AOLS

SURVEY LAW SEMINAR

HANDOUT MATERIAL

sessions 1, 2 & 3

1986

A.O.L.S. LECTURE SERIES: 1985

SURVEY LAW

TOPIC I

The Nature of Law and the Legal System -- Part A

The bare essentials of patterns and processes.

D. W. Lambden

Sources, relevance and significance of the common law
Evolution of the equity jurisdiction
Actions in contract, tort and real property to 1885 and the passage of the Ontario Judicature Act.

I. deRijcke

Current procedural law: Courts of Justice Act, S.O. 1984

PURPRESTURE

Late Middle English. [adoption of Old French pur-, pourpresture, altered from por-, pourpresure, formed on pourprendre to occupy, enclose, encroach upon, etc. from por- (as a regular phonetic descendant of Latin pro-) + prendre (as a regular phonetic descendant of Latin praehender) to seize, take.]

LAW. An illegal enclosure of or encroachment upon the land or property of another or (now only) of the public; as by an enclosure or building in royal, manorial or common lands, or in the royal forests, an encroachment on a highway, public water way, etc.

b. A payment or rent paid to a feudal superior for liberty to enclose land or erect any building upon it. Late Middle English.

Excerpt from The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill ,written in the years 1187-1189.

In the making of ... purprestures the boundaries of land are often broken across and encroached upon; in such a case, if either of the neighbours complains of this in court, the sheriff shall be commanded by the following writ to have a view of those boundaries taken by lawful men of the neighbourhood and, in accordance with their oaths, to cause them to be restored as they ought to be and customarily were in the time of King Henry, grandfather of the lord King:

(This would take the boundary determination back to the time of Henry I who reigned 1100 to 1135.)

Writ for making reasonable boundaries between different tenements

THE KING TO THE SHERIFF, GREETINGS.

I command you to establish, justly and without delay, reasonable boundaries between the land of R. in such-and-such a vill and the land of Adam de Biri in Biri, as they ought to be and customarily are, and as they were in the time of King Henry my grandfather, concerning which R. complains that Adam has, unjustly and without a judgment, occupied more than belongs to his free tenement in Biri; that I may hear no further complaint of default of justice in this matter.

Witness my hand and seal, etc.

MAXIMS OF EQUITY

1. Equity acts *in personam.*
2. Equity acts on the conscience.
3. Equity will not suffer a wrong to be without a remedy.
4. Equity follows the law.
5. Equity looks to the intent rather than the form.
6. Equity looks on that as done which ought to be done.
7. Equity imputes an intent to fulfil an obligation.
8. Equitable remedies are discretionary.
9. Delay defeats equities.
10. He who comes into equity must come with clean hands.
11. He who seeks equity must do equity.
12. Equity regards the balance of convenience.
13. Where there are equal equities the law prevails.
14. Where there are equal equities the first in time prevails.
15. Equity, like nature, does nothing in vain.
16. Equity never wants (i.e., lacks) a trustee.
17. Equity aids the vigilant.
18. Equality is equity.

CLASSIFICATION OF EARLY ACTIONS

REAL ACTIONS for the recovery of lands and other realty.

PERSONAL ACTIONS to recover a debt, a personal chattel or damages for breach of contract. These inluded, obviously, the actions in contract and in tort, but a clear distinction between the two did not evolve until fairly recently.

MIXED ACTIONS included those for recovery of land and for damages. One of these was the action of ejectment.

PERSONAL ACTIONS BEFORE 1885 IN ONTARIO

TRESPASS - an action in tort - for damages for direct and forcible interference with land or goods or injury to the person.

REPLEVIN - an action in tort - for recovery of specific goods taken (an action sometimes muddled up with trespass).

DETINUE - an action in tort - for recovery of specific goods detained (withheld) from the rightful owner.

CASE - an action in tort - for damages arising from a wrongful act or breach of duty or for violation of an absolute right - the last a very wide group of rights.

TROVER - an action of tort - and a special form of case - for recovery of the value of goods.

DEBT - an action of contract - for recovery of a specific sum due.

COVENANT - an action of contract - for damages for breach of a covenant in a deed, but not in respect of a covenant to pay money.

ASSUMPSIT - an action of contract - for damages for breach of a promise not made by deed but otherwise expressed or implied.

TERMINOLOGY

By the Plaintiff
- pleadings -
  - issues
  - declaration
    - counts

By the Defendant
- demurrer
- pleading
  - traverse
  - confession and avoidance
  - plea of estoppel

ROUND TWO!

By the Plaintiff
- replication
  - demurrer
  - pleading

By the Defendant
- rejoinder

And then-----
- surrejoinder
- rebutter
- surrebutter

until the definite issues of law or of fact were clearly enunciated.

A.O.L.S. LECTURE SERIES: 1985

SURVEY LAW

TOPIC 2

Review of the bare essentials of the law of evidence

I. deRijcke

The law: significance, evaluation and place of evidence in the legal process

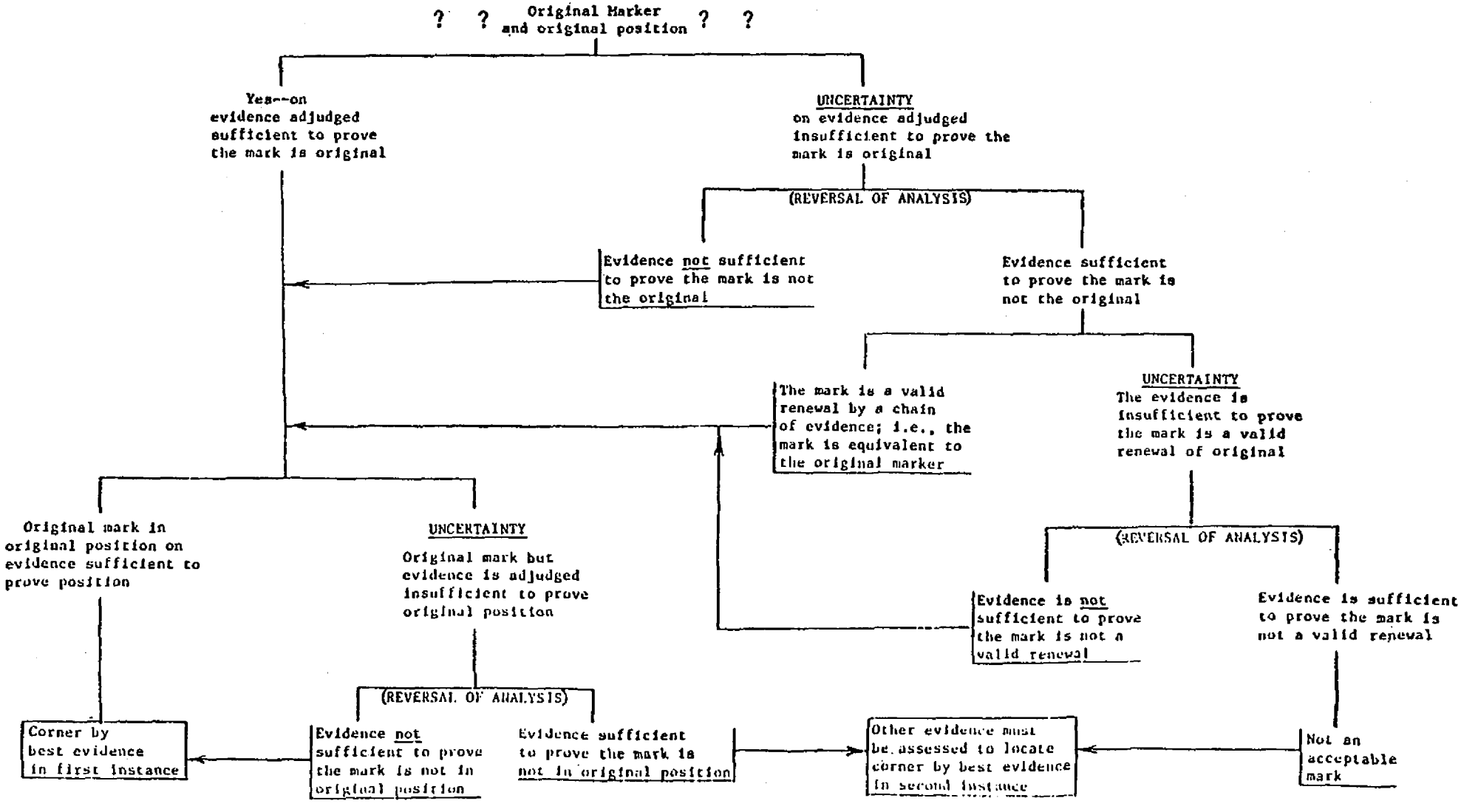
D. W. Lambden

A concept demonstrated for argument and analysis.

THE TREATMENT OF A MARKER FOUND:

BY THIS MARKER, HAS THE CORNER BEEN FOUND?

* The onus of proof is on the party who wishes to upset the settled situation. This principle must guide process of thinking.



D.W.L. 25.3.80

A.O.L.S. LECTURE SERIES: 1985

SURVEY LAW

TOPIC 3

Concepts of Boundaries

D. W. Lambden

Overview of the various types of boundaries and their origins and attributes.

R. J. Stewart

The origins and status of boundaries: a demonstration by the cases.

SURVEYS ACT, R.S.O. 1980, c. 493.

2. No survey of land for the purpose of defining, locating or describing any line, boundary or corner of a parcel of land is valid unless made by a surveyor or under the personal supervision of a surveyor.

SURVEYS ACT, R.S.O. 1980, c. 493.

3. All lines, boundaries and corners established under the authority of any Act heretofore or hereafter in force remain valid and all other things done under any such authority and in conformity therewith remain valid notwithstanding the repeal of such authority.

