THE VIEW OF THE FENCE

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WHITBY

THE VIEW OF THE FENCE

Bryan T. Davies

When this seminar was envisioned this paper was to be given by a lawyer familiar with the role of the surveyor. I suppose some would say that that may be a mutually exclusive situation. In any event, today you have a surveyor with very little legal experience but one who has seen many fences, of many different types, fences that have certainly had a great effect on the role of the land surveyor in Ontario.

Fences have played a part in history ever since man learned to protect himself from other men and wild animals when he ventured from the cave.

Fences have continued to be used for protection from intruders and intruding eyes, and for penning in of cattle or horses.

The word fence is derived from the Latin "fendere", meaning to ward off, suggesting containment of some kind, although the word "fence" undoubtedly is direct from the Middle English word "fens", an aphetic or shortened form of "defens".

Fence is defined in the Oxford English Dictionary as:

> "An enclosure or barrier along the boundary of any place which it is desired to defend from intruders"

While the Columbia Encyclopaedia is a little more modern, saying:

> "A humanly erected barrier between two divisions of land used to mark a legal or other boundary..."

Fences have also shown up in print other than in the rather dry prose of the dictionary. Robert Frost, who lived from 1874 to 1963, is well-remembered as the author of the expression "Good fences make good neighbours". I wonder how many know that a Canadian, Thomas McCullough, uttered an almost identical expression "Good fences make good friends", in 1822.(1)

In "Tom Sawyer", Mark Twain used a fence to demonstrate the power of suggestion and G.K. Chesterton voiced a sensible admonition when he wrote "Don't ever take a fence down until you know the reason it was put up". We shall see how painful this lesson can be later on.

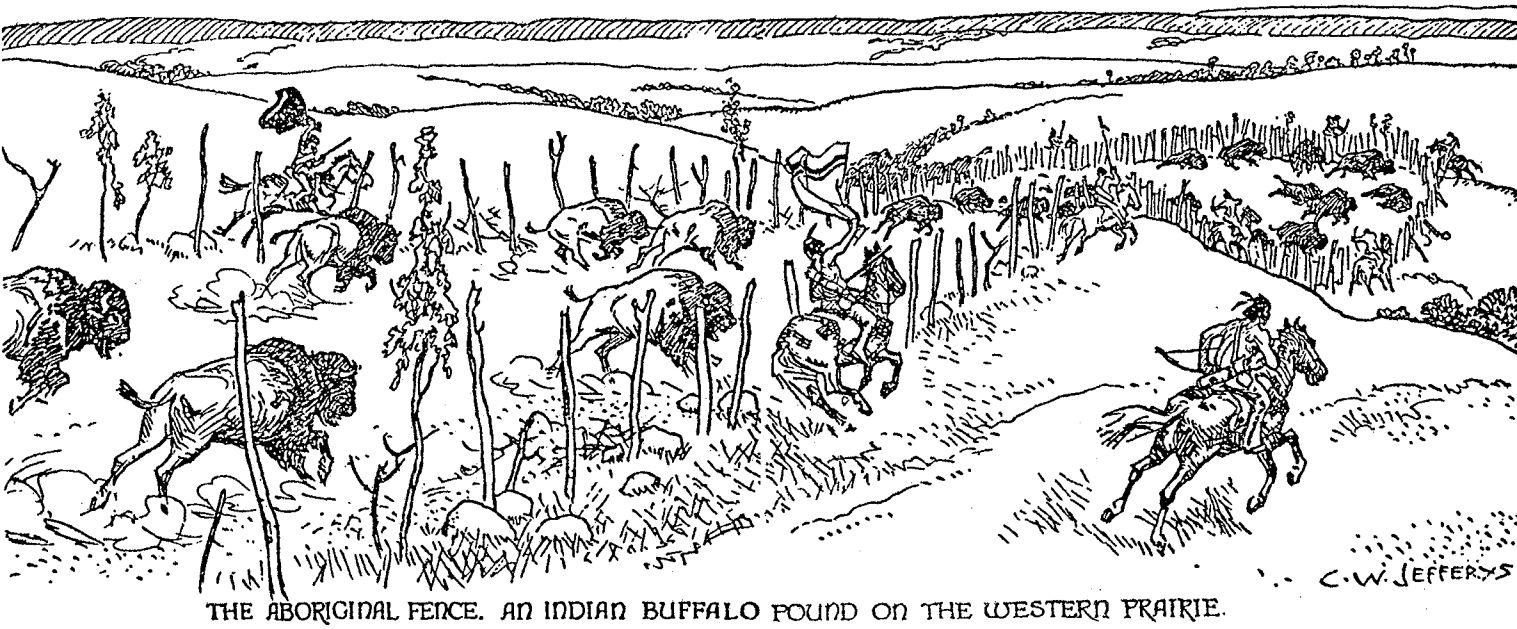
I believe, however, that my favourite "fence" quotation is by Jean Jacques Rousseau who said "The first man who, having fenced in a piece of land, said 'this is mine', and found people naive enough to believe him, that man was the true founder of civil society".(2)

I think we can safely say that that first man was also the instigator of the civil liability suit.

(1) Canadian Quotations

(2) Bartlett's Familiar Quotations

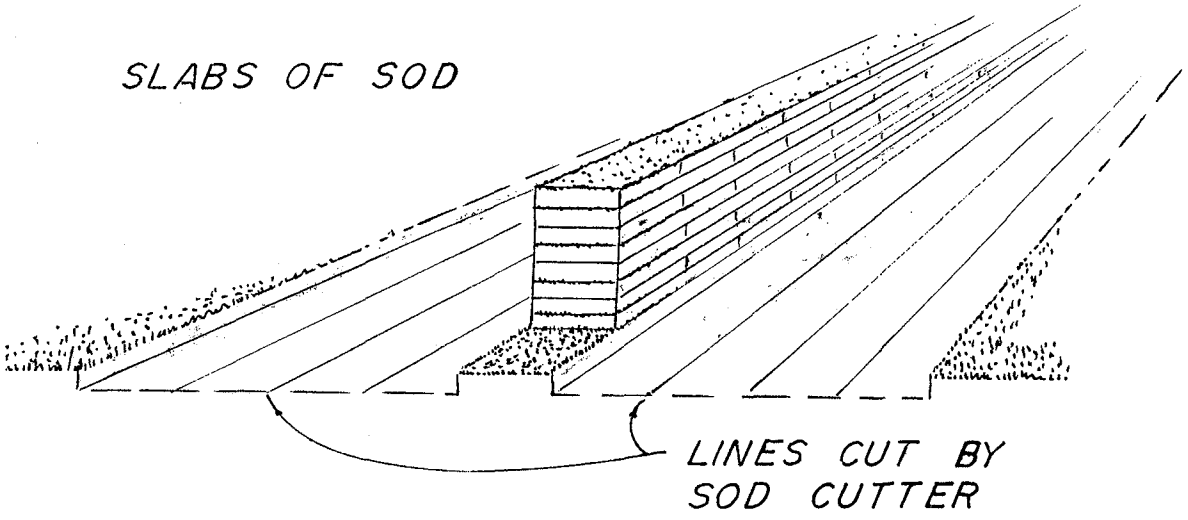
The purpose of this paper is to present to a limited extent, the fence as it is seen as evidence in a lawsuit but before we get to evidence and some case law, I would like to explore the development of the fence in Canada, its construction and use.



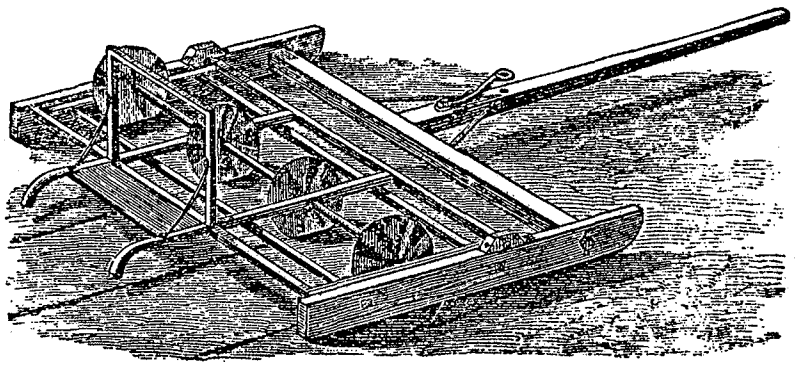
THE ABORIGINAL FENCE. AN INDIAN BUFFALO POUND ON THE WESTERN PRAIRIE.

The earliest form of fencing used in North America were the lines of stakes and brush used to funnel the buffalo into a bottle-neck known as a pound, where they were easily brought down by bow and arrow. The great Cree Chieftain, Poundmaker, so famous in our western history, was named for his craftsmanship in making buffalo "pounds". Figures 1a and 1b show the method of herding very well.

2 A



2 B



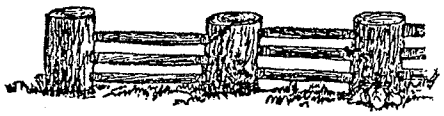
PRAIRIE SOD CUTTER

Obviously the Indians used materials close at hand for their construction. In Ontario, which was covered by bush, materials were also easy to come by but on the prairie it was a different story. Sod was the only material available and it was used to build the first houses and to build fences. Figure 2a shows the method of laying the sod while figure 2b shows a sod cutter which sliced into the soil to a depth of about 4 inches, the sods being lifted and laid much like brick or block walls. A plough would generally be used to pile earth against the base of the wall on both sides. Sometimes stakes with barbed wire would be placed on top of the sod fence.

3A

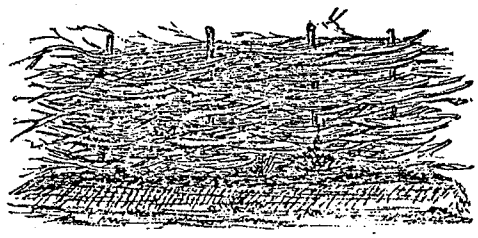
STUMP FENCE

3B



LOG POST FENCE

3C



WICKER FENCE

3D

BRUSH FENCE

3E

RAIL & STONE FENCE

Ontario is probably the most fenced province in Canada with many fields resembling the postage stamp fields of England. When the land was cleared the first fences of brush (Figures 3c and 3d) were erected to attempt to encircle the settler's clearing and keep his livestock in. This, in fact, did not work too well unless the brush fences were "forty feet wide and damned high".(3)

STUMP FENCES

The first fences that the settlers built along property lines were stump fences made, of course, from the stumps pulled from the ground. Figure 4 shows stump fences piled along the road allowance while Figure 5 shows how well preserved a stump fence can be perhaps 150 years after being hauled from the earth by a team of oxen.

(3) Fences, Symons, P. xii

STUMP FENCE

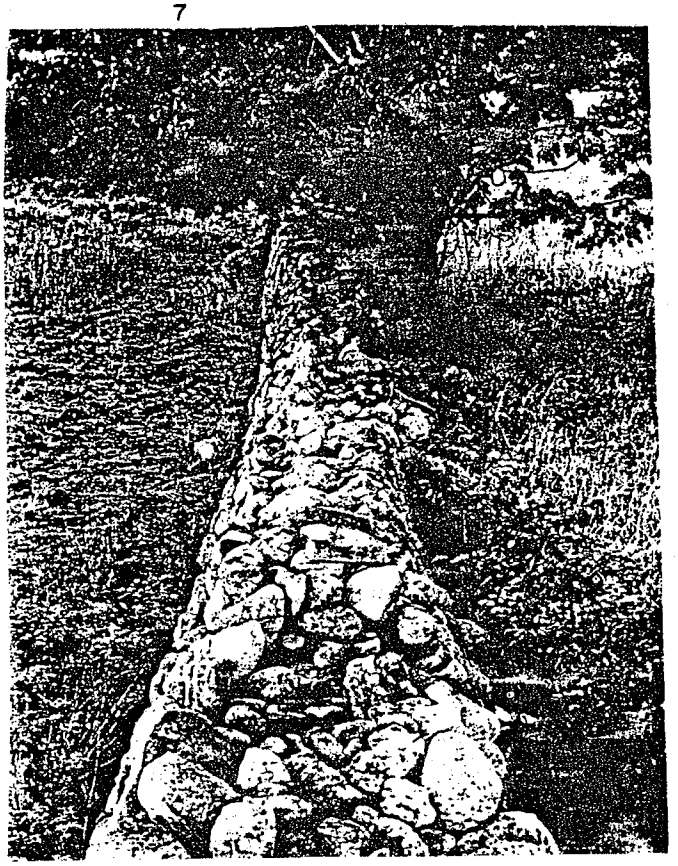
Figure 5 shows how well preserved a stump fence can be perhaps 150 years after being hauled from the earth by a team of oxen.

DRY STONE FENCES

Stone walls were seldom built in such a neat fashion along lot lines, although the two walls in Figure 6a and 6b show the kind of dry stone wall that was occasionally constructed at a great cost for the time.

At this time, I would like to point out the beautiful line drawings by C.W. Jeffreys and found in Harry Symons book "Fences".(4)

7

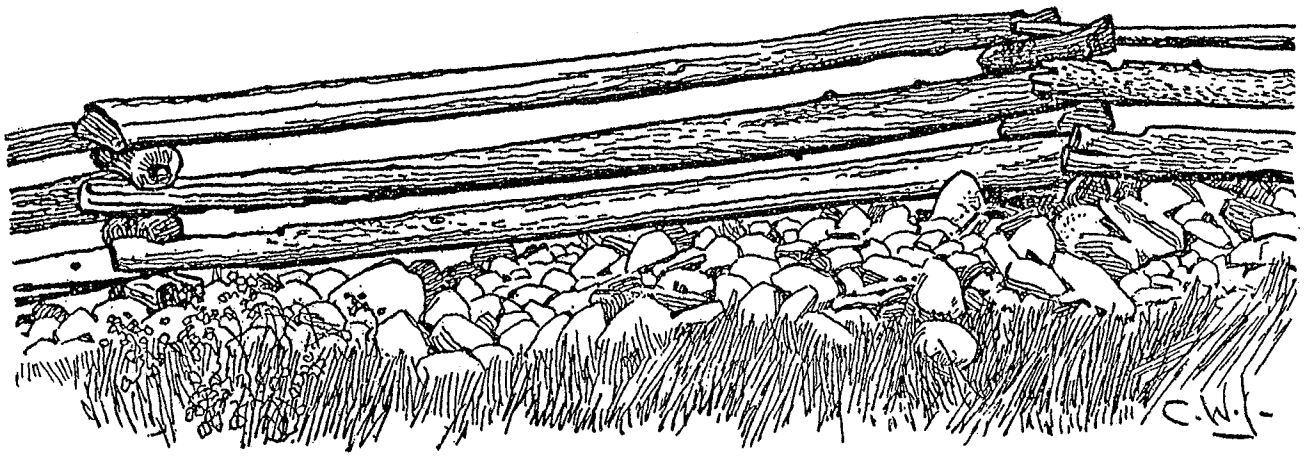


DRY STONE FENCE

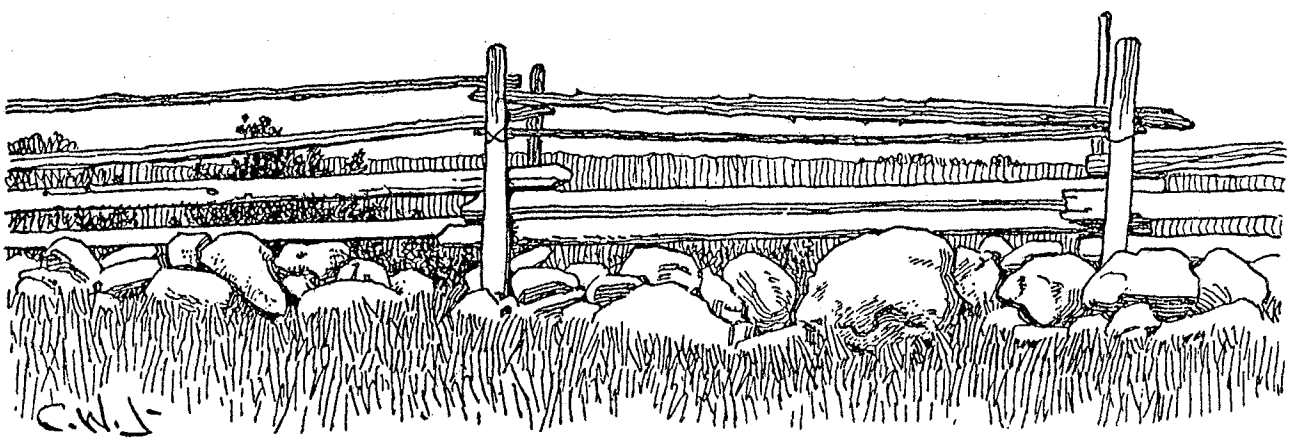
Figure 7 is much more representative of the stone fences found in the stonier parts of Ontario. The amount of work to dig up, transport and pile the stones in a stone wall 100 feet long must have been prodigious.

