Sullivan, got the property in 1870 and lived on it. In 1903 James Sullivan deeded the property to the plaintiff's father, Michael Sullivan, who also lived there.

The plaintiff was born in 1921 and was brought up on the premises. In 1942 he joined the forces and after the war he worked at Barney's River, then married and lived in the Erinville area until 1953. He then moved to Antigonish and has worked there as a barber since.

The plaintiff's father died in 1967 and under his will the property devolved to the plaintiff. The plaintiff said that "nothing was done" to the property from his father's death in 1967 to 1979.

In the fall of 1979 the plaintiff had cattle grazing within the premises.

During parts of the years 1927 to 1930 Hugh Murphy worked on the plaintiff's lands hauling logs. He stayed at a camp to the north of the road and at one near the lake. He worked for Jack White who was cutting on the Sullivan lands. A.B. MacIsaac likewise remembered the camp to the north of the road.

In 1937 – 1939 James Sullivan worked logging for the Sullivans. He came south only to the blaze at No. 3 on Exhibit 6, but not below it.

In 1955 the plaintiff cut some Christmas trees south of the road but purchased these from Kennedy.

Prior to 1960 Kennedy sold some timber north of the road.

In 1964 MacPherson sold logs generally north of the road to people from Country Harbour.

In 1970, MacPherson sold wood to Fred Hale mostly south of the road.

From the use and occupation of the lands by the parties and their respective predecessors I find that this use and occupation generally followed the Hugh J. Sullivan line rather than the MacPhee line.

In 1960, the Municipality of the District of Guysborough conveyed the defendants' lands to Chisholm. The lands had been offered for sale at a public auction for arrears in taxes. The deed recites that the lands:

> "...appearing to be the property of Hugh Kennedy by deed from Jeremiah Kennedy, Sr., dated December 4th, A.D. 1893. ..."

Certainly Hugh Kennedy was not paying the taxes, which is a recognized incident of ownership.

There is no evidence of any express agreement to establish a conventional line. Ordinarily there is such express evidence of an agreement as to the location of the line. Sometimes the agreement is written, but sometimes it is oral.

However, here from 1898 until 1960 the defendants' lands were owned by Kennedy. There is no evidence of the occupation by the Kennedys or the lines they maintained other than at the extreme western end of the lands.

Yet the Kennedys shared a common boundary with the plaintiff's father and grandfather from 1870 to 1960.

I find that from the occupation by the predecessors in title of the parties there has been a recognition over the years of a line dividing the lands. This line apparently had been adhered to for many years by the Kennedys and the Sullivans. Although there is no evidence of an express agreement I am prepared to draw the inference that, in fact, there was such an agreement.

The essence of a conventional line is the agreement of the owners of the respective lots to the location of the line. See **Spencer et al. v. Benjamin** (1975) 11 N.S.R. (2d) 123; 5 A.P.R. 123, **Crossland v. Dorey** (1978), 27 N.S.R.(2d) 139; 41 A.P.R. 139, and **Nelson and Nelson v. Varner** (1977), 20 N.S.R.(2d) 181; 27 A.P.R. 181.

The evidence in support of the Hugh J. Sullivan line indicates to me the establishing of a line by the occupation of such lands by the plaintiff and his predecessors on the one hand and the occupation of the defendants' land on the other.

In woodlands or in a wooded area blazing has long been accepted as a method of showing the location of a line and as an act of ownership.

Fencing has long been accepted as another method of showing the location of a line. As well, the bounds of occupation may be shown by the location of fences. The fences may be to keep cattle in or out or for other reasons.

In recent years the defendant and his predecessors in title did no acts of possession to their lands. However, the plaintiff and his father and grandfather lived on their lands and actually occupied them. The defendant had his cattle grazing on the lands at the time of the entry of the defendant Feltmate.

I find the location of the common boundary between the plaintiff and the defendant Lawlor to be the line set out in the Hugh J. Sullivan plan, Exhibit 4, commencing at point "G" on Exhibit 4, thence running easterly the courses of the Old Giants Lake Road to point "F" and following the line from "F" to “A”.

I accept the evidence of the defendant Feltmate that only 50 cords were cut north of the line. I consider he is a careful and experienced operator. I accept his evidence on this rather than that of Mr. Dadeau. The balance of the wood cut is the property of the defendant Lawlor and he should be permitted by the plaintiff to remove all but that 50 cords. He shall also be entitled to recover from the plaintiff his loss of the premium rate of $3.00 and the bonus of $2.00 for each cord of the wood detained by the plaintiff, other than the said 50 cords

.

I accept the evidence of the defendants on the amount of wood cut and its value. If the parties cannot agree on this figure than I am prepared to accept written or oral submission on this point.

I disallow the claim for wages and benefits to the defendant Lawlor's employees. I allow the sum of $125.00 to cover the additional expenses in getting a truck out and the float. I allow the defendant Lawlor general damages of $250.00 for the expense and inconvenience of having the logs detained by the plaintiff.

I allow the plaintiff general damages of $250.00 for the trespass to his lands.

I am prepared to grant a declaration of title and an injunction if either is requested.

The defendant shall have his costs of the action to be taxed in one bill of costs against the defendant Lawlor only.

Judgment for plaintiff.

SULLIVAN v. LAWLOR
Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Cooper, JJ.A.
May 4, 1981.

This is an appeal from the decision and order of the trial judge awarding damages against the appellant and fixing the line between the properties of the appellant and respondent as a line proposed by the respondent and based on the plan drawn by the surveyor Mr. Hugh J. Sullivan and dated January 23, 1980.

On the application of the respondent William J. Sullivan, an order was granted adding as defendant Wesley Feltmate, who had purchased certain stumpage rights from the appellant Kenneth Lawlor. As there is no appeal from the disposition of that portion of the action involving Mr. Feltmate, no further direction from this court is required.

The trial judge awarded the respondent William J. Sullivan general damages of two hundred and fifty dollars ($250.00) for the appellant's trespass.

The appellant says that the trial judge was wrong in accepting the line proposed by the respondent and shown on the plan drawn by the surveyor Mr. Hugh J. Sullivan.

I quote from the final order:

> "IT IS ORDERED that the line between property of Kenneth Lawlor, the defendant, and William J. Sullivan, the plaintiff, shall be the line as shown on a plan drawn by Hugh J. Sullivan, Nova Scotia Land Surveyor, dated the 23rd day of January, 1980, entit1ed 'Plan of Survey Showing Re-Establishment of Boundary Line Between William Sullivan and Kenneth Lawlor for William Sullivan, in Erinville' commencing at Point 'G' on the aforesaid plan, thence running easterly the courses of the Old Giants Lake Road. to Point 'F' and then following the line from Point 'F' to Point 'A'."

This Hugh J. Sullivan line was based on some blazes shown on his plan of January 23, 1980, filed in the proceedings at trial as Exhibit Number 4, and marked "Old Blazed Line". It appears on the plan just west of Kellys Lake.

The difficulty is that in the appellant's submission there is no evidence possessory or otherwise to support this line and it was in fact rejected.

The whole philosophy of the trial judge's decision is that this Hugh J. Sullivan line represents a conventional line, which although not memorialized by a formal document of agreement, was accepted by the parties as a conventional line upon which they agreed by their actions over the years.

The respondent's problem is that there is great difficulty in pinpointing specific evidence of this conduct.

I shall first review the history of title which was set out in some detail in the trial judge's decision.

The lands formed part of an 1829 grant to Andrew Neilson. It was a 200 acre lot and thus described:

> "...Unto the said Andrew Neilson two hundred acres of land contained in the tract marked 'E' on said plan abutted and bounded as follows that is to say Beginning at a fir tree marked AN standing at the South East angle of land surveyed for James Sullivan on the Western side of the North branch of Salmon River thence running west ninety seven chains and fifty links, thence south twenty chains thence east one hundred and four chains to the River thence by the course thereof Northerly to the place of Beginning according to the annexed plan."

The trial judge pointed out that the sketch attached to the grant contained no metes and bounds description tied to the compass bearings –

> "The subsequent deeds carry on with the same general type of description. The problem [of] defining the lines has thus been perpetuated."

The 200 acre lot as granted was divided in half and the respondent Sullivan now owns the northern part and the appellant Lawlor the southern part. Certain lands to the west of each part of the grant have been occupied by the respective parties although there is no record of their having been granted; these lands extending west about 2400 feet are shown on the Hugh J. Sullivan plan as part of the lands involved in this action.

The description in an 1833 conveyance to John Jost and his wife from Andrew "Nelson" conveyed the northern half with this description:

> "...a certain tract or Parcel of land situate lying and being on the Western side of the Northwest branch of Salmon River in the Province & County aforesaid, abutted bounded and described as follows – Beginning at the upper bounds of the Lot granted to the said Andrew Nelson on the Western bank of the said Northwest branch – thence West one hundred Chains or until it comes to the end of said line – thence on the rear side of said land South Ten chains or until it includes one half of the breadth of the said Lot granted as aforesaid, thence East one hundred Chains, or until it comes to the River, and thence by the River upstream to the place of beginning, containing one hundred acres more of less."

The plans which are in evidence – E 4, the Sullivan plan and E 6, the Stewart E. MacPhee plan dated July 11, 1979, revised December 7, 1979 – both agree on a boundary line from the Salmon River

westerly some five hundred and ninety-two feet to the western side of the Sullivan Road. It is from there westerly over the great portion of the area that divergence occurred.

Although there are no bearings in these descriptions, it is apparent, subject to evidence to the contrary, that the intention was to divide the original lot into two equal parts and that the east-west lines should be parallel.

The MacPhee plan accepts that intention and extends the line without variation from the public highway referred to as the Sullivan Road S 71^0 40' 38" West right through to certain ungranted land shown on both plans as "Lands of John A. MacIsaac".

Mr. Hugh J. Sullivan's plan has a line commencing at Salmon River and proceeding S 71^0 42' 25" West to Sullivan Road. This is only a distance of some 592 feet. There still remains some 9,000 feet. The Sullivan line changes at that road and follows a new direction S 70^0 24' 40" West to Kelly's Lake and then continues along a so-called blazed line S 69^0 33' 10" West to a road called Old Giant's Lake Road. Thence the line proceeds westerly along the delineations of the northern side of that road to the MacIsaac lands. The plan shows a line marked "Tie" which is an extension of the old blazed line, but with a direction S 71^0 54' 10" West. This line intersects the curves of Old Giant's Lake Road so that it is sometimes south of that road and sometimes north.

In any event, the Hugh J. Sullivan line substantially reduces the southern lot compared to the northern.

The MacPhee line as shown on Exhibit 6 clears the most northerly curve on the Old Giant's Lake Road.

The description of the southern portion as it appears in an 1852 deed from John Patrick Kelly (heir of William Kelly) to Jeremiah Kennedy is also set out in the trial judge's decision:

> "...That certain Tract or parcel of Land Situate lying and being on the West side of the North West Branch of Salmon River near Sullivans Lake so called and is abutted bounded and described as follows Viz. Beginning at a Stake and stones Standing on the Western bank of the aforesaid North West Branch at the North West angle of Martin Sullivan's land thence West along the Northern side line of said Lands one hundred and four Chains thence North Ten Chains or until it comes to lands owned by James Sullivan thence East along the Southern side line of said James Sullivan's Land One hundred Chains or until it comes to North West Branch aforesaid thence by the several Courses of said Branch downstream to the place of beginning Containing one hundred acres more less the same being the Southern half of two hundred acres of land originally granted to one Andrew Neilson and by him Sold and conveyed to the aforesaid William Kelly."

The trial judge was impressed with certain findings made by the surveyor Sullivan when he ran the line – stone and fence remnants, stone piles, stone ridges and two wooden stumps. He also found eleven blazed trees on the bearing S 69^0 33' 10" West, which he accepted as a line to the Old Giant's Lake Road. As I have said, Mr. Sullivan followed the north side of this road until it met the east line of the MacIsaac lands.

The trial judge reviewed the evidence of the various witnesses and remarked that there was evidence of remnants of fences and piles of stone, some consistent with the MacPhee line, some with the Sullivan line and some not consistent with either.

Mr. Justice Grant referred to certain evidence, such as that of Jack White and A. B. MacIsaac, who described a camp north of the road and some logging activities.

He then set out this statement, which to me is a vital element in reaching his final conclusion:

> "From the use and occupation of the lands by the parties and their respective predecessors I find that this use and occupation generally followed the Hugh J. Sullivan line rather than the MacPhee line."

He went on to conclude that:

> "...from the occupation by the predecessors in title of the parties there has been a recognition over the years of a line dividing the lands."

From this he drew the inference that in fact there was an agreement as to the line which resulted in a conventional line, and that line was as shown on the Hugh J. Sullivan plan.

The appellant says that there is absolutely no evidence to support such an inference.

I should say that here we are not dealing with the credibility of witnesses. The advantage of the trial judge in assessing the truthfulness of statements is not before us. The whole question is whether, accepting the testimony of the various witnesses, there was evidence before the trial judge on which he could base his finding of a conventional line. The power of an appellant court to draw its own inferences is clear. **Rhodenizer v. Rhodeniser** (1953), 31 M.P.R. 127, at p. 158.

One case where this court did uphold a conventional line as found by the trial judge was **Crossland v. Dorey** (1978), 28 N.S.R.(2d) 91; 43 A.P.R. 91, but there the facts disclosed a line properly surveyed and ratified by an agreement signed by the owners of the adjacent properties. This agreement having been before the trial judge, the Appeal Division could not interfere.

The trial judge in **Crossland v. Dorey** (1977), 27 N.S.R. (2d) 139; 41 A.P.R. 139, at p. 149 and the judgment of this court at p. 102 of 28 N.S.R.(2d) referred to **Spencer v. Benjamin** (1975), 11 N.S.R.(2d) 123; 5 A.P.R. 123, where Macdonald, J.A., at p. 135 quoted a paragraph from Hodgin, J.A., in **Sutherland v. Campbell** (1923), 25 O.W.N. 409, which included these words:

> "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."

Crossland v. Dorey was the normal type of conventional line where the two parties enter into an agreement.

Counsel for the appellant in the present appeal mentions some other examples – **Phillips v. Montgomery et al.** (1915), 43 N.B.R. 229, where McKeown, J., said at p. 249:

> "When owners of adjoining lands, fully cognizant of the dispute as to the location of the line dividing their properties, jointly agree upon a certain line as a division line between them, jointly put up or continue a fence along such chosen line as the common boundary of their respective holdings, and for years limit their respective occupation and cultivation of said properties by such fence, I think in the absence of fraud, each successor in title is bound by the line so agreed upon."

The same principle appears in **Wilbur v. Tingley** (1949), 24 M.P.R. 175, at p. 195.

Corpus Juris (1916), vol. 9, p. 232, does say that an agreement fixing a boundary line may be inferred by conduct, but the statement continues:–

> "But inasmuch as the ownership of land is affected so far as the agreed line varies from the true line the proof of the agreed location should be clear."

That is my difficulty here. Where is the proof of the agreed location?

The learned trial judge himself set out certain facts which appear to support the appellant's position:

> "In 1937-1939 James Sullivan worked logging for the Sullivans. He came south only to the blaze at No. 3 on Exhibit 6, but not below it.
>
> In 1955 the plaintiff cut some Christmas trees south of the road but purchased these from Kennedy.

> Prior to 1960 Kennedy sold some timber north of the road.
>
> In 1964 MacPherson sold logs generally north of the road to people from Country Harbour."

The only suggestion in this summary favourable to the respondent is the next paragraph which says that in 1970 MacPherson, who is the predecessor of Mr. Lawlor, sold wood to Fred Hale mostly south of the road.

As I see it, the strongest contention in the whole case in favour of the respondent is that the line which the respondent claims is the boundary line follows for a substantial distance the blazed trees to which I have already referred.

The respondent's first witness was Edward Hanafin, a Nova Scotia land surveyor. On cross-examination he agreed that about the year 1967 he undertook a survey of the boundary line between the respondent's land and that of Elmer Whitney MacPherson. He said he started at the back end of the fence and ran it back as far as the lake:–

> "I didn't have enough evidence to go on at that time if I was right or wrong, so I just classified it as a trial line. It wasn't a boundary line."

Mr. Hugh J. Sullivan, as I have said, based his survey on what he considered physical evidence on the ground – the stone ridge, the old birch stub, the piles of stone, and the line of old blazes which he felt were marks at least fifty years old.

As to the Old Giant's Lake Road, he said:–

> "Well, I was unable to find any old physical evidence west of point F; and it also appeared to me from talking with some of the individuals, the road. was sort of accepted as the line or appreciated as the line over the years. I show, in my opinion, that that probably is the line."

He referred to the straight line marked "tie" and said it was only in between the two points on his plan – it was not a projection.

He was asked about the MacPhee plan: –

> "Q. Now, Mr. Sullivan, with respect to the MacPhee plan and your own plan, which of those two plans would. you say divides the Andrew Neilson Grant more evenly?

A. Well, I wouldn't really be able to answer that because I have no idea of where the northern boundary of that grant would be located at."

Mr. Alfred Sullivan called on rebuttal referred to the old blazes and the red paint and was asked if he had measured the property either front or back and said he had not – "It was actually just the renewal of the old line".

Mr. Stewart MacPhee based his line on what he described as a considerable amount of stone wall and wire fence. He was asked about the deeds: –

"Well, my interpretation of the original deed that divided it in 1853, I believe the date was, is quite specific that the dividing line was meant to run in the same direction as that grant line and for ten chains north of it."

On cross-examination when he was asked about the other line as indicated by the blazes, he reiterated his position that the deed information was: –

"...quite specific and it refers to the line being ten chains removed from the southerly boundary of the Neilson grant and parallel thereto and although we gave some consideration to the evidence found between the Old Giant Lake Road and Kelly Lake I did not feel that it was a reasonable representation of where the dividing line of that grant would have been."

In any event he rejected the blazes between the Old Giant's Lake Road and Kelly's Lake as being boundaries.

He also found some pole fencing in the line he established.

Mr. James Sullivan was asked about the line with the eleven blazes and he recalled that there was trouble with that line: –

"They couldn't agree on it, so they measured across on the back then and run from that."

He gave the year as 1924.

The appellant's factum sets out a further argument on the conventional line dealing with the respondent's reliance on the "use" of the relevant land by the respective owners.

It describes the line on Exhibit 4 – the Sullivan plan - beginning at point G on the west and running the courses of the Old Giant's Lake Road to point F and thence again easterly to point A at Salmon River.

The statement in the factum reminds us that from point L-6 (which is shown on the insert) less than 800 ft. from the main highway to E-1 (near Kelly's Lake), there is a distance of some 2500 feet and this line did not exist until six months after the commencement of the action.

Mr. Jackson's argument was that the 2500 feet of the line arose not through use or occupation, but by the projection of two lines, "one westerly from some physical evidence near the highway and the other eastward from the line of blazes". From this Mr. Jackson argued that the line was basically a compromise boundary for at least 2500 feet.

With the greatest respect, I am of opinion that the learned trial judge erred in basing his conclusion on the line urged by the respondent based on the blazes identified by the surveyor Mr. Hugh J. Sullivan.

The difficulty with the Sullivan line is that it is completely out of context with the title deeds from whose descriptions it is clear that the intention of the parties was to divide in half property described in the original grant. The only inference which can be drawn from that approach is that the line between the properties of the appellant and the respondent should be parallel with the southern boundary line of the grant. This is the position taken by the surveyor MacPhee and once that position is taken, it is impossible to fix the line following the old blazes as was done by the respondent's surveyor.

As to the conventional line, there is not the clear and cogent evidence required to show that there was ever any agreement between the adjoining owners that the line following the blazes as projected by Mr. Sullivan should be the line dividing the two properties, or to show that the respondent or his predecessors ever actually cut timber or otherwise used or occupied the long narrow triangular strip of land between the Sullivan line and the MacPhee line – the land in dispute.

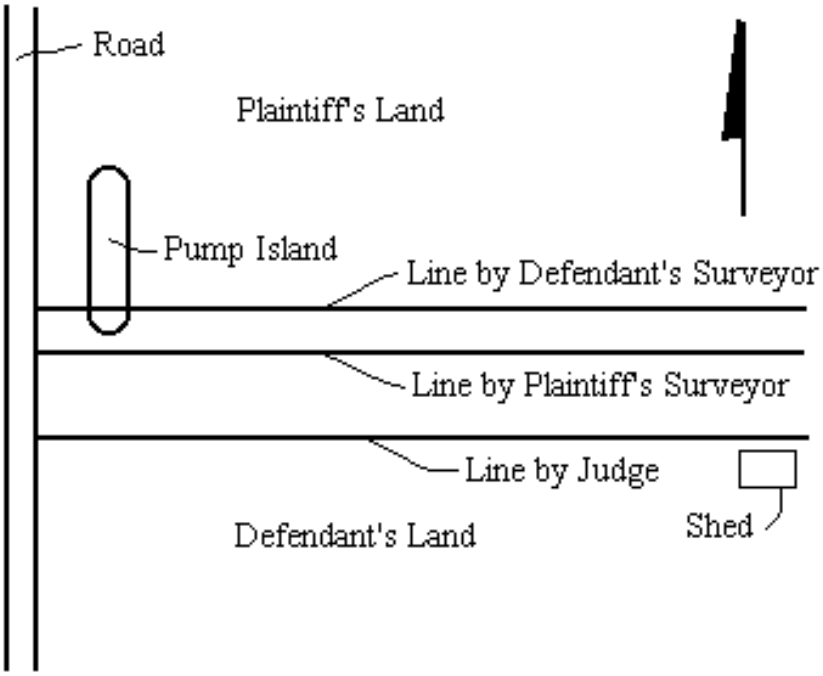
In the result, I would allow the appeal and fix the division line between the lands of the appellant and the lands of the respondent in accordance with the boundaries shown on the MacPhee plan. The appellant shall have his costs throughout.

Appeal allowed

BERGGREN v. MacLEAN See 39 N.S.R. (2d) 451
Nova Scotia Supreme Court, Trial Division
Hallett, J.
May 28, 1980.

The plaintiff and the defendant owned adjoining properties at Avondale, Hants County. The plaintiff operated a gas station on his property and a dispute arose between the parties related to the location of the pump island. The defendant claimed that the island encroached on her land, while the plaintiff claimed that it did not. Each retained a land surveyor to locate the boundary in question.

The following sketch shows the lands and the important features:



The Judge reviewed the descriptions of the lands of the plaintiff and the defendant and indicated that the descriptions were so vague as to be virtually useless in determining the boundaries. Next, the Judge reviewed the work of each of the land surveyors. The defendant's surveyor located the boundary in question based on two buried iron pins. The plaintiff's surveyor based his line on the statutory declaration of a former owner of the plaintiff's property that indicated that the boundary was located 10 feet south of a well.

The Judge then reviewed the testimony of a number of witnesses who testified about the location of the boundary. A number of witnesses told of a fence that no longer existed. The fence had run from near the north side of a wood shed on the defendant's property straight to the road. There were a number

of photographs to support the existence and location of the fence. The Judge indicated that there was ample evidence that independent of where the boundary originally was located, the parties had possessed their lands for many years based on the fence and that adverse possession had occurred. The fence was therefore the new boundary. The Judge determined that the eastern end of the fence had been located 18 inches north of the side of the existing woodshed. The western end of the fence was located based on the location of a rosebush and a rotted wooden post that was either the remnants of a fence post or a tree. The Judge confirmed that location by reference to the testimony of an oil truck driver who testified that he had delivered oil to the service station some years previously and had been able to drive between the southern end of the pump island and the fence and a tree.

The Judge then considered the location of the boundary of the highway. The plaintiff's surveyor had measured 33 feet from the existing centreline of the roadway to establish the sideline. The defendant's surveyor had testified that the highway had been the subject of reconstruction and therefore that the centreline had probably been moved. He positioned the boundary of the highway based on the fact that a found iron pin, the end of a brick walkway and the west side of the pump island all lined up. The Judge accepted this reasoning.

The Judge then had to determine whether or not the acts of the defendant's land surveyor in placing a survey marker on lands which the Judge had determined to belong to the plaintiff constituted a trespass. The Judge found that the land surveyor was protected from a claim of trespass by the provisions of the **Land Surveyors Act** which allowed the surveyor to enter any land while performing a survey so long as no unnecessary damage was done. The Judge found that the right to enter would include the right to place markers. The Judge finally found that if the land surveyor was protected from a trespass claim, the individual who engaged the land surveyor should also be protected.

BERGGREN v. MacLEAN
Nova Scotia Supreme Court, Trial Division
Hallett, J.
May 28, 1980.

This case arises out of a dispute between two neighbours as to the boundary line between their properties in the small community of Avondale, Hants County. In dispute is a strip of land approximately ten feet wide and running the length of their residential lots.

As children, both the plaintiff and the defendant lived on now the properties in dispute. Both were away for periods of time and both eventually acquired title to their respective properties. Reference to the legal descriptions of the lands does not permit an accurate determination of the boundary line. To illustrate the point, the descriptions in the deeds are as follows:

> Deed dated September 15, 1971, from Ronald A. Berggren to the plaintiff, registered on September 20, 1971, in the Registry of Deeds for the County of Hants in Book 290, Page 727:
>
> (*The first description relates to the land in dispute.*)
>
> ALL those lands and premises bounded and described as follows:
>
> FIRST: That lot of land and premises which was conveyed to the said Grantor, Terrence C. Blackburn, by Theresa Church Dimock et vir by deed bearing date the 1st day of June A.D. 1928, and recorded in the office of the Registrar of Deeds at Windsor in the said County of Hants in Book 146 page 300, and therein described as follows: ALL that lot of land and premises which was conveyed to the said Grantor, Theresa Church Dimock by the name of 'Theresa A. Church' by Harold E. Morris and Eve1yn Morris by deed bearing date the 3rd day of March, A.D. 1923 and recorded in the office for the Registry of Deeds at Windsor in the said County of Hants in Book 135 page 872, and therein described as follows:
>
> ALL that certain lot, piece or parcel of land and premises situate, lying and being in Avondale aforesaid, being the same lot of land which was conveyed to the said Harold E. Morris by Andrew Sharp and Lydia Sharp by deed dated the ninth day of October, A.D. 1916, and recorded in the office of the Registrar of Deeds at Windsor, in Book 121 page 357, and in said deed bounded and described as follows, viz:
>
> <u>On the Southwest by Land of James Mosher</u>;
>
> On the Southeast by land of the said Nicholas Mosher;

On the Northeast by land of William Foley, and;

On the Northwest by the main road leading from the Landing (so called) to Belmont, containing One Half Acre more or less, the above described lot of land being the same lot of land and premises which was conveyed to the said Andrew Sharp by Nicholas Mosher by deed bearing date the 5th day of October A.D. 1875 and recorded in the Office of the Registrar of Deeds at Windsor aforesaid in Book 67 page 593.

SECOND: That lot of land and premises which was conveyed to the said Grantor, Terrence C. Blackburn by the Municipality of West Hants by deed bearing date the 26th day of January, A.D. 1932, and recorded in the Office of the Registrar of Deeds at Windsor aforesaid in Book 152 page 529, and therein described as follows:

ALL that certain parcel or tract of land in the said Municipality of West Hants, described as follows:

Situated in Avondale in the said Municipality of West Hants and bounded as follows:

COMMENCING at the main road leading from the Town Landing to Belmont (so called) and running along the line between lands of Nicholas Mosher and lands of William Foley until it strikes the line dividing land formerly owned by Nicholas Mosher, Sr. (Deceased) from land of' William Foley;

THENCE along said line Northerly two hundred and eighteen feet;

THENCE Westerly until it strikes a certain corner stub marking the boundary between lands of William Simpson and William Foley;

THENCE Southerly along said main road to the place of beginning, and containing THREE QUARTERS OF ACRE more or less; the same appearing to be the property of Annie Eliza Shanks Estate by deed bearing date the 19th day of July, A.D. 1901, and registered at the Office of the Registrar of Deeds at Windsor in Book 97 Page 551.

The above described lands being the same as conveyed from Terrence C. Blackburn, et ux, Sarah Blanche Blackburn, to the Grantor herein, Roland A. Berggren, by Indenture of Deed dated the 14th day of July, A.D. 1944, and recorded at the Office of the Registrar of Deeds for Hants County on the 17th day of July, A.D. 1944, in Book 167 at Page 67.

> SUBJECT to the right of the Grantor herein, Roland A. Berggren, to remain on the said property for and during the rest of his natural life.
>
> Deed dated December, 1957, from Emma Louise Hill to the defendant and the said Emma Louise Hill, registered in the Registry of Deeds for the County of Hants on May 9, in Book 225, Page 156:
>
> ALL that certain lot, piece or parcel of land situate near the Newport Town Landing in the Township of Newport in the County of Hants aforesaid and bounded and described as follows:
>
> Southerly by the main road leading to the Town Landing; Westerly by the road leading across the marsh or new road, so called; Northerly on land owned by Andrew Shape and Easterly on land owned by Nicholas Mosher and containing two rods and three and one-half perches of land more or less.

Mrs. Hill has since died.

I have underlined that part of each description that relates to the boundary in dispute. There are virtually no measurements to assist one in locating the common boundary line between the lots. The surveyors called by the parties did some speculation in an attempt to locate the line but there was no satisfactory evidence to support the speculation as to the width of the lots. The only possible physical evidence of a line was found by the plaintiff's surveyor, John L. Lyon; he found two iron pins buried one foot below ground level on what he concluded was the boundary line between the properties.

Richard Pererra, the surveyor called by the defendant, located the boundary line in approximately the same position but he based his determination solely on a statutory declaration of a Harold Morris dated October 24, 1978, which set out that Mr. Morris owned what is now the plaintiff's property from 1916 to 1923 and that his southern boundary was ten feet south of the well on the property (the well is shown on both plans).

The plaintiff, now in his early fifties, and the defendant, now in her late forties, until 1978 had been on friendly terms. On October 11, 1977, the defendant caused to be registered in the Registry of Deeds for Hants County a statutory declaration which recites a dispute she had with her neighbour to the rear (a Mr. Russell Feltham). The statutory declaration concluded with paragraph 6 as follows:

> 6. I am fami1iar with the boundary lines of my lot of land, as described in Schedule 'A', and as a result of my familiarity with the original and proper boundary lines of my lot, it is my intention to commence action against either/or of my adjoining neighbours, Russell Feltham and Waldo Leslie Berggren.

The plaintiff was unaware of the registration of this statutory declaration and in March of 1978 the plaintiff agreed to sell his property, which contained his home and from which he operated a grocery store and a retail gasoline outlet, to a Mr. Robert Leighton. Apparently the title search undertaken on behalf of the purchaser disclosed the abovementioned statutory declaration and an objection to title was made by the purchaser based on the declaration (I have some doubt whether this was a valid objection). The purchaser refused to complete the purchase of the real property but agreed to acquire the stock in trade and was allowed to go into possession; the portion of the sale price relating to the real property was held back, presumably pending resolution of the title issue. What was done, if anything, to resolve this matter was not brought out in the evidence before me. In September of 1978 the defendant's surveyor, Western Nova Consultants Limited (Mr. Richard Pererra, President), having been provided with the Morris statutory declaration and the descriptions, established the defendant's north side line, being the boundary between her property and the plaintiff's, as shown on the plan prepared by the said surveyors dated September 27, 1978 (Exhibit 25). This line indicates that the gas pump island used by the plaintiff and at that time by Mr. Leighton encroached by one to two feet on the defendant's land. The defendant's surveyors placed a survey marker abutting the west side of the pump island shoving the location of the line as established by them. That marker is still in place.

Mr. Leighton, the purchaser of the plaintiff's business, proved to be a very unsavoury character. The plaintiff testified that Leighton wrecked the plaintiff's home and in the fall of 1979 vacated the premises, taking the two Imperial Oil gasoline pumps, which he did not own, with him. To salvage a bad situation, the plaintiff, who had never conveyed the property to Leighton, went back into possession, reopened the store and obtained the agreement of Irving Oil to install two pumps on the pump island so he could resume the operation of a retail gasoline outlet in conjunction with the grocery store. In late November, 1979, Irving Oil employees arrived at the plaintiff's property with two pumps. After installing one pump, Mr. Robert P. DeFazio, the husband of the defendant, came out of the defendant's house (the defendant was not at home at the time) and told the Irving Oil employees that they were putting the pumps on "disputed land."

Mr. DeFazio took a photograph of the employees and then called someone at Irving Oil who told him the pumps would be taken out. He testified that in three or four minutes the pumps were taken out. It is to be noted the plaintiff was not present at this time. Mr. DeFazio also testified that he did not tell the Irving Oil employees to move the pumps. None of the employees of Irving Oil who were at the plaintiff's property on that day were called as witnesses by the plaintiff so DeFazio's testimony is uncontradicted.

Following this incident, there were discussions between solicitors acting for the respective parties which culminated the defendant signing the following document:

TO WHOM IT MAY CONCERN:

I, PHYLLIS MacLEAN, hereby advise IRVING OIL COMPANY LIMITED that I will not institute court action against them if they should, at this time, replace and reinstall gasoline pumps on the land presently in dispute between myself and Waldo Berggren at Avondale, Hants County, Nova Scotia.

However, it is to be understood by IRVING OIL COMPANY LIMITED that they are to respect whatever final boundary line the courts shall impose upon myself and Mr. Berggren concerning the ownership of the land in question, and they are to immediately remove the said pumps if all or any part of them shall be found located on my land.

(Sgd.) Phyllis MacLean

In cross-examination, the defendant stated that she may have told Mr. Harley Swinamer (an Irving Oil official whom she contacted after the initial attempt by Irving Oil to install the pumps) that she did not want the pumps installed. Mr. Swinamer testified that the defendant asked him not to install the pumps; this was prior to her granting the permission set out above which was given on or about December 1, 1979. The defendant acknowledged in cross-examination that her solicitor explained to her that the plaintiff would be making a claim against her for damages for loss of gasoline sales if the pumps were not installed. When Mr. DeFazio found out his wife had granted permission for the installation, he became very angry that his wife would grant this permission without consulting him. He testified that he holds a substantial mortgage on the property. Irving Oil employees returned on or about December 4, 1979, to install the two pumps. The plaintiff again was not present. The defendant went to the area of the pump island and told the Irving Oil employees that the permission which she had given was "no longer in effect." She told them she did not want the pumps in unless they were properly installed. It is to be noted that the Western Nova survey had been completed in September, 1978, and the survey marker was in the ground adjacent to the pump island and showed an encroachment. Irving Oil employees withdrew and the pumps were not installed. The plaintiff claims, among other things, damages for profits on the loss of gasoline sales from December 1, 1979, to date.

The plaintiff's claim is set out in paragraph 14 of the Statement of Claim as follows:

14. The plaintiff therefore claims against the defendant:

(a) Damages for Trespass.
(b) An Order setting aside the Statutory Declaration filed in the Office of the Registry of Deeds for Hants County in Book 373 at Page 459.
(c) Damages for loss of enjoyment by the plaintiff of his 1ands.
(d) Aggravated Damages.
(e) Punitive or Exemplary Damages.

(f) A perpetual injunction restraining the defendant, or her servants and agents from entering upon or interfering with the lands of the plaintiff, including, inter alia, from placing survey posts, erecting fences or placing any materials upon the lands.
(g) Special Damages for the loss of use of the sum of $ 18,679.26 and the interest thereon from February 24th, 1978 to the date of trial.
(h) Such other relief as to this Honourable Court shall deem just.
(i) His Costs of this action.

In her defence, the defendant asserts that the boundary line between the properties is as established by the Western Nova survey and counterclaims that the defendant should be compensated in damages for trespass by the plaintiff on the defendant's property.

The parties admitted that they respectively had good title and were in possession, the only dispute being the location of the boundary line. All the exhibits were admitted without objection, notwithstanding the fact that of the photographs that were introduced into evidence were put in through a witness other than the photographer.

I will deal first with the principal issue, the location of the line between the properties. I am satisfied from the evidence that since 1925 to 1968, a period of forty-three years, there was a fence between the properties of the plaintiff and the defendant that extended from a point on the rear line of the properties eighteen inches north of the northern side of a wood shed located at the northeastern corner of the defendant's property; the fence ran in a straight line to the road. The fence is in the approximate location of the line referred to by various witnesses as Line A on the plan prepared by John L. Lyon and is the most southerly of the three possible boundary lines as shown on that plan. I accept the evidence of John Alex Lyon, an older gentleman called by the plaintiff, that the fence was eighteen inches from the woodshed. The line of the fence is approximately ten feet south of the lines established by the defendant's surveyor and puts the pump island north of the defendant's property on the property owned by the plaintiff. The surveyors, in reaching their respective opinions, did not have the benefit of the evidence I heard during the trial; that evidence proves conclusively that the plaintiff's predecessors in title had open, continuous, exclusive and notorious possession of the lands to the north of that fence from 1925 to 1968, so that even if there was at one time a line between the properties further to the north in the vicinity of the two pins found by John L. Lyon or that the line was only ten feet south of the well on the plaintiff's lands between 1916 and 1923 as stated in the Harold Morris statutory declaration, the plaintiff's predecessors in title were in adverse possession for forty- three years of the lands to the north of the fence and any claim by the defendant, being the abutter to the south, is therefore barred pursuant to the provisions of the **Limitation of Actions Act**, R.S.N.S. 1967, c. 168. Since the plaintiff acquired the property in 1971, he has exercised acts of ownership and has been in possession up to the line of the old fence by cutting the grass and generally occupying the property as his own.

I will review the evidence that supports the foregoing conclusions. Terrence Walker Blackburn, a farmer from Yarmouth County who is now sixty-five years of age, testified that he lived in what is now the plaintiff's home from 1925 to 1945 or thereabouts; the property was owned by his father. He impressed me as a truthful witness. He testified that there was a fence on what has been described as Line A from 1925 to 1945. He recalled that initially there was a barn on the northeast corner of the defendant's property; that it was torn down and replaced with the present wood shed; and that the line extended from the shed straight to the road. As he recalled, the fence was fastened to the barn at the northeast corner. He recalled it was a board fence from the barn past the house and then it was a pole and wire fence to the road. The fence rotted and Mrs. Hill had the fence torn down and his family replaced it. He recalled there was a gate in the fence and that they travelled to school via the gate and then across the Hill property. He was eleven years old in 1925 and thirty-one years of age when he left. He testified that his family cultivated flowers and vegetables up to the line. He testified that when the barn was torn down and the shed built, because it was smaller, the fence had to be extended in an easterly direction to meet the shed. He recalled the fence ran in a straight line to the highway. The shed has not been removed and the fence was approximately twenty feet from the well. He attended at the property a few days before the trial and testified that the shed is in the same place as it was when he lived on the plaintiff's property.

John Alex Lyon, a man of sixty-five years of age, has lived in Avondale practically all his life and is very familiar with both properties. In fact, while the defendant was living in the United States and only coming to her property for summer vacations, he looked after her property. As to the location of the boundary between the properties, he testified that his focal point was the shed. In his opinion, the line ran parallel to the wood shed eighteen inches from it and that ran the shed has never been moved. He testified that Mrs. MacLean's mother lived on the property for as long as he could remember until 1957. He was shown Exhibit 5, a photograph dated April, 1946, which shows a pole and wire fence; he testified that the fence and shed as shown in the photograph are as he remembered them and furthermore that the shed has never been moved. The last time he remembered the fence was twelve to fifteen years ago. He testified that there was room to drive a car between the fence and the pump, which is consistent with the fence being on what has been designated as Line A as opposed to either lines B or C on the Lyon plan. He recalled that the fence had rotted in the lowland near the road. I felt Mr. Lyon was a reliable witness.

G. Munroe Davis, presently of Belmont, Hants County, knew the plaintiff's property well as it was owned by his grandfather, Blackburn. Mr. Davis was around the property from the time he was ten years old in 1923 or 1924 until the Blackburns left about 1945. He remembered that the fence ran from the shed straight to the road in the approximate location of Line A as marked on the Lyon plan. He testified that the fence was close to or joined the shed as shown in the photo- graph, Exhibit 5. He said that you could not walk between the shed and the fence but maybe you could shuffle sideways. He testified that the shed was never moved and is in the same location today as it was when erected in place of the larger barn. He recalled that the fence was pole and wire near the road and a short board

fence up near the buildings. He recalled the fence being there in 1945 but he was not at the property after that time.

Carmen Elliot Church, who is living in Poplar Grove, some two or three miles from Avondale, is familiar with the property, particularly for the period from 1925 to 1945. He remembered the old fence as being very close to the shed and ran to the road. He was of the opinion that the Line marked A on the Lyon plan represented the fence line. In his opinion, the fence was close to the shed and ran fairly straight towards the road. He did not recall the barn being there. Mr. Church was sixty at the time he testified; he acknowledged in cross-examination that he did not recall much about the fence after he was a child in the twenties.

It was Mr. Church who, as an employee for the Department of Highways, dumped a load of gravel on the culvert that had been installed by the plaintiff in front of the defendant's property. Mr. Church testified that he did not dump the gravel on the defendant's property but on the highway and that he did not spread any of the gravel. This would have been in about 1975, at the time the road was paved.

Pirie Berggren, a brother of the plaintiff, lived on the plaintiff's property which was the family home from 1945 until 1960 and then off and on while his father and mother were still living. In 1945 and 1946 he was eleven or twelve years old. He testified that the shed was right next to the fence and in the location of Line A on the plaintiff's surveyor's plan. He testified there was very little room between the fence and the wood shed; that he could not squeeze through. He was shown Exhibit 5. He testified that the fence ran from close to the wood shed straight to the road as shown in the photograph and that neither the fence nor the shed were moved. He testified there was a rosebush "just on our side of the fence." I would note that this rosebush is shown on the Western Nova Consultants plan at a point which would place it on the plaintiff's property as I have determined the boundary. He testified that the well was approximately twenty feet from the fence which is again consistent with the line being where the witnesses testified the fence to have been located. In his opinion, the fence was there in 1960 and that he last recalled seeing the fence in 1968; that it was the same fence as shown in the April, 1946, photograph (Exhibit 5). He recalled there was room for a vehicle to go between the pump and the line to the south.

Orland Berggren, another brother of the plaintiff, lived on the property from 1945 until 1952, went away for a year, and lived there from 1954 to 1958 and, after that, he visited the property often until 1965 when his mother died. He has been there since. He recalled the fence being on Line A because it ran along beside the wood shed. He testified the fence was there when they moved to the property and at that time he was fourteen years of age. He testified the shed has never been moved and that the photograph, Exhibit 5, was the fence as he remembered it. He further testified that the rosebush was on the plaintiff's side of the fence and that the well was approximately twenty feet from the line. He testified to having helped his father put in the fence posts shown on Exhibit 3, and the fence shown on that exhibit is the fence in question. He recalled that the fence gradually deteriorated and it was not replaced with another one. He recalled it being a post fence from the back line to the road. This is

consistent with what the fence appears to be constructed of in the photographs, Exhibits 5 and 18. He last recalled the fence being erect twelve or thirteen years ago. He recalled the tree as shown on Exhibit 16 as having grown up on the line and is the tree shown as A on the most southerly line marked as Line A on the Lyon plan.

The plaintiff testified that he lived on the property as a boy, lived there until he was married in 1964, came back in 1967 and has been there since. He recalled the fence between the properties was never moved and ran to the wood shed as testified to by the other witnesses. The old gasoline hand pump which is shown on Exhibit 18 was put in about 1948 and remained on the property until about the mid fifties. It is to be noted that a fence is plainly visible in the photograph marked Exhibit 18. He began to operate the store in 1967 and the double pumps were put in after that date. He testified there was a corner post at the road marking the boundary between his property and that of the defendant and that all that remains is a stub in the ground which is shown on the Lyon plan as point F. I attended at the property and observed the remnants of this post. As it is flush with the ground, it is difficult to ascertain whether it was a post or the remains of one of the old trees, but the defendant and her husband testified that the stub that is in the ground was not the stump of an old tree, making it a reasonable inference that it is the corner post to which the plaintiff has testified. The plaintiff testified that the fence shown in the photographs, Exhibit 5 and 18, is the fence in question and it came down about 1968. I might note that Exhibit 18, which shows a date of 1965, would obviously have been taken sometime prior to that as the pump in the photograph is the original hand pump which was not likely being used after the mid fifties. The corner post of which the plaintiff talks is not shown on any photographs but he testified that the customers, particularly the truck delivering gas, would hook into the post and it was eventually knocked off.

All these witnesses have testified as to the existence of a fence and it is significant to note that a truck delivering gas could pass to the south of the pump island and the fence line, which would be impossible if the line between the properties was as alleged by the defendant as that line intersects the pump island. In confirmation of this, Cyril Woodman testified that he was employed by Irving Oil in the late fifties and he was familiar with Berggren's General Store and that he used to deliver gas there. He said he used to back his truck in between the pump and the tree and that the truck was about eight feet wide. He testified they used to brush against the tree. Other testimony has indicated that the corner post was in the vicinity of the tree which has been identified as tree B on Exhibits 10 and 18, which is the tree he brushed against when delivering the gasoline. The significance of this is that it confirms there was some eight feet between the pump island and the line. He made no reference to the fence. It may be that at the time when he was delivering, the fence had deteriorated in the front swampy portion of the property.

Contrasted with the testimony of the plaintiff and the witnesses called by the plaintiff is the evidence of the defendant who was born in 1933 and lived on the Hill property, so-called, (now the defendant's) until 1953 when she moved to Halifax where she worked until 1958. During this period, she returned home most weekends. Since 1958, she lived in the United States, coming home every year with some

exceptions until she and her husband moved into the property as a permanent home several years ago. She testified that she could not remember a fence between the properties. In support of her testimony, a Mrs. Mary Taylor, who has lived in Avondale for the past twenty-five years, testified that she walked by the properties many times over the years and could not recall a fence. It should be noted that there has not been a fence for the past twelve to fifteen years.

Apart from the fact that I found the plaintiff's witnesses credible as to the existence of a fence from about 1925 to approximately 1968, the photographs introduced in evidence confirm the existence of a fence. The print, Exhibit 18, made in 1965 was likely taken between 1948 and the mid fifties by reason of the fact the photograph shows the old hand gas pump which was located on the plaintiff's property in those years and shows the fence as plainly visible. In the photograph, Exhibit 5, which bears the date April 29, 1964, the fence is plainly visible as well and, as best one can tell from a photograph, is in the location as testified to by the witnesses called by the plaintiff, that is, close to the north side of the shed on the defendant's land. The photographs confirm it is a pole fence as described by Orland Berggren and had a gate opening opposite the plaintiff's well which is visible in the picture. Between the years 1946 and 1953, the defendant was living on what is now her property. In 1946 she would have been thirteen years of age and approximately twenty years of age in 1953 when she left to work in Halifax. I can understand that she might not remember the fence being there in the thirties as she would have been very young but it is difficult to understand why she cannot remember the fence in the forties and the early fifties.

As stated previously, I find there was a fence between the properties in the location testified to by the witnesses called by the plaintiff. The approximate location of this fence line was imposed by the plaintiff's surveyor on the plan he prepared and has been identified on that plan as Line A by various witnesses. The surveyors called by the parties had established the boundary line some ten feet to the north of where I have determined the old fence was located. I have indicated the limited evidence available to them upon which they respectively determined the location of the line.

In my opinion, any claim the defendant may have had to the land north of the fence line is barred by the **Limitation of Actions Act**, R.S.N.S. 1967, c. 168. There is no one with a better title to those lands than the plaintiff.

The boundary line between the properties shall be fixed as running from a point on the rear line of the properties eighteen inches north of the north side of the defendant's shed in a straight line in a westerly direction to a point on the east side of the highway right-of-way opposite the so-called stub in the ground shown as point F on the Lyon plan. I might point out that counsel for the defendant conceded in argument, and with good reason, that the line established by Lyon as opposed to that established by the defendant's surveyor was the more correct location of the line between the properties as between those two competing lines on the basis that Mr. Lyon discovered two iron pins buried in the ground in the location as shown on his plan. If one was to assume this *was* at one time the boundary between the properties and if I accepted Lyon's opinion as to the location of the line, although it is some eight to ten

feet north of the line that I have determined as the boundary between the properties, it places the gas pump island entirely on the property of the plaintiff. Accordingly, there would be no trespass by the encroachment of the gas pump island on the defendant's property as alleged.

Moving to a different issue, it was difficult for the surveyors engaged to determine the boundaries of the *highway right-of-way*. I have heard their evidence and I am satisfied that the better opinion is that of the defendant's surveyor on this issue. The plaintiff's surveyor simply measured thirty-three feet from the centre of the travelled way and determined the boundary of the highway right-of-way and, accordingly, the western line of the properties of the plaintiff and the defendant. The defendant's surveyor testified that he could not find in existence a plan of the highway right-of-way. Mr. Pererra has considerable experience in the surveying of highway rights-of-way and is familiar with the records of the Department of Highways. He testified that very often when a road is reconstructed as was the road in front of the properties in dispute, the centre of the reconstructed road is not located exactly in the centre of the right-of-way. He was of the opinion that the eastern side of the highway right-of-way was several feet to the east of where it was located by Mr. Lyon. He based his opinion on the following physical evidence: the end of a brick walkway on the defendant's property, an iron pin on the north side of the plaintiff's store lot and the west side of the gasoline pump island all are in a line with one another. He was of the opinion that at the respective times these objects were placed on the lands, the persons responsible for their placement likely checked the location of the highway right-of-way. If the plaintiff's surveyor's line was to be accepted, the objects would be on the highway right-of-way. I accept Mr. Pererra's opinion and find that the eastern boundary of the highway right-of-way in front of the properties in dispute is as shown on the plan prepared by Western Nova Consultants Limited dated September 27, 1978 (Exhibit 25).

The result of these findings is that the pump island is located on the plaintiff's property and does not encroach on the defendant's. It is to be noted that the plaintiff did not ask for a declaration as to the location of the boundary line but, as this was the principal issue, I will grant an Order fixing the boundary between the properties in accordance with the findings that I have made.

The plaintiff claims damages for trespass and counsel for the plaintiff argued that the registration in the Registry of Deeds of the statutory declaration made by the defendant which contained the paragraph that she intended to commence a law suit against one or the other of her neighbours was a trespass. I reject his argument. To have a trespass, there be an entry on the lands. The registration of the document in the Registry of Deeds is not a trespass. Plaintiff's counsel also argued that the defendant was liable for damages arising out of the aborted sale of the plaintiff's property to Robert Leighton. I reject this argument. In my opinion, any loss suffered by the plaintiff by reason of the failure to complete the sale to Robert Leighton was caused by questionable decisions made in March of 1978 to recognize the title objection was valid and, secondly, in allowing Robert Leighton into possession. There had been no trespass whatsoever up to this point in time and, accordingly, there could be no damages arising out of a trespass by the defendant.

As to the plaintiff's claim that the defendant claimed ownership of the lands on which the gas pumps were to be located and that this constituted a trespass, I likewise reject the argument. The only evidence before me as to what transpired between the defendant and the Irving Oil employees, when those employees returned to install the pumps, was the defendant's as none of the Irving Oil employees who were at the property on that date were called. The defendant testified that she advised the employees that the land was in dispute and asked them not to install the pumps. In my opinion, this is not an entry and therefore not a trespass. Likewise, the action of her husband on the first occasion Irving Oil employees came to install the pumps, apart from the fact that he was not acting with her authority, did not constitute an entry upon which an action in trespass could succeed.

The only *possible* act of trespass was the placing of a survey marker which raises the interesting issue as to whether the placing of a survey marker by a surveyor engaged by the defendant to ascertain the location of her property line in itself constituted a trespass by the defendant. The act of placing a survey marker on a neighbour's property has all the earmarks of a trespass in that:

> (1) The defendant engaged the surveyor who entered on the plaintiff's land and placed the marker. Therefore, it can be argued that she caused the marker to be placed on the plaintiff's land;
> (2) Even the most trifling act of entry or placing an object upon a neighbour's land is a trespass;
> (3) The entry by the defendant's surveyor was obviously *intentional* as opposed to accidental;
> (4) Even though made under *mistake* of law or fact that the defendant owned the land, it is nevertheless a trespass. (**Salmond on Torts** (15th Ed.), pp. 48-53.)

I did not find any cases on the point. I am, however, of the opinion that the placement of a survey marker by a surveyor on what is subsequently determined to be a neighbour's land does not constitute a trespass by the property owner who engages the surveyor as the entry was lawful.

The surveyor is immunized from liability in trespass provided he does not do unnecessary damage by reason of Section 16 of the **Nova Scotia Land Surveyors Act**, S.N.S. 1977, c. 13, which states as follows:

> Every Nova Scotia Land Surveyor and his assistants when engaged in professional land surveying may enter upon and pass over any land, doing as little damage as possible; and, save as hereinafter provided, no action shall lie against such Nova Scotia Land Surveyor or his assistants for any act done under this Section, provided that such Nova Scotia Land Surveyor shall be liable for any unnecessary damage done by him or by his assistants under this Section.

I am satisfied that the surveyor in question did as little damage as possible and therefore there can be no suggestion of his liability for having done unnecessary damage. Furthermore, I am of the opinion that by implication as a necessary adjunct to making an entry, the surveyor is entitled to place markers on a property. As he is only liable for unnecessary damage, in my opinion, a surveyor is therefore entitled to cut trees, if necessary to the survey he is conducting, even though some damage may result. Where the surveyor can by legislation lawfully enter and conduct a survey which, in my opinion, includes the placement of a small marker, the property owner who engaged him, even if it can be said that he caused the entry to be made and even though it is an invasion of property, as the entry is lawfully justified by the statute, there can be no action for trespass. To have a trespass, the entry must be without lawful justification. I refer to the following quotations from **Salmond on Torts** (15th Ed.), at p. 48:

> The wrong of trespass to land (trespass *quare clausum fregit*) consists in the act of (1) entering upon land in the possession of the plaintiff, or (2) remaining upon such land, or (3) placing or projecting any material object upon it - in each case *without lawful justification*. (emphasis added)

At p. 679:

> When a statute specially authorises a certain act to be done by a certain person, which would otherwise be unlawful and actionable, no action will lie at the suit of any person for the doing of that act. For such a statutory authority is also a statutory indemnity, taking away all legal remedies provided by the law of torts for persons injuriously affected. No compensation is obtainable save that, if any, which is expressly provided by the statute itself. This defence of statutory authority has its most important application in actions of nuisance, but it is one of general application throughout the whole sphere of civil liability. This statutory authority and indemnity extends not merely to the act itself but also to all its necessary consequences. When the legislature has authorized an act, it must be deemed also to have authorized by implication all inevitable results of that act; for otherwise the authority to do the act would be nugatory.

Therefore, I find that the defendant did not trespass on the plaintiff's land by reason of the placement of the survey marker and, accordingly, there can be no damages arising from trespass. It would seem to me that the better practice in suits of this nature would be to ask for a declaration as to the location of the boundary line rather than simply sue in trespass as, if nothing more than the establishment of a line has been done, it would appear that an action in trespass does not lie; unless, of course, the property owner attempting to establish the line took the subsequent step of erecting a fence, which would be action going beyond that of the survey and thus not afforded the immunity provided by the legislation.

There can be no question that the plaintiff suffered economic loss by reason of Irving Oil declining to install the gasoline pumps as the plaintiff has been unable to sell gasoline in conjunction with his grocery

store operation since approximately the end of November, 1979, to date. Although the plaintiff did not specifically plead the wrong of “injurious falsehood”, he did allege that "the defendant by her actions caused him to suffer loss of enjoyment and occupation of his lands." In my opinion, even if the plaintiff had alleged this wrong, the plaintiff has failed to prove facts to support such an action. In **Salmond on Torts** (15th Ed.), at p 531, the author deals with the conditions of liability for injurious falsehood and states:

> To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained of were untrue; (2) that they were made maliciously – *i.e.*, without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby.

In my opinion, the plaintiff has failed to prove that the defendant made *false* statements. The evidence merely shows the defendant was disputing the boundary line between the properties; this was not a false statement but was factually correct. Secondly, there was no fence between the properties and the defendant was justified in engaging a surveyor to determine her boundary line and the surveyor was justified in fixing a line albeit in what has been determined by me to be the wrong location but, it is to be noted, very close to the line established by the plaintiff's surveyor, both of which lines are some ten feet to the north of the old fence which was no longer in existence at the time of the surveys. Under the circumstances, the statements the defendant made, even if I was prepared to find that what she did was an assertion that she owned part of the land on which the pumps were located, were not made *maliciously*, that is, without just cause or excuse, as she was relying on the survey of an established firm of surveyors.

I have concluded that there was no actionable wrong to form the basis of an award for damages against the defendant, but had I found that there was an actionable wrong, I am satisfied the plaintiff would have had a claim for consequential loss with respect to the loss of profits on gasoline sales as this loss was not too remote and was anticipated by the defendant (**McGregor on Damages** (13th Ed.), paras. 21, 46, 1022 and 1064-1066).

I will now consider the defendant's counterclaim that the plaintiff trespassed on her property by spreading gravel on that portion of her property south of the boundary line between the properties of the plaintiff and the defendant. There is no question that a small portion of the northwest corner of the defendant's property, where it abuts the highway right-of-way, is passed over by cars approaching the plaintiff's gasoline pump island from the south. Mr. Church, the Department of Highways employee, testified that he dumped a load of gravel on the highway right-of-way in the vicinity of the culvert that passed in front of the defendant's property. It is clear from the findings that I have made that this culvert is on the Department of Highway's right-of-way and not on the defendant's land. The only evidence as to the spreading of the gravel by the plaintiff was that of the plaintiff. He testified he spread the gravel in the area of the culvert which, as I have stated, is on the highway right-of-way. The

defendant has not adduced evidence sufficient to prove a trespass and her claim in trespass must be dismissed.

It is to be noted the customers of the plaintiff have in the past trespassed over the defendant's property and can be classified as invitees of the plaintiff but I am satisfied that a property owner is not liable for the acts of trespass of his invitees. There having been no trespass by the plaintiff, his servants or agents, there can be no damages nor any need to issue an injunction as requested by the defendant.

It would be my opinion that the plaintiff should construct a barrier along his property line as I have established it so as to prevent cars approaching his pumps from crossing the corner of the defendant's property as it is conceivable that the installation of the pumps in the present location could constitute an actionable nuisance as the location invites a customer wishing to pull up to the east side of the pump island to pass over the defendant's property.

The defendant testified to a flooding condition in her basement which she blamed on the plaintiff. The defendant did not adduce any credible evidence to support such a claim. The defendant's counterclaim is therefore dismissed.

I do not see the need to issue an injunction at this time.

As to the costs, the plaintiff has succeeded in establishing the line he alleged and the defendant failed to establish the line she alleged as being the boundary between the properties. The plaintiff failed to prove that he was entitled to the damages he alleged and the defendant failed to prove a trespass. Part of the time of the trial was taken up with the plaintiff's attempt to prove these damages. The plaintiff, having been successful on the principal issue raised at the trial, shall have his costs to be taxed less 15%, being my estimate of the time of the trial taken up with the issue of damages and the costs of defending the counterclaim.

Judgement for plaintiff in part.

KING v. BROOKINS See 40 N.S.R. (2d) 278

Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Pace, JJ.A.
July 8, 1980.

The Plaintiff (Respondent) King and the Defendant (Appellant) Brookins owned properties at Oxford, Cumberland County. The King property had the benefit of a 15' wide right of way over the Brookins property in order to access his greenhouse operation. Brookins undertook some landscaping and constructed a lawn which encroached onto the right of way, effectively narrowing it to 6' in width. As a result, King was unable to bring large vehicles to his business and he sued. At trial, King was successful and Brookins was ordered to restore the right of way to its full width and to pay King $5500 for loss of profits and $500 general damages for interference with the right of way. Brookins appealed.

The Court of Appeal agreed with the Trial Judge that the right of way was clear in the documents and that the interference with it by Brookins had been substantial. The Court did modify the Trial Judge's decision in two respects. First, the Appeal Court held that Brookins only had to restore the first eleven feet of the right of way to its original grade. It held that King could use the full fifteen feet and might have to drive over a slight slope in the remaining four feet to do that. Second, the Court modified the awards of damages. It completely eliminated the award of $5500 for lost profits based on a lack of appropriate evidence of the actual loss to King. It then reduced the award of $500 in general damages for interference with the right of way to a nominal $100.

KING v. BROOKINS
Nova Scotia Supreme Court, Appeal Division
MacKeigan, C.J.N.S., Coffin and Pace, JJ.A.
July 8, 1980.

This is an action involving a right-of-way. As the trial judge said at the beginning of her decision, the issue was whether the defendant Bessie Brookins who is the appellant in these proceedings has the right to alter the right-of-way.

The respondent, a greenhouse operator in Oxford, Cumberland County, Nova Scotia purchased his property from Gordon's Greenhouses Limited and it was conveyed by deed dated July 12, 1972.

The property, reasonably large, fronts on the south western side of the Black River Road and goes back generally in a south westerly direction to a lake called "Salt Pond" or "Salt Lake". The right-of-way is thus described in the deed:

> TOGETHER WITH a right-of-way, for the purposes of repairing or maintaining Greenhouses and for the purpose of snow removal over lands of Gordon's Greenhouses Limited adjoining the above described lands and more particularly described as follows:
>
> BEGINNING at a point on the Southwestern boundary of the Black River Road, said point being distant Southeasterly Two Hundred and Eighty Feet from the Easterly corner of land formerly of Amos Halliday, now of one Black; thence Southwesterly along the Western side line of the lands herein granted to the shore of the Salt Pond; thence Northwesterly along the shore of the Salt Pond, Fifteen feet; thence Northeasterly parallel with the Western side line of lands herein granted to the Black River Road; thence Northeasterly along said road Fifteen Feet more or less to the place of beginning.

Some time later on May 8, 1975, Gordon's Greenhouses conveyed the adjoining property to the appellant Bessie Brookins and that deed set out a reservation of the same right-of-way in these words:

> SUBJECT HOWEVER to a certain right-of-way (now held by Earle King), for the benefit of a certain lot of land situate to the southeast of the above described lot and having a frontage on Black River Road of One Hundred and Ninety-seven (197') Feet for the purpose of repairing or maintaining greenhouses and for the purpose of snow removal over a strip of land fifteen feet wide running from Black River Road to the Salt Pond and situate on the extreme southeasterly side of the lands herein conveyed.

It is common ground that in 1978 the appellant constructed a home on the land she purchased in 1975 and that the respondent cooperated with her fully and consented to her using the land covered by the easement during this construction. Counsel for the respondent urged that this fact was relevant in that it indicated the respondent attempted at least to act in a neighbourly fashion. That is of course true, but it is also a fact that must be taken into consideration in the matter of damages.

Problems arose when the appellant landscaping her new home built a lawn which encroached on the right-of-way some nine feet and sloped in such a way, as pointed out by the trial judge, that "Mr. King indicated the landscaping created water drainage to his foundation whereas previously the water used to drain toward the lake."

Madam Justice Glube said that this easement was created by express grant and that it had neither been released nor abandoned.

She referred to **Baker v. Harris**, [1930] 1 D.L.R. 354 and **Levy v. Stevens**, (1978), 26 N.S.R.(2d) 236; 40 A.P.R. 236.

In **Baker v. Harris** an appeal from Kelly, J., upholding an easement was dismissed.

Kelly, J., had stated at p. 357 that:

> Where the title to an easement has been perfected, an extinguishment by release can rarely be effected in any other manner than by an express release, or by circumstances so cogent as to preclude a quasi-releasor from denying the release.

In **Levy v. Stevens** at p. 249, I said:

> In **Smith v. Morris** [1935] 2 D.L.R. 780, Masten, J.A., at p. 782 set out the principles as expressed in **Cannon v. Villars** (1878), 8 Ch. D. 415, at pp. 420-1, and at p. 783 he made this comment:
>
> > '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.'
>
> I also agree with the trial Judge's finding that there was no intention on the part of Fred Nowe to abandon the right-of-way and that a mere cessation of use for a limited period does not result in the loss of the right to use.

The trial judge after referring to these cases decided that the respondent, Earle H. King, had a "right-of-way spelled out in his deed", and that he is entitled to have "the full amount of the right-of-way as originally granted".

The respondent's chief complaint as indicated in his discovery was his inability to go on the nine-foot portion of the right-of-way that has been converted into lawn by the appellant.

When the respondent gave evidence on discovery it was pointed out to him that there was nothing to prevent him from going on the lawn which had been constructed by the appellant and that in fact he had never been forbidden by the appellant in passing over the lawn with vehicles when it was necessary for him to gain access to the right-of-way. His reply was that this was impossible because there was a terrace having a forty-five degree angle and reaching a height of five feet – that is, crossing it with vehicles and equipment would not only destroy the lawn, but would be a source of danger to the persons driving such equipment. I quote the following questions and answers:

> Q. But your main concern is damaging the lawn, is that right?
>
> A. My main concern....
>
> Q. ...is damaging the lawn?
>
> A. My main concern, as I pointed out to you before, is the fact that I cannot use equipment in there to the full advantage that I should on the right-of-way that was provided for me when I purchased my property, and therefore I am suffering a loss of livelihood on account of it, and it is going to cost me loss of revenue on the property.

The appeal raises two main issues:

> 1. The appellant's disregard of the right-of-way.
>
> 2. The damage if any that flowed from her actions.

On the first point I am in substantial agreement with Madam Justice Glube, although I would modify to some degree the remedy which she suggests.

The deeds in question are very clear. This is not a mere license. It is an interest in land – an easement of fifteen feet which was not only set out in the deed to the respondent, but very clearly reserved in the conveyance to the appellant. A substantial reduction in that easement could very well affect the value of the respondent's property.

It was, however, limited by the words of the grant:–

> Together with a right-of-way, for the purposes of repairing or maintaining Greenhouses and for the purpose of snow removal over lands of Gordon's Greenhouses Limited adjoining the above described lands...

The respondent submitted evidence that he needed the whole fifteen feet for trucks and front-end loaders. He mentioned particularly the method of installing the plastic covering for the greenhouses. He took the position it was impossible to do this work when faced with the appellant's obstruction of the easement which reached a height of some five feet.

I agree that an intrusion of a nine-foot slope on a fifteen foot right-of-way is substantial. There is evidence, however, that a large truck was able to drive through the right-of-way quite safely. The respondent's answer is that he needs the full right-of-way for manoeuverability. He is supported to some degree by the evidence of the appellant's father, Mr. Kenneth Gordon, an experienced greenhouse operator –

> Q. And it appears since you conveyed him a right of way adjoining his property fifteen feet wide, there was probably a good reason for it?
>
> A. Yes, because, I figured he needed room to work.

Nevertheless the pictorial evidence does indicate that the whole fifteen feet does not require levelling, but that the respondent could carry out all the functions envisioned by his deed by a reduction to its original level of the first eleven feet of the right-of-way.

In my view a mandatory injunction should issue directing the appellant to modify the slope of her lawn in this manner.

There is a possibility that in the use of his trucks and equipment under this proposal the respondent might very well drive over portions of the appellant's lawn even with this modification; the appellant does not object to this and in any event the respondent has a right to do so for the purposes of his easement even if she did object.

The trial judge awarded $5500 for special damages and $500 for general.

The evidence on damages was very unsatisfactory and sketchy. The respondent was even claiming a substantial sum for interference by the appellant when she was constructing her house, to which I referred earlier in these reasons. It is clear that the respondent gave complete agreement to this interruption of his use of the easement and cannot now claim damages for that period.

His evidence as to loss of profits is unsatisfactory. He cannot complain of interference with his right-of-way until 1979. He showed, however, no attempt or intent to raise any crops in either greenhouse in

1979, nor any attempt or intent in 1978 or 1979 to repair the dilapidated greenhouses so that a crop could be raised. His speculative estimates as to the profits on the crops he might have grown and sold thus do not permit any assessment of special damages.

I would modify the award of damages and allow only nominal general damages of $100.00 for the interference of the right-of-way.

A form of order implementing Madam Justice Glube's decision was issued by the Prothonotary at Amherst under date of April 23, 1980. It was not, however, approved and initialled by the trial judge. It is a complete nullity and of no effect. We must disapprove the practice, all too common, of issuing an order without the approval of the judge in whose name it is purported to be made.

An order should now be issued by this court approving the learned judge's decision as to liability, ordering the appellant to abate the obstruction to the extent above noted and awarding the respondent damages of $100.00 plus costs of the trial.

The appeal should be allowed, but since success has been divided, without costs of appeal to either party.

Appeal allowed in part.

SWINEMAR v. HATT and TARBOX See 41 N.S.R. (2d) 453

Nova Scotia Supreme Court, Trial Division
Grant, J.
June 5, 1980.

This case involved the interpretation of deed descriptions. The Plaintiff and the Defendants all owned land which had come from the same original grantor - Wilson. Wilson had acquired the parent parcel in 1941. In 1959 he conveyed a parcel to the Defendant Hatt. Hatt subsequently subdivided his parcel and conveyed some of it to the Defendant Tarbox. In 1975, Wilson conveyed the balance of the parent parcel to the Plaintiff, Swinemar. Subsequently, a dispute arose between Swinemar on one side and Hatt and Tarbox on the other as to who owned what lands and the parties ended up in court. Swinemar claimed that the Hatt and Tarbox properties amounted to less than two acres. Hatt and Tarbox claimed that they owned 54 acres. Both had employed land surveyors who supported their claims.

The deed descriptions were ambiguous. The Trial Judge did not even bother to quote the descriptions for the readers. The Judge reviewed the evidence of the land surveyors, the parties and others.

The Judge discussed earlier cases which had dealt with ambiguous descriptions and under what circumstances extrinsic evidence could be considered to interpret them. The Judge adopted the reasoning of earlier cases that extrinsic evidence might be considered to interpret a description to determine not what the grantor claims to have conveyed, but what actually was conveyed. To that end, the Court might consider subsequent conveyances and acts of possession and other relevant evidence.

The Judge found that the additional evidence which had been presented to the Court had established that the interpretation argued by the Defendants Hatt and Tarbox was the correct one. The Judge dismissed the claim of the Plaintiff Swinemar.

SWINEMAR v. HATT and TARBOX
Nova Scotia Supreme Court, Trial Division
Grant, J.
June 5, 1980.

This is an action for declarations of title, damages and an injunction. The defendant Tarbox seeks damages and an injunction.

One Woodrow Wilson (Wilson) acquired certain lands from John Lacey in 1941, which lands include the lands in issue. This deed is shown in Exhibit 1, Document #9. In 1959 Wilson conveyed certain lands to the defendant Hatt (Exhibit 1, Document #10) which, in turn, were conveyed partially to the defendant Tarbox (Exhibit 1, Document #13).

In 1975 Wilson conveyed what purported to be the balance of his lands, *i.e.* 325 acres more or less, to the plaintiff (Exhibit 1, Document #12).

The point in issue is exactly what lands were conveyed from Wilson to Hatt as Wilson could only convey to Swinemar those lands which he had left following his conveyance to Hatt.

The plaintiff alleges that the defendant Hatt received only 1.55 acres in the conveyance, Exhibit 1, Document #10. The plaintiff produced a plan, prepared by A. and E. Turner & Associates, N.S.L.S., showing the location of the approximately 1.55 acres. This is Exhibit 2.

The defendant Hatt alleges that he received approximately 54 acres and Exhibit 6 is the plan of survey, prepared by Errol B. Hebb, N.S.L.S., showing the location thereof. Erwin Turner, N.S.L.S., was retained by the plaintiff. He spoke to Woodrow Wilson, who had owned all the land at one stage, and also to Charles Hatt, an adjoining landowner. There appeared to be a conflict in the stories so surveyor Turner obtained the deeds and did his survey. He was unable to follow the description in the deed to the defendant Hatt, Exhibit 1, Document #10, but upon rotating north 90 degrees to the east he could make some sense of it. The theory under which Turner operated was that the plaintiff took what property Wilson had left after his conveyance to the defendant Hatt, Exhibit 1, Document #10. Turner attempted to locate on the ground and to plot on his plan, Exhibit 2, the lands conveyed in Exhibit 1, Document #10. Turner located the Owls Head Road and continued it easterly to the lands of Charles Hatt, now Clyde Hatt. He then followed what he considered had been a meadow to a stop-water or stop-dam. He found a fence in the area he considered had been a meadow, but the meadow now is completely grown with alders. He thought perhaps it was the Penall meadow. He then followed along a road which he assumed to be the Lake Road to the Owls Head Road. He said that a half or a quarter mile further south there is another dam called the Croft dam which was not relevant to his survey. He was unable to locate the 25 foot right-of-way described in the deed, Exhibit 1, Document #11.

Turner said he found fences and blazes in the area of his survey. He said he found a gap of 155 feet or so from what had been the meadow west to the stop-dam. That is, the area he thought had been a meadow did not continue over to the stop-dam.

The Lake Road is shown on Exhibit 2 as a footpath or trail. The stop-dam is shown on Exhibit 2 as 70 – 80 feet long, 3 feet wide and 1 – 2 – 3 feet high. Turner described the Croft dam as being 700 – 800 feet long, 8 – 10 feet high, and much wider on top. Surveyor Turner considered that Exhibit 1, Document #10, was not prepared by a surveyor and did not feel you could apply that document to either plan without some rotation and/or addition to it.

Woodrow Wilson, 68 years of age, of Gold River, has no formal education and is a predecessor in title to all parties. He purchased the property from John Lacey in 1941. In 1959 he said he sold off some of the land to the defendant Hatt. Hatt was looking for a camp lot and he thought $25.00 was a fair price. He said he had no recollection of walking around it with the defendant Hatt, but he cut a line around it. The plaintiff and the defendant Hatt went to a magistrate and had the deed, Exhibit 1, Document #10, prepared and signed.

Wilson later gave a second deed to the defendant Hatt for a roadway, Exhibit 1, Document #l1. He also said that the defendant Hatt bought two roads from him, but he could only find one of the deeds. In preparation of the deed to the plaintiff Wilson said he worked out the description from the plans that were available and said he wanted to be correct. In 1975 the plaintiff paid him $2,000.00 for 325 acres. Although it purports to give all the cranberry bog, it does in fact only give one-half, as the balance of it belongs to Clyde Hatt.

James Hatt, age 68, is a farmer of Beech Hill since 1931. He said he cut some logs for the defendant Hatt. He spoke of the location of the Ash Hollow Road, but he did not know the location of the Lake Road.

Aubrey Hatt, age 79, half-brother of Woodrow Wilson, said he had never heard of the Lake Road. He did know of the William Rafuse Road, or the Willy Rafuse Road. Sometimes it was called a hay road, and sometimes the Old Annapolis Road. The Ash Hollow Road meets the Old Annapolis Road and goes to Ash Hollow. He had knowledge of the stop-dam and the Croft dam. He said there was no road to the stop-dam. He also spoke of a road called the Engine Road.

Fred Swinemar, the plaintiff, age 42, purchased the property from Wilson in 1975. He figured at that time there was a camp lot which had been sold out to the defendant Hatt and a roadway. All the knowledge he had came from Wilson. He had not gone out over the bounds with Wilson before he purchased from him.

Errol Hebb has been a Nova Scotia Land Surveyor since 1974. He was retained by the defendants and given their deeds. He then examined the Crown grants, aerial photos and attended at the locus. It

seemed to him that there was a missing dimension in the deed to the defendant Hatt, Exhibit 1, Document #10, that is, from the dam west to the Lake Road. He found the Lake Road to be more prominent than the Ash Hollow Road, which was really a footpath perhaps used by a team and cattle years ago. However, on the Lake Road he found a place where rocks had been put on the sides for better passage. There were wheel ruts five or so feet wide in many places. He also found blazes from the Croft dam west to the Lake Road and evidence of a boundary line. This he took to be 10 to 20 years old.

Hebb said there had also been some attempt to obliterate the blazed boundary line on the south. At the point of intersection of his extension of the Stewart or Croft dam, in a westward direction to the Lake Road, he found an iron bar in a pile of stones. Also near the Lake Road he found a pile of rocks and decayed corner stake.

On the east side of the Lake Road where it abuts the south side of the Owls Head Road, he found an iron bolt and a stake and stones.

Surveyor Hebb was of the opinion that using Exhibits 5, 7 and 8 the deed to the plaintiff fitted into the general description of the Woodrow Wilson lands without infringing on the lands that Hebb considered were conveyed by Wilson to the defendant Hatt and on to Tarbox. In his investigation of title and reconciling the conveyances relating to the lands, the Nauss grant and the Hawboldt grant gave the plaintiff a total of 393 and 1/3 acres without infringing on the conveyance from Wilson to Hatt, Exhibit 1, Document #10, even though the deed to the plaintiff called for only 325 acres.

Fred Hatt is 60 years of age. In 1959 he purchased from Wilson, Exhibit 1, Document #10. He said he saw Wilson in July of 1959. He, Woodrow Wilson and Teddy Wilson, a deceased brother of Woodrow Wilson, walked off approximately 60 acres. They started at the northwest intersection of the Owls Head Road and the Lake Road and there put in a stake. They then went easterly to the lands of Lucy Hatt and put in another stake. They then went generally southerly down to the Stewart or Croft dam where another post was placed; then west to the road, where another post was placed. Then they went out the road to the place of beginning. He said they travelled east and south by the meadow to the Croft dam, a stop-dam. They then chopped out the south line. He said the Lake Road is very good and can be used by a truck. From time to time it was called the Rafuse Road, the Lake Road, the Stewart Road, and the Farm Road (when potatoes were grown there). It was an original Indian trail to Annapolis, called the Annapolis Road. The defendant Hatt said he paid $1,800.00 on the basis of 60 acres at $30.00 an acre. He later bought the road in Exhibit 1, Document #11, for $180.00. It was to have been $200.00, but as it went over some of his own land this was reduced to $180.00. He said the reason for purchasing this was that his mother objected to his use of the Owls Head Road which she owned or controlled.

The defendant Hatt said he had chopped campfire wood, cord wood, Christmas trees, and used the lands for hunting and fishing. The defendant Tarbox is his nephew and he sold it to him for $1,000.00. He said there is a gravel pit in the area of the disputed lands.

The defendant Hatt produced a notebook which seems to be of great age with the following entry:

> 60 ac land – W. Wilson – 28 July 1959 – $1,800.00.

I have no doubt as to the authenticity of this *aide-memoire*. He said it is a form of diary which he kept for important matters and that he recalled writing in it at Wilson's house – 28 July 1959 – the date the deal was struck. He said it was not written at the lawyer's office, or at the date of the deed, merely the date that the agreement was reached. He said he did not obtain a receipt from Wilson as he knew Wilson could not write.

Clyde Hatt, age 57, is a brother of the defendant Fred Hatt. He was not present at the purchase. He outlined the cranberry bog which he now owns. He spoke of the use of the Lake Road and the Ash Hollow Road as well as the several names for the roads.

Wade Tarbox, age 33, an employee of Twin Cities, is a nephew of the defendant Hatt. He paid $1,000.00 in 1975 and obtained a deed to the property. He walked around the perimeter of the property with Clyde Hatt. Since his purchase he has used it for hunting, fishing, cutting firewood, Christmas trees, and has made an application to the Department of Lands and Forests relating to silviculture.

There are certain findings of fact which I make as follows:

> 1. The plaintiff's deed is for 325 acres. I accept the evidence of surveyor Hebb that the plaintiff got a total of at least 393 acres under that conveyance.
>
> 2. In 1975 the plaintiff paid $2,000.00 for these lands, *i.e.* Exhibit 1, Document #12.
>
> 3. The deed from Wilson to the defendant Hatt was for 54.2 acres, as is shown on the Hebb plan.
>
> 4. I accept the evidence of surveyor Hebb that Exhibit 1, Document #12, gives the necessary acreage to the plaintiff without including any of the lands I find were conveyed by Wilson to the defendant Hatt.
>
> 5. I accept that the defendant Hatt paid $1,800.00 for approximately 60 acres at $30.00 per acre in 1959.

6. I accept the evidence of the defendant Hatt as to the location of the bounds, the acreage, the price, and the circumstances relating to the sale.

With the passage of time from the 1959 conveyance I find that Wilson is confused about the amount of land he conveyed. I do not know the exact circumstances under which the instructions were given to the magistrate who prepared the deed but with the vendor being illiterate, the chance of an error increases dramatically. In Exhibit 1, Document #11, there were two grantors and two grantees thus reducing the margin for error. Exhibit 1, Document #12, was made by Wilson with input from the plaintiff with plans, etc. and I have no doubt but that more care was put into its preparation than into Exhibit 1, Document #10.

Examining the transaction from its overview or overall point of view it does not strike me as being reasonable that in 1959 Fred Hatt would pay $1,800.00 for one acre and yet in 1979 the plaintiff would pay $2,000.00 for 325 or 393 acres in the same general area. No particular reason was expressed for the purchase by Fred Hatt in 1959. It was boggy land and there was no evidence of any particular aspect of it which would attract the very superior price.

I find that the dam referred to in Exhibit 1, Document #10, is in fact the Stewart or Croft dam and that the southern boundary of the lands were omitted in that conveyance. I find that the Lake Road used in Exhibit 1, Document #10, is the old Annapolis Road, the Benjamin Rafuse or Lake Road, or Farm Road as shown on Exhibit 6. I reject the suggestion that it is the Ash Hollow Road as shown on Exhibit 6.

In **Matthews v. Goode** (1924), 56 N.S.R. 543, when dealing with ambiguous descriptions the court held that subsequent conveyances and acts of possession could be taken into consideration to determine the true boundaries.

A similar situation was dealt with by this court in **Saueracker et al. v. Snow et al.** (1976), 14 N.S.R.(2d) 607; 11 A.P.R. 607. In that case Jones, J., (as he then was) upon being faced with a description containing an ambiguity concluded that the general rule is that vagueness of description in the plaintiff's deed compels us to resort to extrinsic evidence to ascertain not what the grantor intended to convey, but, applying the words used in the subject matter, what did they convey. Where the words used are ambiguous, as they are here, parole 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. In these circumstances I must endeavour to interpret the language having regard to the extrinsic evidence. In that case there is a comprehensive resume of the authorities in this province relating thereto.

In **Re Risser's Beach** (1977), 20 N.S.R. (2d) 479; 27 A.P.R. 479, Jones, J., (as he then was) ruled that the deeds contained a latent ambiguity and he admitted extrinsic evidence including maps, plans and

parole evidence of witnesses who had known of the road to assist in determining the location. At p.484;

> ...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 face 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 found 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 the 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.

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 Wensledale 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).

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;...

I therefore find that the conveyance, Exhibit 1, Document #10, includes the lands set forth in Exhibit 6, the description used by surveyor Hebb. In all probability a line was dropped in the giving or receiving of instructions by an illiterate vendor and a magistrate some 20 odd years ago. I am prepared to grant a declaration of title in whatever form the defendants require. Although there may have been entry on the defendants' lands by the plaintiff, there was no evidence of any damage done and I am prepared to fix the general damages of the defendants at $1.00. I am not prepared to grant punitive damages. If the defendants, or either of them, require an injunction I will hear them on that aspect of it at a later date.

The action of the plaintiff against the defendants is therefore dismissed with costs against the plaintiff.

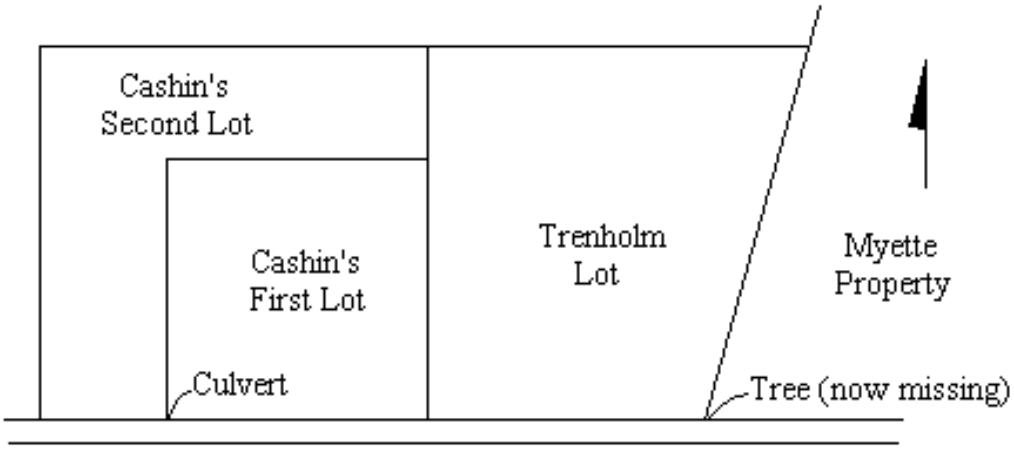
The counterclaim of the defendant Tarbox is allowed with costs. There shall be one bill of costs with one brief and one counsel fee.

Judgment for defendants.

TERRANCE JEROME CASHIN, Plaintiff, v. Unreported
NORMAN TRENHOLM and SONNIE TRENHOLM, Defendants
Supreme Court of Nova Scotia, Trial Division
Hallett, J.
October 21, 1981

Cashin (the Plaintiff) and the Trenholms (the Defendants) lived on adjoining properties in Antigonish County. Both had acquired their properties from Delorey. This case was the result of a dispute over where the common boundary line was located.

The properties are shown on the following sketch:



Delorey first sold a lot to Cashin in 1973. The lot was laid out by Arthur Briggs, N.S.L.S. on instructions from Delorey and Cashin. The lot began at the eastern end of an existing culvert on the north side of the road. It then ran easterly along the north side of the road for 215 feet, then northerly at right angles to the road for 210 feet, then westerly, parallel with the road 215 feet, then southerly 210 feet to the place of beginning. Briggs also measured from the southeast corner of the Cashin lot to a tree which marked the eastern boundary of the Delorey land with the Myette property. A plan and description were prepared. The plan showed the culvert but the description did not. Instead, the description started the measured distance westerly from the tree and proceeded around the lot. The description did not make reference to the plan, but the plan was attached to the deed which was registered. Delorey retained land to the west of the lot sold to Cashin so that he could have access to the land behind the Cashin lot which he retained.

Later in 1973, Delorey sold a lot to the Trenholms. The lot was described as extending on the road from the eastern boundary of the Delorey property (at the boundary with Myette) to the Cashin property but no distance along the road was given. The lot extended back from the road for 250 feet. No survey was done and no plan was prepared.

In 1975, Delorey conveyed another parcel to Cashin. This parcel was "L" shaped and bounded the first Cashin lot to the west and the north. Significantly, the description for this parcel began at "the southwest corner of other lands of the Grantee [Cashin] and being the eastern most edge of a culvert."

Cashin and the Trenholms eventually got into a dispute over the location of their common boundary. The Trenholms retained Stewart MacPhee, N.S.L.S. to locate the boundary. MacPhee approached the problem by first determining where the Delorey/Myette boundary was located and measuring westerly from that point the distance in the Cashin description. The problem was that the tree to which the Cashin lot had been related had disappeared. MacPhee's survey placed the common boundary some 30 feet to the west of where the Briggs line had been located. Trenholm put up a fence and the Cashins' garden was destroyed. The law suit then began.

MacPhee testified that he had simply re-established the Cashin property as it was defined in Cashin's deed. He described how he had established the Delorey/Myette boundary by projecting a boundary line across the road.

Cashin retained Lloyd Taylor, N.S.L.S. to perform a survey. Taylor laid out the Cashin lot from the edge of the culvert, as Briggs had done.

The Judge reviewed the testimony and determined that there was an ambiguity in the location of the Cashin lot between the deed description and the plan. The Judge held that because the plan was attached to the deed, it formed part of the deed and could not be ignored. Also, even though the culvert was not mentioned in the description, it was shown on the plan and was also mentioned in the second deed from Delorey to Cashin.

The Judge reviewed the method used by MacPhee to establish the Delorey/Myette boundary and held that the boundary was not correctly located. Specifically, the Judge noted that if the boundary line across the road was projected, it intersected the north side of the road some 55 feet to the east of where MacPhee had placed the Delorey/Myette boundary. Also, the Judge held that there was no evidence before the Court which showed that the Delorey/Myette boundary was a projection of the boundary on the south side of the road.

The Judge held that the better evidence indicated that the Cashin lot should be laid out by starting at the culvert as Briggs and Taylor had done.

TERRANCE JEROME CASHIN, Plaintiff, v.
NORMAN TRENHOLM and SONNIE TRENHOLM, Defendants
Supreme Court of Nova Scotia, Trial Division
Hallett, J.
October 21, 1981

This is a trespass action arising out of a boundary dispute between the plaintiff and the defendants, both of whom acquired their adjacent lots from a Mr. Ottis Delorey. The area in dispute is located on the north side of the road between Bayfield and Tracadie in the County of Antigonish and measures approximately thirty feet in width along the road and two hundred and fifty feet in depth. Mr. Cashin's residence is on his lot and located to the west of the disputed area and Mr. Trenholm's trailer is located to the east of the disputed area.

In spring of 1973, Mr. Ottis Delorey agreed to sell to Mr. Cashin a parcel of land on the north side of the Bayfield Road. Mr. Delorey and Mr. Cashn attended at the site with a surveyor, Mr. Arthur Briggs, who testified that on April 12, 1973, the three of them met at the property and the lot of land to be transferred to Mr. Cashin was pointed out to him. The southwest corner of the lot was to be located at a point on the north side of the Bayfield Road at the eastern edge of a culvert. Mr. Briggs was to then measure easterly on the north side of the road a distance of two hundred and fifteen feet. The depth of the lot was to be two hundred and ten feet. Mr. Briggs also testified that Mr. Delorey showed him a large tree as being the most eastern boundary of the Delorey property. Mr. Briggs measured the distance from the southeast corner of the lot as he had laid it out to this tree; he found it to be two hundred and twenty-six feet more or less, he then prepared a plan showing the Cashin lot to be located on the north side of the Bayfield Road two hundred and twenty-six feet more or less westerly of what appears on the plan to be the eastern boundary line of the Delorey lands. The plan shows the lot to be two hundred and ten feet in depth, two hundred and fifteen feet on the road and bounded on the west by lands of Ottis Delorey, and having is southwest corner located opposite the culvert. Mr. Briggs testified that he drove pins in at the four corners of the Cashin lot. Mr. Briggs prepared a description in the following words:

> "ALL that certain lot, piece or parcel of land, situate, lying and being at Bayfield, in the County of Antigonish, Province of Nova Scotia, and being more particularly bounded, and described as follows:
>
> BEGINNING North eighty degrees thirty minutes West (N 80^0 30' N) a distance of two hundred twenty-six (226) feet more or less, along the northern boundary of Bayfield Road from the intersection of the northern boundary of Bayfield Road, with the eastern boundary of lands of Ottis Delorey, said Road being one hundred (100) feet in width;

THENCE North nine degrees thirty minutes East (N 9^0 30' E) and perpendicular to said Highway, a distance of two hundred ten point zero (210.0) feet;

THENCE North eighty degrees thirty minutes West (N 80^0 30' W) and parallel to said highway, a distance of two hundred fifteen point zero (215.0') feet;

THENCE South nine degrees thirty minutes West (S 9^0 30' W) a distance of two hundred ten point zero (210.0) feet to the northern boundary of Highway;

THENCE South eighty degrees thirty minutes East (S 80^0 30' E) along said highway a distance of two hundred fifteen point zero (215.0) feet to the place of beginning.

All bearings being magnetic, 1973."

It is to be noted that there is not a reference in the description to the culvert and, secondly, that the description commences two hundred and twenty-six feet more or less from the intersection of the eastern boundary of the Ottis Delorey lands with the north side the Bayfield Road. The evidence discloses that the property to the east of Delorey was owned by a Mr. Myette and this line is referred to as the boundary between Delorey and Myette. The deed to Cashin was prepared in due course, signed on May 3, 1973, and registered at the Registry of Deeds for the County of Antigonish on August 3, 1973. There is no reference in the description to the plan. However, the plan was attached to the deed and was registered in the Registry of Deeds as part of the deed.

Mr. Cashin testified that Mr. Delorey wished to retain a parcel of land to the west of the lot sold to him, on which parcel was constructed a driveway which gave Mr. Delorey access to his back lands which he had also retained. He testified that Mr. Delorey had shown to his father and to him a large spruce tree marking Mr. Delorey's eastern boundary. The tree is no longer there. It would appear that the tree blew down in a windstorm about 1974 and was removed from the site.

Subsequent to Mr. Delorey selling the lot to Mr. Cashin, he sold an adjoining lot to the defendants which is evidenced by a conveyance to them dated September 28, 1973. The land conveyed to the defendants is described in the deed as follows:

"ALL THAT CERTAIN lot, piece or parcel of land situate, lying and being at West Arm Tracadie, in the County of Antigonish, in the Province of Nova Scotia, and more particularly bounded, and described as follows, that is to say:

BOUNDED on the South the road leading from West Arm Tracadie to Bayfield;

BOUNDED on the East by lands now or formerly in the possession of Michael Myatt;

> BOUNDED on the West by lands recently conveyed. to Terrance Cashin by the Grantor herein;
>
> BOUNDED on the North by lands of the Grantor herein.
>
> The lands conveyed herein are lands that have a depth of two hundred and fifty (250) feet from the northern boundary of the said Bayfield Road. The lands conveyed herein are parts of the lands conveyed to the Grantors herein by Deed from Mr. Walter Landry."

It is to be noted that the deed to the defendants states that the lands are bounded on the east by the Myette property and on the west by the Cashin lot. The description does not state the foot frontage of the lot on the Bayfield Road. The lot is two hundred and fifty feet in depth. This deed was not registered until July 22, 1981.

On November 7, 1975, Ottis Delorey conveyed another parcel of land to Mr. Cashin which, for the most part, gave him a greater depth his lot but also gave him additional land on the western boundary of the original lot. The description of this deed dated November 7, 1975, starts as follows:

> "BEGINNING at a point on the northern boundary of the Bayfield Road, said point being the southwest corner of other lands of the Grantee and being the eastern most edge of a culvert;"

I make reference to this as evidence of Ottis Delorey's intention that the southwestern corner of the lot that was originally conveyed to Mr. Cashin was located at the easternmost edge of the culvert as testified to by both Mr. Cashin and the surveyor, Mr. Briggs.

Over the years, from 1973 to the events which led to this law suit in 1981, the parties had some discussions as to the location of the boundary between their respective properties. Mr. Cashin maintained a garden to within five feet of the Briggs line and Mr. Trenholm constructed his driveway just to the east of the Briggs line. Things seemed to have come to a head when Mr. Cashin planted a hedge in the approximate location of the boundary as he considered it to be and Mr. Trenholm felt he had constructed the hedge a foot or two on his lands. Mr. Trenholm engaged a surveyor, Mr. Stewart MacPhee, who carried out a survey of the property and prepared a plan dated June 17, 1981. Mr. MacPhee located the boundary line between the properties to be approximately thirty feet to the west of the Briggs line and he also advised Mr. Trenholm, who in turn advised Mr. Cashin. Mr. Trenholm then constructed a barbed wire fence along the MacPhee line, cutting off Mr. Cashin's access to his garden. Mr. Treholm had put up the barbed wire fence because he had cattle. The cattle then proceeded to roam within the boundaries of the Trenholm property as established by Mr. MacPhee, thus ruining Mr. Cashin’s garden and hedge. The law suit was commenced the next month.

Mr. Stewart MacPhee is a licensed surveyor. He testified that he first located the boundary between the Delorey and Myette properties and then measured westerly from that point ywo hundred and twenty-six feet and fixed the eastern boundary of the Cashin lot, being some thirty feet to the west of the Briggs line. In his evidence, he stated that in his opinion the issue was whether one would hold to the eastern boundary of the Delorey property or the culvert as being the controlling point. He chose the eastern boundary as being the most reliable starting point because that was how the description of the Cashin lot commenced and because he did not find any evidence of pins on the ground marking boundaries of the Cashin lot. He located the east line of the Delorey property by projecting a fence located on the south side of the highway marking the boundary of lands of one Landry and projecting it on the same angle northerly across the road. He testified that there was no evidence whatsoever on the ground of the line between Delorey and Myette on the north side of the Bayfield Road. As indicated, the lands on the south side of the road were owned by a Mr. Landry. Mr. MacPhee testified on examination by counsel for both parties that he had had conversations with Mr. Delorey, who advised him that the tree which Mr. Delorey had pointed out to Mr. Briggs was about on the same line as the line south of the road which he projected across the road and established as the boundary between Delorey and Myette. Mr. MacPhee had not checked to determine if this line was formerly an old Grant or boundary line that crossed from one side of the road to the other. Mr. MacPhee did not think there was any question as to where the Cashin lot began; that is, two hundred and twenty-six feet from the east line of Delorey. He admitted that had he seen pins on the ground marking the eastern line of the Cashin lot, it may have affected his opinion. In short, he plotted the lot strictly from the description and was satisfied that he had properly established the eastern side line of the Delorey property. The result of this interpretation is to move the Cashin lot to the west where it would encroach on the lands that the witnesses testified had been retained by Mr. Delorey because his driveway to his back land was located in this area. It is to be noted that there was no reservation in the deed from Delorey to Cashin reserving a right-of-way over any of the lands conveyed to Mr. Cashin.

Mr. Lloyd. K. Taylor, a Nova Scotia Land Surveyor, was engaged by Mr. Cashin to do a survey. Mr. Taylor testified that in his opinion the best evidence available to determine the location of the Cashin lot was the eastern edge of the concrete culvert as shown on the Briggs plan. He admitted that normally one plots a description from point of commencement but that he did not in this case because there was an "ambiguity" between the description of the land in the Cashin deed and the plan attached to the deed coupled with the fact that there is just not enough land between the west and east lines of the Delorey property to enable Mr. Trenholm's lot to be two hundred and twenty-six feet along the road and Mr. Cashin's lot to be two hundred and fifteen feet along the road, while retaining an area for Mr. Delorey's right-of-way. However, he testified that had no reason to question MacPhee's location of the eastern boundary of the Delorey property. But he did not consult the Crown Grants or to attempt to establish the eastern boundary of the Delorey lands, although he had established the western line of the Delorey property several years previously. It is to be noted that the Delorey lines run at a very sharp angle to the road whereas the parcel of land sold to Mr. Cashin is described as running at right angles the road.

In his direct testimony, Mr. Trenholm stated that he had never seen pins in the disputed area until they had been put in by a friend of Mr. Cashin several years after he had moved to the property. However, he acknowledged in cross-examination that in 1973, the year he acquired the property, he was aware of pins on the north side of the Bayfield Road and that the most easterly pin was in the vicinity of the disputed area, although he located the pin in the area of the MacPhee line. I find that this evidence confirms the testimony of Mr. Briggs that he had put pins in at the four corners of the Cashin lot. I can only speculate as to what effect this evidence would have had on Mr. MacPhee had he been made aware of it prior to the preparation of his Plan.

The issue in this case is quite simple. Where is the eastern boundary of the Cashin lot as the defendants' lot was acquired after the conveyance from Delorey to Cashin and is bounded on the west by Cashin? To determine the location of a parcel of land on the ground, the Court must first look at the deed. In this case, the deed contains not only a legal description but the Briggs plan. There is a discrepancy between the legal description and the Briggs plan if Mr. MacPhee has properly located the eastern boundary of the Delorey lands because if the Cashin lot is located on the ground as shown on the MacPhee plan, its southeast corner is only one hundred and ninety-five feet more or less from the eastern boundary of the Delorey lands and not two hundred and twenty-six feet more or less as called for in the description and as shown on the Briggs plan.

Although there is no reference in the legal description to the plan, the plan is attached to the deed and is therefore an integral part of the Cashin deed and must be considered by the Court just as are the words of the description of the lot. Similarly, although the culvert not specifically mentioned in the words of the legal description, it is shown on the plan which is an integral part of the deed and it must be looked at as part of the written document evidencing the intention of Mr. Delorey and Mr. Cashin as to what parcel of land was being conveyed. Were the Court not to look at this plan which is part of the deed on the basis that there was no reference in the words used in the description to either the plan or the culvert, would be to turn a blind eye to obvious written evidence of intention of the parties. As there is an ambiguity as to what was intended by Mr. Delorey to be conveyed to Mr. Cashin if MacPhee has correctly located Delorey’s eastern line, the Court is entitled to consider extrinsic evidence in order to ascertain the intention of the parties.

Ascertaining the location of the first parcel of land transferred by Mr. Delorey is critical as the defendants acquired only the lands that remained between the Myette-Delorey line and the Cashin lot. The south-western corner of the Cashin lot cannot at the same time be located at the eastern edge of the culvert as shown on the plan if the southeastern corner is two hundred and twenty-six feet westerly from the eastern boundary of the Delorey property as established by Mr. MacPhee.

I accept Mr. Briggs’ evidence that the land to be transferred from Mr. Delorey to Mr. Cashin was to start on the north side of the Bayfield Road at the eastern edge of the culvert and proceed westerly two hundred and fifteen feet. I accept Mr. Briggs' evidence that he was told by Mr. Delorey that a large tree was Mr. Delorey's eastern boundary and that Mr. Briggs measured to that tree a distance of two

hundred and twenty-six feet. I find on a balance of probabilities that the tree was not located on the line that has been established by Mr. MacPhee. As Mr. Trenholm stated, Mr. Delorey seemed confused about the location of his lines. Neither Mr. Myette nor Mr. Delorey testified; apparently Mr. Myette is dead and Mr. Delorey is in Ontario. The evidence put forward by the surveyors respecting their discussions with Mr. Delorey indicate that the tree which he considered to be his boundary line was about on the same line as the wire fence on the Landry property on the south side of the road. The eastern line of the Landry property on the south side of the road, if projected at right angles to the road, intersects the north side of the road approximately fifty-five feet to the east of the boundary line between Delorey and Myette as determined by Mr. MacPhee. Considering the angle at which the Delorey side lines ran to the road, it is probable that the spruce tree to which Delorey referred Mr. Briggs was east of the line that has now been established by Mr. MacPhee. The tree could have been opposite the wire fence on the south side of the road to the observation of a lay person and be east of the line established by Mr. MacPhee by as much as thirty feet. There is no evidence on the ground of a line on the north side of the road in the area that Mr. MacPhee has established as being the boundary line between the Delorey and Myette lands. There was no evidence before me that the lines on the north side of the road should necessarily be projections of the lines on the south side other than the hearsay evidence that Mr. Delorey advised Mr. MacPhee that he thought the Landry line south of the road line was projected to the shore. Mr. MacPhee had not checked the Crown Grants or older deeds to determine if this was so. The old tree to which Mr. Briggs was referred was removed in 1973 or 1974 and no one gave evidence that would accurately locate where that tree was. However, there is one fact that is beyond dispute. The concrete culvert was there in 1973 and is still there. I find that Mr. Briggs drove pins on the north side of the Bayfield Road at the southwest and southeast corners of the lot he was instructed to lay out for Mr. Cashin and it is a reasonable inference that he put them at the corners of that lot as shown on his plan which is an integral part of the deed; that is, at the southwest corner being at the eastern edge of the culvert, and the southeast corner, being two hundred and fifteen feet measured in an easterly direction up the road.

The subsequent conveyance by Delorey to Mr. Cashin of an additional parcel of land in which reference is made to the southwest corner of the original lands sold to Cashin, being at the eastern edge of the culvert, the acts of possession by Mr. Cashin and the location by Mr. Trenholm of his driveway just to the east of the Briggs line, all point to the location of the Cashin line as being shown on the Briggs plan. In addition, there is the evidence that Mr. Delorey wished to retain lands to the west of the lot sold to Cashin and this is consistent with the Cashin lot being located as on the Briggs plan and inconsistent with the Cashin lot being located as determined by Mr. MacPhee.

Mr. Trenholm's deed does not call for a measurement of two hundred and twenty-six feet along the road. There is no evidence that Mr. Trenholm was led to believe he was acquiring two hundred and twenty-six feet of road frontage or that he was misled by the reference in the Cashin deed to this measurement. Mr. Delorey conveyed to the defendants what road frontage remained between his east line and lot he sold to Cashin. Mr. Trenholm saw the pins at the corner of the Delorey property in 1973. There is no evidence on the ground of the line between the Delorey and Myette properties and,

in fact, Mr. Trenholm's trailer straddles the line between Myette and himself as established by Mr. MacPhee.

In summary, considering the whole of the Cashin deed, which includes both the words of the description and the plan, coupled with the extrinsic evidence of the intention of the parties to that deed and the acts of possession, I find that the Cashin lot is located as shown on the Briggs and Taylor plans rather than on the MacPhee plan. The evidence used by MacPhee to locate the eastern line of the Delorey property was unreliable. I therefore find that the defendants trespassed on the Cashin lot

The relief the sought by plaintiff shall therefor be granted:

(a) A declaratory order shall issue establishing the boundary between the plaintiff and the defendants in accordance with the survey plan drawn by Mr. Briggs;

(b) An injunction shall issue prohibiting the defendants from further acts of trespass and conversion;

(c) The plaintiff shall have costs of this action.

BREAN and BREAN (Plaintiffs) v. THORNE and THORNE (Defendants) and ROYAL TRUST CORPORATION OF CANADA, CROSS, SALESKI, ROBB and ROBB & ASSOCIATES LIMITED (Third Parties)

See 52 N.S.R. (2d) 241

Nova Scotia Supreme Court, Trial Division
Rogers, J.
June 11, 1982

The Thornes purchased a building lot at Middle Porter's Lake, Halifax County. They were assisted by Cross, a real estate agent. Saleski was the listing agent for the property and both Cross and Thorne worked for Royal Trust Corporation. There was some confusion as to which lot was being sold when the Thornes visited the site, but they were reassured that the one they viewed was the one being sold. Following the purchase, they began to build a home on the lot they thought they had purchased, but unfortunately they built on the lot next to the one they had purchased, which was owned by the Breans. As the building process went along, the Thornes retained Robb to prepare a location certificate. There was a "rush" on the job as construction had proceeded beyond the footing stage and the building permit required that a location certificate be filed with the municipality before construction went beyond that stage. When the field crew delivered the notes to the draftsperson, the notes didn't match the subdivision plan. The decision was made in the office that the field crew had transposed two numbers by mistake and the numbers were "untransposed" and the certificate was issued showing the house to be on the lot which it was supposed to be on, not the one that it was actually on. The house was completed and the mistake was not uncovered until one year later. The Breans sued the Thornes. The Thornes sued Cross, Saleski, Royal Trust Corporation and Robb as Third Parties claiming that they were responsible for the house being located on the wrong lot.

The Judge first considered what remedy was appropriate and after a careful review of the law, decided that the offending house had to be removed.

Next, the Judge reviewed who among the parties should be responsible for the cost of removing the house. The Judge found that the conduct of the real estate agents and their employer fell below what the standard required and they were required to pay to the Breans all costs for removal of the footings, filling the foundation in and restoring the lot to its earlier state, including an amount for damages for the loss of trees that could not be restored.

The Judge then held that the Breans themselves were responsible for costs of removing the foundation, the basement floor and the floor joists above the basement. That finding was based on the fact that the Breans should have had the location certificate prepared after the footings were placed. Had they done that, presumably the land surveyor would have caught the mistake and no further construction would have occurred.

Robb was held responsible for all costs following the involvement of the survey company based on the negligence of not discovering that the house was being built on the wrong lot.

The Judge held that the Thornes were entitled to have the existing house moved to their lot, or if that was impractical, to have a similar house built and that the parties would be responsible for those expenses in the same proportion as they were responsible for the removal of the Thorne house. The exact amount of those damages was left for a later hearing.

For an excellent discussion of this case, see an article by J.F. Doig in The Canadian Surveyor (Vol. 37, No. 1, Spring 1983) titled “The Ultimate Trespass.”

BREAN and BREAN (Plaintiffs) v. THORNE and THORNE (Defendants) and ROYAL TRUST CORPORATION OF CANADA, CROSS, SALESKI, ROBB and ROBB & ASSOCIATES LIMITED (Third Parties)
Nova Scotia Supreme Court, Trial Division
Rogers, J.
June 11, 1982

Kent and Dianne Thorne inadvertently built their home at Middle Porter's Lake, Halifax County, completely on the property of the plaintiffs, J. Lawrence Brean and his wife Ellen T. Brean. Mr. and Mrs. Brean bring this action for trespass to their land, claiming primarily a mandatory injunction requiring the Thornes to remove the dwelling and general damages to compensate them for the lost use of their property. In lieu thereof, they claim general damages sufficient to restore their lot to its condition prior to the erection of the building.