SURVEYS ACT, R.S.O. 1980, c. 493.

8 - Every base line and meridian line surveyed under the instructions of the Minister before the 28th day of March, 1956, that are shown on the original plan thereof shall be deemed to have been made by competent authority and are true and unalterable and shall be deemed to be defined by the original posts or blazed trees in the survey thereof.

The bare essential details are these:

1. South Australia was created as a Province in 1836, with its eastern boundary to be the 141st meridian of east longitude;

2. Within a decade the necessity arose of defining the boundary between the Province and that part of New South Wales which became Victoria in 1850;

3. Joint and common arrangements were made and the survey conducted between 1845 and 1847 in which 123 miles of the line were run northward from the sea towards the Murray River, clearly marked and monumented, and shown on official maps and officially proclaimed;

4. Under a further agreement the boundary line was extended north to the Murray River in 1850;

5. In 1868, a joint commission between New South Wales and South Australia made longitude observations at the Murray River preliminary to running the line further to the north and it was then found that the earlier line was 2 miles 19 chains west of the new fix of the 141st east meridian;

6. After much correspondence and debate the State of South Australia brought the case before the High Court in 1911 and, losing the action, to the Privy Council.

Propositions of uniform application in common law, of which the Ontario example is only one example, may now be stated:

1. "The position of a boundary is primarily governed by the expressed intention of the originating party or parties or where the intention is uncertain, by the subsequent behaviour of the parties (or beneficiary of the severance) pursuant to any such expressed or implied intention."

2. "That which is intended to set a limit to the laterality of a boundary is referred to as its 'bound'. What constitutes the bound for any particular boundary is a question of law."

3. "Where the bounds are to be located [i.e., found] on the ground is a question of fact to be determined in the light of the best admissible evidence."

FORMS OF TITLE SEVERANCE

(The list may not be all inclusive)

A. DOCUMENTARY

(i) Where the intention to sever is unilateral -

(a) deed of gift
(b) devise
(c) compulsory aquisition - expropriation
(d) dedication to the public
(e) proclamation of vesting
(f) statutory vesting
(g) order of Court
(h) plan registration (followed by conveyance/ mortgage of one lot therein).

(ii) Where the intention is bilateral or multilateral -

(a) bargain and sale
(b) partition
(c) agreement as to position of a lost or confused boundary. (Theoretically this is not a title severance but factually it is.)
(d) quit claim

(iii) By statute law for the division of Crown lands - the 'systems' of the Surveys Act).

B. NON-DOCUMENTARY

(i) Presumption of common law

(a) ad medium filum rule
(b) doctrine of accretion (includes erosion)

(ii) Statutory impositions

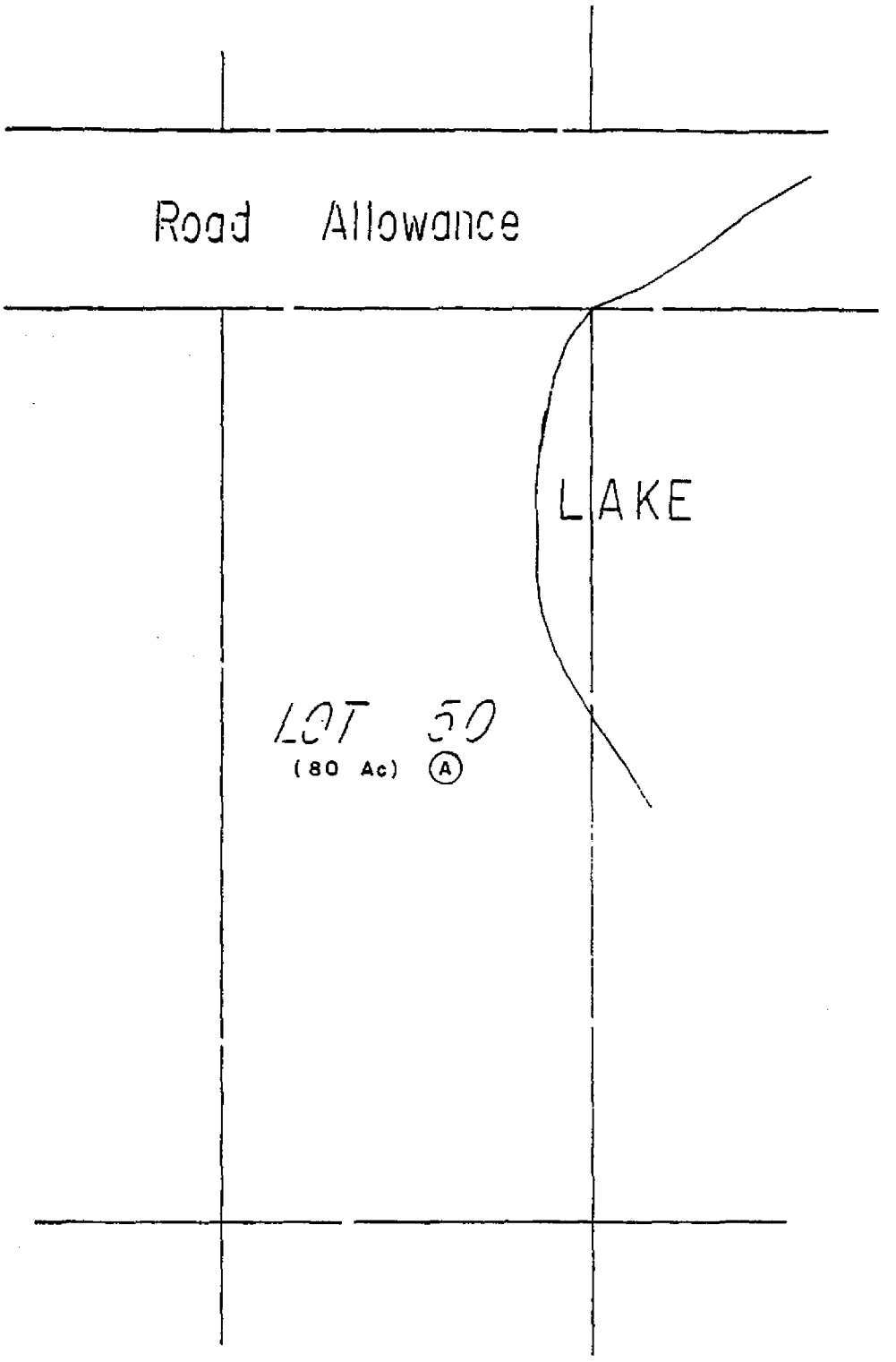
(a) adverse possession against the Crown
(b) adverse posession against a municipality in respect of a road allowance
(c) adverse posession against a freeholder
(d) prescription and user

ABSTRACT FOR LOT 50, CONCESSION 22, TOWNSHIP OF HYPOTHESIS

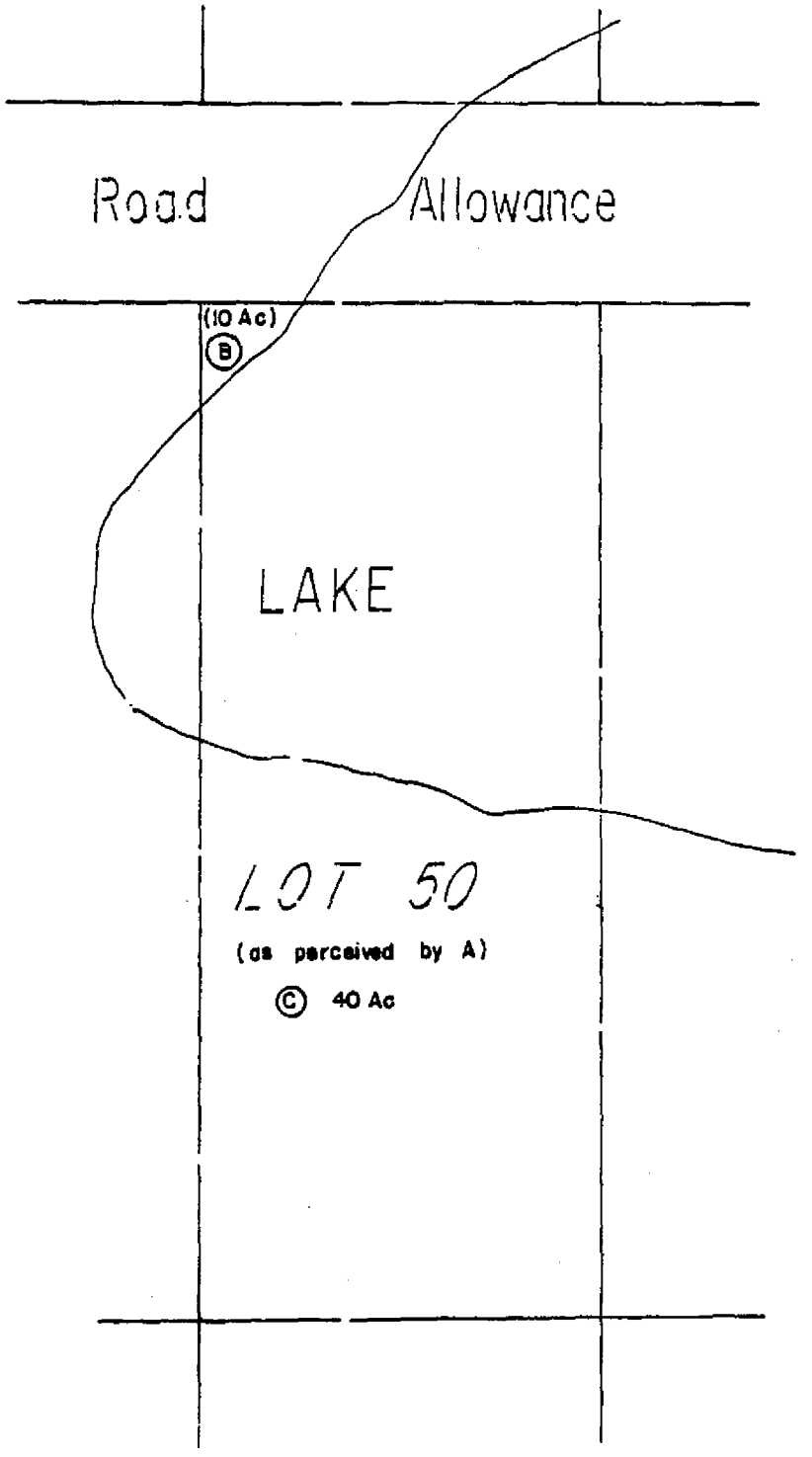
NO.	INST.	DATE	REG.DATE	GRANTOR	GRANTEE	REMARKS
	Patent	1940		Crown	A	all, 80 acres
120	Grant	1956	1956	A	B	all north of lake, 10 ac.
220	Grant	1957	1957	A	C	all except No. 120, 40 ac.
320	Deposit	1975	1976	A deposes that No. 220 not intended to convey balance, but only easterly portion of lot, retaining west 30 ac.		
321	Quit Claim	1976	1976	C	A	west 30 ac.
382	Grant	1979	1979	A	D	west 30 ac. (sketch attached)
420	Grant	1980	1980	B	E	all north of lake, 10 ac.
520	Grant	1983	1983	C	F	all except No. 120 and No. 382 40 ac.

