SEMINAR ON ADVERSE POSSESSION

CONTINUING EDUCATION PROGRAM
ASSOCIATION OF ONTARIO LAND SURVEYORS

SEMINAR ON ADVERSE POSSESSION

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NOTE

The statements made by the various speakers are not necessarily policy statements of the Association of Ontario Land Surveyors nor should these statements be considered "rules" to be quoted.

THE CONCEPT OF ADVERSE POSSESSION

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When asked to join a session on this topic of adverse possession, there certainly could be no refusal. I suspect that the high attendance reflects your similar interest.

The full basis for my talk this morning is printed and copies will be available about lunch time. I do not apologize for the length of it. It attempts to set down the framework for the concept. As to the expression of the concept itself, the program schedule provides the best guide by setting a time limit of 20 minutes. The expression of the concept should not be allowed any greater time.

In broad definition, adverse possession combines the abstract idea of rights in land and the real fact of occupation on the ground in a manner that is inconsistent with the rights of the true owner. The principles involved in adverse possession are those of the law of property regardless of the system of recording the rights. As the bulk of title records in Ontario are under The Registry Act, the adverse possessory claim is a very real topic in this province. I make no attempt here to deal with prescriptive rights to easements, to profits-a-pendre or to similar rights in property.

Relatively little of the law of real property is set down in the statutes. Recourse must be made to case law for guiding principles on estates and tenures and the extent of parcels. These common law principles provide the precedents with which to work.

Adverse possession concerns right that may be acquired otherwise than by grant and these rights then affect the ownership of interests and the extent of that ownership. To be sure it commences as a wrongful action and for some time afterwards the true owner may remove the wrongful occupier (call him a trespasser if you will) if this is done without violence by personal means (such as warning him off, orally or in writing) or by legal action. With the true owner out of possession and the wrongful person in actual physical occupation - and with other conditions fulfilled - time starts to run against the true owner under The Limitations Act. If he does nothing for a sufficient period of time, he stands to lose his right to a legal action to regain his title and his possession.

This raises the point of what possession is all about, and here we might talk solely of the idea of 'possession' and not 'adverse possession'. Possession is rated as the prima facie evidence of ownership good against all claimants except those with a better title.

The word 'title' is the first key. Inasmuch as adverse possession is opposed to the lawful title of the righful owner, it requires proof by the claimant as against the owner's evidence of title, which, of course, must ultimately be in writing and in Ontario may be presumed to be registered documents.

In english law, the estate in land is an entity although an abstract one. It remains as alive with us today as in its early development as a device of the common law that solved the fundamental conflict between the total personal ownership taken by William the Conqueror and the same aspirations of other men for the unique possession of property. What these men, as tenants, were given was the ownership of an estate in a parcel of land. With the idea of an estate came seisin which may be seen as the connecting link between the estate and the parcel.

Over the centuries, the principle of seisin evolved and developed - it is a complex subject, but it reduces a modern meaning of actual legal possession (effectively, ownership) of land under a freehold title. This is not mere possession alone, which is an imperfect holding of land.

Schooled in records, it is our tendency to regard title in a singular light. However, it must be seen in law in a broader sense. To be seised of a freehold estate in fee simple absolute in possession is the highest form of land holding; it is full and complete; it is a vested right in property. In the Land Titles Act one is said to be "the owner in fee simple with an absolute title" - e.g. Section 40.

Salmond used the expression 'a vestitive fact' when he was setting forth the meaning of title as the right, the proof to, and of, the enjoyment of property. Blackstone put it: "title is the means whereby an owner has the just possession of his property". 'Title' is 'entitlement'.

Land Titles legislation - the principle in statutes of this nature is characterized by the process of title by registration - suggests this singular approach whereas a common law title does not. The latter admits the potential conflict arising from the legal doctrine of the relativity of title, and this provides the second key to the real significance of adverse possession. It has been written that title by adverse possession sounds like title by theft or robbery, a wrongful act and therefore a rather primitive method of acquiring land without paying for it. It suggests an anomalous instance of maturing a wrong into a right contrary to one of the fundamental axioms of the law: "For truth it is, that neither fraud nor might can make a title where there wanteth right". "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession".

Look next at the Statute of Limitations. It does not have for its objective the reward of the diligent trespasser for his wrong nor to penalize the negligent and dormant owner from sleeping upon his rights; the purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and to correct errors in conveyancing.

We can summarize this with Laskin's words that the "effect of limitations legislation is to protect a possessor against a paper title holder if the circumstances set out in the statute are present", and the paper title holder is the man who has the deed. This is the relativity that is involved: under the common law - and a title dependent on documents recorded under The Registry Act is a'common law title' - the validity of the title is relative as between those who might potentially claim it. "Ownership" emerges as the better right to possession; in effect this is the proprietary right expressed in the term: "seised of an estate in fee simple absolute in possession."

The Limitations Act specifies the time limit within which the claimant to a better title, who will usually be the holder of the paper title, must act against the adverse possessor. If that time passes without an effort being made to recover the land, the Act bars the present owner from ever doing so and extinguishes his title. The occupant then holds the title by the fact of possession. The one thing he does not hold is the documentary title that is evidence of his rights. To obtain this he must proceed under The Quieting Titles Act, or make a first application under The Land Titles Act or The Certification of Titles Act. It is, therefore, a legal action to secure a paper title as evidence, the details of which will be covered in the next paper by Mr. O'Grady.

The principle of adverse possession presents purely a legal problem when it covers the whole of a defined parcel. It remains the same principle but also concerns a surveyor when it involves directly adjoining lands of only a limited extent. The onus is thrown upon the applicant, the adverse claimant, to prove the valid possession of property and that the title holder is not under disability. (One case in Victoria was a very interesting one: an adverse claimant succeeded in the Court action on a declaration of the ousted owner's daughter that her father was quite sane. Dad's reputation for mental stability was sustained by his loyal daughter but he lost the property as the result. One might rather remain incompetent!)

When, in the retracement of a boundary, a surveyor is faced with the fact there is no remaining physical evidence of the original survey marks but there are walls, fences or other lines of occupation, the problem to be resolved is between two diametrically opposed situations:

(a) whether the occupation is the best evidence of the original boundary line or (b) whether the occupational limits are those arising from potential adverse possession as against an adjoining owner. To be adverse possession it must be over a boundary. This is the third key.

This proposition has been made abundantly clear in innumerable decisions in the courts that employ the English common law. The words of Mr. Justice Cooley in the Michigan case of Dielh v. Zanger have been abundantly quoted, often paraphrased and often abbreviated in Canadian decisions. "As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of the lot actually are....." That decision has been consistently upheld.

Evidence, of course, is the foundation for the re-establishment of boundaries and there are solid guide lines for assessing and weighing the priorities of evidence to determine that best evidence that is called for throughout The Surveys Act before recourse may be had to the mechanical rules of definition that are applicable to the particular systems - the best evidence, in every case, must be satisfied first before a lot line may be laid down by the specified rules. The assessment of the evidence is a legal operation. When original marks are found and proven in their original positions the retracement of the original lines is not a great problem beyond the demands of time and economics. When original monuments and lines are lost it may be that boundaries are resolved on a record of occupation and possession as the best evidence of the original surveys, most frequently represented on the ground by structures such as walls and fences, though much less substantial features may also be found.

To the question of whether this is adverse possession, the answer must be that the common law principle that recognizes the reality of possession (not adverse possession) is also part and parcel of the title by registration concept. As a consequence, in the absence of markers of an original survey, the fact that actual long standing occupation to which adjoining owners acquiesce will be seen as the best evidence by the courts and be accorded greater weight than measurements and the re-establishment procedures of The Surveys Act which are founded on measurements. The latter approach, of course, is the ultimate solution acceptable in law when all else fails.

Now we come to what is essentially the surveyor's problem. It is also a quandary for him. "It also provides the best justification for his existence. The surveyor, ... when determining a boundary has a 'judicial position'. He has moreover, to be both judge and jury. It is this aspect of his role that

distinguishes him from a skilled technician and establishes his professional status".

In the end it boils down to a question of evidence and the weight of evidence.

References

1. Statutes referred to are those of the R.S.O. 1970.

2. Ballentine. Title by Adverse Possession (1918) 32 Harvard Law Review 135.

3. Laskin, B. Cases and Notes on Land Law (Rev.ed.) University of Toronto Press, Toronto, 1964. P.613.

4. Diehl v. Sanger (1878), 39. Mich. Rep. 601.

5. Hallmann, F.M. Legal Aspects of Boundary Surveying in New South Wales. The Institution of Surveyors, Australia, N.S.W. Division, Sydney, 1973.

THE CONCEPT OF ADVERSE POSSESSION

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INTRODUCTION:

Adverse Possession combines the abstract idea of rights in land and the real fact of occupation on the ground in a manner that is inconsistent with the right of the true owner. In English law the rights or interests in land are expressed in terms of various estates and of these it is the freshold estate in fee simple with which adverse possession is primarily linked.

The principles involved in adverse possession of land are those of the law of property regardless of the system of recording the rights. These are administrative systems which have responded variously to the concept. For instance, it is admitted as a part of title by registration law in England while firmly rejected in Ontario, South Australia, Victoria and New Zealand, have admitted its place in the scheme of the Acts during the last 30 odd years, and while New South Wales has been as adamantly opposed as Ontario, it is now under study for admission as a working principle that need not in any sense operate to defeat the statute. The New Brunswick proposal, which is the most recent, rejects adverse possessory claims against registered title, while in Alberta possessory title may be gained against a registered title holder.

As the bulk of Ontario title records are under The Registry Act,[1] the adverse possessory claim is the very real topic in this province. This paper does not entertain any discussion of the prescriptive rights to easements, profits a prendre or other similar rights in property.

COMMON LAW AND STATUTE LAW

Relatively little of the law of real property is set down in statutes. Recourse must be made to case law for guiding principles on tenures and estates and the extent of parcels. These common law principles provide precedents such as that a grant shall be construed most strongly against the grantor, except where the grantor is the Crown; that a subsequent grant cannot derogate an earlier grant; that a lessee cannot acquire rights as against the lessor.

In the past 180 years legislation has simplified much of the real property law. The English legislators appear to have made a cleaner sweep than to date has been attempted in Ontario, but they had a far more troublesome problem than existed here and were motivated to changes of a more radical nature. The property law of Ontario began in 1791 with the Constitution Act expressing a simple and single form of freehold tenure. Then, by the first statute of the newly formed legislature of Upper Canada, English law as it stood on 15 October 1792, was declared to be in force, to be applied in the administration of justice so far as it could be applied in respect of property and civil rights. Complexity enough was thus introduced. It has been fairly stated that at the time of adoption into most of the old colonial empire, the English land law was 'a rubbish-heap which had been accumulating for hundreds of years'.[2]

POSSESSION AND ADVERSE POSSESSION

Adverse possession is one of these complexities. It concerns rights that may be acquired otherwise than by grant and which then affect the ownership of interests and the extent of such ownership. It commences, in fact, as a wrongful action. For some time afterwards the true owner may remove the wrongful occupier if this is done without violence by personal means such as warning him off, orally or in writing, or by legal action. With the true owner out of possession and the wrongful person in actual physical occupation - and with other conditions fulfilled - time starts to run against the true owner and if he does nothing for a sufficient period of time, then he stands to lose his right to a legal action to regain his title and his possession.

Possession, by Maine's definition is physical detention coupled with the intention to hold the thing detained as one's own and by Salmond's definition it is the continuing exercise of a claim to the exclusive use of a material object.[3] Possession is rated as the prima facie evidence of ownership good against all claimants except those with a better right. Inasmuch as adverse possession is opposed to the lawful title of the rightful owner, it requires proof by the claimant as against the owner's evidence of title, which of course, must ultimately be in writing and in Ontario may be presumed to be registered papers.

ESTATE AND SEISIN

In English law, the estate in land is an entity although an abstract one. It remains as alive with us today as in its early development as a device of the common law that solved the fundamental conflict between the total personal ownership taken by William the Conqueror and the same aspirations of other men for unique possession of property. What these men as tenants were given was the ownership of an estate in the parcel of land.

When in the early feudal times a parcel of freehold land was conveyed, the traditional ceremony of feoffment with livery of seisin was performed. By the feoffment, the new tenant received the ownership of the estate and the entitlement to the possession of the parcel of land, that is, to the seisin, which may be seen as the connecting link between the estate and the parcel.

A doctrine of seisin evolved from early feudalism to present modern usage. Seisin changed from the formalized but simple possession of land or chattels in the feudal law to a modern meaning of actual legal possession (effectively, ownership) of land under a freehold title. This is not mere possession alone, which is an imperfect holding of land. " 'Seisin' has been aptly described as the quality of the possession of a freehold estate or the root of proprietary interest in a freehold." [4]

Seisin remains a complex subject for the legal historian but this main thrust of its significance to modern concepts of title can be isolated.

Several principles emerge as relevant to adverse possession. The first is that "There can never be an abeyance of seisin of a freehold estate",[5] that is, there must be no interruption in the succession of title while ownership is resolved. Stated in feudal terms it would be 'nulle terre sans seignieur' - no land without a lord.

The second was aptly stated by Fullerton, J.A. in Jones v. McClean, quoted by Laskin:

> I know of no principle of English law under which real estate can pass from one to another by 'abandonment'. One man cannot abandon his property to another. The term is not applicable to the transfer of property. A man may sell or give away his property to another but he clearly cannot 'abandon' it to another. [6]

The 'giving' may be variously interpreted. The action of a court in settling a title is seen as the legitimizing of the 'giving' that has arisen from non-use and no claim maintained. A claim in adverse possession is realized by an action against a specified party and by a decision that creates the seisin of a paper title.

The third principle concerns the boundaries. ".... the law bounds every man's property and is his fence" was the manner of expression of Theobald in Law of Land for the principle that a man does not lose title to his land or any portion of it even though the evidence of the boundaries is lost. [7]

SEISIN AND TITLE

To be seised of a freehold estate in fee simple absolute in possession is the highest form of land holding; it is full and complete; it is a vested right in property. In the Land Titles Act one is said to be "the owner in fee simple with an absolute title" - e.g. Section 40. The certificate of title given under The Certification of Titles Act (Form II) states that the owner of the land is "absolutely and indefeasibly entitled in fee simple." The Quieting Titles Act refers to a title that is 'absolute and indefeasible' - Section 26.

Absolute must be seen as comparative. A modern absolute title remains subject to the concept of tenure as acknowledging a sovereign overlord for an ownership of interests that are held of the Crown; it is not absolute in the feudal or continental sense of 'allodium'. There are certain exceptions to absolute titles set out in the Statutes, e.g. Section 51 of The Land Titles Act. There are limitations to land rights and there are innumerable restrictions of recent social legislation in the planning and environmental context.

Salmond used the phrase 'a vestitive fact' in setting forth the meaning of title as the right, the proof to, and of, the enjoyment of property; or as Blackstone put it, title is "the means whereby an owner has the just possession of his property". [8]

Seisin,then, in the sense of ownership, is the whole concept of title complete, from legitimate vesting from an origin which is either original as a Crown patent or grant or derivative where the entitled party takes title from a predecessor by grant or testament or other act, or by the operation of law (for example, intestate succession) or the legitimate perfection of a title which has been barred to another by operation of the Statute of Limitations.

Titles are considered in a quality sense, also, as good or bad when in reality it is the evidence of the title that is assessed. A good title means that the evidence of the right is cogent and conclusive or nearly so; a bad title is one of which the evidence is weak and insufficient. In a conveyance between parties, a good title must be a marketable title; but it does not follow that a bad title is not marketable, because it may be possible to prove an acceptable title - that is, acceptable in law - and make an otherwise bad title into a marketable title. In other words, it is not a static situation, but a dynamic one where an otherwise uncertain title may mature into a full and valid one.

TITLE AND ADVERSE POSSESSION

To have a good title to land is to have the essential part of ownership, namely, the right to maintain or recover possession of the land as against all others. In English law, all title to land is founded on possession. Thus a person who is in possession of land, although wrongfully, has a title to the land which is good against all except those who can show a better title; that is, can prove that they or their predecessors had earlier possession of which they were wrongfully deprived. For possession of land is prima facie evidence of a seisin in fee, and he who sues for the recovery of land of which another is in possession, must recover on the strength of his own title and cannot found his title on the weakness of the possessor's title. And not only does possession of land give a good title as against all but rightful owners (whose claim, as we have seen is founded on prior possession), but it also continually tends to bar the rights of all who have such prior title. For if those who are rightfully entitled to land take no steps to assert their rights within the period prescribed by Statute, their remedies will be barred and their title extinguished. So that possession of land for the prescribed period will give title thereto, as against all the world.[9]

Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the fundamental axioms of the law.

> 'For true it is, that neither fraud nor might
> can make a title where there wanteth right.'

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: 'English lawyers regard not the merit of the possessor, but the demerit of the one out of possession'. It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute does not have for its objective the reward of the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.[10]

In Laskin's words,

> .... limitations operating upon title to land are purely statutory and are not as much a means of creating interests as they are of extinguishing paper claims. The effect of limitations legislation is to protect a possessor against a paper title holder if the circumstances set out in the statute are present. [11]

Case law that deals with marketable title appears to have arisen usually from a purchaser's effort to rescind a contract (more often than not for real but unstated reasons that would be inadmissible to a court) and such actions will fail when it can be proven that the title is in fact marketable although not based on the normal conditions of a grant or transfer, but rather on a possessory claim.

A possessory title is just as valid as a title derived from any other source. Consequently, it may be forced upon an unwilling purchaser if quality of title is his only grounds for non-completion of a contract. The conduct of these affairs rests primarily on The Limitations Act for validity and The Vendors and Purchasers Act for immediate action as regards a contract.

DOCTRINE OF RELATIVE TITLES

Under the common law - and a title dependent on documents recorded under The Registry Act is a 'common law title' - the validity of the title is relative as between those who might potentially claim it. This is the doctrine of relative titles of which the foundation is that possession is prima facie evidence of seisin in fee and is good against all the world except against a person who can show a better title. Ownership, then, is the better right to possession. This is the proprietary right expressed as "seised of an estate in fee simple absolute in possession".

The principle behind the legislation for title by registration is that the searching enquiry into the title will resolve the uncertainty of various rights, remove the relativity aspect, settle the title on the party who is adjudged entitled after letting all others publicly state their case, and that this entitlement will be then confirmed as an absolute title by the statute.

The relativity does not entirely disappear, however. For instance, the exceptions from absolute title set forth in Section 51 of The Land Titles Act still apply. If taxes are not paid or a charge not settled, the question of better right to possession is raised. One of the exceptions is prior existing adverse possession. There are other complex legal features to consider in respect of the indefeasibility of a 'guaranteed' title, and also the overall model that is the amalgam of all systems where, as earlier noted, adverse possession has been found to have a part to play in the titles systems.

With the certificates of title that are given under The Certification of Titles Act and The Quieting Titles Act, the absolute character of the title is only as at the moment of issue and the full implication of relativity applies thereafter.

ACTION FOR POSSESSORY TITLE

The provisions in respect of real property in the modern Statutes of Limitation began with the statute of 1623, 21 Jac. 1, c.16, when the emphasis shifted, "from a time limitation on tracing back seisin to a time limitation on asserting a right of entry". [12]

The Limitations Act specifies the time limit within which the claimant to a better title, who will usually be the holder of the paper title, must act against an adverse possessor. If that time passes without an effort being made to recover the land, the Act bars the present owner from ever doing so and extinguishes his title. The occupant then holds a title by the fact of possession. He does not hold a documentary title that is evidence of his rights.

Laskin quotes the judgement of the Privy Council given by Lord MacNaghten in Perry v. Clissold,

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peacably 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". [13]

There are numerous ways in which the action is raised but they all resolve into a dealing of some kind with the property in which it becomes necessary to show a good title to a parcel. Title alone may be in issue, or it may be extent of title and the contest may then arise directly and solely as an issue on boundaries.

The legal procedure may be conducted under The Quieting Titles Act. In Ontario it is not a popular procedure as it is relatively cumbersome and expensive in comparison with the expedient procedures of first application under The Land Titles Act where the Act applies or an application under The Certification of Titles Act where The Registry Act and jurisdiction alone prevail.

The essential conditions which must be fulfilled to perfect a possessory claim are that there is actual, open or visible, notorious, exclusive and continuous possession and enjoyment of the use of the land adverse or hostile to and in derogation of the title of another person by the claimant and those through whom he claims. The land must be under a claim of title as the whole or a part of a parcel, or, in other words, the possessory claim must be over a boundary. Where a part of a parcel is claimed adjoining the other lands of an adverse claimant both an original boundary line and a possessory line must be shown.

A present owner is deemed by law to have constructive possession of the whole of the parcel although he may not use it all and therefore may not be in actual physical possession of it all. This principle of constructive possession does not operate to the benefit of a claimant for adverse possession; hence the claim can only be for the extent of the actual use and occupation, but if no defence is raised the extent could be of the whole parcel.

The proof of the preceding conditions is essential to the claim. Additional proof is provided by showing that there is the receipt of profits (part of the enjoyment of the property), that there is the discharge of the burdens attached to the property, such as the payment of taxes, and that there is the repair and maintenance of the property whether of buildings or of fences or of the land. The quality and the extent of possession are considered: an adverse claimant must show the conduct of a legitimate owner in possession.

There are certain conditions that operate against claims to title by adverse possession: if there has been an acknowledgement in writing by the adverse claimant, the time will date from that acknowledgement; nor will a claim succeed unless the ousted rightful owner was sui juris - of full legal capacity, under no disability of infancy or mental incompetency. Absence, as for instance on military service, is cause for extension of the limitation period in some jurisdictions, but not in Ontario.

Surveyors are cautioned against concluding adverse possession without proper consideration of the legal aspects which must also be satisfied, quite apart from visible features on the ground which may stir the fancy as immediate solutions to a complex boundary problem. The perfection of a claim of adverse possession for title good against all the world including the dispossessed paper title holder is no small matter.

GENERAL STATEMENT OF MATERIAL NEEDED TO SUPPORT A CLAIM OF ADVERSE POSSESSION

(1) The claim is an application to a court under The Quieting Titles Act or to an examiner of titles under The Certification of Titles Act or The Land Titles Act. It must present the basis of the claim in all necessary detail usually by a statutory declaration of facts corroborated by disinterested parties in a similar attestation of their means or sources of knowledge of the alleged facts.

(2) Evidence must be provided as to when the land under claim was first enclosed to exclude the ousted owner; by whom the enclosure was done and the circumstances; the materials constituting the fences or other structures of enclosure; the conditions of these enclosing structures from time to time and the repairs and maintenance carried out and by whom; the means of ingress to the land; the improvements that have been made to land and buildings, and the dates of improvements and by whom made; and the purpose of which the applicant uses the land.

(3) If the applicant claims through predecessors in title the assignment of the possessory rights of the predecessors should be shown.

(4) A plan of survey is so much an essential part of the application that it will seldom be dispensed with except for whole parcels already clearly defined. The surveyor must ascertain the history of the possession sufficiently to be able to properly show the enclosures on which the owner relies for his claim; the relation of these enclosures to the original boundaries of parcels; the roads, road allowances, lanes, paths, gates, doors or other means of entry to the land; the location and description of all buildings; the land use such as pasture, cultivated field, orchard, market garden, storeyard, car park, etc.; any apparent easements, rights of way or encroachments.

One paragraph of the Regulations for the Guidance of Surveyors made by the Surveyors Board of Victoria for surveys under The Transfer of Land Act, 1928, aptly states the surveyor's duties:

> "The Surveyor will be expected to disclose all doubts, discrepancies, and difficulties, and to afford all other information obtainable by him relative to the property that may aid in securing accuracy and completeness in the certificate of title to the land. In these matters he will consider himself rather an agent and advisor of the Government than of the person incidentally employing him, nor will a regard for the interests of such employer be considered as excusing in any degree the withholding of any information affecting the merits of the application, even though the description supplied be literally and technically correct".
>
> (Regulation 4)

The onus is on the applicant to prove valid possession of property and that the title holder is not under disability. (One adverse claimant succeeded on the declaration of the ousted owner's daughter that her father was quite sane; dad's reputation for mental stability and competency was sustained by his loyal daughter but he lost the property as the result).

SURVEYS AND LIMITS OF POSSESSION - A FREQUENT QUANDARY

When, in the retracement of a boundary, a surveyor is faced with the fact that there is no remaining physical evidence of the original survey marks, but there are walls, fences or other lines of occupation, the problem to be resolved is between two diametrically opposed situations· whether the occupation is the best evidence of the original boundary line or whether the occupational limits are those arising from potential adverse possession as against an adjoining owner.

It might be presumed that an old fence and the contentions of the adjoining owners would satisfy conditions for possession that have been continuous for the time specified in The Limitations Act, but the question remains as to whether this possible adverse possession is against lands under recorded claim of title: hence, where is the boundary line between adjoining titles as opposed to adjoining claims of title? To be adverse possession it must, in every instance, be over a boundary.

Survey procedures have as their goal the definition of the boundaries of parcels as 'that to which the title applies'; the predominant and controlling element is the extent of legitimate interest in land. This extent of parcel is defined, by the whole of the common law, solely and only in relation to the original boundaries of the parcel, a principle that is restated in The Surveys Act in Section 3 and throughout the act where the call is always to find the best evidence or original lines.

Where the surveys defining the boundaries of parcels of land were comprehensive in that they delimited all boundaries such as, for example, most parcels in Australia and New Zealand, the Maritime Provinces, mining locations and claims in Ontario, there is a single course of action applicable in retracement of the boundary: the redetermination of the position of a line on the best evidence of that line.

But where a system of surveys pertains, as in Ontario generally, there is an added consideration which cannot be avoided: the possible redetermination of a line in accordance with the procedures prescribed as part of the system. These systems are to a large degree theoretic in that they project the position of lines according to a reconstruction of evidence external to the immediate site when the best evidence at that site is considered lost. This at least provides a solution but it is evident that it also has created new problems as a result of misinterpretation of the part played by an occupational line as potential evidence of the original survey and a tendency to determine the boundary on the basis of the mechanical rules of The Surveys Act. A second source for misinterpretation, certainly as respects titles under The Land Titles Act, lies in the misinterpretation of the significance of a guaranteed title: it is not a guaranteed parcel per dimensions stated. This was brought out emphatically in the decision of the Director of Titles in B.A. 168 (4 October,1966):

> It is an established known fact that until relatively recently, the survey profession and the Land Titles System confused fences marking adverse possessory limits with fences perpetuating original survey lines and monuments, with the result that old survey lines, which were remonumented with fences over the years, were mistakenly rejected as evidence of the original lines, due to the fact that the Land Titles Act did not recognize adverse possession. This was a most unfortunate situation, and one which must be a cause of considerable embarrassment in reviewing old surveys. However, ... all .... agencies .... now recognize the legal significance of fences in the retracement of old boundaries. We cannot therefore permit an error made in accordance with erroneous concepts of previous years to reflect the extent of ownership of property owners today.

The proposition has been made abundantly clear in innumerable decisions of the courts that employ the English common law. The words of Mr. Justice Cooley in Diehl v. Zanger (1878): "As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are..." have been often quoted, often paraphrased, often abbreviated in Canadian decisions and a full quotation of the significant parts of the judgement is warranted.

> "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity.
>
> But no law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance, - a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The .... surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original land marks set ..., and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known ... As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are .... The long practical acquiescence of the parties concerned, in supposed boundary lines, should be regarded as such an agreement upon them as to be conclusive even if originally located erroneously."

The rules that govern first surveys are generally little more than statements of procedure. In most jurisdictions they are official instructions issued under the authority of a public lands act. The fact that our Ontario procedures are rather more complex and have been enshrined in a statute is the result of geography, historical events, surveying practice and land policies.

In principle, it is on these first surveys of parcels that private land holding is established inasmuch as the Crown generally attempted to survey before granting. Where it failed in times past to achieve first definition of the parcel before or at the time of grant, or chose not to do so for patent reasons, it may be excused for the unusual pressures of the times. (As one example of interest, Sir John Robertson won the 1861 election in the Colony of New South Wales on the platform of 'free selection before survey'.) Grants without survey at all are probably easier to handle subsequently than are grants that are either partially bounded by lines of survey or defined in terms of a theoretic system for which doubtful character The Surveys Act of Ontario is distinguished as a rather unusual Act. One would hope that the Crown would never again grant land without full definition on the ground; there is a difference - perhaps politically expedient at times in the past to ignore - between the definition of a parcel by Act of Parliament and definition on the ground by physical marks.

The result of these provincial practices has been that simplicity does not hold equally for the redefinition of the limits of parcels, and an infinite variety of problems arise where boundaries cannot be readily located on the ground or where inaccurate, vague and confused, and sometimes ambiguous and conflicting elements are stated in the title documents.

As a group, we had little to do with the policy decisions that created the situation but to our lasting pleasure we certainly have a most fascinating professional task of technical and human character matching wits and talents to try to keep some semblance of order and sanity in the boundaries within this province. Fortunately, 'de minimis non curat lex' - the law is not interested in trivialities.

Evidence, of course, is the foundation of the re-establishment of boundaries and there are solid guidelines for assessing and weighing the priorities of evidence to determine that best evidence that is called for throughout The Surveys Act before recourse may be had to the mechanical rules of definition that are applicable to the particular system - the best evidence rule must be satisfied first before a lot line may be laid down by the specified rules.

It may be argued that The Surveys Act does not cover all surveys of parcel boundaries, e.g. that it does not cover the survey for, or of, the odds and ends of parcels internal to lot lines or the survey of conventional boundaries. On the other hand, the sweeping terms of Sections 2 and 3 cover the whole scope of parcel definition by prescribing the rule of the common law that the old original lines must be perpetuated. How those lines originated may be quite another question.

The next level down from the natural boundaries and the fixed and recovered surveyed limits are those boundaries of which the present existing occupation provides the best evidence of the original running of the line. These lines are not limits of adverse possession. Yet of lower level as best evidence are the corners and lines re-established through measurements to points external to the immediate locality of corner or line and in accord with the rules of The Surveys Act.

The character or nature of a boundary as a matter of law is well settled. Case law of the last 100 years provides the rules; there are relatively few current issues that lead to legal contest and the recent cases are generally notable for the effort of the courts to review in depth the earlier cases and to summarize the law on the issues and often in a quite broad context with abundant references.

Under whatever system by which ownership of an estate in lands is recorded, the documents of title will include a description of the parcel by means of plans or of words and from the description the boundaries can be determined both in law as to their character and in fact as to their position. In this respect the title registration systems are distinguished by more meticulous attention to the parcel description and definition than is the case with the deed registration systems. Irrespective of the system the law remains the same and generally both systems are now applying the same standards. It is common law, ruled by best evidence. A guarantee of title applies only to the described parcel but that description will not give rise to a claim on the guarantee where incorrect directions, distances or areas are stated. This may appear as a paradox but it is entirely logical in both the theory of the guaranteed title which conceives and treats the parcel always and only as originally defined, and the common law expressed in decisions which reiterate time and again that it is the original lines that control and must be relocated. Place all guaranteed parcels together and it is obvious that there can be only one total block, and if the title owner holds possession of the land marked by the survey monuments then he has the whole parcel to which the title applies. There is then no paradox because this practical principle of common law is also correct in theory for either a common law title or a guaranteed title. This is not to say there could not be an issue over misdescription.

When original marks are found in their original positions the retracement of original lines is not a great problem beyond the demands of time and economics. When original monuments and lines are lost, it may be that the boundary is resolved on a record of occupation and possession as the best evidence of original surveys, most frequently represented on the ground by structures such as walls and fences though much less substantial features may also be found.

To the analytical question of whether this is adverse possession the answer must be that the common law principle that recognizes the reality of possession - not adverse possession - is also part and parcel of the title by registration concept. As a consequence, in the absence of the markers of an original survey, the fact of actual long standing occupation to which adjoining owners acquiesce will be seen as the best evidence and be accorded greater weight then measurements and the re-establishment procedures of The Surveys Act which are founded on measurements. The latter approach provides the ultimate solution that is acceptable in law.

Measurements, of course, are techniques of evaluation of evidence to present a graphical/numerical analysis. Unreasonable variation from recorded values is cause for consideration, but the magnitude of difference that may be accepted is not a settled matter. It would appear to be a question of the same character as that of defining a 'reasonable' man. In this respect see Cain v. Copeland and Kristiansen v. Silversen.

The philosophy must be that measurements are corroborative secondary evidence to the true position of boundaries where these are the actual lines of occupation indicative of the extent of title, and that this principle is only reversed on the most congent evidence that the true boundary lies elsewhere.

Where existing physical occupation, usually designated on plans as "existing lot line" or "existing limit of parcel", is shown on a plan together with some other line marked as the "lot line" or "parcel boundary", the surveyor is in fact stating that he is completely satisfied that the possession on either side of the latter line does not constitute best evidence and that there is a potential issue of adverse possession or of trespass unless the adjoining owners remove the boundary feature and reconstruct it on the line determined by the surveyor.

Referring to The Boundaries Act in B.A. 127, the Director of Titles made these remarks:

> "It is emphasized that the confirmation of the boundary in dispute in no way deals with rights which may or may not have been acquired about this boundary by prescription. Evidence of possession, unless it can be considered to be the best available evidence of the original survey of the line is of no moment in determining the true location of the lost line. Its significance is

> confined to adverse possession, a question of law, a matter outside of the scope of the Boundaries Act.
>
> It is emphasized that the confirmation of the boundary in question deprives no one of any land. The problem .. is to decide where the original boundary is located. If it is found that lines have been surveyed in error contrary to prior existing surveys, then to reject these second inaccurate surveys is to deprive no one of any land; rather its effect will be to right a wrong created by a survey prejudicial to existing unalterable rights."

Herein lies the surveyor's quandary and at the same time the best justification for his existence. "The surveyor, ... when determining a boundary, has a 'judicial position'. He has, moreover, to be both judge and jury. It is this aspect of his role that distinguishes him from a skilled technician and establishes his professional status". *14*

The provisions of Section 2 of The Surveys Act respecting the validity of surveys, cannot be read in the reverse sense, i.e. that any or all surveys made by a surveyor are valid. The survey must always be correct in law.

It is all a question of evidence and the weight of evidence.

CASES CITED

Cain v. Copeland, (1922) 2 W.W.R. 1025, 15 Sask. L.R. 529, 67 D.L.R. 581 reversing (1922) I.W.W.R. 269, 15 Sask. L.R. 135, 66 D.L.R. 806 (C.A.)

Diehl v. Zanger (1878), 39 Mich. Rep.601

Jones v. McClean, 39 Man.R. 321, (1931) 2 D.L.R. 244 (1931) 1 W.W.R. 315 (C.A.)

Kristiansen v. Silverson, (1929) 3 W.W.R. 322, 24 Sask. L.R. 106, (1929) 4 D.L.R. 252, reversing (1929) 1 W.W.R. 256 (C.A.)

Perry v. Clissold, (1970) A.C. 73.

REFERENCES

1. Statutes referred to are those of the R.S.O. 1970.
2. Quoted by Riddel, J. in Miller v. Tipling (1918), 43 O.L.R. 88, at P. 96 43 D.L.R. 469, at p. 477
3. Osborn, P.G. A Concise Law Dictionary (4th ed.) Sweet and Maxwell, Ltd., London, 1954.
4. Laskin, B. Cases and Notes on Land Law (Rev. ed.) University of Toronto Press, Toronto, 1964, pg.31.
5. Laskin, p. 39
6. Laskin, P. 31
7. Theobald, Law of Land. (2nd Ed.) 1929.
8. see Saunders, J.B. Mozley and Whiteley's Law Dictionary. (8th ed.) Butterworths, London, 1970.
9. Williams, R.P. Joshua Williams, Principles of Law of Real Property. 23rd ed. by T.C. Williams, 1920
10. Ballentine, Title by Possession (1918) 32 Harvard Law Review 135
11. Laskin, p. 613
12. Laskin, p. 613
13. Laskin, p. 616
14. Hallmann, F.M. Legal Aspects of Bounary Surveying in New South Wales. The Institution of Surveyors, Australia, N.S.W. Division, Sydney, 1973.

THE LAW AND POSSESSORY TITLE

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The concept of "title by possession", "squatters title" or "squatters rights", is a concept which has developed over two centuries of British history. Under the old feudal system, as consideration of the occupation of a parcel of land, the tenant performed a personal service to the lord of the manor. This service later became an annual rent service, and not the lump sum payment by way of purchase price with which we are familiar today. Under that system, the lord was bound to defend his tenant's title, and the tenant was bound to render to his lord certain services. The matter of the owner being in actual occupation became a vital question. No writing was required to make a conveyance a freehold. Land could be granted by word of mouth, by actual delivery of possession, or livery of seisin, was one of the requisites of a title to a freehold estate, and possession was synonymous with seisin. Absentee ownership was not popular under the feudal system, as the owner was not available to perform his feudal service to his overlord.

Students of English history will recall civil wars in England, mainly the war of the Roses under the Tudor Kings, and the War between the Royalists and the Puritans under the Stuart Kings. A great deal of land had forcibly changed hands and the occupants, in many instances, could show nothing better than a title by possession. It became, therefore, a matter of general interest to devise some method of quieting the titles of lands, where so many titles were resting upon an insecure foundation, for unless some rough and ready method of creating an indefeasible title to lands by possession of the occupant for a reasonable length of time had been found, great hardship would have been created and very much of the land would have escheated to the Crown for want of owners who could prove by their title deeds a complete chain of title.

The Limitations Act of 1623 was the first of a succession of Acts to quiet titles in England, where the owners held by bare possession or occupation. We have, of course, in Ontario today, a Limitations Act as part of the Statutes of this Province. For the purpose of our discussion, we will mainly concern ourselves with Sections 14 and 15 of that Act. Section 4 provides that no person shall make an entry or bring an action to recover any land but within ten years next after the time to make such entry or to bring such action first accrued either to the person making or bringing it, or to some person through whom he claims. Section 15 provides that, at the determination of the period limited by this Act, to make such entry or to bring such action the right and title of such person to the land is extinguished.

When does the right first accrue to the true owner to bring an action or to enter upon the lands? Section 5 subsection 1, The Limitations Act, paraphrased states that the true owner being in possession of the land and has while entitled thereto been dispossessed or has discontinued such

possession, the right to make an entry for distress or to bring an action to recover the land or rent shall be deemed to have first accrued from the time of the dispossession or the discontinuance of possession of the true owner.

The operation of the Statute is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him. The Registry Office records will still show the true owner as the registered owner of the paper title to the said lands, although he may have lost his right to enter upon the said lands. Conversely, assuming the trespasser who has gained the possessory title is the owner of a neighbouring property, again the Registry Office records will only show him as the owner of the paper title to his own lands and not to the additional lands which he now claims by way of possession, as against the true owner.

During the ten year period, there may be a series of true owners who have been dispossessed and, conversely, there may be a series of trespassers who, adverse to one another and to the rightful owner, take and keep possession of the land in a succession of various periods, each less than, but in total exceeding on the whole, ten years and thereby the rightful owner is barred from regaining possession, and he loses his title.

Two other sections of The Limitations Act, that should be mentioned at this time, namely Sections 36 and 37, provide if the true owner is under a disability or infancy, mental deficiency, mental incompetency or unsoundness of mind at the time the right of entry arose, any person claiming through the true owner to whom the right first accrued, notwithstanding the ten year period, may bring the action within five years after the disability ceased to exist or the death of that person, whichever first happened but in no event beyond a period of twenty years from the time the right first arose.

The courts have held that the burden is upon the person seeking to establish title by possession to show:

(1) Actual occupation for the statutory period by themselves or those through whom they claim;

(2) That such possession was with the intention of excluding from possession the owners or persons entitled to possession; and

(3) Discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.

If he fails in any of these respects, his claim must be dismissed.

The right of the owner to bring an action for recovery of land against the trespasser depends not on the wrongful entry by the trespasser, which would be the foundation for an action for damages for trespass.

The right of action for the recovery of land accrues only when the conduct of a trespasser on the land in question is such that the owner thereof is prevented from enjoying that measure of physical possession of which land, of the character of the land in question is capable. In reaching the decision whether or not the owner has discontinued his possession of the land, one must have regard to the peculiar circumstances of the case and the nature of the lands in question. An owner is deemed to have constructive possession of the lands described in his deed, and it is not necessary for him to show that he had pedal possession. In some cases, possession cannot, in the nature of things, be continuous from day to day and possession may continue to subsist notwithstanding that there are sometimes long intervals between the acts of user. The owner of a farm cannot be said to be out of possession of a piece of land merely because he does not perform positive acts of ownership all the time.

A trespasser, on the other hand, must show that he has had exclusive possession of the lands to the absolute exclusion of the true owner. Where the lands in dispute is unenclosed, then the only safe rule to follow is to confine the trespasser to the actual area of which he has by visible occupation excluded the true owner. Occasional use of the disputed land by the true owner in a manner consistent with the uses to which such land may be put, is sufficient to deprive the trespasser of exclusive possession.

