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.

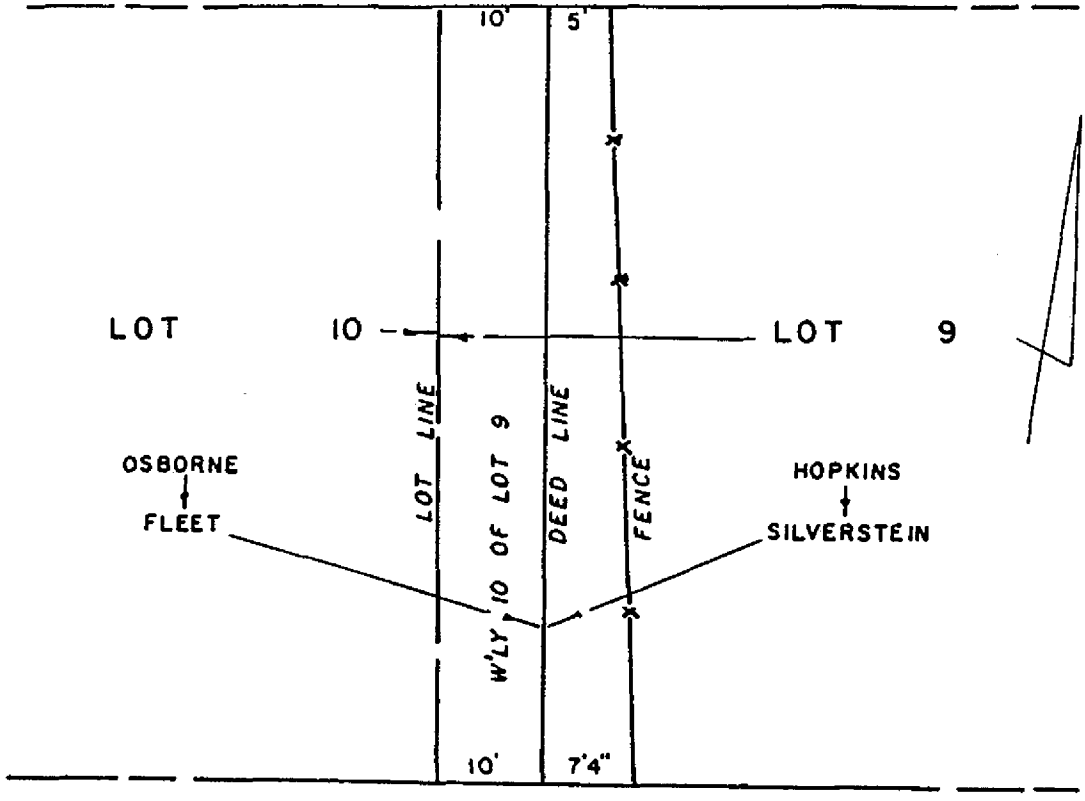
Now then, there are technically two types of classes of possessory title which I refer to as the "vertical" possessory title and the "horizontal" possessory title. The vertical possessory title is not of too great interest to you, but we should mention it briefly in passing. These are the situations 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



FLEET & FLEET v SILVERSTEIN

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.