Note: Between 1940 and 1956, A paid taxes on 50 acres.

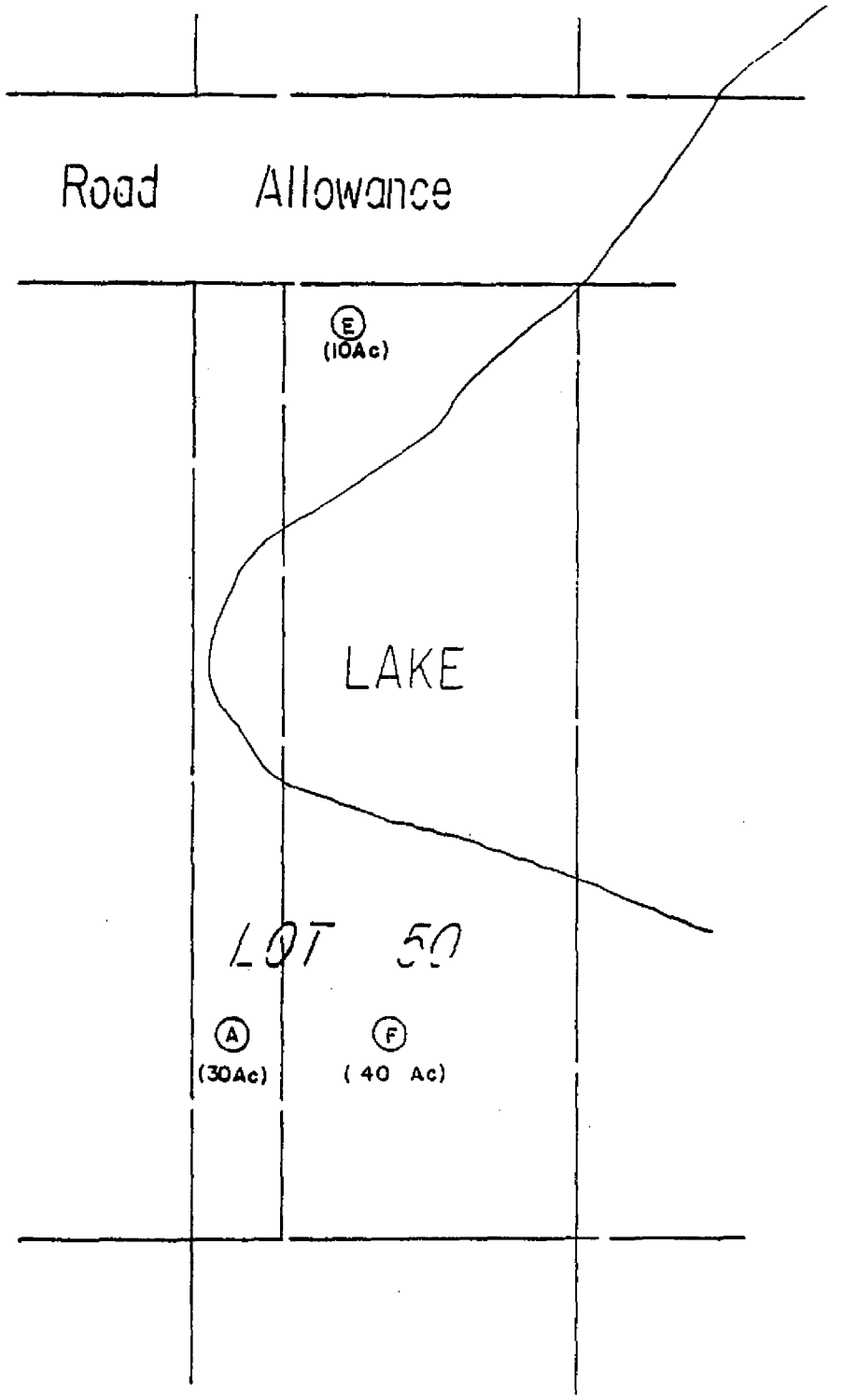
ORIGINAL PLAN



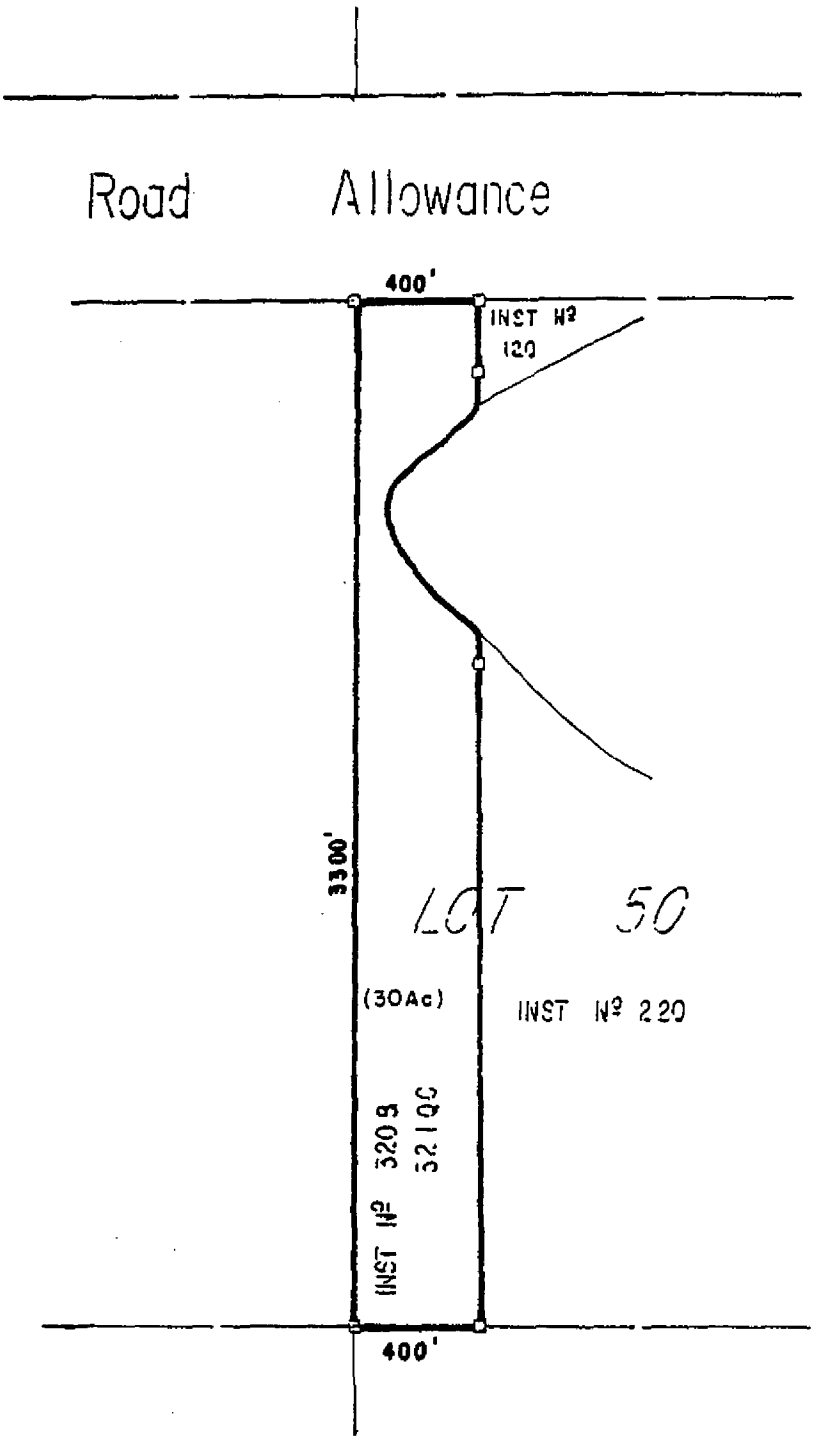
CONCEPT UNTIL 1975



ACTUAL SITUATION



SURVEY PREPARED FOR (A) BASED ON INST Nº 321



BOUNDARIES - ALIQUOT PARTS OF LOTS - POSSESSION TO AGREED LINES - FENCES

Forrest v. Turnbull (1909), 14 O.W.R. 478 (Ont. H.C.); (1909), 14 O.W.R. 930, 1 O.W.N. 150 (Ont. C.A.).