There can only be one possession under The Limitations Act. It is single and exclusive. You cannot have joint possession by the trespasser and the true owner.

The Canadian Abridgement, 1st ed. (1941), vol. 25, sets out the following at pp. 808-9 in its chapter on "Real Property" under the heading, "Wrongful possession - actual, continuance, exclusive, notorious", citing the case of Doe d. Easterbrooks v. Towse, (1885) 24 N.B.R. 387 (C.A.), puts is this way:

> *" 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 burden 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 Ithink 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 burden 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 ..."*

Acts of possession must be considered in every case with reference to the peculiar circumstances thereof. Facts implying 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 the proprietor might be reasonably expected to follow with due regard to his own interest, all these things, greatly varying as they must under various condidtions, are to be taken into account in determining the sufficiency of possession. A possession necessary to defeat the title of a true owner must be actual, constant, visible occupation by some person or persons to the exclusion of the true owner for the full statutory period.

As to the intention of the trespasser to exclude from possession the owner or the person entitled to possession, we would refer you to the case of Re St. Clair Beach Estates Ltd. v. McDonald, 5 O.R. (2d) 82. We will be referring to this case a little later on, but within the context now at hand, the trespasser during the term of the ten years for which he is claiming possessory title had approached the true owner on two separate occasions in the time period offering to buy the disputed parcel of land. On the first occasion, offering $1,000.00 and, on the second occasion, leaving a certified cheque in this amount with his solicitor so as to complete the transaction. In the case of Krause v. Happy, (1960) O.R. 385, in dealing with this matter of intent, the Court of Appeal stated at p. 394:

> *"That the evidence did not indicate animus possidendi on the Plaintiff's part as indicated by the testimony of William Krause, Sr. Referring to the property, he said - 'I wouldn't steal it from him', and 'I didn't expect to get the land for nothing'".*

The burden of proving the actual occupation, the intent to possess and the discontinuance of possession by the true owner is on the trespasser.

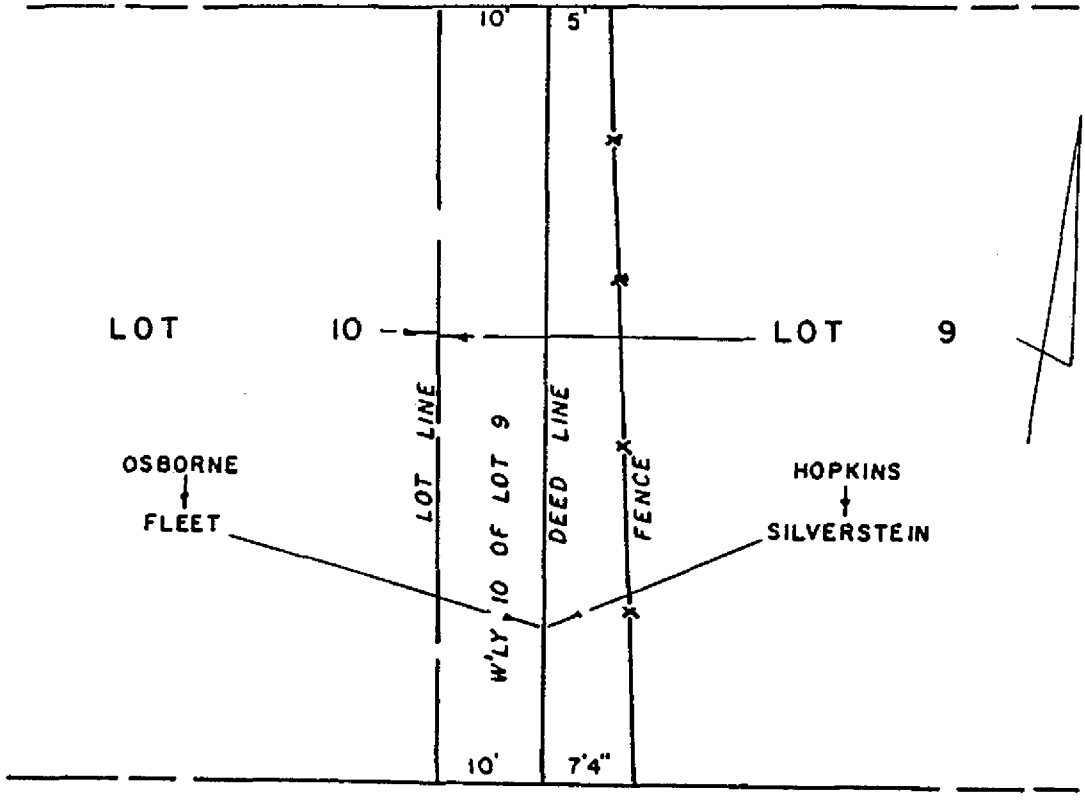
Now then, there are technically two types of classes of possessory title which I refer to as the "vertical" possessory title and the "horizontal" possessory title. The vertical possessory title is not of too great interest to you, but we should mention it briefly in passing. These are the situations where there is no dispute as to the boundaries of the lands in question. In other words, a trespasser has gone into possession of the whole of the property, to the absolute exclusion of the true owner. It might be of interest to note that, under Section 11 of The Limitations Act, it is possible for a joint tenant of two or more joint tenants or a tenant in common of two or more tenants in common to acquire possessory title as against their co-owners. In these situations, the intent to possess becomes very important because there can always be, in the background, some family arrangement by which it is agreed that one person would continue on in possession of the lands, notwithstanding the interest of the other parties, i.e., if a person dies and leaves a property to his three children, two of whom are unmarried, the third is married and has his own home. The married persons says to the two unmarried persons - "you can stay and look after the property until you marry, and when you decide to marry, then we will dispose of the property." In such a situation, I would suggest that there would be no intention to possession by those who were actually physically in possession to the exclusion of the other member of the family.

It is the "horizontal" possessory title that we encounter in our day to day practice. In this situation, you have an owner of a parcel of land and he has spread out as against his neighbours and has claimed possession to lands other than those included in his conveyance.

Now let us deal briefly with a few cases which may illustrate some of the points we have been discussing.

In the case of Fleet and Fleet v. Silverstein and Tenenbaum, (1963) 1.O.R., 153, the Fleets and their predecessor in title, Mrs. Osbourne, were the registered owners of the easterly sixty feet of Lot 10 and the westerly ten feet of Lot 9. The defendants, Silverstein and Tenenbaum and their predecessor in title, Mr. Hopkins, were the registered owners of all of that part of Lot 9 lying to the east of the westerly ten feet. According to the Registry Office records. there was no conflict between their titles. The paper title of Fleet did not cover a strip on the east boundary of the property, seven feet four inches in the front and five feet in the rear. There was a wire fence defining the easterly boundary of the property occupied by the predecessor in title, Mrs. Osborne, for at least 20 years. Trees were planted on the front of the boundary and shrubs were planted in the rear. Flowerbeds were cultivated on the strip of land in question and the lawn was mowed by the plaintiffs right up to the fence.

The sale of the Hopkins' land to Silverstein and Tenenbaum was completed on the 30th of December 1959, and in the month of January, 1960, they proceeded to enter on the disputed strip of land and exercise rights of possession over it by cutting trees and cutting



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down and destroying the shrubs. There is no indication in the report whether a survey was in existence at the time of that sale, but one can readily imagine that there was. Presumably, the defendants received either a poor survey or some bad legal advice or, more likely, a combination of both.

The Court held there was sufficient evidence to find continued, uninterrupted, adverse possession of the strip of land as against the predecessor in title, Mr. Hopkins, of considerably more than the ten year period required by the Statute.

The lands had been conveyed by Osborne to the plaintiffs in April of 1950, and accordingly, the re-entry by the defendants in January 1960 was within the 10 year period. Could the rights of Osborne pass on to the successor Fleet? The court held that where there are a series of trespassers as against the true owner, and trespasser "A" surrenders possession to trespasser "B", who immediately enters into possession of a right which has been handed over to him by "A", the Statute continues to run against the true owner.

The Fleets were not seeking to recover the land nor were they seeking to recover possession of the land, but rather they framed their action on trespass. They were seeking to repel what they say was a trespasser and the Court held that, when Mr. Hopkins purported to convey the strip of land to the defendants, they could take no greater title than Mr. Hopkins had. Mr. Hopkins, having made no attempt to make an entry during the period the property was occupied by the Osbornes and the Fleets, his right to re-enter was absolutely barred by the Statute. Accordingly, the plaintiffs had a perfect right to resist defendants as trespasser and to bring this action to assert these rights.

There is a further point raised in this case, which is of interest.

The Defendant argued that, even though Mrs. Osborne, the predecessor of the plaintiffs, may have accrued or accruing rights as one in adverse possession of the disputed lands, she had not conveyed her interest to the plaintiffs, and, therefore, they could not succeed in their claim. Chief Justice McRuer referred to Section 15 of The Conveyancing Law and Property Act which provides that, unless a contrary intent appears on the face of the document then the conveyance includes all land "held, used, occupied and enjoyed .... as part and parcel thereof" and he stated:

> *"This land was enjoyed as land within the curtilage of the house and was purchased by the plaintiffs as such. As I say, although I do not have to come to a definite conclusion on it, my view at the present time is that the conveyance of the land on which the house sat would be quite sufficient to carry with it all the rights which Mrs. Osborne had and had acquired by possession or otherwise over this strip of land which was enjoyed and used as part and parcel of the property connected with the house erected at 2351 Chisholm St. in the Village of Bronte".*

At the time Hopkins sold the property to Silverstein and Tenenbaum, he had lost his right to the disputed strip of lands and, therefore, the description contained in his conveyance was in error. Conversely, if the dicta of the Chief Justice is correct, and I think it is, then the conveyance from Osborne to Fleet did include the disputed strip because the operation of Section 15 of The Conveyancing Law of Property Act.

The moral of that case - Do not trust or rely upon a metes and bounds description; get an accurate survey showing the possessory limits whether adverse to or consistent with the registered description.

In the case of Brown v. Phillips, et al, 1964, 1 O.R., 292, the Plaintiff Brown was the registered owner of Lot 62 according to Plan 100 in the Town of Fenlon Falls, and the defendant Phillips was the registered owner of Block "A: on said Plan which lay immediately to the east of Lot 62. There was erected in Block "A" by a common owner a picket fence some 23 feet east of the lot line, and ran southerly from the street line for a distance of approximately 40 feet; this fence at its southerly end did not connect with any other fence or erection. There was a low stone wall with a wire fence on top running from the picket fence in a westerly direction to the west face of the house on the plaintiff's lands.

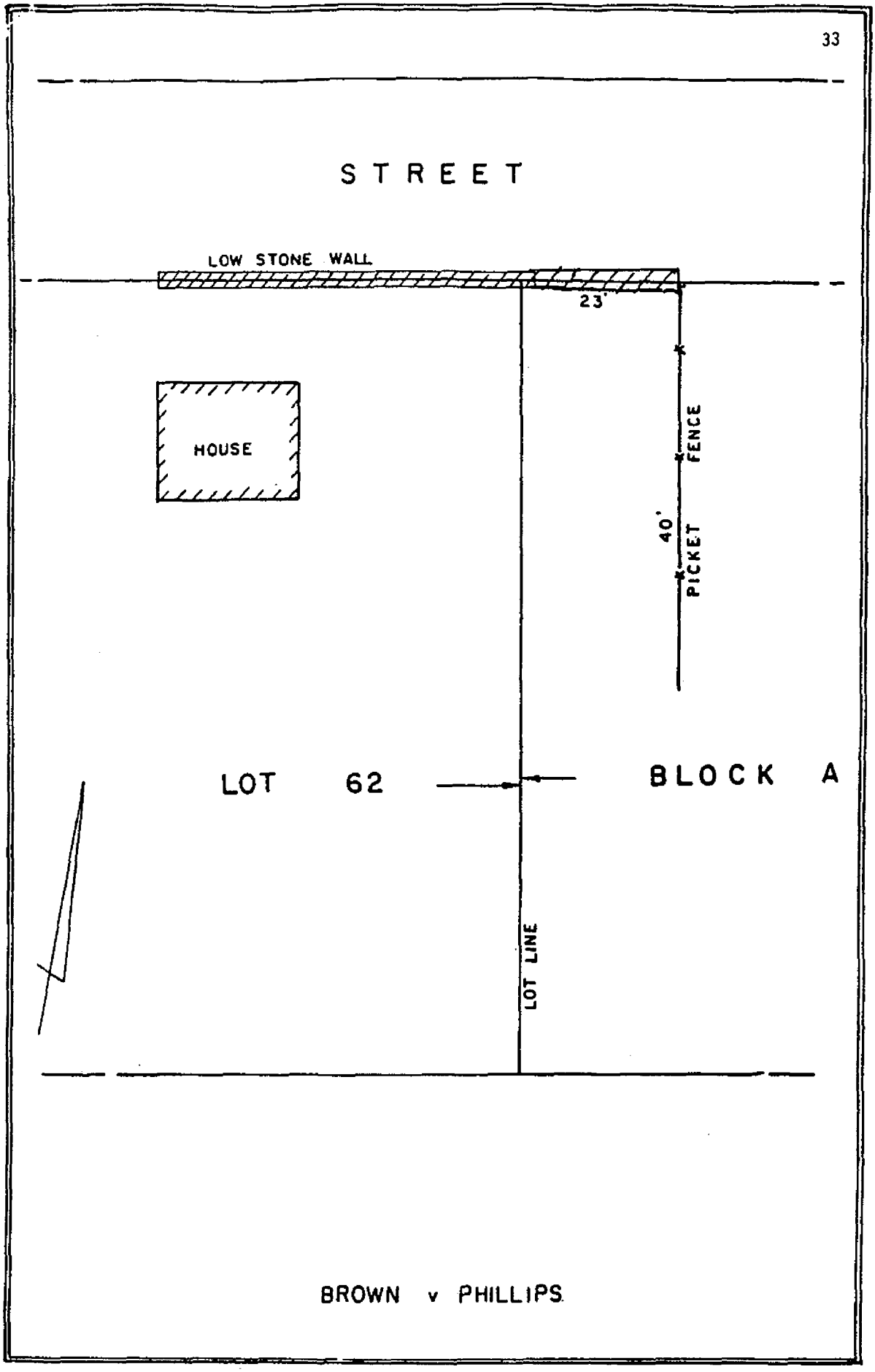
The common owner had conveyed the whole of Block "A" by deed registered in August of 1945. Lot 62 was conveyed in July, 1947. Again, each parcel had a separate chain of title down to the present disputants. One dwelling house stands completely within the limits of each parcel.

The Plaintiff purchased Lot 62 in 1953 and the defendants purchased Block "A: in the same year. Some time later, the plaintiff removed part of the stone wall and thereafter regular use was made of the northerly 30 feet of the lands lying west of the picket fence by the plaintiff's tenants.

In 1955 the picket fence fell into disrepair and was replaced at the initiative of the defendant and he asked the plaintiff's tenant to share the costs.

In July, 1962, the defendant, without consulting the plaintiff or his tenants, removed the picket fence and erected a fence along the dividing line between Lots 62 and Block "A".

At trial, the Judge held that the plaintiff had acquired title to the full strip of land from the street line right to the rear line of Block "A". On appeal, the Court held that there was not sufficient evidence to show whether the plaintiff had used and occupied the lands south of the picket fence to the exclusion of the true owner and, accordingly, amended the judgement of the trial Court to this extent.



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This action was also framed in trespass and the plaintiff asked for a declaratory judgement establishing the boundary between the lands of the plaintiff and the defendant. The Court stated:

> *"While I consider that the plaintiff is entitled to judgement 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."*

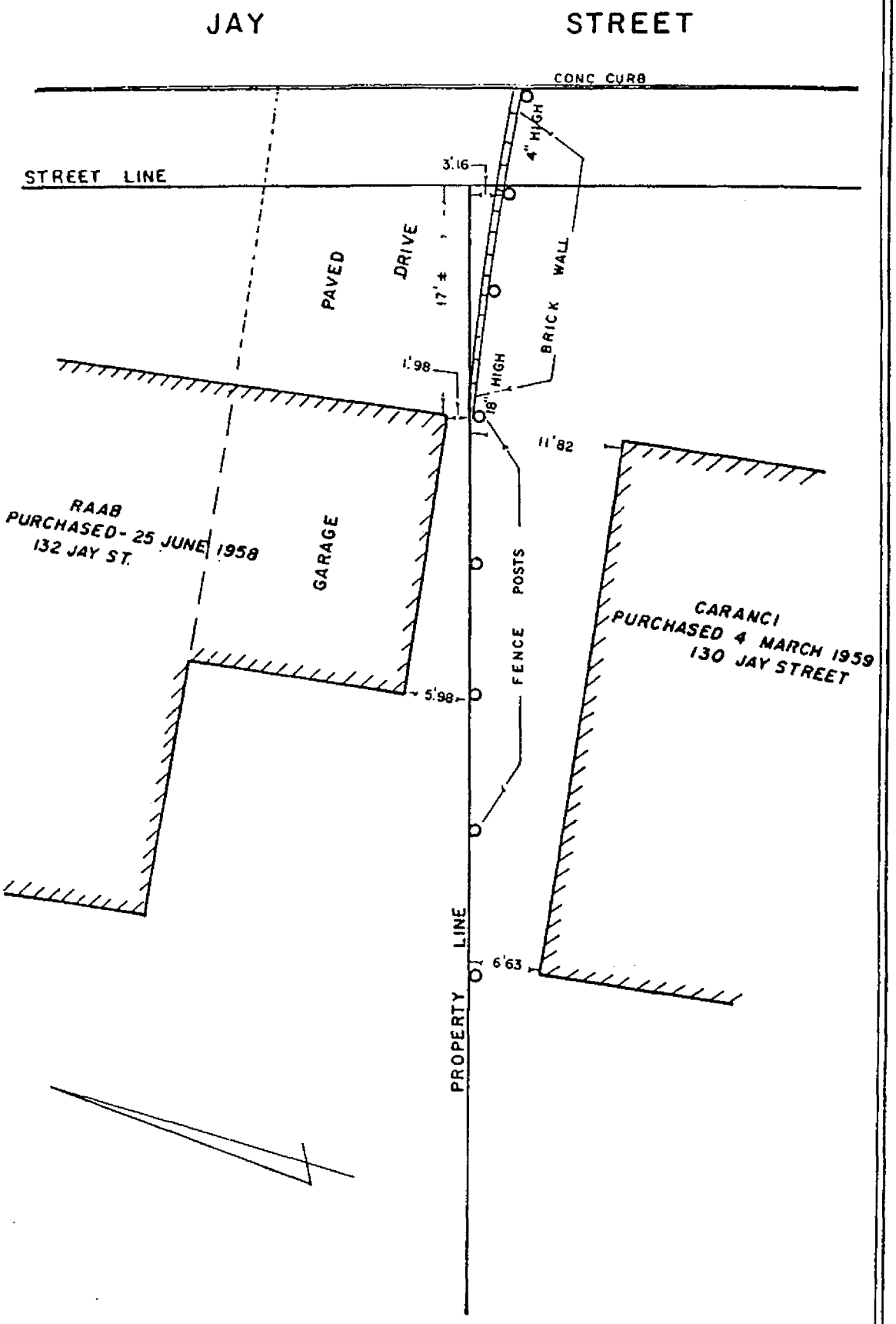
The Court then goes on to quote an old case of 1878, as follows:

> *"The Statute operates to bar the right of the owner out of possession not to confer title on the trespasser in possession".*

Now let us consider a recent unreported decision of Lerner J. handed down the 3rd of March, 1977, namely, the case of Raab v. Caranci. Raab purchased the northerly property in June of 1958 and Caranci purchased their property to the south approximately one year later in March of 1959. In the Summer of 1959, the Plaintiff constructed the low brick wall starting at the curb line and extending to the front of the garage on his property. The wall at the curb line is approximately 4" high and at its westerly extremity, where it is on the common boundary between the properties, is approximately 18" high. Where it crosses the street line it encroaches upon the property of the Defendant by approximately 3.16 feet. Within a week of finishing the wall, the Plaintiff paved the whole of his driveway including all the land on his side (the north side) of the brick wall beginning at the Municipal road curb and then westward to the front wall of his garage. The next year the Plaintiff erected several metal posts immediately to the south of the brick wall and these metal posts continued westerly along to the rear of the property. No wire was strung on these posts as it was understood, according to the Plaintiff, tnat the Defendants were to string the wires, if he put in the posts. A new fence was constructed in 1965 by the Plaintiff along the common property line, from the front of his garage to the rear of the property. A discussion was held with Mrs. Caranci at that time but she had no objection to the fence as it was along the property line and no mention was made of the brick wall.

In August, 1973, the defendants decided to build a new front porch and obtained a survey for the purpose of establishing the location of the street line as they did not want to encroach on the land of the Municipality. It was not obtained to verify an encroachment by the brick wall and pavement and it was then that they discovered the encroachment of the brick wall upon their property. They did nothing about it for approximately a year. On Sunday, the 30th of June,1974, the paintiffs on their return from church found that their good friends, their neighbours to the south had erected a metal mesh wire fence on the surveyed boundary, extending from the street line ending even with the front wall of the plaintiff's garage and house. The evidence indicates that the parties to the action had been good friends over the many years that they lived on their adjoining proper-

RAAB V. CARANCI



and used the driveway in question as a play area. The Defendants had never objected about the location of the low brick wall and even after the survey was made, made no objection to the Plaintiff until the erection of the fence in question. The defendants alleged that the encroachment had only been there with their permission and that the plaintiff had agreed, at the time of erecting the wall, that if a survey ever disclosed the wall encroached upon their property, he would immediately remove the same.

The Court stated - *"The evidence of the defendants has not had the ring of conviction to weaken the precise evidence of the plaintiff and his witnesses, that he took possession of the disputed land in 1959 and that it was never questioned, objected to or treated by the defendants as anything but the plaintiff's property until they obtained a survey in 1973 for other purposes and indirectly discovered the encroachment".*

"The Plaintiff had the animus possidendi - the intention of possessing the disputed triangle of land. He first built the wall and then paved all land north thereof. He asked no permission or sought any help to defray the cost. He also maintained the wall and pavement continuously for more than 10 years as his own property."

The Court granted:

(1) declaratory judgement that the plaintiff had possessory title to the lands referred to in the Statement of Claim; and

(2) An injunction restraining the defendant from interferring with the plaintiff's wall and use of the lands described above; and

(3) A mandatory injunction requiring the defendants to remove the post wire fence constructed by them;

(4) And for damages done to that portion of the driveway by the erection of the fence in the sum of $50.00.

Note now that in the Raab case a declaratory judgement was requested and obtained declaring the plaintiff to have a possessory title to the lands in question. In the Brown v. Phillips case which was an action founded in trespass, the Court held that a declaratory judgement could not be granted. In the Fleet v. Silverstein case again, founded in trespass, the Court stated in dicta that perhaps s. 15 of The Conveyancing and Law of Property Act would operate to bring a privy of title as between one trespasser and another so as to give a succession and continuity of the rights and interests acquired by the trespasser.

These three decisions appear slightly in conflict with each other. However, there is a difference between them: In the Raab case there was only one trespasser over the Statutory period and in the other two cases there were a series of trespassers over the statutory period. The distinction is best stated in a case of McConaghy v. Denmark (1880) 4 S.C.R. 609 by Gwynne J., *"The possession which will be necessary to bar the title of the true owner must be an actual, constant,*

visible occupation by some person or persons (it matters not, whether in privity with each other in succession or not) to the exclusion of the true owner for the full period ... and ... to transfer the title to the person in question at the expiration of the 20 years such person must claim privity with the persons preceding him in the possession during the period of 20 years, unless he himself was continuously in such possession during that period. The difference being that, while any person in possession, after the title of the true owner is barred by a possession to his exclusion for 20 years, may defend successfully an action of ejectment brought by the original owner, however, short may have been the possession of such defendant, and notwithstanding his want of privity with the persons in possession during the 20 years, yet no one can recover as plaintiff in ejectment in virtue of a title acquired by possession against the true owner for 20 years under the provisions of the Statute, unless he himself alone or in privity with others in possession before him had that continuous possession which was required to bar the true owner ..."

Or again, Halsbury's Laws of England, 3rd ed. Vol. 24, on "Limitation of Actions", states at p. 255:

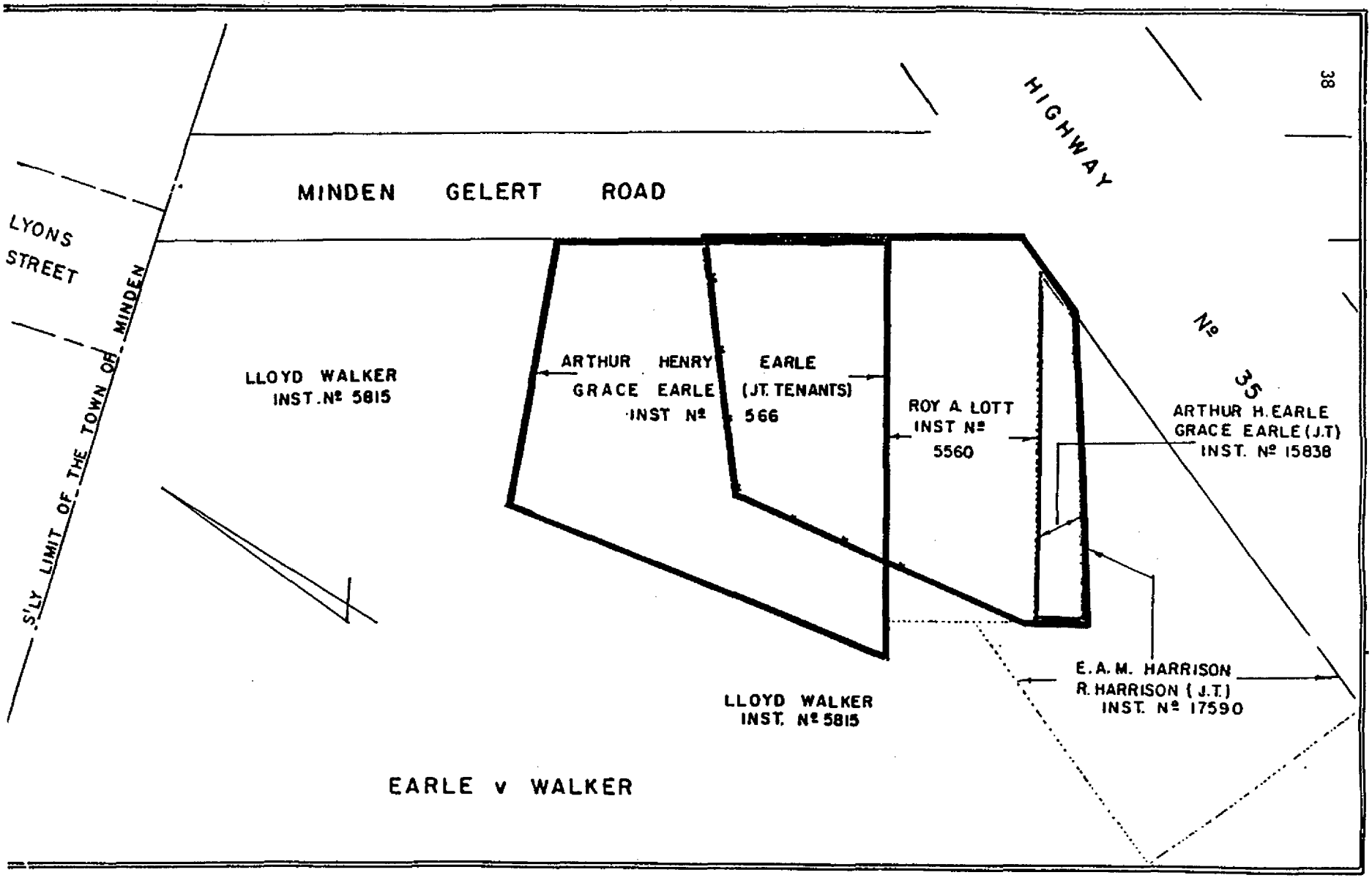
> *490. Position of person in adverse possession. - A person who is in possession of land without title has, while he continues in possession, and before the statutory period has elapsed, a transmissible interest in the property which is good against all the world except the rightful owner, but an interest 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".*

The interest acquired by a trespasser as against the true owner may be transmitted from one trespasser to another by descent, devise, conveyance or even agreement.

If a series of trespassers succeed one another in possession as against the true owner, over the statutory period, the last person in possession can either withstand an action of ejectment or bring an action in trespass. For a declaratory judgement that a trespasser has possessory title there must be privity of interest as between each succeeding trespasser.

One wonders what might be the effect of the dicta of McRuer in the Fleet v. Silverstein case, or better still, what about that clause at the end of the description in some conveyances, "Together with all the interest of the grantor in any abutting lands".

We have mentioned that the occupation of the true owner need not be pedal, ie. that he does not have to mark off the boundaries of his land daily or weekly, in other words, he is deemed in constructive possession of all the lands contained in his conveyance. In this regard let us look for a moment at the case of Earle et al v. Walker (1972) 1 R.O. 96.


38
HIGHWAY
MINDEN GELERT ROAD
LYONS STREET
S'LY LIMIT OF THE TOWN OF MINDEN
LLOYD WALKER
INST. Nº 5815
ARTHUR HENRY EARLE
GRACE EARLE (JT. TENANTS)
INST Nº 566
ROY A. LOTT
INST Nº
5560
Nº 35
ARTHUR H. EARLE
GRACE EARLE (J.T)
INST. Nº 15838
E. A. M. HARRISON
R. HARRISON (J.T.)
INST. Nº 17590
LLOYD WALKER
INST. Nº 5815
EARLE v WALKER

The plaintiff Earle had acquired title to the parcel of land in question by metes and bound description in July of 1951. The defendant acquired his land, which adjoins the plaintiff's land, by a deed registered in 1952, and the description in that conveyance is of interest as it would appear to be what perhaps, some would say is a true lawyer's description. In brief, it is as follows:

> *"Being composed of part of Lot 2 in the "A" concession of the said Township of Minden, and being more particularly described as follows:*
>
> > *Being all of land lying west of the new Bobcaygeon Road (also known as the Minden-Gelert Road), save and except those parcels previously conveyed and registered as Nos. 20034, 144, 163, 337,2285, 2708, 3500, 3525, 3861, 4479, 4728 and 4960, containing by estimation 25 acres be the same more or less and being those lands described in like manner and registered as No. 5030 for the Township of Minden."*

The parcel of land described in registered Deed 3525 being one of the excepted conveyances was the land previously conveyed to the plaintiffs in 1951. The parcel of land of which the plaintiffs went into possession was bounded on the north by a cedar rail fence, which was located approximately 66 feet south of the north end of the lands that had been conveyed to them.

It was not until 1955 that they became aware that their deed conveyed to them land extending approximately 66 feet north on the old fence line, and that the most southerly portion of the land they were actually occupying was not their property. The parcel we are particularly concerned with is the 66 feet of land which the defendant had entered upon, removing soil, removing trees and bushes and constructing a roadway thereon for his own purposes. The plaintiffs brought an action for trespass and for damages.

The defendant alleged that he had always believed himself to be the owner of the strip of land in controversy; that he had used it as his own; that the land was partly cleared and partly in bush, and he had used it for the purpose of cutting firewood, gathering berries and, for four or five years, tapping some trees for the production of maple syrup.

At trial, the Court held that the defendant had acquired a possessory title to the said lands and further stated that the plaintiffs' title was defective and the original grantor intended to convey and the plaintiffs accepted a conveyance, believing it to be that part of which he had effective and actual occupation. On appeal, the Court of Appeal held that the conclusion of the trial judge that the plaintiffs' title to the land was defective and entirely without foundation.

The court further stated:

> *"It has been well settled that where one has documentary title to a piece of land and comes upon it and actually occupies a part thereof, he is considered in law in possession of the whole, unless another is in actual, physical occupation of some part of the exclusion of the true owner. Here neither the defendant nor any other person was in actual possession in that sense, and the plaintiff being in actual possession of all the area contiguous to the disputed strip had sufficient possession. There being no other party actually in possession to the extent required to extinguish the plaintiffs' paper title under the Statute of Limitations their title draws the possession of it.*
>
> *The defendant's user of the land in dispute, if, indeed, the evidence of such user can be related to this precise area consisted of no more than isolated acts of trespass, a toleration of which by the plaintiffs conferred no legal right to the property or an interest therein upon the defendant. His alleged acts of possession were not actual, constant, open, visible and notorious occupation to the exclusion of the true owner and thereupon did not vary the plaintiffs' title."*

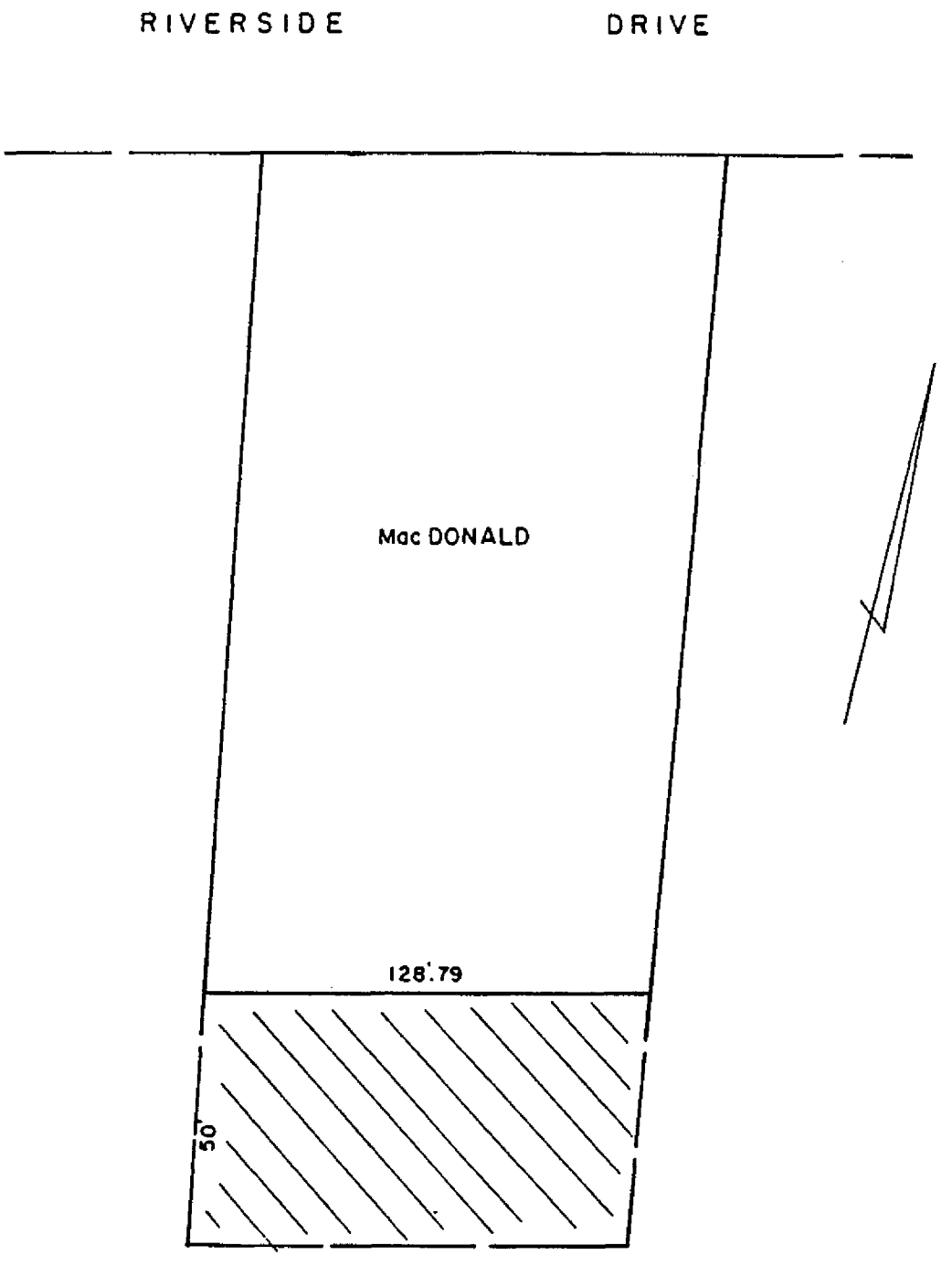
The Court of Appeal set aside the judgement trial and allowed the appeal and substituted therefore a judgement in favour of the plaintiffs for nominal damages a permanent injunction against the defendant and a declaration that they were still the owners of the lands in question.

Again, as to the discontinuance of possession by the true owner, the Court of Appeal decision in re St. Clair Beach Estates Ltd. v. MacDonald, et al, 1 5 O.R., (2d) 482, is of interest on an application for first registration under The Land Titles Act. A Deputy Director of Titles had held that the applicant had withstood a claim for possessory title of part of the lands by the MacDonalds. The MacDonalds appealed to a County Court Judge and then on to the Court of Appeal.

We referred to this case earlier in dealing with animus possidendi This is the one where MacDonald had offered to the predecessor in title, St. Clair Beach Estates Ltd., namely the Grants, $1,000.00 to purchase the lands during the ten year period. The parcel of land in question is approximately 129 feet wide by a depth of 50 feet immediately south of the property owned by the MacDonalds on the south side of Riverside Drive near the City of Windsor. The actual possession which the MacDonalds alleged entitled them to the lands were as follows:

(a) In the Fall of 1961, they removed trees, bush and rubble;

(b) In February, 1962, they bought a dog and set up a dog run of some 50 feet at the south west corner of the lands;



ST. CLAIR BEACH ESTATES LTD. v MacDONALD

(c) In 1962, they seeded the lands with grass, fertilized it and cut it;

(d) In the summer of 1962, they put a sandbox between the cherry trees on the land in question, installed swings and planted some flowers;

(e) In 1963, a picnic table was placed on the land;

(f) In the winter of 1964, they put in their first skating rink;

(g) In the Spring of 1965, they bought a 22-foot boat house and, over the next two years, they used the area in dispute to construct a boat and a trailer for transporting it;

(h) The boat and trailer were stored on the land in the fall and the winter months;

(i) In 1967, they built a doghouse and pole about 50 feet high and embedded it in a concrete foundation 3 feet deep and 1 foot across.

The MacDonalds use of the land in dispute was the normal domestic and recreational use of which an owner would make of his own backyard. In so using the land, the MacDonalds never at any time had the permission or consent of the owners of the Grant farm.

One would have thought surely that, on that evidence, the MacDonalds could have established their possessory title to the lands.

The lands adjacent to the disputed parcel were farmed by the Grants for many years and the plough-line was right up to the edge of the property. The property in dispute was not suitable for cultivation.

As indicated previously, there were cherry trees on the land in dispute, and evidence indicated that the Grants picked cherries from time to time from these trees. The Court therefore concluded that the possession of MacDonald was not exclusive possesssion, as against the true owner, that the true owner, Grant, had not discontinued his possession of the lands for the Statutory period; the Court ruled the claim of MacDonald to a possessory title also fell on those grounds.

Let us turn our minds for a moment to possession as against the Crown and, in particular, with regard to public highways.

Section 3 of The Limitations Act provides that an action on behalf of Her Majesty for the recovery of any land shall be brought within sixty years after the right to bring such action first accrued to Her Majesty. Section 15, as previously indicated, provides that if the action has not been brought within the time limited, then the title of the owner to the lands is extinguished.

There are cases which indicate that title by possession cannot be acquired as to public highways, wharves, or market places, and Rogers, in his text, "Powers of Municipal Corporations",states it as follows:

> *"The right of ownership of real property, such as a highway, market, or a public wharf, held by a Municipality for the common benefit or use of its inhabitants and the Queen's subjects in general, is of such a public character that it cannot as a general rule be lost by adverse possession over the prescriptive period."*

Note, however, the provisions of Section 16 of The Act:

> *"Nothing in Sections 1 to 15 applies to any waste or vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway whether the freehold in such public highway is vested in the Crown or in a Municipal Corporation, Commission or other public body, but nothing in this Section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th of June, 1922."*

Let us look at the recent decision in the case of DiCenzo Construction Co. Ltd., v. Glassco, et al, 12 O.R., (2d) 677. There was another action between the same plaintiff and the Corporation of the City of Hamilton which was included in this report. The actions were tried together.

The question arose as to the title to the original road allowance between Lots 30 and 31, in Concession 5 of the Township of Saltfleet, in the County of Wentworth. The description contained in the conveyance to DiCenzo included one-half of the road allowance referred to, and the description and the surveys submitted indicated that the road allowance had been closed by By-law 145 of the Township of Saltfleet, passed the 4th day of June,1870. The portion of the original road allowance in question contained 1.06 acres, more or less, and the purchase price was calculated at $12,600.00 per acre. The survey further indicated that there was a fence line running down the centre line of the road which had been closed by the By-law in question.

There was never a conveyance by the Municipality of this part of the road allowance to the abutting owners for reasons which we will shortly see. However, the westerly half of the road allowance was conveyed together with Lot 31 in the Fifth Concession for the first time in 1904, and descriptions subsequent thereto included the westerly half of the road allowance as purportedly closed by the By-law.

