CASE LAW WORKSHOP

Selected Cases in Estoppel

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BERNARD v. GIBSON.

Boundary by agreement—Division fences—Statute of Limitations—Smallness of interest.

The plaintiff and defendant were owners of adjoining lots in the township of Vaughan. An Act of the Legislature of Canada (23 Victoria, chapter 102), had been passed providing for a new survey of the township; and, according to a survey made under the provisions of that Act, a strip of land containing about two acres and three-tenths, occupied by the defendant, it was alleged belonged to the plaintiff. On that strip there had recently been standing nine pine trees, seven of which the defendant had cut down. It appeared that some years before 1851 a fence from the front or easterly side of these lots, for a distance of about 60 or 70 rods, had been put up and was then standing on the supposed division line between the two lots: and also another fence running from the rear or westerly side of the lots to a distance of about 25 or 30 rods, leaving a space of about 600 yards in the centre unenclosed; but the parties respectively in occupation of the lots had always used the land on either side of the supposed line as belonging to them, up till about the year 1858, when the father of the plaintiff and the then owner of the defendant's lot procured a survey to be made and a fence to be erected on the division line then laid out, which was paid for jointly by them, and which corresponded with a line which had been run and blazed by the same surveyor in 1851. The plaintiff, in 1873, filed a bill seeking to restrain the further cutting of timber, and for a declaration that the strip in question was his property.

Held, per CURIAM, that there had been a sufficient occupation of the lands on either side of the line for such a length of time as bound the parties under the Statute of Limitations, even if the survey made and fence erected in 1858 were not sufficient acts to compel the parties to abide by that line as the true boundary; BLAKE, V. C., being of opinion that they were. SPRAGGE, C., *dubitante* as to the parties being bound under the Statute of Limitations; but being clear that the matter in dispute was too insignificant to call for the interference of this Court by injunction, he concurred in dismissing the bill with costs.

Held, also, that the Statute of 1860, directing a survey of the township to be made, had not the effect of creating any new right or title, as between parties who had been in undisturbed possession for the statutable period of twenty years before action or suit brought.

The bill in this cause was filed by *Hiram Alonzo Bernard* against *Fullerton Gibson*, seeking to restrain

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the defendant, his servants, workmen, and agents, from trespassing on a strip of land situate between the premises of the plaintiff and those of the defendant, and which, under the circumstances stated in the judgment, the plaintiff claimed to belong to him. The defendant, on the other hand, insisted the slip was his property and claimed a right to take the wood therefrom.

The plaintiff gave evidence in the cause, and swore that he wished to preserve the timber; that payment of its value would be no compensation to him for its loss; that there were nine pine trees on the slip when defendant began to cut, seven of which he had already felled. He also stated that, so far as the original blazed line was discoverable, the fence between the lots was placed on it as nearly as might be.

Statement.

The cause came on to be heard at Toronto, when witnesses were examined at great length, the material parts of the evidence being given in the judgments on re-hearing.

One *Campbell*, a witness for the defendant, in whose statements the Court placed the utmost reliance, and which counsel for the plaintiff did not attempt to impeach, swore that he had "managed lot 53 for his brother, and was interested with his brother in the land, which he purchased in the spring of 1858, and took possession of the place; there was not a line fence all the way through lots 52 and 53; there had been a fence part of the way, but it had decayed. In the fall of 1858 he had employed men to put up a fence, and they commenced to do so. Mr. *H. G. Bernard* (the then owner) was willing to have the fence put up, and we agreed to employ Mr. *McPhillips* to survey the line in order that we might know where to put it up. Mr. *Bernard* said the best way was to get *McPhillips*, as he knew the line and had been there before, *and that*

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it would be well to have it put up in the right place. McPhillips chained the lot. * * * *H. G. Bernard* was there. * * * We chained through the bush on the north side until we came to the second concession; there we found a stake which *McPhillips* had planted a number of years before. Mr. *Bernard* remarked how accurate Mr. *McPhillips* was, for he came out within a hand's breadth of the old stake he planted. He then ran south down the concession, and he came within a few feet of the old stake. He said that stake is the concession line; he placed a stake at a point which he said was to be the corner of the fence." The witness then described the process of running the line on the south through to the east, and proceeded, "The fence was put down on this line. Mr. *Bernard* accompanied us through the whole work, and was perfectly satisfied. It was his suggestion to get *McPhillips;* he said as *McPhillips* had run the line before, we should get him. Mr. *Bernard* proposed to and did pay one half *McPhillips's* expenses. I paid the men for putting up the fence in the first instance, and *Bernard* repaid one-half of the south fence."

Statement.

At the conclusion of the case, BLAKE, V. C., dismissed the bill with costs.

The plaintiff thereupon re-heard the cause.

Mr. *Fitzgerald*, Q. C., and Mr. *Arnoldi*, for the plaintiff, contended that there was nothing proved shewing an agreement on the part of *Bernard* to be bound by the survey of *McPhillips* in 1858. The witness *Campbell* only proved the fact that the survey was made, and that *Bernard* paid one-half of the expense of making it. They also contended that the Act of 1860 (23rd Victoria, chapter 102,) applied where the side lines are laid out, and that the monuments placed by the surveyor must govern, even if the original

1874. monuments or stakes could be found. (See clauses 3 and 6 of the Act.)

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Mr. *George Murray*, contra. There being a fixed and definite point in this case from which to commence, the statute referred to does not apply. That Act was passed merely with reference to actually travelled side lines.

The language of Sir *John Robinson*, C. J., in Doe *d. Beckett* v. *Nightingale*, at page 522 of the report of that case (5 U. C. R.), is very appropriate here, that learned Judge stating: "When the owners of adjacent lots agree, either in consequence of a survey or otherwise, to a certain line or division, and lay their fences accordingly, but carry them out only part of the way, then it perhaps may be found reasonable to hold each to be constructively in possession of the land which would fall on his side of the division line so mutually assented to, if the same were protracted;" but here the fence, by the mutual assent and arrangement of both parties, was carried through all the way, and the plaintiff cannot now, after an enjoyment according to that line for a period of nearly fifteen years, call the line so ascertained and determined in question.

Argument.

The other cases referred to are mentioned in the judgment.

SPRAGGE, C.—As to any defence arising under the Statute of Limitations the question is, was there a continuous division fence between lots 52 and 53 more than twenty years ago, running from the pine stump, which was about half way between the front and rear of the lots? The evidence shews that a fence was put up in 1858 along the old line supposing it to be the true line; but I at least doubt if there was any binding agreement between the parties that that should be the dividing line

Judgment.

between them, whether it were the true boundary or not. In 1851 there was a fence along portions of this line which had been put up some years before, extending some thirty or forty rods west from the pine stump into the bush, as the witness *Eastwood* says. *Simpson's* evidence is of a fence running from the improvements sixty or seventy rods westerly, and that a fence ran from the rear of the concession easterly some twenty five or thirty rods. These two lengths of fence would be together some five hundred yards, thus leaving between them a gap of about six hundred yards unfenced.

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In *Denison* v. *Chew* (*a*), which was an action of trespass a division fence appears to have run the whole distance, along a line surveyed more than twenty years before, as the division line between two lots, and possession had been held on each side accordingly. The Court composed of *Sherwood* and *Macaulay*, JJ., (*Robinson*, C. J., diss.,) held that the Statute of Limitations applied.

Judgment.

In *Bell* v. *Howard* (*b*), which was an action of ejectment, *Denison* v. *Chew* was referred to with approval. In that case a line between two lots had been run more than twenty years before, and fences had been put up in accordance with it along the whole line, with the exception of about sixteen chains in the rear. The case was not decided entirely upon the Statute of Limitations, but upon compact, that the line run should be accepted as the true line; as also of waiver of right to set up any other line. I doubt if what is put as compact and waiver amount to it, but that appears to have been the *ratio decidendi*. See the language of *Draper*, C. J., on referring to the cases of Doe *Beckett* v. *Nightingale* (*c*), and *Denison* v. *Chew* at page 295 and 296.

(*a*) 5 U. C. O. S. 161. (*b*) 5 U. C. C. P. 292.
(*c*) 5 U. C. R. 518.

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Samuel v. Gilson.

In the former of these cases the question of a division fence running along a portion, not the whole of a division line, was considered by the Court. The opinion of Sir *J. Robinson*, C. J., given at page 522 of the report was that as to the portion unfenced it would be a constructive possession to which the Statute of Limitations would not apply, and *Draper*, C. J., in *Bell* v. *Howard* seems to have taken the same view in the passages I have referred to.

In *Wideman* v. *Bruel* (*a*), which was an action of trespass, a verdict was rendered in favor of the defendant—the plaintiff relying on what *Draper*, C. J., calls a "conventional line fifty years old," and partial fencing "compact and arrangement,"—and an application was made for a new trial which was granted on the payment of costs.

Judgment.

In *Heyland* v. *Scott* (*b*), *Davis* v. *Henderson* (*c*), and *Mulholland* v. *Conklin* (*d*) there was no question as to the effect of partial fencing. The question was as to the effect of an owner of land, not a trespasser, having possession, and claiming title—whether his title does not relate to the whole parcel to which he claims title, and not to the spot actually occupied by him only, and the affirmative of this was held in all these cases.

In *Heyland* v. *Scott Hagarty*, C. J., refers to the language of *Draper*, C. J., in *Hunter* v. *Fair* (*e*) putting the case of one without title entering upon land, clearing and fencing a part *and exercising continuous acts of ownership over the residue.*

These cases do not seem to me to establish that where there is a fence along *a portion* of a line there is a con-

(*a*) 7 U. C. C. P. 184. (*b*) 19 U. C. C. P. 165. (*c*) 29 U. C. R. 344.
(*d*) 22 U. C. C. P. 872. (*e*) 28 U. C. R. 827.

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structive possession of the unfenced portion. The opinion of Sir *John Robinson* was against it in Doe *Beckett* v. *Nightingale*, and that of *Draper*, C. J., was against it as a naked proposition in *Bell* v. *Howard*, in which case as I have already stated he proceeded upon compact. Here there is no compact proved, nor is one to be inferred, and there was less than half the distance fenced.

I incline to think the bill properly dismissed on another ground, the acts complained of being of too insignificant a character to warrant the plaintiff in coming to this Court for an injunction.

I agree in the construction put by my learned brothers upon the Act of 1860.

STRONG, V. C.—There can be no doubt upon the evidence but that the possession of the parties has been regulated since 1851 by the line ran in that year by *McPhillips*, at the instance of Captain *Boyd*, under whom the defendant claims. Judgment.

The brush fence spoken of by some of the witnesses is not, it is true, very distinctly proved, but that a line was then defined which was indicated by blazes on the trees, corresponding with the line again marked out in 1858 by the same surveyor, at the instance of *Hiram G. Bernard*, the plaintiff's grantor, and *Campbell*, the then owner of the defendant's lot, No. 53, is beyond dispute, and the weight of testimony is to shew that this was considered as the boundary by all parties until the defendant proceeded to cut the timber, which is complained of by the plaintiff as a trespass, and sought to be restrained by this bill.

The facts as to these surveys and the conduct of the parties are fully stated in the judgment of my learned brother before whom the cause was heard.

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Laying aside for the present the effect of the Statute of 1860 (*a*), the decree dismissing the bill appears to me to be sustained by ample authority.

Although no beneficial enjoyment was had by either party of so much of the land as lay upon each side of the line running through the wood-land, I am of opinion that each party must be considered to have had since 1851, such a possession according to that line as is sufficient to constitute a title under the Statute of Limitations: *Jones* v. *Williams* (*b*).

In *Bell* v. *Howard* (*c*) the facts were very similar and the conclusion of the Court was that the parties were bound. *Denison* v. *Chew* (*d*), *Wideman* v. *Bruel* (*e*), Doe *Beckett* v. *Nightingale* (*f*) are also authorities directly in point.

Judgment.

If therefore there has been nothing to disturb the possession held in fact according to the line of 1851, the defendant's title to the land on which the trespass complained of was committed is established.

If the case had depended on the survey of 1858 alone I should have had some doubt since there would not then have been, in addition to the line run by agreement of the parties, the possession for the requisite length of time to constitute a statutory title, before the filing of the bill. Even in that aspect of the case, however, there is much weight of authority in favour of the decree. The law as laid down by some of these authorities is stated to be that an agreement between co-terminus proprietors settling a boundary line is not within the Statute of Frauds, since the object of the agreement is not to affect title but to ascertain the subjects of the respective titles

(*a*) 23 Vic. ch. 102.
(*b*) 2 M. & W. 326.
(*c*) 6 U. C. C. P. 292.
(*d*) 5 U. C. Q. B. O. S. 161.
(*e*) 7 U. C. C. P. 134.
(*f*) 5 U. C. Q. B. 518.

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of the adjoining proprietors. Thus in *Penn* v. *Lord Baltimore* (*a*), Lord *Hardwicke* said that a settlement of boundaries is not an alienation, because if fairly made without collusion the boundaries so settled are presumed to be the true and ancient limits; and the result of the cases is summarized in a work of much accuracy—*Hunt's* treatise on Boundaries (ed. 2, at p. 206,)—where the law is thus stated: "It may be well to observe here that in America agreements made in respect of disputed boundaries are not within the Statute of Frauds, because it is said they cannot be considered as extending to the title, nor do they have the operation of a conveyance so as to effect an assignment of the property from one party to another."

In *Davis* v. *Townsend* (*b*) the Court says, speaking of parol agreements to settle boundaries, "Such agreements recognize and confirm the title of both the contracting parties to the lands of which they are respectively the real owners, and seek only to distinguish and place beyond the reach of future doubt the true line of separation between them. It has been repeatedly held in America that a parol agreement to ascertain and establish a boundary line between the owners of adjoining lands, either directly by the parties themselves or through the medium of a submission to arbitration, is not within the provisions of the Statute of Frauds, and has no more bearing upon the abstract question of title than the testimony of a witness shewing the practical location of a deed according to its courses and distances."

Judgment.

On looking into the American authorities I have however, been unable to find any case in which a parol agreement to be bound by a particular line has been held conclusive, without the adjunct of either long continued possession sufficient to give a title or, at least, to bar an entry by lapse of time, or such standing by and acquies-

(*a*) 1 Ves. Sr. 448. (*b*) 10 Barb. Sub. C. R. 333.

1874. cence in the acts of the opposite party on the faith of the established boundary, as would on ordinary principles constitute an equitable estoppel.

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In *Denison* v. *Chew* Mr. Justice *Macaulay* expresses himself doubtfully on the point as follows: "Perhaps within twenty years the party might shift the supposed side line between two apparent lots as apparently ascertained by a mutual survey, if not estopped by deed, but after twenty years I should think not so."

I do not further pursue this question, as I am prepared to rest my judgment on the Statute of Limitations, a defence which by his answer the defendant insists upon. I refer, however, to the following authorities as having an important bearing on the view which the Vice-Chancellor took at the hearing: *Hunt* on Boundaries (*a*), *Hilliard* on Real Property (*b*), *Brown* on the Statute of Frauds (*c*), *Corkhill* v. *Landers* (*d*), *Boyd* v. *Graves* (*e*).

Judgment.

I also think that the fact of the defendant having purchased on the understanding that the true boundary was the line of 1851 ought to have weight on the question of estoppel.

Then being of opinion that there had been, previous to the filing of the bill, a continuous possession uninterrupted in point of fact for upwards of twenty years, I have next to inquire as to the effect, upon that possession, of the Statute of 1860.

Upon this question I think much light is thrown by the case of *Denison* v. *Chew* already quoted. In that case a line had been established by agreement between adjoining proprietors prior to the passing of the Statute 59 Geo. III., ch. 14, and afterwards there had been

(*a*) (ed. 2), pp. 224-225, 258-9, 288. (*b*) 343. (*c*) sec. 75.
(*d*) 44 Barb. 218. (*e*) 4 Wheat. 513.

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twenty years' possession according to the agreed boundary, and the question was, whether the passing of the Act before the completion of the twenty years was such an interruption as to make the time elapsed prior to its enactment unavailing. The Chief Justice was of opinion that the effect of the Statute was to give a new right, and therefore the time of possession previous to its passing was not to be taken into account. The other members of the Court, Mr. Justice *Sherwood* and Mr. Justice *Macaulay*, took a different view and determined that the Statute did not disturb the acquired rights of the parties following the case of Doe *Stuart* v. *Redick* (*a*). The necessity for, and object of this statute of 1818, the first Act of Upper Canada regulating surveys, is clearly explained by the Chief Justice in his judgment in *Denison* v. *Chew*. Before that law was made great confusion had arisen with regard to the division lines between lots. There being no guiding course applicable to all the side lines of a concession, the only mode to be adopted in making a survey was to take the courses of the lines of each lot from the patent deed, and as the original surveys had been made by compass much irregularity was occasioned in consequence of the variation of the compass, and of want of care in the original survey. To remedy this the Statute of 1818 provided that the exterior line of the township on the side from which the lots were numbered, should, as the general rule be taken to be the base line, and that the course of all side lines should be parallel to that base line. The operation of this Statute in a case similar to the present was held by the Court of Queen's Bench, in the case cited to be in the words of *Macaulay*, J., as follows: "The Statute is to be the guide in all unadjusted cases to which it applies, but it should not be so construed as to alter the previous law

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(*a*) Taylor's Reports, ed. 2, p. 494.

1874. of the land touching rights of property in general as influenced by long continued possession."

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The Statute now in question (*a*) was passed to meet a difficulty which had arisen in consequence of the side roads between lots not having been actually laid out on the allowances reserved for such roads, in the original survey of the township of Vaughan. The township had been long settled, and as the preamble of the Act recites "the greater number of these allowances had been opened up, travelled, and statute labour and public money expended thereon for many years." The object of the Act then was to confirm these roads, and to do that as equitably as possible as regarded the land owners. The Act then provides in the third section that in making future surveys the original posts or monuments should govern in the front of the concession, and that in the rear the several lots should have given them a proportion corresponding to the width of each lot in front, determined by the original posts in front, of the whole breadth between the side roads as actually established on each side, and that the side lines of lots should be drawn from the original posts in front to the new points so to be ascertained in the rear.

Judgment.

This mode of survey was consequently to supersede in the township of Vaughan that first established by the Act of 1818, and afterwards re-enacted in subsequent statutes, and which could not have been applied in this township, without disturbing the road allowances referred to in the recital to the Act which had been opened and on which money had been expended.

It is worthy of note that this Statute contains no provision for indemnifying parties for improvements which might be cut off by the new mode of ascertaining the

(*a*) 28 Vic. ch. 102.

boundaries of lots prescribed by it. The 59th George III. did contain such a provision.

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The question now presented for our decision as regards the Act of 1860 is precisely that which the Court of Queen's Bench had before it in *Denison* v. *Chew* in 1827 with reference to the Act of 1818, and I have heard no argument which ought to prevent the application of the reasoning and principle of that decision to the present case. I think we must say here, as was said in *Denison* v. *Chew*, that the new mode of ascertaining boundaries given by the Statute is only to be applied in "unadjusted cases," and that as it is clear that if the parties had before 1860 settled their boundaries by deed, the Statute would not have affected rights thus acquired, so neither does it affect a right acquired by length of possession at the time it was passed, though as in *Denison* v. *Chew* that right did not ripen unto a perfect title until the possession had continued for several years afterwards when the statutory period of limitation had elapsed.

Judgment.

I think the decree should be affirmed with costs.

BLAKE, V. C.—The plaintiff owns a part of lot 52 on the west side of Yonge street, and the defendant a portion of lot 53, the adjoining lot to the north. The plaintiff claims that the defendant is cutting timber on his land, and asks to restrain him. It is not clear that the land on which the defendant has been cutting is not a part of the lot which the plaintiff purported to sell to the *McArthurs*. He has not on this point satisfactorily shewn his title to the premises he claims by his bill. The lot of which the plaintiff owns a portion, patented as a 200 acre lot, has included within its fences about 215 acres; that of the defendant, patented in the same way, contains, in like manner, about 217 acres. The bill of the plaintiff is based upon the Act 23 Victoria, chapter 102, which confirms "certain roads in the township of

1874. Vaughan," and provides "for the defining of other road allowances and lines in the said township." Under this statute stone monuments were planted, and it is contended, that, in order to ascertain the division line between lots 52 and 53, these are to be taken in making the survey as the true boundaries, in place of the posts planted on the original survey. I thought, at the hearing of the cause, and still retain the opinion, that whatever may have been the intention of the Legislature in passing the Act in question, the wording of the third section thereof would not permit of such a construction. After speaking of the contemplated survey the third section begins, "From and after such survey being effected * * * every survey which may be made of * * * any division line or limit between lots in the said township, shall be drawn from the post or monument planted in the *original survey.*" The plain wording of this section cannot be contradicted by any equivocal statements in other parts of the Act, which, although they may rather lead to the conclusion that the Legislature had another means of making the survey in view, do not in distinct language say so. Making a fresh survey and taking the monuments laid down under this Act as the guide would give the plaintiff 2 acres and $\frac{3}{10}$ths of the land claimed by the defendant. Taking the old survey as the guide would shew, according to the surveyor of the defendant, that he has about an acre less land than he is entitled to, so that finding this point in favor of the defendant disentitles the plaintiff to any relief.

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Judgment.

But even if the Act gave the plaintiff otherwise the right which he claims, the facts proved by the defendant shew this has been lost. These lots front on Yonge street, and for about forty years a dividing line has been run from this street through the front halves of the lots. More than twenty years before the filing of the bill this line was continued west to the rear end of the lot—the

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trees were blazed all the way through from front to rear and at the westerly or rear end of the lots a post was planted to designate the division at that point between the lots. The fence which the defendant claims as the division line by which both parties are bound was put up in 1858, and is run on the old blazed line above referred to; not only was the division line designated by the marks on the trees, but a fence was run partly through the rear halves of the lots on the marked line. The fence being erected at the rear and front portions of the half lots. *James Eastwood* speaks of the survey, the blazing of the trees, and the erection of this fence in 1851. He was chainbearer of *McPhillips* the surveyor. *Campbell* speaks of a tree fence which extended thirty or forty rods west from the pine stump into the bush; this fence had been there for years; it had rotted and was pulled down and cut away in order to allow the fence of 1858 to be put up. *James Simpson* had been in the neighbourhood since 1839, and remembered the line fence which ran between these lots. He says a brush fence ran across until it met the fence that ran north and south, where the improvements on the lot were; this was about where the front half of the lot ended; "this fence ran west sixty or seventy rods from where the improvements were; I first saw the brush fence in 1850; there was then a post at the rear of the lot between 52 and 53; the line fence there to-day is on the old line fence; it commences at the west where the post I have spoken of was put down; in 1850 the fence went twenty five or thirty rods in an easterly direction from the concession, that is from the western or rear end of the lot; there was a new post put down by the surveyor in 1850 where the old post had been."

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John Davidson says he has lived near the lots for twenty-two years, and remembers a line being run and a post put down at the south west corner and a fence put up; there had been a slash fence put down at the west

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end which ran to the east about fifty rods or more; "I saw that fence twenty one years ago; I remember *McPhillips'* survey of twenty two years ago, and also that of fifteen or sixteen years ago." *Patrick Naughton*, a witness for the defendant, admits that there was a fence of about three, four, or five rods in length at the east end of the bush. The plaintiff's father also admits this portion of the fence to have been there. *McPhillips*, the surveyor, more than twenty years before the filing of the bill, had at the request of the then owners of these lots run the line for them. They then admitted the correctness of the line run through the front halves of their lots, and asked the surveyor to take the westerly end of this defined line and from that to run the line to the rear which he did. The marks then made are still in existence, and shew the line run the whole way through to the rear where the post then planted stood, until it was replaced by the one put down at the more recent survey. This line was further defined by the erection of fences at each end of the half lot, and from the time of the survey for over twenty years no act has been shewn inconsistent with the acknowledgement of this as the division between these lots. The more recent authorities shew clearly that matters other than fencing and cultivation can constitute possession; that wild lands need not be enclosed in order to the making out of a title by possession. The question is, whether the person relying on possession has for the statutory period claimed or held the land as owner, and has used it in like manner as the owners of lands, who have uncleared and unenclosed portions on the lots they occupy, usually use their wild lands, or whether the acts relied on are those of a mere trespasser, and not intended to have been in the assertion of right, title or ownership: *Wideman* v. *Bruel* (*a*), *Heyland* v. *Scott* (*b*), *Mulholland* v. *Conklin* (*c*), *Davis* v. *Henderson* (*d*). The opinion of the

Judgment.