(4) Fences, Symons, Illustrations by C.W. Jeffreys

8 A

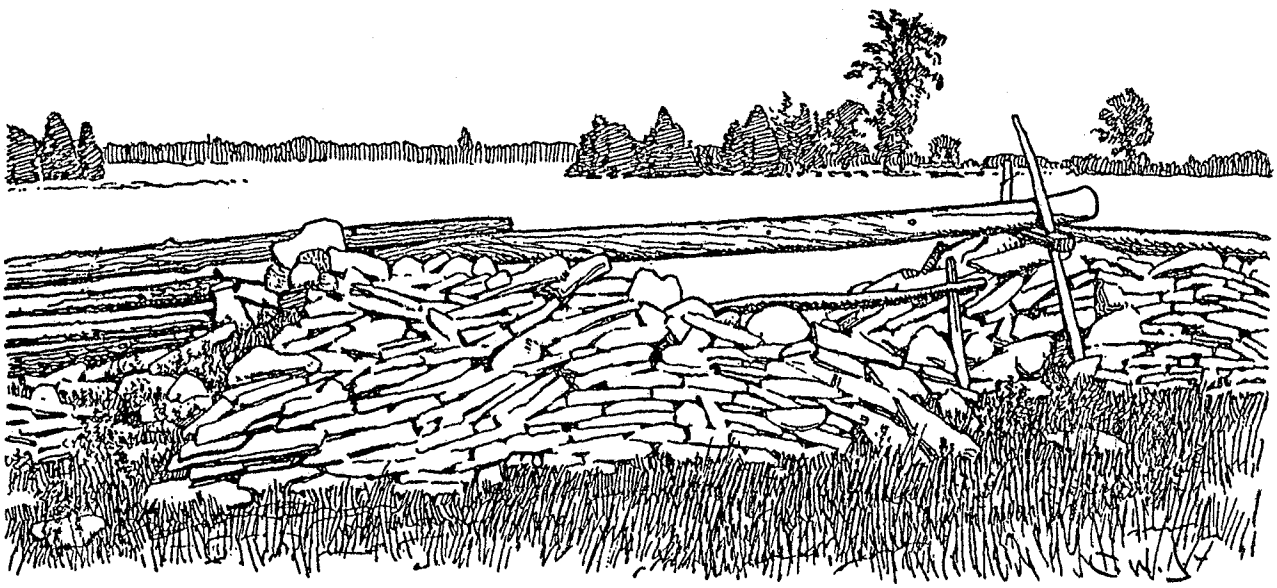


8 B



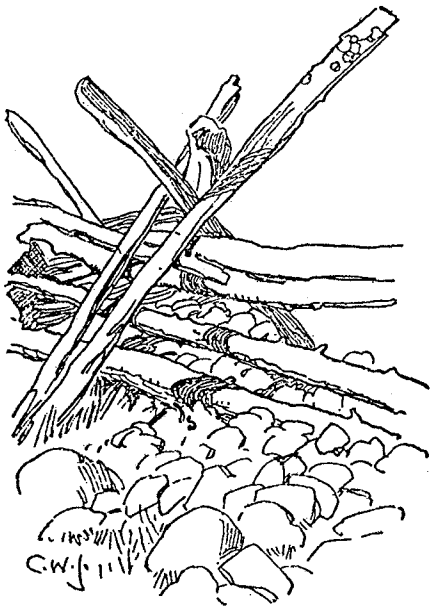
LOG AND STONE FENCES

9



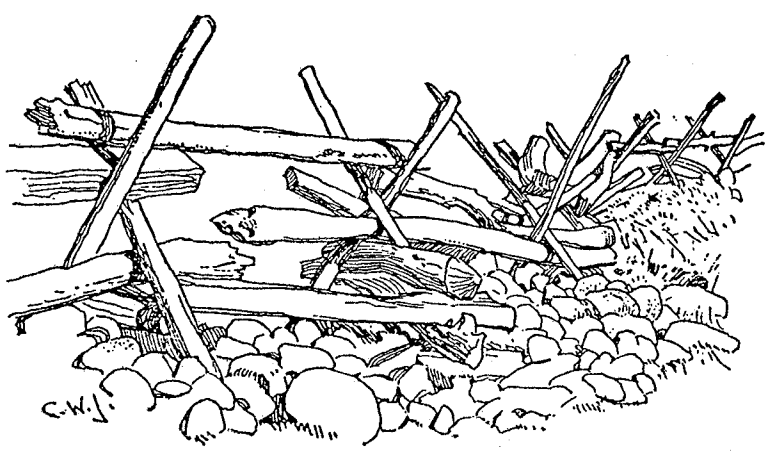
LOG AND STONE FENCE

10 A



RAIL AND STONE FENCE

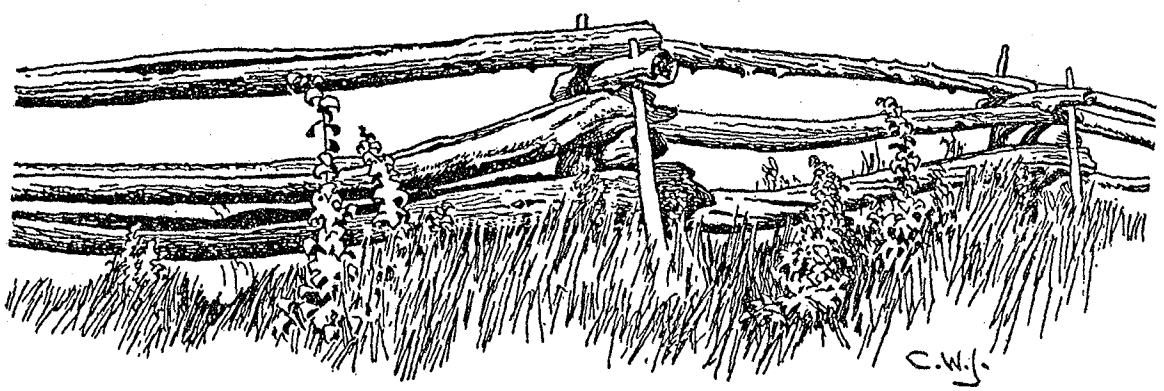
10 B



RAIL AND STONE FENCE

II A

II B

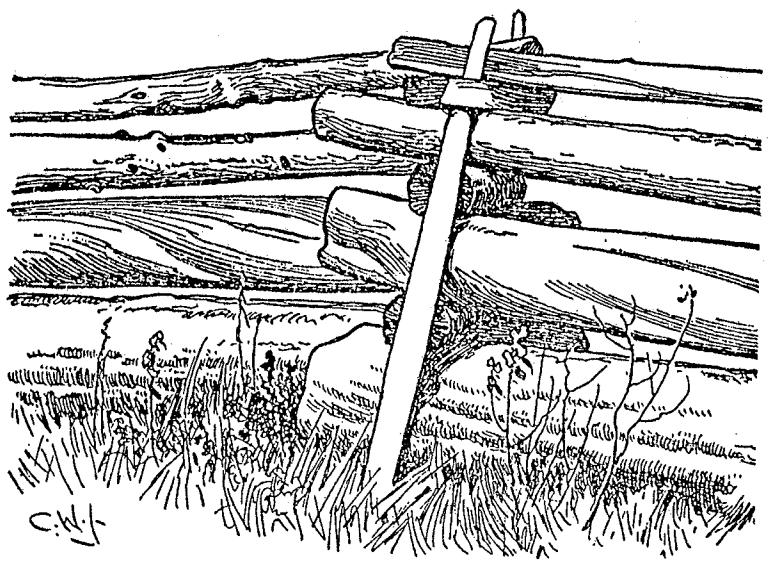


LOG FENCES

12 A

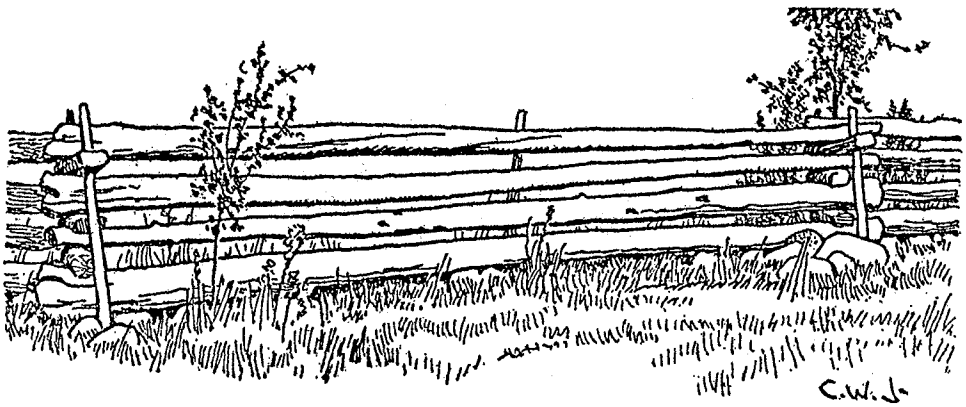
LOG FENCE

12 B

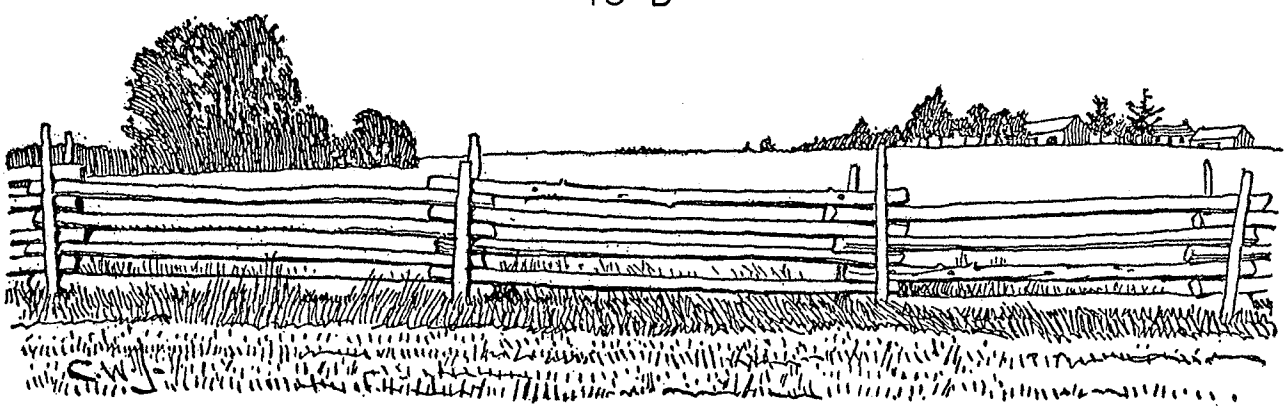


SLEEPER DETAIL

13 A

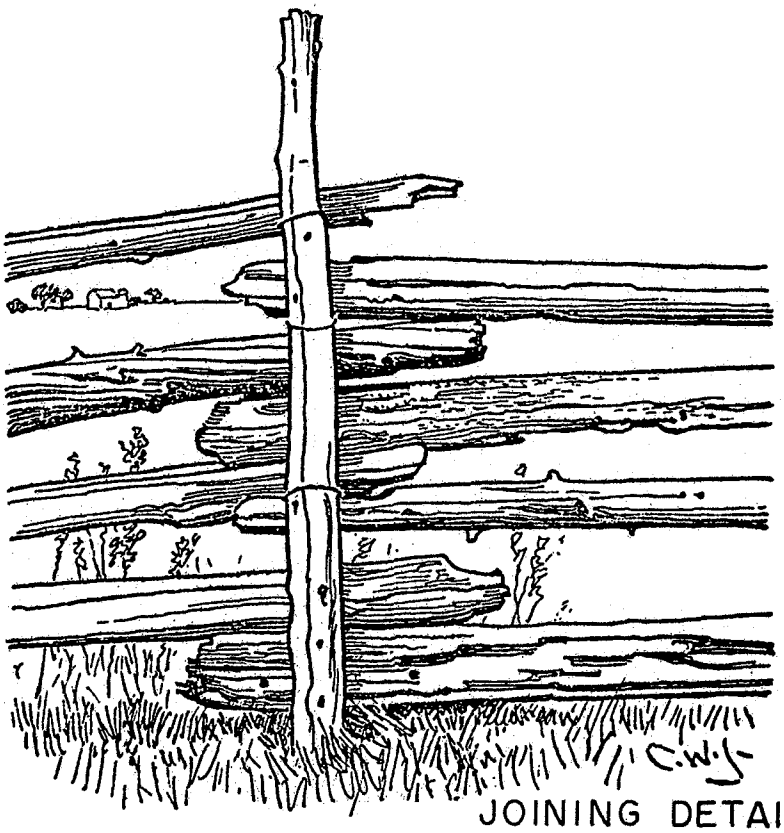


13 B



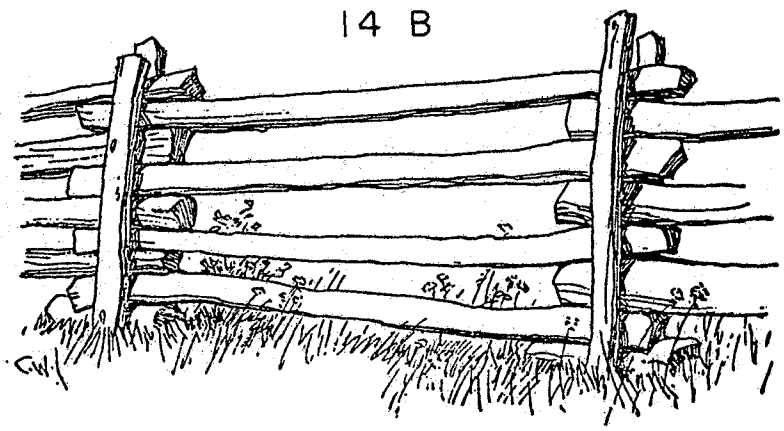
LOG FENCES

14 A



JOINING DETAIL

14 B



LOG FENCE

Fences made of logs, 50 to 60 feet long, peeled of bark and set on sleepers at their ends and sometimes supported on stone walls, were the first fences that were placed along what the owners knew, thought or agreed to be their boundary lines.