The lands were subsequently annexed to the City of Hamilton and the compiled survey prepared showing the lands annexed also showed that the road allowance had been closed by by-law No. 145 of the Township of Saltfleet. The plaintiff, DiCenzo, made application to have the lands entered under The Land Titles Act in accordance with the conveyance of the lands to him, and a more detailed examination of the title disclosed that By-law No. 145 of the Township of Saltfleet, passed on the 14th of June, 1870, did not, in fact, close the road allowance between Lots 30 and 31 in the Fifth Concession of Saltfleet. A proper by-law of the City of Hamilton was required to

close the road allowance and a conveyance thereof to the applicant. The City of Hamilton passed the necessary by-law, however, it would not convey the lands until it received the sum of $15,000.00 per acre, for the parcel of land for which DiCenzo had already paid the party in occupation the sum of $12,600.00 per acre.

Needless to say, DiCenzo did not intend to pay for the land twice and brought the two actions to recover the purchase price from either the vendor or the City of Hamilton. The Court reviewed quite extensively the cases and a development of Section 16 of The Limitations Act. Prior to 1922, this Section read as follows:

> *"Nothing in the foregoing Sections shall apply to any waste or vacant lands of the Crown, whether surveyed or not."*

It was not until the 1922 amendment, which was assented to on the 13th of June, 1922, that reference was made to road allowances whether vested in the Crown or in a Municipal Corporation and the further qualification that, *"That nothing in this Section contained shall be deemed to affect or prejudice any right, title or interest acquired by any person by virtue of this Act."* The last four words in subsequent revisions of the Act, of course, refer to the 13th of June, 1922, being the effective date of the amendment.

The Court, after exhaustive study of the Statutes and the amendments thereto and to the evidence before it, came to the conclusion that the predecessors in title to DiCenzo, had been in occupation of the west half of the road allowance for many years prior to the 13th of June, 1922, and accordingly, they had acquired a possessory title to the lands which could be conveyed and that the Statutory period prior to the 13th of June, 1922, was a ten year period.

Judgement was awarded to DiCenzo against the City of Hamilton for recovery of some $24,000.00 being the purchase price thereof.

The DiCenzo case is being appealed. The case is important as it will decide whether or not, as far as a Municipality is concerned with regard to road allowances, the Statutory period of possession is 10 years prior to the 13th of June,1922. If the Court so finds, then presumably the 10-year period would apply to other lands of the Municipality and with regard to these other lands the Municipality is in no different position than an ordinary taxpayer.

Now then a short word with regard to easements. Title to an easement or right of an easement may be acquired if enjoyed without interruption over a period of twenty years. Periods of interruption must be for one year. The distinction as between acquiring an easement and acquiring title is that on acquiring a title against the true owner you must have exclusive possession to the lands to the exclusion of the true owner, whereas on acquiring an easement, the right or use of the lands does not have to be exclusive to the trespasser. It can be in conjunction

with the user by the true owner and other persons.

If one has been granted a right of way or easement over a parcel of land by deed, then non-user is not necessarily evidence of abandonment. The use of an alternative right of way in lieu of the right of way which has been granted in a conveyance is not evidence that the right of way has been abandoned.

In the case of Himestead Holdings v. Booth, (1972) 10R808, the lands were between the south shore of a lake and a travelled road. There were high land near the road sloping down to a swampy area near the lake. Homestead had paper title under two deeds to the whole area. Booth also had deeds to the land registered in 1962 and 1962, but relied upon the possession of his predecessor in title and himself as to part of the lands. There was that privity of interest between the two trespassers.

At trial the Court held that Homestead had title to a swampy land and Booth had extinguished Homestead's title to the high land subject, however,to two rights of way to allow access to the swampy area from the road.

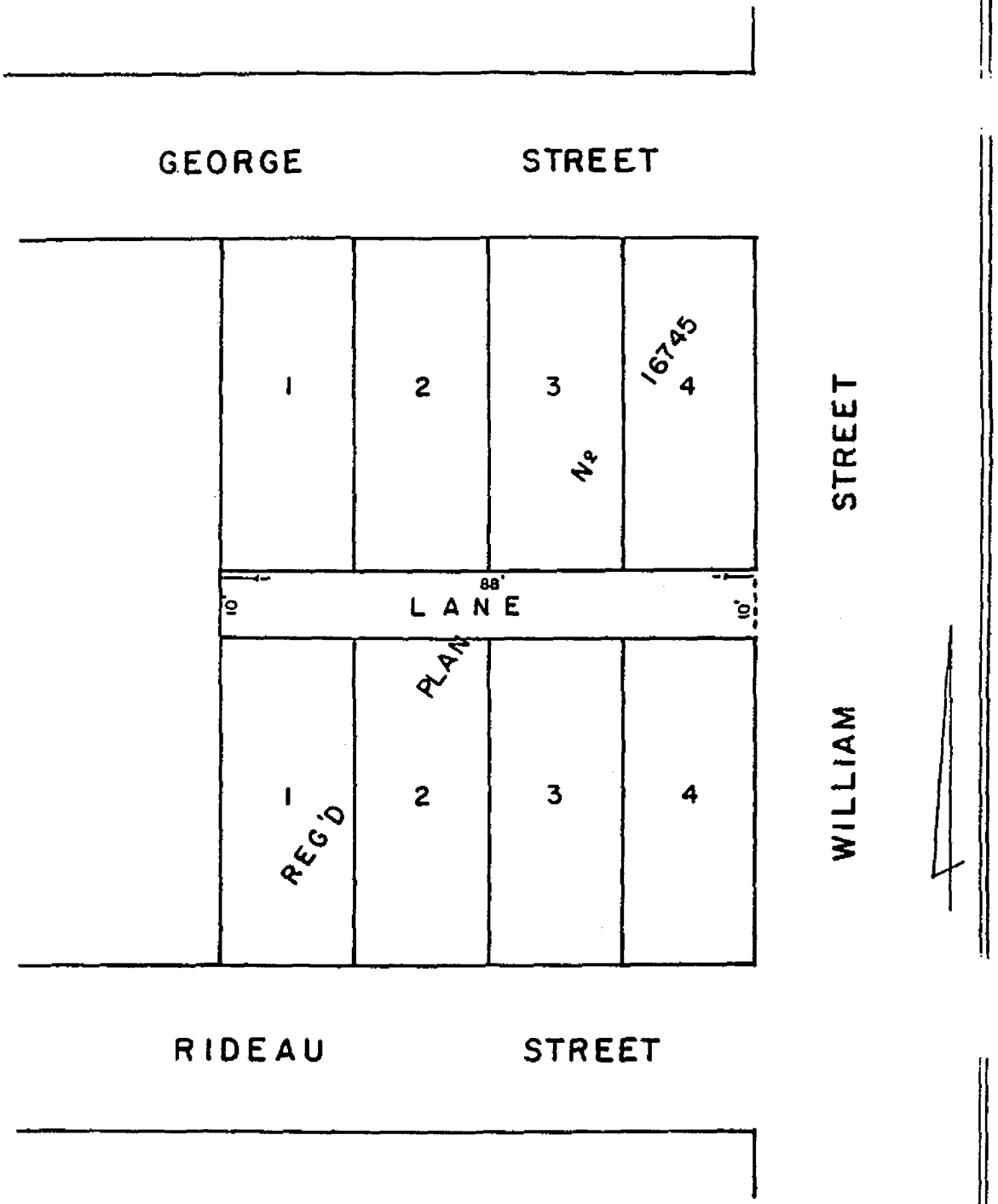
Both appealed: Homestead on the basis that being in possession of a portion of the lands, it was deemed in possession of all of the lands in its deed because of its acts of possession. The Appeal Court rejected this argument and agreed with the trial judge that Booth had extinguished the title of Homestead to the high lands.

Booth on a cross appeal firstly claimed possession to all of the lands because of his acts of possession, and this was rejected.

Secondly, he appealed the finding with regard to the rights of way. The Court held that the trial judge based his finding upon evidence which he thought he had heard. A review of the transcript of evidence revealed no such evidence, but on the contrary that access to the lowlands had always been from the lake or along the shore of the lake. The judgement was amended, deleting the reference to the two rights of way.

Consider now a more practical case: Re Alfrey Investments Ltd. and Shefsky Developments Ltd. 6 O.R. (2d) 321. This was a Vendors and Purchasers motion as to whether or not the Vendor had a possessory title to one half of a lane as shown on Registered Plan 16745. The plan had been registered in the year 1875, and laid out a tier of four lots on Rideau Street in the City of Ottawa, in the rear of which was the lane in question together with another tier of four lots to the north of said lane on the south side of George Street. The lane ran westerly from William Street to a dead end. It was agreed by all parties that the City of Ottawa disclaimed any interest in the lane. As indicated the lane at its easterly end to William Street, gave free access to anyone and there was no evidence that it had ever been controlled or closed by gates 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

RE- ALFREY INVESTMENTS LIMITED



themselves or persons proceeding in and out of their premises used the lane.

The evidence further disclosed:

(a) The owners of the eight lots had always used the land in common with each other for approximately 30 years;

(b) That the Municipality had never maintained or asserted any indices of ownership thereof;

(c) The executive officer of the Vendor Company, who was a former owner had purchsed the lots adjoining the south side of the lane in 1960 and in 1963 paved the lane at his own expense;

(d) No one had 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 the said lane;

(f) That since 1960 the owners of the lands in the south side of the lane had paid the taxes on the south side of the lane.

From this material and other declarations filed, the Court found that the Vendor and its predecessor in title had possession of the lane for more than 45 years.

Further, 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 "animus possidendi" when it intends to establish its legal control of, and claim to, the lane and to exclude the rightful owner therefrom.

Accordingly, two matters had to be determined:

(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, ie. Is the Vendor's use of the land adverse to the legal owners' interests?

On the evidence, the Court was of the opinion that it is abudantly clear that the Vendor did intend to establish possessory title and at the same time exercise one of the rights as an owner, namely, allow others a limited right to use the land, ie. the owners of the lands to the north of the said land. On the question of whether or not the lands were a public lane,the plan was registered in about 1875 and the Surveys Act at that time only provided that roads, streets and commons laid down on a plan are public. There was no reference to lanes. It was not until 1920 when The Surveys Act 1920, (Ont.) c.48 was enacted in which s. 13(2) appears and which provided in part for the

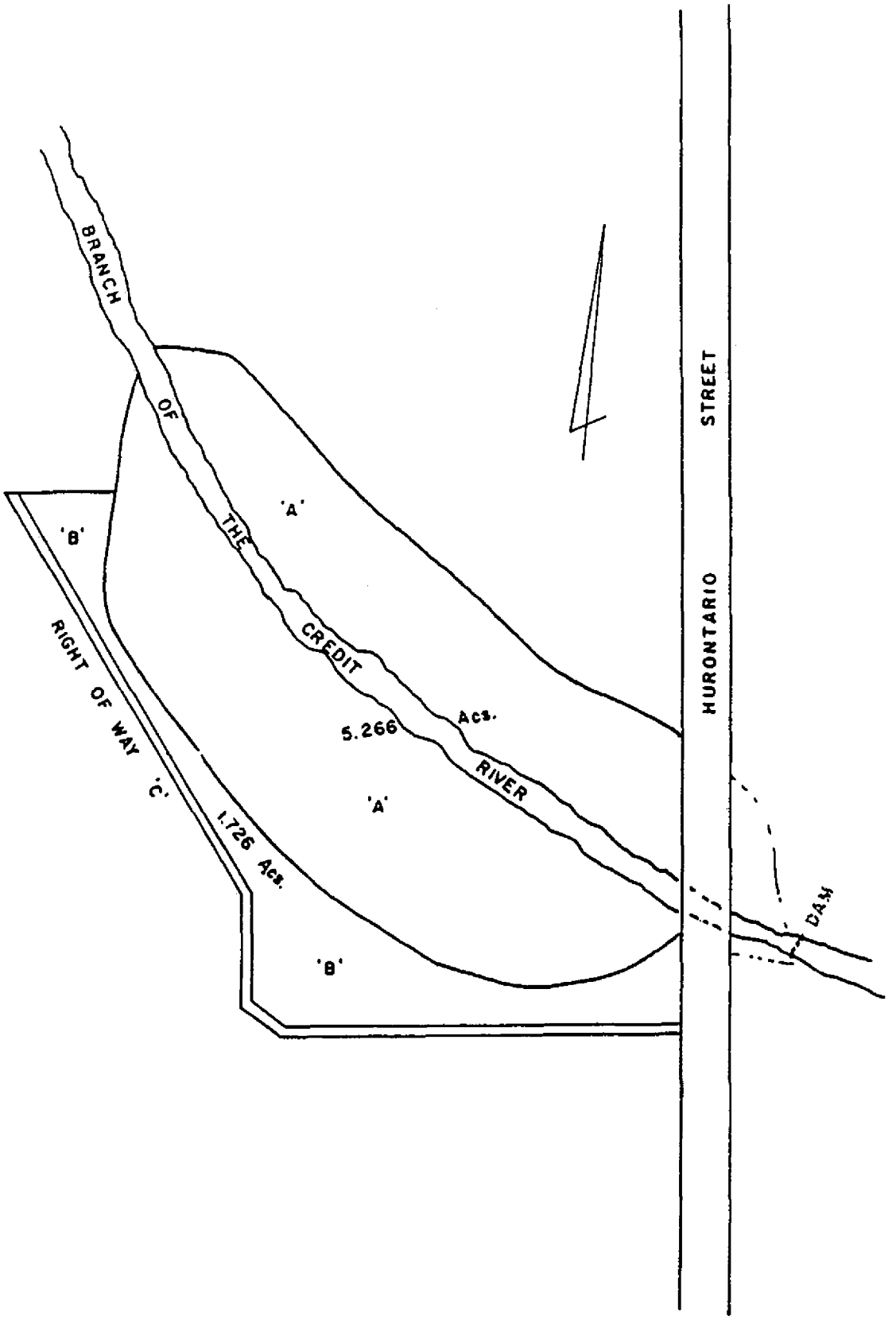
first time that a lane shown on a registered plan would be a public lane. The Court then reviewed many cases dealing with the possible retroactive aspect of the Legislation and came to the conclusion that the 1920 amendment to The Surveys Act was not retroactive.

The Court accordingly found that the Vendor had acquired a possessory title to the south half of the 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 these abutting lands and declared that the Vendor had title to the lands in issue.

Now let us turn to two cases concerning lands either formerly covered or covered by water. The first of these cases is Thomson v. Neil et al 7 O.R. (2d) 438. One Cunningham was the owner of the Southeast quarter of Lot 21, Concession 5 in the Township of Culloden, West of Center Road or Hurontario Street, containing 50 acres more or less prior to 1857. In that year he conveyed to one Clark a "Mill Privilege" situated on the River Credit and consisting of part Lot 24 in the 5th Concession west of Hurontario in the said Township of Culloden. The property was then described by metes and bounds and contained approximately 5¼ acres. There is a chain of title from Clark with regard to this "Mill Privilege" down to the Plaintiff, Thomson, who acquired his interest from one Dods on the 22nd July, 1968. In 1861 Cunningham conveyed the Southeast quarter of the lot referred to above but did not except out the "Mill Privilege" previously granted to Clark. Subsequent conveyances in the chain of title down to the Defendant did except out that portion conveyed to Clark. It was not until 1952, in the conveyance to the defendant Neil that mention was made for the first time in the chain of title that the exclusion was a "Mill Privilege" and the "Mill Privilege" was then described by metes and bounds as in the conveyance to Clark.

Is a "Mill Privilege" only a right of user or does it include a conveyance of the lands covered by water or formerly covered by water as in this case? The evidence disclosed that the mill that was formerly in operation to the east of the road allowance was last standing in 1915 to 1917 and is today in ruins and the last flooding had occured over 60 years ago. In other words, the Credit River had returned to its natural bed and today the property adjacent thereto and shown on the sketch as Parcel "A" was now used and enjoyed as a private stocked trout fishing operation. The Court was of the opinion that the paper title to the lands shown on the sketch as Parcel "A" containing 5.266 acres more or less, was in the name of the defendants, the "mill privilege" having long since disappeared because of the lack of use of the flooding rights for over 60 years.

The Court further concluded that the use of the phrase, "mill privilege" had changed over the years and where formerly it referred to the mill owner having the necessary right to flood adjoining lands; with the disappearance of the mill the term became a descriptive one, describing the property itself and not just the usage of the land.


BRANCH
OF
THE
CREDIT
RIVER
'A'
'B'
'A'
'B'
5.266 Acs.
1.726 Acs.
RIGHT OF WAY 'C'
HURONTARIO STREET
DAM

The lands shown on the sketch as Parcels B & C were totally enclosed by a fence with a gate at the easterly end of Parcel C which was the right of way, which gate had been erected by one Dods, the immediate predecessor in title to the plaintiff, Thomson. Dods had been the registered owner of the "mill privilege" for many years prior to the conveyance in 1968 and had used and occupied with the lands included in Parcels A, B and C as shown on the sketch. The Evidence disclosed that Neil had approach Dods several times over a 5 or 6 year period prior to 1966 to buy the property contained in the "mill privilege" for its approximate land value, and at the time, the defendant Neil objected to Dods in that he had sold the lands to the plaintiff rather than to himself.

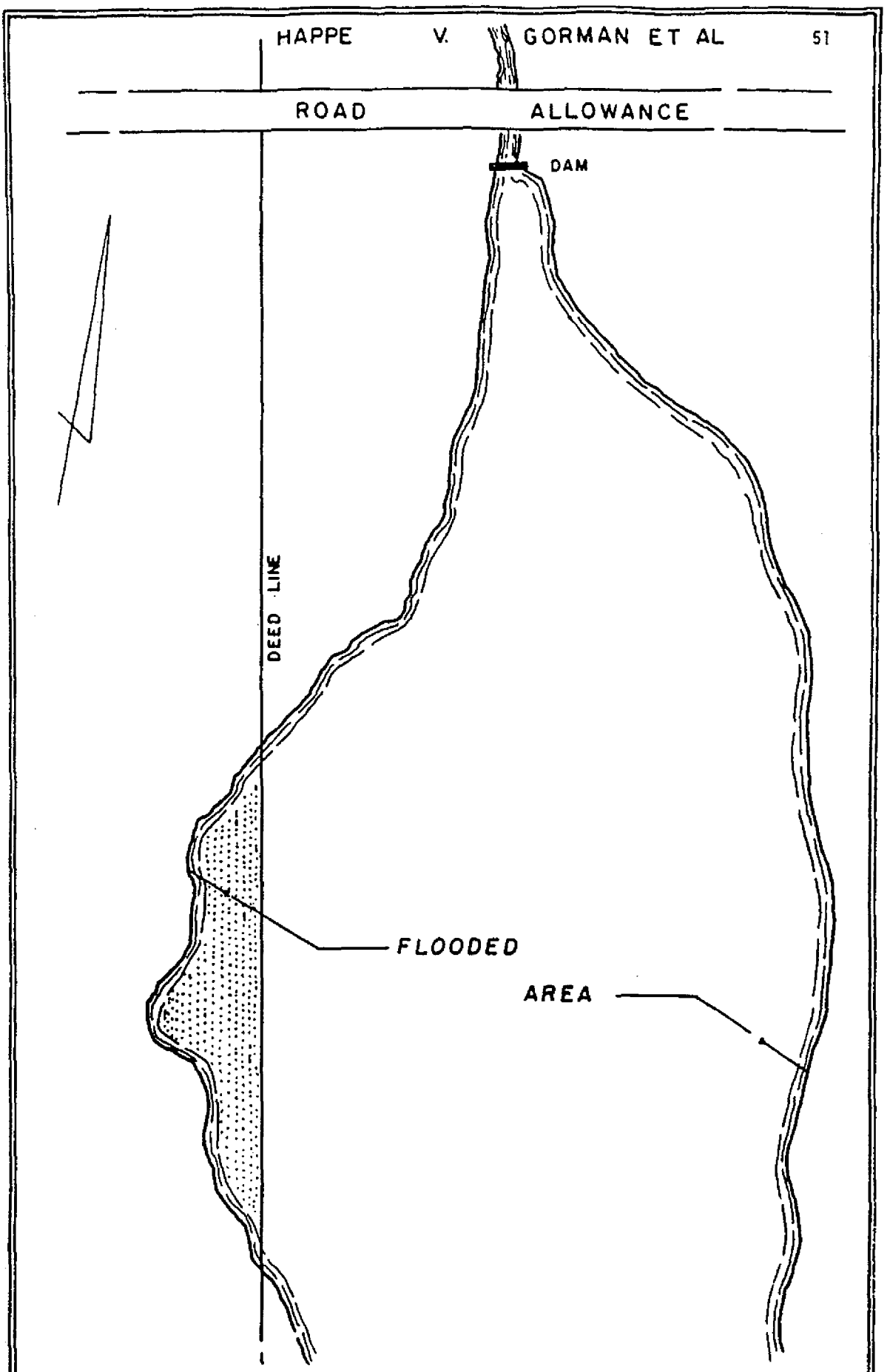
The Court found that Dods who had been added as a party defendant had acquired a possessory title to the whole of Parcels A, B and C as shown on the sketch. It was admitted by all parties that anyone who had acquired possessory title to the said lands then Parcel C was subject to a right of way in favour of the defendants.

The Court then went on to find that Dods had only conveyed to the plaintiff the lands included in the "mill privilege" and accordingly, the plaintiff was only entitled to a declaration as owner of the Parcel A as shown on the sketch and that Parcel B and C were in the name of Dods subject to a right of way over Parcel C in favour of the defendant. Again, what about S. 15 of The Conveyancing and Property Law Act and the dicta in the Fleet and Silverstein case? This case does not appear to have been referred to by Counsel on behalf of the plaintiff.

There is one further point of interest in this case in that defendants were allowed to water their cattle in the Credit River and they thereby obtained an easement in connection with the same. The defendants had also alleged that they had an easement for the pasturing of cattle on the land and the Court found that upon the evidence that only 2 acres of the more than 7 acres in question were suitable for pasturing and that cattle require approximately 1 acre per head and that with a herd of 56 head the defendant would not be likely to use this type of terraine for the pasturing of his herd. There may have been some minimal pasturing as ancillary to the cattle watering at the river. To the extent that this pasturing is incidental and ancillary to the watering of cattle, an easement was acquired. But it is to be distinguished from the separate and independent easemtnt of pasturing.

The unreported decision of Happe v. Gorman et al, handed to Lerner J. on the 1st of June, 1976, is somewhat similar but yet different in that in this case the dam is still in existence and the lands are still flooded by water; however, the flooded area encroaches unto other lands owned by an abutting owner.

The chain of title would indicate that in 1857 or prior thereto the stream was approximately 12 feet in width in its natural condition. The lands, a five-acre parcel of land was conveyed together with the right to construct a dam and flood a further parcel of land approximately 30 acres in area to a depth of 12 feet above the usual water level of the stream at the dam. It would appear that the flooding of such a depth encroached upon land formerly owned by one of the defendants,


ROAD ALLOWANCE
DAM
DEED LINE
FLOODED
AREA

Gorman, and subsequently conveyed by him to his co-defendant, Carswell.

The evidence disclosed that 2 or 3 times over the last 110 years the dam had given away and the stream reverted to its natural bed; however, in each occasion the dam was rebuilt and the lands flooded to the depth of 12 feet or more. The evidence further disclosed that the lands had for many years been used by the people in the immediate area of the village of Cadmus and various witnesses that gave evidence told that they were using and enjoying the pond for fishing, swimming, boating, and in the winter time for ice skating, as a short cut over the ice, and also for the removal of ice from the pond for their ice houses.

To quote from the case:

> *"All seemed to have a nostalgic recollection of their days around Brown's pond at Cadmus. It was commonly referred to as Brown's Lake".*

And again,

> *"However, this idealic and neighbourly atmosphere disappeared when the plaintiffs purchased the property in August, 1970. Mr. Happe took offence at the defendant, Gorman, Carswell's immediate predecessor in title and another neighbour using the pond and also fishing therein. He charged Gorman in Provincial Criminal Court with trespass but the case was dismissed when the Court learned that this lawsuit was outstanding. He also complained that the defendant, Gorman, when he was the owner constructed a duck blind in the pond near the western shore and in the area to which the plaintiff's claimed possessory title. Happe has also left instructions with his caretaker to call the Ontario Provincial Police whenever he finds persons, 'trespassing on the pond'".*

Counsel for the defendant at trial admitted that the plaintiff and their predecessors in title had acquired an easement over that part of the defendant Carswell's lands now covered by the pond by virtue of The Limitations Act, s. 30, 31 and 32.

However, this did not satisfy the plaintiffs who claimed possessory title and not an easement. The result of which would be to effectively prevent the defendants from ever entering the pond which covers part of the defendant, Carswell's lands.

After reviewing evidence of more than 15 witnesses, the evidence as to the user of the pond for recreational purposes over the years prior to the time the plaintiff acquired title, the Court concluded that the plaintiff had not met the onus which fell upon him to show that the predecessors in title had exclusive possession of the area in dispute during a continuous 10-year period, and therefore their claim for a declaration of their title to the area in dispute failed.

Now with regard to the prescriptive easement which might have been acquired under the provisions of s. 31, 32 & 34 of The Limitations Act, the Court concluded on the evidence that the plaintiffs and predecessors in title had enjoyed the right to flood the area in dispute for a period of at least 20 years without interruption within the meaning of S. 32 of The Limitations Act. Further there was no doubt that this right was enjoyed openly, visibly and unequivocally.

The right to flood is an easement and does not have to be used and enjoyed exclusively. Therefore, the finding in Court that the plaintiff or its predecessors in title never exclusively possessed the area in dispute for any 10-year period is not germane to the issue of prescriptive easement. The Court concluded in agreement with the admission at trial of the Counsel of Defendant Carswell, that the plaintiffs had acquired a prescriptive easement to dam the stream and thereby flood the area in dispute.

The plaintiffs in their prayer for relief had requested that declaratory judgement ascerting possessory title. The Court considered that this was not a proper case for exercise of its descretion to grant the plaintiffs a Declaration of Entitlement to the easement which they have acquired by operation of the Limitations Act. The simple reason for this is that the right to this easement has never been challenged or disputed. "If the plaintiffs were willing to content themselves with this easement rather than seeking to exclude the defendants completely from the area in dispute, I am sure this action would never have been brought and life in the village of Cadmus would go on in a neighbourly fashion free of litigation as it did before the plaintiffs bought their land."

With regard to the possessory title under The Land Titles Act we would refer you to the 1977 lectures on The Land Titles Act under the heading of S. 51 of that Act and re problems related thereto.

Assuming that one has been in possession for the Statutory period and has defeated the title of the true owner, what then are the implications of S. 29 of The Planning Act? The acquisition of a possessory title is by operation of the Statute of Limitations and any declaratory judgement which might be obtained from a Court with relation thereto would not appear to be caught within the phraseology of S.S. 2 and 4 of S. 29 of The Planning Act.

If, however, the trespasser is unsure as to whether or not he has acquired possessory title and approaches the true owner for a quit claim with regard to the lands in question assuming that the true owner is the owner of other abutting lands, then a consent of a Committee of Adjustments or a Land Division Committee would be required to such a conveyance.

In conclusion we would refer you to S. 14 of The Conveyancing and Law of Property Act which reads as follows:

> *"14. Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants. R.S.O. 1960, c.66, s. 14"*

Consider for a moment if in the case of re St. Clair Beach Estates Ltd., the result had been different and MacDonald had been entitled to a possessory title to the lands in question, assuming that the main parcel was registered in MacDonald's name together with that of his wife as joint tenants. Presumably, Mr. and Mrs. MacDonald would have acquired their title as tenants in common. Recall part of the evidence for a moment: There was a sand box between the cherry trees; there was swings; part of the area was used as a skating rink. Presumably, there were children who also used and enjoyed the property. Would these children have acquired a proprietory interest as a tenant in common with their parents, or would the proprietory interest only be attracted to persons named as the registered owners of the abutting lands with which the disputed lands were being used and enjoyed?

DEED vs EVIDENCE

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John B. Dodd O.L.S.
Simcoe,Ontario

DEED vs. EVIDENCE

John B. Dodd, O.L.S.
Simcoe.

The topic I have been asked to discuss today will be dealt with from the viewpoint of one practising surveyor whose experience is almost completely gained in Southwestern Ontario.

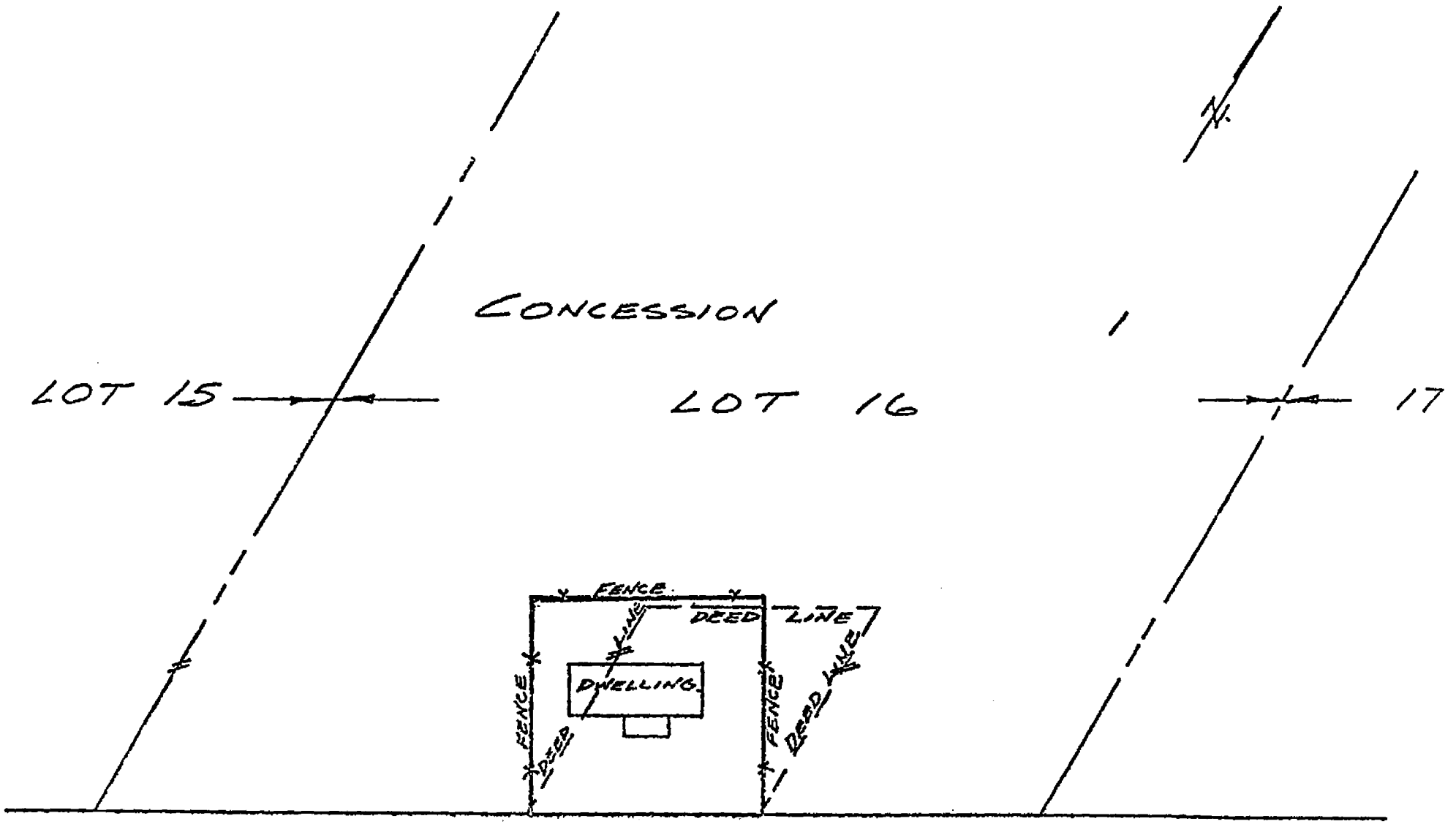
As most of you are aware, there is very little land registration in the southern part of the Province under The Land Titles Act. The Registry Act provides the only means in most instances of recording land descriptions and transactions. Many areas do not at this time have a Land Titles Office for even new subdivisions and consequently, even these are still being registered under The Registry Act.

The area of Ontario in which I practise did not have a resident surveyor on any permanent basis until about 1949. Prior to this what little survey work that was done in the area was done by surveyors located anywhere from 27 to 75 miles away. In addition, there was quite a bit of work done by unqualified people such as grandfathered engineers.

As a consequence there are no survey records of value in the area dating back much more than 30 years. Even survey notes of the original township surveys are of no use when one wishes to determine a dimension of a particular lot or road allowance, since the total field notes available for are a group of about six single front townships consists of about 2 pages of notes outlining the method of determining the lot dimension and road widths for the entire block, and even this is not of any value because the mathematics are in error.

Such items as original monuments of townships surveys or even old town subdivisions are only a theoretic dream. At this point in time it is in almost all cases impossible to determine the original limits of a boundary in any of the old town plans or township surveys.

This preamble brings us to the topic "Deed vs. Evidence". The Surveys Act is the one piece of legislation that is intended to provide guidelines for the establishment of boundaries. We all remember as students struggling with this statute in order to pass our OLS exams. When one reads this Act it appears on the surface to be the answer to all survey problems. However, as we all know The Surveys Act only scratches the surface. Consequently, we find it necessary to adapt and use common sense more than anything written in law. I understand that in certain areas of the Province The Surveys Act has its own peculiar interpretations such as in the Stratford area where Fred Pearce is the administrator of a piece of non-legislation known as The Surveys Act (Pearce Translation). I am


CONCESSION
LOT 15
LOT 16
17
FENCE
DEED LINE
DWELLING
FENCE
DEED LINE
FENCE
DEED LINE
ROAD ALLOWANCE

certain that in the southernsections of the Province there are many more translations of a similar nature.

Unfortunately economics prevents us from doing as much research on a particular job as we should, however, my experience in this area of Ontario seems to indicate that there is very little to be gained by attempting extensive research and in almost all incidents the results are unchanged as a result of time spent.

(sketch)

An example of the problems encountered in completion of field work is shown on the screen.

It is necessary to locate the SE angle of Lot 7 for a lot angle tie. As you will notice the SE¼ of Lot 6 and the southwest ¼ of Lot 7 are in the same ownership. There is no evidence of the line between Lots 7 and 8. The concession line east of Lot 8 is broken by a river and the road between concessions I and II leaves the road allowance for about 3 lots. The concession line in this area is obliterated and there is no further evidence of a lot line until Lot 11/12, a distance of about 2 miles which would have to be traversed along a winding road. The distance bearing between Lot 11/12 and the southwest angle of Lot 7 could then be calculated and the location of the SE angle of Lot 7 established. This method would likely have the blessing of the theorists in the crowd since it closely follows the Surveys Act. However, due to economic considerations this method was quickly discarded and we accepted the two half lot fences as shown on the sketch as being the best evidence of the lot line and divided the distance between them equally to establish the lot corner. I am certain that the next surveyor in the area will be pleased to use the newly planted bar as evidence of the lot angle.

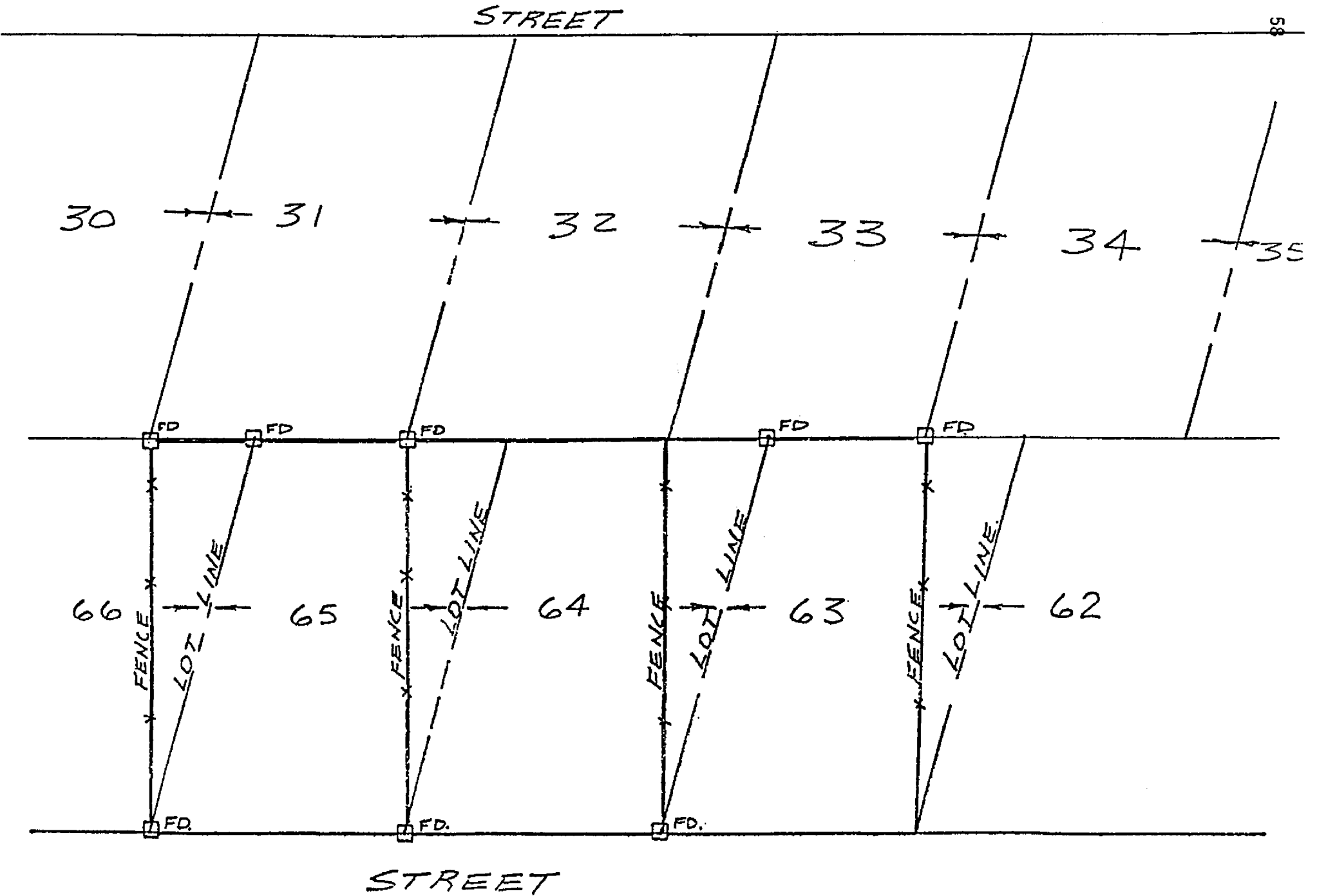
(sketch)

This next sketch is a very standard problem that occurs where the deed was drawn with reference to the lot lines, namely, that the side limits are parallel with one or the other line which runs at an angle other than 90' with the front of the concession. The deed was drawn and the vendor, who was selling the lot from a larger parcel (farm) together with the purchaser go to the site and proceed to lay out the property as they think it should be. They then attended at their lawyer's office or as often was the case in smaller centres, the conveyancer's office and a deed is drawn using what little information is available to the lawyer. The result is as shown. Some time later the property changes hands, or the owner requires a mortgage and a survey is required, the surveyor finds the problem on the site and likely confers with the lawyer for his client. If all parties involved are co-operative, then it is no problem to straighten out the title by any of the following methods:

(1) correcting deed from the original vendor or his successors.

(2) quit claim deeds to and from each party involved.

(3) do nothing except prepare an "R" plan and place it on title showing the lands are occupied as the lands in the


STREET
30
31
32
33
34
35
FD
FD
FD
FD
FD
66
65
64
63
62
LOT LINE
FENCE
FD.
FD.
FD.
STREET

deed by showing the various comparisons of distance and bearing.

If no co-operation is forthcoming then there is every chance of litigation. (sketch)

Let us take a look at a problem in a town plan that generally fits quite well with the ground evidence.