Mr. and Mrs. Brean purchased Lot A-l of the K.D. Hobrecker Subdivision in Middle Porter's Lake, Halifax County, in November of 1973 for $4,000.00. It is a rectangular lot, stretching approximately 160 feet from the east side of Mill Lake Road to the shore of Middle Porter's Lake, with a width of approximately 90 feet. At the time of purchase, the lot was fairly thickly covered with evergreens together with a good deal of underbrush.

Mr. Brean has been a lawyer with the Legal Department of Canadian National for many years. When he and his wife bought their property, they were living in Moncton, New Brunswick. They wanted some property in the Halifax area where they were both raised and harboured notions of one day building a cottage on the lot. Despite this stated inclination, however, they did not make much use of the property. In the years 1974, 1975, 1976 and 1977, they visited the property with their children perhaps three or four times during each summer for daytime picnics and a swim. In October of 1978, they moved from Moncton to Halifax and in 1979 moved into a new home in Dartmouth. During 1978, the Breans made no visits at all to their lot which is only about 20 minutes away from the Dartmouth-Halifax area. And they did not visit the lot again until September 1979 when they discovered that the Thorne house had been built upon it.

As will be described later, Mr. and Mrs. Thorne had built a new home on the Brean lot and moved in to occupy it with their family in December of 1978. In August of 1979, just before the Breans say they discovered the encroachment on their property, the Thornes became aware of the error and the events began which have led up to this lawsuit.

There is no dispute among the parties that the Thorne dwelling was built wrongly on the property of the Breans, without their consent. This amounts to a trespass of the most obvious kind for which the Breans must be allowed appropriate redress.

The first question is what remedy is the most appropriate in the circumstances.

Once that question has been determined, there will arise the question as to how, in what proportion and, if at all, the defendants and the third parties should share the costs of complying with the remedy imposed.

And then, the further question will arise as to whether the third parties, or any of them, are liable to the defendants Thorne for damages incurred by the Thornes as a result of the wrongful placing of the house on the lot and, if so, in what proportion.

The whole matter of the remedies available in cases of encroachment was thoroughly canvassed by Cowan, C.J.T.D., in the case of **Gallant and Gallant MacDonald and MacDonald and The Director, The Veterans' Land Act** (1972), 3 N.S.R.(2d) 137. That was a case involving an encroachment of some few feet. At page 142 of the decision he said this:

> "It is quite clear that I have power to grant an injunction ordering the removal of the encroachment and the restoration of the plaintiffs' lands to their original condition, as near as may be."

He went on to say, however, on page 142:

> "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."

The Chief Justice then went on to review the law as set out in **Mayfair Property Company v. Johnston**, [1894] 1 Ch. 508, **Gross v. Wright**, [1923] S.C.R. 214; [1923] 1 W.W.R. 382; [1923] 2 D.L.R. 171, **Kerr on Injunctions** (6th Ed) at pp. 41-42, **Gilpinville Ltd. v. Dumaresq**, [1927] 1 D.L.R. 730. He concluded his review by referring to **Shelfer v. City of London Electric Lighting Company**; **Meux Brewery Company v. City of London Electric Lighting Company**, [1895] 1 Ch. 287, about which he said that it:

> "...was the case of an action claiming an injunction to restrain the defendants from so working their engines and so carrying on their works as, by reason of vibration or otherwise, to cause damage to adjoining premises, or as to interfere with the enjoyment of the premises by the occupier. The Courts of Appeal found that **Lord Cairns' Act** (21 & 22 Vict. c. 27) in conferring upon Courts of Equity a jurisdiction to award damages instead of an injunction, did not alter the settled principles upon which those courts interfered by way of injunction."

"A.L. Smith, J., said at pp. 322-323:-

> 'Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.'"

"In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction."

"There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section."

"In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out."

"In my opinion, it may be stated as a good working rule that -

> (1) If the injury to the plaintiff's legal rights is small,
>
> (2) And is one which is capable of being estimated in money,
>
> (3) And is one which can be adequately compensated by a small money payment,
>
> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:-

then damages in substitution for an injunction may be given."

"There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction."

In the **Gallant** case, Cowan, C.J.T.D., determined that when the tests in the **Shelfer** case were applied, damages were not the appropriate remedy and a mandatory injunction was granted.

The facts in this case are far more serious than in the **Gallant** case. The encroachment amounts to a complete usurpation, an expropriation if you will, of the plaintiffs' rights to their property. Quite clearly, when the tests set out in the **Shelfer** case are applied, it is not difficult to reach the conclusion, and I do so, that the injury to the plaintiffs of their rights is not small, it is one that is not capable of being adequately estimated in money, and cannot be adequately compensated by a small money payment.

It is true that the Breans made relatively little use of their property and that, as will be seen later, the property was not entirely unique nor too unlike its neighbour Lot A-2 owned by the Thornes and upon which the Thorne dwelling should have been built. But it is going too far to say that in those circumstances damages in exchange for a deed or a court compelled exchange of deeds to Lots A-l and A-2 is the appropriate remedy.

The question of mandatory injunction versus damages as the remedy in cases of property encroachment was again considered by our Trial Court in **MacDonald v. Lawrence and Lawrence** (1980), 38 N.S.R.(2d) 319; 69 A.P.R. 319. That case involved an encroachment of a few feet. Madam Justice Glube, as she then was, cited with approval the decision in **Gallant and Gallant v. MacDonald and MacDonald and The Director, The Veterans' Land Act** (supra), and the case of **Dempsey v. J.E.S. Developments Ltd.** (1976), 15 N.S.R.(2d) 448; 15 A.P.R. 448, a decision of MacIntosh, J., of our court. After discussing the law on the subject, Madam Justice Glube reserved the matter of the appropriate remedy in the circumstances in the hope that the parties could settle their differences. They could not, and she filed a supplementary decision, reported in 40 N.S.R.(2d.) 626; 73 A.P.R. 626, in which she said at page 627:

> "As stated in the initial decision, I have referred to the cases cited by counsel for both parties. When dealing with land, wherever possible, the court should not interject itself as an expropriating authority requiring a party to give up any portion of their land unless they are mutually willing to reach that accommodation."

And then she found that in the circumstances the only appropriate remedy was a mandatory injunction.

In the only case referred to me where the facts are somewhat similar to the ones in this case, that is, the building of a complete house on the wrong property, **MacLean v. MacDonald** (1980), 50 N.S.R.(2d.) 108; 98 A.P.R. 108, Madam Justice Glube, as she then was, said this at page 112:

> "I do not accept that a person should have his or her lands taken away by expropriation by the court which is effectively what I would be doing if I granted damages in this case and allowed the house to remain and transferred ownership to the defendant."

I agree. And although the effect of a mandatory injunction is the tearing down of a fine new home, and seems draconian, the Breans are entitled to the full use of their property without let or hindrance from the Thornes or anyone else.

In my opinion, therefore, the plaintiffs are entitled to an injunction enjoining the defendants from continuing the trespass created by the erection of a dwelling on their lot at Middle Porter's Lake and requiring the defendants to remove the dwelling from the lands of the plaintiffs and to restore those lands to a similar condition to those existing prior to the building of the dwelling. The operation of the injunction, however, shall be stayed for three months to allow time for settlement of the various interests and issues in this case to be properly discussed and worked out among the parties.

Since a number of trees of varying sizes were cut down to make room for the construction of the home and the landscaping around it, it is obvious the land cannot be restored completely to its former state. Damages for their loss must be the remedy. To arrive at an amount, however, is difficult and little evidence is before me to assist in arriving at a figure. In the absence of such evidence, I calculate that the removal of the trees would reduce the value of the lot by 15%. The Brean lot was purchased in 1973 for $4,000.00. No other evidence of the lot value is before me. In 1978 Lot A-8, a reasonably similar lot next to Lot A-l, was purchased by the Thornes for $10,500.00. I, therefore, for the purposes of this decision, fix the present value of the Brean lot without improvements at $12,000.00. Fifteen percent of this figure is $1,800.00, which I assess as damages in lieu of replacing the trees destroyed to make room for the Thorne dwelling.

The plaintiffs Brean are entitled also to damages for their lost use of their lot at Middle Porter's Lake. Considering, however, the very limited use to which the Breans put the property and their complete lack of interest in the property in 1978 and 1979 until September, in my opinion, damages ought not to be much more than nominal. I fix damages, therefore, under this head at $500.00.

The plaintiffs claim no further damages except damages in lieu of a mandatory injunction if the court sees fit not to grant a mandatory injunction.

The second part of this decision deals mainly with the events that led up to the construction by the Thornes of their house on the Brean lot involving the relationship between the defendants Thorne and the third parties.

In the spring of 1978 Kent Thorne was in the market to purchase a lakefront lot on which to build a home. He has been the purchasing agent for Major Foods Limited for seven years. He saw an advertisement by the Royal Trust Company in the Halifax Mail-Star in March or April of 1978 as a result of which he arranged with Mr. Roger Cross, a salesman with Royal Trust Company, to visit Lot A-2 of the K.D. Hobrecker subdivision on Middle Porter's Lake, Halifax County, an area some 20 minutes drive east from Dartmouth.

Mr. George Saleski is also a salesman with the Royal Trust Company and has been since May of 1972. Cross, Saleski and the Royal Trust Company are third parties in this action and were made so at the instance of the defendants Thorne. Saleski had taken the listing for the property from the owner of Lot A-2, Barry Montgomery. His evidence was that he visited the lot prior to this litigation only once, when it was shown to him by Montgomery. At that time he posted a "For Sale" sign on the property. Saleski did not determine from Montgomery where the boundaries of Lot A-2 were. The property was just pointed out to him in a general way. No attempt was made to walk the boundaries or the property or to locate corner posts or stakes. The visit to the property took no more than 15 minutes.

Mr. Saleski says that he placed the sign in the middle or slightly to the right side of Lot A-2. His recollection of the visit, however, is not good and his information as to the location of the lot from Montgomery is sketchy. Kent Thorne remembers the sign to be in a different place on the lot and although the evidence with respect to the position of the Royal Trust "For Sale" sign is confused, I am inclined to accept Thorne's recollection as the more accurate one. He placed the sign in from the Mill Lake Road somewhere near the boundary of Lots A-l and A-2, Lot A-l being to the left of Lot A-2 as one stands on the road looking toward the lake.

Despite the rather cursory treatment evidently given the location of Montgomery's lot, Mr. Saleski was quite candid in saying in his evidence that his normal practice was to site the vacant lot in the owner's presence, and he said that any real estate agent should be able to locate the lot being sold a client. A "For Sale" sign should be erected so as to be relied upon to locate the lot. He agreed under cross-examination that a purchaser could assume that the property between the Royal Trust "For Sale" sign and the left boundary of Lot A-l was in fact Lot A-2. This apparently was the situation faced by Thorne when he was shown the property later by Roger Cross.

Roger Cross in the spring of 1978 was a salesman with the Royal Trust Company. He had been with the company for a year. He began his career as a real estate salesman in 1972 with Fireside Realty, where he obtained his licence. He stayed with Fireside for two years, and then went with the Real Estate Department of Central & Eastern Trust Company for a year and a half then with the Real Estate Department of Canada Permanent, and then to the Royal Trust Company. He left the employ of Royal Trust in the fall of 1978 to work with Pat King Limited.

Mr. Cross was duty agent at the Royal Trust office at the Holiday Inn in Dartmouth when Kent Thorne telephoned. He and Thorne arranged to meet at the property at Middle Porter's Lake. The evidence of what happened while Cross was showing Thorne the property on a Saturday morning in late March or early April 1978, differs drastically between that given by Thorne and that given by Cross.

The evidence of Cross is filled with contradictions, vagueness and unsupported statements. It would take too long to enumerate all of them. Suffice to say, that their accumulated effect, together with Cross' demeanor and attitude on the witness stand, left me in no doubt that I must reject his evidence as almost totally unreliable. Throughout his evidence, Cross referred to what he "would have said" or

"would have done" in many different situations instead of telling us what he actually said or actually did. This bespeaks either lack of recollection of the events he was speaking to or an attempt to have the court believe a certain version of events without him actually saying that the version did in fact occur. In either case, the evidence given could be nothing but unreliable.

As to the events that led up to Kent Thorne's purchase of Lot A-2, therefore, we are left with the evidence of Kent Thorne and his wife Ellen Thorne. Both were on the witness stand a long time and were subjected to a number of close cross examinations. I am satisfied that their recollection of the purchase of the property from Montgomery are substantially correct. On that Saturday morning in March or April 1978, Roger Cross showed Kent Thorne the Royal Trust "For Sale" sign located near the boundary of what turned out to be the boundary between Lots A-l and A-2. They then searched for and located two boundary markers some 100 feet to the left of the sign, one near the road and the other on the shore of the lake. The area was heavily wooded and was difficult to penetrate, but a cut line was distinguished running between the two markers they had found.

Mr. Cross had no plot plan with him nor written description but did have a listing cut with the dimensions of the lot marked on it. It was this skimpy information that Cross was using in an attempt to locate Lot A-2. He was confused and made that confusion obvious to Thorne. He clearly did not know where the property was. This, despite the fact that he knew, Mr. Saleski knew, and their manager, Mr. Mel Ayer, knew that a real estate agent should be able to locate the lot being sold to a client and that the client is entitled to, and does generally rely upon the information given him by the agent.

The whole immediate area was generally heavily wooded and appeared to Thorne as a solid forest. There was nothing obvious to distinguish Lot A-2 from any other lot in the subdivision. Therefore, it was necessary to find stakes or pins to locate the lot. Thorne did not see a plot plan of the property until later, either in his lawyer's office or by receiving it through the mail from Royal Trust.

At the conclusion of the visit to the property, Thorne advised Cross that he liked the general area but that he wanted to be certain of what in fact he was buying. At this time Cross told Thorne that he would check further and would be in touch with him later. Cross did, in fact, phone Thorne one evening some time later and told him that he had checked at the Municipal Building for more information concerning the property and could now say that the lot they had seen with the pins on it and with the cut line was the lot for sale. Thorne said that from this information supplied by Cross, he concluded that the lot he was buying was between the pins and cut line and the Royal Trust "For Sale" sign. He said he felt at this stage the boundaries of the lot had been located. Having satisfied himself from the information supplied to him by Cross over the telephone that he knew what he was buying, Thorne went on to discuss with Cross terms of purchase and Cross advised him that he would draw up an offer for his consideration.

An offer was presented to Thorne and by written agreement of sale dated April 4, 1978 and April 6, 1978, Kent Thorne agreed to buy the property for $10,500.00. The transaction was finally concluded on June 16, 1978, by an exchange of money and a deed from Montgomery to Thorne. There were no doubts in the minds of Kent Thorne or his wife as to the location of Lot A-2, the property described in the deed from Barry Montgomery. They had no doubt because they relied on the information supplied by Roger Cross.

Roger Cross, as earlier noted, was the duty agent while George Saleski was the listing agent. Saleski visited the property once with the listing owner Barry Montgomery. He did not visit the property again. Roger Cross had not visited the property at all before showing it to Kent Thorne. Neither did Cross enquire of Saleski as to any details with respect to the lot, only directions as to how to get to the property at Middle Porter's Lake. It is apparent that the file at the office probably did not contain a plot plan of Lot A-2. Cross did not have a plan nor had he seen one before showing the property to Thorne, and the information that Saleski had in the file or in his head was not communicated to Cross before he showed the property to Thorne. Nor was there any discussion, apparently, between Saleski and Cross with respect to the location of the Royal Trust "For sale" sign on the property.

The practice followed here in showing Kent Thorne the property listed for sale by Barry Montgomery could, in my view, only lead to the confusion that occurred in this case. From the discovery evidence of Mr. Ayer, it would appear that Royal Trust has changed its practice of listing and showing properties and that now, every agent, whether the listing agent or duty agent, gets a copy of each new listing and the agents have seven days in order to view the properties in order to make themselves familiar with them. It is obvious that Roger Cross was not sufficiently familiar with Lot A-2 to identify it to a prospective purchaser and that the system that Royal Trust had in place at the time permitted this ignorance.

I find that the Royal Trust Company was negligent toward Kent Thorne by permitting practices which led to misleading Thorne as to the property he was being sold and was negligent by virtue of the actions of its employees George Saleski and Roger Cross. George Saleski had a duty toward Thorne as the listing agent to ensure that Thorne was shown the right property. He did not make appropriate enquiries of the owner as to the boundaries of the lot, did not take sufficient care in locating the "For Sale" sign upon the lot, took no photographs of the lot which would enable it to be distinguished from its wooded neighbours, and apparently left no plot plan or copy thereof in the file to enable a showing agent to better locate the property on the ground. Neither did Mr. Saleski, knowing all this, when contacted by Roger Cross as to the general location of the property, offer to help him to locate Lot A-2 and make certain it was the property to be shown to Kent Thorne.

Roger Cross was negligent in not properly identifying Lot A-2 to Kent Thorne and, in fact, pointing out to him Lot A-l as Lot A-2. Clearly, he recognized the duty, as did his manager Mr. Mel Ayer and his fellow agent George Saleski, to identify to Mr. Thorne the proper lot. In the face of this realization, Cross was negligent in not obtaining all of the necessary information from the file, from George Saleski,

and from whatever other sources were available to carry out his duty to Kent Thorne and identify to him the vacant Lot A-2. His casual, uninformed, and careless approach to the sale of Lot A-2 to Thorne can only amount, in my view, to incompetence on his part for which incompetence not only he is responsible, but his employer the Royal Trust as well.

When the purchase of the lot from Montgomery was consummated, the Thornes searched for an appropriate pre-fabricated home for erection on their lot. They eventually fixed upon a fairly large 3-storey Viceroy cedar home, chosen to fit the steep sloping contours of their lot.

During May 1978, Thorne began clearing an area for construction of the home. Most of the work he did himself. He also began arranging for the necessary permits from the various building and health authorities in the Municipality. Among these was a temporary building permit under which Thorne proceeded to begin construction. He hired Moore & Cormier Contracting Limited to build a foundation and they helped him site the house on the lot after examining the applicable rules and regulations. In siting the house, the existing pins were used with a string stretched between them. This, together with the road boundary and the plot plan, were sufficient in the view of Moore & Cormier and Thorne to reasonably accurately place the house on the lot.

The excavation was completed by R.D. MacFarlane Company Limited and the footings and basement were built, including the cement floor, when the builder advised Thorne that he would require a building permit to continue the building, not just a temporary permit. The Municipal regulations provide that a temporary building permit authorizes construction only to the point of installation of the footings. This apparently was overlooked by the Thornes, despite the fact that in order to obtain a temporary or preliminary building certificate, Thorne would have received from the Municipality of the County of Halifax a letter setting out the following:

> "A preliminary building certificate allows the placing of the footings ONLY. No further construction shall take place beyond this point until a final permit is issued."
>
> "A final permit will be issued on receipt of a satisfactory surveyor's certificate showing the location of the footings within the required setback and side yard clearance. THE FINAL PERMIT ALLOWS FULL CONSTRUCTION SUBJECT TO BUILDING REQUIREMENTS. BUT YOU MAY ALSO REQUIRE A REGIONAL DEVELOPMENT PERMIT."

When Thorne enquired of municipal building officials for the requirements for a building permit, he was advised that before one could be issued he would have to obtain a surveyor's plot plan and certificate of location. By the time that such a certificate and plot plan were obtained from K.W. Robb & Associates Limited, and subsequently a building permit issued, the footings, the basement walls, the basement floor, the floor joists and part of one wall of the prefabricated home were constructed.

Clearly, Kent Thorne should not have proceeded beyond the footing stage without obtaining a building permit based on a surveyor's certificate of location. Whatever costs or damages, therefore, resulting from work done between the completion of the footings and the delivery of the surveyor's certificate, are the responsibility of the defendants Thorne and should not be attributed to the original negligence of the third parties, Royal Trust, Cross, and Saleski, nor to the perpetrators of any subsequent negligence.

In order to obtain a building permit, Kent Thorne arranged for a surveyor's certificate and plot plan from K.W. Robb & Associates Limited. On August 2, 1978 he telephoned the company and apparently talked to Mr. Paul Sprague. He says that he explained what he wanted, was quoted a price, and told that the job could not be done until the next day. Thorne referred Sprague to Mrs. Thorne to see whether the funds were available and, if so, to give the surveying company the go-ahead. Mrs. Thorne was telephoned and she did in fact authorize the survey. Mr. Thorne does not specifically remember mentioning Lot A-2 to the surveying company, although he could not imagine referring to any other lot since this was the lot he bought. Mrs. Thorne did say in her evidence that she requested a survey certificate for Lot A-2. Paul Sprague could not remember the telephone call but the worksheet referable to this certificate showed initially Lot A-l, although it was later changed to Lot A-2.

On August 4, 1978, a survey crew of two, headed by Brian Dubay, took the original yellow worksheet and a copy of the plan of the Hobrecker subdivision, which had been prepared some years before by Kenneth Robb, and met Kent Thorne at the property. Thorne referred the crew to the stakes he knew of, and they made the necessary measurements on the basis of the foundation on Lot A-l, which was the lot referred to on the worksheet. These measurements and calculations were recorded in the surveyor's field book.

Mr. Thorne was in a hurry to obtain the certificate so he went with the survey crew to meet Mr. Ken Robb, their boss, who was working nearby, in order to get their instructions for their next job. At this time, Robb, who is a Nova Scotia land surveyor of many years standing and the principal in K.W. Robb & Associates Limited, instructed Dubay to transfer his field book notes to the back of the yellow work-sheet. This was a practice seldom employed, but was done in this case so that the survey crew could continue with their work and Robb could return to his office with the pertinent information for the drafting of the plot plan and certificate for Thorne.

When one looks at the measurements and sketch on the back of the yellow worksheet, there is found an outline of Lot A-2 with a sketch of the foundation within its boundaries. Lot A-l is shown to the left and Lot A-3 to the right. In his evidence Brian Dubay says that these lot numbers are not in his handwriting, but he does not know how they got there. At some time "A-l" was crossed out on the face of the work-sheet and "A-2" substituted.

The argument (but not the evidence) of the third party Robb is that Thorne may have changed the numbers on the work-sheet when he was alone with it in the back seat of Robb's car. Thorne denies this, and I believe him. Not only is there no evidence of this occurring, but Thorne would have been

foolish had he known that he was on the wrong lot to have done so and committed himself to the expenditure of scores of thousands of dollars more in the hope that he could hide from everyone forever the fact that his house was on the wrong lot. His evidence is, and again I believe him, that at this time he had no idea whatever that his foundation had been placed on the wrong lot.

Robb and Thorne returned to Robb's office and the work-sheet was given to Paul Sprague for him to draft a plot plan. Thorne remained with him while the work was being done. Sprague had difficulty fitting the lot A-l measurements taken at the site to Lot A-2 and consulted with Robb and Haverstock about the problem.

Together they satisfied themselves that there was a transposition of figures to begin with and that if these figures were re-transposed, they would fit properly on Lot A-2. In any event, a plot plan was prepared showing Thorne's foundation located squarely within the bounds of Lot A-2 using measurements taken, as we know, of Lot A-l. Thorne paid for the plan and certificate and left to continue the process of obtaining a building permit.

A surveyor is under a duty to his client to use reasonable care and a reasonably competent degree of skill and knowledge in his work. It was the surveyor's duty in this case to make certain that they were on the right lot and that the foundation was, in fact, on the lot which they certified it was on. It is not enough for them to say that they were misdirected by Thorne. They were the surveyors upon whom Thorne relied to tell him whether or not his foundation was on Lot A-2. If their professional skill had been properly applied, it would not have mattered that Thorne referred to the pins on the left-hand boundary of Lot A-l as the boundary between Lots A-2 and Lot A-l. The mistake would have been discovered, no building permit issued, the work stopped, and an end put to the cost and damages accumulating from the original negligence of Royal Trust.

As it was, the building permit was issued and construction on the Thorne home continued to the point where the family moved in to live in December of 1978. It was not until August of the next year that the purchaser of Lots A-3 and A-4 became aware of the mistake and communicated this awareness to the Thornes. In a state of shock and disbelief, Thorne began a chain of investigations through his lawyer and Mr. Robb which resulted in confirmation of the error and a revised plot plan and certificate showing the foundation indeed on Lot A-l. By this time, the house was all but completed, although much landscaping remained yet to be done.

I find, therefore, that the third parties, Kenneth W. Robb and K.W. Robb & Associates Limited, were both in breach of their contractual duty to the defendants and were negligent towards them in preparing a surveyor's certificate upon which the Thornes relied to their detriment.

In my opinion, all of the damages which flowed from the continued construction of the Thorne dwelling following the negligent provision of the erroneous plot plan and certificate, are directly attributable to the negligence of the third parties Kenneth W. Robb and K.W. Robb & Associates Limited. This is not a

case of *actus novus interveniens* or continuing negligence. In this case, there are three separate series of negligent acts, each committed by a different group of parties, each generating its own damages irrespective of the negligence of the others. Kenneth W. Robb and K.W.Robb & Associates Limited are responsible for Thorne continuing with the construction of his home beyond the time that the erroneous surveyor's certificate was supplied and, therefore, responsible for all of the attendant damages.

In summary, therefore, the defendants Thorne are liable to the plaintiff in trespass and must remove their house from the Brean lot and restore it as much as can be to its original state. They shall have three months from the date of the order giving effect to the decision to do so.

The defendants Thorne also must pay damages to the plaintiffs in the amount of $1,800.00 for the destruction of trees on the Brean lot and $500.00 for the Breans' loss of use of their property.

The defendants are, however, entitled to indemnification from the third parties, the Royal Trust Company, Roger Cross and George Saleski, for all removal and restoration costs attributable to restoration of the property to its original state, including damages for destruction of the trees together with the removal of the footings and the filling in of the basement excavation.

The defendants, since they negligently continued construction beyond the footing stage, are not entitled to indemnification for the costs attributable to the removal of the foundation, the basement floor, and the floor joists above the basement.

Indemnification of the defendants for the balance of the costs of removal of the Thorne house from the Brean lot shall be the responsibility of the third parties, Kenneth W. Robb and K.W. Robb & Associates Limited, because they negligently supplied a surveyor's certificate and plot plan upon which the defendants Thorne relied to continue construction of their house.

The damages, both special and general, incurred in fulfilling the terms of the mandatory injunction and how they should be apportioned in accordance with the negligence herein ascribed, should be the subject of an application for an assessment of damages when those damages have become known.

Because the defendants will lose their house, or at least suffer major damages as a result of the mandatory removal of their house from the Brean lot, they are entitled to be compensated by those that brought this situation about.

In my opinion, the Thornes are entitled to have their house, or a reasonably similar one appropriate to the contours of Lot A-2, constructed on Lot A-2 to the point of construction and level of landscaping now reached in the present Thorne dwelling.

To be realistic, it is not likely that the Thorne dwelling can be moved substantially and successfully to Lot A-2. If a substitute house is built on Lot A-2, then there shall be credited against the costs of its construction, the full reasonable salvage value realized upon removal of the dwelling from the Brean property. The defendants shall be obliged to remove the dwelling from the Brean lot in such a manner as to salvage as much as reasonably possible for application to the new house or against the cost of the new house.

If it becomes necessary to implement this portion of my decision, the damages incurred in implementing it, both special and general, and how they should be apportioned in accordance with the negligence herein ascribed to the various parties, shall be considered in the hearing for assessment of damages earlier referred to.

The defendants Thorne have claimed special and general damages against the third parties and they introduced some evidence with respect to those alleged damages. I believe, however, that the whole matter of the quantum of damages as between the defendants and third parties will be better considered upon the assessment of damages after the nature and extent of the damages have become known. All damages will be apportioned to each of the third parties in the same proportion to the total damages under each head as their respective responsibility bears to the total cost of returning the Brean lot to its original state.

This rule should apply to the apportionment among the third parties of the general damages awarded to the plaintiffs.

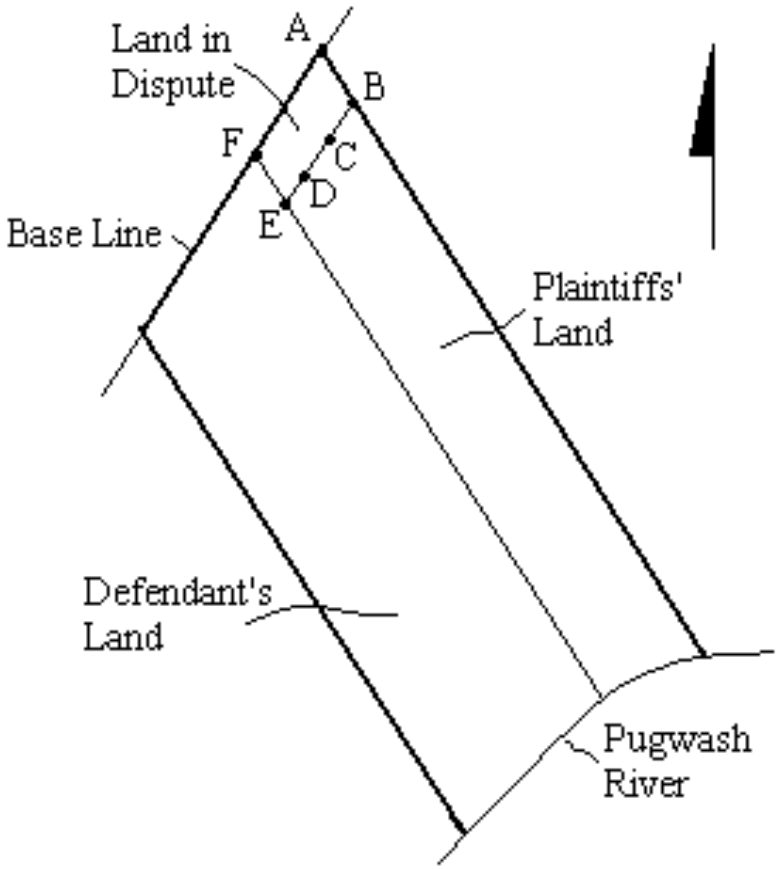
This is a complicated and expensive remedial regimen. It should be obvious that it would be in the interests of most, if not all parties, to reach a settlement and prevent further extensive expense and attendant legal costs.

I will hear the parties as to costs.

Judgment for the plaintiffs.

LAKE and LAKE v. DOBSON LUMBER LIMITED and DOBSON See 52 N.S.R. (2d) 431
Nova Scotia Supreme Court, Trial Division
Grant, J.
July 2, 1982

The Plaintiffs and the Defendant Dobson owned adjoining lands at Pugwash River in Cumberland County. The two parcels had originally been part of one 300 acre Crown Grant. The Plaintiffs now owned the Northeastern 100 acres while the Defendant Dobson owned the Southwestern 200 acres. The land in dispute amounted to about 10 acres and was at the rear or North end of the Plaintiffs' land. The issue to be resolved was whether the conveyance of the 100 acre parcel now owned by the Plaintiffs extended to the base line, or to some other rear line. The lands were configured as shown on the following sketch:



The Plaintiffs' lands had been carved out of the original 300 acre grant in about 1870. The land was described as beginning at the River, then running Northwest along the Northeast boundary of the original grant "..127 chains and 30 links, or to the rear line..." (The distance would cause the Judge some problems because the Northeast side of the original grant had been defined as being only 119 chains and 85 links.) The description of the Plaintiffs' land then proceeded "...southerly and westerly

so far as to be 7 chains and 88 links wide; Thence [southeast] until it comes to the Creek at high water mark...” and was specified to contain 100 acres.

The Court heard a considerable amount of survey evidence. The Plaintiff himself was “a graduate of the surveying school in Lawrencetown” and testified to blazes and other evidence that he found, particularly on the line E to F as shown on the sketch. If the Judge had accepted that the line E to F had been at one time marked as a boundary line, then presumably the argument that the Plaintiffs’ lands went to the base line would be strengthened. Other survey evidence was heard from two land surveyors, one who supported the claim that line E to F had been marked as a boundary and one who claimed that it had never been marked, but that the line E to B had been.

The Court heard evidence from former owners of the Plaintiffs’ land that the line E to B had been adopted by the respective owners of the Plaintiffs’ and Defendant’s lands as the boundary in the 1930's or earlier. The Court also heard evidence that the forest on both sides of the line E to B was of a different age, indicating that cutting had occurred at one time up to that line.

The Judge found that the line E to B had been adopted by former owners of the land as a conventional line. The Judge reviewed several previous cases where the Courts had discussed the topic of conventional lines and held that the present case met all of the requirements.

The Plaintiffs’ claim was dismissed.

LAKE and LAKE v. DOBSON LUMBER LIMITED and DOBSON
Nova Scotia Supreme Court, Trial Division
Grant, J.
July 2, 1982

This is an action for damages for trespass to timberlands and for a declaration as to the boundary line between the parties.

The area of land in dispute is approximately 10 acres in size. It is at the rear of the lots of the parties and its value is apparently far less than the expenses involved in this litigation. I have discussed this aspect of the case with counsel and in the presence of the parties but no settlement was reached.

The claims of title to the lands of each party go back to a common Crown Grant to David and Thomas Donkin. The original Crown Grant was of a 300 acre lot described as follows:

> BEGINNING at a spruce tree marked DTD on the Bank of said river from thence to run north thirty degrees west one hundred and nineteen chains eighty-five links:
>
> THENCE south forty-five degrees west twenty-four chains forty-three links;
>
> THENCE south thirty degrees east one hundred and twenty-eight chains or until it comes to the river Pugwash aforementioned;
>
> THENCE to be bounded by the several courses of the river down stream until it meets the place of beginning first mentioned.

The Crown Grant contained 300 acres. Eventually, the westerly 200 or so acres became the property of the defendants and the easterly 100 or so acres became the property of the plaintiffs.

The plaintiff's deed has the following description:

> ALL that certain farm and premises situate at Pugwash River in the said County of Cumberland, bounded and described as follows:
>
> BEGINNING at the Southeast angle of land now occupied by Joseph Patterson on the north side of the Creek:
>
> THENCE on the side line of the said land North Twenty-Six and a Quarter (26 1/4) degrees West One Hundred and Twenty-Seven (127) chains and thirty (30) links, or to the rear line;

THENCE running southerly and wester1y so far as to be Seven (7) chains and Eighty-Eight (88) 1inks wide;

THENCE South Twenty-Six and One quarter (26 1/4) degrees East until it comes to the Creek at high water mark;

THENCE following the several courses of the said Creek down stream to the place of beginning, with variations, containing, one hundred (100) acres more or less;

ALSO ALL that certain lot of land situate at Pugwash River aforesaid and bounded and described as follows:

BEGINNING on the East side of the Pugwash River Road at the North line of lands of J.D. Demings;

THENCE running East along said Deming's north line to the West side of the Pugwash River;

THENCE running North by the course of the said Pugwash River to the South line of lands of Edward Thompson;

THENCE running westwardly along said Thompson's land to the said Pugwash River Road;

THENCE running southerly along the said East side of the said Pugwash River Road to the point and place of beginning, containing six (6) acres more or less.

AND ALSO ALL that other lot of land situate on the West side of the said Pugwash River Road, Pugwash River aforesaid and bounded and described as follows:

BEGINNING at a point on the West side of the said Pugwash River Road where the same is intersected by the North line of lands of J.D. Demings;

THENCE running westwardly to a stake;

THENCE running northerly parallel with the said Pugwash River Road to a stake on the South line of lands of Edward Thompson;

THENCE running eastwardly by said Thompson's South 1ine Thirty-One (31) chains, more or less, to the said West side of said Pugwash River Road;

THENCE running southerly by the said West side of the said Pugwash River Road to the point and place of beginning, containing Thirty-Four (34) acres more or less.

EXCEPTING from the lots of land above described, all those small portions thereof conveyed by Wilfred Deming et ux to Her Majesty the Queen for highway purposes, consisting of 1.11 acres in all, more fully described in the Deed dated October 28, 1970, and registered at the Registry of Deeds at Amherst, Nova Scotia, in Book 272 at Page 254.

Being the lands described as "First" in a Deed from Alice V. Barner et vir to Morris J. Haugg In Trust dated the 7th day of April, A.D., 1978, and recorded at the Registry of Deeds Office for the County of Cumberland at Amherst, Nova Scotia, in Book 364 at Pages 189-192.

SUBJECT TO a Mortgage to Central and Eastern Trust Company dated the 15th day of February, 1977, and recorded in the said Registry Office in Book 349 at Page 906.

The reference in the Crown Grant to the spruce tree is deleted and instead, the lot commences at the "southeast angle of land now occupied by Joseph Patterson on the North side of the Creek;".

In the plaintiff's deed, the east bound is described as being 127 chains and 30 links, or to the rear line (an increase from 119 chains of 8 chains in the grant).

However, the plaintiff's deed gives no distance for its west line ("until it comes to the Creek at high water mark;").

The plan, Exhibit 6, does not show the length of the plaintiff's east line, which is defined in his deed but does show the measurement of its west line, which is undefined in the deed. Generally, the defendant's lands lie to the west of the plaintiff's lands and the area in dispute is in the rear (north) of the plaintiff's lands and to the east of the balance of the defendant's lands.

The plaintiff's deed is in joint tenancy, both are plaintiffs, only the male plaintiff gave evidence. When I refer to the plaintiff, I refer to the male plaintiff.

The plaintiff is a graduate of the surveying school at Lawrencetown. Prior to purchase, he inspected the boundaries of the land in company with his father. The realtor in charge of selling indicated the starting point and the plaintiff walked north along the defendant's east line to point "E" on the plan, Exhibit 6. He had no trouble following the west line of his lot being the east line of the defendant's lot. At trial, he said he only went to point "E" as the evidence of a line ran out. At discovery, he said he stopped at point "E" because it was dark.

I took it from his evidence that he walked the perimeter of what he considered to be the lot he was purchasing, but went no further north than the line "E, D, C, B" on Exhibit 6.

The plaintiff made no effort to contact the owner of the defendant's property. He said he understood there was an intestacy. This might make it more difficult, but without any inquiry it is impossible to say he could find no one who had an interest in those lands.

The plaintiff claims through a deed with no covenants whatsoever. There is no evidence that he asked his vendor about the lines or if the vendor knew. However, a predecessor in title of the plaintiff, one Wilfred Demings (Demings), was available nearby and on inquiry, subsequent to his purchase, learned that Demings considered the north line to be a blazed line and not the base line. The plaintiff was alerted to the problem by a neighbour, Newson, who referred him to Demings.

I took it from the plaintiff, when giving his evidence, that when he walked the line with his father before purchase, he considered his north line to be the blazed line not the base line.

Later, and I suspect after the purchase, upon reviewing the material, he looked at the Crooker plan and concluded that his north line was the base line and not the blazed line he had found. I consider he had enough background knowledge to, at least superficially, consider the location of his north line and conclude that he could claim back to the base line.

He subsequently examined aerial photographs and other material which fortified his opinion.

When discussing the question with Demings he had already formed the opinion either that his property extended to the base line or that he could now extend it to the base line. He dismissed the information given to him by Demings. He made no effort to contact any of his predecessors in title other than Demings to whom he was referred by a neighbour, Newson.

The plaintiff was unable to find any corner post at point "F" on Exhibit 6 despite one or more searches on the ground for it.

The plaintiff said that no one told him his lands went to the base line. Presumably, that included Sally Smith, Haugg and, no doubt, Newson. I think it fair inference that Newson alerted him to a problem, which was confirmed in detail by Demings. He said Demings told him of the line and that Demings and John Britton "refreshed" the blazed line, which was already there.

The plaintiff said Crooker, to whom he was apprenticed, advised him his lot went to the base line, yet, Crooker was not called by the plaintiff and no evidence was given of his inability to appear.

The plaintiff said that in 1979 after speaking with Demings and Crooker, he went back to the disputed area where he found a tree with 75 year old blazes on two sides somewhere along the line "E" to "F".

He did not see a tree with a 47 year old blaze seen by Rayworth. He said he showed the tree with the 75 year old blaze to one Roger Angowski (Angowski). However, Angowski did not give evidence. That tree was cut by the plaintiff in running his line from "E".to "F". The plaintiff said he cut a line from "E" to "F", which he blazed and painted.

Walter C. Rayworth (Rayworth), Nova Scotia Land Surveyor, prepared the plan, Exhibit 6. He prepared a report, Exhibit 10, in which he concluded the plaintiff's lot ran back to the base line. He concluded "rear line" meant the rear line of the River Philip lots. He found the blazed line "B" to "E". At "E" he found two trees blazed on four sides. He also found two trees with blazes, one 23 years old and one 47 years old along the line "E" to "F".

Rayworth referred to several lots in the general area running to the "rear line of the River Philip lots" and to the base line. He said that the blazes at "E" denoted the corner of a lot. He could not recall the stumps in the area of "E" to "B" as there were two feet of snow on the ground when he was there. On Exhibit 6 Rayworth described the rear line of the River Philip lots as the "base line".

The plaintiff Payson Dobson is 59 years of age. He is the principal of the corporate defendant. He lived with his grandmother on the property, until he was 15 years of age. At that time, Jesse Demings owned the plaintiff's property, which later was owned by Wilfred Demings. He said John W. Britton lived there from 1900, until about 1950, and from then until 1976, John W. Britton came back to the property in the summers.

The defendant said his grandmother, his uncle and his mother (being heirs-at-law of John Britton) sold stumpage, *i.e.* leased the timber rights to Silas Baxter. This he said was from about 1929 to 1931, and this included the area in dispute. There was some cutting done in 1952, but he was not sure if it included the area in dispute.

The defendant said he was shown the line"B-E" by John W. Britton first before 1950, and a second time in 1958 or so. He said he had been shown the blazed corner trees at "E" by John W. Britton. He said that at the time, when he walked the lines with John W. Britton in or about 1958, the line was clear.

The defendant said that after this dispute arose he was shown the line by Wilfred Demings. He said that in 1981, he cut approximately one acre of the 10 acres in dispute. He said he did not go to the south of the line "E-D".

The defendant said that his son made up the description for his deed from the lines on the ground. He said there were stumps from cutting on the south side on line "B-E", but not on the north side of that line. He said there had never been any dispute over the line before.

Wilfred Demings (Demings) is 79 years of age. He lived on the plaintiff's property. He said his father got the land in 1933 from Silas Baxter. He was deeded the property by his father in 1946. He said he farmed and cut logs on the 100 acres owned by the plaintiff. As well, he sold logs to one Ches Atkinson.

Demings said that his father and John W. Britton showed him the back (north) line, including the corner at "E". He said it was a line agreed upon by his father and John W. Britton. He said they chained off the lot to give 100 acres. He said the lot did not go back to the base line, but only to the blazed line "B-E".

Demings said that his father took him back to the line "B-E" before he got his deed from his father. He said the line "B-E" was older than he was. He had been shown it by both his father and John W. Britton.

Demings said that about 30 years ago, he and John W. Britton went back to the line "B-E". Some trees had blown down and they reblazed the line or "brightened up" the blazes, to use his term.

G. Edward Hingley (Hingley), Nova Scotia Land Surveyor, examined the lines. He said the line "B-E" was a well-marked old line, which had recently been gone over. He said the trees were spruce and hemlock and blazed "fore & aft" (on both sides). He said the bulk of the blazes were healed and barked over. He aged the blazes at 27-30 years.

Hingley thought that the blazed spruce, found by Rayworth and aged 23 years, was part of the "irrelevant line", as it was generally in the corridor of that line. He cut down the tree with the blaze aged by Rayworth at 47 years and exhibited it in court. He said he doubted that it was blazed. He thought it had been bruised by a branch being ripped off or having been rubbed by another tree, causing the bruising which now somewhat resembled an old blaze.

Hingley found the two spruce trees blazed on four sides at "E" as a corner. He said the trees south of the line "E-B" were grown to 25-30 feet high and those north of the line "E-B" were 60 or so feet high. He said that indicated heavy cutting south of the line. He said the line "E-F" had been heavily blazed within the year and painted orange. He said he searched for evidence of an old line from "E" to “F” but could not find evidence of such a line.

Hingley concluded, the line "B-E" had been used as a boundary line. He said the logging operation use of the land changed at the line "B-E". In the area separated by the line "E-F", he found trees of the same size on both sides of the line.

Hingley searched in the area of "F" and could not find evidence of a corner marking having been there previously. There was, however, evidence of a corner at "A".

Hingley said that ordinarily when blazing is done to designate an area to be cut, the blazing is on one side of the trees only, whereas, for boundary lines, the trees are blazed on both sides. He said in his opinion "B-E" was marked as a boundary line and had been observed as such as the land use changed at the line "B-E".

Rayworth gave evidence supporting his position that the 47 year old mark was a blaze.

After considering the evidence of both surveyors and reviewing their qualifications, I am unable to find that the 47 year old mark is a blaze or that the 23 year old blaze is not part of the "irrelevant" line, so-called.

I am not able to accept the evidence of the plaintiff that he found a tree with a 75 year old blaze on the line “E-F”, with his knowledge of the law of boundaries and as a person with surveying training, I should think the last thing he would do would be to cut it down as he said he did. As well, Angowski could have been called.

In each of these instances the burden of proof is on the plaintiff and I find he has not met this burden by a preponderance of evidence.

I find that a line at “B-E” has been in existence for at least 50 years. Demings said it was as old as he is but that may have been a figure of speech. Presumably, when Jesse Demings took title in 1933, he would be anxious to know his boundary so he and John Britton established the line "B-E". This was shown to Wilfred Demings by his father and by John Britton. As well, before Wilfred Demings got his deed by 1946 his father went over the line with him.

I find that about 30 years ago Demings and John W. Britton reblazed the line "B-E".

I find that the plaintiff's predecessors in title used their lands up to the line "B-E" and observed "B-E" as the north line of their property.

I find the line "B-E" has been used as the north line of the plaintiff's property for at least 50 years.

In the plaintiff's deed, his east bound is described as being 127 chains and 30 links in length.

The plan, Exhibit 6, has no length for this bound. I assume it was not measured.

In the plaintiff's deed, his west bound is not for any defined distance; that is, no measurement in chains is given. However, the plan, Exhibit 6, the chainage is set out.

I should think it would have been more helpful to have measured the east bound than the west bound. That way, the distance on the ground could be compared with that specified in the deed.

To further add to the uncertainty the east bound described in the Grown Grant is for 119 chains and 85 links whereas, and the west bound on the plan is shown as being 124 chains just to point "E". The east bound to point "B" is further north and should, I assume by looking at the plan, be longer than the west bound, yet its chainage is 5 chains less.

To further complicate the situation with the plaintiff's east line is the fact that his predecessor in title William Britton, in his deed in 1864, para. 6 of Exhibit 1 has only 119 chains as his east line. As well, the description in that deed does not purport to go north to the base line or rear line of the River Philip lots.

Although William Britton only got 119 chains for his east line in his deed he purports to convey out to Silas Wacom, Exhibit 1, para. 7, a lot with an east line of 127 chains. That is, he conveyed out 8 chains more than he received.

To further complicate matters William Britton in the deed to John Britton, Exhibit 1, para. 8, purports to convey a lot containing only 119 chains on its east bound.

It is in the deed from William Britton to Wacom, Exhibit 1, para. 7, that the east bound goes 127 chains or to the "rear line". This latter reference is absent in the Crown Grant and in the conveyances prior to para. 7.

The conveyances from Wacom to Jesse Demings (being paras. 11-18, Exhibit 2) purport to contain the same descriptions, although the actual documents are not in evidence before me.

By 1904 John Britton had acquired all of the 300 acre lot. Two hundred acres from William Britton (Exhibit 1, para. 8) and the other 100 acres (Exhibit 2, para. 12) from Weatherbee.

In 1915 John Britton conveyed the 100 acre lot to one Richard Weatherbee and by 1933 it was conveyed to Jesse Demings. He retained the balance of the lots.

There was reference to a plan of David Crooker, Nova Scotia Land Surveyor, Exhibit 3, which is marked "provisional". It purports to show Crown lands to the east of the plaintiff's lands, being those lands referred to as part of the Patterson lands in some of the conveyances. The description for one of these lots refers to it being bounded "northerly by the rear line of the River Philip lots".

It is alleged by the plaintiffs that the reference in their deed to the "rear line" means the rear line of the River Philip lots. I appreciate the argument, but I must go by the words used by the grantor of the lands with that description and I am forced to the conclusion that had he meant the rear line of the River Philip lots he would have said so and by not saying so (as others had done), he probably meant it to go to a rear line other than that of the River Philip lots. That is to the rear line of the lot he was conveying.

I find the line "B-E" to be a conventional line, a line defined by agreement of the adjoining landowners. They established a line, blazed it, and over the years maintained the blazes. They treated it as the boundary line in their use of their respective lands.

In rural Nova Scotia, such lines are rarely fenced unless there are cattle at large in the area. The usual use is for cutting from time to time as has been done here. The defendants' and the plaintiff's predecessors in title have occupied the lands as one does with wild lands. There was no evidence about taxes by either party.

The defendant has acted to his detriment by cutting on the area to the north of the line "B-E" and constructing a road.

In **Crossland v. Dorey** (1977), 27 N.S.R. (2d) 139; 41 A.P.R. 139, Morrison, J., stated at p. 149:

> In the case of **Spencer v. Benjamin** (1975), 11 N.S.R.(2d.) 123, Macdonald, J.A., said at p. 14 of the opinion as follows:
>
> '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.' "
>
> MacDona1d, J.A., made further reference to **Sutherland v. Campbell** (1923), 25 O.W.N. 409, Hodgin, J.A., speaking for the first divisiona1 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.'

I refer also to **Naugle v. Naugle** (1970), 1 N.S.R. (2d) 554 (Nova Scotia Supreme Court per Gillis, J.) affirmed on appeal (1971), 2 N.S.R.(2d) p. 309. In that case the learned trial Judge said at p. 560 of 1 N.S.R.(2d):

> '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.'

In the case of **McIsaac v. MacKay** (1915), 49 N.S.R. 476 (Nova Scotia Supreme Court in *banco*) the Nova Scotia Supreme Court considered the matter of a long-standing fence. Chief Justice Graham said at p. 480:

> '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.'

In the case of **McNeil & Hingley Ltd. v. Hill**, (1928), 60 N.S.R. 179 (Nova Scotia Supreme Court in *banco*) in the Nova Scotia Supreme Court came to consider a common boundary line which had been agreed upon by adjacent owners and was now of long-standing. Citing from the headnote, the court held:

> 'In an action for trespass to timber lands, in which the question arose as to the ground between certain lots, the evidence showed that a certain boundary line had been recognized for over thirty years as the true boundary, by the adjacent owners.
>
> *Held*, that under the circumstances of the case, the plaintiffs were bound the line so recognized.'

In **Sullivan v. Lawlor** (1981), 45 N.S.R. (2d) 325, Coffin, J.A., stated at para. 57:

> As to the conventional line, there is not the clear and cogent evidence required to show that there was ever any agreement between the adjoining owners that the line following the blazes as projected by Mr. Sullivan should be the line dividing the two properties,

> or to show that the respondent or his predecessors ever actually cut timber or otherwise used or occupied the long narrow triangular strip of land between the Sullivan line and the MacPhee line – the land in dispute.

In **Jollymore v. Acker** (1915), 49 N.S.R. 148, (C.A.), after citing cases in which conventional lines were the subject of litigation, Russell, J., at p. 153 stated:

> But I do not find that in either of these cases the binding character of the convention was made to depend upon the circumstance of such expenditures having been incurred or of anything having been done or suffered beyond the deliberate settlement of the division line by the parties on the ground.

Russell, J., went on to quote from a New Brunswick case **Lawrence v. McDowall** (1970), 2 N.B.R. 442, where Botsford, J., stated at p. 154 of the **Jollymore** case:

> Public policy as well as private convenience require that every facility should be given to the settlement and adjustment of such boundaries. It appears to me, therefore, that when a dividing line which was before uncertain and undetermined has been established and mutually agreed upon by the owners as the boundary line between the respective lots, without fraud or circumvention by either of the parties, such line should be conclusive and binding.

and at p. 156:

> If one of the parties should, within a reasonable time after making the agreement, discover that he had made a mistake and should wish to rectify the error, it would be material to inquire whether the other had been prejudiced to such a degree as to make it inequitab1e that the mistake should be corrected. In the absence of such an appeal to equitable principles for the correction of a mistake, I greatly doubt if there be any need for evidence of anything done or suffered by either party on the strength of the line having been established to render the agreement binding. No such facts were shown in either of the leading cases in this province;

In **Philips v. Montgomery et al.** (1915), 43 N.B.R. 229, McKeown, J., stated at p. 249:

> When owners of adjoining lands fully cognizant of the dispute as to the location of the line dividing their properties, jointly agree upon a certain line as a division line between them, jointly put up or continue a fence along such chosen line as the common boundary of their respective occupation and cultivation of said properties by such fence, I think in the absence of fraud, each successor in title is bound by the line so agreed upon.

I find the north line to be line "B-E". I am prepared to give a declaration to that effect. I dismiss the plaintiff's action with costs to the defendants to be taxed.

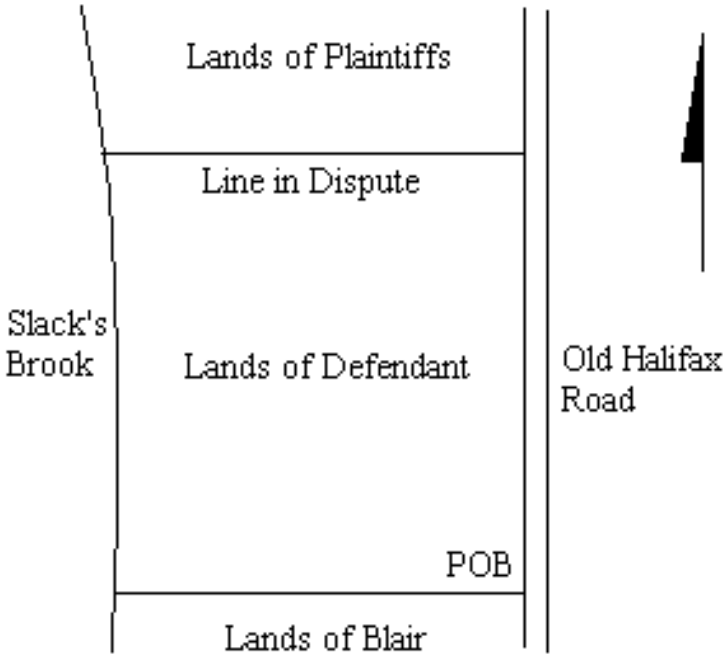
Judgment for plaintiffs in part.

RICHARDS and SLACK v. GAKLIS and LAKELANDS BLUEBERRIES LIMITED

See 63 N.S.R. (2d) 230

Nova Scotia Supreme Court, Trial Division
Clarke, J.
April 17, 1984

This dispute related to the boundary between the lands of the Plaintiffs and the Defendant at Folly Lake, Colchester County. Both properties had been owned at one time by Suther Slack. In 1956, Slack had conveyed a parcel to the Defendant Gaklis. Gaklis and the Defendant Lakelands had subsequently used the lands for blueberry production. The Plaintiffs Richards and Slack had subsequently become the owners of the balance of the Suther Slack property. The properties were located as shown on the following sketch:



At issue was the northern boundary of the Defendant's land. The description in the conveyance to the Defendant started at the noted Point of Beginning and proceeded north along the Old Halifax Road "to an iron stake at the division line between the blueberry lands and the hay lands of the said Suther Slack; thence Westerly and parallel to the said Gilbert Blair's Northern side line to a stream known as Slack's Brook..."

Both sides had retained land surveyors but the Judge noted that neither land surveyor was willing to propose a definite opinion as to where the disputed boundary should be. The iron stake noted in the description could not be found. The Plaintiffs argued that the disputed boundary should follow a row of

rocks which extended in a straight line from the highway westerly to a wooded area. The Defendants claimed that the boundary should be located some 375 feet further north from the row of rocks to a line defined by two tree stumps. In the alternative, the Defendants claimed that they had acquired title to that line by adverse possession.

The Judge reviewed all of the evidence and determined that much of was not helpful.

On the issue of the location of the original boundary, the Judge reviewed a number of factors and found that the row of rocks was the location of the original boundary. The reasoning that the Judge followed is very compelling and makes for interesting reading.

On the issue of adverse possession, the Judge found that the Defendants had established a valid claim to that portion of the disputed land which they had used for blueberry production, but not to a wooded area.

RICHARDS and SLACK v. GAKLIS and LAKELANDS BLUEBERRIES LIMITED
Nova Scotia Supreme Court, Trial Division
Clarke, J.
April 17, 1984

At issue is the determination of the north boundary of lands of the defendant Gaklis, situate at Folly Lake.

By deed dated March 14, 1956, Suther Slack, a single man, then about seventy-two years old, conveyed the following described lands to Gaklis.

> ALL that certain lot, piece or parcel of land and premises situate, lying and being on the West side of the Old Halifax Road at Folly Lake, in the County of Colchester, Province of Nova Scotia, bounded and described as follows:
>
> BEGINNING at the Western boundary of the said Old Ha1ifax Road, at the intersection thereof with the Northern side line of lands of one Gilbert Blair; thence running Northerly along the said Western boundary of the Old Halifax Road to an iron stake at the division 1ine between the blueberry lands and the hay lands of the said Suther Slack; thence Westerly and parallel to the said Gilbert Blair's Northern side line to a stream known as Slack's Brook; thence Southerly along the various courses of the said stream to the said Northern side line of the Gilbert Blair lands; thence Easterly along the said northern side line of the said Blair lands to the place of beginning, containing forty acres more or less;

By a series of deeds and devises, the residue of the land of Suther Slack at Folly Lake passed to Susan Slack, who was the widow of Trueman Slack. Suther died in 1966, when he was eighty- three: Trueman died in 1968. During his later years Suther lived with Trueman and Susan. Susan remarried in 1971, becoming Susan Harpell. The plaintiff Gary Slack is a son of Susan and Trueman. Gary was one of four children of Susan and Trueman Slack. He was born and reared in the Slack home at Folly Lake. After spending two or three years in Ontario, Gary returned to Folly Lake and in due time he and the plaintiff Pearl Richards took up residence in the Slack homestead and purchased, as joint tenants, the lands of Susan which were conveyed to them by a deed dated April 27, 1981.

The relevant and troublesome boundary description in one of several lots conveyed by Susan to the plaintiffs reads,

> On the South by lands of Chris Georgaklis,

being the defendant.

To put the reader in perspective the lands are located at Folly Lake on the west side of the Trans Canada Highway extending between Truro and Amherst. Folly Lake and the C.N.R. line are on the east side of this highway. South is roughly towards Truro and north is roughly towards Amherst. The Slack home, occupied by the plaintiffs, is to the north of the lands in dispute. The house is located on lands which continue to extend northerly from the disputed land. All of this land is at high level and of a rugged terrain with out-croppings of stone and boulders running all through it. It obviously was wooded land at one time and later cleared by its settlers and occupants. It has been managed in such a way that it has become a valuable stretch of land on which blueberries grow. As a result, it has become fertile ground for the production of good quality blueberries. The berries are harvested on a commercial basis and hence the cleared land has taken on special value when otherwise it would have little value in it's present state, at least for any other agricultural purpose. Gaklis is a blueberry broker out of Boston who has for years owned and cultivated substantial blocks of land in Cumberland and Colchester Counties. The plaintiffs have adjacent land on which they grow, pick and blueberries, but I gather this is of much less size and productivity than the lands which Gaklis acquired from Suther. Finally, in this narrative, I should add that at the conclusion of the evidence and the arguments of counsel, I travelled to these lands and in the presence of the plaintiffs and the defendant Gaklis and their respective counsel I walked over the lands and observed both the boundary in dispute and the boundaries not in dispute so that I could better understand the evidence which came before the court.

As I have already said, it is the north boundary of the Gaklis from Suther deed which is in dispute. Since Gaklis acquired his land from Suther before the subsequent transactions which ultimately vested the residue of Suther's land in Susan and thence to the plaintiffs, the plaintiffs acquired that which is beyond the north boundary of Gaklis. The situation is typical of so many of the conveyances made over the years in this province, where "home-made" descriptions were used without the benefit of proper and adequate surveys. As land takes on more value and time passes with the consequent deaths of parties and the fading of memories of those who survive, it becomes very difficult to ascertain that which was intended to have been conveyed by the use of uncertain language. Such is the case in this instance.

I return to the description in the Suther to Gaklis deed. It says,

> Beginning at the Western boundary of the said Old Ha1ifax Road, at the intersection thereof with the Northern side line of lands of one Gilbert Blair.

That point and place of beginning has been ascertained and it is not in dispute. The description continues,

> thence running Northerly along the said Western boundary of the Old Halifax Road ...

The remains of the old road are visible, which is to say the road which was the predecessor to the present Trans Canada Highway. Thus the boundary goes northerly (toward Amherst) along the western boundary of the Trans Canada Highway. How far to the north? The description says,

> to an iron stake at the division line between the blueberry lands and the hay lands of the said Suther Slack.

Therein lies the problem. There is no iron stake to be found. The parties dispute where the division line was in 1955-56 between the blueberry lands and the hay lands.

For the purposes of this action, the plaintiffs retained the services of R.A. Fulton, N.S.L.S., and the defendant retained K.P. MacDonald, N.S.L.S. Both Fulton and MacDonald are competent, experienced and highly qualified surveyors out of Truro. Each of them produced a plan and each gave helpful evidence to the court. Each readily admits he is not able to ascertain with certainty, and accordingly certify, the location of the boundary in dispute. They have developed plans which are the result of their examinations of old title documents, the land, the information provided by each of their retainers and their observations based upon the total of the information made available to them. While all of this is helpful, it does not come down to a matter of preferring the expert opinion of one surveyor over the other, because neither of them really knows which of them is right. Their efforts have helped to sharpen the issue.

The plaintiffs say that the division line between the blueberry lands and the hay lands is at a point where a row of rocks extends in pretty much a straight line westerly from the highway boundary into the woods. In the evidence this is referred to as the rock fence. The defendant says that the division line extends northerly from the rock fence along the western boundary of the highway about 375 feet to a boundary marked by two stumps, which are the remains of two large trees. The northern boundary would then be somewhat angular and irregular in its direction making its way westerly into a wooded area.

The position taken by the plaintiffs is to establish a rectangular lot of land containing an area of 43.48 acres. The position taken by the defendant which would extend to include an additional triangular lot of land, contains a total area of 51.6 acres. The result is that about eight acres, more or less, are in dispute.

There is a considerable amount of evidence offered by both parties which I do not find to be all that helpful in determining the issue before the court. Susan Harpell says she hid in the bushes and heard conversations between Suther and Gaklis which support the position of the plaintiffs. Gary relates observations which he made when he was ten years old driving his bicycle while Suther and Gaklis were looking at the land to be made the subject of the conveyance. The plaintiffs say Suther was senile and the defendant brought liquor to his house at the time the deals were made. These are all denied by Gaklis and his associate Leonard Hardie. While all these witnesses were most likely giving evidence to

the best of their abilities, I do not find these portions represent hard facts upon which to particularly base or influence the finding of the court.

In discussing the manner of determining the intent of parties where an ambiguity exists in a description, I quote from the **Canadian Encyclopedic Digest** (Ontario), (3rd Edition), volume 3, at Title 19, page 16, paragraph 24.

> 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. 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.

To the extent that it is capable of being applied to the present case, I accept what the authors of the **Digest** say as a helpful guide.

Upon hearing the evidence and the submissions, viewing the land in considerable detail, studying the materials which have been referred to the court and reviewing decisions rendered by our and other courts, I have concluded that the northern boundary of the lands of the defendant is where the plaintiffs allege it to be, namely along the so-called rock fence. I shall now set forth the reasons which lead me to that conclusion.

> (1) While in 1984 the line of rocks which are weatherbeaten, mossed over and have some space breaks, do not look like a picture one would have of a rock fence, it nonetheless is a marker or line of rocks which was accumulated at a time long ago when land clearing took place. I have no doubt that thirty years ago it was more prominent than it is today. It still remains something of a natural boundary which cannot be discounted as a factor to be considered. The rock and boulders which are there could not and could not have been accumulated in the manner and location and direction they are without some purpose. I am satisfied by the evidence and the site that the row and line of rock and boulders extending westerly from the Old Halifax Road into the woods was intended to be a division line for some purpose.
>
> (2) I am persuaded by the evidence that the land to the south of the rock line was considered by the Slacks and the defendant Gaklis to be blueberry land in 1955 when the deal was made. While it is evident that it was relatively poor blueberry land, the defendant Gaklis recognized its potential under proper management - so, to both parties it was blueberry land.

(3) I am inclined to accept the evidence that the area to the north of the rock line was used by Suther as a grazing ground for his horse. I doubt that it was much of a hay field, but it was probably low quality grazing ground.

(4) Once one establishes where the non-existent "iron stake" was located, then in describing the northern boundary, the deed says,

> thence Westerly and parallel to the said Gilbert Blair's Northern side line to a stream known as Slack's Brook.

Obviously this is the best description to be found in the deed for the northern boundary. I am prepared to pay respect to the notion of parallelism. Proceeding along the line of rock provides a line parallel to Gilbert Blair's northern side line; whereas the northern boundary as proposed by the defendant does not. By choosing the rock line which is parallel to the Blair line, one does indeed come to the stream still known as Slack's Brook. I must say that I find this highly persuasive. To do this lends sense to the language and interestingly the rest of the description falls in place. To reach Slack's Brook with the northern line as the defendant would have it, creates a line which is not parallel to Gilbert Blair's northern side line to the brook.

(5) Consideration must be given to the acreage. The deed tn the defendant says,

> containing forty acres, more or less.

This is typical language found in conveyances where the metes and bounds have not been surveyed. It is to say that the grantor considered he was selling and the grantee purchasing forty acres, more or less. I take this language to mean approximately forty acres. The exact acreage by choosing the rock line as the northern boundary is 43.48 acres. The exact acreage by the defendant's route is 51.6 acres, which is roughly twenty percent more. Courts have always been prepared to take into account the subject of acreage as a factor to be considered. *(***Sanderson v. Farmer** (1981), 31 Nfld. & P.E.I.R. 298; 87 A.P.R. 298). I find the difference in acreage is another reason favouring the rock line as the northern boundary. It seems to me reasonable to assume that Suther as a man of the woods and the soil would more likely appreciate the significance of forty acres than he would other descriptive language in the conveyance. This was his old home property. I have no doubt that Suther and Gaklis talked in terms of forty acres. Suther was not a dealer in land and conveyancing was obviously an unfamiliar subject to him.

(6) By using the rock line as the northern boundary the result is a rectangular piece of property which is consistent with the manner followed by the Crown grants in the Folly Lake area, including the style of grants made to the predecessors of the Slacks. Parallelism suggests a rectangular piece of land.

(7) While it is not possible to estimate the age, evidence has been found of old blazes and rusted barbed wire stapled to trees in the western area of the lot which would tend to support the conclusion that the rectangular area had been fenced a long time ago. These would be bypassed if the western line were taken from the north-western corner to the south-western corner as proposed by the defendant.

(8) One cannot help but ponder why, if the rock fence were so prominent in the boundary, it was not mentioned in the deed. One principal explanation, in my opinion, is that the deed was not prepared by Suther. On June 4, 1955, Gaklis made a deal with Suther on the basis that he would pay $1,000.00 for the land. Apparently Suther was not entirely sure whether he wanted to sell. His indecision may have been prompted by other members of his family who were reluctant to see him sell, against his own feeling that $1,000.00 was a lot of money. Gaklis left a cheque for $1,000.00 drawn in favour of Suther Slack on the understanding that if Suther negotiated the cheque then Gaklis would know Suther had closed the deal. Suther did negotiate it a few days later at the Royal Bank. On March 14, 1956, Gaklis returned to Suther's house at Folly Lake in the company of Gaklis' right hand man Leonard Hardie and the deed was executed by Suther in the presence of Hardie. Leonard Hardie was Gaklis' principal agent in northern Nova Scotia. On the question of who prepared the deed, Gaklis' evidence waffles. At one point he says Suther did and therefore the words are Suther's. At another, he says he cannot remember bringing the deed with him. At another, he says he cannot be sure whether he or Suther prepared the deed. After hearing all the evidence and carefully examining a photocopy of the original deed, I have no doubt whatsoever who prepared the deed: Gaklis did. Perhaps, more likely, Leonard Hardie had it prepared at an Amherst law office. Whether the description was drawn by Hardie or Gaklis does not really matter. The fact remains that in my judgment Gaklie tried to suggest to the court that the description was drafted by Suther, when I think he knows very well that he or Hardie drew it. I do not think for one minute that the words in this description are those of Suther Slack. If Suther drafted the deed, it seems strange to me that the memories of Gaklis and Hardie, which are so precise on the matters that count to them, would not have remembered that before accepting the deed, one or other or both of them read over the description. If Gaklis or Hardie had drafted the description as I believe, then I find it surprising that with their vivid recollections of the principal events, they have not told the court that Suther read it over or that they went over the boundaries in the document with him. It is conceivable that Suther was presented with an already drawn deed, shown where to sign and did so and then Hardie witnessed his signature. The latter, I suspect, is the more likely scenario. Thus I am not convinced that although Suther signed the deed, the language of the description is necessarily Suther's. I suspect, however, that forty acres of land was a prominent feature of the bargain. Hence it seems to me that these words take on more significance than the absence of a reference to the rock fence or the rock line.

These are the principal reasons which persuade me to accept the northern boundary as being along the rock line and accordingly I reject the evidence offered by the defendant that it begins at a point 375 feet

northerly along the western boundary of the highway. In this respect I find the plaintiffs have met the evidentiary burden upon them.

I have not reached this finding without considering the evidence advanced by the defendant with respect to his assertion of the location of the northern boundary. I am not persuaded by the defendant's arguments.

The next issue is whether through acts of adverse possession the defendant has extinguished the title of the plaintiffs to any portion of the land remaining in dispute and being of course the land extending from a so-called rock fence to the boundary which the defendant Gaklis claims to be his north boundary.

The **Limitation of Actions Act**, R.S.N.S. 1967, Chapter 168 provides in its sections 9 and 21,

> 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.

In discussing the implications of section 9, Grant, J., said this in **Brewer v. Gillis** (1982), 53 N.S.R.(2d) 656; 109 A.P.R. 656, beginning at page 675

> The onus of proving that possession has been such as to entitle the respondents to the protection of the **Statute** is upon them that assert such possession, **Handley v. Archibald** (1899-1900), 30 S.C.R. 130.
>
> In **Ezbeidy v. Phalen** (1958), 11 D.L.R. (2d) 660, MacQuarrie, J., at p. 665 stated:
>
> > '...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 here, there is first of all a presumption that the true owner is in possession, that the seisen 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 exclusive1y 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 **DesBarres v. Shey** (1873), 29 L.T. 593, 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 1imitation, when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant. *cf.* **Halifax Power Company 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 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 of 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 the land comprised or covered by his colour of tit1e: *cf.* **Leesee of Cunard v. 1rvine** (1853) 2 N.S.R. 31.

See **Spencer et al. v. Benjamin** (1975), 11 N.S.R. (2d) 137; 5 A.P.R. 137; **Naugle v. Naugle** (1970), 1 N.S.R.(2d) 554; **Legge v. Scott Paper Company** (1972), 3 N.S.R.(2d) 206.

Also, when considering section 9, in **MacDonald and MacDonald v. Blakeney's Estate** (1980), 39 N.S.R.(2d) 589; 71 A.P.R. 589; Burchell, J., wrote at page 606:

> To be entitled to the declaration of title which they seek, (a declaration of ownership) the plaintiffs must show not only that they have been in exclusive, open and continuous possession of the subject property for a period of twenty years, they must also show that their occupation has been adverse.

I now want to discuss the evidence against those propositions of law, which I accept are correct and applicable to this case.

Susan says,

> "they" (the defendant and his men) "started moving farther north from the rock pile after Suther died (in 1966)".

She asserts that,

> From 1956 onward (she) picked berries every two years and some every year, north from the rock pile, until three years ago.

She says that they (the Slacks),

> Always got their wood for their home off it

and this continued after Suther died in 1966. Susan claims that when the defendant's men were burning the ground, she told them it was not their land but they kept on burning. She confirms the defendant and his employees burned and picked over the cleared land on occasions when she told them it was not Gaklis' land, but she says that,

> Some did leave and some didn't...I didn't take legal action because I couldn't afford it... Trueman was blind, I had children, blueberries and boarders...

And after 1956 Susan says that until he died in 1966, Suther was senile.

The cultivation and management of blueberry lands requires burning and picking on alternate years together with occasional spraying. Leonard Hardie, who worked for the defendant and who present during his negotiations with Suther, says that he and others employed by the defendant first burned this land in 1956 and subsequently in the years 1958, 1960, 1962 and 1964. He further says that under the direction of the defendant he supervised the picking of berries for the defendant in the years 1957, 1959, 1961, 1963 and 1966. Hardie was the defendant's boss on these jobs. According to him,

> At no time did I have any problems with Suther Slack or Susan Harpell.

The defendant says that he took possession of the lands in 1956 and his employees, under his direction, proceeded to prepare them for blueberry production through to the northern boundary, as he asserts it to be. He says, "We operated the lands at all times", without interruption, until the plaintiff, Gary Slack, began to question their right to be on this triangular block, "a couple of years ago". The production of berries from the land was sold to the defendant Lakelands, which is one of the defendant's blueberry companies.

Ralph Hunt is a former employee of the defendant. He says that for about thirteen-fifteen years prior to 1982 he supervised the picking in alternate years on this land on behalf of the defendant Gaklis. Thus his evidence is that he continued the work Hardie performed from about 1967 onward. He says that, "four or five years ago" Mrs. Harpell told him the line should be about ten feet or so from the northern boundary as claimed by the defendant and on one occasion he set a line about ten feet southerly from one of the tree stumps for Susan to have an area on which to pick. Hunt suggests he did this as a neighbourly gesture.

Max Gilbert is another former employee of the defendant. He says that he was involved, sometimes with Hardie, in burning this disputed area through the 1960's. According to Gilbert, it would take two days or so to burn. Burning is a specialized procedure. It is done with burning machines and equipment.

Frank Green was employed on behalf of the defendant during the years 1971 through 1982. He says that during that time he burned and sprayed the lands in dispute and also cut some logs, for Richard Donkin, another of the defendant's men, all from the area presently in dispute. He says, "nobody ever came near me any time I was there".

Picking time involved work by a fairly large crew of people. There certainly could be no mistaking when that exercise was being conducted with people and equipment spotted over the land.

The plaintiff Pearl Richards says that she and her sister Dorothy picked some berries on the disputed land in 1979. In 1980 she and her sister Dorothy and the plaintiff Gary Slack were raking some berries in the area nearest the most northern boundary of the triangular portion in dispute when Ralph Hunt of the defendant arrived. Gary says Hunt was hostile, alleging that the plaintiffs were picking berries on the defendant's land and thereupon threatened to telephone the police. Gary says that rather than have the police called to the scene he gave Hunt about one half of the berries they had picked from this land. According to Hunt’s version of this incident, when Hunt informed Gary that he was on the defendant's land,

> He (Gary) seemed upset . . . he was apologetic about it . . . (he said) 'If I have gone over on Chris Gaklis' land, I will give the berries back' ... I (Hunt) said what would be a fair division, and we agreed on half and ha1f...

Gary tells of one other occasion prior to 1980 when he was picking a bucket of berries from this land to put in his deep freeze. Richard Donkin who was employed as a supervisor of the defendant appeared and asked him if he knew he was on Chris Gaklis' land. Gary says he told Donkin that his mother "says it is hers". The evidence leaves me with the impression that Donkin did not back off from his assertion and that Gary must have left the field, taking the berries he had picked.

The most recent altercation over the berries on the disputed land took place during the last picking season in 1982. The plaintiffs had about one-quarter of the area picked when the defendant's pickers arrived. The defendant's claim of ownership to the land was again asserted. The defendant's people picked the three-quarters which remained. This action was then in the making. By agreement between counsel of the parties to this dispute, I gather each took the berries which were picked on the understanding that the value would be ascertained and held for distribution pending the settlement of this action. The next picking season will of course come in 1984.

The nature of the acts of possession necessary to make them adverse are correctly stated by Cooper, J.A., in **Zinck v. Attorney General of Nova Scotia et al.** (1979), 34 N.S.R.(2d) 12; 59 A.P.R. 12, at page 21.

> The nature and character of possession that is necessary to extinguish the title of the true owner is stated in Anger and Honsberger, **Canadian Law of Real Property** (1959), at p. 789:
>
> > 'The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".'
>
> This statement is supported, by reference to a goodly number of cases, as I said in the course of my reasons for judgment in **Taylor v. Willigar et al.** (1979), 32 N.S.R.(2d) 11; 54 A.P.R. 11. I particularly referred to **McConaghy v. Denmark** (1880), 4 S.C.R 609; and **Sherren v. Pearson** (1887), 14 S.C.R. 581.
>
> The sufficiency of acts of possession must, in my view, be determined by the nature of the land in question.

I have already described the somewhat rugged terrain of this land. From hearing the evidence and viewing the land, I can think of no other commercial use the cleared land is more likely to have had since 1955-56 than growing blueberries. Certainly it is not good pasture land. It is not and has not

been capable of being cultivated for growing grain or vegetables with the shallow soil cover over the rock formation which has been and continues to be its base and additionally, the outcropping of stone and rock through the surface of the soil. In such a setting, the absence of fences is not significant. In fact, the presence of a fence or fences deters from the best use to which all of the land can be put.

I have to conclude that the weight of the evidence persuades me that the defendant has been in "actual, constant, open, visible and notorious occupation" of the cleared land in dispute since 1956. Susan asserts that it was a gradual encroachment. The evidence of the defendant and his former employees is that beginning in 1956 the burning extended over all the cleared land. While I am unable to decide who is really telling the truth on this point, I conclude from examining the evidence as a whole that it is more likely the defendant began burning over most if not all the cleared land in dispute in 1956. If that is not correct, then it soon followed by 1958 at the latest. Having regard for the nature of the land, the subsequent annual husbandry of the cleared land by the defendant makes his use of it actual and continuous. It was certainly open and visible to the owners. The land is by the side of the road. It is within the reach of the naked eye from the windows of the house occupied by the Slacks. It was open and visible to Suther while he lived until 1966, to Susan from 1956 until she remarried in 1971. Following her remarriage she lived in the Truro area, being only a few miles distant, and her interest and knowledge of the activities being carried on by the defendant continued. The plaintiff Gary returned from Ontario in the early 1970's and I am satisfied he, too, knew of the defendant's use and occupancy of the cleared land both prior to and following the April 27, 1981, conveyance of the residue of her Folly Lake land made by Susan to the plaintiffs as joint tenants.

The evidence persuades me that the defendant's claim to the land was asserted at every reasonable opportunity. There could have been no doubt in the minds of the Slacks following 1956 that the defendant was claiming the cleared land. When these claims were asserted, the Slacks backed off. They made no significant effort until 1982 and the commencement of this action to interrupt the defendant's open, visible, continuous and notorious occupation of the cleared land. Susan says she did not contest the defendant for the reason that she was then widowed and she was left with four small children and insufficient money with which to launch an action in the courts. While that is unfortunate, time kept marching on and with it the statutory period as provided by s. 9 of the **Limitation of Actions Act**.

I am persuaded by the evidence that the right of action first accrued in 1956 or 1958 at the latest. In the succeeding twenty years neither Suther nor Trueman nor Susan brought such action and now it is too late. The defendant has met the onus upon him to prove possession of the cleared land and thus the protection of the Statute.

I do not hold the same opinion with respect to the wooded portion of the land in dispute. In my judgment the defendant had no "colour of title" giving him a right to occupy that section. The Slacks continued to cut wood off this portion for their household use in the years after 1955 and 1956. Of the block of land in question, it is near to their house and a natural source of firewood. As well the Slacks

hunted the land and as I see it, used it as their own, which it was, having again regard for the acts of open and visible use and occupancy which one would expect of an owner, considering the state and condition of the land in question. I can find no right for Richard Donkin, the principal agent of the defendant, and through him Frank Green, to have gone upon the wooded area a few years ago and there to have cut and removed trees from it. It is not known now either the number or the value of the which were cut and removed. The evidence is clear that Richard Donkin, who recently died, was an employee and agent of the defendant with respect to the lands in issue and lawfully authorized to act behalf of and in the name and place of the defendant. For these acts of trespass the plaintiffs are entitled to damages which I fix for all purposes, including pre-judgment interest at $650.

To summarize, the declarations and findings which are the subject of this award are:

> (1) The northern boundary of the land conveyed by Suther Slack to the defendant Gaklis by deed dated March 14, 1956 is the rock line or rock fence as depicted on the plan prepared by R.A. Fulton, N.S.L.S. which is exhibit 1.
>
> (2) The **Limitation of Actions Act** operates to give the defendant ownership by adverse possession of the cleared land in dispute as depicted in the plan prepared by K.P. MacDonald N.S.L.S., which is exhibit 4.
>
> (3) The wooded area of the land in dispute as depicted on the MacDonald plan (exhibit 4) which extends westerly from the cleared land is owned by the plaintiffs.
>
> (4) The plaintiffs are entitled to damages of $650.00, being an all-inclusive award, for trespass upon their wooded land by Donkin, who was an agent and servant of the defendant, and those directed by Donkin.

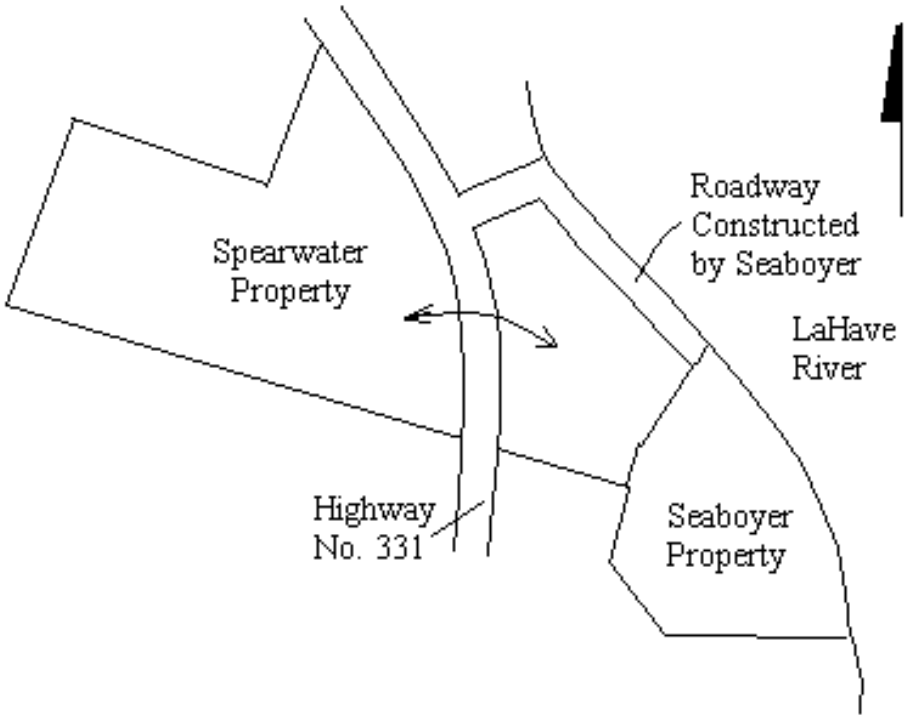
Finally, upon considering all the matters arising out of this action, I have decided that each party shall bear its own costs.

Judgment for plaintiffs in part.

SPEARWATER and SPEARWATER v. SEABOYER and SEABOYER (J.A.) TRANSPORT LIMITED See 65 N.S.R. (2d) 280

Nova Scotia Supreme Court, Trial Division
Nathanson, J.
September 7, 1984

The Plaintiffs and the Defendant Seaboyer owned properties that were adjacent to one another at LaHave, Lunenburg County. The properties fronted on the LaHave River and the case was concerned with the ownership and use of land which had been accreted. At the time of the trial, the respective properties of the parties were located as shown on the following sketch:



The Spearwaters had owned their property for many years. The property was actually made up of four individual parcels, all of which were described as bordered by or running to the LaHave River. In 1982, Seaboyer had acquired land fronting on the River and adjoining the Spearwater property to the South. In 1983, Seaboyer had a bulldozer construct a 10' wide roadway across the shingle beach from an existing access road to his property where he had constructed a fish store. The Plaintiffs sued Seaboyer and the company that he owned for trespass, for a declaration that they were the owners of the shingle beach, for an injunction and for damages. The Defendants argued that the Plaintiffs did not own the area where the roadway had been constructed, or in the alternative, that they had dedicated it to the public.

The Trial Judge reviewed a wide range of issues that are of interest. The following is a listing of those issues and the findings of the Judge:

- The Judge first considered the Defendants' claim that the Plaintiffs did not have sufficient interest in the land over which the roadway had been built to support a claim for trespass. The Judge determined that the land in question had been formed over many years through the process of accretion. There is an excellent review of the general principles of accretion and some valuable comments on the issue of the artificial enhancement of the accretion process. In the end, the Judge decided that the Plaintiffs did have sufficient ownership in the land in question to support the action. The Judge did find that there might be some claim to the land by either the Federal or Provincial governments based on the fact that one or the other level of government had constructed cribwork at or near the property in the past.
- The Judge then addressed the issue of where the northern and southern boundaries of the accreted land should be placed. As to the southern boundary (the common boundary with Seaboyer) the Judge found that the Spearwaters had acquiesced in the location of that boundary as it was shown on two survey plans, one prepared by Seaboyer's land surveyor and one by Spearwaters' own surveyor. The northern boundary was more difficult and in the end, the Judge refused to define it, primarily because the owner to the north was not a party to the action. Of particular interest in the Judges comments is the statement that the normal procedure in dividing accreted land would be to extend the sidelines of the properties as they existed before the accretion.
- The Judge then determined that the acts of Seaboyer did amount to trespass.
- The next issue was whether or not the Spearwaters had dedicated the beach to the public. The Judge undertook a valuable review of the law of dedication and acceptance and eventually found that no dedication had taken place. The Judge made some very interesting comments on the neighbourly attitude that exists in rural Nova Scotia and his concern that neighbourly acts should not be found amount to dedication so as to punish a landowner for their generosity.

SPEARWATER and SPEARWATER v. SEABOYER and SEABOYER (J.A.) TRANSPORT LIMITED
Nova Scotia Supreme Court, Trial Division
Nathanson, J.
September 7, 1984

The plaintiffs are husband and wife who claim that the defendants have been trespassing upon a portion of their lands and, therefore, they seek a declaration of ownership, an injunction and damages. That portion of land is accreted land. The defendants claim that the plaintiffs do not have sufficient legal interest in it to maintain an action in trespass or, alternatively, that the strip of land actually used by them as a road has been dedicated to public user.

The lands of the plaintiffs are situate at LaHave, Lunenburg County, Nova Scotia. Provincial Highway No. 331, curving generally in a north-south direction, divides those lands into two portions. The portion to the west of the highway has an area of 1.782 acres and has upon it the house in which the Spearwaters reside. The portion to the east of the highway, that is, lying between the highway and the shore of the LaHave River, has an area of 26,630 square feet.

It is this latter portion which is the focus of the various claims in this proceeding. Some witnesses referred to it as the 'beach lot'; others, as 'shingle beach'. According to my dictionary, "shingle" describes a kind of small beach rocks. It is my understanding that the beach lot is substantially made up of rocks of that type which were deposited and built up over a long period of time by the ebb and flow of the river tide. The shore line has changed over the years by tidal action; it is probable that the size of the beach lot has increased and decreased accordingly.

There was once a cove to the west. Land in that area accreted to the east of the shore then existing in such manner that the water between the shore and the accreted material became a pond. Until the late 1960's or early 1970's, that pond was open to the river through a narrow channel but, at that time, the northeast portion of the channel, which is the portion closest to the LaHave River, was filled in by tidal action. The northwest boundary of that channel at one time may have constituted a portion of the prevailing shore line and, in such case, would no doubt have constituted part of the southeast boundary of the beach lot of the Spearwater lands.

The plan of survey of the Spearwater property by Becker and Wentzell Surveys Ltd., exhibited at trial, shows the outline of a roadway approximately 10 feet in width running in a southeast direction from beyond the north boundary of the beach lot across shingle beach (including the filled-in area of the channel) to a lot on the south of the beach lot owned by the defendant, James A. Seaboyer. It is necessary to ascertain what, if any, legal interest the plaintiffs have in the accreted portion of the beach lot and, in particular, their legal interest in the so-called roadway over shingle beach.

The Spearwater lands are made up of the eastern portions of four lots shown on early plans. Exhibit no. 14 is an abstract and certificate of title of those lands. It traces the chains of title back to warranty deeds dated 1882, 1896 and 1912. The certificate states that title was "not searched for such instruments as may have been recorded prior to" those dates. The certificate does not state that the title is clear and free from encumbrances but, in his testimony, the solicitor who carried out the search expressed the opinion that the title was merchantable and complete.

Attached to the abstract is a copy of a plan dated September, 1983, by E.H. Solomon, surveyor. That plan shows the highway, the four lots to the west of it, and the beach to the southeast. The beach is unbroken by boundary lines. The boundaries of the lands to the west of the highway do not cross the highway and do not run to the shore. The plan does not show either a cove or a pond in that location.

Various aerial photographs exhibited show the pond in the last stages of development over a period of some 31 years between 1945 and 1976. Land accreted to form the eastern shore of the pond, in the end leaving a narrow channel connecting the pond to the river. At one point of time, boats were able to enter and traverse the channel in order to anchor in the pond.

About 45 years ago, someone caused cribwork to be constructed on both shores of the channel, probably to define it and help keep it open. The evidence as to the identity of the person or body who caused the cribwork to be built is vague. The property was then owned by Mr. Spearwater's father; he did not construct it, but he did not object to it. Mr. Himmelman, the surveyor, stated that it was owned by the government, but offered no proof as to the source of his knowledge or to which government he was referring. Mr. Seaboyer believed it was government property, but had no personal knowledge of the matter. Mr. Spearwater, Mr. Seaboyer and other local people worked on its construction for wages. Generally, all witnesses were unhelpful about the facts of the matter.

At the opposite extreme, there was a plethora of evidence as to usage of the beach lot over the years. Some of it is contradictory. Without going into excessive detail, I find that there was evidence of occasional usage of the beach lot going back at least 20 years. That usage was primarily of various individuals walking, fishing, swimming, leaving an occasional boat there, going to and from fishing and pleasure boats anchored off shore. I also find that the east end of the channel near the cribwork filled in about 5 years ago so as to permit the passage of vehicles. After that, some use of the beach by vehicles was evident. I also find that usage by various persons increased over the years, but substantially so after April 29, 1983, when Mr. Seaboyer caused the access road beyond the north boundary of the beach lot to be graded and widened and caused a bulldozer to pack down the path of a roadway approximately 10 feet wide across the rocks of the beach lot including the filled-in channel of the pond. That path lay just above high- water mark. The weight of the evidence is that the land on which the roadway is located has accreted and has been in existence only during the past 3 to 4 years. Several witnesses indicated that Mr. Seaboyer has been the source of much of the increased traffic as he is using the path across the beach for access to a fish store which is situated on his land to the south of the beach lot.

Mr. Seaboyer and a number of other witnesses testified that there is not now, and never was, any indication that the beach lot was owned by the Spearwaters or anyone else. They have never seen any signs or barriers, and have never been prevented from using the beach or the path across shingle beach. Mr. Spearwater appeared to confirm that evidence to a substantial degree; however, he said that he gave permission to one man, refused Mr. Seaboyer the right to remove gravel from the beach, and complained of gravel removal to the Department of Highways which posted a sign and, when that disappeared, posted a second one.

Mr. Seaboyer acquired the lot adjacent on the south by deed dated November 17, 1982. In anticipation of the acquisition, he hired David Himmelman to carry out a survey of that lot. His original plan of survey is dated October 18, 1982, while a revised plan is dated October 14, 1983. The latter shows a portion of the south-west boundary of the Spearwater lands, but does not show it running all the way to the shore; it stops 95.86 feet from the highway and then turns northeasterly towards the shore. The effect is to decrease the quantity of land claimed by the Spearwaters and to increase the quantity claimed by Mr. Seaboyer for whom Mr. Himmelman was acting. The reason given by Mr. Himmelman in evidence is that the shore referred to in the various legal descriptions in Mr. Spearwater's chain of title is not the shore of the river as it now exists but, rather, is the shore of a cove shown on an earlier plan by Solomon in 1876. However, that plan does not show any part of the lands owned or claimed by the Spearwaters.

Mr. Himmelman expressed the opinion that the accreted land should belong to the property to which it is attached and, therefore, the Spearwaters were not entitled to claim more than one-half of the filled-in area of the channel. He also believed that the Spearwaters could not claim the crib-work because of its use by the public. Mr. Himmelman gave no indication that he realized that he was expressing legal opinions rather than surveying opinions or that he had consulted a solicitor about the matter; nor did he give any indication of first-hand knowledge of the alleged public use of the cribwork area. His plans of survey attribute all of the filled-in channel, rather than only half, to the ownership of the Spearwaters.

Mr. Himmelman's revised plan also shows an "existing road" running from the highway across the beach lot to a new shed situated near the south boundary of the Seaboyer lot; however, it is not shown on his original plan. Since there is nothing in evidence to suggest that the access road at the highway is part of the path over the beach lot and since the weight of the evidence is that the path was pressed down by a bulldozer on April 29, 1983, it seems a gross exaggeration to show it on a plan of survey as an "existing road" only 5-1/2 months later.

Mr. Himmelman testified that Mr. Spearwater came to speak to him during the course of the survey and indicated that his southwest boundary should be shown as running to the shore. Although he gave no reason, Mr. Himmelman was unable to agree. Mr. Spearwater testified that he told Mr. Himmelman that he was dissatisfied with the proposed placement of the north boundaries of the Seaboyer lot (which would be the same as the south boundaries of his beach lot) and he did not accept it; however, he could not afford to go to law to contest it.

Upon consideration of the testimony of Mr. Himmelman and of the two plans of survey prepared by him, I have come to the conclusion that they are not objective so that great weight should not be attributed to them.

Mr. Spearwater retained the services of his own surveyor, Robert Becker of Becker and Wentzell Surveys Ltd., whose plan of survey is dated July 20, 1983. It shows the south boundaries of the beach lot (and the north boundaries of the Seaboyer lot) as and where they are located on the original plan by Himmelman. Mr. Becker testified that Mr. Spearwater had acquiesced in their location and, therefore, he followed that original plan. Mr. Spearwater confirmed that he did agree to it. Mr. Becker's plan also shows by broken lines a "roadway approximately 10' in width, over shingle beach" leading to the Seaboyer lot. It is shown there because Mr. Spearwater requested him to put it in to indicate what path was being used by Mr. Seaboyer. He did not object to the request; but it was one request he should have refused or, if not, he should have labelled the path shown on the plan in a more appropriate manner. When a road is shown on a plan of survey, it may be evidence of dedication or of an intention to dedicate; that is the opposite of what Mr. Spearwater wanted. Mr. Spearwater should have been advised to consult a solicitor at that point. In any event, it is clear from the evidence of Mr. Becker and of Mr. Spearwater that the broken lines on the plan were intended to show the path pressed down by a bulldozer and used by Mr. Seaboyer and were not intended to show a road dedicated in fact and in law.

The first issue is whether the plaintiffs have sufficient legal interest in the lands upon which to base a claim of trespass.

It has long been held in this jurisdiction that a plaintiff in an action for trespass must prove possession, either actual or that which derives from title: see **Lessee of Cunard v. Irvine** [1853-55] 2 N.S.R. 31; **MacDougall v. Layes et al.** (1965-69), 2 N.S.R. 96; **Logan v. Levy et al.** (1975), 20 N.S.R.(2d) 500; 27 A.P.R. 500; **Griffin v. Poirier and Poirier** (1981), 49 N.S.R. (2d) 706; 96 A.P.R. 706 and **Conrod v. Redmond** (1982), 51 N.S.R.(26) 310; 102 A.P.R. 310.

In **MacDougall v. Layes et al.**, (supra), Dubinsky, J., stated at p. 121:

> "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."

In **Conrod v. Redmond**, (supra), Rogers, J., stated the rule in this manner at p. 312:

> "It is therefore clear that the plaintiff in this action must establish clear title to the lands in dispute, either by tracing his title back to the Crown or to someone in possession..."

The plaintiffs have proved that they have clear title to the lands. The exhibited abstract of title and certificate of title together with the testimony of the solicitor who searched and certified the title satisfy me on that point. Granted, the title disclosed is not shown all the way back to the Crown grant; but it is now a commonly accepted practice in this province to search back only 60 years (based, I believe, upon a misinterpretation of certain provisions of the **Statute of Limitations** and a confusion between the concept of occupation and that of documentary title). The defendants had the opportunity at trial to try to demonstrate either that the land was never granted by the Crown or that there was a break in the chain of title subsequent to the Crown grant and prior to the earliest deed in the chain of title disclosed in the abstract exhibited. Since they did not take that opportunity, I infer that there was nothing to demonstrate, and I rely upon the evidence to hold that the plaintiffs have title to the lands.

Even if the quality of their title is insufficient for a finding that they have the possession that derives from title, it is clear that they have had actual possession for many years and so did their predecessors in title. The evidence is that they have resided in the house located on the portion of the property that lies to the west of the highway virtually continuously since approximately 1945 and, prior to that date, the parents and grandparents of Mr. Spearwater resided there. I believe it is the same house as is shown on the Solomon plan of 1883. Occupation of that duration and quality would no doubt be sufficient to vest possessory title in the plaintiffs if they did not already have documentary title and, upon the principle of colour of right, occupation of part would constitute possessory title to the whole as described in the various deeds on record.

It is worth noting that the defendants do not claim title or possession of the Spearwater lands. Therefore, I hold that the plaintiffs are able in law to maintain a right of action grounded in trespass.

We turn now to a consideration as to whether that conclusion also applies to the beach lot. In my opinion, the answer depends upon whether the beach lot – including all accreted material – is in law part of the total lands of the Spearwaters so that it can be shown that they were in possession of the beach lot as well as the lands to the west of the highway. That leads us to the second issue, which is: who has title to the accreted parts of the beach lot including the so-called roadway over shingle beach?

The legal descriptions of the four lots from which the Spearwater property is derived, as set out in the various deeds in the chain of title, run to "LaHave Harbour", "the shore of the LaHave River", “the sea shore" and "the LaHave River" respectively. It is not contested that all of those phrases are references to the western shore of the LaHave River. Therefore, each of the four lots has the river as its southeastern boundary. Moreover, the fact that the boundary lines as stated run to the shore without mentioning that they cross the highway which divides the property indicates that the beach lot lying between the highway and the shore was intended to be part of the total property of the plaintiffs and their predecessors in title.

The law relative to this issue is stated succinctly in the excellent text (and conveyancer's friend) Anger and Honsberger, **Canadian Law of Rea1 Property** 1959, p. 640, as follows:

> "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 alluvial 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..."

It is not challenged that the accretion has been "gradual, slow and imperceptible", being a process that may have been at work at least as far back as the Soloman plan of 1876. Since the property was described as, and actually is, bounded on the southeast by the shore, the accretion belongs to the Spearwaters as owners of the land extended by the accretion.

Certainly that conclusion is applicable to the north portion of the beach lot, that is, the portion that lies between its north boundary and the channel of the pond including the area of it which is now filled in. There may be some doubt whether it is also applicable to the channel and filled-in area for two reasons. One, the cribwork that runs along the two sides of the channel may have been constructed by or on behalf of the Crown, possibly indicating that it and the land on which it stands and beyond may be owned by the Crown. Second, the presence of the cribwork may have been the artificial cause of the northeast portion of the channel being filled in by accretion, and only natural accretion may come within the law.

As to the ownership of the crib-work and adjoining land, the evidence is uncertain and unclear as to who built the cribwork, the purpose of its construction, and the identity of the person or agency who ordered the work done. I was left with the impression that it was possibly built by a construction company for some agency of the federal or provincial Crown. The burden of proof is upon he who alleges. In this case, the defendants have the burden of proving ownership by the Crown and they have failed to carry that burden. They might have called an appropriate public servant as a witness. They might have applied to join the Crown as a party to this proceeding; all actions for a declaration of title should include a claim under the **Quieting of Titles Act**, R.S. N.S. 1967, c. 259, and the Attorney-General of Nova Scotia should be joined as a party. Or the defendants might have notified the Attorney-General or the Department of Lands and Forests of the claims in this proceeding. There is no evidence that they did any of those things. The court was faced with a factual vacuum. I therefore hold that the first reason has not been proved. However, the title and possession of the Spearwaters may be subject to rights of the Crown which can be established at an appropriate time in the future.

As to whether the cribwork was an artificial cause of the accretion, there are two replies that can be made. It is most unlikely that the cribwork, which separates the two opposite sides of the channel, would have been built if the accretion process was not then already under way and obvious; otherwise, there would have been no reason to try to keep the channel open by keeping its two banks separated from each other if the channel did not exist and, therefore, if only one bank existed. Because part of the channel is now filled in, the most that can be said about the relation between the cribwork and the accretion is that the existence of the cribwork did not interfere with the process of accretion which

began prior to the construction of the cribwork. But, even if the cribwork was the cause of the accretion, the principle does not necessarily exclude artificial accretion. In **Canadian Law of Real Property**, (supra), p. 641, it is stated:

> "...the rule applies not only to accretion arising from natural causes but also to accretion arising from artificial causes where the artificial causes arise from a fair use of the land and not from acts done with a view to acquisition of the lakeshore (**Att'y-Gen'1 v. Chambers**, **Att'y Gen'1 v. Rees** (1859), 4 De G. & J. 55, 45 E.R. 22), and the rule will apply to accretion even though it has been unintentionally assisted by or could not have taken place without the erection of groynes for the purpose of protecting the shore from erosion (**Brighton & Hove Gen'1 Gas Co. v. Hove Bungalows Ltd.** [1924] 1 Ch. 372)."

> "Land gained by alluvial deposits arising from natural or artificial causes or from causes part natural and part artificial accrues to the owner of the adjacent land so long as it is proved that the accretion was gradual and imperceptible (**Standly v. Perry,** supra) and even if the accretion is due to artificial erections by a harbour company having statutory privileges (**Doe d. McDonald v. Cobourg Harbour Com'rs** (1843), 1 Ont. Dig.1843)..."

Since there is nothing in evidence to prove that the cribwork was constructed in connection with any acquisition of the shore or in order to protect the shore from erosion, any artificial accretion was within the principle.

In my opinion, the accretion to the Spearwater property includes the area of the channel filled in by sea action as well as some land beyond the cribwork as shown on the survey plans of the Spearwater property and of the Seaboyer property exhibited at trial. That includes the so-called roadway over shingle beach; it is above the mean high water mark and, therefore, would not be able to be claimed by the Crown. Consequently, title is vested in the plaintiffs and, in such case, they have the possession that derives from it so that they can maintain an action in trespass with respect to the roadway or any part of the beach lot.

Before leaving this issue, I should like to make some brief comments concerning the north boundary and also the two southern boundaries of the beach lot. The location of those boundaries affects the quantum of land making up the beach lot. It is desirable to examine whether they are as certain as they appear to be.

The Spearwaters allege that the southwest boundary of the beach lot is the prolongation southeasterly of the southwest boundary of the portion of the property which lies to the west of the highway. Although it is not shown on the 1883 survey plan by Solomon, this is the most logical and probable place to locate it. In such case, it should run straight to the shore instead of, as shown on the

Himmelman and Becker plans, from the highway southeasterly 95.86 feet and then northeasterly on two different bearings a total distance of 113.28 feet to the shore. The way it is shown on those plans has the effect of increasing the size of the adjacent Seaboyer lot by approximately 50%. The earliest of the survey plans is the original one prepared by Himmelman; he was hired by Mr. Seaboyer to survey the lot which lies to the south of the beach lot and which Mr. Seaboyer acquired late in 1982. Subsequently, Mr. Spearwater hired Becker to carry out a survey of his property. Becker spoke to Himmelman, perused a copy of the Himmelman plan, discussed the boundaries with Mr. Spearwater, and then showed the boundaries in the same location as Himmelman had. Becker testified that Mr. Spearwater acquiesced in the placement of those boundaries. However, at the trial, Spearwater testified that he had not agreed to the location of the boundary lines and stopped complaining only because he could not afford legal action. That is most unfortunate. It would have been better if he had sought legal advice at that point. If his acquiescence was forced by circumstances or was under duress, it may be that it was not true acquiescence; but the weight of evidence is that he acquiesced. He knew or should have known that one or both surveyors would rely upon his cessation of complaint in the preparation of their plans of survey. Those plans are certified, in circulation, and recorded in the Registry of Deeds where they constitute notice to the public. It is now too late for Mr. Spearwater to rationalize his prior statements of acquiescence. One or both of the surveyors have relied upon those statements to their potential detriment, and it may be that others have done so as well. In such case, I hold that Mr. Spearwater did acquiesce, that he is bound to the location of the boundaries as shown on the three plans of survey, and that he is estopped from claiming title to the land lying between those boundaries and where the boundary would be if it ran in a south-easterly direction straight to the shore. That land is part of the land owned or claimed by Mr. Seaboyer.

The situation is different with respect to the north boundary of the beach lot. It cannot be the prolongation southeasterly of the east boundary of the portion of the property lying west of the highway because the east boundary is the highway; it does not run southeasterly to the shore but, rather, curves generally in a southerly direction. In trying to ascertain where the north boundary of the beach lot was intended to be, there are several possibilities. The most logical and probable one is that it should follow the south boundary of the beach access road as it is depicted on the Becker and Wentzell plan. The same road runs more northerly on the 1883 Solomon plan but, nevertheless, the fact that it is shown on that plan tends to prove that it has been in existence for at least 100 years. It begins only several feet from where Mr. Spearwater seemed to think his boundary was located, as evidenced by a line of stones placed there by workers about 1963 when the highway was being re-built and recently disturbed by a bulldozer being operated upon the instructions of Mr. Seaboyer. I might be prepared to make a finding that the south boundary of the beach access road constitutes the north boundary of the beach lot if it were not for the possibility that the title of the land adjacent on the north might be affected. Although the ownership of that land is noted on the Becker and Wentzell plan as "owners unknown", the plaintiffs could have made a claim in this proceeding under the provisions of the of **Quieting of Titles Act** and, following the usual procedure, they would have joined the Attorney General as a party. They did not do so. I am reluctant to grant a declaration establishing that boundary under those circumstances, and I decline to do so.

The third issue is whether the acts of the defendants amount to trespass. There can be no doubt that they do. The matter was not seriously contested by the defendants. There is evidence of usage of parts of the beach lot including the roadway over shingle beach. Indeed, the post-trial brief on behalf of the defendants contains the following paragraph:

> "Mr. Seaboyer testified that the started crossing the said beachfront property in l973, using a four-wheel drive vehicle and that he and others continue to use it to gain access to the Seaboyer-Corkum property. He also testified that last year he had three trucks belonging to the corporate defendant drive along the beach roadway to assist in the construction of a fish store that is located on his property. He also testified that he had a bulldozer drive over the roadway to assist in the construction of the store."

Other acts of usage were alleged on behalf of the plaintiffs but, assuming the acts described in the brief were the only acts of usage, they would be sufficient to constitute trespass.

The fourth issue is whether the so-called roadway over shingle beach has been dedicated as a public thoroughfare which the defendants and others are able to use free from liability for trespass. Much of the discussion with respect to the first three issues was directed at the beach lot, including the so-called roadway over shingle beach. The discussion of this issue is focussed exclusively upon the roadway. There is some evidence of occasional usage of the beach lot or the accreted area of the beach lot prior to l980 or 1981. That usage consisted of such acts as walking on the beach, leaving small boats there, and using the shore as a base for access to fishing boats anchored nearby. The evidence of such usage was not limited in any way to the strip of land that the defendants claim is dedicated as a roadway. That is no doubt because the roadway so-called did not come into existence until approximately 1980 or 1981. In such case, there is no point detailing the usage prior to that time as it is not relevant. What is relevant is the evidence of usage after the roadway allegedly came into being.

A description of the basic concept of dedication is found in **Halsburys Laws of England**, 3rd. Ed., Vol. 19, p. 43:

> "60. Dedication and acceptance. A claim to a public right of way may be based either upon dedication and acceptance, or upon some statute (q)."
>
> "Land dedicated by a person legally competent to do so (r) to the public for the purposes of passage becomes a highway (s) when accepted for such purposes by the public; but whether in any particular case there has been a dedication and acceptance is a question of fact (t) and not of law (u)."