The earliest fences were not necessarily too close to the line, as clearing and cultivating were the primary concern as well as the enclosing of stock.

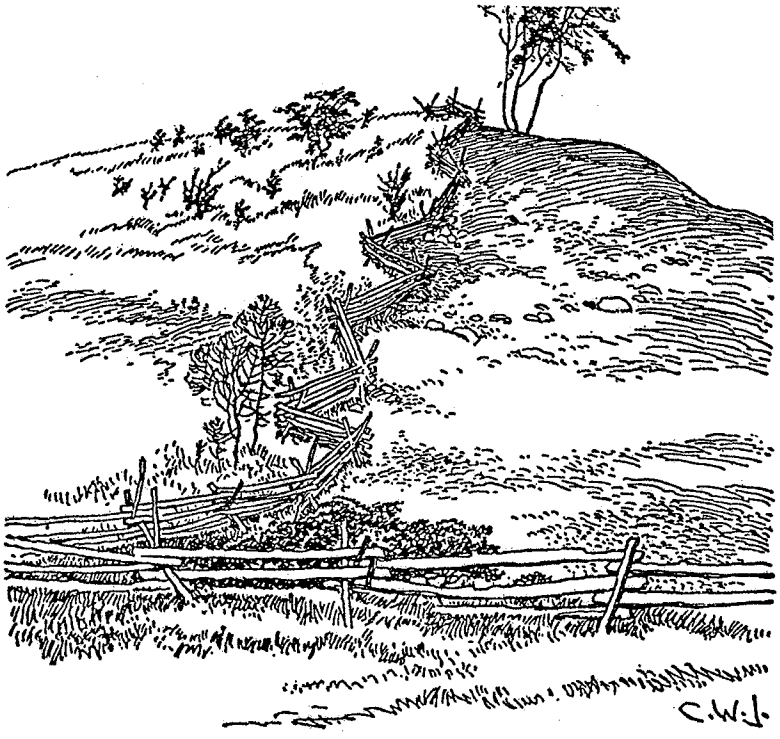
As the land and the country developed, line fences, barriers and boundaries of all kinds assumed greater and greater importance and the boundary lines needed to be more accurately established.

An extract of a letter from David Gibson, Deputy Surveyor, dated 1827,(5) written to a friend in Scotland illustrated how the settlers had their side lines run:

> "... a surveyor of highways has seven shillings and sixpence per day from the time he leaves home to the time he returns, and has always to have a surveyor of land with him. He can call whom he pleases, so I can call myself.... and when surveying for private people I have fifteen shillings per day and five shillings for every 50 chains I run along the side lines of their lot.... I can run two lines (200 chains) per day with freedom ...."

(5) Pioneering in North York, Hart, P. 11

15



SNAKE RAIL FENCES

After the full-log types, one of the earliest fences in Ontario was the snake-rail fence built of split rails, usually of white cedar. In rolling and broken country, this type of fence was a prime favourite. Figure 15 shows a typical snake fence wriggling over the hill.

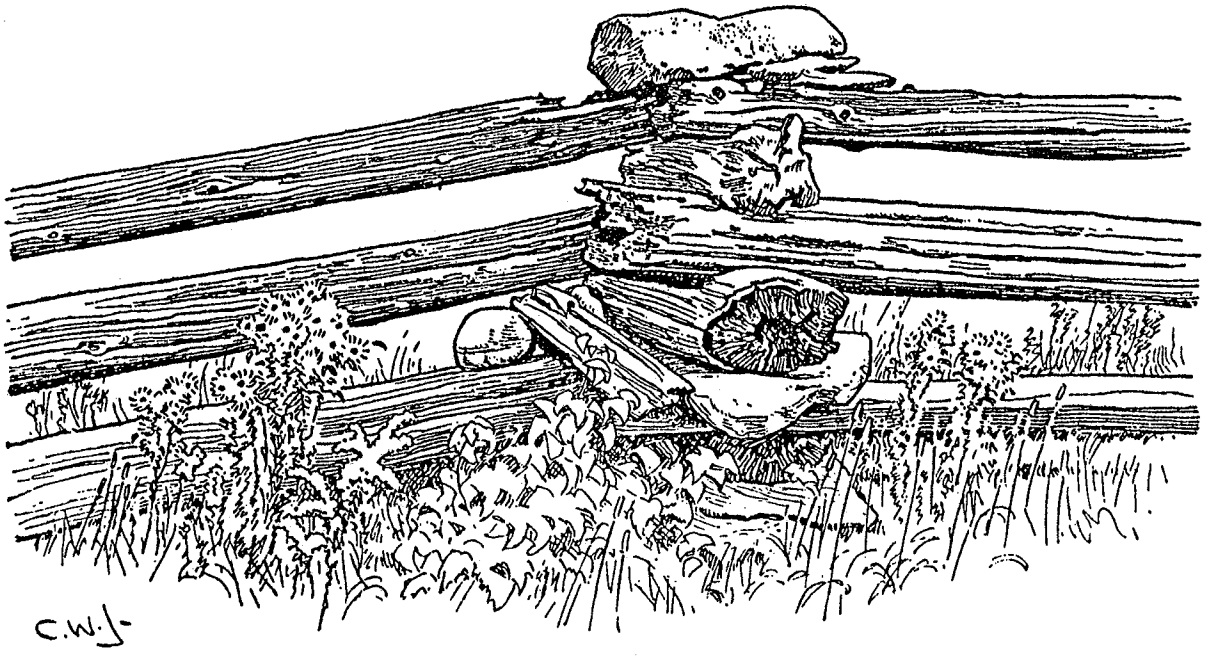
A well built snake-rail fence can easily last 100 years as evidenced by the well-preserved specimen shown in Figure 16.

16

SNAKE - RAIL FENCE

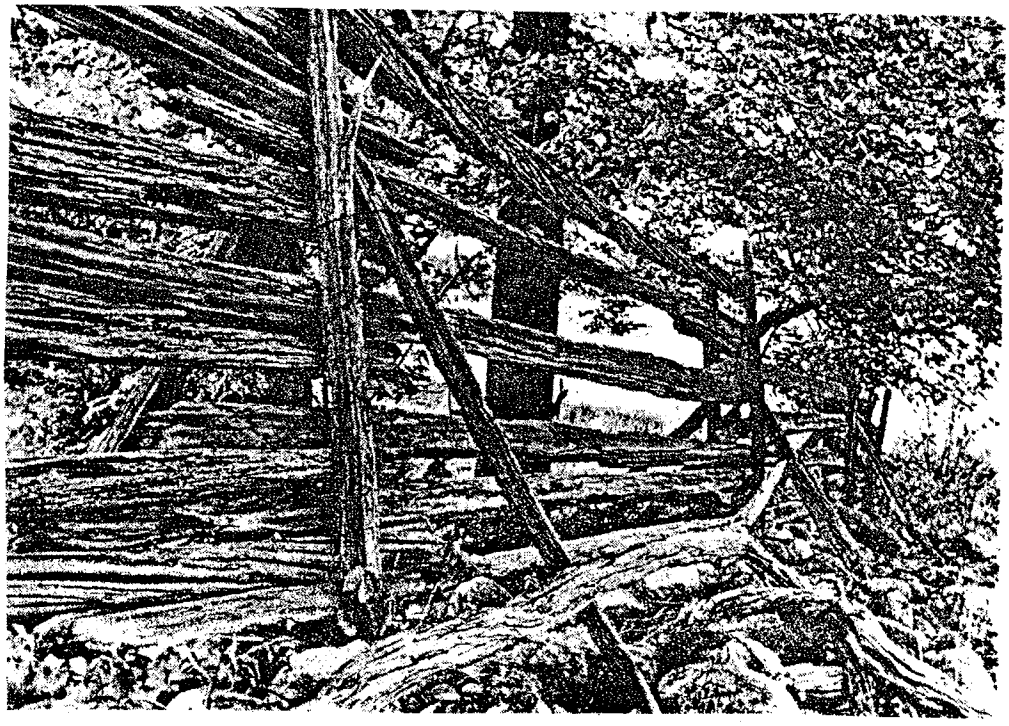
The major problem with the snake-rail fence is that it took up a lot of space that could be properly used for cultivation, weeds grew in the corners, and the shaded bottom logs quickly rotted. In addition, if the joints are not well tied down, the fence falls prey to the pushing of cattle.

17



RAIL FENCE DETAIL

18



SPLIT RAIL FENCE

The natural evolution of the snake-rail fence was to the straight split-rail fence of which Figure 18 is a good example. This type of fence became the standardized line fence until the development of the wire fence, and particularly the barbed wire fence.

19 A

1853
MERIWETHER'S
COLD-WEATHER
WIRE

19 C

1890

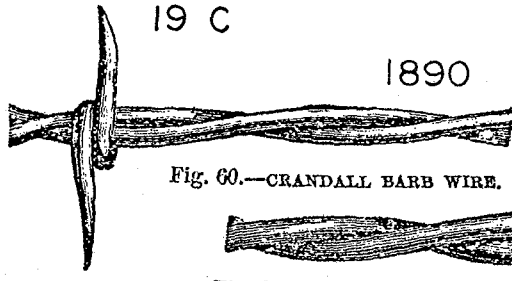


Fig. 60.—CRANDALL BARB WIRE.

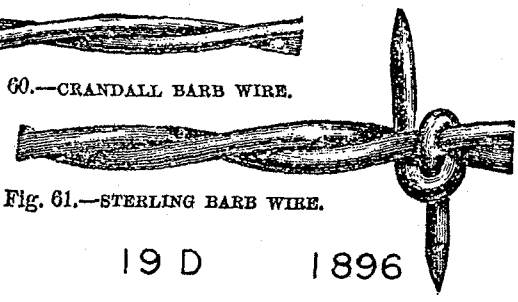
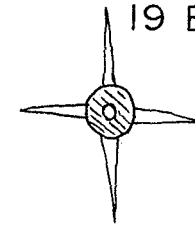


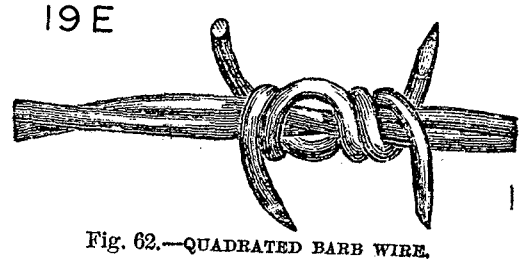
Fig. 61.—STERLING BARB WIRE.

19 D 1896

19 B



19 E



1876

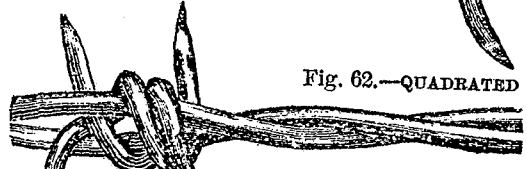
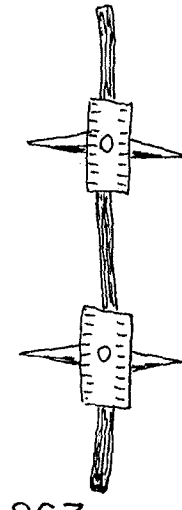


Fig. 62.—QUADRATED BARB WIRE.

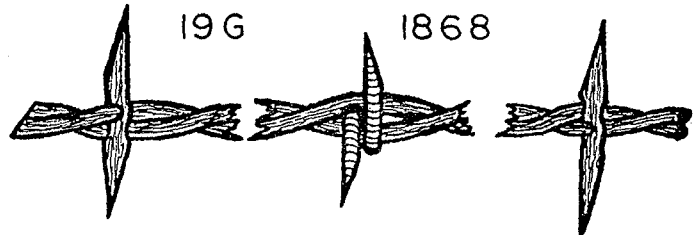
Fig. 63.—IOWA FOUR-POINTED BARB WIRE.