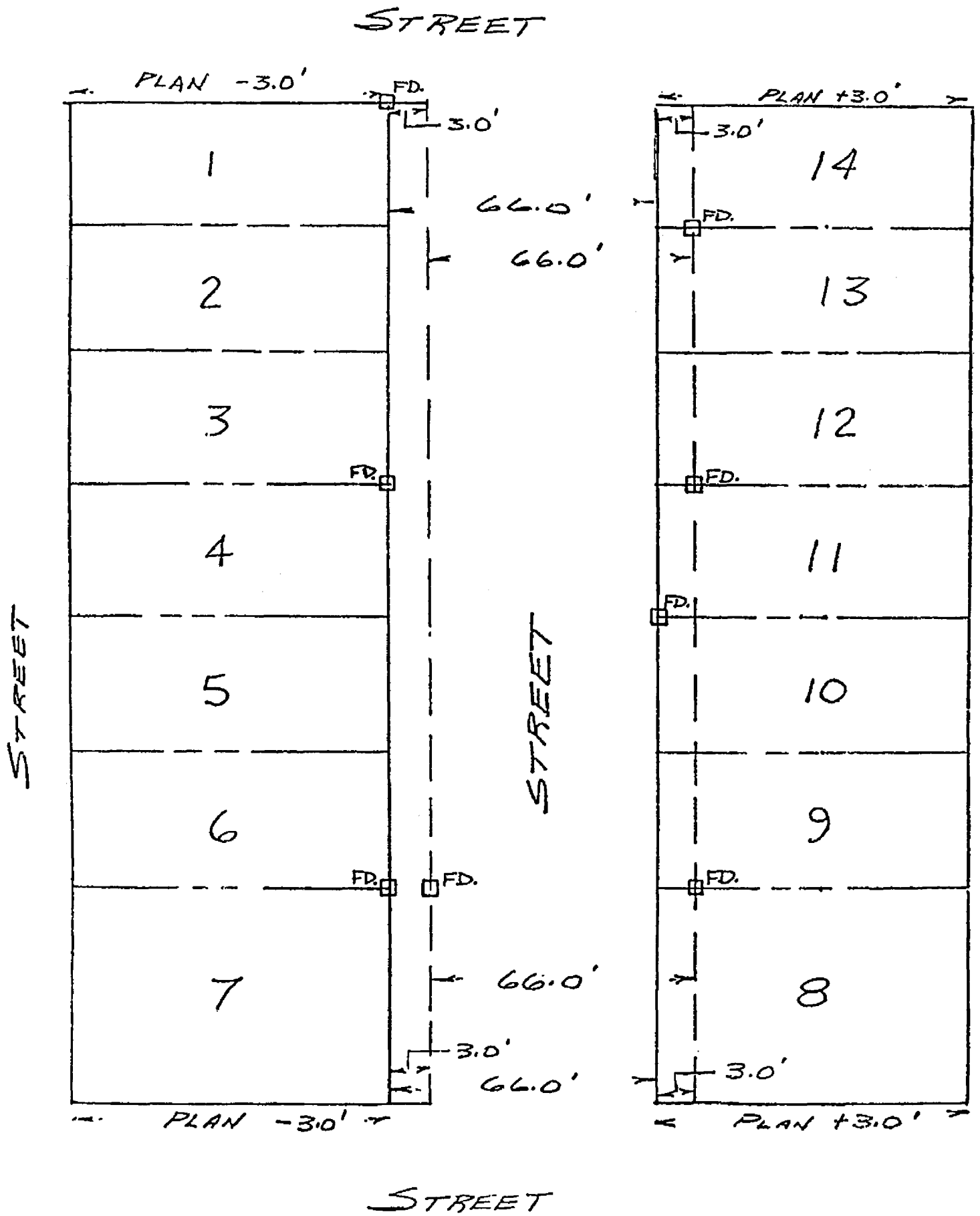
A street line between two blocks was established 20 to 30 years ago by a surveyor probably using the best evidence that he could find at the time. Subsequently, it is found that the block to the east is about 3 feet short in depth while the block to the west is 3 feet long in depth. Up until this time everybody accepted their shortage or surplus without argument.

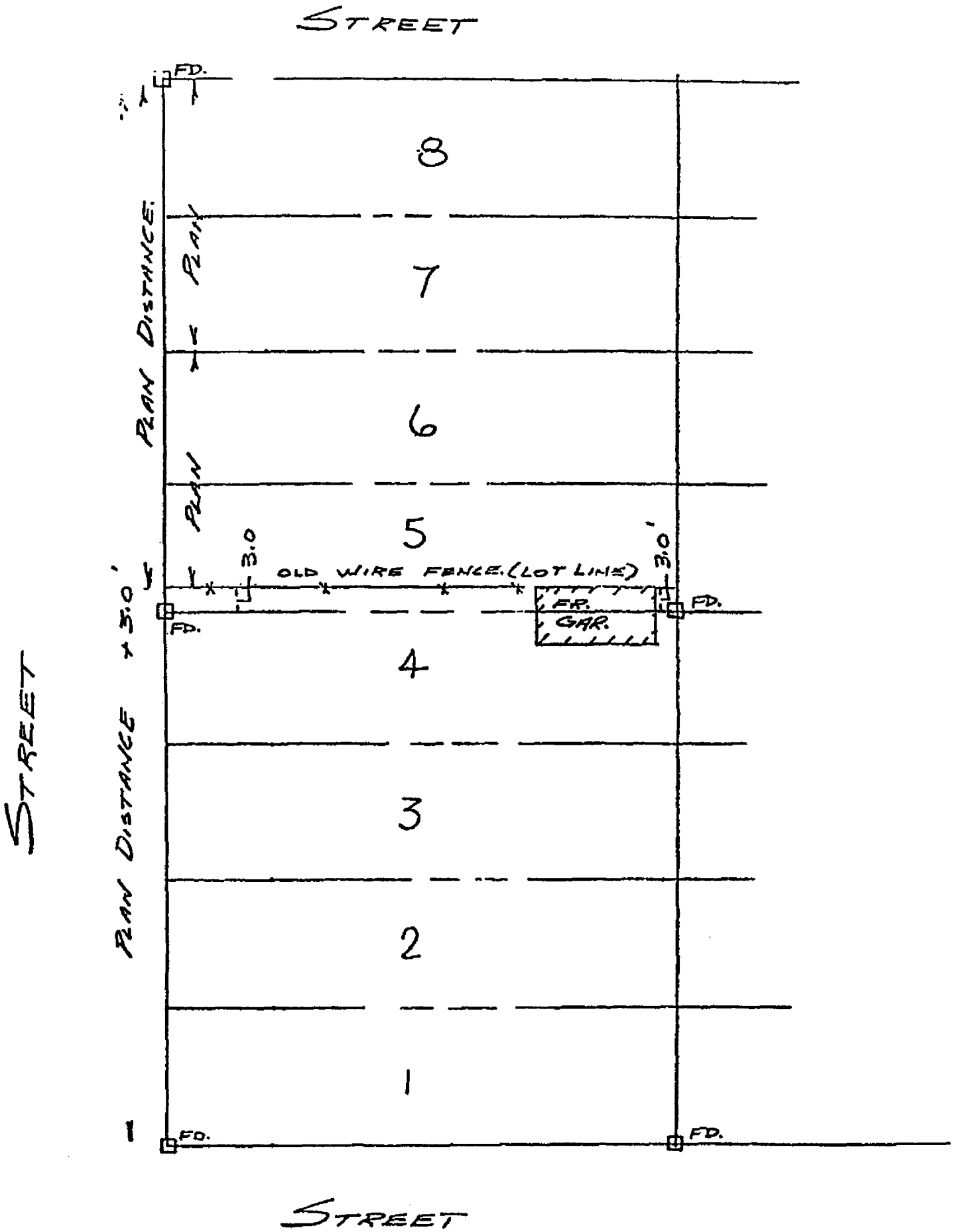
Along comes modern surveyor to do a simple location certificate for mortgage purposes, quite satisfied to accept previous monumentation in the area, however, we are equipped with an electronic bar finder and in our search for the abovementioned evidence we find another series of bars and pipes buried about 3½ feet in the ground all fitting location of lot lines quite well and in very good alignment with themselves but located 3 feet west of the line established in the last 30 years. If this new found line is accepted, the block depths will now fit the plan quite well, but in accepting the new found line hydro and telephone poles will be located on private property and several dwellings which were built in recent years will be in contravention of the set back regulation, in the building by-law. It seemed to me that the most reasonable solution to the problem was not to create a problem and accept the lines as established in recent years. I simply ask, what would you do under similar circumstances.

Let us take a look at the sketch on the screen (sketch)

You see a block on an old town plan dating back about 90 years. About 15 years ago the town hired a surveyor to establish all the block corners in the town. These were monumented using SIB's or cut crosses where concrete interfered. Since that time these block corners have become the basis for most survey work in the old sections of the town. Generally speaking they work very well and very little in the way of problems have been caused by this.

This particular block was established using survey evidence by another surveyor from out of the area who did not believe in proportional division and established lot lines at the north and south end of the block by net measurements from the closest block corner. There is a surplus distance in the block of about 3 feet due to previous surveys to all rest in the central lots in the block.


STREET
PLAN -3.0'
FD.
3.0'
1
2
3
4
5
6
7
66.0'
66.0'
66.0'
66.0'
3.0'
3.0'
PLAN -3.0'
PLAN +3.0'
14
13
12
11
10
9
8
PLAN +3.0'
STREET
STREET
STREET


STREET
FD.
8
PLAN DISTANCE
PLAN
7
6
PLAN
5
3.0
OLD WIRE FENCE. (LOT LINE)
3.0
FD.
FD.
FR.
GAR.
4
PLAN DISTANCE + 3.0
STREET
3
2
1
FD.
FD.
STREET

We are required to do a survey of lot 8 and investigation shows an iron bar (not identified) at a point net distance north of the block corner at the apparent NW angle. There is also a bar located at the apparent North East angle of the lot.

Site examination reveals an old fence (at least 40 years) approximately 3 feet north of the iron bars found on the site. There is also a garage at the rear of Lot 8, built almost to the fence line.

Had there been no monumentation present it would have been my decision to accept the fence line as the best evidence of the lot line and allow the suprlus land to rest in lots 8, 9 and 10.

Investigation northerly reveals possessory limits roughly fitting the plan dimensions, however,none are as good as the fence found between lots 7 and their position could vary by as much as a couple of feet, (hedges, limits of mowed areas, etc.)

It seems to me that the correct procedure to follow in this instance is to prepare an "R" plan and take declarations from the previous owners which went back at least 30 years as to the fact that the subject fence had been used and understood to be the lot line. However, when this was brought to the attention of the lawyers involved in the sale contrary to suggestions from ourselves, went to the owners of Lot 7 and asked them for a quit claim deed to that part of Lot 7 that lay south of the fence. Seeing that they (the owners of Lot 7) may actually have more land than they thought they had and being apparently somewhat greedy, they refused to quit claim.

The present status of this is that the owners of the lands to the north under the advice of a lawyer who should know better, are threatening legal action to acquire lands that they have no right to acquire.

How much easier it would have been to accept the fence as the lot line which we wanted to do and thereby avoid litigation since the owner to the north would have been unaware that there was a possibility of there being anything wrong with the title in the first place.

Based on the previous illustrations, there are probably some very common examples to very common problems. It is my opinion, and I stand to be corrected on this, that most cases of adverse possession are brought about by faulty descriptions and not by conscious effort by a person to defraud his neighbour of land to which he has no right. The faulty descriptions may well have been prepared by a surveyor, based on survey-it, may not have been 'we don't know', and I don't think we need to elaborate on that. Similarly an individual may convey ... or mortgage land to which his title has been extinguished by adverse possession in all innocence. And I think probably the greatest danger I see is not so much the individual..., and I stand to be corrected in law on this, but the individual who has the land by adverse possession, he probably isn't in any great difficulty, but what happens to the mortgage company, that loans money on this particular

piece of land, by the paper title and somewhere along the line, somebody says: "To heck with you. That piece of paper doesn't cover the land in question at all. Go collect your mortgage from somebody else."

I don't have anything else to add to this, except thank you and if there are any questions or any discussions, I'd be happy to take part in it.

ADMINISTRATIVE TRIBUNALS

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J.D.Crane, Barrister
Lay Member, Council
Association of Ontario Land Surveyors

ADMINISTRATIVE TRIBUNALS

J.D.Crane
Barrister
Lay Member,Council
Assoc.of Ontario
Land Surveyors

When Lorraine Setterington first called on January 4th, she left a message with my Secretary that she wanted me to make a 15-minute presentation - "something very simple and informal, on 'Discipline'". I went along in that vein for some time and was quite pleased because I thought I could merely refer to my several letters to your President streamlining the Discipline Hearings. Unfortunately for me, I received a call from Gordon Mackay, who, I understand, is in charge of this Seminar; and, on the assumption he was a client, I returned the call only to learn to my horrow that I was not going to be speaking on 'Discipline', but rather, he wanted me to speak on 'The difference between rules of evidence before a tribunal and in a Court and the admissibility of evidence generally' and, presumably, was tips or suggestions I can make for those of you who are either appearing before administrative tribunals or sitting on tribunals.

Finally, on February 21st, Professor Lambden called me and advised me that I should prepare a speech of 20 minutes which was to last from 1.37 p.m. to 1.57 p.m., and he suggested that I use a partial text the lecture I gave to the students at Erindale College, but to put it in capsule form.

That was the bad news. The good news that Professor Lambden left with me was that I was to be a guest of your organization and was to meet him at 12.00 noon for refreshments.

With that brief preamble, you can understand my reluctance at being introduced as an expert - because I don't think there is such a person in this field - and the best definition I have ever heard is "some s.o.b. from out of town".

Frankly, I was searching for another reason why Gord Mackay and Professor Lambden asked me to deliver this lecture and initially I thought it was because I had some legal knowledge, but then I realized that perhaps it was because I am a member of the Environmental Appeal Board and no doubt David and Gordon thought I had considerable experience in gumming up the works of the Board and could make some suggestions that would be helpful to you today.

As a starting point, I would suggest that whether you are retained as an expert witness to appear before the Master of Titles on a boundary hearing, or whether you are a surveyor actually sitting on the Board, you should first get your facts straight before you start running around looking at law; and it is surprising how many

witnesses, including professional engineers and surveyors, appear before the Boards and Courts not properly briefed as to their role.

Secondly, you should be absolutely sure that you have authority to hear the appeal if you are sitting on the Board; or, if you are a witness, you should know the statute and the section under which you are appearing so that your rights are crystal clear.

For example, I can give you an incident that occurred in our office in my practice where I was retained at about 3.00 p.m. on the last day to appeal to the Ministry of Natural Resources concerning a conservation matter. The client and his solicitor sat in my office while I dictated the letter, and in the style of cause mentioned the parties who, I was instructed, were involved; and then a month later I learned that the applicant for the permit, a construction company, had not appealed. While this was not my fault personally, because I did not have time to check out the matter personally,it points out that in most cases your rights are fixed by statute; and, if you don't comply with the letter of the law, you may not have an appeal.

In the case that I mentioned, we may pull it out of the fire on the basis that the developers, who did appeal, were also the owners of the property; and we might be able to argue that the construction company, which was the applicant, was merely the agent of the owner. However, if I had had the time (which I didn't), I would have found out, by taking a detailed chronology from the client and from the solicitor of all of the background facts and, armed with this information, I would have drafted a Notice of Appeal to include, not only the applicant construction company, but also the owners.

In that example, the time limit was 30 days; and yet the owner and the solicitor sat on it for 29 days and then came to see me at about 2.30 in the afternoon, when I was leaving for a Discipline Hearing at 3.00 p.m. So, even lawyers and developers quite often don't know what the facts are; and I suspect that surveyors, whether they are sitting on the Board of appearing before a Board, often don't know what the true facts are.

To summarize, before you go very far, find out the facts and, secondly, find out the authority under which you should proceed. Once you get over that hurdle, the next step is that you should prepare a list of what you have to prove in order to succeed and then you should do, either in your head or on a paper, a rough plan of how you are going to prove this list. In other words, you should know before you start where you are going and how you are going to get there. This probably sounds pretty fundamental; however, I just finished sitting on an Environmental Appeal Board Hearing which went for 2 days in December and 2 days in February and it wasn't until we started to bludgeon counsel for the Ministry and for the company that we really got down to the real issue in

dispute, and shortly thereafter a revised control order was agreed to, which, in my humble opinion, could have been arrived at in December if both parties had sat down and made a list of those things on which there was no dispute and then the Hearing could go ahead to hear the one or two things in dispute.

As a brief aside and as a concession to Lorraine who initially asked me to speak on 'Discipline', I recommended to your President that a statement of facts be prepared, if possible, in discipline hearings so that the undisputed facts can be admitted and the hearing can be shortened because the Discipline Committee has to deal with only one or two issues in dispute.

Also, I have recommended the streamlining of drafting of charges.

With respect to the different procedure before Courts and Administrative Tribunals, generally speaking in layman's language, the procedure is stricter in Courts and regulated by formal rules of evidence; whereas in Administrative Tribunals the rules of evidence are not nearly so strict and neither is the procedure. But, generally speaking, you should follow the suggestions set out in The Manual of Practice on Administrative Law and Procedure in Ontario, prepared by Professor Mundell and which recommendations flow from the McRuer Report and also from The Statutory Powers Procedure Act (1971), and The Public Enquiries Act (1971), and The Judicial Review Procedure Act (1971).

You can read this pamphlet at your leisure; but I would like to stress a few points to you, namely:

(a) You should give adequate notice to all parties of the time and date of the hearing;

(b) If charges are involved, you should give the defendant a copy of the charges so he can meet them;

(c) At the hearing, itself, the Chairman can obviously be less formal than a Judge, but he should preserve order, and have some order as to how he is going to proceed. For example, in the Tricil Hearing before the Environmental Appeal Board, we suggested to the parties that they call witnesses out of order and, indeed, before the Ministry concluded its case, we suggested that we hear from the company as this would save time and expedite the hearing, which was done.

Secondly, because the evidence at times was technical, the Chairman swore in the company Chemist and the Ministry's Control Officer so that, from time to time, they gave evidence not from the witness box but from the audience which, of course, could not be done in a normal trial.

(d) You should have a transcript of the hearing, and, at the end of the hearing, you should allow the parties to sum up their cases and then you should make a decision and then give reasons for your decision.

As a brief aside, I could perhaps give you some tips on giving evidence, because I have noticed at the Environmental Appeals that witnesses, as well as engineers, tend to mix up evidence with argument, and you should remember to give your story and then sit down; and, when the other side gives evidence, you should ask questions which will destroy their case and help your case; but you should not seize the opportunity to make another argument. And, finally, you should reserve your argument until the end of the case.

You should also seriously consider whether you could effectively conduct the case and be a witness, because there is an old saying that'he who acts for himself has a fool for a client'; and, even if you decide to act for youself, you should know what you are trying to establish in cross-examination; because the best cross-examination in your case may be not to ask any questions because the other side maybe didn't prove its case and you will only help prove it for them by the way you ask questions.

I think I will conclude by dealing briefly with Rules and Evidence and, generally speaking, in a trial a Judge will not allow you to say what someone else told you. There are exceptions, such as psychiatrists giving opinions based on hearsay evidence; but, generally speaking, this is the rule in a Court of Law.

The other exceptions are too numerous to mention in this lecture, but any textbook on evidence will enumerate what are called exceptions to the hearsay rule.

In administrative hearings the tribunal has wider powers and may admit hearsay evidence, perhaps not as truth of the contents thereof, but as an aid to help them find the truth. I can forsee a situation in a boundary dispute where the main parties are now dead but the tribunal may allow a witness to give evidence that the road has been in this location for 100 years and the witness remembers his grandfather, who is now dead, telling him that the road was there when "Grandpa was a boy". This would be admissible because the tribunal is interested in the best evidence and, in the circumstances, this probably would be the best evidence of the road's location unless, of course, there were surveyor's notes or a survey in existence which would be better evidence.

In conclusion, I want to thank you for your attention, invitation and hospitality; and you are probably wondering why Gord Mackay and Lorraine Setterington and Professor Lambden asked me to come to speak to you today, and it was because I was the only lawyer in the Province who could tell you all I knew about anything and in particular formal and informal proceedings before administrative tribunals in 20 minutes. Thank you.

POSSESSORY TITLE

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Professor W. B.Rayner
University of Western Ontario

This paper is printed with the kind permission of the author. The paper was presented at a seminar of the Law Society in May 1977 entitled "Possessory Title- Fact or Fiction?"

POSSESSORY TITLE

Professor W.B. Rayner
University of Western Ontario.

HISTORY

To examine the effect of the Limitations Act [1] of Ontario and possessory title resulting therefrom one must have some general understanding of the development of the concept of "limitation" and "prescription" The word "limitation" means the extinction of stale claims and obsolete titles. [2] Although the concept is necessary, for reasons to be discussed later, it was unknown to common law and thus depends upon statute for its vitality. The concept of prescription, on the other hand, was a common law doctrine whereby certain rights, in the main, easements, could be acquired. In essence prescription [3] is a common law rule of evidence, extended by statute which raises a presumption of a grant from the owner of land to another because of uninterrupted and peaceable user, so that in effect the user acquires title from the presumed grantor. In this sense prescription operates positively, much like a conveyance. Limitation on the other hand operates negatively to extinguish the title of the dispossessed owner.

The law of England relating to the period within which actions could be brought for the recovery of land was codified and simplified by the Real Property Limitation Act of 1833, [4] as amended by the Real Property Limitation Act of 1894.[5] The Limitations Act of Ontario is based upon these Imperial Statutes.

Prior to 1833, the period of limitation varied according to the particular remedy sought. Since there were various remedies available, the period was not uniform in all cases. Although in 1623, the principle that an action must be brought within a fixed number of years became operative (prior to that time the period had been first fixed by the discretion of judges, and then later fixed by certain dates chosen by the legislature), the varing periods of limitation caused some difficulty.[6]

The various forms of actions at common law could roughly be divided into possessory actions, and proprietary actions. The former did not determine the right of property at all, merely the right to possession; the latter determined the right of property. Because the possessory actions offered a speedier remedy the proprietary actions became obsolete and the ancient forms of writ for those actions were abolished. [7]

In addition to the judicial remedy, the person entitled to possession had, and still has, the summary remedy of entry on the land and repossession through self-help (subject,of course,to the general limitations placed upon by the Criminal Code and the tort of trespass to the person if violence is used.) By exercising the remedy of self-help in a symbolic fashion, a form of notional possession in the true owner was maintained so as to prevent the limitation period running against him. This symbolic concept, known as continual claim operated as follows: a person, deterred from entry by menaces or bodily fear, could anproach as near as possible to the land and make a claim with certain solemnities. The claim remained in force for a year and a day and amounted to a legal entry. If repeated once in the space of every year and a day (hence "continual claim") the claim prevented bar of the action by the Statute of Limitations.

The Ontario Act abolishes the common law remedy of continual claim, [8] together with the doctrines of descent cast, discontinuance or warranty. [9] Those latter doctrines, of historical interest only, related to the right of entry and continual claim and are beyond the scope of this paper.[10] The Act also specifically provides that "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."[11]

PURPOSE

The Limitations Act operates so as to extinguish the title to land when land is possessed by another. The possession must be of the quality and duration prescribed by the Act. For reasons of public policy such limitation of actions are necessary even though a wrongdoer may gain thereby. It has been suggested that the concept of limitation automatically quiets titles openly and consistently held; that the concept assists to prove meritorious titles and that it corrects conveyancing errors. [12] Moreover, the concept overcomes some evidenciary problems that would arise in its absence. The passing of time can lead to a clouding of the memories of witnesses or the loss or destruction of documents of title.

OPERATION OF THE ACT

(a) GENERAL

As mentioned previously,the Act, in establishing periods of limitation,operates negatively not only to bar an action to recover possession after the expiration of the limitation period,but also to extinguish the title of the person dispossessed.

The bar of the action results primarily from the operation of s. 4 of the Act which provides:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten 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 the right did not accrue to any person through whom he claims, then within ten 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 it.

The extinguishment of title results from the operation of s. 15 of the Act which provides:

> 15. 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, is extinguished.

Apart from specific provisions relating to the Crown and easements or profits a prendre arising by prescription, the remainder of the provisions of the Act relating to land attempt to define a starting point for the running of the period and to vary the period for persons suffering from a disability.

(B) THE QUALITY OF POSSESSION

The earlier Statutes of Limitation distinguished between adverse possession and non-adverse possession. Thus, possession by one joint tenant was not considered as adverse vis-a-vis all other tenants. Similarly possession by an overholding tenant or a tenant at will was not adverse. However, the Act now does away with the distinction between adverse and non-adverse possession, subject to certain exceptions. [13] Thus, the possession by one co-owner is not now deemed to be possession by all co-owners.[14]

Accordingly, time begins to run from the time when the right of the true owner first arose regardless of the possession of the person dispossessing the owner. However, in one sense the quality of the possession must be adverse or the statute does not apply. For example possession by a person as licensee, fiduciary, agent or servant of the owner is in law possession of the owner. [15]

In order for a trespasser to establish possession that amounts to dispossession of the true owner and hence starts time running under the Act, the trespasser must show exclusive possession and animus possidendi, i.e., an intention to exclude the owner as well as others. [16]

It has often been said that possession necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" which was known or might have been known to the true owner, to the exclusion of the true owner for the full Statutory period. [17]

Acts which do not interfere with the owner's enjoyment of the land for the purposes for which he intended to use it are not evidence of dispossession. Moreover, it should be remembered that when one has documentary title to land he is considered to be in possession of the whole by virtue of the doctrine of constructive possession unless another is in actual possession of some part to the exclusion of the true owner. [18]

Title by possession cannot be established by equivocal acts of possession referable to a limited right of user. Although user may give rise to a prescriptive right in order to acquire possessory title there must be occupation which involves actual and complete possession to the exclusion of all others. [19]

A person who is in exclusive possession of land, even when uncertain of his right to remain in possession, can acquire a possessory title. [20] Enclosure is not an indispensable [21] ingredient to the acquiring of possessory title, nor is it conclusive. [22] Rather, it is strong evidence of possession.

Before leaving the topic of the quality of possession two presumptions should be borne in mind. First, a holder of the paper title who is in possession of part of the lands is presumed to be in possesssion of all the lands. Thus, actual possession of a third party will be necessary to establish dispossession. [23]

In the same vein, in the absence of any paper title holder, simple actual possession may give rise to a presumption of ownership. If that presumption is rebutted, the quality of possession required by the Act and for the appropriate limitation period must be shown. [24]

Secondly, the concept of constructive possession is applicable to a person who takes possession with colour of title. It is not essential that the title be a valid one, for it is the possession which ultimately results in protection. However, it is necessary for the person to enter under a real, bona fide belief in title, a question of fact. [25]

In Chittick v. Gilmore, [26] a defendant obtained a tax deed which unknown to him was void. Although the Court concluded that there had not been continual actual possession of part of the land, the entry under the void tax deed might well be considered entry under a colour of title.

(C) THE SCOPE OF s. 4.

Section 4 bars an action to recover land or rents once the statutory period has run.

Under s. 1 "land" is defined as follows:

1. (c) "land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency; *(27)*

"Rent" is defined as follows:

(d) "rent' includes all annuities and periodical sums of money charged upon or payable out of land. *(28)*

It should be noted that the Act uses "rent" both in the sense of rent charge and rent service.

(i) EASEMENTS

In spite of the broad definition of land, it has been held that the section does not apply to extinguish a right to an easement. [29]

(ii) LAND TITLES

When land is registered under The Land Titles Act [30] no length of possession will defeat the registered title. [31] However, if the statutory period has run before first registration under Land Titles, the person in possession will be protected as registration is not to prejudice any adverse claim as against any person registered as a first owner with possessory title only. [32]

It does appear to be the case that the possessor must have been in possession for the full statutory period even where lands are adjoining notwithstanding the provisions of s. 51 (1) 3, which provide that registered land is subject to "any title or lien that, by possession or improvements the owner or person interested in adjoining land has acquired to or in respect of the land." In essence the Courts have construed "has acquired" as meaning "has finally acquired" and not as meaning "in the process of acquiring".[33]

(iii) CROWN LANDS

At common law, time under the various Statutes did not run against the Crown. The Nullum Tempus Act [34] provided a 60 year limitation period that did run against the Crown. The Act was repealed in 1902 [35] and certain sections substituted therefor. These sections appear primarily now as s. 3 and s.16 of The Limitations Act.

s. 3 reads:

3. (1) No entry, distress, or action shall be made or brought on behalf of Her Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action has first accrued to Her Majesty.

(2) Subsections 1 to 3, 5 to 7 and 9 to 12 of Section 5 and sections 6, 8 to 11 and 13 to 15 apply to rights of entry, distress or action asserted by or on behalf of Her Majesty.

It has been held, prior to 1902 that the Nullum Tempus Act did not apply to unsurveyed or waste lands owned by the Crown.[36] Section 16 codifies this judicial conclusion and extends it to lands included in road allowances, subject to rights acquired before June 13th,1922. [37]

WHEN TIME BEGINS TO RUN

(i) GENERAL

In general time begins to run when the cause of action arose. However, some difficult questions arise. For example, when a life estate is followed by a contigent remainder and the life tenant is dispossessed, when does time begin to run against the remainderman?

Several possibilities present themselves. Does it begin to run when actual dispossession of the life tenant occurs or when the life estate is barred by the Act? Does it run only when the contingency is met or only when the remainderman's interest vests in possession? The Act attempts to meet these problems by deeming various starting points for the running of the time.

Section 5 (1) determines that the cause of action arises when a person has been dispossessed or has discontinued possession. Dispossession occurs when a person comes in and puts another out of possession. Discontinuance occurs where the person in possession goes out of possession and another person takes possession. *38* Mere non possession by the owner is insufficient to cause the running of the period.

Successive possessors may gain possession of land adverselyto the true owner. If privity exists between successive occupants it is clear the statute operates for both periods of possession. *38A* Indeed, it now appears that privity is not necessary. *37B* However, what is essential is that there be no interruption of possession by the various persons in possession from time to time. If there is an interruption the person holding paper title is deemed to be back in possession because of the doctrine of constructive possession. *38C*

Where an owner dies in possession and another person takes possession after the death, time begins to run from death. *39* It should be noted if dispossession or discontinuance occurred before death the period runs from the date of dispossession or discontinuance.

If a person grants land to another, and yet remains in possession the period begins to run when the latter person was first entitled to possession under the grant. *40*

Where land in a state of nature after the Crown grant, the grantee of the Crown not having taken actual possession by residing on or cultivating some part, is possessed by another, the expiration of ten years is not a bar to the action unless the grantee had knowledge of the possession. The cause of action is deemed to accrue when knowledge was had and a maximum period of 20 years is established. *41*

(ii) TENANCIES

The time when the period begins to run varies according to whether the tenancy is under a lease in writing, a verbal lease or a tenancy at will.

In the case of a lease in writing the cause of action is deemed to first accrue at the time when rent was first received by the person wrongfully claiming. If the period is to continue to run no payment in respect to the rent reserved must be subsequently made to the true owner. [42] It should be noted that the landlord's right is not barred merely because of the non-payment of rent. Even though rent arrears may not be claimed after six years, [43] time runs against the landlord with respect to his reversion when he is entitled to possession, i.e., at the expiration of the lease. [44]

If the lease is verbal, whether the tenancy be periodic, the cause of action accrues at the determination of the first of such periods if the tenancy is periodic or when rent was last received whichever last happened.[45]

If the tenancy is a tenancy at will the cause of action arises either at the determination of the tenancy or at the expiration of one year after its commencement when the tenancy is deemed to have determined.[46]

(iii) FORFEITURE OR BREACH OF CONDITION

Section 5 (9) of the Act provides:

> Where the person claiming such land or rent, or the person through whom he claims, has become entitled by reason of any forfeiture or breach of condition, such right shall be deemed to have first accrued when the forfeiture was incurred or the condition broken.

It must be remembered that forfeitures and breaches of condition which confer a right of entry may be waived. The Act expressely preserves this right by virtue of s. 5 (10) which provides:

> 10. Where any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover the land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when it became an estate or interest in possession as if no such forfeiture or breach of condition had happened.

Were it not for subsection (10) time would run under subsection (9) immediately upon forfeiture or breach.

There is some question whether s. 5(1) has any application to possibility of reverter following a conditional limitation which revests the estate automatically in the grantor or remainderman. *47* In that case, no right of waiver is involved.

(iv) FUTURE INTERESTS

Subject to s. 6 of the Act, time does not run against the owner of a future estate or interest until he is entitled to his estate or interest in possession. *48* This is the case notwithstanding that at some time prior to the determination of the prior estate, the person entitled to the future estate was in actual possession of the property. *49*

Section 6 of the Act provides:

> 6. (1) If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of the land, or in receipt of the rent, at the time when his interest determined, no such entry or distress shall be made and no such action shall be brought by any person becoming entitled in possession to a future estate or interest but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of the land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer.

There is no difficulty if the owner of the prior estate was dispossessed but his claim was not statute barred during his life.

In that instance the remainderman may bring his action within ten years of the dispossession of the life tenant or within 5 years from his death, whichever is the longer period. Thus, if X grant to A for life, remainder to B, and A is dispossessed 6 years before his death, B could bring an action within 4 years of the death under the first alternative (4 years being the remainder of the 10 year period) or within 5 years of the death under the second alternative.

The more difficult question is what period is permitted the remainderman when the life tenant is dispossessed and the full ten years have run before his death. It has been suggested that in such a case s. 6 (1) has no application and the remainderman must then commence his action pursuant to s. 5 (11) within 10 years of the determination of the life estate, i.e., within 10 years of the time when the life estate became statute barred. *50*

If the future estate is created after the right of entry arise under the prior estate, and the prior estate is statute barred, so too is the future estate. *51*

(v) DOWER

The right to dower arises upon the death of the husband. *52*

(vi) THE EFFECT OF ACKNOWLEDGEMENTS

Section 13 provides:

> 13. Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land- or in the receipt of the rent, such possession or receipt of or by the person by whom the acknowledgement was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgement was given at the time of giving it, and the right of the lastmentioned person, of of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgement, or the last of the acknowledgements, if more than one, was given.

It should be noted that the acknowledgement must be in writing, signed by the person making it and must be given to the owner or his agent. The acnowledgement need not be in any particular form. Its benefit accrues not only to the person to whom it was given but also to any person claiming through him. There are various requirements set out in the Act for acknowledgements depending upon the capacity or relationship between the parties. *52*

(vii) THE EFFECT OF DISABILITIES

The Act recognizes infancy and some form of mental incapacity, including deficiency, incompetence or unsoundness of mind. *54*

Section 36 provides:

> 36. If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of infancy, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him, notwithstanding that the period of ten years or five years, as the case may be, hereinbefore limited as expires, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability or died, whichever of those two events first happened.

It should first be noted that before s. 36 is operative the person who is suffering the disability must not only be the person in whom the right to bring the action exists, but also that the person must be under the disability when the cause of action arose. Hence, a disability arising after the accrual of the cause of action will not extend the period. *54* Therefore, if A is dispossessed in 1970 and he becomes mentally incompetent in 1972 the period runs from 1970 and s. 36 is not applicable.

The allowance in the case of the disability is confined to the person to whom the right of entry, distress or action for recovery first accrued. Hence, if A, under no disability is dispossessed and then dies leaving the property to an infant B, no extension of the period because of the disability of B is permitted. *56*

It should be stressed that the time to determine when the disability exists is when the cause of action arose which will not always be when dispossessed occurred. For example, if X dispossesses A, a life tenant, B, a remainderman will not have a cause of action either until A's death, or arguably until after 10 years of dispossession of X whichever comes first. It is at that time not the date of dispossession of A, that the determination of a disability must be made.

If a disability exists, then under s. 36 the ten year period may be extended. The period will end either at the end of 5 years after the disability ends or within 5 years of the death of the person disabled. However, in no case can the period be greater than 20 years in total. *57*

Section 38 of the Act provides:

> 38. When a person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrues, and dies without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover the land or rent beyond the period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover the land or rent, first accrued or the period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

This section makes it clear that only the disability of the person to whom the cause of action accrues is to be considered. Thus, disability in any successor is not to be considered. This does not mean however, that successive disabilities in the same person will not be given effect. For example, if A is dispossessed as an infant, and during his infancy becomes mentally incompetent the period will be extended by five years from the date of his death or mental competency, up to the maximum of 20 years. It will not be limited simply to the disability relating to infancy. *58*

The wording of s. 38 makes it clear that, in order to tack successive disabilities, there must be no hiatus between the disabilities for the section speaks of the person not ceasing to be under such disability.

In the case of infancy, one must scrutinize closely the possession taken for in many instances the person in actual possession will be considered to be in possession as bailiff of the infant and his possession will be possession by the infant.

The relevant law is set out in Quinton v. Firth *59*

> "Where any person enters upon the property of an infant, whether the infant has been actually in possession or not, such person will be fined with a fiduciary position as to the infants: 1, whenever he is the natural guardian of the infant; 2, when he is so connected by relationship or otherwise with the infant so as to impose upon him a duty to protect, or at least not to prejudice his rights, and 3, when he takes possession with knowledge in express notice of the infant's rights. Indeed the last ground is but an instance of the application of the general

> trust property, with notice of the trust, constitutes himself a trustee, in which case, unless he enters as a purchaser for value, and continues in possession for twenty years from his purchase, or unless the trust be merely constructive, the statute will afford no defence."

THE EFFECT OF RUNNING OF THE PERIOD

As mentioned previously, the Act bars both the remedy and the right of the true owner once the period has run. *60* However, the Act is silent as to the title of the dispossessor. Since the effect of the Act is negative, the Act leaves the dispossessor in possession with a little gained by the fact of possession and resting on the absence of the right of others to eject him. *61*

The negative aspect of the Act is illustrated in several ways. For example, an easement by necessity will not be implied to assist an adverse possessor where the easement has not been used for a time long enough to establish an easement by prescription. *62* On the reverse side of the coin, the "title" gained by possession remains subject to easements and other rights not extinguished. *63* Moreover, the "title" of the adverse possessor is no greater than the title that was extinguished. Thus, where a squatter extinguishes a tenant's leasehold interest the landlord's interest is not automatically affected.

However, the squatter's title, subject to the foregoing, is effective at law and in equity and can be forced upon an unwilling purchaser. *64*

Moreover, the squatter can regain by action possession lost to a subsequent adverse possessor even where the full period of limitation has not run under the first dispossession of the true owner. The subsequent adverse possessor is not entitled to plead the rights of the true owner, such a plea being an attempt to plead jus tertii as a defence, which is not permitted. *65*

The adverse possessor is entitled to convey his interest by deed or will and the interest will pass on his intestacy to his heirs. *66*

OBTAINING PAPER TITLE

Despite some earlier authority to the contrary, it now seems clear that the possessor is entitled to apply to the Court for a declaration, not that he be declared the owner of the property, but rather for declaration that the title of the true owner is extinguished.

the nature of the declaration granted occurred in Brown v. Phillips et al. [67] This and earlier decisions were reviewed thoroughly by Jones, J. in Fraser v. Morrison et al, [68] in a case before the Nova Scotia Supreme Court.

However, there are ways in which the adverse possessor can have his possessory title raised to a paper title.

The first method is to apply for a certificate of title pursuant to s. 2 of The Quieting of Titles Act. [69]

If the judge is satisfied with the title and considers that the certificate can be safely granted, he may grant it. [70] The effect of the certificate is set out in s. 26 of the Act which reads:

> 26. The certificate of title, sealed, signed and registered as required by section 24, is conclusive, and the title therein mentioned shall be deemed absolute and indefeasible on and from the date of the certificate as regards the Crown and all persons whomsoever, subject only to any charges or encumbrances, exceptions or qualifications mentioned therein or in the schedule thereto, and is conclusive evidence that every application, notice, publication, proceeding, consent and act that ought to have been made, given and done before the granting of the certificate, has been made, given and done by the proper person.

The effect of the certificate is to create paper title in the adverse possessor. [71]

A second possible method requires an application to have the land registered under The Land Titles Act. [72] Section 40 of that Act contemplates the registration of a possessory title upon an application for first registration. As pointed out earlier it is not possible to acquire title by adverse possession after the property is registered under the Act. Subsection 2 of Section 40 permits the person registered with a possessory title, with the approval of the director of titles, to apply to be registered with an absolute title.

In areas where there are no Land Titles Offices an application may be made under The Certification of Titles Act. [73] By virtue of s. 16 of the Act an absolute paper title may be created.

Finally, it may be possible to create paper title by obtaining a quit claim deed from the true owner. The difficulty that arises is the effect of s. 15 of the Act which extinguishes the title of the true owner. However, it may be argued that although the true owner's estate is extinguished, he still retains paper title which he can pass on by deed.

It is however not possible to generate paper title from possessory title by originating notice of motion under Rule 610 of the Rules of Practice, for it has been decided that an application to have a question of title quieted under this rule did not extend to include a claim based on adverse possession. *74*

FOOTNOTES

1. R.S.O. 1970, c. 246

2. Megarry and Wade. The Law of Real Property. (3rd ed. 1966)966.

3. Limitations Act (Ont.) ss. 30, 31.

4. 3-4 Wm. IV c. 27.

5. 37-8 Vict. s. 57.