(*a*) 7 U. C. C. P. 134.
(*b*) 19 U. C. C. P. 165.
(*c*) 22 U. C. C. P. 372.
(*d*) 29 U. C. R. 344.

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Court in Doe *Beckett* v. *Nightingale* (*a*) was that "when the owners of adjacent lots agree, either in consequence of a survey or otherwise, to a certain line of division, and lay their fences accordingly, but carry them out only part of the way, then it may perhaps be found reasonable to hold each to be constructively in possession of the land which would fall on his side of the division line so mutually assented to if the same were protracted." The Court of Common Pleas approves of *Beckett* v. *Nightingale* and *Denison* v. *Chew* (*b*), in the case of *Bell* v. *Howard* (*c*). There Chief Justice *Draper* says, "I consider it was a question proper to be submitted to the jury upon the evidence whether a division line had been adopted and agreed upon between the owners and occupiers of these two lots, according to which they had used, occupied and enjoyed respectively for more than twenty years before the commencement of this action, and if there had been a division line so agreed upon, and the occupation of the respective proprietors had been so mutually limited thereby for twenty years or upwards, the parties would be bound by it, though on an accurate survey it should be found to vary from the true division line ascertained according to the original plan of the survey. It seems to have been conceded all round that the division line between these lots had not been run on the original survey of the township, but there is strong evidence to shew that a line had been run a good many years ago dividing these lots, the marks of which blazed on the trees are still to be traced, and at the north end of which there was a stake standing more than twenty years ago, and considerably within that period; that the occupants of both lots, in cutting timber or disposing of timber to others had asserted their own rights up to this line, claiming nothing beyond it, and giving directions to those employed by, or acting under, them to observe and not to cut the trees which

Judgment.

(*a*) 5 U. C. R. 518. (*b*) 5 U. C. O. S. 161. (*c*) 6 U. C. C. P. 292.

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were marked to designate the line. I think this is evidence of occupation on the one hand, and of acquiescence on the other, of mutual agreement as to the boundary, and of waiver of any right to set up or claim any other boundary; and, if believed by the jury, sufficient to warrant their verdict, which was in fact rested on this ground." In this case the evidence is stronger on the point of the survey being had between the parties for the purpose of defining their position, and in order that they might have their rights ascertained as to the boundaries of their lots, although it is weaker as to the subsequent acts of assent to such division. Taking the evidence as a whole I think there is as much to found a verdict in favour of the defendant here as to support that given in *Bell* v. *Howard*.

Judgment.

But even if the Statute of Limitations did not form a defence I think the subsequent survey of 1858, had between the parties for the express purpose of defining their rights as to their respective lots, the paying by each party of the share of the surveyor's expenses, the putting up of a fence, and the settlement of the cost of this matter in the same way, and the acting on this line for upwards of fourteen years would be sufficient to enable the defendant to meet successfully the case of the plaintiff, where at most he can but claim a little over a couple of acres on which the plaintiff can point out but two trees of any value now standing; and when we consider that it is only in respect of these trees that this Court has any jurisdiction to interfere. Unless this line was intended as a binding division between the parties there was no object in having it. Already there had been the line run, and the new one was had only because as it was to be a final settlement of the matter, greater accuracy was needed than if the parties were merely about to put up for a temporary purpose a fence. Where with this intention parties settle on certain boundaries, I think they should be kept to them, unless they bring them-

selves within those rules under which this Court relieves parties at times from such arrangements. 1874.

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Admitting that the Act on which the plaintiff relies would, under certain circumstances, enable him to have a settlement of his boundaries according to the recent, in place of the original survey, it cannot be taken as opening up settlements made between parties as to their lands; nor can it be taken as giving a fresh period from which the Statute of Limitations is to run, at most it would amount to this, where a party has not disentitled himself, by any of the various means whereby such a right may be lost, to have a survey of his lot then it shall be had in a particular way. I am of opinion first, that the Act does not apply, and second, if it does that the plaintiff by the agreement and the Statute of Limitations has lost the benefits that might otherwise have flowed to him therefrom.

I think the decree should be affirmed with costs, and I cannot but express my regret that the plaintiff should have spent so much money in a litigation involving a right to property of so trifling value. Judgment.

FIRST DIVISIONAL COURT. DECEMBER 17TH, 1923.

SUTHERLAND v. CAMPBELL.

Boundary — Dispute between Adjoining Owners — Blazed Line — Recognition — Estoppel — Conventional Line — Evidence — Limitations Act.

Appeal by the plaintiff from the judgment of the County Court of the County of Middlesex dismissing an action for an injunction restraining the defendant from trespassing and cutting timber upon land alleged to be the plaintiff's, and for damages.

The appeal was heard by Magee, Hodgins, and Ferguson, JJ.A., and Logie, J.

J. M. McEvoy, K.C., for the appellant.

F. E. Perrin, for the defendant, respondent.

Hodgins, J.A., in a written judgment, said that, assuming that a line was blazed by Campbell senior, it could not be found that anything was done by the respondent beyond refraining, when cutting trees, from taking any beyond that line. There was nothing in what happened to estop him from exercising his rights up to his true boundary when he saw fit to do so. When it is asserted that a line between the lands of two persons has become a conventional line superseding the true line, some situation making it inequitable and improper that the true line should be the measure of the right of the so-called trespasser must be shewn. This may be an agreement for consideration or a standing-by while the other party changes his position. See Grasett v. Carter (1884), 10 Can. S. C. R. 105.

The proof in this case fails to establish a conventional line agreed upon by the parties or any circumstances estopping the respondent from asserting any other as the true line.

The appellant has not proved a title to the strip in question; and, although the line drawn by Farncomb, P.L.S., was not satisfactorily shewn to be accurate, that does not aid the appellant.

That a visible blazed line such as sworn to by the appellant, and acts of ownership such as are set out in Jackson v. Cumming (1917), 12 O. W. N. 278, would confer title by possession, if both elements were established, was not to be doubted: see McCannel v. Hill (1920), 18 O. W. N. 343. But the learned County Court Judge (Macbeth) discredited the evidence given on behalf of the appellant by which it was sought to establish the blazed line as existing at a time sufficiently far back to permit reliance to be had on the Limitations Act, and that learned Judge's view should be accepted.

The appeal should be dismissed.

Magee and Ferguson, JJ.A., agreed with Hodgins, J.A.

Logie, J., also agreed, for reasons briefly stated in writing.

Appeal dismissed with costs.

NOVA SCOTIA SUPREME COURT.

[IN BANCO.]

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May 10.

Before HARRIS, C.J., CHISHOLM, MELLISH, GRAHAM and CARROLL, JJ.

Tenants-in-Common—Partition, may be by Parol or created by Estoppel by Deed or in pais—Statute of Frauds—Part Performance—Estoppel.

The plaintiff purchased an undivided one-half interest in certain lands. One L. agreed to purchase the remaining one-half undivided interest from B., the owner, and went into possession. During the time L. was in possession a division of the lands was made between

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himself and the plaintiff and a deed of partition was executed by them which gave to L. the lands in question. Subsequently L.'s agreement to purchase was cancelled, he being unable to complete the purchase and L. by deed quitted claim to B. Defendant, with knowledge of the partition and at the instance of the plaintiff, purchased from B. the half-interest previously purchased by L., as being between himself and the plaintiff a divided property according to the terms of the partition between plaintiff and L.; the plaintiff telling defendant at the time of the purchase by defendant that the property had been divided, and that he could take over L.'s part. After defendant purchased and entered into possession, plaintiff pointed out to him the bounds of his property, which bounds made the lands in question the property of the defendant. Each had possession as defined by the partition with L. and acted generally in their possession in a manner consistent only with divided ownership.

Held, *per* HARRIS, C.J., CARROLL, J., concurring, that the plaintiff and defendant agreed that the partition made between plaintiff and L. should be taken as binding between them and as settling their rights and that the Statute of Frauds did not stand in the way because there was such part performance as to prevent the operation of the Statute.

Held, *per* MELLISH, J., that the plaintiff is estopped by his deed from disputing the terms of the partition between himself and Langille, and that he should be estopped under the circumstance from setting up as between himself and the defendant any other partition, except so far as they may have agreed to depart from it.

CHISHOLM and GRAHAM, JJ., dissenting.

AN appeal from the decision of PATON, J., in favour of the plaintiff, in an action for partition of certain lands alleged to be held by the plaintiff and defendant as tenants-in-common; and dismissing the counterclaim wherein the defendant claimed specific performance of a verbal agreement to partition made between the parties.

The following is the decision appealed from:—

The plaintiff and defendant Ervine Stevens are brothers residing at Gorham's Point, Lunenburg County. The plaintiff says that he and the defendant are owners in common of certain lands at Gorham's Point including a beach of gravel of considerable value because of its suitability for building purposes. The defendant sold practically all the gravel of that beach and the plaintiff claims an accounting and payment of one-half of all amounts received by the defendant. The defendant says he is the sole owner of that beach and that the plaintiff is not entitled to the relief claimed.

The whole property at Gorham's Point was at one time owned by James Berringer. On March 5th, 1895, James Berringer, by separate deeds conveyed the property to his two sons, Haliburton Berringer and Charles Berringer. Each son received certain lots of cultivated land in addition an undivided half interest in the pasture and woodlands. The two sons during their occupancy made no division of the undivided lands. On May 15th, 1920, Haliburton Berringer conveyed all his property to the plaintiff by a description the same as that in the deed of March 5th, 1895, to Haliburton from his father, James Berringer. On April 6th, 1921, Charles Berringer conveyed to the defendant, Ervine Stevens, all the property Charles had obtained from his father James Berringer, by a description the same as that in the deed to Charles, except apparently by a slip in copying, the word "woodland" was omitted.

By these two deeds the plaintiff Randolph Stevens and defendant Ervine Stevens became owners in common of the same lands that were left undivided at the time of the conveyances by James Berringer to his sons Haliburton and Charles. The defendant Ervine Stevens mortgaged his property to the defendant Lila E. D. Kinley, on February 1st, 1928, by a description the same as in the deed to Ervine Stevens from Charles Berringer.

So far as the paper title goes, the lands that were undivided at the time of the conveyances from James Berringer to his two sons in 1895, were still undivided when this action was commenced and were admitted by the defendant, Ervine Stevens, to be undivided at the time of his executing the mortgage to Lila Kinley on February 1st, 1928, for he expressly describes them in that mortgage as being then undivided. He, however, asks the Court to disregard his statement, in the mortgage, that the lands are undivided, and to declare that all the undivided lands were divided with the exception of another beach now called Backman's Beach, formerly called Gorham's Beach. To support his claim he says that before

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he bought his part of the lands from Charles Berringer, the latter verbally agreed to sell to one Stanley Langille, all the property Charles had received from his father James Berringer. Langille paid $200 on account and obtained a receipt. He was not able to complete the purchase and the verbal agreement for sale was at Langille's request verbally cancelled a few months after it was made. Before the cancellation Langille put his father and mother in one portion of the house that Charles Berringer owned outright and Charles Berringer and his family lived in another part of the same house. Defendant alleges that shortly after Langille agreed to buy Charles Berringer's land, he Langille and Randolph Stevens, the plaintiff, agreed to a division of all the undivided lands, except Backman's Beach, and that a written agreement was prepared and executed by Langille and the plaintiff which is as follows:—

Same as defendant's Exhibit A W except married women's certificates and witness certificates that are not quoted.

In order to interpret the written agreement a sketch plan was put in evidence, and with its assistance I have come to the conclusion that according to that written agreement for partition the whole of Long Pond Beach and possibly that part of Backman's Beach south of the road running lengthwise across the beach would go to Langille, while that part of Backman's Beach north of the road would go to Randolph Stevens, the plaintiff. The defendant does not agree with that interpretation as he contends Backman's Beach was left undivided.

That agreement was not signed by Charles Berringer who held the legal title, though he assisted the parties to decide how the division should be made. The agreement appears to have been looked upon as not binding on any one, when Langille's verbal agreement to purchase was cancelled, and counsel for defendant at the argument did not contend that that agreement was itself binding upon plaintiff or defendant.

The defendant Ervine Stevens, however, contends that the conduct of the plaintiff in referring to parts of the undivided lands as belonging to defendant, as plaintiff did on several occasions, and the fact that a division fence between the Brick Hill gate and Long Pond was erected to separate their cattle, and the building of a goose house and some other small buildings, create an estoppel to an extent sufficient to amount to a division upon the terms of the written agreement with Langille. The plaintiff and Langille were very positive in stating, when giving evidence on this trial, that the roads and beaches were not to be divided, and consequently the written agreement does not express their intention. There is very good reason for excluding both the roads and beaches. The roads were convenient dividing lines and the beaches were practically necessary for both parties for the collecting, landing and piling of sea manure, and on which to land and pile other material. Long Pond Beach was especially good for that purpose, and it has been so used by both parties every year without protest from either. The plaintiff also hauled logs to and piled them on that beach at various times without any protest from defendant. In fact, until the defendant sold the gravel of that beach in 1928, the plaintiff made as much use of it as the defendant. There was nothing said or done by the plaintiff after the defendant acquired Charles Berringer's interest, that was inconsistent with plaintiff's contention that the beaches were and are still undivided. When gravel was sold from Backman's Beach in 1923 or 1924, the plaintiff told the defendant that the beaches had not been divided, and the money was divided between them. It would be most inequitable to now allow the defendant to retain for his sole use Long Pond Beach, after obtaining half the proceeds from the sale of gravel from Backman's Beach.

I consider and find that the plaintiff owns an undivided half interest in Long Pond Beach, and is entitled to an accounting, and to payment of half the proceeds arising from the sale by

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defendant Ervine Stevens of gravel taken from that beach. The plaintiff will have the costs of action against the defendant Ervine Stevens. I understand the amount received by that defendant can be easily obtained and verified and I assume it will not be necessary to appoint any person to take the accounts.

The counterclaim is dismissed, but as the same issues were involved in it as in the plaintiff's action, and as the costs of the trial were not increased by the counterclaim, there will be no costs on the counterclaim.

1930. March 11. *W. P. Potter,* in support of the appeal. There was a partition between plaintiff and Langille which was adopted by the plaintiff and defendant. By this partition Long Pond Beach went to the defendant. The description in the partition deed, executed by the plaintiff and Langille, includes Long Pond Beach in the land that went to Langille. Plaintiff told the defendant, when he, the defendant, bought that there had been a division and that he could take over Langille's part. The statements and conduct of both parties show that they both considered the partition made with Langille binding upon them. Plaintiff made no claim to Long Pond Beach until defendants sold sand from that beach; and up to that time plaintiff recognized the defendant as the owner. The plaintiff is the only one who claims that Long Pond Beach was held in common; the evidence of all other witnesses show that it was not so intended and that it went to Langille and then to the defendant. Plaintiff and defendant agreed that the partition made with Langille should be binding upon them. There was a valid partition. Co-tenants may divide land without a deed. Parol partition carried into effect by possession is sufficient: *Jones* v. *Morgan,* 22 N.B.R. 338; *Jackson* v. *Babcock,* 4 John. N.Y. 212; *Jackson* v. *Vosbourg,* 9 Johnson, N.Y. 271; *Neale* v. *Neale,* 1 Keen 672; *Williams* v. *Williams,* L.R. 2 Ch. 294, at 304-305; *Cood* v. *Cood,* 33 Bev. 314; *Paine* v. *Ryder,* 24 Bev. 151, and *Ireland* v. *Rittle,* 1 Atk. 541. Even if there were

not a valid partition, there was an agreement by one to sell to the other portions on respective sides of the lines, which agreement was part performance. Specific performance may be decreed. Fry and Specific Performance, 604; Halsbury, vol. 21, p. 814, and *Knollys* v. *Alcock*, 5 Ves. Sr. 647. Plaintiff is estopped. The partition agreement can be enforced in equity. Defendant has sufficient equities to take the matter out of the Statute of Frauds and to warrant a decree for specific performance. Possession is sufficient part performance. No great length of time of possession is necessary in order to establish a parol partition. In *Bolton* v. *Ward*, 4 Hare 530, only ten years elapsed.

W. G. Ernst, contra. There is no privity between Langille and the defendant. Langille's equity did not pass to the defendant. Langille at no time acquired any title. There never was any division between the plaintiff and the defendant, and one cannot be implied and possession referred to this implied division. Defendant did not buy Langille's interest nor a divided portion of the lands. When Langille determined his purchase with Berringer the division with plaintiff ceased. Defendant bought Berringer's undivided half interest and he did not buy on the faith of the division nor on the faith of any representations made by plaintiff. The partition between Langille and plaintiff never was adopted or confirmed by the parties. The taking of a quit claim deed from Langille was done in order to do away with the necessity of making him a party. Berringer could have confirmed the division with Langille when he conveyed to defendant but he did not. The evidence shows that the beaches were not divided as between plaintiff and Langille. The parties have always treated the beaches as being undivided. The agreement between plaintiff and Langille did not represent the intention of the parties—both parties testify to that. Assuming there was a parol division, this division must be followed by severalty of occupation which must be referable to the agreement to divide. There was common user.

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The occupation in severalty did not take place until recently. Severalty possession means complete and exclusive possession. Defendant has not made any improvements which can be injured. All the improvements were made by plaintiff. The equitable rule should not be applied. Performance must be done by the party asserting the contract in order to get the benefit of the rule. Fry on Specific Performance, sec. 588; *Caton* v. *Caton*, L.R. 1 Ch. App. 137. Even if the facts are as contended by the defendant, he is not within the equitable rule. There is no authority allowing a title in partition by estoppel. At common law a voluntary partition between tenants in common could be made by parol provided it was executed in severalty with livery of seisin. Cruise, 410; Coke on Littleton, 169(a). The Statute of Frauds imposes an obstacle to a valid patrol partition. Freeman on Co-tenancy and Partition, 2nd ed., p. 509. In order to get title by parol partition there must be a definite division followed by long period of possession coupled with improvements: *Johnson* v. *Wilson*, Willes 248; *Ireland* v. *Rittle*, 1 Atk. 541; *Whaley* v. *Dawson*, 2 Schoale & Lefroy 367; Browne on Statute of Frauds, sec. 68; 2 Blackstone Comm. 323; Allnatt on Partition 130; Petersdoroff's Abdmt. 141; Chitty's General Practice, vol. 1, 313; Freeman on Co-tenancy & Partition 520; Thompson's Comm. on Real Property, vol. 3, sec. 1896; Jones on Real Property, vol. 2, 741; *Barry* v. *Seawall*, 63 Fed. R. 742; *Morley* v. *Davison*, 20 Grant's Ch. 96, and *Duncan* v. *Sylvester*, 16 Me. 390. In this case possession is not referable to the agreement with Langille. In order to enforce specific performance there must be a concluded contract which must not be incomplete by reason that the parties failed to agree, expressly or impliedly, on some essential matter and the contract must be precise and certain so that exact performance can be decreed. 27 Halsbury, p. 19, sec. 77; *Douglas* v. *Baynes*, 1908, A.C. 477; *Clowes* v. *Higginson*, 1 Vessy & Beams 524; *Calverley* v. *Williams*, 1 Vessy Jr. 210; Snell's Principles of Equity 534. *Jones* v.

Morgan, supra, is distinguishable. *Neale* v. *Neale, supra,* and *Williams* v. *Williams, supra,* deal with family arrangements which are treated differently from other cases. The present case is not a family affair. In *Coot* v. *Coot, supra,* seventeen years had elapsed and one of the parties had died. This case supports my contention. *Payne* v. *Ryder, supra,* treats of copy hold lands which are treated differently.

1930. May 10. HARRIS, C.J.:—It is admitted by the plaintiff that the agreement between him and Langille was made. As I read that agreement, Long Pond Beach was to become the property of Langille and the agreement did not include Backman's Beach, which was therefore undivided.

The plaintiff says there was an agreement between him and Langille that neither of the beaches was to be divided. That is obviously not the meaning of the written agreement and if there was such an agreement made afterwards it contradicts the written one and defendant was not told about it. The defendant knew before he purchased the property that there had been a division in writing between plaintiff and Langille, although he had never read the document and he did not know what Langille's rights were under the agreement.

The plaintiff came to defendant and asked him to buy the property and before he moved over there the plaintiff told him the property had been divided and he was to take Langille's part. After the defendant moved over to the property the plaintiff pointed out to him the bounds of his property and these bounds made Long Pond Beach the property of the defendant. It appears that plaintiff after the defendant's purchase used the Long Pond Beach for landing and hauling sea manure to his farm each year and on one occasion in the winter season left some logs on the beach for a time, but these things are of little moment in the country districts, even among strangers, and one would scarcely

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expect the brother to object to such a use of this beach which would be of no disadvantage or loss to him.

Apart from the fact that on one occasion the plaintiff claimed that he had the right to haul sea manure over this beach, the plaintiff never claimed any interest in it until the defendant sold some sand off the beach and then plaintiff wanted a share of the proceeds —hence this litigation.

It is, I think, clear that the two brothers agreed that the written division between plaintiff and Langille should be taken as binding them and as settling their respective rights. Each built his part of the line fence between their respective lots and each had possession of his lot as defined by the Langille agreement. That being so, I do not think the Statute of Frauds stands in the way because there was such a part performance of the agreement as prevents the operation of the statute. Fry on Specific Performance, pp. 286 asd 287. The plaintiff's attitude seems to be that the Langille agreement is in full force between him and his brother in every respect except with regard to Long Pond Beach, and so far as that is concerned the agreement is to be varied because he says he had an understanding with Langille outside of the agreement and inconsistent with it. If such a secret agreement or understanding really existed he never disclosed its existence to his brother who thought everything was in writing.

I think that is the proper inference to be drawn from the evidence and I am not impressed with the genuineness of the plaintiff's contention. It is, I think, an afterthought.

I agree with the opinion of my brother Mellish, that the appeal ought to be allowed and the action dismissed both with costs.

CARROLL, J., concurred.

CHISHOLM, J. (dissenting):—Before opening this appeal, the appellant, Ervine Stevens, moved for leave to put in as further evidence an abstract of title to the lands and premises of the

parties situate at Gorham's Point, in the County of Lunenburg, certified by the Registrar of Deeds for the district of Lunenburg, and also the affidavit of Charles O. Berringer, sworn herein the 4th day of March, 1930. His counsel withdrew the application so far as it embraced the said affidavit, and restricted it to the certificate of title.

In his reasons for judgment, the learned trial Judge referred to the fact that the defendant Ervine Stevens, in his mortgage of February 1, 1928, to the co-defendant Lila E. D. Kinley, described his interest in the lands now sought to be divided as "the undivided one-half or share thereof." The appellant desires to show that the plaintiff also executed a mortgage, which is dated May 15, 1920, to one Adam Knickle, in which his interest in the pasture and woodlands are in the same way described as a half interest. I should be disposed to admit the abstract mentioned giving particulars of the last mentioned mortgage; although I am inclined to think that the descriptions in the mortgages are not decisive of the questions in issue. It may be added that the abstract shows that the Knickle mortgage was released before the issue of the writ herein; and no question therefore arises as to all requisite parties not being joined as plaintiffs herein.

The plaintiff, Randolph Stevens, brings this action against his brother, the defendant Ervine Stevens (joining as co-defendant Lila E. D. Kinley, mortgagee of Ervine Stevens' interest) for partition of a lot of land at Gorham's Point in the County of Lunenburg, in the Statement of Claim described as follows:—

"The pasture and woodlands formerly owned and occupied by James Berringer, deceased at Gorham's Point, including the Gorham's Beach and the Partridge Hill cultivated lot, and excepting only the cultivated lot known as the Horn Barn lot being one of the lots conveyed in part to W. Haliburton Berringer by his father James Berringer, by deed dated March 5, 1895."

