# Registered Plans, Lanes and Possessory Boundaries

*Edited and Submitted by Tudor Jones.*

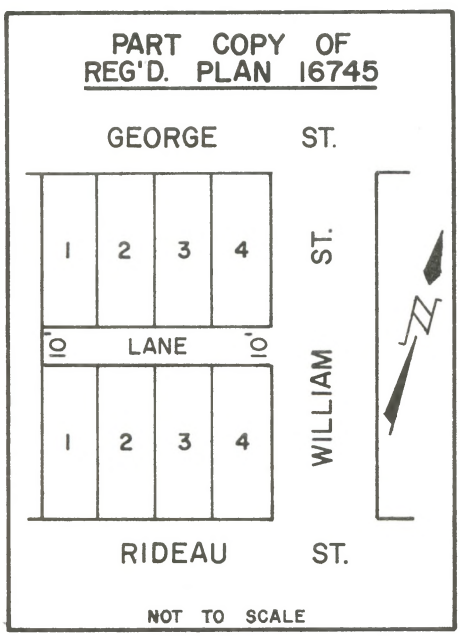
*Note: Following is a highly abridged version of the Judgement handed down in the above case, held in the Ontario High Court of Justice on 25 October, 1974.*

*A complete copy of the proceedings, and precis, can be found on pages 321-335 of the May 23, 1975 issue of "Ontario Reports", available from The Canada Law Book Co., 80 Cowdray Court, Agincourt, Ont.*

*The ownership of lanes shown on plans of subdivision registered before 1920 is discussed, and also contained is some interesting law on adverse possession and possessory title, of which there may be future ramifications.*

**RE-ALFREY INVESTMENTS LTD. and SHEFSKY DEVELOPMENTS LTD.**

The requisition on title submitted by the purchaser to the vendor and requiring interpretation as to its validity concerns the ownership of a lane immediately to the north of the lands owned by the vendor and intended conveyance of the south half of this lane with the lands and premises which were sold to the purchaser.




All these lands are of commercial use and situate on the north-west corner of Rideau and William Sts. The lane extends westward from William St. approximately 88 ft. to a dead end which coincides with the west limit of the vendor's lands and also abuts the north limit of the vendor's lands throughout the whole thereof. The lane is 10 ft. wide and on its north limit abuts on land of strangers to these proceedings. The north limit of these other lands, in turn, face on to George St. at the south-west corner of William and George Sts.

The purchaser contends that the lane is a **public lane** and owned by the Municipality or, in the alternative, that it is still owned by one Robertson, or his heirs, etc., who registered a plan of the eight lots as No. 16745, referred to above, separated by this lane, on June 15, 1875, in accordance with the provisions of the **Registration of Titles (Ontario) Act,** 1868.

Does vendor have possessory title?

The affidavit material filed on this application establishes that searches of the titles to the eight lots abutting the north and south sides of the lane indicate that since the registration of this plan in 1875 there have been no dealings with the lane for more than 40 years by Robertson, his heirs, executors, administrators and assigns, who owned the lands abutting on either side thereof, the earliest reference being that of a former owner (subsequent to Robertson), the S. S. Kresge Company Limited, on or about April 2, 1929. It would seem that this also holds true of the owners of the lands abutting on the north side of the lane.

The east end of the lane opens on to William St. with free access to anyone and there is no evidence that it has ever been controlled or closed by gates, barricades or otherwise to prevent ingress and egress by anyone, but notwithstanding this assumption there is no evidence that anyone other than the owners of these eight lots, either themselves of persons proceeding in and out of their premises, used the lane.

Friedman (the former owner), now an executive officer of the vendor, in a declaration sworn August 28, 1974, declared that (a) the owners of the eight lots have always used the lane in common with each other for approximately 30 years during which period he and his family operated a retail store on the lands on the Rideau St. side of the lane; (b) that the municipality has never maintained or asserted any indices of ownership thereof; (c) that he purchased all the lots adjoining the south side of the lane in 1960, and in 1963 paved the lane at his own expense; (d) no one has ever made any adverse claim to the lands; (e) the owners of Lots 1, 2, 3, and 4 on the north side of the lane have always paid the taxes on the north half of said lane; (f) that he has always since 1960 paid the taxes on the south side of the lane, and (g) that in 1960 he entered into an agreement with the owner of Lot 4 on the north side of the lane to permit an overhead passageway 12 ft. above ground level of the laneway which was similar to the passageway in existence as early as April 2, 1929, according to the sworn declaration of James Bicknell Keachie assistant secretary of S. S. Kresge Company Limited, sworn September 30, 1960. No one has ever taken exception to this overhead passageway.