6. Cheshire. Modern Real Property. (10th ed. 1966) 806.

7. Armour. Law of Real Property. (1st ed. 1901) 424.

8. Supra, fn. 1, s. 9.

9. For a discussion of these terms and their effect see Anger and Honsberger. Canadian Law of Real Property (1959) 773.

10. Ibid. s. 10.

11. Ibid. s. 8.

12. Ballentine, Title by Adverse Possession, (1918) 32 Harv. L. Rev.135.

13. See infra; "The Scope of s. 4."

14. Supra, fn. 1. s. 11 Tolosnak v. Tolonsnak, (1957) O.W.N. 273, 10 D.L.R. (2d) 186.

15. See: Patterson v. Dart (1908) 10 O.W.R. 79, aff'd 11 O.W.R. 241; Heward v. O'Donohue (1890, 18 O.A.R. 529, aff'd (1891) 19 S.C.R. 341; Williams v. Pott (1871) L.R. 12 Eq. 149, Bertie v. Beaumont (1812) 104 E.R. 1001; National Trust v. Lowthian, (1943) O.W.N. 125 Lyell v. Kennedy (1889), 14 App. Cas. 437, Whitmarsh v. Whitmarsh (1972), 23 D.L.R. (3d) 520 (Co. Ct.).

16. Pflug and Pflug v. Collins, (1952) O,R. 419, (1952) 3 D.L.R. 681; aff'd (1953) O.W.N. 140, (1953) 1 D.L.R. 841. Re St. Clair Beach Estates Ltd. v. MacDonald (1975)50 D.L.R. (3d) 650 (ont. Div. Ct.)

17. See Anger and Honsberger fn. 9, p. 789 and cases therein cited.

18. Leigh v. Jack (1879), 5 Ex D. 264 (C.A.) Thus, in Earle v. Walker (1972), 22 D.L.R. (3d) 284 (Ont. C.A.)

A defendant who cut firewood, picked berries and tapped trees was held not to have dispossessed the true owner. On the other side of the coin, where the owner picked cherries from trees, the only agricultural use to which the land could be put, further acts of possession by the trespasser where held not to amount to dispossession. Re St. Clair Beach Estates Ltd. v. MacDonald (1975), 50 D.L.R. (3d) 650 (Ont. Div. Ct.).

19. Littledale v. Liverpool College, (1900) 1 Ch. 19.

20. Smaglinski v. Daly (1971), 20 D.L.R. (3d) 65 (Ont. C.A.)

21. Ibid; Seddon v. Smith (1877), 36 L.T. 168. This is true even in the case of uncultivated land. See Steers v. Shaw (1882),1 O.R. 26

22. George Wimpey & Co. Ltd. v. John, (1966) 2 W.L.R. 414.

23. Homestakes Holding Corp. Ltd. v. Booth (1972), 24 D.L.R. (3d) 280 (Ont. C.A.)

24. Re F. G. Connolly Ltd. et al (1973), 33 D.L.R. (3d) 506 (N.S.) ,(1974), 44 D.L.R. (3d) (N.S.C.A.)

25. Anger and Honsberger. Canadian Law of Real Property, (1959) 790; Walker v. Russell (1965), 53 D.L.R. (2d) 509 (Ont. H.C.)

26. (1975) 50 D.L.R. (3d) 414.

27. Supra, fn. 1, s. 1 (c)

28. Supra, fn. 1, s. 1(d)

29. Midanic v. Cross (1957) O.W.N. (C.A.)

30. R.S.O. 1970, ch. 234

31. Ibid, s, 58 (1)

32. Ibid., s. 58 (2)

33. Gatz v. Kiziw (1957), 8 D.L.R. (2d) 292; Aluminum Goods Ltd. v. Federal Machinery Ltd. et al (1970), 10 D.L.R. (3d) 405 (Ont.H.C.) As the meaning of "improvements" see Gay v. Wierzbicki (1967) 2 O.R. 211 (Ont. C.A.); Mildenberger v. Prpic (1976), 67 D.L.R. (3d) 65 (Alta. S.C.) and infra at p.

34. 9 Geo. III c. 16 (1769).

35. Statute Law Revision Act. S.O. 1902 c.1, s. 2.

36. Regina v. McCormick (1859), 18 O.C.Q.B. 131.

37. Section 16 reads:

> 16. Nothing in sections 1 to 15 applies to any waste of vacant land of the Crown, whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or land laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

For a discussion of the history and effect of s. 16, see Re Walker & A.G. Ont. (1974), 42 D.L.R. (3d) 630 (S.C.C.); (1972), 26 D.L.R. (3d) 162 (Ont. C.A.), 14 D.L.R. (3d) 644 (Ont. H.C.);DiCenzo Construction Co. Ltd. v. Glassco et al, 70 D.L.R. (Ont. H.C.)

38. Rains v. Buxton (1880), 14 Ch.D. 537.

38(a) Beaudoin v. Brown (1961), 28 D.L.R. (2d) 16.

(b) Fleet & Fleet v. Silverstein (1963), 36 D.L.R. (2d) 305.

(c) Handley v. Archibald (1899), 30 S.C.R. 130

39. Supra, fn. 1. s, 5 (2)

40. Ibid, s. 5(3)

41. Ibid, s. 5(4). The section speaks not only of the grantee but also his heirs or assigns. It has been suggested that only possession after the Crown Patent can be used by the person in possession: Armour Law of Real Property. (2nd ed.1916)482.

42. Ibid., s. 5(5)

43. Ibid., s. 17.

44. Chadwick v. Broadwood 49 E.R. 121.

45. Op. cit. s. 5(6)

46. Ibid., S. 5(7). See Logan v. Campbell, (1956) O.W.N. 177 (C.A.)

47. See Armour. Law of Real Property. (2nd Ed. 1916) 494-6.

48. Limitations Act, R.S.O. 1970, c. 246, s. 5(11).

49. Abid., s. 5 (12).

50. Armour. Supra, fn. 47 at p. 498.

51. Supra, fn. 49, s. 6(2).

52. Ibid., s. 25, 26, 27.

53. Ibid. s. 17, 19, 20, 21.

54. For a drfinition of these terms see the Interpretation Act R.S.O. 1970, c. 225, s. 30. In Kirby v. Leather, (1965) Q.B. 367 (C.A.) it was held that a person is of unsound mind when he is incapable of handling his own affairs.

55. Garner v. Wingrove (1905) 2 Ch. 233.

56. Ibid. Murray v. Watkins (1890) 62 L.T. 796. See also The Limitations Act s. 38.

57. The Limitations Act. s. 37.

58. Burrows v. Ellison (1871), L.R. 6 Ex. 128.

59. Quinton v. Firth (1868), L.R. 2 Eq. 45. The position of a stranger who enters with notice of the infant's title is not without doubt. See: Re Taylor (1881), 23 Gr. 640; cf; Kent v. Kent (1891), 20 O.R. 158.

60. See s. 4 and s. 15 quoted supra.

61. Gahagan v. Sisson (1943) O.W.N. 619 (C.A.).

62. Wilkes v. Greenway(1890), 6 T.L.R. 449 (C.A.).

63. Re Nisbet & Pott's Contract (1906) 1 Ch. 386 (C.A.).

64. Lethbridge v. Kirkman (1855), 25 L.J.Q.B. 89.

65. Mergarry and Wade. Las of Real Property (3rd ed. 1966) 1000 and cases therein cited.

66. Asher v. Whithlock (1965), L.R. 1 Q.B. 1; Miller v. Robertson (1904), 25 S.C.R. 32.

67. (1968) 42 D.L.R. (3d) 38.

68. (1972) 23 D.L.R. (3d) 346.

69. R.S.O. 1970, c. 396

70. Ibid. s. 12.

71. For an example see Meredith v. A.G. of Nova Scotia et al (1969) 2 D.L.R. (3d) 486.

72. R.S.O. 1970, c. 234.

73. R.S.O. 1970, c. 59, s. 6.

74. Re Gordon and Muxlow, (1930) 38 O.W.N. 199 (Div.Ct.)

LAND BOUNDARIES AND POSSESSORY TITLE-
A REVIEW OF THE RELATIONSHIP

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This paper is printed with the kind permission of the author. The paper was presented at a seminar of the Law Society in May 1977 entitled "Possessory Title- Fact or Fiction?"

LAND BOUNDARIES AND POSSESSORY TITLE - A REVIEW OF THE RELATIONSHIP

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It may seem presumptuous to suggest that the subject of adverse possession should not be broached until one has a reasonably sound understanding of the origins and nature of property boundaries. This is not necessarily the case when speaking to adverse possession of an entire land unit, but it is particularly true when we speak of encroachments or adverse possession over parts of land units. I draw from my experience as the Examiner of Surveys for Ontario and as Chairman of the Tribunal in many Hearings held under The Boundaries Act to conclude that the subject of land boundaries is indeed misunderstood (and in many cases, not understood at all). The problem, if that is the word, stems from the redundant observation that a given boundary must be re-established in its original position before one can determine if an encroachment has occurred and, if so, the extent of the encroachment. I will attempt in this paper to make the point abundantly clear that a boundary may be reconstructed in its original position by the best available evidence of that location.

In the absence of evidence, and I think one must visualize a wasteland to fulfill this eventuality, then the Statutes provide a mathematical or theoretical alternative which, as we shall see, creates a new line: it will not reconstruct the old. If the lawyer or the surveyor fails to acknowledge that distinction then misery will descend on the land.

I strongly suspect that a great myth exists, and the myth, if I'm right, lies in the assumption that land surveying and boundary definition are strictly controlled by procedures set out in the various Acts and Regulations that have "survey", "title", "boundary" or "registry" in their very names.

I aim to dispel that myth as methodically as is possible in the time available, and to do so we must first determine what a surveyor does and having decided that, how does he do it. For purposes of the subject at hand, I think we can say that a surveyor:

1. Establishes new boundaries, in the sense that he marks out on the ground, or spells out on paper, the configuration and size of new land units. In the truest sense the shape and size of the land units have been created in the mind of the owner of the land; the surveyor is the technical consultant commissioned by the owner to make his creation materialize.

2. Give opinions with respect to the quality of existing boundaries, considered on the basis of the evidence of those boundaries.

3. Re-establishes (re-constructs) those same lines if they become lost or obliterated or confused, again using best evidence.

4. Creates new boundaries to replace those which cannot be re-established.

In the process of examining how a survey is done, I would quickly dispose of The Land Titles Act, The Registry Act, The Boundaries Act and The Certification of Titles Act with the observation that none of these tell a surveyor how to perform a survey. These merely establish minimum standards for plan sizes, mathematical accuracy, etc. However, a small but significant clue may be found in subsection (2) of Section 159 of The Land Titles Act which declares that:

> *"The description of registered land is not conclusive as to the boundaries or extent of the land".*

Translation - Descriptions and evidence might not agree.

Further, section 5(1) of Ontario Regulation 552 under the same Act advises: *"Where a monument no longer exists, all evidence concerning its original position shall be considered in the re-establishment thereof".* Profound but redundant legislation, as we shall see.

The Condominium Act makes reference to boundaries and standards that may, if examined closely, suggest a method of performing very specific types of surveys, but that Act is not relevant to this discussion for obvious reasons.

We may now quickly zero in on the remaining related Act, The Surveys Act, and conclude that this Act does in fact contain very detailed and specific instructions concerning the performance of surveys. The Surveys Act has been referred to at times as the surveyor's bible, or such other names as would imply that it holds the solution to every surveying problem. It is common knowledge in the surveying community that I maintain that The Surveys Act has been misunderstood and incorrectly or improperly applied to resolution of survey problems, and because of this, has brought untold misery to innocent property owners across this Province. Assigning blame where blame is due, the lawyer who insists that a surveyor "stake out the deed" or "stay with The Surveys Act" is as equally guilty of mischief as the surveyor who complies with those instructions (or applies them to his own practice.)

I assure you that I haven't forgotten about possessory title, and that I will be weaving the subject back into the paper in due course. However, I strongly feel that the concept of boundaries must first be explained, and to do this we must also examine the geographic framework of Ontario and the rules of procedures that have evolved from it.

The township with its lots and concessions is the main frame of our land referencing and indexing system, and wherever development occurred, the system was modified (or mutated) by means of "sub-divisions", and I include latter day reference plans in this category, and by the ubiquitous metes and bounds descriptions. Recapping briefly then, Ontario is divided up by:

1. Township Lots and Concessions.

2. Subdivisions (including reference plans) and

3. Metes and Bounds Descriptions.

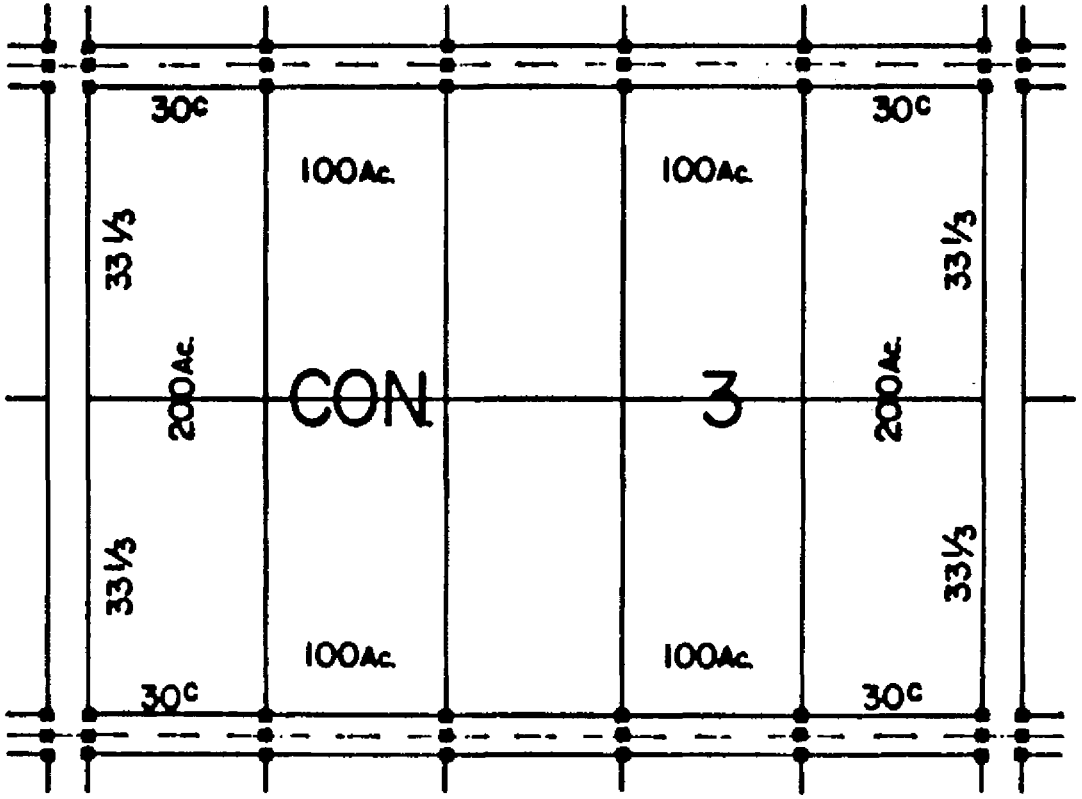
Looking at Townships first, we know that there are many different types of townships that developed or evolved as needs changed and techniques improved, and depending upon where you work, you will be familiar with names such as "front and rear" system, "single front" townships, "double front" townships. The list would go on to embrace 7 or 8 different township systems, each having two or more variations so that the description of the system may often be qualified by the terms "special" or "pattern 1", "pattern 2", etc.

For purposes of this exercise, we will zoom in on a typical "double front" township, and note that the township is made up of blocks of 5 lots, the block limits being defined by road allowances. (Fig.1). Each lot contains 200 acres and it was the practice to patent half lots of 100 acres each.

In the process of creating (marking out) this township, the surveyor was merely carrying out the wishes of the owner (the Crown), and the surveyor's instructions were to survey the concession lines, setting posts at the front corners of the lots. He did not survey the interior lines between the individual lots and ½ lots in this original survey for obvious reasons of cost, and more importantly, time, since the name of the game was to provide land for the influx of settlers. The settlers themselves were held responsible for the establishment of these interior lines, and the Crown, realizing that chaos would ensue if no uniform procedures were available, developed instructions for running these interior boundaries, and codified the instructions in The Surveys Act. Most of the boundaries of the township lots in Ontario were accordingly "established" by land surveyors operating under these instructions. Anyone who has

TYPICAL SECTION OF DOUBLE-FRONT SYSTEM

1818 - 1829



flown over Ontario from Cornwall to Windsor, or from Toronto to Tobermory, cannot refute my statement that most of the lot and concession fabric has been established.

John Dodd, in his paper, has ably described how the original monument on these original surveys would decay and become lost and obliterated with the passage of time. Again, the Crown, in its wisdom, established a fairly comprehensive set of rules for re-establishing this original property framework and those rules again were codified into The Surveys Act. The authors of this legislation were more astute than many of the people who had occasion to use it, because the authors separated the remedy into 2 dinstinct parts, which are:

1. Best Evidence

2. Theory.

An example of this may be found in Section 24, ss. 2 of The Surveys Act, which reads:

> *"A surveyor in re-establishing a lost corner or obliterated boundary in a double front township shall obtain the best evidence available respecting the corner or boundary, but if the corner or boundary cannot be re-established in its original position from such evidence, he shall proceed as follows:"*

Paragraph 3 of that same subsection then goes on to create a new line in a theoretical position:

> *"3 If a part of a township boundary base line or concession line is obliterated, he shall re-establish the same by joining the nearest ascertainable points thereof as intended in the original survey."*

To dispel the notion that these instructions have been taken out of context, we can quickly construct a chart illustrating that these same rules have been applied to the instructions governing every township system described in The Surveys Act. The chart may be superfluous in establishing my argument, but does tend to hammer the point home.

SURVEYS ACT

METHOD OF RE-ESTABLISHING LOST CORNERS OR OBLITERATED BOUNDARIES

SYSTEM	1ST INSTRUCTION	2ND INSTRUCTION
1. Single Front		
(a) Lost Corner	- Best Evidence	- Proportional Division
(b) Oblit. boundary	- Best Evidence	- Join 2 points
2. Double Front		
(a) Lost Corner	- Best Evidence	- Proportional Division
(b) Oblit. boundary	- Best evidence	- Join 2 points
3. 640 Acre Sec.		
(a) Lost Corner	- Best Evidence	- Proportional Division
(b) Oblit. boundary	- Best Evidence	- Join 2 points
4. Front and Rear	ditto	
5. Etc.	ditto	
6. Etc.	ditto	

So, .O.K., you may say, we've flogged Township lots to death but what about lots on a plan of subdivision? We need only turn to section 55 of The Surveys Act to find what we knew all along.

> "55. *A surveyor in re-establishing a line, boundary or corner shown on a plan of subdivision shall obtain the best evidence available respecting the line, boundary or corner, but if the line, boundary or corner cannot be re-established in its original position from such evidence he shall proceed as follows:*"

I said earlier that title is hung on a framework consisting of townships, plans of subdivision and metes and bounds descriptions. I hope we now have some ground rules (!) for townships and subdivisions, but what about M & B Descriptions. Hearkening back to my earlier reference to section 159(2) of The Land Titles Act respecting registered descriptions and extent of land, I translated the section to mean - - be careful - descriptions won't always match the evidence, and there is the magic word again. That particular section does not appear in The Registry Act but I make the suggestion that it need not appear in either Acts: it is a redundant exclamation of natural law.

Where do we go from here? I want to quote from Mr. Justice Cooley, briefly recap the what and how of surveying, illustrate the distinctions by reference to a large recent Boundaries Act Application and wind up by examining some typical applications under The Boundaries Act which had to deal with adverse possession.

What, then, is the judicial function of a surveyor, if that is not too pretentious a description of his functions.

I do not know of a better definition of this function than that given by Mr. Justice Cooley of the Michigan Supreme Court, and the following is the substance of his opinion, excluding only those references to statutes that do not apply here:

> *"When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible to accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors. 'In the State of Michigan all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States as original owner, caused them all to be surveyed once by sworn officers, and as the plan of subdivision was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes;..... The truth unfortunately is that the lines were very carelessly run, the monuments inaccurately placed; and, as the recorded witnesses to these were many times wanting in permanency, ...*
>
> *.....*
>
> *"If (latter) disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However, erroneous may have been the original survey, the monuments that were set must nevertheless*

govern, even though the effect be to make one quarter-section ninety acres and the one adjoining but seventy; for parties buy or are supposed to buy in reference to those monuments, and are entitled to what is within their lines, and no more, be it more or less .....

.....

"While the witness trees remain there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, ... It is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men whose theoretical education is supposed to make them experts who think that when the monuments are gone the only thing to be done is to place new monuments where the old ones should have been, and where they would have been if placed correctly. This is a serious mistake. The problem is now the same that it was before: To ascertain, by the best light of which the case admits, where the original lines were .....

.....

"The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State Statute, disregard all evidence of occupation and claim of titles, and plunge whole neighbourhoods in quarrels and litigation by assuming to 'establish' corners as points with which the previous occupation cannot harmonize .....

.....

"It is merely idle for any State Statute to direct a surveyor to locate or 'establish' a corner, as the place of the original monument, according to some inflexible rule. The surveyor on the other hand must inquire into all the facts; giving due prominence to the Acts or parties concerned, and always keeping in mind, first, that neither his opinion nor his survey can be conclusive upon parties concerned; second, that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and rules that will govern theirs. On Town plans if a surplus or deficiency appears in a block, when the actual boundaries are compared with the original figures, and there is no evidence .....

.....of the stakes which marked the division into lots, the rule of common-sense and of law is that the surplus or deficiency is to be apportioned

between the lots, on an assumption that the error extended alike to all parts of the block."

Recapping the "what" and "how" of surveying, in light of the foregoing, and focussed more closely on the subject at hand, a surveyor must:

(a) give expert opinion with respect to existing boundaries or

(b) re-establish a boundary in its original position and there are no rules save precedent and the rules of evidence.

Are we ready to talk about adverse possession? I do not think so, because having flogged the word evidence for the past 30 minutes, it is now necessary to look at boundary evidence from a surveyor's point of view, and to see if there is any resemblance to a meeting of the minds between surveyors and lawyers on that subject. I am not a student of the law - I'm not even a law student which would be even better, but I do come from a generation of surveyors that received little or no formal training in boundary law per se. One's knowledge of the subject was derived from attemption to resolve countless dilemas when common sense and the nice easy "theoretical" approach of The Surveys Act were so often in conflict. One came by the Canadian Abridgement or the Encyclopedic Digests almost by accident, but suddenly, one discovered that there was a body of common law and case law that spoke to those very dilemas in terms of logical precedents. These, in turn, led one to Laskin and LaForest, Brown and Elridge, Greenleaf and Justice Cooley, to name but a few, and to the discoverer, surveying would never be the same. Sydney Smith and the late Marsh Magwood, Q.C., both former Directors of Title saw these problems manifest in faulty land records and embarked on a remedy through a series of papers and orders under The Boundaries Act. But these were directed to a narrow cross-section of the survey profession and ignored the legal profession.

This "discovery" allowed the surveyor at last to distinguish certain types of evidence and arrange these in a logical heirarchical structure, extending from the most reliable to the least reliable. The Courts have recognize this structure in various ways, but Greenleaf in his book on evidence set this down in simple terms. I can't lay my hands on Greenleaf at the time of writing, but will paraphrase, taking great liberties with his thoughts and words.

In effect then, when considering evidence, a surveyor must rely on the following evidence in the order named:

1. Natural boundaries

2. Original monuments

3. Fences of possession which can reasonably be related back to the time of the original survey.

4. Measurements.

All of the above, of course, is predicated on common sense. "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."

The town of Massey is a pleasant little village on the banks of the Spanish River, about 50 miles west of Sudbury. It is an old town by Northern Ontario standards, having been established by the Spanish River Lumber Company before the turn of the century, and was, for years, the centre of a lively logging industry.

The village also straddles two section limits which have the effect of dividing the village roughly into 4 quarters two of which were patented under The Land Titles Act, and the other two patented under The Registry Act.

Plans of subdivision covering all of the lands were prepared by qualified surveyors and the plans were registered in the Land Registry Office in Sudbury. Over the ensuing years, 3 of the areas were built upon and lived upon. The fourth, being owned by the lumber company though subdivided, was not developed and was left more or less in its natural state.

In or around 1970, the Municipal Officials reported to our office that it was not possible to have surveys performed in Massey because of the apparently huge errors in the original plans and the utter impossibility of reconciling the occupational limits with the theoretical position of the boundaries.

In attempting to resolve the problem we set up the following program:

1. Map all the village from aerial photography and prepare plans showing all buildings, streets, fences, hedges, drives, etc.

2. Prepare traditional survey of all the street patterns (block outline survey) using, if necessary, the centre line of the built-up roads as the best evidence of the original location of the roads. The block outline surveys to be confirmed under The Boundaries Act.

3. We then overlaid the old registered plans on top of the block out-line survey and these in turn were overlaid into the aerial mapping with the following results:

4. The title to all 800 properties were searched, The Registry Act title converted to Land Titles, The Land Titles Parcels were all re-drafted and the title for the whole village consolidated into 6 new registers.

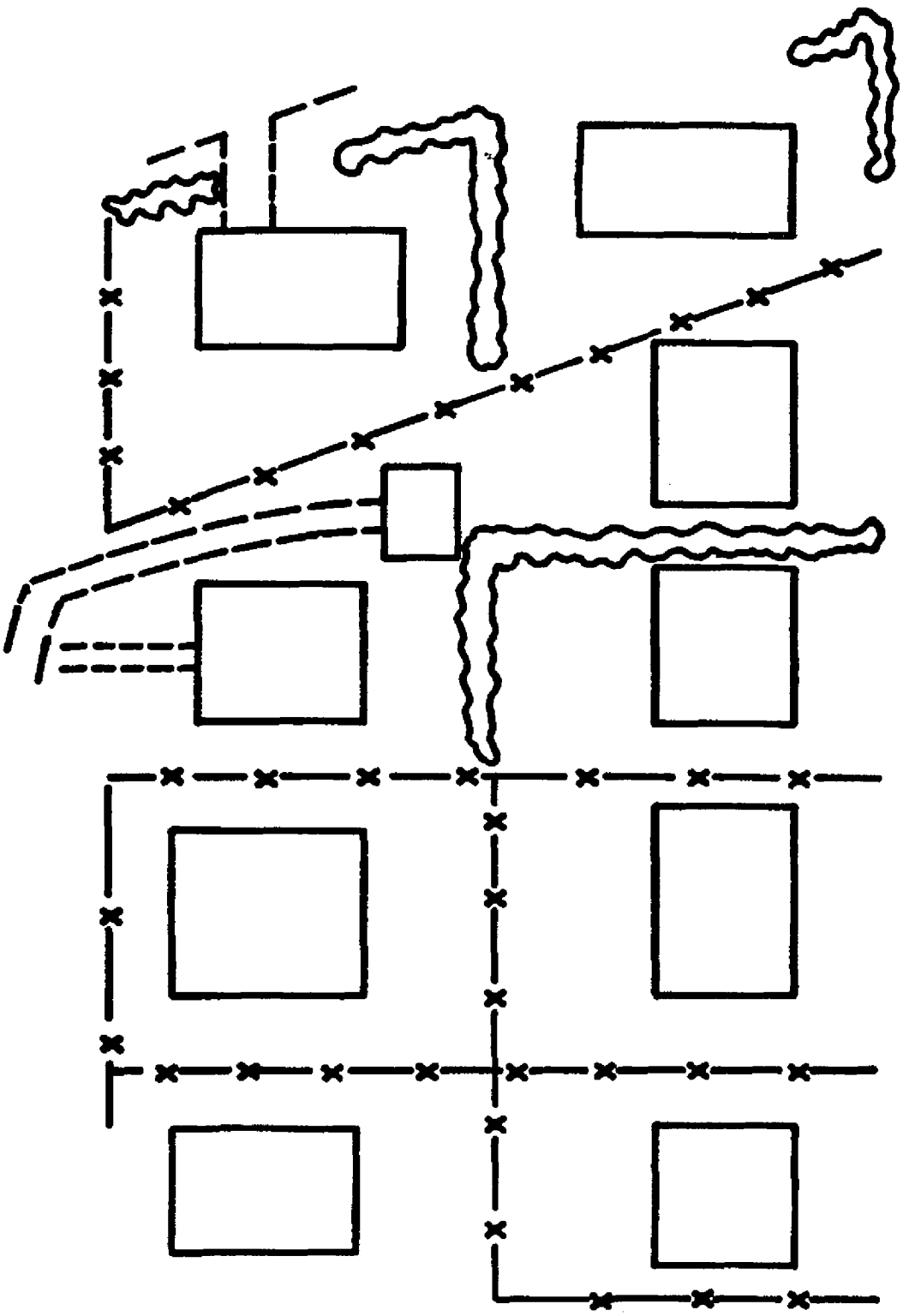
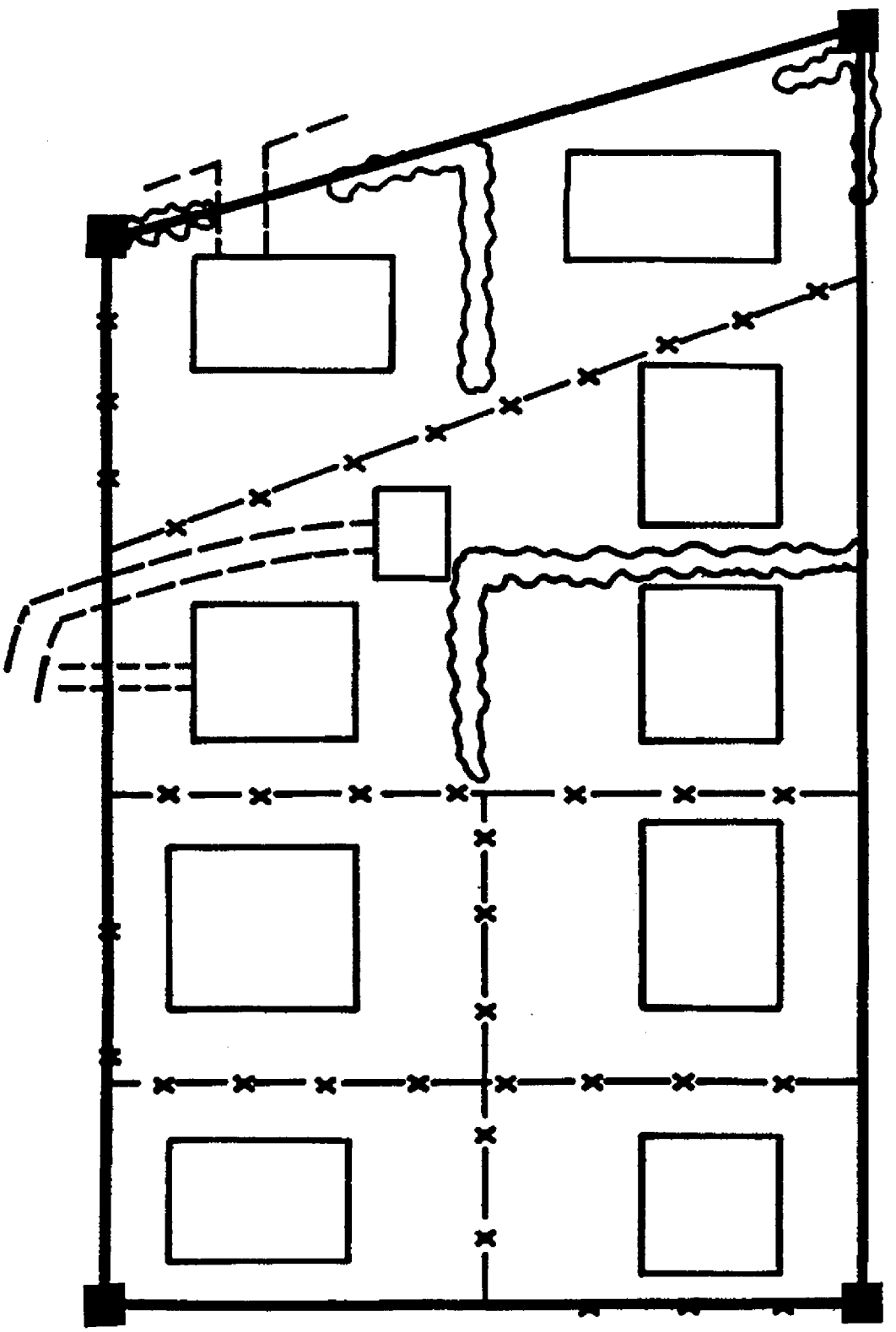


Figure 3



When all surveys, title searching and plans were completed, a combined hearing was held in Massey, the first under The Boundaries Act chaired by me and the second under The Land Titles Act and chaired by one of the lawyers from our Property Law Branch. In effect, the two hearings ran simultaneously, allowing us to hear evidence respecting a title problem, turn the hearing back to The Boundaries Act and confirm the limits of the property in question.

The following diagrams represent some of the problems that were brought to the hearing by the property owners on objection, and the manner in which the tribunal dealt with the situation. I have taken a tremendous amount of liberty with the facts, and beg the indulgence of anyone who may have in the past or in the future, become involved with these lands.

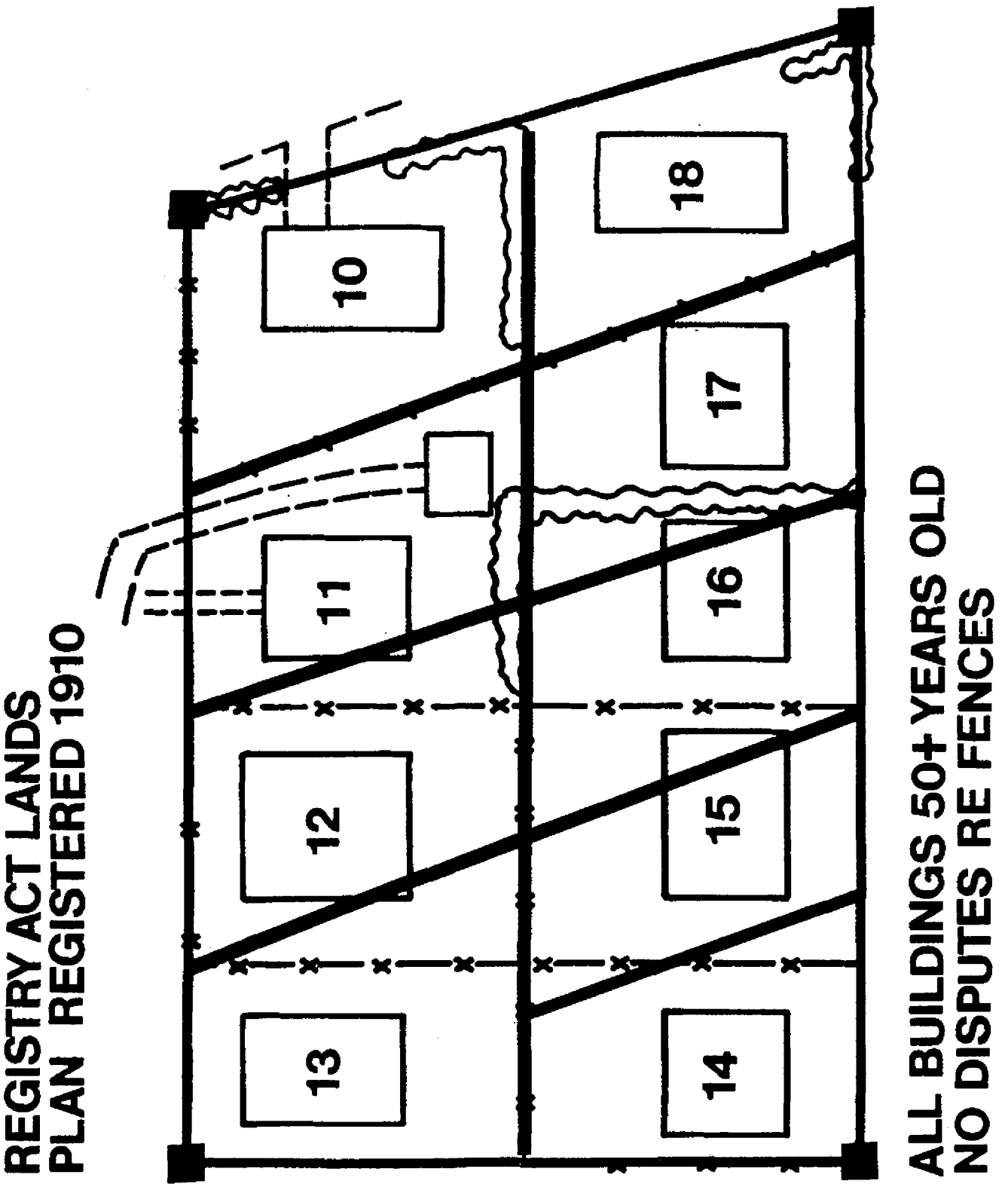
Figure 2 illustrates the occupational evidence as derived from the aerial photography. The x's typically represent fences and the wavy lines, hedges of course, the squares of the buildings with their driveways, etc. In Figure 3 it can be seen that The Boundaries Act block out line survey has been overlaid onto the topographical information and it is apparent that occupation at least in the block limits is consistent with this Boundaries Act survey. However, in Figure 4 we have put the third layer of information on the plan and that is the lot limits as derived from the registered plan of subdivision. One can quickly see that there are overlaps and encroachments on every lot save 10 and 18.

This, of course, precipitated "class action" objection from the owners of all of the lots save 10 and 18, and on cross-examination of the surveyor he testified that he merely transposed the lot line information from the registered plan to this new plan and that he had neither consulted the various owners affected by his actions nor had he researched the plan to determine if that in effect was the manner in which the surveyor had actually staked the subdivision. He subsequently testified that he was unable to find any evidence to the effect that the individual lot lines had been surveyed in the original survey of this subdivision.

The objectors, in presenting their evidence, elicited testimony from a gentleman who was 80 years old, who had lived in Massey all his life, and had a most astounding recollection of people and events in that community. He testified that he personally knew the subdivider in this case, and that the subdivider had told him that the surveyor had made a mistake in drawing the lines on the plan. Further, that the surveyor who did the job was drunk all the time. He said that, on a couple of occasions, he had helped the owner plant wooden stakes on two or three of these lots, to assist purchasers in setting their foundations and building their fences.

The objectors further produced an affidavit from a father of the owner of one of the lots and another affidavit from a grandfather of the owner of another lot, both of which set out the fact that the owner of the lots had shown them where their property lines were and had planted wooden stakes to mark out those lots.

Figure 4


REGISTRY ACT LANDS
PLAN REGISTERED 1910
10
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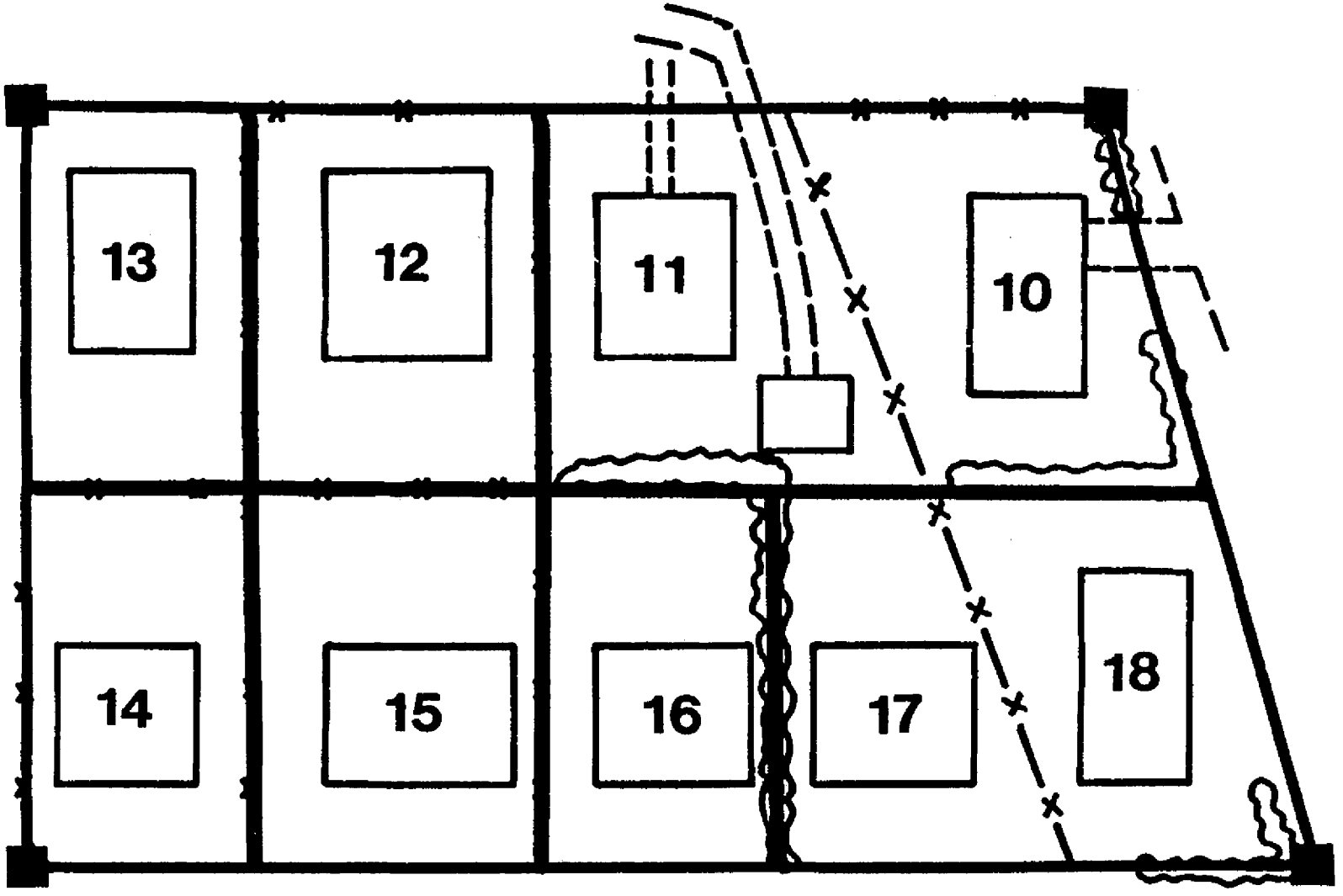
ALL BUILDINGS 50+ YEARS OLD
NO DISPUTES RE FENCES

..EGISTRY ACT LANDS
PLAN REGISTERED 1910



ALL BUILDINGS 50+ YEARS OLD
NO DISPUTES RE FENCES

Figure 4

In view of the fact that peaceful occupation had been enjoyed by these people for up to fifty years, they could have, no doubt successfully, pleaded possessory title. However, in this contest of evidence it was apparent to me that the registered plan of subdivision represented a classic case of misdescription, and I accordingly ordered that a new plan be drawn to correct this misdescription and to reflect what the owner had in fact intended to sell and further to reflect what the purchaser thought he was buying. Figure 4 illustrates the lot fabric on this new plan as it was subsequently registered.