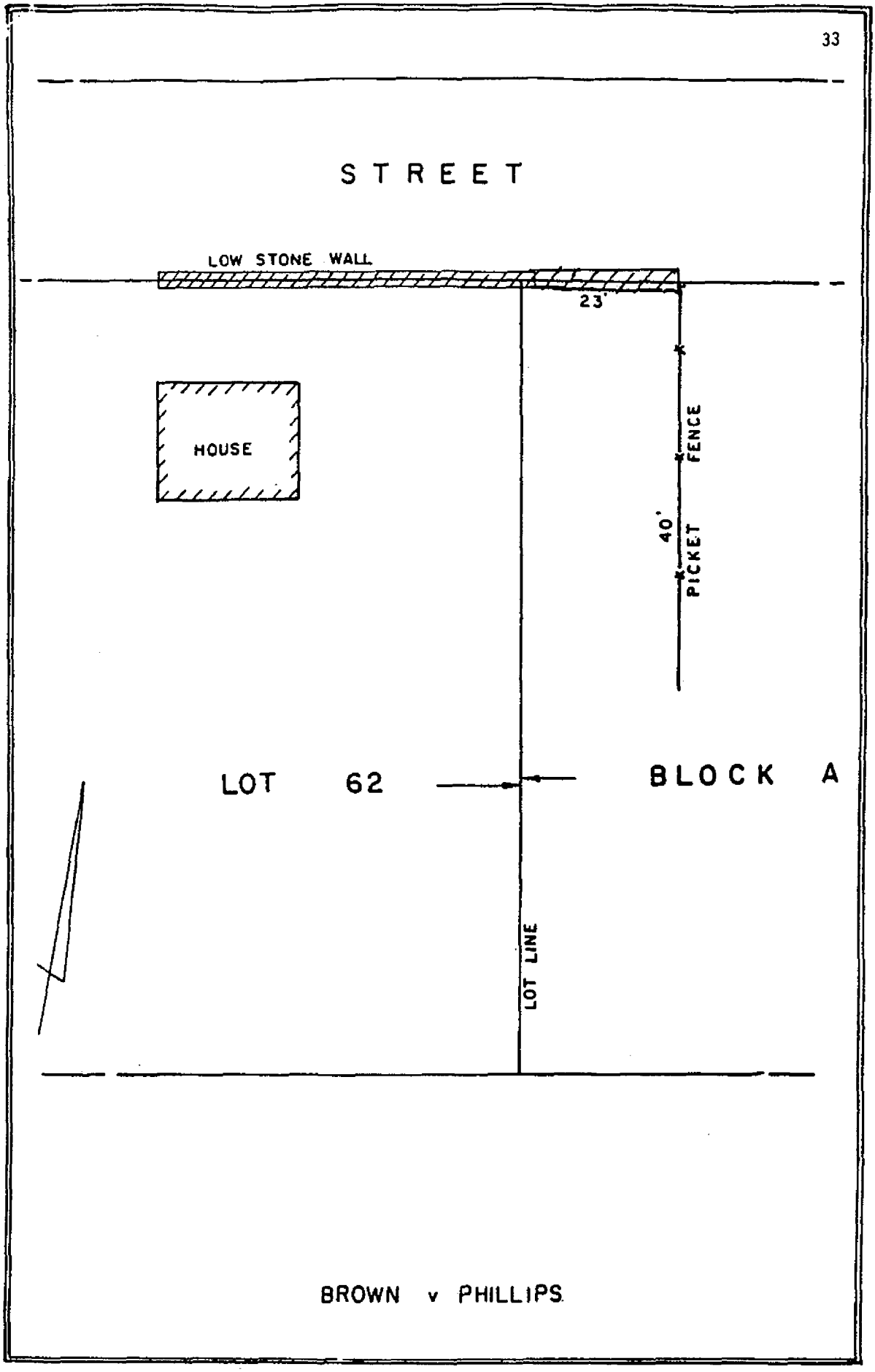
The common owner had conveyed the whole of Block "A" by deed registered in August of 1945. Lot 62 was conveyed in July, 1947. Again, each parcel had a separate chain of title down to the present disputants. One dwelling house stands completely within the limits of each parcel.

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.