19 F 1876



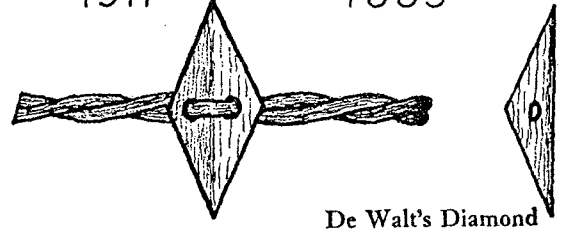
1867
SMITH'S
SPOOL AND
SPURS

19G 1868



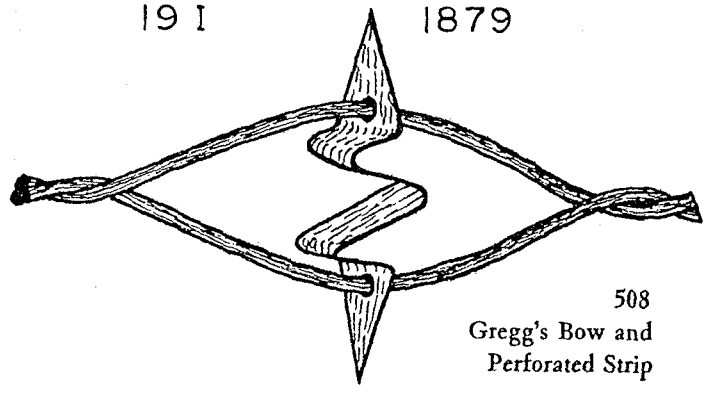
Kelly's Thorny Fence, Mixed-barb Variation 507

19H 1885



De Walt's Diamond 509

19 I 1879



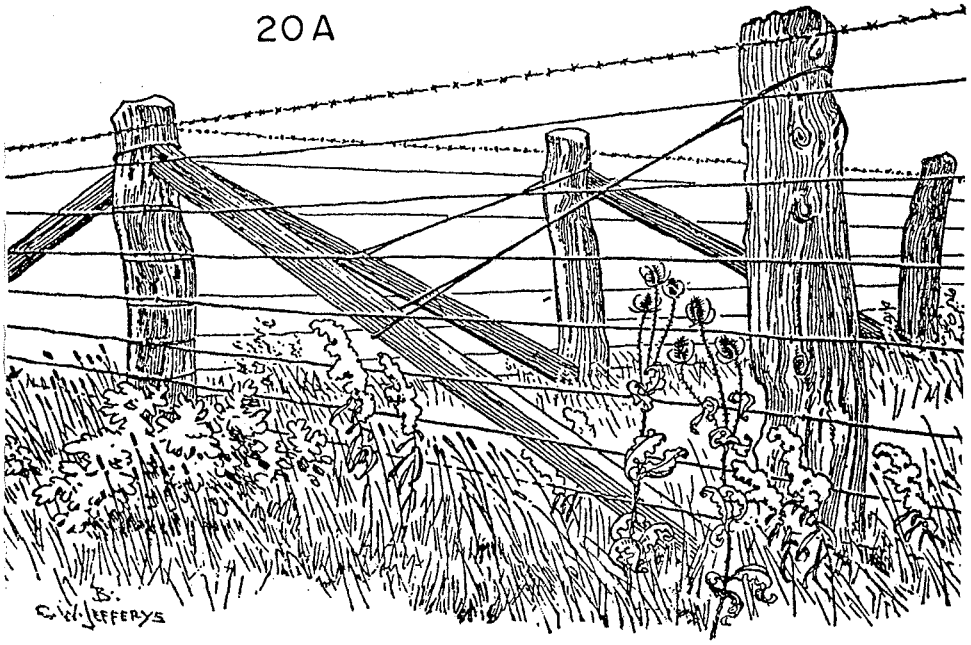
508
Gregg's Bow and
Perforated Strip

It is said[6] that 3 inventions profoundly influenced the development of the west; the revolver, the repeating rifle and the windmill. As history has unrolled itself, it has become obvious that a fourth could be added - barbed wire. In the mid-1850's the conflict between the homesteader and the rancher caught the buffalo, mustang, longhorn and Indian in a "wiry" entanglement that brought them close to extinction. Bloody clashes took place over fences and the supply of wire was an immense source of profit to eastern inventors. Hundreds of patents were issued from 1853 when the first practical cold weather barbless wire was invented and 1867, when the first barbed wire was patented to at least as modern a time as 1959 when a combination barbed-electric wire was invented. Figures 19a and 19b show these earliest devices and a cross-section of some two strand fence is shown.

Barbed wire came to Ontario in the late 1860's and by 1873 wire fence seemed here to stay.

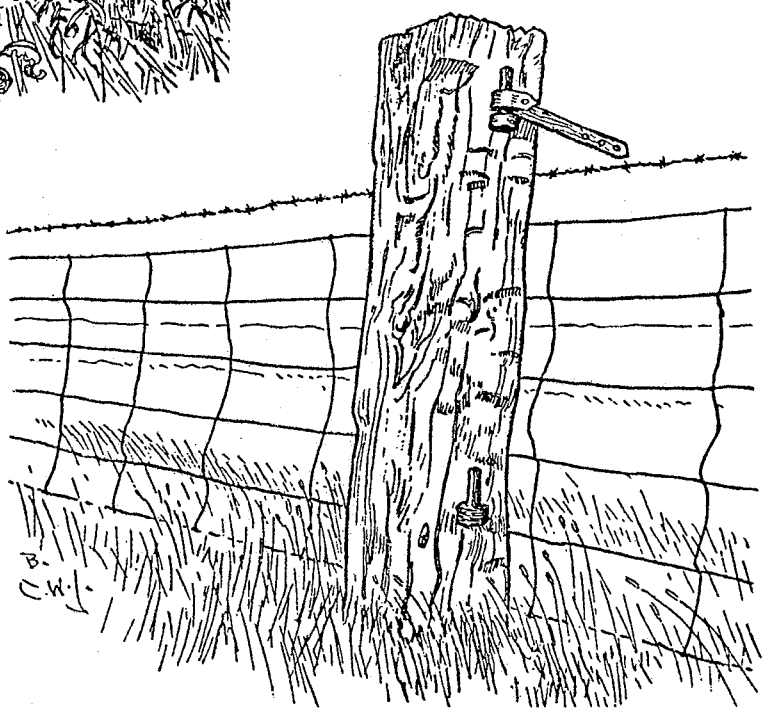
(6) Barbs, Prongs, etc., Clifton, P. 3

20A



EARLY WIRE FENCE

20 B

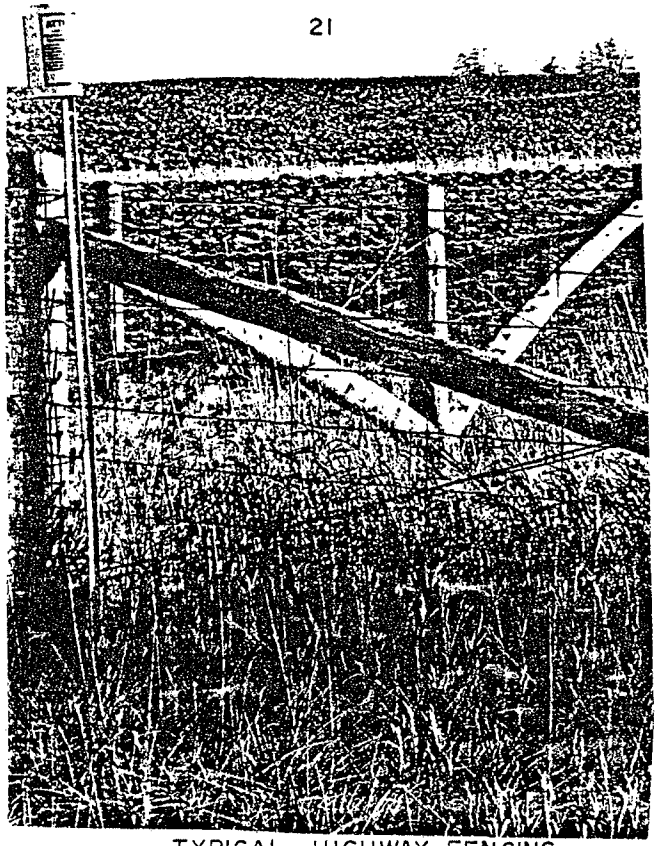


MODERN WIRE FENCE

Various combinations of log stone and barbed wire were tried and the wire fence has now evolved to the point where Figures 20a and 20b depict the majority of farm fencing today.

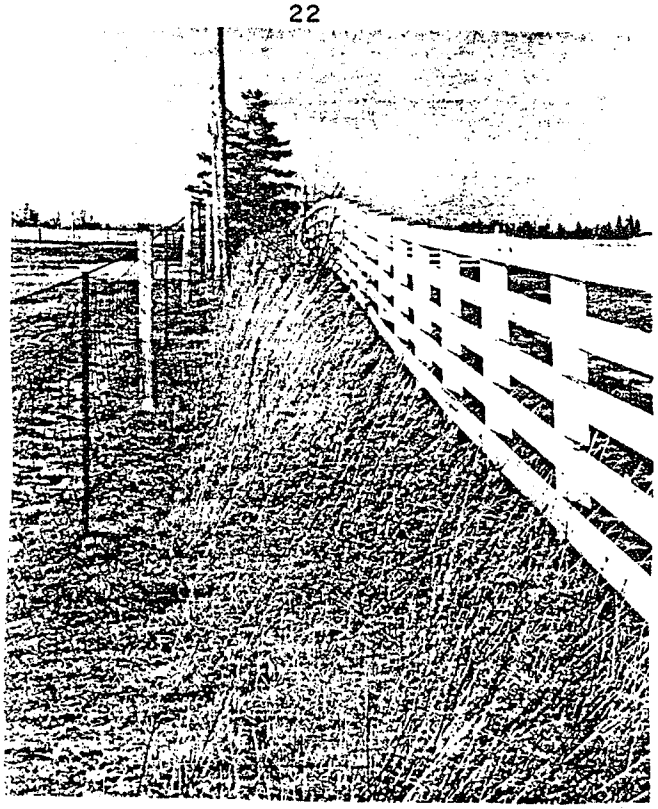
The woven wire provides an effective barrier while the barbed wire on top will discourage cattle from rubbing on it and people from climbing it (except surveyors, that is. You can tell who they are by the patches in their jeans).

21



TYPICAL HIGHWAY FENCING

22

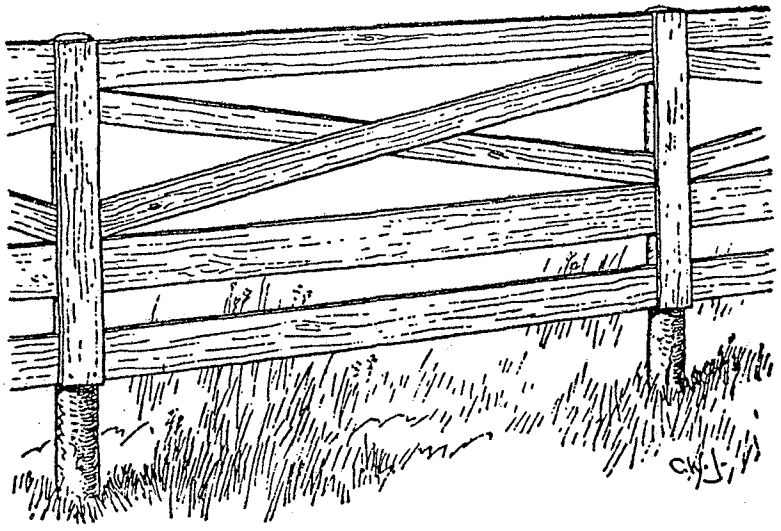


WOVEN-WIRE BOUNDARY FENCE WITH ORNAMENTAL BOARD FENCE ENCLOSING A PADDOCK

Figure 21 shows woven wire fencing on wood posts marking the highway limits while the familiar "bell" marker provides opportunities for lawsuits.

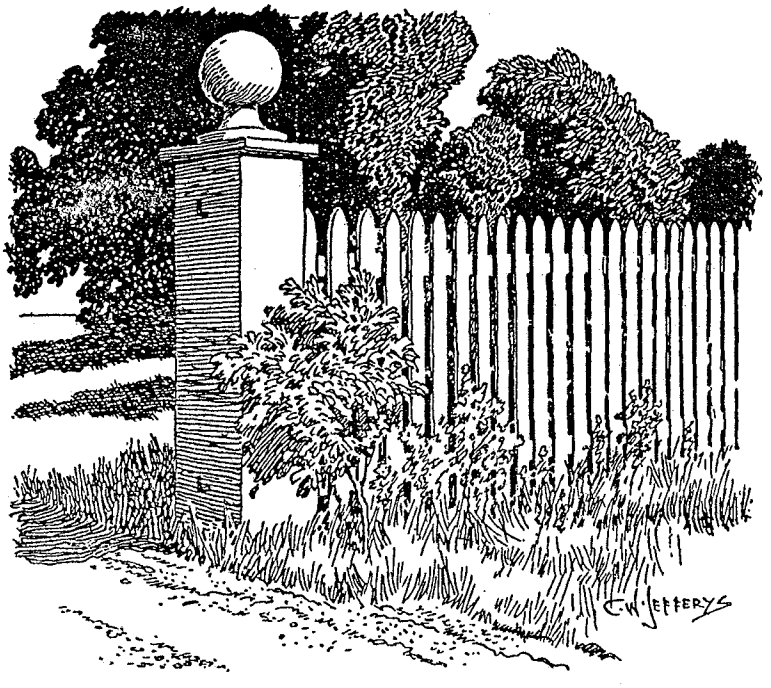
Figure 22 shows the usual post and wire fence along what might be a property boundary with an ornamental board fence adjacent to the field. Double fencing is sometimes most confusing when the type of fence is similar, but these should pose no problem in identification.

23 A



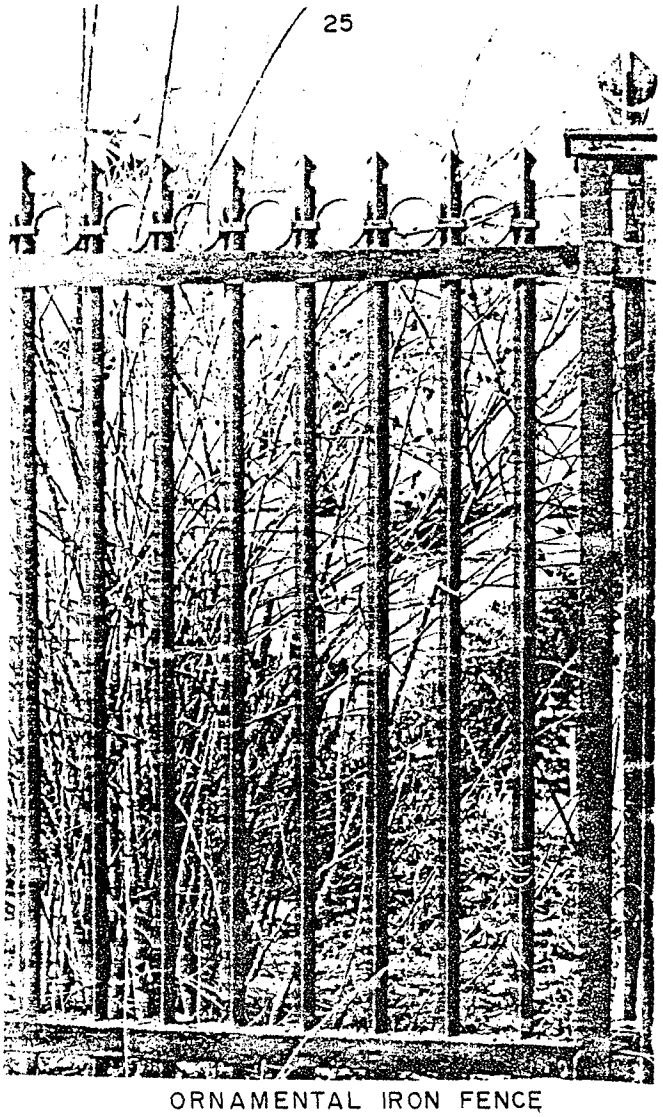
BOARD FENCE BUILT IN 1866

23 B



VICTORIAN PICKET FENCE

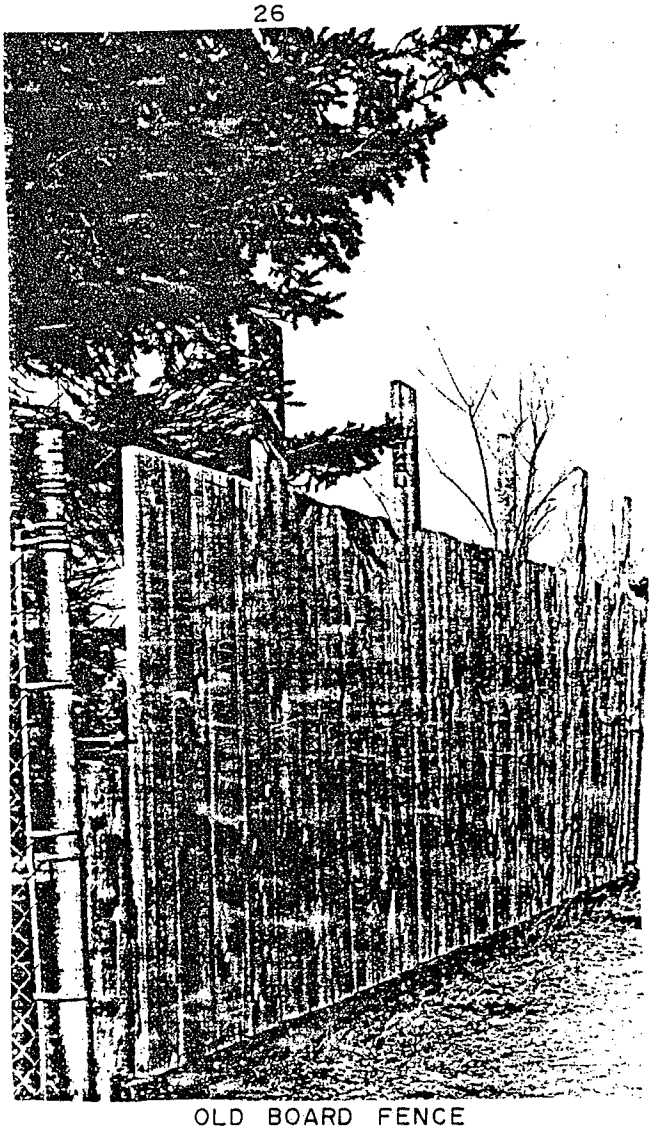
Figures 23a and 23b show fine examples of board and picket fences from the Victorian era while Figure 24 is an example of very elaborate (and expensive) post and board fence, probably built during the early part of this century.