Dealing first with whether the defendants, who raised dedication as a defence, may find some statutory support for their position, the defendants cited s. 10 of the **Public Highways Act**, R.S.N.S. 1967, c. 248, as follows:

"10 (1) Except in so far as they have been closed according to law:
.....
(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;
.....
shall be deemed to be common and public highway until the contrary is shown."

The plaintiffs countered by referring to s. 15(2) of the same **Act** which is as follows:

"15 (2) No road or allowance for a road hereafter laid out, made or set aside by any person other than the Minister or some person acting on his behalf, becomes a public highway for the purposes of this Act until the Minister indicates formally that he accepts the road or allowance as a public highway for the purposes of this Act. R.S., c. 235, s. 15."

In my opinion, neither of these two statutory provisions has application to the present circumstances. Section 10 begs the question as to whether there is a road in existence and, if so, whether it is opened, used and dedicated as such. Section 15(2) deals with the responsibility of the Minister of Highways with respect to a road "laid out, made or set aside" by a person who, most likely, would have to be the owner of the land; in addition, it concerns a "public highway for the purposes of this **Act**" which is not necessarily the same as the kind of thoroughfare envisaged in this proceeding.

Dealing next with the concept of acceptance, there is evidence of substantial usage over the years, but of much more usage during the past 3 or 4 years, that is, after the roadway came into existence. But only some of the latter was with reference to the road-way which is the subject matter of this proceeding. Almost all of that was by a relatively small number of persons and for limited purposes, namely, either access to the river or to the Seaboyer lot which lies to the south of the beach lot. Indeed, it appears that the major users during that period of time were the defendants; they caused a bulldozer to press down the rocks on the shore so as to create a settled path that is now referred to as the roadway over shingle beach. Those acts were followed about 4 months later by the initiation of the present court action by the plaintiffs. I am very doubtful that occasional usage by relatively few people for limited purposes over such a brief period of time is a good basis for a positive finding of dedication in this particular case.

Next, there is the concept of dedication by the owners. That requires intention to dedicate on their part. The evidence is clear that the Spearwaters did not express an intention to dedicate in any way. But evidence of intention may be inferred from acts of user not stopped or interfered with by the owners. In **Mann v. Brodie et al.** (1884-85), 10 A.C. 378 (H.L. (Sc.)), Lord Blackburn stated at p. 386:

> "But it has also been held that 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..."

There is evidence that the plaintiffs did not take any substantial steps to give notice of their ownership to the public or to stop the occasional usage of the beach lot by the defendants and others. They were aware of that occasional usage, yet they did not erect a sign stating "private property" or "no trespassing" or the like; they did not erect a fence or barrier; they did not close off access for one day a year or for any period; they did not warn users or direct them to leave; they did not place an advertisement in a newspaper. Mr. Spearwater gave oral permission to one specific person to leave his boat on the shore; he complained to the Department of Lands and Forests about gravel being removed from his beach; he instructed his lawyer to send a letter to Mr. Seaboyer immediately after the bulldozer created the road-way. That is about the sum total of their positive acts. I can understand that their inaction may have led Mr. Seaboyer and others to believe that the accreted land was not owned by them and was probably Crown land open to the public. But, since their inaction was not combined with evidence of long public user (there being, as I previously indicated, little such relevant evidence with respect to the roadway), I am not willing to draw an inference of intention to dedicate from the relatively few acts of user during the relevant period of time and from the inaction of the plaintiffs.

Whether there has been dedication and acceptance is a question of fact. Based on the whole of the evidence, I find that the so-called roadway over shingle beach is not dedicated as a public thoroughfare.

I am concerned about a number of things: that the roadway leads only to the Seaboyer property and nowhere else; that the roadway is located just a few feet about the mean high water mark; that the roadway is made up of beach rocks; that there is no sign at the highway indicating to the public the existence or the purpose of the roadway; that Mr. Seaboyer did not seek out the Spearwaters and ask them whether they owned or claimed the road-way or the accreted area of the beach lot; that, if Mr. Seaboyer believed the roadway to be Crown land, there is no evidence that he sought permission but, rather, went ahead on his own to bulldoze the roadway. All those concerns confirm my conclusion that the roadway has not been, and should not be, dedicated. There is one additional matter that weighs heavily on my mind.

Nova Scotia is a peninsula virtually surrounded by water. It has thousands of miles of coastline. It has additional thousands of miles of river shore line. Nova Scotians who own lands with water frontage rarely fence or bar access along the shore to friends, neighbours, tourists and the public. There exists a natural toleration and a willingness to share on the part of landowners, particularly those in rural areas. The courts have long recognized this accommodating attitude towards acts which, strictly speaking,

would amount to trespass: see **Campbell v. Pond et al.**, 44 N.B.R. 357 and of **Burden and Gelsinger v. The Township of Sherbrooke**, [1956] O.W.N. 373. There evidence in the present case of a similar attitude. Mr. Spearwater testified that he thought it would not be neighbourly to stop people from walking or launching a boat on his beach as they were not harming anything. At least one other witness testified that it is not the custom of that area to exclude people who are engaged in innocent activities from one's property. If I had found that the roadway over shingle beach was dedicated as a public thoroughfare, my decision might be seen as encouraging other similar claims throughout the province in equally inappropriate circumstances. In the light of the attitude and custom of landowners having water frontage, it is proper that their rights should not be too easily jeopardized. At the same time, they should be aware that their rights are exposed to risk if they fail to take at least some minimal steps to notify the public of their legal right to possession or if they fail to keep out trespassers for some period of time on occasion.

In the result, the defences raised by the defendants are not maintainable while the claims of the plaintiffs are proved.

That brings us to the matter of remedies. The plaintiffs will have a declaration of title, but its scope will be restricted. This case is considered to be an appropriate one for the exercise of discretion to issue a permanent injunction. The plaintiffs will have general damages but, as no real harm has been established, the amount will be nominal. The plaintiffs will receive pre-judgment interest; because no rate was proved, I set the rate at 8%.

Therefore, the court will grant an order:

(a) declaring that all accreted areas of the beach lot are vested in the plaintiffs, subject to: (i) determination of the exact location of the north boundary of the beach lot;
(ii) determination of the interest (if any) of Her Majesty the Queen in the cribwork so-called; and
(iii) my finding with respect to the south boundaries of the beach lot;
(b) permanently enjoining the defendants, their servants and agents from trespassing upon the accreted areas of the beach lot including the so-called roadway over shingle beach;
(c) ordering the defendants to pay to the plaintiffs general damages in the nominal amount of $ 1.
(d) ordering the defendants to pay pre-judgment interest at the rate of 8% per annum from April 29, 1983, to date of judgment;
(e) ordering the defendants to pay party-and-party costs of the plaintiffs, the same to be taxed in the usual manner.

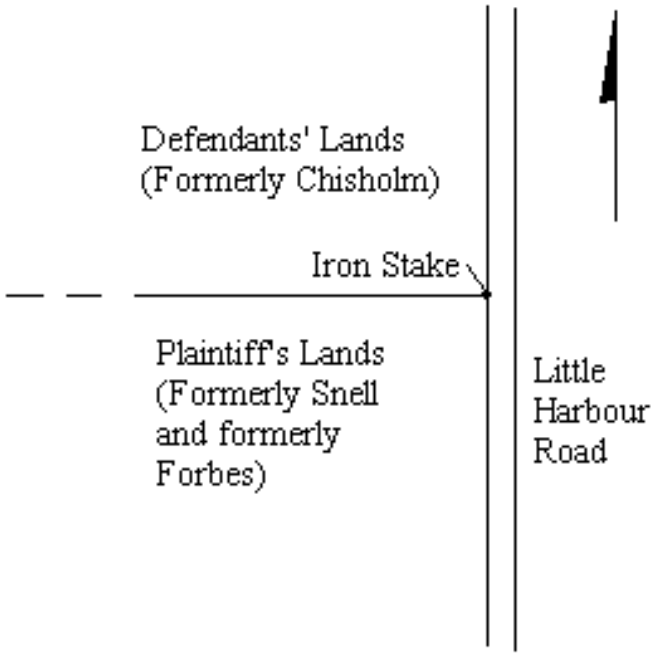
No doubt many of my comments in this decision will be unintelligible without reference to a plan. I am therefore attaching a reduced copy of the Becker and Wentzell plan in the hope that it will be helpful. [see sketch]

I express my appreciation to counsel for the thorough briefs which they submitted.

Judgement for the plaintiff

JOYCE v. SMITH and SMITH See 66 N.S.R. (2d) 406
JOYCE v. WILKENSON and WILKENSON
Nova Scotia Supreme Court, Trial Division
Grant, J.
December 13, 1984

This case is actually two actions combined into one decision. The Plaintiff Joyce and the Defendants (the Smiths and the Wilkensons) owned adjoining lands near Trenton in Pictou County. The lands were located as shown on the following sketch:



The description in the Plaintiff's deed indicated that the Plaintiff's north line was the base line of the Crown Grants. Testimony at the trial indicated that the base line was located some 500' north of the line shown on the above sketch. As a result, the Plaintiff demanded that both Smith and Wilkenson were trespassing and should be ordered to remove their home and mobile home. The Defendants claimed that the line shown on the above sketch represented the correct boundary line between the parties.

The Plaintiff had purchased the property from his sister, Snell. For some time prior to that transaction, Snell had thought that the Smiths' mobile home was located on her property. At about the time of the transfer to the Plaintiff, the Wilkensons began construction of a house on their lot. After the house was completed, Joyce demanded that the Wilkensons and the Smiths pay for the land that they were occupying.

Joyce had hired a land surveyor to survey the property. The land surveyor determined that the base line was located some 500' north of the line claimed by the Defendants. The Defendants hired another land surveyor who located the iron pin on the west side of the road and traced a line westerly to another iron pin. The Defendants claimed that this line represented the boundary line between the properties.

At the trial, there was ample evidence that the former owners of the properties had respected the line marked by the iron pins as their boundary.

The Judge found that despite what the Plaintiff's deed description said, the former owners of the property had come to a conventional line agreement that the line marked by the iron pins was the boundary between the properties. Alternatively, the Judge indicated that the Defendants had established a valid claim to the disputed land by adverse possession. In the further alternative, the Judge held that the Plaintiff would have been estopped from pursuing the claim because he had done nothing while the Wilkensons expended money building their home.

The claims of the Plaintiff were thus dismissed.

JOYCE v. SMITH and SMITH
JOYCE v. WILKENSON and WILKENSON
Nova Scotia Supreme Court, Trial Division
Grant, J.
December 13, 1984

These two actions are brought by the plaintiff for a declaration of title, recovery of certain lands, general damages, special damages, interest and costs.

The defendants also ask for a declaration of title, compensation if ordered to move and costs.

The sole issue is the determination of the north boundary of the lands of the plaintiff. This will determine the south boundary of the lands of the defendants, Wilkinson, and the title to the lands of the defendants, Smith.

The plaintiff alleges that he has good paper title to the lands and occupies a portion, from which possession and occupation of the whole may be implied. The defendants rely on acts of possession of themselves and their predecessors in title, as well as acts by the plaintiff's predecessors in title. They also say that the predecessors in title of the parties agreed on a line and observed the line as their boundary.

Counsel produced abstracts of title (Exhibit 1 and Exhibit 2) which purport to take title back to the Pictou County Atlas, Meacham, 1879. This Atlas has been accepted by this court as an acceptable root of title. Schedule "C" to Exhibit 2 is an excerpt from the Atlas.

The plaintiff's title root goes back to Thomas Cameron and Charles Scott Forbes who had as the north line the "base" line. This base line is also shown as the south line of the predecessor in title of all the defendants. A part of the atlas showing the base line is reproduced on page 2A.
[sketch omitted]

The line in issue is to the west of the Little Harbour Road. It is near Trenton, Pictou County.

A plan, Exhibit 3, dated July 8, 1982, purports to show the lands of the plaintiff's immediate predecessor in title, Virginia Rose Snell.

The plaintiff is a brother of Mrs. Snell, the previous owner. The defendants are a son and daughter of William Eugene Smith and their spouses.

The defendants allege that there was an iron stake on the west side of the road indicating the southeast boundary of their lands. They also allege there was an iron stake at the southwest corner of their lands and that their south line was a blazed line connecting the two iron stakes.

Virginia Snell (Mrs. Snell) is a sister of the plaintiff and acquired the lands in 1968 from Charles Scott Forbes (Forbes). Her deed is paragraph 5 of Exhibit 1. She was not sure of her northern boundary. She said that about two years after she moved in she was told by Alex Chisholm (Chisholm), a predecessor in title of the defendants, that he no longer owned land on the west side of the Little Harbour Road. She lives on a farm near the railroad to the east of the Little Harbour Road and not included on the plan.

Mrs. Snell said that she always questioned the defendants living there. She said she was upset when she learned the defendants, Wilkinson, were building on the lands. She never spoke to any of the defendants about being on what she considered to be her lands. She said she had no money for a survey. She attended on at least three lawyers, including legal aid, but none of them took any action on her behalf, or encouraged her.

Mrs. Snell said that when purchasing the land from Forbes her husband went around the boundaries of her lot with one John Wilson. Forbes was not able to go. She said she did not use the lands on the west side of the road but she walked there and her children played there. She said that when she purchased from Forbes he was in a nursing home and died around 1974.

Mrs. Snell said that by the Norman B. Snell property (shown on the plan) there was an old road leading to the west. She never saw an iron stake or pin near the house of the defendants, Wilkinson. She said her husband has a liquor problem and for that reason the deed was in her name.

Mrs. Snell said she made an agreement with her brother, the plaintiff, to build a home for her and she deeded the land to him. At that time, March 1983, the defendants, Wilkinson, had built their home. A trailer had been on the lands (as shown on the plan) since 1972 (11 years) and Eugene William Smith (Smith) had occupied at least some of the disputed lands for thirteen years. She said she told the plaintiff of the problem before he purchased the lands from her.

Norman Snell (Snell), age 68, is the husband of Mrs. Snell. He said there was an iron stake on the west side of the road just opposite the driveway of one Martin and "on an angle". He said it was there for years before Smith built in that area (1969).

Snell said that Chisholm showed the stake to him and his wife but it was opposite Martin's driveway. He also said the stake was close to Smith's driveway. He denied showing a stake to a surveyor, McCallum.

Bryce Joyce (Joyce) is the plaintiff. He said that in 1982 his sister, Mrs. Snell, told him someone was building on her land. He acquired the land by building a house for his sister in exchange for a deed. He had a survey done and then told the defendants, Wilkinson, to move. He has sold off some lots and had an offer of $3,500 for the lands the Smith trailer is on. He said no one showed him the boundaries before he purchased.

Joyce said he would have purchased the land whether or not it included the area in question.

Gary Wadden (Wadden) became a Nova Scotia Land Surveyor in February 1984. He surveyed the lands of Mrs. Snell in 1982 but had checked out his work after becoming licensed. He did some Registry of Deeds work and concluded the north line of the lands of the plaintiff was the base line, being the rear line of the first division of Farm lots. He said he found remnants of an old fence on the east side of the Little Harbour Road beyond the plan and also to the west of the disputed area. However, there were no remnants of such a line on the disputed lands.

Wadden said he projected a line from the remnants of the fence to the east of the road to the west of the disputed area and concluded this was the north boundary of the plaintiff's lands. He said he told Smith that he was surveying the Snell lands and it looked to him as if the Wilkinson house and the defendant Smith's trailer were encroaching onto the Snell lands.

Wadden said another surveyor told him of an iron pipe near the road south of the Wilkinson house. He has, since his survey, seen the pipe. It was not shown on his plan. He recently went over the disputed area when he found some old stumps, grown over with moss, and some old car bodies.

He said he found nothing on the ground to indicate the Snell north line.

Wadden said that he was subsequently shown an iron bar near the road just south of Wilkinson's house and another iron bar in the ground three hundred and fifty feet or so to the west of the first iron bar. Wadden said that the defendants were assessed for the lands they occupied. He said that on November 12, 1984, he again inspected the pipes and saw evidence of blazed trees in an area five hundred to six hundred feet west of the road. Smith showed him the iron pipe with some stones with moss on them, around its base. He also saw what he considered to be a blazed corner tree in the same area. He said the blazes were twenty-six or so years old.

Wadden said that going westerly from the iron pipe near the Wilkinson house he saw marks on the trees (blazes) leading generally to the other iron pipe near the blazed corner tree.

Wadden said there were also some blaze marks on trees going northerly towards the base line from the area of the blazed corner tree and iron stake with stones.

Lawrence Campbell (Campbell) is a lumberman who knew both Chisholm and Forbes. In 1956-1957 he purchased wood on a stumpage basis from Charles Forbes. In 1958 he bought stumpage from Alex Chisholm. He attended with Forbes who showed him his north line. There was a large iron stake to the west of the Little Harbour Road as his northeast corner. He said there was a clear line westerly from the iron bar towards the Logan Road. He also attended with Chisholm who showed him his south line, which was the same line as Forbes had told Campbell was the Forbes north line. He said the iron

stake or bar on the west side of the road was the common marker and there was a clearly visible line leading west or northwesterly from that iron bar.

Campbell said he returned to the area three weeks ago and found the iron bar to the south of the Wilkinson house on the west side of the Little Harbour Road. It was, he thought, the same bar and in the same place but less of it was visible as fill had been put in around it. He also said he saw old blazes on the trees as he had remembered them running two hundred to three hundred feet westerly. He said there was a birch tree blazed in the direction of the Logan Road.

Campbell said there was no dispute between Forbes and Chisholm and each of them showed him the same line as being their respective lines.

Addison Underwood (Underwood), age 58, worked as a woodworker and cut wood "on the halves" with both Chisholm and Forbes. He said there was never any question of the line separating the properties. He said they lived within one hundred yards of each other. He said he knew them until they died.

He recalled cutting in 1959 and there being an iron or steel rod or stake being the east corner near the road with a blazed line leading westerly from the rod up the hill to another rod with stones at the base. He said that he cut wood with both Forbes and Chisholm and each showed him the line as being the Forbes north line and the Chisholm south line. He was instructed by each to cut up to the line but not to cross it.

Underwood said that he had been back since and saw the stake near the Wilkinson house and was of the opinion that it was similar and in the same approximate location as had been shown to him by Forbes and Chisholm.

Albert McCallum (McCallum) is a Nova Scotia Land Surveyor. In 1978-1979 he surveyed other properties in that area for Logan Land Development (shown on Exhibit 3). During the course of his work he met Norman Snell (husband of Virginia Snell) and Mrs. Snell. He asked to be shown their north line and Snell took him to the stake by Wilkinson's house and told him that was their north boundary marker. He said the pipe was clearly visible to them.

On November 12th McCallum returned to the scene and the pipe was still in the same general vicinity as shown to him by Snell.

On November 13th McCallum again returned to the area and travelled north westerly from the iron stake. He found a blaze on a tree near the Wilkinson house. It was twenty-six years old. He then continued north westerly and came to another iron stake with stones around it. The stones were covered with moss. There was another blazed tree there with a twenty-four year old blaze. He thought

the stake and stones and tree may have indicated the termination of a boundary. He considered these monuments significant.

McCallum was cross-examined vigorously on Snell's condition at the time. He said that when he went to the house Mr. and Mrs. Snell were both present and Mr. Snell accompanied him. He saw nothing to indicate Snell was drinking or intoxicated. Had he been, he said he would have spoken at greater length with Mrs. Snell. He said he saw several blazes; two were twelve years old and the corner tree blaze was twenty-six years old. He said the two iron stakes were five hundred feet apart.

McCallum consulted with Wadden when Wadden prepared his plan. He said he gave Wadden access to his material including his field notes.

McCallum said the iron posts were similar to those used by surveyors but since 1979 a surveyor must put his "own mark" on such a monument.

Elmer Fraser (Fraser) is 63 years of age and has lived all his life in the vicinity of this land. He knew Alex Chisholm, his father Joseph Chisholm and Charles Forbes. He said he knew the boundary line and the stake near the road. He said that in the 1950s you could see the cut out line connecting the two iron stakes.

Just after the war in 1946, he lumbered the land for one MacNeil, who bought the stumpage from Forbes. They used the line as the north line of Forbes. He said the line was run and blazed in 1939 or just before the war.

Fraser recalled an old ice house belonging to Jim Lahey being on the Chisholm lands in the 1930s. He recalled hauling ice to and from the ice house. He recalled an old road to the south of the stake leading a short distance up the hill on the Forbes property.

Fraser was acquainted with the stake and stones to the west of the line. He said the line was clearly visible and was observed as the line by the owners. He said Forbes and the Chisholms were the best of friends and to his knowledge there was never any dispute over their boundary line.

By the time the plaintiff purchased the property the Wilkinson house was finished and occupied and the Smith trailer had been on the lands for twelve years. Mrs. Snell had said nothing to Wilkinson or any of the Smiths. The plaintiff paid for the Snell survey before he owned the lands. He made no effort to examine the property for evidence of the boundaries and at trial he had never been on any of the area in dispute.

The plaintiff said that after the survey he told the defendants to move. He has sold off some lots. He said the disputed lands were not an "intrinsic" part of the purchase. I assume he took his chances with this part of the purchase.

The plaintiff said he told the Wilkinsons to stop before they built their house. I note the plan was made around June 1982 and it shows the Wilkinson house. The plaintiff's deed is March 1983.

Eugene William Smith (Smith) purchases the land from Chisholm in 1970. He was shown the bounds by Chisholm. His father and Chisholm worked together. Chisholm showed him the iron stake at the road and followed a blazed line westerly to the stake and stones. He has been assessed since 1970. The lands were to the north of the base line and continued about five hundred feet south of the base line.

In 1972 Smith built to the north of the base line. In 1974 he built a garage with a road leading into the disputed area. In 1969 a brother died and in 1972 the defendant Smith moved the trailer to the lot and has occupied it since.

Smith said that Snell complained to him once and he showed Snell the iron pins, which seemed to satisfy Snell. He next got a "lawyer's letter" which was quickly followed by the Originating Notice in November 1983.

Smith said his northern neighbour questioned his north line but it was surveyed and found to be in order. No action was started. He said he had no knowledge of the area prior to 1970. There were no fences on the property. He said a Mr. Wilson showed he and Wadden the rear pin and blazes. Snell questioned if Smith had moved the pin but he was apparently satisfied he had not done so. In 1972 Smith did some bulldozing on the disputed area. Neither Snell nor Mrs. Snell came to see him then.

The defendant Robert Smith is a son of Smith and moved there in 1970. He lived in the trailer and got a deed in 1979. He has been assessed since then. He was with his father when Chisholm showed them the boundaries.

George Wilkinson is married to a daughter of Smith. He purchased the land in 1981 and was shown the boundaries by Smith. He said it was swampy and it cost him $2000 to level it. He said Kerry Snell, a nephew of Joyce, came over one day when the house was being built and inquired about the line.

Wilkinson said that a few months after the house was completed Joyce called and said he wanted $4,500 immediately, that evening. Joyce later attended personally for the money.

Wilkinson said he and the Smiths considered paying something reasonable to Snell or Joyce for the sake of peace but never did. Joyce wanted interest at 19.5 per cent on the whole sum.

Although Snell had his title searched and certified he had no survey done.

I would first like to make some observations and findings.

Wadden did not survey for the trial and so showed none of the monuments in the disputed area on his plan. I felt McCallum was a superior witness with more knowledge of the disputed area.

Joyce bought the property with the known dispute and immediately brought action. I find the plaintiff did not assert ownership until after the house was completed.

The plaintiff or his predecessor in title never were assessed or paid taxes on the disputed lot. The defendants and Smith did. Although unpleasant at the time, it generally is an incident of ownership.

The paper title appears to follow the base line, as shown in Exhibit 3.

I am satisfied and find that the two iron stakes represent the northeast and northwest corners of the plaintiff's land and the blazed area between them is the north line of the plaintiff and the south line of the defendants, Wilkinson.

I find that the line between the two stakes has been observed as the dividing line of the two properties for over fifty years.

I am satisfied and draw the inference that the two iron posts were placed to designate the southwest and southeast corners of the Wilkinson lands (then the Chisholm lands) and the northwest and northeast corners of the Forbes lands. I am also satisfied that they were placed there by or on behalf of the owners of the respective lots.

I find that the defendants and their predecessors in title have occupied the lands to the north of the line for at least fifty years and the plaintiff and his predecessors in title have occupied the lands to the south of the line for at least fifty years.

I find that the casual walks of Mrs. Snell and her children and others on these lands has not been occupation of the lands such as to deprive the Chisholms of their title.

Prior to the construction of the Wilkinson house the lands immediately to the north of the stake near the road were of a swampy or boggy nature with alders and briars along with hardwood and softwood trees.

I find that the owners Chisholm and Forbes agreed upon a line and had corner iron bars inserted into the ground and blazed lines between the two bars and from the westerly bar to the north to the base line.

I find that the presence of monuments to the east of the road on the base line and other monuments to the west of this land along the base line and the absence of any such monuments along the disputed area is inconsistent with the north boundary of the plaintiff's lands following the base line. I find the absence

of such monuments and the presence of the iron stakes and the blazed lines is consistent with the Chisholms and Forbes having agreed on a line other than the base line.

The old fence to the east of the road is indicative of a dividing line there as are the remnants of an old fence to the west of the property in dispute.

To further confirm the evidence of Fraser I find the road to the south of the ice house is the same road referred to by Mrs. Snell.

I accept the evidence of Campbell, Fraser and Underwood of occupation of the lands by the Chisholms and Forbes.

In **Nelson and Nelson v. Varner** (1977), 20 N.S.R.(2d) 181; 27 A.P.R. 181, at p. 189, Morrison, J. (as he then was), dealt with a conventional line, so called as follows:

> "Even if I found that the surveyor's line was accurate, I would be compelled to find on the evidence that a subsequent conventional line had been established by the erection of the line fence in 1944."
>
> "In the case of **Spencer v. Benjamin** (1975), 11 N.S.R.(2d) 123, Macdonald, J.A., said at p. 14 of the opinion as follows:
>
> > '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.'"
>
> "Macdonald, J.A., made further reference to **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 be shown. This may be an agreement for consideration or a standing-by while the other party changes his position.'

"I refer also to **Naugle v. Naugle** (1970), 1 N.S.R.(2d) 554 (Nova Scotia Supreme Court per Gillis, J.), affirmed on appeal (1971), 2 N.S.R.(2d) 309. In that case the learned trial judge said at p. 560 of 1 N.S.R.(2d):

> '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.'

"In the case of **McIsaac v. MacKay** (1915), 49 N.S.R. 476 (Nova Scotia Supreme Court in *banco*), the Nova Scotia Supreme Court considered the matter of a long-standing fence. Chief Justice Graham said at p. 480:

> '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 the case, if left to their own judgment, had not regarded them."
> ....
>
> 'The defendant makes nothing by contending that because a brush fence at the rear is crooked therefore it is not a line fence and the line be some place else. The safe rule is to follow the course of the fence in the well used and cultivated portion of the farm and regard the parallel fences of adjoining proprietors.'

"In the case of **McNeil and Hingley Ltd. v. Hill** (1928), 60 N.S.R. 179 (Nova Scotia Supreme Court in *banco*) the Nova Scotia Supreme Court came to consider a common boundary line which had been agreed upon by adjacent owners and was now of long-standing. Citing from the headnote the court held:

> 'In an action for trespass to timber lands, in which the question arose as to the boundary line on the ground between certain lots, the evidence showed that a certain boundary line had been recognized for over thirty years as the true boundary, by the adjacent owners.'

'Held, that under the circumstances of the case, the plaintiffs were bound by the line so recognized.'"

Nelson and Nelson v. Varner, supra, at p. 191 states as follows:

"The question of adverse possession has also been raised by defence counsel and on this point also I find the defendants must succeed."

"Section 9 of the **Limitations of Actions Act** being c. 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.'

"MacIntosh, J., of the Trial Division of this court, in the case of **Spencer v. Benjamin**, S.T. No. 00078, discussed the matter of adverse possession. At p. 4, of his decision, in Vol. 37 of the decisions of the Nova Scotia Supreme Court, Trial Division, he said as follows:

'The late MacQuarrie, J., in **Ezbeidy v. Phelan** (1958), 11 D.L.R.(2d) 660, 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, ...and a person who claims by long adverse possession only, such as the plaintiff must rely on here, there is first of all a presumption that the true owner is in possession, that the seisen 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.
....

> "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.'"

"It is stated at p. 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 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).'"

In **Sullivan v. Lawlor** (1981), 45 N.S.R.(2d) 325; 86 A.P.R. 325; Coffin, J.A., at page 331 cited **Crossland v. Dorey** (1978), 28 N.S.R.(2d) 91; 43 A.P.R. 91, relating to where the parties enter into a formal conventional line agreement as follows:

> "The trial judge in **Crossland v. Dorey** (1977), 27 N.S.R.(2d) 139; 41 A.P.R. 139, at p. 149 and the judgment of this court at p. 102 of 28 N.S.R.(2d) referred to **Spencer v. Benjamin** (1975), 11 N.S.R.(2d) 123; 5 A.P.R. 123, where Macdonald, J.A., at p. 135 quoted a paragraph from Hodgin, J.A., in **Sutherland v. Campbell** (1923), 25 O.W.N. 409, which included these words:
>
> > '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.'
>
> "**Crossland v. Dorey** was the normal type of conventional line where the two parties enter into an agreement."

> "Counsel for the appellant in the present appeal mentions some other examples – **Phillips v. Montgomery et al.** (1915), 43 N.B.R. 229, where McKeown, J., said at p. 249:
>
> > 'When owners of adjoining lands, fully cognizant of the dispute as to the location of the line dividing their properties, jointly agree upon a certain line as a division line between them, jointly put up or continue a fence along such chosen line as the common boundary of their respective holdings, and for years limit their respective occupation and cultivation of said properties by such fence, I think in the absence of fraud, each successor in title is bound by the line so agreed upon.'"

The defendants were on the land under colour of their deeds.

In the event I had not been satisfied with the evidence of a conventional line I would have found that the plaintiff and his predecessors in title had acquired title to the disputed lands by their use and occupation thereof.

It seemed to me that the plaintiff and Mrs. Snell were putting some distance between themselves and Snell and his apparent thought of the boundary line. I find that Snell showed Smith the iron post to the south of the Wilkinson house near the road as being the northeast corner of the plaintiff's lands.

I find that when Chisholm told Mrs. Snell he did not own lands to the west of the road he had already sold all the lands he owned to the west of the road to Smith.

The defendants have raised the defence of estoppel. That is that the plaintiff through his own conduct and the conduct of his immediate predecessor in title, is estopped from the remedy he seeks.

Although title to the property was in Mrs. Snell, the plaintiff did have knowledge of the building of the Wilkinson house. He commissioned the survey in 1982 while his purchase from Mrs. Snell was pending. I find that Mrs. Snell and the plaintiff both knew that Wilkinson was erecting his residence on land to which they at least later, asserted ownership.

Similarly, Mrs. Snell was aware that the mobile home of the defendants, Smith, was on property over which she asserted ownership. Like the Wilkinson situation she knew it was located on the lands. However unlike the Wilkinsons, the mobile could be more easily removed from the land.

Mrs. Snell said nothing to the defendants, Smith, nor did the plaintiff. Each knew considerable money was being expended by the defendants and Smith. Mrs. Snell said she consulted at least three lawyers, including legal aid. No letter was ever written. Mrs. Snell lived almost next door and could easily have

spoken to any or all of them. All the plaintiff did was demand $4,500 that day, well after construction was completed.

Wilkinson expended considerable money in getting his lot fit for the construction of his house. Mrs. Snell knew he was doing this and I am prepared to draw the inference that the plaintiff knew as well; Wilkinson commencing the bulldozing in September of 1981.

The plaintiff only acquires the title which his predecessor in title had to give him. Mrs. Snell knew of the use and expenditure of money by the Wilkinsons. I find that the plaintiff knew of this also.

A somewhat similar situation was considered by Morrison, J. (as he then was), in **Crestpark Realty Ltd. v. Riggins et al.** (1977), 21 N.S.R.(2d) 298; 28 A.P.R. 298. Certain facts were found by a jury including the affirmative answer to a question:

> 'Was the plaintiff by its officers or one or the other of them aware during the period December 1, 1972 to the time of the delivery of the tax deed on December 19, 1973, that a dwelling-house was being built on Lot A-19A on Wallingham Street, Dartmouth, N.S. (being also known as Civic Number 6 Wallingham Street, Dartmouth, N.S.)?'

"The jury, by answering this question "Yes", indicated that they were satisfied that an officer of the company, specifically in this case Richard Weldon, had knowledge that a dwelling-house was being erected on Lot A-19A during the specified period of time and stood idly by and allowed this dwelling-house to be erected and occupied by the defendants."

"In the case of **Empire Coal and Co. v. Patrick et a1.**, 43 N.S.R. 65, Graham, E.J., said at p. 76:

> 'The learned judge has placed his decision upon a ground which is quite correct and I entirely agree with it. That is, that D. Johnson Patrick is estopped from setting up the deed in question. The principle is thus stated in **Evereste and Strode on Estoppel**, page 411:,
>
> "A, an owner of land, stands by and allows B to lay out money in building on his (A's) land, being all the time aware of his right to the land, and B having no notice of it A is estopped from subsequently asserting his right and will be compelled to permit B to have quiet and peaceful enjoyment of the land so build on."
>
> 'The proposition is stated in **Ramsden v. Dyson**, 1 E. and I. App. 168:

> "If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere but leave him go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profits.'"

"I also refer to 14 **Ha1sbury**, (3rd. Ed.), pp. 638-640:

> 'The term "acquiescence" is used in two senses. In its proper legal sense it implies that a person abstains from interfering while a violation of his legal rights is in progress;...
>
> 'Acquiescence operates by way of estoppel. It is quiescence in such circumstances that assent may reasonably be inferred, and is an instance of estoppel by words or conduct. Consequently, if the whole circumstances are proper for raising this estoppel, the party acquiescing cannot afterwards complain of the violation of his right. For this purpose the lapse of time is of no importance...'
>
> 'When A stands by while his right is being infringed by B, the following circumstances must as a general rule by present in order that the estoppel may be raised against A: (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted; (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights; (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake; (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right.'

"I am therefore satisfied that in interpreting this verdict and giving a judgment consistent with the jury's answer I must direct that the plaintiff is estopped and precluded absolutely from maintaining this action against the defendants, John and Muriel Riggins."

Had I not found that a conventional line has been agreed upon by Chisholm and Forbes I would have found that the plaintiff was estopped and precluded absolutely from maintaining the action against all of the defendants.

The conveyance from Forbes to Snell (paragraph 6 of Exhibit 1) giving the base line as the north boundary line is inconsistent with a conventional line agreement. The deed contains the ancient description continued for 1822. Mrs. Snell said Forbes was in a nursing home and I note his signature is an "X", very imprecisely made (attached to Exhibit 1). The jurat does not include the year. It was however recorded in September of 1968. The description in the deed refers to a cutting agreement with Campbell dated 1967. Campbell said it was in 1957. This agreement, I find, corroborates the evidence of Campbell and of the conventional line agreement between Forbes and Chisholm. I have some doubt of the capacity of Forbes to understand the description in the deed due to his age and infirmity and to its inconsistency with the Campbell agreement and the other evidence of the conventional line.

I attended at the lands with counsel. The iron (or steel) pin or bar near the Wilkinson home is not such that one would find unless put there for a purpose. It resembles a crowbar and looks almost immoveable. Neither surveyor took it out to see the length. The other bar is said to be similar but surrounded with stones and near blazes. We did not attempt to see that bar as the alders and briers with accompanying mud seemed too formidable. It is located in a rural area and took considerable work to make it level.

The occupation of the land, other than to cut firewood or logs occasionally, would be limited, one would need some dedication to voluntarily walk through it. The areas which were cleared for the Wilkinson house and the Smith trailer are of course now level and have some grass. The rest is very thick scrub land today.

I am prepared to grant a declaration of title to the defendants in a form which can be properly recorded at the Registry of Deeds Office, with plan attached.

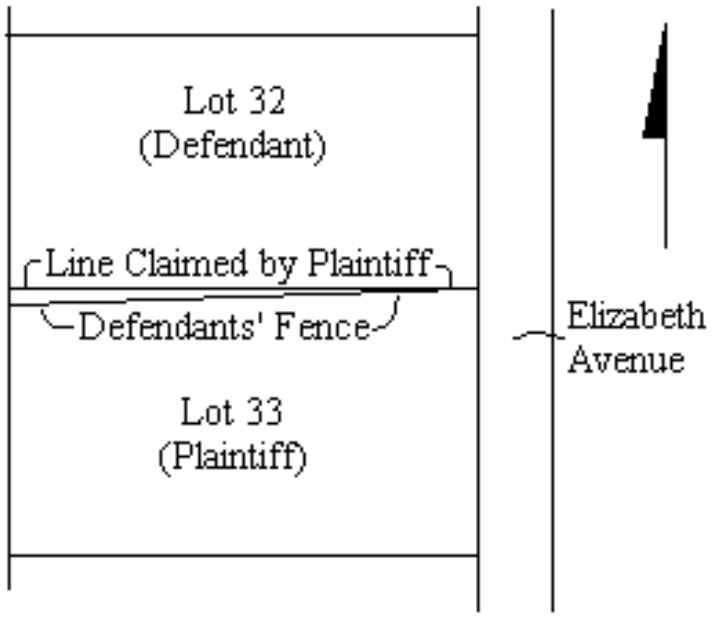
I have considered the matter of general damages to the defendants. There was some nuisance but the plaintiff did not in any way interrupt them in their occupation of the lands. The defendants did not ask for general damages.

I am not prepared to grant damages to the defendants. They shall have their costs in one Bill of Costs with one brief and one counsel fee.

Order accordingly.

O'MELIA and O'MELIA v. HIMMELMAN and HIMMELMAN See 69 N.S.R. (2d) 271
Nova Scotia Supreme Court, Trial Division
Hallett, J.
May 31, 1985.

The Plaintiffs and the Defendants owned adjoining lots on the western side of Elizabeth Avenue, in the Melvillewood Subdivision in Halifax. The dispute between them was over the location of their common boundary line. The properties were located as shown on the following sketch:



The Defendants had constructed a fence as shown on the sketch. They then retained a land surveyor. It was agreed among all parties that the plan of Melvillewood Subdivision plan had significant problems when it was matched with what was on the ground. The land surveyor retained by the Defendants based his opinion on information given to him by the Defendants that the fence was located in the same position as another fence which had stood for over thirty years.

The Plaintiffs retained another land surveyor. The two land surveyors agreed as to the location of the western side line of Elizabeth Avenue and the point where the boundary in question intersected the street line. The Plaintiffs' surveyor formed the opinion that the boundary in question should be placed at right angles to the street line, as it was shown on the original plan.

The Judge reviewed the testimony of the parties and their respective witnesses. In particular, the Judge reviewed the methodology of the two land surveyors. The Judge held that the method adopted by the Plaintiffs' land surveyor was the better approach and found that the boundary between the parties was at right angles to the street line. The Judge then found that there had not been sufficient evidence of a

conventional line agreement between owners of the respective properties and further that neither party had established a claim for adverse possession.

O'MELIA and O'MELIA v. HIMMELMAN and HIMMELMAN
Nova Scotia Supreme Court, Trial Division
Hallett, J.
May 31, 1985.

This is a boundary line dispute between two neighbours in a subdivision in the City of Halifax. The area of land in issue is so small as to not warrant the legal battle and consequent expense that has ensued. However, the plaintiffs had no option but to institute these proceedings after the defendants erected a fence between the properties on land that the plaintiffs considered was likely theirs. The piece of land in issue is triangular in shape. The apex of the triangle is on the west side of Elizabeth Avenue where the lots abut and measures westerly on the sides of the triangle approximately 140 feet to the rear line of the parties' lots. At the rear line (the base of the triangle), the disputed distance measures a mere 5.5 feet in width. Both lots have a 60 foot frontage on the west side of Elizabeth Avenue.

It is apparently well known in survey circles that the location of the boundaries of the lots in this subdivision is not without its difficulties. The Melvillewood subdivision was laid out in 1946 and 1947; the houses on the lots in question were built within a few years after the subdivision was started. Both the plaintiffs' and the defendants' houses were built by a Mr. Brewer who had at one time lived in the defendants' house located on Lot 32, which is located immediately to the north of the plaintiffs' house on Lot 33. Mr. Brewer at first constructed the house on Lot 32. He then built a house on Lot 33, sold the house on Lot 32 to Mr. MacIntyre, the father of the defendant Mrs. Himmelman. Mr. Brewer then moved into what is now the O'Melia house on Lot 33. The parties disagree as to where the boundary line between the two lots is located. There has never been a fence extending the full length of the sideline between the two properties. There was a small section of fence in the disputed area near the rear of the lots. I will have more to say about that later.

The description of the plaintiffs' Lot 33 states that he has 76 feet on his rear line. The fact is he occupies about 60 feet at the rear line. A few years ago the plaintiff began to construct a fence to mark the boundary between the properties and he calculated where the fence should be located by measuring on his rear line 76 feet northerly from the fence which purportedly marks the southern boundary of his property, that is the boundary between Lots 33 and 34. A fence constructed at a point 76 feet north of the plaintiffs' south fence would substantially encroach on what the defendants considered to be their property. The defendants complained and the plaintiffs did not proceed.

In May of 1983 the defendant, Mrs. Himmelman, who had lived in the dwelling on Lot 32 since she was four or five years of age had decided that she knew where the boundary was between the properties and one weekend while Mr. O'Melia was away on a fishing trip, Mrs. Himmelman's husband erected a chain link fence extending the full length of the side line between the properties on the location as determined by Mrs. Himmelman. The plaintiffs then engaged the services of Mr. Roy A. Dunbrack, an experienced surveyor, who, following extensive survey of the lots and the surrounding area, gave the plaintiff his [opinion] dated May 16th, 1984, in which he located the boundary line between the two

properties at a point on the rear line some 5 ½ feet north of where the fence had been constructed by the defendants. Although the discrepancy in the competing lines is 5 1/2 feet at the rear line, the discrepancy narrows down to nothing at the street line. There is agreement between Mr. Dunbrack and the defendant surveyor, Mr. Kenneth W. Robb, as to where the boundary line between the properties is located where it strikes the west side of Elizabeth Avenue; they do not agree on the angle at which it runs westerly to the rear line of the lots – thus the difference of 5 1/2 feet at the rear line.

The defendants engaged Mr. Robb who was faced with a fait accompli in that the fence was up and he gave an opinion to the defendants that the fence that they erected was properly located on the boundary line between the lots.

One would have thought the parties might have agreed to split the difference because the only portion of the land that is really in dispute is located well to the rear of their houses and measures a mere 5 1/2 feet in width and that only at the very rear of the lots. However, the parties did not settle and the trial ensued to determine the proper location of the sideline between the two properties.

Mr. Dunbrack's opinion is essentially that he has been able to plot the sideline between Lots 32 and 33 in accordance with the original subdivision plan prepared by a surveyor by the name of Mr. George Bates. The Bates plan is dated April 15, 1947. In Mr. Dunbrack's opinion, there is insufficient evidence that would establish possessory title in the defendants to the disputed 5 ½ foot triangular strip which the defendants have encompassed as part of their property by the construction of the chain line fence in the location determined by Mrs. Himmelman. The position of Mr. Robb is that looking at all the facts, it is not possible to plot on the ground the boundary line shown on the Bates plan and that based on information he received from Mrs. Himmelman; his study of the location of buildings and other fences in the area and his survey work he felt the proper location for the boundary line between the properties is where the fence was erected.

The argument put forward on behalf of the defendants is that they have acquired title by being in occupation of this disputed area for more than 20 years by reason of it having been fenced and used by them and that this is buttressed by evidence of an alleged agreement made between Mr. MacIntyre and Mr. Brewer in the early fifties that this line would be the division line between the two properties. There is no written agreement and the defendant must rely on verbal evidence to establish the conventional line they claim.

Mr. Charles MacIntyre, the father of the defendant, Mrs. Himmelman, testified that he bought the defendants' property (Lot 32), in 1953 from Judge Murray and that he lived there until he sold it to his daughter, the defendant, Mrs. Himmelman in 1967. Mr. MacIntyre is presently 74 years of age. It would appear that he was in error on the date as it was not until 1977 that he sold the property to his daughter. At the time Mr. MacIntyre bought the property from Judge Murray, Mr. Brewer was then living in Lot 33. Mr. MacIntyre testified that when he moved in there was nothing to indicate where the line was. There was some dispute over a location of a well, as to whether it was on Lot 33 or Lot 32.

Evidence adduced shows where the well was located on Lot 32; I don't know really why there ever was a dispute as the well was clearly on Lot 32. Mr. MacIntyre testified that a surveyor was called in and a pin was put in on Elizabeth Avenue and one on Lynn Road (which abuts the rear of the properties). The pin on the rear line was about a foot to the north of what he described as a stone wall on the south side of the lot at the rear of the property. He was never given a plan. He went on to stay there a short time and after that Mr. Brewer's son put a fence up near the rear of the property and it was located about one foot north of the garage which was located toward the rear of Lot 33; the fence ran westerly to Lynn Road in the approximate location where the defendants erected the chain link fence in 1983. Mr. MacIntyre said the Brewer fence was made of 2 x 4 stringers with wire on it and extended from Lynn Road at the rear of the properties easterly to the garage located on Lot 33.

Mr. MacIntyre testified that the rear of his land was a deep gully, having a lot of boulders and trees on it. Gradually, over a period of years he cleaned this up, brought fill in, etc. He testified that in about 1970 Mr. Brewer sold Lot 33 to the plaintiffs and that the old fence that Brewer's son had put up at the rear of the property was still standing but not in good shape.

Mr. MacIntyre testified that when he bought Lot 32 in 1953, there was a little low stone wall near the alleged boundary line at the rear of the garage and extended toward Lynn Road. He said Mr. O'Melia took the little fence down.

Mr. MacIntyre's evidence was not very convincing or conclusive of anything in particular. The main thrust of the defendants' case comes from the mouth of the defendant, Mrs. Himmelman. She testified that she is now 35 years of age and has lived on Lot 32 for some 31 years, having lived there first with her father and after her father conveyed the property to her with her husband and their two children. She testified in more detail about the events surrounding the dispute as to the location of the well when Mr. MacIntyre acquired the property in 1953. At that time she was four years old and would appear to have a remarkable memory if one were willing to accept her evidence, which I am not. She recalled big spikes being put in at the time of the dispute over the location of the well. She went on to say the Brewers lived on Lot 33 until it was sold to O'Melia in 1970. She too described a stone wall which ran from the rear of the garage and just north of the garage westerly out to Lynn Road. She said that it was in 1958 or 1959 that Mr. Brewer's son Clyde erected the fence that ran from a point about one foot north of the northwestern corner of the garage on Lot 33 westerly to Lynn Road. The fence also ran around the back of the Brewer property, Lot 33. She described it as a green scalloped wire fence and that she took it to be the boundary. Having been born July 13th, 1949 at the time the fence was erected she would have been about 9 years of age. While it is convenient for her to now describe it as a boundary fence, one has to wonder how a child of nine reached this conclusion. She identified an old photograph taken in 1970 from the dining room window of the house on Lot 32 which purportedly shows old posts for the fence that ran along Lynn Road at the rear of Lot 33 but she stated the post was not the corner. Not much help can be derived from that particular photograph. A number of photographs taken in 1978 and in December of 1984 were also introduced which showed spruce trees, rocks, a birch tree and other odds and ends in the disputed area, none of which are a great deal of help

other than to show that the disputed area is very rough. Photos 3 and 4 (Exhibit 14) which were taken in July of 1978 clearly show that the area in dispute was not cultivated by either of the owners. There is no question that the rear portion of the entire Lot 32 was gradually filled in and improved over the years although there is little sign of improvement in the disputed area which measures 5.5 feet in width on the rear line at the western extremity of Lots 32 and 33.

Mrs. Himmelman testified with respect to fences on different lots in the subdivision and how long they had been there. For reasons I will state later in this decision, the location of these fences and partial fences are not particularly relevant to resolve the dispute between the parties.

On cross-examination she was asked to comment on a statement that appears on a plan prepared by Mr. Robb that points to the existing chain link fence as being in the location of a "previous old fence in place for 30 years". This reference on the Robb plan is with respect to the fence in the disputed area to the west of the garage on the plaintiff's property extending out to Lynn Road at the rear of the properties in question. There are no measurements on the Robb plan of this distance but it would appear to be something in the order of 30 or 40 feet, whereas the overall length of the disputed boundary line between the properties is 137 feet. Mrs. Himmelman testified that she did not tell Mr. Robb that the fence was there for 30 years.

She testified that in 1978 the defendants had discussed the boundary line with Mr. Frank Longstaff who is a surveyor in the Halifax area. She stated that he had advised them that the line was a foot to two feet from where the fence is now located. However, she doesn't have a copy of the letter and she never did get a sketch or plan. Apparently by 1978 Mrs. Himmelman had had words with Mr. O'Melia as to the boundary line.

She testified, and this is the crux of the problem, that the fence she had erected was based on her knowledge of the line since she was a child and that the chain link fence they constructed is about a foot on their side of the line. She relied on the fact that there were stakes on the land when her father bought it. One should never lose sight of the fact that at the time she was 4 years of age. She acknowledged in her evidence that by 1974 there wasn't much left of the short piece of fence that had been constructed in the late fifties by Mr. Brewer's son. She said that when they were children in the fifties and sixties they would walk along the north side of the garage on Lot 33 and squeeze by the narrow opening and climb over the fence at the rear of the garage. She testified to some acts of possession: about having a rabbit pen in the area of the spruce tree near the O'Melia garage and a play house towards the back of the property but it was quite evident to me that there was little use made of the rear of Lot 32. Mr. Brewer used to store lumber behind his garage on Lot 33 as he was a contractor.

She acknowledged under cross-examination that she didn't have any discussion with Longstaff when he allegedly gave her the boundary line opinion. I am satisfied that if Mr. Longstaff had given a boundary

line opinion, we would have heard from Mr. Longstaff as a witness. Furthermore the evidence is hearsay.

On cross-examination she said she remembered her father calling Judge Murray about the problem with the Brewers as to the location of the well and men coming out and marking off the land and driving in stakes. She was about 5 years of age at the time. She acknowledged there were no documents which relate to that survey that she knows of. She acknowledged that the fence only extended from Lynn Drive to the rear corner of the garage and not beyond it. This is of significance because Mr. Robb, in his evidence, testified that she had told him another fence extended eastwardly, about a foot north from the garage, to the area of the spruce tree which was east of the garage. Mr. Robb must have been in error on this or Mrs. Himmelman gave him incorrect information.

Teresa Mosher, the sister of Mrs. Himmelman, testified for the defendants. She too had lived as a child on Lot 32 until April of 1970. She remembered Clyde Brewer's son building the fence which went from the garage and extended westwardly to Lynn Road and that the fence was closer to Lot 33 than the chain link fence that has now been constructed. She said Clyde Brewer was around 16 or 17 years of age when he put up the short section of fence and that he told them he was putting the fence up to stop them going through the Brewer's back yard. She was around 8 or 9 at the time. She acknowledged that there was a platform at the rear of the garage on Lot 33 but that there wasn't any lumber stored there as she recalled.

Mrs. Mary Mills was called by the defendants. She lived across the street from Lot 32 at civic no. 13 Elizabeth Avenue and had lived there since 1950, a period of some 35 years. When she moved there in 1950, Lot 33 was vacant and had just been sold to Mr. Brewer. She testified there was then an old stone wall near the rear of the property in the disputed area. The garage was not there at that time and there was an old fence on top of the old wall. She testified that it looked like an old dividing line. The old fence was on top of the stone wall and that it ran from Lynn Road easterly to about half way to Elizabeth Avenue and the wall would be just south of the line where the Himmelmans have constructed the chain link fence.

It is reasonable to infer that <u>if</u> there was an old wall and an old fence there in 1950, the subdivision having only been laid in 1946 and 1947, it would not have been a boundary line dividing Lots 33 and 32. It may have been a boundary line for some parcel of land that went into the composition of the Melvillewood subdivision, as any markers or boundary fences for these lots, as laid out in 1946 or 1947, would not have characteristics of old walls and old fences three years later. The only evidence of any marking of boundary lines in the subdivision was that the lots were staked according to Mrs. Mills at the time she observed the lots in 1950. She had been interested in buying Lot 32 and said it was staked. She said Mr. Brewer built his garage about a year after he went into possession of Lot 33 and that the garage was built about a foot from the stone wall. That would appear to be correct. What I am not prepared to accept is the inference drawn by Mrs. Mills that that old stone wall was the boundary line between Lots 32 and 33 as laid out on the Bates plan. She said that Mr. Brewer built the

short piece of fence which I have already discussed, about three or four years after he built his garage, which would be consistent with the evidence of Mrs. Himmelman and her sister Mrs. Mosher that the fence was built around 1958 or 1959. Mrs. Mills said the new fence was built on or about the same line as the old fence.

She then gave considerable evidence as to the location of fences and lots to the south of the lots in dispute in this lawsuit and as to when they were built. One point of significance in her evidence is that she testified that Mr. Brewer put up the fence on the south side of Lot 33 about 1955 or 1956. This fence has since been replaced by the owner of Lot 34, a Mr. O'Neill, (that lot is now owned by Mr. Neilson or at least it was at the time the Robb plan was prepared in 1983). The other significant point about that evidence is that it can be inferred that the people who owned lots in this subdivision on the west side of Elizabeth Avenue were probably not too sure where their lines were as by putting up the fence on the south of his property, Mr. Brewer would appear to have short-changed himself on his southern boundary as he effectively cut down the width of his lot at the rear from the 76 feet called for in his deed to approximately 60 feet.

Mrs. Mills testified that when she moved into the subdivision, she saw stakes on the ground and that the fences were built on the lines where the stakes were located. I am not prepared to accept Mrs. Mills' evidence on this point as she would have had to be constantly checking out where markers were and that the fences on these various lots were built where the markers were. That is not really credible. Even if it were, it may be that surveyors who had been engaged in the past and through inadequate survey work, failed to properly ascertain the location of the boundary lines of various lots. The other significant point in her evidence that Brewer erected the fence on his south boundary in 1955 or 1956 is that irrespective of where the line should be located in accordance with the Bates plan, that fence which has been in place for some 30 years would effectively govern the southern boundary of the plaintiff's property. However, what is in issue in this law suit is the northern boundary of Lot 33.

During her cross-examination, Mrs. Mills testified that there was a pin just out from the Brewer driveway on Elizabeth Avenue and it lined up with the small stone wall at the rear. This evidence tends to show the flavour of Mrs. Mills' testimony which was clearly tailored to suit the defendants. Unless she was a surveyor, I don't know how she would decide that this pin lined up with the stone wall at the rear of the lots in dispute. While it may have to a casual observer, such as Mrs. Mills, we are only talking about a discrepancy of 5 1/2 feet on the rear line of their respective lots.

The evidence of the plaintiffs can't add very much to the picture as they didn't acquire Lot 33 until 1970. Mr. O'Melia testified there was an old piece of fence angled to the garage when he bought the property. It was pretty well rotted out. He eventually tore it down in 1974. He, like Mr. MacIntyre, was filling in the rear of the property. He testified, and I accept his testimony from having looked at the photographs, that there really wasn't any use made of the area in dispute. He said he didn't know really where his boundary was. He said Mr Longstaff and someone else looked at the property but they could not give him a surveyor's certificate. He testified, and Mr. Dunbrack confirmed this, that when he

engaged Mr. Dunbrack, he simply asked him to locate the line as he was thinking of selling and the defendants had erected the chain link fence on what he thought might have been his lot. He stated in his evidence that when he bought from the Brewers there was a wooden fence in the front that extended only a short distance back. Brewer had told him that he had an extra 16 feet somewhere and that is why Mr. O'Melia hired the surveyor in 1976 or 1977. He said it never occurred to him that the little piece of fence at the rear of the property was a boundary line fence. He testified that he had put rocks and fill into the disputed 5.5 foot strip.

So much for the evidence of the parties and the witnesses called on their behalf apart from the surveyor's evidence.

The deeds show that there are no ambiguities with respect to the descriptions of the line in question. The deed to Lot 33 makes reference to it being Lot 33 on the plan of the Melvillewood subdivision made by George Bates dated April 18, 1947. The description starts on the west side of what is now Elizabeth Avenue at the southeast corner of Lot 32, proceeds southerly along the street 60 feet to Lot 34, thence westerly along the north side of Lot 34, 136 feet to the north-west corner thereof, and thence northerly 76 feet to the southwest corner of Lot No. 32, thence easterly along the southern side of said Lot No. 32, 137 feet to the place of beginning.

Lot 32 is described as being shown on a plan made by George T. Bates dated May 25, 1946. It begins on the west side of what is now Elizabeth Avenue at the southeast corner of Lot 31, proceeds southerly 60 feet to the north-east corner of Lot 33, thence westerly along the northern side of said Lot 33, 137 feet to the northwest corner thereof, thence northerly 60 feet, thence easterly so many feet to the place of beginning.

The May 25, 1946 plan has never been located. However, it would appear that lot 32 is described as shown on the 1947 plan. There is no ambiguity in the description of the line in dispute. The April '47 Bates plan shows the disputed sideline between lots 32 and 33 to proceed at 90^0 from the street line.

Mr. Dunbrack's report to the plaintiffs dated May 16, 1984, after making reference to the descriptions in the deeds, concluded as follows:

> "We carried out an extensive field survey and study of the area covered by the subdivision plan only to find that the subdivision plan dimensions and ground conditions did not fit in all cases. From our study we did find that the older lines of occupation for Lots 33, 32, 31 and 30 at the street lines of Elizabeth Avenue suited the subdivision plan requirements. Lines of occupation for the lots immediately south of Lot 33 did not agree with the subdivision plan information at the street line of Elizabeth Avenue and the directions of the side lines were considerably different than the 90^0 called for in the subdivision plan."

"Our survey and investigations north of Lot 33 did not reveal long standing lines of occupation that would justify a boundary decision predicated on their position. Therefore, giving consideration to all known factors it is our opinion that the front corners of lots north from Lot 33 should be established in accordance with ground conditions and that the side lines of the lots should be established at 90^0 to the street line as called for on the subdivision plan prepared by Mr. Bates."

Mr. Dunbrack filed an addendum to that report on April 1, 1985, indicating how he established where the west sideline of Elizabeth Avenue was located. He did this by using the point of curvature of the face of the retaining wall near the north-eastern corner of Lot 29 on the west side of Elizabeth Avenue and joined it by a straight line to the fence corner at the northeastern corner of Lot 32. He continued this line south to the marker at the corner of Lot 32 and turned his 90^0 angle to establish the boundary between Lots 32.and 33. He went on to state that as they were not required to determine the southern boundary of Lot 33, his calculations did not deal with the question of where the angle in the street, which occurs somewhere in front of Lot 33, was exactly located or the exact deflection in the street line at this point.

Mr. Robb's report of August 5, 1983, to the defendants' solicitor is as follows:

"After considerable research and a detailed site survey, I have staked the above named lot in accordance with the location of existing fences marking the side boundaries of Lots '30', '31', '32', '33', and '34'. These fences have been in their present location for a considerable number of years and in my opinion are the best evidence of the original boundary lines."

"The plan of Melvillewood Subdivision is dated May 25, 1946 and signed by George Bates P.L.S. and is a mathematical impossibility. This plan has a combination of errors that could be either angular or distance measurements. The plan will simply not fit on the ground and no two different surveyors would therefore be able to survey the area in the same way; they would have to make assumptions on where the errors are and adjust angles and distances accordingly."

"The best solution in this area is to establish the boundary lines in accordance with existing fences or concrete walls and other evidence of occupation and usage. My client pointed out to me on the ground where boundary fences were in existence continually for a period of at least 30 years. This seemed to be the best evidence especially when 5 other fences on both sides of our lot can not fit in with the 'plotted' lines shown in yellow on my plan, but measure approximately sixty feet (60') in width, except of course, Lot '33' which is shown as seventy-six feet more or less (76'+/-) on the Melvillewood Subdivision plan but is somewhat less on the ground between fences."

"I am prepared to go into this matter more deeply with you whenever you are ready."

Both surveyors testified and were cross-examined extensively.

I have no hesitancy in rejecting Mr. Robb's opinion that the chain link fence as constructed by the defendants is the boundary line between the two properties. I have reviewed Mr. Dunbrack's evidence very carefully, particularly to determine whether I felt he had properly established the location of the western street line of Elizabeth Avenue. After careful review of his evidence, I am prepared to accept Mr. Dunbrack's opinion that the western street line of Elizabeth Avenue is located as shown on the Robb plan and that this conforms to the 1947 Bates plan that laid out the subdivision. I should note that Mr. Robb's plan was prepared from extensive survey information supplied to him by Mr. Dunbrack's firm and he was able to use this information for the purpose of compiling his plan, although he disagreed with Mr. Dunbrack's conclusions. Mr. Dunbrack did not prepare a separate plan, simply to save expense as the street line as shown on the Robb plan was as determined by Mr. Dunbrack. I am satisfied it was reasonable for Mr. Dunbrack to conclude that the retaining wall at the northeastern corner of Lot 29 and Lot 30 and the fence corner at the northeastern corner of Lot 32 were located on the western boundary of Elizabeth Drive as shown on the Bates plan. This was based on the extensive survey work done by Mr. Dunbrack's firn in the immediate area. As there is no deflection on the west side of Elizabeth Avenue as shown on the Bates plan until a point south of the north sideline of Lot 33 (the O'Melia lot) it was reasonable for Mr. Dunbrack to extend the street line, as established, southerly to the southeastern corner of Lot 32 being the point on the west side of Elizabeth Avenue where Lots 32 and 33 abut. Both Mr. Robb and Mr. Dunbrack agreed that the southeastern corner of Lot 32 is as located on the Robb plan. By implication in adopting the Dunbrack survey work as to the location of the western side of Elizabeth Avenue where it abuts Lot 32 by showing it on his plan Robb agrees with Dunbrack's location of the western side line of Elizabeth Avenue.

The Bates plan laying out the subdivision shows the southern sideline of Lot 32, the line in dispute, to be at right angles to the western side of Elizabeth Avenue. The yellow sidelines as shown on the Robb plan are at right angles to the west side of Elizabeth Avenue. I find that the south side line of Lot 32, as described in the deeds forming the chain of title from the time when Lot 32 was first sold to its acquisition by the defendants, is plotted on the Robb plan as depicted by the yellow lines. I am satisfied that this yellow line shows the location of the line as described in the deed to Lot 32 as shown on the 1947 Bates plan. The same, of course, goes for the north side line of Lot 33 because this is a common boundary line. Now to deal with the points in issue.

Conventional Line Agreement

The evidence put forward by the defendants to prove that Mr. MacIntyre, the former owner of the defendants' property, and Mr. Brewer, the former owner of the O'Melia property, agreed in the early fifties on a boundary line between the properties, is not reliable. The fact that there was a short piece of fence in the vicinity of the disputed boundary line in the area between Lynn Road and the rear of the

garage on Lot 33 is not sufficient and cogent evidence that there was an agreed upon boundary line. The fence did not extend more than a third of the length of the disputed line. There is evidence from Mrs. Himmelman's sister that the fence was put up to keep kids from going on the Brewer property; the evidence is not conclusive that it was intended as a boundary fence. There is no written agreement and the evidence of there being a verbal agreement between Mr. Brewer and Mr. MacIntyre is totally inadequate to establish a conventional line. It is possible that the fence was simply put up in the location it was because it was easy to tie it into the corner of the garage. The testimony that a survey had been done in the early fifties following the dispute over the well is not credible. The defendants have not produced any evidence of such a survey. It is clear that the well was located on Lot 32. It is unlikely that there was a survey necessary to resolve that dispute.

As stated by Mr. Justice Coffin of the Appeal Division of this Court in **Sullivan v. Lawlor** (1981), 45 N.S.R. (2d) 325; 86 A.P.R. 325 (N.S.C.A.), there must be clear and cogent evidence to establish a conventional line. The evidence is totally lacking in this case.

The Evidence

I have already commented on Mrs. Mills' evidence. She is a long time neighbour of the MacIntyres and while I do not feel she was telling deliberate falsehoods, the facts to which she testified are such that the evidence cannot be relied upon.

Mrs. Himmelman's testimony that stakes were put in the early fifties by the surveyor at the time of the dispute over the well likewise cannot be accepted. She was a very young girl at the time. She has a great interest in these proceedings and I am not prepared to accept her evidence.

Adverse Possession

For the defendants to succeed they must show that they had acquired possessory title to the strip of land in question, as I am satisfied the proper location of the sideline as called for in the Deeds is as determined by Mr. Dunbrack (as shown by the yellow line between Lots 32 and 33 on the Robb plan). The possession necessary to extinguish the title of the true owners, O'Melia, to part of Lot 33 must be actual, open, constant, and notorious occupation by some persons to the exclusion of the owner for the full statutory period of 20 years and not merely a possession that is occasional or temporary. The evidence falls far short of the quality necessary to acquire possessory title to the exclusion of the true owner. There has never been a fence along the entire boundary line between the properties, the short piece of fence that was in the vicinity of the boundary line between 1958 or 1959 and 1974 was not there for the required 20 year period and it could not be considered to have resulted in the defendants' successfully ousting the plaintiffs or their predecessors from the lands. The acts of possession in this immediate area were only occasional. While it is true that Mr. MacIntyre put fill in Lot 32 over a period of many years, these acts do not establish that he occupied the disputed strip. It is clear from Mr. O'Melia's evidence that he, too, has put fill in this area. The strip was, in effect, a no-man's land

and this is evident from a look at the photos taken in 1978 shown as photos 3 and 4 in Exhibit 14. The evidence indicates the rocks in the location of the "old stone wall" were rubble dumped in the spot from time to time. I am satisfied that the respective owners of Lots 32 and 33 over the years never knew exactly where the boundary line was between the lots. The defendants and their predecessor, Mr. MacIntyre did not exercise the exclusive possession required to oust the owners of Lot 32 from any part of the strip of land in issue.

I agree with Mr. Dunbrack that Mr. Robb's use of the other fences in the subdivision on other lots to determine the boundaries between Lots 32 and 33, where those fences do not conform to the location of the sidelines as determined by survey based on the description in the Deeds is an improper approach to establishing a disputed boundary line. Where one is seeking to support a boundary line in such circumstances, it is the fences on the boundary lines in dispute that are relevant. Acts of possession over a period of many years on lots down the street are not to be accorded any great weight if an owner of a lot (capable of being plotted on the ground in a manner that conforms with the subdivision plan) has not been ousted from his lot by a neighbour's acts of adverse possession for the required period.

While I had a little difficulty with Mr. Dunbrack's opinion as to the location of the western sideline of Elizabeth Avenue, after reviewing it carefully, I am prepared to accept his opinion that if he has not located the west side of Elizabeth Avenue north of the kink exactly in the location as called for on the Bates plan, he is within a half a foot. At discovery when he spoke of the street line being out by somewhere from two to two and a half feet he was referred to the overall length of Elizabeth Avenue which included that portion of Elizabeth Avenue to the south of the kink, which on the Bates plan, is shown as approximately in the middle of Lot 33. Therefore, whatever problems there may be in locating the west side of Elizabeth Avenue south of the disputed line, such problems do not adversely affect his opinion with respect to the northern portion of Elizabeth Avenue. What is of significance in Mr. Dunbrack's opinion, is that even if he is out half a foot in locating the western side of Elizabeth Drive, the disputed boundary would be out no more than 3/10ths or 4/10ths of a foot at the rear line (a very negligible amount).

Mr. Dunbrack testified that he had to pick a base from which to run his 90^0 angle to establish the sideline. There is no dispute between he and Mr. Robb as to where that point is between Lots 33 and 32 on the west side of Elizabeth Avenue. The only dispute would be whether he has placed Elizabeth Avenue at the right longitude. I am satisfied he has, as best one can. Furthermore, despite Robbs' evidence his plan by implication accepts the west side of Elizabeth Avenue as located by Mr. Dunbrack.

I did not find Mr. Robb's opinion acceptable. However, Mr. Robb was faced with a fait accompli when he was engaged in this matter. His clients had already erected the chain link fence. Mrs. Himmelman had the fence erected not on the basis of a survey but what she knew from being a life-long resident of Lot 32, much of which was based on what she remembered as a very young child; the basis for her opinion was not reliable. It is also to be noted that Mr. Robb was obviously influenced by the

alleged statement made to him that an old fence had been in position for some 30 years in the location where the chain link fence had been erected. That information, if given, was not correct.

Mrs. Himmelman, was, in effect, her own surveyor. Mr. Robb made much ado about the problem created by the angle of deflection on the west side of Elizabeth Avenue as shown on Mr. Dunbrack's working drawings. He suggested it didn't correspond to the angle as shown on the Bates plan and that this would throw out Mr. Dunbrack's opinion. It is clear that Mr. Robb misinterpreted Mr. Dunbrack's working drawings. Generally speaking, the thrust of Robb's evidence was to throw a smokescreen around the problem and say that you have to rely on "settled occupation". However, the evidence of "settled occupation" is so skimpy that one could not rely upon it. The lynch pin of his evidence seemed to be that this old fence had been in place for some 30 years. That was in error. He also relied on fences on other properties. I have already pointed out that they could not affect whether or not a neighbour had acquired possessory title to lands of his abutter where the sidelines of the lots can be plotted as it was done in the case by Mr. Dunbrack.

Mr. Robb complained that the Bates plan was a "floating plan". By that he meant it was not tied into any Coordinate as is now the case in most survey work. While that fact is true and that fact made it difficult to locate the west side of Elizabeth Avenue, through extensive survey work I am satisfied that Mr. Dunbrack was able to do so and that his conclusions are reasonable and supported by the evidence.

There is no doubt that over the years the location of the west side of Elizabeth Avenue was not likely pinned down with any accuracy and that is why in all probability the fences on other lots go off at other than 90^0 angles. Those errors on other lots cannot be a basis for deviating from the sidelines as called for in the deeds based on the April, 1947 Bates plan with respect to Lots 32 and 33. If that approach were to be followed, there would be real chaos in the subdivision and although I make no finding on the question as it is not an issue, it would appear that the owner of Lot 34 immediately to the south of the O'Melia property, has probably acquired possessory title up to the fence that has been in existence since the mid fifties along the entire length of Lots 34 and 33. The evidence of occupation by the owners of Lot 32, MacIntyre and Himmelman, is simply insufficient for them to have extinguished the title of the O'Melias to Lot 33 as described in their deed and as shown on the Bates plan.

In coming to the conclusion that I should not accept evidence of there being an old boundary in the vicinity as claimed by the defendants, I drew some assistance from the fact that a plan prepared by a Mr. Donovan, a surveyor, in 1958 at the time Lynn Drive was conveyed to the Province did not show any such fence. Furthermore, a blow-up of an aerial photograph taken in 1969 did not show a fence. Mrs. Himmelman said the fence had been built in 1958 and Mr. O'Melia said it was torn down in 1974. While other fences in the subdivision are visible, this fence must have been of rather a rickety and obscure nature. It is clear from Mr. Robb's evidence that he was relying on what he stated was told to him by Mrs. Himmelman that the fence was there for some 30 years. It was not; it was there for approximately 15 years. Mr. Robb went on to state that there was another fence that extended past

the garage and past the spruce tree which would be further to the east. As mentioned before, not even Mrs. Himmelman testified to this fact. I agree with the opinion expressed by Mr. Dunbrack that to base an opinion that possessory title had been acquired on the evidence available to Mr. Robb, was an improper approach to this boundary line dispute. I also agree with Mr. Dunbrack's opinion that reliance on fences on other properties is not a reliable method of determining whether possessory title has been acquired to the area in dispute where the lots are capable of being plotted as Mr. Dunbrack did. I do not agree with Mr. Robb's opinion that if you accept Mr. Dunbrack's solution, you upset the other lines in the subdivision. This is not the case. The boundaries as called for in the deeds should prevail. However, it may be that over the years, one owner or another of lots in the subdivision may have acquired, by the erection of the fences, possessory title to land that was otherwise part of his abutter's property.

It is clear that Mr. Robb misinterpreted the Dunbrack worksheets with respect to the angle of deflection on the west side of Elizabeth Avenue.

An insight into the quality of Mr. Robb's testimony can best be gleaned by his comment that "it's scary" to use the 90^0 angle called for in the Bates plan. While the survey of this boundary line was not easy, Mr. Dunbrack approached the problem in a reasonable way with extensive work and his opinion is acceptable. Mr. Robb said he relied on monuments in reaching his opinion but there is a complete lack of credible evidence upon which he could properly conclude that there was a fence in place for the statutory period that would enable him to reach the conclusion that he did; he made inadequate enquiries with respect to the duration and quality of occupation. Mr. Robb stated that the fences in the subdivision showed a pattern of development of sideline boundaries that should prevail. I agree with Mr. Dunbrack that Robb's reference to "patterns having developed in the subdivision", is not supported by the facts. The fence on the south side of lots to the south of Lot 33 are generally located to the north of the lines as shown on the Bates plan while the fences on the south sides of the lots to the north of Lot 33 are generally located south of the side lines as called for on the Bates plan. It should also be noted that the fences on lots north of Lot 33 do not extend the full length of the lots in question. I formed the impression that in all likelihood the owners of the lots in the subdivision put up their fences where they felt it was reasonable but one does not base conclusions on a property dispute on such evidence where the lot line in question can be located through basic survey practices. It was clear that Mr. Robb was relying to a considerable extent on the so-called "old fence" that was allegedly on the line in dispute for some 30 years which, in fact it was not. I felt Mr. Robb's testimony in respect to questions in cross-examination was evasive; he had a difficult position to sustain.

I should say a word about arguments made by the defendants' counsel. I am satisfied that the defendants' counsel in his brief properly identified the issues before the court as follows:

> "1. Whether the boundary line as between the plaintiffs' and defendants' lots is as delineated by Mr. Dunbrack, the plaintiff's surveyor, or Mr. Robb, the defendants' surveyor?"

> "2. In the event the plaintiffs' surveyor's opinion is found to be correct, whether the defendants have acquired title to the lands in dispute by virtue of an agreement between the parties' predecessors in title, or by adverse possession?"

However, having stated the issues correctly he proceeded to refer to a number of cases that deal with ambiguous descriptions. There was no vagueness or ambiguity in the description of the common boundary line between Lots 32 and 33. The line runs at right angles to Elizabeth Avenue. So discussions about monuments taking precedence over angles, etc., is completely irrelevant. There was not any reference in the description of Lots 32 and 33 to monuments with respect to the disputed line. There was not an old boundary fence that was in place on the line of dispute for the statutory period of 20 years. Were that the case, one would, of course, accept that as the boundary between the properties.

Defendants' counsel argues that the defence was claiming under "colour of title". From which he then concludes that possession of part is possession of the whole. The concept of colour of title doesn't really apply to this case but to situations where the title is defective and the grantee enters. However, even in those cases, the acts of possession necessary to oust an owner are equivalent to those required where the grantee has not colour of title. The acts of possession exercised by the defendants and their predecessors were insufficient to oust the owners of Lot 33 from the disputed area.

In summary, Mr. Robb's approach to resolving this dispute over this boundary line was not sound. The description called for in the deeds of the O'Melia and Himmelman lots are unambiguous. Those descriptions are based on the April 1947 Bates plan and have been accurately plotted and are shown on the Robb plan in yellow. The street line of Elizabeth Avenue as called for in the descriptions and as shown on the Bates plan is as shown on the Robb plan north of the angle of deflection. There is no satisfactory evidence of a conventional line agreement nor is the plaintiffs' claim barred by the defendants' acts of adverse possession.

I find that the boundary line between Lots 32 and 33 is as shown in yellow on the Robb plan going from the point on Elizabeth Avenue at the southeast corner of Lot 32, proceeding southwesterly to the eastern sideline of Lynn Road as shown by the yellow line on the Robb plan. Therefore, the chain link fence constructed by the defendants in 1983 is located at the rear of the property approximately 5 1/2 feet on the plaintiffs' property. It is clear from a review of the Robb plan that it extends along the plaintiffs' property for most of the dividing line between the two properties other than a very small section near Elizabeth Avenue.

The plaintiffs claimed damages for trespass. I shall award them damages of $1.00. The plaintiffs claim damages for the cost of returning the plaintiffs' land to the condition it was in prior to the trespass. I shall order that the defendants have thirty days to remove the fence in a good and workman like manner and restore the land, failing that the defendants may cause the same to be removed and the defendants shall pay the plaintiffs reasonable costs of doing so. There will be no additional damage award for loss

of use of the land as the land is more or less useless. An Order shall issue restraining the defendants from further trespasses to the plaintiffs' land and a declaration shall issue that the boundary line is located as I have found. There will no award for punitive or exemplary damages. The plaintiffs shall have pre-judgment interest at the rate of 12 per cent on the award from the date the cause of action arose and shall have interest at 12 per cent on out of pocket disbursements from the date of payment for surveyors, etc. until the day of judgment. The plaintiffs having succeeded in this action shall have their costs to be taxed.

It is unfortunate that Mrs. Himmelman hadn't seen fit to engage a surveyor prior to taking the initiative of building the chain link fence. I am sure that neither of the parties can afford the expense of this lawsuit and it would have been much more satisfactory for all concerned had they agreed on a boundary line as the little area of land is virtually useless.

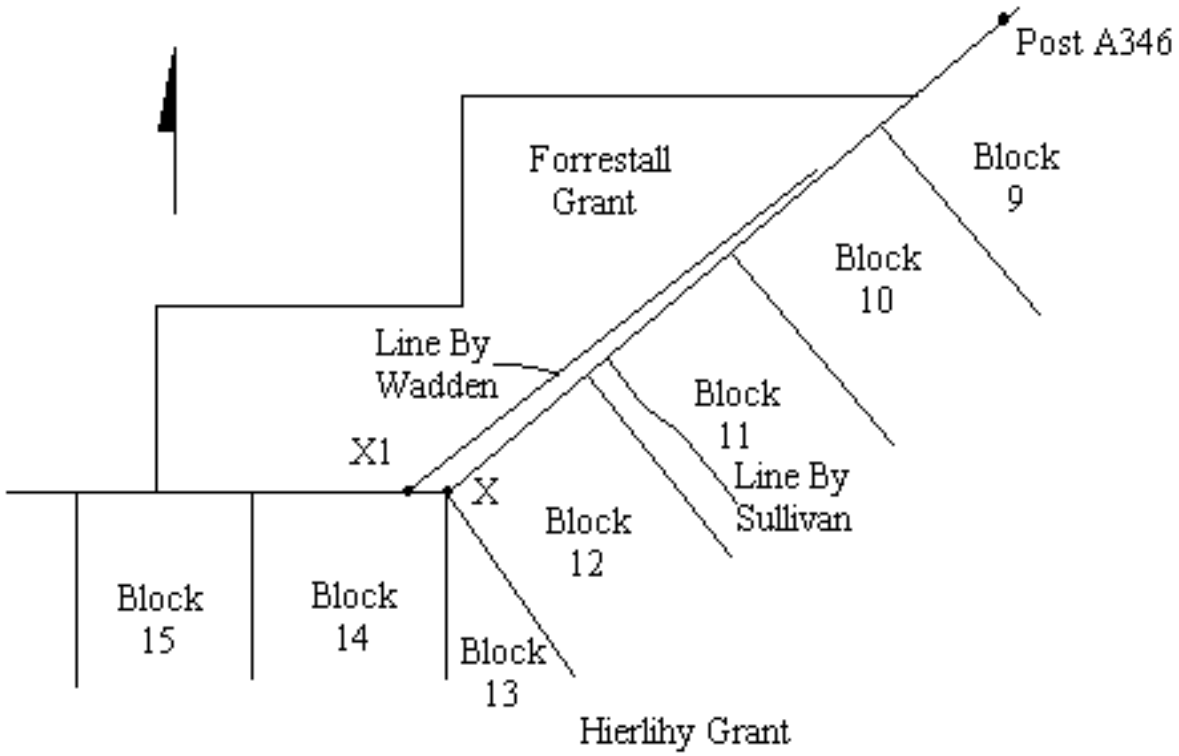
Judgement for the Plaintiff.

KENNEDY, MacDONALD, McNEIL et al. See 77 N.S.R. (2d) 38
v. ALEX, ALEX, LAYES and WEBB
Nova Scotia Supreme Court Trial Division
Grant, J.
January 12, 1987.

-and-

JOHN J. KENNEDY, JEAN F. MacEACHERN, DAN MacNEIL, See 83 N.S.R. (2d) 374
BERNARD A. CHISHOLM, JAMES MacDONALD,
DONALD CHISHOLM, EDWARD A. CARTY, GREGORY
CAMPBELL, BRIAN STEEVES and WILLIAM A. MacDONALD
(appellants) v. PETER ALEX and JOHN LAYES (first respondents),
LEONARD McCARRON, DELORES MacDOWELL,
JOHN BEKKERS and ANTHONY BEKKERS (second respondents)
and MARY WEBB KENNEDY, DAN JAMES DONALD (third respondent)
Nova Scotia Supreme Court Appeal Division
Jones, Matthews and Chipman, JJ.A.
March 18, 1988.

This was a very complicated boundary dispute. The Plaintiffs owned lands which had originally been part of the Hierlihy Grant and the Defendants owned lands which had originally come from the Forrestall Grant at Lanark, near the Town of Antigonish. The essence of the dispute was the location of the western (or rear) boundary of the Heirlihy Grant and the Eastern boundary of the Forrestall Grant. The Hierlihy Grant had been subdivided into large blocks and the blocks had been re-subdivided. The essential configuration of the lands is shown on the following sketch. Also shown on the sketch are the designations for some points and lines which will assist in understanding the judgements.



At the Trial level, much of the Judge's decision dealt with the approaches taken by the two land surveyors. Both surveyors agreed with the Northern line of Blocks 14 and 15. Both also agreed with the location of the most westerly line on the Forrestall Grant and where it intersected with the Northern line of Block 15. Sullivan found evidence along the western lines of Blocks 9 to 12. He produced that line to intersect the agreed northern line of Blocks 14 and 15 at Point X. Wadden worked on the internal divisions of the Blocks of the Hierlihy Grant and determined that the Apex of Block 13 intersected rear line of Blocks 14 and 15 at Point X1. Points X and X1 were approximately 1000 feet apart.

The Trial Judge considered many factors, including the length of the southern side of the Forrestall Grant, the fact that the Sullivan line projected (with a couple of small deviations) to Post A346, claims of the various parties, especially with regard to the location of the summit of Sugarloaf Mountain and others. The Judge was particularly concerned that if the Wadden line were accepted, the result would be to shift the boundaries of the internal divisions of the Blocks in the Hierlihy Grant. In the end, the Trail Judge found that the Sullivan line best represented the location of the original boundary.

The Plaintiffs appealed.

The Appeal Court reviewed all of the facts and the decision of the Trial Court. The Court expressed the opinion that the Trial Judge had misdirected himself about the effect of adopting the Wadden line. The Appeal Court held that if the Wadden line were to be accepted, the result would be to simply "shift" the blocks in the Hierlihy Grant about 1000' to the west.

The Court of Appeal held that the Sullivan line was not the correct line for a number of reasons. One reason was that it placed the summit of Sugarloaf Mountain in the Forrestall Grant. Another reason was that it would result in the southern line of the Forrestall Grant being much longer than what was called for in the original grant.

The Court also found that the Wadden line had not been proved to be the correct line.

The result was that the parties had no resolution to the dispute.

KENNEDY, MacDONALD, McNEIL et al. v. ALEX, ALEX, LAYES and WEBB
Nova Scotia Supreme Court Trial Division
Grant, J.
January 12, 1987.

On November 5, 1784 some years after the fall of Quebec, an apparently grateful and benevolent King George III granted 21,600 acres at Antigonish to Colonel Timothy Hierlihy and 88 other of his loyal soldiers. There was no plan attached to or contained in the grant. This is said to be the original Town of Antigonish Grant and bounds on Antigonish Harbour.

The grant was later subdivided into 42 lots of 500 acres each and 1 lot of 600 acres.

Exhibit 29 is a plan said to be from the Crown Lands Office dated 1787. It shows the grant as subdivided. Unfortunately someone had apparently attempted to retrace the lines but in doing so appears to have made some errors.

A plan dated 1814 shows the grant as subdivided into the lots, in more detail.

This action relates to the location of the rear line (west line) of Lots 10, 11 & 12. It was frequently referred to as the base line.

In the original grant the rear or west line of Lots 1 to 12 is on the bearing S 40 degrees W and continuing for 450 chains. It then angles westwardly on bearing S 30 degrees W for 375 chains. Both of these lines are straight. The grant and Exhibit 29 both use the same bearings and distances.

The plan of 1814 shows the same bearings as the grant.

In each of these plans Lot 13 is at the junction of the two relevant bearings and is triangular in shape. This junction was referred to by some witnesses as "the corner". Here the apex of Lot 13 meets the northeast corner of Lot 14 and the southwest corner of Lot 12. The location of this point is critical to the location of the base line.

Generally these lots fronted on Antigonish Harbour where they were serviced by a road called the Harbour Road. The general area is called Lanark. The houses and cultivation were mainly along the road. The area of the junction of the rear lines contains a steep grade and includes Sugarloaf Mountain, one of the highest peaks of land in the area. The land in dispute has not been cultivated but has been used mostly for firewood. It had been logged some years ago.

Eventually the 500 acre lots were each subdivided into 5 lots of 100 acres. Some were later subdivided into smaller lots, particularly along the highway.

The plaintiffs are the present owners of some of the lands contained in these lots from the Hierlihy grant, particularly Blocks 11 and 12 and part of Block 10.

On April 28, 1815 George III granted 500 acres to Margaret Forrestall et al. (widow and children of Michael Forrestall, deceased). This land lies to the rear (west) of Lots 10, 11 & 12 and to the north of Lots 14 and 15 of the Hierlihy grant. It includes the area where the lines of the Hierlihy grant intersect (the corner, so called).

The relevant bearings on the Forrestall grant vary some from the Hierlihy grant. One is N 42 degrees E (i.e. S 42 degrees W) rather than S 40 degrees E and the other is N 82 degrees E (i.e. S 82 degrees W) rather than S 80 degrees W. Those variations are said to be due to the fluctuations in magnetic north referred to by the surveyors as the "march of the compass".

Thus in the area in dispute the eastern line of the Forrestall grant is the western line of the Hierlihy grant.

The Forrestall grant and others are served by a road on the west leading to Cloverville and Fairmont. Most of the homes are near the road. Most of the cultivation is nearer the road and the eastern portions of the lands are not cultivated but are generally used for cutting firewood. The defendants are successor in title to the Forrestall grant.

The sketch below is a portion of the plan showing the junction of the relevant boundary lines of the two grants. [See sketch]

For a couple of hundred years the owners of the lands apparently peacefully enjoyed their lands.

Around 1950 a dispute arose as to the location of the line between one Billy Farrell on the Alex lands (from the Forrestall grant) and Rod Kennedy, father of John Kennedy (from the Hierlihy grant). Farrell was not a surveyor but apparently he did some blazing along the south boundary of the Forrestall grant and the north line of Lots 14 and 15. A surveyor named Alex MacKay had some involvement at that time, the extent of which is not known. It is said that MacKay did some work on locating the base line as well. MacKay did not give evidence.

In l966 Sheldon Patriquin of M.H. Wadden Surveys surveyed in the area of the base line. His Plan Exhibit 34 dated March 22, 1966, purports to show the "base line of harbour lots".

In 1960 M.H. Wadden surveyed the Mary Webb property which is bounded on the east by the base line. His preliminary "60-10" plan is Exhibit 35.

In 1966 M.H. Wadden cut out and blazed what he considered to be the base line.

From the Farrell activity in the early 1950's the situation festered until 1981 when Hugh J. Sullivan N.S.L.S. ran his line for the defendants which generally followed the MacKay base line of 1954.

In 1984 Gary Wadden, son of M.H. Wadden, confirmed his father's line of 1966.

The Wadden line takes the base line several hundreds of feet further west than the Sullivan line.
The Pleadings:

Although it has been generally accepted that I am to endeavour to fix the base line I can only do so with relation to the parties to this action. That is, I cannot fix the base line so that it results in the taking of land from someone who is not in this lawsuit or from one plaintiff to another.

For example, for me to extend the Jean MacEachern south line as shown on Exhibit 2, westwardly to point X1, I would have to give her some of the Floyd lands and some of the Van Gestel lands. I cannot do that as Floyd is not involved in this action. As well Mrs. MacEachern is not seeking lands from Van Gestel.

Likewise I am not to rule on the internal divisions of the blocks. That is, I do not rule on the ownership or occupation of Block 11 for example. My concern is with the location of the west line (base line) of Block 11.

In some instances I must consider what lots are contained in certain blocks. For example Block 14 be shown to contain its 5 lots. In that instance Floyd has lots 2, 3, 4 and 5 and Van Gestel has Lot 1 of Block 14 (according to Sullivan, which I accept).

This is relevant and important in attempting to determine what owners are in the "corner", Block No. 13, and to determine the proper location of the "corner" of the base lines.

The Wadden line runs on a bearing of N 24 degrees 46' 42" E. The Sullivan line runs on a bearing of N 25 degrees 08' 04" E a variation to the east of about 1 degree.

The Sullivan line makes two slight deviations. Near the back (west) of Lot 10 it changes to N 22 degrees 55' 24" E, apparently to conform to a crown land line. It then deviates to N 22 degrees 55' 20" E to the northwest corner of Lot 1 of the Hierlihy grant.

Both Sullivan and Wadden agreed on the location of the southwest corner of the Forrestall grant (now Herbert Alex). That is where its west line meets the north line of Lot 15 of the Hierlihy grant.

Each surveyor was faced with the difficulty of determining a starting point. The Hierlihy grant gives no dimensions for the individual lots. The 1814 plan gives the widths of the lots as 150 chains but with no other dimensions. They are bounded on the east by the western shoreline of Antigonish Harbour.

The surveyors also agreed on the location and bearing of the north line of Blocks 14 and 15 being the south line of the Forrestall grant (now Alex).

The major question is the length of the south line of the Forrestall grant. That locates the corner of Blocks 12, 13 and 14, that is, the "corner" where the west or base line of Blocks 1 to 12 intersects the north lines of Blocks 15 and 16. At that point Lots 12, 13 and 14 meet.

Methodology of Sullivan:

Both surveyors started at the same point and progressed easterly along the north line of Blocks 14 and 15. Sullivan was on a bearing of N 65 degrees 45' E and Wadden on a bearing of N 65 degrees 44' 58" E. Each found evidence of the old line. There is no dispute as to that line. The major point in issue is the length of this line.

Sullivan and Wadden considered line "C" not to be substantially in dispute. This line intersects the north line of Block 15 of the Hierlihy grant to the east of its northwest corner. This is shown on the 1814 plan and the Forrestall plan, as well as on Exhibits 2 and 20.

Line "A" likewise is not substantially in dispute. Both surveyors agreed that it follows the north line of Blocks 14 and 15, being the south line of the Forrestall grant. In extending line "A" to point "X" Sullivan considered the location of the Simon Irish line. He concluded Irish had Lots 4 and 5 of Block 15 and Lot 1 of Block 16. Each sublot was taken as 30 rods wide. He found evidence of a line dividing these lands from the Forrestall lands which he considered to be over 100 years old. Line "A" is part of the east-west line as shown on Exhibit 2.

Sullivan concluded he had located the eastern boundary of Block 14, which would also be the western boundary of Block 13. He traced Lots 2, 3, 4 and 5 of Block 14 to Floyd.

Sullivan concluded that making "X1" as the "corner" would place Floyd in Block 13 not 14. Exhibit 16 places Floyd in Block 14.

Exhibit 17 is the abstract of the present Van Gestel lot. It is said to contain Lot No. 1 of Block 14 and Lot No. 5 of Block 13 (or part of it). It is the former Frederick J. Chisholm lands conveyed by his heirs to the Land Settlement Board. Line "D" of Sullivan is the east line of Block 14 and the west line of Block 13.

Sullivan found evidence of the side lines of Blocks 14 and 15. They are parallel to each other and perpendicular to line "A".

Sullivan rejected the dimension of the south line of the Forrestall lot. He considered it an error, meant to refer to acreage not distance. He considered that Exhibit 8, which he felt was the Forrestall field

sketch, was consistent with that belief. He considered the Forrestall grant, as a grant junior to the Hierlihy grant, to be of limited authority and assistance.

Sullivan considered Jean MacEachern's lot to be out of Block 13 not 12. He was, however, concerned about justifying the presence of 70 acres and where it was located.

Sullivan considered the Dan MacNeil lot to be in Block 12 although Wadden had included it in Block 11. If in Block 12 then his initialled tree may be within his boundaries.

Sullivan said that with Van Gestel on both sides of the western boundary of Block 13 it placed him partially in the pie shaped lot, consistent with his deed.

Sullivan concluded that the evidence of the Irish lines and the Floyd lots took up Block 14 and placed Mary MacEachern in Block 13.

Sullivan attempted to find physical evidence of the lines to verify his measurements particularly his locating of the side lines of the lots and blocks. Sullivan related his line to the west line of Blocks 1 to 10.

Methodology of Wadden:

Wadden found evidence of a fence and tree line which he concluded was the division between Blocks 12 and 13. This he considered to be the MacEachern south line. This line he produced westerly to where it met line "A", at point "X1".

Wadden found evidence of an old fence line which he concluded was the north line of Block 12 and the south line of Block 11. He concluded it was the north line of William (Duffy) MacDonald and the south line of Dan MacNeil. He located the north line of the Dan MacNeil lot, it being the south line of the Arnold Joseph MacNeil lot. He located evidence of an old fence and tree line along that boundary.

Wadden worked primarily on Blocks 12 and 13 and the Doyle, Burke, Webb and Forrestall grants. He considered the 53 chain south bound of the Forrestall grant significant. He felt justified in extending line "A" in Exhibit 2 easterly along an old blazed line to point "X1". This distance of 56.6 chains compared favourably with the 53 chains in the Forrestall grant and with his location of the southwest corner of the MacEachern lot.

Wadden made little or no effort to deal with the owners of Blocks 13, 14 and 15 all of whom must fall within the bounds of those lots. Sullivan took great pains to do so and in doing so the MacEachern lands go within the triangle of Block No. 13. In doing so Sullivan rationalizes his location of the various owners but in putting the MacEachern lands in Block 13 he is inconsistent with the MacEachern deed and chain of title.

Possessory Title:

In order to have acquired a possessory title to lands it is necessary that the adverse possession meet the requirements set forth in our case law sufficient to meet the requirements of the **Limitation of Actions Act**, R.S.N.S. 1967, c. 68.

The nature of the possession to be proved was expressed by MacQuarrie, J., in **Ezbeidy v. Phalen** (1958), 11 D.L.R. (2d) 660, at p. 665:

> "...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 here, 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 deseised 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 LT 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 Company 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 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."

In **Zinc v. Attorney General of Nova Scotia et al.** (1979), 34 N.S.R. (2d) 12; 59 A.P.R. 12, Cooper, J.A., at p. 21 discussed the necessary acts of possession:

"The nature and character of possession that is necessary to extinguish the title of the true owner is stated in Anger and Honsberger, **Canadian Law of Real Property** (1959), at p. 789:

> 'The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".'

"This statement is supported by reference to a goodly number of cases, as I said in the course of my reasons for judgment in **Taylor v. Willigar et al.** (1979), 32 N.S.R.(2d) 11; 54 A.P.R. 11. I particularly referred to **McConaghy v. Denmark** (1880), 4 S.C.R. 609; and **Sherren v. Pearson** (1887), 14 S.C.R. 581."

"The sufficiency of acts of possession must, in my view, be determined by the nature of the land in question."

Use of the Lands:

It is relevant to consider the nature of the lands so occupied. The lands in issue have never been cleared. They are unfenced. Some of the lands were logged over the years but not recently. Chisholm and Haley recalled some cutting on the MacGuillivray lands.

Block 13:

Bernard Chisholm of Dunsmore, in his 60's, is a former owner of the Van Gestel property. He lived there for 30 years. He and his brother, Rod, a surveyor-engineer ran the line with Secco. Chisholm said he had been to the summit of Sugarloaf over 100 times and the base line was 200 or so feet west of the summit.

Block 11:

Daniel James MacDonald, age 45, owns part of Block 11. He got it from his father Hugh, called "Hughie Number Eleven" who died at age 86. Hugh got it from his father, also called "Number Eleven". He was shown by his father and grandfather where the base line ran near a swamp or pond. He said the Wadden line ran through the swamp. He helped Wadden run the line in 1966.

In 1976 MacDonald constructed a road to get to his back line to cut hardwood. It crossed the Sullivan line. In 1961 he and his brother John Hugh, a civil engineer, ran the line to a pond. They had Joe McLellan, a surveyor do his side lines. McLellan stopped when he came to the Sullivan line. MacDonald took out some of Sullivan's markers and put them on the Wadden line.

Donald Chisholm, a plaintiff, owns part of Block 11. He was shown by a predecessor in title where the base line (his west line) ran through a swamp or pond.

In 1964 Chisholm ran his line on the MacGillivray line and went west of the Sullivan line. He came to a marked stump which is now down and gone.

Greg Campbell owns part of Lot 11. He considered the Wadden line to be the base line and his west line.

Block 12:

Dan MacNeil is 89 years old and lived on Lot 12 all his life. He is the third generation on Lot 12. His father showed him blazes on an old maple tree. He put his initial on a tree some years ago. That tree is about 100 feet from the base line which he considered to be the Wadden line. The tree with the blaze is shown in Exhibit 33. He considered the Sullivan line to be too far up the mountain (to the east). He said he saw no old blazes on the Sullivan line.

Jean MacEachern considered she owned the top of Sugarloaf. Her husband indicated the west line as being to the west of the top of the mountain.

Leonard McCarron said the Wadden line was just a few yards from the base line as indicated to him by Philip Chisholm who showed him where logging had been done.

Edward Haley bought and cut on the William MacGillivray lot in 1936-37-38. He cut to the west of the Sullivan line.

The plaintiff John Kennedy owns part of Lot 12. He said that there was a dispute in the early 1950's and Billy Farrell ran the south line of the Forrestall grant. Later a surveyor, MacKay, chained the base on the line run by Farrell. Farrell continued on easterly from the corner identified by Wadden to the Sullivan corner. He said he had used the land up to the Wadden line.

Kennedy moved the Sullivan corner post to the location of the Wadden corner. He said there were some old blazes along the Sullivan line. He had been with MacNeil and saw the initialled tree. He considered that blaze to be 200 or so feet east of the MacNeil house if that line was extended (westerly).

Burden of Proof:

The standard of proof is on a balance of probabilities. The burden is on the plaintiffs to establish the base line as they allege it to be and on the defendant to establish it as they allege.

Priority Given to Certain Facts:

The case law indicates the priority to be given certain facts under such circumstances. In **Richard v. Gaklis** (1984), 63 N.S.R.(2d) 230; l41 A.P.R. 230, Clarke, J. (as he then was), at p. 234 reviewed the law in this province relating to the effect given to certain facts to determine the intent where there is an ambiguity in the grant:

> "In discussing the manner of determining the intent of parties where an ambiguity exists in a description, I quote from the **Canadian Encyelopedic Digest** (Ontario) (3rd Edition), volume 3, at Title 19, page 16, paragraph 24:
>
> > '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. 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.'"

(1) Most effect is to be given to natural boundaries: The location of the Bay is not relevant as it was not a factor in any of the surveyors' calculations or evidence.

The location of the summit of Sugarloaf was dealt with by some of the witnesses and is shown on Exhibit l. It is not referred to in the grant.

(2) Next, effect is given to the lines actually run and corners run at the time of the grant. Apparently no lines were run and no corners were established at the time of the grant, which was unusual. There may have been a plan at one time but if so, it is now gone.

(3) Next, effect is given to the lines and corners of adjoining owners if they are sufficiently established: The lines of some of the adjacent lots are established by old fences and rows of trees but not in the disputed area.

(4) Finally, effect is given to courses and distances: Those in the Hierlihy grant are not considered helpful. The south bound of the Forrestall grant was given considerable weight by Wadden.

Sugarloaf:

One natural feature is Sugarloaf summit. Peter Alex does not claim it, that is, he does not allege that his east line extends to it. Jean MacEachern said her line was to the west of the summit as shown to her by her late husband. That is consistent with Exhibit 1, the photo.

Bernard Chisholm said that Billy Hugh MacGuillivray (predecessor in title of Jean MacEachern) owned to the top of Sugarloaf and about 200 feet beyond.

The MacEachern Lot:

The abstract of title of this lot (Exhibit 21) shows it as being a part of Block 12. Like the other blocks, Block 12 contained 500 acres which was subsequently subdivided into 5 lots of 100 acres each. Her lot is apparently Lot No. 5 of that block. It appears from paragraphs 8 to 12 of Exhibit 21 that 80 of the 150 acres of MacEachern are from that lot. The balance may be from Lot 4 of Block 12 although Sullivan thought it might have come out of Block 13.

To extend the MacEachern south boundary on Exhibit 2 to point "X1" would result in taking the northern part of the Van Gestell lands and a portion of the Floyd lands. There is no issue between these parties in this action and I therefore am not in a position to do so.

I consider that line "E" shown on Exhibit 2 as "original southern boundary of Lot 12" and the line of trees to the south of it shown as "southern boundary of Lot 12 according to Registry of Deeds records", are each capable of being the southern boundary of Lot 12.

Wadden accepted the latter as the line and Sullivan accepted the former.

I cannot accept the one Wadden chose because it disturbs the title of lands not in issue in this case.

Persuasive Factors:

There are certain factors which I find are persuasive in my determination of the line both from the paper title and by possession:

> (1) The measurement of the south bound of the Forrestall grant is 53 chains. Using the intersection of line "C" and line "A" as a starting point and proceeding easterly along the line agreed upon by the surveyors, point "X1" is, in my mind, more consistent with that dimension than continuing on to point "X".

(2) It is common to most of the evidence, particularly Bernard Chisholm and Edward Haley that Billy Hughie MacGillivray (now Jean MacEachern) owned to the west of the summit of Sugarloaf.

(3) The Sullivan line conforms to the western line of the lots to the north of Block 10 (Blocks 1 to 10). The Wadden line does not.

(4) The north west corner of Block No. 1 and the western boundary of that line shown on Exhibit 1 apparently indicate a dividing line between cultivated and wild lands. That line is a northern extension of the Sullivan line.

(5) The owners and predecessors in title to the lots contained in Blocks 11 to 12 from time to time used the lands somewhat to the west of the Sullivan line.

The evidence of Bernard Chisholm is somewhat in conflict with that of Sullivan principally in the location of the MacEachern lands. As I understood Chisholm the southern boundary of Block 12 shown on Exhibit 2 should be produced westerly to "X1". That however probably would involve the lands of Van Gestell and Floyd and this case does not involve that issue. That is, there is no issue here between MacEachern, Van Gestell and Floyd.

There have been several prior surveys with each surveyor apparently leaving blazes and other evidence of his work. These blazes, some now 35 years old, are in my opinion, not authoritative. They are not evidence of old lines but are an apparent expression of an opinion of the location of a line. Upon what bases or evidence those blazes were placed is unknown.

Acceptance of the Base Line:

The plaintiffs considered the base line to be west of the Sullivan line. The defendants considered it to be the Sullivan line.

Bernard Chisholm and Edward Haley save evidence of the base line as accepted by Billy Hughie MacGillivray (a predecessor of MacEachern). Chisholm placed it some 200 feet west of the summit of Sugarloaf.

Layes had gone over the lines with Walter Grant, a predecessor in title, and considered his line to be the Sullivan line. The same generally was the position of Alex.

The evidence, as one would expect, considering the terrain and use of the lands, although consistent that the base line was west of the Sullivan line, was not consistent in the exact location of that line.

I had the opportunity to go with counsel and some of the parties to view portions of the area in dispute including the summit of Sugarloaf.

As Exhibit 1 indicates from the contour lines, the land is hilly and Sugarloaf is steep. The use, i.e. the cutting and removing of logs and firewood, would, I believe, follow the lines of least resistance. Some areas are virtually impossible to walk because of the terrain. Therefore there are no clear lines where there was evidence of other than occasional use of the land. The cutting by Layes was extensive but that was recent and resulted in the long simmering problem coming to a head.

There is evidence of extensive use of the lands on Exhibit 1 in the extremely northwestern portion of the lands near Blocks 1 and 2.

There is considerable evidence of use on Exhibit 1 in the areas near the roads. Many of these lines are comparatively straight and parallel, running east and west. However, on such a large area as is covered in Exhibit 1 they look to be generally at right angles with the base lines as set out by both Sullivan and Wadden.

I make no determination of the location on the ground of all of the MacEachern lot, that is, whether it is all in Block 12 or 13. From the abstract of title evidence before me it is from Block 12. Exhibit 2 shows two south lines for Block No. 12, one being the "original" and the other from the "Registry of Deeds". If the latter line was produced to intersect line "A" it would cut into Van Gestell and Floyd who are not parties to this action.

All of the old plans show the southern boundary of Block 12 going into the "corner". If MacEachern is in Block 12 then her lands are not as shown in Exhibit 2, unless she also has some lands out of Block 13.

I have some doubt that the evidence found by Sullivan on the ground on the actual line "A" was sufficient to extend it to point "X". I consider he primarily relied on the blazes of MacKay in 1950.

I am attracted to Wadden's taking line "A" to point "X1", because it is so near in length to the south bound of the Forrestall grant. However, as Forrestall is the junior grant I do not consider I should rely on it until I have exhausted any reasonable interpretations arising form the Hierlihy grant.

One problem or possible problem may have been created with the subdividing of the blocks in five parts. These subdividings were done lengthwise with the result that all the lines are parallel. It therefore becomes difficult to tell if the side lines are of the blocks or the lots. This is evident in looking at Exhibit 2 relating to the south line of Block 12 and the west line of Block 15.

Findings:

I find some acceptance of the base line by the plaintiffs being to the west of the Sullivan Line. I find this has been recognized and observed by some of the owners of the lands for some time.

The lots of the plaintiffs and the defendants were all occupied. There is evidence that the plaintiffs did some acts of possession of the disputed lands for some years. There is evidence that the defendants did likewise. Each occupied a portion of the lands and thus is deemed to have occupied the whole. I find the acts of possession and use by the plaintiffs of the disputed lands were not exclusive, nor were they continuous. They were from time to time only.

Because of the nature of the terrain the use of the area in issue was limited generally to the removal of logs and firewood. Once logged the land was unproductive or was not used until new growth was of a size to be cut for firewood. However, the harvesting of firewood by the plaintiffs was only occasional and not continuous.

I am satisfied and I find that the Sullivan line is consistent with the plans of the grant. It is consistent particularly with the west line of Lots No. 1 and 2 which shows some changes in use i.e. to cultivation from wild lands. (Exhibit 1)

Generally the line of Sullivan is, in my opinion, more consistent with the balance of the base line to the north. The Wadden line is inconsistent with the balance of the west line of Blocks 1 to 10.

Sullivan continued the west line southerly from the northwest corner of Block No. 1 to the area of the Fire Tower lands in a comparatively straight line apparently conforming to the transposed bearing from the grant.

I consider Sullivan's work with Blocks 14 and 15 was necessary to fit all the lots into those blocks. Unless that could be done the result would be unrealistic.

I accept Sullivan's plan and his location of the base line from the evidence he used. I accept Sullivan's appraisal of the physical evidence of the side lines in preference to that of Wadden.

In the pleadings each side sought damages for trespass. These claims were abandoned. Even had they been pursued I would have disallowed them because of the nature of the evidence and the uncertainty of the boundary.

I find on a balance of probabilities that the base line is the Sullivan line. I accept it and the evidence of Sullivan generally in preference to that of Wadden.

The defendants shall have their costs of the action to be taxed but in one bill of costs with one brief and one counsel fee.

Order accordingly.