The declarations of Keachie and Friedman both attest to the possessory title to the laneway and the declaration of Keachie goes much further by stating that his company was in actual continuous, exclusive, open and undisturbed possession of the lands in question from April 2, 1929, to September 30, 1960.

Therefore, on this evidence it is not unreasonable to conclude that the vendor and its predecessor in title have had possession of the lane for more than 45 years.

In order to establish possessory title, the vendor must show that it had the **animus possidendi** as well as the **factus possidendi.** The vendor would have the **animus possidendi** when it intends to establish its legal control of and claim to the lane and to exclude the rightful owner therefrom.

Halsbury's Laws of England, on "Limitation of Actions", states at p. 251:

> No right of action to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. Such possession is called adverse possession. Where a right of action to recover land is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action is not deemed to accrue unless and until adverse possession of the land is taken. Thus, the statute cannot commence to run unless and until the true

owner ceases to be in possession of his land.

And at p. 255:

A person who is in possession of land without title has, while he continues in possession, and before the statutory period has elapsed, a transmissible interest in the property which is good against all the world except the rightful owner, but an interest which is liable at any moment to be defeated by the entry of the rightful owner; and, if such person is succeeded in possession by one claiming through him, who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period.

And at p. 259:

The title gained by possession is limited by easements and other rights which still remain unextinguished, but a person who gains by the statute the leasehold interest to property held on lease does not thereby become liable to be sued on the covenants of the lease; the term is in no sense vested in him, though, if those covenants are enforceable by a proviso for re-entry on breach of any of them, the person who so gains a title may indirectly be forced to perform the covenants to preserve his interest from being destroyed by ejectment. A title acquired by adverse possession does not destroy the right of persons entitled to the benefit of covenants to enforce them against the land.

The 13 C.E.D. (Ont. 2nd), states at p. 17:

A person in possession of land in the assumed character of owner, and exercising possibly the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of The Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title. The Statute of Limitations is a law of extinctive, not of acquisitive prescription. It operates to bar the owner out of possession, not to confer title on the trespasser or disseisor in possession.

And at pp. 20-1:

Possession must be considered in every case with reference to the peculiar circumstances. The acts constituting possession in one case may be wholly inadequate to prove it in another. Possession is a question of fact and such matters as 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 a possession. The existence of a fence is evidence of occupation but it is not conclusive evidence that such occupation as exists is exclusive. Nor is the roaming of cattle over the land a sufficient act of possession. The possession of land necessary to bar the title of the true owner must be an actual, constant, open, visible and notorious occupation, by some person or persons, not necessarily in privity with each other in succession but to the exclusion of the true owner, for the full statutory period; the possession must not be equivocal, occasional, or for a special or temporary purpose.

Two questions on the facts in this application become moot, i.e., (a) whether the vendor can establish possessory title to a piece of property while allowing others a right of way over it during the 10-year limitation period, and (b) whether the vendor can establish possessory title to land which the legal owner has designated as a lane, i.e., is the vendor's use of the land adverse to the legal owner's interests?

The Canadian Abridgement, 1st ed. (1941), sets out the following at pp. 808-9 in its chapter on "Real Property":

Per Palmer, J., after referring to the requirement of actual, open, exclusive and continuous possession for the statutory period: "Before this can be determined it must be ascertained what is possession of land. This appears to be a very simple matter; but when we attempt to apply it in practice, a more difficult subject cannot well be perceived. It is easily seen that it cannot mean that a person must continue actually on the land in order to remain in possession. *Nor can it be any actual enclosure of the property; at the same time, it must be the having the use and bearing the burthen of the property* . . . It is difficult to lay down any precise rule to determine this question, so much depends upon the nature and situation of the property, the use to which it can be applied, or to which parties claiming it may choose to apply it; but I think it can safely be laid down that when visible and notorious acts of use and ownership are exercised over the whole premises for twenty years after an entry under claim of title, that is sufficient. It may be admitted that where the property is of such a nature that nothing is required to be done to it, and no burthen cast upon it, and the acts thereon are such as could be fairly referable to mere acts of trespass without claim of right, the owner's possession would not be displaced; but where acts of ownership have been done upon the land, which, from their nature, indicated a notorious claim of property in it, and are continued for twenty years, that must have been known to the owner if he had not intended to abandon the property and discontinued his possession, and without interruption from him, such acts are evidence of an ouster of such owner, and an actual, continuous possession against him. . ."

*Doe D. Esterbrooks v. Towse,* (1885)

And at p. 819:

Whether the origin of the possession was adverse to, or with the permission of, the owner is immaterial. If the person claiming under the Statute has been in possession for the statutory period, without paying rent or acknowledging title, it is of no moment with expectation, or with what assent, or upon what agreement he went upon the land in the first instance. This is not to say, however, that there may not be an occupation by another, on behalf of the owner, as servant or agent, and not for the benefit of the occupier, which will not come within the Statute.