This case illustrates the importance of agreements between parties in the creation of a boundary, especially when those agreements are executed upon the ground.

Two brothers, James and Robert Forrest, inherited a 200 acre lot and a 50 acre aliquot part of another lot when their father died. The 50 acre lot was held by both as tenants in common, each with a 1/2 interest. The 200 acre lot was divided: the north half, containing 100 acres, went to James and the south half, containing 100 acres, went to Robert. Subsequently two boundary problems arose.

First, a rail fence existed as the dividing line between the north and south halves of the 200 acre lot and up to this fence both parties cultivated for over 10 years before a new dividing line was measured in by the brothers and found to be 67 links south of the old rail fence at the eastern side of the lot, about 21 feet south at the centre and coinciding near the western side of the lot. Robert never acknowledged this new line and continued to cultivate to the old rail fence. Upon his death, Annie Turnbull (a sister) received title to Robert's land. James then erected a fence on the new line, which was taken down by Turnbull.

The second problem arose when Robert and James began to use the west and east halves, respectively, of the 50 acre aliquot parcel, with the agreed boundary to be an irregular fence approximating the division of area. When Annie Turnbull inherited title to the westerly 25 acres from Robert's estate, James claimed the fence encroached on his land by 10 feet throughout, basing his claim on a precise area determination.

In both situations, the court decided that the old fences, being placed by and agreed upon by both parties, and having been lived up to for over 10 years without dispute, were fixed as the boundaries dividing the separate titles. One quote (at page 481) is worthy of note:

> "Even without a fence, if the brothers had agreed upon a line and lived up to it for 10 years, it would have been conclusive against the plaintiff's [James] contention.

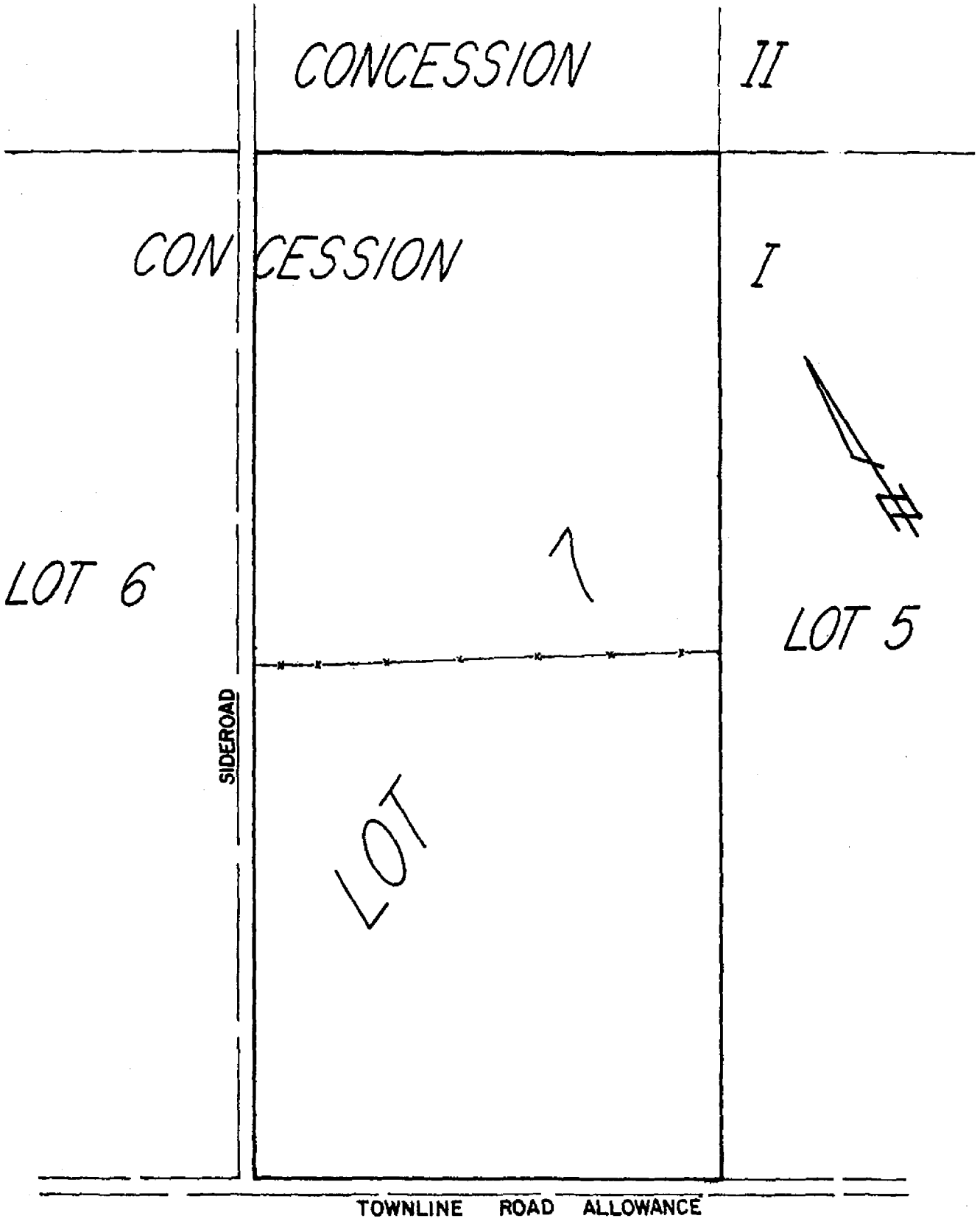
The case is interesting in that the descriptions of the two 100 acre parcels showed no ambiguities (a situation that always arises with aliquot part divisions unless a metes and

bounds description or other specific terms are incorporated), and yet an agreed upon fence, as evidence extrinsic to the deeds, was considered to be the true boundary as opposed to a mathematical interpretation and survey determination of the "North Half" and "South Half". The same rule was applied to the division line of the 50 acre parcel into east and west halves.

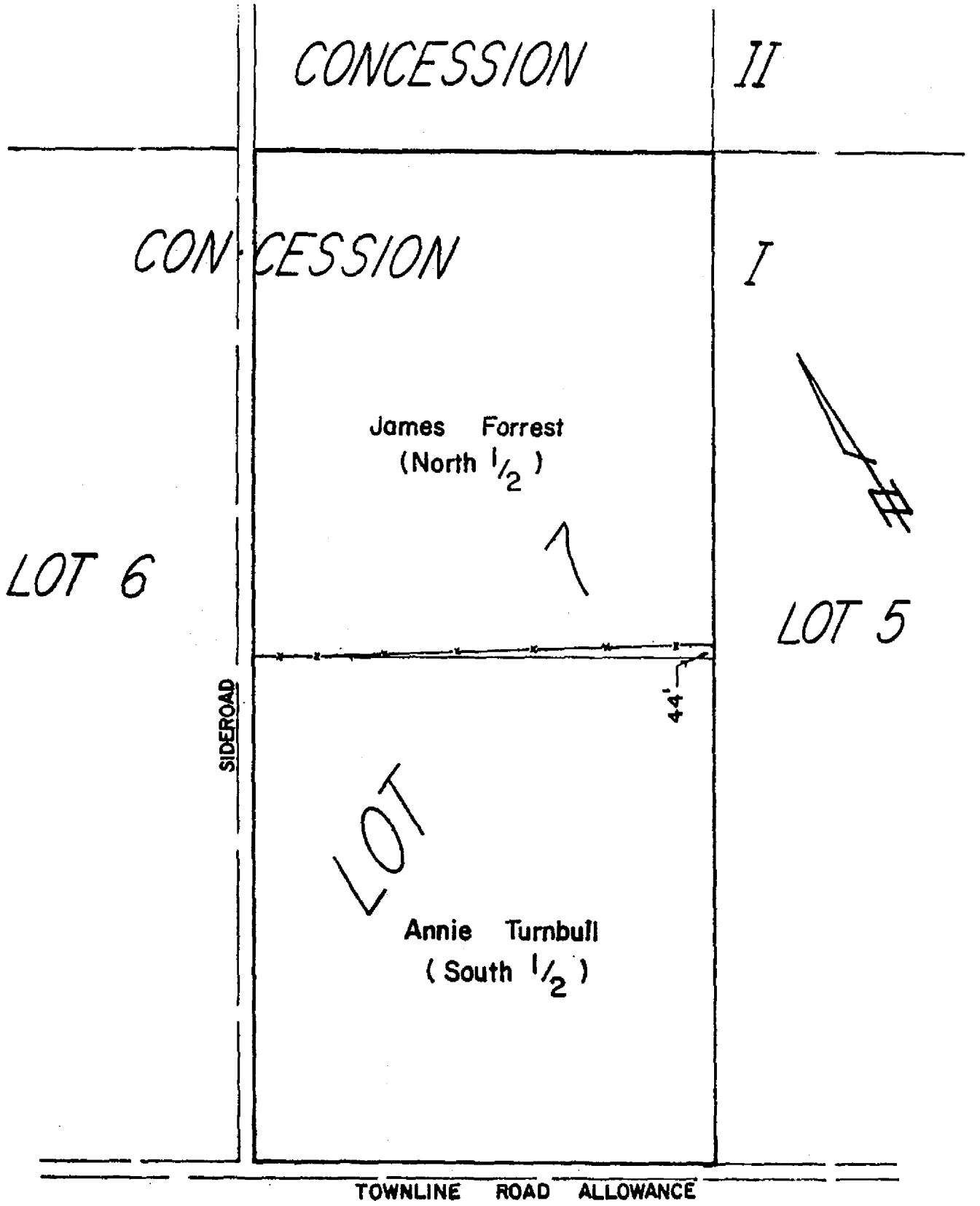
Both boundaries were settled by agreement between adjoining owners in the creation of the severance lines. It appears, then, that evidence of such agreement is sufficient to create a latent ambiguity in a description which, on the surface, appears to be unambiguous.