The plaintiff claims that he is the owner of an estate of inheritance in fee simple of one of two equal shares in the said lands

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and that the defendant Ervine Stevens—I shall refer to him hereafter as the defendant—is the owner of the other share. The defendant by way of defence denies that the plaintiff owns a half interest in the said lands, and alleges that on or about the 15th of May, 1920, one Charles O. Berringer conveyed to one Stanley Howard Langille his interest in said lands, and that while Langille was the owner thereof the plaintiff and Langille had agreed to divide and did divide and set off the previously undivided lands "with the exception of Gorham's or Backman's Beach, and did convey, each to the other, the portion of the same which was to be held thereafter by the grantee in his own exclusive right. The whole tract was formerly owned by one James Berringer, and the said James Berringer by two deeds, dated March 5, 1895, conveyed in fee simple to each of his sons, Charles O. Berringer and Haliburton Berringer, certain lands, portions of his said lands; and he also included in the said deeds to his sons, an undivided interest described in the following words:—

"Also the undivided one-half of all and singular the pasture and woodlands now owned and occupied by me at Gorham's Point and the Beach known as Gorham's Beach and also the Partridge Hill cultivated lot."

Haliburton Berringer conveyed to the plaintiff by deed dated May 15, 1920, all the lands described in the deed from James Berringer to Haliburton Berringer in 1895, and Charles Berringer conveyed to the said defendant by deed dated the 6th day of April, 1921, all the lands described in the deed from James Berringer to Charles Berringer in 1895.

In May, 1920, Charles Berringer by word of mouth sold or agreed to sell his lands as already mentioned to Stephen Langille and he put Langille into possession. Langille made a payment of $200 on account of the purchase price. No deed passed.

While Langille was so in possession, Charles Berringer, the plaintiff, and Langille, all three traversed the lands and made a division of all the undivided property with the exception of a por-

tion thereof hereinafter mentioned. The plaintiff and Langille say that all roads and beaches were to be excepted; the defendant says that Gorham's Beach only was to be excepted.

Following the arrangement made by these parties on the ground, a document was prepared by a solicitor and signed by plaintiff and his wife and by Langille and his wife. This document is in effect a deed by which plaintiff conveys to Langille his interest in a part of the lands owned in common, and Langille conveys to the plaintiff his interest in another portion of the same. Later Langille failed to pay the purchase price and he gave up possession to Charles Berringer and the latter conveyed to the defendant Ervine Stevens as already stated. It may be added here that by a deed dated June 3, 1929, from Langille to the plaintiff, Langille quitted claim to the lands described in the partition deed of May 15, 1920.

This action appears to have been begun in consequence of the sale by the defendant to third parties of the sand on that portion of the original Berringer property, which is now known as Long Beach. The plaintiff claimed one-half interest in this beach and the defendant claimed that it had been set off to Langille in 1920. If the written division of 1920 were still in force Long Beach would fall within the portion set off to Langille.

The learned trial Judge decided that no division had been made, and that the division attempted to be made in 1920 was not effectual as between the plaintiff and defendant; that even if effectual at any time as between plaintiff and Langille it could not enure to the benefit of either Charles O. Berringer or defendant, because they were not parties to it. The learned Judge also held that, apart from the Langille arrangement, there was no valid division made by the plaintiff and defendant themselves.

The plaintiff's evidence is to the effect that he told the defendant at the time of defendant's purchase that the beaches were never divided; he denies that he told the defendant that if he

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would purchase the Charles Berringer property he would get what Langille was to get under the division. He told the defendant, he admits, that the written agreement would give Bachman's Beach to him, the plaintiff, and Loug Beach to Langille. Leaving out the beaches he admits also that he and the defendant have lived up to the provision of the written agreement. When Langille found that he was unable to pay the purchase price, $3,800, he says he and Charles Berringer agreed that the bargain should be abandoned, and he gave up possession to Charles Berringer. That, it seems to me put the parties as they were; and any rights which Langille might have acquired by being put into possession were thus surrendered to Charles Berringer. The written agreement fell with the agreement to purchase. True, it might have been recognized by the plaintiff and Charles Berringer, but there is no evidence to show that it was, nor indeed was that circumstance contended for by counsel. To make it effectual a new agreement would be necessary, inasmuch as Charles Berringer was a stranger to the written agreement, and was in no position to enforce it against the plaintiff.

As to the contention that the plaintiff and defendant had themselves made a valid division, the trial Judge has found the facts in plaintiff's favour; he has found in substance that there never was any agreement between them to adopt the Langille agreement in its entirety, or any agreement, outside the written one, to divide the beaches.

A parol partition of lands owned by tenants in common, must comply with the provisions of the Statute of Frauds as to a deed or note in writing. There may, of course, be circumstances which may take the case out of the statute, such as those which enable the party upholding the alleged partition to invoke the doctrine of part performance, but in this case there is not in my opinion, clear proof of such part performance. If there is adverse possession for the prescribed period by one of the parties he may acquire

rights quite independent of the Statute of Frauds. There is nothing in this case to assist the defendant in that regard.

I think the appeal should be dismissed with costs.

GRAHAM, J., concurred.

MELLISH, J.:—James Berringer was the owner and occupant of a farm which formed a peninsula in Lunenburg County, and of the beach leading therefrom to the main land and known as Backman's Beach or as Gorham's Beach. In 1895, James Berringer conveyed to his son W. Haliburton Berringer, an undivided one-half interest in certain of said lands and in said beach, and the entire interest in certain lands adjoining and forming part of said farm. In 1925 the said James Berringer also conveyed the remaining undivided half interest in said lands and beach to his son Charles O. Berringer, and the entire interest in certain other lands adjoining and forming the remainder of said farm. By deed dated the 15th May, 1920, the said W. Haliburton Berringer conveyed his said undivided half interest in said lands and beach and the said adjoining lands which he held to the plaintiff. Charles O. Berringer had been negotiating for the sale of his remaining half of the undivided lands and beach and the adjoining lands which he held to one Stanley Langille who paid Charles O. Berringer $200 on account of the purchase price for this half and the other lands adjoining in which the vendor had the entire interest. In pursuance of his agreement to purchase with Charles O. Berringer, Langille went into possession in the autumn of 1920. Meantime in April or early in May, 1920, Langille and the plaintiff who both came from Tancook, in anticipation, had the undivided farm lands partially divided on the ground by the said Charles O. Berringer. A deed of division was accordingly executed by plaintiff and Langille and dated the 15th May, 1920—the date of plaintiff's deed.

In *all* of the deeds above referred to the said undivided lands are referred to as including *only* "pasture and woodlands" "Gor-

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ham's Beach" and the "Partridge Hill cultivated lot." It is of importance to note this in view of the contention of the plaintiff that the Long Pond Beach so called was not a part of the "pasture and woodlands." If it were not, neither of the parties have any interest in it.

A perusal of this deed of division at once clearly shews that the part of the "pasture and woodlands" known as the Long Point Beach went to Langille, it also in my opinion shews that Gorham's Beach was left undivided. In one respect the main line of division on the ground made by Berringer differs from that in the deed which gives plaintiff a little more land than the line fixed by Berringer. The deed of partition provides that the division line running north and south through the property should be a road running from Brick Hill Gate to Thick Rock Beach. This road runs for the most part along near the eastern side of Long Pond. It is difficult to believe that this change was not made advisedly. Plaintiff, however, apparently to save fencing agreed on the line fixed on the ground. This was a straight line running from Brick Hill Gate to the southern end of Long Pond which itself then formed the boundary to the northern end thereof whence another straight line was taken to Thick Rock Beach. Langille was unable to complete his purchase and forfeited his payment on account of the purchase price and left the property. Thereafter early in 1921 the plaintiff told defendant, his youngest living brother, that Langille could not complete his purchase and that he could get the property. The said defendant knew at that time that the undivided property had been divided between plaintiff and Langille and there was no question of a new division. Defendant accordingly went into possession under a deed from Charles O. Berringer to him dated 6th April, 1921. Both parties occupied the property according to the said division between plaintiff and Langille, plaintiff using exclusively as his own the part assigned to him by said division and defendant using exclusively as his own

the part assigned to Langille. Fences were erected on the main line of division north and south above referred to—half by plaintiff and half by defendant. Plaintiff cut the timber on his side of that line for himself and defendant used the land on the other side for himself growing potatoes for himself on what is called the Long Pond Beach without any protest from defendant, and both parties acted generally in their possession in a manner consistent only with a separate and divided ownership. And in this connection it is to be noted that plaintiff at this time and at least until after the commencement of this action had no interest whatever in the lands conveyed by him to Langille, including the Long Pond Beach and he appears to have been quite willing to live up to his arrangement with Langille as the proper arrangement to be regarded in dealing with defendant, and did live up to it until in 1923 or thereafter when defendant began negotiations for a sale of sand from the Long Pond Beach.

Defendant was doubtless as anxious as plaintiff had been not to buy an undivided property and admittedly before defendant came upon the property or began to negotiate for it, plaintiff told defendant that it had been divided with Langille—which defendant already knew—and that defendant could take over Langille's bargain with Berringer. There was no further anxiety then on the part of either of them as to the division which had then been settled by deeds and by monuments on the ground. If this had not been the case we would naturally expect a new partition would have been made between the brothers or at least spoken of. The circumstance that the plaintiff at the time of the commencement of this action had no interest in the lands so conveyed to Langille and now sought to be divided is in my opinion in itself sufficient to defeat this action.

But apart from that, the admitted facts herein and the proper inferences therefrom and the weight of the testimony in my opinion establish the conclusion that said defendant at the instance

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of the plaintiff bought the property as being between him and the plaintiff a divided property according to the terms of the deed between plaintiff and Langille, leaving the Backman Beach (or as it is sometimes called the Gorham Beach) undivided, that the plaintiff is estopped by his deed from disputing the terms of the partition between himself and Langille, that he has failed to prove that there was any mistake in the terms of said deed and that he should be estopped under the circumstances from setting up as between him and his brother any other partition except in so far as they may have agreed to depart from it.

The learned trial Judge has in my opinion based his decision on untenable ground, viz.: that by the Langille deed of partition the northern half of the Backman Beach would go to the plaintiff and that it would therefore be inequitable to allow said defendant to have the whole of the Long Pond Beach after having received half of the profits from the Backman Beach. This construction of the deed has so important a bearing on the whole aspect of the case, that in disagreeing with it, I feel the more free to disagree with the conclusions reached on the trial. The fact that there was a division between the brothers is I think undisputed. Having this in mind it cannot fairly, I think, be said that the description in the mortgage given by said defendant can be taken as deciding otherwise. The description in the deed to this defendant from Berringer properly represented the vendor's interest in the land and would naturally if inaccurately be followed as it *was* followed in the contemporaneous and subsequent mortgages.

It appears to have been admitted on the trial that the Backman Beach was undivided. But it was strenuously contended before us that the learned trial Judge was right in holding that the northern part of the beach under the Langille partition went to the plaintiff. This first came to plaintiff's mind in 1923, and is based on the contention that as used in the deed the words "Western extremity of the said Gorham's Point property at Back-

man's Beach" mean the western end of that beach, the context and circumstances, I think, clearly shew this view to be untenable. These words are used as terminating a course "by the waters of Mahone Bay" and the next course is by a "main road" which can only be found by regarding the said "western extremity" as being the western extremity of the farm property as contained in the peninsula and not including the barren beach along which no definite road runs and which would necessarily be used in common.

I would allow the appeal and dismiss the action with costs.

Appeal allowed.

SUPREME COURT OF NEW BRUNSWICK.

[APPEAL DIVISION.]

MURRAY ET AL. v. MCNAIRN.

Before RICHARDS C.J., HARRISON and HUGHES JJ.

Boundaries—Adjoining wilderness lands—Whether "conventional line" established—Evidence that parties had "abided by" a line not based on grant lines—Line not disputed nor agreed upon—Insufficient evidence to establish conventional line—No estoppel—Trespass—Perpetual injunction.

The plaintiffs and defendant owned respectively the western and eastern half of a lot of wilderness land and a dispute had arisen concerning the location of the centre or dividing line between the two half-lots. The plaintiffs had a surveyor (Harding) locate on the ground the boundaries of the lot as originally granted and also the line dividing the half-lots and relied on these lines. The defendant did not dispute the correctness of these boundaries as being the boundaries of the original grant but alleged that the parties were bound by a conventional dividing line (marked "EF" on Harding's plan) some four chains west of the surveyed line. The conventional line "EF" if accepted would give the defendant about thirty acres more land than would the surveyed line. The plaintiffs' deeds gave them title to the land in dispute. In 1947, the defendant, prior to the Harding survey, had a surveyor (Sherren) run the lines and found that there was some four chains on the ground more than the grants called for. The plaintiffs and defendant agreed to divide the extra strip and had a new dividing line run and the defendant agreed to sell his lot to the plaintiffs for $1,200. The defendant later cancelled the agreement as to the sale of the lot and repudiated the agreement as to the lines. Until the boundaries were determined by the Sherren survey there had been no dispute concerning the dividing line and both parties and their respective predecessors in title had, for thirty years or more abided by the line "EF" which was clearly marked by blazes. There was evidence that the plaintiffs and their predecessors in title had never cut timber beyond the line "EF" and that the defendant had on many occasions cut up to that line. The plaintiffs brought an action of trespass claiming damages by reason of the defendant entering on their woodlot and cutting and removing timber, also a perpetual injunction and a declaration that the western half of Lot 97 as shown on Harding's Plan was the land of the plaintiffs. The defendant, denied the ownership of the plaintiffs and pleaded the Statute of Limitations. He also counterclaimed for damages by reason of an interim injunction which the plaintiffs obtained. The trial judge dismissed the action and sustained the counterclaim. The plaintiff appealed:

Held, allowing the appeal, that there was not sufficient evidence to establish any line as a conventional line.

There was in the record no evidence of any specific agreement to establish the line "EF" as a conventional line nor of how this line came to be on the ground. No one claimed the line "EF" to be a correct line nor recognized it as the boundary of his lot but all parties abided by it.

Since the deeds and grant plans vest the title in the plaintiffs unless the boundary has been altered by reason of a conventional line, the burden of proof is upon the party claiming ownership by reason of such conventional line, and the whole question is whether there is sufficient evidence to establish such a conventional line.

Where, however, a line between two adjacent lots has been set out in a wrong place and there is no dispute, the mere acquiescence in its location, as in this case, and the occasional cutting of trees up to such line, does not furnish evidence of estoppel and either owner may assert his right to have the line correctly run as the plaintiffs have done.

Held, inasmuch as the land in dispute was all woodland and the only evidence of occupation was some intermittent cutting of timber, the defendant's claim of title by adverse possession should be dismissed.

THIS is an appeal from the judgment of Anglin J. in an action of trespass for the cutting and removing of timber; and for a perpetual injunction. The plaintiffs' action was dismissed by the trial judge and the defendant's counterclaim sustained.

1952. March 4. *R. M. Palmer, Q.C.*, for the plaintiffs to support appeal.

There is no evidence to support the finding of a conventional line. None of the requisites for the establishment of a conventional line are present. There was no dispute between adjoining occupiers as to the true location of the dividing line between their properties; no agreement between them settling such dispute arrived at on the ground; no recognition of such agreed line by words or conduct. *Wilbur v. Tingley*, 24 M.P.R. 175; *Grosett v. Carter* (1884), 10 S.C.R. 105; *MacMillan v. Campbell et al.*, [1951] 4 D.L.R. 265; *Phillips v. Montgomery et al.* (1915), 43 N.B.R. 229; *Jollymore v. Acker*, 24 D.L.R. 503; *Roach v. Ware*, 19 N.S.R. 330; *Davison v. Kinsman*, 2 N.S.R. at p. 3. Where adjoining owners act under misapprehension, or in ignorance or under an erroneous assumption of the facts concerning the location of the true dividing line between their respective properties, neither of them is, in the absence of facts creating an estoppel, bound thereby but may show that such action was taken in ignorance, or under misapprehension. *McDonald v. McDonald* (1867), 7 N.S.R. 42; *Bryam v. Viollette* (1893), 32 N.B.R. 68; *Sisters of Misericorde v. Tellier*, [1932] 3 D.L.R. 715; *Dill v.*

Wilkins (1853), 2 N.S.R. 113; *Roach v. Ware* (*supra*); *Sutherland v. Campbell* (1923), 25 O.W.N. 409. This is not a true conventional line case. The parties are adjoining owners but not occupiers. *Huffman v. Rush et al.* (1904), 7 O.L.R. 346. To establish title by possession there must be some claim to the whole area involved in the dispute as well as entry upon and actual occupation or cultivation of part. A blazed line is not sufficient. *Swinehammer v. Hart,* [1912] 5 D.L.R. 106; *Ettinger v. Atlantic Lumber Co.* (1919), 59 S.C.R. 649. The defendant has never occupied the disputed area nor had his predecessors in title. Intermittent acts of lumbering do not constitute continuous possession. The plaintiffs have documentary title to the disputed land and have been continuously in constructive possession of it. The facts support neither a conventional line nor a title by adverse possession in the defendant to the area in dispute and there is no third ground on which defendant can base his claim. *Doe dem des Barres v. White* (1842), 3 N.B.R. 595; *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Wood v. LeBlanc* (1904), 34 S.C.R. 627; *Gooden v. Doyle*, 42 N.B.R. 435. There is no estoppel. The defendant has not altered his position to his prejudice. On the contrary he has done nothing but acts of spoliation on the land. Even if there was an estoppel it was waived by the conduct of the defendant. *McIntyre v. White,* 40 N.B.R. 591.

J. K. McKee, for the defendant, *contra*:

The findings of fact made by the trial judge are amply supported by the evidence. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside such judgment unless the appellant satisfies them that the judge was wrong, that there was no evidence to support his findings of fact and that therefore his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses on the stand. *Powell and Wife v. Streatham Manor Nursing Home,* [1935] A.C. 243; *Kenny v. Johnson,* 19 M.P.R. 380; *Duffy v. LeBlanc,* 19 M.P.R. 384; *Bradford v. McNeill,* 21 M.P.R. 128; *Geldart v. Fairweather,*

21 M.P.R. 226. There is ample evidence to support the findings of the trial judge that the parties and their predecessors in title recognized the line "EF" as the boundary between their properties and there is no agreement that this boundary is otherwise. To establish a conventional line it is not necessary that there be a dispute. There was acquiescence on the part of the parties to this line and an implied agreement. *Grasset v. Carter* (*supra*); *Phillips v. Montgomery* (*supra*); *Inch v. Flewelling* (1890), 30 N.B.R. 19; *Wilbur v. Tingley* (*supra*); *MacMillan v. Campbell et al.* (*supra*). The respondent, relying on such recognition and acquiescence, expended money and labour on lumbering operations. The defendant gained title to the land in question by adverse possession. He had exclusive, continuous, open, visible, and notorious possession, for 32 years, of the area in dispute. The defendant lumbered thereon to the knowledge of the plaintiffs, who acquiesced therein, and made no protest or objections. Lumbering was the only use to which the area could have been put.

R. M. Palmer, Q.C., in reply.

Cur. adv. vult.

1952. April 17. The following judgments were now delivered:

RICHARDS C.J. concurred with HARRISON J.

HARRISON J.:—This is an action of trespass—the plaintiffs claiming damages from the defendant by reason of the defendant entering on the plaintiffs' woodlot and cutting timber thereon and removing same, also a perpetual injunction to restrain the defendant and his agents from repeating any such wrongful acts, also a declaration that the lot described in the Statement of Claim is the land of the plaintiffs.

The defendant denied the ownership of the plaintiffs and claims to own the lot in question. He pleaded the Statute of Limitations. The defendant also counterclaimed for damages by reason of an injunction which the plaintiffs obtained on Novem-

ber 17, 1950 restraining the defendant from cutting or removing timber, logs or trees from the said lot until after trial or further order. The defendant also asked for a declaration that he is the owner of the lot in question and of the logs, trees and timber so taken from the said lot, and that the injunction order be dissolved.

The lot in question is described in the Statement of Claim as follows:

"All that certain tract, lot or parcel of land situate in the Parish of St. Mary's in the County of Kent and Province of New Brunswick, bounded and described as follows:

"Bounded on the south by the Mill Creek Stream, on the west by Lot 75 in Block 0 granted to Angus McEachern, on the north by Crown Land Lot 142 in Block 0, and on the east by land of Harry McNairn, being the western half of Lot 97 in Block 0 Granted to John McDonald and containing 50 acres, more or less."

This lot is the western half of lot No. 97. The defendant claims title to the eastern half of lot No. 97 comprising fifty acres by two deeds each conveying twenty-five acres—namely deed dated May 12, 1919 from Alex Murray conveying 25 acres adjoining the Amos half of lot No. 97 and deed dated October 13, 1927 from Anna Johnson et al. of 25 acres of lot No. 97 adjoining lot No. 98 on the east.

Upon the evidence of the two surveyors who gave evidence, W. A. Harding for the plaintiff and S. C. Archer for the defendant, it is quite clear that, according to the plans accompanying the Crown grants of lot No. 97 and the lots in the vicinity of lot No. 97, the plaintiffs' deeds gave them title to the lot in dispute.

W. A. Harding located the centre line of lot No. 97 according to the grant and marked it "GH" on plan P-17, and defendant's counsel stated at p. 229:

"We are willing to admit that Mr. Harding's lines of the grants are correct, but we do not admit they are the lines between the parties. He correctly shows the line according to the grant."

The defendant claims that a line marked "EF" on the Harding plan (P-17), located some four chains west of the centre line according to the grant, is a conventional line established by the plaintiffs and their predecessors with the defendant and his predecessors.

In regard to the defendant's plea claiming title to the lot in dispute by adverse possession, there is no finding as to this by the trial judge, and little attempt was made to support the claim. Inasmuch as the land is all wooded land and the only evidence of occupation was some cutting of timber which had been done intermittently for many years, the defendant's claim of title by adverse possession may be dismissed.

The judgment of the learned trial judge was delivered orally at the conclusion of the case, as follows:

"I find on the evidence that the western boundary of Lot 97 described in the pleadings is the line EF as shown on the plan in evidence made by Deputy Land Surveyor Harding, which is also the line 'B' on the plan in evidence made by Deputy Land Surveyor Archer. This is an old blazed line which, as it is now apparent, was not laid out in accordance with the original grants. However, I find on the evidence that the parties to this action and their respective predecessors in title recognized this line as the boundary between their adjoining properties. The plaintiff Ralph Amos says that they all abided by this line until 1946. I am not satisfied on the evidence that there has been any agreement that this boundary is otherwise or in accordance with lines set out in the original grants.

"There is a case in the Appeal Court of New Brunswick, *Wilbur v. Tingley* (1949), 24 M.P.R., p. 175 which deals with disputes of this nature and I have followed that case.

"The action is, therefore, dismissed and the counterclaim sustained. There will be judgment accordingly with costs."

I note in this judgment that there is first a finding that the parties to the action and their predecessors recognized the line "EF" as the boundary between the adjoining properties, and the judge goes on to say that he is not satisfied that there has been any agreement that the boundary should be in accordance with the lines set out in the original grant.

Since the deeds and grant plans vest the title in the plaintiffs unless the boundary has been altered by reason of a conventional line, the burden of proof is upon the party—in this case the defendant—claiming ownership by reason of such conventional line, and the whole question is whether there is sufficient evidence in this case to establish such a conventional line.

It is a fact that if the conventional line is accepted it takes a strip some four chains in width, containing some thirty acres, from the plaintiffs' western half of lot No. 97.

There is no direct evidence of any agreement, verbal or in writing, between the owners of the two halves of lot No. 97. There is no evidence of any dispute as to the line between the adjoining owners. There is evidence, however, that the conventional line claimed is clearly marked by blazes and has been in existence for thirty years or more. Furthermore that the Amos family, owners of the western half of lot No. 97, never did any cutting beyond this line "EF", and on the other hand that the owner of the eastern half of lot No. 97 did, on many occasions during thirty years or more cut up to the line "EF".

The evidence on behalf of the defendant might be summarized as follows:

Defendant stated that the line "EF" had been in existence over thirty years and there had been no dispute about it as the dividing line between the Amos family and himself until the year 1946. He said on direct examination that he had cut over the disputed lot practically every year, and on cross-examination that on an average he had cut over a half-acre each year and some years he had not cut at all.