BROWN v PHILLIPS

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."*

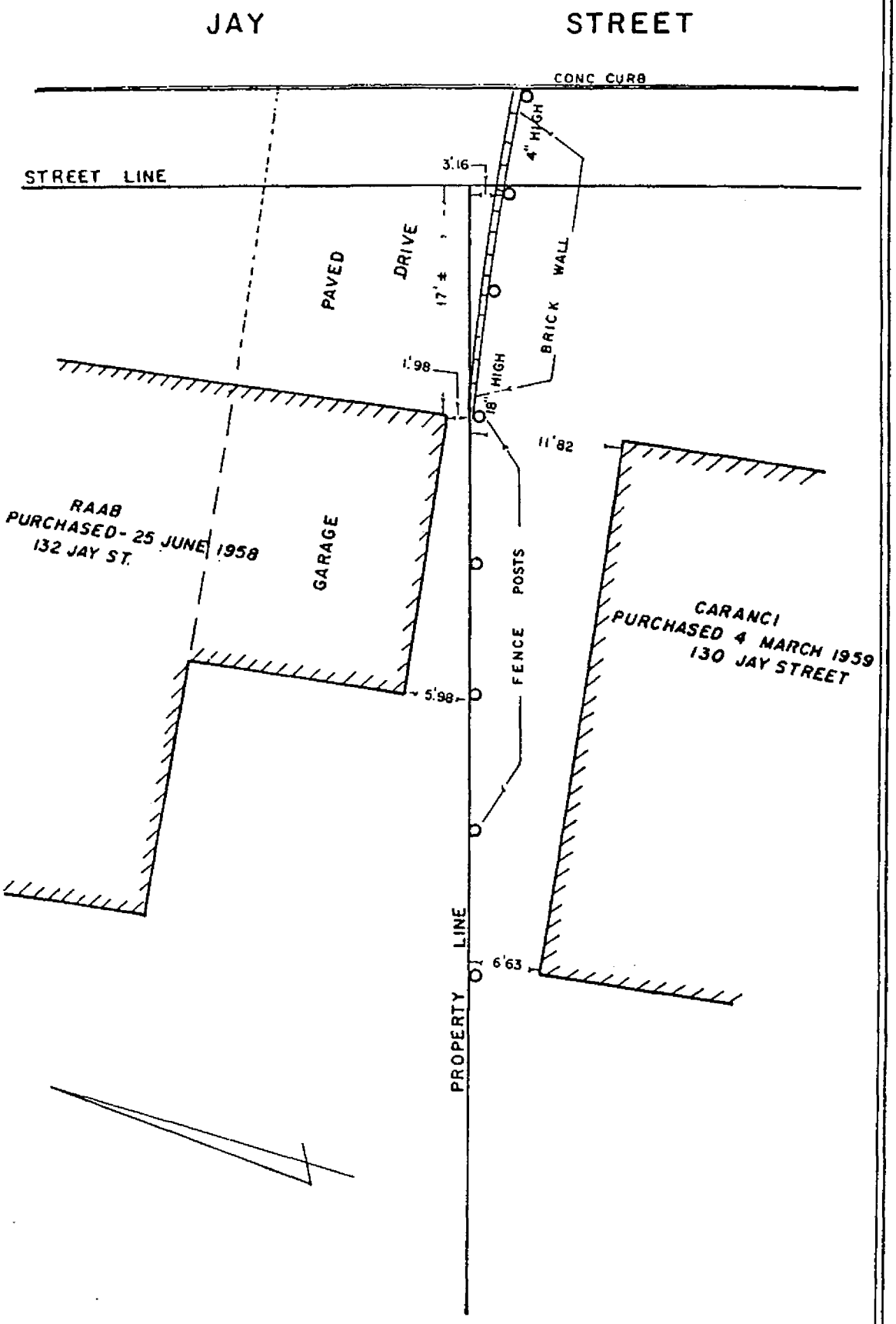
The Court then goes on to quote an old case of 1878, as follows:

> *"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:

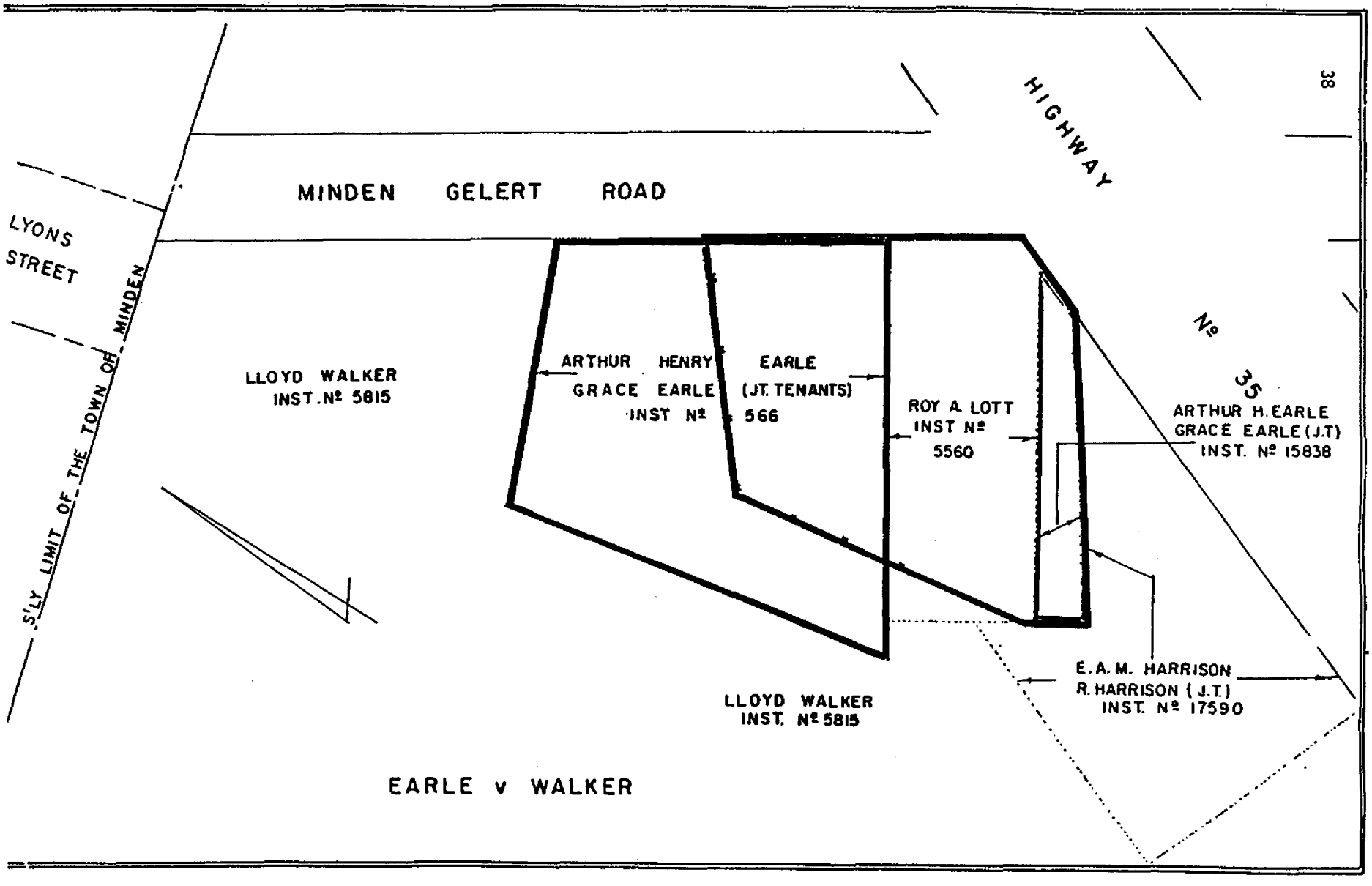
> *490. Position of person in adverse possession. - A person who is in possession of land without title has, while he continues in possession, and before the statutory period has elapsed, a transmissible interest in the property which is good against all the world except the rightful owner, but an interest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