Surveyors, when encountering occupational lines at variance with title descriptions, should be prepared to investigate the origins of those lines and ascertain whether any agreements, parol or otherwise, existed at the time of the severance.

10/10/85
R.J. Stewart



FORREST v. TURNBULL



FORREST v. TURNBULL

MacMahon, J. JULY 13TH, 1909.

FORREST v. TURNBULL.

Boundary—Action to Settle—Line Fence—Adverse Possession.

Held, that where persons have agreed to a divisional line between lands and have lived up to it for 10 years, even without a fence, such division would be conclusive evidence of ownership.

G. G. McPherson, K.C., for plaintiffs.

R. S. Robertson (Stratford), for defendant Annie Turnbull.

J. J. Coughlin, for defendant Robert Turnbull.

Tried at Stratford Non-jury sittings on 17th June.

MacMahon, J.:—Robert Forrest was the owner in fee of Lot number 7 in the 1st concession of the township of Wellesley, in the county of Wellington, containing 200 acres; and also of the north quarter of lot number 6 in the said 1st concession, containing 50 acres more or less.

He died on the 5th October, 1892, having left a will which turned out to be void. He left surviving him three sons, Alexander Forrest, James Forrest, and Robert Forrest, and one daughter, Annie Forrest, who in 1893 married Robert Turnbull.

By deed in triplicate, dated the 2nd December, 1893, Alexander Forrest, Robert Forrest, James Forrest and Annie Turnbull, wife of Robert Turnbull, being all the heirs and heiresses at law of the said Robert Forrest, deceased, other than the party of the third part, therein called the grantors of the first part; and Triphinia Forrest, wife of James Forrest, of the second part; and Robert Forrest, the grantee, of the third part.

479 It is recited that the said Robert Forrest, deceased, was at the time of his death seised in fee of the lands hereinafter described and that he had published his last will and testament on the 1st day of September, 1876, wherein he appointed the said Alexander Forrest executor of his will, and died without revoking said will. But that by reason of the will being witnessed by the legatees and devisees the bequests were null and void, and the parties hereto, being all the heirs of the said Robert Forrest, deceased, have agreed among themselves as to the division of said estate, and it has been agreed (on certain money considerations therein expressed) that the lands herein mentioned should be conveyed to the party of the third part (Robert Forrest), namely, the south half of lot seven in the first concession of the township of Wellesley, containing 100 acres; and also

the undivided half interest in the north quarter of lot 6 in the first concession of the said township of Wellesley, containing 50 acres.

On the same day (2nd December, 1893), Alexander Forrest, Robert Forrest and Annie Turnbull, wife of Robert Turnbull, heirs and heiress-at-law of the said Robert Forrest, deceased, conveyed to James Forrest the north half of lot 7 in the 1st concession of Wellesley, containing 100 acres, and the undivided one half interest in the north quarter of lot 6 in the 1st concession of Wellesley, containing 50 acres.

Up to the time of the death of Robert Forrest the elder, in 1892, the dwelling house, barns, &c., were on the south half of lot 7, the north half being bush land. On his death, his son Robert occupied the house, and James and his sister Annie (now Mrs. Turnbull) lived with him. Annie married Robert Turnbull in 1893—a year after her father's death, —and, although her husband had a house in Stratford, she lived from time to time with Robert as housekeeper until his death in 1901.

During the lifetime of Robert Forrest the younger, he and his brother James exchanged work with each other, although each worked the respective halves of lot 7 to which each was respectively entitled.

There was a rail fence between the north and south halves of the lot, which formed the boundary line for over ten years prior to Robert's death. In May, 1903, Robert and James chained the lot and ascertained that the northern boundary of the south half of lot 7 was on the east line of
480 the lot, 67 links south of the fence. They put up an anchor post at the easterly fence and several stakes running westerly on the new line.

The defendants said that Robert Forrest had expressed dissatisfaction with the new line as run, and he manifested his non-concurrence in it by continuing to cultivate up to the old fence, although three or four stakes had been planted on the projected new line.

James Farrell said he was with James and Robert Forrest in 1903 when they chained the east side of lot 7. One stake, he said, was put on the east line of the farm about forty feet south of where the old fence was where the old fence is indicated by the red line on the plan prepared by J. J. McKenna, O. L. S. (exhibit 8). Robert Taylor said a fence with nine strands of wire was put up after Robert's death, in 1904. The wire fence commences 67 links, or 44 feet 8 inches, south of the old fence, and about the centre of the lot is 21 feet south of the old line, and runs into the old fence, according to scale, about 250 feet from the west side of the lot.

Turnbull admitted he cut down the wire fence put up by James Forrest, and his servants under his instructions removed the posts.

On the 22nd of April, 1904, a year after the death of Robert Forrest, the younger, Alexander Forrest and James Forrest, as administrators of Robert Forrest, deceased, as well as in their personal capacity as heirs of Robert Forrest, in consideration of the sum of $9,000, conveyed to Annie Turnbull the south half of lot 7 in the 1st concession of Wellesley, containing 100 acres, and, secondly, the westerly

half of the north half of lot 6 in the 1st concession of Wellesley, containing 25 acres, owned by the deceased Robert Forrest in his lifetime.

Although Robert and James Forrest chained the east line and put down stakes, Robert did not regard the act as altering the boundary, as he continued to cultivate up to the old fence to the time of his death, as still constituting the boundary between his land and that owned by James. It is true that James put up a wire fence on the new line, but that was after Robert's death. If Robert was agreeing to a new boundary line upon which a fence was to be erected, that should have been done during his lifetime, or some written agreement should have been entered into between them shewing that he was assenting to and intended
481 to be bound by the new line, but the only corroboration as to his assenting to the new line is his taking part in the survey.

I do not think that is sufficient. Robert committed an unequivocal act after the survey shewing that he did not intend to be bound by it, as he disregarded the existence of the new line and the stakes when he continued to plow and cultivate up to the old fence which he still considered the boundary of his south half of the lot.

The plaintiff has failed as to the cause of action alleged in the third paragraph of the statement of claim.

As to the cause of action alleged in the fourth and fifth paragraphs of the claim, that the defendants are in possession of the easterly half of the north quarter of lot 6 in the first concession of Wellesley, the property of the plaintiff, described as follows:—

"Commencing at the northern boundary of the said lot at the line between the east and west halves thereof, thence southerly along the said dividing line to the southerly boundary to said north quarter of said lot. Thence easterly along said southern boundary 10 feet. Thence northerly parallel with the east and west boundaries of the said lot to the northerly boundary thereof. Thence westerly along the northern boundary of said lot 10 feet to the place of beginning.

The only satisfactory evidence as to the positions taken by Robert and James when they became tenants in common of the north quarter of the lot was that given by James Forrest himself, who said that a division was made according to an irregularly built fence in 1894 between what was supposed to be the west half and the east half of the north quarter of the lot, and they, the two brothers, agreed that Robert should own as his part what was west of that fence, the wooded part, and that James should occupy and own what was east of that fence, and they both lived up to that during Robert's lifetime, and afterwards by the defendants until this action was commenced in 1908. Even without a fence, if the brothers had agreed upon a line and lived up to it for ten years, it would have been conclusive against the plaintiff's contention. Shaw v. Steers (1882), 1 O. R. 26; McGregor v. Kriller (1885), 9 O. R. 677.

There must be judgment for the defendants dismissing the action with costs.

FORREST v. TURNBULL—DIVISIONAL COURT—NOV. 2.

Limitation of Actions.]—An appeal by the plaintiff from the judgment of MACMAHON, J., 14 O. W. R. 478, dismissing an action brought to establish the plaintiff's right to certain land, was dismissed with costs by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ. G. G. McPherson, K.C., for the plaintiff. R. S. Robertson, for the defendants.

INTERPRETATION OF DESCRIPTION - MODERN AND ANCIENT INSTRUMENTS - PATENT AND LATENT AMBIGUITIES - FALSA DEMONSTRATIO NON NOCET

Watcham v. Attorney-General of the East Africa Protectorate, [1919] A.C. 533 (P.C.).

This is a judicial interpretation of an ambiguous deed description. Not a Canadian case, it is nevertheless of importance to land surveyors in Canada as a Privy Council decision prior to 1949. The case has been applied in the Canadian courts (see, e.g., Brown v. Norbury (1931), 25 Alta L.R. 591 (C.A.) and others listed in "Cases Judicially Cited" of the Canadian Abridgment (2d) and Supplements. The decision has been highly regarded for its historical analysis of the common law with respect to the interpretation of documents (but a reading of Schuler A.G. v. Wickman Machine Tool Sales Ltd., [1974] A.C. 235) leads to a concluding editorial comment).

The case arose from an action in ejectment in which the Attorney-General for East Africa as plaintiff sued the defendant Watcham to recover possession of certain lands in the Nairobi district and for consequential relief. Watcham claimed the lands under a Crown certificate (in our terminology, a Crown patent or grant) dated December 1, 1899. The initial high court judgment held for the Attorney-General as plaintiff; Watcham appealed to the Court of Appeal for Eastern Africa and the judgment was affirmed. Watcham then appealed to the Privy Council and it is this second appeal that forms the subject of this Commentary.

Watcham claimed to be entitled to a strip of land one mile in length and one-quarter mile in depth along the south bank of the Nairobi River. The Crown certificate of 1899 described these lands — the Riverside estate -- as follows:

> "The piece of land delineated on the plan hereto attached, situate in the railway mile zone, and containing 66 3/4 acres, or thereabouts, being in extent from the intake of the Nairobi water supply down the pipe-line for a distance of one mile on the right bank of the river for a width of one-quarter of a mile from the river, and contains an area of 66 acres 3 roods, 22 perches, as per plan attached." (Note: 22 perches appears in the quoted description but otherwise in law reports it is 27 that is used.)