*Doe D. Perry v. Henderson,* (1847)

In **McColl Bros. Ltd. v. Watkins** (1924), the dispute concerned the use by the defendant of a strip of the plantiff's adjoining land as a lane. The defendant claimed not an easement but the possessory title to the land itself. It was held at p. 521:

To divest the owner of her ownership in fee, it would be necessary to shew an intention to do so; and the defendant relied upon the use of the gangway for upwards of 10 years before action; but she did not shew an exclusive use of a defined or enclosed piece of land. The lane as constructed was used by any person who wished to go from Pinnacle street east to Church street, and men passing to and fro used the lane to enter the hotel by the back-door. The use of the strip by the public was encouraged, and there was a gate at the rear of the lot giving upon a narrow pathway which was a continuation of the strip. Such possession was not enough.

In this case, the casual roadway constructed to comply with the Liquor License Act regulations would be avail-

able for Margaret as well as Nora. There was no evidence that Margaret used it as appurtenant to her residence and the two residences behind her house; but, on the other hand, there was no evidence of exclusive use by Nora or her successor. the defendant, and nothing to warn Margaret that the strip was intended to be used in such a manner as to exclude her from its possession and eventually extinguish her ownership.

However, this case can be distinguished in the issue before this Court. There is evidence of exclusive possession (i.e., possession so as to exclude the owner while permitting others to use the land); the agreement between the two adjoining owners regarding the walkway over the lane; the paving of the land and the payment of taxes.

In **Wright v. Olmstead** (1911), the plaintiff had the legal title to a lot fronting on a strip of land which had been laid down on a plan as a street. The plaintiff claimed title to this strip by possession. The strip had been fenced by the plaintiff's predecessor with the consent of the owner and on the understanding that the fence would be removed if the strip was wanted for a street, the original purpose of the fence being to prevent cattle from straying. The plaintiff's predecessors had taken title to the adjoining land with notice that the strip was intended to be dedicated as a public highway. It was stated at p.436:

> The use of the front part for croquet was only for two or three years—Miss Ferguson joining with Thomas in thus using it as a common play-ground. It can hardly be pretended that, where two neighbours occassionally meet and play croquet on a piece of ground which neither owns, but over which each is exercising a right of way, either of them is thereby in actual possession, to the exclusion of the real owner. . .
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> There was no continuous user of the land for a piling-ground. At best it was but intermittent user and not throughout the statutory period. During all this time Miss Ferguson also made use of the strip as a way to the rear of her own premises, cultivating occasionally a portion of it, also piling fuel on the strip and throwing her ashes upon it, which Thomas Herbert Cooledge was in the habit of spreading upon the land. . .
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> Thomas Herbert Cooledge knew that the strip was intended to be used as a public way, and that he had no right to it except as one of the public. He admits that he was using it only until it was required for the purpose for which it was laid out. Thus his attitude was not that of a person claiming to others having the right to use it; and, be in possession to the exclusion of for this reason alone, the plaintiff fails.

Once again, this case at bar can be distinguished since it is abundantly clear that the vendor **did** intend to establish possessory title and at the same time exercise one of the rights of an owner—namely, allow others a limited right to use the land.

The authorities cited above therefore establish that a person who has obtained possessory title is in the position of a true owner and can deal with his land as such. Therefore, presumably, he could grant such rights of way over the piece of land as he wished and also, presumably, his title would be subject to rights of way or easements over the land which he acknowledged in the limitation period. Putting it another way, once it is found that the vendor has established possessory title, such title would be subject, of course, to a right of way by anyone who had used the lane during the 10 years immediately preceding this proposed sale. This would appear to include the owners or owner of the four lots abutting the north side of the lane together with anyone entering the lane from William St.

However, the matter does not end with the foregoing conclusion because it is necessary to determine whether this is a public lane.

Plan 16745 was registered pursuant to the **Registration of Titles (Ontario) Act, 1868,** when "An Act respecting Land Surveyors and the Survey of Lands" 1859, paraphrased, stated that when lands have been surveyed, all allowances for roads, streets or commons laid down on a plan are public lands. It made no reference to "lanes" **per se.**

Any intermediate amendments to the **Surveys Act** are immaterial until 1920 when the **Surveys Act,** 1920 (Ont.), was enacted in which s. 13 (2) appears as:

> Subject to the provisions of *The Registry Act* and *The Land Titles Act,* as to the amendment or alteration of plans, all allowances to roads, streets, lanes or commons, surveyed in any such city, town, village, lot, mining claim, mining location, or any parcel or tract of land or any part thereof, which has been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof shall be public highways, streets, lanes and commons.

For the first time the word "lanes" appears and thereafter they become public.