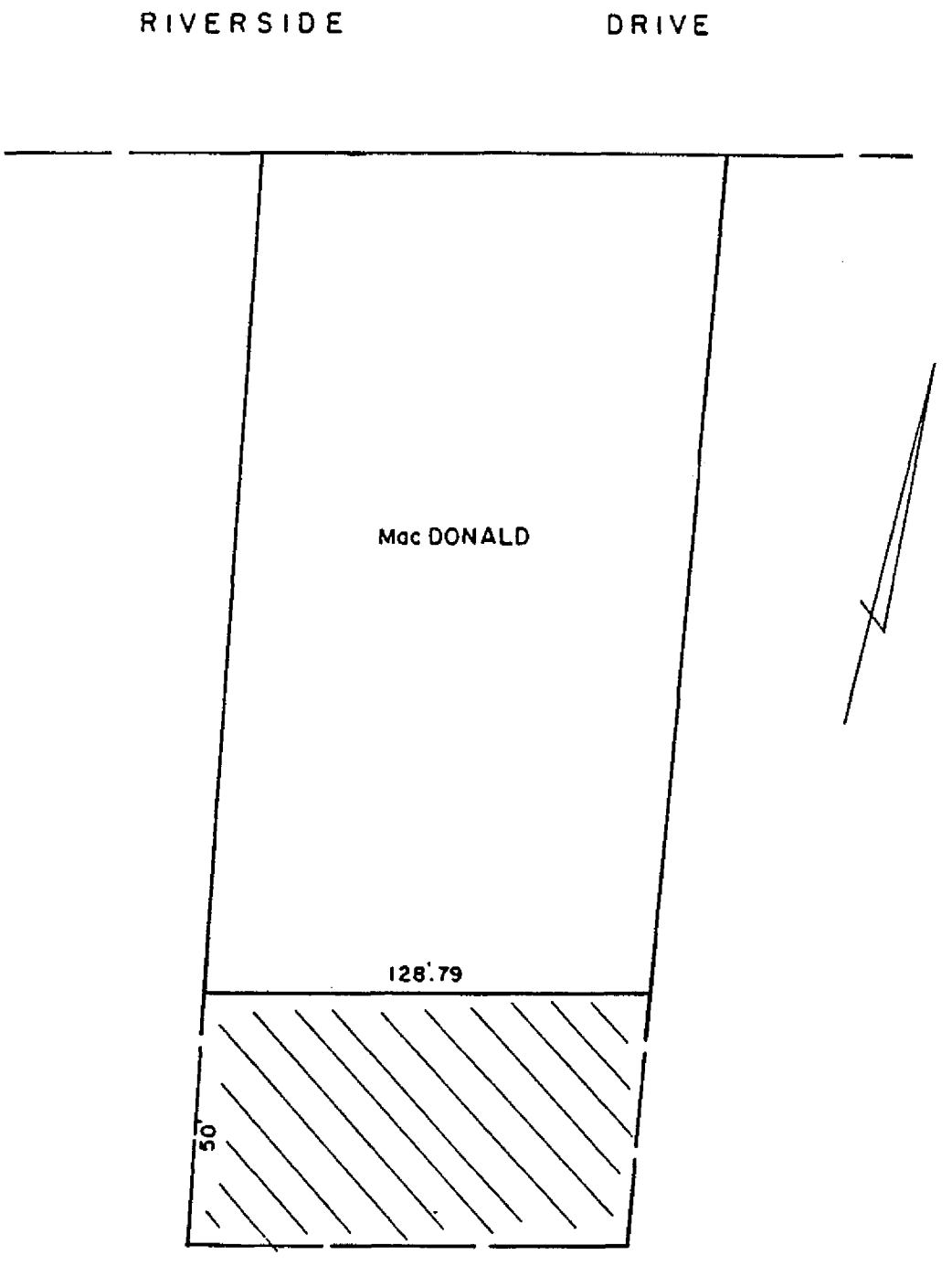
The Court of Appeal set aside the judgement trial and allowed the appeal and substituted therefore a judgement in favour of the plaintiffs for nominal damages a permanent injunction against the defendant and a declaration that they were still the owners of the lands in question.

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.