Ralph Amos, one of the plaintiffs, admitted that "EF" was the only line he knew and he said: "We didn't know where our line was." Again he said: "I never accepted it or refuted (*sic*) it; the line was there and I abided by it." On the other hand the defendant was asked on cross-examination:

"Q. Until you started getting grant plans from Fredericton you didn't know where any of the true lot lines of any of those

lots were on the ground as detailed on the grant plan? A. No, because I seen no grants.

"Q. You just fell in line with mistakes made by earlier people right from the start? A. Right from the start, yes.

"Q. If they are wrong, you are wrong? A. If they are wrong, I am wrong."

Joseph Poirier said that Robert Amos, father of Ralph Amos and former owner of the lot in question, showed him the line "EF". Ernest McEachren said that about twenty years ago he lumbered on the eastern half of the McNairn lot for the defendant and that the defendant told him to get Mr. Amos to show him the line so there would be no trouble about it, and he said the plaintiff, Ralph Amos, showed him the line "EF". Ralph's father, Robert, also showed him the line in 1924; he is not definite as to where he did his cutting, although he says: "I was cutting choice stuff and had to go all over it". (The line "EF").

The defendant admits that the plaintiff, Ralph Amos, in 1946 procured the grant plan of lot No. 97 for him and that he then sent for surveyor Sherren to run the line between lots No. 97 and No. 98 owned by Joseph Poirier, and Sherren ran that line. That line is the line "KL" on Harding's plan (P-17) and is located some 4.18 chains to the east of the blazed line "IJ" claimed by Poirier as the dividing line between lots No. 97 and No. 98. Sherren measured on the ground from the east line of lot No. 97 ("KL") to the west line of lot No. 75 as it had been occupied, and found that there was some four chains on the ground more than the grants called for, and the suggestion was made that he divide this strip of four chains in width between the Amos family and the defendant McNairn. He then ran a line 1½ chains to the east of the line "EF" now in dispute. Ralph Amos referred to this as the "agreed line" and he and his sister swear that the defendant agreed to this line. Ralph Amos testified that "Mr. McNairn accepted it and I accepted it for the heirs of the Robert Amos Estate." Flora Amos testified:

"The next morning they came up and ran this agreed line. Mr. McNairn gave his full consent before it was done. After they ran the agreed line, they were back at the house and Mr. Sherren asked Mr. McNairn if he was satisfied with what had taken place and he said he was very well satisfied—that he only wished he had had it done years before."

McNairn denies these statements and says he never agreed to any line but the line on the ground "EF.". As against this, however, is the written agreement dated February 1, 1947 (ex. P-19) which reads as follows:

"February 1st, 1947. We, the undersigned, Ralph Amos, and Harry McNairn, hereby enter into an agreement whereby Harry McNairn agrees to sell to Ralph Amos his half of lot 97 (ninety acres) after the line between he and Joseph Poirier is fixed. The agreement is contingent that the line does not go above the gully at the bend of the brook, and also contingent that there be no change in the lines between the west line of the Angus McEachern down (east). Deeds to be passed before the 15th of March 1947. The sum of three hundred dollars to be paid as first payment when the deeds are passed. Another three hundred to be paid by the 15th of June, 1947 and balance to be covered by mortgage of not over two years duration at 7% interest. BALANCE $600. A payment of $10 ten dollars to bind the deal contingent upon above subjects aforementioned.

Witness: (sgd) Harry McNairn
Flora Amos (sgd) Ralph Amos.

March 13, 1947. I have decided not to sell this piece of land and refused to give the deed as called for in this agreement and has been released of this agreement at my own request and have refused the line between Robert Amos Estate as ran by Jim Sherren.

(sgd) Harry McNairn."

The explanation of the reference to the line between McNairn and Joseph Poirier is that Joseph Poirier acquired the west half of lot No. 98 adjoining lot No. 97 on the east in 1945, and he claimed that the boundary between this lot No. 98 and the defendant's half of lot No. 97 was located where there was a blazed line marked on plan P-17 as line "IJ". The true dividing

line between lots No. 97 and No. 98 according to the Grants is located 4.18 chains to the east of this line; and if the defendant by agreement with Poirier was put in possession of this strip of land 4.18 chains in width containing some thirty acres, he was willing that the dividing line between himself and the Amos family should be shifted to the agreed line 1½ chains to the east of the line "EF".

The provision that "the agreement is contingent that the line does not go above the gully at the bend of the brook" means that the eastern line of lot No. 97 should be the line specified in the Grant as surveyed by Sherren. This line, marked "KL" on Harding's plan, ran to "the gully at the bend of the brook."

Whatever else may be said about this agreement, it is evidence that the defendant was considering a new dividing line between himself and the plaintiffs. The words in the postscript to the agreement in March 1947 "and have refused the line between Robert Amos Estate as ran by Jim Sherren" show that he had been considering the so-called agreed line.

This evidence is sufficient to destroy the contention that the boundary line as between the plaintiffs and the defendant had been fixed.

Apart from this agreement, the evidence falls short of the requisites to establish a conventional line. Those requisites are set out in the majority judgment in *MacMillan v. Campbell et al.*, 28 M.P.R. 112 at p. 120 as follows:

"The important fact is that the parties should have agreed on a boundary line between their adjoining lands. It is not necessary that there should have been a dispute; it is not necessary that such boundary should be marked by a fence, so long as it is clearly defined by blazing or spotting or by monuments or otherwise it is not necessary that this conventional line should have been acquiesced in for any special period after the agreement. The essential matters are the making of the agreement and afterwards such an alteration of one party's position as would estop the other from disputing the conventional line. Thus if one erects a building, relying on the conventional

line, the other party is estopped to deny it. The erection of a fence or any expenditure of money or labour might also be sufficient."

And also by Hughes J. in *Wilbur v. Tingley*, 24 M.P.R. 175, at p. 195 as follows:

"If the respective owners of adjoining lands are in dispute as to the location of the boundary between them and they meet and agree upon a boundary line or have a boundary line located on the ground and marked and both parties acquiesce in that agreement, they have 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 line or not. No length of time is necessary after an agreement is reached. The erection of a fence on the agreed line is not necessary. Delay in objecting may and frequently does establish acquiescence. Such agreement does not involve a breach of the Statute of Frauds. It does not require a conveyance of any land from one party to the other. It is simply an agreement acknowledging the correct location of the boundaries and settling a dispute."

There is no evidence whatsoever as to the original marking out of these lines—whether as a result of an agreement between the adjoining owners or merely because of a mistake made by a surveyor. Surveyor Archer was asked if it was possible that the line "IJ" was the line between the two 25 acre sections of the eastern half of lot No. 97 which were conveyed in two separate parcels to the defendant, to which Mr. Archer said "It would be possible". And again: "Q. It is in the right position for it? A. Practically."

Regarding the claim of estoppel because the plaintiff Ralph Amos permitted the defendant's employees to cut trees up to the line "EF", no doubt if there had been a dispute as to the ownership of the land cut over and, with knowledge of this dispute, the plaintiff had permitted the cutting by the defendant without protest, there would be ground for an estoppel. The plaintiff would then have been acting with knowledge that his claim was repudiated by the defendant who was asserting his

ownership of the lot, and the plaintiff's conduct would then be evidence of the abandonment of his own claim. Moreover the plaintiff by his conduct would have induced the defendant to believe that he could safely incur expense in lumbering or otherwise making use of the lot in question, and the plaintiff should not afterwards be permitted to object. In other words he would be estopped.

Where, however, a line between two adjacent lots has been set out in a wrong place and there is no dispute, the mere acquiescence in its location, as in this case, and the occasional cutting of trees up to such line, does not furnish evidence of estoppel and either owner may assert his right to have the line correctly run as the plaintiffs have done.

I have found no case in which a conventional line has been established on such meagre evidence as we have here.

The conclusion therefore is that the plaintiffs are entitled to succeed. The appeal should therefore be allowed and judgment entered for the plaintiffs granting a perpetual injunction to restrain the defendant, his servants, agents and employees from entering upon, cutting or removing any timber, trees or wood from the lot in question, also a declaration that the plaintiffs are entitled to such lot as described in the Grant Plan of lot No. 97, and that the defendant pay to the plaintiffs the damages as admitted at the trial, namely $420, with leave to the plaintiffs to apply to the trial judge if proceedings at the trial left open the question of any further damages.

The plaintiffs should also have their costs of this appeal and of the trial.

HUGHES J.:—This is a trespass action. The dispute concerns the location of the centre line of a lot of wilderness land in the Parish of St. Mary's in the County of Kent. The plaintiffs are the owners of the west half of lot No. 97 in block '0' and the defendant claims that he is the owner of the east half of said lot. The plaintiffs had a survey made by Deputy W. A. Harding. He located and marked lines on the ground as and for the

boundaries of said lot No. 97 and a line dividing the said lot into two half-lots, and the plaintiffs rely on these lines. The defendant does not dispute the correctness of these boundaries as being the boundaries of the original grant, but alleges there is a conventional line between the two lots of land by which the parties are bound. Mr. Creaghan, counsel for the defendant, at pp. 229 and 230 of the record makes this clear. He said:

"We are willing to admit that Mr. Harding's line of the grants are correct but we do not admit that they are the lines between the parties. He correctly shows the line according to the grant.

"MR. PALMER: On his plan.

"THE COURT: Admits Harding's lines 97 are correct?

"MR. CREAGHAN: No. According to the grants. We do not admit the line. They materially vary. It looks as though the whole area has shifted approximately half the lots but we are not questioning his plan—that his plan is correct according to the original grant plans. This variation of eleven feet is not worth talking about.

"THE COURT: That is what I thought.

"MR. CREAGHAN: We do not admit it is the line between the parties, My Lord.

"MR. PALMER: What you have just said amounts to this you are admitting that Plan 17 drawn by Mr. Harding correctly shows on it the said line of Lot 97 as they are—

"MR. CREAGHAN: As they were granted but we do not admit they are now correct lines between the parties."

The line claimed by the defendant gives the defendant about thirty acres more land than he gets by the line claimed by the plaintiff as correct. The defendant admittedly cut logs on certain disputed land.

The case was tried before Mr. Justice Anglin. At the end of the trial the learned Justice announced his findings thus:

"I find on the evidence that the western boundary of Lot 97 described in the pleadings is the line E-F as shown on the plan in evidence made by Deputy Land Surveyor Harding which is also the line B on the plan in evidence made by Deputy Land Surveyor Archer. This is an old blazed line which as is now

apparent was not laid out in accordance with the original grant. I find on the evidence that the parties to this action and their respective predecessors in title recognized this line as the boundary between their adjoining properties. The plaintiff Ralph Amos says that they all abided by this line until 1946. I am not satisfied on the evidence that there has been any agreement that the boundary is otherwise or in accordance with lines set out in the original grants. *Wilbur v. Tingley* (1949), 24 M.P.R., p. 175. The action is therefore dismissed and the counterclaim sustained. There will be judgment accordingly with costs."

The plaintiffs claiming according to the original grants are entitled to succeed unless they have lost their rights by reason of a conventional line having been established. We have to consider therefore whether there is evidence which would justify the learned trial Judge in holding that there was a conventional line established which would deprive the plaintiffs of their title to the said thirty acres of land. There is not in the record any evidence of any specific agreement to establish the said line as a conventional line. In *Wilbur v. Tingley*, 24 M.P.R. 175, Chief Justice Richards at p. 181 states the rule clearly about establishing such a line, thus:

"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 the properties, that such recognition may be by expressed words, or by conduct. Time is not an element of the contract."

There is no evidence how the said line referred to as a conventional line came to be on the ground. It is admitted to be in the wrong location to be a grant line. Both parties wanted to have their lines properly established before that line was retraced. No one claimed the said spots indicated a correct line but in their operations they looked at it but did not cut over it. Ralph Amos said they all abided by this line until 1946. The learned trial judge finds that they "recognized this line as the boundary between their adjoining properties."

The evidence is very plain that the parties to this suit never recognized the said line as the boundary of their lot. There

is no evidence that their predecessors ever did so. All we know about the line is that there is a line spotted through the woods. We don't know how or by whom or why or when it was put there. It is not a line indicating any grant line. So far as we know no interested person accepted it as a boundary. The fact that none of the Amos family ever cut across it does not prove that they accepted it as their boundary. In 1947 the defendant engaged James Sherren, a deputy land surveyor, to locate lines for him. In doing so he located the eastern line of lot No. 97 in the same place as Harding later located it. Plaintiffs and defendant agreed to accept that line as a correct line and the defendant agreed to sell to plaintiffs the said eastern half of lot No. 97 for $1,200. A few days later this agreement was cancelled and all agreements about lines repudiated. In my opinion there is no evidence in the record sufficient to establish any line as a conventional line. The appeal must therefore be allowed and the judgment directed by the trial judge to be entered for the defendant will have to be set aside and judgment entered for the plaintiff against the defendant for $420 damages as agreed upon with leave to the plaintiff to apply to the trial judge if proceedings at the trial left open the question of any further damages.

The plaintiffs are also entitled to a perpetual injunction restraining the defendant, his servants, agents and employees from entering upon, cutting or removing any timber, trees or wood from the lot described in the plaintiffs' statement of claim as laid out on the land by deputy W. A. Harding.

The plaintiffs are entitled to their costs here and below.

Appeal allowed with costs and injunction granted.

[COURT OF APPEAL]

Biggs v. Township of Egremont et al.

GALE, C.J.O., HOULDEN AND BLAIR, JJ.A. 25TH FEBRUARY 1976.

Estoppel — Conduct — Municipality *giving* deed — Municipality estopped from pleading lack of supporting by-law to invalidate deed.

Municipal law — Powers of municipal councils — Sale of land — By-law authorizing sale not necessary — Municipal Act, R.S.O. 1970, c. 284, s. 336(1).

APPEAL from the judgment of Lerner, J., 5 O.R. (2d) 72, 49 D.L.R. (3d) 491, making permanent an interim injunction.

M. A. Craig, Q.C., for defendants, appellants.
Peter T. Fallis, for plaintiff, respondent.

The judgment of the Court was delivered orally by

GALE, C.J.O.:—It is our conclusion that this appeal must be dismissed, with a certain variation in the trial judgment to which I shall make reference later. The facts are set out in the judgment of the Honourable Mr. Justice Lerner and no point would be served in laboriously repeating them here.

It is our view that since the transaction culminating in the deed was executed, the township cannot successfully attack its validity on the basis that no supporting by-law was passed before the township entered into it. We hold this view even if a by-law would be necessary in other circumstances, a question which we do not need to decide.

We are also of the opinion that s. 336(1) of the *Municipal Act*, R.S.O. 1970, c. 284, was met, in that the giving of the deed subject to the reservation indicated clearly a decision by Council that the land would not be required beyond the life of the reservation.

Having decided that the deed was a valid and effectual document, we now turn to the question of the interpretation of the reservation which was worded in this way:

> AND SUBJECT ALSO to the right of the Grantor to use that *part* of the said lands presently used by it *for waste disposal services* until such time as the grantors are prohibited [*sic*] from so using the

> said lands pursuant to the provisions of The Waste Management Act and/or the Regulations made pursuant thereto.

(Emphasis added.)

We have decided, with respect, that the trial Judge interpreted the reservation too narrowly by confining the area reserved to the easterly 75 ft. of the three acres which were conveyed. The plaintiff in his evidence admitted that prior to the receipt of the deed, the township had used fill from the west part of the property to cover the waste in the east 75-ft. area. Therefore, the west area from which fill was taken comes within the area reserved, the use of which was retained by the township. I say that having regard to the part of the reservation which reads "that part of the said lands presently used by it for waste disposal *services*". It might have been otherwise had the reservation been for that part of the land on which waste was being deposited.

Accordingly, the judgment should be varied to so provide, and the variation will include the right in the township to move fill from the westerly portion to the easterly portion of the parcel. This of course is not to be taken as implying that the depositing of waste can be carried out to the west of the westerly limit of the easterly 75 ft.

The success on the appeal having been divided, there will be no costs of the appeal.

Judgment accordingly.

Prince Edward Island Court of Appeal
Nicholson, C.J., Peake and C.R. McQuaid, JJ.
March 17, 1978.

ESTOPPEL - TOPIC 1325

Estoppel in pais (by conduct) - Acquiescence - Construction of buildings on land - In 1954 a man built a house and lived in it on land owned by the plaintiff's predecessor in title, who said nothing - Subsequently the man built other buildings on the lot - In 1960 the defendants purchased the property from the occupier and lived on it - In 1971 the plaintiff successor of the owner of the land claimed ownership of the land and rent, which the defendants refused to pay - The plaintiff brought an action for possession of the property against the defendants - The Prince Edward Island Court of Appeal affirmed the judgment of the trial judge that the plaintiff was estopped from asserting a right to possession, where his predecessor had acquiesced in the construction and occupation of buildings on the lot and the occupation of the lot.

CASES JUDICIALLY NOTICED:

Sass v. St. Nicholas Mutual Benefit Association of Winnipeg, [1937] S.C.R. 415, appld. [para. 9].
MacGuigan v. Turner, [1948] O.R. 216, appld. [para. 9].
Cairncross v. Lorimer (1860), 3 Macq. 829, appld. [para. 9].
DeBrysscge v. Akt, (1878), 8 Ch. D. 286(C.A.), appld. [para. 9].

STATUTES JUDICIALLY NOTICED:

Rules of Court (P.E.I.), O. 21, r. 20 [para. 6].

COUNSEL:

DAVID H. JENKINS, for the appellant;
HORACE B. CARVER, for the respondents.

This case was heard at Charlottetown, P.E.I., before NICHOLSON, C.J., PEAKE and C.R. McQUAID, JJ., of the Prince Edward Island Court of Appeal.

On March 17, 1978, NICHOLSON, C.J., delivered the following judgment for the Court of Appeal:

1 NICHOLSON, C.J.: In the month of May in the year 1954 one Everett Coughlin constructed a house measuring 24' x 16' on land which, as is now admitted, was owned by the appellant's predecessor in title. Coughlin built the house and subsequently occupied it with the knowledge of the owner of

the land, who, at that time was Weston Rollings, Sr. Coughlin continued to occupy the land upon which his house was constructed and land adjacent to and surrounding the house until the month of April 1960. At that time Coughlin sold the property to the respondents under an agreement of sale for the sum of $1,500.00. The respondents moved into the house, made improvements on it, built a workshop on adjoining land and throughout the years made certain improvements on the land adjacent to the house and workshop. This was all done with the knowledge of Weston Rollings, Sr. Weston Rollings, Sr., died in the month of June, 1964, and was survived by his widow Margaret Rollings and his son, the appellant.

2 On May 3rd, 1971, the Executors of the Estate of Weston Rollings and Margaret Rollings entered into an agreement for the sale of certain lands, including the lands occupied by the respondents, to the appellant. In the month of June, 1971, the appellant advised the respondents that he was the owner of the land upon which the respondents' house was built and requested payment of an annual rent of $20.00. The respondents refused to pay such rent and disputed the appellant's ownership of the land. The respondents at this time considered they were owners of a parcel measuring 250 feet (frontage) along the road and 270 feet (deep) "*to the Park fence*". The appellant in the years between June, 1971, and December, 1973, advised the respondents that if they refused to pay rent such action as might be necessary would be taken to evict them from the property.

3 In the month of December, 1973, this action was commenced by the Executors of the Estate of Weston Rollings, Sr., Margaret Rollings and the appellant against the respondents for recovery of the land occupied by the respondents. The statement of claim alleges that the appellant and others are the owners of certain lands which are particularly described and that the respondents in the year 1960 "*wrongfully entered and took possession of a certain plot of land within the said lands hereinbefore more particularly described.*"

4 Before any defence was filed in the action, a deed of conveyance was executed from the Executors of the Estate of Weston Rollings and Margaret Rollings to the appellant. This deed of conveyance is dated March 19, 1974, and was registered on May 13, 1974. Subsequently, with the consent of counsel for the respondents, the statement of claim was amended whereby the action was continued with the appellant alleging ownership of the land and the Estate of Weston Rollings and Margaret Rollings were no longer plaintiffs.

5 On January 25, 1975, a statement of defence was filed whereby the respondents claimed to be "*in possession by themselves or their tenant of the plot of land referred to in the Statement of Claim and they plead that they are so pursuant to Order 21, Rule 20 of the Rules of Court*". They also pleaded the *Statute of Limitations*, R.S.P.E.I. 1951, c. 87. On June 4th, 1975, the statement of defence was amended as follows.

> In the alternative, the Defendants state that the Plaintiff is estopped from saying that the Defendants wrongfully entered and took possession of the lands described in the Statement of Claim and that he, the Plaintiff, is the owner in fee thereof, because the Plaintiff, or his predecessor in title at no time indicated to the Defendants his alleged title or right to possession in the said lands despite the various acts of the Defendants, which were known to the Plaintiff, or his predecessor in title in relation to the said lands.
>
> In the alternative, the Defendants state that the Plaintiff is guilty of laches of which the following are particulars:
>
> 1954 The Defendants' predecessor in title erected a house on the lands.
>
> 1960 The Defendants took possession of the lands.
>
> 1971 First complaint by the Plaintiff.
>
> In the alternative, the Defendants state that the Plaintiff acquiescented in the possession of the lands by the Defendants.

6 Order 21, rule 20, of the Rules of Court referred to in the statement of defence reads as follows:

> No defendant in an action for the recovery of land who is in possession by himself or his tenant, shall be required to plead his title unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the case hereinbefore mentioned, it shall be sufficient to state, by way of defence, that he is so in possession and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of facts contained

in the plaintiff's statement of claim. He may, nevertheless, rely upon any grounds of defence which he can prove except as hereinbefore mentioned.

7 Nowhere in the pleadings is the land occupied by the respondents described by metes and bounds. It was not until after the action was commenced that the respondents obtained a deed to the property which they purchased from Everett Coughlin. By deed dated October 16th, 1974, Everett Coughlin and wife conveyed the following lands to the respondents:

> All that parcel of land situate, lying and being on Lot of Township Number Twenty-four (24) in Queens County, Province of Prince Edward Island bounded and described as follows; that is to say: COMMENCING at a point in the Eastern boundary of the National Park, said point being also set in the shore boundary of North Rustico Beach; Thence running in an Eastwardly direction along the boundary of the shore of North Rustico Beach for the distance of One Hundred and Eighty-five (185) feet or to a certain road leading in a southwardly direction from the North Rustico Beach; Thence running in a southwardly direction along the Western boundary of a certain road leading in a southwardly direction from North Rustico Beach to a distance of Two Hundred and Fifty (250) feet or to a point; Thence running in a Westwardly direction for the distance of Two Hundred and Seventy (270) feet or to the Eastern boundary of the aforementioned National Park land; Thence running in a Northwardly direction along the Eastern boundary of the aforementioned National Park land for a distance of Two Hundred and Twenty-five (225) feet or to the point at the place of commencement.

8 The action came on for trial before Bell, J., on September 10th, 11th and 12th, 1975, at which time evidence was heard on behalf of the parties. Because of illness and the subsequent retirement of Mr. Justice Bell, he was unable to deliver judgment. By agreement of counsel, the case was assigned to M. J. McQuaid, J., for completion, with the understanding that the evidence taken at the trial before Bell, J., would constitute the evidence for the parties on the trial before Mr. Justice McQuaid. The case was argued by counsel on the basis of that evidence.