JOHN J. JEAN F. MacEACHERN, MacNEIL, BERNARD A. CHISHOLM, MacDONALD, CHISHOLM, EDWARD A. CARTY, GREGORY CAMPBELL, BRIAN STEEVES and WILLIAM A. MacDONALD (appellants) v. PETER ALEX and JOHN LAYES (first respondents), LEONARD McCARRON, DELORES MacDOWELL, JQHN BEKKERS and ANTHONY BEKKERS (second respondents) and MARY WEBB KENNEDY, DAN JAMES DONALD (third respondent)
Nova Scotia Supreme Court Appeal Division
Jones, Matthews and Chipman, JJ.A.
March 18, 1988.

This is an appeal from a decision of the Honourable Mr. Justice W.J. Grant dated January 12, 1987, and the order based thereon whereby he settled the line which divides properties of the parties. The appellants derive their title from a grant to Hierlihy (the Hierlihy grant) dated November 5, 1784. The grant description has no plan attached. The respondents derive their title from a grant to Forrestall (the Forrestall grant) dated April 28, 1815. The grant description has a plan attached, signed by the Surveyor General.

The two grants are situated near the town of Antigonish, N.S. in an area called Lanark.

The Hierlihy grant consisted of 21,600 acres and in due course was divided into 42 blocks of 500 acres each, and one block of 600 acres. Exhibit 29 is a plan from the Crown Lands Office dated 1878 showing the subdivision. The entire grant straddles both sides of Antigonish Harbour and the relevant portion is on the western side of the Harbour, containing blocks 1 to 23. Each block was further subdivided into five lots numbered from north to south on blocks 1 to 12 and from east to west on blocks 13 to 23. The trial related to the location of the west or base line of blocks 10, 11 and 12, in which the lands of the appellants lie. In the original grant, the base line of blocks 1 to 12 is on a bearing S 40^0 W and continuing for 450 chains. It then angles westwardly on a bearing S 80 degrees W for 375 chains. Both lines are straight. Block 13 is at the junction of the two lines and is triangular in shape. This junction (the Corner) is where the apex of block 13 meets the northwest corner of block 14 and the southwest corner of block 12. The location of the Corner is critical to the location of the base line to its north. The base line was fixed on behalf of the appellants by their surveyor, Wadden (the Wadden line) and on behalf of the respondents by their surveyor, Sullivan (the Sullivan line). The Wadden line fixes the Corner 1,029 feet southwest from the point fixed by the Sullivan line. The following is a tracing of Exhibit 2, the Sullivan plan, showing the two lines and other pertinent information. Point X is the Corner as determined by Sullivan and point X1 is the Corner as determined by Wadden.

It is important to remember that the location of the Corner itself and hence blocks 14 to 23 would be moved further southwesterly 1,029 feet if the Wadden line is chosen. Both Sullivan and Wadden agreed that the junction of lines A and C shown on the Sullivan plan represented the southwest corner of the Forrestall grant.

The following is a copy of the plan of the Forrestall grant signed by the Surveyor General. On this plan, the distance from the agreed junction of lines A and C to the Corner is 53 chains, that is to say 3,498 feet. The description of the Forrestall grant states that it lies to the rear of the Hierlihy grant. The beginning point is on the base line of the Hierlihy grant (line "A", Sullivan plan) on the northern angle of block no. 13 (the Corner), and the description concludes by making reference to the 53 chain distance as follows:

> "...along said Rear line fifty three chains or until it meets the place of Beginning containing in the whole Five Hundred acres."

The learned trial judge referred to the pleadings and indicated that it was generally accepted that he was to endeavour to fix the base line. He pointed out that he could only do so in relation to the parties to the action, that is he could not fix the line so that it resulted in the taking of land from someone not in the law suit. For example, he pointed out that to extend the MacEachern south line as shown on Exhibit 2 to point X1 he would have to give MacEachern some of the Floyd lands and some of the Van Gestell lands. He stated he could not do that as Floyd was not a party and MacEachern was not seeking lands from Van Gestell. Likewise, he considered he was not to rule on the internal division of the blocks.

The learned trial judge noted that for a couple of hundred years, the owners of the lands apparently enjoyed them peacefully. He found that a dispute arose around 1950 as to the location of the line between Billy Farrell on the Alex lands (from the Forrestall grant) and Rod Kennedy, father of John Kennedy (from the Hierlihy grant). Farrell was not a surveyor, but apparently he did some blazing along the south boundary of the Forrestall grant and the north line of lots 14 and 15. A surveyor, Alex MacKay, had some involvement at that time, the exact extent of which is not known. It was said that he did some work on locating the base line as well. MacKay did not give evidence at the trial. The situation "festered" until 1981 when Sullivan ran his line for the defendants which generally followed the MacKay base line of 1954.

The learned trial judge reviewed the methodology of Sullivan in arriving at his line. Both surveyors had started at the agreed intersection of lines C and A and proceeded northeastwardly. Sullivan proceeded about 72 chains or 4,752 feet before he selected the Corner. In locating the Corner at point X he considered his location of Simon Irish lands. He considered the Irish lands to be lots 4 and 5 of block 15 and lot 1 of block 16. The "division line" of former Irish lands was drawn by him on Exhibit 2 traced in part above. Sullivan concluded that in this way he located the eastern boundary of block 14 which intersected the Corner. He traced lots 2, 3, 4 and 5 of block 14 to Floyd. If one were to make X1 as the Corner, he said this would place Floyd in block 13 and not block 14 as it was placed in Exhibit 16, an abstract of title. The Van Gestell lot is shown as lot 1 of block 14 and he referred to line D as the east line of block 14 and the west line of block 13. Sullivan rejected 53 chains as the dimension of the south line of the Forrestall lot. He considered it an error, referring to acreage not distance. He considered the Forrestall grant as a junior grant to the Hierlihy grant, the stated bounds of which to be

of limited authority and assistance, and in arriving at his length of some 72 chains he relied on what he considered physical evidence of the lines to verify his measurements.

The learned trial judge then addressed the methodology of Wadden. He found evidence of a fence and tree line which he considered the division between blocks 12 and 13. He found evidence of other lines and markings. He considered the 53 chain south bound of the Forrestall grant significant and he picked the Corner to be at point X1, a distance of 56.6 chains which he thought compared favourably with the 53 chains in the Forrestall grant, and with his location of the southwest corner of the MacEachern lot which he placed in block 12. The learned trial judge pointed out that while Wadden made little or no effort to deal with the owners of blocks 13, 14 and 15, Sullivan took great pains to do so and in doing so, the MacEachern lands went within the triangle of block 13, rather than block 14 as Wadden placed it. The significance of this will be discussed later.

The learned trial judge reviewed the law relating to possessory title. He was not able to find any acts of possession which assisted him materially in determining the position of the line.

The learned trial judge also referred to **Richards and Slack v. Gaklis and Lakelands Blueberries Limited** (1984), 63 N.S.R.(2d) 230; 141 A.P.R. 230, dealing with the law relating to the effect given to certain facts to determine the intent where there is ambiguity in a grant. He noted that monuments, lines and corners – if sufficiently established – took precedence over courses and distances.

The learned trial judge then reviewed factors which he found persuasive in his determination of the base line, noting that there were factors favourable to both the Wadden and Sullivan lines. Specifically, he was attracted to Wadden's line because it was so near to the length of the south boundary described in the Forrestall grant. However, as the Forrestall was a junior grant, he did not consider he should rely on it until he exhausted any reasonable interpretations arising from the Hierlihy grant.

While noting that some of the owners of the lots had accepted and observed a base line west of the Sullivan position for some time, the learned trial judge concluded that the Sullivan line was consistent with the lines of the Hierlihy grant. It was more consistent with the west line of lots 1 and 2, some 5 miles to the north and he was impressed with Sullivan's work with blocks 14 and 15 which fitted all the lots into those blocks. If that could not be done, the result would be "unrealistic". He accepted Sullivan's appraisal of the physical evidence of the sidelines in preference to that of Wadden.

The learned trial judge did not make any specific findings of credibility in his decision.

The Sullivan line being selected, the order for judgment fixed it as the division of the properties on either side. The various claims for trespass and other relief were not pursued so that this was the sole determination of the trial judge from which this appeal is brought.

The fixing of the base line by the respective surveyors turned chiefly on their resolution of the following issues:

> 1. the length of the south line of the Forrestall grant;
>
> 2. whether the MacEachern lot was in block 12 or block 13. The resolution of this issue influenced greatly the fixing of the two lines forming the common boundaries of blocks 12 and 13 and blocks 13 and 14 respectively;
>
> 3. the location of the boundaries of blocks 14 and 15;
>
> 4. the location of Crown Post A346.

In selecting the Sullivan line, the learned trial judge resolved these issues in Sullivan's favour. In reviewing his decision, it must be kept in mind that his findings cannot be overturned unless they were plainly wrong.

1.The length of the south line of the Forrestall Grant:

The learned trial judge's rejection of the distance of 53 chains on line A from line C to the Corner must be assessed in light of his statement:

> "I am attracted to Wadden's taking line 'A' to point 'X1', because it is so near in length to the south bound of the Forrestall grant. However, as Forrestall is the junior grant I do not consider I should rely on it until I have exhausted any reasonable interpretations arising from the Hierlihy grant."

In taking this approach, he no doubt had in mind the following testimony of Sullivan:

> "A. Well the Hierlihy Grant was the senior grant and it appeared to me that the Forrestall Grant was based on the Hierlihy Grant, so I felt that there was sufficient means to re-establish the Hierlihy Grant from evidence of the Hierlihy Grant Subdivision. Plus the fact that there was sufficient evidence on the Hierlihy Grant."

The learned trial judge also referred to **Richards and Slack v. Gaklis and Lakelands Blueberries Limited**, supra, where Clarke, J. (as he then was), reviewed the law relating to the effect given to certain facts to determine the intent where there is an ambiguity in a grant, and said at p. 234:

> "In discussing the manner of determining the intent of parties where an ambiguity exists in a description, I quote from the **Canadian Encyc1opedic Digest** (Ontario), (3rd Edition), volume 3, at Title 19, page 16, paragraph 24:

> '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. 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.'"

A serious question arises in my mind whether there was an ambiguity in the Forrestall grant. The last distance is expressed to be 53 chains. It is not even qualified by the words "more or less", although it does say it or until it meets the place of Beginning. Moreover, there is nothing in the evidence to show that either natural boundaries, lines actually run and corners run at the time of the grant or lines and corners of adjoining owners were sufficiently established to the satisfaction of the learned trial judge that he could disregard the distance of 53 chains. He specifically found that there were no natural boundaries, lines or courses run or adjoining boundaries sufficiently established. To say that the Hierlihy grant line must prevail is not helpful when the location of that line is the very fact being investigated. It would seem to me that the strongest evidence of the end of that line in some other place would be required to displace the presumption that arises from the clearly expressed distance of 53 chains in the description prepared by the Surveyor General and so clearly shown on his plan.

What is the evidence independent of the line marked 53 chains? No plan was attached to the description of the Hierlihy grant. The learned trial judge rejected the various blazes left by previous surveyors which he considered some 35 years old and, in his opinion, not authoritative. They were not evidence of old lines but an apparent expression of an opinion of the location of a line. Upon what bases or evidence those blazes were placed is unknown, he said.

The learned trial judge specifically stated:.

> "I have some doubt that the evidence found by Sullivan on the ground on the actual line 'A' was sufficient to extend it to point 'X'. I consider he primarily relied on the blazes of MacKay in 1950."

As the learned trial judge pointed out, the 53 chain distance is common to most of the evidence, particularly to that of Bernard Chisholm and Edward Haley which is to the effect that Jean MacEachern owned to the west of the summit of Sugarloaf. This mountain is the one natural feature in the disputed area. Alex did not claim it and MacEachern said that her line was to the west of the summit. Bernard Chisholm said that MacEachern's predecessor in title owned to the top of the Sugarloaf and about 200 feet beyond. The learned trial judge himself recognized at the outset of his decision that the major point in issue was the length of this line. The foregoing review of the evidence raises serious doubts that this

line could be longer than 53 chains, but before any conclusion can be reached, the evidence relating to the other issues and the findings of the learned trial judge with respect thereto must be examined.

2. Whether the MacEachern lot was in block 12 or block 13:

A review of Exhibit 2 makes it clear that the placement of this lot plays a major part in the final determination of the location of the Corner. The learned trial judge in accepting the Sullivan line placed this lot in block 13.

Again, referring to Exhibit 2, it is to be noted that Sullivan fixes the southern boundary of block 12 as MacEachern's northern boundary (line "E"). Wadden fixes the southern boundary of block 12 as MacEachern's southern boundary. Thus, the Sullivan southern boundary of block 12 reaches the shore in the line of the peninsula immediately to the north. An examination of the grant plan, Exhibit 29, as well as Exhibit 6, the original subdivision plan of the Hierlihy grant shows the line between blocks 12 and 13, i.e. line “E”, reaching the shore at a cove to the south of the peninsula and not at the line of the peninsula as Sullivan fixed it on Exhibit 2 and where he marked it on the orthophoto. This composite, Exhibit 1, will be referred to later.

Sullivan has laid out the MacEachern lot as coming to a point at the west, which is inconsistent with the description in its deed, which gave it a rectangular shape with its western boundary abutting on the respondent's properties. This latter description first appeared in its present form in 1926. The abstract showing it as part of block 12 goes back to 1784 (Exhibit 21). Sullivan did not survey the MacEachern lot or its surrounding lots.

Bernard Chisholm, who along with his family owned the Van Gestell lot to the south, testified that the Van Gestell lot did not cut off the MacEachern lot as shown by Sullivan. He said that the Sullivan plan was wrong in this respect. He said that the Van Gestell lot came to a 60 degrees point and was not rectangular as shown by Sullivan. The MacEachern property was rectangular.

Wadden was also able to establish the northern boundary of block 12. This was the north line of William Duffy MacDonald and the south line of Dan MacNeil. MacDonald's deed stated that he was in block 12. The inclusion of MacEachern in block 12 gives this block the approximate correct width of 152.5 rods or 2,475 feet as Wadden's plan shows it to be.

The learned trial judge said:

> "I make no determination of the location on the ground of all of the MacEachern lot, that is, whether it is all in Block 12 or 13. From the abstract of title evidence before me it is from Block 12. Exhibit 2 shows two south lines for Block No. 12, one being the 'original' and the other from the 'Registry of Deeds'. If the latter line was produced to

> intersect line 'A' it would cut into Van Gestell and Floyd who are not parties to this action."

In the result, however, the learned trial judge could not accept Wadden's selection of the south boundary of MacEachern as the south boundary of block 12 because:

> "It disturbs the title of lands not in issue in this case."

Again, the learned trial judge, after noting that Bernard Chisholm's evidence was somewhat in conflict with Sullivan as to the location of the MacEachern's lands went on to say:

> "As I understand Chisholm the southern boundary of Block 12 shown on Exhibit 2 should be produced westerly to 'X1'. That however probably would involve the lands of Van Gestell and Floyd and this case does not involve that issue. That is, there is no issue here between MacEachern, Van Gestell and Floyd."

It is apparent from reviewing these passages, as well as the decision of the trial judge as a whole that he rejected the placement of the MacEachern lot in block 12 only because he feared that by so doing, he would make determinations which would affect the lands of persons who were not parties before him. In this respect, I believe that he was under a misapprehension. The placement of the MacEachern lot in block 12 does not cut into the Van Gestell or Floyd lands, but only moves them over to the southwest, along with all of the blocks 13 to 23, a distance of approximately 1,000 feet. The evidence, to be reviewed, does not show that these various properties are so tied to the markings on the ground that moving them on the plan in this direction affects the rights of these parties one way or another. Moreover, the learned trial judge was correct in noting at the outset of his decision that nothing decided in this case can affect the rights of people who are not parties. They are obviously not bound by whatever inferences one might draw as to the location of their property from the fixing of this line between the parties here wherever it is fixed.

I am satisfied that, but for the misapprehension under which the trial judge appears to have been labouring, he would probably have found that the MacEachern property was a part of block 12. Consequently, the case becomes strong for moving the Corner and blocks 13 to 23 to the southwest as indicated and as determined by Wadden.

3. The location of the boundaries of blocks 14 and 15:

Line "D" on Exhibit 2 above is the division line between blocks 13 and 14 according to Sullivan. Sullivan referred to a tree line, an old fence and some stones between the water and highway 337. He did not follow this beyond the road towards the Corner. An examination of the transcript shows that this evidence, if it was a line at all, could just as easily be the boundary of one of the subdivided lots in the block, as well as the boundary of the block itself. Bernard Chisholm negates it as a boundary line

saying that it was an old cattle lane. This evidence was not contradicted. The learned trial judge said at p. 26:

> "One problem or possible problem may have been created with the subdividing of the blocks in 5 parts. These subdividings were done lengthwise with the result that all the lines are parallel. It therefore becomes difficult to tell if the side lines are of the blocks or the lots. This is evident in looking at Exhibit 2 relating to the south line of Block 12 and the west line of Block 15."

In view of this, it is difficult to agree with the learned trial judge's statement at p. 28:

> "I accept Sullivan's appraisal of the physical evidence of the side lines in preference to that of Wadden."

Bernard Chisholm, former owner of the Van Gestell property, testified that it came to a point of about 60 degrees, not a sharp point and was not as shown by Sullivan. This leads to the inference that the Van Gestell lot was at least in part lying in block 13. As already pointed out, the learned trial judge has not only made no adverse finding respecting Chisholm's evidence either as to credibility or otherwise, he has laboured under the misapprehension that to accept it would somehow purport to bind Floyd and Van Gestell who were not parties before him.

In fixing line "D" as the boundary between blocks 13 and 14, Sullivan made no inquiry of the residents. No witness supported the location of any of Sullivan's references of blocks 14 and 15 to points on the ground.

While the learned trial judge did accept Sullivan's appraisal of the physical evidence of the sidelines in preference to that of Wadden, Wadden did no work in this particular area. In speaking of the measurements from the shore to the base line on lots 1 to 12, Sullivan made the point that they were of limited value. He said:

> "Q. Now, Mr. Sullivan, my learned friend also questioned you on measurements that you took from the shore or from the road, as shown on Drawing B, measurements from the shore, to the base line, on Lots 1 through 12, and you answered you did not measure them. What is the reason. Why didn't you measure those, Mr. Sullivan?
>
> A. Well I felt that there was...they were too erratic ... there was a lot of discrepancies between the measurements and there was...
>
> Q. And why would that be?

A. Well I sort of doubted whether they were ever really physically measured in the original subdivision. And I think a lot of these measurements may have come about by maybe people suggesting them, or maybe ordinary people measuring them, or this type of thing.

Q. Have you ever seen a plan of the Hierlihy grant with measurements on those lines?

A. I haven't."

This, coupled with Bernard Chisholm's evidence about the findings on the ground around block 14 greatly weakens my confidence in Sullivan's rejection of the 53 chain line set out on the Surveyor General's sketch attached to the Forrestall grant.

Accordingly, I do not find that the exhaustion of reasonable interpretations arising from the Hierlihy grant weaken the 53 chain line. Rather, I am in agreement with the first sentence of the passage quoted above from the learned trial judge where he said:

"I am attracted to Wadden's taking line 'A' to Point 'X1', because it is so near in length to the south bound of the Forrestall grant."

As I mentioned at the outset, it is important to remember that the location of the Corner and lots 13 to 23 would be moved on the Sullivan plan further to the southwest about 1,000 feet if the Wadden line is chosen. The reader is invited to look at the relationship between the dividing lines of blocks 14, 15 and 16 and the south and west lines of the Forrestall grant produced in the Surveyor General's drawing set out above. An examination of the same lines in relation to one another should be made of Sullivan's plan Exhibit 2. If lots 13 to 23 – are moved 1,000 feet or about two-fifths of a block to the southwest on Exhibit 2, the two plans would be similar in this respect, but not unless they are so moved. Moreover, by doing this the road shown on the Sullivan plan would appear to cross the northern boundary of lot 15 at about the point where line "C" joins it. This also means that the location of the road and blocks 13, 14 and 15 should be moved, and if this were done, the plan would coincide almost completely with the Surveyor General's sketch of the Forrestall grant and Exhibit 6, the Hierlihy subdivision..

From this, it is apparent to me that the selection of the Corner by Sullivan is more apt to create concern and confusion among nearby property owners who are not parties to this action, than is the adoption of point "X1" as the Corner.

With the greatest respect, therefore, I believe that the learned trial judge misapprehended the documentary evidence as well as the uncontradicted testimony of those who were able to shed any light on the conclusions of Sullivan with respect to the boundaries of lots 14 and 15.

4. The location of Crown Post A346:

An examination of Exhibit 2 shows that Sullivan's base line runs from point "X" to Fire Tower Crown Post A346. After this, he said that he next took a bearing on Crown Post 3324, nearly 4 miles to the north, computed the direction thereof and that became the balance of the base line of Hierlihy. When he was cross-examined Sullivan readily agreed that if the Crown was "wrong" in locating this post, then his line was wrong. No evidence was given to show that this post, assuming that it was erected by the Crown, was correct. No person purporting to speak on behalf of the Crown was called. There was evidence that Wadden was concerned as to the validity of its location and that inquiries had been made at the Department of Lands and Forests. He was unable to find any plan or deed with measurements which might have justified the location of this post. He did, however, examine the boundaries shown on deeds of an adjoining property to the north on the same line which measured out to a position consistent with the Wadden line – within 5 feet of it. This is a position some 400 feet west of the base line between Crown Post A346 and point "X".

On reviewing the transcript, I can only conclude that what little evidence there is on the subject fails to give any support for the conclusion that Crown Post A346 so-called is a reliable guide to the base line of the Hierlihy grant. There was no evidence of a survey based on deed measurements. All one has to go on is the work of Wadden which does anything but reinforce one's lack of confidence in this monument so heavily relied on by Sullivan.

5. General Comments:

The learned trial judge, in support of the Sullivan line said this:

> "Generally the line of Sullivan is, in my opinion, more consistent with the balance of the base line to the north. The Wadden line is inconsistent with the balance of the west line of Blocks 1 to 10."

Wadden did not project his base line more northwardly than Crown Post A346 which is between blocks 8 and 9. He was, however, asked at trial to extend his base line northwardly to the northwest corner of block 1 on the orthophoto plan, Exhibit 1. Sullivan had already projected his line northwardly on this composite photo to the northwest corner of block l. As the learned trial judge noted, his line makes two slight deviations over this distance. There are no deviations in the same line described in the Hierlihy grant or shown in the later plans thereof. Exhibit 1 has been examined. It comprises a number of aerial photos pasted together on a roll of paper some 6 1/2 feet long and 5 feet wide. While the composite may have been of help in showing the general area in a graphic way, there was no evidence as to its degree of accuracy. Specifically, the altitude from which each photograph was taken or the steps taken to ensure that they were from the same altitude was not established. Moreover, the accuracy of the photo as a whole is contingent upon the precise pasting together of these many photos.

An error of a degree on one plan could compound itself very quickly as one moved a distance of a few miles on the ground.

Wadden was asked to extend his base line northwardly to the northwest corner of block 1 on the orthophoto plan. He said he could not do it accurately, that an error of a quarter of an inch would throw the corner out by 200 or 300 feet. Indeed, Sullivan said a one degree error in drawing the line from point "X" to the northwest corner of block 1 would throw the corner of block 1 out by 523 feet. The corner of block 1 was about 5 miles distant from the Corner.

Wadden drew a 5 or 6 mile line and came out 100 feet east of the alleged northwest corner of block 1. Sullivan drew his line to the northwest corner of the clearing. However, he had difficulty because his base line has an angle in it at Crown Post A346. While the angle is only 11 minutes or one-sixth of a degree, this would still make a difference of nearly 90 feet. Sullivan ignored the angle saying that he could not plot it on there within probably 60 or 70 feet. In addition, on the particular scale the width of the pen could represent 50 to 70 feet.

I cannot find that projections made in the manner described are of immaterial assistance in judging the Sullivan and Wadden lines as the correct boundary line of the parties in the area of blocks 10 to 12.

In summary, I am respectfully of the view that the learned trial judge has overlooked material evidence, has misconstrued evidence and has refrained from making findings which he otherwise would have made because he was under a misapprehension. As already pointed out none of his findings are based on the credibility of witnesses, but rather on inferences drawn from largely uncontradicted evidence. This court is in as good a position as the learned trial judge to draw such inferences from the evidence. With respect, many of the inferences drawn were incorrect, leading the learned trial judge to incorrectly locate the Corner, resulting in the selection of the wrong base line of the Hierlihy grant.

I stated that the trial judge after referring to the pleadings said that it had been generally accepted that he was to endeavour to fix the base line. The material before him rendered this a difficult, if not impossible task. His concerns regarding the Wadden line are understandable. It would have been helpful if the Forrestall grant had been surveyed and other investigations made.

It is also unfortunate that all of the parties who cannot be but should be affected by this decision are not before the court. Specifically, the wives of Peter Alex and John Layes with whom they are respectively joint tenants of their properties are not parties.

While the material before us satisfies me that the Sullivan line is not the dividing line between the lands of the parties, I am also satisfied that the Wadden line has not been shown to be that dividing line. It is clear from what I have already stated that any evidence led to lengthen the 53 chain southern boundary of the Forrestall grant is unsatisfactory. I am satisfied that the southern boundary of the Forrestall grant

has not been shown to extend easterly from the intersection of lines "A" and "C" on the Sullivan plan, a distance greater than 53 chains or 3,498 feet.

I would therefore allow the appeal and set aside the decision and order of the learned trial judge. Both the action and the counterclaim should be dismissed. In view of the effect that this decision has on the positions taken by the parties, the costs of the trial should be awarded to the appellants and the second respondents against the first respondents and the costs of this appeal should be awarded to the appellants against the first respondents, with one brief and one counsel fee in each case.

Appeal allowed.

DAVID C. TOBIAS and TRITON ALLIANCE LIMITED See 78 N.S.R. (2d) 271
v. FREDERICK G. NOLAN
Nova Scotia Supreme Court, Appeal Division
Hart, Jones and Macdonald, J.J.A.,
April 15, 1987.

This was an appeal from a decision of MacIntosh J. of the Trial Division. The trial decision was reported at 71 N.S.R. (2d) 92. Since this decision of the Appeal Division gives all of the necessary facts and background, only this case will be reviewed.

The dispute related to properties at Oak Island, Lunenburg County. Oak Island is famous for stories of buried treasure and the parties to this dispute were all involved in the search for that treasure. In 1818, Oak Island had been subdivided into 32 lots of 4 acres each. By the late 1800's the whole Island was owned by just a few families. The Sellars family owned lot 5 and lots 9 - 20 inclusive. In 1935, the Sellars family executed a series of deeds which conveyed lots 15 - 20 to Grimm. Grimm subsequently transferred those lands to Hedden. Hedden also acquired lots 6 - 8, 25, 26, and 30 - 32 from another family. Hedden then conveyed all of his lands to Lewis, who conveyed to Acadia Trust Company, which conveyed to Chappell, who conveyed to Tobias, the Plaintiff. The description in the 1935 deeds would be crucial to the case. The typed description read:

> "All that certain tract or parcel of land being part of Oak Island near Western Shore in the County of Lunenburg, and comprising Lots 15, 16, 17, 18, 19 and 20, conveyed by the original grantees thereof to John Smith in and previous to the year 1825 and by him conveyed to Thomas E. Smith and Joseph Smith by deed dated March 29, 1853, registered at the Registry of Deeds at Bridgewater in Book 16 at page 485, and devised by the will of Anthony Graves dated July 14, 1887, on file in the Registry of Probate at Lunenburg and later devised and conveyed to Henry Sellers and Sophia Sellers from whom the Grantors derive all their title and interest herein, each of said lots being described as containing four acres more or less."

At the end of the typing, someone had added in pen and ink “said described lands estimated to contain in the whole 150 acres.”

Following the 1935 deed, a plan of the lands which had been conveyed was prepared by surveyor March. The March plan showed that the Sellars had conveyed not just lots 15 - 20, but lots 5 and 9 - 20 (note that there is an error in the decision where the Court indicates that the March plan showed lots 5 and 15 - 20.) The Sellars family apparently believed that they had sold all of the land on the Island in which they had an interest. The “money pit” where the treasure was apparently located was on lot 19.

In the late 1950's, Nolan, a land surveyor, became interested in the Island. He discovered that the deeds from the Sellars family in 1935 had not, on their face, included all of the lands owned by the

family at the time and he got the Sellars heirs to deed the "missing" lots (lot 5 and lots 9 - 14) to him. From that point there was an ongoing dispute between Nolan on one side and first Chappell and then Tobias on the other.

To further complicate the matter, Nolan also purchased a small lot on Crandall's Point. There was a roadway to the Island over a causeway which led from Crandall's Point. Nolan closed off the roadway, claiming that it encroached on his small lot. The Province then built another roadway below the high water mark which Nolan also interfered with.

The parties almost went to court in the early 1970's but the matter was settled, at least temporarily by an agreement in 1971. That settlement agreement eventually broke down and the current action was started.

Tobias was claiming (among other things):

- that he was the owner of the lots 5 and 9 - 14,
- for damages for trespass and damage to his property, and
- for damages for interference with the tourist business which he had been carrying on.

Nolan counterclaimed for (among other things) a declaration that he was the owner of the disputed lands and that he owned the land that the roadway was built on.

The Trial Court found that Nolan was the owner of the disputed lands and awarded damages for breach of the 1971 agreement. Tobias appealed.

Macdonald, J.A. wrote the decision for the Court of Appeal. After reviewing the facts and the findings of the Trial Division, the Court first addressed the issue of the descriptions in the 1935 deeds.

The Court of Appeal first considered whether the descriptions contained a patent ambiguity. The Plaintiff had argued that there were three instances of ambiguity in the descriptions. First, the use of the word "comprising" was argued to mean "including" the missing lots. The Court dismissed this argument, holding that comprising here obviously meant "made up of." Second, the Plaintiff argued that the wording referring to earlier conveyances indicated an intention to include all of the lands which had been included by those earlier conveyances - that is - lots 5 and 9 - 20. The Court of Appeal did not accept that argument. Third, the Plaintiff argued that the handwritten addition referring to 150 acres indicated an intention to convey more than just the named lots. The Court of Appeal considered that the entire holdings of the Sellars family as disclosed by the March plan was only 52 acres, and found that the reference to 150 acres "just does not make sense" and dismissed the words as *falsa demonstratio*. The Court thus determined that the deeds did not contain a patent ambiguity.

The Court then addressed the issue of whether the 1935 deeds contained a latent ambiguity - that is - even though they were clear on their face, did the surrounding evidence make them ambiguous. The Plaintiff referred to a number of facts which seemed to raise doubts about the description such as the March plan, the fact that the Sellars family apparently believed that they had sold all of their land on the Island and others. The Court of Appeal reviewed all of these issues and held that the Plaintiff had not established that a latent ambiguity existed in the 1935 deeds.

The Court then turned to the Plaintiff's claim that the 1935 deeds should be rectified to reflect the intention of the parties at that time and to include the lots in dispute. The Court reviewed the law on rectification and held that the Plaintiff had not met the burden of proving that the deeds should be rectified.

The Court of Appeal then dealt with the issue of laches. The Defendant had argued (and the Trial Judge had accepted) that the Plaintiff, or his predecessors had known that there was a problem with the 1935 deeds but had done nothing to have the problem rectified. As a result of the long delay, the principle of laches should be applied and the Court should not deal with the claim. The Court of Appeal commented carefully on the issue, but since it had already decided that rectification was not appropriate, did not have to make a ruling on the point.

The Court of Appeal then decided that the Plaintiff had not proved a claim of adverse possession of the disputed lands.

The Court then turned to Nolan's cross appeal.

Nolan argued that the roadway built by the Province was located on land which belonged, at least in part, to him. The Trial Court had clearly found that in 1973, the roadway was below the high water mark. Nolan claimed that despite that finding, the roadway had been above the high water mark when it had been constructed in 1965 and had been built on his lands and were still on his lands. The Court of Appeal held that if Nolan could have proven that the high water mark had moved through some process other than natural erosion, he might have succeeded in this claim. As there was no evidence about how the high water mark had moved, the Court presumed that it had moved through the slow and gradual process of erosion and that Nolan had lost the land in question.

Finally, the Court of Appeal altered the awards of damages which had been made by the Trial Court.

DAVID C. TOBIAS and TRITON ALLIANCE LIMITED v. FREDERICK G. NOLAN
Nova Scotia Supreme Court, Appeal Division
Hart, Jones and Macdonald, J.J.A.,
April 15, 1987.

This litigation involves an action by the appellants, David C. Tobias (Tobias) and Triton Alliance Limited (Triton) against Frederick G. Nolan (Nolan) for a declaratory judgment that Tobias is the person entitled to possession of certain lands on Oak Island, for damages for trespass and damage to property, for injunctive relief, for an order for specific performance of an agreement in writing entered into by Nolan, Triton and Melbourne R. Chappell on November 6, 1971 (the 1971 agreement) and for damages for breach of such agreement.

Nolan counterclaimed for damages for breach of the 1971 agreement, for injunctive relief, for a declaration that he is the owner of the disputed lands on Oak Island and for an easement of necessity over lands of Tobias.

Nolan joined the law firm then known as Kitz and Matheson and one of its partners as third parties. He had previously received a qualified certificate of title from that firm with respect to the disputed lands on Oak Island. By order of Mr. Justice MacIntosh it was ordered that the third party proceedings be tried separately.

The matter came on for hearing before Mr. Justice MacIntosh on May 22 through May 29, 1985. By reserved decision rendered on December 17, 1985 (reported in (1986), 71 N.S.R.(2d) 92; 171 A.P.R. 92), the learned trial judge:

> 1. Dismissed the action of Tobias for rectification of the 1935 deed and for title by adverse possession and held that Nolan had title to lot 5 and lots 9 to 14 inclusive.
>
> 2. Dismissed the claim of Tobias and Triton for damages for trespass and damage to the causeway linking Oak Island to the mainland.
>
> 3. Dismissed Nolan's counterclaim for damages for trespass to his lands on Crandall's Point.
>
> 4. Held that the 1971 agreement was terminated and that none of the parties had any rights or obligations under it; consequently the claims for such damages for breach of agreement were dismissed.
>
> 5. Granted a declaration that there is a public highway along the north shore of Nolan's lands on Crandall's Point and that the public are entitled to use such public highway without obstruction.

6. Ordered that Nolan forthwith remove any obstruction he had placed on the said public highway.

7. Dismissed Nolan's claim for an easement and for a declaration of ownership of the causeway from Crandall's Point to Oak Island.

8. Declared that the 20 foot wide centre road on Oak Island is a roadway available for the common usage of the occupants of the Island.

9. Ordered that Nolan pay to Triton the sum of $15,000.00 by way of damages for loss suffered through Nolan's interference with Triton's tourism business; and $500.00 by way of damages for loss suffered by the appellants through Nolan's removal of markers and monuments from the Island after a court injunction was obtained in the fall of 1983 restraining Nolan from carrying out certain activities on lot 5 and lots 9 to 14. This injunction was dissolved by Mr. Justice MacIntosh but restored by order of this court pending the determination of this appeal.

10. Awarded Nolan $100.00 damages for interference by the appellants with his use and enjoyment of his lands on Oak Island.

THE FACTS

Oak Island is located in Mahone Bay off the coast of Lunenburg County. It comprises 128 acres and by the Crandal plan of 1818 and indeed by earlier plans was divided into 32 numbered lots of 4 acres each.

By way of historical background, it appears that in or about 1795 a boy named Daniel McInnis came across a depression in the ground at the base of an oak tree in a clearing on the eastern end of Oak Island. A large limb of the oak tree bore the unmistakable marks of a block and tackle. The next day Daniel McInnis accompanied by two companions named Smith and Bogg started to dig up the depressed area. It was not long before they unearthed non-native flagstones and other signs that the area had previously been excavated. Subsequent operations revealed a shaft over 200 feet in depth leading to what has been known for over 150 years as the "money pit". There appears to be an elaborate underground drainage system connecting the "money pit" via two flood tunnels to the Atlantic Ocean. In an early exploration of the shaft, a rather large flat stone marked with what appeared to be hieroglyphics was removed from the shaft. This stone apparently acted as what today might be called a hydraulic seal with the result that with its removal the "money pit" was flooded by seawater. This has frustrated treasure seekers from that day to this and no treasure has been reported recovered.

In 1962-63, Tobias became interested in searching for the Oak Island treasure and became financially involved with one Robert Restall who then was exploring the "money pit" under an agreement with the

then owner, Melbourne R. Chappell. In 1965, Mr. Restall, his oldest son and two other men died tragically when they were overcome by gas in a shaft in or near the "money pit". The actual exploration of the area was then taken over by an engineer named Robert Dunfield. In 1967, drilling operations were carried out by Mr. Dunfield and Tobias under the treasure trove licence possessed by Mr. Chappell. By deed dated June 15, 1977 Tobias purchased from Chappell lands on Oak Island described as follows:

> "All that Island known as Oak Island, situate on the western side of Mahone Bay, in the County of Lunenburg, Province of Nova Scotia, including (but not restricting the generality of the foregoing) those lots of land conveyed to Melbourne R. Chappell by the following conveyances, namely:
>
> > (1) Quit Claim Deed from the Acadia Trust Company dated the 12th day of April, 1957, recorded the 20th day of April, 1957, at the Registry of Deeds Office, Chester, N.S. in Book 26 at Page 195; and
> >
> > (2) Deed from Mary Ellen Chapman et al. dated the 1st day of February, 1961, recorded the 20th day of July, 1961, at the Registry of Deeds Office, Chester, N.S. in Book 27 at Page 339;
>
> SAVING AND EXCEPTING out of the land hereby conveyed the land conveyed by Melbourne R. Chappell to Daniel C. Blankenship by Deed dated September 19, 1975, and recorded at the Registry of Deeds Office, Chester, N.S. on September 26, 1975, in Book 54 at Page 161."

Tobias contends that these lands include lot 5 and lots 9 to 20 both inclusive as shown on the Crandal plan. Nolan's position is that they do not include lot 5 and lots 9 to 14, to which he claims title by virtue of quit claim deeds received in 1963 and also by adverse possession.

The money pit is located on lot 19 and by 1824 John Smith had acquired title to lots 15, 16, 17, 18, 19 and 20. These six lots became known as "the Smith lots".

From the mid 1800's onward, Oak Island was owned and occupied by three families. One of these was the Sellers family. By the turn of the century, Henry P. Sellers owned lot 5 and lots 9 to 20 both inclusive. In 1905, Mr. Sellers entered into a lease arrangement with one Frederick L. Blair, an insurance agent in Amherst, Nova Scotia, allowing Blair to search for treasure in the "money pit" area. Blair was involved in treasure hunting on Oak Island from l893 up until the time of his death in the spring of 1950. Mr. Henry P. Sellers died in 1916 and by his will his lands passed to his widow, Sophia Sellers, and his son, Selwyn Sellers. Mrs. Sellers died intestate in1931 survived by her son, Selwyn, and a daughter, Erdie Powers. A second daughter, Bessie Corkum pre-deceased her mother and was survived by 10 children.

Selwyn Sellers and other heirs decided to sell their land holdings on Oak Island because they no longer lived there but rather resided in Chester Basin. The property at this time was assessed for tax purposes at $650.00. After 1930, Selwyn Sellers renewed Blair's lease on a year to year basis only because he considered it an encumbrance to his title.

In 1934, Gilbert Hedden, an automobile dealer in Morristown, New Jersey who resided at Chatham, New Jersey, became interested in searching for the Oak Island treasure. His New Jersey lawyer, George W. Grimm, Jr., retained solicitors – Mr. Reginald V. Harris and Mr. J.G.A. Robertson as his Nova Scotia agents. Mr. Hedden at this time was only interested in purchasing that portion of Oak Island containing the "money pit" and sufficient land around it to enable an extensive search and drilling operation to be carried out. As a result, only the title to lots 15 to 20 inclusive (the Smith lots) was searched. Mr. Robertson retained a Mr. Zinck of Chester to carry out the actual title search. At the same time, Mr. Grimm retained S. Edgar Marsh, a land surveyor, to survey the 6 acre piece of land located on lots 18 and 19 upon which Mr. Blair held a lease and which included the "money pit".

Once the title search was completed, Mr. Hedden instructed Mr. Grimm to attempt to arrange to lease, expropriate or buy the property. As a result, Mr. Blair and Mr. Harris contacted Selwyn Sellers and the other heirs and endeavoured to negotiate the purchase of the lands adjacent to the "money pit" and, of course, the pit itself. The position of the Sellers heirs was that they were not interested in selling a portion of their lands on Oak Island but would consider selling all of their lands there for $5,500.00. Eventually an agreement was reached between the parties but apparently not reduced to writing. On and after July 26, 1935 by five warranty deeds for the purchase price of $5,000.00, Selwyn Sellers and the other heirs conveyed to George W. Grimm, Jr. the following described property.

> "All that certain tract or parcel of land being part of Oak Island near Western Shore in the County of Lunenburg, and comprising Lots 15, 16, 17, 18, 19 and 20, conveyed by the original grantees thereof to John Smith in and previous to the year 1825 and by him conveyed to Thomas E. Smith and Joseph Smith by deed dated March 29, 1853, registered at the Registry of Deeds at Bridgewater in Book 16 at page 485, and devised by the will of Anthony Graves dated July 14, 1887, on file in the Registry of Probate at Lunenburg and later devised and conveyed to Henry Sellers and Sophia Sellers from whom the Grantors derive all their title and interest herein, each of said lots being described as containing four acres more or less."

The deeds were typewritten and at the end of the description in the deed from Selwyn Sellers was added in pen and ink "said described lands estimated to contain in the whole 150 acres". All the deeds contained a similar insertion worded somewhat differently. As an example, in the deed from Erdie Powers the addition read, "said described lands estimated to contain 150 acres".

The deeds were prepared by Mr. Harris. The evidence is silent as to who inserted the handwritten additions. When Mr. Harris prepared the deeds, he did not apparently have access to the 1818 plan or

any of the earlier ones and therefore obviously relied on the abstract of title prepared the year before with respect to lots 15 to 20.

Shortly after the transaction was closed, Mr. Grimm requested Mr. March to conduct a survey of the property purchased from the Sellers heirs. Mr. March did so assisted by his son, Stephen March, Wallace Young and Archibald C. Dauphinee. The latter owned at that time lots 6, 7, 8, 25, 26, 30, 31 and 32 on Oak Island. Mr. March completed his survey plan on September 9, 1935. Although it does not refer to the numbered lots, it is clear that it shows what was lot 5 and lots 15 to 20 inclusive as having been conveyed by Selwyn Sellers to George W. Grimm. The plan shows the total area as being 52 acres.

By deed dated September 13, 1937, Archibald C. Dauphinee and his wife conveyed to Mr. Hedden lots 6, 7, 8, 25, 26, 30, 31 and 32. By deed of October 11, l943, George Grimm, Jr. and his wife conveyed lots 15 to 20 both inclusive to Mr. Hedden. The description used in the deed was identical to that in the 1935 deed to Grimm except that the reference to 150 acres was left out.

On June 7, 1950, Mr. Hedden and his wife conveyed to John Whitney Lewis the lots previously conveyed to him by Mr. Dauphinee and Mr. Grimm. There is no reference in the deed that lots 15 to 20 contain approximately 150 acres as was the case in the conveyances of such lots to George W. Grimm, Jr. Attached to the deed to Mr. Lewis was a copy of the March plan of September 9, 1935. No reference, however, is made in the description in the deed to such plan.

Mr. Lewis conveyed the lands to Acadia Trust Company later on in 1950. The trust company then conveyed the lands to Melbourne R. Chappell in 1957. The description in these latter deeds was the same as in the previous conveyances. They referred to the numbered lots but did not include by number lot 5 and lots 9 to l4 inclusive. The March plan was attached to them but again no reference to the plan was made in the description.

In or about 1958, Nolan, a land surveyor, became interested in the so called Oak Island treasure. He obtained permission from Mr. Chappell to do some surveying in the area of the "money pit" but was not permitted to conduct a search for treasure.

Nolan testified that as a result of receiving information that there was land between what had formerly been owned by the Sellers and Dauphinee families, he conducted a title search. He obtained a copy of the Crandal plan from the Department of Lands and Forests and ascertained that Mr. Chappell and his predecessors in title going back to 1935 had received only lots 15 to 20.

In April, 1963, Nolan obtained warranty deeds from Bessie Sellers, Hilda Mosher Sellers, Leda Sellers, Erdie Powers and Hazel Fisher of "all the grantors interest in Oak Island." This description was not explicit enough to permit Nolan to be placed on the assessment rolls. In the following year he

obtained quit claim deeds from the Sellers women to lot 5 and 9 to 14. He was thereafter placed on the assessment rolls as the owner for assessment purposes of these lots.

Once he obtained the quit claim deeds Nolan approached Mr. Chappell and offered to exchange the deeds for the right to search for treasure in the "money pit" area. This offer was rejected by Mr. Chappell.

In September of 1965, Mr. Chappell had a causeway constructed by Mr. Dunfield from Crandall's Point on the mainland to Oak Island to facilitate the movement of heavy equipment on to the Island. Mr. Chappell or Mr. Dunfield posted an armed guard on the causeway who refused to allow Nolan to cross onto the Island.

In 1966, Nolan purchased a 1/4 acre lot of land on Crandall's Point and in the following year blocked the road leading to the causeway, alleging that it was on his lands.

In 1968, Tobias entered into an agreement with Nolan by which Tobias and others were permitted to cross Nolan's land on Crandall's Point to reach the causeway. Under the terms of the agreement, Tobias was to pay Nolan an ascertained sum on an annual basis. Tobias refused to pay the agreed consideration under the final extension of the right of way agreement in 1969.

On April 1, 1969, Triton Alliance Limited was formed. Its main objects are to raise funds and to pursue treasure hunting on Oak Island. It has a maximum of fifty shareholders. Mr. Tobias is the president of the company and Daniel Blankenship is the secretary treasurer and director of field operations. Mr. Blankenship first came to Oak Island in 1965. Prior to that time, he had been a successful contractor in the State of Florida. He has been engaged for the past 22 years in searching for the Oak Island treasure. He now resides permanently on the Island.

To back track a bit, Mr. Chappell and his men obtained access to the causeway by going along an old roadway located on the north side of Crandall's Point below the main high water mark. Evidence from various witnesses indicated that this old road had been used for many years to gain access to the point. Nolan attempted to block off this road and in 1970 and 7l Chappell commenced action against Mr. Nolan for trespass on the causeway and on lot 5 and 9 to 14 on the Island.

This litigation was settled by the 1971 agreement. The agreement provided that the parties involved would attempt to work together to search for treasure on Oak Island and would share information with each other in such endeavour. The agreement was specifically made without prejudice to the rights of any party in relation to their claim for lands on Oak Island. Clause six of the agreement provided in part as follows – "... that during the term of this agreement, including the automatic renewals provided for in clause 1 herein, neither of the parties hereto shall commence any action against the other in respect to any alleged trespass or alleged claims or interests in the title or ownership of lots 5, 9 to 14 inclusive."

In 1973, the Department of Transportation built a road from trunk highway No. 3 to the causeway leading to Oak Island. This new road followed, according to the Department of Transportation engineer, pretty much the path of the old road which was below high water mark and indeed the new road was "more in deeper water".

Friction continued between the parties creating difficulties in carrying out the joint treasure search as provided for in the 1971 agreement. As an example, Nolan built an extension to his museum which extended onto and effectively blocked the highway constructed in 1973 thereby disrupting the tourist traffic. In 1976, Nolan built a cottage on the Island on one of the lots conveyed to him by the quit claim deeds in 1963. No effort was made by Chappell or Tobias to prevent him from doing so.

The appellants eventually felt that there was no possibility of obtaining cooperation from Nolan and treated the agreement as being at an end. The present action was then commenced to rectify the l935 and subsequent deeds and for other relief mentioned earlier.

The appellant now appeals against the decision of Mr. Justice MacIntosh and the order based thereon whereby he found that Nolan was entitled to possession of lots 5 and 9 to 14. The respondent cross-appeals against the finding of the learned trial judge that the roadway along the north shore of the respondent's lands at Crandall's Point was a public highway and that at all material times it was below the high water mark. Nolan also appeals against the award of $15,000.00 damages awarded the appellant, Triton, for interference with tourism and against the trial judge's order that Nolan bear the costs of the third party.

THE ISSUES

Counsel for the appellant has set forth eleven grounds of appeal. In his factum he has marshalled them under the following seven headings.

> "I. the description should be interpreted as conveying lots 5 and 9 to 20 without the assistance of extrinsic evidence;
>
> II. the description should be interpreted as conveying lots 5 and 9 to 20 with the assistance of extrinsic evidence;
>
> III. the deed should be rectified to state that lots 5 and 9 to 20 were conveyed;
>
> IV. laches;
>
> V. documents which are admissible under the Ancient Document Rule;
>
> VI. documents which are admissible under the Business Records Rule;

VII. documents which are admissible as statements against proprietary interest."

Whether or not the 1935 deed contains a latent or patent ambiguity and whether it should be rectified must be decided of course on admissible evidence. Therefore, I propose to consider first the issue of document admissibility.

ADMISSIBILITY OF DOCUMENTS

Counsel for the appellants submitted at trial and before this court that the correspondence of Messrs. Grimm, Robertson, Harris, Zinck, Blair, Chappell, Hedden and Ross Corkum and others relating to the property at Oak Island should be received in evidence under the rule that permits the receipt in evidence of ancient documents. In addition to such correspondence, Mr. Parish also sought to enter into evidence as ancient documents copies of agreements, treasure trove licences and the like. Apart from his contention that these letters and documents should be received as ancient documents, he contended that they are also admissible as business records pursuant to s. 22 of the Nova Scotia **Evidence Act**, R.S.N.S. 1967, c. 94 (as amended). Subsections (1) and (2) of s. 22 provides as follows:

"22(1) In this Section,

(a) 'business' includes every kind of business, profession, occupation, calling, operation of institution [institutions], and any and every kind of regular organized activity, whether carried on for profit or not;

(b) 'record' includes any information that is recorded or stored by means of any device."

"Business Record"

"(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter."

Triton Alliance Corporation did not come into existence until April 1, 1969. No document relevant to the issue of the reach and scope of the description in the 1935 deed to Grimm was tendered that purported to have been made by that company in the ordinary course of its business. Likewise, no other documentation of any kind or nature was produced and established as having been made in the usual course of any business of Triton's predecessors in title relevant to the issue of what was intended by the parties to be conveyed by the 1935 deed.

With respect to the admissibility in evidence of certain documents under the Ancient Document Rule, Mr. Justice MacIntosh quoted (at pp. 99-100) the following passage from **Phipson on Evidence** (11th Ed.), paras. 338-339:

> "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 rule; 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 learned trial judge then went on to say (pp. 100-101):

> "The same source goes on to state after the above quotation:
>
> > 'The document should purport to constitute the transaction which they affect, mere prior directions to do the acts, or subsequent narratives of them, being inadmissible.'
>
> "**Cross on Evidence** 4th Ed., at p. 13, quotes Willes, J. in **Malcolmson v. O'Dea** (1863), 10 H.S. Cas. 593, at p. 614:
>
> > 'Ancient documents coming out of proper custody, and purporting on the face of them to show exercise of ownership, such as a lease or license, may be given in evidence...as being in themselves acts of ownership and proof of possession.'
>
> "Messrs. Sopinka and Lederman, **Evidence in Civil Cases**, sets forth what constitutes proper custody on p. 434 as follows:
>
> > 'Documents are said to be produced from proper custody when they have been in the keeping of some person and in a place where, if authentic, they might reasonably and naturally be expected to be found. The case of **Doe d. Jacobs v. Phillips** has on numerous occasions been approved by Ontario Courts as properly setting out the tests as to what constitutes proper custody. That case

> held that, except in the situation where the party who tenders a particular document is the proper depository of such documents, the fact of custody of that document be properly established by evidence, and that where the fact of proper custody is established, there is no need to inquire what happened to the document between the date of execution and the date of production.'

"As to the use that may be made of ancient documents, these authors comment as follows at p. 105:

> 'Ancient documents such as deeds or leases which affect an interest in property, have been admitted by the Court as evidence of possession of the realty. Most authors do not treat the admissibility of such evidence as an exception to the Hearsay Rule. They are inclined to treat such evidence as presumptive evidence of possession and thus as original evidence in its own right. Other authors, however, feel that the documents are tendered not only to establish the inference of possession from the mere existence of the documents, but are submitted as proof of the truth of the statements contained therein, and can only be accepted as an exception to the Hearsay Rule. The latter view is persuasive. It is clear that the courts have been prone to receive ancient writings because the fact of their age, their unsuspicious appearances, and that they were produced from a place of natural safekeeping for such documents, all suggest that they are authentic. Once admitted as authentic documents, it is illogical to limit their use as evidence to the drawing of inferences of possession and not allow them as evidence of the facts contained therein.'

"The scope of this rule is set forth in **Phipson on Evidence**, 12th Ed., at para. 1761 as follows:

> 'The rule applies not only to wills and deeds requiring attestation, but to accounts, letters, entries, receipts and settlement certificates, as well as, it has been thought, to all other documents, public or private.'

"What Phipson seems to be referring as ancient documents in the quotation set forth in the **Legge** case are deeds, leases and the like, by which any right of property purports to have been exercised."

"In this case the great bulk of documents is comprised of letters seeking to establish the intention of the parties vis-a-vis the 1935 deed, i.e. that it was intended to cover all the interest of the Sellers in Oak Island. These letters are not documents 'by which any right of property purports to be exercised'. They are rather subsequent narratives of what is alleged to have taken place."

> "I have no difficulty deciding that the documents sought to be admitted under the Ancient Document Rule are from proper custody. Such of these documents as are more than twenty years old qualify as ancient documents and accordingly are admissible."

Counsel for the appellant does not take issue with the foregoing statement of legal principles but rather submits that the trial judge committed a reversible error by not indicating which documents he held to be admissible or inadmissible under the Ancient Document Rule.

It is to be noted that with the exception of Tobias and Nolan and the latter's grantors, all the parties to the various relevant conveyances in and after 1835 are now deceased as are Mr. Blair, Mr. Harris, Ross Corkum and J.G.A. Robertson.

In any land transfer the conveyance is the concluding act of the contract of purchase and sale. Here, the appellant says that the deed to his predecessor in title, George W. Grimm, Jr., in 1935 did not properly reflect the intention of the parties.

In attempting to determine what the parties intended the 1935 deed to convey, such of the correspondence that can be classified as ancient documents and that bears directly on the issue of what the Sellers intended to sell and what Mr. Grimm intended to buy is, in my opinion, admissible on the issue of rectification and land usage. When I am examining such issues, I shall specify those letters that I consider to be admissible in evidence.

STATEMENTS AGAINST PROPRIETARY INTEREST

The appellants also contend that two sets of documents were admissible in evidence on the basis that they consisted of statements against proprietary interest. The first group of documents are what counsel refers to as "the Corkum letters". These are letters between Ross Corkum and M.R. Chappell during the 1960's. Mr. Corkum was one of the vendors in the conveyances to George W. Grimm, Jr., in 1935. The thrust of the correspondence was a request by Corkum to buy back from Mr. Chappell part of what once had been his family's property on Oak Island (the Sellers property).

The second document is a single letter from Selwyn Sellers to Mrs. Anderson, the tax assessor, in which he says that in future the taxes on his property on Oak Island would be paid by Mr. Harris.

From a careful examination of the record, I am satisfied that Selwyn Sellers was of the opinion that he had sold all his property interest on Oak Island to Mr. Grimm in 1935. In reaching this conclusion, I have taken into account the fact that the Sellers family did not appear on the assessment roll pertaining to Oak Island after 1935.

With respect to "the Corkum letters", I have no doubt that at one time Ross Corkum thought that Mr. Chappell owned all or a portion at least of the Sellers' lands on Oak Island. The appellants contend that this is evidence that lot 5 and lots 9 to 14 were conveyed by the 1935 deed. This is a permissible inference but it is one that does not necessarily follow from the letters. Corkum may well have been mistaken. In any event, this evidence, from the point of view of the appellants, is weakened considerably by the fact that Ross Corkum, by his will, left his interest in lots 9 to 14 to J. Andrew Corkum. The latter, along with several other of the Corkum heirs, gave a quit claim deed dated December 18, 1969 to lots 9 to 14 to Donald Andrew Corkum.

Ross Corkum never received a conveyance from Mr. Chappell. It therefore appears that he must have concluded that lots 9 to 14 had not been conveyed by the 1935 deed to Mr. Grimm and, consequently, he devised his interest in them as I have indicated. If Mr. Corkum was correct then it would follow that both Selwyn Sellers and himself were in at least constructive possession of lot 5 and lots 9 to 14 at the time they wrote the letters I have referred to. This possession was usurped by Nolan in and after 1963. It is to be noted that Nolan in his evidence stated that, in his opinion, apart from himself the only other person or persons who might have an interest in lot 5 and lots 9 to 14 were the Corkums. Nolan described his title to lot 5 and lots 9 to 14 as being "qualified to the Corkums".

AMBIGUITIES IN THE 1935 DEED

The first issue raised by the appellants is that the description in the 1935 deed from the Sellers heirs to George W. Grimm, Jr., should be interpreted as conveying lot 5 and lots 9 to 20 without recourse being had to extrinsic evidence. In other words, this submission is that the deed has an ambiguity on its face which, under the circumstances, amounts to a patent ambiguity.

For ease of reference, I set forth again the description contained in the 1935 deed:

> "...All that certain tract or parcel of land being part of Oak Island near Western Shore in the County of Lunenburg, and comprising Lots 15, 16, 17, 18, 19 and 20, conveyed by the original grantees thereof to John Smith in and previous to the year 1825 and by him conveyed to Thomas E. Smith and Joseph Smith by deed dated March 29, 1853, registered at the Registry of Deeds at Bridgewater in Book 16, at page 485, and devised by the will of Anthony Graves dated July 14, 1887, on file in the Registry of Probate at Lunenburg and later devised and conveyed to Henry Sellers and Sophia Sellers from whom the Grantors derive all their title and interest herein, each of said lots being described as containing four acres more or less, but said described premises estimated to contain in the whole one hundred and fifty acres more or less..."

The reference to 150 acres was, as I have already pointed out, written in by pen and ink. Alterations and interlineations in a deed are presumed in the absence of evidence to the contrary to have been made prior to execution. The reason behind such presumption is that a deed cannot be altered, after it

is executed, without fraud or wrong; and the presumption is against fraud or wrong – **Norton on Deeds** (2nd Ed.), pp. 32-33.

In support of his submission that there is an ambiguity on the face of the 1935 deed, counsel for the appellant contended:

> 1. That the word "comprising" in the deed description means in this case only "including" or "encompassing" lots 15 to 20. In other words, the submission is that something more than those lots was conveyed.
>
> 2. Reference is made in the deed that the lands conveyed were "devised by the will of Anthony Graves" – since Graves owned lot 5 and lots 9 to 20 inclusive, Mr. Parish submits that all those lots were conveyed to Mr. Grimm.
>
> 3. That the reference to l50 acres indicates that more than six lots totalling 24 acres were conveyed and indeed that all the Sellers' land on Oak Island, namely, lot 5 and lots 9 to 20 was conveyed.

Mr. Parish referred to several dictionary definitions of the word "comprising" in support of his position that it should be interpreted as meaning only "including". On the other hand, in **Stroud's Judicial Dictionary** (4th Ed.), at p. 531 the following definition of comprising is given:

> "COMPRISING. 'Comprising' imports interpretation, like NAMELY, or THAT IS TO SAY, e.g. 'All my farming stock, comprising, so many horses, etc.' (**Jones v. Roberts** 34 S.J. 254)."

While it is true that "comprising" may mean "including", it seems to me that in an act as final as a conveyance of land it must mean something more finite. I would, therefore, interpret it to mean "made up of" or "consisting of" or "namely".

With respect to the second contention of the appellant on this submission, the reference in the description that the lands thereby conveyed were devised by the will of Anthony Graves does not, to my mind, mean that all the land devised by Mr. Graves was conveyed to Mr. Grimm. The statement simply means that lots 15 to 20 were devised by the will of Anthony Graves. In addition, the will also passed title to lot 5 and lots 9 to 14. Under the circumstances, the mere reference to the lands having been devised by Mr. Graves does not, in my opinion, give rise to the presumption or conclusion that all the lands devised by Mr. Graves passed to Mr. Grimm under the 1935 deed.

The reference in the 1935 deed to 150 acres is obviously based on the hearsay evidence contained in the record that Selwyn Sellers thought that Oak Island comprised 300 acres and that his family owned one-half of it. The deed to Mr. Grimm refers specifically to six lots and states they each contain four

acres. The total holdings of the Sellers family on Oak Island consisted of 13 lots made up of lot 5 and lots 9 to 20 both inclusive for a total of 52 acres. The reference therefore in the deed to 150 acres just does not make sense. In **Doe and Murray v. Smith** (1848), 5 U.C.Q.B. 225, it was held that the specific and not the general description governs. Likewise, the Supreme Court of Canada in **Frantz v. Hanson** (1918), 57 S.C.R. 57; 41 D.L.R. 457, held that the reference in the deed to "said land containing 271 acres" was not a warranty. Mr. Justice Anglin said (p. 474 D.L.R.):

> "...I am of the opinion that the words 'containing two hundred and seventy-one acres' or 'containing two hundred and seventy-one acres more or less', are merely a part of the description, probably to be regarded as *falsa demonstratio* (see cases collected in 10 Hals., p. 407, n. (g), and not importing a covenant or warranty as to quantity which could found a demand either for compensation or for damages after the completion of the contract."

I am of the view that such comments are apt in the present case. To my mind, the words in the subordinate description, namely, "said described lands estimated to contain on the whole 150 acres" does not create a warranty or covenant as to quantity. In addition, the reference to 150 acres has no meaning in reality and I would reject such subordinate description as *falsa demonstratio* as defined in **Black's Law Dictionary**, revised 5th Ed., 1979 as an erroneous description of a person or thing in a written document.

In result, I am of the opinion that the 1935 deed does not contain a patent ambiguity but rather is clear on its face and can be read only as conveying lots 15 to 20 on Oak Island. A surveyor armed with such description and a copy of the 1818 plan obviously would have little difficulty in locating the lots on the ground and delineating their boundaries.

I turn now to a consideration of the submission that the description in the 1935 deed contains a latent ambiguity. A latent ambiguity 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. The question therefore is whether there is here proof of facts and circumstances that makes ambiguous what is otherwise a clear description.

The appellants refer to certain matters and incidents established by the evidence and contend that such create an ambiguity in the deed - namely, as to whether it conveys only lots 15 to 20 as it purports to do or whether it in fact conveys all the interest of Selwyn Sellers and the other heirs to land on Oak Island. The circumstances relied on by the appellants are:

> 1. The March plan of September 9, 1935, which indicates that what was conveyed to George W. Grimm was 52 acres more or less made up of lot 5 and lots 9 to 20.

2. The fact that the Sellers family was removed from the assessment roll pertaining to Oak Island after 1935.

3. Lack of use of the disputed property by Selwyn Sellers after 1935.

4. Use of the disputed property by others with the permission of Mr. Hedden for the purpose of cutting hay and firewood and pasturing cattle and horses.

5. The fact that treasure trove licenses were granted to Mr. Chappell in the 1950's and 1960's covering all of Oak Island.

6. That in the late 30's and in the 1940's the only land owners on Oak Island were considered to be Gilbert Hedden and Archibald Dauphinee.

7. The fact that in 1936 Mr. Hedden, when he insured his property on Oak Island, described it as "the small lot as well as the main property".

The appellants recognize that extrinsic evidence going to intention is inadmissible in determining whether a latent ambiguity exists. They contend, however, that the circumstances set out above go to the use of the property and can be relied on in interpreting the description in the deed.

In 1935, Mr. Grimm engaged Mr. March to survey the property he had purchased. Mr. March was shown where various boundaries were and what he in fact surveyed was the total land holdings of the Sellers family on the Island as such were described and pointed out to him. The result was that the survey plan bears no resemblance at all to the description in the 1935 deed to Mr. Grimm. Mr. March also prepared a metes and bounds description of the land he had surveyed but such was never used in any of the subsequent conveyances.

As I have already said, in all probability Selwyn Sellers thought that he had sold to Mr. Grimm all his interest in the Oak Island lands, hence the removal of his name from the assessment roll and his absence from the Island. These matters, however, go more to intention than to land use.

It is true that some of the lands the Island were used at various times for pasturing of animals. It is also true that some haying and wood cutting were permitted on them. It is not always clear from the evidence where such activities took place. Assuming, however, that they always occurred on lot 5 and lots 9 to 14, they do not, in my opinion, allow for the drawing of the inference that, as a result of such activities, the lands were those of Mr. Grimm and Mr. Hedden.

With respect to the special treasure trove licenses granted to Mr. Chappell covering <u>all</u> of Oak Island, it must be remembered that Mr. Hedden in 1937 acquired the Dauphinee property which he in turn conveyed to Mr. Chappell. Further, the fact that one is in possession of a special treasure trove licence

does not necessarily mean that he is the owner of the land on which he is authorized to search. It should also be noted that Nolan acquired a treasure trove license for lot 5 and lots 9 to 14 after the expiration of Chappell's special treasure trove licence.

The description in the insurance cover in 1936 is interesting. I doubt, however, if the insuring of property can be considered "use of the property". In any event, whether the reference to the small lot in the policy is a reference to lot 5 or to some other lot forming part of lots 15 to 20 is problematical.

I have considered the law relating to latent as well as patent ambiguities as set forth and explained in such cases as **Re Risser's Beach** (1977), 20 N.S.R.(2d) 479; 27 A.P.R. 479, and **Ratto v. Rainbow Realty et al.** (1985), 68 N.S.R.(2d) 34; 159 A.P.R. 34. I have also examined such texts as Anger and Honsberger **Law of Real Property** (2nd Ed.), 1985. The conclusion I have reached is that the circumstances relied on by the appellants fall short of showing or indicating with the degree of clarity required that the 1935 deed contains a latent or patent ambiguity in its description.

I may say that the issue of patent and latent ambiguity was not raised or, more correctly perhaps, not pressed at trial – hence, we do not have the benefit of the trial judge's views on such matters. That is the reason for the lack of reference to Mr. Justice MacIntosh's decision in my consideration of the issue of patent and latent ambiguities.

RECTIFICATION

The appellants sought rectification of the 1935 deed of conveyance and rectification of all subsequent deeds so that they would include legal descriptions of lot 5 and lots 9 to 14.

As Mr. Justice MacIntosh pointed out, the remedy of rectification is an equitable remedy by which the courts will modify the terms of a written instrument so as to give effect to the real intention of the parties.

In **Anger and Honsberger**, supra, the authors say at p. 1202:

> "Where the parties have reached an antecedent agreement and then, by a mistake unknown to both parties, the written instrument fails to properly record their agreement, the court, in its equitable jurisdiction, may order rectification of the document so that it will agree with the 'real' agreement of the parties. Rectification may be ordered by the court, notwithstanding the writing requirement of the **Statute of Frauds**. As was stated in **United States of America v. Motor Trucks Ltd.**:
>
> > 'The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but, when the written instrument is rectified, there is a

> writing which satisfies the Statute – the jurisdiction of the court to rectify being outside the prohibition of the statute.'
>
> "It is important to note that the court is not rectifying the contract that was made between the parties, but rather the improper expression of their agreement as found in the written document. In **Frederick E. Ross (London) Ltd. v. William H. Pim Jr. & Co. Ltd.** in rejecting a request for rectification, Lord Denning said:
>
> > 'In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.'"

Later at pp. 1204-1205 the following appears:

> "It is now clear, since the decision of the English Court of Appeal in **Joscelyne v. Nissen**, that it is not a requirement for rectification that there be a binding contract between the parties, prior to the agreement being put into writing. In that case, in return for allowing her father to stay in her house, the daughter had her father's car hire business transferred to her. A question arose as to who was responsible for the house bills and the written agreement was silent on the point. The court ordered that the written agreement be rectified, such that the daughter would be responsible, despite the fact that there had been no binding contract prior to the execution of the written document."
>
> "The common intent of both parties must continue to the time of the execution of the document."
>
> "There has been some conflict among the cases as to what is the nature of the burden of proof where a claim for rectification is made. In the leading Canadian case on the point, Duff, J as he then was, in **Hart v. Boutilier** stated that there must be 'a fair and reasonable doubt' that the writing does not contain the true agreement of the parties. However, in **Joscelyne v. Nissen** it was stated, by Russell, L.J., that the appropriate burden of proof is merely convincing proof; as it would be unwise to import from the criminal law phrases such as 'beyond all reasonable doubt'. None the less, Lord

> Russell reiterates that this is a strong burden of proof and it has been suggested that the difference between the two burdens seems to be largely semantic."
>
> "In addition to oral evidence of the parties' intentions, any correspondence between the parties and evidence of subsequent conduct can prove to be decisive."

The burden cast upon the appellants in this case is to establish:

> 1. That prior to the execution of the 1935 deeds Selwyn Sellers and the other Seller heirs and Gilbert Hedden, through his solicitor and agent, George W. Grimm, Jr., reached a common intention that the vendors were to sell and the purchaser was to buy lot 5 and lots 9 to 20 on Oak Island.
>
> 2. That the subsequent deeds did not properly record the intention of the parties.
>
> 3. That there was a common or mutual mistake.

In addition to what I have already said about the burden of proof, I would refer to the following comments of Mr. Justice MacDonald in **Smith v. Hemeon**, [1953] 4 D.L.R. 157, at pp. 159-160:

> "The burden which lies upon a plaintiff seeking rectification of a deed on the ground of mutual mistake is a very heavy one requiring clear and convincing evidence that the deed failed to carry out the common and continuing intention of the parties: **Fowler v. Fowler** (1859), 4 De G. & J. 250, 45 E.R. 97 at p. 103; **McNeil v. Iona Gypsum Products Ltd.**, [1925] 2 D.L.R. 659, 58 N.S.R. 80; **Hart v. Boutilier** (1921), 56 D.L.R. 620 at p. 630; 23 Hals., 2nd Ed., pp. 150-153, 157-159; **Cheshire and Fifoot on Contracts**, 2nd Ed., pp. 188-189; **Kerr on Fraud & Mistake**, 7th Ed., p. 552.
>
> "It is clear that the court has jurisdiction to rectify the deed so as to make it conform to the actual intention of the parties and that though there must be an agreement embodying that intention, it is not necessary that the agreement itself be in writing: **United States v. Motor Trucks Ltd.**, [1923] 3 D.L.R. 674 at pp. 686-687, [1924] A.C. 196 at p. 200, 25 O.W.N. 78; 23 Hals., p. 158; **Armstrong v. Wright** (1930), 2 M.P.R. 309. The terms of the agreement may be proved by parol evidence so as to prove the intention of the parties and the error in the deed which subsequently passed between the parties, provided it 'be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties': **Kerr**, supra, p. 552; and see per Duff, J., in **'N.F. Whalen' v. Point Anne Quarries Ltd.** (1921), 63 D.L.R. 545 at p. 568; 63 S.C.R. 109 at pp. 126-127. It is true that in many of the cases in which the Courts have reformed an instrument there has been something

> beyond the parol evidence such as a draft agreement or memorandum or written instructions to a solicitor, etc., yet it is established that where the mistake is clearly proved by parol evidence, the Court will act even though there be nothing in writing to which the parol evidence may attach:..."

I have considered the evidence that the appellants say support their contention that in 1935 the intention of all parties was that the heirs of Sellers were selling and that Gilbert D. Hedden, through his solicitor and agent, George W. Grimm, Jr., was buying lot 5 and lots 9 to 20 on Oak Island.

Some of the proposed evidence goes not, in my opinion, to such alleged intention but rather to land use that more properly may be considered on the question of possessory title. In so saying, I have in mind such evidence as that of the Sawlors that they pastured cattle on Oak Island, perhaps on the disputed lands, from 1949 to 1969 with the permission of Mr. Chappell. In addition, some of the documentary evidence, namely, letters contain single, double and, in some cases, triple hearsay. These I do not find helpful in a determination of what the parties intended to buy and sell in 1935.

As I have already stated, it appears clear to me that Selwyn Sellers thought that he had conveyed to Mr. Grimm all his interest in land on Oak Island, namely, lot 5 and lots 9 to 20. This is supported by the removal of the Sellers family from the assessment rolls relating to Oak Island after 1935, their nonuse of Oak Island after that date and the evidence of various local residents to the effect that after 1935 the Sellers family was thought to no longer be land owners on Oak Island.

To succeed in their claim for rectification, however, the appellants must show not just a unilateral error but rather a mutual or common mistake. This brings me to a consideration of the evidence relating to the intention of Mr. Hedden and Mr. Grimm in 1935 at and prior to the land purchase from the Sellers family.

There is no dispute that in 1934 all Mr. Hedden was interested in was the area around the "money pit". In result, only the title to lots 15 to 20 was searched. Mr. Hedden's agents in Nova Scotia were Mr. Harris and Mr. Robertson. I would also classify Mr. Blair as standing in somewhat of an agency or advisory capacity to Mr. Hedden. Mr. Blair had been actively engaged in searching for treasure on Oak Island since 1893 and it is apparent that his advice and counsel were welcomed by Mr. Hedden. In 1934, Mr. Blair had the mines lease on six acres of land, which included the "money pit", and also the treasure trove licence or agreement. By an assignment in writing dated March 1, 1935, Mr. Blair assigned to Mr. Hedden the exclusive right granted him by the province to recover treasure buried in or near Oak Island. Mr. Hedden in turn agreed to carry out treasure seeking operations on the Island. The agreement provided that the net proceeds of any recovered treasure was to be divided equally between Messrs. Blair and Hedden.

In a letter dated February 16, 1935 to Mr. Harris from Mr. Blair, the latter said:

> "...I gather from your remarks you are under the impression that the lots mentioned – 15 to 20 inclusive - comprise the whole island. As I understand it, they embrace the eastern end only. On examination of a sketch furnished me by the Mines Dept., I would judge the island to be about 120 acres in extent. Basing my opinion on Mr. Robertson's report, it would appear it was divided into twenty lots of approximately six acres each. The remaining lots – 1 to 14 – are now owned by three or more parties, one of them being Mr. Sellers, but in that portion we are not interested."

Included in the correspondence tendered in evidence in this case were three letters from Mr. Hedden that hear directly upon the question of what he intended to purchase in 1935. The first of these letters is to Mr. M.R. Chappell in which Mr. Hedden says:

> "When I purchased the land originally it was purely for the purpose of obtaining entry to the site and my main objective was the area covered by the **Mines Lease and Treasure Trove Act**. All of the purchases were made by George Grimm and were then later transferred to me and it is very possible that the so-called lots 9 to l4 were not included."

In 1964, Mr. Hedden was requested by Mr. Harris to execute a quit claim deed to Mr. Chappell apparently of any interest he might have in lot 5 and lots 9 to 14. In a letter of reply dated May 6, 1964, Mr. Hedden said:

> "I recall that when I sold to Lewis my attorney raised the question of the lots 9 through 14 and Lewis, being in a hurry took the conveying deed as offered."

Later in the same letter he said:

> "I am sorry that it is all so confusing but, as I never had any deal with Chappell or Acadia I hesitate to blindly sign over rights to lots that I possibly never owned, or possibly still own. If the deed is still in my name I am obviously liable for the accrued taxes and interest, but I cannot get through my head just how Chappell got ownership to lots 9-14 unless he bought them from somebody."

On May 23, 1964 in a letter to Reginald V. Harris, Mr. Hedden said:

> "I have no recollection of ever having had any connection with the lots 9 to 14..."

It will be recalled that John Whitney Lewis purchased Mr. Hedden's interest in Oak Island in 1950 and conveyed the same later on in the same year to the Acadia Trust Company. By undated letter to Mr.

Hedden, which obviously was written some time in 1950 after he had acquired the lands but before he sold them, Mr. Lewis said:

> "Referring to the 1818 map copy, I enclose a pencil tracing of the portion of it in which I am interested. In comparing this with the map which was a part of the deed or conveyance of the lands to me, it seems that the lots mentioned in the deed do not cover all of the lands shown on the map, attached to the deed, as the land conveyed by Sellyn Sellers to George W. Grime {sic). I have not received the deed from the registrar in Chester, but I have a blueprint of the map which you had photostated to attach to the deed and am referring to the copy that I have as well as my memory of the map attached to the deed. Of course the important thing is that the money pit covered, however I will appreciate your helping me clarify the matter of just which lands were conveyed."

The map Mr. Lewis refers to that accompanied the deed to him is, of course, the survey plan prepared by Mr. March dated September 9, 1935.

Mr. Lewis received the 1818 plan (which obviously is the one prepared by Mr. Crandal and shows Oak Island as being divided into 32 numbered lots) from either Mr. Harris or Mr. Hedden. Therefore, contrary to the impression one might take from some of the evidence, the 1818 plan was not first located by Nolan in 1963 but rather came to light in or prior to 1950 by or on behalf of one of Tobias's predecessors in title.

Four letters from Mr. Harris are revealing. On November 5, 1963, M. Harris, in response to a query received from Mr. Grimm, wrote the latter saying:

> "Now to answer your letter, if it is not too late. First of all, the purchase of Oak Island properties in 1935, Whatever I did then was for you and Hedden. Mr. Chappell was not in the picture. I have all the original correspondence. Hedden was never concerned with Lots 9 to 14. I had a search made by J.G.A. Robertson of the titles to the lots around the Money Pit at the South end of the Island 15 to 20. You will remember the exciting time we had getting the heirs together at Chester Basin. Lots 9-14 were not acquired by Hedden, but only those around the Money Pit."

In a letter dated May 7, 1964, Mr. Harris wrote to Mr. Chappell and said in part:

> "Hedden was never interested as far as I know in any lots except nos. 15 to 20."

Mr. Harris again wrote to Mr. Chappell on January 3, 1967 saying:

> "My recollection is that the deeds to George W. Grimm, Instrument No. 40, July 26, 1935 conveyed lots 15 to 20 inclusive. That was all Hedden was interested in, although the Sellers Estate apparently had title to lots 9 to 14 they were not included in any deed to Grimm. I have asked Nolan to bring in his title deeds and I may be able to relate them to the abstracts of title you have sent me."

Two days later, Mr. Harris again wrote Mr. Chappell and said:

> "Since writing you on the 3rd inst., I have had a call from Nolan who brought with him his deed to lots 9-14. I looked it over and, in my opinion, it conveys whatever interest the Seller's estate had in the lots 9-14. I checked the deed against the abstract of title you have sent me and I cannot find it in the abstract. I am more than satisfied that all that Grimm or Hedden ever acquired was the area on which the money pit stood, namely lots 15-20."

The letters written by Mr. Hedden to which I have referred are capable of supporting the conclusion that Mr. Hedden did not intend to purchase lot 5 and lots 9 to 14 inclusive in 1935 but rather was only interested in lots 15 to 20. This conclusion is fortified by the other letters to which I have referred, particularly those of Mr. Harris.

In support of their contention that Mr. Hedden intended to purchase lot 5 and lots 9 to 20 in 1935, the appellants point in particular to the March plan; a letter from Ross Corkum to M.R. Chappell expressing a desire to purchase a portion of what used to be his family's property on Oak Island (this evidence is neutralized somewhat by the fact that in 1969 various people by the name of Corkum conveyed to Ronald Andrew Corkum by quit claim deed all their interest in lot 5 and lots 9 to 14); the treasure trove licences issued to Mr. Chappell covering all of Oak Island; the evidence of various witnesses to the effect that the Sellers ceased being land owners on Oak Island on and after 1935 and the fact that Mr. Hedden took out an insurance policy on his Oak Island property described as "the small lot as well as the main property".

The foregoing collectively is relevant and pertinent circumstantial evidence from which the appellants submit that the only rational conclusion to be drawn is that Hedden intended to purchase and did purchase lot 5 and lots 9 to 20 in 1935.

The letters to which I have referred, however, do not call for the drawing of any inferences. Mr. Hedden clearly states that he has "no recollection of ever having had any connection with lots 9 to 14"; "that it is very possible that the so called lots 9 to 14 were not included [in the 1935 deed]"; "I recall that when I sold to Lewis my attorney raised the question of the lots 9 through 14 and Lewis, being in a hurry, took the conveyancing deed as offered".

Mr. Harris prepared the deeds from the Sellers heirs to George W. Grimm, Jr. and attended at the closing. He stated to Chappell prior to the latter conveying to Tobias that "I am more than satisfied that all that Grimm or Hedden ever acquired was the area on which the 'money pit' stood, namely, lots 15-20."

In result, I am of the opinion that the appellants have not discharged the heavy burden of establishing by clear and convincing evidence that in 1935 the Sellers heirs intended to sell and that Hedden intended to buy lot 5 and lots 9 to 14. It follows that I agree with Mr. Justice MacIntosh when he said (p. 110):

> "...I cannot conclude that there is 'clear and convincing' evidence that rectification should be granted or that there is not 'a fair and reasonable doubt' with respect to this issue."

LACHES

Mr. Justice MacIntosh, after dismissing the claim of Tobias for rectification of the 1935 and subsequent deeds. went on to say (p. 110):

> "...even if rectification would otherwise be available to the plaintiff, the defences of acquiescence and laches are obvious obstacles to its application. These two doctrines are related and operate to prevent a party from seeking to enforce rights where an infringement had previously been ignored."

After reviewing the relevant authorities on the subject, the learned trial judge said (p. 111):

> "The aforementioned principles of laches and acquiescence, when applied to the staleness of this claim, serve to confirm the decision to deny deed rectification in this instance."

Since I am in agreement with Mr. Justice MacIntosh that the rectification sought by the appellant, Tobias, should not be granted, the issue of laches does not really arise on this appeal. Since, however, it was considered by Mr. Justice MacIntosh and dealt with by counsel in argument, I will make a few comments about such doctrine.

As pointed out in **Halsbury's Laws of England** (4th Ed.), vol. 16, in para. 1478 et seq, the chief element of laches is acquiescence which has sometimes been described as the sole ground for creating a bar in equity by the lapse of time. Acquiescence implies that the person acquiescing is aware of his rights and that he is in a position to complain of an infringement of them.

Apart from the views expressed by Mr. Justice MacIntosh, it is to be noted that in the present case Mr. Grimm wrote to Mr. Harris under date of August 16, 1935 expressing the view that the description in

the deed to him from the heirs of Sellers was inadequate and that a survey should be carried out to ascertain the boundaries of the property purchased for Mr. Hedden. As a result, Mr. March surveyed the Sellers property on Oak Island and by the plan dated September 9, 1935, to which reference has already been made, showed Selwyn Sellers as having conveyed 52 acres more or less to George Grimm, Jr. These 52 acres comprised what on the Crandal plan were shown as lot 5 and lots 9 to 20. Mr. March also prepared a metes and bounds description of the property as surveyed and plotted by him. Strangely enough, this description was never used in subsequent deeds but rather the description employed was always that contained in the 1935 deed until the conveyance by Mr. Chappell to Tobias.

The point is that Mr. Grimm knew in 1935 that the Sellers owned 52 acres on Oak Island and that each of the numbered lots referred to in the deed to him contained 4 acres for a total of 24 acres. I discount, as I have already done, the reference in the deed to 150 acres. Mr. Grimm should have been alerted to the fact that if indeed the intention was to buy all the Sellers property interest on Oak Island then the deed to him was deficient. There is nothing in the evidence or record to indicate that Mr. Grimm or Mr. Hedden made any effort in and after 1935 to have the '35 deed to Grimm rectified or otherwise corrected. This supports the conclusion that as Mr. Hedden was only interested in the "money pit", 24 acres in that area was all he wanted and intended to buy.

It will also be recalled that in 1950 Mr. Lewis apparently queried the absence of lot 5 and lots 9 to 14 in the deed to him but says Mr. Hedden, "Lewis, being in a hurry, took the conveyancing deed as offered."

In result, it appears to me that if lot 5 and lots 9 to 14 were intended to be bought and sold in 1935 along with lots 15 to 20, then Mr. Grimm, Mr. Hedden and some at least of the latter's successors in title knew or ought to have known that the 1935 deed did not carry out such intention. Their failure to do anything about it when the intention of all parties to the 1935 deed could have readily been ascertained well might in and of itself defeat the claim for rectification of the 1935 deed even if it could be said that such claim was otherwise valid.

ADVERSE POSSESSION

At trial the appellant, Tobias, indicated that even if his claim for rectification did not succeed he still should be found to be entitled to lot 5 and lots 9 to 14 by virtue of the possession of these lots by his predecessors in title and by himself.

In my opinion, this claim for title by adverse possession must be founded on acts of possession that occurred prior to 1963. In that year, Nolan acquired deeds to lot 5 and lots 9 to 14. He thereafter occupied the lands, built surveyor's shacks on them, did considerable digging of test holes, bulldozing, exploration and the like. In 1975, he built a summer cottage on one of the disputed lots without apparently any objection from Mr. Chappell. On occasion, Mr. Nolan erected gates or barricades to

keep people off these lots. In 1967-68, Nolan had Brady's Lumber Company timber lot 5 and lots 9 to 14. Nolan's possession of these lots was recognized by Mr. Blankenship who testified:

> "...I don't believe in 1970 that we were allowed to go on lots 9 through 14, no
>
> .
>
> Q. And who stopped you from going on lots 9-14?
>
> A. Mr. Nolan.
>
> Q. What did you do as a result, you being Triton? Did you build a road to get to the money pit area?
>
> A. Yes, we built a road in order to circumnavigate the lots 9 through 14. We built a road through the swamp."

What must be shown to establish adverse possession was clearly stated by Mr. Justice MacQuarrie late of this court in **Ezbeidy v. Phalen** (1958), 11 D.L.R.(2d) 660, at p. 665:

> "...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 here, 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 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."

The acts of possession relied on by Tobias was the cutting of trees and hay on the lands by his predecessors in title and the grazing by them of livestock and the payment of taxes.

Mr. Justice MacIntosh concluded that (p. 115):

> "The acts of possession alleged by the plaintiffs are more in the nature of what have been described in other similar cases as 'intermittent acts of trespass' – they were not 'exclusive, continuous, open and notorious'."

The issue of adverse possession not strongly urged on this court but in part of the submission oblique reference was made to it. I have, therefore, for the sake of completeness considered it.

In **Gillis v. Gillis** (1979), 32 N.S.R.(2d) 40; 54 A.P.R. 40, this court said, (p. 49):

> "The question in any given case whether the adverse possession relied on is such as will extinguish the title of the true owner is one of fact for the trial judge and should not be disturbed by an appellate court unless, as Mr. Justice Ritchie said in **Stein v. The Ship 'Kathy K'** 4 N.R. 381, [1976] 2 S.C.R. 802 at p. 808, the trial judge 'made some palpable and overriding error which affected his assessment of the facts'. See also **Metivier v. Cadorette** 8 N.R. 129, [1977] 1 S.C.R. 371."

I have reviewed with care the entire record in this case and I am not persuaded that Mr. Justice MacIntosh wrongly applied any legal principle or overlooked or misinterpreted material evidence of fact in reaching the conclusion that Tobias had not discharged the burden of establishing title by adverse possession to lot 5 and lots 9 to 14.

In consequence of all of the foregoing, I would dismiss the appeal of the appellants and confirm the decision of the learned trial judge that Nolan is entitled to lot 5 and lots 9 to 20 as shown on the Crandal plan of Oak Island.

THE COUNTERCLAIM

The grounds set out in Nolan's Notice of Cross-appeal are:

> (1) That the learned trial judge erred in law in concluding that the alleged roadway along the north shore of the respondent's lands at Crandall's Point, in the County of Lunenburg, Province of Nova Scotia, was constructed on Crown lands and was, therefore, a public highway.
>
> (2) That there is no evidence, or insufficient evidence, to support the finding of the learned trial judge that there may have been tidal erosion of the north shore of Crandall's Point between 1965 and 1975.
>
> (3) That the learned trial judge erred in law in not requiring that the appellants discharge the onus of proving on the balance of probabilities that the alleged roadway along the north shore of the respondent's lands at Crandall's Point, in the County of Lunenburg, was a public highway.
>
> (4) That the learned trial judge erred in not considering or not giving sufficient weight to evidence relating to aerial photography and other investigations carried out by the Department of the Attorney General for the Province of Nova Scotia concerning the status of the alleged roadway along the north shore of the respondent's lands at Crandall's Point, in the County of Lunenburg, Province of Nova Scotia.
>
> (5) That the learned trial judge erred in law in awarding the appellants damages for interference with tourism in the amount of $15,000.00.
>
> (6) That there is no evidence, or insufficient evidence, to support the learned trial judge's findings that the appellants had suffered damages due to interference with tourism in the amount of $15,000.00.
>
> (7) That the learned trial judge erred in law in requiring that the costs of the third party be borne by the respondent.

Counsel for Nolan submitted argument on the seven grounds under the following three headings:

> 1. Crandall's Point.
>
> 2. Damages.
>
> 3. Third Party Costs.

CRANDALL'S POINT

This heading encompasses the issues raised in grounds 1 to 4 inclusive of the Notice of Cross-appeal.

As already mentioned, Nolan purchased a one-quarter acre lot on Crandall's Point in 1966. Upon this lot he built a museum. At one time the road to the causeway went across Nolan's land on Crandall's Point. In 1963, the Department of Highways built a new road following generally the roadbed of the old road leading along the north shore of the Point. Several witnesses testified that the old road had been a public road and below the high water mark.

The issue joined on these grounds of cross-appeal is simply whether the road being used to gain access to the causeway leading to Oak Island and constructed by the Department of Highways in 1973 is a Crown owned public road or whether the roadbed is on lands owned by Nolan.

Mr. Justice MacIntosh in reaching the conclusion that the roadway along the northern boundary of Crandall's Point was constructed below high water said (p. 117):

> "In coming to my conclusion that the present roadway along the northern boundary of Crandall's Point was constructed below high water mark, in addition to the above submissions, I was particularly impressed by the evidence of the Department of Highways engineer, Walsh. He was at this area before, during and subsequent to the construction of this shore road. His opinions, which I accept, are evidenced from the following excerpts of his testimony at trial and as outlined in plaintiff's rebuttal brief - "

The thrust of the excerpts from Mr. Walsh's evidence that the learned trial judge went on to specify was that the new road generally followed the old road to Crandall's Point and was completely below high water mark. Mr. Walsh also said that when the road was constructed in 1973 a ditch was left between it and the high water mark. Someone unknown to Mr. Walsh subsequently filled in the ditch the following year.

The position of counsel for Nolan as set out in his factum is:

> "The uncontradicted evidence at trial indicates that there was a significant change in the high water mark along the north shore of Crandall's Point between 1965 and the construction of the roadway in 1974. This evidence is summarized as follows:
>
> "(1) When the transparent plastic overlay of Crandall's Point prepared in 1975 and showing the Department of Highways road (Exhibit 98 located in tube) is placed over the 1965 aerial photograph of Crandall's Point (Exhibit 95 located in tube), it shows that the roadway crosses lands which were well above the high water mark in 1965."

"(2) The Department of Attorney General memorandum dated June 18, 1974, and found in the Department of Highways file (Appeal Book Vol. VIII, Tab 45, p. 5), refers to the comparison of the 1965 and 1975 aerial photography and states as follows:

> 'When the Department of Highways did the construction work in 1973 they were careful to stay below what appeared to be high water mark at that time. However, a comparison of the 1965 and 1975 high water marks clearly shows that some of the operations were carried on well above the 1965 high water mark. The only possible explanation is that between 1965 and 1973 something happened to alter the location of high water mark. Mr. Nolan claims that shortly before he acquired the land in 1966, some fill was removed from the end of Crandall's Point and used in the construction of the causeway, and that this was done without the permission of the then owner Mr. Pressley.' "

"(3) Survey Plan found in the Department of Highways file (Appeal Book Vol. VIII, Tab 45, last page) denotes 'oriringal (sic) high water line' and describes area above this as being used to construct causeway to Oak Island."

"(4) Legal description in Deed from Pressley to Nolan conveying Crandall's Point (Appeal Book Vol. VIII, Tab 30) reads in part:

> 'Thence northerly, northeasterly, easterly, southeasterly and southerly following the original line of mean high water mark at Crandall's Point (so-called) as existed prior to the construction of the causeway to Oak Island as shown on said plan and on the aerial survey photo as made by Atlantic Air Survey Co. Ltd. and dated June 7, 1965'."

Mr. Justice MacIntosh recognized this submission and stated (p. 116):

> "The defendant submits that by placing a plastic overlay made from a 1975 aerial photograph of Crandall's Point over a 1965 photograph of the same area indicates that the present position of the roadway infringes upon the lands of the defendant. However, in the 10 year period between 1965 and 1975 there could well have been a change of the average high water mark caused by tidal erosion. Tidal erosion increases the amount of the foreshore and the Crown's titular interest therein."

Counsel for Nolan on the hearing of this appeal said that they were not and could not dispute the finding of Mr. Justice MacIntosh that in 1973 the road to the causeway was below high water mark. They contend, however, that in 1965 the road was not below high water mark. If the roadway was indeed on Nolan's land in 1965 then whether it was vested in the Crown in 1973 will depend upon how the

change in location of the high water mark came about. In **Halsbury's Laws of England** (4th Ed.), vol. 49, the authors say at para. 295:

> "The presumption of law is that where land or foreshore is subject to accretion or alluvion and the added land is above high water mark, the addition belongs to the owner of the dry land to which it is added, and if the added land is above the low water mark it belongs to the owner of the foreshore. Evidence can be adduced to rebut this presumption, but that evidence must be very strong."
>
> "Where the opposite process, dereliction, takes place and the tidal water gradually and imperceptibly encroaches upon land which was formerly situated above high water mark, that land becomes the property of the owner of the foreshore and the ownership of land which was formerly part of the foreshore passes to the owner of the bed of the tidal water."

And at para. 297:

> "Where the change of boundary between the land and the water is not slow and imperceptible but sudden or as a result of deliberate artificial reclamation, the presumptions as to ownership do not apply and there is no change in the ownership of the land."

Counsel for the appellants have challenged the admissibility of the file from the Department of Highways and also the evidence created by the overlay, namely, that land below high water mark in 1973 was well above high water mark in 1965.

To my mind, there is merit in this objection. With respect to the overlay, there is a question of interpretation that arises and normally one would expect evidence to explain and interpret the aerial photograph and the overlay. The file of the Department of Highways does not contain any document that is admissible under any special evidentiary rule. The authors of the letters and reports could have been called as witnesses.

Whether the challenged exhibits should have been received in evidence or not is to my mind not a decisive factor with respect to the issue raised on this aspect of the cross-appeal. Mr Justice MacIntosh has found that the road to the causeway was below high water mark in 1973 and that consequently it is vested in the Crown. The burden was upon Mr. Nolan to establish:

> (1) That, in 1965 the land upon which the road was built was above high water mark and was his land; and

(2) That the change in the boundary between the land and the water was not the result of natural erosion but was sudden and caused by some factor that can be identified.

I have examined the record with care. Assuming there was a large land loss between 1965 and 1973, I am not persuaded by what evidence there is on the point that such loss has been shown by a preponderance of evidence or on a balance of probabilities to have been caused by other than natural erosion. I am of the further opinion that the appellant has not discharged the burden of establishing that what is now the location of a public highway was his lands in 1965. In so saying, I am mindful of the evidence from several local residents that there was for years a public road along the north side of Crandall's Point. It was on this road and indeed more to the ocean side than the land side that the 1973 road was built by the Department of Highways.

DAMAGES

With respect to Triton's claim for damages arising from lost tourism revenue, the learned trial judge said (p. 123):

> "In 1976, Triton took over tourism on the island from the provincial government. The evidence of Blankenship, which I accept, sets forth the nature and extent of the interferences caused by the activities of the defendant acting under a misapprehension of his rights. The net revenue over the past eight years including government grants, has averaged approximately $7,000.00 (Exhibit No. 82). What effect the defendant's activities had on this income is difficult to assess based on this evidence alone. In any event the court is obligated to fix damages."
>
> "I fix the plaintiff's damages on this regard as $15,000.00."

In 1976, the province requested Triton to take over tourism on Oak Island. The evidence of Mr. Blankenship is that Nolan blocked off the highway built by the province in 1973. The evidence is not clear whether it was blocked off in 1976. There is no question but that the last extension made by Nolan to his museum encroaches on the highway.

When asked if tourists were able to get onto Oak Island without hindrance in 1983 and 1984, Mr. Blankenship replied in the negative and explained his answer as follows (p. 115-116):

> "Mr. Nolan was, during the tourist season, he would close up the gates between the two iron posts, the chain, he would close that up, which was to the south of Crandall's Point and then he would open up his other, his wooden barricade, I believe had been replaced by the chain and two iron posts on the western side, so he would open up that access and then the tourists were supposed to come in on the western side of the museum and then proceed around a sharp bend to the south of the museum and make a

> sharp u-turn and then go across the causeway. And invariably the first and second car would block that very restricted way of getting around the museum and then you wouldn't get any tourists until those people moved their cars and hopefully maybe another one would come by without blocking up the way, but no buses could get by after... he only allowed the traffic to go to the western way, which was on the road that the province had raised the elevation of in 1974. They couldn't circumnavigate the corner."

Introduced as an exhibit was a document showing certain expenditures of Triton and the revenue after expenses from tourism. For 1977 to 1984 the amounts were:

1977 – $7,164.92
1978 – 1,870.32
1979 – 3,072.08
1980 – 3,748.45
1981 – 4,551.45
1982 – 6,207.17
1983 – 14,529.06
1984 – 15,309.01

The 1983 and 1984 figures include a provincial grant of $7,500 and $8,000 respectively. Without this grant, the net revenue for those years would have been $ 7,029.02 and $7,309.01 respectively.

There is absolutely no doubt that Nolan interfered on occasion at least with the flow of tourists to Oak Island. The evidence indicates that in one day alone eighty-seven cars had to be turned away because Nolan had blocked off the road.

What the evidence does not tell us is how often this happened and the extent of the obstruction. There also is no evidence as to what admission fee, if any, tourists had to pay to enter onto the Island or just how the tourist revenue was generated.

In my opinion, the appellants and, particularly, Triton, have not discharged the burden of establishing that they sustained substantial economic loss as a result of Nolan's interference with their tourism business.

It follows that on the evidence as it appears in the record, it is my opinion that the award of $15,000.00 is not supported by the evidence and is consequently a totally erroneous estimate of the damage or loss.

As I have said, Nolan did interfere with the tourism business of Triton. To what extent and with what monetary consequences we do not know. I would, therefore, set aside the award of $15,000.00 and in its place substitute a nominal award in the amount of $500.00.

THIRD PARTY COSTS

As I have earlier said, Nolan received in 1963 a qualified certificate of title to lot 5 and lots 9 to 14 from the law firm of Kitz and Matheson. When he was sued by the appellants, he elected to join such firm and its senior partner as third parties. Later it was ordered that the third party proceeding would be heard separately..The third parties did not participate in the trial of the present action.

It was because he dismissed the appellants' claim to lot 5 and lots 9 to 14 that Mr. Justice MacIntosh later dismissed the third party proceedings because Mr. Nolan had simply not suffered any loss as a result of the services rendered by the law firm. Since he had a qualified certificate of title to lot 5 and lots 9 to 14, I am a bit puzzled why Nolan thought it necessary to join the law firm. Had he lost to the appellants with respect to lot 5 and lots 9 to 14, he could then have brought action on the certificate of title. His chances of success would have been no better or no worse by taking third party proceedings than it would have been in a later action on the certificate.

I appreciate that it was the actions of the appellants in claiming ownership to lot 5 and lots 9 to 14 that triggered involvement of the third parties. I am not, however, persuaded that it was necessary to involve them at this stage and I therefore would not disturb the disposition of costs on this aspect of the matter as made by Mr. Justice MacIntosh.

THE INTERLOCUTORY INJUNCTION

This injunction was granted on September 19, 1983 by Mr. Justice Burchell and continued on October 6, 1983 by the Honourable Judge Clements. Mr. Justice MacIntosh by order dated April 7, 1986 dissolved the injunction. That portion of the order was stayed by this court pending the determination of this appeal and cross-appeal. I would now vacate the stay and restore the order dissolving the injunction.

CONCLUSION

I would dismiss the appeal with cost to the respondent. I would allow the cross-appeal to the extent only of varying the damages for loss of tourism revenue from $15,000.00 to $500.00. Success being somewhat divided on the cross-appeal, I would direct with respect to it that each party bear their own costs. I would not disturb Mr. Justice Macintosh's disposition of costs on the trial.

Appeal dismissed; cross-appeal allowed in part.

ROBERT B. ASHLEY and GLENN M. CREWS (plaintiffs) v. THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS and THE BOARD OF EXAMINERS OF THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS (defendants)

See 79 N.S.R. (2d) 435

Nova Scotia Supreme Court Trial Division
Nathanson, J.
August 19, 1987.

Ashley made application to the Association of Nova Scotia Land Surveyors ("the Association") to approve of his entering into articles of apprenticeship with Crews. The application was refused by the Board of Examiners ("the Board") on the basis that Crews did not have five years of experience as a Nova Scotia Land Surveyor, contrary to a requirement that the Board had adopted. Ashley appealed to the Courts claiming that the Board did not have the power to make such a rule.

The Court agreed that the Board did not have the power to make the rule that it had made. The Court held that only Council could make such a rule by adopting a regulation to that effect. The ruling of the Board to refuse to approve the articles was quashed. The Court then explained that the Board was not of a nature that the Court could force it to approve the articles.

ROBERT B. ASHLEY and GLENN M. CREWS (plaintiffs) v. THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS and THE BOARD OF EXAMINERS OF THE ASSOCIATION OF NOVA SCOTIA LAND SURVEYORS (defendants)
Nova Scotia Supreme Court Trial Division
Nathanson, J.
August 19, 1987.

Wishing to practise surveying in Nova Scotia, Robert B. Ashley entered into articles of apprenticeship with Glenn M. Crews, a Nova Scotia Land Surveyor, and submitted it to the Board of Examiners of the Association of Nova Scotia Land Surveyors for registration. The Board of Examiners declined the application on the ground that Crews did not have five years' experience or its equivalent as a Nova Scotia Land Surveyor as required by a policy of the Board. Ashley and Crews submit that neither the provisions of the **Nova Scotia Land Surveyors Act**, S.N.S. 1977, c. 13, nor the regulations thereunder, nor any bylaw of the Association of Nova Scotia Land Surveyors made pursuant thereto authorizes such a policy which, therefore, is without any foundation in law. They now claim an order in the nature of certiorari quashing the decision of the Board of Examiners and an order in the nature of mandamus requiring the Board to reconsider its decision.

FACTS

Robert B. Ashley is a surveying engineer. He has a Bachelor of Science degree in Surveying Engineering from the University of New Brunswick, is a member of the Association of Professional Engineers of Nova Scotia, and holds a commission as a Canada Lands Surveyor. Between March and July 1985 he articled with one Frank Longstaff, N.S.L.S., the contract of articles for which was approved by the Board of Examiners. On September 15, 1986, he entered into articles of apprenticeship with Crews; those articles are in a form which has been prescribed by the Board of Examiners. At that time, Crews had been a Nova Scotia Land Surveyor only 15 months, having received his certificate of qualification on June 28, 1985.

By letter dated October 10, Howard K. Wedlock, Executive Secretary of the Association and Secretary of the Board of Examiners, wrote to Mr. Crews as follows:

> "The Board of Examiners have a ruling that normally a surveyor must have five years experience before taking on a student."
>
> "I suggest that you send me a letter stating your reasons why you consider your experience, etc. suitable to article a student, even though you have just received your license to practise within the past year...."

In reply, Crews pointed out that there was no authority for such a ruling but, nevertheless, he was complying with the request. He then outlined his training and experience, and concluded by stating that

he had completed three years nine months of continuous, challenging land surveying problems, and asked the Board of Examiners to consider that the amount of work he had completed to date was equal to what the average surveyor takes five years to complete.

By letter dated January 19, 1987, Mr. Wedlock, as Executive Secretary of the Association, set out the decision of the Board of Examiners:

> "The Board members, after due consideration, declined the application on the basis that you have not in their opinion demonstrated sufficient reasons to take on a student for articling purposes..."

Mr. Ashley and Mr. Crews replied by separate letters dated January 28. Mr. Ashley stated that he could find nothing in the Act, the regulations, or the bylaws that gives the Association or the Board authority to have or implement such a policy without passage of a regulation; he requested that the Board review his application and, if it was not accepted, advise the authority for its decision. Mr. Crews stated that he would not accept a ruling of the Board for which there was no authority in the Act or the regulations, and he insisted upon a reconsideration of the Board's decision.

In a letter to Ashley of February 3, Mr. Wedlock stated:

> "...the Board's ruling was published in the Board of Examiners Report, October 1981 issue of the Nova Scotian Surveyor. This policy has been in force since that time and as well has the approval of Council. The ruling is in accordance with Section 98(h) of our present regulations."

Mr. Wedlock also sent a copy of that letter to Mr. Crews and, in a covering letter dated February 6, added:

> "For additional reference you should read 3(b), page 26, Board of Examiners, Instructions to Candidates."

Pursuant to the requests of Ashley and Crews for reconsideration, the Board met on May 7 to reconsider Ashley's application. It decided to decline the application on the ground that Crews did not have experience equivalent to that of a surveyor of five years' standing.

Both Ashley and Crews say that they had no previous knowledge of the existence of a ruling of the Board. The position of the Board of Examiners is that the ruling originated with, and was approved by, the Board; that reference to it was made in the publication of the Board's reports in 1981 and subsequent years; that the ruling has been approved by the Council of the Association; and that the policy has been in effect since it was adopted.

With respect to the first point, it is noted that the minutes of the meeting of the Board of Examiners held on October 1, 1981, contain the following:

> "3.2.2. The Board approved a motion by Roy Dunbrack, seconded by Bruce Gillis, that 'to be eligible to sign an indenture with a student a surveyor ordinarily must have at least five years' experience as a Nova Scotia Land Surveyor', and that this requirement should be effective 1 Nov. 81. The gist of this requirement is to be part of the Board's report at the Annual Meeting, and details are to be included in the Board's new Handbook. Also, the indenture document is to include a certificate that the surveyor has five years' experience as a N.S.L.S. and that he has no other indentured student in his employ. The indenture document is to be received by the Board within 30 days of the date of the beginning of the articles."

With respect to the second point, the **Nova Scotian Surveyor** published reports for the annual meeting, Summer 1981, including a report of the Board of Examiners by its Chairman, A.F. Chisholm, which contains only one relevant reference to the matter of articling:

> "...your Board will supervise and rule on the terms and times of articles and other conditions relating to articled students..."

An extract of minutes of a meeting of the members of the Association held in 1981, tendered as an exhibit, contains a summary of a discussion as to why the Board of Examiners had recently ruled that a surveyor could not have an articled student under him unless he had five years' experience as a Nova Scotia Land Surveyor. The discussion ended in the following manner:

> "Jim Gillis – I move that we table this report until such time as our solicitor has checked into the legality of the Board's recent ruling and then bring it back to an annual meeting. Russell MacKinnon – Seconded. Vote – Motion carried."

Mr. Chisholm's report as Chairman of the Board of Examiners for the following year contained this relevant paragraph:

> "A new booklet '**Instructions to Candidates**' was completed this year becoming effective May 1, 1982. It also contains revised application forms and minimum percentage of articling time for field and office functions. Your Board spent much time at each of the seven meetings discussing the five-year ruling recently passed on October 1, 1981. It reads '...to be eligible to sign an indenture with a student a surveyor ordinarily must have at least five years' experience as a Nova Scotia Land Surveyor ...'. The last meeting of the year the Board proposed to Council that if a decision by the Board re the above was felt unfair by any surveyor, it could be appealed to Council."

Mr. Chisholm's report as Chairman for the year 1983 contained only one brief mention of the matter:

> "The Board held lengthy discussions on the 'five year policy' and has made suggestions to Council regarding the handling of this matter."

It should be noted that neither side in this proceeding disclosed to the Court any minutes of a meeting of the Council of the Association indicating that the Board's policy in this regard was approved by the Council, nor any copy of the Board's new handbook mentioned in the minutes of the meeting of October 1, 1981, nor any minutes of an annual meeting of the Board approving the report tabled at the 1981 meeting of the Association.