ORNAMENTAL IRON FENCE

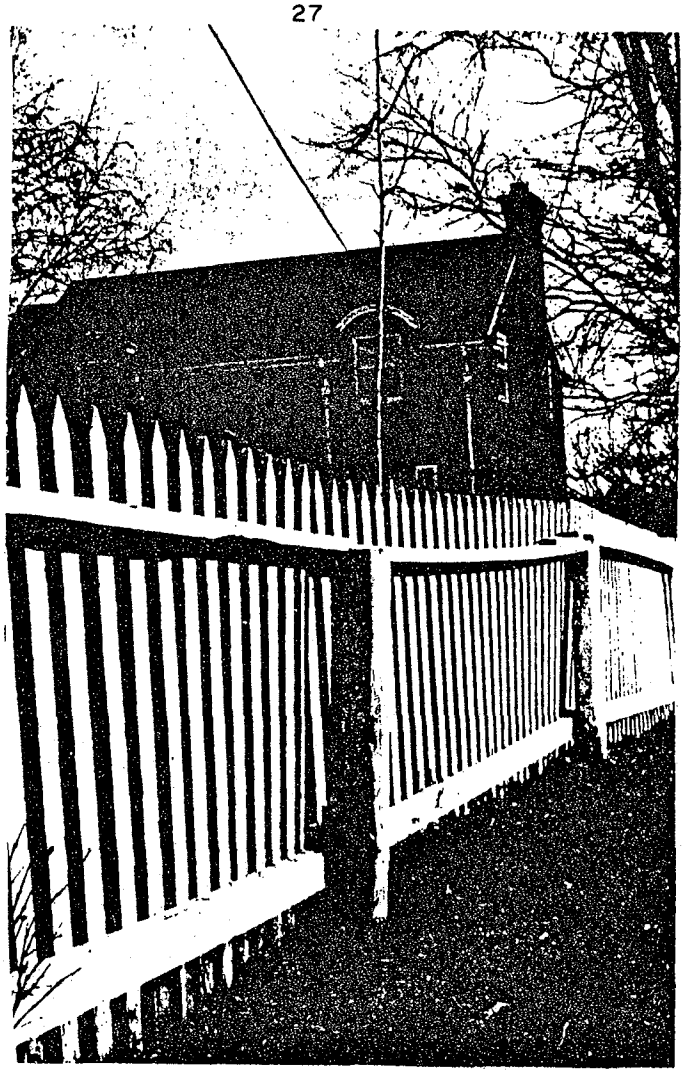
Figure 25 shows the kind of ornamental iron fence, such as is built around Osgoode Hall in Toronto, but was far too expensive for the ordinary purse.

26



OLD BOARD FENCE

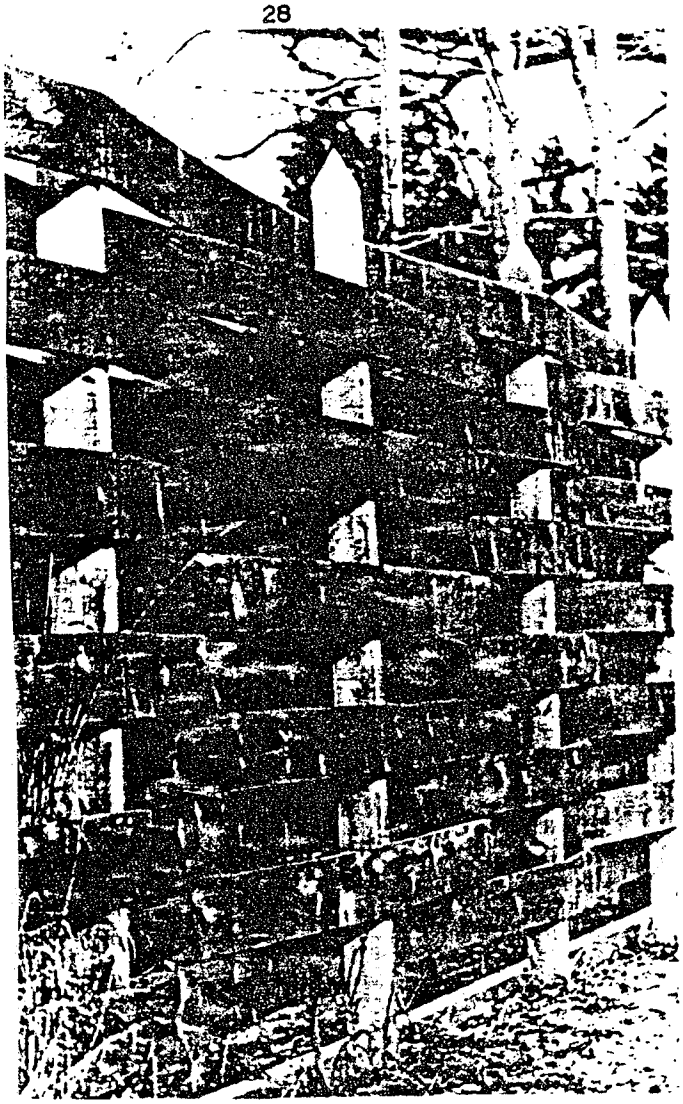
27



WOOD POST FENCE WITH PICKETS

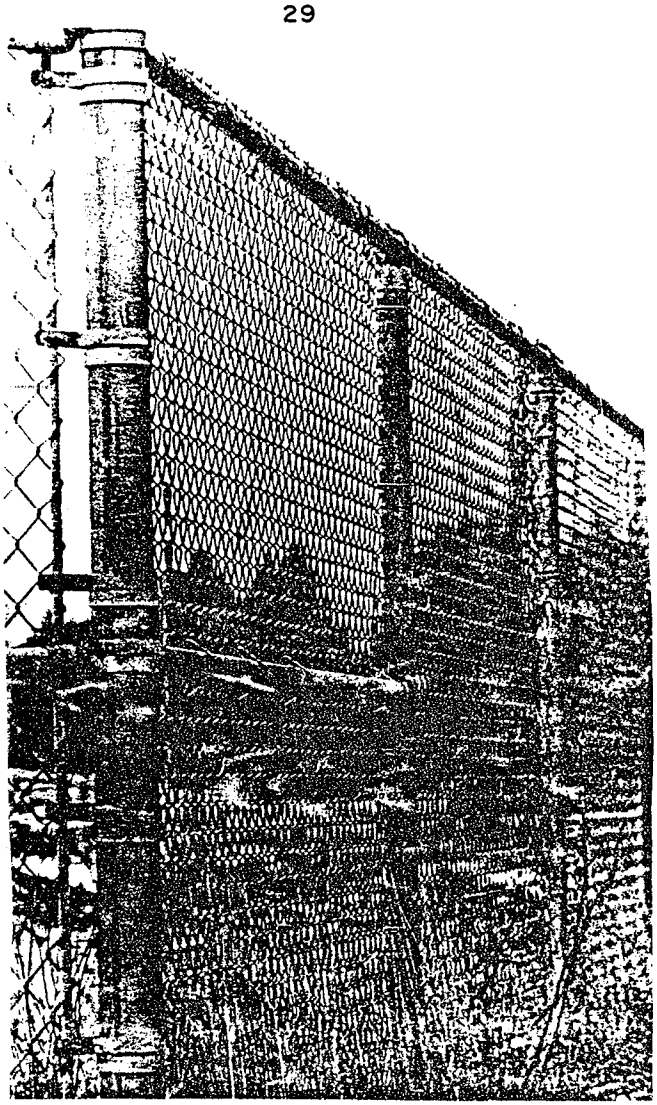
Figure 26 is representative of the Board fences built along property lines in the cities and towns of Ontario 60 years ago, and which still remain, in good condition, in many of these towns, while Figure 27 is typical of the picket fence built between residential properties in more recent times, although the ubiquitous chain-link fence has become the most popular today.

28



"BASKET-WEAVE" SUBDIVISION FENCE

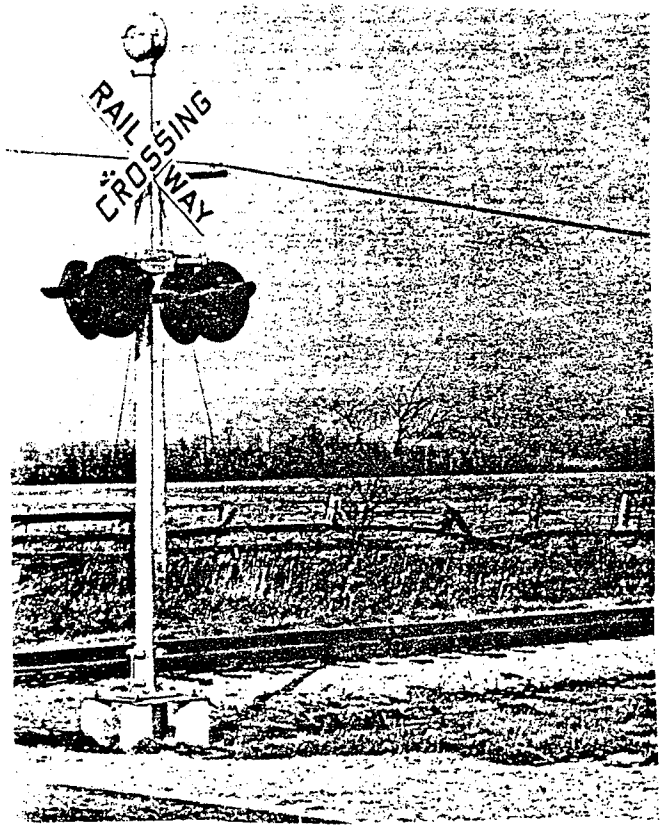
29



"CHAIN-LINK" FENCE

The fences shown in Figures 28 & 29 are typical of the type of fencing that dramatically increase the cost of surveys. One is solid, high and probably conceals a vicious dog, while the chain link fence with its concreted corner posts has probably destroyed any credibility that the remaining monuments might have.

30



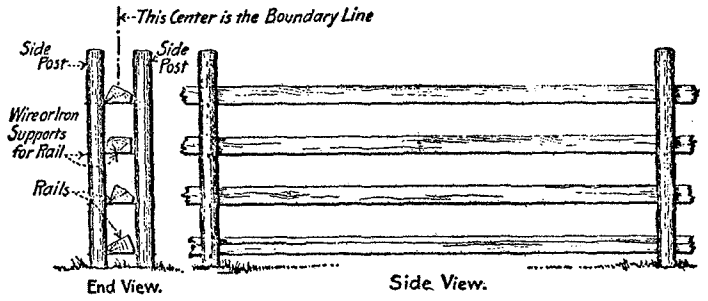
RAILWAY RIGHT-OF-WAY FENCE

Figure 30 shows a railway line, the company to remain anonymous, with a rather dilapidated fence on the far side. Federally and Provincially chartered railways are obligated by the Canada Railway Act and the Railway Act (Ontario) respectively, to erect and maintain a fence on the railway. I am sure we have all had occasion to ponder the attitude of the railway companies regarding fences when the time comes to establish the mutual boundaries.

Both Railway Acts use the expression "On the Railway"(7) and my first impression is that this means not outside the railway limit. The problem, of course, is one of definition of the limit and that could be the subject of a paper all on its own.