In **Essex Border Utilities Com'n v. Labadie** (1924), the Court was considering a plan registered in 1894, in which a lane was shown. In 1924, the abutting owners contended that they were entitled to possessory title by users for many years. The fact situation was similar to the case at bar. The plan had not only been registered prior to the amendment to the **Surveyors Act** in 1920, but the **Surveys Act,** R.S.O. 1897, and the Act in 1914, neither of which made reference to lanes. In the appeal at p. 357, Middleton, J.A. stated:

> The Surveys Act, R.S.O. 1914 which declares that "roads, streets, or commons" shewn upon a plan shall be "public highways, streets, and commons," does not help the plaintiffs; it has no application to lanes: Brett v. Toronto Railway Co. (1909).
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> Even if the plan amounted to an offer to dedicate, the municipality had never accepted the lane as public property. The municipal by-law was based upon the condition that the plaintiffs should produce satisfactory proof that the alley was dedicated as an alley. That was meaningless, and not a proper or permissible method of exercising the municipal power of assuming a public highway.

There was no comment by the Court in that appeal on the effect of the 1920 amendment to the **Surveys Act** as to whether the 1920 amendment was or would be retroactive to effect a plan put on prior to 1920 (as in this case registered in 1875) when "lanes" were not included in the existing Act at that time or any amendment down to 1920 when "lanes" were first included.

In **University of Western Ontario v. Wilson et al.,** (1961), a plan had been registered in 1907 showing a lane running through the plan. The issue was whether the lane was public or private. Mr. Justice Donnelly applied the provisions of the **Surveys Act of 1920** to the plan in issue holding that the lane was a public lane and he stated at pp. 71:

> Section 13 (2) of the Surveys Act, 1920, provided that all allowances

for roads, streets, lanes or commons which had been surveyed in any lot or parcel or tract of land or any part thereof and laid down on the plans thereof become public highways, streets, lanes and commons. The *Registry Act*, 1910 provided that a plan, although registered, did not become binding on the party registering the same or upon any other persons unless a sale had been made according to such plan. A sale was made according to Plan 453 in 1907 and a sale according to Plan 454 was made in 1909. By virtue of the *Surveys Act* of 1920 the plans became binding on the parties who registered them and all allowances for roads, streets, lanes or commons laid down on such plans became public highways, streets, lanes or commons and the title of the land included in such highways, streets, lanes or commons vested in the municipal corporation even though it did not adopt them for general use. It follows that lanes referred to in the statement of claim and shown on Plans 453 and 454 for the Township of London are public lanes.

Mr. Justice Donnelly did not distinguish the **Essex** case or discuss the problem whether the 1920 Act was retroactive and applied to the plan registered in 1907. Rather, the decision seems to have been based on whether there had been a sale of any of the lots, which in fact he found had occurred and that as a consequence thereof the registered plan of a subdivision became binding on the owner once a sale had been made in accordance with the plan.

It is a fundamental rule that statutes are presumed to be intended to apply to future acts and conditions and, therefore, a statute, other than dealing with procedure, will not be held to operate retrospectively unless a clear intention that it should do so is manifested by express words or by necessary and distinct implication.

The right of the owner of the abutting lands to the laneway (the vendor's predecessor (s) in title) at the time of the enacting of the **Surveys Act** was a valuable right—the ownership of the right of way and, therefore, a right capable of being evaluated in money. After the enactment of the 1920 amendment to the **Surveyors Act,** this became, if the purchaser's construction is correct, deprived of all value.

There is nothing in the 1920 amendment which takes the right of ownership of the laneway away from the vendor.

Bringing this matter to a conclusion then, I order that the Corporation of the City of Ottawa be added **nunc pro tunc** as a party respondent to this application.

However, regardless of the consent of the municipality, I find that the Corporation of the City of Ottawa has no right, title or interest in the lane designated on the plan dated June 15, 1875, and registered in the registry office for the Registry Division of the City of Ottawa as No. 16745 on a date which was undecipherable on a photostatic copy thereof provided to me. I also find that the applicant has possessory title to the south half of the said lane subject to a right of way in favour of the owners and occupiers of the abutting lands and all persons having lawful ingress and egress to those abutting lands and that, therefore, the objection to title made by the respondent purchaser is not a valid objection. In so far as title is in question with respect to this particular objection, the vendor has title to the lands in issue.

I neglected to state earlier that during the course of the argument, counsel for the parties agreed that unless the lane was found to be a public lane, it is private property registered in the name of the original owner subject to any rights of possession which may have been acquired by the applicant or its predecessors in title.

I am indebted to counsel for the argument and the subsequent submissions in writing for my assistance. In all the circumstances, therefore, I do not think this is a case for costs.