The description had two problems. Firstly, no plan was attached to the certificate although called for by the Regulations and by the certificate itself; there was no conclusive government plan in existence to show the extent of Watcham's title, and no other valid plan of the lands was on record in the land registry. Secondly, there are two conflicting statements in the parcel clause: (a) the area of 66 3/4 acres (or alternatively 66 acres 3 roods 22 perches) and (b) the description by the bounds enclosing 160 acres.

The question before the court, to be determined without the aid of any map, was simply this: was the extent of Watcham's grant to be fixed by the description of its area or by the description of its boundaries? The Court noted that: "It is not a very easy question."

Legal principles considered.

It was well established, as a common law rule of construction, that when the language of a deed is clear, extrinsic evidence could not be admitted to show the intention of the parties: North-Eastern Ry. Co. v. Lord Hastings, [1900] A.C. 260. It was also well established that extrinsic evidence could be admitted to interpret ambiguous ancient documents : the dictum of Sir Edward Sugden, later Lord St. Leonards, in Attorney-General v. Drummond (1842), 1 Dr. & War. 353 at 368 -- "One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what the deed means."

But here the question in 1919 was about ambiguous modern documents such as Watcham's certificate.

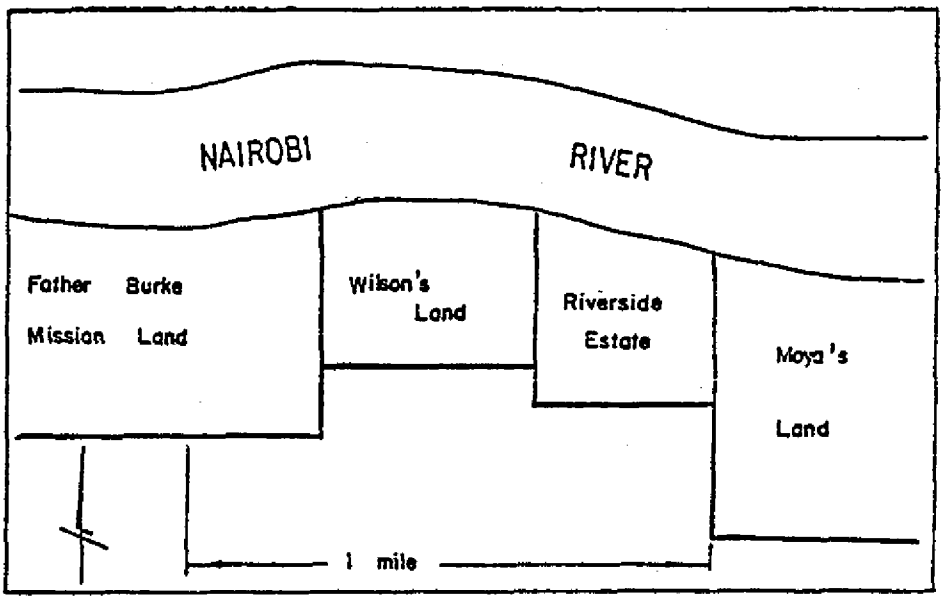
Only after a thorough analysis of relevant common law was extrinsic evidence admitted to clarify Watcham's certificate. The description contains a patent ambiguity. At common law, a patent ambiguity is one which is apparent on the face of the document. In contrast, a latent ambiguity is not apparent; the document seems certain on inspection, but the ambiguity becomes evident once extrinsic evidence is brought to light. Extrinsic evidence -- oral and documentary -- is admissible in the case of a latent ambiguity, but in general terms is not admissible to explain a patent ambiguity. For example, see Grasett v. Carter (1884), 10 S.C.R. 105 at 114 where Strong, J. recited the "well known principles of construction" (and then proceeded

to resolve the matter by other realistic considerations) Note also the rule from the earlier case of Mellor v. Walmesley, [1905] 2 Ch. 164 summed up in the present case at page 541:

> "Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statements contained in it as to the dimensions or quantity of the property, or any inaccuracy in a plan by which it purports to be described will not vitiate this description."

The Watcham case is important for it was here thoroughly rationalized that modern instruments, as well as ancient ones, with either latent or patent ambiguities can be clarified by resorting to evidence outside of the deed itself (See Eastwood v. Ashton, [1915] A.C. 454 for a modern patent ambiguity, and see Van Dieman's Land Co. v. Table Cape Marine Board, [1906] A.C. 92 for a modern latent ambiguity.

Author's sketch of the related lands – not to scale



Watcham v. Attorney-General of the East Africa Protectorate

Extrinsic Evidence Considered

1. (1902) Crown certificate of lease to Wilson of 18 Acres.
2. (1904) Permit to Watcham by the native, Moya, to occupy Moya's lands.
3. (1904) Crown conveyance to Father Burke to establish a Mission.
4. (1904) Rough sketch prepared by Watcham himself showing Wilson's lands to the west of the Riverside estate and Moya's lands to the east.
5. (1907) Private survey of the Riverside estate containing 39.7 acres, the extent of which was shown to the surveyor by Watcham's sisters (but the court did not feel that Watcham was bound by the boundaries pointed out by his sisters).
6. (1913) Watcham's claim of user, as submitted to the court of first instance by Watcham's lawyers, (At p. 545: "The certificate is his only title. His user of any of the land must therefore be a user under it.")

Court's Analysis of Extrinsic Evidence

The Privy Council believed that Watcham's actual user of the Riverside estate, was entirely inconsistent with his larger claim of 160 acres. If the boundaries mentioned in his certificate were accurate, then Wilson's land would be entirely within Watcham's grant and a large slice of the Mission land would also be included. This the court found to be untenable especially since there was no evidence that Watcham had ever granted a conveyance or a license of occupation to either the Mission or to Wilson. Finally the rough sketch which Watcham had drawn in 1904, "embodied several admissions against his present claim, to the effect that persons other than himself were owners of or were in possession of property he claimed to be his own."

Decision

The Privy Council decided that it was:

> "...clear from these facts that the statement of the boundaries contained in the certificate is no true guide to the ascertainment of the property intended to be conveyed. There is only one other guide -- the area. The choice lies between them; one or other must be falsa demonstratio. The area comes first and is repeated after the boundaries. In their Lordships' view the description of the

> boundaries is the falsa demonstratio, and the other description being complete and sufficient in itself, that of the boundaries should be rejected."

They also decided that:

> "A trifling removal of the southern boundary of the lot further southward would obviously increase the contents by 27 acres and bring the area up to the figure named."

The "trifling" shift was into remaining government lands, and was not objected to by the government.

01/04/85
J. Galejs

EDITORIAL COMMENT: We are in these issues considering the interpretation of deeds about land, and the degree to which ambiguities of wording are resolvable by the consideration of extrinsic evidence.

Ambiguity, of course, is not to be equated with difficulty of construction. In Schuler A.G. v. Wickman Machine Tool Sales Ltd., [1974] A.C. 235, the Watcham decision was not considered applicable to the interpretation of the difficult wording in the terms of the contract in dispute. Lord Simon of Glaisdale at page 269 referred to Sir Edward Sugden's dictum in Attorney-General v. Drummond as containing a logical flaw — that it really says: "if you tell me what you have done under a deed, I can at best tell you only what you think that deed means." He left the dictum as applicable to ancient documents but noted that "Watcham's case was already [by other judgements] considerably weakened as a persuasive authority" for general application to modern documents. Lord Wilberforce (at page 261) didn't like it at all ("the refuge of the desperate"). It may be weakened, but it still stands in respect of the interpretation of deeds.

So also does the general principle of law, as expressed in Norton on Deeds (1906) at page 43, apply to all written instruments: "... the question to be answered always is, 'What is the meaning of what the parties have said?' not, 'What did the parties mean to say?'... it being a presumption juris et de jure ... that the parties intended to say that which they have said."

Watcham v. Attorney-General of the East Africa Protectorate

The resolution of ambiguities which includes the isolation of a falsa demonstratio, remains solely within the jurisdiction of a court as a question of law for the judge and not as a question of fact for a jury. Section 2 of the Surveys Act, R.S.O. 1980, c. 493 settles the validity of the survey, but does not settle the boundary. A surveyor's opinion in attempting to resolve an ambiguity remains as professional opinion only. Finality of the boundary depends on some curial action which is outside the surveyor's assignment. The surveyor is quite probably providing the survey and plan as the vehicle for the action and, perhaps needless to add, the surveyor as a professional man is engaged and paid for his opinion, not for his uncertainties.

[PRIVY COUNCIL.]

WATCHAM . . . . . APPELLANT;

AND

ATTORNEY-GENERAL OF THE EAST AFRICA PROTECTORATE . . . . . RESPONDENT.

J. C.* 1918 June 11.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Evidence — Instrument — Patent Ambiguity — Evidence of User — Falsa demonstratio.

The principle that when an instrument contains an ambiguity evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent.

Where, therefore, in a land certificate issued by the Crown in 1899 there is a variance between the stated acreage and the area as described by physical boundaries (namely, one mile along a river to a width of a quarter of a mile therefrom), evidence can be given of user inconsistent with the area intended being that included in the boundaries, so as to establish that that description is a falsa demonstratio.

APPEAL from a judgment of the Court of Appeal for Eastern Africa (February 25, 1915) affirming a judgment of the High Court of Eastern Africa.

The respondent on behalf of the Government of the East Africa Protectorate sued the appellant to receive 753½ acres of land adjoining the Nairobi River, and for consequential
534 relief. The appellant claimed part of the land under a certificate, dated December 1, 1899, issued to him by the Crown under the East African Land Regulations, 1897. The area included in the boundaries stated in the certificate was necessarily about 160 acres, whereas the certificate stated that the land contained 66 acres 3 roods and 27 perches. No plan was attached to the certificate.