It should also be noted that page 26 of the Board's booklet, **Instructions to Candidates**, dated April, 1982, contains a section dealing with a surveyor's responsibility to articling students. Mr. Ashley swore in his affidavit on file that the copy originally provided to him by the Association did not mention the so-called five-year policy but, after the decision by the Board, he obtained another copy and found that two new subparagraphs had been added to s. 3. One of those new subparagraphs stated as follows:

> "Surveyor's Responsibility to Articled Students.
>
> 3...
>
> c. A student may article only with a N.S.L.S. who has held that commission for a period of at least five years."

With respect to the fourth point, the applicants tendered the affidavit of one Rodney E. Humphreys, N.S.L.S., who swore that he articled with one Michael Tanner, who at the time of such articles had not been a Nova Scotia Land Surveyor for a period of five years. The Board characterized that case as a mere slip.

ISSUES

The amended originating notice (application inter partes) in this proceeding claims that the Board of Examiners exceeded its jurisdiction and breached the rules of natural justice in not informing Ashley or Crews of its ruling before they entered into articles of apprenticeship so that it ought to reconsider Ashley's application. For its part, the Board and the Association claim that the Board, being an administrative and not a judicial body, was exercising its discretion in the performance of its administrative duties which is not reviewable by the Court; that the Board, in making the five-year ruling, was exercising powers vested in it by statute or by regulations; and that neither the Board nor the Association owes a statutory imperative duty to Ashley or Crews which can be enforced by way of mandamus.

Counsel are agreed upon the following issues:

> l. Is the decision of the Board of Examiners dated January 19, 1987, reviewable by the Court?
>
> 2. If it is, has the Board authority under the Act, regulations or otherwise to implement and maintain the five-year rule?
>
> 3. Does mandamus lie against the Board?

LAW

The objects of the Association are stated in s. 3(4) of the Act to include:

> "Association Continued
>
> 3...
> Objects of Association
>
> (4)...
>
> (b) to regulate the practice of professional land surveying and to govern the profession in accordance with this Act, the regulations and the bylaws;..."

The object in subs. (b) authorizes the Association to regulate the practice of surveying and to govern the profession of surveying. That is to be done in accordance with the Act, the regulations and any bylaws adopted by the Association.

The Act creates two bodies of authority, no doubt to breathe life into the objects. Section 4(1) creates a Council of the Association which, by s. 8(1), is authorized to make regulations and, by s. 9(1), is authorized to make bylaws. Section 11(1) creates a Board for-

> "Board of Examiners"
>
> "11(1) ... the examination of students and applicants wishing to qualify as Nova Scotia Land Surveyors, the issuing of certificates of qualification, and the admission as members of the Association,..."

Of the several subjects with respect to which the Council is authorized to make regulations, two are particularly relevant to the present circumstances. Subject to a requirement that all regulations must be

approved by the members of the Association and by the Governor in council, the Council may make regulations:

> "Regulations"
>
> "8(1)...
>
> (a) respecting the government and discipline of any person entitled to practise as a Nova Scotia Land Surveyor including any person who is a member, student member or a holder of a certificate of authorization;
>
> (b) respecting the examination of applicants for admission as students, fixing the terms of articles and providing for the reduction of such terms by reason of educational standing or experience and respecting the examination of students and applicants for membership in the Association and prescribing examination fees[.]"

The Council is also authorized to pass bylaws relating to administration and domestic affairs of the Association. The subject matter of such bylaws is enumerated in s. 9(1), none of which is relevant to the present proceeding, and all bylaws are required to be approved by the members of the Association.

One of the principal duties of the Board appears to concern the admission of members to the Association. By s. 12(1), the Board is required to admit certain persons to membership:

> "Admission of Members"
>
> "12(1) The Board shall, upon application, admit as a member of the Association any natural person who furnishes satisfactory proof that the person
>
> (a) is twenty-one or more years of age;
> (b) has paid the prescribed fees;
> (c) is of good moral character;
> (d) has successfully passed such examinations and <u>served such articles as determined by the regulations</u>;
> (e) has complied with all the provisions of the Act and regulations; and
> (f) has taken the prescribed oaths as set out in the bylaws of the Association."
> (emphasis added)

The Act does not provide for an appeal except with respect to decisions of the Discipline Committee of the Association. The applicants say that their only recourse is an application for a review of the jurisdiction of the Board.

At this point, some summarization may be helpful. Section 3(4) of the Act indicates the intention of the Legislature that the Association's authority to regulate the practice and profession of surveying shall be exercised in accordance with the Act and the regulations. Section 8(1)(a) and (b) of the Act indicates the intention that the Council has the power to make regulations governing a student member and fixing the terms of a student's articles. Section 12(1) of the Act indicates the intention that the Board shall admit into membership a natural person who proves, inter alia, that he has served articles determined by the regulations. The scheme of the Act relative to the subject of articling appears to be that the Council makes the regulations and the Board ensures that the regulations are obeyed.

Let us examine the relevant regulations, which are those numbered 87, 93, 94, 95, 96, 97 and 98.

The relevant portion of regulation 87 states:

> "QUALIFICATIONS OF APPLICANTS"
>
> "87 An applicant for admission as a member of the Association shall
>
> ...
> (b) article for such period of not less than three months nor more than three years as is prescribed by the Board;..."

Regulations 93 to 97 inclusive are as follows:

> "ARTICLES"
> ...
>
> "93 Where a surveyor and a student enter into articles, the articles shall be registered with the Board within thirty days of the signing date."
>
> "94 Where an application to be registered as a student is approved by the Board, the Secretary shall register the applicant as a student and notify the parties by mail of such registration."
>
> "95 Following the Board meeting next after an approval of an application to be registered as a student, the Secretary shall advise the student as to the terms of articles which will be required in respect of him."
>
> "96 A member of the Association who is a party to articles may, with the consent of the student and the approval of the Board, transfer the articles to another member of the Association."

"97 Upon cause being shown to the Board, the Board may transfer articles from one member of the Association to another member."

The relevant portion of regulation 98 states:

"BOARD OF EXAMINERS"

"98. The Board shall
...

(h) publish requirements for terms of articles and make such publication available upon request[.]"

Regulation 87(b) is concerned with the period of articling; it authorizes the Board to prescribe what period of time, within the limits stated, a particular applicant is required to article. It has no relevance to the question of whether an applicant may article with a member of less than five years' standing, a question which is properly categorized as one dealing with the terms of articles. That subject is dealt with explicitly in regulations 95 and 98(h).

Regulation 95 directs the Secretary of the Board to advise the student about the terms of articles required of him. It is submitted that that regulation implies that it is the Board that prescribes the terms of articles. I do not accept that submission.

Regulation 98(h) directs the Board to publish requirements for terms of articles. It is submitted that this implies that it is the Board that prescribes the requirements or the terms. I do not accept that submission.

Section 8(1)(b) of the Act clearly and explicitly authorizes the Council of the Association to make regulations fixing the terms of articles. Section 12 of the Act clearly and explicitly directs the Board to satisfy itself that an applicant has served articles as determined by those regulations.

No provision of the Act authorizes the Board to fix a term of articles except by way of a regulation. No regulation permits the Board to fix a term of articles that limits a student or applicant for membership to articling only with members of the Association who have been members for five years or more. Regulations 96 and 97 authorize the transfer of articles between two parties, each of whom is a member of the Association; no particular length of membership is required.. These two regulations appear to give support to an argument that the regulations do not indicate any intention of restricting articling to members of five years' standing.

The regulations are silent as to any such restriction. The Council, although it has the statutory power to make regulations on the subject, has not exercised that power. There is a void. It can be filled at any

time by the Council properly exercising its power to make a regulation. It cannot be filled by the Board purporting to set rules which it is not authorized by statute or by regulation to do. The authority of the Board is limited to ensuring that the regulations duly enacted by the Council are carried out and fulfilled.

ANALYSIS

When Mr. Ashley sent his articles of apprenticeship to the Board of Examiners, he did it pursuant to regulation 93. The Board was empowered to deal with the matter because the Council had exercised its power to make regulations fixing the terms of articles arising from s. S(8)(1)(b) of the Act by making regulations 87 and 93 to 98 inclusive.

Note that Ashley was not applying for membership in the Association: he was merely applying for registration of his articles. Therefore, the fact that he may not have fulfilled all requirements for membership (in that he did not file an affidavit as to his character) is irrelevant.

When the Board informed Ashley that it declined his application, it believed it was acting with power implied from regulation 94. It did have power to decline his application for registration of his articles, but not for either of the reasons it gave. The first reason given – that Crews did not have five years' experience normally required of a surveyor taking on an articled student – was a rule that was beyond the power of the Board to impose. Neither the Act nor the regulations authorized the Board to create such a rule. Neither the Act nor the regulations authorized the Board to impose a requirement for equivalent experience. The power to do that is vested in the Council to exercise by way of regulation "fixing the terms of articles and providing for the reduction of such terms", and the Council has not made any regulation creating a five-year rule so-called. If the Board wished to have that power, it should have requested the Council to pass an appropriate regulation and, if Council acceded to that request, it could then have passed a regulation which had to be approved by the members of the Association and by the Governor in Council in order to become effective.

The Board is a statutory body deriving its powers from the statute that created it. Here, the Board purported to give itself powers. It made rulings and policies, gave instructions to candidates, ignored a resolution of the membership of the Association asking for a legal opinion as to the legality of what the Board purported to have done. In other words, it acted as if it were a power unto itself and did not need authority or the approval of the Association, its members, or the Governor in Council.

Nothing that I have said is intended to reflect upon the wisdom of the so-called five-year rule. Indeed, one can perceive that it may be a wise and perceptive requirement to impose on students who intend to become qualified as Nova Scotia Land Surveyors. But that is not enough. The Court has the duty of ensuring that a statutory body does not try to impose wisdom and thereby exceed its statutory jurisdiction.

The Association and the Board of Examiners are statutory bodies. The Board exceeded its jurisdiction, and there is no indication that the Association took any steps to change its course. It is necessary for the Court to intervene. In **Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.**, [1975] 1 S.C.R. 382, Dickson, J., stated at p. 388:

> "There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest..."

The decision of the Board of Examiners dated January 19, 1987, is reviewable by the Court.

Having reviewed that decision, I find that the Board of Examiners did not have authority under the Act, the regulations or otherwise to implement and maintain the so-called five-year rule so that, therefore, its decision of January 19 was made without lawful authority. Certiorari will issue to quash that decision and the ruling of the Board upon which the decision was purported to be based.

Mandamus does not lie in these circumstances against the Board of Examiners. In **DeWolf et al. v. City of Halifax et al.** (1979), 37 N.S.R.(2d) 259; 67 A.P.R. 259, Morrison, J., cited with approval a passage from **Karavos v. Toronto and Gillies**, [1948] 3 D.L.R. 294 (Ont. C.A.) where, at p. 297, Laidlaw, J.A., set out four prerequisites for mandamus:

> "...Before the remedy can be given, the applicant for it must show (1) 'a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced': High op. cit., p. 13, art. 9; p. 15, art. 10. (2) 'The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform'; ibid., supra, p. 44, art. 36. (3) 'That duty must be purely ministerial in nature, 'plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers': ibid., supra, p. 92, art. 80. (4) 'There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy': ibid., supra, p. 18, art. 13."

Here, the applicant does not have a clear right to have his articles registered; the duty to register is not incumbent on the Board, and it is not purely ministerial in nature. Note regulation 94 which directs the secretary of the Board to register an applicant where the application is approved by the Board. Criteria for such approval are not set out so that there is some room for the exercise of discretion. In a proper case, the Board has the ability not to approve an application. The application submitted by Ashley was not a proper case.

CONCLUSION

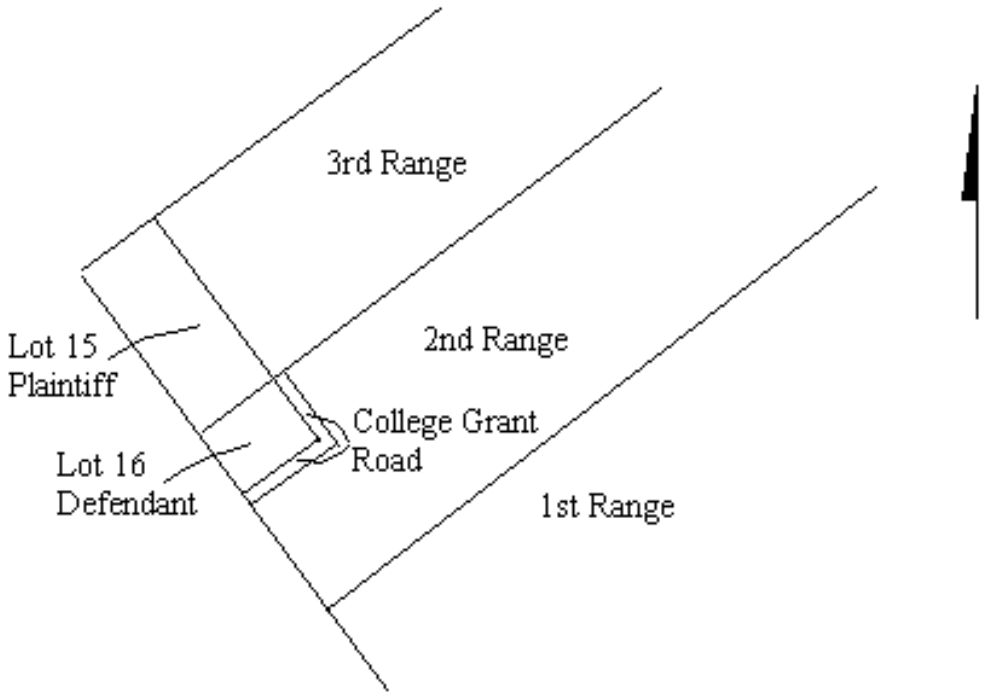
In the result, certiorari will issue quashing the ruling and the decision of the Board of Examiners. Mandamus will not issue against the Board.

The applicants will have their costs of the application to be taxed in the usual manner.

Application allowed in part.

JOHN RAYMOND FRASER (plaintiff/defendant by counterclaim) See 80 N.S.R. (2d) 215
v. CECIL A. ARCHIBALD, ARCHIBALD MacLAUGHLIN, ETHEL MacLAUGHLIN, CALVIN ARCHIBALD, NANCY A. ARCHIBALD, RONALD ARCHIBALD, ELIZABETH ARCHIBALD, EUGENE BREEN and MYRNA BREEN (defendants/plaintiffs by counterclaim)
Nova Scotia Supreme Court Trial Division
MacDonald, J.
June 29, 1987.

The Plaintiff and the Defendants owned adjoining properties near Lochaber, near the intersections of Pictou, Guysborough and Antigonish Counties. The dispute between them was over the location of their common boundary line and the amount of land in dispute amounted to 21 acres. The case report does not provide much in the way of specific evidence that would help to locate the properties or the landmarks referred to, but the following is a rough sketch that depicts the given information:



The Plaintiff claimed that the boundary line between the two properties had been fixed by a conventional line agreement between the owners of the properties in 1945. There was evidence that the two owners at that time had met with a surveyor on the land and had run a line which was still visible. The Judge refused to accept that a conventional line agreement had been reached for two reasons. First, the Judge determined that one of the parties who had apparently agreed to the line in

1945 was in the process of selling the land and there was no evidence that the Plaintiff was aware of that agreement. Second, the Judge found that neither side had done anything to the land based on the agreement. The Judge reviewed the wording in **Grasett v. Carter** and found that a necessary part of a conventional line agreement was that one or the other side must act on the agreement by the expenditure of money.

The Defendants' claim to the location of the boundary was based on the acreage of their land and the belief that the land was bounded on the south and east by the College Grant Road. If the road was the boundary, then the boundary between the Defendants and the Plaintiff would have to be moved further northwesterly in order for the Defendants' property to contain the 40 acres called for. The Judge found that there was no evidence that the College Grant Road was the boundary of the Defendants' land, or in fact that the road had even existed when the lots were subdivided.

The Judge found that there was insufficient evidence to support the claim by either side that they had established ownership of the disputed land by adverse possession.

Given that neither the claim of the Plaintiff nor the Defendants' had been accepted, the Judge suggested that the proper course to locate the boundary would be to establish the boundary between the Second and Third Ranges and project that line southwesterly.

JOHN RAYMOND FRASER (plaintiff/defendant by counterclaim) v. CECIL A. ARCHIBALD, ARCHIBALD MacLAUGHLIN, ETHEL MacLAUGHLIN, CALVIN ARCHIBALD, NANCY A. ARCHIBALD, RONALD ARCHIBALD, ELIZABETH ARCHIBALD, EUGENE BREEN and MYRNA BREEN (defendants/plaintiffs by counterclaim)
Nova Scotia Supreme Court Trial Division
MacDonald, J.
June 29, 1987.

This action is over a property line dispute which involves about twenty-one acres of culled woodland situate on the intersecting boundaries of Pictou, Antigonish and Guysborough Counties, near Lochaber. The plaintiff claims inter alia that his western boundary be the public road leading to Ohio, an injunction and damages. The placing of the western boundary of the plaintiff along the public road would then entitle him to the twenty-one acres in dispute.

The defendants' counterclaim asks for a declaration that the boundary between them and the plaintiff be placed on what was referred to as the Sterling Snow line (on a plan by Sterling Snow dated the 26th day of October, 1974) and an injunction. The lands of the defendant, Cecil A. Archibald, (the "defendant") were conveyed to his children and their spouses, the other defendants, by deed dated the 31st day of December, 1982.

The history of this dispute has its beginning back in 1813 when His Majesty the King conveyed five thousand acres of land near Lochaber to King's College of Windsor, Nova Scotia. The land in dispute is a small part of this grant.

A plan of the College Grant, so-called, was filed in the Registry of Deeds in November of 1859. At this time the grant was subdivided into one hundred acre lots, on plan of Daniel C. Robertson dated November, 1855 (exhibit D4).

The plaintiff by deed dated the 3rd day of January, 1949 and recorded on the 19th day of March, 1973, was granted three lots of land in the area, which included lots number one and two and sixteen as shown on exhibit D4. Lot number sixteen was described as follows:

> "Lot 16 in the second Range of said College Grant according to a plan of the said Grant lately made by John Gollan, Surveyor, containing 40 acres more or less."

The defendant by deed dated the 5th day of November, 1947 and recorded on the 22nd day of June, 1948, was granted several lots of land, including what was lot number fifteen on the Robertson plan. This lot was described as follows:.

> “Bounded on South by lands deeded by the said Laughlin McPherson to Donald McDonald of South Lochaber;
>
> On West by lands occupied by Robert Archibald of New Town;
>
> On North by lands of Angus L. McPherson, formerly lands occupied by Dougald McPherson;
>
> On East by lands of James Irwin, formerly lands of Daniel McDonald of South Lochaber;
>
> Containing 100 acres and formerly part of Old College Grant."

There was apparently no dispute between the predecessors in title of lots number fifteen and sixteen in respect to their mutual dividing line. In 1948, the defendant was lumbering on the land now in dispute and was seen by the plaintiff, who was then in the process of buying lot sixteen. Archibald and Fraser went to see Mr. Alex Cameron of Sherbrooke, a solicitor, but nothing was resolved, and nothing was produced out of that meeting which is of any help to me.

In 1945, the then owners of lots sixteen and fifteen, James Irving and Rod McPherson, with Cecil Archibald and William Archibald, accompanied Aubrey McKay, P.L.S., who ran a line between lots fifteen and sixteen, which was mutually agreed on between Irving and McPherson. McKay took as his starting point on the New Town-Lochaber Road a stone pile and stake, which was pointed by Irving and ran a line which is more or less the same line as was run by Sterling Snow, P.L.S., in 1974, and now called the "Snow line".

The defendants argue that the evidence discloses a "conventional line" agreement. The basic law with reference to a conventional line is set in **Grasett v. Carter**, (1880-85), 10 S.C.R. 105, at p. 129 as follows:

> "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."

The case at bar can be distinguished, in this case the parties who "agreed" to what was later called the "Snow line", were then about to be vendors. They did not do anything on the land related to the

"conventional line", nor is there any evidence that the plaintiff was aware of the agreed line. On the evidence before me, I am not satisfied that the criteria essential to the establishment of a conventional line has been proved.

The plaintiff claims the twenty-one acres depicted on exhibit 5(a); he claims that the College Grant road to the south and east is his boundary in these directions. He, of course, must prove this by a preponderance of evidence.

The plaintiff's evidence on the acreage of lot 16 is basically that his deed calls for forty acres and he will not settle for anything less. The description to his lot is only that it is number sixteen in the second range, according to a plan or survey and that it contains forty acres. (my emphasis)

There is no evidence that the road shown on exhibit D4 was in existence at the time that the subdivision of the College Grant was made in 1855. Without evidence to the contrary, I am of the opinion that these roads were not there in 1855, and did not form the boundary of any of the lands now in dispute. I therefore reject the College Grant road as the northwesterly boundary of the plaintiff's land.

The plaintiff, as well as the defendants, claim the land in dispute by adverse possession. Grant, J., of this court, in **Joyce v. Smith and Smith** (1984), 66 N.S.R. (2d) 406; 152 A.P.R. 406, quoted from the decision of Morrison, J. (as he then was), in **Nelson and Nelson v. Varner** (1977), 20 N.S.R.(2d) 181; 27 A.P.R. 181, at p. 191 as follows:

> "The question of adverse possession has also been raised by defence counsel and on this point also I find the defendants must succeed."
>
> "Section 9 of the **Limitation of Actions Act** being c. 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.'
>
> "MacIntosh, J., of the Trial Division of this Court, in the case of **Spencer v. Benjamin**, S.T. No. 00078, discussed the matter of adverse possession. At p. 4, of his decision, in Vol. 37 of the decisions of the Nova Scotia Supreme Court, Trial Division, he said as follows:

> ‘The late MacQuarrie, J., in **Ezbeidy v. Phelan** (1958), 11 D.L.R. (2d) 660, 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,...and a person who claims by long adverse possession only, such as the plaintiff must rely on here, 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 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.
> .....
>
> "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 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."’

"It is stated at p. 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 largely a question of fact in each case in which due regard is to had to the exact nature and situation of the land in dispute (**Godson Contracting Co. v. Grant Trunk Ry.** (1917), 13 O.W.N. 241). Possession 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 model of using it, the course of conduct which the proprietor might reasonably be expected 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).’”

The evidence of obtaining possessory title by adverse possession in this case is sparse indeed.

The defendant cut logs in the disputed area in 1947-1948, he did clear cutting and selective cutting. He was interrupted by the appearance of the plaintiff and, after the meeting with the solicitor, Cameron, he postponed further cutting because he understood that the plaintiff would have the boundaries established, and because he thought he had cut all the worthwhile lumber. The defendant had surveyors run lines on two occasions: McKay in 1945 and Snow in 1974. Both lines are about the same and have been referred to as the "Snow line" (exhibit D5). The defendant would walk over the land during hunting season.

The plaintiff logged the area in 1952-1953; he took anything that would make a log, built brows and bulldozed a road. After that he would, on occasion, cut some firewood and Christmas trees. He was aware at the time Sterling Snow was running the line in 1974, but apparently did not participate or interfere. When the plaintiff bought the land, he was not shown any specific Northwest boundary; he only assumed that boundary was the road.

In my opinion, the dividing line remained in continual dispute, with neither side surrendering to the other. There was not adverse occupation by either party which was exclusive, continuous, open and notorious.

It appears to me that the boundaries of lot sixteen can be determined by the description aforementioned on page three. This description has been the same since the first deed conveying lot sixteen was made from King's College to Daniel MacDonald in 1890.

Exhibit D4 is a plan (the Robertson plan) registered in the Registry of Deeds at Antigonish on the 21st day of November, 1859. It is a plan showing the subdivision of the College Grant as forty-four lots, of which lots fifteen and sixteen are two. The subdivision divides the grant into three ranges: the first range borders Lochaber Lake; the second range is created by a line running from the southwest to the northeast, with its southeasterly border being the northwesterly border of the first range; the third range is created by a line running parallel to the dividing line between the first and second range, and is the division line between the second range and the third range. Lots fifteen and sixteen are situate at the southwest side of the grant; lot fifteen is in the third range and lot sixteen is in the second range.

The description of lot sixteen places and limits it to within the second range. The northwest boundary of the second range, when projected southwesterly, divides lot fifteen from lot sixteen and thus creates the boundary between them. That is the line referred to on exhibit D5(b) as the extension of the "Old Crown Line".

In summary then, my findings are as follows:

> l. I reject the claim of a “conventional line" agreement along the "Snow line" so called, as the necessary criteria has not been met.

2. I reject the "Snow line" as the proper dividing line because it was established mainly because of the earlier line run by Aubrey McKay and there was not any evidence that would justify the location of that line.

3. I reject the plaintiff's claim of the road boundary because there was no evidence to establish it as such.

I reject the claims of adverse possession of both parties for the reasons stated above.

The only real evidence indicating the division line between lots fifteen and sixteen is the reference to the second range contained in the description of lot sixteen. It appears logical and proper that the division line between the second and third range when projected southwesterly, is the division line between lots fifteen and sixteen and I so find and declare it to be the dividing line.

The plaintiff, having failed in his action, and there being evidence that the defendants attempted to settle the dispute on the basis of the "Old Crown Line", costs of this action go to the defendants in one bill of costs.

Order accordingly.

ANGUS R. HILL and ARTHUR F. HILL (plaintiffs) v. See 100 N.S.R. (2d) 205
RUTH MacLEAN, JOHN MacLEAN, STANLEY WEATHERBY and HEATHER WEATHERBY (defendants)
Nova Scotia Supreme Court Trial Division
Roscoe, J.
January l6, 1991.

The Plaintiffs were brothers who owned lands at Onslow, Colchester County. The Defendants MacLean were a husband and wife who owned adjoining property. The Defendants Weatherby were the daughter and son-in-law of the MacLeans who were occupying a mobile home that had been placed on land which both the MacLeans and the Hills claimed. The main issue in dispute was therefore the location of the boundary between the Hills and the MacLeans. The properrties were on the North side of the Laybolt Road. The Plaintiffs' property was located to the east of the Defendants' property.

The Hills had acquired their property from their father, who had acquired it from one Barnhill. The description of the Hill lands was very vague:

> "A piece of land on the north side of said Cross Road bounded east by George Laybolt's land, north by base line, west by Ian McCallum's land, south by Cross Road."

The MacLeans land had come from a larger parcel that had once been owned by one McCallum. McCallum had transferred the land to Bailey, who had sold to Budgey. The descriptions used in these deeds had remained consistent since 1862 (save for the changing of the names of the adjoining owners.) The description was quite detailed and had obviously been prepared by a land surveyor with specific bearings and distances in chains and links. The courses of the description that related to the common boundary line between the Plaintiffs and the Defendants related to the Defendants eastern boundary. That course read "Thence by top of said Bank and along Robert Barnhill's line to the Cross Road..."

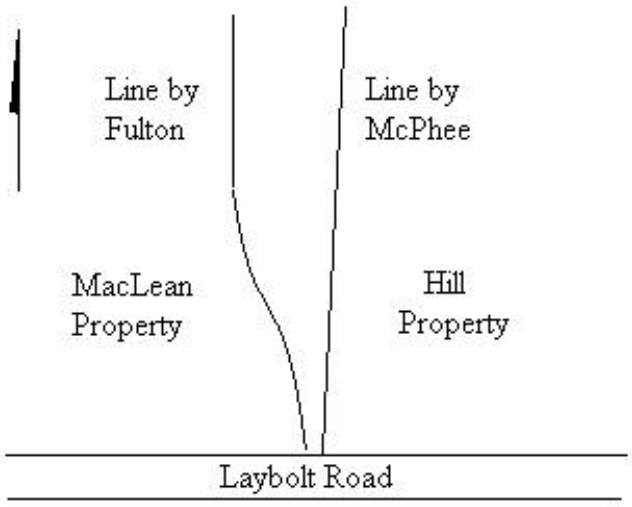
After Budgey acquired the land, he subdivided it and sold the part adjoining the Plaintiffs to LaPointe, who sold it to Loughhead, who sold it to the Defendants MacLean. The description used in this series of deeds had been prepared by LaPointe based on measurements he made on the ground at the time of the transaction.

Both parties retained a land surveyor.

The Plaintiffs retained Ray Fulton. Mr. Fulton's opinion as to the location of the boundary in dispute was based primarily on his understanding of a conventional line agreement that had been reached by Budgey and the Hills when Budgey was purchasing the property.

The Defendants retained Stewart McPhee. Mr. McPhee's opinion was based on his interpretation of the description in the deed to Budgey and on discussions with McCallum who had once owned the property. McCallum indicated that the boundary had been surveyed in the 1940's and McPhee understood that the Barnhills had been present during that survey and had agreed with it. He discounted the claim that a conventional line agreement had been reached because Budgey was not an owner of the property at the time the agreement had been reached.

The difference between the two surveyor's opinions amounted to some 8.9 acres. The area in dispute is shown in a very rough fashion by the following sketch:



There was a significant amount of evidence about the use of the lands and about the agreement between Budgey and Hill.

The Judge accepted the boundary opinion of Fulton. The Judge listed a number of reasons for that finding and that list makes very interesting reading.

The Judge ordered the mobile home of the Defendants Weatherby removed from the land.

ANGUS R. HILL and ARTHUR F. HILL (plaintiffs) v.
RUTH MacLEAN, JOHN MacLEAN, STANLEY WEATHERBY
and HEATHER WEATHERBY (defendants)
Nova Scotia Supreme Court Trial Division
Roscoe, J.
January l6, 1991.

This matter concerns a property line dispute and an alleged trespass. The plaintiffs seek a declaration that the boundary between their lands and that owned and occupied by the defendants is as shown on a plan prepared by their surveyor, damages for the trespasses, an injunction requiring the defendants to remove their belongings from the lands east of the alleged boundary and an injunction restraining the defendants from coming on the lands east of the alleged boundary.

The plaintiffs, Angus and Arthur Hill, are brothers. They are farmers who own several pieces of property in the Onslow, Colchester County area. They acquired the lands in question from their father. The defendant, Ruth McLean, is the registered owner of land adjacent to the Hill's land. John McLean is her husband, Heather Weatherby is her daughter and Stanley Weatherby is Heather Weatherby's husband. The Weatherby's occupy a mobile home situate on the land in dispute.

The land in dispute is situated on the Laybolt Road in Onslow and is adjacent to a winding brook called McCurdy's Brook. The land is partially wooded, partially cleared and contains a riverbank that varies in height from the riverbed from three or four feet at some points to as high as 40 feet at other points. The land between the top of the bank and the water varies in width from 50 feet to 200 feet.

The main issue is the location of the east boundary of the McLean lands which forms the west boundary of the Hill lands. Arthur Ross Hill, the father of the plaintiffs, acquired the land in 1959 from the Barnhills. The description in their deed is as follows:

> "A piece of land on the north side of said Cross Road bounded east by George Laybolt's land, north by base line, west by Ian McCallum's land, south by Cross Road."

That description was first used in 1914 when the land was conveyed by John and Mary McCurdy to George A. Barnhill.

At the time that Arthur Ross Hill purchased the land from Barnhill in 1959, Ellis Bailey was the owner of the land to the west, a portion of which is now owned by the defendants. Ellis Bailey acquired the land in 1954 and owned it until 1968, when he sold it to Norman Budgey. The description in the Bailey to Budgey deed is as follows:

> "All that certain piece or parcel of land situtate in Onslow aforesaid on the East side of the Old Tatamagouche Road, and on what is called McCurdy's Brook, described and

bounded as follows: Beginning at a stake and stones on the North side of the Cross Road leading from the Back Road so-called to North River, to the Old Tatamagouche Road aforesaid distant Northerly by said Cross Road from the centre of the bridge on McCurdy's Brook ten chains and nineteen links;

1) Thence turning North twenty-seven degrees and twenty minutes East five chains and twenty-five links to a stake;

2) Thence North two chains twenty-four links to a stake;

3) Thence North twenty-two and a quarter degrees West nine chains seven links to another stake;

4) Thence due North six chains sixty-seven links to another stake;

5) Thence North fifty-five and one-half degrees East six chains thirty links to a juniper tree;

6) Thence South eighty-five degrees East eight chains twelve links to said McCurdy's Brook;

7) Thence by Brook up stream North twenty-seven and one-half degrees one chain and eighty-five links to a small spruce on the East side of the Brook;

8) Thence North forty-five degrees East twenty-five chains, more or less to the West line of lands of the late Arthur Hill;

9) Thence by said line South seven degrees West twenty-two chains and fifty links to McCurdy's Brook;

10) Thence by said Brook down stream six chains;

11) Thence South seven degrees West to the top of the upland bank;

12) Thence by top of said Bank and along Robert Barnhill's line to the Cross Road;

13) Thence by said Cross Road to the place of beginning, containing sixty acres, more or less."

(Paragraphs numbered for ease of reference.)

Thence in a Westerly direction along the Northern boundary of the Laybolt Road to the point and place of beginning.

It is the twelfth call in that deed, that is, "Thence by top of said bank and along Robert Barnhill's line to the Cross Road" which creates the dispute in this case. The metes and bounds description in the Bailey to Budgey deed was first used in 1862, although the proper names of the adjoining landowners have been changed periodically through the years.

Immediately after Norman Budgey obtained the land, he subdivided it and sold a portion to a friend of his, Gerald LaPointe. The description in the deed is as follows:

> "All that certain lot, piece or parcel of land situate, lying and being on the North side of the Laybolt Road at Onslow Mountain in the County of Colchester and Province of Nova Scotia and more particularly described as follows:
>
> Beginning at a stake situate on the Northern boundary of the Laybolt Road at Onslow Mountain aforesaid, said stake also situate One hundred and Twenty (120) yards in a Westerly direction from the centre of the bridge where the Laybolt Road crosses the McCurdy's Brook;
>
> Thence in a Northerly direction along the bottom of the High Meadow to the McCurdy's Brook;
>
> Thence along the several courses of the McCurdy's Brook Three Hundred and fifty (350) yards more or less to the point where the McCurdy's Brook meets the Western boundary of lands of Ross Hill;
>
> Thence in a southerly direction along lands of Ross Hill to the top of the upland bank;
>
> Thence continuing in a Southerly direction along the said bank along Ross Hill's line to a stake situate on the Northern boundary of the Laybolt Road;
>
> Thence in a Westerly direction along the Northern boundary of the Laybolt Road to the point and place of beginning.
>
> The above described lot of land containing Twenty (20) acres more or less.
>
> Being And Intended to be a portion of the lands conveyed to Norman Frank Budgey and wife as Joint Tenants by Ellis N. Bailey and wife by deed dated the 29th day of October, A.D. 1968."

In 1969, LaPointe sold the land to Joseph and Mabel Loughead, and in 1973 it was acquired by John and Ruth McLean from the Lougheads, and the Budgey to LaPointe description was again used.

Each party has retained a surveyor who testified, at the trial, of this matter. Each surveyor has prepared a plan which shows what, in their respective opinions, is the boundary between the Hill lands and the McLean lands. Mr. Ray Fulton, who testified on behalf of the plaintiffs, establishes the McLean eastern boundary in a manner which would indicate that the McLeans own approximately six acres to the east of the McCurdy Brook, whereas Mr. Stewart McPhee, who testified on behalf of the defendants, places the boundary in a manner which would, if accepted, mean that the McLeans have approximately 14.9 acres on the east side of McCurdy Brook.

As a result of this difference of opinion , the area of the land in dispute is approximately 8.9 acres and forms a roughly triangular shaped piece of land that is approximately 525 feet wide on its northern boundary with McCurdy Brook, which boundary is approximately 1,500 feet from the Laybolt Road. From the northern end of the area in dispute, the eastern boundary (the Fulton line) and western boundary (the McPhee line) converge to points 50 feet apart on the Laybolt Road, which forms the southern boundary of the area in dispute. The boundary line, as established by Mr. Fulton, from a point approximately midway from the brook to the road, follows the irregular course of the upland bank of the McCurdy Brook, while the McPhee line, is a straight line, from the top of the bank to the road.

The difference in opinion of the two surveyors is, as a result of them placing different weight on the various pieces of evidence presented to them, both on the ground and verbal reports given to them by the parties and their various predecessors in title. Many of these people were witnesses, and their testimony will be reviewed, before examining the evidence of the surveyors in more depth.

Arthur Ross Hill, the father of the plaintiffs, testified on their behalf. He is 68 years of age and has lived in Onslow all his life. In addition to the lands in dispute, the family farm also included land to the northeast of the land in dispute, known as lot 42, and the reason for the purchase of lands on Laybolt Road from the Barnhills, in 1959, was to gain access to lot 42 from the Laybolt Road. He recalled, when he was approximately 14 years of age, which would have been in 1936, going onto the land in question to assist the Barnhills in cutting firewood. The area of the land where that was done was described by Mr. Hill as "the gulch", just west of the bank, which is consistent with Mr. Fulton's opinion of the boundary between the McLeans and the Hills but inconsistent with where Mr. McPhee has drawn the boundary line.

Mr. Hill described a meeting he had with Dr. Budgey a few days prior to Dr. Budgey purchasing the lands to the west of Hill's land from Ellis Bailey. According to Mr. Hill, Dr. Budgey was unsure as to the exact location of the boundary betveen them and wanted to settle it before he purchased the land from Bailey. He and Dr. Budgey walked the property and Mr. Hill pointed out to Dr. Budgey where he thought the western boundary of his land was and Dr. Budgey agreed with that location. After the

commencement of this action, he again showed Mr. Fulton where he and Dr. Budgey had agreed the line was.

On cross-examination, Mr. Hill testified that if the McPhee line is accepted, he thought the Hills would not have access to lot 42 from the Laybolt Road. He indicated that the meeting with Dr. Budgey was to establish the existing boundary not to create a new one. He also indicated that, between 1960 and 1967, when Mr. Bailey was his neighbour to the west, Mr. Bailey came upon the land in dispute and cut firewood, for which he paid Mr. Hill.

Arthur F. Hill, one of the plaintiffs, testified that lot 42 is connected to the lands claimed by him on the Laybolt Road. He described the topography of the land and indicated that this action was commenced when he observed a for sale sign on the Laybolt Road, in the late 1980's, which indicated land, he believed to be owned by him and his brother, was for sale.

Angus Ross Hill, the other plaintiff, testified that he was familiar with the lands when it was owned by the Barnhills and recalled going there, as a child to find a Christmas tree, with Robert Barnhill. The place where the Christmas tree was cut was in the area now in dispute, that is, to the east of the Fulton line but to the west of the McPhee line.

Ellis Bailey, age 76, who is a predecessor in title of the defendants, having owned the lands to the west of the Hills from 1954 to 1968, testified on behalf of the plaintiffs. He testified that the eastern boundary of the lands he owned began at the bridge and followed the top edge of the bank to a point on the boundary of Hill's lot 42 where it crossed the brook. He indicated that he owned no land east of the top edge of the upland bank. He indicated that he cut logs on the property now claimed by the McLeans but that he had paid Barnhill and later the Hills for those logs. He testified that trailer, that is now occupied by Weatherbys, is on land he believes is owned by the Hills.

Dr. Norman Budgey, who is a predecessor in title to the McLeans, purchased land from Ellis Bailey in 1968. Just after buying the land, he subdivided it and sold a portion to his friend Mr. LaPointe. He indicated that since the deed, describing the Bailey lands was not entirely clear as to where the eastern boundary was, he met with Mr. Arthur Ross Hill and walked over the land with him. He and Mr. Hill came to an agreement as to where the boundary was, and that agreement is now represented on the plan drawn by Mr. Fulton. He indicated that Mr. LaPointe drew the description for the portion of land purchased by him and now owned the McLeans. He indicated that Mr. LaPointe had measured the 350 yards along the several courses of the McCurdy’s Brook, and that Mr. LaPointe had calculated the acreage. Dr. Budgey agreed that the 20 acres was quite overestimated. At the time of his agreement with Mr. Hill he was not yet the owner, although he had a signed agreement of purchase and sale for the lands. He indicated that he was "astonished" by McPhee plan which shows the boundary so far to the east of where he and Mr. Hill had agreed the line was.

Mr. Donald C. Groves, who has in Onslow all of his life and is 50 years of age, testified that, as a young man, he worked for Mr. Barnhill cutting wood for fence posts in an area that is shown now, by Mr. Fulton, to be lands of the Hills. He further indicated that, as a child, he and other boys had built a little cabin east of the brook on the side of the upland bank and that it was Mr. Barnhill who gave them permission to do so. Their cabin was very close to where the Weatherby's trailer now is.

Lawrence E. McCallum, age 73, a predecessor in title to the McLeans, testified on behalf of the defendants. He acquired the land from his father who owned the land from 1930 to 1949, and he then sold it in 1952 to Delbert Crowe. He testified that in the late 1930's, when he was approximately 21 years of age, his father retained the services of a man by the name of Alex MacLeod to survey the eastern boundary line. He testified that he assisted Mr. MacLeod by carrying the chain and cutting brush. The line that Mr. MacLeod surveyed is similar to that as shown on the McPhee plan. He indicated that Mr. Barnhill was aware of the survey but did not participate in it. He indicated that, since this action started, he pointed out to Mr. McPhee where that line had been surveyed. On cross-examination he indicated that his family did not use any of the property east of where Mr. Fulton has drawn the line.

George L. Connelly, age 54, testified on behalf of the defendants. Mr. Connelly has lived nearby the land in dispute all his life. He testified that there is an old dump approximately 350 feet east of the boundary line proposed by Mr. McPhee which he believed belonged first to the Barnhills and then to the Hills. He indicated that he advised Mr. McPhee of the location of the dump and advised Mr. McPhee that, at one time, there was a fence just west of the dump and that it was the fence between the McCallums and the Hills.

Gary Grant, a Nova Scotia Land Surveyor, testified on behalf of the defendants. He indicated that in the early 1970's he was retained by Mr. MacLean to survey his property. Mr. Grant is employed by the Nova Scotia Power Corporation. The work was never completed and his memory of what he actually did was poor. He did indicate that he recalls meeting with Dr. Budgey and that Dr. Budgey showed him where the boundary between Hill and Budgey was, although Dr. Budgey did not inform him of any agreement with Mr. Hill to that effect. On cross-examination he indicated that he did not tell Mr. McPhee that Ross Hill was present when he was surveying the property.

Mr. Stanley Weatherby, one of the defendants, testified that he lives in a mobile home which is on the land in dispute. He further testified that he never offered to buy the land from the Hills.

Mrs. Heather Weatherby, one of the defendants, testified that she has lived in the mobile home on the lands in dispute since 1980 and that the driveway to that mobile home was constructed in 1979 and that until the commencement of this action, no one had ever questioned their presence on the land.

Mr. Ray Fulton, the surveyor retained by the plaintiffs, prepared a written expert's report and a plan of the lands in dispute, dated April 5, 1988, which was entered as exhibit No. 1. Mr. Fulton has been a professional surveyor since 1952, and was qualified as an expert in this proceeding.

In coming to his opinion, as shown on exhibit No. 1, he reviewed the descriptions in the deeds to the Hills, the McLeans, Budgey and the Reids, who are owners of lands to the east of the Hills.

Mr. Fulton had, in 1974, surveyed the western boundary of the McLean's land, that is the boundary between Budgey and McLean, at the request of Dr. Budgey. He had set survey markers in the course of that survey which marked the first and second calls of the deed from Budgey to LaPointe. In 1988 he checked to ensure that those markers were still in place and then, to establish the third course of the description, that is "Thence along the several courses of the McCurdy's Brook Three Hundred fifty (350) yards more or less to the point where the McCurdy's Brook meets the Western boundary of lands of Ross Hill;", he measured from the point he had established in 1974, 1050 feet or 350 yards along the brook and came to a point within 10 feet of a Nova Scotia Power Corporation survey marker, which he assumes was placed there by Mr. Grant. Mr. Fulton, after discussing the matter with Mr. Grant, agreed that the pin placed by Mr. Grant was in the proper place, that is 350 yards along the several courses of the brook.

The next call on the deed is "Thence in a Southerly direction along lands of Ross Hill to the top of the upland bank;" Mr. Fulton indicates that "since 'southerly' can cover a wide range of direction, this call wasn't specific enough to provide a positive direction or ending point". For clarification, he discussed the matter with Mr. Ross Hill and Dr. Budgey and was advised by them that, at the time Dr. Budgey purchased the land from Ellis Bailey, they had agreed on the location of that line. Mr. Fulton has based his opinion largely on the agreement between Mr. Hill and Dr. Budgey, but also on the eleventh and twelfth calls in the Bailey to Budgey deed. Mr. Fulton says his line, which is shown as line A to B on his plan, is consistent with the Bailey to Budgey description. From point B he places the balance of the boundary as running along the top of the upland bank to a point on the Laybolt Road.

In his testimony, Mr. Fulton indicated that if the eastern boundary of the McLean lands is as he has established, the McLeans received approximately 11 acres, not the 20 as indicated in the deed. He further indicated that in rural areas, total acreage contained in a deed is often misstated, and where it is necessary to choose between a distance and estimated acreage, it is preferable to choose the distance as being accurate as opposed to the acreage.

In his written report and in his testimony, Mr. Fulton indicated that he did not agree with the line as drawn by Mr. McPhee for a number of reasons, including the fact that the line as drawn by Mr. McPhee would increase the acreage in the Bailey to Budgey deed by at least 15 acres more than called for in the deed. As well, Mr. Fulton disagreed with Mr. McPhee's interpretation of the word "by". Mr. Fulton says that "by" means along, whereas, Mr. McPhee interprets it as meaning crossing or going past. Mr. Fulton also disagrees with Mr. McPhee's interpretation of the word "bank" as used in the

descriptions. Mr. Fulton believes that the bank is the steepest part of the change in elevation from the brook level to the upland, which is several feet higher, but Mr. McPhee, in Mr. Fulton's opinion, has interpreted "bank" as being the brow of the hill several feet beyond the bank.

Mr. Stewart McPhee, the surveyor retained by the defendants, has been qualified as a surveyor since 1970. His final plan of the McLean/Hill boundary is dated October 18, 1988 and was submitted as exhibit No. 2. In addition, there are two written reports dated June 4, 1988 and November 22, 1990 on file as expert reports. He was qualified by the court as an expert in the area of surveying and boundary retracements.

At the time Mr. McPhee prepared his report, dated June 4, 1988, he had completed a preliminary plan, and, at that time, it was his opinion that the boundary between McLean and Hill was much farther to the east of where he placed it in his final report and plan. The final plan is dated October 18, 1988. In his preliminary report he placed the boundary between Hill and McLean along the remains of a fence, which begins approximately 120 feet from the top of the bank of the brook at the northeast corner of the lands in dispute and continues in a southerly direction to a point approximately 120 feet from the Laybolt Road. However, in his final report and on his final plan, Mr. McPhee shows the boundary between McLean and Hill as running in a southwesterly direction in a straight line from a point south of the bank to the Laybolt Road so that it reaches the Laybolt Road some 600 feet west of where it is shown on his preliminary plan.

Mr. McPhee bases his opinion on the Bailey to Budgey description and discussions with Mr. Lawrence McCallum, Mr. Gary Grant and Mr. George Connelly. He placed very little weight on information received from Dr. Budgey concerning the line agreement with Mr. Hill, since Dr. Budgey was not the owner of the lands in question at the time of the agreement. He indicated in his testimony that he placed much more reliance on the information received from Mr. Lawrence McCallum with respect to the survey done by someone Mr. McPhee referred to as Mr. MacKay in 1940. However, the person who did that survey was a Mr. MacLeod not MacKay, and it appears from other evidence that that person was not a qualified surveyor. It also appears that Mr. McPhee wrongly thought that the Barnhills were present at the time that survey was completed and that they agreed with the findings.

Mr. McPhee, when referring to the Budgey to LaPointe deed, preferred to accept the acreage cited in that deed as being more accurate than the 350 yards more or less called for in the deed. The way Mr. McPhee has interpreted the Budgey to LaPointe deed, instead of 350 yards along the courses of the brook, the measurement would be approximately 520 yards.

In resolving the dispute in this case there are, as indicated by counsel in their briefs, a number of legal issues to be taken into account. The plaintiffs refer to **Halsbury's Laws of England**, Fourth Edition, vol. 12, paragraphs 1459 et seq. and submit that in construing the deeds, the object is to discover the real intention of the grantor. In ascertaining this intention, the ordinary rules of construction of documents applies and words must, in general, be taken in their ordinary sense or given their meaning

as determined by common usage. In addition, the words must be construed in harmony with the context.

The plaintiffs also rely on **McLellan v. Salter** (1988), 1 R.P.R.(2d) 20 (N.S.T.D.), where the plain meaning of words in a deed were relied upon to settle a boundary dispute.

Both counsel have referred me to a passage in **Richards v. Gaklis et al.** (1984), 63 N.S.R.(2d) 230; 141 A.P.R. 230 (T.D.), where Clarke, J., as he then was, said at p. 234:

> "In discussing the manner of determining the intent of parties where an ambiguity exists in a description, I quote from the **Canadian Encyclopedic Digest** (Ontario), (3rd Edition), volume 3, at Title 19, page 16, paragraph 24.
>
> > '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. 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.'
>
> "To the extent that it is capable of being applied to the present case, I accept what the authors of the **Digest** say as a helpful guide."

The plaintiffs also rely on the law regarding conventional line agreements to establish their claim and refer to **Halsbury's Laws of England**, Fourth Edition, Volume 4, paragraph 833:

> "Mere agreement sufficient. Boundaries may be fixed by an agreement made between two or more adjacent owners where their boundaries have become lost or confused. It would appear that, in general, such an agreement need not be in writing and, a fortiori, need not be by deed; for, if it was fairly made, it will be presumed that it did not involve any alienation of land but that the boundaries settled were the true and ancient limits. Moreover, the settlement of boundaries is a mutual consideration sufficient to support a contract not under seal, even where the land is situate out of jurisdiction."

The plaintiffs refer to **Spencer v. Benjamin** (1975), 11 N.S.R.(2d) 123; 5 A.P.R. 123 (A.D.), where a conventional line agreement was found to exist where the seller of property and the plaintiff attended on the land just prior to the purchase to examine and agree upon the boundaries.

The defendants urge consideration of the evidence of acts of possession by the various title holders through the years, and in support, refer to **Ratto v. Rainbow Realty et al.** (1985), 68 N.S.R.(2d) 34; 159 A.P.R. 34; **Re Risser's Beach** (1977), 20 N.S.R.(2d) 479; 27 A.P.R. 479, and **Saueracker et al. v. Snow et al.** (1976), 14 N.S.R. (2d) 607; 11 A.P.R. 607.

The defendants, in their brief also refer to the maxim *falsa demonstratio non nocet cum de corpore constat* which is explained in **Anger and Honsberger Real Property** (2nd. Ed.) page 1314 as follows:

> "It may be freely, although inadequately, translated as 'a false demonstrative particular or reference does not prejudice what was clear before'. The maxim applies to descriptions of both property and persons but its application to persons mostly occurs in wills and is dealt with in the next chapter. 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. The characteristic of the cases within the rule is that the description, so far as it is false, applies to no subject at all and, insofar as it is true, applies to one only. The rule is not confined to cases where the first part of the description is true and the latter is untrue, it being immaterial in which part of the description the falsa demonstratio occurs."

The defendants rely on this maxim in arguing that, in the deed to Lapointe, in the reference to "350 yards to the point where McCurdy's Brook meets the western boundary of lands of Ross Hill", is a subordinate description, the principal description being the reference to the adjoiner and, therefore, the reference to the yardage should be rejected.

After considering all of the evidence and the arguments of counsel on the facts and the law, I have come to the conclusion that the boundary line between the plaintiffs and the defendants is that as shown on the plan prepared by Mr. Fulton dated April 5, 1988, and entered herein as exhibit No. 1. The reasons for coming to this conclusion are as follows.

1. The description contained in the Bailey to Budgey deed, which has been in effect since 1860, must be examined carefully. According to the surveyors involved in this case, the description was obviously drafted by a surveyor and a survey of the lands carried out at the time the description was first used. This is fairly obvious from the precise distances and courses contained in the 13 calls of the description, the first 11 of which contain magnetic bearings expressed in degrees and minutes and measurements expressed in chains and links. It is the twelfth call in that deed, "thence by top of said bank and along Robert Barnhill's line to the Cross Road;" which creates the present dispute. Mr. McPhee is of the opinion that "by the top of said bank" means crossing over or passing by the top of the bank and then proceeding in what is now S 18^0 57' 10" W in a straight line, 1,557 feet to the road. I am more persuaded by the plaintiffs' opinion that "by top of said bank" means to follow along the top of the bank

all the way back to the road which, from point "20" on Mr. McPhee's plan, proceeds in a south-westerly direction and then in almost a semi-circular manner going east of the Fulton line and following the brook in its very irregular course. It is certainly more plausible that the surveyor, in 1830, omitted directions and measurements because of the difficulty involved in following the course of the upland bank from point "20" to the road. If the line were intended to be as Mr. McPhee suggests, there is no reason for the surveyor to have omitted the direction and distance.

In his evidence, Mr. McPhee indicated that it would not have presented a major difficulty to the surveyor in 1830 to measure the various courses and calculate the directions of the top of the upland bank. However, given the descriptions of the topography of the land in dispute by all of the witnesses, I have no doubt that the task would have been monumental. The following discussion of the **Dominion Land Survey Manual of Instructions of 1903** contained in **Survey Law in Canada**, 1989, Carswell Company, p. 143 confirms that opinion:

> "The **Manual** required horizontal distance to be actually measured by the surveyor and 'in chaining over uneven ground, should the same be so broken as not to permit of the full chain being levelled, the measurement should be made with such portion thereof as may be easily levelled...' The Gunter's chain used in the early Dominion surveys, as everywhere else in those days, was notoriously inaccurate by its very form and weight, but more serious, the constant pulling progressively lengthened the linkages. This was recognized by the **Manual**. 'The chain is to be tested and corrected, at least every other day during use, by a standard measure which shall have been previously compared and approved by the Surveyor General.' The standards were calibrated wooden poles. The correction was usually done by removing a link, shortening it with a new end loop and replacing it."

Considering that the top of the upland bank, as shown by Mr. McPhee and by Mr. Fulton, and described by many of the witnesses, varies in height from barely discernable to 40 feet high and twists and turns over a course of more than 2,000 feet, it is understandable that it was not described in more precise terms.

This interpretation of the Bailey to Budgey description is also consistent with the plain meaning of the word "by". In the **Shorter Oxford English Dictionary** there are six meanings given for the word "by" when used as a preposition, none of which are remotely close to the meaning being given that word by Mr. McPhee. The first meaning given, when the word "by" is used as a position in space is “at the side or edge of, near, close to” and another is “in the region or general direction of, towards”.

The way in which Mr. Fulton has interpreted the word "by" is also consistent with the way it has obviously been used in the rest of the description, for example, the last call is "thence by said Cross Road to the place of beginning". If the word "by", in that call was meant to be used as going past or

crossing over the road, the course would not proceed to the place of beginning. There are four other places in the deed where the word "by" is used as meaning along or beside.

2. Since the cases, cited by counsel, establish that the court should have the highest regard to evidence of natural boundaries, for they are least likely to be in error and since the bank of a brook is a natural boundary, and the words in the deed, by their common usage, reflect the intention to follow the natural boundary, it should be found to be the boundary.

3. I am further persuaded by the evidence of acts of possession of the owners from time to time on both sides of the bank, that indicates that most of them considered the top of the bank to be the boundary. The evidence I find helpful in this regard is: That of Arthur Ross Hill, who spoke of going on the land in approximately 1936 to assist the then owners, the Barnhills, in cutting firewood; the evidence of both Arthur Ross Hill and Mr. Ellis Bailey, who both indicated that Mr. Bailey purchased firewood from the Hills which he cut from an area west of the top of the bank; the evidence of Angus Ross Hill regarding cutting a Christmas tree many years ago after receiving permission from the Barnhills; and the evidence of Mr. Donald Groves with respect to cutting fence posts for Mr. Barnhill and building a cabin on the side of the bank.

The only former owner who disagrees with the top of the bank as the boundary is Mr. McCallum, who indicated that his father was not sure where the eastern boundary of their lands was so Mr. MacLeod was hired to find the boundary. As we now know, Mr. MacLeod was not a qualified surveyor, and in my opinion, he was in error in placing the line where he did at that time. It is interesting to note that Mr. McCallum indicated that his family did not use any of the land east of the bank.

4. I have come to the conclusion that Mr. McPhee reached his conclusion by either misinterpreting information that was given him by Mr. McCallum and Mr. Connelly or those informants gave him information that was different from their testimony in court. Included in this category are the statements that Mr. McPhee attributed to Mr. McCallum regarding the Barnhills being present at the time when Mr. MacLeod ran the line from point "20" to point "5", as shown on the McPhee plan. In addition, Mr. McPhee was under the impression that the man who did that work, whose name he thought was MacKay, was in fact a qualified surveyor. As well, the information he received from Mr. Connelly appears to have been overstated in terms of its accuracy and clarity. It must also be remembered that Mr. McPhee found no physical evidence on the ground along the line, from point "20" to point "5", to indicate that it had once been established as a boundary line.

5. The Bailey to Budgey description calls for 60 acres, more or less, and the evidence of Mr. Fulton is that if the line were to proceed along the top of the bank, approximately 65 acres would be included, whereas, if the line proceeds as Mr. McPhee indicates, the acreage would be increased approximately 15 acres. Given that the acreage estimate was apparently calculated by a surveyor, some weight should be given factor.

6. I find, based on **Spencer v. Benjamin**, supra, that just prior to Dr. Budgey buying the land from Mr. Bailey, the meeting on the land with Mr. Hill constituted a conventional line agreement. Although Dr. Budgey was not yet the owner of the property, he certainly had an interest in it since it was then subject to his agreement to buy it. Since both Dr. Budgey and Mr. Hill to the location of the boundary line between them, and Dr. Budgey acted upon the agreement by purchasing the land and then selling a portion of it to his friend a few days later, the plaintiffs are now bound by that agreement, although, in retrospect, it appears that they are conceding approximately six acres to their neighbours. I am further satisfied that the boundary line, as shown on the plan by Mr. Fulton, is that which was agreed to between Dr. Budgey and Mr. Hill.

7. In light of the above findings and conclusions, the description in the deed from Budgey to LaPointe and then from LaPointe to McLean does not present an ambiguity. Mr. LaPointe measured the distance along the brook from point "W" as shown on the Fulton plan, to point "A" which, in accordance with the agreement with Mr. Hill was on the eastern boundary of the Budgey lands, and determined that the distance was 350 yards, more or less. Both Mr. Grant and Mr. Fulton came to the same conclusion when they measured the distance. Obviously, Mr. LaPointe, who not a surveyor, made a serious overestimation when estimating the area of the land conveyed by Budgey. If Mr. McPhee's opinion were accepted, it would mean drawing a conclusion that Mr LaPointe, in measuring the course along the brook, was off by approximately 176 yards. It is more likely that he was in error in calculating the acreage than the distance. If *falsa demonstratio* applies to this description, it is the acreage statement which is wrong.

In determining the boundaries of the land, as described in the deed from Budgey to LaPointe, obviously the intention of the grantor is an important factor, and since the grantor in that deed, Dr. Budgey testified that the boundaries were intended to be as shown by Mr. Fulton, that evidence is very persuasive.

For these reasons, I shall order that the plaintiffs are entitled to the declaration sought, that is, that the boundary between them and the defendants is as shown on the plan dated April 5, 1988 by Mr. Fulton. I therefore find, that the defendants are trespassing upon the lands owned by the plaintiffs and shall order that they remove their possessions from the plaintiffs' land. In light of the fact that the defendants have two mobile homes on the land, I assume they will require good weather and dry land to comply with the order, so they shall have until July 31, 1991 to remove all their belongings from the plaintiffs' land. After July 31, 1991, the defendants will be enjoined from trespassing on the lands of the plaintiffs.

Since the plaintiffs did not lead any evidence with respect to damages suffered by the trespass, that aspect of their claim is dismissed. The plaintiffs shall be entitled to the costs of this action and, for that purpose, I find that the amount involved in accordance with the tariffs is $20,000 on scale 3, that is, the plaintiffs are entitled to the amount of $2,625 costs plus taxable disbursements.

Judgment for plaintiff.

K.W. ROBB & ASSOCIATES LIMITED (appellant) See 101 N.S.R. (2d) 216
v. HER MAJESTY THE QUEEN (respondent)
Nova Scotia Supreme Court Appeal Division
Hallett, Matthews and Freeman, JJ.A.
February 12, 1991.

A land surveyor had prepared profiles and cross sections for roads shown on a tentative subdivision plan. He was charged with unauthorized practice of engineering and convicted in the Provincial Court. The land surveyor appealed.

The Appeal Court reviewed the respective definitions of "engineering" and "professional land surveying" under the Acts. The Crown argued that land surveying should be restricted to the measurement of existing boundaries. The land surveyor argued that the work was necessary in order to confirm that the proposed road could actually be constructed within the boundaries shown on the plan. The Court of Appeal stated that both professions might have input into road design - land surveying at a preliminary stage and engineering at a more detailed design stage. The Court found that the line between the two functions had not been clarified by the Legislature or by long standing practice. Given this lack of certainty, the Crown was left with the burden of proving beyond a reasonable doubt that the land surveyor had crossed the line.

The Court of Appeal found that the work done by the land surveyor at the tentative plan stage was "simply making proposals which the engineer may or may not follow at the final stage." The Court found that the Crown had not met the burden of proving beyond a reasonable doubt that the work done by the land surveyor had fallen within the definition of engineering and the appeal of the land surveyor was allowed.

K.W. ROBB & ASSOCIATES LIMITED (appellant) v. HER MAJESTY THE QUEEN (respondent)
Nova Scotia Supreme Court Appeal Division
Hallett, Matthews and Freeman, JJ.A.
February 12, 1991.

The issue in this appeal is the line between the statutory authority of land surveyors under the **Land Surveyors Act**, R.S.N.S. 1989, c. 249 and that of civil engineers under the **Engineering Profession Act** R.S.N.S. 1989, c. 148.

The appellant, a land surveyor, prepared the road profiles and cross sections which were included with plans submitted by his client as part of an application for tentative approval of a subdivision under the Halifax County subdivision bylaw. He was convicted in Provincial Court on a charge of carrying out "the application of engineering by designing a transportation system or a part thereof" contrary to s. 20(a) of the **Engineering Profession Act**. The actual offence under s. 20(a) is the unauthorized practice of professional engineering, a particular instance of which was alleged in the information. The conviction was upheld in an appeal to the County Court.

Section 2(g) of the **Engineering Profession Act** defines "engineering" as follows:

> "2(g) 'engineering' means the science and art of designing, investigating, supervising the construction, maintenance or operation of, making specifications, inventories or appraisals of, and consultations or reports on machinery, structures, works, plans, mines, mineral deposits, processes, transportation systems, transmission systems and communications systems or any other part thereof;"

The dictionary meaning of "designing" is extremely broad, and with respect to a part of a transportation system could include the crudest sketch of the sidelines of any proposed road. Obviously, everything that may constitute road design is not within the exclusive domain of professional engineers. In the full context of the **Act**, the meaning must be limited to the application of the special skills of the engineer to the designing of transportation systems by applying engineering principles for engineering purposes, that is, with a view to eventual construction.

"Professional land surveying" under s. 2(j) of the **Land Surveyors Act** means...

> "the advising on, the reporting on, the supervising of and the conducting of surveys to determine the horizontal and vertical position of any point and the direction and length of any line required to control, establish, locate, define or describe the extent or limitations of title."

The Crown has urged that the practice of land surveying should be confined to the measurement of existing features of the landscape, including boundaries. In laying out subdivisions, a land surveyor should start by having a professional engineer establish centre line profiles for proposed roads. With respect, this approach is too narrow and leaves out of account the traditional role of the land surveyor in proposing new boundaries and laying out road allowances, a role which can only be diminished by the clear language of a statute. It may be noted, for example, that s. 11(1)(a) of the **Public Highways Act** deems "all allowances for highways made by surveyors for the Crown" to be common and public highways.

The appellant argues that he had to prepare the profiles and cross-sections in order to show that a road could be built within his proposed road allowance limits to specifications published by the Nova Scotia Department of Transportation. This argument would suggest that there is an engineering aspect of road design for purposes of construction, and a land surveying aspect of road design for purposes of location. There may be a semantic alternative, if it could be said that whatever a surveyor does to position a proposed road is not really road design. But that places an artificial strain on the ordinary meaning of "design". The two **Acts** will support an interpretation that both land surveyors and engineers are involved in road design, surveyors in a rudimentary, preliminary way for the surveying purpose of locating road allowances, engineers in a much more complex and specific way for the engineering purpose of road construction. Obviously, there is a gray, overlapping area of some magnitude between the two professions.

The demarcation line should long since have been determined between the two professions by negotiation, fixed by regulation or statutory amendment, and settled by practice. In the absence of such a boundary line the Crown is faced with a task of no small difficulty in establishing beyond a reasonable doubt that it has been overstepped.

The definition of engineering in s. 2(g) of the **Engineering Profession Act** of the was considered with respect to the design of an electrical system by Jones, J.A., in **R. v. O'Malley Electric Ltd.** (1987), 77 N.S.R.(2d) 344; 191 A.P.R. 344 (C.A.). He cited with approval the decision of McLachlin, J., of the British Columbia Supreme Court in **Brough Marine Consultants Ltd. v. Aqua Terra Flotations Ltd.**, 18 D.L.R. (4th) 217:

> "...it is necessary to set out certain principles of construction applicable to ss. 1 and 21 of the (British Columbia) **Engineers Act**. First, monopolistic provisions in statutes such as the **Engineers Act** are to be strictly construed. In **Laporte v. Que. College of Pharmacists** [1976] 1 S.C.R. 101; 23 C.C.C.(2nd) 45; 58 D.L.R.(3d) 555; 10 N.R. 602, de Grandpre, J., reaffirmed the principle enunciated by Taschereau, J., in **Pauze v. Gauvin** [1954] S.C.R. 15 [at 18]:

[Translation]

'The status creating these professional monopolies, sanctioned by law, access to which is controlled and which protect their members in good standing who meet the required conditions against any competition, must however be strictly applied. Anything which is not clearly prohibited may be done with impunity by anyone not a member of these closed associations.' "

"Secondly, the provisions of the **Act** must be interpreted in accordance with their primary purpose, which is the protection of the public, particularly, public safety: **Advance Giophysics Ltd. v. Acheron Mines Ltd.** (N.P.L.) [1973] 1 W.W.R. 358; 32 D.L.R.(3d) 518, at 520 (B.C.S.C.)."

"With respect I think it is important to emphasize the public interest factor particularly in relation to the engineering profession."

Jones, J.A., said the definition of engineering in the Nova Scotia **Act** "must be read having regard to the objects of the **Act** and in particular that engineering means the science and art of designing and supervising construction by persons who through education and training are skilled in the principles of engineering. The legislature intended that it was necessary in the public interest to have those works designed and constructed under the supervision of professional engineers."

In the **O'Malley** case an electrical contractor was convicted under s. 20(a) of the **Engineering Profession Act** for designing and supervising the actual construction of an electrical system.

In the present case the plans related to tentative subdivision approval only. There are three stages: (1) preliminary approval, which can be based on a rough sketch requiring no professional preparation, (2) tentative approval, and (3) final approval, which requires detailed engineering drawings signed and sealed by a professional engineer. Requirements for the tentative stage include a boundary survey, a survey plan showing the proposed lots, and a centre line profile of proposed roads. In addition, the Department of Transportation requires road cross-sections at this stage. The bylaws do not specify whether tentative road profiles and cross-sections must be prepared by a professional engineer rather than a land surveyor.

The owner, Al Deveau, testified that he hired the appellant "to survey those lots and to do the designing. whatever it would take, to conform to those lots so I would get, you know, the maximum of ... the idea basically was to get the maximum lots out of it. That's what I try to do, that will conform to the bylaws of the county."

In direct examination the following questions and answers were given:

"Q. And did you hire Mr. Robb to lay out the roadway as well ...?".

"A. Not particularly. It was basically to ... no, I suppose he had to do some ... you know, some sketch there so the lots would fit properly."

A drainage plan was submitted to the Municipality as part of Mr. Deveau's application. He said Kenneth Robb, apparently the principal of the appellant, told him he was not an engineer and was not allowed to design a drainage plan, so he referred him to a professional engineer whom Mr. Deveau engaged to prepare it.

Even the location of roads on a tentative plan, measured on a horizontal plane, might fit a definition of road design, but that appears to have excited little concern. What apparently led to the charge was the inclusion of the centre line profile and cross-sections of the road. These are measured on the vertical plane; both go beyond existing conditions and show the ground altered by cutting, filling and ditching for the proposed road. The trial judge, Her Honour Judge Frances K. Potts, found these to be part of a transportation system consisting of more components than simply a road. She found it met Department of Transportation specifications, which required the application of engineering principles.

Judge Potts stated:

"...it seems to me whether or not you apply engineering in a limited sense or an extended sense the question is whether or not there has been the application of engineering principles. It seems to me that given the evidence with respect to the Department of Transportation Specifications, and there's no question that those specifications were relied on and had to be relied on in determining the proposed centre line profile, I would find that under the circumstances and although only in a very limited way that K. W. Robb & Associates in preparing the plans which were tendered here as an exhibit referable to Les Collins Avenue are indeed a design of a part of a transportation system and that in so doing K. W. Robb & Associates carried out the application of engineering."

With respect, merely determining whether there has been an "application of engineering principles" is not the test. The burden on the Crown is to prove, not that the appellant performed certain acts which might be classified as road design or the application of engineering principles, but that he did so in a manner that constituted the practice of professional engineering. In order to do so it must show that the acts the appellant performed went beyond what was reasonably necessary under the **Land Surveyors Act** for locating a road allowance and thus fixing lot boundaries on a plan intended for tentative subdivision approval, and amounted to the design of a road for construction purposes.

That seems far removed from the purpose of plans for tentative approval, with their emphasis on locations and dimensions of various features of the subdivision or its environment. Under s. 7.4(a)(iii)

such plans "must be accompanied by two copies of the plan showing the centre line profiles of the proposed public streets or highways or proposed private roads".

The bylaw does not require that the profile submitted at the tentative stage be prepared by an engineer, perhaps because of the onerous requirements for the engineering drawings needed for final approval.

Plans submitted for final approval must, under s. 9.6, be accompanied by engineering drawings showing existing and proposed public streets or highways and private roads within the proposed subdivision, and including plans, design calculations, profiles, cross-sections, details and specifications. In addition, s. 9.7 requires that the engineering drawings include information relating to roads, drainage and services vastly more complex and specific than the road profile required with the tentative plan. The engineering drawings and design must be signed and stamped by a professional engineer. While the engineer would presumably make use of the surveyor's measurements, he would not be bound by anything the surveyor proposed for tentative approval, including the road profiles and cross-sections. It is difficult to see how the public interest would be protected by a requirement that the profiles and cross-sections submitted with the tentative plans be prepared by an engineer as well.

A surveyor has a duty to his client to establish the location of roads as accurately as possible, he must be aware that the subdivision approval his client seeks depends on the approval of the proposed road locations by the Department of Transportation. He must take Department of Transportation specifications for roads, the so-called "blue book", into account to the fullest extent of his ability. Those specifications, which are necessarily based on engineering principles, are public information, prepared in nontechnical language. Any member of the public, to say nothing of a surveyor, is entitled to consult them and treat them as guidelines in the early planning stages of various enterprises. Indeed, Crown evidence established that developers are required to be familiar with the contents of the book and to adhere to its requirements. If the surveyor ignores them, the location of roads on his plans, and the tentative boundaries of proposed lots, may become merely so many lines on waste paper.

At the tentative approval stage the surveyor is simply making proposals which the engineer may or may not follow at the final stage. The more closely the surveyor anticipates the engineer's requirements, the better the chances that the road allowances on the tentative plans will not have to be changed. If the engineer finds the terrain in the proposed road allowance will not support construction, the surveyor may be faced with resurveying the whole subdivision.

It was explained in the evidence that the Municipality forwards copies of plans at the tentative approval stage to the Department of Transportation to determine the answer to this question:

> "Does the private road, as shown on the attached subdivision plan, meet all the applicable right of way alignment and gradient requirements of the Department of Transportation?"

The evidence of Ian Foote, divisional engineer for the Department of Transportation, was that at the tentative approval stage the Department was not interested in criteria of road construction: "we're just looking for the geometry on the road". However a cross section and profile were required "before we give tentative approval of any subdivision road".

Mr. Foote further stated that for proposed public roads, "... we require cross-sections to prove that the road can be built within the right of way that he's going to eventually deed over to us.

In the present case the Crown must show that the surveyor went beyond what was necessary to establish the location of subdivision roads with the greatest degree of accuracy within his ability for the purpose of defining the limitations of title of the proposed lots. That is, it must prove that he went beyond the authorization in s. 2(j) of the **Land Surveyors Act** in preparing the profiles and cross sections and practiced professional engineering as defined in s. 2(g) of the **Engineering Profession Act**.

It must do so in the absence of evidence that the road locations in the plans prepared for tentative subdivision approval were intended to be acted upon for engineering purposes, construction, as opposed to surveying purposes to locate road allowances, and thereby, lot boundaries or limitations of title. It is relevant that roads cannot be lawfully built within the road allowances on the subdivision plans, no matter how feasible the profile and cross-sections show them to be, without final subdivision approval. Final subdivision approval is not possible without engineering drawings signed and sealed by an engineer.

The burden is on the Crown to prove beyond a reasonable doubt that the appellant was practicing professional engineering in the manner alleged. On the evidence before the court it must be doubted that a properly instructed jury, acting judicially, could have reached that conclusion, beyond a reasonable doubt.

In effect, this is a finding for the appellant on the second of his three grounds of his appeal from the County Court, which is as follows:

> "Did the learned County Court Judge on Appeal err in law insofar as he failed to overturn the learned trial Judge's determination that the Appellant's actions were not lawful and authorized by the **Land Surveyors Act**, R.S.N.S. 1989, c. 249?"

I would allow the appeal and set aside the conviction and fine.

Appeal allowed.

K.W. ROBB & ASSOCIATES LIMITED and K.W. ROBB (applicants) v. ASSOCIATION of NOVA SCOTIA LAND SURVEYORS and GRAEME LEE, FLORA LEE, L. MARION GATES, ROSS SHOTTON, PATRICK GARETY and HEATHER O'BRIEN (respondents)

See 101 N.S.R. (2d) 382

Nova Scotia Supreme Court, Trial Division
Tidman, J.
December 4, 1990

The applicants had applied to the Court for an order restraining the Complaints Committee of the Association of Nova Scotia Land Surveyors from considering a series of complaints filed by the other respondents. The Lees had originally filed a complaint against Robb which had been dismissed by the Complaints Committee on a technical ground. Subsequently, the Lees had re-filed their complaint and some of their neighbours (Gates, Shotten, Garety and O'Brien) had filed complaints against Robb based on the same fact situation.

Robb argued that the principles of *res judicata* or estoppel should apply to prevent the Association from considering the complaints. *Res judicata* is a principle of law which provides that once a matter is resolved, it should not be re-considered. Estoppel as applied here is a similar concept in that Robb argued that since the Association had stated that it would not consider the original complaint, it should not be permitted to re-consider it. Robb also argued that the proceedings violated his rights under the **Charter of Rights and Freedoms**. The complaints were based largely on testimony of Robb which had been given at a civil action over a boundary. Robb argued that Section 13 of the **Charter** provided that no testimony given in one proceeding should be used against an individual in a subsequent proceeding.

The Court rejected all of these arguments. The Judge held that since the initial complaint had been dismissed on a technical ground, its merits had not been considered by the Complaints Committee. Thus, neither *res judicata* nor estoppel would apply. As to the Charter argument, the Judge held that the Court would not stop the proceedings at the Complaints Committee stage, but could always review the whole matter following the completion of the discipline process to ensure that the principles of natural justice had been followed.

K.W. ROBB & ASSOCIATES LIMITED and K.W. ROBB (applicants) v. ASSOCIATION of NOVA SCOTIA LAND SURVEYORS and GRAEME LEE, FLORA LEE, L. MARION GATES, ROSS SHOTTON, PATRICK GARETY and HEATHER O'BRIEN (respondents)
Nova Scotia Supreme Court, Trial Division
Tidman, J.
December 4, 1990

This is an application to restrain the Complaints Committee of the Nova Scotia Land Surveyors Association, one of the respondents, from further dealing with complaints made by the remaining respondents against the personal applicant, Mr. Robb.

The personal applicant, an officer and director of the corporate applicant, was retained to do survey work by one Mr. Banks in connection with a land boundary dispute between Mr. Banks and his neighbours, Dr. and Mrs. Lee, two of the respondents herein. The boundary dispute was settled during trial. Following trial, Dr. and Mrs. Lee registered apparently several different written complaints regarding the professional conduct of Mr. Robb in connection with his survey work done in preparation for the trial. The complaints were directed to the Executive Director of the Association of Nova Scotia Land Surveyors. The Complaints Committee of the Association dismissed the complaints and so informed the Lees by letter dated June 28, 1989, which stated that the complaint was dismissed on "procedural grounds". The letter went on to explain the procedural grounds by stating:

> "Over the course of the investigation we received from you several packages of documents. We have just lately discovered that they all had covering letters dated December 18, 1988 that differed in content. As these letters significantly differed in the substance of the allegations made against Mr. Robb, we had no choice but to dismiss the complaint."

Following that decision of the Complaints Committee, the Lees registered a further complaint against Mr. Robb with the Association arising out of the same subject matter. They also advised other neighbours that their, as well as the Lees' property lines, had been altered as a result of. the Robb survey. The neighbours, who are the four remaining respondents, also registered written so-called complaints with the Association regarding Mr. Robb's professional conduct in connection with the survey.

The Association has indicated to Mr. Robb that its Complaints Committee intends to deal with the complaints.

The applicants now apply to this court for relief which would restrain the Association from further acting on the complaints. Specifically they seek:

(a) An order in the nature of prohibition proscribing the Association of Land Surveyors Complaints Committee from proceeding with the complaints;

(b) A declaration that the defence of res judicata is available with respect to the complaints of the named respondents sought to be entertained by the Complaints Committee of the Association of Nova Scotia Land Surveyors;

(c) A declaration that the Association of Nova Scotia Land Surveyors is estopped from considering the aforementioned complaint;

(d) A declaration that the Association of Nova Scotia Land Surveyors exceeds its jurisdiction and/or operates contrary to statute and/or operates contrary to the attention [sic] of the Act, insofar as it considers the aforementioned complaints;

(e) An order for costs.

Mr. Coles, acting for the applicant, basically sets out two positions:

1. That the complaints made to the Association of Nova Scotia Land Surveyors against his client have been previously dealt with by the Association and on the principles of res judicata or estoppel, the Association is prevented from again dealing with them; and failing success in that position;

2. That s. 13 of the **Canadian Charter of Rights and Freedoms** dealing with self-incrimination, prevents the Association from dealing with the complaints.

In his first position, Mr. Coles argues that although this application deals with so-called complaints by respondents which have not previously been dealt with by the Association, those complaints "gather their information from Mr. and Mrs. Lee", and therefore since the subject matter of their so-called complaints is the same as that of the Lees, the same arguments of estoppel and res judicata apply as well to those so-called complaints. I use the term so-called complaints because the second string to Mr. Cole's bow is that, in any event, the so-called complaints of the other personal respondents are not complaints at all, but rather only letters seeking information from the Association.

I agree with Mr. Stern when he says letters from laymen to an Association regarding the conduct of its members, which all the so-called complaints in this case are, do not have to be precisely termed as complaints in order to be so considered by the Association. The letters sent to the Association by the respondents, other than the Lees, in my view, were correctly considered by the Association to be complaints.

I agree with Mr. Coles, however, that these complaints deal with the same subject matter as complaints by the Lees, that is, Mr. Robb's professional conduct in relation to the same land survey and thus agree that his arguments of res judicata and estoppel in relation to the Lees' complaint apply equally to the complaints of the other personal respondents.

The Association of Nova Scotia Land Surveyors is governed by the **Land Surveyors Act**, which is an act of the Provincial Legislature. The **Act** states that the Association is, among other things, to govern the profession in order to serve and protect the public interest. The **Act** provides specifically how the Association is to deal with complaints made by members of the public against its members.

Two separate committees deal with complaints. A complaint is first vetted by a Complaints Committee. That committee has the power to investigate the complaints and after doing so, it must either dismiss the complaint or advise the complainant that the complainant may proceed further.

If the complainant wishes to proceed, the complaint is then dealt with by the Discipline Committee. If the Discipline Committee finds the member guilty of misconduct, it may punish the member in a number of ways set out in the **Act**, including by reprimand, by suspension, or by cancelling the member's membership in the Association.

The Discipline Committee is also given power under the **Act** to hold hearings, require witnesses to give evidence under oath, order the production of any document, and to certify contempt. The rules of evidence apply at its hearings and counsel may be present. Witnesses may be examined and cross-examined, the hearings are recorded and the right is given to appeal the Committee's decision.

Generally then, as Mr. Stern points out, the Complaints Committee investigates and the Discipline Committee hears and adjudicates.

The purpose of the prerogative writs, which include the writ of prohibition sought by the applicant, was stated by Atkin, J., in **R. v. Electricity Commissioners** [1923] All E.R. 161, and expanded upon by Disbery, J., in **R. v. Saskatchewan College of Physicians and Surgeons et al.** (1966), 58 D.L.R.(2d) 622. At p. 636, Disbery, J., stated:

> "With the continuing development in more recent times of a multiplicity of tribunals, boards, commissions, local authorities and other statutory bodies and officials, and clubs, professional and other associations and trade unions (all of which are hereafter referred to as 'tribunals') who exercise judicial or quasi-judicial powers, the use by this court of these Crown writs has been extended to keep such tribunals within the proper limits of their jurisdiction."

I agree with Mr. Stern's submission that prohibition is not an appropriate remedy for actions of the Complaints Committee, since it does not exercise "judicial or quasi-judicial" powers.

Mr. Coles argues that the power to determine, which the Complaints Committee does possess, is a "judicial or quasi-judicial" function. Again, however, I agree with Mr. Stern's submission that there is a distinction between the power to investigate and determine and the power to investigate, determine and adjudicate, and that it is the power to adjudicate which is the "judicial or quasi-judicial" function.

I thus find that the Complaints Committee of the Association is not a "judicial or quasi-judicial" tribunal and consequently will not grant an order in the nature of prohibition proscribing that Committee from proceeding on the complaints.

Although there is authority which indicates that the doctrine of res judicata is not applicable in relation to administrative bodies, which the Complaints Committee is, the remedy I find is nonetheless not warranted on the merits.

The first complaint of the Lees was dismissed because the Complaints Committee could not determine the basis for the complaint. The basis for the complaint was subsequently made clear to the Committee by the Lees further complaint. The Committee as a result has now decided to investigate their complaint as well as the complaints of the other respondents concerning the same subject matter. The complaints have not been dealt with on their merits and therefore the principle of res judicata would not apply. Neither, for the same reasons, would the principle of estoppel apply, since the original complaint was dismissed only on procedural grounds.

I thus do not accept the first position put forward by Mr. Coles.

In regard to Mr. Coles' second position, he submits that the information upon which the complaints are based comes from evidence given by Mr. Robb in the civil action brought against him by the Lees, and thus, by virtue of s. 13 of the **Charter**, it cannot now be used against him by the Association.

Section 13 of the **Charter** provides:

> "A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or the giving of contradictory evidence."

Mr. Stern submits that what the Complaints Committee has done or proposes to do, is not a proceeding in the sense used in the **Charter** section. He argues that the Complaints Committee seeks only to continue an investigation which is not a formal proceeding as contemplated by the section, and thus the section of the **Charter** does not apply.

I tend to agree with Mr. Stern, but in any event, I would not interfere at this point with the proceedings of the Association.

In my view, the situation here is similar to that in **Ripley v. Investment Dealers Association of Canada et al.** (1988), 86 N.S.R.(2d) 434, 218 A.P.R. 434, where a committee of the Investment Dealers Association had called a formal hearing to deal with charges made against Mr. Ripley. In that case, the Trial Division of the court had granted injunctive relief restraining the Association from proceeding with the hearing.

In reversing the grant of injunctive relief, Hart, J.A., stated at para. 9:

> "This court should be reluctant to interfere with the affairs of a domestic tribunal, such as the IDA. It should be permitted to carry on with the procedures adopted by its members. Should it fail to follow the course of natural justice, the respondent has his remedies to pursue. It would be premature at this stage that the respondent would not receive a fair hearing under the Constitution of the Association of which he is a member."

There are no facts here which compel the court to interfere, at this stage, with the affairs of the Surveyors Association and consequently I decline to do so.

If at the conclusion of the Association's proceedings it is considered that the Association failed to follow the course of natural justice, the applicants will have their remedies to then pursue.

The application is therefore dismissed with costs but only to the respondent Association.

Application dismissed.

MARY E. BARTLETT and MARGARET A. ARMENANTE (plaintiffs) v. WILLIAM JOHNSON and DEBORAH JOHNSON (defendants) See 105 N.S.R. (2d) 159

Nova Scotia Supreme Court, Trial Division
MacDonald, J.
April 3, 1991.

This was an application by the Plaintiffs to prevent the Defendants from continuing construction of a roadway across the property of the Plaintiffs. The Defendants owned a four acre parcel which was accessed by way of a right of way across the Plaintiffs' land. The documents which created the four acre parcel were not specific as to the exact location of the right of way. The Defendants had apparently taken it upon themselves to pick a location for the right of way which was convenient for them but apparently ran very close to the house on the Plaintiffs' land.

This report deals with an application for an injunction prior to trial. Such applications are often made with affidavit evidence only and therefore there may be a dispute over the facts and the reports are of little help in sorting out general principles of law. Here, the Judge did make some comments that are helpful.

The Judge stated that in circumstances where the location of a right of way was not clearly defined by a deed, the parties who had the right of way did not have the right to construct one where they pleased. The Judge stared that the first point of enquiry would be whether the parties to the transaction that had first created the parcel with the benefit of the right of way had decided on it's location. If so, then that location was where the right of way would go. If not, then the location would have to be decided in conjunction with the owners of the burdened land.

MARY E. BARTLETT and MARGARET A. ARMENANTE (plaintiffs) v. WILLIAM JOHNSON and DEBORAH JOHNSON (defendants)
Nova Scotia Supreme Court, Trial Division
MacDonald, J.
April 3, 1991.

This is an application for an interim injunction to prevent the defendants, the Johnsons, from doing further work or using a new right of way or road which is being constructed by the Johnsons over land of the applicants.

These property disputes between neighbours give rise to greater controversy, as well as to greater expense, than any satisfaction to anybody. It is a matter that, at least on an interim basis, could be better dealt with by reasonable negotiations. That not being the case, the court must deal with it on the affidavit presented and the arguments made.

The background to this dispute as related to the acquirements of the respective property rights is, I believe, as follows: as to the Johnson property - they received from one, Archie MacKinnon, four acres of land and a right of way, which right of way is described as follows:

> "Bounded on the West by the lands of Allan Eric MacKinnon, along with a right of way from the Highway leading from Hays River to Brook Village to be shared in common with Allan Eric MacKinnon and Archie MacKinnon their heirs and assigns as a means of ingress and egress and containing four acres of land, more or less." (emphasis added)

The Johnsons received that deed in September, 1990. Archie MacKinnon received the land from Allan MacKinnon in October, 1974.

The Bartletts (as I'll call them) received their property also from the same Allan MacKinnon, the grantor to Archie MacKinnon, in May of 1984; and reserved from the lands deeded from Allan MacKinnon to the Bartletts were lands which had been transferred to a Banks and then to Archie MacKinnon (which is the four acres).

That is, then, that the right of way (described above) which is undefined started with Allan MacKinnon, and went from Allan MacKinnon down to the Johnsons, with Archie MacKinnon as an intermediary. And insofar as the Bartletts are concerned, the conveyance from Allan MacKinnon to the Bartletts was subject to that right of way - an undefined right of way. And, as you can see, whoever drafted that conveyance planted the seeds of later litigation which is now taking place.

The affidavits filed are somewhat contradictory as to location of the right of way, which is the whole question here. In fact, I am of the opinion without making any determination as to the contradictory aspects of the affidavits, there probably never was an identifiable right of way into the four acre lot

deeded to Archie MacKinnon, and then to the Johnsons. I mean identifiable in the sense of being a used road, right of way of some kind. However, on the evidence before me I cannot resolve that. I will quote from Matthews, J.A., of our Appeal Court in **Gateway Realty Ltd. v. Arton Holdings Ltd. et al.** (1990), 96 N.S.R.(2d) 82; 253 A.P.R. 82 (C.A.). He said at p. 84:

> "Beetz, J., in **Metropolitan Stores** wrote of the difficulty or impossibility for a court to decide the merits at an interlocutory stage at p. 130:
>
> > 'The limited role of a court at the interlocutory stage was well described by Lord Diplock in the **American Cyanamid** case, supra, at p. 510:
> >
> > "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.'"'

There is no doubt that the respondents had the right to claim reasonable access to their four acre lot over the property of the applicants. But they do not have the right to arbitrarily determine the location of that right of way. If the location of a right of way was agreed to between Archie MacKinnon and Allan MacKinnon, when it first arose, then this would be the right of way which would have to be accepted by the parties before me. However, I cannot decide where that right of way was at this stage.

To obtain an injunction, various tests have been applied by our courts and this is well reviewed by Davison, J., of this court in **J.W. Bird and Co. Ltd. v. Levesque et al.** (1988), 82 N.S.R.(2d) 435; 207 A.P.R. 435 (T.D.), at p. 439 where he quotes from, I believe, Hallett, J. (as he then was):

> "... I would suggest, with respect, 'ordinarily' or in most cases where a party seeks intervention which restricts the rights of another before a full trial on the issue, the burden on that party should be to advance evidence to indicate a prima facie case."

Now here, of course, the Bartletts are seeking intervention which would restrict the Johnsons before a full trial. But the case above states "which restricts the rights" and that is what I cannot determine is "the rights" as related to location of the rights of way.

The applicants have owned their property for some seven years. It is used, I believe, for a summer residence. There was apparently little or no traffic to the four acre lot. As far as I can gather, without trying to make any definite determination between the contradictions within the affidavits, there was no physical or overt right of way created.

The respondents, the Johnsons, on acquiring their four acre lot in 1990 (with knowledge of their right of way but without any proper information of its location) entered upon the applicants' land and built a road and ditch. As I understand the arguments, there is no dispute about that. They had no right to assume that they could determine where their right of way could be located. The road was not to be determined by putting it where they pleased. And the applicants owning the land on which this work was done have a prima facie right to stop them.

As to the balance of convenience and not knowing the extent to which the right of way might be used, it could be a very great nuisance and aggravation to the Bartletts, having traffic pass a few feet from their door all through summer. On the other hand, I see no reason why the respondents cannot build a new road on what they call the upper side of the barn if they can prove that they have the right of way. If they can prove that they have the right to have a right of way between the barn and the Bartlett house, then that is something that can be properly taken care of in the final action.

As I said in the beginning, it is unfortunate that these matters can't be negotiated between the parties. It would save them a lot of money and a lot of bad feelings. In the event, however, I will say that an order will be made along the lines which I indicated - an injunction will be granted.

There will be no costs, and I say that because the **Rules** were not followed. I was not given the opportunity to make a proper study of these cases, and there will be no costs in the cause. Ordinarily, it would either follow the event or be in the cause. I would suggest that counsel attempt to get the parties to try to agree on what would be a temporary right of way until this matter is decided.

Order accordingly.

ARTHUR C. BACKMAN (appellant) v. ASSOCIATION of NOVA SCOTIA LAND SURVEYORS (respondent) See 106 N.S.R. (2d) 283

Nova Scotia Supreme Court, Trial Division
Davison, J.
July 3, 1991.

The Discipline Committee of the Association of Nova Scotia Land Surveyors had found the appellant guilty of professional misconduct and had ordered that he pay to the Committee its costs and disbursements as fixed by the Taxing Master. The Taxing Master ordered that those costs and disbursements included fees charged by the solicitor hired by the Association to prosecute the discipline matter. The Appellant appealed that part of the Taxing Master's ruling on the basis that the **Land Surveyors Act** did not authorize Committee to be reimbursed for those particular costs.

The Judge reviewed the provisions of the **Land Surveyors Act** and found that there was not clear authorization under it to allow this cost to be passed on to a member found guilty under the discipline procedures. The Judge compared the Act to other professional legislation where there was an explicit power to recover those costs.

The Judge allowed the appeal.

ARTHUR C. BACKMAN (appellant) v. ASSOCIATION of NOVA SCOTIA LAND SURVEYORS (respondent)
Nova Scotia Supreme Court, Trial Division
Davison, J.
July 3, 1991.

This is an appeal from the decision of Arthur E. Hare, Q.C., Taxing Master, dated February 12, 1991.

On March 26, 1990, a formal complaint against the appellant was sworn by Rosalind C. Penfound, secretary of the respondent. The complaint was heard before the Discipline Committee of the respondent on June 8, 1990, which committee subsequently filed a decision and order dated August 13, 1990, wherein it found the appellant guilty of professional misconduct and ordered him to "...pay to the Discipline Committee its costs and disbursements on the investigation as taxed by the Taxing Master."

A hearing before the Taxing Master took place on January 30, 1991, at which time representations were made to the Taxing Master as to the effect of the order of the respondent. The Taxing Master filed a decision on February 12, 1991, wherein he found that the appellant was required to pay the solicitor and clients costs incurred by the respondent in the prosecuting of the complaint against the appellant in addition to any expenses of the Discipline Committee. The bill of costs presented to the Taxing Master included court reporting services and the expenses of the members of the Discipline Committee, including traveling and hotel expenses, the total of which was less than $1,000. The substantial portion of the bill of costs related to legal fees and disbursements of the lawyer who conducted the prosecution in front of the Discipline Committee and the amount sought for these items is approximately $5,500.

During the hearing before me, the solicitor for the respondent advised, and the solicitor for the appellant accepted, the fact that it was the practice for members of the Discipline Committee to receive expenses but that they donated their time for the benefit of the Association.

The governing legislation is the **Land Surveyors Act**, R.S.N.S. 1989, c. 249, which provides for a continuation of the Association of Nova Scotia Land Surveyors and sets out the objects of maintaining ethical and professional standards for the members of the Association.

All authority under the **Act** rests with the Association or its Council. The Council consists of the President and Vice-President, the Minister of Lands and Forest or his appointee and councillors elected from six zones across the province. The Council makes and passes bylaws, subject to the approval of the members of the Association at an annual meeting, which deals with the professional, governmental and financial aspects of the Association.

For the achievement of the Association's objects, the legislation directs the establishment of a Board of Examiners with respect to qualifications, a Complaints Committee and a Discipline Committee. The scheme of the **Act** as it relates to misconduct of its members was to maintain separation between functions of the Complaints Committee and the Discipline Committee. Provisions which relate to the Complaints Committee are under the general heading of "Offenses". The procedure with respect to the operation of the Discipline Committee is under the heading of "Discipline".

For the purpose of this proceeding, the relevant sections of the **Act** are:

> "Complaints Committee Established
>
> 24(1) There shall be a Complaints Committee appointed by Council, whose composition and function shall be provided for by Council in the bylaws."
>
> "Conduct May Be Investigated
>
> (2) The conduct of any member, holder of a certificate of authorization or student member, may be investigated by the Complaints Committee upon the receipt by the Secretary from any complainant of a written statement alleging, on the part of the person being complained of, conduct which may constitute professional misconduct or misrepresentation."
>
> "Duties Of Complaints Committee
>
> (3) Upon the Secretary receiving a complaint as described in subsection (2), the Complaints Committee shall
>
> > (a) investigate the complaint; and
> >
> > (b) where it is satisfied that the evidence disclosed by the investigation, which might reasonably be believed, could not support a finding of professional misconduct or misrepresentation, order the dismissal of such complaint and accordingly notify the complainant and the person whose conduct is being investigated; or
> >
> > (c) where it is satisfied that there is some evidence disclosed by the investigation, which might reasonably be believed, which could support a finding of professional misconduct or misrepresentation, advise the complainant that the complainant may either

(i) request the Association to appoint a person to swear a complaint under oath of and on behalf of the Association and in the name of the Association in which case the Association shall have the responsibility of carrying the expenses and costs of proceeding with the complaint, or

(ii) swear a complaint under oath in which case the complainant and not the Association shall have the responsibility of carrying the expenses and costs of proceedings with the complainant."

"Election By Complainant

(4) Where a complainant has been advised by the Complaints Committee of the provisions available to the complainant pursuant to clause (c) of subsection (3), the complainant may elect to proceed with the complaint either pursuant to subclause (i) or subclause (ii) of clause (c) of subsection (3)."

"Association To Bear Costs

(5) Where a complainant elects to proceed with the complaint pursuant to subclause (i) of clause (c) of subsection (3) and so notifies the Complaints Committee, the Chairman of the Complaints Committee shall notify the Secretary and the Association shall have the responsibility of carrying its own costs and expenses of proceeding with the complaint."

"Complainant To Bear Costs

(6) Where a complainant elects to proceed with a complaint pursuant to subclause (ii) of the clause (c) of subsection (3), the complainant may swear a complaint under oath and file the complaint with the Secretary and the complainant shall have the responsibility for the complainant's costs and expenses of proceeding with the complaint."

"Council To Appoint Person To Swear Complaint

(7) Upon the Secretary being notified by the Chairman of the Complaints Committee of a request made by a complainant pursuant to subsection (5), the Secretary shall notify Council and Council shall appoint a person to swear a complaint under oath of and on behalf of the Association and to file such complaint with the Secretary."

"Secretary To Deliver Complaint

(8) Upon a complaint under oath being filed with the Secretary, whether or not sworn by a person appointed by the Association, the Secretary shall deliver the complaint to the Discipline Committee to be heard on the questions of professional misconduct or misrepresentation and discipline."

"Complaints Committee To Investigate

(9) No complaint with respect to professional misconduct or misrepresentation shall be referred to the Discipline Committee unless the complaint has been investigated by the Complaints Committee, pursuant to subsection (3)."

.....

'Discipline Committee Appointed

25 There shall be a Discipline Committee appointed by the Council, and the composition and function of the Discipline Committee shall be provided for by the Council in the bylaws."

.....

"Powers Of Discipline Committee

26(1)(f) direct that, where it appears that the proceedings were unwarranted, such costs as to the Council seem just be paid by the Association to the member whose conduct was the subject of such proceedings;

(g) direct such person to pay to the Discipline Committee its costs and disbursements on the investigation wherein he has been found guilty to an amount to be taxed by the taxing master or fixed by the Discipline Committee and, when fixed by the Discipline Committee, shall not exceed two thousand dollars and such person shall not carry on the practice of professional land surveying until he has made payments of such cost."

The terms of the order of the Discipline Committee in this proceeding was an incorporation of the terms of s. 26(1)(g) when it required the appellant to "pay to the Discipline Committee its costs and disbursements on the investigation". I find these words vague and ambiguous. There is nothing in the **Act** to suggest the Discipline Committee per se would be required to pay any expenses or costs. Only the Association has power by statute to receive funds or incur debts. Furthermore, the word "investigation" is a term more pertinent to the Complaints Committee in the scheme of the legislation.

It is common ground that the monies the respondent now seeks to recover from the appellant were monies spent by the respondent Association for legal fees and disbursements. If it was the intention of the legislators that the Association was to recover its costs and expenses, why did the statute not so stipulate as it did in s. 24(5) where it is provided that the Association shall carry its own costs of proceedings with the complaint?

By virtue of s. 26(1)(f), the Association must bear the costs of the member if the Discipline Committee deems the proceedings against a member to be unwarranted. Yet, if the member is found guilty, the member must pay to the Discipline Committee "its" costs and disbursements.

Can I assume that because the legislation includes the word "costs" that this means legal costs? I posed to counsel the question that if it meant legal costs could I assume that the only legal costs would be the account submitted by the solicitor who "prosecuted" the complaint. The solicitor for the respondent, very fairly, pointed out the possibility of a lawyer being retained solely to advise the Discipline Committee during its deliberations.

I pose these questions to illustrate the difficulties encountered in attempting to interpret the legislation. The legislation is the statute which created the respondent. Why is the language not more precise? For example, a similar discipline scheme can be found in the **Barristers and Solicitors Act**, R.S., c. 30, s. 1 and the legislation leaves no doubt about what can be recovered by the Society from a member following a discipline hearing. I refer to s. 32(9) which reads:

> "Reimbursement Order
>
> (9) The subcommittee may by resolution order a barrister, who has been found guilty of professional misconduct or conduct unbecoming a barrister, to reimburse the Society for (in addition to any moneys which he may be liable to pay under subsection (8) of Section 40) all or some of the costs of the proceedings and preceding investigation, including the reasonable fees and disbursements of any counsel and auditor engaged by the Society for the purpose and, except as the subcommittee may otherwise order, the payment thereof by the barrister shall be a condition precedent to his continuing to practise."

The appellant should receive the benefit of any ambiguity. It is probable the respondent had input or the opportunity to have input in the drafting of the statute but, furthermore, the provision, although compensatory in nature, has penal overtones. In **Royal College of Dental Surgeons of Ontario v. Rival** (1976), 2 C.P.C. 293, the Ontario High Court in reviewing provisions relating to costs in disciplinary proceedings stated at p. 294:

> "It is in effect similar to a penalty section and if it was the intention of the Legislature to render the member responsible for the fees and expenses of the members of the committee, that is to say, the tribunal, then clearer language should have been used."

It is my view, in this case, that if the legislature had intended that a member of the Association, who was the subject of discipline, should be required to indemnify the Association for legal fees on a solicitor-client basis, that intention should have been clearly stated and the doubt should be resolved in favour of the appellant.

The appeal from the decision of the Taxing Master is allowed. The appellant is not required to reimburse the respondent the account of Burchell, MacAdam and Hayman. The appellant shall recover from the Respondent its costs of this appeal in the amount of $500.

Appeal allowed.

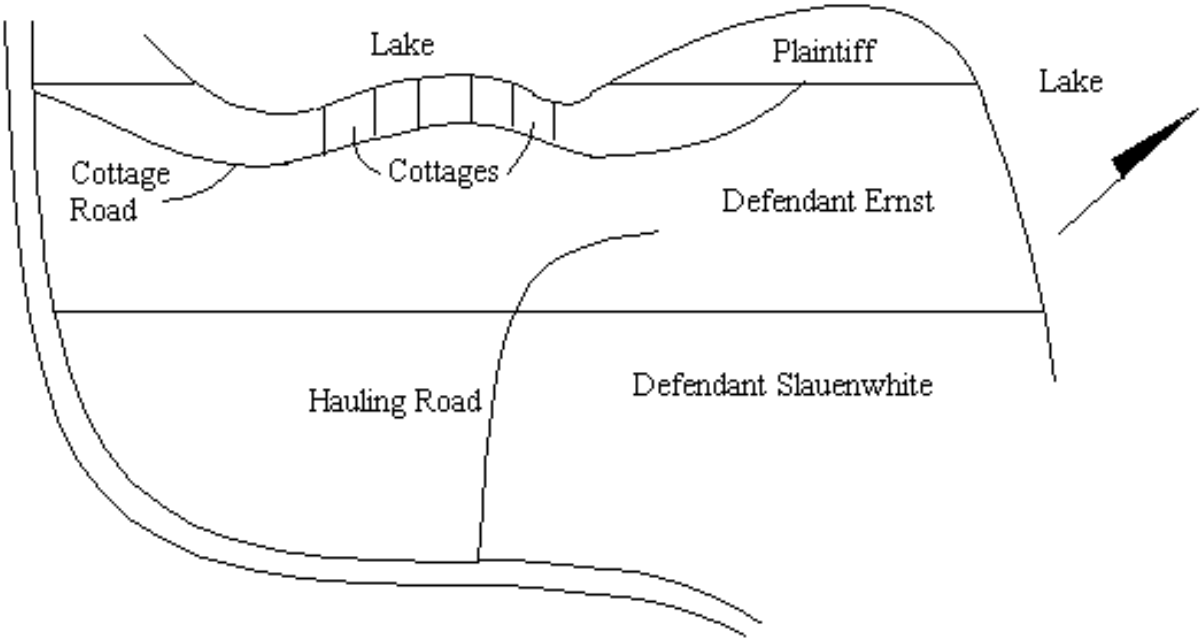
ELDON B. HIRTLE (plaintiff) v. FRANKLYN L. ERNST, THELMA M. ERNST, REGINALD H. SLAUENWHITE, LENA P. SLAUENWHITE and ATTORNEY GENERAL of NOVA SCOTIA (defendants)

See 110 N.S.R. (2d) 216

Nova Scotia Supreme Court, Trial Division
Nathanson, J.
December 19, 1991.

This case dealt with the interesting issue of whether a right of way of necessity could be claimed to a parcel when there was no direct access to the parcel from a public road, but there was access from a lake or river.

The Plaintiff Hirtle applied to the Court under the **Quieting of Titles Act** to have the title to his land on Big Mushamush Lake in Lunenburg County quieted. In addition to the land which he claimed, the Plaintiff also claimed a right of way over the lands of the Defendants Slauenwhite and/or the Defendants Ernst. The lands were configured as shown on the following sketch:



The Plaintiff had no direct access to the Public Highway. He claimed a right of way of necessity. There were two possible land accesses, one over the "Cottage Road" over the lands of the Defendant Ernst and the other over the "Hauling Road" and its extension over the lands of the Defendant Slauenwhite and the Defendant Ernst. Both Slauenwhite and Ernst claimed that the Plaintiff had access to his land by way of the Lake and should not be able to claim a right of way of necessity over their lands.

The Judge reviewed the law surrounding rights of way of necessity. The Judge reviewed many texts which dealt with the issue and found that they indicated that a requirement for a right of way of necessity was absolute inaccessibility. The Judge held that such a statement could be applied to a totally landlocked parcel but was too broad to be applied to a parcel where access could be had by water. The Judge then reviewed many Canadian, English and American cases on the issue and extracted the following points:

- the concept of right of way of necessity is based on public policy - that land should not be useless,
- the requirement of absolute necessity has evolved into one of practical necessity, and
- access by water is subject to a number of considerations such as where the use of the waterway would be contrary to law or where it would be impractical to use the water to transport the basic necessities for the use of the land.

The Judge held that in the case before the Court, the Plaintiff's parcel would be rendered useless without a right of way of necessity and that the Lake was not an alternative access to the land. The Judge further found that the provisions of the **Water Act** (now the **Environment Act**) would probably make the use of the Lake by the Plaintiff contrary to law. Finally, the Judge found that the Lake was not of such a character that the Plaintiff could use it to transport the things necessary for the normal use of the Plaintiff's parcel.

The Judge awarded the Plaintiff a right of way of necessity over the "Cottage Road."

Note that the Judge's finding that the **Water Act** precluded the use of the Lake by the Plaintiff is probably incorrect. The **Water Act** and the **Environment Act** could probably not be used to interfere with the right of navigation which is the responsibility of the Federal Government under the Constitution.

ELDON B. HIRTLE (plaintiff) v. FRANKLYN L. ERNST, THELMA M. ERNST, REGINALD H. SLAUENWHITE, LENA P. SLAUENWHITE and ATTORNEY GENERAL of NOVA SCOTIA (defendants)
Nova Scotia Supreme Court, Trial Division
Nathanson, J.
December 19, 1991.

The central issue of this decision is a relatively rare aspect of the doctrine of right of way of necessity, namely, the applicability of the doctrine to land which borders upon water.

To a claim for a certificate of title pursuant to the **Quieting Titles Act**, R.S.N.S. 1967, c. 259 (now R.S.N.S. 1989, c. 382), the plaintiff has joined two additional claims: (1) for a declaration that he is entitled to a right of way or easement over adjacent lands; and (2) for damages for loss of mesne profits, loss of enjoyment of property, and loss of ability to develop his property.

The first additional claim is for a right of way or easement of necessity arising by implication of law or, in the alternative, a right of way or easement arising by prescription. The second additional claim is for damages arising from the alleged refusal of the owners of the adjacent lands to allow the plaintiff free passage over their lands from the time he acquired his property in 1988.