Figure 5 shows another situation in the same area, with slight variances. In Figure 6 we can again see how The Boundaries Act block outline survey was overlaid onto the photogrammetric base, and the lot lines again as derived from the former registered plan were also superimposed to form the composite plan. This again precipitated a "class action" objection and the surveyor, under cross-examination, (and beginning to see the light) testified that first of all the block outlines were consistent with the travelled streets and consistent with the other block conformed remarkably well with those shown on the registered plan. He further testified that this was in fact a different plan prepared for a different subdivider by a different surveyor than was the case in the previous illustration, and that from an examination of the plan and the original field notes of the surveyor, the individual lots had been surveyed and marked with stakes in the original survey.

The objectors, for their part, testified that they had measured out these properties by themselves and that they had agreed amongst themselves as to the various boundaries, and that the owner of Lot 21 was an engineer and he was the first one in the block to build his house and measure out his fences, and it was deemed that he knew what he was doing. The objectors further testified that for the most part they had laid off their property lines by measuring from the fences on Lot 21 and that although there may now be an error they should be entitled to the lands that they had occupied.

Again, in this contest of evidence, I was forced to rule that the lot lines as set down by the surveyor were in fact the true lot lines and that they should be confirmed in that position. I then advised the objectors that they should plead their case for possessory title before the Director of Titles in a subsequent hearing on an application for first registration to The Land Titles Act.

Figure 7 illustrates a situation that was, as you can see, becoming common place in this particular application, and the testimony of the surveyor under these circumstances was similar to that given in the first illustration, and that was to the effect that no stakes were planted in the original survey covering the corners of the individual lots.

The objectors, again through their 80 year old witness, testified that he had in fact assisted the original subdivider in placing wooden stakes to show the purchasers of these lots where their lines were to be run.

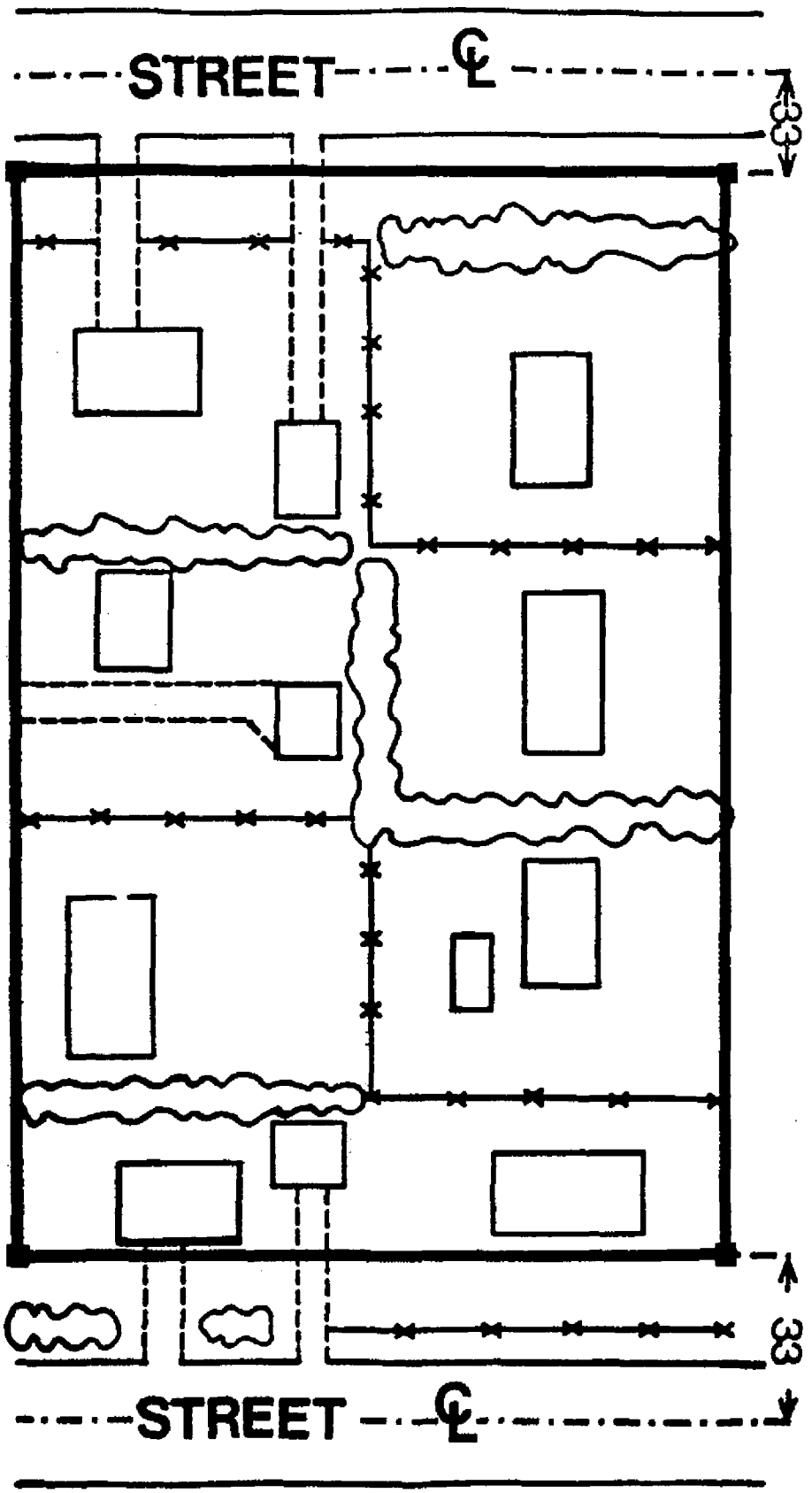

STREET
℄
33
33
STREET
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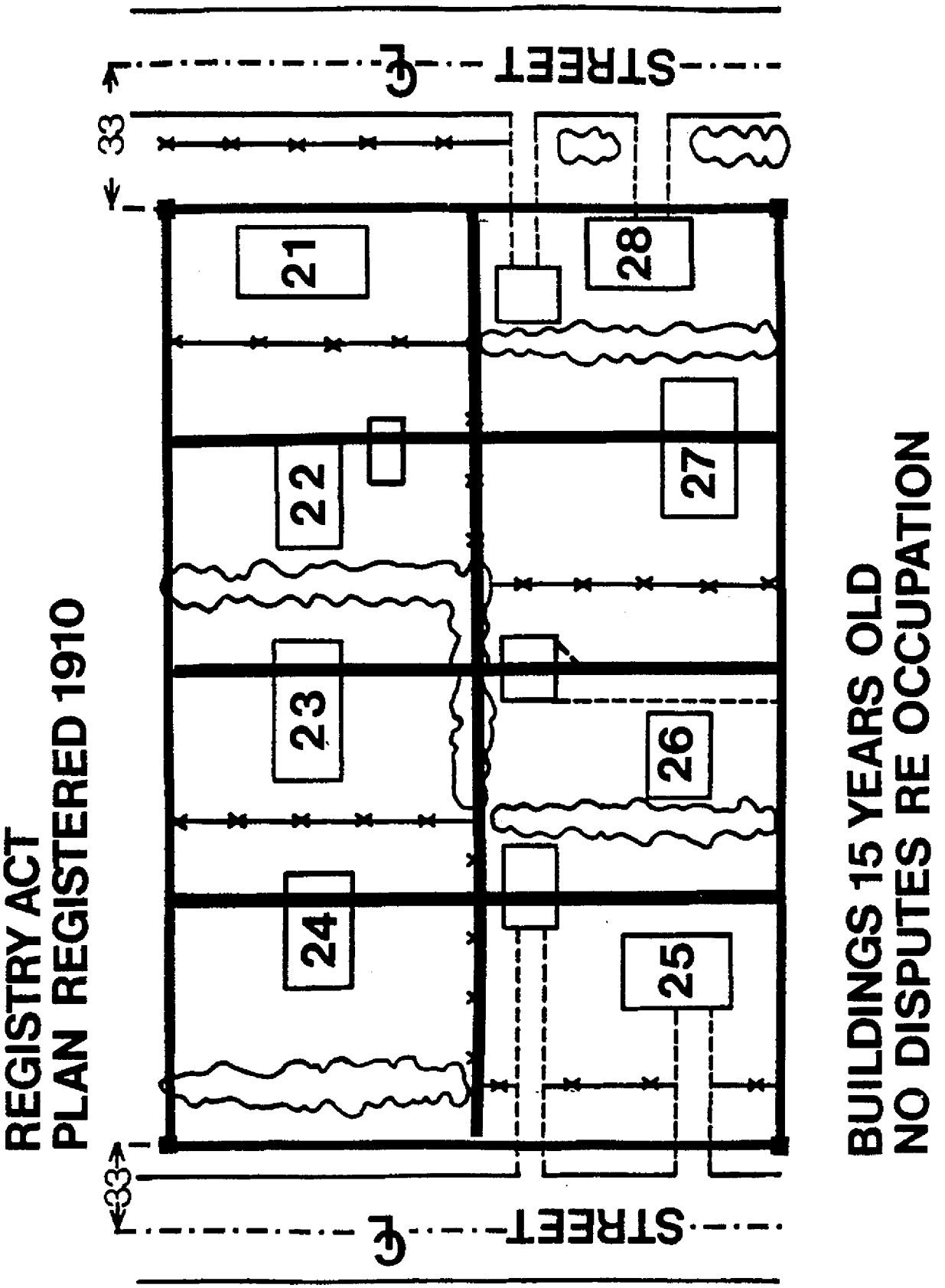
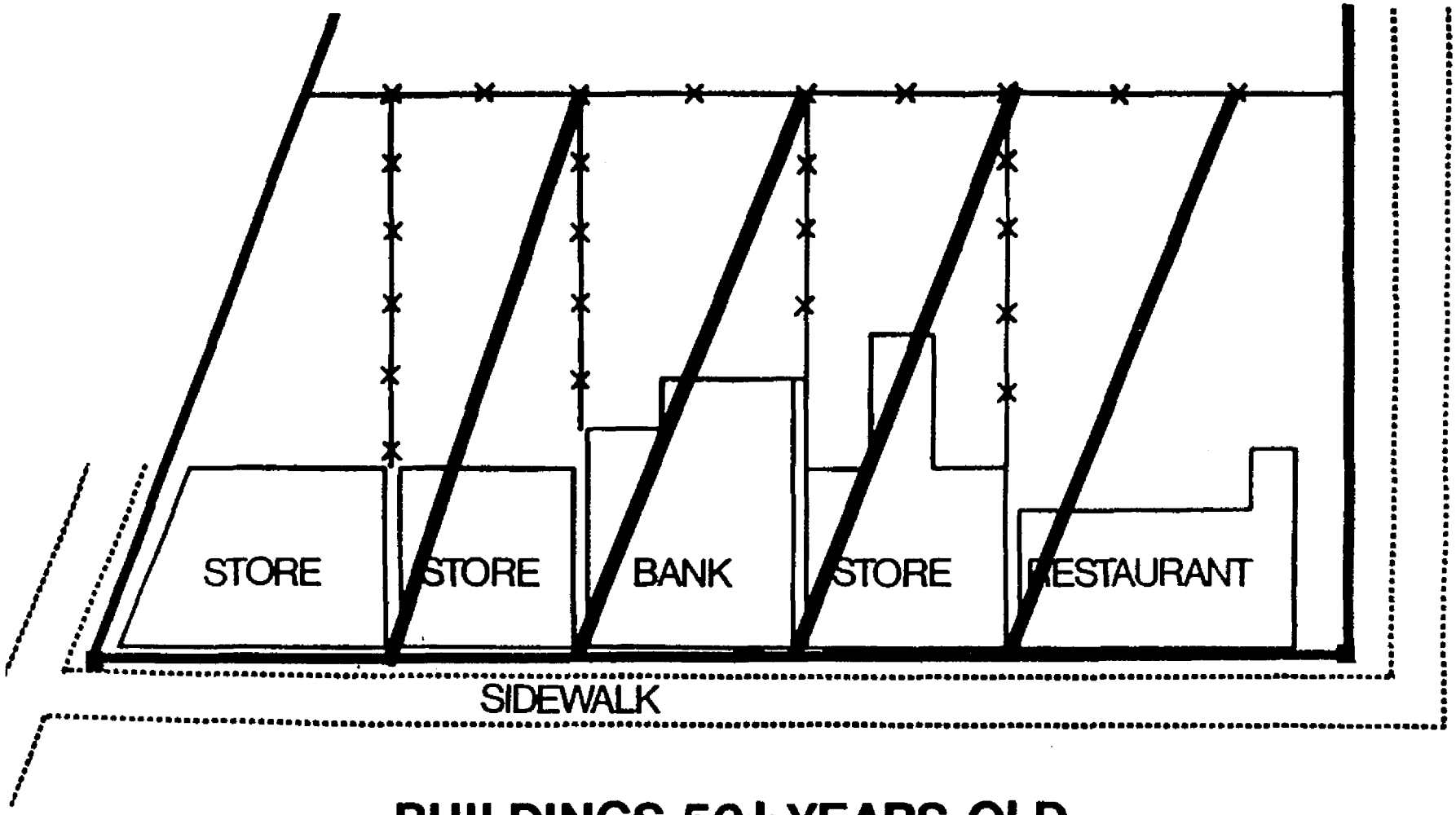
Figure 6


REGISTRY ACT
PLAN REGISTERED 1910
STREET
33
21
28
22
27
23
26
24
25
33
STREET
BUILDINGS 15 YEARS OLD
NO DISPUTES RE OCCUPATION

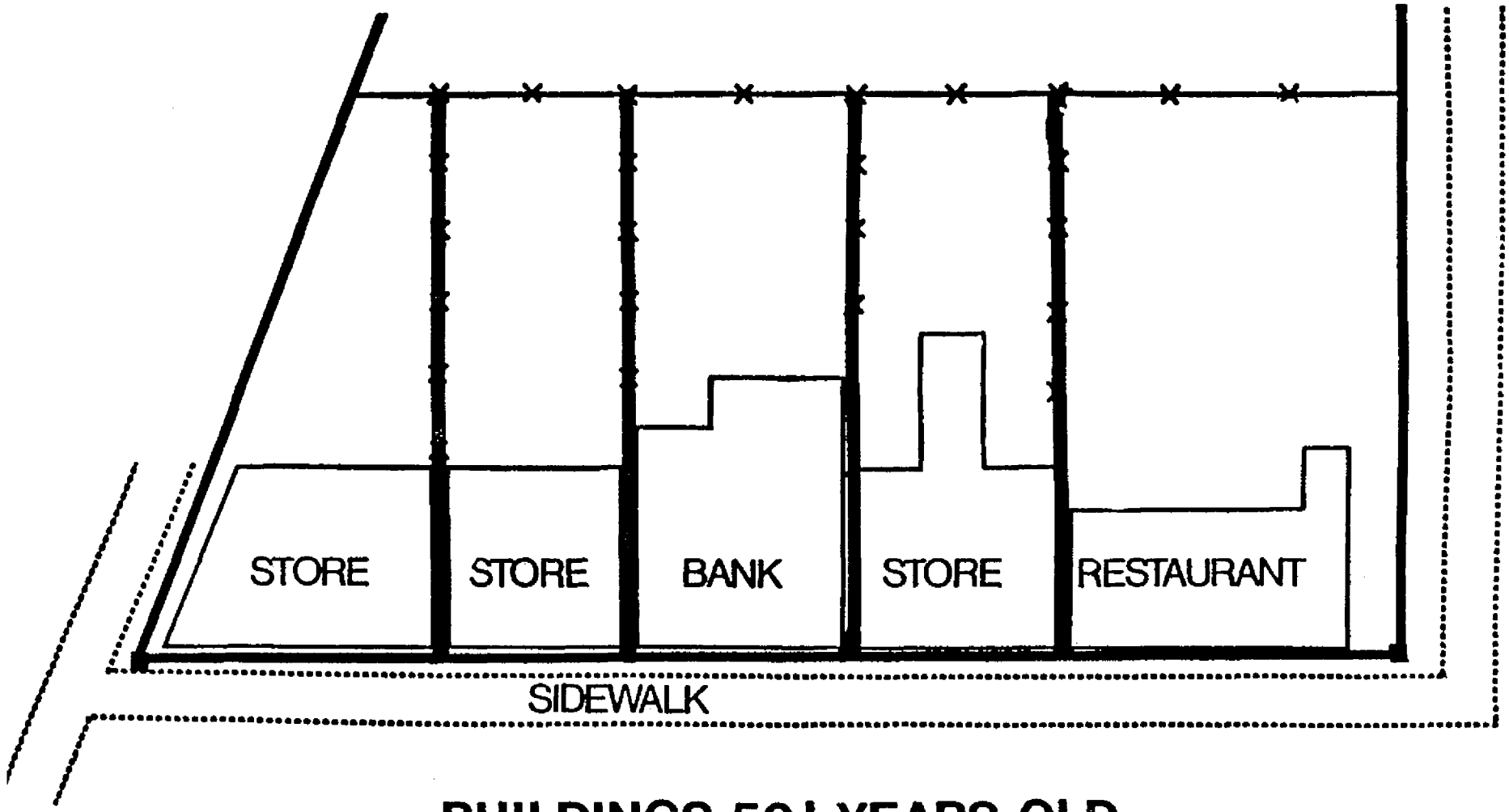
REGISTRY ACT
LANDS PLAN REGISTERED 1908



BUILDINGS 50+ YEARS OLD
NO PREVIOUS DISPUTES

Figure 7

REGISTRY ACT
LANDS PLAN REGISTERED 1908

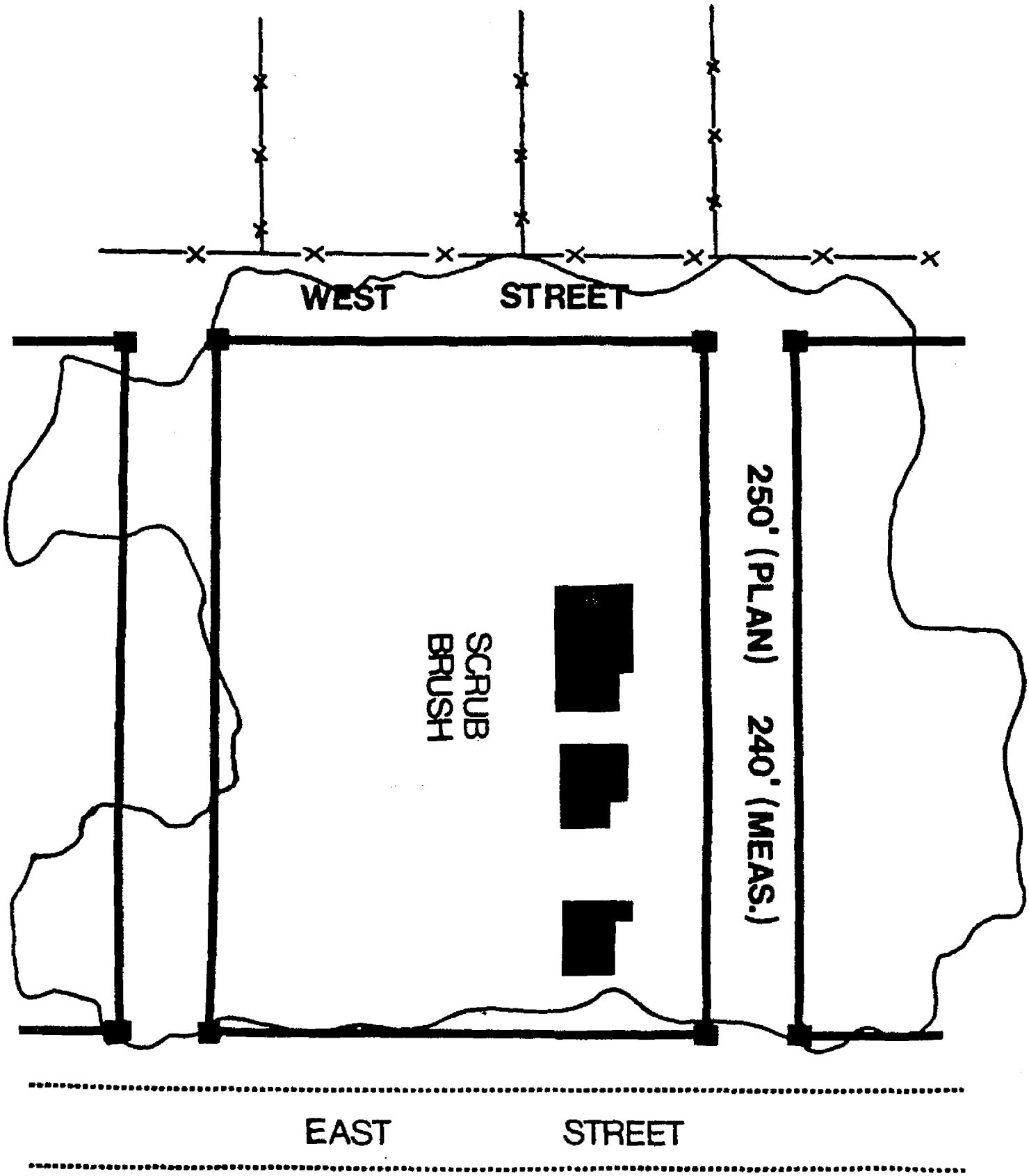


BUILDINGS 50+ YEARS OLD
NO PREVIOUS DISPUTES

He also advised that the subdivider told him that he was aware that the lines as set out on the ground were not in the same location as those set out on the plan but that some dumb draftsman had made a mistake. There were further affidavits by the owners and predecessors in title confirming that the existing occupation could be traced back at least 50 years and that no disputes had ever arisen between neighbours with respect to their boundaries. They further argued that common sense demands that the lot lines of the properties on the main business street of the community would run perpendicular to the main street and not at some unreasonable angle.

Accordingly, I ruled that this again was an example of misdescription on a registered plan of subdivision which had failed to reflect the lots as created in the mind of the owner at the time of the subdivision and that the lot lines should be amended to conform with the occupation. The surveyor was ordered to amend the plan which was subsequently registered in the configuration shown in Figure 8.

Figures 9 and 10 are not intended to illustrate a possessory title situation, but are included here to demonstrate how, in a real life situation, the theoretical or methematical instructions as set out in The Surveys Act were used to position property boundaries. This particular area had remained undeveloped for some 60 years but had been subdivided by registered plan over that period. This particular block contains two tiers of five lots each and as can be seen from Figure 9, the surveyor disclosed that there was a shortage in this block between East Street and West Street, amounting to 10 feet. Now in the absence of any other evidence, the surveyor, in these circumstances, is compelled by common sense and common law, to distribute the shortage equally amongst each of the lots. However, before the individual lots were marked out on the ground, three of these lots were sold and the new owners, wishing to build their houses, measured out three 50-foot lots from the survey monument on East Street. They put in their basements and applied for a first draw on their mortgage at which time they were instructed to submit a surveyor's certificate. The surveyor went on the ground and laid out the lots with the result seen in Figure 10. A municipal by-law requiring a 4-foot side yard, required the surveyor to disclose that the first building was 2 feet too close to the line; that the second building was right on the line, and that the third building was 2 feet over the line. Under these circumstances, the owners were,of course,unable to plead adverse possession and they were unable to plead misdescription, and finally had to resolve their problem by an exchange of lands which, of course, had to be processed through the Land Division Committee.


WEST STREET
250' (PLAN) 240' (MEAS.)
SCRUB BRUSH
EAST STREET

EAST STREET
PLAN REGISTERED 1912
BUILDINGS ERECTED 1973
250' (PLAN) 240' (MEAS.)
SCRUB
BRUSH
WEST STREET

MOCK BOUNDARY HEARING

ORDER AND REASONS

****

EXTRACT FROM "THE THEORY & PRACTICE OF SURVEYING"

By J.B. Johnson, C.E. John Wiley & Sons 1906

APPENDIX A

THE JUDICIAL FUNCTIONS OF SURVEYORS

By Justice Cooley of the Michigan Supreme Court

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

In the State of Michigan all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan of subdivision was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth unfortunately is that the lines were very carelessly run, the monuments inaccurately placed; and, as the recorded witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed it is impossible to determine by the record, with the aid of anything on the ground, where it was located. The incorrect record, of course, becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed , as indeed they should have been, for in general there could have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should become dear. The fact probably is that town surveys are quite as inaccurate as those made under authority of the general government.

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold and the work of improvement begun.

A generation has passed away since they were converted into cultivated farms, and few if any of the original corner and quarter stakes now remain.

The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing were substituted in its place, the adjoining proprietors might in a few years be found disputing over their lines, and perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However, erroneous may have been the original survey, the monuments that were set must nevertheless govern, even though the effect be to make one half-quarter section ninety acres and the one adjoining but seventy; for parties buy or are supposed to buy in reference to those monuments, and are entitled to what is within their lines, and no more, be it more or less. *McIver v. Walker, 4 Wheaton's Reports, 444; Land Co. v. Saunders, 103 U.S. Reports, 316; Cottingham v. Parr, 93 Ill. Reports 233; Bunton v. Cardwell, 53 Texas Reports; 408; Watson v. Jones, 85 Penn. Reports, 117.*

While the witness trees remain there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men whose theoretical education is supposed to make them experts who think that when the monuments are gone, the only thing to be done is to place new monuments where the old ones should have been, and where they would have been if placed correctly. This is a serious mistake. The problem is now the same that it was before: to ascertain, by the best lights of which the case admits, where the original lines were. The mistake above alluded to is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we shall refer is not what is commonly supposed.

An act passed in 1869, Compiled Laws, 593, amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows:*

* For the U.S. rules governing this subject, see Appendix 1, Page 736.

"*Second.* Extinct interior section-corners must be re-established at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it.

"*Third.* Any extinct quarter-section corner, except on fractional lines, must be re-established equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line."

The corners thus determined, the surveyors are required to perpetuate by noting bearing trees when timber is near.

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from government bought such land as was within the original boundaries, and unquestionably owned up to the time when the monuments became extinct. If the monument was set for an interior-section corner, but did not happen to be "at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it," it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains as a potential fact so long as he can present better evidence than any other person. And it may often happen that, notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

There are two senses in which the word extinct may be used in this connection; One, the sense of physical disappearance; the other the sense of loss of all reliable evidence. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that if a man lose his deed he shall lose his land altogether.

But if by extinct corner is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent:

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field notes indicated it to be.

2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.

3. No statute can confer upon a county surveyor the power to "establish" corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and Federal Law; it is a question of property right. The original surveys must govern, and the laws under which they were made must govern, because the land was bought in reference to them; and any legislation, whether State or Federal, that should have the effect to change these, would be inoperative, because disturbing vested rights.

4. In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence and give full opportunity for a hearing. No arbitrary rules of survey or of evidence can be laid down whereby it can be adjudged.

The general duty of a surveyor in such a case, is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable, and the surveyor should inquire when it originated, how,and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State Statute, disregard all evidences of occupation and claim of title, and plunge whole neighbourhoods into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize. It is often the case that where one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit when the people concerned do not question them not only breeds trouble in the neighbourhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common-sense must declare that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared. *Stewart vs. Carleton. 31 Mich. Reports, 270; Diehl vs. Zanger, 39 Mich. Reports, 601; Dupont vs. Starring, 42 Mich. Reports, 492.* And county surveyors, no more than any others, can conclude parties by their surveys.

The mischiefs of overlooking the facts of possession must often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting-point in the original survey of the town plat;

or a surveyor settling in the town may take some central point as the point of departure in his surveys, and assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

Suppose, for example, a particular village street has been located by acquiescence and use for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor that he may be sure that his neighbour shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was, or not, and the first result is, he notifies the lot owners that there is error in the street line, and that all fences should be moved, say, one foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the lot owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding some one disposed to do so. We shall then have a lawsuit;and with that result?

It is a common error that lines do not become fixed by acquiescence in a less time than twenty years. In fact, by statute, road lines may become conclusively fixed in ten years; and there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, and all concerned have cultivated and claimed up to it. *McNamara vs. Seaton, 82 Ill. Reports, 498; Bunce vs. Bidwell, 43 Mich. Reports, 542.* Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of any considerable time. The litigant, therefore, who in such a case pins his faith on the surveyor, is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgement.

Of course, nothing in what has been said can require a surveyor to conceal his own judgement, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of parties as if it were at another. But he would do mischief if he were to attempt to "establish" monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him, and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong, if not conclusive, evidence of such settlement. The peace of the community absolutely reuires this rule.

Joyce vs. Williams, 26 Mich. Reports, 332. It is not long since that, in one of the leading cities of the State, an attempt was made to move houses two or three rods into a street, on the ground that a survey under which the street had been located for many years had been found on more recent survey to be erroneous.

From the foregoing it will appear that the duty of the surveyor where boundaries are in dispute must be varied by the circumstances. 1. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties,express or implied, have rendered them unimportant. By monuments in the case of government surveys we mean of course the corner and quarter stakes: blazed lines or marked trees on the lines are not monuments; they are merely guides or finger-posts if we may use the expression, to inform us with more or less accuracy where the monuments may be found. 2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. It is merely idle for any State Statute to direct a surveyor to locate or "establish" a corner, as the place of the original monument, according to some inflexible rule. The surveyor on the other hand must inquire into all the facts; giving due prominence to the acts of parties concerned, and always keeping in mind, *first,* that neither his opinion nor his survey can be conclusive upon parties concerned; *second,* that courts and juries may be required to follow after the surveyor over the same ground, and that it is exeedingly desirable that he governs his action by the same lights and rules that will govern theirs. On town plats if a surplus of deficiency appears in a block, when the actual boundaries are compared with the original figures, and there is no evidence to fix the exact location of the stakes which marked the division into lots, the rule of common-sense and of law is that the surplus or deficiency is to be apportioned between the lots, on an assumption that the error extended alike to all parts of the block. *O'Brien vs. McCrane, 29 Wis. Reports, 446; Quinnin vs. Reixers, 46 Mich. Reports, 605.*

It is always possible when corners are extinct that the surveyor may usefully act as a mediator between parties and assist in preventing legal controversies by settling doubtful lines. Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow this judgement, cannot, on the basis of mere consent, be compelled to do so; but if he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them. Of course, it is desirable that all such agreements be reduced to writing; but this is not absolutely indispensable if they are carried into effect without.

MOCK BOUNDARY HEARING

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Exhibits and Plan for Hearing on Pages 135 to 139

MOCK BOUNDARIES HEARING

Chairman:
(G.F. Mackay) Good afternoon, my name is Gordon Mackay and I will be chairing this tribunal.

This is a hearing under The Boundaries Act - Legal and Survey Standards Branch, File B-6000.

Mr. Gardiner, will you please read the Notice of Hearing.

Clerk:
(J.N. Gardiner) Yes, Mr. Chairman.

An application has been made by Mr. 3½ for the purpose of confirming the true location on the ground of the boundaries of lands described in Registered Instrument 2500, being Lot 3 and the east half of Lot 4, Registered Plan 35 in the Township of black, County of White. In support of the application, a draft plan of survey has been filed, signed by John Middleground, Ontario Land Surveyor and dated October 6, 1976.

Chairman: Mr. Gardiner, may we have proof of notice.

Clerk: Yes, Mr. Chairman. All interested parties to the Application were served by prepaid registered mail with a copy of the Notice of Hearing and with a copy of the draft plan of survey. The Notice of Hearing was published in the Ontario Gazette on Saturday, January 8, 1977.

Chairman: Have any formal objections been received to the Application?

Clerk: Yes. Three formal letters of objection have been filed: One by Mr. 5½, owner of lands lying immediately to the west of the lands under application; one by Mr. 2, owner of lands immediately east of the lands under application, and one by Mr. Croach, owner of lands immediately north of the lands under application.

Chairman: Is the Applicant present and is the Applicant represented by counsel?

Lawyer Allems: (Darlene Allems) Yes Mr. Chairman, my name is Allems, initial D., and I represent Mr. 3½, the Applicant in these proceedings.

Chairman: Is Objector Mr. 2 present and represented by Counsel?

Lawyer Gibson: (Bob Gibson) Mr. Chairman, my name is Gibson, initials R.S.K., and I represent two objectors in these proceedings, Mr. 2 who owns lands on the east side of the lands under application, and Mr. 5½, who owns lands to the west of the lands under application.

Chairman: Is Mr. Croach present and represented by Counsel?

Mr. Croach: (Tag Donaldson) My name is Croach and I can't afford a lawyer. I just want to know what the Sam hill is going on here. I have fenced the back of my property.

Chairman: Thank you Mr. Croach. I will give you the opportunity to give your arguments and your evidence in due course.

Miss Allems, this is your client's application. Would you care to lead off, please.

Lawyer Allems: Thank you Mr. Chairman. I would like to call as my first witness Mr. John Middleground, the surveyor who prepared the first plan.

Chairman: Mr. Gardiner, would you swear in the witness please.

Clerk: Do you swear that the evidence you will give before this hearing will be the truth, the whole truth, and nothing but the truth?

Middleground: I do.

Clerk: state your full name please.

Middleground: John Middleground.

Lawyer Allems: Mr. Middleground, could you describe for this hearing the method you used in preparing this survey?

Middleground: Yes ..... well..... it is pretty well as shown on the plan. I staked out the lot using what I thought was the best evidence under The Surveys Act.

Clerk: Mr. Middleground, the Chairman has not seen this plan prior to this hearing and it will be necessary for the record and in order that the parties can fully understand what is taking place that you describe in detail the methods used in re-establishing these boundaries.

Middleground: I searched the title records and I uncovered a survey by O.L.S. Fenceon in 1963 being a survey of the lands for Mr. 5½.

Lawyer Gibson: Mr. Chairman, I have a photocopy of the field notes by O.L.S. Fenceon and a resume of the title deeds to the subject lands which I would like to file as exhibits.

Chairman: Miss Allems, do you have any objections?

Lawyer Allems: Mr. Chairman, I would ask if O.L.S. Fenceon is here in order that we may cross-examine him with respect to his field notes and if he is not here, I would respectfully suggest that the field notes are in the nature of hearsay evidence and accordingly, inadmissible.

Chairman: Mr. Gibson?

Lawyer Gibson: Mr. Chairman, O.L.S. Fenceon is out of the country and is unable to be here. However, I strongly feel that it is necessary to introduce these field notes in order to provide the tribunal with a clear insight into the events leading up to this application.

Chairman: Miss Allems, I appreciate your reluctance to accept these field notes as an exhibit to the hearing and in another forum your objection may well have been sustained. However, a tribunal is given greater latitude with respect to the rules of evidence and I am accordingly accepting these field notes as an exhibit, but I can assure you that your concerns will be taken into account when weighing this evidence in our further discussions and deliberation. Mr. Croach, do you have any objections?

Mr. Croach: Yes, I object to the way this survey is done and I want to know how come they are taking my land away?

Chairman: Thank you Mr. Croach. We will hear your story at the appropriate time.

Clerk: Exhibit #1 is a photostat copy of a page of field notes by O.L.S. Fenceon dated January 23,1963, and Exhibit #2 is a resume of title deeds.

Mr. Middleground, would you continue now.

Middleground: Thank you. My first task was to verify or disprove the line A-B by O.L.S. Fenceon as it appeared from his field notes filed as Exhibit 1, because he established the C_1-D line parallel to this A-B line. I was able to do this by means of a mortgage survey carried out by O.L.S. Walltie on Lot 6, the field notes of which were available in my office.

Lawyer Allems: Excuse me Mr. Chairman, but I do have a photocopy of the Walltie field notes which I was hesitant to submit as evidence since O.L.S. Walltie is now deceased and cannot testify. However, in view of your earlier ruling with respect to the O.L.S. Fenceon field notes, I would now request that the copy of O.L.S. Walltie's field notes be filed as an exhibit.

Chairman: Objections, Mr. Gibson?

Lawyer Gibson: No, Mr. Chairman.

Chairman: Any objections Mr. Croach?

Mr. Croach: Well, Mr. Chairman, I object to the way this surveyor has set my boundary line .....

Chairman: Later Mr. Croach - later.

Clerk: Exhibit 3 is a photocopy of a page of field notes by O.L.S. Walltie dated July 25, 1946.

Proceed Mr. Middleground.

Middleground: I set off the ties shown on O.L.S. Walltie's field notes and produced these to the ends of the line, and after extensive digging, I found the remains of the wooden posts planted in the original survey for Plan 35. These were some 2 feet on one or the other side of the fence which Fenceon accepted for the line between Lots 5 and 6, but there can be no doubt that my positioning of the boundary is the correct positioning.

I then measured over plan distance in order to re-establish the C_1-D line, being the line between the east and west halves of Lot 4 and found an iron pipe at D by O.L.S. Fenceon approximately 2 feet off this plan distance. I then decided to check through to First Avenue which I was able to establish at G and H and found that my total frontage from B to G gave merely a 0.25 foot surplus. This again tended to support my interpretation of the evidence and led me to the conclusion that proportional division would be the most equitable method of re-establishing these boundaries. I then set my S.I.B.'s at D and E accordingly

For the rear of the lots I computed the distance from the original wood stake at A to the streetline on First Avenue and set SIB's by proportional division at C_1 and E. As a precaution, I checked for evidence at the north end of the line between Lots 3 and 4 at location C_2 and found an original wooden stake 2 feet below ground level. The position of this stake fit my calculated proportions and this fact strongly supported my method of survey.

Lawyer Allems: Did this method of survey create any encroachments, Mr. Middleground?

Middleground: Yes Mam, The eaves of the building on the property of Mr. 5½ and the frame garage on the property of Mr. 2 both encroach on the applicant's land. Further, as you are already aware, an irregular wire fence lies approximately 4 feet south of the north limit of the lot. Mr. Croach informs me that he built this fence himself.

Mr. Croach: Mr. Chairman, if I might .....

Chairman: Later, Mr. Croach, later.

Lawyer Allems: Mr. Middleground, do you consider the A-B line to be re-established by the best available evidence and it is re-established in accordance with The Surveys Act?

Middleground: Yes, it is.

Lawyer Allems: Mr. Middleground, do you consider the F-E line to be re-established by the best available evidence and is it re-established in accordance with The Surveys Act?

Middleground: Yes, they are.

Lawyer Allems: Thank you Mr. Middleground. I have no further questions.

Chairman: Do you wish to cross-examine, Mr. Gibson?

Lawyer Gibson: Yes Mr. Chairman. Mr. Middleground, did you discuss this survey with Mr. 5½ during the progress of this survey?

Middleground: Yes.

Lawyer Gibson: And what did he say?

Middleground: Mr. 5½ told me that the Fenceon Survey was performed to mark out the property he was purchasing from Greenacre and he had always considered that to be the easterly boundary.

Lawyer Gibson: Did you discuss the position of these boundaries with the applicant, Mr. 3½?

Middleground: Yes, I did.

Lawyer Gibson: What did he say with respect to the C_1-D line?

Middleground: Well Mr. Gibson, he didn't know the position of his boundaries and that is why I was commissioned to do the survey.

Lawyer Gibson: Mr. Middleground, on the F-E boundary, your plan shows that you found a steel angle iron at three different locations and it would appear that these form a line that would lie approximately 2.5 feet east of your line at location F and 3 feet west of your line at location E.

Middleground: That is right.