The material terms of the certificate and the circumstances of the case appear from the judgment of their Lordships.

The action was tried by Hamilton C.J., who held that upon the construction of the certificate the appellant was entitled to 66 acres 3 roods and 27 perches. He held that the other defences failed, and ordered possession except as to an area, to be agreed upon survey, sufficient to make up

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SCOTT DICKSON, and SIR ARTHUR CHANNELL.

with 39.7 acres appearing upon the plan edged yellow, a total of 66 acres 3 roods and 27 perches.

The Court of Appeal (Bonham-Carter and Tomlinson J.; Ehrhardt J. dissenting) affirmed the decision.

1918. May 7, 9, 10. *Hughes K.C.* and *Sheldon* for the appellant.

Tomlin K.C. and *Vernon* for the respondent.

June 11. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a decree dated February 25, 1915, of the Court of Appeal for Eastern Africa whereby that Court affirmed a decree of the High Court of Eastern Africa, dated May 8, 1913, and made in an action in which the respondent, as plaintiff on behalf of the Government, sued the appellant as defendant in ejectment to recover possession of 753½ acres of land in the Nairobi district and for subsidiary relief.

The defendant claims to be entitled to these lands under three different titles.

First, the Riverside estate, under a certificate from the Crown dated December 1, 1899, made or granted in accordance with the East African Land Regulations dated December 29, 1897, and described as follows, the words in italics being in
535 print and the rest typewritten: "*The piece of land delineated on the plan hereto attached, situate in the railway mile zone, and containing* 66¾ *acres, or thereabouts, being* in extent from the intake of the Nairobi water supply down the pipe-line for a distance of one mile on the right bank of the river for a width of one-quarter of a mile from the river, and contains an area of 66 acres 3 roods 22 perches, as per plan attached."

The second, styled Moya's land, under a permit dated March 31, 1904, issued to him by the Survey and Land Commissioner, claimed to comprise 350 acres, and the third, styled Masondo's land, alleged to have been acquired by him from Masondo, a native, and claimed to be about 350 acres in extent.

The case was tried before Hamilton C.J., who held that all the land acquired by the defendant through Moya, coloured green on a plan given in evidence at the trial, and numbered plan 1, was outside the land, the possession of which was claimed by the Government. He further held that the land acquired by the defendant through Masondo, styled in the case Masondo's land, and edged brown on said plan 1, formed no part of the area claimed by the Government, and by his decree dated May 8, 1913, ordered that the areas of the lands in respect of which the defendant paid compensation to these two natives, Moya and Masondo, and of which the plaintiff had undertaken to grant leases to the defendant were such as were shown on plan in the action, i.e., plan 1, marked respectively Moya and Masondo.

Their Lordships, after careful consideration of the evidence given in the case and the judgments of the learned Chief Justice and of the learned judges in the Court of Appeal, see no reason to differ from the conclusion which has been arrived at in respect of these two pieces of land. They think the decree pronounced as to them should be confirmed. It only remains to consider the decision arrived at in reference to the Riverside estate.

That estate was in the year 1907 surveyed by a Mr. Woodruffe, the boundaries being pointed out by the Misses Watcham, the sisters of the defendant. It is delineated on the same
536 plan and edged yellow, and as surveyed is found to contain only 39.7 acres. Their Lordships are not satisfied that these ladies were authorized by the defendant to point out the boundaries of the estates, as they apparently did, at least to some extent, and do not think that the defendant can be held bound by anything they may have said or done in reference to that subject. The Attorney-General raised no objection at the trial to the boundary of the Riverside estate being extended so as to include a total area of 66 acres or thereabouts, and the Chief Justice held that under the certificate of December 1, 1899, the defendant was entitled to occupy the land edged yellow on the plan, and a further area of 27.21 acres, and ordered that the plaintiff should survey out an additional area to the plot marked Riverside on the plan in the action, so as to make up the holding of the defendant to 66 acres 3 roods 27 poles or thereabouts, the area mentioned in the certificate. He further ordered: "That the defendant do deliver up to the plaintiff possession of all that area within the line marked in red on the said plan, save and except a sufficient area as may be agreed on the survey above mentioned and adjoining Riverside on the south, as shown on the said plan, to make up that holding to 66 acres 3 roods 27 poles or thereabouts."

By the third of the above-mentioned Land Regulations it is provided that every certificate shall be accompanied by plan of the lands, prepared or approved of and signed by a Government surveyor or other officer for the purpose of the Commission; but though words "as per plan attached" appear in the certificate immediately after the description of the parcels, no plan of the kind prescribed was attached to the certificate or produced. An effort was made to show from the conduct and admission of the defendant that a plan found in the Registry, marked 3 and not signed by anyone, had been attached to the certificate and was the plan referred to in the certificate, but in their Lordships' view the effort was not successful. The question, therefore, which their Lordships have to determine, unaided by any map, in effect resolves itself into whether the extent of the property conveyed or assured by the certificate is to be fixed by the description of its
537 boundaries or by the description of its area. It is not a very easy question.

When there is in an ancient deed or other document a latent ambiguity, extrinsic evidence of user under it may be received to ascertain its meaning. Lord Sugden, in the oft-quoted passage in *Attorney-General* v. *Drummond* (1), said: "One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means."

(1) (1842) 1 Dr. & War. 353, 368.

The reason for that rule is said to be that in the lapse of time and change of manners the words used in the instrument may have acquired a meaning different from that which they bore when originally employed: *Drummond* v. *Attorney-General*. (2) In *Waterpark* v. *Fennell* (3) Lord Cranworth states the rule of law thus: "It is certain that where parcels are described in old documents in words of a general nature, or of doubtful import, we may, indeed we must, recur to usage to show what they comprehend. Where, indeed, words have a clear definite meaning, no evidence can be admitted to explain or control them. Thus, a demise of my messuage at Dale could not by any parol evidence be shown to have been meant to describe not a messuage, but a sheet of water. The distinction is obvious."

(2) (1849) 2 H. L. C. 837, 862.
(3) (1859) 7 H. L. C. 650, 680.

But where contemporary exposition is thus relied upon on the ground that the meaning of the words of an ancient grant has changed, the instrument must be old enough to permit this change, and there must be uncertainty or ambiguity in its language: *Rex* v. *Varlo* (4); *Chad* v. *Tilsed* (5); *Lord Hastings* v. *North-Eastern Ry. Co.* (6)

(4) (1775) 1 Cowp. 248, 250.
(5) (1821) 2 Brod. & B. 403, 406.
(6) [1899] 1 Ch. 656, 661, 663; [1900] A. C. 260.

A patent and a latent ambiguity are defined in Lord Bacon's Law Tracts, reg. 23, p. 99, as follows: "There be two sorts of ambiguities of words, the one is ambiguitas patens and the other latens. Patens is that which appeareth to be ambiguous
538 upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed, that breedeth the ambiguity."

The principle of the above-mentioned decisions, so far as it is based on the probability of a change during the lapse of time in the meaning of the language used in an ancient document, cannot of course have any application to the construction of modern instruments, but even in these cases extrinsic evidence may be given to identify the subject-matter to which they refer, and where their language is ambiguous the circumstances surrounding their execution may be similarly proved to show the sense in which the parties used the language they have employed, and what was their intention as revealed by their language used in that sense.

The question, however, remains whether in such instruments as these proof of user, or what the parties to them did under

them and in pursuance of them, can be used for the like purpose. In *Wadley* v. *Bayliss* (1) it was decided that the user of a road described in an ambiguous way in an award made under an Enclosure Act by the owner of a holding by the award allotted to him, might be proved in evidence in order to ascertain the meaning of those who worded the award. In *Doe* v. *Ries* (2) Tindal C.J., in delivering judgment, the document to be construed being modern, said: "We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." The fact mainly relied upon in that case to show that the document to be construed was a legal demise, and not a mere agreement for a lease, was this: that the person who claimed to be the tenant or lessee had been put into possession and remained there. In *Chapman* v. *Bluck* (3), was practically to the same effect. Tindal C.J., in giving judgment, said: "Looking only at the two first letters between the parties, on which
539 the tenancy depends, I think this falls within the class of cases in which it has been held that an instrument may operate as a demise, notwithstanding a stipulation for the future execution of a lease. But we may look at the acts of the parties also; for there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute." Park J. said: "The intention of the parties must be collected from the language of the instrument and may be elucidated by the conduct they have pursued."

(1) (1814) 5 Taunt. 752.

(2) (1832) 3 Bing. 173. 181.

(3) (1838) 4 Bing. N. C. 187. 193, 195.

In the case of *Van Diemen's Land Co.* v. *Table Cape Marine Board* (1) the action out of which the appeal arose was brought for trespass on the foreshore of Emu Bay, in Bass's Straits. The plaintiff claimed to be entitled under a grant from the Crown, dated July 17, 1848, in which there was a latent ambiguity. One of the questions in issue was the construction of this grant, and the substantial point in controversy was whether the piece of land granted extended to low-water mark, thus including the foreshore, or only to high-water mark. The plaintiffs sought to prove their title to the locus in quo, including the foreshore, by proof of acts of ownership over it before the grant—namely, that they had been in possession of it and had spent money in improving it, and had continued in possession of it after the making of the grant. The judge at the trial rejected this evidence, and a new trial was moved for because of this rejection. The deed of July 17, 1848, contained a recital that the company had been authorized to take possession of certain lands, and had ever since been in possession thereof. It was held that the evidence abovementioned was improperly rejected. Lord Halsbury, in delivering judgment, after referring to this recital, said:

(1) [1906] A. C. 92, 93.