9 Mr. Justice McQuaid delivered the judgment now appealed against on June 16th, 1977. In that judgment he decided that the respondents were entitled to a plot of land measuring 250

feet by 150 feet, which plot is part of the lands originally owned by Weston Rollings, Sr., and in this action claimed by the appellant. In his judgment McQuaid, J., states at pages 13 - 15:

> I am satisfied that the land he (Everett Coughlin) occupied was actually owned at that time by George Weston G. Rollings, Sr. and that Rollings stood by and allowed Coughlin to build his house and also allowed him to move onto the land the other small building measuring eight feet by ten feet. Rollings lived only five hundred yards away, in an unobstructed line of vision, and I am satisfied that he must have known that Coughlin was building on his property. I am also satisfied from the evidence that at no time did he ask for or attempt to collect rent from Coughlin and I am therefore prepared to hold that Rollings made absolutely no objection to the violation by Coughlin of his (Rollings') legal right to the parcel measuring two hundred feet by one hundred and fifty feet while that violation was occurring. In effect, he acquiesced in the violation of his legal right by choosing to keep silent when he ought to have advised Coughlin that he was building on his land. The law in this respect is very clearly set out in *Sass v. St. Nicholas Mutual Benefit Association of Winnipeg*, [1937] S.C.R. 415, where the court ruled that if a person, by delay and standing by, has entitled another to assume the validity of a possessory title and to act upon such assumption to his detriment, such person can not set up against that other person a title which he should have asserted at an earlier date. The general principle is thus stated in *MacGuigan v. Turner*, [1948] O.R. 216, quoting Lord Chancellor Campbell in the case of *Cairncross v. Lorimer*, (1860), 3 Macq. 829:
>
> > The doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he can not question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

> Acquiescence by words or conduct in such circumstances as to infer an assent creates an estoppel (*DeBrusache v. Alt*, (1878), 8 Ch. D. 286, C.A.).

Again at pages 17 - 18:

> Because of his acquiescence, G. Weston G. Rollings, Sr. and consequently his successor in title, the plaintiff herein, is now estopped from claiming ownership to that portion of the '*subject land*' which Everett Coughlin took possession of in May or June of 1954.

Relying to a large extent on the evidence of Everett Coughlin, McQuaid, J., decided:

> the defendants are entitled to possession of that parcel of land measuring two hundred feet along the breakwater right-of-way and extending northwardly for the distance of one hundred and fifty feet. It is impossible for me to accurately describe the parcel by metes and bounds other than to say that it appears to me that it could be described as commencing on the northern side of the road leading to the breakwater at the southeast corner of land in possession of E. Gallant and shall extend from thence in a northwardly direction along the eastern boundary line of the Gallant property (and, if necessary, in a continuation thereof) for the distance of one hundred and fifty feet; thence two hundred feet in a direction easterly so as to reach a point distant one hundred and fifty feet from the northern side of the road leading to the breakwater and from this point running southerly for the distance of one hundred and fifty feet to the northern side of the road leading to the breakwater and thence in a westerly direction along the northern side of the road leading to the breakwater and following the various courses thereof for the distance of two hundred feet or until it meets the place of commencement.

10 The appellant appeals against the judgment of McQuaid, J., on the following grounds:

> 1. That the learned trial Judge erred in finding that the Defendants had exercised acts possession as required by law over all of that parcel of land over which he ordered the Defendants be entitled to possession in order to allow the Defendants to be entitled to possession thereof.

2. That the learned trial judge erred in finding that the Defendants were entitled to possession of the whole of that parcel of land to which he ordered that the Defendants were entitled to possession in that such finding was contrary to the evidence.

In the Notice of Appeal it is stated that "*the appeal is for the setting aside of part of the judgment only, such part being complained of being the Order defining the size and location of the parcel of land to which the Defendants are entitled to possession, the intention of this appeal being that the said judgment should be varied to provide that such parcel include only that portion of the subject lands as referred to in the Statement of Claim which are situate immediately below and in front of the area where the residential building of the Defendants is situate.*" From this it can be seen that the decision of the learned trial Judge is only questioned on the matter of the size of the parcel of land to which he found the respondents entitled.

11 I have carefully considered the evidence as it appears in the record of proceedings at trial, together with the judgment appealed against. The main thrust of the appellant's argument is that the evidence does not disclose sufficient acts of possession as are required by law to allow the respondent's "*to be entitled to all the lands for which the order was made*". In my opinion, the learned trial Judge's decision should not be disturbed. The area of land awarded to the respondents is supported by the evidence and, there being no question of credibility of witnesses, I am not able to say that the trial Judge was clearly wrong in his assessment of the size of the lot over which the respondents and their predecessors exercised dominion and control. It was a difficult case and, as I have said, I cannot see any error on the part of the trial Judge.

12 For the reasons stated, I would dismiss the appeal and confirm the decision of M.J. McQuaid, J. The respondents will have their costs of appeal to be taxed.

Appeal dismissed.

Editor: D.C.R. Olmstead
kmb

ROLLINGS v. SMITH et al.

Prince Edward Island Supreme Court,
M.J. McQuaid J.

Judgment—June 16, 1977.

Adverse possession — Statute of Limitations — Whether doctrine of laches applies where there is statutory limitation period.

Adverse possession — Estoppel — Principles.

Accretions — Whether title vested in Crown or owner of adjacent land.

Plaintiff brought action for possession of a parcel of land occupied by defendants. Defendants and their predecessors in title had occupied the land for nineteen years prior to the action, building a house on the property, and plaintiff and his predecessors in title had acquiesced in that occupation. Defendants pleaded: (1) *Statute of Limitations*; (2) laches; (3) absence of title in the plaintiff since the land was an accretion to the land to which he held title, and; (4) estoppel.

Held—Defendants were found entitled to possession of the portion of the property used and occupied by them, but ordered to deliver up to the plaintiff the rest of the property at issue.

The statutory limitation period had not expired when the action was brought. The doctrine of laches had no application. Where there is a statutory limitation period, the plaintiff has the benefit of the full statutory period in which to enforce his remedies.

Title to accretions, whether produced by the retreating of the high-water mark or by alluvial build-up, is vested in the owner of the adjacent land if the accretions are gradual and imperceptible. It vests in the Crown only if accretions are perceptible and can be measured. There was no evidence that these accretions were perceptible or caused by sudden recessions of water, and therefore title vested in the owner of the adjacent property.

The following elements must be present before the words or conduct of an owner of land will estop him from setting up his title against an occupier:

(1) the owner must know of his legal right to the land; (2) the occupier must be unaware of the owner's legal right; (3) the occupier must spend money or do some other act to his prejudice in relation to the land; (4) the owner must know of the occupier's mistaken belief as to his legal rights. All these elements were present in the instant case, and therefore the owner-plaintiff was estopped from asserting his title against the occupier-defendants. This estoppel encompassed not just the land on which the defendants' house was built, but also the portion surrounding the house to which their use and occupation had extended.

Cases considered
Archbold v. Scully (1861), 9 H.L. Cas. 360, 11 E.R. 796 – applied.
Cairncross v. Lorimer (1860), 3 Macq. 827 (H.L.) – applied.
Chuckry and R., Re, [1972] 3 W.W.R. 561, 2 L.C.R. 249, 27 D.L.R. (3d) 164, reversed (*sub nom. Chuckry v. R.*) [1973] S.C.R. 694, [1973] 5 W.W.R. 339, 35 D.L.R. (3d) 607, 4 L.C.R. 61 – applied.
De Bussche v. Alt (1878), 8 Ch. D. 286 (C.A.) – applied.
McGugan v. Turner, [1948] O.R. 216, [1948] 2 D.L.R. 338 – applied.
R. v. Lord (1864), 1 P.E.I. 245 – applied.
Sass v. St. Nicholas Mut. Benefit Assn. of Winnipeg, [1937] S.C.R. 415, [1937] 2 D.L.R. 761 – followed.
Taylor v. Wallbridge (1879), 2 S.C.R. 616 – referred to.

Statutes considered
Statute of Limitations, R.S.P.E.I. 1974, c. S-7.

Authorities considered
Anger and Honsberger, Canadian Law of Real Property (1959), pp. 311, 640, 641.

ACTION for possession of land.

S.D.H. Jenkins, for plaintiff.
H.B. Carver, for defendants.

16th June 1977. M.J. McQUAID J.:—This action was commenced by a general form writ of summons issued on 29th December 1973. Originally it was between Bertha Bullman and Margaret Matilda Rollings, executrices of the last will and testament of G. Weston Rollings, and Margaret Matilda Rollings, in her own right, and George Weston Rollings, as plaintiffs; and Eldridge Smith and Mary Smith as defendants. On 25th June 1972 an amended statement of claim was filed in which George Weston Rollings was named as sole plaintiff and the action continued as between George Weston Rollings as plaintiff and Eldridge Smith and Mary Smith as defendants.

In his amended statement of claim the plaintiff alleges that he is the owner and is entitled to possession of a parcel of

land at or near North Rustico Harbour in Queens County, described as follows:

"All that tract, piece or parcel of land situate, lying and being in lot of township number 24 in Queens County aforesaid, bounded and described as follows, that is to say:

"COMMENCING at the intersection of the northeastern boundary of the Harbour Road with the southeastern boundary of the Park fence; THENCE following the northeastern boundary of the said Harbour Road until is strikes the eastern boundary of the old Fishermans' Rights Road; THENCE in a southeastern direction following along the northeastern boundary of the old Fishermans' Rights Road to the Gulf of St. Lawrence (the entrance of Rustico Bay); THENCE following along the western boundary of the Gulf of St. Lawrence in a northern direction and in a northwestern direction to the National Park property; THENCE in a southwestern direction following along the southeastern boundary of the National Park property to a marker marked I.P. XXXVII; THENCE from the last mentioned point in a southwestern direction to the point at the place of commencement."

The statement of claim further alleges that in or about the year 1960 the defendants wrongfully entered and took possession of a certain plot of land within the lands described above. This plot will hereafter be referred to as the "subject land" and includes the land on which the defendants are presently residing and using for a landing for their fishing equipment and for other purposes. The plaintiff claims:

(a) possession of the "subject land";

(b) general damages;

(c) costs of these proceedings;

(d) such further and other remedies as the Court may in its discretion deem just.

In a statement of defence filed 3rd February 1975, and an amendment thereto filed 9th June 1975, the defendants say that they are in possession of the "subject land" pursuant to O. 21, R. 20 of the Rules of Court (as they then were) which said Rule provides as follows:

"No defendant in an action for the recovery of land who is in possession by himself or his tenant, shall be required to plead his title unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the case hereinbefore mentioned, it shall be sufficient to state, by way of defence, that he is so in possession and it shall be taken to be implied in such statement that he denies, or does not admit, the

allegations of facts contained in the plaintiff's statement of claim. He may, nevertheless, rely upon any grounds of defence which he can prove except as hereinbefore mentioned".

The defendants also plead:

"1. that the plaintiff is now estopped from saying that the defendants wrongfully entered and took possession of the "subject land";

"2. the plaintiff is guilty of laches of which the following are particulars:

"(a) 1954 – the defendants' predecessor in title erected a house on the "subject lands",

"(b) 1960 – the defendants took possession of the lands,

"(c) 1971 – first complaint by the plaintiff;

"3. that the plaintiff acquiesced in the possession of the "subject land" by the defendants;

"4. The Statute of Limitations (R.S.P.E.I. 1951, c. 87; now R.S.P.E.I. 1974, c. S-7)."

The defendants also raised the legal defence that the plaintiff does not own the "subject land" or, in the alternative, that the "subject land" is owned by the Crown.

The case proceeded to trial and Bell J. (as he then was) heard the evidence of the plaintiff, both defendants and seven other witnesses. Mr. Justice Bell's illness and subsequent unexpected retirement from the Bench made it impossible for him to deliver his judgment and I must now arrive at a decision from the 169-page transcript of the evidence and without the benefit of observing or hearing any of the witnesses as they gave their evidence. Much of the evidence before the learned trial Judge was given with the aid of a survey plan of the property prepared in 1967 by J.A. Reardon, P.L.S. and also with the aid of a series of photographs of the locus taken by Mary Smith, one of the defendants. The witness would, in many cases, explain what he was describing by outlining it on the plan. Without observing what the witness was doing, it was often difficult for me to follow what he was describing. For example:

"Q. Where is the boundary here?

"A. Well, it's here. Starts back here, back of Urbain Doucette's house; down there; back here; doesn't come to the Fishermans' Rights Road; goes back to here."

And again, when outlining the land at one time farmed and therefore not under water as alleged:

"Come here again and I will show you the land we farmed. Here's Doucette's house here. The line went up this way. We never farmed that way. We farmed this until the Park went through

and from here to here where the Park goes through they left that out to the Gulf of St. Lawrence."

However, I have been able to satisfy myself as to the exact location of the land described in the plaintiff's statement of claim; the location of the "subject land" and the location of the various other parcels concerning which there was any controversy during the course of the trial.

The defendants plead the Statute of Limitations and, in effect, say that they were adversely possessed of the "subject lands" as "squatters" for a period in excess of twenty years and therefore the plaintiff's right to recover the land is barred by s. 17 of the Statute (R.S.P.E.I. 1974, Cap. S-7). Section 17 provides as follows:

"No person shall take proceedings to recover any land except within twenty years next after the time at which the right to do so first accrued to some person through whom he claims (hereinafter called 'predecessor') or if the right did not accrue to a predecessor then within twenty years next after the time at which such right first accrued to the person taking the proceedings (hereinafter called 'claimant')".

However, the evidence conclusively shows that the earliest occupation of the "subject land" by any person other than the plaintiff or his predecessors in title was by one Everett Coughlin, who entered into possession in May or June of 1954. This action by the plaintiff to recover the land was commenced on 29th December 1973 and the twenty-year period allowed to the plaintiff to commence his action had not expired. The defence of adverse possession under s. 17 of the Statute of Limitations is therefore not available to the defendants.

The defendants also plead that the plaintiff is guilty of laches and for this reason his claim must be disallowed. Laches is defined as undue delay in prosecuting a claim and is based on the principle that a plaintiff must enforce his claim without delay and if he refrains from seeking his remedies after the violation of his rights become known to him he may be barred by his laches. The defence, however, is only allowed when there is no statutory bar and a person is not barred by laches if there is a statutory bar and he is entitled to the full statutory period before his claim becomes unenforceable (Lord Wensleydale in *Archbold v. Scully* (1861), 9 H.L. Cas. 360, 11 E.R. 769 and quoted with approval by the Supreme Court of Canada in *Taylor v. Wallbridge* (1879), 2 S.C.R. 616). The statutory bar here is our Statute of Limitations which allows the plaintiff twenty years to commence his action to enforce his claim. In the case at Bar the full statutory

period of twenty years had not expired before this action was commenced and for this reason the defence of laches is clearly not available to the defendants.

It is also submitted on behalf of the defendants that the "subject land" is the product of artificial accretion caused by an old breakwater which ran to the westward of the defendants' house to the cliff and that the land thus created by this artificial accretion did not belong to the Rollings family but rather to the Crown. In support of this submission the defendants rely on the evidence of Beecher Court when he was asked:

"Q. How did this area build up to be the area it is today?

"A. The breakwater catching the sand and grass grows on it and that is how sand dunes are built up.

"Q. Am I correct that it was the breakwater that caused the build-up of the sand?

"A. *That is my opinion.*" (The italics are mine.)

With respect, this "opinion" of Mr. Court does not satisfy what is required to allow me to conclude that the alluvial accretion — if there has been any — was of such a kind as to vest the accretion in the Crown rather than in the owner of the adjacent land. The law with respect to accretion is very clearly set out in the case of *Re Chuckry and R.*, 27 D.L.R. (3d) 164, [1972] 3 W.W.R. 561, 2 L.C.R. 249, reversed (*sub nom. Chuckry v. R.*) [1973] S.C.R. 694, [1973] 5 W.W.R. 339, 35 D.L.R. (3d) 607, 4 L.C.R. 61, where Dickson J.A. (dissenting in part) says at p. 174:

"The main issue in the appeal is whether the doctrine of accretion, born of Roman law and developed as an integral part of the English common law, presently forms part of the law of Manitoba. The doctrine has been often defined, perhaps nowhere better than in 2 Bl. Comm., pp. 261-2, 'And as to the lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction* as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees it shall go to the owner of the land adjoining . . . In the same manner, if a river, running between two Lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy'. The river and the doctrine can give, and they can also take away."

And again at p. 175 of the same judgment:

"For accretion to have occurred, it must be the result of a well-understood mechanism operating in a definite way. This

mechanism can take one of two forms or be a combination of both. These are: the retreating of the highwater line away from its former position, thus exposing land that was until then submerged; or the build-up of land through the process of alluvium, thus pushing back the highwater line: *A. –G. B.C. v. Neilson*, (1956), 5 D.L.R. (2d) 449 at p. 455; [1956] S.C.R. 819 per Rand J.; *Re Bulman* (1966), 57 D.L.R. (2d) 658 at p. 662, 56 W.W.R. 225, per Routtan J.

"The second requirement is that the process operates slowly and gradually so that the land growth is imperceptible. If any additions are made as a result of flooding, they must be those that would occur in the natural course of events: *Clarke v. City of Edmonton*, [1929] 4 D.L.R. 1010 at pp. 1014 and 1019; [1930] S.C.R. 137; *Re Bulman*, supra at p. 662; 230; *Bruce v. Johnson*, [1954] 1 D.L.R. 571 at p. 576; [1953] O.W.N. 724."

Where land is conveyed and described as bounded by a shore, or is actually so bounded, the rule of common law is that, if such boundary becomes extended by alluvial accretion due to the *gradual, slow* and *imperceptible* retirement of the water or deposit of alluvium, the accretion belongs to the owners of the land so extended and not to the Crown (Anger and Honsberger, Canadian Law of Real Property (1959), 640). The accretion will only belong to the Crown if the accretion is perceptible and the exact space between the original shore and the new high water mark can be defined; or if the accretion has been perceptible by marks and measures as it took place; or if the accretion has been formed by a sudden recession of the water. (Anger and Honsberger, Canadian Law of Real Property (1959), p. 641). These general principles respecting accretion were recognized in this Province by the decision in the case of *R. v. Lord* (1864), 1 P.E.I. 245 where Peters J. said:

"But it is an ancient and well established rule of law that alluvium, or whatever may aid in the formation of land deposited gradually or by little and little, belongs to the owner of the adjoining land, and, therefore, a stranger has no right to remove sand or other marine substances as they are from time to time washed up and deposited on the shore, or else their accumulation, which might in time form land, or raise the beach which protects it, might be prevented. And it has also been decided that artificial means may be brought to aid natural causes in producing it".

There is nothing in the evidence of Beecher Court or any of the other witnesses to show that the accretion has been "perceptible" rather than "gradual, slow and imperceptible" or that it was formed "by a sudden recession of the water" and; in the

absence of such necessary evidence, the defendants' submission cannot be sustained.

In a written brief to the Court, defendants' counsel submits that the land upon which the defendants are presently in possession was once covered by tidal waters. With deference, however, the evidence does not substantiate this contention but rather only indicates that the "subject land" was low land and was subject to flooding only at storm tides in the fall of the year. Everett Coughlin, the immediate predecessor in possession to the defendants, was asked:

"Q. These storm tides that come up, did they bother you much?

"A. Just in the fall.

"Q. How often would you get one of these?

"A. Usually once or twice in the fall."

Beecher Court, an 87-year-old resident of the area, was called as a witness for the defence, and in cross-examination was asked:

"Q. Do you remeber when Everett Coughlin built the house there?

"A. Yes.

"Q. At that time, was it dry up there?

"A. Yes, dry then for years before that. When the water came up there it was a long time ago. After probably an extreme tide it would come up in front of Coughlins after he built it. I'm not sure. He would know that himself."

I am not able to conclude from the evidence that the "subject land" was ever actually "covered by tidal waters" as contended by counsel for the defendants. It was undoubtedly low land and was subject to the inconvenience of flooding once or twice a year during storm tides but there has been no evidence submitted to show that the ordinary tides ever passed over the "subject land". I am therefore satisfied that the "subject land" always was and still is a portion of the land conveyed to Aquilla J. Rollings by the Commissioner of Public Lands by deed dated the 6th day of January, 1896 (exhibit P-4) and subsequently intended to be vested in the plaintiff through the following chain of title:

(1) Aquilla J. Rollings by Will to George Weston G. Rollings (filed and registered 11th May 1935).

(2) George Weston G. Rollings by Will to his wife Margaret Matilda Rollings (filed and registered 11th June 1965).

(3) To the plaintiff by deed (exhibit P-8) from Margaret Matilda Rollings and Bertha Grace Bullman, executrices of the

estate George Weston G. Rollings, and the said Margaret Matilda Rollings, in her own right (registered 13th May 1974 in liber 192, folio 244, Queens County Registry).

Having concluded that the "subject land" is included in the conveyance to the plaintiff (exhibit P-8), I must now determine from the evidence if any portion of the plaintiff's land has been occupied by the defendants or their predecessor in possession under circumstances which will effectively prevent the plaintiff from claiming absolute ownership. The defendants' immediate predecessor in possession was one Everett Charles Coughlin. Mr. Coughlin's testimony is that in May, 1954, he approached George Weston G. Rollings (Sr.) for "land on the hill" on which he intended to build a house. Rollings told him that he didn't want to sell any "land on the hill" and that "he owned to the fence (the National Park fence) and below the fence he didn't care what I done". Because of the title deeds at that time in his possession, I don't interpret this as an acknowledgment by Rollings that he did not own "below the fence" but rather as a "don't care attitude" on his part as to what Coughlin did below the fence. As a result of this conversation Coughlin immediately proceeded to erect on land below the fence a dwelling measuring sixteen feet by twenty-four feet. He received no deed of the land and the dwelling was not build on a foundation but rather on creosote posts. He later moved onto the land another small building measuring eight feet by ten feet which he purchased from George Weston G. Rollings (Sr.) . Couglins's evidence is that the lot he occupied measured two hundred feet on the breakwater right-of-way and extended north for one hundred and fifty feet. No fences were erected nor was the land enclosed in any way. Mr. Coughlin was of the opinion — wrongly, I hold — that the land he occupied was "fishermans' rights" and he was so informed "by people that has lived there". I am satisfied that the land he occupied was actually owned at that time by George Weston G. Rollings, Sr. and that Rollings stood by and allowed Coughlin to build his house and also allowed him to move onto the land the other small building measuring eight feet by ten feet. Rollings lived only five hundred yards away, in an unobstructed line of vision, and I am satisfied that he must have known that Coughlin was building on his property. I am also satisfied from the evidence that at no time did he ask for or attempt to collect rent from Coughlin and I am therefore prepared to hold that Rollings made absolutely no objection to the violation by Coughlin of his (Rollings') legal right to the parcel measuring two hundred feet by one hundred and fifty feet while that violation was occurring.

In effect, he acquiesced in the violation of his legal right by choosing to keep silent when he ought to have advised Coughlin that he was building on his land. The law in this respect is very clearly set out in *Sass v. St. Nicholas Mut. Benefit Assn. of Winnipeg,* [1937] S.C.R. 415, [1937] 2 D.L.R. 761, where the Court ruled that if a person, by delay and standing by, has entitled another to assume the validity of a possessory title and to act upon such assumption to his detriment, such person cannot set up against that other person a title which he should have asserted at an earlier date. The general principle is thus stated in *McGugan v. Turner,* [1948] O.R. 216, [1948] 2 D.L.R. 338, quoting Lord Chancellor Campbell in the case of *Cairncross v. Lorimer,* (1860), 3 Macq. 827 (H.L.):

"The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he can not question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

Acquiescence by words or conduct in such circumstances as to infer an assent creates an estoppel (*DeBussche v. Alt* (1878), 8 Ch. D. 286 (C.A.). The general requirements of the rule are detailed by Anger and Honsberger, Canadian Law of Real Property (1959) where the authors state at p. 311 that in order that A may be estopped in equity from complaining of the violation of his rights by B, the following must be established:

(1) "A must know of his legal rights because the rule is founded on his conduct in the light of that knowledge". In the case at Bar, George Weston G. Rollings, Sr. must be presumed to have known his legal rights because he had in his possession the title document, being the Crown grant to his predecessor in title, Aquilla Rollings (exhibit P-4) which clearly described his land and had attached thereto a plan of it.

(2) "B must be mistaken as to his own legal rights because, if, he is aware he is infringing on A's rights he takes the risk of A later asserting them."

The evidence of Everett Coughlin clearly indicates that he was honestly mistaken as to his own legal rights. He thought he was building on "fishermans' rights" and a lawyer whom he consulted told him "he couldn't see any reason for me not to

build a house there" and also told him that there was no need of a deed. I am therefore satisfied that Coughlin did not believe at that time that he was infringing on the rights of George Weston G. Rollings, Sr.