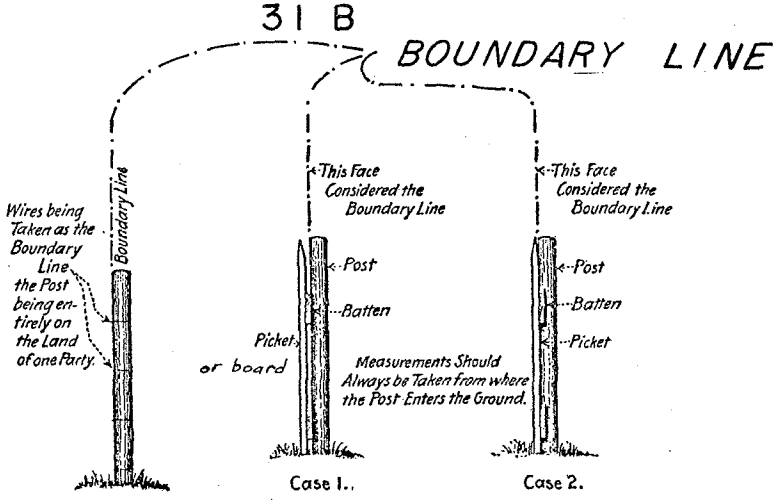
(7) Canada Railway Act, R.S.C. 1970, Ch. R-2, Sec. 214
Railway Act, R.S.O. 1950, Ch. 331, Sec. 114

31 A



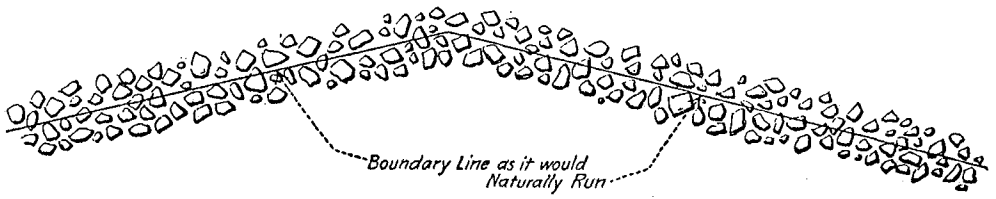
RAIL OR LOG FENCES

31 B



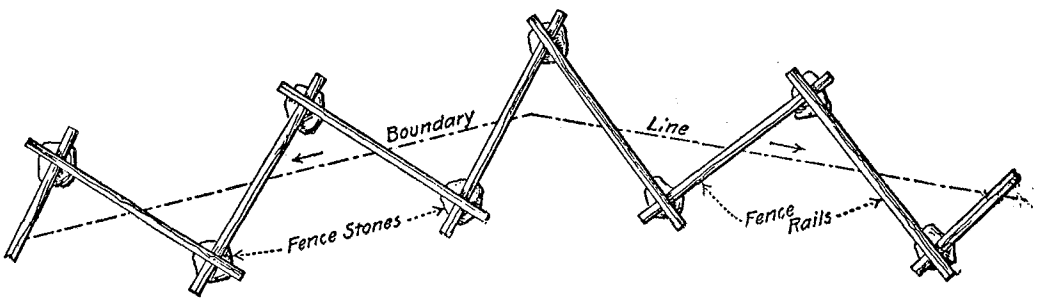
FENCES WITH WIRE OR PICKETS ON ONE SIDE

32 A



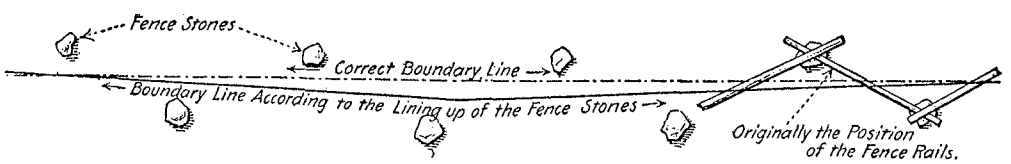
BOUNDARY THROUGH A STONE WALL

32 B



BOUNDARY LINE THROUGH A SNAKE - RAIL FENCE

32 C



RECONSTRUCTING A FENCE, IF ONLY
EVIDENCE OF THE JOGS, IS AVAILABLE

Now that we have hopefully learned a little more about fences and their construction, we can review the rules of evidence before proceeding to examine some cases.

As I am sure you all remember from your survey law courses that "evidence" can be defined as "all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation".(8)

Now in court, there are some 15 types of evidence considered and it must be pointed out that evidence is not proof, it is the consideration of the evidence and the conclusions that may be drawn that may produce the proof. Some types of evidence are:

- oral
- documentary
- real
- extrinsic
- indirect or circumstantial
- parol
- primary

In a civil action, the burden of proof is on the plaintiff and the decision is based on a preponderance of evidence and not, as in a criminal proceeding, beyond a reasonable doubt. This is virtually counting up the pieces of evidence, dividing them pro and con, and the bigger number wins.

(8) Osborne's Concise Law Dictionary, Burke, P. 137

While the above is technically correct it should be pointed out that "weight" of evidence is also considered and also that because of the enormous amounts of money involved in recent lawsuits, civil actions are moving away from the "preponderance of evidence" concept towards the "reasonable doubt" aspect of the criminal court room.

The admission of evidence is allowed in court by either the "Canada Evidence Act" (R.S., c307) or "The Evidence Act (Ontario)" (R.S.O.1970 c151), depending on the jurisdiction. A surveyor will hopefully only be in court as an expert witness and as such will be allowed to give "opinion evidence" which is quite different from any other type of witness. You will be allowed far more latitude and your knowledge of the value of fences may be admitted under the rules.

Of course when you do give opinion evidence you must remember the duties of the expert witness which can be summarized as follows:

A) All questions put to him should be answered clearly and intelligently.
B) He should be absolutely unbiased and honest.
C) He should have real expert knowledge of his particular subject.
D) He should be prepared to discuss the opinions of other authorities and state why he agrees or disagrees with them.
E) His testimony should be limited to things and opinions that he can defend before experts in his particular field.

Surveys in Ontario are made according to the Surveys Act (R.S.O. 1970, c453) and the attendant regulations.

Section 9 of the Surveys Act respecting original surveys and section 54 respecting plans of subdivision both state that lines, boundaries or corners established in the original or first survey are true and unalterable and are defined by the original posts or blazed trees, whether or not they are the same distances between posts as shown in the original plan and field notes, the subdivision plan or in any deed.

Under parts II to VII of the Act, instructions are given as to how a surveyor shall re-establish a lost corner or boundary. In the various types of townships the first consideration is the obtaining of the best evidence available respecting the lost point before proceeding to any theoretical reconstruction.

This same method of procedure for plans of subdivision is outlined under Section 55 of the Act.

This, of course, means that the position of original posts governs and our job is to establish, using the best evidence, where this was. This very often means having to prove that the fence is located today in the position of the original line.

The laws of evidence that we as surveyors would use to arrive at our conclusions are as follows:(9)

1 NATURAL BOUNDARIES - about which one is least likely to make a mistake;

(9) "What is a Survey?", Setterington, 1981

2 ORIGINAL MONUMENTS - that is, monuments that are undisturbed and can be proven to be in their original position;

3 EVIDENCE OF POSSESSION AND LOCATION OF THE MONUMENTS - that is, possession that can reasonably be related back to the original survey. This could include fences, lines of trees, etc.

4 MEASUREMENTS - as contained in the original deeds or plans.

You will note that the right type of possession has precedent over measurements.

This principle is one of long standing in the law and relates to what I believe to be, along with the "Home Bank v. Might Directories" case, the most practical and useful precedent that we surveyors have, that is the rule accepted by the state of Michigan in "Diehl v. Zanger (1878), 39 Mich. 601". In this landmark case, Mr. Justice Cooley stated the following:

A) Any re-survey made after the original monuments have disappeared is for the purpose of determining where they were, not where they ought to have been;

B) A long established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments have disappeared;

ERRATA:

Page 36 has been repeated on Page 37. No page is missing.

Paragraph C) on page 38 opposite was scrambled and should read as follows:

"Nothing is better understood than that few of our early plats (plans) will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities .... and the visit of the surveyor might well be set down as a public calamity; "

... believe to be, along with the "Home Bank v. Might Directories" case, the most practical and useful precedent that we surveyors have, that is the rule accepted by the state of Michigan in "Diehl v. Zanger (1878), 39 Mich. 601". In this landmark case, Mr. Justice Cooley stated the following:

A) Any re-survey made after the original monuments have disappeared is for the purpose of determining where they were, not where they ought to have been;

B) A long established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments have disappeared;

C) Nothing is better understood than that few of our early plats (are true and unalterable and are defined by the original posts or blazed trees, whether or not they are the same distances between posts as shown in the original plan and field notes, the subdivision plan or in any deed.

D) The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them;

E) Monuments control courses and distances - an inflexible rule in real estate law.

In 1914, Chief Justice Meredith of Ontario, entirely agreed with the above principles stated by Justice Cooley and based his judgement in "Home Bank v. Might Directories Ltd." on them. This case has become a landmark case in Canada.(10)

We are now getting to the subject of the fence as evidence. First, we have to decide just what part of the fence is to be used for the line, if indeed that is the intention.

(10) Home Bank v. Might Directories Ltd., (1914) 31 O.L.R. 340, 20 D.L.R. 977(C.A.)

If there is to be consideration given to using the fence as a lot line or boundary line between owners, it is essential to obtain as much information about the fence as possible, e.g.,

- how old is it;
- is evidence available as to where it was intended to be;
- was it placed on a surveyed line;
- what are the usual practices regarding the position of fences on lines;
- other surveyors notes

It has been my experience that when determining the line on stone, log or rail fences, one should use the centre line of the structure as in Figure 31a, and when fences with wire, boards or pickets are on one side only, the face of the posts should be used.

Naturally, if the owners can provide evidence as to the intent and procedure involved during construction, this should be included in your evaluation of the evidence.

Figures 32a and 32b show the re-establishment of fence lines under different circumstances - note that the line in the snake-rail fence bisects the rails as much as possible.

Three expressions that are commonly found in boundaries case-law are "Conventional Boundary", "Estoppel", and "Adverse Possession".

Conventional Boundary

A conventional boundary is one established by agreement between adjacent owners regarding their mutual boundary. This may or may not be the township lot line or registered plan lot lines, that obviously will depend on the evidence. But under certain conditions, a conventional boundary will become the property line and perhaps the lot line.

Conventional lines may not be used to convey land as that would be a fraud under the Statute of Frauds(11) which requires that such transfers must be in writing. The conventional line is for the purpose of providing an agreeable boundary between corners.

A conventional line can only be made by the owners and not one owner and a prospective owner.(12)

(11) Statute of Frauds, R.S.O. 1970, Ch. 444

(12) Smith v. Anderson (1942), 16 M.P.R. 287

There are numerous cases which outline these principles but perhaps the following excerpt from "MacMillan v. Campbell et al"[13] by Mr. Justice Harrison of the Supreme Court of New Brunswick (Appeal Division) is the most persuasive.

Justice Harrison said:

> "The most 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."

(13) MacMillan v. Campbell et al, 28 M.P.R.112, (1951) 4 D.L.R. 265 (N.B.C.A.)

Estoppel

As was suggested above, estoppel is the doctrine of law which prohibits a person from denying the truth or necessity of complying with some statement formerly made by him, or the existence of facts which he has by words or conduct led others to believe in.

That is, if a person, by a representation purported to be the facts of the matter, induces another person to change his position on the faith of it, he cannot afterwards deny the truth of his representation.

There are a number of forms of estoppel, but the one which concerns surveyors is "estoppel 'in pais'", or "equitable estoppel". An example of this would be the person who builds on land supposing it to be his own, and the real owner, observing his mistake, abstains from setting him right and leaves him to proceed in his error. He has been "estopped" from asserting his ownership in the land.

In addition, a person who, in selling a parcel of land, wilfully mis-states the position of his own property line and thereby leads a purchaser to believe that he is acquiring land which was not included in the deed is "estopped" from afterwards claiming such land as his own and is subject to a judgement to correct the deeds.

Adverse Possession

Adverse possession has been defined as:

> "The possession which would be such as in the nature of the land would be suitable and reasonable"(14)
> or
> As Lord MacNaghten said in 'Johnston v. O'Neill'(15)
>
> "Possession must be considered in every case with reference to the peculiar circumstances... the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests - alll these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of possession."

and also in this connection, the judgement of Mr. Justice Rogers in "Mason et al v. Lewis Miller & Co. Ltd." is of interest:

> "The co-tenant may have had title; but the operations of the Todds over 40 years ago, followed again over 35 years ago by the Youngs, and again over 25 years ago and the assumption of full control by them, through the maintenance of their blazed lines, the usual

(14) Ibid

(15) Ibid

method of marking proprietorship of wild lands, and making of and operating roads all over the land and the general supervision of the woods foreman over these lots as part of the extensive holdings of which they formed a part, all bear convincing testimony as to the continued open and notorious possession of the defendants' predecessors to the exclusion of the claimants and their predecessors. The Todds began their occupation by unequivocally using the lands exclusively for their obviously intended purposes and thereafter they did such acts as would be expected of owners of such lands in due course. Clearly the owners of lumber lands are not expected to cut over them except at intervals, dependent upon regrowth and consistently with their general purpose to operate on sound business principles."

It appears that the key phrases in considering whether adverse possession has been gained or not are:

- character and value
- natural use
- blazed lines in wild country
- open and notorious
- acts of expected owners

Of course, regard must be had to the Statute of Limitations[16] which sets out the time required to have adverse possession ripen into the fee in the land, i.e., 60 years against the Crown, 20 years for a right-of-way or easement and 10 years to recover land being possessed, although recourse should be made to the provisions of the Statute in effect at that time.

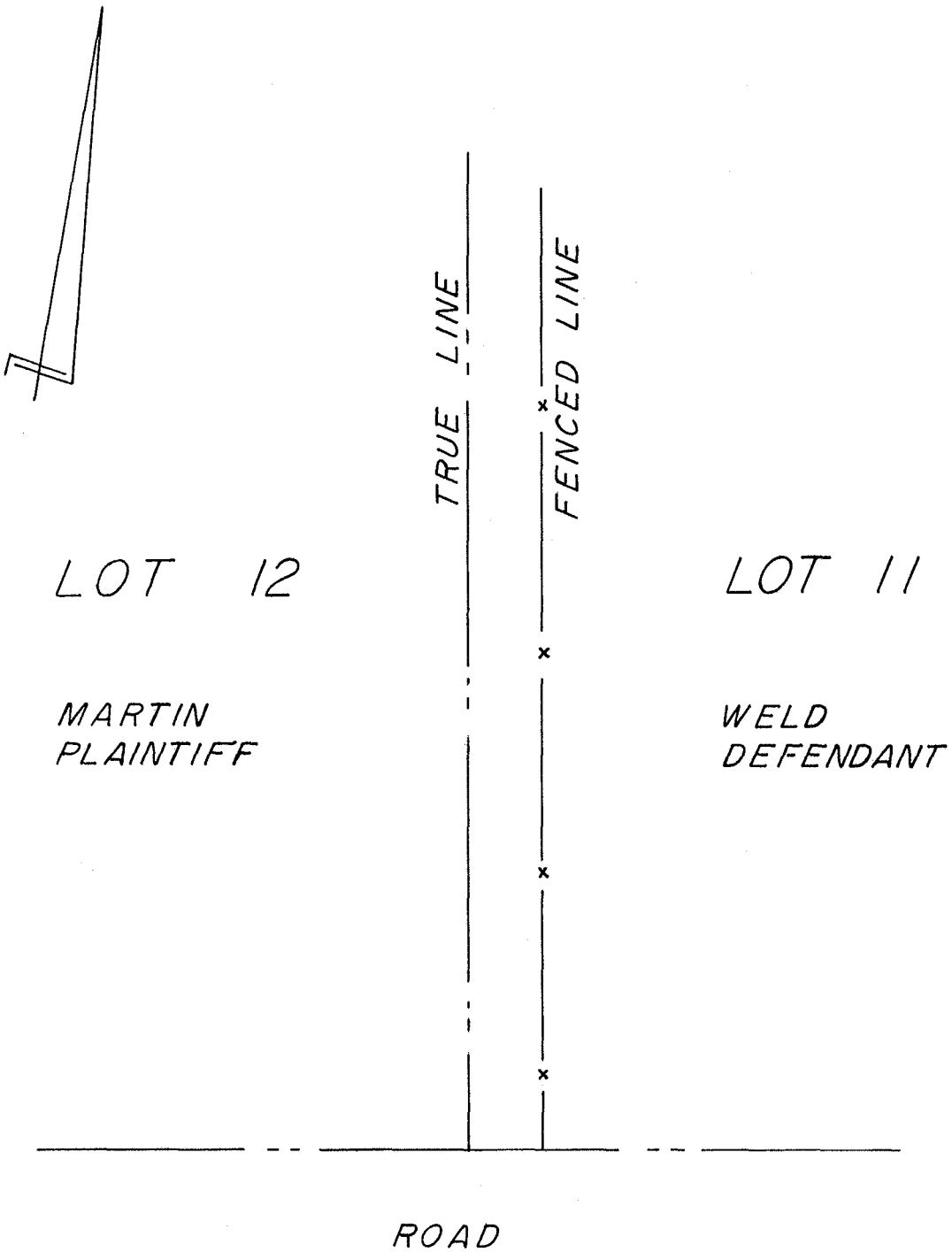
In order to demonstrate some of these principles, I would like to present a few cases that have been reported and considered of importance in boundary law. In discussing any case in a common law jurisdiction it is important to understand that the law is interpreted by judges using either a quasi-legislative role or an interpretive one.