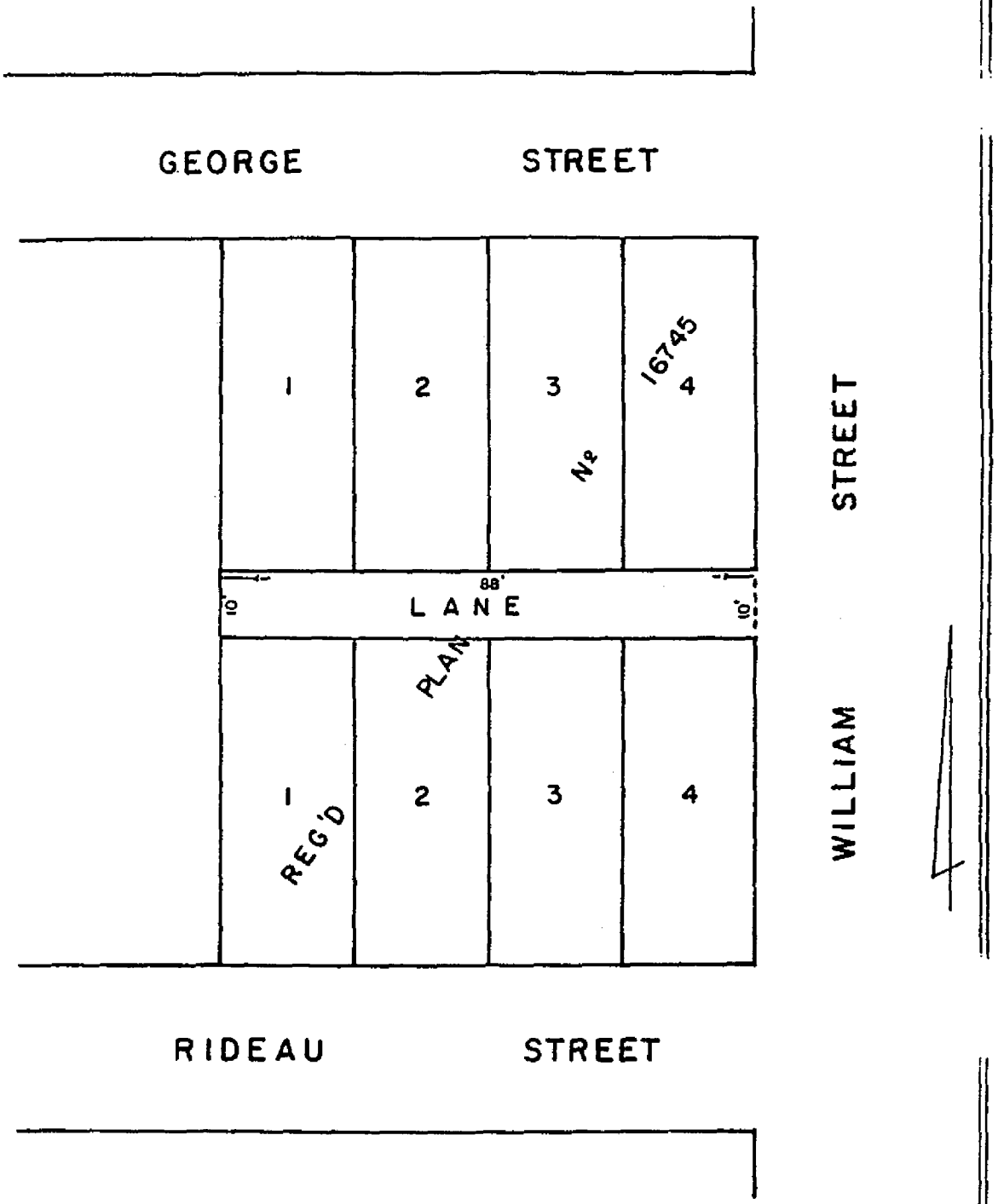
Both appealed: Homestead on the basis that being in possession of a portion of the lands, it was deemed in possession of all of the lands in its deed because of its acts of possession. The Appeal Court rejected this argument and agreed with the trial judge that Booth had extinguished the title of Homestead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