The adjacent land owners do not contest the plaintiff's claim to title, but submit that a right of way or easement has not been established by any accepted means or, if established, they ask the Court to decide who has the right to choose the location and to establish the limits. They also submit that the plaintiff is estopped from claiming damages due to having prior knowledge that no right of way or easement was agreed to.

The Lands

The lands claimed by the plaintiff consist of four acres more or less out of Lot No. 7 Letter D in the Second Division at Lower Northfield, Lunenburg County, bounded and described as follows:

> "On the North West by the Big Lake, on the North East by said Big Lake, on the South West by said Big Lake, and on the South East by lands of Samuel Slauenwhite ..."

This is the legal description set out in the deed by which the plaintiff acquired the property. This description goes on to state that the lands are a portion of 60 acres conveyed in 1860 by Henry Lantz and wife to John H. Ernst and James Ernst by deed recorded in Book 17 page 285.

Chain Of Title

For the purposes of the present action, especially in light of the fact that the Attorney General has filed documents indicating that the Crown has no interest in this matter, it is not considered necessary to review the history of the title of the lands all the way back to the Crown grant. It will be sufficient to go back only to such document of conveyance which is relied on to support an assertion of unity of title which, as will be seen, is an essential prerequisite for a right of way of necessity.

By deed dated August 5, 1829, recorded on October 2, 1829, one James Butler and wife conveyed "in the second division Letter D number seven containing Three hundred Acres ... more or less" to Henry Lantz, Philip Lantz, Jacob Lantz and Adam Lantz. Although there is no formal document of partition on record, subsequent recorded conveyances manifest that the four grantees divided the acreage among themselves. By deed dated October 17, 1838, recorded in Book 11 page 459, Philip, Jacob and Adam Lantz, and their wives conveyed away 225 acres more or less of the 300 acre lot of land. Henry Lantz conveyed his share, consisting of 80 acres more or less, to his two sons, by deeds bearing the same date in the year 1857.

By warranty deed dated July 10, 1857, recorded on February 10, 1858, in Book 16 page 142, Henry Lantz conveyed to his son, Henry, three parcels of land including "part of my share of lot no. 7 letter D second Division being about forty acres more or less, joining Philip Aulenback's land with the small Island in the Lake, being set apart for him for use as the line now stands". By warranty deed bearing the same date, recorded in Book 16 page 160, Henry Lantz conveyed to another son, Alexander, four parcels of land including "part of my share of lot no. 7 letter D second Division being about Forty Acres more or less adjoining James Lowe's land being set apart for him by me as the line now stands between my son Henry".

Three years later Henry Lantz, the son, conveyed 60 acres more or less at Northfield, being part of Lot No. 7 Letter D in the Second Division, to John H. Ernst and James Ernst. In a deed dated December 14, 1860, recorded in Book 17 page 285, this acreage is described as being bounded "on the North West by land owned by Philip Aulenback on the South by land owned by Alexander Lantz and on the North by a certain Lake with small Island in said Lake".

By deed dated April 9, 1900, but not recorded until March 27, 1986, in Book 377 page 1048, John H. Ernst and wife, together with others, conveyed to one Joseph Slauenwhite the four acres more or less at Lower Northfield as described in this decision under the heading "The Lands". A statutory declaration of one Pauline Balcome, dated February 12, 1988, and recorded in Book 419 page 835, indicates that the other persons who executed this deed were the heirs at law of James Ernst.

Joseph Slauenwhite died circa 1930 leaving a will wherein, after a number of small bequests, he devised and bequeathed the residue of his estate to his son, Archibald. Archibald J. Slauenwhite died December 25, 1985, leaving a will wherein he devised and bequeathed his estate to his executor and

trustee to convey cabin lots to specified persons, and to sell other lands and divide the proceeds among specified persons, with the residue of his estate being devised to Harlie M. Slauenwhite, who is named as executor and trustee.

By trustee's deed dated February 16, 1988, recorded in Book 419 page 837, Harold Slauenwhite conveyed the four acres more or less at Lower Northfield to Eldon Hirtle, who is the plaintiff in the present action.

Robert C. Becker, a licenced surveyor of ten year's standing, who was hired by the plaintiff to survey the limits of the land which he acquired from Harold Slauenwhite, and who conducted a survey in March and April 1989, testified at the trial. Two plans prepared by him were entered as exhibits. I accept substantially the whole of his testimony and plans. On the basis thereof and the particulars of the chain of title disclosed in evidence, I find that the plaintiff's lot is a portion of the lands conveyed by Henry Lantz on July 10, 1857, to his son, Henry Jr.; that it lies adjacent to the boundary line which divided the portion of Henry Lantz, Jr. from the portion of his brother, Alexander Lantz; that the location of that boundary line is revealed by evidence of the remains of an old fence line; that the portion of Alexander Lantz is now owned by the defendant, Franklyn Ernst; and that the plaintiff's land is semi-circular in general shape, being surrounded on the west, north and east by the waters of Big Mushamush Lake and bounded on the southeast by the lands of Franklyn Ernst.

I also find that there is a continuous chain of paper title from 1829 to 1988. No person other than the plaintiff has established any claim to title or to possession of the lands adverse to that of the plaintiff. The plaintiff is the only person disclosed to have such a substantial claim and, on the basis thereof, ought to have his title quieted.

The Court is prepared to order that a certificate of title shall issue under the provisions of the **Quieting Titles Act**.

Good practice indicates that it is desirable that a certificate of title should set out a modern description rather than a vague or inaccurate older description. The applicant will arrange for a surveyor to prepare a proper description and to swear an affidavit to the effect that such description describes the same lot as is set out in the applicant's deed and in the statement of claim and as depicted on the plan of survey exhibited at trial. A certificate of title containing the modern description, either alone or together with the one in current use, will then issue.

Access

The portions of land which Henry Lantz, Jr. and Alexander Lantz acquired from their father in 1857 run in a northeasterly direction at right angles to Northfield Road, which is a public highway. Another public highway, Sweetland Road, runs off Northfield Road in a northeasterly direction for approximately 1,500 feet and then turns southeasterly to run at something like right angles across the

Henry Lantz, Jr. and Alexander Lantz portions of land for a distance of approximately 1,600 feet, and then turns northeasterly once again. Two roadways run off Sweetland Road toward the plaintiff's lot. Neither of these roadways is a public highway.

The first of these roadways was referred to in the testimony of various witnesses as "the cottage road", doubtless because it provides access to several cottage lots which are adjacent to its northwestern boundary. It runs off the Sweetland Road in a northeasterly direction through the Alexander Lantz portion, roughly parallel to the dividing line between the Henry Lantz, Jr. and Alexander Lantz portions, towards the southeastern boundary of the plaintiff's lot. The roadway is rocky, bumpy, unpaved and virtually impassible in its present condition beyond the last cottage lot presently in existence, where it is little more than a path. In order that it be able to be used for access to the plaintiff's lot, it would be necessary for the land to be cleared and the roadway graded and extended to the plaintiff's southeastern line.

The second roadway is a hauling road which begins approximately 1,500 feet beyond the intersection of the Sweetland Road with the cottage road. It runs off the Sweetland Road in a northwesterly direction across lands owned by Reginald H. Slauenwhite, and then turns to run northeasterly across the Alexander Lantz portion which is now owned by the defendant, Franklyn Ernst. It approaches, but does not touch, the southeastern boundary of the cottage road near the last cottage lot now in existence. It ends in the middle of an empty field.

The only other possible means of access to the plaintiff's lot is via the waters of Big Mushamush Lake. The plaintiff's lot is roughly semi-circular, more particularly the upper portion of a circle which has been divided by a horizontal line. The horizontal line is equated to the dividing line between the Henry Lantz, Jr. and Alexander Lantz portions. The portion of the circumference which connects the two ends of the horizontal line is equated to the shore of Big Mushamush Lake. Thus, the plaintiff's lot has only two boundaries, namely, a northwestern circumferential boundary which runs along the shore of Big Mushamush Lake, and a southeastern boundary which is a straight line running in a southwest-northeastern direction.

In order to have access to his lands, the plaintiff must cross lands not owned by him which lie between the Sweetland Road and his southeastern boundary, by using one of the two roads or otherwise, or must use the waters of Big Mushamush Lake for access by boat to his northwestern circumferential boundary. There are no other possible means of access to his land.

There is very little evidence about Big Mushamush Lake. Small recreational boats ply its waters on Sundays in summer. One or two public boat ramps exist on the shore of the Lake. There is no evidence of use by large or commercial vessels.

When the plaintiff acquired the lot in 1988, he was then aware that it was land-locked on its southeastern boundary. He tried to purchase a right of way, but was unsuccessful. Nevertheless, he bought the land. In order to make use of it, access by some means is a necessity.

The plaintiff wishes to construct a home on his land and to reside there. He needs access appropriate to such usage.

Rights Of Way Of Necessity

Rights of way of necessity (sometimes referred to as ways of necessity or easements of necessity) have been recognized since early times and are now well-known in law, especially to conveyancers.

Perhaps the best description of rights of way of necessity is found in Goddard, **A Treatise on the Law of Easements** (6th Ed., Stevens and Sons Limited, 1904) at p. 37:

> "... It frequently happens that property is so situated that, unless the owner is permitted to make some use of his neighbour's land, the property would be unusable and worthless. In cases of this kind the law generally steps in and provides the owner of the otherwise useless property with the easement he wants, because of the necessity he has for it. The most common instance of this kind of easement occurs when a piece of land is wholly surrounded by the land of other persons, so that unless the owner were permitted to pass over the surrounding land, he would have no means of getting to his own property, and it would be worthless. In this case the easement which the law would provide would be a right of way, commonly called 'a way of necessity ...'"

And at p. 359:

> "Rights of way of necessity are acquired by implied grant. A grant of a way of necessity is presumed to have been made whenever land has been sold which is inaccessible except by passing over the adjoining land of the grantor or by committing a trespass upon the land of a stranger, or when an owner of land sells a portion and reserves a part which is inaccessible except by passing over the land sold. This species of right has been recognised from very early times, and is said to depend upon the principle that when a grant is made, every right is also presumed to have been granted, without which the subject of the grant would be useless ..."

Other descriptions are set out in **Freeman's Rights of Way** (4th Ed. 1958), at p. 61; **Gale on Easements** (14th Ed. 1972), at p. 118; Megarry and Wade, **The Law of Real Property** (4th Ed. 1975), at pp. 830-832; **Halsbury's Laws of England** (4th Ed.), vol. 14, pp. 73-74; Anger and Honsberger, **Law of Real Property** (2nd Ed. 1985), vol. 2, at pp. 932-935; and **Cheshire and Burn's Modern Law of Real Property** (14th Ed. 1988), at pp. 509-514.

It is noted that two essential characteristics of rights of way of necessity are the existence of circumstances which give rise to an implied grant of the right and inaccessibility giving rise to a necessity for the right. I will discuss both of these characteristics; although, as will be seen, the primary focus of these reasons is the latter one, that is, the nature of the necessity which must be proved in order to establish the existence of a right of way of necessity.

Note that a grant of a right of way of necessity is presumed to have been made when land is sold which is inaccessible except by passing over the adjoining land of the owner. This situation can exist when land is severed by sale resulting in one portion being inaccessible except by passing over the other portion. Thus, the grant of a right of way of necessity is presumed when land is severed by sale so that one portion is inaccessible except by passing over the other portion. The principle is explained in Goddard, **A Treatise on the Law of Easements**, supra, p. 361, in this manner:

> "Every right of way of necessity is founded upon a presumed grant, and unless a grant can be presumed, no way of necessity can be claimed, even though a landowner is in consequence totally deprived of all means of access to his land. A grant of this kind is generally presumed when property in land has been severed by sale, and when one portion is inaccessible except by passing over the other, or by trespassing on the land of a stranger. No grant of right of way over the stranger's land can be presumed, and therefore no way of necessity over that land can be acquired, but a grant by the owner of one of the severed portions to the owner of the other can be presumed, and therefore a way of necessity over his soil can be claimed ..." (emphasis added)

In the present case, I find that, when Henry Lantz divided Lot 7 Letter D Second Division between his two sons on July 10, 1857, this constituted a severance of the property which resulted in the eastern part of Henry Lantz, Jr.'s lot being inaccessible by land except by passing over the Alexander Lantz portion. This gave rise to a presumption that Henry Lantz, Jr. had been granted a right of way of necessity to his portion over his brother's portion. This presumed grant of a right of way of necessity vested in Henry Lantz, Jr. and each and every one of his successors in title of the eastern part as long as the inaccessibility continued unchanged. I find that the plaintiff is his latest successor in title.

It will also be noted that the land sold must be inaccessible, except by passing over the adjoining land of the grantor or, more particularly, except by passing over the other portion of land severed by sale. The owner has a necessity for access to the land so that it will not be unusable and worthless. Both the nature of that inaccessibility and the nature of the owner's necessity for access have been analyzed and discussed in many cases and legal texts. For convenience, I will refer only to some of the latter.

In Goddard, **A Treatise on the Law of Easements**, supra, it is stated at pp. 359-361:

> "... it may be that the right is given on the ground of public policy, that the land may not be rendered useless and unprofitable, but whatever may be the principle upon which the

> right is presumed to have been granted, the law has always and in every case annexed a right of way of necessity to the ownership of land-locked ground when that and the surrounding land have been severed by sale."
>
> "A way of necessity can only be acquired when a landowner has no other way to his ground. It has sometimes been thought that a way of necessity could be claimed if a person had none but an inconvenient way to his land ... but the balance of authority shows that a man cannot acquire a way of necessity if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbour's soil." (emphasis added)

The learned authors of **Gale on Easements**, supra, use the phrase "absolutely inaccessible or useless" at p. 118:

> "It is not essential that the inaccessibility of the land granted (or retained) be due to the fact that it is surrounded by land of the grantor (or grantee) and no other person; but speaking generally it does appear to be essential that the land is absolutely inaccessible or useless ..." (emphasis added)

Megarry and Wade, **The Law of Real Property**, supra, sets out the principle in a slightly different way at p. 831:

> "... If some other way exists, no way of necessity will be implied unless that other way is merely precarious and not as of right, or unless, perhaps, it would be a breach of the law to use that other way for the purpose in question. Nor will there be a way of necessity if the other way is merely inconvenient, ... for the principle is that an easement of necessity is one 'without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property ..." (emphasis added)

Finally, quoting once again from Goddard, **A Treatise on the Law of Easements**, supra, the nature of the inaccessibility is defined in terms of the nature of the necessity at pp. 38-39:

> "... it is thought more consistent with principle to hold that the law provides these rights only in cases in which there is an absolute necessity for them. In support of this view, the name by which they are known--easements of necessity--points to the fact that there must be absolute necessity before the law will compel a landowner to submit to so detrimental a right as an easement in this land--a right in reality, though not in theory, imposed on his land against his will ..." (emphasis added)

It would seem to appear from the foregoing statements quoted from various texts that a fundamental requirement of a right of way of necessity is the existence of absolute inaccessibility giving rise to an absolute necessity for access. In my opinion, that is too broad a statement. It will be noted that the statements quoted from the texts refer to lots which are land-locked. There ought to be no doubt that the general statement at the beginning of this paragraph does apply to land-locked lots, but there is reason to believe that it does not necessarily apply to lots which border on or are partly surrounded by water.

This aspect of rights of way of necessity has been the subject of analysis only rarely in English and Canadian case law; although, as might be expected, American court decisions have dealt with it on a number of occasions over the years.

Hints of the English position can be found in some of the text material quoted above.

Goddard, **A Treatise on the Law of Easements**, supra, at pp. 359-361, speculates that rights of way of necessity may be based upon public policy "that the land may not be rendered useless and unprofitable". It is obvious that a lot of land may be rendered useless and unprofitable by being surrounded partly by land and partly by water as surely as by being surrounded wholly by land.

Megarry and Wade, **The Law of Real Property**, supra, at p. 831, notes that a right of way of necessity may be implied where other existing access is "not as of right, or unless, perhaps, it would be a breach of the law to use" the other access. The learned authors cite in support of the first part of that quotation the case **Barry v. Hasseldine**, [1952] 1 Ch. 835, wherein, at p. 839, Danckwerts, J., says:

> "... In my opinion, however, if the grantee has no access to the property which is sold and conveyed to him except over the grantor's land or over the land of some other person or persons whom he cannot compel to give him any legal right of way, common sense demands that a way of necessity should be implied, so as to confer on the grantee a right of way, for the purposes for which the land is conveyed, over the land of the grantor; ..." (emphasis added)

In support of the latter part of the quotation, the learned authors cite **Hansford v. Jago**, [1921] 1 Ch. 322, at pp. 342-343, where, as is indicated in a footnote, Russell, J., suggested, but did not find it necessary to decide, that a right of way of necessity might arise when the only alternative way was in breach of a bylaw. These two cases do not deal with situations of access to a lot of land partly surrounded by water; but, as will be seen, the principles derived from them may be applied to such situations.

The three Canadian cases, to which reference will now be made, deal with situations of lands bordering on water.

Fitchett v. Mellow et al. (1897), 29 O.R. 6 (Ont. H.C.), is cited and strongly relied on by the defendants. In that case, a piece of land was surrounded on all sides but one by waters of a bay. Meredith, C.J., held that there was access to the land via the waters of the bay even though that access was not capable of utilization without an unreasonable expenditure of money and, moreover, the waters of the bay were a highway which, like a highway upon dry land, prevented a claim to a right of way of necessity. In my view, this case illustrates the general rule that there can be no right of way of necessity where there is another means of access which is inconvenient.

Harris v. Jervis (1980), 31 N.B.R.(2d) 264; 75 A.P.R. 264 (Q.B.T.D.), and **Michalak v. Patterson** (1986), 72 N.B.R.(2d) 421; 183 A.P.R. 421 (Q.B.T.D.), are two cases which deal with land-locked cottage lots bordering on water. There is no indication in the case reports of any submission as to the possible effect in law of the existence of access by water. Apparently, access by water was not considered as a means of access to the land. In both cases, the court recognized a right of way of necessity over adjacent lands.

I have reviewed fifteen cases of the American courts in which the implication of a right of way of necessity where the land in question bordered on water was an issue. Of those, four cases denied a right of way of necessity over adjoining lands and eleven cases granted it.

The four cases referred to are: **Moore v. Day** (1921), 191 N.Y.S. 731 (C.A.); **Littlefield v. Hubbard** (1925), 38 A.L.R. 1306 (Maine S.J.C.); **Woelfel v. Tyng** (1960), 158 A. 2d 311 (Maryland C.A.); and **McQuinn v. Tantalo** (1973), 339 N.Y.S. 2d 541 (C.A.).

In **Moore v. Day** the claimant asserted a right of way over another's land to reach a navigable lake at a point where access to his land on an island was more convenient than by public access. This case was followed, without discussion, in **McQuinn v. Tantalo**, where one cottage owner on a lake asserted a right of way over another's lot; the court found no way of necessity because the land in question was accessible via navigable water which the land owners had a right to use. It is not clear from the case report of **Littlefield v. Hubbard** whether a way of necessity was denied because there existed inconvenient alternative access or because the land of the plaintiff and the land of the defendant did not have a common root of title. The court in **Woelfel v. Tyng** found no right of way of necessity because there was access by water. Of the four cases, this is the only one which, if applied to the present fact situation, would preclude recognition of a right of way of necessity in favour of the plaintiff, Hirtle.

The eleven cases which granted a right of way of necessity notwithstanding that the land to be accessed bordered on water are as follows: **Rodal v. Crawford** (1935), 261 N.W. 260 (Michigan S.C.); **A.S.D. Securities Inc. v. J.H. Bellows Co. et al.** (1933), 192 N.E. 472 (Ohio C.A.); **Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Passage** (1899), 55 N.E. 462 (Mass. S.J.C.); **Cookston v. Box** (1959), 160 N.E. 2d 327 (Ohio C.A.); **Jay v. Michael** (1900), 48 A. 61 (Maryland C.A.); **Flood v. Earle** (1950), 71 A. 2d 55 (Maine S.J.C.); **State et al. v. Deal et al.** (1951), 233 P. 2d 242 (Oregon S.C.); **Peasley v. State of New York** (1980), 424 N.Y.S. 2d

995 (Court of Claims); **Hancock v. Henderson** (1964), 202 A. 2d 599 (Maryland C.A.); **Redman v. Kidwell et al.** (1965), 180 S. 2d 682 (Florida Dist. C.A.); **William Dahm Realty Corporation v. Cardel** (1940), 16 A. 2d 69 (N.J.C. of Ch.).

None of these eleven cases, if applied to the present fact situation, would preclude recognition of a right of way of necessity in favour of the plaintiff; however, some of the cases are more applicable than others.

In **Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Passage**, the waterway was not available for transportation of all such things as may be needed for the reasonable use of the land to be accessed. In **Cookston v. Box**, the waterway was used only as an outlet for pleasure craft and no transportation facilities existed for carrying on the ordinary and necessary activities of life from and to the land in question via water. The court in **Peasley v. State of New York** granted a way of necessity where the navigable body of water had not been used as a highway for commerce and travel for many years; the court expressed this reasoning as a limited exception to the general rule. The court in **Hancock v. Henderson** stated that the modern view of ways of necessity was based on public policy favouring full use of land. By this view, merely bordering on a body of navigable water does not determine whether a way of necessity should be granted; the availability of the water route to meet the requirements of the uses to which the property would reasonably be put was also at issue. In **Redman v. Kidwell**, the court held that, because of changed conditions in the present day, the rule of strict necessity has developed into a rule of practical necessity. Finally, the water access issue was simply ignored in **William Dahm Realty v. Cardel**.

Few, if any, of the foregoing cases, especially the American ones, are binding upon me. Nevertheless, I consider them to be very persuasive. They appear to be capable of being accommodated within the framework of a unified philosophy. They provide reasonable and practical solutions.

The cases which have been cited indicate that the doctrine of right of way of necessity has been continuing to evolve over the years and has evolved to the stage where a number of statements of principle can be added to the traditional conception of the doctrine:

> 1. The doctrine of right of way of necessity is based on public policy -- that land should be able to be used and not rendered useless (see Goddard, **A Treatise on the Law of Easements**, supra, pp. 359-361; **Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Passage**, supra; and **Hancock v. Henderson**, supra).
>
> 2. Although there can be no right of way of necessity where there is an alternative inconvenient means of access, the requirement of an absolute necessity or a strict necessity has developed into a rule of practical necessity (see **Redman v. Kidwell**, supra, and **Littlefield v. Hubbard**, supra).

3. Water access is not considered to be the same as access over adjacent land (see **Harris v. Jervis et al.**, supra; **Michalak et al. v. Patterson et al.**, supra; **Hancock v. Henderson**, supra; and **William Dahm Reality v. Cardel**, supra). That is especially so in cases where the water access is not as of right or would be contrary to law (see Megarry and Wade, **The Law of Real Property**, supra, at p. 831) where access is not available for transportation of things needed for reasonable use of the land to be accessed (see **Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Passage**, supra), where the water access does not have transportation facilities for carrying on the ordinary and necessary activities of life to and from the land (see **Cookston v. Box**, supra), or where the water is not navigable or usable as a highway for commerce and travel (see **Peasley v. State of New York**, supra).

In the present case, I find: that, without a right of way of necessity, the lot in question will not be able to be used and will be useless; that this is not a case where there exists an alternative, though inconvenient, means of access; and that water access over Big Mushamush Lake to the lot in question is not by right and, indeed, would probably be contrary to law pursuant to ss. 1(j) and 3 of the **Water Act**, R.S.N.S. 1989, c. 500. The former provision defines "watercourse" to include the bed, shore and water of a lake, and the latter provision vests watercourses in the Crown:

"Vesting of watercourses in Crown"

"3(1) Notwithstanding any law of the Province, whether statutory or otherwise, or any grant, deed or transfer made on or before the fifth day of April 1941, whether by Her Majesty or otherwise, or any possession, occupation, use or obstruction of any watercourse, or any use of any water by any person for any time whatever, but subject to subsection (2), every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in Her Majesty in right of the Province, and shall be deemed conclusively to have been so vested since the sixteenth day of May 1919, and is fully freed, discharged and released of and from every fishery, right to take fish, easement, profit a prendre and of and from every estate, interest, claim, right and privilege whatsoever, whether or not of the kind hereinbefore enumerated, and shall be deemed conclusively to have been so fully freed, discharged and released since the sixteenth day of May 1919." (emphasis added)

The plaintiff can have no right to use or pass over the waters of Big Mushamush Lake because Big Mushamush Lake is vested in the Crown and any right that any predecessor in title of the plaintiff may have had was discharged and released on May 16, 1919. The fact that, by virtue of s. 4(1) of the **Act**, the Minister may authorize the plaintiff to use the lake would not affect the reality that the plaintiff's access would not be as of right.

I also find no evidence that Big Mushamush Lake can be used for transportation of things needed for reasonable use of the plaintiff's land, that Big Mushamush Lake has transportation facilities for carrying

on the ordinary and necessary activities of life to and from the land, and that Big Mushamush Lake has been used or is usable as a highway of commerce and travel.

Conclusion

As previously indicated, the applicant's claim for a certificate of title pursuant to the **Quieting of Titles Act** is granted.

The plaintiff has satisfied the Court that, in the present circumstances, he is entitled to a right of way of necessity in order that he should have access to his land. An order will issue recognizing and granting a right of way over and along the so-called cottage road, in common with all other persons having use of the same road, with the plaintiff being required to pay the full cost of construction of any extension of the roadway as it presently exists, and a proportionate share of any cost of maintaining the roadway and keeping it in good repair and condition.

I consider it unnecessary to consider the plaintiff's alternative claim to a prescriptive right of way.

I consider the plaintiff's claim for damages to be inappropriate in the circumstances. Moreover, the plaintiff has not proved any general or special damages.

A claimant under the **Quieting of Titles Act** usually bears the costs of the application but, where the application is contested unsuccessfully, such costs should be shared. Therefore, the plaintiff will have 50% of his costs of the action to be taxed in accordance with Tariff A (the amount involved being $35,000 under Scale 3) and Tariff D.

Judgement for the plaintiff.

Mr. and Mrs. JOHN CAMPBELL, Applicant, and Unreported
R.A. (RAY) FULTON, P. Eng., N.S.L.S. Respondant
Nova Scotia County Court
MacDonnell, H.J., J.C.C
October 30th, 1991

Fulton prepared a location certificate for the Campbells which certified that there were no easements, rights of way or encroachments on the Campbells' land. It later turned out that one corner of their property encroached onto an abandoned public road. The Campbells were forced to purchase a portion of the road and then sued Fulton in Small Claims Court for the amount they spent. The Small Claims Court adjudicator disallowed the claim apparently without explaining his reasons. The Campbells appealed.

The Campbells claimed that Fulton had a duty to discover the road and show it on his certificate. They claimed that his failure to show the road fell below the standard of care which Fulton should have met and therefore amounted to negligence for which the Campbells should be compensated.

Fulton claimed that the issue was really one of a boundary dispute (and therefore that the Small Claims Court did not have the power to hear it.) He also claimed that he was not required to show the road as his only duty was to determine whether or not the foundation on the lot fell within the boundaries.

The Judge stated that Fulton mistakenly believed that the Campbells required the certificate for mortgage purposes. The Judge indicated that Fulton had made no attempt to locate the road, even though he knew it was somewhere near the rear of the Campbells' property. The Judge found that Fulton had been negligent in not showing the road on the certificate and that it should have been shown even if the certificate had only been for mortgage purposes.

Fulton was required to pay the Campbells their expenses.

Mr. and Mrs. JOHN CAMPBELL, Applicant, and
R.A. (RAY) FULTON, P. Eng., N.S.L.S. Respondant
Nova Scotia County Court
MacDonnell, H.J., J.C.C
March 5, 1991

On October 30th, 1990, Mr. and Mrs. John Campbell (Campbell) filed a Claim in the Small Claims Court of Nova Scotia, at Amherst, N.S. claiming the sum of five hundred and thirty-five dollars and seven cents ($535.07). The particulars of the claim are:

> 1. The Claimants are the owners of property located at Wentworth, Cumberland County, Nova Scotia.
>
> 2. The Defendant is a Nova Scotia Land Surveyor carrying on business in Truro, Colchester County, Nova Scotia.
>
> 3. On or about January, 1990, the Claimants employed the Defendant to carry out survey work with respect to the above-mentioned parcel of land which the Claimants were about to purchase. The Defendant carried out the survey on the land and on or about the 25th day of January, 1990 he issued a survey certificate stating that no easements, rights of way or encroachments existed upon the said parcel of land.
>
> 4. In reliance upon the survey certificate issued by tho Defendant the Claimants completed the agreement of purchase and sale with respect to the said property and were given a deed dated February 28, l990.
>
> 5. In or about July of 1990, survey work was being carried out on the lot adjacent to the Claimants' property. The survey determined that a portion of the Claimants' land was in fact overlapped by a public highway belonging to Her Majesty the Queen in right of the Province of Nova Scotia.
>
> 6. As a result of the discovery of the said encroachment, the Claimants have been subjected to the added expense of having to purchase that portion of the abandoned roadway that encroaches upon their land, from the Department of Transportation. In addition, the Claimants have incurred those legal costs arising in remedying this defect in title.
>
> 7. The Claimants therefore claim that the Defendant was negligent in not identifying the aforementioned encroachment and that as a result of the Defendant's negligence, the Claimants have suffered damages.

8. The Claimants therefore claim:

(a) $200.00, being the cost of obtaining a deed from Her Majesty Queen in the right of the Province of Nova Scotia, to rectify the title problems caused by the Defendant's negligence;

(b) $335.07 being legal costs incurred by the Claimants to rectify the aforementioned problem with the Claimants' land;

(c) costs of this action.

The Claim came on for a hearing before Morris J. Haugg, Q.C., an Adjudicator of the Small Claims Court of Nova Scotia, on December 6th, l990. After hearing the evidence, the Adjudicator, on December 7th, l990, filed an Order which reads:

THAT the claim against R.A. (Ray) Fulton by Mr. and Mrs. John Campbell be dismissed without costs to either party.

On December 18th, 1990, Campbell filed an Appeal to this Court on the following grounds.

"It is erroneous in point of law."

The Adjudicator has filed a Stated Case, which is attached hereto as Schedule "A".

Counsel for Appellant, Campbell, in his submissions states the issues are:

1. Did the learned adjudicator error [sic] in law, by concluding that the surveyor should not have noted that the possible encroachment of the abandoned highway on the Appellant's land, owing to the fact that the survey problem was one of boundary?

2. Did the learned adjudicator error [sic] in holding that no "easements, rights-of-way, and/or encroachments" existed on the Appellant's property?

3. Did the learned adjudicator error [sic] in law by concluding that the Defendant carried out his duties earnestly and carefully and with the appropriate amount of skill?

Counsel for Campbell submits that the abandoned public highway clearly falls in the category of an easement, and that Fulton had a duty to note the said easement or potential encroachment upon the survey certificate plot plan he provided. The failure to so note the abandoned highway on the plot plan provided to Campbell resulted in a standard of care which was below what was required of surveyor in the circumstances.

Counsel on behalf of Fulton submits that this is a boundary dispute, and there ie no evidence of negligence on the behalf of Fulton. He was aware of the existence of the old abandoned highway, however was not required to show this as his only duty was to determine that the foundation of the house was within the boundaries of the lot. Further, that the foundation being located within the boundaries of the lot, and there being no apparent easements, right-of-ways and/or encroachments, Fulton provided the services he was required to do under the circumstances.

The facts as disclosed by the Stated Case was that Fulton was aware that a surveyor's certificate was required by the Campbells, and the work would have been done on their behalf. He erroneously believed that the Surveyor's certificate was required for mortgage purposes.

Fulton was provided with a description of the lot, and accompanied by an employee conducted an investigation of the property, during which he located the metal pins designating the four corners of the lot. He aware of the fact that there was an old road at the rear of the property, however made no attempt to verify if the road boundary encroached on the property in question, as he had formed an opinion that the road was north of the lot.

Fulton provided a certificate, the particulars of which are set out in paragraph 13 and 14 of the Stated Case. Despite the notation that the existence of any apparent easements, right-of-ways and/or encroachments is noted on the attached sketch, he did not show or make any mention of the abandoned road. It was later determined by another surveyor that the iron pin which Fulton indicated as being the northwest corner of the property in question was in the middle of the abandoned road. Thus, the sketch was clearly in error, as a portion of the land which he indicated in this sketch as being owned by the vendors and being purchased by the Campbells, was actually owned by Her Majesty the Queen in the right of the Province of Nova Scotia.

The fact that the lot was covered in snow at the time Fulton investigated the site is of no relevance, and does not excuse him from his duty to establish that the corner posts were on the land being purchased. His reliance on the LRIS map and the location of certain trees also is no excuse for his negligence in not showing on his certificate and sketch that the northwest corner of the lot being purchased by the Campbells was located in the middle of the abandoned road.

The learned Adjudicator was in error when he found as a matter of fact and law that the certificate provided by Fulton was correct, and as there were no "easements, right-of-ways and/or encroachments," and that the problem discovered by the later survey was a boundary problem.

There is no question whatsoever that Fulton was negligent in not disclosing on his sketch and certificate that the abandoned road ran across the corner of the lot being purchased by the Campbells. The boundary of the road plainly encroached on the property being purchased by the Campbells, and even though the survey requested was for the purposes of determining the location of the dwelling house on the lot being purchased, this encroachment should have been shown by Fulton. This was a minimal

requirement for such a sketch and certificate prepared by a professional surveyor. Fulton was in breach of the standard of care required of him as a professional surveyor in such a situation.

I find that the Order of the Adjudicator is erroneous in law, and I allow the Appeal. The Order made by the Adjudicator is set aside.

In the first paragraph of the Stated Case, the Adjudicator states that the material facts were pretty well agreed to between the parties. Thus, it must be presumed that the amount of the Claim of two hundred dollars ($200.00) for obtaining a deed to rectify the title problem, and three hundred and thirty-five dollars and seven cents ($335.07) legal costs was not challenged.

I would allow the Claim of the Campbells in the amount of five hundred and thirty-five dollars and seven cents ($535.07) together with costs in the amount of fifty dollars ($50.00) against the Respondent, Fulton.

Appeal Allowed

HER MAJESTY the QUEEN (appellant) See 111 N.S.R. (2d) 313
v. GARY LEIGH STEVENSON (respondent)
Nova Scotia County Court
Haliburton, J.C.C.
December 31, 1991.

The Respondent Stevenson and the Village of Lawrencetown had been negotiating for the purchase of land for the purposes of construction of a sewage treatment facility. Negotiations were deadlocked over the location of the access easement over the Respondents land and the Village was contemplating expropriation. It hired a Nova Scotia Land Surveyor to survey the route it favoured and that route was marked with survey markers. Shortly after the survey was complete, the Respondent apparently removed the markers. He was charged with an offence under S. 442 of the Criminal Code for wilful removal of a boundary marker. He was acquitted at trial because the Judge felt that the survey markers were only marking a proposed boundary, not an actual boundary, at the time that they were removed. The Crown appealed.

The County Court upheld the decision of the Trial Judge and found that since the Village did not have any property interest in the Respondents land at the time that the survey markers were removed there could not be any boundary and thus no boundary markers.

HER MAJESTY the QUEEN (appellant) v. GARY LEIGH STEVENSON (respondent)
Nova Scotia County Court
Haliburton, J.C.C.
December 31, 1991.

This is an appeal taken on behalf of the Crown against the acquittal of the accused on the charge

> "That he, at or near Lawrencetown, in the County of Annapolis, Nova Scotia, on or about the 8th day of April, 1990, did wilfully remove survey stakes placed as a boundary line contrary to s. 442 of the **Criminal Code**."

At the conclusion of the trial, the trial judge, John R. Nichols, J.P.C., dismissed the charge. His decision is not long and it is here repeated in full:

> "The court is required to determine in this factual situation whether the survey stakes removed by the defendant Stevenson constituted a 'boundary line' or 'part of the boundary line of land'. The survey stakes in question from the evidence of the surveyor MacBurney marked out a proposed right of way formed part of a proposed boundary line."
>
> "A 'boundary' is defined in the **Random House Dictionary of the English Language**, New York Second Edition 1987 as:
>
> > '1. something that indicates bounds or limits; a limiting or boundary line.'"
>
> '**Halsbury's Laws of England** (4th Ed.), Lord Hailsham of St. Marylibone (London, Butterworth's, 1973) Vol. IV at p. 356 writes, it is 'an imaginary line which marks the confines or line of division of two contiguous parcels of land'. **The Dictionary of English Law**, Jowett (1959) defines 'boundary, bound' as 'the imaginary line which divides two pieces of land from one another'."
>
> "In the chapter on boundaries in **Survey Law in Canada** (1989) Carswell, Toronto, boundary is defined:
>
> > '4.01 A boundary is the line of division between two parcels of land. It is a limiting line; by it is ascertained the extent of parcels in separate ownership or subject to different rights.' "

"Section 442 of the **Criminal Code** states:

> 'Everyone who wilfully pulls down, defaces, alters or removes anything planted or set up as the boundary line or part of the boundary line of land is guilty of an offence punishable on summary conviction.' “

"The court holds that the Crown has not established that a boundary line or part of a boundary line was in existence at the time of the defendant's actions. The survey stakes marked an inchoate line relating to a proposed expropriation.”

"The court grants the motion of defence counsel and dismisses the charge against the defendant."

This appeal was taken by way of written submissions. These submissions have been reviewed as well as the transcript of the original hearing and the other materials filed. I concur with the conclusions reached by Judge Nichols and the appeal will be dismissed.

The Facts

The Village of Lawrencetown was interested in acquiring a piece of property from Mr. Stevenson, the accused, for use as a sewage treatment plant. A right-of-way would also be necessary for service vehicles and personnel, both for construction and continued use of the property as a sewage treatment area. The treatment plant and the property to be acquired were, as I understand it, located adjacent to the Annapolis River at some distance from the highway. Preliminary negotiations took place between the parties as to the quantity of land required, the possible location of the right-of-way over the remaining lands of Stevenson, and the price the Village was prepared to pay for the land. A preliminary survey of the property was done, wooden markers were driven by a land surveyor, and the proposed property lines were defined in that fashion. The evidence indicates that the real dispute which eventually developed between the parties was over the location of the right-of-way road. Ultimately, metal survey monuments were placed by the surveyor, marking out a proposed right-of-way through the centre of Stevenson's hayfield in the location preferred by the Village and to which Stevenson had consistently objected. Within a few hours of those survey markers having been placed by the surveyor, Mr. Stevenson arrived on the doorstep of the Village Commissioner to return four survey markers which he indicated were "the property of the Village".

Issues At Trial

The accused raised two issues on the trial. The first issue raised was that it had not been proven beyond a reasonable doubt that these particular survey markers were, in fact, the markers used and placed in the location as alleged in the information. Judge Nichols did not weigh the proof of that fact and I agree it is not necessary to do so. The second issue raised by the defence was that there was, in

fact, no "boundary line". That such is the case appears to be self-evident. There was, however, established by those survey markers a proposed boundary line which would have become a boundary line if the Village expropriated as they indicated they intended to do, or if they had eventually reached agreement to acquire title to the desired property by conveyance.

It is at least of passing interest that the Village Commission, according to the transcript, would not be in a position to expropriate the property unless and until subdivision approval had been obtained from the Planning Authority. It seems clear from that bit of evidence (offered by the Chairman of the Village Commission) that no change in boundary lines could be contemplated without at least that one intermediate step over which neither the proposed purchaser nor vendor had any control.

The accused is charged under s. 442 which provides simply:

> "Every one who wilfully pulls down, defaces, alters or removes anything planted or set up as the boundary line or part of the boundary line of land is guilty of an offence punishable on summary conviction."

I will not pretend to have embarked on a study of the history of this section, however, I would observe that at least in the **Criminal Code**, S.C. 1953-54, c. 51, s. 383 appears in precisely the same wording as the current s. 442. In addition to that, I note that s. 384 of that earlier **Code** created an indictable offence where the boundary marker related to a national, provincial, county or municipal boundary line. Both these sections apparently dated from at least 1892.

Having made that digression, it is apparent that the philosophy embodied in this section is one which predates by many years the authority and privileges given to land surveyors under current provincial legislation. It seem obvious that the protection intended to be afforded by this section relates directly to those values enumerated by Judge Nichols in his decision after the trial. The object of the section clearly was to maintain peace and order between neighbours by the preservation of ancient boundary markers which distinguished the division line between their respective properties and property interests. No different rule can apply between property owners and public authorities than between private owners.

Crown counsel argues in his brief that

> "This is not a case where owners disagreed and something more, likely court action, would have to be commenced to define the boundary."

Indeed, it is not a case where owners disagreed. It is a case where someone trespassed upon the land of an owner and placed survey markers without the owner's consent. On the other hand, it is hardly correct that something like court action was not contemplated. In this case, the trespasser was contemplating expropriation, which is in fact a quasi-judicial process, but had not yet taken the

necessary steps. That expropriation, when approved by the Planning Authority, another quasi-judicial process, would have defined a boundary at some time in the future.

With respect to the above observation that a trespasser had placed the survey markers, I should observe that s. 15 of the **Land Surveyors Act**, R.S.N.S. 1989, c. 249, specifically authorizes a professional Nova Scotia Land Surveyor to "enter upon and pass over any land" and further provides that no legal action shall be taken against him except for "unnecessary damage". This section clearly does not authorize or permit a land surveyor to place permanent survey markers on anyone's property. Section 15 constitutes a restriction on the common law rights of ownership and the enjoyment of property in that it permits a trespass for a specific class of persons for specific purposes. It obviously must be interpreted restrictively.

What Is A "Boundary Line" And When Is It Created?

The brief filed by Crown counsel is helpful and fair in considering what constitutes a boundary (although it does not promote the Crown's position). In discussing that subject, he quotes in his submission the textbook **Survey Law In Canada** , 1989, Carswell, p. 473:

> "Surveyors have no more authority than other men to determine boundaries."
>
> "(Page 294) So long as a dispute continues, no surveyor can lay down the boundary since its determination is of necessity a judicial act, and must be judged in court according to law after hearing of evidence."

Relying on **A Treatise on Law of Surveying and Boundaries** (4th Ed.), 1976, p. 13, his brief continues:

> "The surveyor cannot by his own act establish a new boundary line." (my emphasis)

And again referring to **Survey Law in Canada**, p. 104, the Crown's brief continues:

> "It is the combined result of the owner's statement on the plan, the registration of the plan and the dealing with land parcels represented on the plan that creates the boundaries. Before these combined actions, the marks on the ground are merely pieces of iron or wood; after the actions, the marks become 'monuments' and the lines have become 'boundaries'. Boundaries are the result of marking or identifying and the sanction of both recognition and adoption; they are then the boundaries."
>
> "A line does not become a boundary nor a survey marker a monument until they appear as items in a document of conveyance of some interest in land." (my emphasis)

Finally, the application of s. 442 is not entirely without jurisprudence. I refer to **Tremeear's Annotated Criminal Code** (6th Ed. 1964), which includes the following relevant annotations:

R. v. Hatt (1915), 25 C.C.C. 263; also 27 D.L.R. 640 (N.S.Co.Ct.)

> 'Where a municipality, desiring to close a road, built a fence across it, but did not proceed according to law in closing the road, held, accused, who had broken the fence in order to use the road, could not be convicted of an offence (under this section) since the fence constituted an illegal obstruction across a highway.'"

And citing **Morissette v. St. Francois Xavier Parish** (1911), 40 Que. S.C. 224; also 18 C.C.C. 291 (C.A.):

> "The boundary between a highway and adjoining land, belonging to plaintiff, was settled by a judgment, and the boundary marks had been duly placed, but the municipality later adopted a resolution for laying out a new boundary, and a surveyor, appointed by the municipality, proceeded to place marks on plaintiff's land. Plaintiff pulled up these marks, and was charged with an offence under former s. 532, but was acquitted. In a later action for damages, held, plaintiff was properly acquitted, since the action of the municipality and the surveyor was illegal." (my emphasis)

It is clear that the Village of Lawrencetown had no proprietory interest in the property of the accused or in any adjoining property at the time when the surveyor purported to set up a "boundary line". Without a property interest, there could be no boundary line dividing the property of two owners. The **Criminal Code** has no application in the circumstances of this case.

The appeal is therefore denied with costs to be paid the respondent which I fix at $750.

Appeal dismissed.

JANET MITCHELL, ZITA ROBAR, LINDA OUELLET & NORAH VILLENEUVE (Plaintiffs)
v. KEVIN CLARKE (Defendant)

See 111 N.S.R. (2d) 342

Nova Scotia Supreme Court, Trial Division
Glube, C.J.T.D.
January 23, 1992

The Plaintiffs and the Defendant owned adjoining properties at Ingramport. The Plaintiffs claimed that the Defendant had moved the house on his property and then built a deck on it so that both encroached on their property.

The Judge who delivered the decision did not provide enough information to thoroughly review the actions of the land surveyor and to follow the logic used to position the boundaries. Despite this, the case is very instructive in the way that the Judge dealt with the survey evidence.

First, the Judge reviewed the facts and noted particularly that the Defendant had purchased the land when the lawyer who acted for him advised that there were title and boundary issues and that the title should have been quieted before purchase. Following the purchase, the Defendant moved a house on the land and then had a location certificate prepared which showed the house to be well within the boundaries of the lot. Surprisingly, the land surveyor who prepared this certificate apparently did not testify and the Judge placed no weight on the certificate. The Defendant Clarke was acting as his own lawyer, so perhaps that explains this and other poor presentation of evidence to the Court.

John F. Thompson, N.S.L.S. had prepared a survey showing the Defendant's house and deck encroaching and he testified as to the methods he used to prepare his plan. The Judge seemed very satisfied with Thompson's approach and opinion.

The Defendant introduced evidence as to the boundary in question:

- He and a neighbour testified as to a hole in a rock wall as representing the boundary. The Judge was unimpressed, stating that the wall was not shown on any old plans, the "lining up" of the boundary with that hole was done by eye and many holes in rock in the vicinity had been used to moor boats.
- He introduced a 1930 plan of the area which the Judge gave no weight to because there was no testimony to indicate how the plan had been prepared and for what purpose.
- He introduced a photograph that was not dated and which was not supported by any evidence as to what is showed and when it was taken. The Judge gave no weight to the photograph.

The Judge found that the Thompson survey reflected the correct location of the boundary to within half a foot. The Judge then found that neither the Defendant nor his predecessors in title had established adverse possession to the land in dispute.

The Judge ordered the Defendant to purchase the land of the Plaintiffs'. That part of the decision is instructive because it shows the approach that the Courts can take when the cost to move an encroachment might exceed the value of the property in question.

JANET MITCHELL, ZITA ROBAR, LINDA OUELLET & NORAH VILLENEUVE (Plaintiffs) v. KEVIN CLARKE (Defendant)
Nova Scotia Supreme Court, Trial Division
Glube, C.J.T.D.
January 23, 1992

The Plaintiffs are four sisters: Janet Mitchell, Zita Robar, Linda Ouellet and Norah Villeneuve. They claim to own certain land in Ingramport, Nova Scotia as the only heirs at law of their mother, Marjorie Brownie. This land abuts land owned by the defendant, Kevin Clarke. The plaintiffs claim that Mr. Clarke has located a portion of his house on their land and they seek to have this encroachment removed. Marjorie Brownie died intestate and the action has been carried essentially by Janet Mitchell.

The issues in this case are as follows:

1. Who has paper title to the land?

2. Who has possessory title to the land?

3. Remedy.

1. Who Has Paper Title To The Land?

In 1920, Arthur Brownie purchased from the Crown the Indian River Indian Reserve which consisted of 325 acres of land. Arthur Brownie sold lots to Lorinda Brownie and in 1944, Marjorie H. Brownie, the mother of the plaintiffs, acquired the land lying between the Halifax and Southwestern Railway (now the Canadian National Railway) and the waters of St. Margaret's Bay which is said to include the land in dispute. The land in dispute as shown on a survey plan of Thompson and Purcell Surveying Ltd ., dated December 11th, 1989, consists of 9800 sq. feet bounded on the south by St. Margaret's Bay and on the west by the lands of Kevin Clarke. John F. Thompson, a licensed Nova Scotia Land Surveyor since 1959, prepared the plan.

Kevin Clarke, a real estate consultant, received a deed to his property on October 22nd, 1987. He purchased his property from Anard and Olaf Gustavson. The description in his deed includes all of the lands claimed by the plaintiffs. The Gustavson title was verified by Mr. Clarke's solicitor as being possessory title only, and the solicitor recommended a "Quieting of Title Application". The solicitor expressed no opinion about the actual boundaries of the property.

The purchase and sale agreement between Mr. Clarke and the Gustavsons reflects that they did "not have a metes and bounds description" of their property. A statutory declaration dated October 22nd, 1987 by Anard Gustavson claims that no one claimed adverse title to his father's land "except for a small triangular piece of land boarding the Ingramport Brook which may form part of the old Arthur

Brownie grant". (There is no evidence that this statutory declaration or those from Cyril Langille and Noah Boutilier also sworn on October 22nd, 1987, and referred to later in this decision, were recorded in the Registry of Deeds.)

There was a house on the former Gustavson property which was in the extreme western part of the land too close to the highway. Mr. Clarke moved the building and subsequently had a location certificate prepared which places the eastern boundary line 20 to 25 feet east of his house.

Between December 21st, 1988 and January 6th, 1989, Mr. Thompson prepared a survey plan for the estate of Frederick C. Hayter for an application under the **Quieting Titles Act**. This earlier survey dealt in part with the lands of Marjorie Brownie located between the railway and the #3 highway, and shown as lot D on the Hayter plan and also with lands formerly belonging to Mersey Paper Company Limited (Mersey), known as the cemetery lot and shown on the plan as lot C.

Mr. Thompson testified that he precisely located the railroad and the highway in the field. Then, based in part upon a 1954 survey plan of lot C prepared by two provincial land surveyors for Mersey whom he described as quite reliable, he located lot C on the ground. This located the mutual boundary for lots C and D. He was able to do this even though some of the early deeds contain no metes and bounds in their descriptions. Although the highway was relocated after the 1954 plan, Mr. Thompson explained the differences in the new and old highway boundaries in relation to the cemetery lot to the satisfaction of the court. Mr. Thompson determined that the eastern boundary of lot C was the same as the boundary fixed by the 1954 Mersey survey of the cemetery lot. He also referred to a 1936 plan prepared when the highway was realigned which shows a chainage figure running in a straight line to the water. According to Mr. Thompson, this forms the western boundary of the lot in issue.

Based upon the Indian Reserve grant and the older plans, including the Mersey cemetery lot, Mr. Thompson found that the western boundary of the Marjorie Brownie land was a straight line from the railroad to the waters of St. Margaret's Bay. As a result, his plan shows that Mr. Clarke's house projects 0.6 feet into the Brownie land, and the deck built on the eastern and southern side of the house projects onto and over the land by seven feet.

Mr. Clarke disputes Mr. Thompson's surveys. Mr. Thompson claimed his starting point for the Hayter survey was accurate to within half a foot.

Mr. Clarke and Mr. Brian Murphy, the present owner of lots C and D, submitted that there was a partial old rock line or stone wall on the Murphy property marking the boundary between lots C and D. Mr. Clarke referred to a drilled hole in a rock on the shore as the boundary marker and the point to which a line siting could be taken along the rock wall to show that the disputed property line entirely misses his house and deck. This siting was done by eyesight by Mr. Murphy while he stood on the rock wall on his property and lined up the rock with the drilled hole pointed out to him by Mr. Clarke.

Mr. Thompson explained that because no rock line or stone wall was shown on the 1954 plan, nor was there any reference to a rock line or stone wall in any of the deeds, these were not shown on his plan. He did not know about a drilled hole in a rock on the shore being a boundary marker. There was other testimony that there were many drilled holes in rocks in the area; most of them had rings in them for tying up vessels.

Mr. Clarke introduced a 1930 plan of Mersey entitled **House Properties at Ingramport** which shows the east-west boundary line of the land in issue 24.6 feet further to the east than the boundary on the Thompson plan. Although the earlier plan is shown as being drawn by F. Tupper, whom Bowater Mersey Paper Company Ltd., formerly Mersey, identified as being the company surveyor at that time, there is no evidence that this plan was used in any way in 1954 to identify the cemetery lot or that it was ever on file at the Registry of Deeds. There is no way to test the purpose of the plan or how the line was located. This plan also shows a new road alignment which did not occur until seven years later.

Mr. Clarke further relied upon a photograph which is undated. No witness was called who had personal knowledge of the date it was taken or what it purported to show at that unknown date.

Mr. Clarke testified he dealt with a number of municipal and provincial departments to determine the requirements for moving and renovating the building before purchasing the property. He admits that when he was dealing with the various officials relating to setbacks and the requirements for the septic field, he did not tell them about any rights the Brownie's might have. The property was undersized for normal septic field requirements. He acknowledges he was aware of the possible difficulty with the boundary at the time, claiming he did not have it surveyed as he thought that from his information, there was not much risk. He described that its use was "grandfathered" but "borderline" from the county's point of view, and he did not want to "raise red flags" by revealing the possible ownership of land against his interest.

After examining all of the evidence, based on a balance of probabilities or preponderance of evidence, I find the following:

1. The western boundary of the Indian Reserve grant was a straight line to the water.

2. The photograph which is undated, the 1930 plan of the house properties, the rocks claiming to be a rock wall delineating lots C and D, and the drilled hole in the rock on the shore, do not amount to reliable evidence which would alter the boundary line as surveyed by Mr. Thompson. The only aspect which even approaches disputing the survey is the possibility of a six inch margin of error which of course could be in Mr. Clarke's favour or against him, that is, the foundation encroachment might be one foot, six inches, or nothing.

3. Mr. Clarke chose to rely on information from lay people including his own opinion. He chose to ignore the legal warnings contained in his counsel's certificate of title and to close his

eyes to possible difficulties. In so doing, I find he was in error. He built up his premise of paper title based upon a foundation which I find does not exist.

4. In spite of the possibility that a six inch error could be in Mr. Clarke's favour, I find it is highly unlikely considering the expertise of the surveyor.

The defendant has failed to provide proper admissible evidence which displaces the plaintiffs title to the land in dispute. The plaintiffs have paper title to the land as shown on the survey plan dated December 11th, 1989 by Thompson and Purcell Surveying Ltd. If this plan is not already registered in the Registry of Deeds, I order that it be registered.

2. Who Has Possessory Title To The Land?

The person claiming to have possessory title as against the owners of paper title must show actual, open, notorious, continuous and exclusive possession for a period of twenty or more years up to the commencement of this action. Constructive possession is insufficient.

Olaf Gustavson is too ill to testify. Anard Gustavson was 77 when he signed his statutory declaration. He is now deceased. His parents lived in a house on what was originally known as the Lewis Miller Lumber Company land. He was born in 1911. He and his brother Olaf were the sole heirs after their father died in 1965 and they continued to live on the property until a few years prior to 1987 when they purchased a piece of land adjoining what I have found to be the Brownie land. Mr. Anard Gustavson claims no one has made an adverse claim except for the small triangle. They paid the taxes and claimed title based on "continuous, notorious and exclusive possession since 1907".

Mr. Langille, 86 years old when he swore his statutory declaration and now unable to testify, worked at the Lewis Miller Lumber Company in 1913 and passed the Gustavson property daily. At that time, John Gustavson, the father of Olaf and Anard, living in the house on the property. He recalls the Gustavson family continued to live there until a few years before 1987. Attached to his statutory declaration, and that of Mr. Gustavson and Mr. Boutilier, is a land registration services map (L.R.I.S.) which shows the whole piece including the lot claimed by the plaintiffs as being the land occupied only by the Gustavson family.

Noah Boutilier, age 77 at the time of swearing his statutory declaration and unable to testify, also identified the Gustavsons as the owners of the same full piece of land. He swears that the house was within the bounds of the highway with its western footing within three to four feet of the edge of the highway pavement. He knew of no one else ever claiming the property.

Dana McEachern, age 25, has for several years crossed the land to go scuba diving without interference. Roger Taggart, age 49, has resided in Ingramport since 1952, except for three or four years when he 19 to 22 years old. He lives across the highway from the defendant and the plaintiffs are

his first cousins. He claims Anard and Olaf Gustavson occupied part of the land, although they never went to the Ingramport Brook which is the eastern boundary of the Brownie property. To his knowledge, the division line between the Gustavson and Brownie properties was a clump of trees located on the land. He claims there was an open field west of the trees and the trees were the eastern boundary of the Gustavson property. After being shown a current photograph taken by Mr. Clarke which includes a clump of trees to the east of Mr. Clarke's deck, he related that to the old undated photograph which shows small trees and suggests that the current photograph shows the same trees only taller. He said the tree line is in reasonable proximity to the edge of the Gustavson property.

Mrs. Janet Mitchell, age says the disputed lot is the last lot belonging to her mother. Her mother sold the other lots for income for the family, but held onto this lot and Mrs. Mitchell continues to pay the taxes on the property. The Brownie family grew up living across the road and they used the disputed land to go swimming off the rocks and to fish in the brook. For twenty years or more, from approximately 1947 to 1967, Mrs. Brownie leased the land to a John O'Connell for his boat. Mrs. Mitchell denies that any of the Gustavsons ever used the triangular piece of land, nor does she recall any building or fence in the area of the western boundary of the Brownie land in her lifetime. Following her marriage, Mrs. Mitchell and her husband lived nearby and Mr. Mitchell also knew the area well. In the last five years of her life, Mrs. Brownie lived with the Mitchells away from the property. During that time Mr. Mitchell unsuccessfully appealed the tax assessment on the property on Mrs . Brownie's behalf. The appeal, which was denied, was based on the fact that the piece of land was too small to build on.

When Mr. Clarke was trying to buy the Gustavson property, either he or his lawyer or both unsuccessfully approached the Mitchells seeking to buy a portion of the disputed land. In 1989, the Mitchell's noted that the former Gustavson house had been moved and appeared to be on their property. Andrew Mitchell, the Mitchell's son, investigated the L.R.I.S. map which showed the property including the Brownie land as one lot belonging to the Gustavsons. He had that changed. He did what he described as an amateur title search and then approached Mr. Clarke on behalf of his mother with a view to selling him the piece of land for $5,000, the assessed value. At that meeting, the parties walked around the property. Mr. Clarke said that high tides put some of the property under water.

According to Andrew Mitchell, Mr. Clarke told him the following: that he knew where the property line was; that he knew the house was placed over the property line; and that he said "we (meaning he and his lawyer) knew you had a shot at us but we thought it was a risk worth taking". Mr. Clarke denies the content of that conversation and denies knowing that his house was encroaching on the Brownie land. He denies going into the purchase blindly and putting the house wherever he wanted it to be. He claims he checked with people in the neighbourhood and relied on what they said before moving the house. Mrs. Mitchell is convinced he tried to steal the property.

After reviewing the facts, I accept the Mitchell's evidence that the land was rented out annually by Mrs. Brownie at least until 1967. As a result, no person or persons could acquire any possessory title up to that point in time.

Did the Gustavson's subsequently obtain possessory title up to the clump of trees? The fact that witnesses believe the property line is in a certain place, does not make it so. To show possessory title it must be shown that the Gustavson's used the land continuously and exclusively from 1967 until 1987 and that Mr. Clarke has continued using the land until the start of this action. The area in question was described as "rough" and "swamp" and there was no evidence of what use, if any, was made of it by the Gustavsons.

I find there is no evidence or insufficient evidence to satisfy me on a balance of probabilities that the Gustavsons had exclusive use of the Brownie property up to the tree line or exclusive use of any part of the Brownie lot. In his statutory declaration, Anard Gustavson failed to identify the boundary of the triangular piece. He may have meant that the land in issue here all belonged to the Brownies. To be meaningful, his reference to the Brownie land would require more specific delineation. Also, there was evidence that Anard and Olaf Gustavson moved off the property several years before it was purchased by Mr. Clarke. This means that there is a gap in the evidence of continuous possession of the portion claimed by Mr. Clarke even if he had been able to establish exclusive use.

Based on all of the evidence, I find Mr. Clarke has failed to prove on a balance of probabilities or preponderance of evidence that he has possessory title to the land. (Note **Brown v. Phillips et al.** (1963), 42 D.L.R.(2d) 38, at p. 42 and **Ezbeidy v. Phalen** (1957), 11 D.L.R.(2d) 660.)

3. Remedy

The plaintiffs seek a mandatory injunction. The basis upon which a mandatory injunction will be granted is set out in the case of **Gallant et al. v. MacDonald et al.** (1970), 3 N.S.R.(2d) 137. At p. 146 Cowan, C.J.T.D., quotes from the English case of **Shelfer v. City London Electric Company**; **Meux Brewery Company v. City of London Electric Lighting Company** [1895] 1 Ch. 287, as follows:

> "In my opinion, it may be stated as a good working rule that –
>
> (1) If the injury to the plaintiffs legal rights is small,
>
> (2) And is one which is capable of being estimated in money,
>
> (3) And is one which can be adequately compensated by a small money payment,

> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction –
>
> then damages in substitution for an injunction may be given."
>
> "There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction or otherwise acting with a reckless disregard to the plaintiffs rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction."

A mandatory injunction is a drastic remedy which should not be awarded without considerable thought.

In this case, the .6 foot encroachment is extremely small. Although the deck encroachment is large and could easily be removed, to order removal of the house for a .6 foot encroachment would be a drastic measure. I find it is inappropriate to order Mr. Clarke to move the house because of the small nature of the encroachment.

Mr. Clarke denies deliberately encroaching on the Brownie land. Again I reiterate that Mr. Clarke chose to rely on neighbours and hopes. He appears to have shut his eyes and hoped, or he failed to make the proper inquiry. He used extra land in applying for several permits. I have difficulty understanding how he received the deed which contained a description of the whole piece of land when at the same time Mr. Anard Gustavson swore in his statutory declaration that someone else might own a portion of that land. I am unable to accept that Mr. Clarke's wrongful acts were unintentional. His acts show reckless disregard for the probable ownership of land by others. I find Mr. Clarke did act recklessly. He was careless, deliberately closed his eyes and appears to have improperly relied on information from people he spoke with before buying the property.

I am aware of my previous decisions in **MacDonald v. Lawrence and Lawrence** (1980), 38 N.S.R.(2d) 319; 69 A.P.R. 319, and **MacLean v. MacDonald** (1980), 50 N.S.R.(2d) 108; 98 A.P.R. 108, and the decision of Rogers, J., in **Brean and Brean v. Thorne and Thorne** (1982), 52 N.S.R.(2d) 241; 106 A.P.R. 241. Although normally the court does not perform the role of expropriating land by ordering conveyance of the land to a nonowner to correct a problem, I find that in this case it totally inappropriate to order the house to be moved even though such a remedy might be granted because of Mr. Clarke' s conduct. The cost of moving the house would undoubtedly exceed the value of the Brownie land. The only proper way in which this matter can be resolved is to order the transfer of the land to Mr. Clarke at a fair price as damages. This is one of those rare cases where the court must find that Mr. Clarke must buy the whole piece of land. It is the only equitable remedy for the plaintiffs whose property has been encroached upon. In addition to the mandatory injunction, the plaintiffs seek to have the defendant request that certain telephone poles be moved. In light of my finding that damages is the appropriate remedy, this request is unnecessary.

What is a fair price for the land? There was evidence from the Mitchells that they tried to sell the property, however, its area is too small to be a building lot. The appraisal of the property by Turner Drake and Partners confirms this and places the highest and best use for the land as development in conjunction with the adjoining lot, that is Mr. Clarke's property. Mr. Clarke has effectively added the Brownie land to his own already without any right or permission from the plaintiffs or any payment to them. The appraisal puts a maximum value of $15,000 if the acquisition of the lot was necessary to provide the minimum area for building approval purposes to the adjacent owner, and the minimum value of $5,000 if the acquisition was just to provide privacy and a larger lot. They value the property at $10,000 as of January 29, 1990. It is known that the assessed value is $5,000.

Mr. Clarke used the extra land to assist him in obtaining the necessary building permits. He acknowledges he did not want to red flag the possible adverse ownership. Even with this land his lot is still below minimum requirements, however, he believes it made it easier to get approvals with the land included. His location certificate prepared after the house was moved and provided to the municipality, shows he added something over twenty feet to the southeast corner of his lot. In addition to using the land for his own purposes, Mr. Clarke also granted a right of way to the Maritime Telephone and Telegraph Company Ltd. (MT & T) to allow them to relocate certain telephone poles on the land which I find is the Brownie land.

To determine the value of the land, I have also examined the various offers made to settle this case without a trial. Some were initially referred to and introduced by Mr. Clarke although he was advised that the court normally does not consider settlement offers during the trial. Once Mr. Clarke continued to refer to settlement offers in evidence, the plaintiffs submitted the full package relating to settlement negotiations. Offers to sell the land were first made by Mr. Andrew Mitchell when he visited Mr. Clarke and offers back and forth continued from November 1989 with the final offer being made on November 8th, 1991. This was approximately one month before the dates originally set for trial. Examination of this last offer shows it was a very reasonable one on the part of the plaintiffs. In the offer, Mr. Clarke was given two choices: the first was to buy the land for $6,500 within ten days of the offer; the alternative was to remove the deck, lease the land for twenty years for $1,500 with permission to leave the house as is, he was to request that MT & T move the poles back to their former location and the plaintiffs would establish a registrable line agreement.

Although the additional land did not bring Mr. Clarke's lot up to the minimum size, it was of assistance in allowing him to move the house and putting in a septic field. Adding the Brownie lot to his land gave him more than just privacy. After considering all of the evidence, I value the property at $7,500. I find Mr. Clarke is obliged to purchase the property for $7,500 with interest from May 1, 1990 to the date of this decision. The interest rate shall be agreed upon or if no agreement is reached, the court will decide the rate based upon written submissions.

The plaintiff is also entitled to costs. In my opinion this case should never have proceeded to court. There was some intransigence by both sides, but the evidence leads me to conclude that Mr. Clarke

was the stumbling block to any settlement. He says that the caveat against his property prevented him from obtaining funds to resolve the matter, however, this does not seem to have been communicated appropriately to the plaintiffs at least at the time of their final offer. He did not respond to the final offer. The plaintiffs are entitled to costs in the amount of $2,170 plus disbursements.

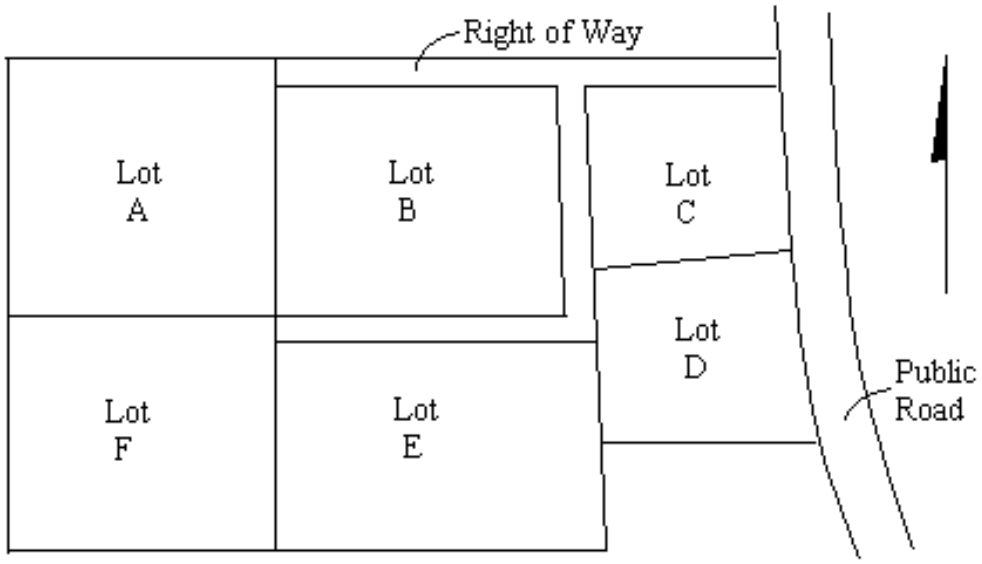
During his testimony Mr. Clarke said he was willing to buy the land at a fair price, however, he claimed that because the plaintiffs filed a caveat against the property at the Registry of Deeds he was unable to refinance his property and make the purchase. In order to provide Mr. Clarke with the ability to raise the necessary funds, it is ordered that the caveat on file in the Registry of Deeds is temporarily lifted for a 90 day period for the purpose only of allowing Mr. Clarke to refinance the property to pay the amounts owing to the plaintiffs. If Mr. Clarke fails to make the necessary payments of the damage award, in interest and costs within the 90 days from the date of this decision, then the caveat shall remain and shall be deemed to have been in full force and effect throughout, that is, from the date it was recorded and it will continue thereafter in full force and effect.

If payment is made within 90 days, a warranty deed shall be given to Mr. Clarke from all of the plaintiffs and the caveat shall be formerly released. In anticipating that Mr. Clarke will fulfill his obligations under this decision, I urge the plaintiffs to arrange to have the warranty deed signed by all parties during the 90 day period and held by the plaintiffs solicitors so that when the payment is made the transfer of ownership of the land can immediately be effected and the caveat released.

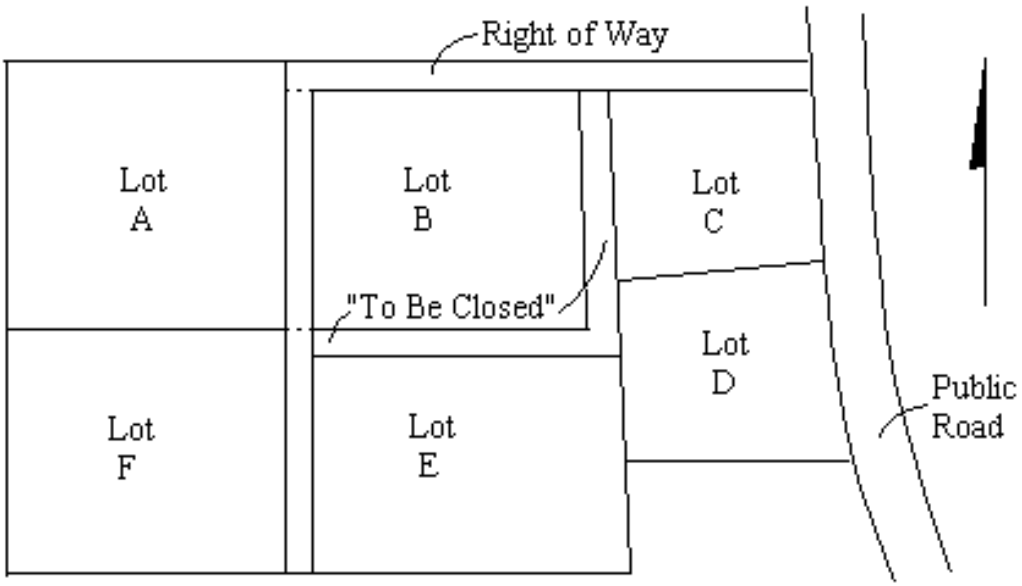
Order accordingly.

JOHN COLLINS and CAROLE COLLINS See 123 N.S.R. (2d) 71
v. RICHARD SPEIGHT
Nova Scotia Supreme Court
Goodfellow, J.
May 12, 1993

The parties owned adjoining lands on Hermans Island, Lunenburg County. The Plaintiffs claimed a right of way over the land of the Defendant in order to access the lots they had purchased. The Plaintiffs had purchased several lots from the parents of the Defendant. When they originally discussed the possible purchase of the lots, they were shown a subdivision plan which depicted the lots as follows:



Before the transaction was completed, the parents of the Defendant changed the layout of the rights of way shown on the plan so that the land was configured as follows:



In the case report, the Judge referred to the rights of way on the new plan as follows:

- The right of way along the north side of the subdivision was referred to as the Main Right of Way;
- The right of way running North/South between Lots A and B and Lots E and F was referred to as the Substituted Right of Way; and
- The right of way marked “To Be Closed” was referred to as the Internal Right of Way.

The Plaintiffs purchased Lots B, C, D and E and the Internal Right of Way. Lots B and E were noted as being subject to the Substituted Right of Way. Neither of Lots B or E nor the Internal Right of Way conveyed to the Plaintiffs were explicitly given the right to use the Main Right of Way.

The parents of the Defendant conveyed Lot F to him together with the rights to use the Main and the Substituted Rights of Way. They then conveyed Lot A to their daughter with the same rights to rights of way. The daughter then conveyed Lot A and the rights to the rights of way to the Defendant. Finally, the parents conveyed the fee to the Main Right of Way to the Defendant.

Some time later, the Plaintiffs sold Lots C and D. Subsequently, the Defendant refused to allow the Plaintiffs to access their remaining properties by way of the Main Right of Way. The Plaintiffs sued.

The Judge reviewed the facts and addressed the issue of whether the deed to the Plaintiffs should be rectified to include rights to the Main Right of Way. A number of factors were considered before the Judge concluded that the parties clearly intended to include the right to use the Main Right of Way and that the omission of that right from the deed was clearly a mutual mistake which should be corrected by rectifying the deed.

The Judge then discussed the issue of implied right of way. The Judge again reviewed the surrounding circumstances and found that a right of way across the Main Right of Way could be implied from the facts.

Finally, the Judge addressed the issue of damages. No damages were awarded to the Plaintiffs as a result of the actions of the Defendant. The Court ordered that the Plaintiffs contribute one half of the cost of construction of a road which had been built by the Defendant on the Main Right of Way.

JOHN COLLINS and CAROLE COLLINS v. RICHARD SPEIGHT
Nova Scotia Supreme Court
Goodfellow, J.
May 12, 1993

Dr. John Collins and his wife Carole were in the market to purchase a property on the South Shore and while visiting friends on Hermans Island, Lunenburg County they saw an advertisement describing a property for sale with "a superlative view" and they responded by arranging a visit with the owner, Lenn Speight, for the afternoon of Easter Sunday, 1979.

En route to looking at another property that morning Dr. and Mrs. Collins drove by the advertised property and noted a gentleman in the driveway who turned out to be Lenn Speight. Dr. and Mrs. Collins stopped, identified themselves and ascertained it was convenient for the Speights to have the Collins view the property then rather than wait for the appointed time in the afternoon.

Mr. Speight showed the Collins about the property and took Dr. Collins up the hill to see the view from the property behind the one advertised which was also owned by Mr. Speight. Dr. and Mrs. Collins were shown the garages and then the small Cape Cod home by Lenn Speight and his wife Celia after which they had some preliminary discussions as to the price ($69,000), availability for closing (around the end of August), etc.

Dr. and Mrs. Collins returned in the afternoon when discussions continued. Either in the morning or at the second meeting in the afternoon, but more likely in the morning, Lenn Speight produced a plan he had prepared by M. McMullin dated June 29, 1974, created and surveyed prior to the **Subdivision Regulations** for the County of Lunenburg that came into effect in 1975 so no municipal approval of Lenn Speight's plan was required.

The lot that had been advertised is lot "D".

In walking about Lenn Speight pointed out to Dr. Collins roughly where the lots were situated. Lenn Speight indicated his intention to retain lots "A" and "F" for his daughter and son, but that the remainder of the lots, "B", "C" and "E" were for sale as well as lot "D".

Lenn Speight expressed concern for his family (daughter and son) to have access to the water frontage which was across the public roadway. He explained to the Collins he had to sell the water frontage as part of lot "D" and therefore it would be necessary to retain a right-of-way for exclusive use of his family from the roadway to the water.

Dr. Collins expressed the view that he and his wife were shown the plan by Lenn Speight to explain the right-of-way required at the water lot and to point out the three other lots were for sale by piece or

whatever fashion a person wanted to buy. Mr. Collins referred to Lenn Speight indicating also these other lots were for sale and that he intended to sell them.

To Mrs. Collins' surprise Dr. Collins said we will buy lot "D". Both Dr. Collins and Mrs. Collins observed the "Right Of Way" on the plan, but there was no specific discussion of it. Lot "D", of course, bordered on the public highway.

Dr. and Mrs. Collins contacted their solicitor, George Caines, and a third meeting was set up with the Speights at the property. The Collins advised they could not afford to buy the lots and asked Lenn if he would take an option, and Lenn agreed.

There followed a discussion initiated by either Lenn Speight or Dr. Collins to possibly vary the internal right-of-way to run across the lots "B" and "E" between them and lots "A" and "F" and the plan produced by Lenn Speight was so modified.
[See sketch]

In order to facilitate understanding the court refers to the "main right-of-way" as the marked Right Of Way running from the public highway bordering lot "C" through bordering lot "B" ending at lot "A" as shown on the original plan.

The "internal right-of-way" is the "L" shaped right-of-way commencing at the main right-of-way across the back of "C" between it and "B" running across a portion of the back of "D", then going between "E" and "B" back to "F".

The "substituted right-of-way" is that shown on the second modified plan starting at the main right-of-way at lot "A" proceeding over lot "B" continuing over a portion of the internal right-of-way across through the back of lot "E". The Collins and Lenn Speight agreed to this substitution and change, and the remainder of the internal right-of-way became a separate lot.

Both Dr. and Mrs. Collins viewed it as a road up to "A" and across the lots "B" and "E" and also the small portion of the former internal right-of-way.

On July 31, 1979 Carole Collins received from Lenn and Cecilia Speight her deed to lot "D" subject to the right-of-way to the shoreline extending from the main right-of-way.

On July 31, 1979 Carole Collins received from Lenn and Cecilia Speight her option to purchase lots "B", "C" and "E" subject to the substituted right-of-way.

On the 24th of July, 1981 Lenn and Cecilia Speight conveyed to Carole Collins the lots described in the option of July 31, 1979.

On the 24th of July, 1981 Lenn and Cecilia Speight conveyed to their son, Richard Speight lot "F" together with two rights-of-way, the main one and the substituted right-of-way.

On the 24th of July 1981 Lenn and Cecilia Speight conveyed to their daughter, Janet Speight lot "A" together with the main right-of-way and the substituted right-of-way.

On the 7th of August, 1981 the Collins gave a collateral mortgage to Lenn and Cecilia Speight for the lots acquired by option.

On the 20th of June, 1984 Janet Speight conveyed lot "A" above to her brother, Richard Speight.

On the 22nd of October, 1984 Lenn and Cecilia Speight conveyed the fee in the main right-of- way to their son, Richard Speight.

Dr. and Mrs. Collins, by deed dated July 13, 1983, sold lots "D" and "C" and they planned to build or transfer a home on lot "E".

In 1989 they attended on the main right-of-way and Richard Speight indicated there would be a problem with the right-of-way at the first of the road. He was referring to the main right-of-way. Dr. and Mrs. Collins resided in Ontario and over the years 1983-1989 there had never been any suggestion of lots "B" and "E" not having an entitlement to the main right-of-way. Dr. Collins visited the land, including the main right-of-way, approximately four to five times between 1983 and 1989, and Mrs. Collins approximately six times. Richard Speight recalls seeing the Collins vehicle near his cottage on lot "F" on at least one occasion.

Richard Speight now takes the position that the Collins never had any entitlement to the main right-of-way. Mrs. Collins commenced this action for a declaration of entitlement of the main right-of-way for her lots "B" and "E" and the remainder of the internal right-of-way and additional relief.

Issues

1. Have Dr. and Mrs. Collins established a mutual mistake and entitlement to rectification?

2. Are Dr. and Mrs. Collins entitled to the main right-of-way by implication or estoppel?

3. Are any of the parties entitled to damages or compensation?

First Issue

Have Dr. and Mrs. Collins established a mutual mistake and entitlement to rectification?

Lenn Speight produced the plan prepared for him by M. McMullin showing six separate and distinct lots labeled by or for him "A" to "F". The plan shows two lots, "D" and "C", abut the highway from Lunenburg to Mahone Bay. None of the remaining four lots abut any public highway and can only be accessed initially by the main right-of-way and the internal right-of-way, and after modification by agreement accessed solely by the main right-of-way and the substituted right-of-way. No other access was ever considered or contemplated by Lenn and Cecilia Speight, Dr. and Mrs. Collins and initially Richard Speight.

The preparation and presentation of the plan could convey one and only one intention, namely, that the lots would have access as designated on the plan. I agree and accept the evidence of Dr. and Mrs. Collins that the only rational and logical conclusion from the plan itself is that the main right-of-way was available for at least the four lots, "A", "F", "B" and "E" and in the modified plan also the "L" shaped lot created by the balance of the internal right-of-way which was extinguished and substituted, by agreement, by the substituted right-of-way.

The plan alone, and again as modified, speaks clearly of one logical conclusion only, that is access to lots "B" and "E" as intended by use of the main right-of-way as the only right-of-way that commences at the public highway. Any other conclusion would be directly opposite to the intention of Lenn Speight to so dispose of his land. There is an overwhelming wealth of evidence confirming that conclusion including:

1. The stated intention of Lenn Speight to sell the lots individually or collectively.

2. The granting by Lenn Speight of an option that provided "This Option may be exercised for any one or more of the said lots B, E and C."

The option dealt with separate lots with separate prices.

"a) for lot B - 15,000
"b) for lot E - 15,000
"c) for lot C - 9,000"

Lots "B" and "E" were subject to the 25 foot substituted right-of-way. This was necessary, otherwise lot "F" would have no access to the main right-of-way whatsoever, and lot "A" would have otherwise severely limited access to the main right-of-way.

3. The Collins disposed of lots "D" and "C" without any reservation of a right-of-way to the remaining lots for the simple reason, as Dr. Collins stated, "the thought never occurred to us".

4. Lenn Speight never suggested or hinted at any lack of entitlement to the main right-of-way.

5. On the initial visit Easter Sunday Lenn Speight pointed out generally the location of the individual lots.

6. The changes to the plan dealt only with internal access to lots within the subdivision and never any change to the main right-of-way which was essential to all the back lots.

7. Lenn Speight secured a letter from the County of Lunenburg, District Planning Commission June 11, 1979 confirming lots "A" to "F", as shown on the plan of subdivision, did not require approval because the individual lots were created before the subdivision regulations came into effect in 1975.

8. Lenn Speight did not give evidence in this trial to contradict or cast any doubt on the credible evidence of Dr. Collins and Mrs. Collins of the intent of all parties at the time of sale by Lenn Speight and purchase by Mrs. Collins.

9. The totally consistent approach and evidence of Dr. and Mrs. Collins with their unshakeable belief that they held, from the outset, an entitlement to the main right-of-way.

10. Richard Speight, when he encountered difficulties with the cottage he built on lot "F" in relation to the available land for a private sewage system, approached Dr. Collins by correspondence directly and on occasion to Dr. Collins' solicitor, Derek Wells. Richard Speight had rather surprisingly forgotten the existence of this correspondence as he kept no file copies. It was such a major concern to him having embarked on the building of a cottage without approval and having expended substantial funds and labour on the road that its is hard to understand his failure to remember the existence of his correspondence.

His letter of the 8th of August, 1983 to Dr. Collins stated:

> "With regard, also, to meeting clearances of my disposal bed I would explain trouble I am having through a misunderstanding of my father over status of my 'new' right-of-way, it is deeded over your land."

His letter of the 28th of October, 1983 to Mr. Wells stated:

> "I hoped Dr. Collins would grant this transfer of ownership since he will lose nothing and originally he gained absolute ownership of the original 'right-of-way' between his lot 'E' and lot 'B' and between lot 'C' and lot 'B'. Also the strip for which I ask, will not affect his access to his land."

On the 15th of December, 1983 Richard Speight wrote to Dr. Collins:

> "I have made several calls to lawyer Wells about my request about our right-of-way. I had given the proposal and diagram to Mr. Wells to send to you some time ago."
>
> "I hope your own development of your land will benefit from my road building. Also, once two buildings are on a road, the power company will string wire."

By letter to Dr. Collins dated the 19th of January, 1984 Richard Speight stated:

> "I hope you have seen the development in the road I had built for about $6,000 and that we enjoy this land before we are all too old."

Richard Speight sent a plot plan with this last letter. It outlined the parallelogram P.Q.R.S. being the 25' strip he needed for Health Department approval.

This was taken from the original plan presented Easter Sunday, 1979 to Dr. Collins and Mrs. Collins by Richard's father Lenn Speight and so noted on the plan by Richard Speight. Richard Speight, in his own handwriting marked the main right-of-way "Right of way to lots A. B. E. F."

To make the factual scene complete I accept the evidence of Dr. Collins of a willingness to accommodate Richard Speight provided it did not impair the use by the Collins of lots "B" and "E" and the remainder of the "L" shaped internal right-of-way separate lot and that it did not adversely impact on the owners of "D" and "C".

Richard Speight, who did not recall any response, belatedly acknowledged a letter was obtained from the Department of Health to meet the Collins' concern about their remaining lots.

Unfortunately this accommodation was never followed up by Richard Speight and fortuitously he received lot "A" from his sister and no longer required a portion of lot "B" for a private sewage system.

There is of course the additional evidence of Derek Wells, an experienced solicitor, who acted for the Collins' solicitor, George Caines, on the closing of lot "D" and completion of the option. His evidence is that the substituted right-of-way simply replaced the internal right-of- way and that to him the main right-of-way was plain and clear from the public highway.

His only concern was whether or not the remainder of the internal right-of-way needed approval as a lot, and they were going to pursue this when the legislature rectified any prospective problem. His instructions from the Collins was that the Collins intended to build on one of the back lots, probably "E". In cross-examination he confirmed the lots were always treated as absolutely separate lots and never any consolidations. There was never any mention of the main right-of-way shown clearly on the plan and never any suggestion by Mr. Speight of any limit on the Collins' entitlement to use it. He acted on the assumption it was clear that access to the highway was by the main right-of-way.

Apart from all this is that the Speights specifically referred to the reservation of the main right-of-way in conveyances to their children and only referred to the substituted right-of-way in conveyances to the Collins.

The evidence is overwhelming, compelling and convincing that the parties intended the main right-of-way be available to the Collins for their lots, and in particular "B" and "E" and the "L" shaped remainder lot, and its absence from the deeds to the Collins for these lots is a clear mutual error or mistake. The inclusion was simply thought unnecessary.

This mutual mistake of omission is to be rectified by a deed or a registered declaration of this court.

Second Issue

There is no real need to address this issue as a result of findings of fact and conclusions reached on the first issue, however, as counsel have addressed it thoroughly, I should deal with it.

In **Nantais v. Pazner**, [1926] 4 D.L.R. 258, Ontario Court of Appeal, Smith, J.A., at p. 259 states:

> "I think it is clear that where an owner subdivides his land by a plan showing numbered lots abutting on a lane, giving access over it from these lots to a street, registers the plan, and sells and conveys such lots, describing them by number according to the plan, there passes with the lots the grant of an easement appurtenant to them over the lane."

Smith, J., adopted from another case at pp. 259 and 260:

> "The plaintiff, however, having purchased his lots as lots laid down upon a registered plan showing certain streets upon which they abutted, acquired as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways."

In **Pugh v. Peters et al.** (1876), 11 N.S.R. 139, Ritchie, E.J., at p. 142, states:

> “These streets were obviously laid out to render the lots more valuable, so as to command a higher price at the sale, as well as to afford access to the portion of the rear, which would be inaccessible without them, and to Peters and Frecker, whose lots are bounded by them in their respective deeds, there is an implied covenant from the grantors that they should forever have a right of way over them."

and he quotes from a textbook on easements starting at the bottom of p. 142 to 143 as follows:

> "In these cases it is broadly laid down that where a grantor conveys land bounded on a street or way, he is estopped to deny the existence of such street or way, and the grantee acquires by the conveyance a perpetual easement or right of passage upon and over it, from the full enjoyment of which he can never afterwards be excluded."

I have also considered **Hart of Boutilier**, [1921] 56 D.L.R. 620, Supreme Court of Canada.

Lot "B" is described in part as follows:

> "Thence South, Eight-Two degrees, Thirty minutes, East (S 82^0 30' E), a distance of One Hundred Ninety-three point zero (193.0) feet, following the southern boundary of a right-of-way shown on the plan of survey to a steel pin marking the northeastern corner of lot 'B';"

Schedule "A" goes on to say:

> "... being the same as shown designated as lot 'B' on a subdivision plan prepared by M. McMullan, Nova Scotia Land Surveyor, on the 29th day of June 1974."

It is clear from the representations of Lenn Speight through the production of his plan intended to be and actually relied upon by the Collins gives rise to a right to the main right-of-way by implication and estoppel. I refrain from any finding in relation to lot "C" because it has not been addressed nor are the persons entitled to lot "C" a party to this action. Nevertheless I hold by implication and estoppel the Collins felt comfortable in disposing of lots "C" and "D" due to the reliance on the Speight plan and representations. Lot "B" is entitled to its use along its border, and the "L" shaped lot along its border where they border on the main right-of-way, access to the main right-of-way and both lots "B" and "E" and "L" shaped lot are entitled to use, by ownership, the substituted right-of-way of access and to exercise entitlement to the main right-of-way to the highway by estoppel.

Third Issue

Are either of the parties entitled to damages or compensation?

Damages must be reasonably quantified and shown to have arisen from a breach. No damages have been established by either party. The claim by Mr. Collins for Mr. Caines' existing account of over $400 and anticipated account of over $2,000 have not been established and may well encompass matters that are outside the issue of damages and in such areas as might be covered by a determination on costs. The claim for storage advanced has not been established. No notice to Richard Speight was given of such expense being incurred and no opportunity for mitigation of such a claim if it were validly

established as an item of damages. No satisfactory explanation of the delay in seeking a declaration has been provided.

With respect to the matter of compensation Dr. Collins has requested that the court address this matter and I am prepared to oblige. Dr. Collins does not oppose a reasonable award by way of compensation to Richard Speight for any benefit derived by the Collins arising out of his expenditure of time and money on the road to date. Dr. and Mrs. Collins do not deny substantial work has been done on the main right-of-way to the point that there is a limited physical degree of vehicle access. There is an obvious benefit to the Collins lots, but they did not have an opportunity to provide any input into the expenditures and the need for urgency was created by Mr. Speight who has substantially been the beneficiary of his efforts to date.

In the future they will have to reach agreement before either party is bound to make any contribution. Richard Speight indicated in his evidence and in the letter dated the 19th of January, 1984 that he had spent about $6,000 on the road and this is exclusive of his own fairly extensive labour. It seems reasonable therefore that there be an equal sharing of the cash outlay incurred to date and compensation shall be paid by the Collins to Richard Speight in the amount of $3,000. The **Judicature Act** mandates prejudgment interest and the parties have agreed on the rate of 9%. It is calculated simple interest, and the only discretion in the court is to limit the time frame of recovery where there has been undue delay.

Exercising such discretion I award prejudgment interest for a two-year period for a total prejudgment interest of $540. Richard Speight is therefore entitled to compensation and prejudgment interest totaling $3,540.

Punitive Damages

The evidence falls far distant from establishing any entitlement to punitive damages. For an example of the kind of misconduct that warrants an award of punitive damages see **Conrad v. Household Financial Corp. et al.** (1992), 115 N.S.R.(2d) 153; 314 A.P.R. 153, a decision of MacDonald, J., which was approved of on appeal.

Costs

Counsel are entitled to be heard on costs and disbursements.

With respect to the matter of costs, the starting point is Civil Procedure Rule 63.03(1). Unless the court otherwise orders the cost of a proceeding or of any issue of fact or law therein, it shall follow the event.

The plaintiffs' claim herein was for a declaration with regards to the main right-of-way. The plaintiffs also asked that the compensation be set, and they sought punitive and other damages. On the whole, the plaintiffs have been successful, although there is an element of mixed success, but there is such a substantial degree of success on the part of the plaintiffs that, in my view, costs should follow the event.

Civil Procedure Rule 63.02 makes it clear that costs are in the discretion of the court and the first consideration I have to deal with is the position of the offer filed by the plaintiffs on the 15th of April, 1993. Should it be considered under Civil Procedure Rule 41A? Civil Procedure Rule 41A.03 deals with the effect of a failure to accept an offer. There are a number of comments I want to make with respect to 41A.09(1). It starts off with "unless ordered otherwise" so what Civil Procedure Rule 41 means is an opportunity for a party with precision to indicate the basis upon which at any point in time particularly under the Rule seven days prior to the trial, what is acceptable by way of settlement in order to avoid the uncertainty and expense of proceeding to trial.

It is clear that the discretion of the court remains with respect to the matter of costs, and that discretion must always be exercised judicially, and care has to be given with respect to the assistance and direction provided by Civil Procedure Rule 41A.09. It does, however, very clearly indicate that it applies where the plaintiffs obtain a judgment as favourable or more favourable than the terms of the offer to settle. The offer to settle is directly on point with respect to the declaration, but essentially that is what the plaintiffs were seeking, and the matter proceeded to trial with the additional claims for which the plaintiffs were not successful in relation to punitive damages and the claim for other damages.

There is still the matter of discretion on the application of 41A and it is my conclusion that, while the courts must make every effort to encourage offers of settlement, they should be filed with complete precision and there is a measure of success, a very limited measure on the part of the defendant. The offer does not address the direction and award to the defendant of compensation with prejudgment interest.

On balance I am of the view, and so exercise my discretion to conclude, that Civil Procedure Rule 41A, the double-up provision, is not appropriate in these circumstances.

Civil Procedure Rule 63.02(b) does provide some guidance, 63.02(2)(b) in that the court can exercise its discretion as to costs and may take into account any offer of contribution. Certainly some weight has to be given to the offer because it was one that could easily have brought a response that might well have brought forward settlement by an adjustment in relation to the area of compensation. It is not a major factor, but the court always has to exercise its discretion by encouraging offers of settlement.

The Rules that were introduced providing for tariffs were on the theory that there should be a greater relationship to the actual fees involved via an award of party and party costs, but that is not always achievable because there has to be some recognition of factors such as the mixed degree of success,

etc. The tariff, in its application there is guidance, but again it is the discretion of the court because the Rules in relation to tariffs, 63.04(1) starts off with,

> "subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the tariffs and, in such cases, the 'amount involved' shall be determined, for the purpose of the tariffs, by the court."

and it sets out a number of steps of guidance, many of which do not apply here because there has not been any improper process or handling of the process. There has been a high degree of cooperation between the parties with respect to limiting the costs of the trial.

The **Costs and Fees Act** does provide, where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determining having regard to (1) the complexity of the proceeding and (2) the importance of the issues.

As important as the matter is to all parties, it is not a terribly complex proceeding and really resolved on a determination of fact which I had absolutely no difficulty in finding that the intent of Lenn Speight was to establish a subdivision to which all of the lots at the back have the right to use an entitlement to use the main right-of-way. It is not terribly complex, but it has required a great deal of time and effort because these things are tedious and land matters require a great deal of concentration.

To some extent I am trying to relate this to what an award would be in other cases of the same duration, time and effort and give some consideration to the fact that there was an offer of settlement which was very dramatic in the direction of the court determination. Somehow this matter ought to have been resolved.

In doing the best I can in exercising my discretion as carefully as I can in a judicial manner, I conclude that the amount involved for the purposes of taxation is $45,000, that scale 3 is appropriate, that the plaintiffs are entitled to their costs, taxed and allowed in the amount of $4,500.

Counsel now agree on disbursements of $2,400 so that costs and disbursements are taxed in the total amount of $6,900.

Order accordingly.

GARY A. YEOMANS and SHEILA A. YEOMANS (plaintiffs) See 128 N.S.R. (2d) 225
v. EDWARD BOURGEOIS (defendant)
Nova Scotia Supreme Court, Trial Division
Haliburton, J.
December 23, 1993.

This was an application by the Plaintiffs for an interim injunction to restrain the Defendant from using a disputed right of way. An interim injunction application is heard by a Judge prior to the principal action between the parties. The evidence considered by the Judge is often in affidavit form and the issue is whether or not to restrain one of the parties from doing some act before the matter can be heard fully at trial. As a result, Judges are usually more concerned with the issue of whether or not some irreparable harm will result if one of the parties is allowed to continue some action and less concerned with the actual merits of the underlying action. Comments that a Judge makes in deciding interim applications are therefore generally of limited assistance in helping the reader to understand general principles of law. In this case, the Judge did make several comments about the respective rights of the owners of the benefited and burdened parcels where a right of way exists and it is for this reason that the case is included.

The Defendant owned a lot on Third Lake, Windsor Junction. The lot had originally been surrounded by the lands of the Plaintiffs' predecessor in title and when the Defendant purchased the lot a right of way was included for access from the public road. Subsequently, the Defendant's son purchased an adjoining lot and the Defendant began to use the right of way which the son had. For a number of years part of the right of way which the Defendant had been granted was not used by him. When the Plaintiffs purchased the burdened parcel, they began to make landscaping improvements which interfered with the Defendant's right of way. A whole series of events followed which the Judge termed "very childish behaviour." In the end, the action was commenced and the Plaintiffs claimed that the Defendant had the right to use the right of way only to the extent that he had used it while he owned the property and that he had no right to maintain the right of way to an extent beyond that which was absolutely necessary for access purposes.

The Judge dismissed the application but in doing so provided a very succinct review of the rights of a landowner who has been granted an express right of way. Specifically, the Judge found that the right of way gave the Defendant:

> "...the right of access to his house for all normal modern day purposes, including the right for himself and his invitees to travel to and from his home by vehicle or on foot, the right to erect normal services for electricity, telephone, sewer and water."

Further, on the issue of maintenance, the Judge ruled that the Defendant had the right to maintain the right of way by plowing and even paving, so long as he remained within the physical limits of the granted right of way and did not interfere with the Plaintiffs' underlying rights.

GARY A. YEOMANS and SHEILA A. YEOMANS (plaintiffs) v. EDWARD BOURGEOIS (defendant)
Nova Scotia Supreme Court, Trial Division
Haliburton, J.
December 23, 1993.

This matter came before me by way of a chambers application wherein the plaintiffs sought to have the court issue an interlocutory injunction

> "... restraining the defendant, his servants, agents or invitees from entering upon, travelling over or in any way using a 20 foot right of way..."

At the time of the application, I expressed the view that the plaintiffs' application was without merit. This decision was reserved to permit the parties, particularly the plaintiffs/applicants, a further opportunity to make written submissions with respect to any restrictions which might be applicable, restricting the lawful user of the easement or right of way of which the defendant is the owner. Having received submissions from both parties and thoroughly reviewed the cases which they have submitted, I find that my view is unchanged.

The application for an interlocutory injunction is dismissed. Neither urgency nor balance of convenience has been established. The parties have asked me to express my views on the underlying trespass action, and their respective rights.

The Background

On the 20th of July, 1954, the defendant, "Bourgeois", acquired a building lot on the shore of Third Lake at Windsor Junction, Halifax County. The lot had water frontage of 65 feet and a depth of 147 feet, more or less. He bought the property from the heirs of Harry Lintaman who retained the surrounding property. Since the property was landlocked, the grantors conveyed a right of way to access the property. The right of way as granted continued the length of the south boundary of the lot to the lakeshore. The Lintamans themselves used a private road or right of way to gain access to the Windsor Junction Road. The right granted to Bourgeois included joint use of the roadway. The full rights of Bourgeois are described in the following paragraph contained in the grant:

> "Together with the right of entry on a private road and the use thereof, the said private road being twelve feet wide and running from the main public road across lands owned by Marion J. Lavers, Also the right of entry and the use of a twenty (20) foot right of way and the extension thereof to meet the private road, hereinbefore described. The said right of way abutting on and bounding the southern side of the lot herein conveyed.

> All as shown on a plan dated the 5th day of October, A.D. 1950, and prepared by L.R. Williams, P.L.S. and attached to a deed from Marion J. Lavers to Gladys May Lintaman."

The effect is to grant a 12 foot "way" leading to a 20 foot way leading to the right of way in question, which accesses the property and the lake.

It should be noted that a reproduction of the 1950 plan depicts the right of way extending to the shoreline.

Bourgeois did not, in fact, build a house on the property until 1969 when he retired. In the meantime, in 1960, his son acquired the adjoining property of Marion J. Lavers, about which more later. The Lintaman property (the servient tenement) has been occupied by a succession of owners since 1954. At least some of those owners did not deserve a positive neighbourly attitude from Mr. Bourgeois. The photographs in evidence demonstrate the Bourgeois property is well kept. The plaintiffs' property is tidy and well kept. They have made dramatic improvements in the house and surrounding property after their purchase in 1988. It is because of this and further improvements they wish to make to their property that they have run into trouble with Bourgeois. They have created a back or side lawn, which did not previously exist, adjacent to the right of way. They have extended a stone wall. A survey plan suggested that this work impinges on Mr. Bourgeois' right of way.

It is likely that each of the parties has assumed an unreasoned and antagonistic position to the rights of the other. The real injury suffered by either of them is not significant and does not justify legal action. It is likely there would never have been any friction between the parties had the plaintiffs known of Bourgeois' rights and right of way at the time they acquired the property in 1988. Unfortunately, they were not aware of the existence of the right of way until after a 1990 argument with Bourgeois. In 1990, Mr. Yeomans laid a temporary water line to the lake over the land adjacent to Bourgeois' property. Bourgeois ran over this water line several times with his garden tractor, resulting in a confrontation between the two as to which of them was the victim of trespass. In February of 1991, a plan of survey was prepared for Mr. Yeomans which disclosed the location of the right of way. Much of the right of way has not, in fact, been used by the owners of either of the properties.

The lack of "use" of portions of the right of way by Bourgeois is one basis upon which the plaintiffs contend Bourgeois' rights can and should be restricted. Bourgeois has, in fact, never used the right of way to gain access to the lake. He has adequate access to the lake on his own property. Hence, for a distance of approximately 100 feet from the lakeshore, the right of way appears to be in a totally unimproved state, covered with bushes, small trees, wild flowers, raspberries and the like. The upper 50 feet is used as a driveway. It provides access to the front door of the Bourgeois property, but is not the driveway of preference for Mr. Bourgeois himself. Since his son acquired the adjoining property about 1960, Bourgeois has had the free use of that property to gain access to his own. Using the son's land together with the right of way, he has created a circular drive around his dwelling. His normal

route of entry and of exit from his house by motor vehicle is over his son's property and not over the right of way.

The plaintiff similarly has a circular drive around his dwelling. His predecessors in title apparently preferred to use the driveway most distant from the Bourgeois property as their means of access. To use the second driveway requires joint use of the right of way. It is this second driveway which is now Mr. Yeoman's preferred route of access to his dwelling. To some extent, at least, it is Yeoman's enhancement of his use of that driveway which has triggered the conflict between the parties.

Access to the shared roadway is not without impediments. In connection with the occupation of the Bourgeois property, there are located a well and a utility pole within the joint right of way. The survey plan prepared for Mr. Yeomans in 1991 depicts a rock wall which also encroaches on the right of way. The extension of this rock wall towards Mr. Bourgeois' property created a significant conflict between the two. In addition to these physical impediments, the surveyor apparently concluded that the Bourgeois right of way, as it abuts the adjacent 20 foot right of way, was offset by 8.2 feet, thereby restricting its width at that point to 11.8 feet.

The parties are in conflict as to whether or not the rock wall encroaches on the right of way and interferes with Mr. Bourgeois' access. They are in conflict about the cutting of a tree (or an old stump) on the unfrequented portion of the right of way. They are in conflict with respect to the right of Mr. Bourgeois to grade and gravel his driveway over the right of way and his right to remove snow in the winter time. As regards both gravelling and snow clearing, the plaintiff further contends that such activities have been carried on by Bourgeois outside the limits of the right of way. This latter complaint relates to the fact that the plaintiff had attempted to create lawn on that portion of the right of way which was not actually occupied as a driveway by Bourgeois by adding topsoil and seeding it to lawn. Bourgeois responded by grading and gravelling what he considered to be his right of way. In addition to what appear to be genuine and real areas of dispute, there are complaints which I sincerely hope are imagined. The plaintiff complains of Bourgeois visitors parking on the right of way and interfering with the plaintiff's use of it. He complains of Gerald, the younger Bourgeois son, spinning his tires on the right of way as deliberate provocation. On the other side, the Bourgeois have complained of harassment and annoyances which, if justified, are a reflection of very childish behaviour.

The plaintiff, in testifying, contended that since he was prepared to see that the area is maintained (filling of pot-holes) and cleared of snow that Bourgeois, who has only a right of way, should be thereby precluded from performing any maintenance himself.

In his testimony, Mr. Bourgeois conceded that in scraping the driveway with his tractor, he "hooked" a large rock which may not have been within the 20 foot right of way and which may have caused some damage and he apologized for that on the stand. The rock he spoke of, he said, was in the area where the right of way is only about 10 feet wide. He spoke of his reasons for "getting rid of the willow tree" which he contended was on his boundary line.

Submissions And Issues

The plaintiff's submission was put pretty succinctly at the conclusion of the hearing with the proposition that "Bourgeois has the right to travel over the right of way only to the extent that he has established his user" over the past 20 years or so and that "he has no right to maintain a roadway other than to the extent necessary to permit entry".

The dispute between the parties can be resolved only by describing the rights which Bourgeois acquired under his conveyance. There are no issues, save to interpret that conveyance. According Bourgeois the rights to which I find him entitled forces the conclusion that the plaintiff has not only failed to establish a strong prima facie case, but clearly indicates that the balance of convenience between the parties is in favour of dismissing the interlocutory application. The plaintiff has failed to establish that he will suffer <u>any</u> harm, let alone irreparable harm before this matter comes to trial if, indeed, it does come to trial.

The Law

It is important to emphasize that Bourgeois has received his right of way by express grant and not by prescriptive right or user. The extent of the grant is contained in the following words:

> "The right of entry and use of a 20 foot right of way ... (and running from the main public road across lands ...)"

Aspotogan Ltd. v. Lawrence 14 N.S.R.(2d) 501, is perhaps the leading case in Nova Scotia regarding rights of way. The court endorsed the law as it was reviewed and enunciated by Morrison, J., the trial judge. There was an express grant of a right of way there in the following terms:

> "Never the less saving and reserving for ourselves our heirs and assigns perpetually our several rights and privileges in the Grist Mill and Dam ... All the roads in use on the lands thus hereby divided shall be kept open ..." (paragraph 29)

Morrison, J., quoted from **Gale on Easements**, 14th Edition, p. 44, at para. 54 of his judgment:

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

(Paragraph 55)

> "... 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."

(Paragraph 56)

> "It seems that, subject to any qualifying words in the grant, the authorized mode or quality of user ... 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."

Morrison, J., also referred to **Dalhousie Land Company Limited v. Bearce**, 6 M.P.R. 399 (N.B.C.A.):

(Paragraph 57)

> "... the grantee of a right of way has a right ... 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."

and to **White v. Grand Hotel**, [1913] 1 Ch. 113:

(Paragraph 62)

> "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."
>
> "... 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 underlining)

Where there is an express grant, a proper interpretation must consider what restrictions have been placed on the grant by the grantor. The preceding paragraph quoted from **White v. Grand Hotel** refers to one such restriction, that is, the width of the road permitted. As I observed at the time of the hearing, it is difficult to contemplate the grant of a right of way describing larger rights than the one we have before us. That is, "the right of entry and the use of ...". No restrictive words are employed. The grant is as large as it can be, subject only to considering the proper uses which the servient tenant may continue to make of his underlying rights. There being no restrictive words used, the court must consider whether there are other restrictions implicit, based on the circumstances prevailing at the time of the grant, the relationship of the parties and their respective properties, the physical position of the right of way and the purpose it was intended to achieve. Referring again to **Aspotogan**, at para. 66 (p. 523), Morrison, J., included the following in a lengthy quote from **Cannon v. Villars** (1978), 8 Ch. Div. 415:

> "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 ... 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, then a ... right of way would include a right to use it, for reasonable purposes, sufficient 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 ... 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 ... for carts, horses, carriages, and everything else." (my underlining)

On the basis of the law as he reviewed it, Morrison, J., reached the conclusion in **Aspotogan** that since the "wording of the grant refers to roads" and "oxcarts"...

(Paragraph 68)

> "... there is no restriction in the words of the grant as to the method of use ..."

(Paragraph 69)

> "There is no restriction in the grant limiting the width of the roads referred to."

(Paragraph 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."

Conclusions

Common restrictions which frequently appear in the grant of an easement or a right of way relate to a termination date, the payment of an annual user fee, the width, a restriction on the use of commercial vehicles or an obligation to maintain the right of way to a particular standard. No such restrictions have been imposed upon the grantee of this right of way. The plaintiff has objected that Bourgeois is not entitled to maintain the driveway but must rely upon maintenance to be provided by the owner from time to time of the servient tenement. That is a novel and extraordinary proposition. It is a power not balanced by any obligation to maintain.