These are the extreme poles of the judicial spectrum. They range from the judgments of Lord Denning in the United Kingdom and the U.S. Supreme Court under former Chief Justice Earl Warren which tended to be extremely responsive to changing times, to those judges who are strictly bound by precedent and see that they have no discretion to modify the law for social conditions and changing attitudes.

An empirical study across Canada has revealed[17] that the typical judge sees his role as essentially an interpretive one although tempered by the dictates of fairness and justice. These judges recognize the position of the legislative function in the making of law in Canada.

(16) Limitations Act, R.S.O. 1970, Ch. 246

(17) The Canadian Legal System, Gall, P. 179



MARTIN v. WELD (1860)

Each judge is different, as those of you who have been in court will know, and his "style" of administering justice is based on how he or she regards the twin doctrines of "precedent" and "stare decisis".

While we are really not studying the Canadian legal system here, I believe that it is important to understand that judges will follow past decisions, or "precedents", when the facts are the same or very nearly so. Portions of past cases may be used and because even judges have opinions, different judges will arrive at different decisions using the same facts and this problem is resolved by the use of the doctrine of "stare decisis".

This doctrine requires that a judge of a particular court must follow the previous decision of the highest court within his particular provincial jurisdiction. The judge may also be "persuaded" by courts outside of his jurisdiction and he would give careful note to the level of that court. The date of the cases being used as precedents is important as it is generally assumed that the more recent the case, the more likely it is to prove the proposition. Sometimes the reputation of the judge will have an influence on the decision.

I think that it is important to understand these rules when considering any case that has been decided in any common law jurisdiction. Judgements usually refer to these "persuasive" cases and you will see how the law is built on the decisions of the past.

The case of "Martin v. Weld"[18] which was decided by the Court of Upper Canada, Queen's Bench in 1860 illustrates the problem of adverse possession and a "misunderstanding" or "common error" by both parties as to the position of the true boundary. The effect of the Statute of Limitations is also relevant in this case.

As you can see by the sketch there existed a fence line that had been accepted by both parties as their common boundary and the plaintiff, Martin, had been in possession since 1829, or about 30 years.

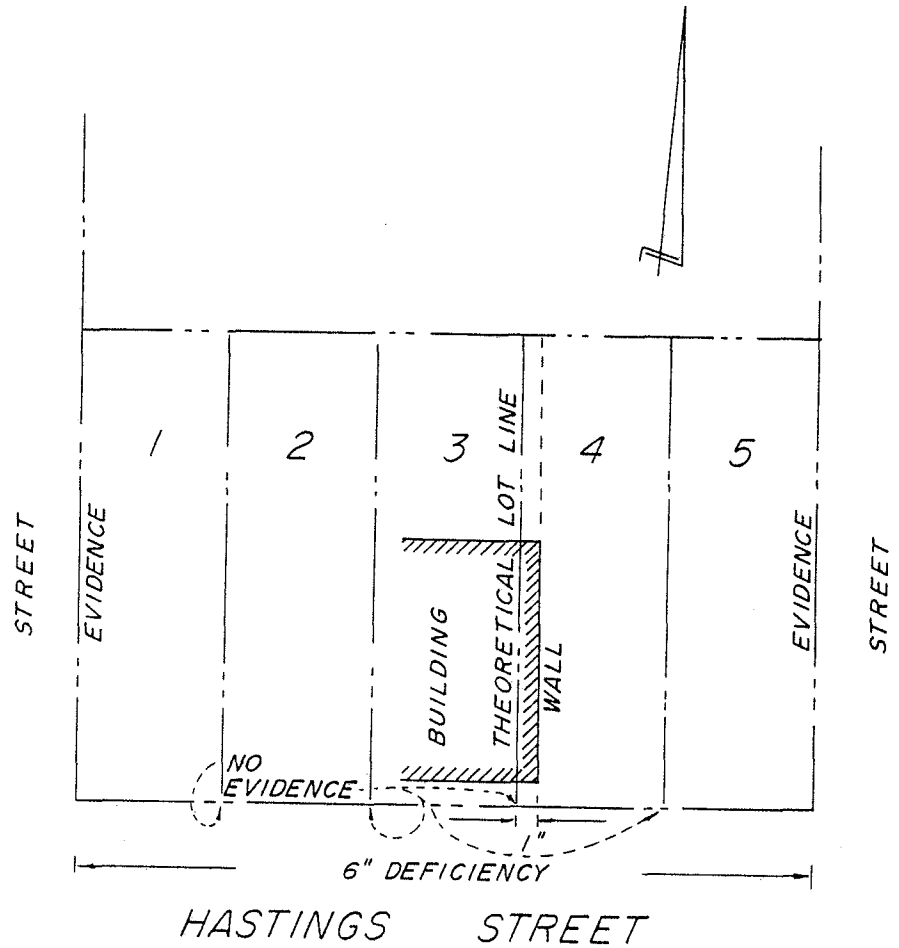
The defendant, Weld had a survey made and the true boundary was laid out. When the Plaintiff attempted to work on the old fence the neighbours came to blows.

In the trial before Richards J. with a jury, the jury found that the Plaintiff should succeed and he was awarded two pounds in damages. The decision was based on the possession of more than 20 years.

The Defendant, Weld, appealed on the basis that the trial judge had erred in his direction to the jury and in the law, the common error should allow correction.

On appeal, Chief Justice Robinson of the Ontario Court found that the appeal should be denied. The Justice stated that even though both owners were in a common error regarding the true line of division, the Statute of Limitations was still running and thus possession had been gained by the Plaintiff.

(18) Martin v. Weld, (1860) 19 U.C.Q.B. 631



BARRY v. DESROSIERS

Of course if it could have been shown that the line had been agreed to and that it would govern no matter what, then it would have been a conventional line, binding on both parties on the principle of "Estoppel in Pais".

"Barry v. Desrosiers"(19) is a 1908 decision of the British Columbia Court of Appeals and concerns the method of determining the lot line boundary when all internal survey evidence is gone in a block in the city.

(19) Barry v. Desrosiers, (1908) 9 W.L.R. 633, 14 B.C.R. 126 (C.A.)

The facts of this case showed that a fire had swept the block some 23 years previously and had destroyed all the survey posts. A resurvey using evidence at the ends of the block showed that the block was 6 inches shorter than shown on the plan. The surveyor divided the shortage "pro rata" to set the east limit of Lot 3 thus placing the Defendant's building about 1 inch over the line.

The trial judge found:

> "That the survey was not wrong but that the defendant had been mistaken the position of his boundary in the past when the building was built".(20)

The Plaintiff then appealed this decision claiming that the damages were only payment for what was in effect an expropriation of part of his land and he was really claiming damages to cover the cost of moving the building.

The Defendant's solicitor "riposted" that there is no evidence as to the exact location of the Lot 3 as there is no satisfactory explanation as to the 6 inch shortage and that the Plaintiff had no right to make such a claim until he reestablishes by proper evidence, the exact location of Lot 3.

Mr. Justice Clement made the following points in deciding in favour of the Defendant and overturning the lower court decision:

> 1. The lot stakes have disappeared and no attempt was made to fix their position;

(20) Ibid

2. No evidence was available to show how or where an error was made;

3. He knew of no principle of law in British Columbia which says that the error was one which extended uniformly along the whole block and that each lot should suffer equally.

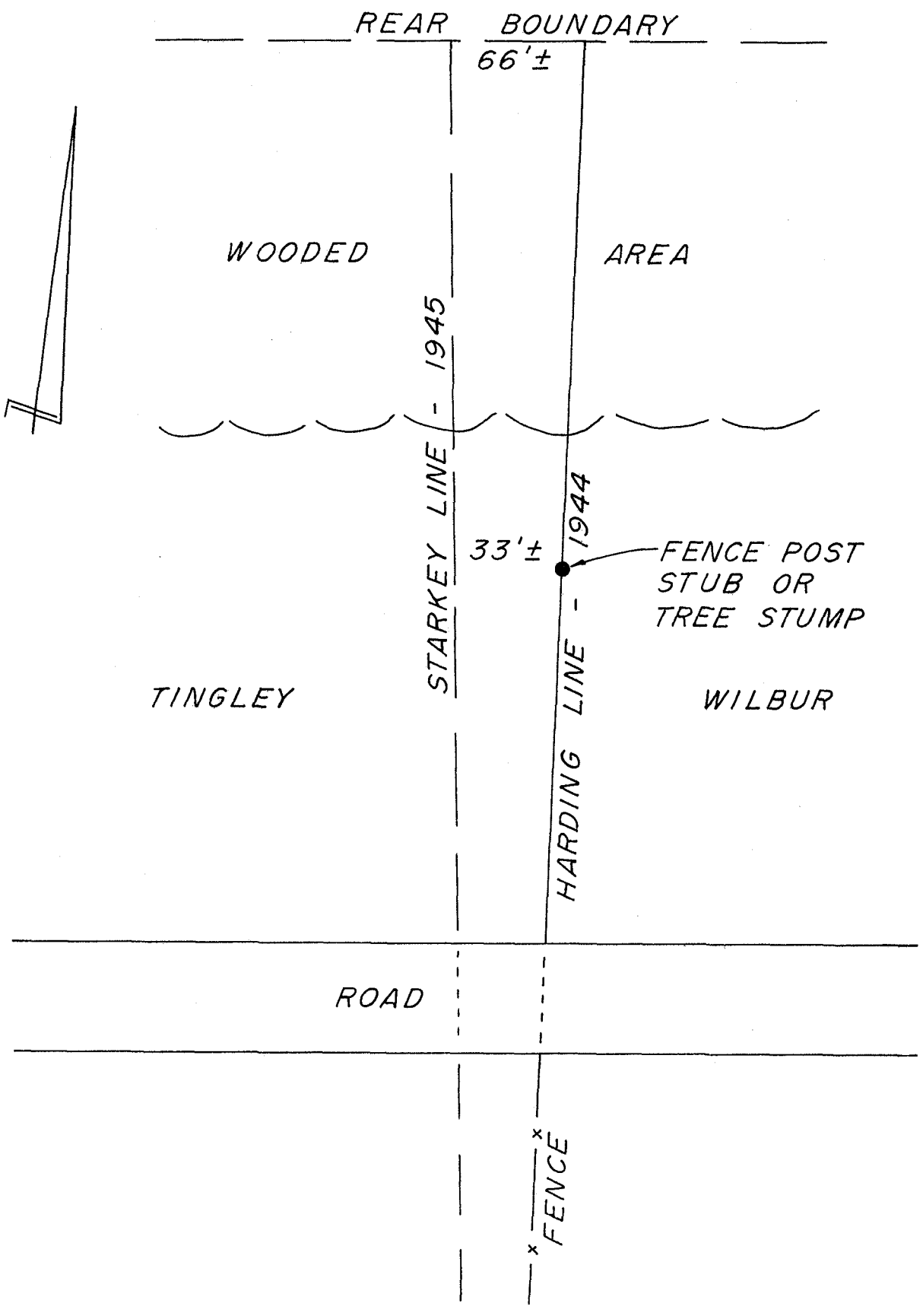
(In Ontario one should consider section 55 of the Surveys Act).

4. In the absence of such a statute, it is simply a guess as to which lot is incorrect and that the best evidence of the east limit of lot 3 is the building wall.

It is noteworthy that this decision satisfies the conditions of the Surveys Act in that the best evidence should be used before theoretical division is employed.

This case is very similar to "Home Bank v. Might Directories" in that a wall (it could have been a fence) was used as the best evidence of the original position of the line.

This case also points up the danger of indiscriminate proportioning or of simply laying out plan distances.



WILBUR v. TINGLEY

The case of "Wilbur v. Tingley",[21] decided in 1949 by the Appellate Division of the Supreme Court of New Brunswick, is an example of the acceptance by the court of a "conventional line" in an action for trespass.

Wilbur and Tingley, the plaintiff and defendant respectively in this case, were owners and occupiers of adjoining lots of land. While there was no defined line through the wooded area, they both agreed on a blazed line for convenience.

When Tingley cut some trees over this blazed line, a dispute arose and they agreed to get the line surveyed to the rear of the properties.

The plaintiff, Wilbur, employed one Harding, a Deputy Land Surveyor, and showed him an old fence south of the road running north and south and also a fence stub or tree stump north of the road said to be on the line.

The defendant, Tingley arrived at this time and assisted in the survey with other neighbours.

Harding projected the fence northerly across the road and found that it hit the stub. He then continued to the rear of the property. This line appeared to be agreeable to both parties, according to eyewitnesses to this survey.

(21) Wilbur v. Tingley, 24 M.P.R. (1949) 4 D.L.R. 113 (N.B.)

As some trees had been cut by Tingley over this line, he agreed, in writing, to pay Wilbur for them, and did in part with an undertaking to pay the balance at a later date.

A few days later, Wilbur decided that he was not satisfied and hired a second surveyor, Starkey, to re-run the line. This new line was found to be 33 feet west of Harding's line at the stub and approximately 66 feet west at the rear property line.

Wilbur then repudiated the agreement and brought this action for damages (lumber cut) between the "old" and new line subsequent to the agreement, and for the return of the monies paid earlier.