(3) "B must spend money or do some act to his prejudice because otherwise he would not suffer by A subsequently asserting him rights."

Mr. Coughlin did act to his prejudice inasmuch as he proceeded to expend money in the construction of a house on land on which he honestly felt he was privileged to build.

(4) "A must know of B's mistaken belief so as to make it inequitable of him to keep silent and allow B to proceed."

Although there is no direct evidence that George Weston G. Rollings knew of Coughlin's mistaken belief, in my opinion this knowledge may reasonably be imputed to him. When Coughlin approached him for "land on the hill", Rollings most certainly must have realized that Coughlin was asking for this because he thought that Rollings owned the land. When he was told that he could not buy any of this land he did not ask permission to build "below the fence" but rather went ahead and built there. When Rollings saw him do this without his permission, but after first having asked permission to purchase "on the hill", this surely must have alerted Rollings to the fact that Coughlin was of the mistaken opinion that he was free to occupy this land without the consent of Rollings.

Because of his acquiescence, G. Weston G. Rollings, Sr. and consequently his successor in title, the plaintiff herein, is now estopped from claiming ownership to that portion of the "subject land" which Everett Coughlin took possession of in May or June of 1954. The question still remaining to be decided is how much land was so occupied by Coughlin at that time and can now be claimed by his immediate successors in possession, the defendants herein?

In the course of his direct examination Coughlin was asked to describe to the court the land he occupied when he moved into possession in May or June of 1954. He replied by indicating on the Reardon Plan, by the letters A, B, C and D, a lot measuring two hundred feet by one hundred and fifty feet – two hundred feet along the breakwater right-of-way and extending one hundred and fifty feet northwardly. This was the land on which he built his sixteen by twenty-four house and onto which he moved the smaller building measuring eight feet by ten feet. The defendants, however, in this Action are now claiming a much larger parcel of land and the parcel claimed is thus described in what purports

to be a quit claim deed from Coughlin:

"COMMENCING at a point in the Eastern boundary of the National Park, said point being also set in the shore boundary of North Rustico Beach; Thence running in an Eastwardly direction along the boundary of the shore of North Rustico Beach for the distance of One Hundred and Eighty-Five (185) feet or to a certain road leading in a southwardly direction from the North Rustico Beach; Thence running in a southwardly direction along the Western boundary of a certain road leading in a southwardly direciton from North Rustico Beach to a distance of Two Hundred and Fifty (250) feet or to a point; Thence running in a Westwardly direction for the distance of Two Hundred and Seventy (270) feet or to the Eastern boundary of the aforementioned National Park land; Thence runnin in a Northwardly direction along the Eastern boundary of the aforementioned National Park land for a distance of Two Hundred and Twenty-five (225) feet or to the point at the place of commencement."

It should be noted that this quit claim deed is dated 16th October 1974 – approximately ten months after the commencement of this action by the plaintiff – and was registered on 31st October 1974. Mrs. Smith, one of the defendants, was questioned with respect to this deed:

"Q. At whose request did Mr. Carver or Mr. MacDonald draw that document?

"A. At our request.

"Q. You didn't have any deed before 1974?

"A. No, we didn't. We always assumed it was fishermans' reserve or Crown property.

"Q. It appears that all of the covenants have been removed from this. He doesn't promise you anything. This quit claim deed runs to the National Park fence for two hundred and seventy feet. Where did Mr. Carver or Mr. MacDonald get those measurements?

"A. *We measured it.* (The italics are mine.)

"Q. Measurements you supplied?

"A. Yes.

"Q. Mr. Coughlin testified this morning that he occupied a parcel of land maybe one hundred by one hundred and fifty.

"MR. CARVER: I think it was two hundred by a hundred and fifty.

"Q. At any rate, he testified he occupied a smaller portion of land and giving you a deed for this portion, can you explain why he would give you a deed for the larger amount?

"A. This is the portion we occupy *now.*" (The italics are mine.)

This may very well be the land they occupy "now" but it is much larger than the parcel to which George Weston G. Rollings, Sr. stood by and allowed Coughlin to occupy in 1954. Coughlin's evidence readily establishes this when he says he occupied two hundred feet by one hundred and fifty feet and also in his reply to the following questions:

"Q. How much area of land would you say you built up there?

"A. I would have about twenty feet in front of the house and roughly one hundred feet to the right of the house.

"Q. You built that up over the years you were there?

"A. The first year I was there.

"Q. Built it up in 1954, did you?

"A. Yes.

"Q. Mr. Rollings in his direct examination said it is his understanding Mr. Smith is claiming to the National Park fence. You didn't build all the way back there, did you?

"A. No.

"Q. How much distance is between what you built up and the distance to the Park fence?

"A. I am not sure. It is so long since I was there. I would have to take a look at it. I would say three hundred feet.

"Q. You didn't build up any of the land behind your house, towards the Park?

"A. No."

The evidence of the defendants does indicate that they are now occupying a larger portion of land and that following their occupation in 1960 they built up some of this larger portion by hauling sixty or seventy truckloads of clay onto it. There is, however, nothing in the evidence to indicate that George Weston G. Rollings, Sr., nor his immediate successor in title – Mrs. Margaret Rollings – nor the plaintiff in any way acquiesced in the occupation by them of this larger portion and the doctrine of estoppel does not work against them with respect to any of the land other than the parcel measuring two hundred feet by one hundred and fifty feet occupied by Coughlin in 1954.

Counsel for the plaintiff contends that the only portion of land to which the doctrine of acquiescence can be applicable is that small portion on which Coughlin built his house and the twenty feet in front of the house and the, roughly, one hundred feet to the right of the house. I must, however, hold against that contention. It is unreasonable to assume that Coughlin, during his period of occupation, would confine his use and occupation

to merely that small strip of land on which his house and other small building were located and to the twenty feet in front of the house and the, roughtly, one hundred feet to the right of the house. He indicated on the Reardon Plan a lot measuring two hundred feet by one hundred and fifty feet which he says he actually began to occupy in May or June of 1954 and I am prepared to accept his evidence in this respect.

My decision therefore is that the defendants are entitled to possession of that parcel of land measuring two hundred feet along the breakwater right-of-way and extending northwardly for the distance of one hundred and fifty feet. It is impossible for me to accurately describe the parcel by metes and bounds other than to say that it appears to me that it could be described as commencing on the northern side of the road leading to the breakwater at the southeast corner of land in possession of E. Gallant and shall extend from thence in a northwardly direction along the eastern boundary line of the Gallant property (and, if necessary, in a continuation thereof) for the distance of one hundred and fifty feet; thence two hundred feet in a direction easterly so as to reach a point distant one hundred and fifty feet from the northern side of the road leading to the breakwater and from this point running southerly for the distance of one hundred and fifty feet to the northern side of the road leading to the breakwater and thence in a westerly direction along the northern side of the road leading to the breakwater and following the various courses thereof for the distance of two hundred feet or until it meets the place of commencement.

In any event, the intent of my decision is that the defendants shall remain in possession of that parcel of land measuring two hundred feet by one hundred and fifty feet first occupied by Everett Coughlin in May or June of 1954. If its exact location can not be agreed upon, it is ordered that a qualified land surveyor be engaged to survey the parcel and that the cost of such a survey be born in equal shares by the plaintiff and the defendants. It is further ordered that the defendants vacate and immediately deliver up to the plaintiff the balance of the "subject lands" as the same are described in the quit claim deed from Everett Coughlin to the defendants (exhibit D-7).

No costs are awarded to any of the parties to this action.

Judgment accordingly.

BEA et al. v. ROBINSON et al.

Ontario Supreme Court [High Court of Justice],
Boland J.

Judgment—November 17, 1977.

Boundaries — Claim to title by adverse possession — Estoppel — Application of principle of conventional line — Trespass — Assault.

The plaintiffs, JB and LB, were the registered owners of Lot 54, Plan 72 in West Lorne, Ontario. The defendants, R and H, were the registered owners, each as to a part, of the abutting Lot 53 on the same plan. The plaintiffs purchased Lot 54 in 1964 without obtaining a survey, on the assumption that the lot line between Lot 54 and Lot 53 followed the production of a line of shrubs. In 1966, the plaintiffs, assisted by the defendant R, erected a boundary fence along what the parties assumed was the boundary line; in fact, the fence was erected approximately four and one-half feet inside Lot 53.

In 1975, the boundary line between the two properties was surveyed and as a result, the defendants demanded the removal of the fence; subsequently, the defendants cut down the fence. When the fence was being demolished by the defendants, an altercation developed between the plaintiff LB and the defendants R and H resulting in injury of the plaintiff.

The Court considered three issues:

1. What was the proper location of the boundary line between the properties? With respect to this issue the Court considered two theories:

a) Did the plaintiffs have title by adverse possession?
b) Were the defendants estopped because of the theory of conventional line from asserting that the boundary line as found by survey was the legal boundary?

2. Did the defendants trespass on the plaintiffs' lands in the course of their removing the fence?

3. Did the defendants assault the plaintiff LB?

Held—1. The plaintiffs' claim based on adverse possession failed. The plaintiffs' possession of the disputed strip of land did not last ten years; furthermore, the Court was not satisfied that the possession was adverse because of the defendant R's agreement to the erection of the fence in 1966.

The argument of the plaintiffs that the defendants were estopped from asserting their paper title to the disputed lands because of the theory or principle or conventional line also failed. In order to find a conventional line, there must be uncertainty as to a boundary line resulting from the impossibility of determining the line from a registered plan or deed. If the true boundary is determinable, but there has been no proper effort to determine it, then an agreement establishing a conventional line will not defeat the true boundary.

A boundary agreed upon by adjoining landowners can only be presumed to be the true and ancient limit of the property when there is no registered instrument to contradict the agreement. If there is a contradictory registered instrument, then a parole agreement as to boundary is void as against The Statute of Frauds (Ontario), The Conveyancing and Law of Property Act (Ontario) and The Planning Act (Ontario).

Lastly, the agreement for the conventional line, if found to be effective would have created no more than a tenancy at will, which could be determined at any time and was determined by the defendants' ejection of the plaintiffs from the disputed strip.

2. The claim for trespass was dismissed.

3. The claim against the defendant R based on assault was allowed because R used excessive force in the circumstances. The claims against H were dismissed.

Note

This case is of interest because of its treatment (and for many solicitors it may be an introductory view) of the principle of the theory of conventional lines.

The decision of Boland J. has narrowed the applicability of the principle, at least in Ontario, almost to the point of rejecting "a just and equitable doctrine with much appeal" altogether. Boland J. concludes that an agreement for a conventional line is only enforceable where it can be deemed to establish the true and ancient boundary. Where the true boundaries can be established by reference to a registered plan or deeds, or by any other means, a contradictory line established by conventional line is unenforceable.

Cases considered

A'Court v. Cross (1825), 3 Bing. 329, 130 E.R. 540 – referred to.
Asher v. Whitlock (1865), L.R. 1 Q.B. 1 – referred to.
Grasett v. Carter (1884), 10 S.C.R. 105 – applied.
Jollymore v. Acker (1915), 49 N.S.R. 148, 24 D.L.R. 503 (C.A.) – referred to.
Penn v. Lord Baltimore (1750), 1 Ves. Sen. 444, 27 E.R. 1132 – distinguished.
Spencer v. Benjamin (1975), 11 N.S.R. (2d) 123 (C.A.) – referred to.
Wallington v. Townsend, [1939] Ch. 588, [1939] 2 All E.R. 225 – referred to.
Woodberry v. Gates (1846), 3 N.S.R. 255 (C.A.) – referred to.

Statutes considered

Conveyancing and Law of Property Act, R.S.O. 1970, c. 85, s. 3.
Limitations Act, R.S.O. 1970, c. 246, ss. 4, 15.
Planning Act, R.S.O. 1970, c. 349, ss. 29(2), 29(7).
Registry Act, R.S.O. 1970, c. 409.
Statute of Frauds, R.S.O. 1970, c. 444, s. 1(1).

ACTION for a declaratory judgment as to the title of certain lands and for damages for trespass and assault.

Mervin L. Riddell, for plaintiffs.
Douglas G. Gunn, for defendants.

17th November 1977. BOLAND J.:—This matter concerns a property-line dispute and an alleged trespass and assault. The plaintiffs are man and wife and are the registered owners of the property described as Lot 54, Plan 72, Village of West Lorne, County of Elgin. The deed in their favour was dated 26th June 1964 and registered 18th August 1964 as Instrument No. 102152 Village of West Lorne.

The defendant Carmen Robinson is a retired railway employee and the official fence viewer for the area. He is the registered owner of the rear 44 feet of Lot 53. He has erected a new house on these lands.

The defendants James Creighton Hardenbrook and Linda Mae Hardenbrook are man and wife and the registered owners

of the balance of Lot 53 designed as Part 1 on Reference Plan 11R691. They purchased these lands from defendant Robinson by deed dated 11th June 1975 and registered 27th June 1975 as Instrument No. 184737. The three properties are shown on survey prepared by W. Douglas Smith, Ontario Land Surveyor, dated 28th October 1975, filed as Exhibit 1.

There are three issues to be determined. The first and most difficult issue to be decided is the proper location of the boundary line between the properties of the respective parties. The second issue is whether or not the defendants trespassed on the plaintiffs' lands and the third issue is whether or not the defendants assaulted the plaintiff Luzi Bea.

Unfortunately the plaintiffs purchased Lot 54 without obtaining a survey. According to their evidence they assumed the lot line between their property and the defendants' property was along the line of "the old eight foot shrubs" shown on Plan of Survey filed as Exhibit 3, while in fact it was approximately five feet northeast of these shrubs. The plaintiffs rented their property to tenants in 1964 and 1965 and moved into their new home on 1st May 1966. John Bea testified that prior tenants, as well as his tenants, cut the grass up to "the old shrubs" and that he followed the same procedure until 1975.

John Bea also testified that in March 1966 he and Mr. Robinson discussed erecting a fence between the rear boundary of their lands. Mr. Bea wanted to erect the fence to keep the dogs off his property. John Bea also testified that Mr. Robinson assisted him in lining up the fence. The fence was erected by John Bea the first week of April 1966. This old wire fence is clearly shown on survey filed as Exhibit 3 as being situate approximately 4 feet 5 inches west of the lot line between Lots 53 and 54. The fence extended from the rear of Lot 53 to within a few feet of the plaintiffs' house. The plaintiffs planted flowers and vegetables in the fenced area and continued to cut the grass up to "the old bushes".

The problem with respect to the boundary line first reared its ugly head when the defendant Robinson erected a new house on the rear 44 feet of Lot 53 and encountered difficulties with respect to set backs. According to the evidence of the plaintiffs, the first time they learned there was some difficulty with respect to the fence was when the defendants cut down the fence on 10th September 1975. Mr. Robinson testified that he did not assist John Bea in lining up the fence and on 6th August 1975, he instructed his lawyers to demand removal of the fence as

substantiated by Exhibits 19 and 20. Furthermore, there is the uncontradicted evidence of John Hardenbrook that he discussed the fence with John Bea and during the discussion the plaintiff agreed to remove the portion of the fence situate on the Hardenbrook property. He failed to do so.

All parties agree the fence was cut down on 10th September 1975. Mrs. Bea was most upset when she saw the fence being demolished and a fracus occurred which resulted in an injury to Mrs. Bea's right arm and shoulder. The evidence with respect to the alleged assault is contradictory. Mrs. Bea testified that she looked out her window and saw Mr. Robinson and Mr. Hardenbrook standing in her flower garden cutting down the fence. They had thrown the wire and posts on her garden. She ran outside to stop them. Mr. Hardenbrook threatened her with a hammer and Mr. Robinson shook the chain-saw at her. She picked up a stick and Mr. Robinson grabbed her by the arm and pulled it out of its socket. She cried and was in great pain, and her daughter took her to the family doctor and then to the St. Thomas Hospital. The doctors' reports are filed as Exhibits 25, 26 and 27. Mrs. Bea remained in the hospital all day and her shoulder was bandaged and her arm was strapped to her chest. Her arm was strapped for a week and remained in a sling for a second week. She testified that her arm is still hurting and she is having some difficulty doing her housework.

On the other hand, the defendants testified that Mr. Robinson and Mr. Hardenbrook cut the wire fence and posts, rolled the wire up and laid them all on the plaintiffs' property. Mrs. Bea came out of her house and threatened to kill them. She hit Mr. Robinson on the left arm with a stick. He and Mrs. Hardenbrook managed to get the stick away from her and she found a mop handle and threatened to hit them again. They all testify that she picked up the chain-saw but having listened to her giving evidence I find she did not threaten the defendants with the chain-saw.

Having considered all the evidence, I also find:

(1) The defendant Robinson assisted the plaintiff John Bea to line up the wire fence in 1966. I do not believe Mr. Robinson's evidence in this respect.

(2) The plaintiffs agreed to remove the portion of the wire fence erected on the Hardenbrook property. This evidence is not disputed.

(3) The plaintiffs were first made aware of the problem of the wire fence encroaching on the Robinson lands in August

1975 when the lawyers exchanged correspondence.

(4) The defendants thoughtlessly threw the fence posts and wire on the plaintiffs' lands.

(5) The plaintiff Luzi Bea was injured when Robinson grabbed her arm. Mr. Robinson used excessive force in the circumstances.

As Morton J. observed in *Wallington v. Townsend*, [1939] Ch. 588, [1939] 2 All E.R. 225 [at 228], a case similar to the one at bar, "The case is a good illustration of the fact that actions in which the subject-matter is comparatively trifling often give rise to the most difficult questions of fact and of law." However, it is clear from the facts in this case that at one time the plaintiff had possession of the disputed land on his side of the fence and that he was put out of that possession by the erection of the new fence. Possession by itself gives good title against all the world, except someone having a better legal right to possession (*Asher v. Whitlock* (1865), L.R. 1 Q.B. 1); and thus the plaintiff must succeed in this action unless the defendant can prove a better title, and therefore a better right to the possession of the land in question. The defendant argues that he has the right to possession by virtue of the fee simple granted to him in his deed of Lot 53, Plan 72. I find that the plan marked Exhibit 3, prepared by W. Douglas Smith O.L.S. shows the correct dimensions and location of Lot 53. From that plan and the defendant's deed it is clear that Mr. Robinson has paper title to the disputed strip of land. It follows therefore that unless an event has occurred which would derogate from that title in some way, the defendants are entitled to the exclusive possession of the property and the plaintiffs must fail. The plaintiffs plead that two such events occurred; namely that the defendants' right to recover possession of their land was extinguished by limitation, which is to say the plaintiffs had no [sic] title by adverse possession; and that the defendants are estopped from asserting their legal title to the disputed land by their former agreement as to its boundary. This second allegation is a reference to the theory of conventional lines.

The plaintiffs' first argument, based on adverse possession, must fail. In recognition of the truism that "Long dormant claims have often more of cruelty than of justice in them" (*A'Court v. Cross* (1825), 3 Bing. 329 at 332, 130 E.R. 540, per Best L.J.), limitation statutes have been passed to prevent the prosecution of stale claims. In Ontario, ss. 4 and 15 of The Limitations Act R.S.O. 1970, c. 246 govern the extinction of claims for the recovery of land, with the following words:

"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,

"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."

To establish title by adverse possession in this case, the plaintiffs must show both that their possession of the land was inconsistent with the defendants' title and that such possession lasted ten years. The latter condition did not exist on the facts, so there cannot be title by adverse possession. However even if the fence had stood for over ten years I am not convinced that the plaintiffs' possession of the defendants' land could be called adverse, as it was pursuant to an agreement regarding the boundary, and I say this cognizant of the fact that the agreement was based on a mistake as to the boundary. The problem is, the possession was inconsistent with the defendants' intended use of the lands to which they had paper title, but it was not inconsistent with their intended use of the land they mistakenly thought that they did not own. In still other words, the use was inconsistent with their true rights but not with their apprehended rights.

It may well be that in cases such as these the mistake about the true location boundary is a mistake of fact from which the Court could grant equitable relief to one party where it would not prejudice the other. In any event this need not be decided because as I have said, the fact that the fence was torn down before the expiry of ten years precludes any claim to the land based on adverse possession.

It follows therefore that if the plaintiffs are to succeed they must be able in law to prevent the defendants from relying on their paper title to the property which would defeat the plaintiffs' rights to it as the persons in possession. The plaintiffs pleaded that the defendants were estopped from asserting their legal title to the disputed land because of their former agreement as to the boundary of it. Although counsel did not use the words, or refer

to the theory, it is clear to me that such an argument has been considered in cases dealing with conventional lines.

The conventional line appears to be an American device which has frequently been employed in the maritime provinces to resolve boundary disputes. (*Woodberry v. Gates* (1846), 3 N.S.R. 255 (C.A.), *Jollymore v. Acker* (1915), 49 N.S.R. 148, 24 D.L.R. 503 (C.A), and *Spencer v. Benjamin* (1975), 11 N.S.R. (2d) 123 (C.A.)). However, the use of the principle is not limited to the maritime Courts, as the existence of it was acknowledged in Ontario in *Grasett v. Carter* which was appealed to the Supreme Court of Canada [1884] and is reported at 10 S.C.R. 105. In that report Ritchie C.J. states very plainly when and how a conventional line operates [at pp. 110-1]:

"I think it is clear law, well established at any rate in the Lower Provinces where I came from, and I believe it must be established everywhere, that where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination, and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that that is the true dividing line between the two properties."

At p. 127 Strong J. gave his understanding of the principle:

"I take the law to be well settled, that if adjoining land owners agree to a dividing line between their respective properties, and one of them, knowing that the other supposes the line so established to be the true line, stands by and allows him on the faith of such supposition to expend money in building upon the premises according to the line assented to, he is estopped from showing that he was mistaken, and from denying that he is bound by the line which he has thus induced the other party to rely upon."

Henry J. made a more abbreviated comment which shows that the evidence of reliance upon the agreement need not be the construction of a building. He said at p. 129:

"There is no doubt in my mind on the evidence, that that line was agreed upon. The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and erects a house, or an expensive fence, or holds and improves the land, the other party is estopped from saying that the line is not the right one."

The facts in *Jollymore v. Acker*, supra, are so similar to those in the case at bar that I will mention them. It was an appeal

from a judgment in favour of the plaintiff in an action for damages for tearing down a fence on a disputed boundary line. The fence was built by the predecessors in title of the parties, who were adjoining property owners, and who agreed that it should be located upon a line of surveyors stakes. They had been uncertain about the line, had a surveyor run it out and by mutual consent built the fence on the uncertain line. The fence was renewed by subsequent owners and was treated as the boundary until the defendant asserted that the fence was not on the true line and that he therefore had a right to remove it. At trial the plaintiff was successful and the defendant appealed. The appeal was dismissed on the basis that the fence line was a conventional line enforceable by both parties and their successors.

I have reviewed the cases on conventional lines because they resolved boundary disputes with a great deal of justice. Equity prevented the parties from going back on their agreements when their true boundaries were discovered and it was their legal right to do so.

On the basis of *Grasett v. Carter,* supra, and the other cases referred to above, it would seem that a conventional line was established in the case at bar and that therefore the plaintiffs should succeed; however, I have not reached this conclusion for the reasons below.

In *Grasett v. Carter* one of the prerequisites for finding a conventional line was that there be uncertainty as to the dividing line of the two lots and that the uncertainty be resolved by the agreement of the parties. In that case it was impossible to determine the true boundary of the properties because of errors made in the original and subsequent surveys and because the land had been physically altered. In my view when the parties do not know the location of the line because they have made no inquiries or other attempts to discover it, that is not an uncertain boundary that can be varied by agreement. In the case at bar although there had been some problems with surveys, it is clear that it was possible to determine the true boundaries, and from this fact I conclude that the boundaries of the adjoining lots were not uncertain, they were merely unknown. I doubt therefore that the facts support a finding of a conventional line that could be enforced as against the true boundary. If the true boundaries were determined and found to differ from the agreed line, to enforce the agreed line would result in a transfer of title to the property situate between the true and agreed lines. This cannot be, as will be explained below.

The second reason why I find the plaintiffs' claim must fail is based on the numerous statutes which regulate dealings in real property in this province. Section 1(1) The Statute of Frauds, R.S.O. 1970, c. 444, provides:

"1.—(1) Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents there unto lawfully authorized in writing, and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect."