To apply some of the propositions expressed in the cases and authorities relied upon in **Aspotogan**, it is evident that Bourgeois originally bought the property to erect his retirement home. The property which he acquired was landlocked and he required a right of way to make practical use of it. The cases make it clear that we must adjust our thinking to modern developments. The right of way is restricted only by its width. Subject to that limitation, the grantee must have the right of access to his house for all normal modern day purposes, including the right for himself and his invitees to travel to and from his home by vehicle or on foot, the right to erect normal services for electricity, telephone, sewer and water. The right to maintain a roadway in conjunction or cooperation with other users is clearly one of his rights. The only limitation which I understand to be placed on Bourgeois in the use of this right of way is that he may not interfere with or impede the plaintiffs in their use and enjoyment of their own property. For practical purposes, he may plow snow, ditch, place gravel or even pavement on his driveway, but only within the limits of his 20 foot section and only if it does not adversely affect the use and enjoyment by the plaintiff of his underlying rights as a co-occupant of the easement and occupant of the abutting lands. It has been argued that Bourgeois is restricted to <u>using as a right of way</u> only those lands which he has used in the past. Again, this is not a right of way acquired by prescription but one acquired by grant. The failure to actively occupy or use either the full 20 foot "width" or the entire "length" of the right of way cannot be lost by his failure to actively occupy it. Obviously, his rights could be diminished by prescription if some adverse party were able to establish an adverse user in the future.

The plaintiff has tendered for the court's consideration an Ontario case, **Cohen v. Boone**, Middleton, J., (1921), 50 O.L.R. 368, a case involving the use of a driveway in a commercial area in downtown Toronto. It is cited for the proposition that the plaintiff misguidedly thought

> "he had some right over and above the right of free ingress and egress over the lane and turning place to and from his premises."

The facts of that case are somewhat the converse of the present. In that case, the plaintiff was attempting to dictate to co-owners certain restrictions on their user of the right of way. The case confirms that "the owner of the soil" is entitled to make such use of the area covered by the right of way as he sees fit and to exclude those not granted a right of way, the property being subject only to a "reasonable user of the right of way" by those "entitled". The case does not add to or detract from the position of the present plaintiffs.

Briefly put, Bourgeois was specifically granted an easement "of entry and use" of an area which is specifically defined. The purpose of the grant was to permit the construction and occupation of a private residence. The right granted must be interpreted in accordance with modern usages. The effective use of such a right of way requires the complimentary and necessary right to build and maintain a roadway and other services customarily in use for the purposes intended. Such a grant of easement does not permit the grantee to interfere with or impede others who have co-existing rights to the right of way, nor does it permit the grantee to trespass on other lands of the servient tenement, nor create nuisances affecting the same.

The application is, accordingly, dismissed. It proceeded largely for the purpose of assisting the parties in obtaining some resolution of their respective rights. Both parties desired a preliminary skirmish in the court so as to assess their respective positions vis-a-vis proceeding to a full trial. That being the case, I think it appropriate to award costs at this stage. Accordingly, the costs on this application will be costs in the cause.

Application dismissed.

GARY WELLS (plaintiff) v. CYRIL WELLS (defendant) See 132 N.S.R. (2d) 388
Nova Scotia Supreme Court
Nathanson, J.
June 16, 1994.

The Plaintiff and Defendant were Nephew and Uncle. The Uncle had purchased a portion of the lands now owned by the Nephew over forty years ago and the portion was landlocked. The Uncle immediately started using a driveway to access his land from the public road and continued to do so for the forty year period without permission. The driveway ran diagonally through the balance of the Nephew's land and made it impossible to develop it. The Nephew built an alternate driveway for the Uncle, but the Uncle refused to use it. The Nephew then blocked the original driveway and the lawsuit began.

The Nephew cited cases in support of the proposition that he, as owner of the burdened parcel, could force the Uncle to accept an alternate right of way, so long as it was no less convenient for the Uncle.

The Judge found that the right of way was originally one of necessity but also was founded on prescription. The Judge reviewed the law on the issue and held that the owner of a burdened parcel could not force the owner of the benefited parcel to accept an alternate right of way.

GARY WELLS (plaintiff) v. CYRIL WELLS (defendant)
Nova Scotia Supreme Court
Nathanson, J.
June 16, 1994.

The principal issue in this case is whether the owner of a servient tenement is entitled to alter, change the location of, or substitute a right of way of necessity which has been used by the owner of the dominant tenement openly, continuously and adversely for a period in excess of 40 years. That issue must be resolved in the negative.

The plaintiff owns approximately 6.5 acres of land at Eastern Passage, Halifax County. A small portion of that acreage has a frontage of 60 feet more or less on the southwestern side of Cow Bay Road, a public highway. The defendant, who is the uncle of the plaintiff, resides in a house on a lot, two boundaries of which are adjacent to the plaintiff's acreage, and the northwestern boundary of which is 150 feet more or less southeasterly from the southeastern boundary of Cow Bay Road. In short, the defendant's lot is landlocked. The defendant and his family have ingress and egress by foot and by vehicle over a driveway which runs through that portion of the plaintiff's acreage which is adjacent to Cow Bay Road. It is common ground that the defendant has been using that driveway for that purpose for a period in excess of 40 years.

Both the plaintiff's acreage and the defendant's lot are portions of land which were at one time owned by the Director, The Veterans' Land Act. The Director conveyed the defendant's lot to the defendant by deed in 1950, and subsequently conveyed to the plaintiff's father, Reginald Wells, by deed in 1957. The plaintiff acquired his acreage from his father by deed in 1983.

Upon acquisition of his lot, the defendant commenced construction of a house and, at approximately the same time, knowing that he was landlocked, he began to travel over what is now the plaintiff's acreage. He did not ask permission from the Director, The Veterans' Land Act, or from his brother, Reginald Wells. Nor did he ask for permission later when his nephew acquired the plaintiff's acreage from his father. It is common ground that the defendant and his family have been walking and driving over the driveway upon what is now the plaintiff's acreage openly, continuously and adversely for over 40 years. I believe it is also common ground that the defendant has acquired a right of way over the driveway. However, there is disagreement as to the nature of that right of way.

The plaintiff's father, Reginald Wells, tried unsuccessfully to sell the land fronting on Cow Bay Road for several years before his death. The plaintiff also wanted to sell after he acquired it, but was similarly unsuccessful. It was considered that the lot was unsaleable because the driveway over which the defendant had a right of way ran diagonally through the property in such manner that there was insufficient room for the construction of a house. In 1992, the plaintiff was approached by one Burton Naugle who was familiar with the property and offered to buy it on condition that he be permitted to open up a new driveway along the western side boundary of the lot and that the existing driveway be

closed so as to enable him to build over it. The alternate driveway could be used by the defendant. There is some disagreement as to what was said and done at the time this plan was implemented. Naugle testified that he spoke to the defendant before construction of the alternate driveway began and that the defendant consented to the construction of the alternate driveway along the western boundary of the lot. The defendant denied that he consented; he testified that he received no indication or warning before construction of the alternate driveway commenced.

The defendant, by his solicitor, sent to Naugle a letter threatening legal action if he altered, changed or disturbed the existing driveway. Naugle then declined to complete the purchase of the plaintiff's lot.

The defendant declined to use the alternate driveway.

One Saturday morning about two weeks after the date of the lawyer's letter, the defendant found the original driveway blocked by a tractor and further obstructed by large stones and dirt placed upon the driveway by the plaintiff. The plaintiff testified that he was widening the alternate driveway, at a point close to where it overlapped the original driveway, when the tractor broke down. He further testified that he was unable to arrange for the tractor to be repaired for approximately six days, during which time the tractor remained where it was blocking the original driveway. Before leaving it there, the plaintiff attached to the driver's wheel a sign bearing a statement that anyone who touched the tractor would be prosecuted, and also bearing his name and telephone number.

Both the plaintiff and the defendant testified that at no time during the period of use of the original driveway by the defendant did the plaintiff or anyone else give him permission to use that driveway for ingress and egress. There was some evidence of occasional or periodic use for brief limited periods of time by others. The defendant testified that he gave permission to the plaintiff to use it. Both the plaintiff and the defendant testified that the construction of an alternate driveway was not discussed between them before construction of it commenced. Clearly, although they are uncle and nephew, they do not communicate a great deal with each other.

I am not inclined to believe Naugle that the defendant consented to the construction of the alternate driveway. In any event, little turns on it as, in my opinion, the legal consequences would not be different if the finding was otherwise.

I do not believe the plaintiff that his tractor chanced to break down upon the original driveway while he was trying to widen the alternate driveway. It is simply too much of a coincidence to believe that the tractor broke down in a location that caused the defendant maximum inconvenience shortly after the plaintiff arranged for the construction of the alternate driveway which the defendant declined to use, and after the date of the letter to the plaintiff from the defendant's solicitor. I find it impossible to accept that the plaintiff required six days to have the tractor repaired, during which period he made no effort to remove the dirt and stones from the original driveway, and made no effort to explain the situation to the defendant.

The defendant has clearly established that he has a right of way of necessity over the original driveway: Goddard's **A Treatise on the Law of Easements** (6th. ed., Stephens & Sons Limited, 1904), p. 359. That right of way of necessity has been in existence, and has been used, for a period in excess of 40 years. Generally speaking, usage of a right of way, openly, continuously and adversely for that period of time would be considered as giving rise to a prescriptive right of way.

It is submitted on behalf of the plaintiff that the defendant does not have a prescriptive right of way with respect to the original driveway; that the defendant has a right of way of necessity which continues only during the subsistence of the necessity and, therefore, can be terminated or changed by the plaintiff at any time he creates a convenient alternative driveway for the defendant; and that the plaintiff has the legal right to locate and relocate the right of way and substitute an alternate right of way without the consent of the defendant, so long as the alternate is at least as convenient as the original right of way. In support of those propositions the following cases were cited: **Holmes v. Goring** (1824), 2 Bing 76; 130 E.R. 233; **Deacon v. South-Eastern Railway Co.** , [1889] 61 L.T. 377 (Ch. D.); **Laurie v. Winch**, [1953] 1 S.C.R. 49; **Matthews et al. v. Plympton (Township)** (1982), 37 O.R.(2d) 382; 135 D.L.R.(3d) 675 (H.C.); **Giecewicz et al. v. Alexander et al.** (1989), 3 R.P.R.(2d) 324 (Ont. H.C.). Let us look at each of those cases individually.

Holmes v. Goring, supra, appears to be wrongly decided. The headnote in the case report states: "The way of necessity is limited by the necessity which created it, and ceases, if at any subsequent period the party entitled to it can approach the place to which it led, by passing over his own land." Strictly speaking, this case has no application to the present fact situation in which there is no evidence that the defendant can or ever will be able to pass between his home and the highway by passing over his own land. But, even if that were not so, there is doubt as to the correctness as to the principle for which the case supposedly stands. In **Proctor v. Hodgson** (1855), 10 Exch. 824, Baron Parke commented at p. 824, with respect to **Holmes v. Goring**, that: "I should have thought it meant as much a grant forever ... and it struck me at the time that the court was wrong ..." Eleven years later, **Pearson v. Spencer** (1861), 1 B. & S. 571, held that a way of necessity once created must remain the same way as long as it continues, and Blackburn, J., at p. 586 stated: "We certainly do not feel inclined to extend the authority of **Holmes v. Goring** (1824), 2 Bing 76; 130 E.R. 233, so far as to hold that the person into whose possession the servient tenement comes, may from time to time vary the direction of the way of necessity, at his pleasure, so long as he substitutes a convenient way."

The other four cases all deal with the entirely different fact situation of an express grant. **Deacon v. South-Eastern Railway Co.**, supra, held that the grantor of an undefined right of way contained in an express grant has the right to define the line of the way but, once defined, the grantor cannot afterwards alter it. **Laurie v. Winch**, supra, concerned the construction of rights set out in a conveyance in which the grant was silent as to the dominant tenement, location and termini of the way, and the nature and extent of the rights conveyed. **Matthews et al. v. Plympton (Township)**, supra, dealt with the issue of whether obstruction of a private right of way by construction of a public highway was sufficiently substantial interference with the enjoyment of the private right of way as to be actionable. **Giecewicz**

et al. v. Alexander et al., supra, concerned the interpretation of an easement which was created by an express grant and which was qualified on its face to provide a driveway over certain lands but not by any specific route. These cases are distinguishable on their facts.

Counsel for the plaintiff stated that, despite exhaustive legal research, he was able to discover only one case which was directly on point and clearly established that the owner of the servient tenement had the right to relocate a right of way of necessity. The case is **Wynne v. Pope** (1960), 3 S.A. 37.

I do not accept that case as authority for the principle claimed for it, for three reasons.

The case is cited in a footnote in **Gale on Easements** (1972, 14th Ed.), p. 117, as a case in which "it was held by the Supreme Court of South Africa that an easement of necessity can be altered by the owner of the servient tenement if he can afford to the owner of the dominant tenement another route as convenient as the original route". The footnoted citation stands in contrast to the general principle set out in the main body of the text which is stated to be: "Where a way of necessity arises ... its line is to be chosen by the grantor; but it is for the person entitled to it to make it up. It has been said that the line, once established, cannot be altered by the servient owner." (emphasis added) As authority for that general principle, the learned author of the text cites in the same footnote the case of **Pearson v. Spencer** (1861), 1 B. & S. 571, 584 per Blackburn, J.; affd. (1863) 3 B. & S. 761 (Ex. Ch.).

The case is neither binding nor persuasive. With respect, it is a decision not of the Supreme Court of South Africa but, rather, of the Cape Provincial Division. The principal propositions of law stated in it appear to rely on this authority upon South African cases, rather than those of England or Canada or any Commonwealth country, which I am unable to verify. Those propositions may be derived from the Roman-Dutch system rather than the English common law.

While the language is not easy to read, I am not sure that the case stands for the proposition of law which counsel attributes to it. At p. 39, the court states:

> "As I understand the law, 'via ex necessitate' can be claimed by an owner where it is necessary for him to have ingress or egress from his property by such a way in order to reach a public road. Such a servitude is created 'simpliciter', and could be altered by the owner of the servient tenement if he can afford to the owner of the dominant tenement another route as convenient as the old route. For the owner of a dominant tenement to be able to claim the right of 'via ex necessitate' along the specific or defined route, it would be necessary for such servitude to have been duly constituted, for example, by an order of court, or by prescription, or by any form recognized by the law." (emphasis added)

And at p. 40:

> "It was not contended on behalf of the excipient that defendant could never acquire by prescription the right to a servitude of way along the defined route. Mr. Newton Thompson conceded, for instance, that if plaintiff had sought to alter the route but the defendant objected thereto and insisted on the retention of the existing route, then should plaintiff have acquiesced therein, it might well be that prescription would begin to run against plaintiff and that if he continued to acquiesce in the open peaceable and continuous use by defendant of the existing route for the thirty years she could acquire the right by prescription to the use of that route and no other."
>
> "In the present case defendant is not claiming to have acquired a right to cross plaintiff's property by prescription but she claims that by prescription she has acquired a right to do so along a particular route. Mere proof the use of that route for thirty years does not establish that it has been used adversely to the plaintiff or that it has been used as of right. The use of that particular route did not arise from contract or in any other legally recognized manner. It was a 'precarium' tacitly granted ... and accordingly was not exercised as of right by defendant or her predecessors in title. The plaintiff could at any time have put a stop to the use by defendant of that particular route provided he placed at her disposal an equally convenient route. His permission to her to use that particular route was accordingly revocable." (emphasis added)

Counsel for the plaintiff relies upon the first and second sentence in the first excerpt quoted, but ignores the third sentence which appears to indicate that the owner of a dominant tenement may claim a way of necessity along a specific or defined route by prescription; that is exactly the claim being made by the defendant in the present case. The second excerpt indicates that acquiescence by the owner of the servient tenement to open, peaceable and continuous use for thirty years would give rise to prescriptive rights; that is exactly the claim being made by the defendant in the present case. In the third excerpt quoted, the right to travel over the particular route did not arise in any legally recognized manner so that the owner of the servient tenement could have stopped such use at any time; in the present case, it is conceded that the period of usage is sufficient to give rise to a prescriptive right.

In **Wynne v. Pope**, supra, the owner of the dominant tenement was not able to prove adverse use and, therefore, was unable to establish title by prescription. Thus, the owner of the servient tenement could at any time put a stop to the use of the particular way of necessity provided that he placed at her disposal an equally convenient route in order to service the continuing necessity. In the present case, there is evidence of prescription, that is, of open, continuous and adverse use for a period in excess of forty years. That gives to the defendant, as owner of the dominant tenement the prescriptive right to use the specific driveway across the plaintiff's acreage which is the servient tenement.

It is thus clear that the plaintiff has no authority for his claim that he, as owner of the servient tenement, has the right to relocate the driveway and, therefore, to alter the right of way which the defendant acquired by prescription. Indeed, there is authority to the contrary: **Pearson v. Spencer**, supra. See also **Gormley v. Hoyt** (1982), 43 N.B.R.(2d) 75; 113 A.P.R. 75 (C.A.).

In closing argument, counsel for the plaintiff cited the additional case of **Ring v. Pugsley** (1878), 18 N.B.R. 303, which holds that while a prescriptive right to light and air will be presumed after 20 years of uninterrupted use, no presumption is raised where the owner of the adjoining land has no means of resisting or obstructing the flow of light and air. It is submitted that if that principle was applied to the present case, the defendant might be precluded from achieving a prescriptive right of way over the original driveway where the plaintiff and his father had no means of resisting the defendant's use of the driveway over the 40 year period. This argument cannot be accepted because the plaintiff or his father, or both of them, could have constructed a proper roadway and forced the defendant to use it at any time before the defendant's prescriptive right accrued.

The position of the defendant is that the original driveway over the plaintiff's acreage may well have begun as a right of way of necessity but, after open, continuous and adverse use for more than 40 years, the defendant now has a statutory right to a prescriptive easement. This submission is based upon the following provision of the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258:

> "Prescription"
>
> "32 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 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 that purpose by deed or writing." (emphasis added)

Counsel did not cite any Nova Scotia cases dealing with the legal effect of this provision. However, the legal effect of the very similar English equivalent of this provision is discussed in **Gale on Easements**, supra, at pp. 146 ff, where the learned author states that the section does not appear to alter the common law and that user must be "as of right" which must have been enjoyed as an easement. In the present case, the requirements have been fulfilled and, therefore, the provision applies to the claim of

the defendant to a right which, therefore, is deemed to be absolute and indefeasible. The plaintiff has no right to alter the way of necessity which is vested in the defendant by prescription attained as the result of open, continuous and adverse usage for more than 40 years.

The claim of the plaintiff is refused. The counterclaim of the defendant is maintained.

The defendant has counterclaimed for a declaration that he has a valid right of way over the original driveway. An appropriate order will issue granting that claim, while recognizing the right of the plaintiff, as owner of the servient tenement, to use the driveway as well.

The defendant also counterclaimed for damages for trespass, intimidation and nuisance. The defendant will have judgment for general damages for trespass in the amount of $2,000. It is not considered necessary in the circumstances to award exemplary, punitive or aggravated damages. However, if any blockage of the driveway should occur again, such a claim would then be appropriate and in order.

The defendant will have prejudgment interest at the agreed rate of 4 1/2 % per annum from July 25, 1992, to the date of judgment.

Finally, the defendant will have his costs of the action to be taxed in accordance with tariff A, scale 3, and tariff D.

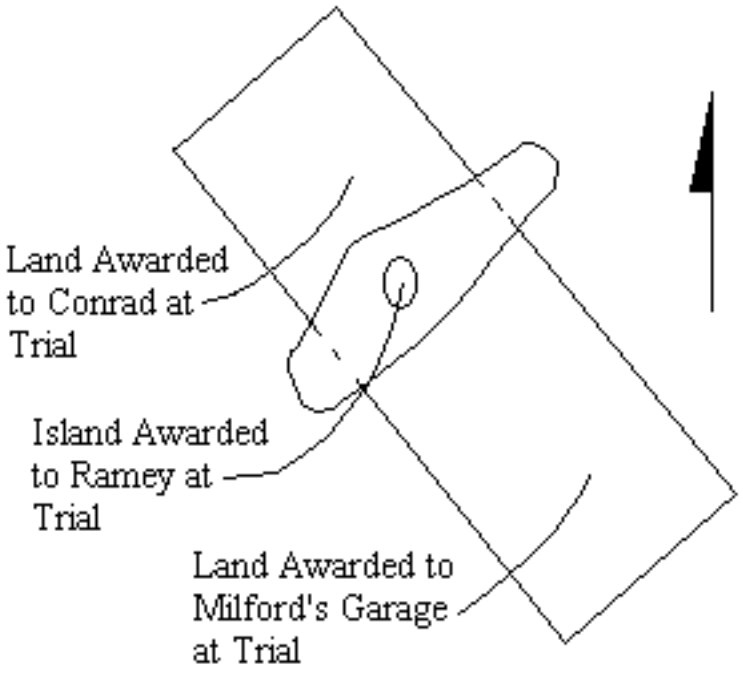
Order accordingly.

DELMER E. CONRAD (appellant) v. THE HONOURABLE THE ATTORNEY GENERAL of the PROVINCE of NOVA SCOTIA, MILFORD'S GARAGE LIMITED, HAROLD RAMEY and BARBARA RAMEY (respondents)

See 136 N.S.R. (2d) 170

Nova Scotia Court of Appeal
Matthews, Jones and Pugsley, JJ.A.
December 14, 1994.

Conrad had applied to the Trial Division Court under the **Quieting of Titles Act** for a declaration that he was the owner of 100 acres of land at Wellington, Queens County. The Attorney General had been made a party to the action (as is required under the Act) but had not participated. Milford's Garage Limited had claimed that it was entitled to the southeastern 60 acres of the land in question and the Rameys had claimed title to an island in a lake which divided the 100 acre lot into two sections. The lands were configured as shown on the following sketch:



The lands had been purchased by Albert Ramey in 1920. There were two competing chains of title following that:

Claim by Conrad	Claim by Milford's Garage Limited
1. Deed from Albert Ramey to Elmer Ramey in 1933. 2. Deed from Elmer Ramey to Roger Cross in 1956. 3. Deed from Roger Cross to Ronald Wile in 1959. 4. Deed from Ronald Wile to Conrad in 1959. The Deeds from Elmer Ramey to Cross and from Cross to Wile had never been registered, so a Quit Claim Deed from Elmer Ramey to Conrad was executed in 1969.	1. Maintenance Deed from Albert Ramey to Harold and Barbara Ramey in 1946. 2. Mortgage from Harold and Barbara Ramey to Milford's Garage Limited in 1949. 3. Sheriff's Deed (pursuant to the mortgage) to Lester Turner in 1952. 4. Deed from Lester Turner to Milford's Garage Limited in 1952.

Milford's Garage Limited claimed that the 1933 deed from Albert to Elmer Ramey had only conveyed the lands on the Northeast side of the lake and that its paper title to the remaining lands of the original 100 acres was superior to Conrad's. It also claimed that it had exercised adverse possession of those lands. Harold and Barbara Ramey claimed the island in the lake on the same two grounds. Some cottages had been sold on the southeast side of the lake and they were not claimed by any of the parties.

The Trial Judge held that there was no ambiguity in the deeds in Conrad's chain of title and the paper title to the entire 100 acres was vested in Conrad. The Judge then went on to hold that Harold and Barbara Ramey had established a good claim to the island by adverse possession "in the context of having colour of title." The Judge also found that Milford's Garage Limited had established that it had a better title to the lands southeast of the lake by virtue of adverse possession "with the assistance of colour of title."

Conrad appealed arguing that the Trial Judge had made errors in applying the concepts of adverse possession and colour of title to the situation. The Rameys cross appealed claiming that the Trial Judge had made an error in not holding that they had better paper title to the whole 100 acres, or in not rectifying the Deed from Albert Ramey to Elmer Ramey.

The Court of Appeal held that the Trial Judge had made errors in applying the concepts of adverse possession and colour of title. The Court reviewed the acts of possession claimed by the Rameys and Milford's Garage Limited and held that they were not exclusive, continuous or notorious. The Court also held that for the concept of colour of title to apply, the claimants had to establish adverse possession to at least a part of the lands claimed before that possession would be extended to all of the lands mentioned in the Deed under which the claimants claimed. The Court of Appeal granted this part of the appeal and awarded Conrad the whole 100 acres.

As to the cross appeal, the Court of Appeal accepted the Trial Judge's findings and dismissed it.

DELMER E. CONRAD (appellant) v. THE HONOURABLE THE ATTORNEY GENERAL of the PROVINCE of NOVA SCOTIA, MILFORD'S GARAGE LIMITED, HAROLD RAMEY and BARBARA RAMEY (respondents)
Nova Scotia Court of Appeal
Matthews, Jones and Pugsley, JJ.A.
December 14, 1994.

This is an appeal from a decision and order in an action under the **Quieting Titles Act**.

The appellant claimed title to approximately 100 acres of woodland located at Wellington, Queens County. The original grant to Barnabas Freeman in 1828 contained some 200 acres. The land was subsequently divided into two 100 acre lots running northwesterly from the old Wellington Road. Although not shown on the original grant the land was in fact divided by Beavertail Lake and included an island in the lake.

The land in this action in fact comprised 46 acres on the northwesterly side of the lake, 60 acres on the southeastern side of the lake and the island. The appellant has been granted title to the lot on the northern side of the lake. Title to the southeastern lot and the island is still in dispute in the action.

The title to the 100 acre parcel was conveyed on February 2, 1920 to Albert Ramey from Lawrence and Estella Hanley. Albert Ramey conveyed the land on May 19, 1933 to Elmer Ramey. By deed dated July 6, 1959 Donald Wade Wile and Mary Elizabeth Wile conveyed the following lands to the appellant Delmer E. Conrad:

> "All those lands and premises which were conveyed to one Roger Cross by Deed from Elmer Ramey dated August 21st, 1956, and in said Deed bounded and described as follows: All the one-half (western) of that certain lot, tract, piece or parcel of land situate at Wellington in the County of Queens, being the land granted by the Province of Nova Scotia on the 28th day of July A.D., 1828, to one Barnabas Freeman, of Milton, and which said lot of land contained two hundred acres, and which said lot of land was conveyed by the said Barnabas Freeman to Michael Seamond by Deed duly recorded in the Office of Registry of Deeds at Liverpool on the eighth day of September A.D., 1846, in Book 14 page 36, one hundred acres having been sold by said Michael Seamond to Benjamin Hubley and James Finton, as by their deed duly recorded in the Office of Registry of Deeds, Liverpool, July 12th, 1912, in Book 52 page 470 and 471 being the land conveyed by the said Lawrence Hanley and Estella Hanley to the said Albert Ramey by Indenture dated the 2nd day of February A.D., 1920, the lot hereby conveyed being the same lands and premises as were conveyed by Albert Ramey to Elmer Ramey by Deed dated May 19th, 1933 and recorded in the Office of the Registry of Deeds at Liverpool, N.S., in Book 72 page 95-96, and being the same

> lands as conveyed to the male Grantor herein by deed from Roger Cross and Marlene Cross, his wife, dated the 2nd day of March, A.D., 1959."

The description refers to deeds from Elmer Ramey to Roger Cross dated August 21, 1956 and from Roger and Marlene Cross to Ronald Wile dated March 2, 1959. These deeds were not recorded in the Liverpool Registry of Deeds. To correct the title a quit claim deed dated November 12, 1969 was executed by Elmer and Helen Ramey to Delmer E. Conrad and recorded on June 29, 1969. The deed stated that the lot conveyed was the same land and premises as were conveyed by Albert Ramey to Elmer Ramey by deed dated May 19, 1933. This chain of title formed the basis of the appellant's claim to the 100 acres.

On February 20, 1946, Albert Ramey gave a maintenance deed to Harold and Barbara Ramey containing the following description.

> "All the undivided half of the lands conveyed to the said Albert Ramey from Lawrence Hanley and Estella Hanley his wife, by indenture bearing the 2nd day of February, A.D., 1920, recorded in the Registry of Deeds office at Liverpool, Queens County, N.S. in Book 69, pp. 672-673; and the portion hereby intended to be conveyed is the portion on Molega Lake and lying between said lake and the lands of Nathaniel Croft, the remaining undivided one-half of said lot being now owned by Elmer Ramey."

On September 16, 1949 Harold and Barbara Ramey gave a mortgage of the lands conveyed to them by Albert Ramey to Milford's Garage Limited. The same lands were conveyed by Sheriff's deed on May 31, 1952 to Lester Turner who in turn conveyed the lands to Milford's Garage Limited on July 22, 1952. By virtue of this last conveyance Milford's Garage Limited claimed title to the lands on the southeastern side of the lake. It also claimed that it had exclusively occupied the lot since the conveyance in 1952. Harold and Barbara Ramey claimed title to the island by virtue of the maintenance deed and adverse possession.

The action was tried before Mr. Justice Haliburton. Survey plans prepared by Mr. Errol Hebb, P.L.S. were filed. He testified that he prepared the plans after visiting the site with Delmer Conrad and Mr. Elmer Ramey on July 12, 1989. The lot was the easterly portion of the Barnabas Freeman grant. They started on the westerly boundary of the lot on the northwestern side of the lake. They followed the boundary to the northwest corner and then proceeded northeasterly to a pile of rocks. The boundary was clearly marked. They then followed the northeastern boundary until it came to Beavertail Lake. They then proceeded to the southeasterly side of the lake. They found an area occupied by cottages on the northwesterly side of the 60 acre lot. That area is not included in the claim. Mr. Hebb was advised that Mr. Conrad had not sold the land occupied by the cottages. Mr. Hebb proceeded along the power line until he was in the vicinity of the eastern side of the island. There he found the easterly boundary to the lot which was in accordance with Mr. Ramey's directions. Mr. Hebb subsequently traversed the eastern boundary which adjoined Crown land and was well marked to the Wellington

Road. The western boundary from the Wellington Road was marked by a survey marker and a blazed line.

The only evidence of occupation was a cottage road through the lot, the power line and the six or seven cottages on the side of the lake. There was no evidence of logging on the lot on the southeastern side of the lake. There was no evidence of occupation of the island except for camping. Mr. Hebb stated that the lots run more northerly and southerly than in any other direction.

In rebuttal evidence Mr. Hebb stated that he cruised the southeastern lot and did not find any evidence of cutting. In fact he stated there was no evidence of cutting in the previous 40 years. There were no hauling roads.

Kathryn Crossland is the appellant's daughter. In 1970 she went to the property with several others including her father. They went to the lot on the north side of the lake. They then walked to the southeastern side of the lake where there was a small beach. She visited the lake in succeeding years until 1973. In 1976 she went to the lake and discovered the cottages on the shore. She went home and brought her father back to the site and showed him the cottages. He was shocked when he saw the cottages.

Sherry Nodding worked for her father, the appellant, after 1979. She produced the notices of assessment for the property for 1989 and 1993.

Harold Ramey was called by the defence. He testified that his grandfather, Albert Ramey owned the one hundred acres. Albert Ramey gave him 50 acres and Elmer Ramey the remaining 50 acres. Elmer Ramey got the lot on the northwest side of the lake. Harold got the lot on the southeastern side by the maintenance deed. Harold Ramey stated that he and his grandfather cut firewood on the lot over several years. He also testified that he logged the island and went out to the island about three times every summer. The island was included in the maintenance deed by the inclusion in the deed of all other lands owned by Albert Ramey. He acknowledged that the logging occurred before he received the maintenance deed. He claimed he paid taxes assessed on the island. When Harold Ramey gave the mortgage the maintenance deed prohibited any conveyance of the lands while the grantors were still alive except with their consent. He informed Milford's Garage Limited of this condition when he gave the mortgage. Apart from camping and visiting the island there was no other occupation.

Elmer Ramey was called as a witness. He was 82. He testified that he bought 100 acres of land which he stated was on the western side of the lake. He said Harold and Barbara got the other hundred acres when they moved in with his father. He acknowledges signing the quit claim deed to Delmer Conrad. He said he did not know what it was for but signed because the land was not his and he was paid for it. He did not read the deed. He denied that he had shown the property to Mr. Hebb.

Eldridge Ramey testified that he sold the cottage lots. He bought the land from George Milford. He also cut 80 or 90 cords of wood on the lot for George Milford. That was around 1960.

Lester Turner is president of Milford's Garage Limited. He originally purchased the land when the mortgage was foreclosed. He testified as follows:

> "A. It must have been '50, late '50's I would say or '60.
>
> Q. And what have you done in relation to the land from that time forward?
>
> A. I haven't done hardly anything. I cut a few, some cord wood onto it for firewood.
>
> Q. Un hum. Have you had to keep the lines up?
>
> A. No, somebody run the lines for me.
>
> Q. Even back then?
>
> A. No then, no later on.
>
> Q. What other things would you have done to the land, if anything?
>
> A. I hunted onto it.
>
> Q. How often would you do that?
>
> A. In the fall. And I had Eldridge when he was living around there, he worked for me and he used to go out that way and he'd go back onto it once in awhile, drive through it. See if anybody was cutting on it.
>
> Q. Did you ever observe anyone trespassing on the land or doing anything in relation to the land?
>
> A. No, I didn't."

He also stated:

> "Q. Yeah. So it's Milford's Garage cutting and your rabbit hunting ...
>
> A. Right.

Q. ... are the only use to which you've put that land?

A. Rabbit hunting and deer hunting.

Q. And any, and the cutting that took place on that land took place when it was, when the, when Milford's Garage was owned by George Milford, is that correct?

A. Right.

Q. And you say you've done some cutting within the last year?

A. Within the last year and a half, yes.

Q. What have you done?

A. Cut hardwood on it.

Q. How much?

A. I put a, probably 10 or 12 cord. I put in a wood furnace in my house, and I went and cut wood on it."

Barbara Ramey is married to Harold Ramey. She testified that they received the maintenance deed from Albert Ramey. After Albert passed away in 1952, Harold visited the island. Her daughter camped on the island. Mrs. Ramey picked cranberries on the island. They also were assessed and paid taxes on the island.

After reviewing the evidence the trial judge concluded:

"I did find the evidence of Harold and Barbara Ramey credible insofar as their occupation of the island was concerned. They have exercised their proprietorial right under a conveyance from Albert Ramey which they believed to be valid. With respect to the island, Harold and Barbara Ramey entered into possession of it in an open and notorious manner and have arguably established themselves on a preponderance of evidence to be the only occupiers. I accept that during the early 1950's, Harold Ramey cut and sold the logs from the island. Their continuous though intermittent use of the island is consistent with its character and with the use which a true owner would make of the property ..."

"Using it as a campground, consistently paying the municipal tax levy on the island and their regular seasonal visits in the context of having 'colour of title' amounts in total to

> something more than disjointed acts of trespass. It results in a claim of which any conscientious owner should have become aware and, therefore, results in the dispossession of the title holder. Harold and Barbara Ramey will, accordingly, have a Declaration of Title with relation to the island."

With respect to the appellant's claim he stated:

> "Applying the provisions of the **Registry Act** makes it clear that the plaintiff has a superior paper title. The conveyance from Albert to Elmer Ramey recorded in 1936 conveyed 'all' the interest of the father in the property in question. The description was identical with that he had received. Section 27 of the Act makes it clear, then, that a subsequent conveyance from Albert to Harold of a portion of those lands was of no effect. The evidence of Elmer Ramey as to the understanding between him and his father cannot by any stretch of the imagination satisfy the heavy onus cited by MacDonald, J.A., from **Smith v. Hemeon** (above). In view of the frailty of Elmer Ramey's evidence, I am not persuaded that there is any reliable evidence as to what he acquired from his father or 'intended' to convey to Cross as opposed to what was described in that Deed. I do not find the clear and convincing evidence that would permit the rectification of a contract made 50 years ago for the benefit of the present owner who had no interest whatever in the original contract."

He concluded that the paper title in accordance with the **Registry Act** belonged to the plaintiff. However, he went on to conclude:

> "While I find that the superior paper title rests with the plaintiff, I am satisfied that with the assistance of colour of title, Milford's Garage has established that they and their predecessors have exercised such continuous, open, notorious, and exclusive possession as to exclude the owner from his normal rights."

In the result he found that the appellant's claim was barred by the **Statute of Limitations** and that the respondents were entitled to certificates of title under the **Quieting Titles Act**. The appellant has appealed from that decision. A cross-appeal was filed on behalf of Harold and Barbara Ramey.

The appellant has raised five grounds of appeal. They are essentially covered in the first two grounds which are as follows:

> "(1) As a matter of law, the learned trial judge erred by failing to apply the correct test to determine adverse possession."

"(2) As a matter of law, the learned trial judge erred by misinterpreting the effect of the doctrine of colour of title in establishing title by adverse possession so as to dispossess the true owner of real property."

The cross-appeal contends that the trial judge erred in holding that the appellant had the superior paper title and in failing to permit rectification of the deed from Albert Ramey to Elmer Ramey.

In **Sherren v. Pearson** (1887), 14 S.C.R. 581 and **Wood v. LeBlanc** (1904), 34 S.C.R. 627 the Supreme Court of Canada dealt at length with the type of possession necessary to extinguish the title of the true owner. In **Wood v. LeBlanc**, Davies, J., stated at p. 633:

"... The nature of the possession necessary to do this in the absence of colourable title was fully considered by this court in the case of **Sherren v. Pearson** 14 Can. S.C.R. 581. It was there decided that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute."

"In the carefully reasoned opinions of the judges in that case statements on the point are made which do not seem to leave the matter open to any doubt. Chief Justice Ritchie formally approved of the law as laid down in **Doe d. DesBarres v. White** 3 (N.B. Rep.) 595 and at p. 585 goes on to say:

> 'To enable the (trespasser) to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.'"

"And in another place he says,

> 'the trespasser to gain title must as it were "keep his flag flying over the land he claims".' "

"Strong, J., and Fournier, J., concurred. Taschereau, J. (now the Chief Justice of this court, said (pp. 594-595)):

> 'The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or deprive them of their right to treat him as a wrongdoer in entering on their land. The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of

> wilderness lands. If the property is of a nature that cannot easily be protected against intrusion, mere acts of user by trespassers will not establish a right.'
>
> 'Owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation.'"

"Henry, J., said (p. 592):

> 'Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should continue that disseisin so as to amount to an ouster, and that ouster maintained for the statutory period. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of land of which the party claims possession.' "

"Now, in my judgment, the possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is that part occupation. And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held while so engaged and in actual occupation of part to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres within the bounds of his deed. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be an actual continuous possession, at least of part."

He also stated at p. 639:

> "Evidence that a party claims land by possession either with or without colour of title is not sufficient when it merely establishes that the claimant used the lands in the same way and for the same purposes as an ordinary owner would. A true owner of lands is not bound to use them in any way. He may prefer to leave them vacant. While they are

> vacant he still retains the legal possession, and he only ceases to be in legal possession when and during the time that he is ousted from it by a trespasser or squatter, who has acquired and maintained what the law holds to be an actual possession. If the squatter claims to have ousted him by constructive possession he must prove a continuous, open, notorious, exclusive possession of at least part of the lands the whole of which he lays claim to under his colourable deed."

The following passages are from the text **Anger and Honsberger Law of Real Property** (2nd Ed.), at p. 1515:

> "The possession that is necessary to extinguish the title of the true owner must be 'actual, constant, open, visible and notorious occupation' or 'open, visible and continuous possession, known or which might have been known' to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is 'equivocal, occasional or for a special or temporary purpose'."

And at p. 1518:

> "The possession necessary under a colourable title to bar the title of the true owner must be just as actual, open, exclusive, continuous and notorious as when claimed without colour of title, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is such partial occupation."

See also **Harris v. Mudie** (1882), 7 O.A.R. 414.

The trial judge made several references to the failure of the appellant to exercise acts of possession over the land or to exclude trespassers. It appears from his decision that he concluded acts of trespass falling short of actual possession of some portion of the lands were sufficient to dispossess the true owner where there was a claim of colour of title.

The trial judge stated:

> "Using it as a campground, consistently paying the municipal tax levy on the island and their regular seasonal visits in the context of having 'colour of title' amounts in total to something more than disjointed acts of trespass."

He also stated:

> "While I find that the superior paper title rests with the plaintiff, I am satisfied that with the assistance of colour of title, Milford's Garage has established that they and their predecessors have exercised such continuous, open, notorious and exclusive possession as to exclude the owner from his normal rights."

With respect the learned trial judge applied the wrong standards both with regard to the acts of possession and to the claim of constructive possession. There was evidence that the appellant was not aware of any intrusions on the land until he saw the cottages in 1976. There was no reference in the deed from Albert Ramey to Harold and Barbara Ramey to the island. With respect that deed was not sufficient to support a claim of colour of title to the island.

The appellant lists a number of factual errors in the decision. They relate mainly to the acts of possession by the respondents. They are relevant in assessing the trial judge's conclusion that the defendants had established titled by possession.

The appellant's brief summarizes the acts of possession as follows:

> "14. The acts of possession performed by the respondents Milford's Garage Limited consist of the following: Cutting eighty to ninety cords of wood around 1960 (Evidence of Eldridge Ramey Case on Appeal page 245 line 25 - page 246 line 10; page 248 lines 6-26. Evidence of Lester Turner page 260 line 16 - page 261 line 7), hunting (Evidence of Lester Turner Case on Appeal page 261 line 8 - page 262 line 32) and paying real property taxes in 1991 and perhaps some earlier years (Evidence of Lester Turner Case on Appeal page 256 lines 16-28)."
>
> "16. The acts of possession on which the respondents Harold Ramey and Barbara Ramey are relying are as follows: Logged the island once in the late forties or early fifties (Evidence of Harold Ramey Case on Appeal page 204 lines 19-26; page 205 lines 30-34, children camped on the island a couple of times around 1975 (Evidence of Harold Ramey Case on Appeal page 204 line 27 - page 205 line 5; page 205 lines 17-29. Evidence of Barbara Ramey Case on Appeal page 268 line 30 - page 269 line 4), picked cranberries (Evidence of Harold Ramey page 205 lines 7-8. Evidence of Barbara Ramey Case on Appeal page 269 lines 5-14), visited the island three times every summer (Evidence of Harold Ramey Case on Appeal page 198 lines 10-13, paid taxes (Evidence of Harold Ramey Case on Appeal page 201, lines 4-12. Evidence of Barbara Ramey Case on Appeal page 269 lines 21-26."

I think that is a fair assessment of the evidence. I agree with the appellant's submission that these acts were not sufficient to extinguish the appellant's title under the **Statute of Limitations**. These acts were not exclusive, continuous and notorious as required under the **Act**.

Turning to the cross-appeal the respondent's claim that the trial judge erred in holding that the appellant had the superior title to the land by virtue of the conveyances to him. They maintain that Albert Ramey in conveying the land to his son Elmer in 1933 only intended to convey the area on the northern side of the lake. Nothing in that deed supports that contention. The deed used the same description as contained in the previous conveyances and referred to the land as comprising one hundred acres.

Harold and Elmer Ramey testified that Elmer only occupied the property on the northern side of the lake and that Albert retained possession of the southeastern side of the lake which he conveyed to Harold in the maintenance deed. The description in that conveyance is by no means clear. The trial judge did not find Elmer Ramey a satisfactory witness because of his age. It is clear from the transcript that he was confused and that his memory was poor. He had no difficulty in pointing out the boundaries to Mr. Hebb in 1989.

The respondents point to the reference in the deed from Ronald and May Wile to the appellant in 1959 where the word "western" is included in the description. They contend that this restricted the conveyance to the northwestern side of the lake. The reference is not consistent with the remainder of the description. Mr. Hebb was unable to explain the reference and simply considered it an error. The trial judge did not accept the respondents' claim and refused rectification of the deed. I can find no error on the part of the trial judge in reaching that conclusion.

There was argument as to the admission of a statutory declaration by Linkard Hunt. The trial judge concluded that it had little weight. I do not think it is necessary to consider that evidence further.

I would allow the appeal, dismiss the cross-appeal and set aside the order and certificate of titles issued in the trial court. The appellant is entitled to a certificate of title in fee simple to the lands set out and described in Schedules "A" and "B" of the order appealed from together with costs of the action and the appeal against the respondents. The trial judge directed the costs to be taxed in one bill under the third scale on the value equivalent to the municipal assessment on the property. The trial costs will be assessed on that basis. I would allow costs on the appeal in the amount of $1,500 plus disbursements.

Appeal allowed.

RICHARD T. HERBST (Plaintiff) v. ANN ELIZABETH SEABOYER, ALBERT LEO SEABOYER, MARGUERITE SEABOYER and DANIEL JAMES SEABOYER (Defendants) Unreported

Supreme Court of Nova Scotia
Haliburton, J.
February 24, 1993

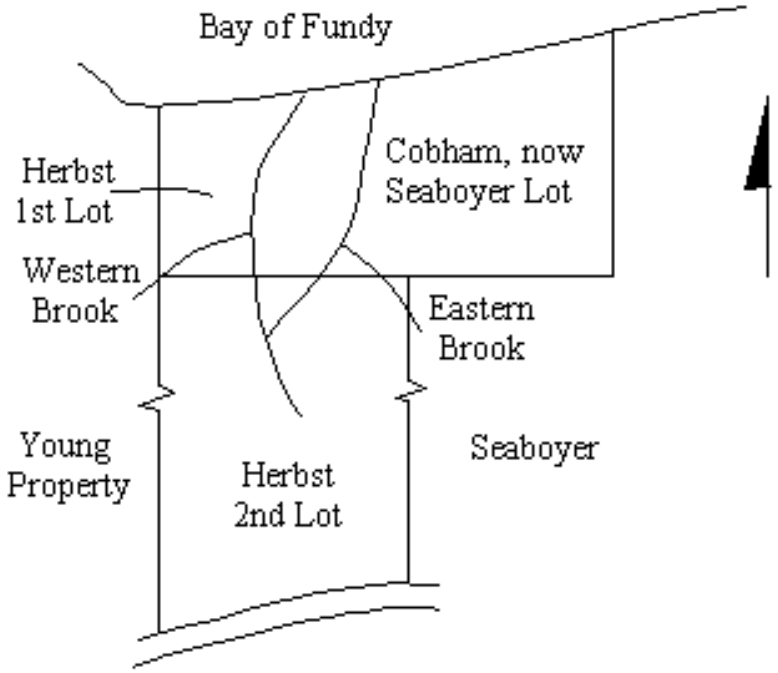
-and-

RICHARD T. HERBST (appellant) v. ANN ELIZABETH SEABOYER, ALBERT LEO SEABOYER, MARGUERITE SEABOYER and DANIEL JAMES SEABOYER (respondents) See 137 N.S.R. (2d) 5

Nova Scotia Court of Appeal
Hallett, Matthews and Chipman, JJ.A.
December 6, 1994.

This case involved a boundary dispute between two adjoining owners of property fronting on the Bay of Fundy at Phinney Cove, Annapolis County.

The properties of the parties were located as shown on the following sketch:



Both Herbst and both Seaboyer lots had originally been owned by Healy. Healy sold the first Herbst lot, then the Cobham lot (later acquired by Seaboyer) and then the second Herbst lot. Finally, Healy sold the balance of his property to Seaboyer.

A dispute arose between Herbst and Cobham/Seaboyer over the boundary line between the Cobham lot and the first Herbst lot. The deeds referred to the common boundary as the centre of a brook. The Seaboyers claimed that the original brook had been the western brook as shown on the sketch and that Herbst had dug the eastern brook and then occupied the land between the brooks. Herbst claimed that the boundary was the eastern brook.

The Seaboyers retained Grant McBurney, N.S.L.S. to prepare a survey of the boundary in dispute. Herbst retained Kirk Hicks, N.S.L.S.

While the boundary between the two parties was the main point in contention, there were other matters in dispute:

- the land surveyors disagreed as to how the boundary on the shore of the Bay of Fundy should be located. McBurney defined it by reference to vegetation and a prominent bank while Hicks established the ordinary high water mark by obtaining an elevation for that height and transferring that elevation to the site by levelling from a control monument;
- there was a reservation in the deed of the second Herbst lot of "the Old Shore Road." The Seaboyers claimed that the reference was to a roadway to the shore, while Herbst claimed that the reference was to the public highway at the south of the property;
- there was a dispute over how McBurney had laid out the Cobham lot.

The Trial Judge reviewed a significant amount of evidence, including the procedures followed by both land surveyors. The Judge found that:

- Herbst had artificially altered the brook and the primary boundary between his property and the Seaboyers was the western brook;
- the method used by MacBurney to locate the shore boundary was preferred;
- the reservation in the deed of the second Herbst lot was, in fact, a reservation of a roadway leading from the public highway to the shore, not just of the public highway; and
- the method used by McBurney to lay out the Cobham lot had been correct.

Herbst appealed.

The Court of Appeal reviewed the four points determined by the Trial Judge and held that the Judge had been correct in all but one. The Court of Appeal disapproved of the method used by McBurney to lay out the Cobham lot.

The Cobham lot had been described very simply as starting at the centre of the brook at the southeast corner of the Herbst lot, then proceeding down the brook to the shore of the Bay of Fundy, then easterly along the shore 400 feet, then southerly 300 feet, then westerly 400 feet to the place of beginning. McBurney had interviewed an individual who had accompanied Healy when he paced off the Cobham lot and based on information given to him by that individual, and his interpretation of the description and the surrounding circumstances, had laid out the lot as shown on the sketch. His interpretation resulted in the eastern line of the lot being 427 feet instead of the 300 feet called for and the south line to be 360 feet instead of the 400 feet called for. The Court of Appeal stated that there was no ambiguity in the description, so that no extrinsic evidence should be used to alter the plain words. The Court stated that the first line should follow the brook to the Bay of Fundy, the second line should follow the shore of the Bay of Fundy for 400 feet, the third line should be 300 feet long and should end at a point 400 feet from the point of beginning.

RICHARD T. HERBST (Plaintiff) v. ANN ELIZABETH SEABOYER, ALBERT LEO SEABOYER, MARGUERITE SEABOYER and DANIEL JAMES SEABOYER (Defendants)
Supreme Court of Nova Scotia
Haliburton, J.
February 24, 1993

The Plaintiff herein has sued the Defendants for trespass to land and for damages. He seeks in this action to have the Court determine the proper boundary lines between his property and that of the Defendants and to determine whether or not the Defendant has a right-of-way crossing the Plaintiff's property.

The parties are agreed, and the Abstract of Title furnished by the Solicitor for the Plaintiff reflects, that title to all the lands in question derive from Malcolm R. Healy. Beginning 1969, Malcolm Healy divided the property and sold it in a number of lots. It is the lines of division between those lots that is now the subject matter of this action.

Malcolm Healy acquired the property in two lots: by a Warranty Deed from MacIsaac Hallet, recorded in Book 213, Page 354, in the Registry of Deeds for Annapolis County, lands described by the following words:

> All that certain piece or parcel of land situate, lying and being at Phinney Cove, in the County of Annapolis, Province of Nova Scotia, bounded and described as follows:
>
> > BEGINNING at the Bay of Fundy shore at the Northeast corner of lands of Cecil Young;
> > THENCE running Eastwardly the course of the Bay of Fundy shore until it comes to the West line of lands of Martin Boudreau;
> > THENCE turning and running Southwardly along Boudreau's West line sixty-six (66) rods, or until it comes to the pasture fence at the North of the fields;
> > THENCE turning at right angles and running Westwardly along said pasture fence until it comes to the East side of the Old Shore Road running from the Phinney Cove Highway to the Bay of Fundy;
> > THENCE turning and running Southwardly along the East side of said Shore Road until it comes to the North boundary line of the main Phinney Cove Highway;
> > THENCE turning and running Westwardly along the North boundary line of the highway until it comes to the East line of the aforesaid lands of Cecil Young;
> > THENCE turning and running Northwardly along Cecil Young's East line to the Place of Beginning...

Subsequently, in May of 1958, Healy acquired the second lot to complete his block of land by a Deed from the Administrator of the Estate of MacIsaac Hallett (the Grantor of Lot 1 above) wherein the lands were described in the following words:

> COMMENCING at that point where the Southwest corner of land now or formerly owned by Martin Boudreau abuts on the North side of the main highway;
> THENCE running Northerly along said Boudreau's West line until it reaches the South line of land now owned by Malcolm R. Haley (sic);
> THENCE running Westerly along said Haley's South line, which is marked by a pasture fence, until it reaches the East side of the Old Shore Road which runs from the Phinney Cove Highway to the Bay of Fundy;
> THENCE turning and running Southerly along the East line of said Shore Road until it comes to the North line of the main Phinney Cove Highway;
> THENCE turning and running Easterly along the North side of the highway to the Place of Beginning...

These two Deeds taken together comprise all the lands lying between the Bay of Fundy shore on the North, the Main Phinney Cove Highway on the South, the lands of Martin Boudreau on the East, and the lands of Cecil Young on the West. The plans and maps which are exhibits herein suggest that the property would be basically rectangular in shape.

In 1969, Mr. Healy began a process of subdividing his property. He sold a lot on the shore to Arthur Brooks. This property (the Brooks/Ritchie Lot) is described in the following words:

> BEGINNING at the Bay of Fundy shore at the Northeast corner of lands of Cecil Young;
> THENCE turning and running in a Southerly direction along the East boundary line of said lands of the said Cecil Young a distance of three hundred feet to a point;
> THENCE turning at right angles to the hereinabefore (sic) mentioned line and running an Easterly direction along lands of Malcolm R. Healy to the centre of a brook;
> THENCE turning and running along the centre of the said brook in a Northerly direction following the various courses thereof to the shore of the Bay of Fundy;
> THENCE turning and running in a Westerly direction following the various courses of the shore of the Bay of Fundy to the Place of Beginning.
> BEING the same lands and premises conveyed by Malcolm R. Healy to Arthur E. Brooks by Deed dated the 25th day of July, A.D. 1969.

Shortly after, Gordon and Rachel Cobham by a Deed dated August 5th, 1970 and recorded in Book 236, Page 531, acquired lands which Healy described with the following words:

> COMMENCING at a point in the centre of a brook at the Southeast corner of a lot of land conveyed by Arthur E. Brooks et ux to Shirley Ritchie by Deed dated the 26th day of June, A.D., 1970 and recorded in the Registry of Deeds for the County of Annapolis on the 15th day of July, A.D. 1970 under Recording No. 77922;
> THENCE running in a Northerly direction along the centre of the said brook following the various courses thereof to the shore of the Bay of Fundy;
> THENCE turning and running in an Easterly direction along the shore of the Bay of Fundy a distance of Four Hundred (400') feet to a point;
> THENCE turning and running in a Southerly direction in a straight line along lands reserved by Malcolm R. Healy, the Grantor herein, a distance of Three Hundred (300') feet to a point;
> THENCE turning and running in a westerly direction along lands reserved by Malcolm, R. Healy, the Grantor herein, a distance of a. Four Hundred (400') feet to the Place of Beginning.

These lands are hereafter referred to as the Cobham Lot.

THE CLAIM

In 1973, the Plaintiff, Richard Herbst, was looking for a place on the Bay of Fundy shore. A friend told him about the cottage built on the Brooks/Ritchie property. He made two visits to this cottage or camp and arranged to purchase the title of Shirley Ritchie. In 1974, when he returned for the summer, he realized there was no legal access from the public road. As a result, he sought out Malcolm Healy and purchased land which Mr. Healy described:

> All that certain lot, piece or parcel of land and premises situate, lying and being at Phinney Cove, in the County of Annapolis, Province of Nova Scotia, more particularly bounded and described as follows:
>
> > COMMENCING at a point where the East boundary line of lands now or formerly owned by Cecil Young intersects with the North side line of the Old Main Phinney Cove Highway;
> > THENCE running in an Easterly direction along the North side line of the Old Main Phinney Cove Highway, a distance of Three Hundred and Eighty Feet (380') to a point;
> > THENCE turning and running in a Northerly direction on a line parallel with the East boundary line of the said lands of the said Cecil Young to the South boundary line of lands conveyed by Malcolm R. Healy to Gordon Cobham and Rachel Cobham by Deed dated August 5th, 1970 and recorded in the Registry of Deeds for the County of Annapolis on August 7th, 1970 in Book 236 at Page 531;

> THENCE turning and running in a Westerly direction along the South boundary line of said lands conveyed by the said Malcolm R. Healy to the said Gordon Cobham and Rachel Cobham by Deed dated and recorded as aforesaid, and continuing in a Westerly direction along the South boundary line of lands owned by Richard T. Herbst, the Grantee herein, a total distance of Three Hundred and Eighty Feet (380') more or less to the East boundary line of said lands of the said Cecil Young;
> THENCE turning and running in a Southerly direction along the East boundary line of said lands of the said Cecil Young to the Place of Beginning.
>
> SAVING AND EXCEPTING THEREOUT AND THEREFROM the Old Shore Road where the same crosses the lands herein described.
> (My emphasis)

These lands will hereafter be termed Herbst Lot 2.

Malcolm Healy conveyed two parcels from this block but unrelated to the issues before the Court; one to the Department of Highways in relation to a realignment of the highway and the other to Anne Marie Trudell Daniels, a small parcel abutting the highway. Then by a Deed dated the 5th of October, 1984, he conveyed all his remaining interest in the relevant block of land to the Defendants, Albert Leo Seaboyer and Marguerite Seaboyer. In 1987, the Seaboyers (Defendants) acquired the Cobham property.

For our purposes, it may help to observe that from the Healy block, the Plaintiff has acquired two lots forming the Western portion running from the Bay of Fundy shore Southward to the highway while the Defendants have acquired the residue of that block, together with any interest retained by Mr. Healy in "the Old Shore Road where the same crosses the lands herein described".

THE ISSUES

The Plaintiff, in his submission subsequent to trial, has set out the issues in the following terms:

> 1. What is the starting point of the Herbst Deed (Brooks/Ritchie lot)... at "the shore of the Bay of Fundy"? This issue also affects the laying out of the Cobham lot which in turn affects the northern boundary of the (second) Herbst lot.
>
> 2. Which of the watercourses described to the Court is meant in the phrase "thence at right angles to a brook"?
>
> 3. How should the Cobham lot be laid out on the ground, and do the deed distances govern?

4. What is the meaning of the phrase "saving and excepting thereout and therefrom the Old Shore Road where it crosses the land above described" in the description of the Herbst parcel?

THE EVIDENCE OF THE PLAINTIFF

The Plaintiff, Richard Herbst, is a retired highschool teacher. He learned of a "cabin" for sale through a friend. "After we checked the cabin", he initiated the inquiries which resulted in his purchase. He described the difficulty he had in getting to the cabin from the highway at that time. He crossed a culvert over the highway ditch but testified that there was no path leading toward the cabin and he and his companion forced their way through dense cover. He said the cabin was in disrepair.

In arranging the purchase, he said that the boundary lines of the property were not discussed. "We were mainly interested in the cabin". He spoke to Mrs. Ritchie on the telephone and to Mrs. Iva Gale, friend of Mrs. Ritchie, in a face to face conversation. No representations were made as to the boundary lines of the property and his first consideration of boundaries was after he received his deed. In the summer of 1974, when he returned to the area, he endeavoured to locate the boundaries on the ground. He found the fence line marking the Cecil Young property (his West boundary). He measured 300 feet from the shoreline and went Easterly "to the East channel of the brook". He testified that his channel was marked in bedrock while the "Western course had no water in it". His exploration made it obvious that they had no access to the highway and, he, therefore, wanted to acquire the second lot. His testimony was that no road had been established to the cabin. He purchased the second lot from Malcolm Healy, but again he "did not discuss boundaries". His objective, he said, was simply to get "access". The conveyance "excepted" the Old Shore Road. The Plaintiff said words to the effect: "Healy did say he wanted to travel the Old Shore Road Easterly to other property he owned".

The Plaintiff testified that he did subsequently have a discussion with Healy about boundary lines. It took place when Healy accompanied the Cobhams who "said I had gone over their land – they figured the stream had been changed". Healy at that time told him what his property lines were and that the width of his lot was 100 feet. Herbst testified that he measured off 100 feet from the Young line and it came to the middle of his cabin door. He said that during that discussion, Healy had told him: "If I didn't cooperate, he would say that the boundary was the West course" (of the brook). And he also "said he was sorry he had not reserved an access or right-of-way".

Herbst, in his evidence, introduced photographs, a plan (Exhibit No. 2C, Appendix G) prepared on his behalf by H. Kirk Hicks, N.S.L.S., and discussed the "brook" or, as he preferred, "water course" which divides into two branches some distance South of his original South boundary line. The Eastern boundary line of the cabin property was bounded by the brook; the west branch passes approximately 40 feet East of the cabin., while the East branch is 140 feet distant. The land between the two branches of the brook is a major element in the dispute between the parties. Mr. Herbst, in his testimony, described the extensive use he has made of this area, erecting a flagpole, erecting or repairing a stone wall, clearing and making the area suitable for camping. He recalled that there had been a dispute with

Cobhams over the property line and that they had subsequently exchanged correspondence to the same effect. He testified that in 1974, he had used the existing culvert as a starting point for his pathway to the cabin; that Mr. Healy had indicated some displeasure at Herbst using "his land" so he put in his own culvert 50 feet West of the other. He said he created a new footpath leading from a parking area at the highway and that there was nothing that could be described as a "road" except at one point where a roadway came from the Young property on the West toward the fish sheds on the East. He described that trail or roadway as being about one-half the distance between the highway and the shore. His new "path" intersected an existing trail only once, but the existing trail had a soft spot so that he had departed from that routing almost immediately and did not use the existing road North of the cross fence. He testified that he had experienced no problems with the Defendant Seaboyers until 1987 when acts of trespass began. They began to use the pathway to travel across the property and interfered with his use of the property between the brooks, destroying his possessions. Apparently there was some confrontation and "they disagreed violently". In 1987, he discovered that the Seaboyers had retained a surveyor, Mr. Grant McBurney, N.S.L.S., who had prepared a plan (Exhibit No. 1B, Appendix Pl) on their instruction. The Plaintiff testified he had "problems with that plan" which he indicated to both the surveyor and the Seaboyers. He met with the surveyor and they "disagreed 2000%" about the location of the brook. They disagreed about the location of the high water mark as well as he layout of the various Healy lots. As a result of these disagreements, Mr. Herbst obtained aerial photographs, topographical maps and other maps. He satisfied himself from an examination of these materials that the distance from the centre line of his cabin to his West boundary was 100 feet and from his cabin to the "brook" was 200 feet, giving him a lot 300 feet in width. He testified that after 1987, the Defendants built a cottage on the property claimed by him, between the two branches of the brook, and constructed a roadway over his property. The Defendants have "committed innumerable acts of trespass" and he estimated it would cost $18,000 to $20,000 to reinstate his property to its former condition.

Under cross-examination by Defence Counsel, the Plaintiff testified that Tom Mack had, at one time, done work on the property with his backhoe at his instructions. His evidence was that Mack had worked on the "West water course".

He confirmed again that he had not inquired about the property lines when purchasing the property and said that on his first visit, he had not seen any brook but in June of 1974, he did see "two water courses when only the East one had water in it". As of June 1974, he understood his boundaries to be the East water course, the shore, the fence (Young) and 300 feet deep. He reiterated that no one ever told him his boundary lines, but he reached his conclusion as to his East boundary line being the Eastern water course "after 30 seconds – after measuring from the fence to the cabin" and "after getting the maps". He said the West water course is 40 feet from the centre of the cabin and had a width varying from four to 15 feet. The Eastern branch, he said has a width varying from 10 to 15 feet "at elevation" but "at bedrock level two to three feet". He was asked if the Eastern branch could be described as a "ditch". He conceded that was a possible description. He was challenged as to whether he had changed the brook so as to isolate the West branch from the normal flow of water and he insisted that he had done

no more than to remove "brush, debris and wash, old boots and junk", from the Eastern branch. He termed "absurd" the suggestion that he had "cut that line in the bedrock". He testified that the disagreement with Cobhams had occurred within a couple of years of his purchase when they accused him of having "changed the brook". He was asked if Malcolm Healy had not told him that the western course was his boundary, which he denied, saying he "absolutely never told me the centre line of the West Brook was my boundary".

With respect to the property that he purchased directly from Malcolm Healy for access, he testified that he had not been there when Healy marked off the boundary. He said he walked down with him but was not there when he measured.

With respect to the road leading to the shore and the reservation contained in his Deed from Healy, he testified that the alignment of the road depicted on the McBurney plan "missed by one thousand miles". At one time, Healy's son, Oscar Healy, claimed to be opening up "his Daddy's road" with a chain saw and a tractor. Mr. Herbst called the R.C.M.P. His evidence was that 50 to 70% of the McBurney alignment is wrong.

I find I have very limited confidence in the ability of the Plaintiff to be objective about any aspect of the dispute between him and his neighbours. It appears that he initially took no interest at all in the location of the boundary lines of the lot he was acquiring and then subsequently decided unilaterally what those boundary lines should be. Having exercised possession of the property he claimed for some l3 years in spite of the objections of his adjoiners, he is absolutely determined to retain the rights he has exercised.

Harold Kirk Hicks was retained by the Plaintiff to prepare a plan of the Brooks/Ritchie lot and the Cobham lot. As an incident to those surveys, the North boundary line of the Herbst (second) lot must be established as the common Southern boundary line. His plan, entered as Appendix "G" to Exhibit 2-C, depicts the Plaintiff's property as the Plaintiff had described it. Mr . Hicks had used as his starting point the McBurney plan of 1987 so that it can be read only in conjunction with that earlier plan. The McBurney plan depicted as the South boundary of the properties Highway # 418 and its predecessor, the "Old Shore Road", as it existed before realignment. This designation creates some confusion since the Defendant uses the same name to refer to a road leading to the shore. Hicks testified that he used the intersection of the "Old Shore Road" on the McBurney plan and the Young fence as one of his starting points. He obtained an opinion rom David L. DeWolfe, hydrographer, as to the elevation of mean high water and he used that elevation of 12.40 feet based on a Nova Scotia control monument to establish the limit of the Herbst property on the Bay of Fundy. With regard to the shore line, he testified that the McBurney plan uses the "limit of vegetation" which he testified is as much as 60 feet away from "mean high water". In his report as in his testimony, Mr. Hicks observed that the major point of contention between the parties is as to which of the two water courses is to be the boundary line. He observed that there were no monuments placed in any of the corners when the property was set off and that there was conflicting evidence as to which of the brooks was intended to be the boundary line. He made several observations with respect to the two water courses. He found:

1. The bedrock ...(at the point of diversion) would cause water to flow in the east brook until it reached a depth of about six inches, at which time it would overflow into the West watercourse and run in both watercourses.

2. The rock dam (built by the Plaintiff in the West water course) ...consisted of coarse gravel and small stones which he did not feel would stop water from flowing into the West brook.

3. The West watercourse was generally much shallower and less defined than the East watercourse in the where Mr. Herbst's south boundary intersects them.

In his testimony, he said: "I could not decide from the information I had what the status of the brooks was when Healy conveyed the property". He testified with respect to the "rock dam" that it is past the point of divergence and would not impede the normal flow.

He described the manner in which he had laid out the Cobham (Seaboyer) lot which he termed "fully described", the result of which was that the North line of the (second) Herbst lot cannot be a straight line. Having adopted that theory of the configuration of the Cobham/Seaboyer lot, he observed that if the Western boundary of that lot is the Eastern water course as claimed by the Plaintiff, then the measured lines create a parallelogram. If the Western water course were used, however, those measurements would result in a mathematical impossibility.

With respect to the "Old Shore Road" and his observations, he said there was a "trail" to the shore.

On cross-examination, Mr. Hicks conceded that the surveying of shore properties represents a minor portion of his practice and that he has never before used a calculated high water mark as a boundary line on the shore. Such Deeds, he said, often call for a starting point at the "bluff" and that, in fact, he has never before this located the "shore" on a plan. He did locate the old fence along the Young property forming the Western boundary of the Herbst lot and followed that to the edge of vegetation where the foreshore "was bedrock".

With respect to the preparation of his survey, he conceded that he had spoken to no neighbours about the location of the boundaries. He had spoken to Brooks, a previous owner, who he found "very evasive" and to Iva Gale "who thought that the west branch was the brook."

With respect to his decision to use the calculated mean high water point as the Northern boundary line, he conceded that he had no knowledge of other surveyors using this procedure, nor of any of those practicing in Annapolis County having used it in the past. He had relied on "text book" materials in making his decision to do so. With respect to the high water line which he calculated, he testified there were no physical marks on the foreshore which would assist in identifying the location of that line. However, by coincidence, while he was conducting some aspect of his survey, he observed the water

level at the time of high tide, and on investigation, that level proved to be consistent with his theoretical line. But again, the tide left no physical evidence.

Mr. Hicks testified that he was able to find no monuments with respect to the Cobham/Seaboyer lot which had been placed when it was set off from the other property. Thus, there was no evidence that its lines had actually been run.

With respect to the intersection of the highway and the Herbst property, he testified that he had located an iron pipe previously driven.

In a discussion of what may have been intended by various references and of the reference to "Old Shore Road", Middle Cross Road, and any ambiguity referable to the South line of Herbst, he expressed his opinion: “I find the intent of the parties is what would rule". He was unable to theorize as to why there was a reservation for “the Old Shore Road" in the Deed from Healy to Herbst and why Healy had not "excepted" the newly aligned highway as well as the former highway if the reservation is to be given the meaning now argued for by the Plaintiff.

THE EVIDENCE OF THE DEFENCE

The Defendant, Ann Seaboyer, testified that she had retained Grant McBurney, P.L.S., to survey "all our lines" while they were "in the process of buying" the Cobham lot. She identified two of the documents introduced as exhibits under Exhibit 1A, tab 15 and 16, letters from the Cobhams, the previous owners of that lot to her, forwarding photographs and confirming their opinion that the stream bed had been altered so as to relocate the boundary line between their lot and the Plaintiff's. The second letter reads: (tab 16 in the Defendant's list of documents):

> This is to verify that Mr. Herbst of Phinney Cove, N.S. did cause to be diverted, from its original course the brook which divided his property and ours. Enabling him to try to claim a longer shoreline than his deed shows.

Ms. Seaboyer identified a number of photographs depicting various aspects of the property, including the Old Shore Road which "runs from the highway to the shore as shown by" the McBurney plan. Photograph 10 at tab 18 depicts the intersection of that road with the old highway and shows the culvert at its intersection.

Grant McBurney, P.L.S., testified with relation to the basis of his report which is before the Court as Exhibit 1B and the manner in which he performed his survey. With respect to the stream, he described the three photographs found at tab 17 in Exhibit 1A. He described the general nature of the stream between the highway and the disputed boundary lines as being broad and shallow until it reaches the point where the two branches diverge. The Eastern stream, he said, "drops off very quickly into this new gouge" depicted on photograph 3. He testified that he was engaged in 1987 by Albert Seaboyer,

one of the Defendants, specifically to survey Seaboyer's Western boundary, that is, the common boundary between what I have termed the Herbst lot, and the newly conveyed Seaboyer lot which extends from the highway to the South boundary of the shore lots. He was subsequently engaged to survey the "Cobham" lot. Mr. Seaboyer, at the time, owned the large lot (direct from Healy) and was proposing to buy the shore lot (from Cobhams). McBurney testified that he began by locating the fence marking the Young property and found it to be a line running "essentially straight" from the shore to the highway where he "found an iron pipe". He next "came over 380 feet" Easterly along the highway, looking for the boundary of the Herbst lot, and found "nothing physical". In the absence of any markings on the ground, he referred to the Deeds of both Herbst and Seaboyer which call for 380 feet along the "Shore Road", by which McBurney meant the old highway, and then extended Northerly "parallel to the Young boundary". McBurney found he could not meet all the criteria demanded by the Deed based on his observations so he said: "I interpreted" that a "perpendicular distance of 380 feet" was intended. This distance is slightly greater than 380 feet along the side of the road. With respect to the Young fence, he found it down in places, but traceable "practically to the vegetation line" at the shore.

In the course of his survey, McBurney testified he had "discussions with Herbst" regarding the location of the Southerly boundary of the Herbs" shore lot. He said that Herbst “did not seem to object to the South and East lines" of this lot (he had bought from Healy) but that he did take issue with the line which McBurney had determined to be a continuous straight line marking the South boundary of the two shore lots, and especially with the survey marker placed in the West branch of the brook. He did not recall him objecting to the North/South position of that survey marker, but objected to its location in the West branch as opposed to the East branch.

McBurney described how he had determined the location of the South line of the shore lots in "green" on his plan. He construed the "Bay of Fundy shore" to be "where the land stopped and the bay began". He testified that the regulations pursuant to the **Land Surveyors Act** require that interpretation, and that interpretation is consistent with the guidelines he followed in Ontario and on "Canada lands" in his previous experience. He testified there is a discrepancy between the "vegetation" lines as depicted on his plan and that of Hicks, particularly on the Young line. At other points, the discrepancy is not great. He described the line of vegetation which he assumed to be the North boundary as generally represented by an embankment two or three feet high above the shelving rock ledge which forms the foreshore. He testified as to his familiarity with other surveys of the shore and said specifically: "I have in my possession three other surveys by other surveyors" who "chose to use a line similar" to the one he had used. He testified that in his experience, he had "not seen the method of using mean high water". He testified he had observed the remains of old fish houses in the vicinity of the Northeast corner of the "Cobham lot" where he had placed. a survey marker, and he gave his opinion that physical, visible evidence is very important in surveying boundary lines. He said: "Most people would think they were buying to the line they can see". He testified that after having determined the "shore line" as the North boundary, he relied on the fence line of Young to establish the Southerly direction, turned a right angle as called for in the Deed and placed a survey marker in the brook which he considered "a natural

boundary". The brook and shoreline create natural boundary lines for the Cobham lot as well. He could find no physical evidence on the ground. He made a judgment that the "green line", that is, the South line of the two shore lots, was a straight line and that it ran perpendicular to the Young boundary line. He expressed his guess that Malcolm Healy, in designing the descriptions, intended to provide a lot which would be 400 feet wide and about 300 feet deep. He said the Deed was not ambiguous, but to make sense of the description,

> "I thought Healy just squared off 300 by 400. Consequently, the East line is 400 feet plus and the frontage is about 360 feet."

He had instructions from Mrs. Cobham, the former owner, that the Northeast corner was near the fish houses which coincided with his observations. He testified that he looked at both the senior and the junior Deeds to reach his conclusions which he reached in the absence of any lines marked on the ground. Seaboyers told him of the dispute regarding the brook as a boundary line in 1987. He examined the brook and found it "very evident" that someone had placed "gravel, rocks and dirt to block the West branch". He was "struck by the nature of the cross section of the brook". Above its point of division, it was shallow and wide, up to 25 feet. The West branch has a similar character while the East branch is different in character, being narrow and having vertical sides. He described it as a "gouge". Photograph 3, he said, depicted no water in the West branch but water in the East branch because of the blockage of the West branch and the "vertical gouge" which deepened the East branch. He said he spoke to the previous owner, Mr. Brooks, who confirmed that he had treated the West brook as his boundary but he was unable to obtain such confirmation in writing. He had heard from Brooks something of the dispute between him and Herbst, the Plaintiff, over that boundary line. He was asked about the comment of Mr. Herbst in his testimony that the entire area was a delta 400 feet wide. He disagreed with that comment reiterating that the "stream bed is 12 to 15 feet wide".

With respect to the Southerly boundary line of the shore lots, he concluded that line was a straight line because of the phraseology in the Deeds "continuing in a Westerly" direction, "running in a Westerly" direction. With respect to the road to the shore, he said the evidence he relied upon, and depicted on his location plan of the 30th of May, 1987 was the fact that there was, first of all, a road called for in the description conveying that lot to Herbst from Healy; and the road was shown to him by Oscar Healy and Ann Seaboyer.

On cross-examination, he reiterated that his location of the shore line was based on the edge of vegetation which was an easily identifiable point on the shore and in keeping with the regulations. Thirdly, he said that is what "owners think they are getting". He considered that there was no great difficulty in re-establishing that line within two feet.

With respect to choosing to interpret the Southerly line of the two shore lots as a single straight line, he testified that he had agonized in making that decision, but concluded that Healy had "probably not intended to create a long (shallow diamond) shaped lot along the shore. He testified that the 300 by

400 foot measurement signified to him that Malcolm Healy “thought of the brook as running at right angles and he designed the two lots on that basis." When he conducted his survey, he could see that here was water in the East branch and likely none in the West branch and testified that the two brooks are separated by approximately 65 to 70 feet. He reiterated that the channel for the East brook "was very unnatural – deep, narrow" and looked like a "gouge in the rock". With respect to the roadway to the shore, he testified that it is approximately seven feet wide having been rutted by tire marks. He construed it to be the road mentioned in the deeds. He said he walked into the woods a distance of 250 feet East of the "red" dividing line on his plan, that is, the line extending Northward from the public highway, and he found no evidence of any other roads. He did not show the roadway on his 1987 plan, he said, because it did not cross the "red" line. He said that the appearance of the road indicated that it had been there a long time.

On re-examination, he called upon his experience and his having lived in the area for some time to observe with respect to the East brook "that gouge is unique" and that if not for the gouge, the water would flow in a straight line down the West branch.

Fred Healy is a son of Malcolm Healy and lived in the immediate area much of his life. He travelled the road to the shore many times and once cleared it of encroaching alders. Much of the area has grown up in alders since the early 50's. He testified that before coming to Court, he went down to the shore and found the road that has always been there "as far as I remember". "Other than the few little changes, it was pretty well similar." He said the road had been used by fishermen as access to their fishing shanties and that parts of it had not been used where the users chose instead to approach by way of Cecil Young's field. He said after crossing the brook, the fishermen's "path" went across to the fish houses. The was never any dam in the Western watercourse in his memory. The road was used only occasionally. He used it himself couple of years. He said the fishermen used it until the early 50's. His brother and his father had traversed the road with tractors, salvaging material for fence posts from the shore. He moved away from that area in 1959. At the time his father sold the property to Herbst, his only reason to walk down it would have been to check a piece of land that his father was saving on the Eastern side of Herbst and Cobham to eventually give to him and his sister. He said that would have been in the early 70's. He said that piece of land was eventually sold to someone else (Seaboyers) but their (the Healys') intention was that:

> "We would have used that road for access".

Mr. Healy testified that in the 1950's, there was only one brook. He said "only the West brook makes sense...there was no other". When he visited the area a week before trial, he observed that "the brook has been rerouted to the East". He spoke of the rocks piled to one side and the gouge which distinguishes the East branch.

In discussing the road leading to the shore and the fence line which marked the original boundary between the first and second lots acquired by his father from Hallett, he testified that there were pasture

bars across the road leading to the shore at the fence which was intended to keep the sheep in, while permitting access to the shore.

Iva Gale was, perhaps, the most important witness to testify. It was she who acted as a "go between" for most of the property transactions affecting the lands in question. She had grown up in Hampton, some six miles distant from the site and after marriage, she sought out land in that area for herself and husband, and for some of her friends. She was the intermediary when the Plaintiff acquired his original property from Ritchie.

She testified that she and her husband returned to the area in 1969 and that in 1970, she assisted Shirley Ritchie in buying what is now the Herbst property from Mr. and Mrs. Brooks. She said that Mr. Brooks described the property and how to get there but that Malcolm Healy "took us and showed us the road" and told her that "the little camp" was the Brooks' property. She testified that Brooks had described the land as a "small piece" running from "Young" on the West or lefthand side "to the middle of the brook on the right side of the camp". She testified as to the gate and the fence which she equated with the South line of the property and recalled the existence of a little pond as part of the brook. She visited the site three weeks before trial, followed the Old Shore Road, which she said was the same road as she recalled, until some point close to the shore where it turned to go toward the fish houses. She said that road was referred to as the Old Shore Road. After Shirley Ritchie acquired the Brooks property, Iva Gale and her family frequented the property in the summertimes. She said: "We went down there a lot with the children. We picnicked and the children played in the pool".

It was Iva Gale who contacted Malcolm Healy to arrange the purchase of the shore lot for the Cobhams. At his suggestion, she walked over the land with him during or about July of 1970. She described the course they took as following the right side of the left (West) brook to the shore, then Easterly along the vegetation line, approximately 400 feet to a point close to the old fish houses, back 300 feet through briars and then across to the brook where they had begun. She understood the starting point was the centreline of the brook. She said that Mr. Healy had "paced" the distances. Mrs. Gale supplied a number of photographs taken during those earlier years. They appear at tab 14 of Exhibit 1A. The photographs were taken by her husband to send to the Cobhams to show them "the land we had purchased for them". She said there was an old foundation and an open area which is the same place on which the Seaboyers have now built their cottage. The old foundation is shown in photograph 3 representing the property acquired by the Cobhams. At that time, she was interested in purchasing more land to the East from Malcolm Healy for herself, but he was keeping that land "for his son". The Gales subsequently purchased the Cecil Young property on the Herbst West line.

With respect to the East and West branches of the brook, she testified that she had never seen the East branch until "three weeks ago".

It was Mrs. Gale who was the contact when Shirley Ritchie sold the property to Herbst. She said she did not describe the property and its boundaries to him because he "had been there – he described it to

me"; that is, the camp, the brook and the pond. Two years later, she heard from her friends of the changes that had taken place. She walked down herself and found that the brook had been changed – "the left brook had been filled in and the new one dug out". She was present when the Cobhams went to talk to Herbst, objecting to his actions in changing the brook, and that his response had been to say: "the West brook was not the original". She understood there was a subsequent confrontation at which she was not present and she confirmed that on her recent visit, there was no water in the West branch, but that the brook "has been detoured, filled in", and its "new course is one I had not seen before". She was referred to the McBurney plan of 1990 (Exhibit 1B, Appendix P2) and confirmed her opinion that the Old Shore Road as depicted on that plan was the road they walked to the shore during the period 1970 to 1973.

When cross-examined, she testified that she had not been shown the Ritchie lines when that property was acquired, but she was shown the proposed Cobham lines shortly after. She described again walking the property with Malcolm Healy and walking from the starting point about 300 feet to the shore, about 400 feet from there and then the East and South lines "to square it up." She has not visited the property frequently since the Plaintiff acquired it from Ritchie. She said only that she was down the summer following and then again when she heard of the changes in the brook, and once more with the Cobhams in approximately 1975. Her final visit was a few weeks before trial. Her evidence was that the road to the shore was improved after Herbst bought the property over its condition between 1970 and 1975. She described its condition at that time as being rutted, with the centre being the grass hump.

Oscar Healy, like Fred Healy, is a son of Malcolm Healy. He was apparently the son who stayed home, except for ten years spent in Alberta between 1959 and 1969. He said he lives in the "old home place". He testified that the "Old Shore Road" was the boundary line of the first lot acquired from his father "from the pasture fence up". He said he recently walked the Old Shore Road to the Herbst property. It was the same road which is now in better shape. He used the road regularly from 1970 to 1976 to haul driftwood from the shore with a tractor and power trailer. Trees overgrew the road which made him "duck" branches as the driver. He said there would have been "no problem to walk down it".

After the Plaintiff acquired his property in 1973, and until 1976, Healy frequently found he had to cut ropes which impeded his entry and passed signs indicating private property, no trespassing. For some period of time, the Healys used an adjacent field to access the road closer to the shore rather than using the old culvert at the highway. This appears to have been the situation prevailing from 1970 onward. Because the field, in turn, grew up in alders, Oscar Healy testified in 1978 he decided to reopen that section of the road. He asked the Plaintiff if he could bring his equipment in over the Herbst culvert in order to start this work. Permission was refused. He then began to clear out that section with his chainsaw and it was at this time that Herbst contacted the "Mounties" and some ensuing exchange of legal action followed.

Mr Healy said: "As long as father was O.K., I had no trouble with Mr. Herbst". He confirmed that this road was "the only way to the shore in that area". It was his opinion that the highway had never been called the "Shore Road" and he was familiar with another road in the area known as the Lower Cross Road. He described the brook, saying that the West branch had always been there and that before Herbst acquired his property, “that was the only brook". It was changed in 1975 or 1976 when Herbst had a new brook dug with a backhoe. This came to his attention when, in 1976, he tried to take his tractor to his area of the fish houses when he encountered a ditch 2 ½ feet deep by two feet wide which is what is referred to as the East branch. As to how the "ditch" got there, he said: "I've seen ditches dug by backhoe...the stabilizer marks were still there." With respect to the point where the two brooks intersect or diverge, he expressed his opinion that "someone used a pick and a maul on the ledge". On cross-examination, he gave his age as 52. He said he had done some work trimming out the limbs on the road at some point; that after 1976, because of his health, the use of the road was not all that important to me". He was asked about the detour through his father's field accessing the road. He described that as being a detour of about 20 feet and said that his father had started using that route while he, Oscar, was out west. He said anybody used the road who wanted to. There was never any question raised and that the road went to the shore. With respect to his opinion about a mall and a pick, he conceded that he did not see anyone actually digging out the brook. The layout of the Cobham lot as designed by McBurney coincided with “what my father told me.”

SOME LAW IS AGREED

The parties are agreed that there is ambiguity in the descriptions used when laid out on the ground.

The parties, or a least their Counsel, are agreed that an ambiguity in a description should be resolved on the basis of the following priorities: (1) Natural boundaries will be the first consideration; (2) Artificial monuments such as corners as actually marked or lines run are the items of next importance; (3) Adjacent boundaries, that is, the lines and corners of adjoining owners must next be taken into account; and (4) The courses and distances given in the Deed will finally be considered and given effect so far as consistent with the prior evidence.

In connection with these theories, Counsel have referred me to **Boyd et al. v. Fudge et al.** 46 D.L.R. (2d) 679, a case decided by the New Brunswick Supreme Court Appeal Division in 1964; **Hill v. MacLean** 100 N.S.R. (2d) 205, a case decided by Roscoe, J., Trial Division, 1991; and finally, **Kennedy et al v. Alex et al.** 77 N.S.R. (2d) 38. In the latter case, Mr. Justice Grant, quoting from **Richard v. Gaklis** (1984) 63 N.S.R. (2d) 230, relies in the following quotation from the **Canadian Encyclopedic Digest**:

> "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. 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."

INTERPRETATION

These guidelines for interpretation must be put in context, however. They are guidelines to be used in aid of determining the "intention" of the parties. Where the boundaries of the property which the Grantor intended to convey do not accord with the boundaries of the property which the Grantee believed he was getting, there is a particular type of dispute and questions arise as to whether the parties were of one accord or not. The intention of the parties will govern. On the facts of this case, the intention to be ascertained is primarily the intention of Malcolm Healy who set off this small parcel to Brooks. The intention or understanding of Brooks as to what he acquired would also be a significant factor in the interpretation of the ambiguous description. Where the understanding and interpretation of both Brooks and Healy were the same, where they were *ad idem*, as it were, it is difficult to conceive a situation where a subsequent owner would be in a position to claim boundary lines other than those established by the original parties (in the absence of a claim for adverse possession).

It is in this context that evidence of extrinsic facts may be considered after “the whole description" has been looked at fairly. Only then is resort to be had to the landmarks, monuments, adjacent boundaries, etc., all of which is for the purpose of determining what is "most consistent with the apparent intent of the Grantor".

FINDINGS

With respect to the description of the four lots set off by Malcolm Healy to others, there is only one certainty, that being the location of the Eastern fence line of the Young property which forms the Western boundary of all the Healy property. The parties dispute the location of the shore line of the Bay of Fundy; they dispute whether it is the East branch or the West branch of the brook which forms the boundary line between the Seaboyer and Herbst shore lots; and they dispute the alignment of the South line of both shore lots.

With respect to the red (North/South) line on the 1987 McBurney plan, the alignment of that boundary adopted by McBurney is not objected to except insofar as its length may change with the South boundary of the shore lots. Finally, there was a suggestion at trial that Mr. Herbst, the Plaintiff may be entitled to lands lying on the South side of Highway #418 on the basis that this latter highway is the realigned "Old Shore Road" and not the road referred to by Mr. Healy in his Deed as “the Old Main Phinney Cove Highway.”

The two surveyors and the plans they have prepared are in marked disagreement. They obviously reflect the views of the party putting them forth. McBurney described the development of his plan as an exercise in determining the intention of Malcolm Healy. Mr. Hicks described the terms of his engagement as a review of the earlier plan prepared by McBurney. While he did contact the first owner of the Herbst property, Mr. Brooks, and Mrs. Gale, I find that his investigation was designed to identify the points in contention between the parties and to locate the natural landmarks which would tend to support the conclusions already reached by the Plaintiff. I find the approach adopted. by McBurney the preferable one. His investigation was specifically related to finding the intention of the Grantor, Malcolm Healy. His conclusions contemplate the fact that the shore line of the Bay of Fundy and the highway leading through Phinney Cove are roughly parallel. The property lines of the entire lot as owned by Healy approximate a right angle to the shore and the highway. In conveying the original lot, Healy described it in a fashion that suggests that he thought of it in terms of a rectangle having a depth from the shore of 300 feet. I find that the second lot which Healy conveyed, this time to the Cobhams, was similarly intended to have a depth of 300 feet from the shore. Again, it was described in terms which suggest that he intended to convey a rectangular parcel. The extrinsic evidence is that the survey marker placed by McBurney near the fishermen's sheds is located approximately in the place Healy indicated as the Northeast corner to Iva Gale. All of the extrinsic evidence, including the possession actually exercised by Brooks, the demonstration of the lines by Healy to Gale, the occupation of Ritchie and Gale in their use of the Herbst property prior to his acquisition, are consistent with the conclusions reached by McBurney and inconsistent with the boundary lines demonstrated on the Hicks plan. I find the McBurney plan most accurately reflects the intention of Malcolm Healy.

LOCATING "THE SHORE"

As between a private land owner and the Crown, the cases make it clear that "the shore" is the line of mean high water. Mean high water has been defined and interpreted in the cases and in law dictionaries. The definition assigned by the Appeal Division of New Brunswick in **Turnbull v. Saunders** is an accurate statement of the law in that regard, with one small reservation which I shall mention. Speaking for the Court, Chief Justice Hazen said, at page 670:

> "... in my opinion the Trial Judge correctly stated the law when he informed the jury that if they could find the medium high tide line between the spring and the neap tides that that line could be called high water mark."

The caveat I have with respect to the quotation is that the word "medium" is imprecise. If the meaning assigned in this quotation is "mean" or "median", then the quotation is absolutely correct. The complete phrase normally utilized to express this concept is "mean high water". I have no reservation on the basis of the evidence before me in expressing the view that Mr. Hicks accurately laid out a line on the foreshore which coincided with the mean high water mark. On his plan, he has equated that term with "ordinary high water". In my view, the two phrases are not, or at least, may not be synonymous and I

reject the definition provided in the text **Survey Law in Canada** which was placed before me as Exhibit No. 4, wherein the author states at page 195:

> "...the term ordinary high water has not been precisely defined in Canada, but it can be equated with the average, medium or mean high tides."

Mean high water is a median line which is capable of calculation and which is exactly equidistant between the highest of high tides (so called spring tides) and the lowest of high tides (neap tides), the spring tide occurring when the sun and the moon are aligned in a position to exert the maximum attraction on the tides and the neap tides occurring when the attraction of the heavenly bodies are least effective.

Mr. Hicks located mean high water, identified that on his survey plan and used it as the starting point for the Herbst west line. McBurney used the edge of vegetation and a three foot bank. Circumstances alter cases. What was the intention of Mr. Healy who started his description at "the shore" of the Bay of Fundy? Counsel referred to **Turnbull v. Saunders** (1921) 60 D.L.R. 666 (N.B.C.A.) which was decided in different circumstances where mean high water was far removed from the line of vegetation. The contest there, decided by a jury, was between the government of the Province of New Brunswick and a land owner and the contest related to the ownership of gravel below high water. The jury determined that high water was marked by a ridge of gravel, and, they took that as the boundary. I find the case distinguishable on its facts. The Regulations made pursuant to the **Land Surveyors Act** amended to O.I.C. 90-671, N.S. Reg. 145/90, prescribe, among other things, definitions or standards to be used by land surveyors in this province. Section 7(g) defines "ordinary high water mark" as:

> 7(g) ...the limit or edge of a body of water where the land has been covered by water so long as to wrest it from vegetation or as to mark a distinct character upon the vegetation where it extends into the water or upon the soil itself;
>
> 23 Except where existing rights are to the contrary, as in the case of water boundaries ordinary high water mark shall be used as the feature defining the boundary.

The standards imposed upon surveyors, then, for their purposes do not contemplate the use of mean high water as a normal feature for defining a boundary. McBurney followed the prescribed definition in preparing his plan and he assigned a similar intention to Malcolm Healy. Evidence was given as to the character of the shore line. The line chosen by McBurney is described as being coexistent with a modest bank, slightly seaward of accumulated driftwood, and at a point where vegetation and loose soil ends and the bare rock ledge of the foreshore sloping into the sea begins. Mr. Hicks conceded that there was no mark or monument on that foreshore to assist in defining the location of the mean high water mark. The line, he argued, could be re-established at any time with accuracy. Without the aid of instruments, however, it is apparent and I find that it would be impossible to ascertain this theoretical line.

Once again, the question is, what was in the contemplation of Malcolm Healy? He was familiar with the general area; he was familiar with the descriptions by which he had acquired the property; he relied upon the fence as the dividing line between his property and that of Young. I find that he had in his contemplation the generally rectangular shape of his entire parcel, the generally parallel relationship of the Bay of Fundy shore and the highway, and the fact that the old roadway or pathway leading to the shore followed the general alignment of the brook running from the highway towards the shore. The evidence of the surveyors and the photographs make it clear that the nature of the shoreline is such that the most distinguishing natural feature, of a more or less permanent nature, is a three foot bank at the top of which vegetation ceases, and at the bottom of which the bared rock ledge is washed clean by the sea.

It was in the context of these physical realities that Healy agreed to convey the first lot, now the Herbst lot, to Brooks. He subsequently, after negotiations with Iva Gale, agreed to convey a second lot to Gordon and Rachel Cobham but in doing so, he was determined to reserve a third lot on the shore which he intended to convey to his son, Fred, and a daughter at some future time.

The surveyor, McBurney, theorized that Healy's intention was to create rectangular lots. Implicitly, their North/South division lines would be roughly parallel with the sidelines of his own lot. The logic of that proposition is eminently appealing to me and I find that to have been his intention. In that context, Healy endeavoured to compose a description for the lots which could be readily identified on the ground. I find that he walked the perimeter of the Cobham lot with Mrs. Gale. We have her evidence as to what he thought that lot would look like. He followed the West branch of the brook to the line of vegetation. He followed the line of vegetation Easterly along the shore for an estimated distance of 400 feet. He determined from that point that the remains of the fish sheds were on the property he intended to reserve for his son and daughter. He then paced off the distances of 300 feet and 400 feet Southerly and Westerly to complete the rectangle.

On the basis of that evidence, I have no doubt that his intention in conveying the original property to Brooks (now Herbst) was to use the bank or line of vegetation at the shoreline as starting point to measure 300 feet South along the fence. He then turned an angle of 90^0, travelled East to "the brook", and then followed the brook Northward in what he considered to be roughly a parallel direction to the first line, arriving at the shoreline which again he would have recognized as the edge of vegetation, and following the shoreline Westerly to close the lot.

THE BROOK

What did Malcolm Healy consider to be “the brook"? Virtually the only evidence as to "intention" before the Court is that the Western branch was the one intended. The boundaries interpreted in that fashion are the boundaries of the lot actually occupied by Mr. and Mrs. Brooks who first acquired the property from Mr. Healy. Those boundaries encompassed the land subsequently occupied by the Ritchies when they were the owners of the property. The property was variously described by its

owners and others as a small lot with the brook running "close" by the cabin and containing within its boundaries "a pond". The West brook is of the same character as that of the brook above its point of division and contrasts sharply with the nature of the East brook which is described as having the character of a ditch.

I accept the evidence of the two Healy men and of Iva Gale that the two branches of the brook have been substantially altered. The Plaintiff, indeed, conceded that Tom Mack had worked on the two streams with his backhoe machine shortly after Herbst acquired the property.

All of this evidence is consistent with the observations made by the surveyor, McBurney, in the course of his investigations. I do not accept as truthful the evidence of the Plaintiff that he simply had the brook "cleaned".

Mrs. Gale's testimony is clear evidence of what Malcolm Healy thought he was able to convey to her friends, the Cobhams, and her recollection is corroborated in a very material way by the photographs she and her husband. took prior to the purchase by the Cobhams. Among the photographs is a view of the "old foundation" which is in approximately the same location as the present Seaboyer cabin as well as the view of what is presently the Herbst cabin, taken from the "East side of brook on your land, Shirley's cottage visible (in part) at left. Middle of brook is beginning of your property". These photographs taken in July of 1971 remove any doubt whatever as to the intention and contemplation of all the parties involved with the property at that time. I find that both the Brooks and the Cobhams, in acquiring their respective properties from Healy shared his understanding of their boundary lines.

LAYING OUT THE SOUTH LINE

The third issue raised by the Plaintiff with respect to the laying out of the Cobham lot is of limited importance in the overall scheme. In any event, for the reasons indicated earlier, I accept that the McBurney plan reflects the intention of Mr. Healy at the time he set off that lot, and the understanding of the Cobhams when they acquired it. The laying out of lots and determining their respective boundary lines was a simple matter for Mr. Healy as long as he stuck to parallels and right angles. I am not persuaded that he would have chosen to complicate the laying out of the division lines between the lots he created if it turned out that the brook was not strictly parallel to the sidelines and that the shoreline had a slight curve. There is no reason to think that reserving a few square feet of rough and wooded land behind the shore lots would have motivated him to create a boundary line inconsistent with the other established property lines in the vicinity. I find that the Cobham lot, as laid out by McBurney, is basically as intended by Malcolm Healy notwithstanding that the measurement of the depth of that lot is greater than that assigned to the East and South lines called for in the description.

THE OLD SHORE ROAD

In conveying property to the Plaintiff, Healy reserved the Old Shore Road "where the same crosses the lands herein described". It is the contention of the Plaintiff that the "Old Shore Road" does not cross the lands conveyed. The Plaintiff puts forth the proposition that the "Old Shore Road" reserved by Healy is the main public highway leading through the community. Even without the evidence of the several independent witnesses who testified, it would be difficult to accept the proposition that Mr. Healy, who had lived in the immediate area for many years and presumably knew his property well, would have bothered to include such a reservation if it referred only to the public highway. That Malcolm Healy considered the shore road to be something different from the public highway is established by the fact that one of the boundary lines for the property he was conveying was that very highway which he designated as "The Old Main Phinney Cove Highway". It is simply nonsense to suggest that having used the roadway as a boundary line, he would then reserve the right to its use as crossing the property. It seems perfectly clear that in Malcolm Healy's mind, the "Old Shore Road" was something different from the "Old Main Phinney Cove Highway" and it seems equally clear that unless the reservation is completely redundant, the "Old Shore Road" was a road crossing over the lot of land which he was then conveying.

While the evidence of Herbst himself seems to deny any knowledge on his part as to the location of the intersection of the highway and the "Old Shore Road", he, nonetheless, concedes that there was an identifiable track leading virtually from the highway to the cabin he acquired. The evidence of the two Healys and of Iva Gale is not refuted in any way to the effect that the roadway presently used by Herbst is "the Old Shore Road" to which Malcolm Healy would have been referring. It was the established means of access to the property now owned by Cobham and, from time to time, to the fish sheds. I accept without reservation the description of the routing of that access road as described by these witnesses and particularly by Oscar Healy. This again is corroborated by the fact that Herbst testified that at some point, Mac Healy denied him the continuing use or entry over his culvert to gain access to this roadway.

The term “Old Shore Road” is a generic term in my view and I think I can take judicial notice of the fact that properties abutting the shore are frequently the subject of reservations of rights-of-way for former owners or the local community at large, giving access to the shore for various purposes. The evidence in this case clearly establishes that there was, in earlier times, fishing activity along this shore, and that access was gained to the fishermen’s sheds either entirely across this property or, at other times, by crossing this property from the Young property. There is additionally the evidence, which I accept, that it was Malcolm Healy’s intention to convey a third lot on the shore to two of his children and that the reservation of the right-of-way would have been necessary in order to gain access to that property which Mr. Healy, for the time being, retained. I accept the evidence of the two Healys and of Iva Gale as to the use they made of the "Old Shore Road" and as to its location. I reject the evidence of the Plaintiff as to his inability to travel that road when he first acquired the property. The evidence of the Plaintiff himself, indeed, is that he used this road for access to his own cabin until after he acquired

the second lot from Healy and had gotten into a dispute with the Cobhams over their dividing line, after which Mr. Healy prevented him from using that portion of the roadway which crossed the remaining lands of Healy.

I find that the "Old Shore Road" reserved by Mr. Healy in his Deed to the Plaintiff is the road leading to the shore and designated as the "Old Shore Road" on the McBurney plan which is in evidence as Appendix P-2.

CONCLUSION

In conclusion, I find, that the Plan of Survey as prepared by McBurney accurately reflects the ownership of the lands in question. The claim of the Plaintiff will, therefore, be dismissed. The counter-claim of the Defendant, Ann Seaboyer, for a Declaration of Title as to those lands claimed by her is allowed. The costs of the Defendants and the Plaintiff by Counter-Claim are allowed to be taxed as one Bill of Costs. I fix the amount of their claim at $20,000 for purposes of taxation. In view of the fact that the trial continued over three days, costs will be taxed on Scale 4.

Judgement for the Defendants

RICHARD T. HERBST (appellant) v. ANN ELIZABETH SEABOYER, ALBERT LEO SEABOYER, MARGUERITE SEABOYER and DANIEL JAMES SEABOYER (respondents)
Nova Scotia Court of Appeal
Hallett, Matthews and Chipman, JJ.A.
December 6, 1994.

This is an appeal from a decision of Haliburton, J., arising out of a boundary line dispute. There are four points raised on the appeal; one has merit.

The appellant acquired two contiguous parcels of land by separate transactions in the early 70s. The first lot he acquired is known as the Brooks Lot and is described as follows:

> "Beginning at the Bay of Fundy shore at the Northeast corner of lands of Cecil Young;
>
> Thence turning and running in a Southerly direction along the East boundary line of said lands of the said Cecil Young a distance of three hundred feet to a point;
>
> Thence turning at right angles to the hereinabefore (sic) mentioned line and running in an Easterly direction along lands of Malcolm R. Healy to the centre of a brook;
>
> Thence turning and running along the centre of the said brook in a Northerly direction following the various courses thereof to the shore of the Bay of Fundy;
>
> Thence turning and running in a Westerly direction following the various courses of the shore of the Bay of Fundy to the Place of Beginning.
>
> Being the same lands and premises conveyed by Malcolm R. Healy to Arthur E. Brooks by Deed dated the 25th day of July, A.D. 1969."

The second lot was acquired from Mr. Malcolm Healy in 1974 and it is described as follows:

> "All that certain lot, piece or parcel of land and premises situate, lying and being at Phinney Cove, in the County of Annapolis, Province of Nova Scotia, more particularly bounded and described as follows:
>
> > Commencing at a point where the East boundary line of lands now or formerly owned by Cecil Young intersects with the North side line of the Old Main Phinney Cove Highway;

Thence running in an Easterly direction along the North side line of the Old Main Phinney Cove Highway, a distance of Three Hundred and Eighty Feet (380') to a point;

Thence turning and running in a Northerly direction on a line parallel with the East boundary line of the said lands of the said Cecil Young to the South boundary line of lands conveyed by Malcolm R. Healy to Gordon Cobham and Rachel Cobham by Deed dated August 5th, 1970 and recorded in the Registry of Deeds for the County of Annapolis on August 7th, 1970 in Book 236 at Page 531;

Thence turning and running in a Westerly direction along the South boundary line of said lands conveyed by the said Malcolm R. Healy to the said Gordon Cobham and Rachel Cobham by Deed dated and recorded as aforesaid, and continuing in a Westerly direction along the South boundary line of lands owned by Richard T. Herbst, the Grantee herein, a total distance of Three Hundred and Eighty Feet (380') more or less to the East boundary line of said lands of the said Cecil Young;

Thence turning and running in a Southerly direction along the East boundary line of said lands of the said Cecil Young to the Place of Beginning.

Saving and Excepting Thereout and Therefrom the Old Shore Road where the same crosses the lands herein described."

The respondent Albert Seaboyer acquired a parcel of land known as the Cobham Lot. It is to the east of and adjacent to the Brooks Lot and was subsequently conveyed to the respondent Ann Seaboyer. It is described as follows:

"Commencing at a point in the centre of a brook at the Southeast Corner of a lot of land conveyed by Arthur E. Brooks et ux to Shirley Ritchie by Deed dated the 26th day of June, A.D., 1970 and recorded in the Registry of Deeds for the County of Annapolis on the 15th day of July, A.D., 1970 under Recording No. 77922;

Thence running in a Northerly direction along the centre of the said brook following the various courses thereof to the shore of the Bay of Fundy;

Thence turning and running in an Easterly direction along the shore of the Bay of Fundy a distance of Four Hundred (400') feet to a point;

Thence turning and running in a Southerly direction in a straight line along lands reserved by Malcolm R. Healy, the Grantor herein, a distance of Three Hundred (300') feet to a point;

Thence turning and running in a Westerly direction along lands reserved by Malcolm R. Healy, the Grantor herein, a distance of Four Hundred (400') feet to the Place of Beginning."

In 1984 Albert and Marguerite Seaboyer obtained another parcel of land from Mr. Malcolm Healy; it was subsequently conveyed to Ann Seaboyer and is contiguous to the Cobham Lot.

These four parcels of land were part of two parcels of land that had been acquired by Malcolm Healy and described as follows:

1. "All that certain piece or parcel of land situate, lying and being at Phinney Cove, in the County of Annapolis, Province of Nova Scotia, bounded and described as follows:

    Beginning at the Bay of Fundy shore at the Northeast corner of lands of Cecil Young;

    Thence running Eastwardly the course of the Bay of Fundy shore until it comes to the West line of lands of Martin Boudreau;

    Thence turning and running Southwardly along Boudreau's West line sixty-six (66) rods, or until it comes to the pasture fence at the North of the fields;

    Thence turning at right angles and running Westwardly along said pasture fence until it comes to the East side of the Old Shore Road running from the Phinney Cove Highway to the Bay of Fundy;

    Thence turning and running Southwardly along the East side of the said Shore Road until it comes to the North boundary line of the main Phinney Cove Highway;

    Thence turning and running Westwardly along the North boundary line of the highway until it comes to the East line of the aforesaid lands of Cecil Young;

    Thence turning and running Northwardly along Cecil Young's East line to the Place of Beginning ...

2. Commencing at that point where the Southwest corner of land now or formerly owned by Martin Boudreau abuts on the North side of the main highway;

Thence running Northerly along said Boudreau's West line until it reaches the South line of land now owned by Malcolm R. Haley (sic);

Thence running Westerly along said Haley's South line, which is marked by a pasture fence, until it reaches the East side of the Old Shore Road which runs from the Phinney Cove Highway to the Bay of Fundy;

Thence turning and running Southerly along the East line of said Shore Road until it comes to the North line of the main Phinney Cove Highway;

Thence turning and running Easterly along the North side of the highway to the Place of Beginning ..."

These two descriptions are relevant with respect to the fourth issue raised by the appellant. As found by the trial judge these two conveyances to Malcolm Healy taken together comprise all the lands lying between the Bay of Fundy Shore on the north, the main Phinney Cove Highway on the south, the lands of Martin Boudreau on the east, and the lands of Cecil Young on the west. The property was rectangular in shape.

The boundary line dispute erupted essentially as to the location of the boundary between the Brooks and Cobham lots. There were assertions that the appellant had altered the location of the brook marking the Eastern boundary of the Brooks property by moving it to the east. The matter came to a head when the respondent Ann Seaboyer built a cottage on what she considered to be part of the Cobham lot but which the appellant considered to be part of the Brooks lot. Each of the parties eventually engaged surveyors; Mr. McBurney for the respondents and Mr. Hicks for the appellant. Plans were prepared and the matter went to trial.