Lawyer Gibson: And such a line drawn to these angle irons would eliminate, if it were the true line, the encroachment of the garage. Is this correct?

Middleground: Yes, if it were the correct line, but it is not, for reasons I have already stated.

Lawyer Gibson: Did you discuss this survey with Mr. 2?

Middleground: No, I did not, because my evidence and survey methods were strong enough, in my opinion, to make this unnecessary.

Lawyer Gibson: Mr. Chairman, I have no further questions for this witness.

Chairman: Do you have any reply to this cross-examination, Miss Allems?

Lawyer Allems: Yes, Mr. Chairman.

Mr. Middleground, with respect to the line C_1-D (pause), do the title deeds describe the parts of Lot 14 as being the east and west halves of the Lot?

Middleground: Yes, they do.

Lawyer Allems: Does Mr. Fenceon's survey divide the lot into east and west halves?

Middleground: No, it does not.

Lawyer Allems: Does your survey divide Lot 4 into east and west halves?

Middleground: Yes, mam, it does.

Lawyer Allems: Thank you Mr. Middleground that is all.

Chairman: Thank you Mr. Middleground, you may step down.

Clerk: Mr. Chairman, excuse me, but we have not given Mr. Croach the opportunity of cross-examining this witness.

Chairman: How could I possibly forget.

Mr. Croach: Young fellow, your plan says there is a fence there 20 years old and I want you to know that that fence is more than 25 years old and I can prove it.

Middleground: Mr. Croach, did you have a proper survey when you built the fence?

Croach: No, I didn't, but I don't see what the hell that has to do with it because I have been using that land for 25 years and I think that if you knew anything about the laws of this land, that you would realize that I own it and you've got your line in the wrong place.

Middleground: Sorry, Mr. Croach, but I disagree with you and I guess we will have to let the Chairman decide on that issue.

Croach: Mr. Chairman, I'm no lawyer, and I ain't no surveyor, but I know where my boundaries are; and I know what my rights are, and all I've got to say that you've got to straighten this mess out.

Chiarman: Well, Mr. Croach, I am going to do my best.

Miss Allems, do you wish to reply to Mr. Croach's cross-examination?

Lawyer Allems: No, Mr. Chairman, I do not.

Chairman: Miss Allems, do you have any further witnesses?

Lawyer Allems: No, Mr. Chairman. That is the case for the Applicant.

Chairman: Mr. Gibson, do you wish to present any evidence?

Lawyer Gibson: Yes, Mr. Chairman, I would like to call Mr. 2 to the stand.

Clerk: Mr. 2, do you swear that the evidence you will give before this hearing will be the truth, the whole truth and nothing but the truth?

Mr. 2
(Dick Gardiner) I do.

Clerk: State your full name please.

Mr. 2 Mr. 2.

Lawyer Gibson: Mr. 2, you filed a formal objection to this application. Would you state to the tribunal the nature of your objection?

Mr. 2 Well, the line on this plan cuts through my garage and doesn't agree with the line that me and my neighbour agreed on.

Lawyer Gibson: What line is that, Mr. 2; I mean the one you agreed to?

Mr. 2 Well, back in about 1963 or 1964, I wanted to build a garage on my property, so I asked my neighbour, who was Red Hectare at that time ... he sold the house to Mr. 3½ in 1974 ... and he said, well let's measure it off and find

Lawyer Gibson: What did you do then?

Mr. 2: Well old Mr. Red Hectare said that a surveyor had planted some pipes on the other side of his property and all we had to do was measure over 90 feet to set my line. I got out my 25 foot cloth tape and we measured over 90 feet at the front and the back and I drove in a steel angle iron at each end. I then got old man Red Hectare to sight between them and I drove another angle iron where I wanted to build the garage.

Lawyer Gibson: Did you sign any papers with respect to this line?

No. 2: No. Hectare and I just agreed that was a good boundary, so I went ahead and built my garage.

Lawyer Gibson: Thank you Mr. 2. I have no further questions.

Chairman: Do you wish to cross-examine?

Lawyer Allems: Mr. 2, are you a surveyor, or ever worked for a surveyor?

Mr. 2: No, I am not, and I did not.

Lawyer Allems: Are you aware that there are laws governing the setting of boundary lines?

Mr. 2: Well, there must be, but I figured that was only when there was a fight between neighbours.

Lawyer Allems: Do you mean a fight in the same sense as a dispute?

Mr. 2: Yes - sure.

Lawyer Allems: And you and your neighbour are now having a dispute over this boundary?

Mr. 2: Yes, that's right.

Lawyer Allems: O.K. You have just told us that the laws concerning boundaries should be used to settle fights.

Mr. 2: That's right.

Lawyer Allems: Did you ever hear of The Surveys Act?

Mr. 2: No, I did not.

Lawyer Allems: I have no further questions.

Chairman: Mr. Gibson, do you have any reply?

Lawyer Gibson: No, Mr. Chairman. I have no further questions.

Mr. Chairman, I would now like to call Mr. Greenacre.

Clerk: Do you swear that the evidence you will give before this hearing will be the truth, the whole truth and nothing but the truth?

Red Hectare:
(F.J.S.Pearce) I do.

Clerk: State your full name.

Red Hectare: Red Hectare.

Lawyer Gibson: Mr. Hectare, the title deeds show that you purchased the property now owned by the Applicant in 1956 and you sold the property to the applicant in 1974. Do you agree with that?

Mr. Hectare: Yes, I do.

Lawyer Gibson: You heard Mr. 2 describe how he wished to build a garage and how he asked you to help him locate the boundary between your property and his property, and that you further assisted him in driving steel angle irons on that line, and further that you agreed that was the line. Are these statements to the best of your recollection, true?

Hectare: Yes, indeed.

Lawyer Gibson: In your mind then, was the line between your property and Mr. 2's property fixed by those steel angle irons?

Hectare: Sure it was, we had no problems.

Lawyer Gibson: Thank you Mr. Hectare, no further questions.

Chairman: Miss Allems?

Lawyer Allems: Mr. Hectare, are you a surveyor or have you ever worked for a surveyor?

Hectare: No.

Lawyer Allems: Have you ever heard of the Surveys Act?

Hectare: No.

Lawyer Allems: No further questions Mr. Chairman.

Chairman: Do you wish to reply Mr. Gibson?

Lawyer Gibson: No. I have no furt r questions, Mr. Chairman.

Mr. Chairman, I would like to recall the surveyor.

Chairman: Mr. Middleground, you are still under oath.

Lawyer Gibson: Mr. Middleground, I notice on the plan that at location A and at location C , that you found original wooden stakes 2 feet below ground level.

Middleground: That is correct.

Lawyer Gibson: Did you look for original stakes at locations E and F?

Middleground: Yes, I did. We dug there at least 2 feet and found no original posts.

Lawyer Gibson: You seem to make a habit of digging holes in people's lawns. Do many people throw stones or otherwise threaten you?

Middleground: Yes, they do Mr. Gibson.

Lawyer Gibson: I want you to know that I am one of them, Mr. Middleground.

Thank you Mr. Middleground. I have no further questions.

Chairman: Any cross-examination Miss Allems?

Lawyer Allems: No, Mr. Chairman. I have no further questions.

Lawyer Gibson: I have no further evidence, Mr. Chairman.

Chairman: For the benefit of the parties to this application, the Statutory Powers Procedure Act allows a tribunal to conduct its business whether formally or informally in accordance with the situation that may exist at any given time. To this end, I will ask your indulgence in allowing Mr. Croach to present his evidence as he sees fit. You will, of course, have the opportunity of cross-examining him. Mr. Croach, would you place your case before the tribunal please.

Clerk: Do you swear that the evidence you will give before this hearing will be truth, the whole truth and nothing but the truth?

Croach: I do.

Clerk: State your full name, please

Croach: Mr. Croach.

Croach: Yes. Well like I said before Mr. Chairman, I lived on that property for 25 years - long before any of these fellows moved into the neighbourhood - I built that fence then and I planted my garden up to that fence for all of these 25 years, and nobody has ever said "Boo" to me about it.

Old Hectare and the applicant here were always good neighbours and got along fine until these damn surveyors and lawyers started messing things up. Why is it, Mr. Chairman, that we always get along fine until these fellows start mixing things up?

Chairman: Try to stick to your argument, Mr. Croach.

Croach: I haven't much more to say, except I know that they are trying to take some of my land - and they got the boundary on that plan in the wrong place. I know enough about the law to tell me that I've got my rights in these lands and the boundary should be moved

Chairman: Is that all Mr. Croach?

Croach: Yes Sir.

Chairman: Miss Allems, do you wish to cross-examine Mr. Croach?

Lawyer Allems: No Mr. Chairman.

Chairman: I would now like to have summation with respect to your arguments. I don't wish to influence the manner of your presentation, but I should advise you that when weighing argument, I mentally assign 10 points for brevity and deduct 1 point for each minute elapsed in the presentation of your summation.

Lawyer Allems: I am shooting for 5 points, Mr. Chairman, under those rules.

Mr. Chairman, I submit that O.L.S. Middleground has re-established the boundaries under application in accordance with accepted techniques in the science of surveying, he has applied the provisions of the relevant statutes and has brought his experience and technical expertise to bear in resolving the question before the tribunal. Very briefly, I would reiterate:

- that he re-established the Line A-B from original evidence,
- that he has re-established the limit of First Avenue in accordance with undisputed evidence,
- that he has found that the distance between the line A-B and First Avenue agrees very closely with that of the original plan,
- that he has applied the principle of proportional division to provide an equitable distribution across Lots 1 to 5,
- that he was correct in disagreeing with the survey by O.L.S. Fenceon for the simple reason that he worked from original evidence,
- that with respect to the line dividing Lot 4 in two parts that the title deeds refer to the east half and west half of the Lot,
- that O.L.S. Middleground's survey divides the Lot into an east half and west half,
- and that O.L.S. Fenceon's survey DOES NOT divide the Lot into an east half and a west half,
- that with respect to the line E - F, I submit that neither Mr. 2 nor Mr. Hectare had either the technical expertise or the knowledge of law to allow them to re-establish the boundary between their properties,
- that Mr. Hectare and Mr. 2 accordingly re-positioned the boundary incorrectly, and that being the case, I submit that their actions should not be allowed to prejudice the rights of the applicant.

With respect to the objection by Mr. Croach, it must be acknowledged that he is pleading adverse possession by other words. I must also acknowledge that the applicant was un-prepared to defend an objection on the grounds of adverse possession and has made no submission in that respect. I only point out to the tribunal that an original post was found well inside Mr. Croach's fence and that the tribunal should give this fact its fullest consideration.

I submit, Mr. Chairman, that the boundaries be confirmed in accordance with the plan before this hearing.

Chairman: Mr. Gibson?

Lawyer Gibson: Mr. Chairman, I am shooting for six points by speaking more quickly than my colleague. My client, Mr. 5½, purchased his property and built his house in accordance with a survey by O.L.S. Fenceon, and I submit that he is entitled to rely on that survey. Although O.L.S. Middleground has found original stakes at location A-B, and that his measurements show close agreement with the original plan, it must be acknowledged that Mr. 5½ was the first owner to build on and occupy the lands in question. In light of this, Mr. Chairman, I strongly feel that the Middleground line C_1, be rejected and that the line by Fenceon be confirmed.

With respect to the line E - F, I again acknowledge that O.L.S. Middleground's positioning of the boundary is likely more theoretically correct than the line established by Mr. Hectare and Mr. 2. However, Mr. Hectare and Mr. 2 did establish and fix a line that was mutually acceptable to them by their own testimony and that they occupied that line as evidenced by Mr. 2's garage. I submit that Mr. 2 cannot now be denied his rights and privileges with respect to this boundary, - and I further submit that the applicant, by his actions up to the time of the Middleground survey, found no reason to dispute or question the position of the garage and is now barred from doing so.

Again, Mr. Chairman, I submit that the Middleground line be rejected in favour of the line established by Mr. 2 and Mr. Hectare. Thank you, Mr. Chairman.

Chairman: Do you have any reply Miss Allems:

Lawyer Allems: Well, Mr. Chairman, I could only reiterate that O.L.S. Middleground has re-established the lines in accordance with the statutes, in accordance with the best available evidence of their original location, and in accordance with the time - tested and acceptable techniques of legal surveying and that they be confirmed as shown.

Chairman: Thank you. I shall reserve my decision in this matter. This hearing is adjourned.

EXHIBIT 1

O.L.S FENCEON
Jan. 23/63

135

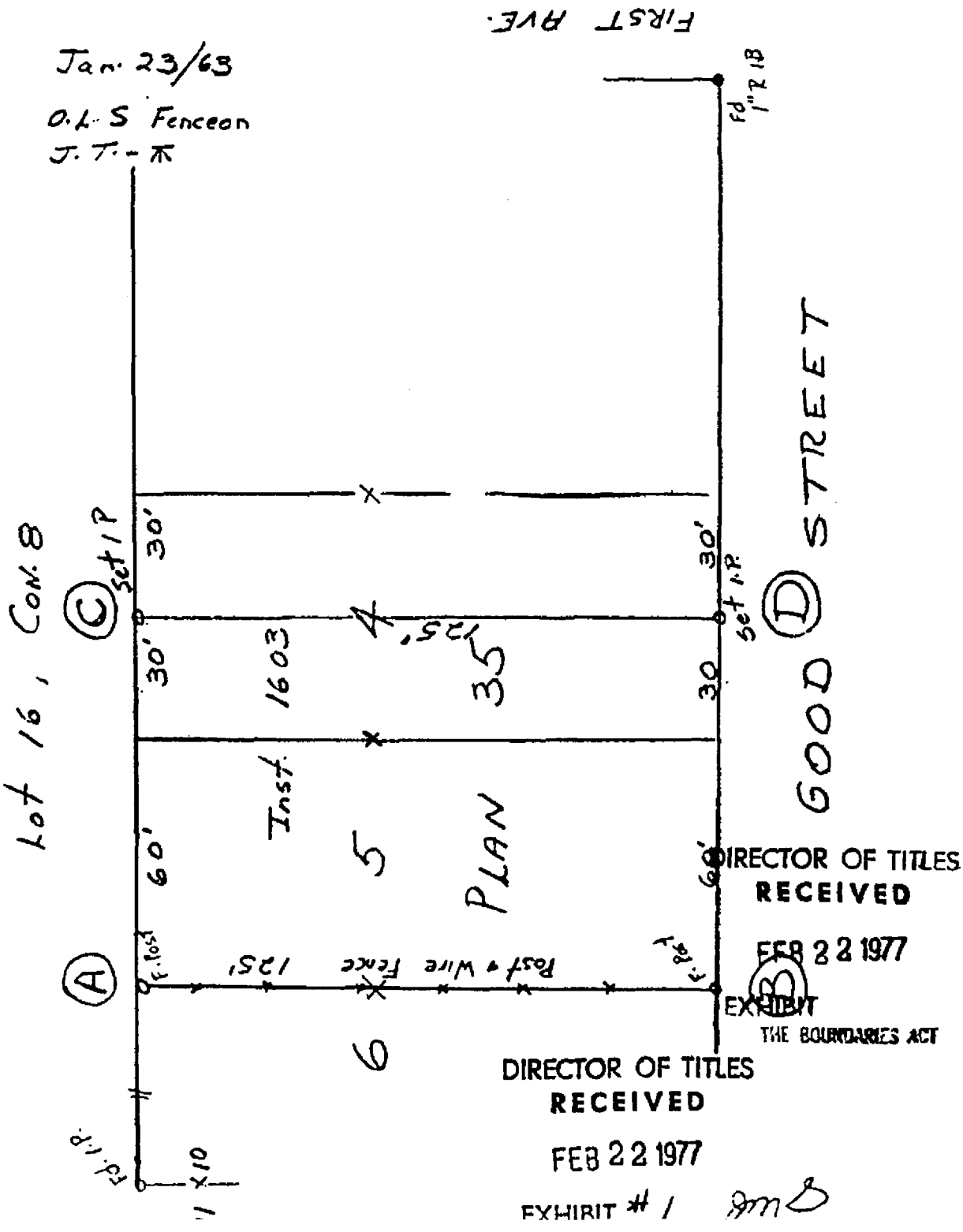


EXHIBIT 2

RESUME OF TITLE DEEDS

Registered Plan 35

Number	Instrument	Dated	Registered	Grantor	Grantee	Land
1506	Grant	3 Sept, 1955	30 Sept, 1955		Mr. 2	Lot 3
1603	Grant	1 July, 1956	15 July, 1956		Mr. Greenacre	Lots 3, 4 and 5
1726	Grant	1 Feb, 1963	6 Feb, 1963	Mr. Greenacre	Mr. 5½	Lot 5, W½ Lot 4
2500	Grant	1 March 1974	31 March 1974	Mr. Greenacre	Mr. 3½	Lot 3, E½ Lot 4
		Lot 16	Concession 8	TWP of Black		
805	Grant	15 May, 1950	31 May, 1950		Mr. Croach	Part, same as Inst. 799

EXHIBIT
THE BOUNDARIES ACT

DIRECTOR OF TITLES
RECEIVED
FEB 22 1977

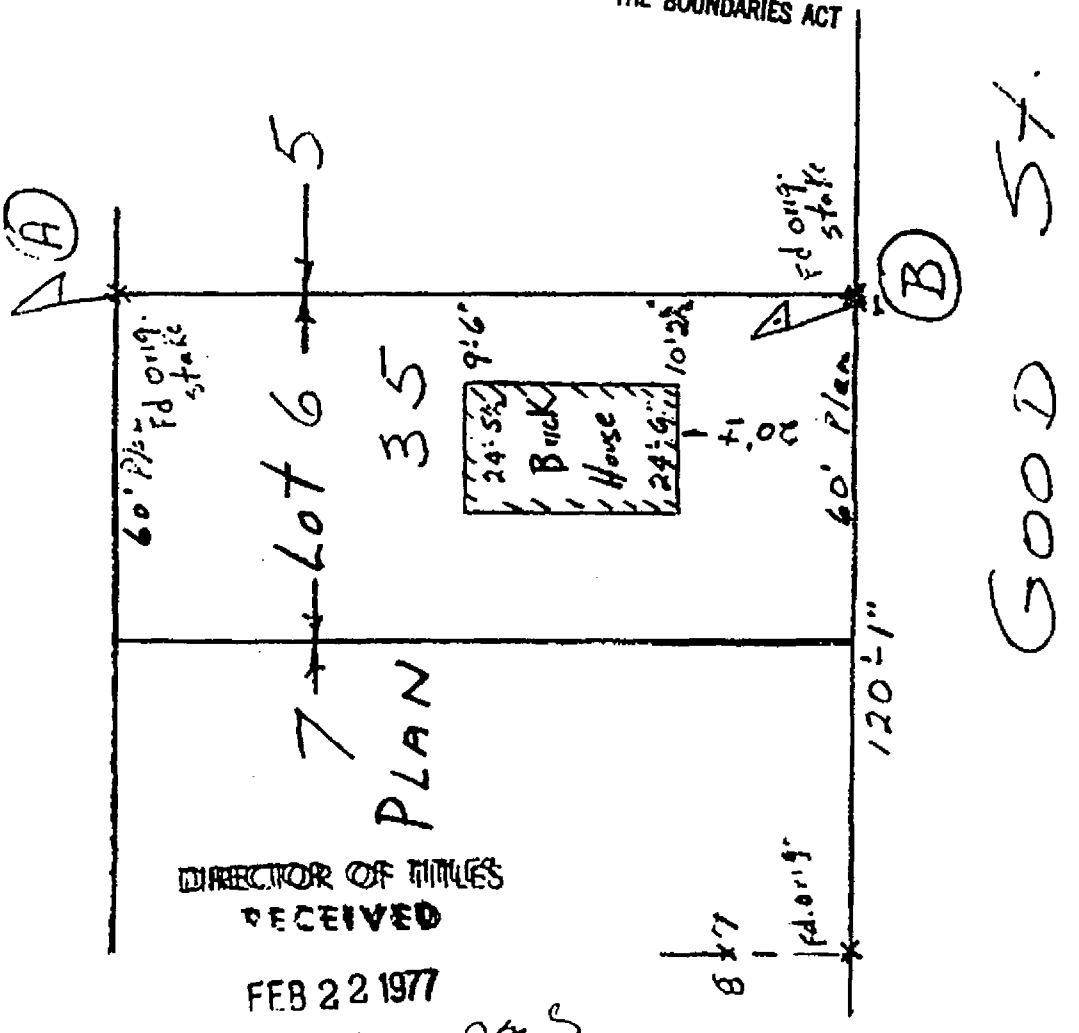
DIRECTOR OF TITLES
RECEIVED
FEB 22 1977

EXHIBIT
THE BOUNDARIES ACT

EXHIBIT 3

O.L.S. Wolfe
July 25/46.

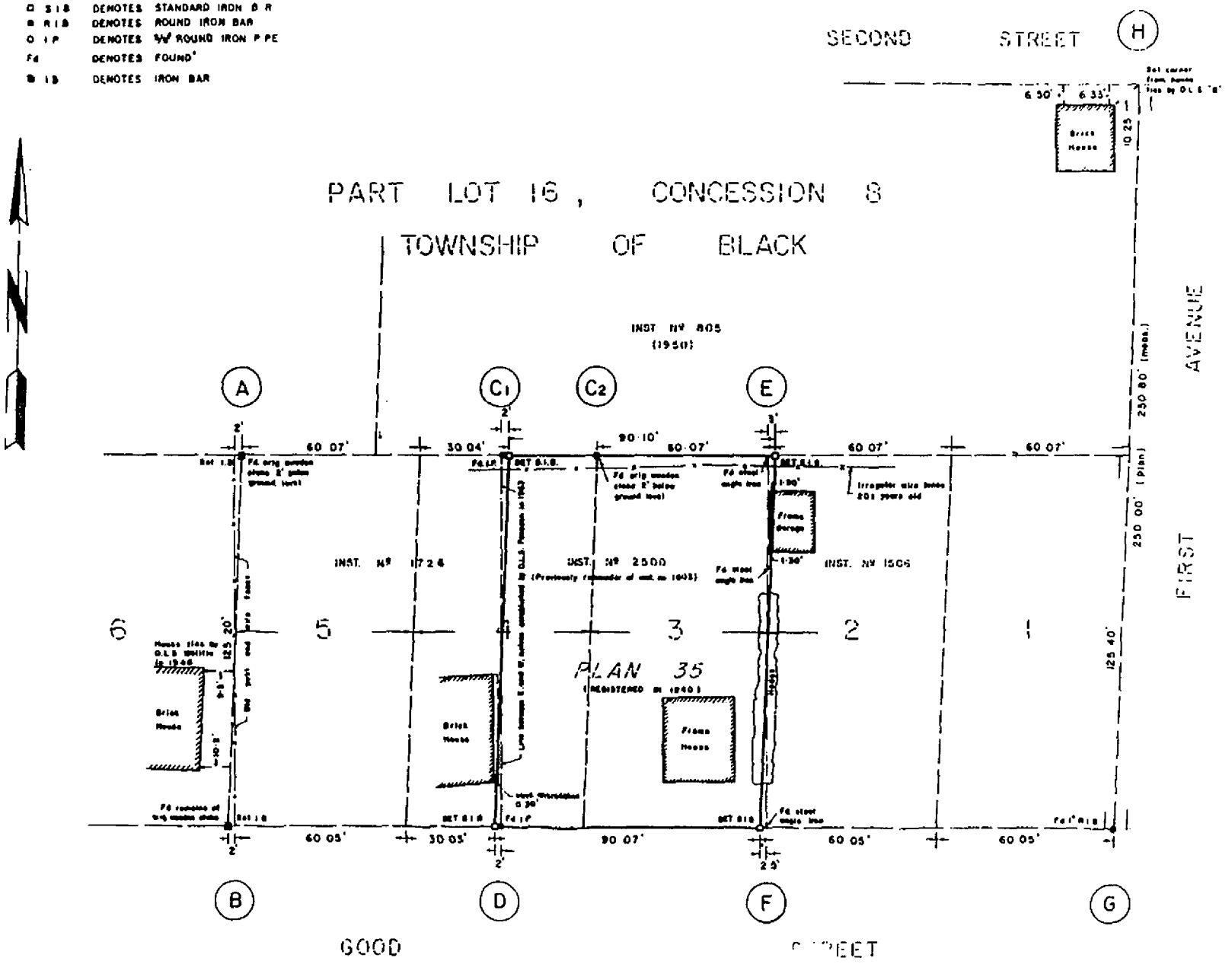
DIRECTOR OF TITLES
RECEIVED
FEB 22 1977
EXHIBIT
THE BOUNDARIES ACT



DIRECTOR OF TITLES
RECEIVED
FEB 22 1977
EXHIBIT #3 JNS

LEGEND

○ S I B	DENOTES	STANDARD IRON B A R
● R I B	DENOTES	ROUND IRON BAR
○ I P	DENOTES	¾" ROUND IRON P PE
Fd	DENOTES	FOUND
B I B	DENOTES	IRON BAR



MOCK BOUNDARIES ACT HEARING

ORDER AND REASONS

The testimony and evidence that has been presented at this hearing has, in my mind,raised three separate issues with respect to the law of boundaries.

The Surveyor for the applicant has illustrated his expertise with respect to the technical elements of the science of surveying and has applied this expertise most diligently when measured against the generally accepted interpretation of The Surveys Act. Said another way, Mr. Middleground has looked for original evidence and where none was found, in his view, he has used proportional division. However, there is a body of common law that can and must be brought to bear in resolving disputes that could not otherwise be resolved under a narrow interpretation of a given statute. That is to say, that our lives are governed to a considerable degree by the customs of the past and by the continuing pursuit of an equitable solution to our problems and it is this custom and equity that are, in good part and in a broad sense, the foundation of our common law.

Now, as a chairman of a tribunal, it is essential for me to draw,not only from my own experience and feeling for the evidence, but from the great resource of precedents that have been established by our Courts in the process of merging and common law and statute law in the resolution of the disputes of the past. Now, with this in mind, I will address myself to the problem at hand and will discuss the various boundaries as they have been presented to the hearing.

No objection has been raised by the Municipality with respect to the re-establishment of the limit of Good Street and I am satisfied that the alignment that has been presented on this plan is re-established from the best evidence of its original position, and that boundary is hereby confirmed.

I would then like to direct my attention to the line A - B insofar as this line has to a great extent governed the position of other boundaries of the lands under application. It is at this point that I must run the risk of making decisions that could tend to prejudice the rights of parties who are not before this hearing. With this very important reservation in mind, I must very closely examine the boundaries under application themselves to determine if they can be resolved without recourse to extrinsic evidence, or evidence external to the lands under application. Looking then at boundary C_1 - D, I find from the evidence and testimony as follows:

Mr. 5½ purchased all of Lot 5 and what he believed to be the west half of Lot 4 from Mr. Hectare in 1963, and he has testified that the Fenceon survey was undertaken to mark his boundaries. It must be acknowledged that the Fenceon survey represents the first running of the line between the east and west parts of Lot 4. Mr. 5½ purchased the land as defined by that survey believing that the line was correctly placed, believing that it represented the intentions of the vendor, and was obviously satisfied in his own mind that it was the true boundary of his lands. It is noted that the iron pipes planted by Fenceon are still in place in the ground. It is further obvious to me that the vendor for a neriod of time, and the purchaser, Mr. 5½, up to the time of the time of the present survey, occupied and enjoyed their lands up to the line established by Fenceon. Notwithstanding the fact that the title deeds describe the lands as the east and west halves of the Lot, and notwithstanding that O.L.S. Middleground has more precisely established the theoretical position of the line between the east and west halves, I am quite convinced that the iron pipes planted by Fenceon more adequately reflect the intent and the expectation of the original parties to the severance and should be held.

Touching briefly on the question of misdescription, I find that in view of the foregoing, that the description in the title deeds are incorrect and stemming from that and the concept of priority of severance, I find that the applicant lands, being a subsequent severance, contain only the remainder with respect to Lot 4.

The principle survey issue that emerges from an examination of the Line C, - D can be paraphrased as the "first running principle".

For precedent, I look to McDonald v. Knudsen, a case before the British Columbia Court of Appeal. The legal principle is stated in the OLS Association's book on Boundaries taken from the Canadian Abridgement and I quote: *"Where an owner of land points out and defines by his surveyor the exact boundaries of the lot he is selling to a purchaser and the lot is marked by posts on the ground, the purchaser cannot, after a period of years during which he had made valuable improvement thereon, be dispossessed of his possession or title, upon discovery of the fact that the description in the deed would locate the property differently."*

I therefore order that the line C_1 - D is confirmed as the line joining the iron pipes planted by O.L.S. Fenceon. I make this ruling independent of any consideration of the merits of the evidence submitted with respect to the line A-B.

I will now direct my attention to the line E - F and - note that the techniques used by the surveyor, together with the apparently acceptable degree of precision in the original survey of Plan 35, would lead me to the conclusion that the boundary as fixed by O.L.S. Middleground, is the true boundary. However, we have heard testimony this afternoon

which makes it quite clear to me, that a conventional boundary has been created by operation of a parole agreement between Mr. 3½ and Mr. Hectare, the former owner of the Applicant's land. The requirements necessary to establish a conventional line has been clearly stated by the Courts in Wilbur Tingley, a case before the appeal division of the Supreme Court of New Bsunswick, it was stated by Chief Justice Richards and I quote from the head-note of the case as reported:

> *"I think it well settled that to establish a conventional line there must be an agreement between the parties to recognize some line as the boundary line between properties, and that such recognition may be by express words, or by conduct. Time is not an element of the contract. Once the agreement is made unconditionally it is effective immediately and in the absence of fraud cannot be cancelled or repudiated at the will of one of the parties."*

Again, quoting from Wilbur v. Tingley, Justice Hughes concurred with Richards and went on to say that the owners: *".....by thus doing established a conventional line between their lands and the line so established becomes the actual and fixed boundary between their properties whether it is in fact the true boundary or not".*

I do not consider that the principle of adverse possession is an element in the resolution of the line E - F, nor do I find it necessary to invoke the principle of estoppel. The Boundary between Mr. 2, and the applicant was clear and unequivocally a conventional boundary as defined by the angle irons planted by the parties to the agreement and is the true and unalterable boundary, and I DO SO RULE.

Mr. Croach, I sincerely regret that I am unable to solve the problem that has arisen as a result of this application insofar as the boundary between your real ownership and the ownership of the applicant. I agree with Miss Allems that you are pleading before this tribunal to resolve a claim to the lands on the grounds of adverse possession. However, two things are quite clear. The first, is that I have the authority in this forum to decide the true location on the ground of lost or disputed boundaries. The second point that is clear to me is that I do not have the authority under The Boundaries Act to rule on the rights or interests with respect to the ownership of lands on either side of that boundary, once it is established. Now Mr. Croach, on the evidence presented to this hearing, I find that the north boundary of the lands under application in heavy, solid line, is, in fact, the true notherly limit of the lands under application, subject to my rulings with respect to the sidelines, and I DO SO RULE.

I want it understood, Mr. Croach, that my ruling must in no way jeopardize your enjoyment of the lands between the fence and the line until the matter of the ownership of these lands has been settled in the appropriate Courts. I would strongly recommend that neither you, Mr. Croach, nor the applicant, Mr. 3½, do any physical thing with respect to the boundaries and the fences until the issue has been resolved.

I make no order as to costs. This hearing is adjourned

DISCUSSIONS:

A. FOLLOWING MORNING PAPERS

B. FOLLOWING MOCK HEARING (INCLUDES GROUP DECISIONS)

C. FOLLOWING ORDER AND REASONS

DISCUSSION FOLLOWING MORNING PAPERS

CHAIRMAN SEAWRIGHT: Ladies and Gentlemen, we have about seven minutes by my watch, if you have any questions to the three speakers, please identify yourself and direct your questions to the Chair, and I in turn will direct them to the speaker. Any questions?

MR. GLEN WEAVER: I have a question for Mr. O'Grady. The case concerns the one you mentioned Mr. O'Grady, but it was done so first in the City of Hamilton in the Township of Saltfleet. I thought I heard you say that possessory title was gained by reason of the fact that occupation could be shown for ten years prior to 1922. I thought I heard you say sometime previous to that, that possession against the Crown had to be 60 years prior to 1922. Clarify that for me please.

MR. O'GRADY: Section 3 of The Limitations Act says that to bring an action on behalf of Her Majesty, you'd need 60 years that she had to be out of possession, and you wander through the various sections and you get to 15 and it says if the action hasn't been brought within the time limit in the Act as against Her Majesty of 60 years, and as against an individual, it is 10 years, unless you're under a disability, then the title of the true owner is defeated. Now then Section 16 goes on and says: "Nothing in Sections 1 to 15 affect waste or unsurveyed lands of the Crown". In 1922 it was added to that Section the references to road allowances and roads vested in the Crown or in a local municipality. The Section now reads: "This does not affect ..." in other words you couldn't get possessory title against a road allowance, but it doesn't affect any rights or interest acquired before the 23rd of May 1922. In the DiCenzo case that I referred to, they had been in possession up to this fence line, which was in the centre of the road allowance, since about 1870, according to the evidence and it had come in, in the conveyancing around 1901 and had been conveyed from then on down to the present owner. So that the Court held in that decision, that the time element was ten years as far as the road was concerned against the Crown prior to the 23rd of May 1922. I wondered whether that case would go to appeal, because Reid hedged in on both sides. Somebody from the City of Hamilton tells me that that is going to appeal for sure, so we're going to have to wait to see, and if it runs the course of the other cases that I referred you to, the Court of Appeal has upset the trial judge. I don't know if that will be the result here or not. We'll have to wait and see what the Court of Appeal has to say on it.

MR. PAUL WYMAN: Mr. Chairman, I'd like to have the Panel as a whole give their opinion on what has been the attitude or what has been the opinion as to lands held by the municipalities that were not necessarily for the public use they sometimes acquire land for development. I'm wondering if these lands can be occupied again and used; are there decisions against that or are these lands different from those lands which they hold strictly for public use, for roads or parks or whatever?

MR. O'GRADY: As far as I'm concerned, my opinion is that, what we call the City, the municipality is in no better position than you or I, the ten year period applies to them, because it isn't land within that public domain, like the old cases referred to, as highways, wharves and market places and that. I don't think it would fit into that . But if they acquire a piece of property for tax arrears or as you indicated, for an industrial development or something like that, then I think they're in no better position than you or I and possession can run against them; or conversely they can acquire possession against you.

MR. PAUL WYMAN: The other question is what is defined as Crown Land or to be more specific, what is the opinion in terms of companies like The Canadian National Railway, Universities and so on - are these considered Crown Lands or are they just corporations which happen to be publicly owned?

MR. O'GRADY: As I said earlier, that's a good question - have you got another? I know as far as the Planning Act is concerned, you get that exception under Section 29 of conveyances to municipalities and that, I don't think within that exception under The Planning Act, that you find the universities or conservation authorities, unless they've specifically mentioned. They're not specifically mentioned, nor Ontario Hydro or anything like that. I think they're in the same boat, that even though they may be an emanation of the Crown or a Crown Corporation, they're the same as anybody else, that they're not the Crown itself or Her Majesty.

(Question from Floor) - In the Glasgow case where a person had title to a road allowance - suppose he chose not to have title to that road allowance, so that in effect he would have a natural severance because the road allowance is there.

MR. O'GRADY: Are you indicating had he conveyed just the whole of Lot 31 and not included the road allowance with it (right). - You get into the nice question. Again going back to the first case I referred to, Fleet and Silverstein, where Chief Justice McRuer as he then was, indicated that maybe Section 15 of The Conveyancing Law and Property Act operates to attract with it, the adjoining piece of land that he has occupied, and because under that Section it says: "Unless the contrary is mentioned in the conveyance, it includes all lands used, occupied and enjoyed as part and parcel thereof." So the written description is not always the final thing. Again, it's a matter of having to come back to you people as surveyors and show us what's there, what's the deed line and what's the occupation line and then judgements have to be made, and those judgements are the most difficult judgements, I think. Some members, a lot of members in my profession, unfortunately take it very lightly and I don't think they look at it seriously enough.

MR. FRED SCHAEFFER: I guess it's probably a Jerry O'Grady question. Apparently due to The Planning Act, the fellow next door may or may not have got possession. But what about the fellow who had the lot against which there's been adverse possession. He may have lost title. Is he left with a non-conforming lot? Because conceivably if his house doesn't conform with the by-law, you may be asked to demolish your house. What is his position in this matter?

MR. O'GRADY: To start off again, Fred, it's one of those odd aspects of the Act that we get into; it's the operation of the statute, that he has lost his title to it, but I don't think it puts him in any worse position. Let's put it this way, if he owns the whole of the lot and he's built his house on it and he's informed that the municipality wants to widen the street and take 10 feet off the front, and his setback is not in conformity, again it's one of those things that when you look at the setback requirements, a lot of times we run into it in London. In the annexed areas, you write to the City and they give you the present by-law of the City, and really when you dig back you find the house was built 30 years ago and was either in London Township or Westminister. You really should go back and take a look at their by-laws, and it's really not so much a legal non-conforming use. The setbacks were valid at the time they were put up. But I don't think that answers your question. I don't know where you sit. The statute operates, the true owner has lost his title and maybe he is in an awkward position.

MR. BRUCE DONALDSON, Guelph: Historically many of us have run into situations where we have a parcel of land adjacent to a railway boundary. Maybe I can refer to a plan of subdivision. To date in most of the experiences that I've encountered, the tracks have been referred to as the monuments witnessing the boundaries. I wonder if any of the members on the panel have had experiences relating to conflicting occupational evidence referred to deed measurements from the centre line of the track, where the railway is loosing land. It's pretty difficult when you're trying to get a draft plan of subdivision approved or certification of the Titles Act.

MR. O'GRADY: I'll take a whack at it. I can recall years ago when I was at Land Titles and handling first applications and it was a bugbear, when you got especially next to the CN, and you had Harry Currie as Regional Land Surveyor ..... Harry always took, as I recall, the attitude, it didn't matter where the fence was at the line, if they had 30 feet from the centre line of the track, that was what they got. But if the fence was over farther, then they got up to the fence.

Back in my family up north, especially on my wife's side, the're a lot of rail roaders and they were section men and that, and I watched them lay track. The thing is that, that description you're referring to is one that was devised 100 years ago almost. You know when they lay track, they lay it again inside the present rail and then out and so you shift everyting over about 6 to 8 inches, and then it depends on where they have laid the next

to compensate the movement each time or they keep going to one side. So really, when you get down to today's track, is this the one that we're talking about of 1870 when the conveyance was registered? Maybe this is the problem that you run into with the fence line. Maybe it was in accordance with the original track that was there years ago, and maybe not conforming to the present track because you've got to take that into consideration. I don't know how the devil you'd research that.

One last comment I would like to make, and from the research I 've done on possession and that, it's most difficult if you've got a deed or you have a registered description including a right of way, it's most difficult to lose that title. It's difficult to lose your paper title for the rights of way or the easements that you have together with your deed. The trespasser, he's got to go through hell and high water to disprove your paper title. Maybe some day we'll get some better case law or better amendments to the legislation to make it a little easier for you and I.

CHAIRMAN SEAWRIGHT: Ladies and Gentlemen, let's show our Panel our appreciation.

The meeting will hereby recess for lunch. We'll re-convene here promptly at 1.30 p.m.

DISCUSSION FOLLOWING MOCK HEARING AND "GROUP DECISIONS"

CHAIRMAN FLATMAN: I believe we're ready to reconvene. I'm sure we all have our opinions. I don't know how many of them there is going to be, but there must have been quite a few disputes. There were questions, there were differences of opinion judging from all the conversation that went on. Perhaps we can commence now with a 60-second delivery of the group decisions, and if we can have the Chairman for Group I stand and give the opinions of his group . .

CHAIRMAN - Group I: There was some confusion under the Boundaries Act whether you could confer a boundary by adverse possession because that was adverse possession. We assumed that you couldn't. We accepted the north limit of Plan 35 being Lot 2, 3 and 4 to 5 as set by the surveyor Middleground. We felt that the owner to the north could apply for the land that is contained by that fence line running east and west and being south of the nort limit of Plan 35. On the west boundary, we disagree with Middleground and we accepted the line as monumented by the surveyor back in '63 where he placed iron pipes and although it was intended to divide it into east and west halves, that is the first survey and we consider that an original survey. The east boundary between Lots 2 and 3 there was no original evidence found by Middleground. He did it by proportion. We agree with the line as set by the two owners, and where they set the angle irons for the corners.

CHAIRMAN FLATMAN: Thank you, spokesman for #2 Group. Let's get lined up in the bull pen for each group.

CHAIRMAN - Group 2 : We concurred pretty well that the establishment of the lots on the registered plan, according to the way Mr. Middleground established them. The half lot line in Lot 4, we didn't take as an original survey according to the Surveys Act which tells you that a lot of corner established by an original survey. It was established erroneously, an agreed-on line, acquiesced in for a long enough period to establish the extent of ownership for the entitlement according to Middleground. On the east side, similarly, we have an acquiesced line that was established and agreed on by two adjacent owners, but we agreed that the original line between 2 and 3 would be in the position established by Middleground.