The trial judge found:

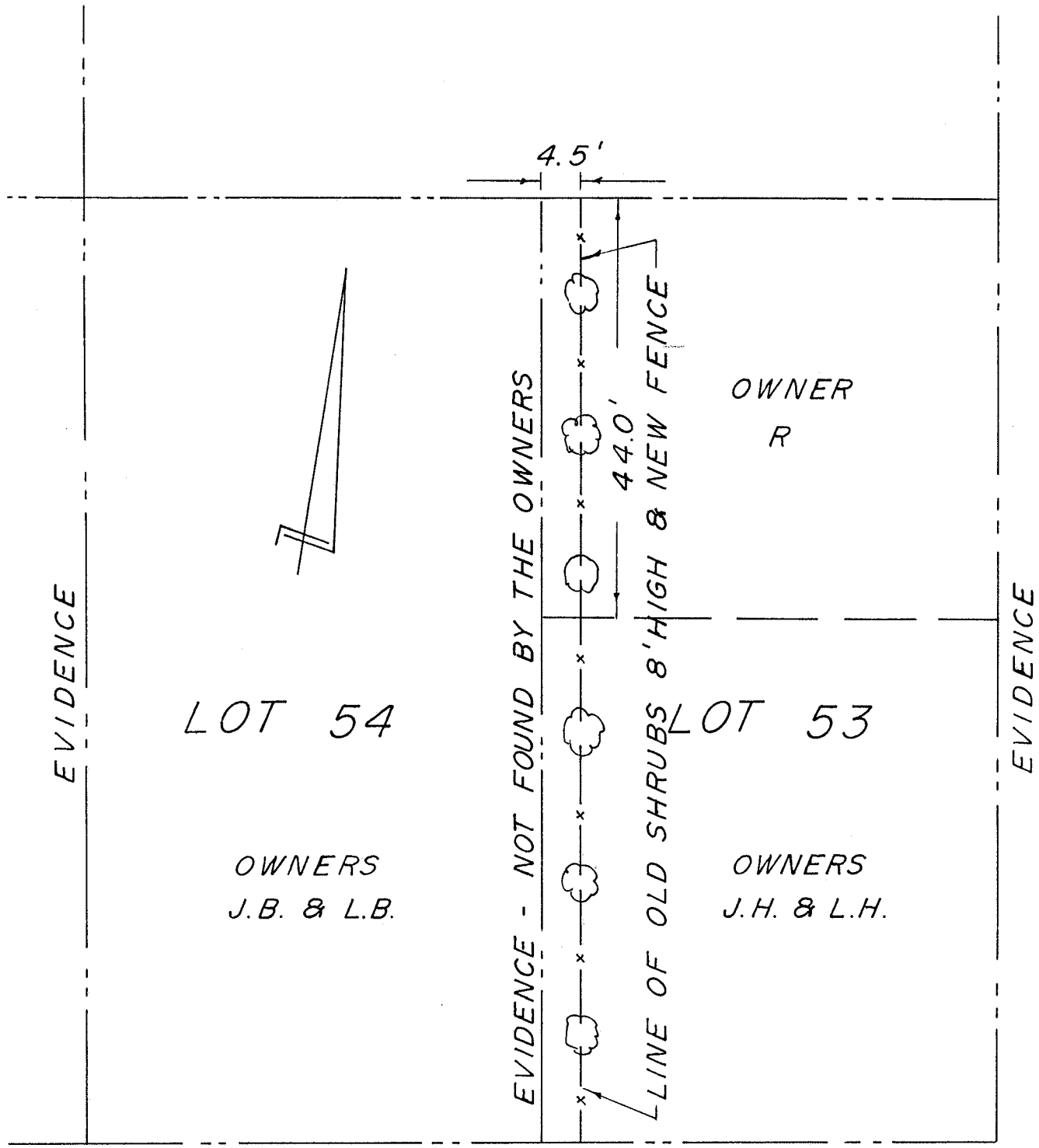
1. That the "Harding" line was incorrect
2. That the "Harding" line was not a conventional line
3. That the "Starkey" line was correct
4. That Wilbur was entitled to damages.

The trial judge had used 9 previous cases as precedents for his decisions, some within New Brunswick and some from other jurisdictions.

On appeal before Richards C.J., Harrison and Hughes, JJ., it was held that the trial judge wrongfully stated the requisites for the establishment of a conventional line. He had said that a conventional boundary must be fenced, occupied to by cultivation or recognized for a long time. In addition, he found, as a matter of fact, that the plaintiff had never agreed to the Harding line being conclusive when witnesses had clearly stated otherwise.

The concurring opinion by Mr. Justice Hughes is the most easily stated example of the test for a conventional boundary:

> "If the respective owners of adjoining lands are in dispute (Note: other cases have held that there need not be a 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 and 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 breach the statute of frauds as 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."



BEA v. ROBINSON

The Appeal Court, as you may have guessed, stated that the "Harding" line must be regarded as a conventional line between the parties.

This case is of great interest for a number of reasons.

ONE, it clearly shows the difference between an acquiesced boundary and adverse possession;
TWO, the rule of "estoppel" is shown in that Wilbur was barred from repudiating his agreement;
THREE, the necessity for the doctrine of "stare decisis" is pointed out by the comments of the justices of the Appeal Court on the wrongful interpretation by the Judge in the Lower Court.

An Ontario case reported in 1977, "Bea v. Robinson"(22) is used to illustrate when an agreed upon line is not a conventional boundary and in fact had its "painful" moments.

As you can see from Figure 36, we have two subdivision lots with the rear 44 feet severed from lot 53 and fronting on the east street. A row of "old" 8 foot high shrubs existed in 1964 when the plaintiffs "B" purchased lot 54. No survey was obtained and "B" assumed that the line of shrubs was the lot line.

In 1966, "B" and defendant "R", on mutual agreement built a fence on the line of shrubs.

(22) Bea v. Robinson, Ontario High Court of Justice (1977); 81 D.L.R. (3d) 423, 3 R.P.R. 155

In 1975 "R" discovered the true boundary between the lots by survey and the fence was found to be 4.5 feet east.

The defendant's "R" and "H" demanded that the fence be removed and "B" refused. "R" and "H" then cut down the fence in September 1975 causing a fight in which "B" was injured. "B" sued to gain possession and for damages for assault.

The action was dismissed as to "B"'s claim for possession to an agreed line for the reasons outlined below, but the damages for assault were allowed.

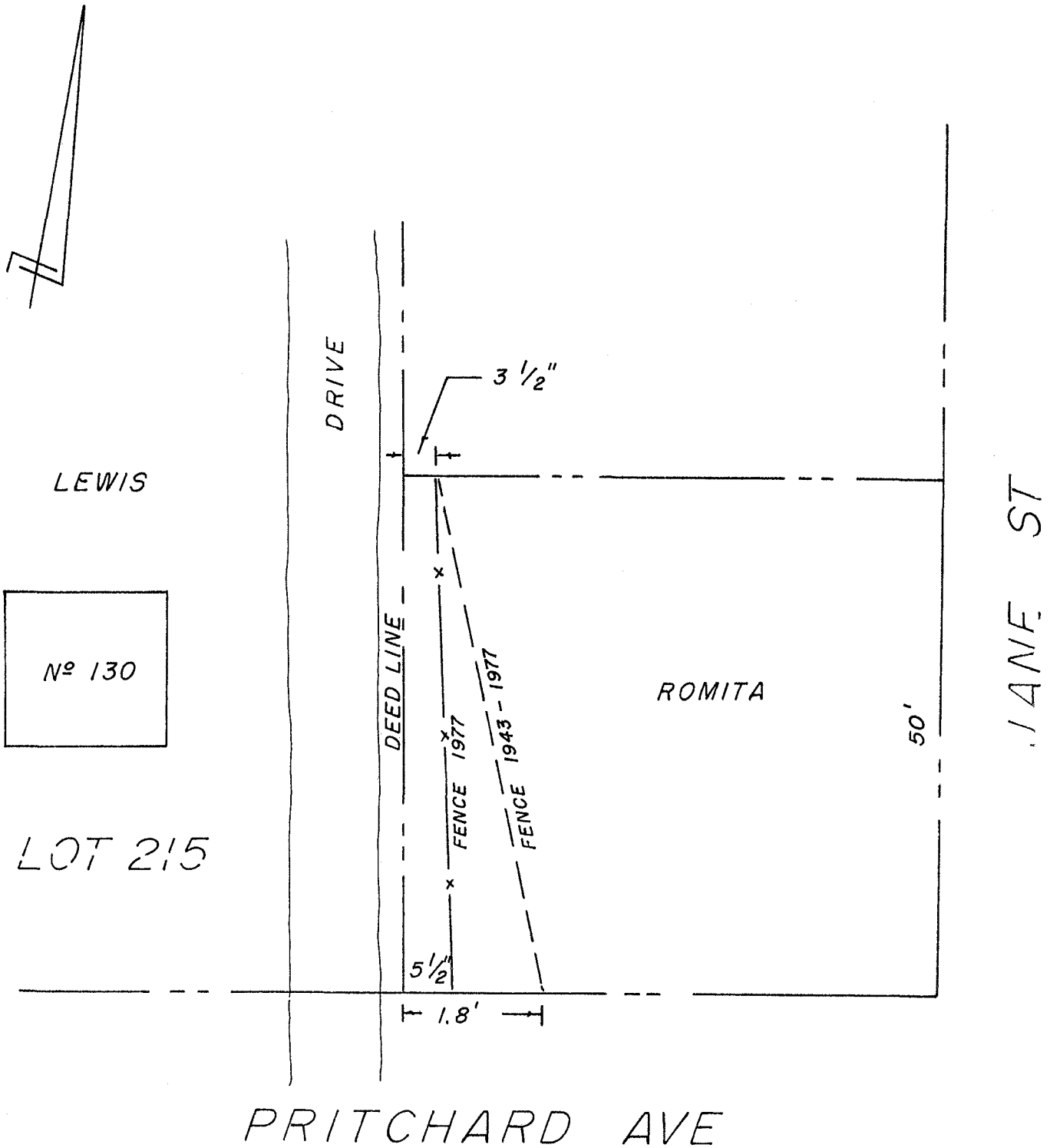
1. No adverse possession as there was not 10 years occupation;

2. The possession is not adverse as there had been an agreement;

3. No conventional line as the requirement that the true line be unable to be determined was absent. The true boundary was able to be determined the owners simply did not find out;

4. If the true line was found and differed from the agreed line then a transfer of title would occur contrary to the Planning Act, Secs. 29(2) and (7);

The lesson to be learned from this case appears to be that every effort must be made to find the true line before resorting to an agreed line. Of course, the agreed line may still be the best evidence of the lot line, but not in this case.



LEWIS v. ROMITA

Care should be taken to ensure that the provisions of the Planning Act are adhered to when deciding on the worth of a fence as a lot line and this will be the subject of a future discussion.

In the above case, "Bea v. Robinson", we saw among other things that a mutual agreement as to a common boundary negated the provisions of the Statute of Limitations. In the case of "Lewis v. Romita"(23) reported recently (judgement - February 7, 1980) we can see that it is most important that an agreement between two owners must be clearly written and included in some registered document to avoid costly legal actions.

As shown in Figure 37, the plaintiff, Lewis owns lot 215 on the north side of Pritchard Avenue and abuts the defendant Romita's land which fronts on Jane Street. The plaintiff purchased her land with her late husband in 1943 and has lived there continuously to this date; the defendant purchased his land in 1975. At that time the fence was located as shown in broken line on the sketch, that is, 1.8 feet east of the lot corner as determined by survey and not disputed.

During renovations made by the defendant in 1977 the fence was moved, somehow, closer to lot line at the south end being now 5-1/2 inches east and remaining in the same place at the north end - 3-1/2 inches east.

(23) Lewis v. Romita, Ontario High Court of Justice (1980)

The area in dispute is therefore a triangle of land being about 14 inches (1.14 feet) on its base and the matters in the case revolved around the respective rights of the plaintiff and the defendant in the above noted triangle.

The plaintiff claimed damages in the amount of $10,000 for trespass, an order restraining the defendant from going on any part of her land, a declaration that she is the absolute owner and a mandatory injunction requiring the defendant to put the fence back to its pre-1977 position.

The claim for damages was withdrawn the morning of the trial and photographs tendered as exhibits showed that the effect of moving the fence was to narrow the strip of vegetation between plaintiff's driveway and the fence. No evidence was offered to suggest any interference with the plaintiff's use of her property.

This would appear to be a very trifling matter, and in fact the court agreed with defense counsel that it indeed was, but no authorities were cited to support the defense contention that the maxim, "de minimus non curat lex", that is, "the law does not concern itself with trifles", should be applied in a case involving ownership of land.

It would also appear that the courts will involve themselves in even the smallest of land disputes and therefore one should never assume that his decision to ignore a difference of a few inches is inconsequential.

It as also said in the agreed statement of facts that there was an agreement which stated:

> "The owner of the defendant's lands prior to the defendant had agreed to the location of the fence."

This is obviously rather vague and as we shall see was of little help to the defendant, the defendant was obviously going to claim that the fence was one of convenience only and was not intended to be the property line.

The plaintiff claimed that she had acquired possessory title of the land in question by reason of use and occupation for the 34 years from 1943 to 1977 when the fence was moved.

The learned judge quoted the requirements to establish possessory title as stated by Mr. Justice Lerner in "Raab v. Caranci" (1977), 24 O.R. (2d) 86 at 90, 97 D.L.R. (3d) 154 and affirmed by 24.O.R. (2d) 832 n., 104 D.L.R. (3d) 160n (C.A.).

Mr. Justice Lerner, citing other precedents, stated as follows:

> "1. Actual possession for the statutory period by themselves and those through whom they claim;
>
> 2. That such possession was with the intention of excluding from possession the owners or persons entitled to possession; and
>
> 3. Discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession."

You must note that all of these requirements must be met throughout the entire ten year period as provided by Sections 4 and 15 of the Limitations Act.

We will recall that Section 4 requires that the owner must attempt to repossess the land within the ten year period and Section 15 states that if that period has passed then his right of recovery has lapsed.

Obviously both sections have been satisfied by the 34 year possession period.

Defense counsel, in rebuttal tried to make the point that the written agreement quoted above would defeat this claim for adverse possession; this argument was not agreed with by the judge.

It is obvious that some written agreements, for example one which stated that plaintiff could use the land for ease of getting out of a car but it belonged to the defendant or his predecessor, would negate any claim to possession, but this agreement did not so state.

Firstly the plaintiff was not a party to the agreement.

Secondly the agreement was not very detailed.

The onus is clearly upon the defendant to prove that the agreement contained sufficient evidence to negate the claim of possession.

If the fence was located in a mutually agreed position and thought to be on the boundary with both parties ignorant of the true line then adverse possession would not be negated. This is the only reasonable construction to use.

In this case the judge supported his decision in favour of the plaintiff by using, in addition to the case quoted, two other cases previously referred to in this paper, "Bea v. Robinson" (1977) and "Martin v. Weld" (1860), thus demonstrating the judicial use of precedents.

An important lesson to be learned from this case and the previous cases outlined is that a surveyor should never blindly accept fences as lot lines, nor should he simply lay out deed or proportion. Investigation of the age, ownership and purpose of the fence both in the field and in the registry office (deeds and deposits) will enable you to do a far better job for your client, his neighbours and the surveyor who follows you.

I believe that all of the above points out that fences and other occupational evidence must be given full weight by the surveyor when determining boundaries. Let us strive to obtain all the evidence before resorting to the easy job of proportioning or laying-off. Remember the "Gospel" according to Cooley.

In conclusion, I would like to say "thank you" to Ken Brooks of our office for his illuminating sketches and titles, to my secretary, Betty Marshall, for her typing and to Bob Gaspirc for turning the pages.

Credit is also due to Michael Smither, whose book "Fences in Ontario" provided some fine examples of fences and posthumously, to Harry Symons and S.W. Jeffreys for the marvellous information in Mr. Symons' book "Fences".

I hope that I have been able to provide you with some insight on the subject of fences and the law, and that I shall be able to research and publish additional material for the use of the profession regarding highways and railways in the near future.

Thank you.

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