The learned trial judge accepted the opinion of Mr. McBurney as to the location of the boundaries of the various parcels of land. Accordingly he dismissed the appellant's action. The appellant has raised four points on the appeal described in the appellant's factum as follows:

"Issue #1. What is meant by 'shore', mean high water mark or the edge of vegetation? That is, what is the starting point of the Herbst deed (formerly Healy to Brooks) at 'the shore of the Bay of Fundy'?"

"Issue #2. Was the court below justified in ignoring deed distances in determining the location of the Cobham lot? That is, how should the Cobham lot be laid out on the ground, and do the deed distances govern?"

> "Issue #3. Which watercourse is the east boundary of the original Herbst lot? That is, which of the watercourses described in the evidence is meant in the phrase 'thence at right angles to a brook'?"
>
> "Issue #4. Is there a road or right of way across the second Herbst lot? That is, what is the meaning of the phrase 'saving and excepting thereout and therefrom the Old Shore Road where it crosses the land above described' in the description of that lot?"

The learned trial judge accepted the evidence of the witnesses called by the respondents over the evidence of the witnesses called for the appellant as to the location of the lines of the properties and, in particular, the location of the brook as described in the Brooks deed. The trial judge did not find the appellant credible. At p. 11 of his decision, after reviewing conflicting evidence, he stated:

> "I find I have very limited confidence in the ability of the plaintiff to be objective about any aspect of the dispute between him and his neighbours. It appears that he initially took no interest at all in the location of the boundary lines of the lot he was acquiring and then subsequently decided unilaterally what those boundary lines should be. Having exercised possession of the property he claimed for some 13 years in spite of the objections of his adjoiners, he is absolutely determined to retain the rights he has exercised."

The learned trial judge took a view of the lands in dispute.

The evidence supports the findings of the learned trial judge that (i) the shore line of the Brooks Lot and Cobham Lot were properly located by Mr. McBurney; (ii) that the brook referred to in the description of the Brooks Lot is the so-called western brook rather than the eastern brook as claimed by the appellant; and (iii) the descriptions of the lands conveyed to Malcolm Healy and the viva voce evidence given at trial support a finding that the Old Shore Road referred to in the deeds and in particular in the conveyance to Mr. Herbst of his second parcel of land is not the same road described as the Phinney Cove Highway as contended by the appellant but a road running from the Phinney Cove Highway northerly to the shore. Therefore Issues #1, 3 and 4 cannot be sustained.

With respect to Issue #2, that is, whether the learned trial judge was justified in ignoring deed distances in locating the eastern and southern boundaries of the Cobham lot, I am of the opinion that the trial judge erred in accepting Mr. McBurney's opinion on this issue. There are no monuments, natural or otherwise, referred to in the description of the Cobham Lot. Apart from the brook and the shore line there are no monuments or fences on the ground. The description starts at the southeast corner of the Brooks lot and runs northerly along the centre of the brook to the shore of the Bay of Fundy. The description then goes along the shore in an easterly direction "400 feet to a point" and thence "southerly 300 feet to a point" and thence running "in a westerly direction along lands reserved by Malcolm R. Healy a distance of 400 feet to the place of beginning". The description is not ambiguous. The

evidence of Iva Gale that she walked with Malcolm Healy when he paced off the north line of the Cobham Lot and that he stopped short of the fish houses and stated to her that he was retaining the land to the east of the fish houses on the shore cannot, in the absence of some reference in the description of the Cobham lot to the fish houses, alter the plain meaning of the words of the description of the Cobham lot. The description called for 400 feet on the shore by 300 feet on the east and 400 feet on the south. The McBurney plan results in a shore frontage of about 360 feet and an east line of 427 feet. There is no evidence on the ground that the east line was established at a point about 360 feet from the northeast corner of the Brooks lot. There is no evidence that would support Mr. McBurney's speculation that the original grantor of the Cobham Lot, Mr. Malcolm Healy, intended to convey rectangular lots. It was this conclusion that led Mr. McBurney to fix the east line as being 427 feet in length. The Cobham Lot is essentially rectangular in shape whether one uses the distances called for in the deed for both the north and east lines or Mr. McBurney's speculation. There are no words in the description of the Cobham Lot which indicate that the original grantor, Malcolm Healy, intended that the south line be a straight line as speculated by Mr. McBurney.

Counsel for the appellant relies on **McPherson v. Cameron** (1868), 7 N.S.R. 208 (C.A.), to support an argument that the evidence of Iva Gale that Malcolm Healy did not intend to convey any land to the east of the fish houses when pacing off the Cobham Lot dictates such a finding. This is the rationale for Mr. McBurney's opinion that the east line of the Cobham Lot be located 360 feet from the northeast corner of the Brooks lot rather than the 400 feet called for in the deed.

There is a fundamental difference between the nature of the description of the Cobham Lot and the lot in question in **McPherson v. Cameron**. The north line, that is the line along the shore of the Cobham Lot, proceeds easterly "400 feet to a point"; an undefined and unidentified point. In **McPherson v. Cameron** the line in question went to a corner of an adjacent Grant, the location of which was known to be at a beech tree which many witnesses testified to. In other words, the questionable boundary line in the **McPherson v. Cameron** went to an identifiable point and that point prevailed as to the location of the corner of the land over a corner that would be determined if one were to use the distance called for in the deed. The north line of the Cobham Lot proceeds 400 feet to a point that cannot be identified. Therefore the distance called for in the Cobham deed must prevail rather than the extrinsic testimony of a person who was with the grantor when he paced off the lot. Malcolm Healy's intention must be taken from the words of the description as there is no ambiguity in the description as was the situation in **McPherson v. Cameron**.

The law applicable in this case is clear. The intention of the parties to a deed is to be determined by the words used in the deed and effect should, if possible, be given to the words. (**Saueracker et al. v. Snow et al.** (1974), 14 N.S.R.(2d) 607; 11 A.P.R. 607 (T.D.) at paragraph 20). The well-known rules that are applied to find the intent of a grantor where there is an ambiguity as recited by Dodd, J., in **McPherson v. Cameron** at p. 212 have no application whatsoever with respect to determining the location of the north and east lines of the Cobham Lot as there is no ambiguity in the description nor any ambiguity when the description is applied to what is on the ground.

The learned trial judge erred when he concluded that he should determine the intention of the original grantor Malcolm Healy as to the location of the Cobham Lot based on the evidence of Iva Gale and the speculation of Mr. McBurney. The intention of the original grantor must be determined by the clear words used in the deed. Therefore the McBurney plan with respect to the Cobham Lot should be altered (i) to extend the northern line easterly the distance called for in the deed, namely, 400 feet from the brook; and, (ii) to limit the east line to a distance of 300 feet to a point that would be approximately 400 feet from the southeast corner of the Brooks lot being the place of beginning. These changes would not be inconsistent with the descriptions contained in the conveyance of the second lot to Herbst and the conveyance in 1984 from Malcolm Healy to Albert Seaboyer and Marguerite Seaboyer.

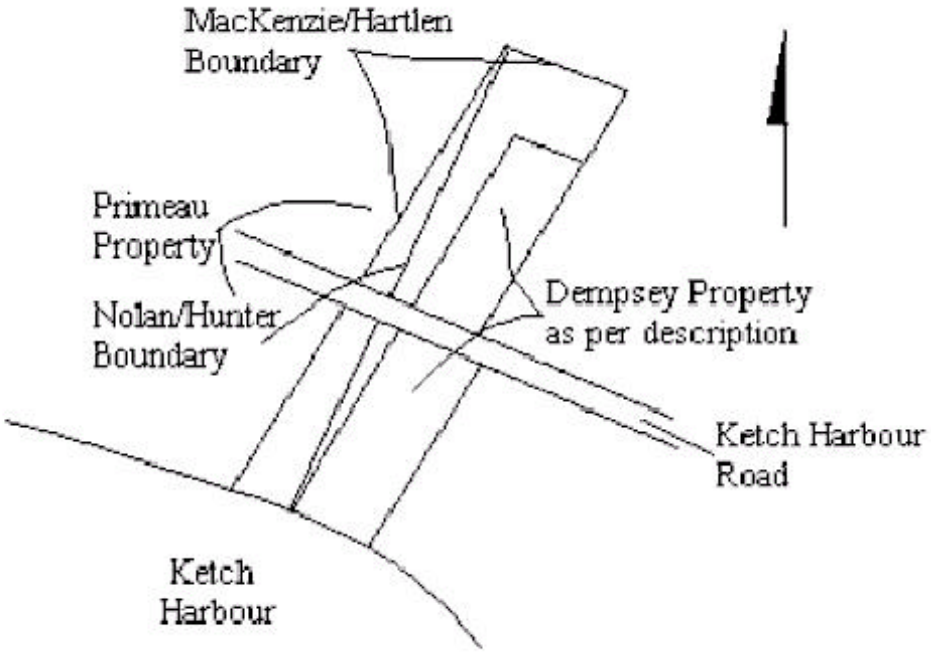
The appeal has failed in the main, particularly when one realizes that the alteration of the boundaries of the McBurney plan do not significantly affect the lands owned by the respective parties and that the main point of contention was the location of the west boundary of the Cobham Lot. I would award costs on the appeal to the respondent at 40% of the costs awarded at trial plus disbursements.

Appeal allowed in part.

ALLAN M. DEMPSEY and G. JUNE DEMPSEY (plaintiffs) See 144 N.S.R. (2d) 275
v. PAUL PRIMEAU and SHIRLEY PRIMEAU (defendants)
and MICHAEL MADDALENA, Barrister and Solicitor (third party)
Nova Scotia Supreme Court
Stewart, J.
August 31, 1995.

The Plaintiffs and Defendants owned adjoining properties at Ketch Harbour, Halifax County. There was a dispute over the location of the common boundary line and the Plaintiffs commenced this action for a declaration as to the proper location of that boundary and for damages for an assault by Paul Primeau against June Dempsey. The Defendants for their part claimed that there had been no trespass and asked for an order fixing the boundary in a location proposed by them and in the alternative, that they had established title to the lands up to the boundary claimed by them based on colour of title, conventional line agreement or estoppel. In addition, the Defendants added the Third Party, who was the lawyer who had acted for them in the purchase of the lands and asked for damages against him if they lost.

The evidence as to the location of the boundary in question was complex. The following sketch will assist the reader in following the arguments:



The description of the Dempsey property had remained consistent since 1858. It began at Ketch Harbour, then ran northeasterly 127' to the Road, then westerly 2'6" along the road, then northeasterly across the road for 100', then northwesterly 20 feet, then southeasterly parallel with the first and third courses to the Harbour, then along the Harbour southeasterly to the place of beginning.

In 1920, a land surveyor named MacKenzie had prepared a survey of the Dempsey property for the owner of the surrounding property. He extended the third course as shown on the sketch to intersect an existing stone wall. He then ran the fourth course the length of the stone wall and the fifth course parallel with the first and third courses. This resulted in the Dempsey property being shown deeper and 13.69' wider than called for in the description. Despite this, the Dempsey property continued to be transferred based on the original 1858 description. The property surrounding the Dempsey property was then conveyed based on the MacKenzie survey. In 1992 Hartlen retraced and accepted the MacKenzie survey.

In 1960, Nolan was hired to create a subdivision of the property surrounding the Dempseys. At the time, he was not aware of the existence of the MacKenzie survey, but did, of course, have the description of the surrounding property which was based on that survey. Nolan's plan showed the west side of the Dempsey property as not running parallel with the east side as shown on the above sketch. Nolan based that line on some blazed trees that he found between the properties. That line became the eastern side of Lot Y on Nolan's plan which was eventually purchased by the Primeaus. In 1981, Hunter retraced the boundary of Lot Y and accepted the Nolan line.

The Primeaus constructed a gabion wall along the boundary established by Nolan. A dispute eventually erupted between the Dempseys and the Primeaus which culminated in Paul Primeau striking June Dempsey with a trailer attached to his truck and injuring her knee.

The Judge found that the MacKenzie/Hartlen survey did not accurately reflect the west boundary of the Dempsey property and that the Nolan/Hunter surveys did not accurately reflect the east boundary of the Primeau property. The Judge found that there was a strip of land13.69 feet wide between the properties of the Dempseys and the Primeaus. The Judge therefore dismissed the claim of the Dempseys.

The Judge then addressed the issue of adverse possession/colour of title as claimed by the Primeaus and determined that there was some convincing evidence that the Primeaus and their predecessors in title had exercised possession sufficient to support a claim to the land up to the Nolan line based on colour of title. However, the Judge held that the proceedings before the Court were not the appropriate ones for the Court to rule on that issue. The Judge recommended that the Primeaus commence an application under the **Quieting of Titles Act** for such an order and further recommended that the third party (the Primeau's original lawyer) undertake that process at no charge.

The Judge then addressed the claim for assault and found that Paul Primeau had assaulted June Dempsey, but that she had been 50% at fault for putting herself in position to be struck by the trailer.

ALLAN M. DEMPSEY and G. JUNE DEMPSEY (plaintiffs) v. PAUL PRIMEAU and SHIRLEY PRIMEAU (defendants) and MICHAEL MADDALENA, Barrister and Solicitor (third party)
Nova Scotia Supreme Court
Stewart, J.
August 31, 1995.

Each of the parties, in effect, seeks a declaration of title and the location of the boundary line between their respective properties at Ketch Harbour, Halifax County, Nova Scotia.

The plaintiffs, Allan and June Dempsey (the "Dempseys"), seek a declaration that the "correct" boundary line between their property and the lands of Paul and Shirley Primeau (the "Primeaus"), is the so-called MacKenzie/Hartlen line rather than the Nolan/Hunter line. The issue is whether the location and position of the common boundary line of their respective properties is the Nolan/Hunter line or the MacKenzie/Hartlen line or, on the other hand, whether their properties are separated by lands owned by unidentified third parties.

The Dempseys, in submitting the 1920 R.W. MacKenzie survey, the MacKenzie/Hartlen line, as being correct, contend the surveyor, Fred Nolan, erred in establishing his location of the boundary line (the Nolan/Hunter line or Nolan line). They say that in creating Lot Y, being the lands of the Primeaus, the location of the eastern line is not supported by reference to the metes and bounds description in the deeds nor by the physical evidence on the ground. Therefore, the Primeaus have trespassed over the property line in building a gabion wall along the Nolan/Hunter line.

The Primeaus and the third party, Michael Maddelena, (the "Maddelena "), on the other hand, submit there is no trespass as the line, created in 1960 by Fred Nolan and remarked in 1981 by Allan Hunter, is correct. Maddelena, a practising member of the Nova Scotia Barrister Society, represented the Primeaus on the purchase of Lot Y. Together they say that the triangular piece of property between the MacKenzie and Nolan lines, claimed by the Dempseys, was conveyed to the Primeaus and never formed part of the Dempsey lands. The gabion wall is built on the correct property line. They contend Carl Hartlen, in completing his 1992 survey, (the MacKenzie/Hartlen line or the MacKenzie line), did not follow the " methodology" of an independent surveyor and merely retraced the MacKenzie survey of 1920, accepting R.W. MacKenzie's assumptions and findings, which were erroneous, given the metes and bounds description in the deeds and the physical evidence on the ground.

In addition to claiming "no trespass", seeking a declaration asserting the Nolan line, and commencing a third party claim against their former solicitor, Maddelena, the Primeaus respond to the Dempseys' claim by stating, in the alternative, that if the MacKenzie line is correct:

1. they have possessory title to the disputed land by constructive possession, under colour of title together with the requisite period of possession;

2. the doctrine of conventional line estoppel applies, given the Dempseys' agreement to the line, and/or

3. the Dempseys acquiesced and did not object to their construction of the gabion wall between 1987 to 1992, and are, therefore, estopped from enforcing the MacKenzie/Hartlen line.

In addition to the land title claim, June Dempsey also alleges an assault by Paul Primeau. Paul Primeau says that there was no assault, and, in the alternative, if there was, "volenti and/or contributory negligence" apply.

The Dempsey Lands

The metes and bounds description of the Dempseys' lands, purchased in February of 1983 from Edward Billard, has not changed since it was owned by Henry Martin in 1858. These lands remained within the Martin and Billard families until the Dempsey acquisition. Edward Billard's mother, Catherine Rose Billard, was the daughter of Henry Martin, Jr. and the grand-daughter of Henry Martin. There is no latitude in the words used in the metes and bounds description arising from the use of approximating words as "more or less". The words are precise, the description reads as follows:

> "All that lot, piece or parcel of land situate, lying and being at Ketch Harbour, in the County of Halifax, in the Province of Nova Scotia and abutted and abounded as follows:
>
> BEGINNING at a rock standing on the shore on the northeastern side of Ketch Harbour on the north side of Henneberry's fields;
>
> THENCE north 44^0 east, 127 feet by the fence as it now stands to the end thereof on the southern side of Ketch Harbour Road;
>
> THENCE westerly along said road 2 feet and 6 inches.
>
> THENCE 19^0 east, cropping (sic) the road and by said a stone wall 100 feet to a stake;
>
> THENCE north 72^0 west, 20 feet to a stake;
>
> THENCE south 44^0 east, cropping (sic) Ketch Harbour Road aforesaid and passing a large rock on the southern side of said road, 261 feet and 6 inches to shore of Ketch Harbour;
>
> THENCE southeasterly by the shore to the place of beginning."

The Primeau Lands

The metes and bounds description of the property purchased by the Primeaus in 1986 was created by Fred Nolan when he surveyed "Lot Y" for subdivision purposes. He prepared the survey, apparently at the request of the Roman Catholic Episcopal Corporation, in order to permit the sale of the lot to Edward Billard, the same Edward Billard who sold the Dempsey lands to the Dempseys. Edward Billard resided on the Primeau property for nine years between 1960 and 1969. The property was then sold twice before being acquired by the Primeaus. It is acknowledged that the disputed eastern boundary of the Primeau property, as surveyed and described by Fred Nolan, does not run parallel to the first course of the eastern boundary of the Dempsey property, as called for in the Dempsey deed description and in the original Martin survey plan attached to the Martin deed in 1858.

The Disputed Lands

The disputed lands consist primarily of a steep cliff higher at the northern end and more sloping at the southern end. The MacKenzie/Hartlen line traces the boundary along the top of the cliff whereas the Nolan/Hunter line places the boundary along the base of the cliff. The cliff itself is not identified in any of the metes and bounds descriptions of the conveyances to the parties in their respective lands. In each case, the historical descriptions of their lands does not make reference to the steep slope. The only documentary reference is contained on the 1920 MacKenzie survey plan.

When, in 1986, the Dempseys excavated rocks from the back of their property, with the exception of a large boulder which straddled the line and which they removed, they intentionally kept to the east of the Nolan line. They had Roy Smith, a relative and a surveyor for the City of Halifax, communicate this to the backhoe operator. Concerned about the sturdiness of the embankment, following the excavation, the Primeaus in 1987 began to construct a gabion wall on their side of this boundary, and along the line defined by the Nolan survey and in their deed description.

History Of The MacKenzie/Hartlen Line

Carl Hartlen, in preparing his "survey" for the Dempseys, relied upon R.W. MacKenzie's 1920 field notes and survey plan of the former Martin property, which he obtained from his firm's archives. MacKenzie's field notes reflect his consideration of the relevant 1858 metes and bounds description and the attached original Martin survey plan. In support of the deed description, he found physical evidence of stone walls along the two eastern courses of the Dempsey lot. Turning westerly at a spruce tree in a stone wall, rather than at a stake as per the deed, MacKenzie's field notes, but not his survey plan, refer to evidence of a wall on the northern boundary. This contrasts with his notation about physical evidence of walls on the eastern boundary, which were noted in and on both documents, ie., his notes and his plan. No remnants of such a northern wall were found by Hartlen in retracing the line; neither is a northern wall referred to in the 1922 James Johnson conveyance to "James MacKay and

Charles Flemming" of the property to the west, north and east of the Dempsey property, which included what would later become the Primeau lands.

To arrive at the northeast corner of the Dempsey property, MacKenzie extended the second eastern course thirty-three feet beyond the hundred feet metes and bounds identified in the deed description and decreased the length of the first eastern course by approximately fifty feet making it seventy-five feet rather than a hundred and twenty-seven feet from the shore line; a shore line which, by all accounts, would have been subject to change during the sixty-two years between the original survey of the Dempsey property for Henry Martin and the MacKenzie survey. MacKenzie's two eastern courses total two hundred and nine feet rather than two hundred and twenty-seven feet described in the deed. I am satisfied MacKenzie, and Hartlen by retracing the MacKenzie survey, located the first course of the eastern boundary by following the stone walls as noted in Martin's metes and bounds description and were able to locate the turn in the eastern boundary south of the Ketch Harbour Road, at the point where the second eastern course began. Therefore, they had the point from which to commence the second course of the eastern boundary, which MacKenzie extended thirty-three feet beyond the hundred feet called for in the deed to a northern wall. Hartlen, on the second eastern line, found the remnants of a rock wall at, as well as before and after the thirty-three foot point determined by MacKenzie, and the twenty inch blazed spruce tree on the eastern boundary line, but as stated, he found no remnants of a northern wall.

If the second eastern course of the Dempsey property ended at a hundred feet, as per the deed, the redrawn Dempsey lot would show the proposed true or original western Dempsey boundary line, as per the deed description, cutting through the northwest corner of the Dempsey house, by approximately two feet. The Dempseys in view of the age of their house, approximately 130 years, offer this as conclusive proof that no one, at any time, treated this "proposed" western line, as the true or original western boundary of their lands. This is not the conclusive proof, as suggested by the Dempseys, since it ignores the fact people do build over or beyond their boundary lines. At best, it can be said to provide the Dempsey property owners with adverse possession of the lands upon which that corner of the house is located.

No physical evidence was depicted in MacKenzie's field notes with respect to the disputed boundary line but his survey plan refers to the boundary line running along a cliff and, as called for in the deed, parallel to the first course of the eastern line on the south side of Ketch Harbour Road. Hartlen, in his December 10, 1992 survey report, stated he found no reliable evidence along the northern and western boundaries and, therefore, used MacKenzie's plan dimensions. However, his survey plan depicts a twelve inch three-sided blazed spruce tree, six to seven feet west of the MacKenzie line and three to four feet west of the Nolan line. Unable to indicate the age of the blaze, Hartlen admitted to having no knowledge, and making no inquiries, as to the meaning of a three-sided blaze prior to the 1979 regulations. He chose not to rely on the blazed tree or to determine whether it constituted possible physical evidence of a common boundary line. The Primeaus question why would Hartlen accept, as one of his boundary lines, the northern wall previously identified and located by MacKenzie, but which

he was unable to find and yet at the same time ignore the three-sided blazed tree which he found in the vicinity of the two properties.

Fred Nolan testified to having found this particular blazed tree, along with two to three others, and this suggested the property line was within two feet of the side with the centre blaze and thereby complied more closely with where he set his line rather than the location of the MacKenzie line. Indeed, Nolan testified to what he determined to be an ancient blaze on the dead tree as being the major reason he decided not to run his line parallel with the eastern line as per the deed. When Hartlen contacted Nolan, about the discrepancy in his line and the deed description, he said he could recall no explanation being given by Nolan about why the lines were not parallel.

Whether MacKenzie, in arriving at his boundaries, obtained information from the owners of the neighbouring properties in an attempt to determine the usage of the land, the line locations, or any line agreements, is unknown. Although reciting the necessity of considering and weighing the existing documentation, the physical evidence and any recorded discussions with relevant parties, when setting boundaries, Hartlen, in conducting his survey, made no effort to speak to any of the Billard family members or the Flemmings concerning the two properties. Edward Billard, the original purchaser of the newly created Primeau/Lot Y lot in 1960 as well as the vendor of the Dempsey/Martin lot to the Dempseys in 1983 testified to not being concerned about the boundary between the two properties, given the family connection to both lots, but did concede that he considered the 1960 Nolan line to be the true boundary between the properties as well as commenting upon the limited use made of the Dempsey back-yard. Fred Nolan testified to a discussion with the occupant of the Dempsey property when determining his boundary lines, although unable to recall with whom he spoke. The abstract of title shows Edward Billard's mother, Catherine Rose Billard to be the owner from 1957 to 1978 when she conveyed the property to her children in joint tenancy and they to their brother, Edward Billard in 1979.

In 1981 Hunter was retained by William and Kathleen Munroe, the then owners of the Primeau lot to retrace and remark, with steel pipes, the Nolan survey of the lot. He testified to placing survey markers, following a discussion with the occupant of the Dempsey property. Mr. Edward Billard, the then occupant of the Dempsey property, could not recall having such a discussion.

As the Dempseys contend the 1960 Nolan survey, the basis for the creation of the Primeau lot, is erroneous, the MacKenzie survey plan is being offered by them as representing the best evidence of the true location of the western boundary of the Dempsey property, subject only to any adverse possession and estoppel claims justifying a change in the line subsequent to that date by the Primeaus or their predecessors in title.

The onus is on the Dempseys claiming the MacKenzie line to be the true line, to prove, on the balance of probabilities the MacKenzie survey is correct and, therefore, the Nolan survey is incorrect.

For a number of reasons, I am unable to find that the MacKenzie/Hartlen survey accurately portrays the boundaries of the Dempsey property. I accept MacKenzie accurately found the eastern boundary line but as the Primeaus and Maddalena contend, MacKenzie's assumptions, which Hartlen adopted concerning the northern and western lines do not withstand analysis.

It is obvious the MacKenzie survey does not retrace the original Martin boundary as described in the deed. It does not correspond with what the original Martin description denotes the boundaries to be, as metes and bounds, which are precise in the description, have been increased and decreased, and monumentation, relied upon in 1858, such as stakes, no longer existed. Using the distance of one hundred feet as the turning point for the northern boundary, the boundaries outlined in red on the Hartlen plan were confirmed by Carl Hartlen as representing a retracing of the Martin, now Dempsey lot, as per the Martin deed.

Both MacKenzie, and Hartlen in retracing MacKenzie, found the second course of the eastern boundary, but extended it beyond what was actually conveyed in the Martin deed. Stone walls and a blazed spruce tree on the eastern line continued the eastern line beyond the hundred foot metes and bounds description in the deed. MacKenzie turned westerly at a spruce tree some thirty-three feet beyond the hundred feet, because he found a northern wall and used it as his northern boundary. His assumption apparently was that the presence of a northern wall reflected actual possession establishing the northern boundary.

As for the separate issue of the ownership of these lands through use beyond the northern line described in the deed, according to Catherine Rose Billard's statutory declaration, registered in the Registry of Deeds at 3261/1154, her father, Henry Martin, Jr., for a period in excess of fifty years, continuously used the Martin lands as pasture and for the planting of a garden. However, his grandson, Edward Billard, testified that during his lifetime of fifty-six years, the actual use of the property on the north side of the Ketch Harbour Road did not go much beyond the location of the house. In fact, the garden shed was located a few feet from the backdoor. It was not until the Dempseys excavated a large pile of rocks in the back yard, in 1986, were they able to extend the shed towards the northern boundary.

I agree with the submission of the third party, Maddelena, that although the MacKenzie northern wall is evidence of actual possession of the Dempsey lot, there is absolutely no evidence of actual possession of the lands to the western line as drawn by MacKenzie. Hartlen does not dispute this. The lands between the Nolan line and the MacKenzie line, and particularly the resulting disputed triangular lot, is an embankment, and MacKenzie found no evidence of actual possession in order to establish his western line. Again, as to the secondary issue of ownership through use, the disputed land is not pasture land. If there was any possibility of such use, it was certainly not used in that capacity, except perhaps for the occasional parking of an automobile on lands owned by the Department of Highways, during the forty-four years Edward Billard was associated with the property prior to selling it twelve years ago to the Dempseys.

MacKenzie in trying to locate the original northern boundary looked to the northern wall as being the best evidence available. No stake was found at the hundred foot point on the second course of the eastern line as described in the Martin deed. MacKenzie looked to other evidence in finding the "proper" location of the northern boundary. He went beyond the hundred foot point by thirty-three feet to a found northern wall even though there is nothing to suggest the hundred foot description was inaccurate or a misdirection. He failed, however, with respect to the western boundary of the Dempsey lot to find evidence of a form of actual possession indicating where people traditionally accepted the boundary to be located.

By running the western line from the northwest corner of the northern wall found rather than from a point twenty feet west of the hundred foot point on the eastern boundary line, MacKenzie widened the western boundary of the Dempsey lot by approximately thirteen feet. This is inconsistent with the evidence of actual possession and the dimensions in the Martin deed and the original Martin plan and negates the western boundary line as posed by MacKenzie, causing me to reject the MacKenzie/Hartlen proposed common boundary as being the true boundary.

History Of The Nolan/Hunter line

In 1922, two years after the MacKenzie survey, 9.2 acres of land immediately to the west, north and east of the then Martin lot was conveyed by James Johnson to James MacKay and Charles Flemming, who in 1945 conveyed the same parcel of land to the Roman Catholic Episcopal Corporation. This land included the parcel of land which would later become the Primeau/Lot Y lot. The 1922 Johnson deed description was drafted in accordance with the MacKenzie survey and incorporated the MacKenzie survey dimensions for the Dempsey property when drafting the legal description, in order to work around the piece of property then owned by the Martins. The MacKenzie plan is, however, not referred to in the deed description. The eastern boundary of the lands acquired from Johnson by MacKay and Flemming and later by the Roman Catholic Episcopal Corporation is, therefore, the MacKenzie line rather than the original Martin deed description line. Thus, Johnson and his predecessors retained documentary title to the unconveyed thirteen foot strip of land between the deeded western boundary of the Dempsey property and the deeded eastern boundary of the lands acquired from Johnson in 1922 by the Primeaus' predecessors in title, being the MacKenzie line, having failed to convey all by relying upon the MacKenzie survey dimensions.

Not finding the actual location of the original landmarks, which must govern if found, Nolan testified he then turned to the best possible available evidence of possession, relying on it to show where people traditionally accepted the common boundary line, to be. Three to four feet to the west of the eastern boundary of the Primeau property line, as set by Nolan, he found a dead three-sided blazed tree, which still exists, along with two to three other blazed trees, causing him, as previously stated, to draw his eastern boundary line in keeping with them while ignoring the parallel provision in the Dempsey deed description. MacKenzie's 1920 survey, of which Nolan was unaware, made no reference to a found three-sided blazed tree near the boundary.

Nolan, although lacking the MacKenzie survey, certainly had access to the deed description out of which the Primeau lot was created and in which the metes and bounds description used the "precise" MacKenzie survey dimensions. He testified to being "very conscious" of not drawing the eastern boundary of Lot Y, the Primeau lot, parallel with the Dempseys' eastern boundary, and that this caused him to remember this property, even without the benefit of his field notes, some thirty-five years later. In setting the line, he relied upon a number of the blazed trees as showing a boundary line running along the bottom of the natural embankment and on his discussions with the occupants of the Dempsey property. As his plan was intended for subdivision purposes, he stated he did not note any found blazed trees on Lot Y. This is, however, in contrast to the stone wall which he noted on Lot X being another property created on the plan and which he surveyed at the same time.

Since 1960, the Primeau lands have been conveyed by deed description which makes no reference to the Mackenzie survey dimensions cited in the Johnson deed to "MacKay and Flemming" and then to the Roman Catholic Episcopal Corporation, as the eastern boundary of the lands. The Nolan/Hunter line is not reflective of the true boundary line between the former Johnson property and the lands to the east which include the Dempsey property. The line was reset by Nolan in 1960, from the evidence on the ground of blazed trees which did not coincide with the Johnson deed description of the eastern boundary line (the MacKenzie line) or the parallel direction of the eastern boundary, as plotted on the Martin and MacKenzie plans. In fact, the only recorded relevant boundary that is not parallel to the eastern line of the Dempsey property is the Nolan line as set by Nolan and remarked by Hunter. For this reason, it is clear that the Nolan line does not reflect the true boundary between the parties' lands.

The Location By Title Documents Of The Primeaus' Eastern and the Dempseys' Western Boundary Line

The Dempseys have not satisfied me, on a balance of probabilities, that the MacKenzie/Hartlen line is a correct location of the western boundary of their lands. Similarly, the Primeaus have not, on a balance of probabilities, satisfied me that the correct location of their eastern boundary is as drawn by Fred Nolan and identified as the Nolan/Hunter line. As reviewed earlier, I am satisfied that the Dempseys' western boundary is to the east of where R.W. MacKenzie and Fred Nolan located their lines, and the Primeaus' eastern boundary is, by title deeds, to the west of the Nolan/Hunter line.

The purported extension eastwardly of the Primeaus' eastern boundary to the line created by Nolan and incorporated into the deed to the Primeaus has not been established as the true eastern boundary of the Primeau lands. I am satisfied on the balance of probabilities that the true metes and bounds eastern boundary of the Primeau lands is as plotted by MacKenzie, even though MacKenzie was apparently mistaken in locating the western boundary of the Dempsey lands. MacKenzie, in plotting the western boundary of the Dempsey lands, did not locate it as it was on the original Martin deed. The effect was to show, on his plan, the western boundary of the Dempsey line, approximately 13.69 feet, along the northern boundary of the Ketch Harbour Road, westerly of where it should have been. Therefore, when the MacKenzie metes and bounds was used as the eastern boundary of the lands conveyed by

Johnson to Flemming and MacKay, it omitted to include this strip of land, 13.69 feet on the northern boundary of the Ketch Harbour Road, and extending northward parallel with the original Martin line and beyond and also forming a rectangular piece of land on the north boundary of the Dempsey land. Neither this piece of land nor any portion of it was, therefore, conveyed to the Primeaus' predecessors in title. Although the deed to the Primeau/Lot Y purports to convey a portion of these lands, that is the triangular piece of land between the MacKenzie and the Nolan lines, the vendor did not have this title to convey.

In the circumstances, and following my findings as to the location of the eastern line of the Primeaus' lot and the western line of the Dempseys' lot, there remains, on the ground, a triangular piece of land not contained within either parties' lands, as I have located them. It is in effect, this piece of land which forms the primary subject matter of this dispute. Although framed in the anticipation of a finding that the MacKenzie/Hartlen line would be found to be correct, the alternative submissions by the Primeaus, for a declaration of title by possession, conventional line estoppel and estoppel by acquiescence, are relevant in respect to this triangular lot of land. The owner or owners of this triangular piece of land are unidentified and consequently are apparently not parties to this proceeding.

Primeaus' Claim To A Declaration of Possession

The Primeaus' deed description purports to incorporate the triangular lot between the Nolan line and the MacKenzie line and they may well have, by virtue of the doctrine of constructive possession, a claim under colour of title against the true owners. The Dempseys' deed, however, does not include the triangular lot, although they may have an adverse possession claim against the true owners for the portion of the property west of their true line, extending to the Nolan line, which is not in issue in this action.

On the evidence and as between the Primeaus and the Dempseys who, granted, are not apparently the true owners, there appears to be some convincing testimony to the actual continuous, open and notorious possession of the Primeaus' predecessors to the exclusion of others in this triangular lot. Without making a determination as to whether the acts of possession necessary for a trespasser in possession to oust the true owner, as opposed to the acts of possession of a person in possession under colour of title, exists, the former requiring the trespasser to be in actual possession of every part of the property disputed and the latter, being in possession under colour of title, requiring the trespasser only to be in constructive possession of a part in order to be considered in possession of the entire property described in the conveyance, I note the following:

1. Possession must be open, visual and notorious so that any person having an interest in the property would be put on notice. The fact that the Primeaus' deed stood unchallenged as a registered conveyance for nearly thirty years adds to the contention that the Primeaus' predecessors were in constructive possession of all of the disputed lands. This acts as public notice (**Griffin v. Poirier and Poirier** (1980), 42 N.S.R.(2d) 164; 77 A.P.R. 164 (T.D.), at p. 175);

2. The Primeaus, by their predecessors creating a blazed line and placing survey markers marking the line, have, in the circumstances, assumed control of the lands in question. The evidence of control must be viewed in the circumstances of the nature of the lands, itself, the major portion of which, given its steep contour and rocky terrain, is not conducive to practical use.

3. The continuous occupation and use of the house built in 1960 by Edward Billard on the Primeau lands.

Procedure For A Declaration Of Title By Possession

The Primeaus seek a declaration establishing the Nolan line as the boundary between the two properties. The Dempseys had sought, and I rejected, a declaration that the MacKenzie line is the boundary between the lands of the two parties. Declarations of title of and to lands involving persons or potential persons, not party to proceedings, are provided for pursuant to the **Quieting Titles Act**, R.S.N.S. 1989, c. 382. As stated in C.W. MacIntosh's text **Nova Scotia Real Property Practice Manual** (1988), a party claiming title by adverse possession, as are the defendants here, may obtain a declaration under the **Limitation of Actions Ac**t, R.S.N.S. 1989, c. 258 as amended to the effect that the true owner's title of and to the land and any right of action to recover possession has been extinguished by the acts of adverse possession over the requisite twenty years. It is with respect to the extinction of title that a party is entitled to a declaratory judgment pursuant to the **Limitation of Actions Act** and not for the purpose of obtaining a confirmation of title. In arriving at this determination, Jones, J., as he then was, in **Fraser v. Morrison and Beer** (1972), 7 N.S.R.(2d) 261 (T.D.), at pp. 267 and 268 quotes from the Ontario Court of Appeal in **Brown v. Phillips et al.** (1964), 42 D.L.R.(2d) 38, at p. 44:

> "While I consider that the plaintiff is entitled to judgment declaring that the title of the defendants to the lands above described has been extinguished, I do not consider that in this action the plaintiff can have an order declaring him to be the owner of these lands. The position of the person whose possession has extinguished the title of the former owner was stated by Strong, J., in **Gray v. Richford** (1878), 2 S.C.R. 431, at p. 454 as follows:
>
> > 'The **Statute of Limitations** is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversation with, a law of extinctive, not one of acquisitive prescription - in other words, the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the **Statute of 4 Wm. 4** says not one word as to the acquisition of title by length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the **Statute of Jame**s,

> which only barred the remedy by action, but its operation is by way of extinguishment of title only."'

In such circumstances, the persons alleging title and the persons alleging acts of adverse possession are parties in the proceedings. The true owner seeks to preserve his title and the claimant, pursuant to acts of adverse possession, seeks to have the title extinguished. The foundation of the proceedings is the **Limitation of Actions Ac**t, and in particular, the provisions in ss. 9 and 21 that extinguish a claim not pursued within twenty years. Where the court is satisfied there are the necessary acts of possession and the limitation under the Act has passed, it may then give a declaration extinguishing the right of action and the title of and to the lands of the true owners.

In the instant case, the Primeaus do not seek to extinguish a right of action or title of and to the lands of the true owner, pursuant to the **Limitation of Actions Ac**t, rather they seek to be declared the owner of a possessory title in the lands, under the **Limitation of Actions Ac**t, as against a party not the true owner. As stated, this is not a relief available even as against the true owner. The appropriate procedure is an application pursuant to the **Quieting Titles Act** for a declaration conferring title, after having fulfilled the requirements of that Act.

In the Primeaus' third party Statement of Claim, they seek indemnification for, or in the alternative, damages in the amount of any damages, losses, costs, expenses or other liability for which they may become liable to the Dempseys, pursuant to the proceedings. No such liability has arisen as the Dempseys have failed to establish the MacKenzie line as the true boundary between the properties. Absent a successful claim by the Dempseys, as against the Primeaus, there is no claim for indemnity by the Primeaus against their former solicitor, Maddelena. However, under the circumstances, I would suggest the third party, on behalf the Primeaus, consider commencing and completing, without cost to the Primeaus, a Quieting Titles application in order that the Primeaus may acquire legal title to the lands they apparently believed they were purchasing in 1986.

The Assault

June Dempsey includes a claim for damages against Paul Primeau, submitting his conduct towards her was wilful and intentionally tortious and constituted an assault and battery.

On December 28, 1992, after receiving the Hartlen survey, Allan Dempsey removed Paul Primeau's utility trailer from the gravel driveway located in the area of the disputed lands and placed it on the driveway closest to the Primeaus' house. He then strung a rope across the gravel driveway from his fence to a pole and attached a "No Trespass" sign. This rope was later cut by Paul Primeau, when he returned the utility trailer to its earlier location. It is at this point the version of the events as testified to by June Dempsey and Allan Primeau, vary.

June Dempsey says Paul Primeau had cut the rope by the time she got out her front door, and he was getting ready to back up the trailer. She yelled at him not to park the trailer. She stated, after approaching the driver's window and telling him not to put it back, "because there were papers", she then went over to where the rope was and picked up the sign, holding it in front of her, all the while telling him not to back up the trailer. She said Paul Primeau ignored her and continued to back up the trailer. She then stepped back, at some point dropping the sign. She stated he was not going to stop, he did not stop, and in fact he accelerated and the trailer caught her knee. She fell down, throwing stones at the truck to get him to stop. She felt she had good eye contact with him in the rearview mirror and that he definitely knew she was there. She later connected with him, again at the truck window, and at some point calling him a crazy man and swearing at him before returning to the house. She went for x-rays on her knee and took Tylenol for the pain. Although the injury sustained to her knee, consisting of bruising, swelling and some discomfort, was not of a serious nature, having no prolonged defects or problems, she contends Paul Primeaus' actions were intentional and actionable.

Paul Primeau testified to not seeing anyone when he was backing the trailer, having, according to his discovery evidence, looked in his rearview mirror and, according to his trial evidence, looked back over his shoulder. He denied having any discussion with June Dempsey to this point. After backing the trailer and positioning it, there was a kick at his door and a pounding at his window. June Dempsey was standing there in her stocking feet, holding the "No Trespass" sign. When he opened the door, she screamed at him about it being her property and continued to do so as he unhooked the trailer. He left and, after he arrived home, he called the police. He says the first time he was aware of an alleged assault was when the police officer told him he was being investigated for an assault. He stated he had not run into her.

Peter Martin, a friend of the Dempsey family, testified to having seen the events from his kitchen window, a distance, according to him, of eight hundred feet and, according to Allan Dempsey, approximately four hundred to five hundred feet. His testimony parallels June Dempsey's recollection of events, including seeing Paul Primeau back his trailer into her, knowing she was standing in the disputed area behind the trailer. During the course of the criminal investigation in this matter, Paul Martin's eye witness testimony was never brought to the attention of the police. I am not, for this reason alone, prepared to dismiss his evidence. I question, however, whether he saw as much detail as he testified to, but I do accept he viewed some of the events.

Salmond on Torts (17th Ed. 1977), reads as follows at p. 122:

> "Assault:
>
> "The act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery amounts to an actionable assault."

and at p. 120

> "The application of force to the person of another without lawful justification amounts to the wrong of battery. This is so, however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm. Even to touch a person without his consent or some other lawful reason is actionable. Nor is anger or hostility essential to liability: an unwanted kiss may be a battery."

I am satisfied that Paul Primeau was aware that June Dempsey was in the area of his truck and trailer, having been earlier yelled at and approached by her at the driver's window, and before he backed the trailer into the gravel driveway. She did not appear out of nowhere as he would have me believe. In order to have the sign, she would have had to, at some point, have picked it up prior to the trailer being reparked. She made her presence known the moment she left the house, both verbally and physically. She, however, did not back down, even after being ignored by Paul Primeau, who proceeded to complete his task of backing the trailer into the disputed area. She chose to stand behind the trailer holding up the sign, only stepping aside as the trailer was being backed up.

I am satisfied that Paul Primeau did strike June Dempsey in the knee area with the trailer. This act, in itself, constitutes an assault and battery.

Paul Primeau, in the alternative to denying any assault and battery has raised the defence of contributory negligence and submits June Dempsey was negligent herself, in approaching the rear of the trailer, knowing he was in the process of returning it to the disputed gravel driveway. Contributory negligence was defined by the Nova Scotia Appeal Court in **Langille v. Wolfe (D.G.) Enterprises Ltd. and Wolfe** (1987), 79 N.S.R.(2d) 92; 196 A.P.R. 92 (C.A.), when Matthews, J.A., at p. 109 quoted from **Nance v. British Columbia Electric Railway Co**., [1951] 2 All. E.R. 448 (P.C.):

> "... all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury, he cannot claim on the part to compensate him in full ... Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle."

The burden on June Dempsey, in this instance, is to exercise reasonable care and skill for her own protection.

I must consider the conduct of the plaintiff in relation to the submission of contributory negligence. After approaching the driver's door, expressing her wish for the driver to stop and appreciating she was being ignored by Paul Primeau, June Dempsey placed herself at the rear of the trailer, a position far more dangerous than continuing to stand by the truck door, strenuously expressing her disapproval. She stood where she knew Paul Primeau intended to park the trailer. She placed herself at risk of the trailer striking her knowing, according to her testimony, there was little room to manoeuvre, if he chose to continue and not to stop.

I find June Dempsey placed herself at risk or, at least, was negligent in what she did. She could or should have reasonably foreseen that by standing behind a trailer in the process of backing up, in a confined space, she was placing herself at risk. In the circumstances, I find each at fault and assign responsibility equally, that is fifty percent to Paul Primeau and fifty percent negligence to June Dempsey. She is entitled to recover one-half of her damages.

June Dempsey suffered minimal injuries from the assault and the battery. She went to the Outpatients Department at the hospital, had x-rays and took Tylenol for the pain of the swelling and bruising. There are no aftereffects.

After considering the various factors in such a claim, I find the present value of June Dempsey's claim is $500.00 reduced by fifty percent.

I have considered the matter of aggravated and punitive damages and have concluded that this is not a case for such an award.

In the circumstances and pursuant to the decision of the Nova Scotia Court of Appeal in **Bush v. Air Canada** (1992), 109 N.S.R.(2d) 91; 297 A.P.R. 91, June Dempsey is entitled to interest at the rate of 2.5 percent on the sum of $250.00.

Costs

On balance the Primeaus have been successful, although they are not entitled to the declaration of title and June Dempsey has recovered a damage award in the amount of $250.00. Taking all factors into account, including the cost of removal of the wall as claimed for by the Dempseys, I award the Primeaus costs on Scale 2 and set the amount involved for purposes of taxation at $10,000.00. In setting the amount of $10,000.00, I have had regard to the fact that this proceeding involved a substantial non-monetary issue of importance to the parties, namely the claim for declaration of title by the Dempseys.

Order accordingly.

TRUST for the HEIRS of the ESTATE of WILLIAM MASON and ANN (MASON) HARTLING (appellants)
v. EVA MASON (respondent)

See 176 N.S.R. (2d) 321

Nova Scotia Court of Appeal
Glube, C.J.N.S., Flinn and Cromwell, J.A.
April 15, 1999.

The Respondent Eva Mason had applied to the Nova Scotia Supreme Court under the **Quieting Titles Act** for a declaration that she was the owner of certain lands at Tangier. That application had been opposed by the Appellants on the grounds that an 1875 deed in the chain of title which Eva Mason relied on had not conveyed the interest of several heirs in the Mason family. The Supreme Court had awarded Eva Mason the certificate of title which she requested based on two grounds: first that the 1875 deed had effectively conveyed the interests of all of the heirs and second that the claims of the heirs were barred by virtue of adverse possession/colour of title.

The Mason heirs appealed.

The Nova Scotia Court of Appeal addressed the two grounds in the Trial Judge's decision. They found that the Trial Judge had been wrong in deciding that the grantors in the 1875 deed had the authority to convey the interests of he other heirs. On the second ground of the Trial Judge's decision, the Court of Appeal reviewed the law of adverse possession and specifically colour of title. The Court found that Eva Mason and her predecessors in title had exercised actual, open, notorious, continuous and exclusive possession of at least a portion of the lands claimed. Based on this finding, the Court held that the principle of colour of title applied to extend that possession to all of the lands claimed. The Court's discussion of the concept of colour of title is particularly valuable.

TRUST for the HEIRS of the ESTATE of WILLIAM MASON and ANN (MASON) HARTLING (appellants) v. EVA MASON (respondent)
Nova Scotia Court of Appeal
Glube, C.J.N.S., Flinn and Cromwell, J.A.
April 15, 1999.

This is an appeal from the decision of Justice Hamilton, in Chambers, on an application by the respondent under the **Quieting of Titles Act**, R.S.N.S. 1989, c. 382.

Justice Hamilton granted the respondent a Certificate of Title to approximately 12 acres of land at Tangier, Nova Scotia, (the lands in dispute) on two alternative bases:

> (i) that the respondent's alleged root of title, a deed, without covenants, executed and delivered in 1875, effectively conveyed the entire fee simple to 40 acres of land of which the lands in dispute now form a part; and, as the chambers judge said, if she was wrong in that conclusion,
>
> (ii) that the respondent had demonstrated, on the evidence, that she was entitled to a certificate of title to the lands in dispute by colour of title.

Whatever title passed with the 1875 deed, there is an unbroken chain of that title to 1944, when it was acquired by the respondent's husband, now deceased. The appellants (the Mason heirs) claim that no title passed with the 1875 deed. They claim to represent, as trustees, all of their heirs-at-law of the owners of the property prior to 1875. The appellants, having opposed the respondent's application, submit that Justice Hamilton made errors in law in reaching each of the alternative conclusions.

The 1875 Deed

The title to the property in question is traced back to William Mason and Ann (Mason) Hartling, who acquired 400 acres of land at Tangier in 1830, as Tenants in Common. The land in dispute is included in this 400 acres. William Mason and Ann (Mason) Hartling represented two separate and distinct Mason families. Ann Hartling's undivided 1/2 interest was devised, by will, to her son, William Mason, Sr. (not the same William Mason who was Ann Hartling's co-tenant in common.) William Mason, (Ann Hartling's co-tenant in common) died intestate. He was survived by his widow and several children, one of whom was Peter Mason.

The deed in question, upon which the respondent relies for her root of title, is dated December 21, 1875. It conveyed 40 acres which, the parties agree, include the land in dispute in this appeal. It is also agreed that the 40 acres is part of the 400 acres acquired by William Mason and Ann Hartling in 1830. The grantors are described, simply, as Peter Mason and William Mason of Tangier, Halifax County, Yeomen. The grantee is described as Andrew McG. Barton of the City of Halifax, Gentleman. The instrument recites:

> "Whereas the said Andrew McG. Barton hath heretofore from time to time made advances to the said Peter Mason and William Mason to the extent of one hundred dollars upon the consideration of the transfer of the property hereinafter described to the said Andrew McG. Barton."

The words of the grant are:

> "... grant bargain sell assign transfer and quit claim to the said Andrew McG. Barton his heirs and assigns [the lands] ... To have and to hold and said lands and premises to the said Andrew McG. Barton his heirs and assigns forever."

Rejecting the argument advanced by counsel for the Mason heirs, that this instrument was only a lease of the lands, the trial judge said:

> "I am satisfied however it is a deed as opposed to a lease because of the express language of grant contained in it and because of the reference to $100 having been advanced in consideration of the transfer of the property."

I agree with the conclusion of the chambers judge, that the document is a deed as opposed to a lease.

There is, however, a problem with this conveyance. There is no indication in any part of the conveyance that Peter Mason executed the conveyance in any capacity other than in his personal capacity. Further there is no written, and signed, authorization of any kind, giving to Peter Mason any authority to convey the title interests of the other heirs-at-law of his father.

While there is no documentary evidence, by way of written authorization, both parties acknowledge that during this period of time (1875), William Mason, Sr., (the owner of the undivided 1/2 interest in the property acquired under his mother's will) and Peter Mason (one of the sons of the other co-tenant in common who died intestate) had the power to manage the overall Mason properties. Further, that in accordance with that power, they executed leases of the property. However, the extent of that "power to manage" is not known because it is not in writing, or, at least, has not been produced.

The appellants take this position, however, that such limited authority to manage does not include a power to convey the legal title of others.

The chambers judge found that there was sufficient evidence from which she could reasonably draw the inference, and did infer, that William Mason, Sr., and Peter Mason effectively transferred all of the outstanding interests in the land conveyed by the 1875 deed, thereby providing the respondent with a good root of title to the land in dispute. The evidence before the chambers judge, and upon which she relied for this conclusion, includes:

1. the acknowledgment of the parties that William Mason, Sr., and Peter Mason had power to manage the lands on behalf of all of the Mason heirs and did, in fact, lease part of those lands.

2. the deed itself with the actual consideration of $100 recited, as being "in consideration of the transfer of the property";

3. subsequent leases of property wherein William Mason, Sr. and Peter Mason are described as

(a) "acting jointly for and on behalf of Ann Mason; and the widow and heirs of William Mason deceased";

(b) "empowered by the Mason family to conduct and manage the general business of said Mason property under Letter of Attorney" (although no letter of attorney has ever been produced); and

(c) "owner of the estate of the late Ann Mason", with respect to William Mason; and "acting Attorney for the heirs of the late William Mason", with respect to Peter Mason.

4. the conduct of the grantees in the 1875 deed, as well as that of certain mining companies who subsequently acquired interests in the lands. In each case they acted as though they were owners of the entire land conveyed in 1875; and there is no evidence that the Mason heirs disputed the ownership of the 40 acres while it was occupied by the mining companies.

5. the 40 acre parcel of land was the subject of numerous conveyances to and from various mining companies, their creditors and trustees in bankruptcy for the next 45 years.

The chambers judge decided that given the evidence of Peter Mason's leadership role on behalf of his mother and siblings with respect to their land, together with the evidence in the other subsequent documents of his having apparent authority to deal with their interests by way of lease:

"I find it is reasonable to infer from the evidence that he had the power to sell the 40 acres."

The chambers judge further found, given this evidence and the subsequent dealings with the 40 acres, by the mining companies, that William Mason, Sr. and Peter Mason

> "had the authority to, and did release to Mr. Barton, the interests of all of the heirs of William Mason and Ann Hartling in the 40 acres."

Counsel for the appellants on this appeal submits that there was no express authority whatsoever, in any instrument, authorizing Peter Mason to sell, let alone to convey, the legal title of the other heirs of his father. Absent any such instrument, counsel submits, the court cannot construe a power to convey those legal interests from an authorization to manage them. Counsel for the respondent submits that the lack of specific authority is not finally determinative; and that such authority, to convey, can be inferred from extrinsic evidence including other contemporaneous recorded instruments.

The Chambers judge does not, in her reasons, indicate the basis, in law, by which she is able to conclude that Peter Mason had the authority to convey the legal title of the other heirs-at-law of his father, and that he did, in fact, convey those interests. There is, certainly, no express power, in any documentation, giving Peter Mason authority to convey, or even to sell, those interests. Further, the chambers judge cites no judicial authority for her conclusion that she is able, at law, to infer the power - to convey the legal title of others - from surrounding circumstances. Counsel for the respondent has not cited any judicial authority which permits such an inference to be drawn, in the circumstances that exist here.

Absent any written, and signed, authorization, I know of no judicial authority which permits the court to infer - in circumstances such as these - that Peter Mason had the authority to convey away the legal title of the other heirs-at-law. Without written documentation it cannot be determined if all of the heirs gave the authorization, when that authorization was given, and the precise terms of that authorization. Further, in this particular deed, Peter Mason does not even purport to be dealing with the interests of the other heirs. He is not described in the deed as acting in any representative capacity, and did not sign the deed other than as "Peter Mason."

A distinction should be noted, here, between a power to sell and a power to convey. Principles of agency law recognize a power to sell arising out of representations by the principal that an agent has ostensible authority, or representations by the principal amounting to estoppel. However, even an express power to sell is strictly construed, and the burden is on the party alleging authority to prove it. (See **The Law of Vendor and Purchaser**, Di Castri, 3 ed., vol. 1, p. 3.3)

A power to convey, however, is quite a different thing. This distinction, in general terms, is set out in the dicta of Henry, J., in **Taylor v. Wallbridge** (1879), 2 S.C.R. 616 at p. 678-79:

> "It is a well settled rule that all written powers, such as letters of attorney, or letters of instruction, shall receive a strict interpretation, and the authority is never extended beyond that which is given in terms, or is absolutely necessary for carrying the authority so given into effect."

"The power to convey is in no way subordinate to the power to sell or to contract for a sale. The latter power can be exercised by entering into a contract binding on the principal, and may, therefore, be fully executed. The rights and obligations of the principal may thereby be totally changed, so that specific performance would be decreed. Personal property, passing by sale and delivery by an agent, binds the principal, who, by his delivery to the agent, gives him an implied authority to deliver to the purchaser. With real estate it is quite different; and authority to sell is not held to be an authority to make a feofment under the common law; and, by a parity of reasoning, the power to sell would not include one to convey. **Payley** says:

> 'The agent or solicitor of the vendor cannot, without special authority, receive and give a discharge for the purchase money, and the usual indorsed receipt is in equity no conclusive evidence of payment.'

Sugden on vendors says:

> 'A purchaser cannot safely pay the purchase money to the vendor's attorney without the seller's authority, although he is intrusted with the conveyance and is ready to deliver it up.'"

Recent cases have not applied this dicta strictly. Rather, it has been relaxed somewhat. Di Castri, in his text, (supra) also at p. 3.3, notes that authority to sell does not include a power to convey:

> "... unless the language of the particular power, expressly or by necessary implication, so authorizes."

In addition to referring to the **Taylor** case, the author refers to **Re Rode** (1968), 64 W.W.R.(N.S.) 430 (B.C.S.C.) and **Findlay and Findlay v. Butler and Butler** (1977), 19 N.B.R.(2d) 473; 30 A.P.R. 473 (Q.B.).

In **Rode's**, a written power of attorney contained specific authority to sell certain lands identified in the documentation but did not empower the attorney, in so many words, to convey the lands. It empowered him "to do and execute all acts, deeds, matters and things necessary to be done in and about the premises". The chambers judge decided that while each case must be decided on its particular facts, this particular power of attorney contained a power to convey the lands.

Similarly, in **Findlay**, the principals, an elderly couple, gave the agent written authorization to act on their behalf in disposing of their residential property, in the following words:

> "We the undersigned authorize Kenneth B. Cross to sell the house and all contents on the corner of Water - Augustus Sts. known as the Frank Sheen house."

The document was signed, notorized and registered in the Registry of Deeds. The trial judge decided that having regard to all of the circumstances, the power of attorney given by the principals to the agent "included by necessary implication the power in him to execute a conveyance of their property pursuant to any sale he might conclude".

In this matter under appeal, Peter Mason does not even have express authorization, in any instrument, to sell the interests of the other heirs-at-law of his father. Without such express authorization, I know of no judicial authority which permits the court, in the circumstances here, to infer a power to convey those interests.

Whether an estoppel argument could succeed, in a situation where the agent - acting under ostensible authority of the principal to "manage" the principal's lands - executed a conveyance of those lands; and where it could be said that the principal, by subsequent conduct, acquiesced in that conveyance it is not necessary for me to decide. There is no basis, on the evidence here, to advance such a position.

In my respectful opinion, therefore, the chambers judge erred in law in her conclusion that the 1875 deed effectively conveyed the entire fee simple in the 40 acres of land described therein, and thereby provided the respondent with a good root of title upon which to base her claim for a certificate of title to the lands in dispute.

Colour Of Title

The same 40 acres parcel of land, which was the subject of the 1875 conveyance, was the subject of numerous conveyances to and from various mining companies, their creditors and trustees in bankruptcy for the next 45 years. These conveyances are summarized in the decision of the trial judge as follows:

> 1898 To - The Tangier Gold Mining Company
>
> 1900 Public auction re-sale to Worcester Tangier Mining Co.
>
> 1902 To - The Eastern Trust Company, trustee
>
> 1916 To - Bradford Mines Ltd. (replacing a lost 1903 deed)
>
> 1926 Bradford Mines Ltd. in liquidation
>
> To - The Tangier Mining and Power Company, Limited
>
> 1932 Nova Scotia Trust Company, trustee-in-bankruptcy of The Tangier Mining and Power Company, Limited

To - Tangier Mines Ltd.

1936 To - Nova Scotia Gold Mines Limited

1939 Canadian Credit Men's Trust Limited, trustee-in-bankruptcy to Nova Scotia Gold Mines Limited

To - Freeman Pollard

This 40 acres parcel of land was purchased by the respondent's late husband, Cavell Mason, at a sheriff's sale in 1944. The property was sold under writ of execution by the Sheriff for the County of Halifax to satisfy a judgment against the owner, Freeman Pollard. The sheriff's deed, to Cavell Mason, recites that an advertisement of the sale was published in the Dartmouth Patriot by five consecutive weekly insertions, that copies of the advertisement were posted up "in the most public places of Tangier, Musquodoboit Harbour, Spry Harbour and other places in the locality where the lands are situate, for at least 20 days before the time appointed for the said sale", and that the lands were sold by the sheriff at public auction to Cavell Mason, being the highest bidder.

The respondent and her late husband began living on the 40 acres described in the sheriff's deed after it was purchased in 1944. They lived in the house known as the mining manager's house. The respondent still lives in that house. There is no dispute in this case that the respondent (and her late husband until his death) have been in open, notorious and exclusive possession of the house, together with 4-5 acres of farm adjacent to the house, since 1944. The lands were devised to the respondent in her late husband's will and confirmed to her by a trustee's deed from the executor of her late husband's estate.

The 40 acres of property had never been surveyed. In 1983, the respondent retained a surveyor and instructed him to survey the legal description contained in the 1944 deed (40 acres) excepting out therefrom any parcels of lands occupied by other persons who may have acquired superior rights to her by reason of adverse possession. This survey produced a block of land, identified on the surveyor's plan as Block A. It contains approximately 15 to 16 acres. No other person resides on Block A with the exception of the respondent. Her home and the farm associated with that home (a total of four to five acres) are included in Block A. It is Block A for which the respondent applied for a certificate of title, on the basis, inter alia, of colour of title.

In Anger and Honsberger, **Real Property**, 2nd Ed., Oosterhoff and Rayner, 1985, the bases for a claim based on colour of title are correctly set out as follows:

> "The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some

part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the **Statute of Limitations**, other requisite of those statutes being complied with."

"The person relying upon the doctrine of constructive possession must enter under a real, bona fide belief of title. While in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title, and, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any land which he does not take into his actual and effective occupation. A person who has no title is in possession in law only of that part of which he is in possession in fact."

"A person having clear documentary title may have constructive possession of all land conferred by the title but, if he has not clear documentary title, his possession is limited to such part of the land as is proved to be in his actual possession and in that of those claiming through him."

"As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed."

The above principles are derived from well known cases that have enunciated them, such as the decision of the Supreme Court of Canada in **Wood v. LeBlanc** (1904), 34 S.C.R. 627; the decision of the Ontario Court of Appeal in **Harris v. Mudie** (1882), 7 O.A.R. 414; the decision of the New Brunswick Court of Appeal in **Stewart v. Goss** (1933), 6 M.P.R. 72 and the decision of this court in **Rafuse and Rafuse v. Meister** (1979), 32 N.S.R.(2d) 217; 54 A.P.R. 217; 102 D.L.R.(3d) 57.

In his publication **Nova Scotia Real Property Practice Manual**, Butterworths, 1998, Charles W. MacIntosh, Q.C., describes colour of title at para. 7.1D as follows:

"While a person holding paper title to the land is deemed to be in constructive possession of the whole of the land whether he occupies it or not, a trespasser may

obtain possessory title only to that portion that he openly, notoriously, continuously and exclusively possesses. In other words, the true owner's title is extinguished only with regard to that portion adversely occupied. The situation is different if the trespasser enters the land under colour of title, in which case possession of part of it will be deemed constructive possession of all of it within the boundaries described in the deed. Colour of title is explained in **Harris v. Mudie**:

> 'When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir-at-law or devisee under a will, or under a deed from a married woman defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and comes within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a bona fide claim, and ought not lightly to be extended to a purchaser from a squatter or other person having no title, where the party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner; and clearly not to cases where he knows the grantor has no title.' "

"The possession necessary to bar the true owner under colour of title must be just as actual, open, exclusive, continuous and notorious as when claimed without colour of title. The only difference is the amount of land which may be claimed."

In this case, the Chambers Judge found, as a fact, that the respondent's late husband, at the time he purchased the 40 acres at the sheriff's sale, had the required good faith to form the basis of a colour of title claim.

Since there is no dispute in this case that the respondent, and her late husband, had open, notorious and exclusive possession of at least four to five acres of the lands described in the sheriff's deed, they are - by virtue of colour of title - deemed to be in constructive possession of the whole of those lands.

Obviously, the respondent recognized that her constructive possession of the whole of the lands was defeated, to some extent, by occupants who were recognized as having superior rights to part of those lands by adverse possession. For that reason, the respondent has only claimed a certificate of title for those lands within the 40 acres that no other person has occupied adversely to them.

The trial judge further decided that there was not sufficient adverse possession by the Mason heirs to counter the constructive possession of the respondent to the other 11-12 acres of Block A.

The conclusion of the Chambers judge is as follows:

> "In this case Eva Mason's family's continuous residence in the home on the lands described in the 1944 sheriff's deed for more than 20 years is sufficient to give her a certificate of title to the whole of Block A. Even if, after 1875, certain Mason heirs continued as tenants-in-common of the 11 or 12 acres of Block A, the effect of Eva Mason's possession since 1944, under the **Limitations of Actions Act**, is to extinguish any claim of any co-tenant or his or her heirs."

On this appeal, the appellants submit that the chambers judge made errors in law in coming to this conclusion. They raise, essentially, three arguments which I will deal with individually.

Firstly, the appellants' submit that the Sheriff's deed of 1944 cannot support a claim based on colour of title because that deed only conveyed whatever interest the judgment debtor may have had in the lands at the time of the Sheriff's deed.

I reject that submission. Counsel has cited no authority to support his broad proposition that such a deed cannot support a claim based on colour of title. In fact, as the authorities to which I have referred show, it is not the instrument which gives the title but adverse possession under it for the requisite period with colour of title. As Barry, C.J., said in **Stewart v. Goss** (supra):

> "Strictly speaking, the term colour of title would seem to exclude the idea of right. If the instrument itself passes or constitutes title, it is not colour of title, because it is in a sense the title itself. The very term implies that it is not valid to pass title."

The bona fides of the respondent's late husband would come into play, here, and I will deal with that matter when dealing with the third submission of the appellants.

The second submission of the appellants is that the chambers judge erred in law in concluding that the occupation by the respondent of part of the lands (the house together with 4-5 acres of farm) was adverse to the true owner. The appellants contend that the Mason heirs make no claim to that portion of the lands, and, therefore, the respondent's occupation of it is not adverse to the appellants. Therefore, the appellants submit, the occupation of those 4-5 acres does not give rise to a finding of constructive possession of the remainder, under colour of title.

I reject that submission as well. It is acknowledged that the portion of the lands which the respondent has continuously occupied since 1944 (the 4-5 acres) is included in the 40 acres purported to have been conveyed in the 1875 deed. Since it has been determined - as the Mason heirs had claimed - that the 1875 deed did not convey the entire fee simple in those 40 acres, then the respondent's late husband did not acquire good title through the Sheriff's deed, in 1944. The various conveyances from the 1875 deed down to and including the Sheriff's deed all purport to convey the same 40 acres. There

is no separate deed to the lands which the respondent has occupied. It follows, therefore, that someone - other than the respondent (and before her, her late husband) - is the true owner of that property. Whoever that true owner is (the Mason heirs or otherwise) the respondent has been in occupation of those lands adverse to that true owner. The concession, therefore, by the Mason heirs, that they make no claim to the lands which the respondent has occupied, is irrelevant.

The appellants' submission, therefore, that the respondent has not been in adverse possession of the lands which she has continuously occupied, has no merit.

The appellants' third submission is that the chambers judge erred in her conclusion that the respondent's late husband entered upon the lands, with a bona fide belief in his title, after acquiring those lands at the Sheriff's sale. The appellants submit that such a conclusion could not be reached, in law, where, as here, the respondent's late husband did not have the title searched before acquiring the property. Further, the respondent's late husband should have known that the 40 acres included his own father's property, and he could not have had a bona fide belief that he was acquiring his father's property.

Whether there was such a bona fide belief is, essentially, a question of fact. The chambers judge considered the evidence and found, as a fact, that the respondent's late husband "had the required good faith to form the basis of a colour of title claim to the whole of Block A."

As to knowledge concerning his father's property, the chambers judge said:

> "At the time he purchased the land at the Sheriff's sale, he may have known others might claim portions of the 40 acres by virtue of adverse possession by them. This knowledge would not have affected the 11 or 12 disputed acres which are unoccupied."

I agree with that observation.

Further, in considering this question of bona fide belief, the chambers judge had before her an extensive affidavit of the respondent. That showed, among other things, that the respondent and her late husband were not strangers to this property at the time it was purchased in 1944. In fact, both of them were Mason heirs. In her affidavit, the respondent deposed:

> "1. THAT I am the widow of Cavell Mason and have resided at Tangier or Dartmouth my entire life. I am 73 years of age, and I have personal knowledge of the matters herein deposed to."
>
> "2. THAT in early 1944, my husband and I became aware that the 'Manager's house', so called, and surrounding lands, formerly occupied by a succession of gold mining companies, was to be sold at public auction by the Sheriff. I recall there were

> advertisements in the Dartmouth newspapers as well as posters in the community. My husband attended at the Sheriff's sale and was the successful bidder. After he obtained the deed from the Sheriff, he and I moved in to the manager's house, where we resided (except for a period of 15 years when we lived in Dartmouth and rented that house to others), until his death in 1992. Since that time, I have resided in the house.
> . . . . .
>
> "10. THAT when my husband and I determined to have a survey prepared of the boundaries of our lands, we instructed our surveyor Kenneth Robb, to exclude from the 40 acres described in the Sheriff's Deed any lands which were used and occupied by other persons as their home properties. To the best of my knowledge, Block "A" as it is now depicted on Mr. Robb's plan, does not include any land actually possessed or occupied by any other person, and no other person lives on Block 'A' except myself."

This demonstrates that the respondent's late husband was not someone who obtained his deed fraudulently, or obtained the deed knowing that there was no good title passing with it, such as taking a deed from a squatter. The respondent and her late husband were familiar with the background of the property, and that knowledge would have contributed to their understanding, and bona fide belief, when they acquired the Sheriff's deed.

As to his failure to search the title, the chambers judge specifically found that such failure did not show a lack of good faith. I agree with the submission of the respondent's counsel on this particular matter. The failure to search cannot, by itself, show a lack of good faith.

The finding of the trial judge that the respondent's late husband had the required good faith to form the basis of colour of title is a finding of fact, and there is no palpable, or overriding error in this conclusion which she drew from the evidence. That being the case I cannot, and will not, interfere with her finding.

In summary, and in conclusion, the respondent and her late husband purchased lands on the strength of the Sheriff's deed in 1944. They relied on nothing else but this deed for their title, except, perhaps, their personal knowledge of the property. It has now been determined that the title upon which they relied is defective. Between the two of them, they resided on part of those lands openly, notoriously, exclusively and continuously for over 50 years. Further, no other person had resided upon or occupied any part of the lands for which the respondent claims a certificate of title (Block A) adversely to her interests.

In granting the respondent a certificate of title to Block A, the chambers judge properly applied the correct principles of law respecting colour of title. Her conclusions, in applying the principles respecting colour of title to the facts of this case disclose no error of law. Further, there is no reviewable error in her factual findings on the evidence. There is, therefore, no basis for interference by this court with her decision.

I would dismiss this appeal. I would order the appellants to pay to the respondent her costs on this appeal which I would fix at $1,500 plus disbursements.

Appeal dismissed.

VALERIE BROWN and ERIK JENSEN (plaintiffs) See 178 N.S.R. (2d) 72
v. DAVID EDWARD BELLEFONTAINE (defendant)
Nova Scotia Supreme Court
Scanlan, J.
May 27, 1999.

In this case, the female Plaintiff was the niece of the Defendant. The parties owned adjoining properties at Grand Lake. The dispute between them arose over the common boundary line between their properties, whether or not the Plaintiffs' parcel extended to the shore of the lake or only to a bank overlooking the shore, and the use of a common right of way. The Plaintiffs applied to the Court for an order to rectify the original description or in the alternative, confirming that they had acquired title to the land in dispute by adverse possession. In addition, they claimed damages for trespass.

The Judge's decision did not give sufficient information to determine with certainty how the lots were configured. The two lots had been separately conveyed by the parents of the Defendant to the Defendant and his sister in the early 1960's. The sister had later conveyed her lot to her daughter, the female Plaintiff. The dispute gradually developed over the years.

The descriptions of the two lots were drawn in the early 1960's by a land surveyor. The Judge was critical of these descriptions as being inconsistent and confusing. After reviewing the circumstances surrounding the conveyances and what happened after, and listening to the testimony of the land surveyor, the Judge held that the description of the Plaintiffs' lot did not match the intent of all of the parties. The Judge ordered the description rectified to more accurately reflect that intention - specifically, that the Plaintiffs' lot extended to the Lake Road and to the high water mark of the lake.

The Judge then turned to the question of adverse possession. Even though the decision to rectify the deed did not require the Judge to address this issue, the Judge held that the Plaintiffs and their successors in title had clearly exercised the required possession of the land in dispute for the required time period.

The Judge then reviewed the Defendant's counterclaim for various acts of trespass to his land and dismissed all of them.

The Judge then addressed the question of the rights to a mutual right of way. No right of way had been included in either deed but the Judge held that there had been an intent to include a right of way, particularly for the benefit of the Defendant.

Finally, the Judge addressed the question of damages suffered by the Plaintiffs as a result of the various acts of the Defendant. The Judge recited a long list of apparently childish and vindictive acts on the part of the Defendant and awarded the substantial sum of $15,000 in general damages.

VALERIE BROWN and ERIK JENSEN (plaintiffs) v. DAVID EDWARD BELLEFONTAINE (defendant)
Nova Scotia Supreme Court
Scanlan, J.
May 27, 1999.

This judgment was initially delivered orally in summary form on the 27th of May, 1999, on the understanding with counsel that a more detailed decision would be provided to counsel at a later date. The essence of the decision remains the same although more detailed reasons are provided herein.

I want to first begin by thanking counsel for the assistance they have rendered to the court. I might point out at this point in time I feel that it is important to the parties that this matter be settled as soon as possible. It is because of the need to have the issue settled that I am prepared to give an oral decision immediately. This will allow the parties to deal with the property knowing what they own or what they are entitled to do on the property, and they can make plans for the future.

Facts:

This case is dealing with a boundary dispute involving lands in the Grand Lake area. The plaintiffs acquired the lands from the mother of Valerie Brown, Evangeline Brown. Evangeline Brown had obtained the lot from her parents, Rita and Adjutor Bellefontaine. I begin by briefly outlining the facts surrounding the creation of Lots A and the adjacent Lot B owned by the defendant David Bellefontaine.

In 1962 Adjutor and Rita Bellefontaine decided they were going to convey lots to their son and daughter on Grand Lake. Adjutor and Rita Bellefontaine had previously acquired six and one-half acres of land more or less at Grand Lake in 1933 from a Mr. Horne. The lands were surveyed in 1933. The exact boundaries of the six and one-half acres were not clearly established. I refer specifically to the fact that the boundary on the northeast corner of the Bellefontaine land was not clearly established by the survey done in 1933 by R.W. MacKenzie. In spite of the boundary not being well established in 1933, by 1962, Rita and Adjutor Bellefontaine felt they had established possessory title to the land extending over to the westerly boundary of the Lake Road as identified on the survey plan, Exhibit No. 4. It was their intention in 1962-1963 to convey lands over to the westerly boundary of the Lake Road based on that occupation. In that regard I refer to the evidence of the surveyor, Granville Leopold. In his evidence he said that if the boundary in the 1933 R.W. MacKenzie plan was accepted as being the boundary of the Bellefontaine land, Lot A would have been basically split down the middle. He marked on Exhibit #4 where he thought that R.W. MacKenzie extension would have gone through Lot A.

Mr. Bob Feitham is a licensed Nova Scotia land surveyor and he was a crucial witness in this case. He was a relative of Rita and Adjutor Bellefontaine. He was on good terms with them. He says he learned

the Bellefontaines were going to get a survey done conveying the lands to their son and daughter on Grand Lake. He felt that he could do the survey as he knew the Bellefontaines did not have the money to hire someone else. They were not a wealthy family. It was his understanding that he was to prepare plans to allow for the conveyance of two lots. He described Rita and Adjutor as being fair, salt of the earth people. Mr. Feitham was to draw out two lots on Grand Lake and prepare plans for subdivision approval and the deed descriptions to convey the lands. There were some initial problems with lot size in terms of meeting subdivision regulation requirements but that did not impact on the disputed northern or eastern boundaries. One of the arguments advanced by the plaintiffs is that the deed descriptions prepared by Mr. Feitham do not adequately reflect the intentions of the parties at the time of the conveyance.

If the defendant is successful then the plaintiffs will not have any shore frontage and there will be a very small strip of land along the shore road still owned by the defendant. Many of the structures built by the plaintiffs and their predecessors in title will in fact be on the defendant's lands.

Rectification:

A leading case on the issue of rectification is **Hart v. Boutilier** (1916), 56 D.L.R. 620 (S.C.C.). In that case the court stated that rectification could be granted upon clear evidence of a mutual mistake. This was cited with approval in **Amos and Amos v. Helmke et al.** (1980), 39 N.S.R.(2d) 675; 71 A.P.R. 675 (T.D.). I adopt the principles as set out in the above-noted cases as well as **Murphy's Ltd. v. Fabricville Co. et al.** (1980), 45 N.S.R.(2d) 250; 86 A.P.R. 250 (T.D.).

I start by saying that I am satisfied there is the lack of certainty in the descriptions. If I were to only look at the descriptions in the conveyancing instruments it is not clear as to exactly what was intended. In the description for Lot A, as conveyed to Evangeline Brown in 1962, there are some inconsistencies. I point out that while the description is not as well drafted as it should have been, there is other evidence which satisfies me as to the intent of the Grantor.

As I read Schedule A in Mrs. Brown's deed, I note that it states that it starts at a stake and stone established by J.D. MacKenzie, P.L.S. "**being the northeast corner of the lands owned by Adjutor Bellefontaine**". I understand that to mean the grantors intended that the starting point would be the northeasterly extension of their lands. The northeasterly extension of their lands I am satisfied is at the intersection of the public road and the high water mark. That is where Evangeline Brown's lot was intended to start. In addition, as I read through the description it says in the first course:

> "Thence proceeding sixty-six degrees, twenty- five minutes west a distance of thirty-six feet to a point;"

> "Thence proceeding fifty-one degrees, forty minutes west a distance of 106.6 feet to a point on the south side of a concrete retaining wall located **on the shore of Grand Lake**."

In reading the last mentioned course it is difficult to accept the defendant's position that it is intended that point not be on the shore of Grand Lake. I refer, as well, to the deed from Adjutor and Rita Bellefontaine into David Bellefontaine himself because it goes to that very same point. In David Bellefontaine's deed it reads in relation to the courses leading to that point:

> "Thence proceeding forty-three degrees, forty minutes east **along the high water mark of Grand Lake** a distance of forty-eight feet to an iron bar on the south side of a concrete retaining wall being the northwest corner of Lot A."

In other words, in that description prepared by the same surveyor at the same time he refers to following a course along the high water mark to get to that same point. I accept that in terms of reading the deed into Evangeline Brown there is a problem in terms of inconsistencies. Reading Evangeline Brown's deed description alone does not show what the grantor intended and I therefore have considered all the evidence to determine what was intended by the parties. I accept the evidence of Evangeline Brown that she thought she and her brother David Bellefontaine were to be treated fairly and each get a lot on the shore.

Mr. Cooper, on behalf of the defendant, urged the court to simply read the metes and bounds description as set out in the deed and apply the rules, principles and guidelines of surveyors as annunciated by the surveyor, Mr. Granville Leopold. Mr. Leopold was an expert witness, qualified to give evidence as a Nova Scotia Land Surveyor on the issue of survey descriptions, practices and terminology. His evidence was to the effect that if a surveyor wants to describe a lot as extending to the high water mark, he would and should say you go to the high water mark. He says if you want to start at the top of the bank and not grant to the high water mark, that is what you say.

In this case I accept the evidence of Mr. Feitham who is also a qualified Nova Scotia Land Surveyor. He was not qualified to give evidence as an expert in terms of land surveying. He was however the witness who was carrying out the instructions as given to him by Rita and Adjutor Bellefontaine. He surveyed the lands and prepared the descriptions. He said when he referred to the stake on the top of the bank he intended to refer to the lands going to the high water mark. He says that he referred to a traverse line simply to give him a straight line between the various points and at no time did he intend that the lands on the north side of Lot A would not extend to the lake. That was his intention, that is what he understood he was instructed to do and that is what Mrs. Brown says she understood that he did do. There is clear and cogent evidence as to what was intended. Just as important, that is what the parties understood had happened thereafter. Evangeline Brown understood she owned the lands now claimed by the plaintiffs and she acted accordingly for many years after the initial conveyance.

Mr. Feitham knew what he was supposed to do. Mr. Feitham, I have no doubt is a qualified surveyor, but he was not the most consistent surveyor in this case. As Mr. Leopold said, he could not get closure on the lot when he tried to calculate it. In the description, the terms he used were inconsistent even when referring to the same point. This inconsistency reflects on the care or lack thereof that he took in terms of preparing the descriptions. Perhaps there was a false sense of security in thinking that this was family and there never would be a problem and that both sides knew or should have known what was intended.

As I have already stated, there are problems with the deed in terms of the way that it is written. There is more than enough evidence before me to indicate that the parties each understood that their lands would go beyond that which was described within the traverse lines as set out in the description. It is appropriate that the court order that there be rectification so that the lands will extend all the way to the public right-of-way on the easterly side and to the high water mark on all of the northerly course of Lot A, beginning at the public right-of-way on the easterly side going over to the extension of the boundary between Lot A and Lot B which is identified in the survey plan, Exhibit No. 5.

Adverse Possession:

It is not necessary that the plaintiffs prove adverse possession because of this court's ruling on the issue of rectification. I go on to deal with the issue however by way of alternative. The nature of the possession required to extinguish the title of the true owner is stated in Anger and Honsberger **Canadian Law of Real Property** (Toronto: Canada Law Book, 1959, p. 789 as:

> "The possession that is necessary to extinguish the title of the true owner must be 'actual, constant, open, visible and notorious occupation' or 'open, visible and continuous possession, known or which might have been known' to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is 'equivocal, occasional or for a special or temporary purpose'."

This definition has been adopted by the Appeal Division of the Nova Scotia Supreme Court (**Gillis v. Gillis** (1979), 32 N.S.R.(2d) 40; 54 A.P.R. 40 (C.A.); **Taylor v. Willigar** (1979), 32 N.S.R.(2d) 11; 54 A.P.R. 11 (C.A.)). Possessory title can be established through the adverse possession of more than one person. However, the possession must be transferred to the succeeding holder either by descent, devise, conveyance, gift or agreement. (MacIntosh, C.W., **Nova Scotia Real Property Practice Manual** (Toronto: Butterworths, 1988 at p. 7-7 (3)).

Evangeline Brown and her husband, Harry Brown, did not simply sit back and wait for 20 years or 30 years and then say, by the way there was a mistake we want the boundaries extended now. They began within a relatively short time to treat the land in such a way that anybody who reasonably looked at that land, and the use that they made of it, would clearly understand they treated the land now

claimed as theirs. Most of the disputed land is made up of a steep embankment. Harry Brown worked year after year and built steps and walkways on the embankment. There were not many other people that could make much more use of that bank. Certainly Harry Brown and Vangie Brown did enough in terms of that land to make it very clear to anybody that cared to take a look at it, there was no question as to who owned it. Rita Bellefontaine and Adjutor Bellefontaine were alive at this point in time. For many years they witnessed, condoned and praised the work that was being done in that area. They did not object in any way, shape or form. I am satisfied they did not object because they too understood that when they conveyed the lands to their son and daughter that they gave them each lake front property. In the case of Vangie Brown, Rita and Adjutor Bellefontaine also thought they gave them the land extending as far as they owned, over to the public right-of-way.

Only Harry Brown and a goat could have meaningfully used the steep bank along the northern boundary. Originally the top of the bank was fenced so the cows would not fall over it. That is indicative of how steep it was. I viewed the property. It is very clear that Mr. Brown put an awful lot of work into building retaining walls at the bottom of the bank. Walls, fences and steel rails were erected on or near the bank. In addition Harry Brown built an outhouse on the disputed land, with a cement foundation that would probably withstand any bombardment. The work that was done on the disputed land was phenomenal.

This is not a piece of land that somebody could park on for 20 years and stay there. I refer to **Taylor v. Williga**r (1979), 32 N.S.R.(2d) at p. 11. It was clear from that case that the court must have regard to the nature and circumstances of the land. The **Taylor v. Williga**r case dealt with fishing camps on Partridge Island. The courts looked at the land and the nature of the possession that could be exercised. They dealt with the issue of continuous possession. I suppose if you were to push the term continuous to the fullest extent you would say somebody would have to park on that land, lay from one boundary to the other and stay there for 20 years and not ever remove themselves. That would be the extreme in terms of continuous use and occupation. The disputed land in this case could only be used in conjunction with the use and enjoyment of the cottage. As I said, for the most part, it could not be used at all except for Harry Brown and his work with the board walks, the walls, the cement structures and support structures he put in. There is very little more that could be done with the disputed land in terms of construction. It had to be clear to anybody who saw Mr. Brown and Vangie Brown in terms of what they did with the property that they intended to exercise exclusive possession. The fact that they were not there sometimes in the winter did not mean that their occupation was not continuous in the sense referred to in **Taylor v. Williga**r. They could not stay there all winter but certainly the structures that Mr. Brown put in place stayed there for many, many years. Some of the structures were only removed when Mr. Jensen and Valerie Brown recently decided they were going to build a house. The acts of possession were continuous through to that point in time. Anybody who came there could see that Mr. Brown and Mrs. Brown were claiming that property. Valerie Brown and Mr. Jensen certainly did not relinquish any claim they had to the property thereafter. All of the things that must be done in terms of that particular property to prove possessory title has been done.

The fact that David Bellefontaine's children were allowed to run over the property from time to time is nothing more than incidental use and enjoyment of the property by Mr. and Mrs. Brown. They expected that their children could run on David Bellefontaine's property and they did not mind the Bellefontaine children running or playing on their property from time to time. That is not to say that they in any shape or form relinquished ownership to the property.

I consider as well David Bellefontaine's evidence and that of his sons in terms of their allegations that they cleaned up the banks and the shores. I am clearly satisfied in my mind that in terms of cleaning the shore above the high water mark, that Harry Brown did most of that work. What few pieces of trash David Bellefontaine may have picked up was no more than anyone strolling on the beach may have picked up. In this case for example David Bellefontaine tried to impress upon the court that he is something of a naturalist with a keen interest in preserving nature. It would not be unexpected that he would therefore pick up litter found on his sister's or any other lot in the area. David Bellefontaine also referred to an area where he and others parked boats on the shore. There is clear evidence that Harry and Vangie Brown used the shore and bank to park and store their boats as did many members of the general public. The fact that the Browns would also allow others to use the area to park boats from time to time, including David Bellefontaine is not an indication that they relinquished any claim to the lands. I am satisfied that was part of Harry and Evangeline Brown's use and enjoyment of the property. Allowing other people to pass over or use one's land is incidental to ownership. It is not unusual that somebody would allow their family, their nephews and cousins to come and enjoy and share their property with them but it does not in any way relinquish the ownership.

It came as a total shock to Vangie Brown when in 1995 she got a letter from David Bellefontaine stating in effect that she did not own all this property. In 1995 he claimed a little sliver across the shore and a little sliver across the side by the public road. Up to that time Mrs. Brown never thought for a moment that it was not her land. I accept Mrs. Brown's evidence on that point. I go one step further and say that I accept that Mr. David Bellefontaine knew or should have known that she was claiming that land and there should have been no question in his mind as to the extent of her claim for ownership. In terms of acts of possession, I again refer to the cement walls and outhouse, the steps and the board walks. There were other acts of possession including cleaning of brush, storage of boats and general use of the land to the extent that it was possible. There was fill added and trees planted. In later years Ms. Valerie Brown and Mr. Jensen built a gabion wall in the area.

The defendant suggested that the Browns had to get permission from Adjutor Bellefontaine in terms of placement of the wharf in front of the property. I do not accept that was a matter of getting permission. Mr. Brown and Adjutor Bellefontaine had a simple discussion in a normal way as between the families as regards how best to fulfil the needs and desires of everybody in the families using the shore area. The wharf was constructed in the lake and not on the disputed lands in any event. There was in no way a relinquishment of any claim to the land that they thought was theirs. It was in no way an attempt by Adjutor Bellefontaine to assert title to the now disputed land.

I conclude this issue by saying I am satisfied that the plaintiffs and their predecessors in title have established title through adverse possession. It follows from that conclusion that the plaintiffs have a valid claim to the disputed lands based on both legal and possessory title, the legal title having been based on the rectified deed.

Counterclaims:

I am going to refer for a moment to the counterclaim. There was a counterclaim by the defendant alleging trespass. I have dealt with most of the issues on the counterclaim by ruling that many of the areas where David Bellefontaine has alleged trespass were not his. I still wish to address the counterclaim where it refers to the salt and sand being spread on the right-of-way and causing damage to the trees in the area. That claim by the defendant, to understate it in the extreme, is ludicrous. The evidence is clear that there were a few handfuls of salt and sand spread in the right-of-way over the years. When I say a few handfuls of salt and sand that is exactly what I mean. There is not a shred of evidence to show it caused any damage to the defendant's land or trees. For the defendant to raise that as a part of his counterclaim and to waste the court's time asserting that claim is just that, a total waste of the court's time. It is a total waste of resources in terms of the plaintiffs having to defend against a totally unwarranted counterclaim. I have asked counsel to raise this issue again in terms of costs. The other counterclaims are equally lacking in merit. I do not go through the counterclaims item by item but the law and facts do not support any of the counterclaims and they are all dismissed.

The Right-Of-Way:

As to the extent of the right-of-way, there was no deeded right-of- way. The right-of-way is referred to on the survey plan, Exhibit No. 5 and it is shown as being a 12 foot right-of-way. There was never a deed. I am satisfied on the evidence that there was an attempt to create a right-of-way that was mutually beneficial to both sides. To the credit of the plaintiffs they have not put the defendant to the strict proof of the right-of-way in terms of saying look, there was no deeded right-of-way and the only way you are going to get it is to prove it the same way we had to prove it by adverse possession or to show that there was a mutual mistake in the deeds by not including the right-of-way. They say, "look there is a right-of-way. We agree and acknowledge that there is a right-of-way, just please establish the right-of-way based on the use".

I am satisfied that the use was intended to be for recreational and passenger vehicles. There was reference in the evidence of Mr. Bellefontaine to a few truck loads of cement or rock being hauled to or from the shore and the odd time some other construction materials coming or going from that area. I am not satisfied that either by use or intention that the mutual right-of-way was to be used for heavy construction vehicles and transport trailers or big trucks. Mr. Bellefontaine owned a half ton truck or a car and in a few cases a four by four truck throughout the years. On the odd occasion he took larger vehicles down. The intention was not to establish a construction company down on that shore. It was not intended that he would be taking tandem trailers or tractor trailers down there. There is a

right-of-way established by use. It was a travel way. The plaintiffs, prior to the plaintiffs in this action, Vangie Brown, did acknowledge and accept that there would be some use of the right-of-way to gain access to Lot B over Lot A.

I am satisfied that right-of-way does not extend to the shore. It does not extend to the retaining wall on the westerly side of the lot which is on the south shore of the Grand Lake. It goes back a fair distance from that wall.

It is going to be difficult for me to describe that, counsel without going there. I do not know when or how you expect me to go there. I expect that the only thing I can do is to go there and mark it or look at it and say, you know, this is what I understand based on the evidence, because I cannot describe it in words. It is clear from the evidence that the turning point off of Lot A onto Lot B is on the Brown property. I refer for example to Exhibit No. 4, and there are markings on that plan that show the approximate area where it turns onto Lot B. If the parties can agree where it is and where the turn is from Lot A to Lot B then I can leave it to the parties. I do suggest they agree on it very quickly if they can. If you can agree in the next week or so as to where it is then I would suggest one further thing and that is once you agree you have it surveyed so you know where it is. If you cannot agree then I will go down and I will actually take a look at the property again and show you where the right-of-way is going to be and then you can have it surveyed.

In relation to the turning area, I am satisfied that there really is not much of a turning area required as I viewed the property. It is a rather gentle slope for most vehicles and there is no need to have a wide radius turning area that is going to go up where the garden was or up onto the Jensens' or Browns' lands. It is simply a matter of a continuation of the right-of-way. Like I said, you are not putting tractor trailers or tandem trucks down there on a regular basis. I might say to you as well Mr. Bellefontaine that if you have the need to get a tandem truck or a tractor trailer down there for some particular reason that if you approach the Jensens and Browns or maybe their successors in title in a reasonable way they might afford you the right to go down there once in a while with that type of truck or equipment. Just as you should have afforded them the right to get in to build their house with the equipment that they were using. If they do not acquiesce then the evidence would suggest you would be able to gain access to the area for that type of equipment by crossing your own property.

I want Mr. Jensen and Ms. Brown to understand as well, however, that right-of-way is not a parking lot. It was not intended to be a parking lot for the future. Mr. Bellefontaine and his successors in title do have a right to cross that property. You are not to interfere unreasonably with the use and enjoyment of that property. If you do that you do so at your own peril.

Damages:

The actions of the defendant, David Bellefontaine, and his sons, who are not joined as parties, were intended to inflict misery on Mr. Jensen, Valerie Brown, Valerie Brown's mother and Harry Brown.

This dispute did not blow up over night when Mr. Jensen and Ms. Brown started building their house. For many, many years David Bellefontaine has made life miserable for Harry and Evangeline Brown even though he only recently asserted a claim to the lands which were the subject of this action. There was a dispute in the evidence as to the events which have occurred over the years but I accept the evidence of Harry Brown, Evangeline Brown, Valerie Brown and Erik Jensen over the evidence of David Bellefontaine or his sons. I accept, for example, that Mr. Brown moved a tree which fell from Mr. Bellefontaine's property onto the right-of-way. I accept that the tree was initially growing on David Bellefontaine's property. It fell across the right-of-way and Harry Brown did something as innocuous as cutting the tree up. Between he and his wife they rolled it off to the side of the right-of-way so it would not obstruct. It was not interfering with David Bellefontaine's property. It was not intended in any way to harass or interfere with his use and enjoyment of Lot B. They simply removed it from the right-of-way and they came back the next weekend and low and behold David Bellefontaine takes the tree and plants it in their livingroom. That is totally unacceptable behaviour. It does nothing but escalate the situation. To Harry Brown's credit he walked away and said "it is not worth the fight, I am not going back".

This action by David Bellefontaine was not based on any assertion of claim to the now disputed lands but he was just being generally miserable to the Browns and later the Jensens whenever an opportunity existed. It got to the point where Harry Brown finally threw his hands in the air and gave up. He was totally fed up with trying to deal with David Bellefontaine, somebody he described as "crazy". I say to David Bellefontaine; I cannot understand why the issues which arose over the years could not have been resolved by some means other than those you have resorted to.

Even though Harry Brown stopped going to the cottage the Browns did not relinquish any claim to the disputed lands. Evangeline Brown and her family continued to use and enjoy the property.

I refer to a number of other incidents. I have not counted all of them because there were too many incidents to recount. I look to things like David Bellefontaine and his son out digging a hole in the yard just after Mr. Jensen and Valerie Brown built their house. He planted a railway rail, not a railway tie, a rail, in their lawn. He refuses to talk about it. Mr. Jensen went down and said, "what are you doing, you can't dig up my lawn. You can't stick that thing there". They would not reply to his pleas. Mr. Jensen walked away because he did not know what else to do. He could not reason with Mr. Bellefontaine. Eventually Mr. Jensen pulled out the steel rail. Mr. Bellefontaine called the police the next year and said somebody stole my steel rail. Mr. Bellefontaine knew they did not steal his steel rail. He had a letter from plaintiff's counsel saying where he could find it and he knew where it was. It should not have been put there in the first place.

In another incident with Valerie Brown and Mr. Jensen, they put a garden in. It was approximately eight feet by eight feet and enclosed with wooden railway ties. I am fully satisfied that garden was within the confines of the plaintiff's property and outside of the right-of-way. Mr. Bellefontaine went to the area and tore the garden up. He buried it under a bunch of top soil, fill, or sod and put the railway

ties off the site. That is about as vindictive behaviour as I could ever imagine. That type of behaviour made Valerie Brown scared to stay on the property. She did not feel that she was safe because the people that were harassing her were not acting rationally.

Vangie Brown described one instance where she went to the shore and she begged you, Mr. Bellefontaine, she begged you: "Please, please don't let this go on". Vangie Brown was not asking you to do something in terms of giving up your rights Mr. Bellefontaine, she was simply saying, "I owned this property, Valerie owns this property now, please let us enjoy it, give it up, be reasonable, don't keep going." She said "you are doing things that you can't do. Mother would never have wanted this". What you David Bellefontaine did was totally unjustifiable.

I said there were too many incidents to recite and there were. David Bellefontaine and his sons put barbed wire up around this property in places that they should not have put it. When Valerie Brown and Mr. Jensen went to build on their property he did just about everything that could possibly be imagined to interfere with construction on that property. I have no idea how much more it cost them but I cannot imagine that the extra work and inconvenience that they were put to was free. We are not dealing with quantum in terms of those extra costs but certainly in terms of the aggravation and the frustration and the loss of enjoyment in terms of their dream home, it is immeasurable. There was absolutely no need for you to go around planting steel stakes and steel bars that were so offensive, not just in terms of aesthetics but they made it impractical or impossible for the Jensens to turn vehicles. They had to cut trees down and use cranes or booms to lift the materials to build their house on the property. Why? The most offensive thing they ever did was to forget to remove their car from the right-of-way or at least part of it for a short period of time. That is the most offensive thing any of the Browns or Jensens did. Most of what you were claiming was not yours, it was theirs.

If you go around staking out property and interfering with property you better make sure it is yours Mr. Bellefontaine. In this case the land that you posted with signs and barbed wire and steel bars and big stakes was not your land.

I asked Mr. Ritcey about a big stake David Bellefontaine placed in the driveway between Lot A and Lot B up at the southern exposure. I said, "were you claiming that in terms of possessory title, in terms of the usage of that road". He says, "no" and to his credit he admitted that he did not but he probably should have because that driveway existed for many years in that particular spot. They say no we do not want anything more than just the exact metes and bounds of that boundary on that southerly exposure on the southwest corner. But they could have.

In terms of the trucks that were put in that area for the purpose of construction, I saw the pictures, I heard the evidence. The construction people were there, there was no great interference with your use or enjoyment of your roadway or the right-of-way or anything else. If you wanted to get in or out I am sure they would have moved. You did not ask.

Mr. Bellefontaine you criticized Mr. Jensen for parking his truck or cars on the right-of-way when they went to Maine to do their water rafting. Your reaction to their parking their cars on the right-of-way was inappropriate. It is not reasonable that you turned around and blocked the right-of-way so they could not remove their cars to get to work. That is not an acceptable way to deal with a right-of-way incident Mr. Bellefontaine. If somebody blocks your right-of-way, you go down and you ask them; can you move the vehicle. If they do not, then there are other ways to resolve it short of feuding. The fact that you would then block him in and refuse to move your vehicle makes your actions no better than his, especially where his action was not intentional in the sense that the vehicles were not left there for the purpose of blocking your right-of-way.

It is incidental with the ownership of the land that there will be vehicles parked on that right-of-way from time to time. So long as they do not materially interfere with the use and enjoyment of the right-of-way then it is acceptable. They can park there for short periods so long as they are prepared to go and move if and when you want them to for the purpose of using the right-of-way. The plaintiffs cannot leave vehicles unattended in the right-of-way for inordinate amounts of time. They better make sure that they are around to move the car and not park cars on the right-of-way for a long period of time.

I must say the converse is not necessarily true, your right is a right of through passage. In other words you can pass over the land. I do not know why in terms of your use or enjoyment of the right-of-way, you would be parked on the land. It is possible and I hope that Mr. Jensen or his successors in title or Ms. Brown and her successor in title will be mutually understanding if you stop there for short time so long as it does not materially affect their use or enjoyment of the land. I urge both sides to be reasonable in terms of the use of the right-of-way.

I am not here being asked to compensate Vangie Brown for the misery that she and Harry Brown endured. They are not parties to this action. I am not compensating them for incidents such as the tree incident. That took place long before the parties, Valerie Brown and Mr. Jensen, occupied the property. They are the plaintiffs. It is only the trespasses and the actions by Mr. Bellefontaine in relation to the plaintiffs that I deal with.

I also point out that I understand that Mr. David Bellefontaine's sons, when they acted in terms of digging holes and putting up signs and putting barbed wire fence, they were acting in concert with or on behalf of David Bellefontaine. I do attempt, in terms of the award of damage, to redress the actions or the wrongs as inflicted by David Bellefontaine and his sons working with him as against Valerie Brown and Erik Jensen only.

Mr. Jensen and Ms. Brown were building a dream home. Valerie Brown, as a child, lived on, and enjoyed this lot. It was one of her favourite places and as she became an adolescent and a mature adult she again fell in love with the property. She wanted to make her life and future with herself and her husband on that land. The actions of Mr. Bellefontaine during construction and subsequent to that

time have resulted in Valerie Brown saying to this court that she no longer wants to live there. Mr. Jensen has expressed the same feelings. It still is a beautiful lot on the shores of Grand Lake. There is nothing wrong with the plans for the house that they built. They just cannot get over the feelings and the emotions that have resulted from the actions of David Bellefontaine and his sons.

Few things are more precious to people in this country, this province, than having the right to own and enjoy property or to use and enjoy property that they own. I might say to you David Bellefontaine, had I found this to be your property, I would be enforcing your rights just as stringently. I would be saying to you, yes David Bellefontaine, you own this land and Mr. Jensen and Valerie Brown had no right to try and take the land away from you or to interfere with your use and enjoyment. That is not what I have found. I have found that it was their land and what you did interfered with their use and enjoyment of the property.

How do you compensate somebody for having their garden taken away? What are a few tomatoes worth, a few broccoli that the groundhogs eat or the lettuce that the groundhogs eat? Probably not much if you went to the market to replace them. But they mean a lot when you wake up and see them gone and you are afraid to stay in your house at night because you do not know what is going to happen next. What does it mean when you wake up and look out the window of your new house and you see a big sign plastered on your land and somebody else is claiming your land? What kind of value do you put on those things?

There are so many things that I say happened in relation to this property. I cannot single out any one thing that you did, but the cumulative effect in terms of what you did Mr. Bellefontaine was horrendous. No matter how much I award to Valerie Brown and Erik Jensen I cannot compensate them in the sense that I cannot make them feel that they again love this property or they want to stay on this property. They may never change their mind in that regard. They may never find another property that they have that same attachment to, especially Valerie Brown. You just cannot put dollars and cent figures on those types of things. The court can appreciate, through the evidence, just how much it meant to those people.

I said I am not compensating Harry Brown or Vangie Brown. I can understand how much it meant to Harry Brown when you look at the number of hours and years, 10 years or more, that he worked on those walls and those steps and those stairways and to finally have to say; "it's just not worth it". Ten years of work, it's just not worth it. How would you compensate those people for that 10 year project?

I asked Mr. Ritcey to give a figure in terms of the damages. To his credit he says; "you know, I hesitate to put a value on it". As I have said money will not compensate these people. I refer again specifically to Valerie Brown and Erik Jensen, you cannot compensate them in terms of saying this is what it is worth for you to have lost your dream. This is what it is worth for you to have endured this harassment for these many years. I am satisfied that it is substantial, very, very substantial. Mr. Ritcey

suggested a figure of perhaps $5,000 or $15,000 dollars and I have to say Mr. Bellefontaine, were it not for his representations as to quantum, I do not know how high I would have gone in terms of picking a figure that is reasonable in terms of compensation. I am satisfied in view of Mr. Ritcey's submissions that it is more than a nominal amount. It is not one dollar, it is not a five hundred dollar amount, just to say they made their case or to bring the point home. It is not just the principle. These people were fighting for their property, to continue to use and enjoy what they owned. You were trespassing on their property. I am satisfied that it is appropriate in this case to make an award of $15,000 in general damages for the trespass. Like I say it is only because of the submissions of Mr. Ritcey that I limit it to that amount. This went on repeatedly year in and year out. I do not know what $15,000 is going to do for Mr. Jensen and Ms. Brown but it will never make up for what they have had to endure.

Costs:

I thank counsel for their submission on costs. I begin by saying in relation to disbursements that the plaintiffs are entitled to reasonable disbursements. Hopefully the parties can get together through counsel and agree on those disbursements but, if not, they can be taxed. In relation to the party and party costs, obviously the plaintiffs have met with a great deal of success.

The position that I take in relation to settlement discussions is not whether or not there was an agreement because the parties have come back before me and asked the court to resolve the issue. I do note from my understanding of the settlement that was read into the record that the plaintiffs were prepared to give up substantially more than what, in the end result, the court ordered they were entitled to. They were prepared to make a very substantial concession. The reason that concession fell apart is not something that is before me in terms of evidence because counsel cannot give evidence. They made their submissions and it is obvious the settlement fell apart for one reason or another and I simply start at that point. Clearly the fact that the plaintiffs were prepared to give up anything in terms of that shore frontage or the land on the side by the right-of-way is indicative of the fact that they were prepared to give something up just to have this thing settled short of a full trial. It was not unreasonable for them to ask Mr. David Bellefontaine to go back to the lot and take a look and see where they could put a pin that was acceptable to them. He refused to even go back and do that. He was simply asking for more than what the court has determined he was entitled to even from that point on. Whether it is one foot along the shore or one thousand square feet does not matter. The plaintiffs were offering more than the defendant was entitled to in the end.

In terms of quantum, counsel have thrown some figures around. I did award $15,000 in relation to the trespass. I do not have evidence before me to say what the land itself was worth. I do not have clear evidence as to what the plaintiffs' property would have been worth had the defendant succeeded in asserting the claims that he had put forth. There was some vague reference on that point, mainly elicited through defence counsel from the witnesses as the trial proceeded. There was nothing that convinced me as to the value of the property. I am satisfied that this is not a case that I should refer to Tariff "A"

and say that the amount involved was "X" number of dollars because I simply do not have the evidence to do that nor do I believe it would represent a proper award for costs.

I am satisfied that the most appropriate disposition in this case is to make a lump sum award. I keep in mind the fact that it is clearly established in the case law that party and party costs are not intended to compensate the parties fully for the litigation. Either side, whether they win or lose, can expect to bear substantial costs on their own. I am satisfied in this case it is appropriate that I take into account the number of days we have spent in trial and the efforts that the parties have made in terms of presenting their case and defending the counterclaims. It is appropriate to award costs in the amount of $12,000. That is in addition to the disbursements and the general damages that I have awarded with interest.

I want to add one further comment before we close. This dispute thing has gone on for many, many years Mr. Bellefontaine. I say this to Mr. Jensen and I hope that even though Ms. Brown could not be here today she hears it as well: if you do not decide to bury the hatchet pretty soon this will only continue to fester. If any of the parties really want to have this feud continue they will find ways to have this feud continue and to make life miserable for the other side. I expect that whether it is Mr. Jensen or Ms. Brown or anybody else that might buy the property from them if they sell it, if you keep pushing them, you will end up back in court again Mr. Bellefontaine. I say to Mr. Jensen and Ms. Brown and to anybody that attempts to push Mr. Bellefontaine, it is quite clear to me that he will not be pushed if his rights are being trampled upon. I simply say please for your own sake, for your own peace of mind; bury the hatchet. I have decided who owns the land and who has what rights in terms of the property. Short of another court saying that I have made a mistake, you are going to have to live with it. If somebody else does not say that I have made a mistake, just move on. I do wish everybody involved good luck and I am sincere in saying that.

I might note counsel, in case it comes up and the record is reviewed, on Exhibit No. 1, tab 7, I have made some markings on that exhibit. Just for the record, you will both know that those are my markings not something the witnesses put on. I put them on by mistake, not realizing it was the original I marked on. Specifically, on the front page of that Exhibit, tab 7, I underlined the words "along the high water mark at Grand Lake a distance of 48 feet to an iron bar on the south side of a concrete retaining wall being the northwest corner of Lot A". That is on this crossed out description. And then I put "used to interpret Lot A". Those are my words and, again for the record, in terms of the second page of that tab, I have written the words "was to be high water mark in Lot B" and underlined the words "on the shore of Grand Lake". So those are my markings for the record counsel and they are not anything that the witnesses put on.

Judgment for plaintiffs.