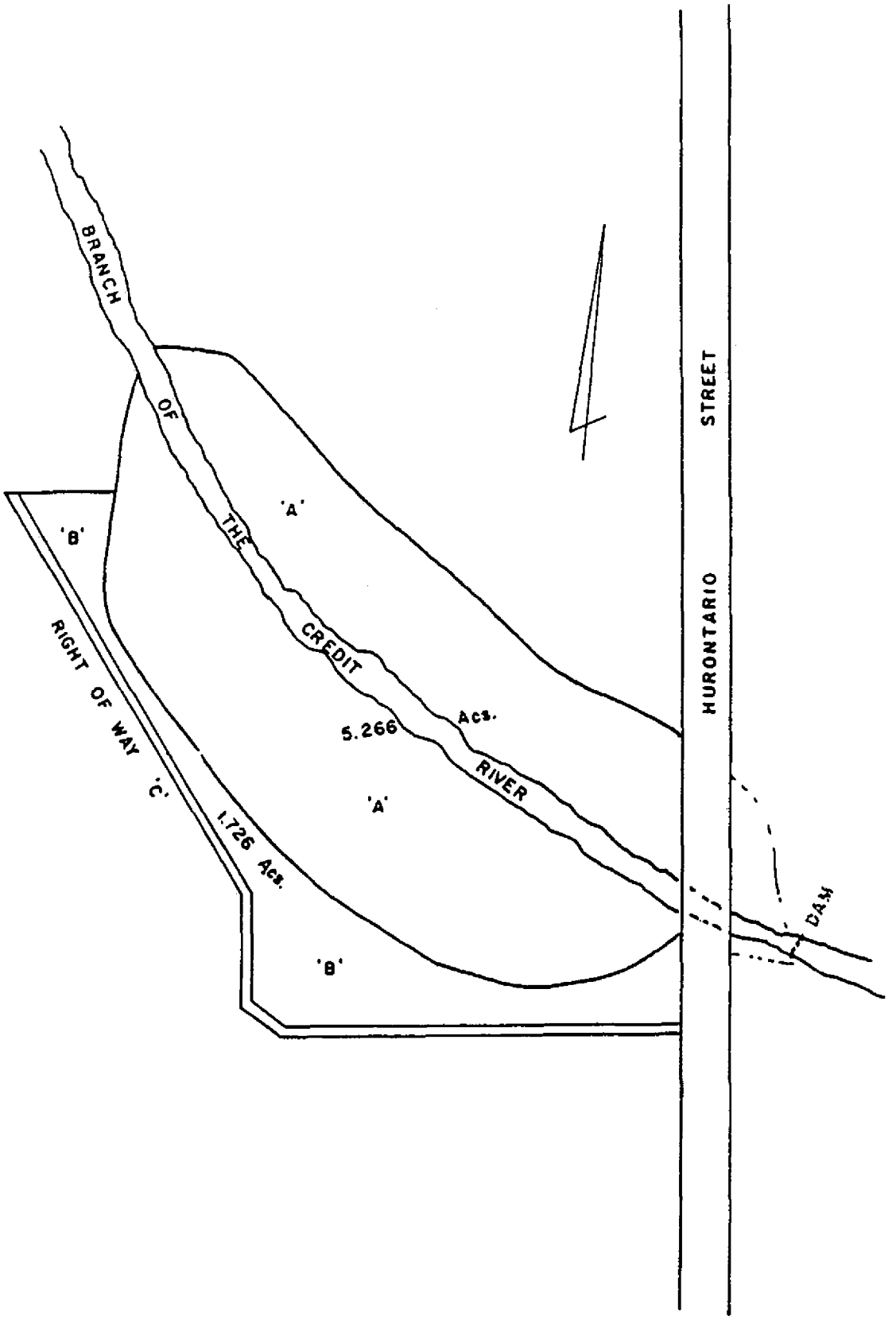
first time that a lane shown on a registered plan would be a public lane. The Court then reviewed many cases dealing with the possible retroactive aspect of the Legislation and came to the conclusion that the 1920 amendment to The Surveys Act was not retroactive.

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.