If this section applied to the case at bar then the agreement regarding the fence would have created a tenancy at will, which could be determined at any time by the defendant. This would defeat the plaintiffs; however, it has been held in a great number of cases, beginning with *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444, 27 E.R. 1132, that The Statutes of Frauds does not apply to a settlement of a boundary by a conventional line because it is not an alienation of an estate in land. According to the theory of Lord Hardwicke in that case [1 Ves. Sen. 448] "the boundaries so settled are presumed to be true and ancient limits", not the result of any exchange of land. This reasoning makes a distinction between matters of title and matters of boundary, but I find this unacceptable in light of the fact that agreements for conventional lines are binding on the successors in title to the original parties (*Jollymore v. Acker*, supra). This being the case there is no way in my mind to deny that title to the lands in question is determined by the agreement for the conventional line. Accordingly the best the plaintiffs could have obtained by the agreement with the defendants was a tenancy at will which was unequivocally determined by their being ejected from the property, and therefore they cannot show a better title than to the defendants.

It is also my opinion that a boundary agreed upon by adjoining landowners can only be presumed to be the true and ancient limit of the propety when there is no registered instrument to contradict the agreement. That is to say when a parole agreement as to a boundary is at variance with the boundary that may be determined by reference to a deed or plan, then the agreement is an unenforceable attempt to convey land without the formal requirements of writing and registration. The Conveyancing and Law of Property Act, R.S.O. 1970, c. 85, also supports the view

just expressed in that s. 3 thereof provides "A feoffment, otherwise than by deed, is void and no feoffment shall have any tortious effect" [sic]. The combination of The Conveyancing and Law of Property Act and The Registry Act, R.S.O. 1970, c. 409, requires that agreements which have the effect of changing interests in land be effected by deed and registration to be enforceable against third parties. As I have already said, conventional lines as described in the authorities must, where they are not on the proper boundary of the land, effect a change in the interests of that land. There being no writing or registration in the instant case, the agreement must be unenforceable, and the plaintiffs cannot succeed.

Finally, the plaintiffs must fail because their agreement with the defendants is in contravention of s. 29 of The Planning Act, R.S.O. 1970, c. 349, which provides in subs. 2:

"(2) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

"(*a*) the land is described in accordance with and is within a registered plan of subdivision; or

"(*b*) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment with respect to, any land abutting the land that is being conveyed or otherwise dealt with; or

"(*c*) the land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada or Her Majesty in right of Ontario or by any municipality, metropolitan municipality, regional municipality, district municipality or county; or

"(*d*) the land or any use of or right therein is being acquired for the construction of a transmission line as defined in *The Ontario Energy Board Act* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose; or

"(*e*) a consent is given to convey, mortgage or charge the land, or grant, assign or exercise a power of appointment with respect to the land or enter into an agreement with respect to the land."

and further provides in subs. 7:

"(7) An agreement, conveyance, mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with."

The combined effect of these provisions is to render any agreement that has the effect of granting the use of or right in land, directly or by entitlement to renewal for 21 years or more, of no effect unless one of the conditions enumerated in s. 29(2)(*a*) to (*e*) are met. It is clear that none of these conditions were met in the case at bar, and since I find that the agreement as to the location of the fence was an agreement, which at the time it was made had the effect of granting the use of land for more than 21 years, it therefore follows that the agreement is voided by The Planning Act. In the result, the grantee-plaintiffs gained no interest in the land other than their temporary possession of it, and all their rights terminated upon their being [dis]possessed. Further, and perhaps more importantly, to allow the plaintiffs to raise the agreement to estop the defendants from relying on their legal title would result in the plaintiffs getting title to the land and that would be a circumvention of The Planning Act.

For these reasons I conclude that the principle of a conventional line is a just and equitable doctrine with much appeal, but one that has application only where there is no other means of establishing the boundaries of adjoining properties. Put another way, an agreement for a conventional line is only enforceable by the mechanism of an estoppel where it would not have the effect of changing the boundaries of the two properties. That would not be in any case where the true boundaries could be determined by reference to the descriptions in the deeds of the two properties.

It is unfortunate, in my view, that this finding produces the result that a person can by representation as to a boundary, induce another to act to his detriment by building up to a false boundary, and then be allowed to deny his representation and rely on the true boundary to eject the person. This is exactly

the injustice the principle of estoppel was meant to prevent, but to follow the cases referred to above, in which the Ontario statutes were not considered, and hold otherwise, would bring chaos to our system of regulating ownership of real property. As I indicated earlier, perhaps in the proper case the victim of such a false or mistaken representation might have a remedy in equitable relief from mistake of fact.

Thus the plaintiffs must fail in this action because they cannot prevent the defendants from showing a better title to the property either by extinguishing that title through limitation or by estopping them from raising it altogether.

Also, in my view the plaintiffs have not satisfactorily proven the alleged trespass and their claim in this respect is also dismissed.

Finally, having considered all the evidence with respect to the assault on the plaintiff Luzi Bea and relying particularly on the medical evidence filed as Exhibits 21, 22, 23, 25, 26 and 27, I find the defendant Carmen Robinson yanked the right arm of Mrs. Bea causing a dislocation of the right humerus from the glenoid fossa of the scapula and causing her considerable pain. She is still experiencing some pain and has difficulty doing some of her housework. I find Mr. Robinson used far more force than was necessary in the circumstances. I assess the general damages of Luzi Bea for personal injuries in the amount of $1,200 and I assess her special damages for personal injuries in the amount of $132.40.

All claims against the defendants James Creighton Hardenbrooke and Linda Mae Hardenbrook are dismissed with costs to these defendants on a County Court scale.

Judgment for the plaintiff Luzi Bea against the defendant Carmen Robinson in the amount of $1,332.40. Considering the behaviour of the defendant Robinson, parties shall pay their own costs.

Judgment for the plaintiffs against one defendant for damages for assault; other claims dismissed.

WEEKS et al. v. ROSOCHA

Ontario Supreme Court [Court of Appeal],
Arnup, Weatherston and Robins JJ.A.

Heard - January 19, 1983.
Judgment - May 27, 1983.

Mortgages - Change of ownership of mortgaged land - Sale by mortgagor - Assumption of mortgage - Purchaser agreeing to "assume mortgage" - Mortgage containing "due on sale" clause - "Due on sale" clause not being usual mortgage clause - Purchaser not obligated to assume mortgage containing "due on sale" clause.

Sale of land - Title - Defects of title - Waiver of defects - Requisitions - Purchaser requisitioning approval of mortgagee to her assuming mortgage - Requisition not tantamount to waiver by purchaser of purchaser's contractual right to have mortgage free of "due on sale" clause.

Estoppel - Estoppel in Pais - Elements of estoppel - Reliance by representee to his prejudice - Necessity for prejudice - Forbearance - Purchaser giving voluntary concession - No reliance by vendor - Purchaser entitled to revert to strict legal position on giving reasonable notice.

Purchaser contracted to buy a property owned by vendors. In the agreement, purchaser agreed to assume an existing first mortgage. Purchaser's search disclosed a clause in the mortgage to be assumed providing that in the event of the vendor's selling or contracting to sell the property, or in the event that a prospective purchaser of the property failed to apply for and receive mortgagee's approval to assume the mortgage and to execute an assumption agreement, then, at the option of mortgagee, all of the money secured by the mortgage would become due and payable. Purchaser requisitioned production of mortgagee's approval of purchaser or, alternatively, production of an amending agreement deleting the due on sale clause from the mortgage. No reply was made to this requisition by vendors nor were any steps taken by vendors to secure mortgagee's approval or to obtain an amending agreement. On two occasions vendors requested that purchaser seek the approval directly but purchaser did not do so. On the closing date vendors tendered and purchaser

refused to close on the basis that vendors had failed to provide the mortgage to be assumed in accordance with the agreement. The property was subsequently resold by vendors at a substantially lower price. Vendors sued purchaser claiming their total loss on the resale. Vendors were successful at trial. Purchaser appealed.

Held - The appeal should be allowed.

On a proper construction of the agreement of purchase and sale, purchaser was entitled to a first mortgage free of the due on sale clause. Such clauses had not attained the status of "usual mortgage clauses" and purchaser, therefore, could not be held to have impliedly agreed to assume a mortgage containing such a clause.

The trial Judge was in error in holding that purchaser's contractual position, thus stated, was altered in any way by her requisition that mortgagee's approval be obtained. That requisition did not, by virtue of the sole fact that purchaser appeared willing to accept something less than a mortgage free of the due on sale clause, amount to an alteration of purchaser's rights under the contract. Purchaser was not obligated, by virtue of the requisition, to initiate an approval application or to enter into a direct relationship with mortgagee. However, even if that requisition could be characterized as a waiver of purchaser's contractual right to have a mortgage free of the due on sale clause, in the sense of a variation of the contract, forbearance or promissory estoppel, it was at most only a voluntary concession unaccompanied by any consideration. It was not, therefore, irrevocable and unless vendors had been induced to change their position in reliance on it, purchaser was not precluded from changing her position. Since nothing said or done by purchaser prior to the closing could reasonably have induced vendors to have relied on the alleged waiver or to have changed their position on the basis of it, purchaser was entitled to terminate the effect of such alleged waiver by reasonable notice. On the facts, that alleged waiver did not continue in effect, nor could vendors have thought it to continue in effect, up to the closing. As the mortgage to be assumed was not in accord with the agreement on the closing date, vendors were not in a position to close the transaction and, in consequence, their action must fail.

Cases considered

Birmingham & Dist. Land Co. v. London & North Western Ry. (1888), 40 Ch. D. 268 - referred to.

Combe v. Combe, [1951] 2 K.B. 215, [1951] 1 All E.R. 767 (C.A.) - referred to.
Hughes v. Metro. Ry. (1877), 2 App. Cas. 439 (H.L.) - referred to.
Wauchope v. Maida, [1972] 1 O.R. 27, 22 D.L.R. (3d) 142 (C.A.) - referred to.

Authorities considered
Cheshire and Fifoot, Law of Contract (10th ed., 1981), pp. 502-11.
Di Castri, Law of Vendor and Purchaser (2nd ed., 1976), pp. 290 et seq.
Fridman, The Law of Contract (1976), pp. 474-75.
Treitel, Law of Contracts (5th ed., 1979), pp. 81 et seq.

Words and phrases considered
assume mortgage
due on sale

Canadian Abridgment (2nd) Classification
Mortgages IV. 1. a.
Sale of Land VIII. 3. b.
Estoppel I. 2. e.

APPEAL from a judgment, reported (1982), 23 R.P.R. 208, 36 O.R. (2d) 379, awarding damages to vendors for purchaser's failure to complete a purchase of land.

J.S. Stewart, Q.C., and R.W. Powell, for defendant-appellant.
J.D. Murphy, for plaintiffs-respondents.

May 27, 1983. The judgment of the Court was delivered by

ROBINS J.A.: - This is an appeal from a judgment in favour of the plaintiffs [reported (1982), 36 O.R. (2d) 379, 23 R.P.R. 208] for damages sustained by them as a result of the defendant's alleged breach of an agreement of purchase and sale.

On April 6, 1981, the defendant ("the purchaser") contracted to buy a house owned by the plaintiffs ("the vendors" on Riverside Drive in the City of Toronto for $375,000. As part of the purchase price, the purchaser was to assume an existing first mortgage of about $90,000, the terms of which were set forth in the agreement of purchase and sale as follows:

> "Purchaser agrees to assume an existing First Mortgage for about NINETY THOUSAND DOLLARS ($90,000.00) bearing interest at the rate of 11 3/4% per annum and repayable in blended monthly payments of ONE THOUSAND TWO HUNDRED FOURTEEN DOLLARS AND FORTY-FIVE CENTS ($1,214.45), including principal and interest and 1/12th of the estimated annual taxes and to run until November 1984."

An investigation of title by the purchaser's solicitor disclosed an existing first mortgage from the vendors, as mortgagors, to the Royal Bank of Canada, as mortgagee, containing the following clause:

> "Provided that in the event of
>
> (1) the Mortgagor selling, conveying, transferring, or entering into any agreement of sale or transfer of the title of the lands hereby mortgaged to a purchaser, grantee or transferee not approved in writing by the Mortgagee; or
>
> (2) if such a purchaser, grantee or transferee should fail to (a) apply for and receive the Mortagee's written approval as aforesaid, (b) personally assume all the obligations of the Mortgagor under this charge, and (c) execute an Assumption Agreement in the form required by the Mortgagee,
>
> then at the option of the Mortgagee all monies hereby secured with accrued interest thereon shall forthwith become due and payable."

That clause ("the optional maturity clause") was not mentioned in the agreement of purchase and sale. It is central to the controversy between the parties in this case.

On April 24, 1981, the solicitor for the purchaser delivered a letter of requisitions to the solicitor for the vendors which included this requisition:

> "Without prejudice to my client's rights under the Agreement of Purchase and Sale, I wish to submit the following requisitions on title.
>
> . . .
>
> 2. Instrument Number A800343 is a Charge in favour of the Royal Bank of Canada, dated the 21st day of

November, 1979 and registered on November 24th, 1979. Presumably this is the Mortgage the Purchaser agreed to assume; the Mortgage contains a proviso which requires that upon sale of the property the Mortgage becomes payable in full at the option of the Mortgagee unless the Purchaser has been approved by the Mortgagee.

REQUIRED: On or before the date of closing production of approval of Purchaser by the Mortgagee or in the alternative required production of an Amending Agreement deleting from the Mortgage the paragraph in respect of approval of Purchaser. Required further production on closing of a Mortgage Statement confirming that the terms of the Mortgage coincide with the terms set out in the agreement of Purchase and Sale."

No reply was ever made to the requisition and, it is common ground, no steps were taken by the vendors to secure approval of the purchaser by the mortgageee or to have the optional maturity clause deleted from the mortgage. Nor, however, did the purchaser co-operate with the vendors to secure mortgagee approval, or take any steps on her own for this purpose, notwithstanding that the vendors' solicitors had, on at least two occasions, requested that the purchaser seek approval directly.

On the day fixed for closing, that is, June 30, 1981, the vendors' solicitor properly tendered the documents necessary to complete the transaction contemplated by the agreement of purchase and sale - save and except that no document was tendered in satisfaction of the requisition with respect to the optional maturity clause. The purchaser, preserving her legal position, did not close, the transaction aborted, and this lawsuit ensued.

By the time the action came on for trial before Her Honour Judge Haley in the County Court of the Judicial District of York, the property had been resold at a substantially lower price and the vendors claimed their total loss which, it is agreed, amounts to $129,577.56. The purchaser denied any liability for those damages contending that the vendors had failed to provide a first mortgage to be assumed on closing whose terms conformed with the agreement of purchase and sale. Accordingly, it was submitted, the purchaser was not obliged to complete the transaction and was not in breach of contract for refusing to do so.

The learned trial Judge delivered carefully considered reasons for judgment in favour of the vendors in which she found that although the purchaser's rights under the agreement itself were such that the purchaser was entitled to insist on

closing on a first mortgage without the optional maturity clause, the letter of requisitions submitted on the purchaser's behalf had the effect of altering those rights. In the view of the trial Judge, the letter of requisitions constituted an acceptance of the optional maturity clause and a waiver of the purchaser's right to require strict compliance with the terms of the agreement in this regard. By accepting the clause, the purchaser was held to be under an implied obligation to co-operate with the vendors in seeking mortgagee approval, and, by not taking any steps to obtain such approval, the purchaser was held not to have fulfilled her obligation. Consequently, the trial Judge concluded the purchaser was precluded from refusing to complete the transaction on the basis of the mortgage as it stood on the date of closing and was liable in damages for so doing.

On this appeal from that judgment, counsel for the purchaser contends that the trial Judge erred in holding that the requisition submitted by the purchaser's solicitor altered the purchaser's rights under the agreement so as to disentitle her in the circumstances of the case from requiring a mortgage without the optional maturity clause. On the other hand, counsel for the vendors, while, of course, supporting the decision with respect to the requisition, contends that the trial Judge erred in holding that the purchaser, apart from the requisition, would have been entitled under the terms of the agreement of purchase and sale to avoid the transaction because of the presence of the optional maturity clause in the mortgage to be assumed. I shall deal with the latter submission first.

In my opinion, on a proper construction of the agreement of purchase and sale, the purchaser was entitled on closing to a first mortgage free of the optional maturity clause in issue, and the trial Judge was correct in so holding. The principal amount, the rate of interest, the terms of repayment and the date of maturity of the mortgage to be assumed were clearly set forth and agreed to by the parties; but their agreement contained no reference to an optional maturity clause being in the mortgage. Though the vendors and their agents were aware of the clause, it appears they inadvertently failed to include it in the agreement and its existence was not brought to the attention of the purchaser before she contracted to buy the property. In these circumstances, the purchaser can hardly be said to have agreed to the clause or to have bound herself to assume a mortgage containing it.

Counsel for the vendors, however, argues that it was not necessary that there be specific reference in the agreement to the clause, and that the absence of such reference does not amount to a mis-description of the mortgage which would

entitle the purchaser to rescind. In the submission, clauses of this nature have become so common that they now fall within the category of "usual mortgage clauses" whose presence can be implied and thus need not, and normally are not, set out in an agreement of purchase and sale. With respect to this case, it is argued that the optional maturity clause should be regarded in the same way as any other acceleration clause found in the existing mortgage. The trial Judge, however, refused to accept that submission. After reviewing the evidence, she found that the clause was not in such common use that it had attained the status of a "usual mortgage clause" which could be foreseen by a purchaser, and there is no reason for this Court to interfere with that finding.

A purchaser, in my opinion, cannot impliedly be required to accept a clause which authorizes a mortgagee, at its option, to call the mortgage loan in the event of a resale; and which, moreover, imposes an affirmative obligation on the purchaser and subsequent purchasers to apply for and receive mortgagee approval, to personally assume the mortgagor's obligations under the mortgage, and to execute an assumption agreement in the form required by the mortgagee. If a clause of this type is to be included in a mortgage to be assumed, the agreement should so provide.

Manifestly, the optional maturity clause in issue is designed to benefit the mortgagee and is of no advantage to an owner of the property. Depending on fluctuations in interest rates and other circumstances prevailing at any given time, the clause could well prove harmful to the owner's interests. It clearly interferes with and restricts the owner's ability to resell the property with what may be an attractive existing mortgage and renders every such resale conditional on the mortgagee's approval of the new purchaser. Whether approval will ultimately be granted is entirely a matter for the mortgagee. In rejecting the contention that the potential detriment of the optional maturity clause is too speculative a ground upon which to permit the purchaser to avoid the contract, the trial Judge made the following observations at p. 384 [p. 216 R.P.R.] which I respectfully adopt:

> "The nature of the detriment to the defendant of an optional maturity clause goes beyond the question of approval or lack of approval by the mortgagee to the assumption of the mortgage by the defendant. The right to transfer to a subsequent purchaser the property with the assumption of a mortgage for $90,000 with interest at 11 3/4% until November 1984, would be a distinct advantage to the defendant in attempting to resell the property if interest rates continued to be above that rate

> at the time of the negotiations. It would also be a factor for consideration by a subsequent purchaser that he or she would also be able to resell the property with the assumption of a mortgage without approval of the mortgagee. A mortgage containing an optional maturity clause has less value or would appear less attractive to a prospective purchaser than one without such a clause. There can be no guarantee that the policy of the Royal Bank, or any other mortgagee, would not change to withhold approval arbitrarily. There is no protection against such a policy in the clause as it appears in the mortgage in this case."

It follows from what has been said that since the vendors were responsible for providing a first mortgage in conformity with the agreement of purchase and sale and failed to do so on the date of closing, the purchaser was not required to complete the transaction or liable for the vendors' damages. On this basis, the trial Judge would, but for the letter of requisitions, have dismissed the action. What then is the effect of the letter of requisitions? How does it operate to change the conclusion that otherwise would have been reached in this case?

This brings me to the purchaser's contention that the letter of requisitions did not constitute an alteration or waiver of the purchaser's rights under the agreement or preclude her from requiring a mortgage without an optional maturity clause. In essence, counsel argues that the trial Judge misconstrued the meaning and intent of the requisition and attached legal consequences to it that could not properly be attributed to a requisition of this nature.

Before examining these submissions, it is to be noted that this trial proceeded almost entirely on an agreed statement of facts, and such additional evidence as was adduced is of little relevance to this aspect of the case. Moreover, the solicitors who acted in the transaction (and neither of them are solicitors of record) were not called as witnesses, and as a result, the issues arising out of the letter of requisitions fall to be determined on the evidentiary basis provided by the sparse statement of agreed facts filed by the parties.

The requisition, to repeat it in part, was framed in these terms:

> "REQUIRED: On or before the date of closing production of approval of the Purchaser by the Mortgagee or in the alternative required production of an Amending Agreement deleting from the Mortgage the paragraph in respect of approval of Purchaser."

The learned Judge interpreted that requisition to mean that the purchaser was "prepared to abide by the terms of the mortgage to be assumed and sought to be approved by the mortgagee as required by the optional maturity clause", and, if approval was not obtained, the purchaser then required that the clause be deleted. The trial Judge, further, took the requisition to mean that the purchaser had "adopted the position of requiring approval of the Mortgagee" and impliedly had "assumed an obligation to co-operate with the [vendors] in applying for that approval". In sum, the requisition was held to have altered the purchaser's rights under the contract and entitled the vendors to assume the purchaser's acceptance of the clause.

Counsel for the purchaser challenges that interpretation. In his submission, the requisition amounted to no more than a statement by the solicitor that, if, as he presumed, the mortgage on title was the mortgage to be assumed by his client on closing, it contained a clause that rendered it payable in full on a sale unless the purchaser was approved by the mortgagee, and he therefore "required" the vendors to produce, on or before closing, either the mortgagee's approval of the purchaser or an amending agreement deleting the clause at which the requisition was aimed. Nothing in the requisition, counsel argues, can be taken to indicate any intention on the part of the solicitor to obligate his client to initiate an application for mortgagee approval or to enter into a direct relationship with the mortgagee, or to execute mortgage covenants in its favour (all as required by optional maturity clause), and no such obligation can properly be implied from the words of the requisition. How the productions referred to were to be obtained was left to the vendors and their solicitor; the problem was not the purchaser's or of the purchaser's making and how it might be cured was a matter entirely for the vendors; it was their responsibility to produce a mortgage in compliance with the agreement.

Counsel acknowledges, of course, that the solicitor indicated that production of the mortgagee's approval on or before closing would provide a satisfactory answer to the problem, but says that statement cannot be read, nor was it intended to be read, so as to impose an obligation on the purchaser to take the steps necessary to obtain approval, or to shift any responsibility in this respect to the purchaser. Counsel concludes by saying that, in any event, not only was the letter specifically written "without prejudice" to the purchaser's rights under the agreement but there was no consideration for a waiver of any of those rights, and, as matters transpired, neither the requisition nor the purchaser's

subsequent conduct could operate so as to lead the vendors to believe that the purchaser had irrevocably relinquished her right to assume a mortgage consistent with the agreement, and accordingly, the vendors cannot use the solicitor's requisition as an excuse for their failure to meet their contractual responsibility.

As I view the matter, the preferable construction to be placed on the letter of requisitions is that advocated by counsel for the purchaser. Having regard to the nature and function of requisitions in real estate transactions, I find it difficult to conclude that simply because the solicitor submitted a requisition in the form in question his client's contractual rights were thereupon altered and a duty was imposed upon her to make application and execute such documents as may be necessary to procure mortgagee approval. To give the requisition that effect is tantamount to treating the optional maturity clause, for all practical purposes, as a term of the agreement of purchase and sale or, in other words, to elevating that clause, solely on the basis of the requisition, to a contractual term.

A requisition is no more than a statement of requirements for the completion of a real estate transaction. The requirements normally relate to the provisions of the agreement of purchase and sale, to matters of title, to zoning and municipal matters, and to the documentation needed to complete the transaction. Manifestly, a solicitor's main objective in submitting requisitions is to preserve and protect his client's rights under the agreement of purchase and sale. In this case, the requisition was directed, not to title, but to a matter to which the client had a right under the agreement and was entitled to receive on closing even if no requisition had been submitted.