We also agreed that ... the concensus anyway agreed on the back, the position of the rear line established by Middleground correct as the limit of the plan. It was an occupational limit in the fence as far as the extent of ownership.

CHAIRMAN - Group 3 : Group 3 had some difficulty ariving at a concensus of opinion .... We agreed at times with the applicant surveyor. I think there's a problem with the easterly line, the line the surveyor found with the angle iron.

CHAIRMAN - Group 4: There were five spokesmen on deck to take over and how do you expect to hear when they stay so

far from our mikes.... First of all, we also had some confusion whether to use the Stratford Surveys Act or the Provincial Surveys Act. We agreed that the survey by Surveyor Middleground appears to be sound as far as setting the lines and lot corners are concerned, and it's based on the best evidence rules. It was interesting to note that in 1946 a surplus was found across Lots 6 and 7 of 0.80 which was found to be the distance between the line and First Avenue. Now this observation to confirm this surplus was the stake found at the northeast corner of Lot 4. Therefore we agreed that the Middleground retracement survey appeared to be valid in assessing and locating the lot lines. It is interesting to note that the iron pipes were planted to define the half line for Lot 4 prior to the conveyance of Greenacres to 5½. Therefore we felt that Greenacre and 5½ were happy with the monumentation, and therefore this would be the property line. The angle lines were set to define the property line and Wallbanger and 3½ seemed to be happy with that line, and in order to retain harmony in the community , they agreed to hold the angle irons on the east boundary, the pipes on the west boundary, the street line as indicated by the monumentaion on Fifth Street. We had some misgivings about the occupation line on the north which would require further investigation.

CHAIRMAN - Group 5: I like the word "harmony" - that's a new one for us. Group V were an equally balky group. They divided into about three different groups, but 50% of them felt that Mr. Middleground's survey was perfectly correct, and the rest of use agreed to disagree on somethings, but we did agree on the street line and the rear line as being set correctly. The angle irons would define the best evidence of the lot line; and then the half lot line, and this is where we divided our opinion once more. Some felt there should be further posts in between the found posts in the northwest corner of 3, and then along the straight line out to the side. That's it.

CHAIRMAN- Group 6: We had 11 in our group and 9 of us agreed that on the west boundary, the line of the iron pipe should be used as it was the first survey dividing Lot 4 into equal halves. There was the same ratio of opinion on the east boundary of Lot 3. We felt that the line as set by the two owners should be held. We felt that Mr. Middleground's line for the rear boundary, the north boundary was correct, but that Mr. Croach probably had some claim for adverse possession up to that old fence line. We didn't have time to discuss the street line and I assume that it is ok.

CHAIRMAN - Group 7: As we had unanimous decision on two of the pc in Group 7 and the line on the west, we decided, for the previous survey, the action brought by 3½ to get 5½ should be defeated. On the east, there was an acquiescence of property between Mr. 2 and Mr. Greenacre at the time, so the action between 3½ and 2 should be defeated. On the rear we felt that when he established that angle iron, and this is where he had about a 40 - 60 split in our group, 60% will agree with the following statement, that since there was the finding of an angle iron front and back they were actually allowing a trespass, and we voted in favour of the action between Mr. 3½ and Mr. Croach.

CHAIRMAN - Group 8: Group No. 8, I thought at first we were going to have 12 different opinions, but eventually we sorted two things out. There was one thing on the plan, there seemed to be a measurement error there on the frontage of Lot 5. Because they've got 60.05 and they've got two feet and I don't know whether that meant that Lot 5 had 62.05 feet or whether the measurement went right across the old wooden stakes. I presume that is what we have on the plan.

Disregarding that then, they were of the opinion that the iron pipes set in Lot 4 were for the division of Lot 4, and should be held, and it was an undisputed boundary and no client had brought any action against it. The boundary between Lots 3 and 2, we considered would be between the found steel angle irons at the rear by the garage and house on Good Street. It was a conventional boundary agreed upon by the owners and we could see no reason for a surveyor coming in and disturbing several possessions in this area.

The rear boundary on Mr. N Croach's land was established from original evidence of the original posts, and we thought that was the rear boundary of the lots in the subdivision. Now whether Mr. Croach would have a claim that he could bring up later. Unfortunately, though he has allowed these angle irons and pipes that were found on his property during the years and he may have lost his claim.

CHAIRMAN- Group 9: Group Number 9 felt that the iron pipes could govern for the west boundary and the angle irons which would govern for the east boundary for the reasons given, and the rear boundary exactly the same. We had however, some dissenting votes in our Group by the eminent Professor Dave Lambden and Hans Koester who decided in favour of the young lady's picture.

CHAIRMAN - Group 10: Well we had another split decision, and we thought we would confirm the boundaries as established by Middleground completely and advise all the adjacent owners that may have recourse under another Act.

CHAIRMAN - Group 12: Number 12, after much discussion, agreed on the west boundary, with the iron pipes. On the east boundary, we would use the steel angle irons from the front to the rear. Unfortunately our discussion of east and west boundaries took so much time we didn't have time for anything else, but on the rear line, I think it would be about 60-40 for the Middleground survey.

CHAIRMAN - Group 11: We took a very careful look at this and in fact I guess we were still over there delving into this long after everybody had got up. We were somewhat confused right at the first instance when we took a look at Mr. Middleground's survey and wondered how on earth they ever got past Frank Ujvary. He would have turned around and sent it back saying there wasn't enough supporting evidence or background information because a copy of the subdivision was not included with the application. So we had to start off by making some presumptions. First of all, there was

no apparent confusion about the street line of Good Street, but we did start having problems about all the other entries that Mr. Middleground stated on his plan. For instance, on First Street, he indicates a depth of 250 feet plan. We had to make the presumption that indeed it was the same Plan #35 that created it. Therefore, the proportioning procedure was possible for the 124.4. We also had to make a presumption that indeed the depth of the lots were 125 feet. We also then had to make the determination ... we derived the thing down into four problems, and the first one was the line AB, the line between Lots 5 and 6.. We thought there might be some confusion there and we should verify whether Mr. Middleground indeed established that properly, and we came to the conclusion that indeed he did, that the fence line had no bearing on the position of the line between Lots 5 and 6, and that the original posts, or the evidence of them formed the best evidence of that.

We did, however, note that there must be a drafting erratum and we having to make judgement, took into account that Mr. Middleground in his testimony said that he was using proportional procedure, and therefore it must be a drafting erratum, and we should take it as that.

We then took a look at the line between Lots 3 and 2 and came to the conclusion that [illegible] Mr. Middleground was correct in establishing that line as the line between Lots 3 and 2, and since there was no evidence of the line between 3 and 2, he had certainly used the best rule ... or procedures in so doing. However, by co-agreement, we heard in evidence that indeed both adjoining owners had agreed mutually to have the boundary line where the steel angle irons are situated, therefore we thought that the property line must go along the angle irons for its full entire length even though adverse possession is not evident at the front part where the angle iron is and the standard iron bar was planted. But by co-agreement that was the line between them, it should then become the property line.

On the westerly boundary of 3½'s property we noted that the survey that first established that line, done by my friend, Mr. Fenceon, appears to be the first survey and indeed was used for the documentation that accompanies it, because it took place the following month in the abstract of title, and therefore the iron pipes certainly form the best evidence, being the first survey to establish a property line and erratum on the notes indicated indeed it was the half lot line.

On the rear we noticed from the evidence that Mr. Croach puts forth the fact that he had utilized this land for a period of 20 to 25 years. Therefore, we feel that Mr. 3½ has thereby virtually lost his title to that portion.

CHAIRMAN - Group 13: The pipes and the angle irons and the fence on the north. Thank you very much.

CHAIRMAN - Group 14: Mr. Chairman, I'm John Pierce and am no relation to Red Hectare involved in this. Our findings were divided, maybe half and half, that Mr. Middleground's survey was substantially correct in delineating the limits of the lots according to the registered plan. In other words he did correctly Lot 3 as on Registered Plan #35, and the east half of Lot 4. We believe that certainly there was adverse possession claimed by Mr. Croach and he probably would win it. We think that probably the same situation might well hold over on the other side, on the east side of Lot 3. We're in doubt about Fenceon's survey, some of us were, by virtue of the fact, on Fenceon's plan, he sets up the limits between Lots 5 and 6, and shows this to be a post and wire fence. Apparently in that year, 1953, did not uncover the evidence of the original survey stakes that were found by Mr. Middleground, and consequently, I think that throws some light, at least some reason to correctly establish his iron pipe along the eastern boundary of the land in question. Thank you.

CHAIRMAN - Group 15: I'll make this very brief too. Group 15 found for the iron pipes on the west side, the angle irons on the east side and the fence on the north side.

CHAIRMAN - Group 16: Our Group felt that Mr. Middleground was correct as to determining the 5, 6 lot line and the subsequent proportion for the 2, 3 line, as well as the street line and the north limit. However, we felt that the Fenceon Line should be held as the division of Lot 4, since this was the first survey. Even though we felt Middleground's survey was correct for the 2, 3 line, however, after discussing the real purpose of the Boundaries Act here whereby it was thought that a boundary had to be settled one way or the other, whether it was on the lot line or not, it was agreed that the property boundaries had to be settled at the angle irons on the east side and the fence on the north, and the iron pipes on the west side.

CHAIRMAN - Group 17: We agreed for the plan prepared by surveyor, Middleground as to the framework. However, we felt that the boundaries should go by the iron pipes and angle irons, and also we were somewhat uncertain about the possessory title with Mr. Croach. However, we felt he had a very good point, and we also discovered the error on Good Street, and also we felt that perhaps in preparing this plan, it should have been in parts, so that once the boundary is established by the Boundaries Act, perhaps it should be described with the property. You'll have a portion of Lot 2 in 1, and so on, and perhaps parts should be created and descriptions corrected accordingly.

CHAIRMAN - Group 18: Mr. Chairman, Group 18 agreed that the survey by Middleground in establishing the lot lines is correct in all instances. Seven out of the eight of us wanted to hire him. The eighth one noticed the drafting error on Good Street and didn't want to hire him. We feel that having established the lot lines that Mr. Croach established adverse possession, if not for 25 years, at least for 15 years since the angle iron was set or the cherries were picked or whatever, but he still has good possession down to the fence and Mr. 3½ should not be permitted to

cross that. The line between Mr. 3½ and 5½ should be established between the iron pipes for the reason that it has been previously surveyed on behalf of both of them in effect, and therefore it's a mutually agreed upon line. The line between Mr. 3½ and Mr. 2 on the east limit has mutually been agreed upon for a period of at least 15 years with no dispute and the line should be established between the steel angle irons.

CHAIRMAN - Group 19: Gentlemen, Group 19 agreed that our second surveyor did a hell of a good job; we feel he's well aware of the fact that occupation would prevail generally, but that having reported to his client, and having received perhaps not so good legal advice, he was forced to pursue the argument that he did. We agreed that the pipes would have been taken, that the angle irons would be taken,and that the rear fence would have been taken. One further philosophical note, we decided that the Legal Surveys would probably recommend that the matter be referred to the Association Compalints Committee as soon as Mr. Fenceon could be located in Acapulco.

CHAIRMAN - Group 20: In Group 20, there wasn't too much dispute on Lot #4, the half lot line as the first severance of Lot 4 that had already set the iron pipe. On the boundary of Lot 2 and 3, it was a 55% for and a 45% against for the angle iron be accepted. The rear line,according to the survey by Mr. Middleground, was accepted.

CHAIRMAN FLATMAN: Thank you very much. Now, gentlemen, we've all heard 20 different opinions culled from 300 others. Now I'll ask Gordon Mackay to come forward and give us the official word.

DISCUSSION FOLLOWING DECISION

CHAIRMAN FLATMAN: I wonder if we could, in the next few minutes, form an informal panel and I'll ask Jim Gardiner if he would take a seat up stage and Mr. Dave Lambden, and I think I'll join in myself. We'll discuss the details of that decision. I've a few questions and I wonder if perhaps we might ask Gordon if he would answer some of the problems that the decision has given rise to. Mr. O'Grady, Jerry, if you would volunteer too.

MR. MACKAY: Well, there was no indication from the evidence that a line has been established by implied or real agreement between Mr. Croach and the owners of the lands. In the one case between 2 and 3½, there was evidence of an agreement, a meeting of the minds over that boundary and there's a difference in that respect.

CHAIRMAN FLATMAN: Mr. Croach did say that he occupied that land for 25 years or something. Does this not carry some weight?

MR. MACKAY: Well, it probably gives him, as so many of the groups pointed out, a right to the land, but all I did was establish the limits from which his rights could be measured. In other words, we didn't know whether he had adverse possession or not, until I established a line under The Boundaries Act, and once that line is established, then he can argue adverse possession on one side or the other of it.

CHAIRMAN FLATMAN: You don't feel that your decision has more or less set him back somewhat. It implies that the boundary is the line C1-C2-E.

MR. MACKAY: No, I maintain that my decision has greatly helped him, because when he goes to resolve the problem of title, then it won't be confused with the question of boundaries. That will have been settled for him.

CHAIRMAN FLATMAN: Do you have any further comment, Jerry, that you might make?

MR. O'GRADY: I unfortunately missed some of the evidence. I was away at the start. One group referred to cherry picking, and depending on time element, the line C1 D was established in 1963. O.K. that's over a ten-year period and presumably the surveyor, when he went in there he was an agent of Greenacre, the owner and that would be an entry upon the land on the part of the owner. I don't recall when the angle irons were put in, and again

whether or not that would be like camping upon the land and picking the cherries so as to be evidence of non-discontinuance of possession. Unless we can know when those two things were done, it might turn on whether Mr. Croach could establish his possessory title down to that fence line. Because all he did say was: "I've used it down to the fence line and that's it". Unfortunately, that is what we are generally faced with in declarations of possession. Nobody has argued with it and that's it, but we've fed in a littlbe bit in a couple of cases that we've discussed this morning and I wonder what success he would have if he went to Court and tried to establish down to the fence line. A lot would turn on those things.

CHAIRMAN FLATMAN: Apparently Red Hectare and Greenacre and his neighbour agreed on those angle irons. Now if those angle irons had been put in recently, Jerry, say just a few weeks ago, but both owners agreed with them,would that make the property line by joining the angle irons or would there have to be a period of time elapse?

MR. O'GRADY: No, I don't think so. I think that it's in order as far as the line EF is concerned. It is proper that this is the agreed line as between the two parties, but my concern is that how did Greenacre know where to put that angle iron, how come he knew to go over the fence, and jum over there for whatever that is (five feet or something) and put his angle iron back at that line? I didn't hear any evidence to this .... maybe he knew where the wooden stakes were buried over there. I don't know.

CHAIRMAN FLATMAN:Now,I noticed the Director had put in a word in regard to the C1-D line, he referred to that as the line between the East and West parts, not theline between the East and West halves. Is there any reason for that?

DIRECTOR MACKAY: Well, the situation as it now exists is no longer the East and West halves of the lot. The ownership is now with respect to the East and West parts, and they have now to be re-defined or re-described for title purposes.

CHAIRMAN FLATMAN: So , even though the line was originally called the line between the East and West halves, it is now in fact the line between the East and West parts. Why?

DIRECTOR MACKAY: The description would be accepted at a land registration counter, and is what I chose to call it at the Hearing .

CHAIRMAN FLATMAN: Before I call for questions from the floor, I wonder if Dave Lambden has any comment on this decision.

DAVE LAMBDEN: I would very much hesitate to say that the Honourable Justice Mackay is a fink, but I don't think he took proper appreciation of the young lady, he's a chauvinist and that becomes the truth. He has definitely however, abided by the proper principles and I am very pleased with the decision and I

think we should now be able to see the neighbours all in peaceful occupation with their existing boundaries. I think it's a credit to the office to render a decision of this nature.

DIRECTOR MACKAY: Thank you very much. You'll get your $2 immediately after..

CHAIRMAN FLATMAN: Now I'm sure there's been some interest generated by this.

(Voice from Floor) Just a short question, could I ask Mr. Mackay would it be a rule of thumb if the jurisdiction in The Boundaries Act Hearing in layman's term is to confirm existing boundaries rather than create boundaries?

DIRECTOR MACKAY: No, the intent of the Act is to re-establish original boundaries ... re-establish boundaries in their original position insofar as we can do so. We've established the west boundary in accordance with, as I put it, the first running principle, and therefore we are back to the original boundary on that side. We've relocated it in its original position. With respect to the east limits, we have again re-established it in the position that it was established by the owners by mutual agreement.

MR. JOHN PIERCE: But you are commenting on the line of Lots 2 and 3 of the registered Plan?

DIRECTOR MACKAY: I'm quoting from a case law that I was able to uncover, and that case law said that once that line has been established by agreement, it becomes the true lot line.

MR.JOHN PIERCE: How could it be an agreed upon boundary which they recognized at that time of agreement as probably not being the true boundary between Lots 2 and 3 of the registered plan. I'm sorry butting in here, but that puzzled me, the two owners certainly agreed upon a boundary and I don't complain about that whatsoever, but how did that agreed upon line which they roughly measured out themselves admittedly with a tape and they didn't know how much it had streched and so on. But they did strike a boundary, and they probably recognized at that time that it was just an agreed upon boundary, it wasn't the true line between Lots 2 and 3, according to the registered plan. How can you accept that as being the true and unalterable boundary between Lots 2 and 3. Most certainly it's an agreed upon boundary as far as ownership is concerned, but surely you can't allow that is the true line between Lots 2 and 3 of a registered plan.

DIRECTOR MACKAY: In their minds it was the line between lots 2 and 3.

MR. PEARCE: Can I pose a simple question, Mr. Chairman. What if at point E and F, where the iron bars were placed by Mr. Middleground, the original wooden posts were found buried some two feet, would that change the ruling on the lot between Lots 2 and 3?

CHAIRMAN FLATMAN: Well, I'm sure it would have an effect. Gordon correct me if I'm wrong.

Yes, I would say that if they found the original stakes, they would have found the lot line.

DIRECTOR MACKAY: May I answer that question while it's still hot. I just quoted from the case law that was available to me, and I'm inclined to agree with it, that once having established that line by agreement, if they subsequently came along later and found original evidence, it would negate the agreement, and I turn for support to Justice Hughes in the case mentioned and repeat that he said that the lines so established becomes the actual and fixed boundary between their properties, whether it is in fact the true boundary or not. Now that's fairly clear.

MR. FRED PEARCE: By some queer incident, I received a copy of the transcript and I've been studying it, and I read here that #2, when asked by Lawyer Gibson: "Did you sign any papers with respect to the line? and the answer was "no, Red Hectare and I just agreed that that was a good boundary", I didn't hear him saying that that was the boundary between, but that was a good boundary. I think the question arises as to whether this was a boundary again. In your mind, was the line between your property and Mr. 2's fixed by those steel angle irons? Well, I believe the transcript I have is a little different from what we received .....

DIRECTOR MACKAY: Yes, you nearly blew it there....

MR. FRED PEARCE: Sure it was. We had no problems. In other words what the adjacent owner is saying is that property line with the steel iron fixes the property line between the two. But remember here, what they're really saying is that they agreed that this was a good boundary [illegible] the manner in which they had done it. Now I believe in the judgement. One other statement was made in respect to this line, that this would be the line subject to fraud ... in the absence of fraud. Well may I suggest that the gentlemen who sold this property was aware of the manner in which he had laid it out himself, understood that he was not a surveyor - the purpose of doing so was to build a garage and quoting his own words: " We agreed that would be a good boundary". Then he sold a parcel of land that was not in accordance with what they had agreed was a good boundary, and according to the evidence, was never disclosed to the new owner that they had agreed to a boundary. I would suggest, Mr. Chairman, that that was fraud.

DIRECTOR MACKAY: I would suggest that's the last time you get your hands on one of my transcripts.

(from the Floor) This is directed to the Chairman. Our Group concurred with your decision unanimously. However, one very serious question has arisen as to evidence. When was Plan 35 registered? prior to or after the construction of the fence at the rear?

CHAIRMAN FLATMAN: We'll ask Mr. Gardiner that question.

MR. GARDINER: Well, the plan indicates that Plan 35 was registered in 1940.

MR. WYMAN: I would have a disagreement in that the line of the angle irons between Lots 2 and 3 would constitute the lot line. My question was slightly on a different tract; I wondered then if by mutual agreement, if two owners can actually shift the position of their limits differently than what it is described in their documents or their deeds, how this relates to The Planning Act? Are they not actually creating a severance between their properties, thereby making it very easy for persons to circumvent the Planning Act. I could see it's being done consciously where a person was in contravention of a municipal by-law, and got together with his neighbour, rather than going through all the problems and expense and time of going through the land division process to create a property that was in conformance with the municipal by-law, then they would merely by mutual agreement decide that the line would go where it would be most convenient and thereby create a line.

DIRECTOR MACKAY: You've raised a very important element in that and I'll just address part of the question. It's my personal opinion and my personal observation that too often a proportional division is used to establish a boundary where in fact, the primary evidence of that boundary does exist, and applying a proportional division where evidence exists, you create a necessity to go to The Planning Act more often than not. I think it creates more problems than it solves in that respect.

MR. FLATMAN: Well, I'm just wondering too if I have to re-establish the line between lots 1 and 2, which corner do I use for proportion, do I start at the end of the line or another corner. You're going to get something different than anyone else would get.

(From Floor) I have a question concerning the first running of the line between the two iron pipes. I think George Bell raised an important point when he said that according to The Surveys Act, the original monuments are those developed during a subdivision plan or a township lot corner. Now it seems to me that you're treating these two iron pipes with the same status of original monuments. I think the fact that the brick house was apparently built according to the line between the two pipes has kind of influenced the thinking. Let's presume that there was no house there - this was heavily wooded area. You had a line with two iron pipes that were five feet out at either end, but nothing had been built, no line set between them. Would they still have original status? Could you disagree with them?

MR. GARDINER: May I generally comment on that? A surveyor running a line doesn't really establish anything unless he's intending to re-establish a line that had already been established some way by an original plan. In this particular instance it was the actions of the owners that validated that first running, not the fact that the surveyor ran a line.

(From the Floor) - The statements were that you're sort of giving it original status by describing it as first running, original line. According to the Act, if they're not original monuments then they are disputable monuments. The only thing that's bothering me is the fact that buildings were erected based on it.

DIRECTOR MACKAY: No... They're brand new monuments at the time they were put in. They're original monuments of the division of the line.

(From the Floor) Yes, but according to the Act, unless they're lot corners on a subdivision plan or lot corners on a township plan, the way I read it, those are the only monuments that are original and undisputable.

DIRECTOR MACKAY: I disagree with you empathically.

MR. KEN McCONNELL: Could I ask for clarification of one point .. two points? One, if the line by agreement had been established, say right beside the frame house in Lot 3 approximately ten feet away from where the lot line was established, how could I then best establish the line between Lots 1 and 2. Jim had mentioned this question..would I then proportion? something that extreme?

CHAIRMAN FLATMAN: I'll open that one up to the panel.

MR. LAMBDEN: I'd like to bring up a point that is a bit of history, going back 17 or 18 years now. At the time we were drafting this Act at the Titles Office, it had as its name The'Special Surveys Act'. One of the main objections that was put forward to that - and it was significant and certainly was a cogent argument against it - was given by Mr. Beatty who was then Surveyor General. His argument was that it was not a Special Surveys Act; it was a Boundaries Act. Consequently, I must agree with Gordon, that the Line EF is the lot line, but it does not control the lines between Lots 1 and 2. I think this is the distinction you have to draw. The Surveys Act will stand on its own merits.

MR. McCONNELL: So what you are saying is that the line between Lots 1 and 2 would be as Mr. Middleground has already established it by proportioning, even though the parole line may be some ten feet more into Lot 3.

MR. O'[illegible] We are getting to the bottom of the problem, yes Sir.

DIRECTOR MACKAY: Yes, and I think it's resolved a question that was raised earlier. In proportioning for division between Lots 1 and 2, you go back to Middleground's theoretical position of the line between Lots 2 and 3.

MR. McCONNELL: So you really are utilizing the line between Lots 2 and 3 .. two lines, demarcating the lines between Lots 2 and 3.

DIRECTOR MACKAY: No, there's one point in there that becomes a proportional division ... not necessarily creating a line.

MR. McCONNELL: I think there's a lot of us can't quite see clear on that line - the line that has been established by agreement is not merely a property line and does not necessarily reflect the lot line.

MR. GARDINER: Because you'd never have an end to the surveys.

MR. McCONNELL: True enough, you'd always have a problem in the future as we know. I guess we can't resolve that one any further than that. Could I also clarify that in The Boundaries Act Hearing, matters of adverse possession cannot be determined, no matter what strength the evidence given before it is?

MR. GARDINER: Yes, that is our interpretation of the Act.

MR. MCCONNELL: If the application before the Courts was one for a Boundaries Act and First Application, would your ruling have been any different?

DIRECTOR MACKAY: My ruling would not have been any different, but the Director of Titles may have come up to the court-room in a combined application, and resolved that problem independently of the question of the boundaries.

MR. McCONNELL: Well so the final analysis might be indeed the decisions that were given by the various groups that indeed the fence would be the property boundary.

DIRECTOR MACKAY: Ultimately, the way the testimony was shaded, yes, you could come to that conclusion.

(From the Floor) Did I understnd you to say that the case law decision that you quoted was that your decision. (yes) And did you say that was under appeal?

DIRECTOR MACKAY: Well that's an oldie. That goes back to 1800.

(From floor) But there was an appeal and the appeal was upheld... I don't understand ..

CHAIRMAN FLATMAN: The decision of the Court of Appeal, I think he said. It was a Court of Appeal decision.

DIRECTOR MACKAY: The case was before the Appeal Division of the Supreme Court of New Brunswick.

(From Floor) Then the second part of my question is you set up as that line, the westerly limit of Lot 2, you decided that, that was the westerly limit of lot 2? Am I correct in that assumption? (yes) Then where it intersects the northerly limit, does that not leave the northwest angle of Lot 2? (Yes) Subsequently at the south end it establishes the southwest angle of Lot 2?

DIRECTOR MACKAY: I'm a little leery at what you're driving at ... yes.

(From Floor) Well all I'm saying is that if you go to proportion, you would have a proportion between the two neighbours corners on either side; once you established that by a Boundaries Act Hearing. Is that not an undisputed corner? (laughter) Therefore, you've got 5 feet proportion into those two lots.

DIRECTOR MACKAY: Well now I don't agree with you. I thought we had sort of resolved that question by saying there has to be some finality. The Boundaries Act as Dave said is to bring some degree of finality to the dispute over boundaries.

(Floor) An undisputed line ...

DIRECTOR MACKAY: If it's an undisputed line in terms of The Surveys Act.

(Floor) Is it not?

DIRECTOR MACKAY: Well I don't know. I haven't addressed myself to that problem and you could probably make a case of that by itself. It's an undisputed line under The Boundaries Act.

(Floor) I'd just like to say how unhappy I am about the whole case. First of all with regard to the surveys of aliquot parts, the Surveys Act is very clear on that. It entrenches how these must be surveyed. I think when in North America we went to sort of a hybrid thing, common law and the certain scientific methods of the encyclopedists, that, you know, in general the boundary system, I think the idea was for this to override. So the Surveys Act makes no bones about how to survey aliquot parts, and I believe if you look at your case law, I can't cite it now because I didn't know what case would be discussed, but I know of one, where surveys have been overturned because they were improperly done. Obviously, if the surveyor had been drunk and surveyed a third of the lot, he wasn't anywhere near an aliquot part. So it's very clear in this survey from the evidence that he didn't survey the aliquot part, that he blundered in finding evidence, that line C1 D as surveyor Fenceon surveyed it,is directly in conflict with an intrenched piece of legislation. I think the same thing is true of Line E-F. The Surveys Act says in its second Article that no [illegible]ey is vali[illegible]pt on[illegible] made by a surveyor. Now the parole ag[illegible]ement is f[illegible] where you don't have a statutory boundary. You've go[illegible] registered plan here. The boundary has been established - there's [illegible] question. Why do we have a Surveys Act? Why do we have a Registry Act? Why do we have an Ontario Land Surveyor? If anyone can go and make a parole agreement when there's already evidence of a good survey there in the field. I think the case of Justice Hughes that you c[illegible]e is in the absence of a previously confirmed survey. You've got an original survey done under competent parties It would be very hard to argue that Mr. Wallbanger and his cohort did a survey under competent authority. The job of The Boundaries Act is to confirm statutory boundaries - it's not to decide on cases of adverse possession and such. That can come after. There's nothing in this case which does not become clear by treating first of all the evidence as it was originally surveyed, and then going to another remedy other than the Boundaries Act and settling these questions of adverse possession, possessory title or what have you.

In other words, there's two layers here and I don't think it's in the jurisdiction of The Boundaries Act to settle this thing because all these arguments that we're giving you they follow. A line can wander pretty well at random.

DIRECTOR MACKAY: I'm allowing 20 days for anyone to lodge an appeal.

CHAIRMAN FLATMAN: I was just wondering on these Lot lines 2 and 3, if we get a special label on that lot line to tell us whether we can proportion from it or not. We won't know the difference in the future.

MR. GARDINER: Well, I can't recall the Section in The Boundaries Act.. maybe Dave would remember because of Mr. Beattie's objections, but there is a section or subsection that does state'regardless of any confirmation of any particular boundary under The Boundaries Act, it does not necessarily affect the means of re-establishing another boundary by The Surveys Act by proportional division'. In other words you could go on either side of that conventional boundary to find original evidence and by proportional division, if you felt that that was the best evidence to re-establish the 1-2 line. I think that's what the Boundaries Act does.

MR. LAMBDEN: That was the original intent of the Boundaries Act, no question about that. If I may, I'd like to refer to a section of my paper which has been printed. It is found in the papers available at the back. These often quoted words of Mr. Justice Cooley in Diehl and Zanger read as follows: "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing error. This is as true of a government survey as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischief that must follow would be simply incalculable and the visitation of the surveyor might well be set down as a great public calamity." Now there's got to be a resolution somewhere to the boundary to two adjoining owners. The purpose of the Boundaries Act is to settle the boundary between adjoining owners. The essential purpose of the Surveys Act, of the procedures of The Surveys Act was essentially to establish the first line between adjoining owners. Now to be a valid survey, it must be performed by an Ontario Land Surveyor. To be a valid boundary, it did not have to be. This is still the common law.

CHAIRMAN FLATMAN: Are there any further comments or questions?

MR. JOHN PIERCE: In following up what you've just said, sure then it's a matter of identifying what we're talking about. We have basically a registered plan with a line between lots and surely it's still there. Now people have chosen to choose something else which let's call it most certainly their boundary between properties, but why can't it all be resolved by a further plan and putting on parts, still transferring part #3 or whatever it is, to get over the wedge that's between the boundary established by survey methods and by registered plan, and what has now become an

acceptable limit between properties. Where is the confusion? Surely it's just a matter of them following up with a further plan identifying what has been decided by your commission and transfer of title goes on. If you don't do something like that, there is just going to be later confusion in the later transfer of title. In other words, it's another reference plan that has to be put on after.

MR. GIBSON: In principle, Mr. Pierce, I soundly agree with what you're saying there and the implications of it right down the line. As I understand from members of the legal profession, their greatest service rendered to the public is that they do not stir up litigation. Now if every single survey would require further legal processing in order to settle the boundary, that may not be nearly as advantageous a system as accepting the boundary in the first instance in the manner that has been given in the Director's decision. I don't think our job is to stir up conflicts and require clients to go continually in respect of quit claiming or applications of one thing or another. There must be a finality to a boundary somewhere, and if that can be found under The Boundaries Act as between you and I, irrespective of the others, then we have achieved a big goal.

MR. BROWN: It is interesting that as I get to my feet that somebody gets the ball rolling in exactly what I said and I appreciate that they said it a lot better than I could perhaps. The thing that I'd like to finalize on here, a recent statement, a very recent statement, is to kind of encompass as I understand it, is that surveyor Middleground had prepared a Surveys Act type survey, where he has re-established the original limits of Plan 35 so to speak. However, adverse possession has crept into the situation, and I believe that Middleground has prepared an excellent survey and he has merely shown this adverse possession, as it compares to the Surveys Act Plan that he has correctly prepared. Now that is where I would like to believe his responsibilities end. Now perhaps Mr. Pierce's comment would make that a wrong statement, but the thing is he has shown the adverse possession - it was not his title or his position as an Ontario Land Surveyor to act as judge, jury and executioner and move those bars to where his experience now or at the time would have said: 'I'll move those SIB's; I'll accept the fence or accept whatever is there. I would like to believe that it was not his position to accept these boundaries of acquiescence and survey them as such and hope that nobody disputes his decision. I would like to confirm that he did go through the correct processes, in preparing this plan, showing the adverse evidence and letting the ball go on from there.

Now perhaps if he did act as judge, jury and executioner, and accept some of these boundaries, he would have saved the public some expense in having saved the Hearing, had he correctly made the Hearing's decisions. But unfortunately, he puts his posterior on the line in making this judge, jury and executioner decision in spite of The Boundaries Act, and that leaves him open to an awful lot of liability and hence subsequent repercussions because of his professional status, that he could get sued for stealing land from one person or giving it to another. Now what I'd like to confirm, if you've understand my statement is, has he gone far enough? should an Ontario Land Surveyor really show what has been shown here, a Surveys Act Plan, show the evidence that is adverse to it, or should he in his own judgement act

as judge, jury and executioner, prepare a plan as he thinks it should end up or should he do as Mr. Pierce suggests, create an R Plan, which is a halfway in between situation, showing all which in this case would be six parts, I believe, and let it carry on from there forever and ever, and perhaps he's going to be called as a witness. Do you understand my statements?

CHAIRMAN FLATMAN: Would you comment on that?

DIRECTOR MACKAY: Well, I prefer not to .. it may prejudice my opinions in further Boundaries Act Hearings - I'll defer it to David or Jerry.

MR. O'GRADY: No, I think the surveyor has done his proper duty to his client and to the solicitor, and then it's to be taken from there for the other judgement. You should not be either throwing this in or taking it out - don't be judge and jury out in the field, show it and let them make the decision. Now, whether or not you have a reference plan, I think a reference plan could follow from this, because after all, if it comes down to a legal decision between lawyers, the decision here is the boundary, there should be quit claim deeds exchanged between the parties and get the Committee of Adjustments approval etc., but that's another phase that follows on. Because I don't think Gord in his position under The Boundaries Act necessarily decides those things - that becomes a legal decision after.

MR. CURRIE BISHOP: I feel that as a land surveyor we could sign the plan that was issued initially to the Hearing. But if we change the line around and accept the angle irons as the lot line, then we can't sign the plan as a land surveyor saying that it is in accordance with the Surveys Act, and I think that we're getting put on the spot in a Hearing to state that such a line is in accordance with The Surveys Act when it isn't. If we are going to adhere to this line of angle irons as the lot line, then we can't say it's in accordance with The Surveys Act. We've got to strike that from our Certificate.

DIRECTOR MACKAY: Well, I would only suggest, and I think I've suggested this before, that given three weeks, and somebody with the Grade 10 education, I could train them to perform that type of survey. Now if that's professional surveying

MR. CODE: I fail to see really that there's any difference between your ruling that the west limit, the line C1 D is not the limit between the east and west halves of Lot 4, the line between the pipes, and that the line of the angle irons ... I think there is a contradiction here. The line between the angle irons you called a lot line, yet the line between the pipes you say is not the limit between east and west halves, and yet ... I really can't see the difference there. I don't think it's necessary to make a quit claim deed, but the boundary could be confirmed at the property line and then subsequently the owner of 3½ would own a portion of Lot 2, and the owner of Lot 2 would own a portion of Lot 3, and I don't think there would be any necessity for quit claim deeds or any further litigation.

DIRECTOR MACKAY: Another appeal coming up.

CHAIRMAN FLATMAN: The difference of opinion there of the two surveyors, Walltie and Fenceon were reasonably close. The angle iron fence is 3 feet out.

MR. YATES: I listened to this august body and I retired to my panel over there and thought I had all the answers down pat. It seems that we've generated a lot of discussion and I think a lot of confusion. I think everything seemed to be going along well with all the surveyors,and experts came in and they are giving us different answers... I'm not saying I haven't been to Boundaries Act Hearings, and I don't think I ever really listened to what the definition of boundaries were until Gord mentioned it was the re-establishment of boundaries in their original position. I think that seems to be the key answer into this solution, and yet I can't seem to define the difference between the limit between 2 and 3 and the rear limit. I can say that the original position of 2 and 3 is the stake, although we didn't rule it that way, but in coming into the interpretation of The Boundaries Act, you said it was the original position. Now Dave mentioned it's establishing boundaries and I think he's a little short of words there - you said it's in its original position, and so maybe you'll have to explain to us again the difference between 2 and 3 and the rear line.

DIRECTOR MACKAY: Well keep in mind that Mr. Middleground didn't find any other original evidence on the line between Lot 2 and 3 for one thing.

MR. YATES: You wouldn't accept proportional in lieu of original?

DIRECTOR MACKAY: Of Course not.

MR. WISEMAN: Mr. Chairman, I just thought ... I would clear something up that's on my mind. Is it not true that when a piece of land is severed, it could have been the owners themselves that put those pipes in,and would not your argument hold if a surveyor was involved or not?

DIRECTOR MACKAY: It's a first division and I would have to agree with that, yes.

MR. WISEMAN: The fact that the surveyor did it was beside the point.

DIRECTOR MACKAY: I think that the fact that the surveyor did it removes a certain element of mystery about it - it gives a greater significance - it doesn't change things.

MR. MOFFATT: I would like to come back to a question asked Mr. O'Grady a while ago, that Middleground in fact prepared correctly. I contend that he didn't and go back to a speech that the late Mr. Marsh Magwood made at an OLS Convention a number of years ago whereby the surveyor should be the expert in the extent of title, and in fact Mr. Middleground should have prepared his plan showing the

lines as decided upon by The Boundaries Act; for if this plan had not gone to a Boundaries Act Hearing, he in fact should have prepared a survey for his plan in accordance with the plan that would stand up at the Hearing. I wonder if you could just comment on that again.

MR. O'GRADY: If the surveyor prepared the plan in accordance with the judgement handed down by the Director or under The Boundaries Act, presumably, he is sitting as again judge and jury and usurping the authority under the Boundaries Act, and that's it. So the thing can come before the proper place to be decided. Then I think he had to show this evidence on the plan. Because if he doesn't, then there's no arguments. I don't follow you.

MR. MOFFATT: I contend he should show his evidence on the plan, but I also submit that if Mr. Middleground had done the survey according to the best available evidence, then there never would have been a Boundaries Act Hearing. And he created mischief by surveying in the front.

MR. O'GRADY: That could very well be, and maybe he perpetrated the whole thing. You know one thing I wondered about, something that was going through my mind, I recall years ago, it was on deposit in the City Registry Office and I forget whose the judgement was, but there's reference in here to wooden stakes and no indication where they came from - I presume they weren't marked etc., as to who put them in there, but we're accepting them. But there was an old case, a Supreme Court case or I don't know whether it went to the Court of Appeal, but it was on stakes and monuments, but more the wood stakes, because they're very short, aren't they - they're only about two feet, and they weren't below frost level, and they could have shifted. So how do you know they're in the same position they were when they were put in back in 1925, or whenever this plan was put on. You're assuming again an assumption, because they're there, that they are in the same place that they were put in. They may have shifted.

DIRECTOR MACKAY: Ladies and gentlemen, I think this is up in Moosinee in that permafrost.

MR. LAMBDEN: I would like to make a statement. I get blamed, I suppose, for a lot of The Boundaries Act. I shipped off to Australia and left it in other people's hands to do something about it. Going back many years in English legal history, the principle had been settled out that those who made the laws should not be involved in making the decisions under the laws. So in 1300 or 1400 in England, they separated the judiciary from the actual law making process to a very substantial degree, if not completely. I think my departure to Australia was very timely in that sense. I don't know whether, if I had been involved directly with the Boundaries Act over these past several years, I would have created the same temper to the whole operation as has been created by the Titles Office Administrators, most recently by Mr. Justice Mackay whom I like to address by that title.

But what does come very strongly to my mind is that I went to a Country where there is no survey system in Australia and New Zealand, none whatsoever. And coming back, I'm very happy myself with the way The Boundaries Act was carried out, because I think there is an overriding premise in connection with The Surveys Act which leads me to say the

surveyor should survey, if he possibly can - his duty is to survey according to what he would foresee as being the decision of the Director, because he's bound by that same elemental rule, that he is to re-survey according to the best evidence, and the best evidence rule is common law, and that's where we pick up all these other elements that are associated with it quite separate from The Surveys Act, because that's the first thing we're called upon to do.

CHAIRMAN FLATMAN: Well Gentlemen, I think this discussion has fomented a great deal of comment and personal opinion, and I think you've all demonstrated that. We want to thank the members of the panel. (Applause)