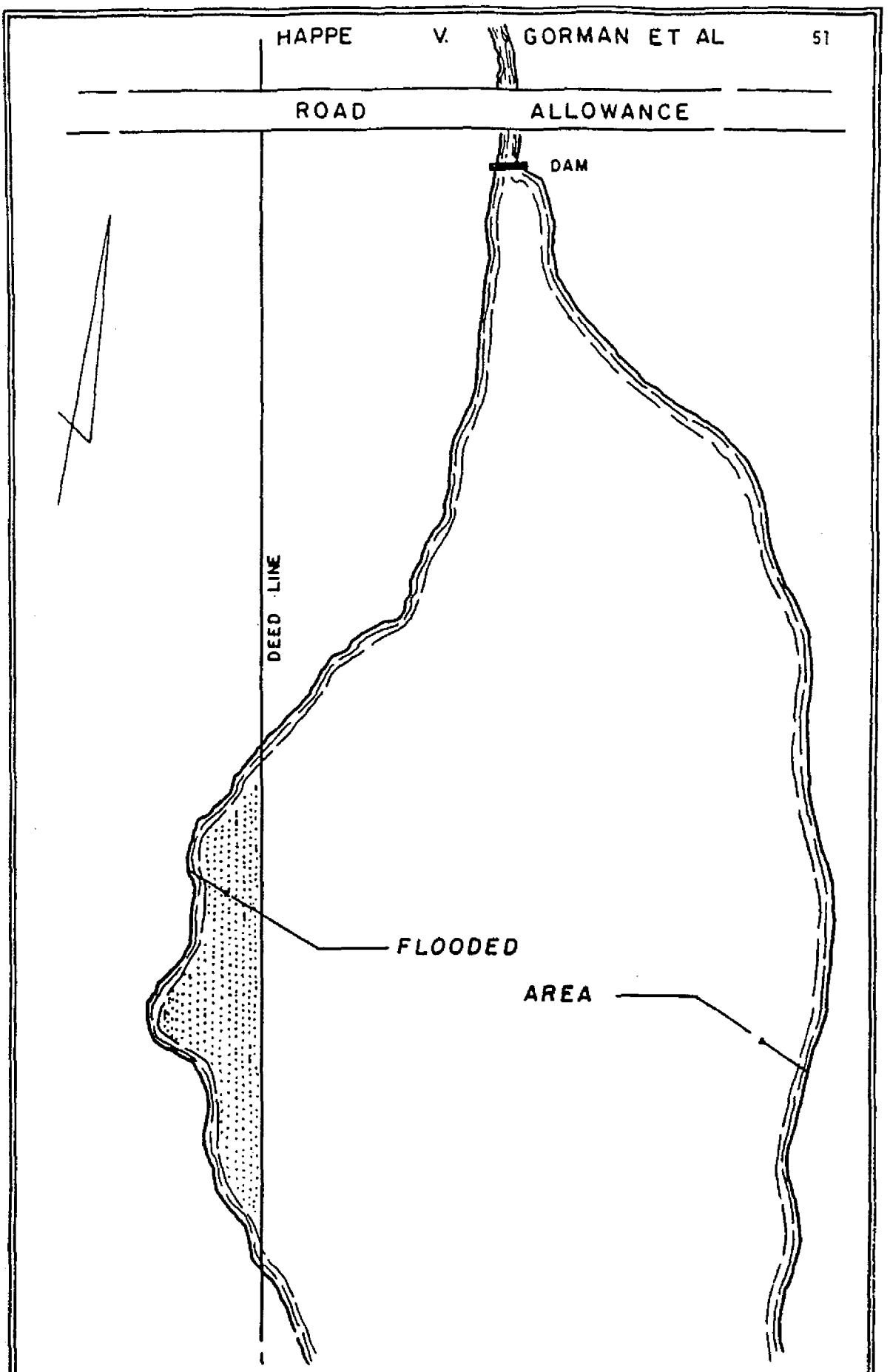
The Court found that Dods who had been added as a party defendant had acquired a possessory title to the whole of Parcels A, B and C as shown on the sketch. It was admitted by all parties that anyone who had acquired possessory title to the said lands then Parcel C was subject to a right of way in favour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