In making the requisition it was open to the solicitor to require the best solution to the problem which, of course, was that the clause be removed by way of an amending agreement executed by the mortgagor and mortgagee. However, he volunteered that something less than that would constitute a satisfactory answer, namely, the mortgagee's approval of his client. If this were obtained the purchaser would, of course, assume a mortgage in which the clause was present and applicable to future sales during the term of mortgage. Beyond indicating the acceptability, at that point in time, of that result, I cannot agree that the words of the requisition carry an undertaking requiring the purchaser to use her best efforts to obtain approval and execute documents required by the mortgage company. In my view, a requisition designed to protect a purchaser's rights should not be interpreted to diminish those rights unless that conclusion is compelled by

clear and unambiguous language or further and other circumstances. Here, as I see it, the purchaser's solicitor was saying to the vendors' solicitor, if not in so many words, "The mortgage on title does not comply with the agreement. Produce the mortgagee's approval of my client or have the clause removed. The ball is in your court." On this construction, the vendors were unable on the date set for closing to satisfy a clearly valid requisition and fulfill their obligations under the agreement and, it follows, their action therefore must fail.

I would not, however, leave the matter at that. Let me assume, as was held below, that, properly interpreted, the requisition means instead that the purchaser was "prepared to abide by the terms of the mortgage to be assumed" and "sought to be approved" as required by the optional maturity clause and, therefore, was under "an obligation to co-operate" in applying for that approval. That interpretation is supported by the argument that, viewed realistically, it could not have been expected that the vendors on their own could likely negotiate the mortgagee's approval without the purchaser's compliance with the clause, or, in effect persuade the mortgagee to forego its rights with respect to this sale. Accepting, for that or any other reason, the interpretation most favourable to the vendors, it is nonetheless my view that the requisition, notwithstanding that interpretation, was not given proper effect at trial and the action still must fail.

The requisition was characterized as a waiver and, by virtue of it, the purchaser was held to have "waived her right" to require strict compliance with the terms of the agreement and to have the optional maturity clause deleted. Whether waiver is used in the sense of variation of the contract, forbearance, or promissory estoppel (see generally, Cheshire and Fifoot, Law of Contract (10th ed., 1981), pp. 502-11; Fridman, The Law of Contract (1976), pp. 474-75; DiCastri, Law of Vendor and Purchaser (2nd ed., 1976), pp. 290 et seq; and Trietel, Law of Contracts (5th ed., 1979), pp. 81 et seq) what is being put against this purchaser is that the waiver created by the requisition varied or "altered" the contractual terms so that the purchaser was thereafter no longer entitled to insist on the vendors' performance of the original agreement. Once the requisition was delivered the obligation to co-operate came into existence and the waiver became operative. The purchaser's subsequent refusal to co-operate accordingly relieved the vendors of their covenant to provide a mortgage on closing without the optional maturity clause and entitled them to enforce an agreement which but for the requisition they would not have been in a position to enforce.

With deference, I cannot agree with that. The requisition

or, if you will, the waiver, was, at most, a voluntary concession unaccompanied by any consideration. Manifestly, it was not irrevocable. Unless the vendors had been induced to change their position in reliance on the solicitor's statement, the purchaser was not precluded from changing her position; nor was she legally bound to relinquish any of her rights under the agreement. On the interpretation advanced by the vendors, can the waiver be said to have continued in effect until closing so as to bind the purchaser and prevent her from asserting her rights under the original agreement?

Before turning to the factual circumstances essential to the determination of this issue I should make brief reference to the principles which, in my opinion, govern this situation and within which the vendors must bring themselves to succeed in this action. In Hughes v. Metro. Ry. (1877), 2 App. Cas. 439 (H.L.), Lord Cairns stated at p. 448:

> ". . . it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

In Birmingham & Dist. Land Co. v. London & North Western Ry. (1888), 40 Ch. D. 268, Bowen L.J. said at p. 286:

> "It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."

In Combe v. Combe, [1951] 2 K.B. 215, [1951] 1 All E.R. 767 (C.A.), the following passage appears in the judgment of Lord Denning at p. 770:

> "The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word."

Wauchope v. Maida, [1972] 1 O.R. 27, 22 D.L.R. (3d) 142 (C.A.) is a decision of this Court which I think helpful in indicating the proper approach to the present case. It involved a real estate transaction in which the first mortgage to be assumed by the purchaser bore interest at the rate of 10 1/2 per cent per annum rather than 10 per cent as called for by the agreement of purchase and sale. To remedy that the parties agreed to a reduction in the principal amount of the second mortgage to be given back on closing. Notwithstanding that agreement, at the last minute the purchaser refused to close insisting on compliance with the terms of the original agreement. The trial Judge allowed his action for the return of the deposit holding that the waiver of the mortgage interest requirement was a voluntary waiver not supported by consideration and therefore revocable by the purchaser provided that notification of withdrawal was given to vendors before they had acted upon the waiver to their detriment. That judgment was reversed by this Court on the factual ground that the variation or waiver was not gratuitous or unsupported by good and valid consideration. Schroeder J.A., speaking for the Court, made mention of the line of authority to which I have referred and had this to say at pp. 32-3:

> "I have dealt with the plaintiff's consent to an alteration in the interest provisions of the first mortgage as a parol variation of the original written contract supported by consideration. If the consent to such variation was, as held by the learned Judge, no more than a voluntary concession or waiver on the part of the plaintiff, nevertheless the defendants having acted in reliance upon such waiver made no effort to have the first mortgagee alter the rate of interest to 10% in consideration of a cash payment by the defendants of $1,000 by way of bonus or of some other negotiated adjustment. Their

> conduct in this respect was shaped by the granting of the concession above mentioned. The plaintiff was bound in equity by the doctrine of *estoppel* to give the defendants reasonable notice that the concession was to be withdrawn and the strict position under the contract restored. This would have involved the granting of a reasonable extension of the closing date to enable the defendants to carry out the contract as originally framed.
>
> . . .
>
> . . . the defence to the present action rests upon a solid basis, apart from estoppel, if the view be taken that there was here a consensual variation of the contractual term in question founded upon good and valid consideration as we have held."

It is beyond question that the requisition in this case constituted no more than a voluntary concession or gratuitous waiver on the part of the purchaser. There was no consideration here to support a variation of the contractual terms. Accordingly, it is clear from the authorities, the purchaser was free to resile at will from the waiver said to have been constituted by his solicitor's letter of requisition. The question then is whether, in the circumstances disclosed by the evidence, anything transpired which served as an estoppel to deprive the purchaser of the power of retraction which she otherwise had with respect to the gratuitous waiver in issue.

The answer to that question, in my view, is clearly in the negative. Nothing said or done by the purchaser, or on her behalf, throughout the period of some two months from the date of delivery of the letter of requisition to the date of closing could reasonably have induced the vendors to rely on the alleged waiver or cause them to change their position on the basis of it. The fact is that to the knowledge of the vendors the purchaser refused throughout to take any steps whatsoever to secure mortgagee approval herself or to co-operate for this purpose. On at least two occasions she was requested to seek approval directly from the mortgagee but did not. The trial Judge found that it was never her intention to attend at the bank to sign any of the necessary mortgage documents or, indeed, to engage in the approval process.

This is not a case in which the purchaser lulled the vendors into a false sense of security or led them down the garden path. Here the vendors knew, surely well before closing, that the purchaser would not co-operate and, knowing that, did nothing themselves to comply with the terms of the agreement and provide a mortgage on closing which conformed

to those terms. The purchaser did not act in such a way as to put it out of the vendor's power to fulfill their responsibility under the agreement.

I think it significant that no answer was made to the letter of requisition as would *normally* be expected between solicitors, and that no written communication was sent at any time indicating either the vendors' reliance on the requisition or registering their complaint about an alleged failure on the part of the purchaser to comply with an understanding or promise to seek mortgagee approval.

To conclude, it is my view that if the requisition is to be interpreted as a waiver, it was unsupported by consideration and the purchaser was entitled to terminate the effect of such a waiver by reasonable notice of such intention. In all the circumstances of this case it was evident beyond peradventure that if a concession had been granted by the solicitor's letter it was withdrawn and the waiver was no longer operative. On this record, the alleged waiver did not continue in effect, nor could the vendors have thought it to continue in effect until closing so as to prevent the purchaser from asserting her rights under the original agreement.

On the date of closing the mortgage to be assumed was plainly not in accord with the agreement, indeed, it was then due and payable. The vendors are not entitled on the facts here to revert to the requisition to relieve themselves of their contractual obligation. Since they were not in a position to close the transaction in accordance with the agreement, their action cannot succeed.

For these reasons I would allow the appeal, set aside the judgment at trial, and order that the action be dismissed with costs. The purchaser is entitled to the costs of the appeal.

Appeal allowed.

RE APPLE MEADOWS LTD. et al. AND GOVERNMENT OF MANITOBA et al.

Manitoba Court of Queen's Bench, Wilson J. May 22, 1984.

Statutes — Repeal — Statute conferring five-year moratorium on rent control to encourage construction — Subsequent statute repealing early legislation and imposing immediate rent control — Whether repeal affects moratorium — Rent Stabilization Act, 1976 (Man.), c. 3 (C.C.S.M., c. R85) — Residential Rent Regulation Act, 1982 (Man.), c. 16 (C.C.S.M., c. R84), s. 2(1) — Interpretation Act, R.S.M. 1970, c. I80, ss. 24(1), 25(1)(c).

Equity — Principles — Estoppel — Statute conferring five-year moratorium on rent control to encourage construction — Subsequent statute repealing early legislation and imposing immediate rent control — Whether Crown estopped from imposing immediate rent control on persons relying on early legislation — Rent Stabilization Act, 1976 (Man.), c. 3 (C.C.S.M., c. R85) — Residential Rent Regulation Act, 1982 (Man.), c. 16 (C.C.S.M., R84), s. 2(1).

The applicants built certain apartment buildings in reliance upon the *Rent Stabilization Act*, 1976 (Man.), c. 3 (C.C.S.M., c. R85), which granted a moratorium on rent control of five years from first occupancy of each apartment. However, the *Residential Rent Regulation Act*, 1982 (Man.), c. 16 (C.C.S.M., c. R84), removed the moratorium. The applicants brought an application for a declaration that they continued to be exempt from rent control under the former Act.

Held, the application should be dismissed.

Estoppel does not lie against the Crown in the face of an express provision of a statute. Moreover, by s. 24(1) of the *Interpretation Act*, R.S.M. 1970, c. I80, an Act is to be construed as reserving to the Legislature the power to revoke it. Section 25(1)(c) of that Act, which provides that a repeal does not affect vested rights, had no application because s. 2(1) of the *Residential Rent Regulation Act*

provides that it applies to all residential premises in the province notwithstanding any agreement or waiver, or litigation or judgment to the contrary.

Falmouth Boat Construction Co., Ltd. v. Howell, [1950] 2 K.B. 16; affd [1951] A.C. 837; *St. Ann's Island Shooting & Fishing Club Ltd. v. The King*, [1950] 2 D.L.R. 225, [1950] S.C.R. 211, apld

Combe v. Combe, [1951] 2 K.B. 215, discd

Other cases referred to

Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256; *Grasett v. Carter* (1884), 10 S.C.R. 105; *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130; *Woodhouse A.C. Israel Cocoa Ltd. S.A. et al. v. Nigerian Produce Marketing Co. Ltd.*, [1972] A.C. 741; *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 1 W.L.R. 761; *Re Certain Statutes of Province of Manitoba Relating to Education* (1894), 22 S.C.R. 577; *Hough v. Windus* (1884), 12 Q.B.D. 224; *The Queen in right of New Brunswick v. Estabrooks Pontiac Buick Ltd. et al.* (1982), 144 D.L.R. (3d) 21, 44 N.B.R. (2d) 201 *sub nom. Province of New Brunswick v. Estabrooks Pontiac Buick Ltd. et al.*, 7 C.R.R. 46

Statutes referred to

"Act to Amend the Landlord and Tenant Act and the Condominium Act", 1980 (Man.), c. 60, ss. 35, 36

Interpretation Act, R.S.M. 1970, c. I80, ss. 3(1), 24(1), 25(1)(*b*), (*c*)

Landlord and Tenant Act, R.S.M. 1970, c. L70, s. 128(3) (enacted 1980, c. 60, s. 35; repealed 1982, c. 18, s. 26)

Rent Stabilization Act, 1976 (Man.), c. 3 (C.C.S.M., c. R85) (repealed 1980, c. 60, s. 36), s. 2(2)(c)

Residential Rent Regulation Act, 1982 (Man.), c. 16 (C.C.S.M., c. R84), ss. 2(1), (2)(a)

APPLICATION for a declaration that the applicants are exempt from rent control.

D'Arcy C. H. McCaffrey, Q.C., and *Grant Mitchell*, for applicants.

B. F. Squair, for respondents.

WILSON J.:—Applicants are proprietors of residential apartment units built with an eye to the exemption from rent controls to be had with adoption of the *Rent Stabilization Act*, 1976 (Man.), c. 3 (C.C.S.M., c. R85). They now cry "foul" to the cancellation of those exemptions worked by repeal of that statute, and by the rules introduced by the *Residential Rent Regulation Act*, 1982 (Man.), c. 16 (C.C.S.M., c. R84), whereby the projection of revenues, which was the basis for their investment, is wiped out with resulting losses to the applicants because of rents fixed at levels which make it impossible to meet the (amortized) construction and maintenance costs of the premises in question.

In formal terms, the application comes on by way of *certiorari*

for a declaration of exemption from rent control as to those premises, and cancellation of the rulings or directions to the contrary issued by the authorities vested with jurisdiction in such matters by the *Residential Rent Regulation Act*.

While the *Rent Stabilization Act* imposed a scheme of rent controls, by s. 2(2)(*c*) these did not apply, *inter alia:*

> (c) for a period of 5 years from the beginning of the first tenancy thereof, to tenancies of new residential premises that are
>
> (i) under construction and not occupied on January 1, 1976, or
>
> (ii) constructed after January 1, 1976 ...

In December, 1977, applicants began construction of nine apartment buildings of eight units each, 72 apartments in all, each of which apartments they expected would be exempt from control for a period of five years after first tenancy. Construction ended late in 1977 by which time some apartments were already occupied, while others took longer to attract tenants. For apartments occupied in, say December, 1977, the freedom from control would expire with December, 1982, while for an apartment rented in, say April, 1978, the exemption would continue to April, 1983. And because of varying "first tenancy" dates the application here concerns but 48 of the 72 apartments.

But in 1980 the Legislature passed "An Act to Amend the Landlord and Tenant Act and the Condominium Act, 1980 (Man.), c. 60, s. 36, of which repealed the *Rent Stabilization Act*, subject to continuance of proceedings already underway, these to be concluded under the procedures introduced by (new) s. 128 of the *Landlord and Tenant Act*, R.S.M. 1970, c. L70, enacted by s. 35 of the amending statute.

By s-s. (3) of s. 128, however, the relief so to be had as to proceedings then underway under the now defunct *Rent Stabilization Act* did not avail "with respect to residential premises that would result in rent increases that would take effect on or after July 1, 1980".

Even that much was swept away with the repeal of s. 128 by the amendments to the *Landlord and Tenant Act* enacted by 1982, c. 18, s. 26, the Legislature at the same time adopting the *Residential Rent Regulation Act*. That statute espoused a system of rental supervision except, s. 2(2)(*a*):

> (a) for a period of 5 years after the date of issue of the first occupancy permit in respect thereof, to new residential premises in respect of which the first occupancy permit was or is issued on or after January 1, 1978 ...

A date which, of course, shuts the door against the applicant

landlords here for relief or other consideration under this latest legislation.

In earlier proceedings before the appeal panel established under the *Residential Rent Regulation Act* the applicants said in their letter of November 16th last addressed to that tribunal:

> Construction on Apple Meadows commenced in approximately December 1976 and was completed in late 1977. Because there are nine buildings of eight units each involved in the project, interim occupancy permits were available prior to completion of construction and some tenants moved in during the course of construction constituting early occupancies.
>
> Under the provisions of the Rent Stabilization Act, which was in force at the time we decided to construct Apple Meadows the legislation assured us a five year exemption from rent controls. I attach copies of the applicable legislation.
>
> Through inadvertence when the Residential Rent Regulation Act was passed, the government overlooked the fact that by making the legislation retroactive to January 1st, 1978, they were taking away an exemption period that was fundamental to the decision to proceed with construction in the first place. Had we not been promised the exemption we would not have proceeded with construction.
>
> In scheduling rent levels, there was a planned and concerted effort to normalize and bring rents into market condition levels over a fire year period. We were given rights under that legislation and we believe we still have that exemption prevailing notwithstanding the provisions of the existing legislation.
>
> We have not appealed all the units at Apple Meadows. Based upon the dates of first occupancy (which are reflected in the Affidavit of Joyce Milgaard which is filed with you) we have only appealed those units which we believe are exempt from the provisions of the Act.

That appeal failed, with the result, according to para. 5 of the affidavit sworn by the president of the applicant Fairweather, that the landlords here are "locked into a losing position for the foreseeable future". And, of course, the case before me is in effect an appeal from dismissal of their case before the appeal panel.

And firstly, the applicants argue that adoption of the scheme (or philosophy) of rent controls written into the *Rent Stabilization Act* was tantamount to an invitation for the construction of new premises, to increase the amount of residential accommodation beyond what was theretofore available. Or, in stronger terms, an offer to investors, including the applicants, to embark upon new construction, financed on the basis of the rental incomes assured by that statute.

So viewed, repeal of the *Rent Stabilization Act* amounts to a breach of the offer so held out by the Crown and accepted by the applicants here. Indeed, the case was likened to *Carlill v. Carbolic Smoke Ball Co.*, of happy memory to generations of law students since its appearance in [1893] 1 Q.B. 256.

Whatever its merits elsewhere, in the present arena that argument must fail.

There is of course a rule or doctrine of "promissory estoppel", anticipated with *Grasett v. Carter* (1884), 10 S.C.R. 105, and certainly alive since *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 K.B. 130, and described by Lord Hailsham of St. Marylebone in *Woodhouse A.C. Israel Cocoa Ltd. S.A. et al. v. Nigerian Produce Marketing Co. Ltd.*, [1972] A.C. 741, as "an expanding doctrine".

Genesis of the rule may be read in Lord Denning M.R.'s *The Discipline of Law* (1979), where, at pp. 208-9, and quoting from his own remarks in *Combe v. Combe*, [1951] 2 K.B. 215 at p. 220, that recently retired and very learned jurist said:

> The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.
>
> Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge."

Of the absence of consideration, he confesses, the House of Lords thought he went too far: *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 1 W.L.R. 761, *per* Viscount Simonds at p. 764. And the opinion he offered (then Denning L.J.) in *Falmouth Boat Construction Co., Ltd. v. Howell*, [1950] 2 K.B. 16, that estoppel could lie against the Crown, was rejected by the House of Lords when that case went to appeal, [1951] A.C. 837. Our own Supreme Court had earlier so held in *St. Ann's Island Shooting & Fishing Club Ltd. v. The King*, [1950] 2 D.L.R. 225 at p. 232, [1950] S.C.R. 211 at p. 220, Rand J. holding that "there can be no estoppel in the face of an express provision of a statute". And see, generally, the very useful "Estoppel and the Crown", 9 Man. L.J. 15 (1978), at p. 16.

Legislation is sometimes enacted to give expression to contracts or other undertakings to which the Crown is a party, the repeal of which legislation would be subject to especial considerations. But generally, the right of the Legislature to change its mind is

confirmed with s. 24(1) of the *Interpretation Act*, R.S.M. 1970, c. I80:

> *Power of repeal reserved*
>
> 24(1) An Act shall be construed as reserving to the Legislature the power of repealing or amending it and revoking, restricting, or modifying a power, privilege, or advantage thereby vested in, or granted to, a person.

Of the "strength and universality of the presumption that every legislative body has power to repeal its own laws", Sir Henry Strong C.J. said, *Re Certain Statutes of Province of Manitoba Relating to Education* (1894), 22 S.C.R. 577 at p. 655, "this power is almost indispensable to the useful exercise of legislative authority since a great deal of legislation is of necessity tentative and experimental".

And, of enactments so repealed, 31 C.E.D. (Ont. 3rd), pp. 122-3, s. 288:

> When an Act is repealed, the common law rule is that it must be considered as if it had never existed, except as to transactions past and completed during the currency of the statute. The effect of the repealing statute is to obliterate the repealed Act as completely from the records of the enacting legislative body as if it had never been passed. The repealed Act must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded while it was an existing law. [Citing authority (footnote omitted).]

All well and good, say the applicants, but with that must be kept in mind the general principle of law that "statutes should be interpreted if possible so as to respect vested rights": *Hough v. Windus* (1884), 12 Q.B.D. 224 at p. 237; and see *The Queen in right of New Brunswick v. Estabrooks Pontiac Buick Ltd. et al.* (1982), 144 D.L.R. (3d) 21 at p. 30, 44 N.B.R. (2d) 201 (*sub nom. Province of New Brunswick v. Estatbrooks Pontiac Buick Ltd. et al.*) at p. 212, 7 C.R.R. 46.

A rule, moreover, given statutory recognition with s. 25(1) of the *Interpretation Act*, *viz.*:

> 25(1) Where an enactment is repealed in whole or in part, the repeal does not,
>
> . . . . .
>
> (*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;
>
> (*c*) affect a right, privilege, obligation, or liability acquired, accrued, accruing, or incurred under the enactment so repealed;

But that in turn, was the answer, must be read with s. 3(1) of the same statute:

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3(1) Every provision of this Act extends and applies to every enactment, unless a contrary intention appears, enacted or made before or after the commencement of this Act.

And, however the language of s. 25(1) might otherwise have availed, the supposed "vested rights" pleaded by the applicants were clearly gone with s. 2(1) of the *Residential Rent Regulation Act:*

2(1) Except as otherwise provided *in this Act*, this Act applies to *all residential premises in Manitoba*

(*a*) notwithstanding any agreement or waiver to the contrary entered into or given before or after the coming into force of this Act;

(*b*) notwithstanding that litigation is pending related to the residential premises, or to the landlords and tenants thereof, or to tenancy agreements in respect thereof, or to any increase in rents therefor, or the validity or enforceability of any proceedings, decisions or awards in respect of the tenancy agreements or the fixing or varying of rents for the residential premises; and

(c) notwithstanding any judgment or decision of a court rendered before the coming into force of this Act, in respect of any proceedings relating to the increase or fixing of rent for the residential premises.

(My emphasis.)

True, there were no such agreements or waivers (passing the "contract" theory, for the applicants, disposed of above), no pending litigation, nor any judgment or decision in respect of proceedings affecting the parties or premises here. But given the positive terms of the opening phrase of s. 2(1), I do not think the applicants may successfully plead the maxim *expressio unius est exclusio alterius*, assuming its significance otherwise.

Exemptions accorded by the *Rent Stabilization Act* related to the "first tenancy" of the several suites, 72 in all, in question, each of which was treated as "new residential premises" within the meaning of s. 2(2) of that Act, whereby, in the one apartment building, some apartments would be, and others not, subject to rent control, to the respective advantage or disadvantage of the occupant of the day. Or, where such control existed, a shelter which could vanish for one, while continuing for his neighbour across the hall in the same apartment complex.

With the later *Residential Rent Regulation Act* those anomalies are gone, the five-year shelter now being defined in terms of "first occupancy permit", *i.e.*, the licence to occupy a new building rather than the varying initial tenancies of the several suites in the building.

Had the Legislature so minded, the watershed fixed for

commencement of the rule might have been put earlier than January 1, 1978, and I was asked to treat that as a date adopted by mistake or inadvertence. If so, the remedy applies by way of an appeal to the Legislature, rather than the invitation addressed to me to in effect amend the statute.

In the result, the application is dismised. Of the further request to fix damages already suffered and reasonably to be anticipated, not seriously pressed at this stage, inquiry and determination of that issue is not one answerable in the context of an application of this nature.

The respondents are entitled to costs, if asked.

Application dismissed.