"When these are the circumstances under which the grant is actually made—why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? .... It would be a singular application of the maxim quoted by Coke (2 Inst. 11), 'Contemporanea expositio est fortissima in lege,' to suggest that the proof of
540 user must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed. The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intention of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the questions in debate."

The case of *North-Eastern Ry. Co.* v. *Lord Hastings* (1), above referred to, is not inconsistent with this case, as in it the decision was rested solely on the fact that the language of the instrument to be construed was plain and unambiguous. (1) [1900] A. C. 260.

These cases, their Lordships think, establish the principle that even in the case of a modern instrument in which there is a latent ambiguity, evidence may be given of user under it to show the sense in which the parties to it used the language they have employed, and their intention in executing the instrument as revealed by their language interpreted in this sense. The question remains, however, whether such evidence can be adduced for the same, or a similar purpose, where the ambiguity in the language of the instrument is patent not latent, as when for instance the description by the boundaries of the property granted conflicts with its description by its acreage, especially where those boundaries are fixed by or measured from natural physical features of the locality. Parcel or no parcel is, no doubt, a matter of fact to be decided by the judge or judges of fact. Extrinsic evidence may be given, as in *Doe* v. *Webster* (2), where a garden proved to have been occupied with a house was held to have passed with the house under the word appurtenances. Direct evidence of the intention of the parties to it is of course inadmissible. Where in a grant of land there is a discrepancy between the parcels as described, and any plan referred to then as far as that discrepancy extends, the description of the parcels will generally
541 prevail: *Horne* v. *Struben.* (1) Where a deed contains an adequate and sufficient definition of the property which it was intended to pass, any erroneous statements contained in it as to the dimensions or quantity of the property, or any inaccuracy in a plan by which it purports to be described will not vitiate this description: *Mellor* v. *Walmesley.* (2) (2) (1840) 12 Ad. & E. 442. (1) [1902] A. C. 454. (2) [1905] 2 Ch. 164.

Where in a grant the description of the parcels is made up of more than one part, and one part is true and the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a falsa demonstratio, and will not vitiate the grant. It may, however, operate as a restriction: *Morrell* v. *Fisher*. (3) It is immaterial, moreover, in what part of the description the falsa demonstratio occurs: *Cowen* v. *Truefitt*. (4) In *Eastwood* v. *Ashton* (5) four heads of identification of the parcels were mentioned in the instrument to be construed. The fourth was a plan endorsed on the deed and coloured pink. The first three of these were uncertain and insufficient, and the plan was accordingly preferred and adopted. In the case of *Herrick* v. *Sixby* (6), a piece of land, about 140 or 150 acres in extent, was divided into two lots and sold. The eastern portion became vested in the appellant. It was described in the deed of conveyance as containing about 90 acres, more or less; the western portion, vested in the defendant, was described as containing about 50 acres. The descriptions in the deeds do not agree as to the way in which the boundary line between them should run. It was found that on the language of the deed it was very doubtful where it was intended the boundaries should run, the description of them equally admitting of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making that quantity different; the former was held to prevail. At the trial the respondent went into considerable evidence to prove his continuous possession and enjoyment of the land claimed in accordance with the construction of the deed which
542 he relied upon. This evidence was not dealt with by Sir Richard Kindersley, who delivered the judgment, as inadmissible, though he found it to be unsatisfactory. Sir William Erle, Sir James Colvile, and Sir Edward Vaughan Williams formed with him the Board. And it is scarcely possible that if they considered this evidence of possession and acts of ownership to be inadmissible, that fact would not have been mentioned.

(3) (1849) 4 Ex. 591, 604.
(4) [1899] 2 Ch. 309.
(5) [1915] A. C. 900.
(6) (1867) L. R. 1 P. C. 436.

In *Booth* v. *Ratté* (1) the Crown, under the great seal of the Province, granted to one Joseph Aumond a piece of land in the town of Bytown, styled a water lot, bounded as therein described. One of these boundaries was described as "from a point on the River Ottawa, two chains distant from the shore, southerly parallel to the general course of the shore to a point on the northern limit of Cathcart Street, produced on a course of south 66.30 west distant 2 chains from the aforesaid shore of the River Ottawa." The grantee sold portions of this lot to different persons, one of whom was Amable Prevost, to whom he by deed dated November 2, 1867, conveyed the lot described in the grant from the Crown, excepting those portions conveyed to the other purchasers. By deed of July 23, 1867,

(1) (1890) 15 App. Cas. 188.

Prevost conveyed to the plaintiff Booth part of the water lot so granted to Aumond, describing the boundary towards the river, as " thence along the northerly line of Cathcart Street in a westerly direction to the water's edge of the River Ottawa, thence along the water's edge down the stream in a northerly direction to the line of Bolton Street." Here the boundary on the river's side is called the water's edge, whilst in the Crown Grant the boundary on the land granted is described as two chains from the shore. The plaintiff before the conveyance to him was executed was put into possession by Prevost. The contention of the defendants in the original action and on the hearing of the appeal was to the effect that the words " along the water's edge " meant the line which separated the land from the water, and that the plaintiff was not entitled to any strip of subaqueous soil. The plaintiff was allowed to prove acts of ownership over this subaqueous
543 strip, by the erection of a large floating wharf and boating-house moored to the bank of the river, the use and occupation of which he had been permitted to enjoy for many years without objection by the Crown or Prevost. It was held that the description in the conveyance was capable of being explained by possession, and that the possession which in that case followed upon the conveyance was sufficient to give the plaintiff as against Prevost a good prima facie title to the whole of the two chains.

In all these cases the ambiguity, such as it was, was patent not latent. They in no way conflict with the decision in *Clifton* v. *Walmesley* (1), to the effect that where a covenant in a lease is clear and unambiguous the parties whatever their intention, in fact, may have been on entering into it are bound by its terms and extraneous evidence cannot be received in explanation of it. To the same effect are the judgments of Lords Blackburn and Watson in the *Trustees of the Clyde Navigation* v. *Laird.* (2) The case of *Cooke* v. *Booth* (3) to the contrary effect has been discredited and cannot now be regarded as well decided: *Baynham* v. *Guy's Hospital.* (4)

(1) (1794) 5 T. R. 564.

(2) (1883) 8 App. Cas. 658, 670, 673.
(3) (1778) 2 Cowp. 819.
(4) (1796) 3 Ves. 294.

Now, applying the principles established by these authorities to the present case how does the matter stand as regards the first issue upon which the case went to trial—namely, what is the area covered by the original certificate of the Riverside estate, granted by Government to the defendant to which he is now entitled ?

It appears from the judge's note that on April 30, 1913, the defendant put in a medical certificate to the effect that he should not strain his voice, and alleged that he was very unwell, but he never then or at any subsequent sitting of the Court was examined to establish into what area of land he went into possession under the certificate of December, 1899,

or what acts of ownership he exercised over any, and if so what portion of the land he now claims. It is found by Hamilton C.J. and not disputed, that the area included
544 within the boundaries mentioned in the certificate is 160 acres in extent.

It is also found by the Chief Justice that a Mr. Wilson had for several years before 1904 occupied under the Government a plot of land, 18 acres in extent, L.O. No. 991. This plot would, if the boundaries were correct, form portion of the 160 acres. In addition, the defendant when applying for a certificate for Masondo's land furnished a rough sketch, No. 7, which showed that his Riverside estate was bounded on the west by Mr. Wilson's holding. If the defendant was the owner and occupier of the whole 160 acres this sketch amounted to an admission by him against his proprietary interest. It was urged that Wilson might have acquired his portion either by assignment from the defendant, or from the Government with the defendant's consent. There was no proof whatever of any transaction of this kind. On the contrary a certificate was in the year 1902 given to Wilson by the Commissioner to hold this 18 acres of land direct from the Government for ninety years. No evidence was given on the behalf of the defendant to explain how it came about that he was from before 1902 out of possession of portions of the land he now claims as his own, or how it came about that the Crown in 1902 conveyed it to another, without, as far as it appears, his consent or concurrence. If, however, all that was conveyed to the defendant by certificate was 66 acres 3 roods and 27 poles no such difficulty presents itself since Wilson's holding might well lie outside that area.

Again the rough sketch represents the defendant's holding as bounded on the east by Moya's holding abutting upon the River Nairobi, as both the Riverside and Wilson holdings are represented to do. The permit, dated March 31, 1904, given to the defendant to occupy Moya's holding and accepted by him describes that holding as adjoining the Riverside estate. In this respect the rough sketch must be accurate, but if the relative dimensions of the three plots of land be looked at either on the sketch map, or on the so-called trial map, it is perfectly clear that the river frontage of Riverside could not approach
545 the mile in length which, if the boundaries in the certificate were accurate, it should do.

Again the rough sketch represents Wilson's holding as bounded on the west by the mission holding, also abutting on the same river. If the boundaries were accurate the mission holding would be cut by a line drawn from the intake at right angles to the course of the river, as it is contended it should be, and a large slice of that holding would be included in the 160 acres which the defendant claims. In fact, this mission

land appears to have been sold to Father Burke, presumably as trustee for the missions, and conveyed to him by the Crown by an agreement dated July 12, 1904. In this case, as in Wilson's, there is no proof whatever that this was done with the consent or approval of the defendant; or that Father Burke acquired any interest in the land from the defendant.

If the defendant was the grantee of the 160 acres included within the boundaries as he claims to be, this rough sketch would necessarily involve and embody several admissions against his proprietary interest to the effect that persons other than himself were owners of or were in possession of property he claimed as his own. The certificate is his only title. His user of any of the land must therefore be a user under it. It is a user, however, entirely inconsistent with the larger claim, since it only amounts to the possession and enjoyment of a small portion of that area lying along a comparatively short stretch of the river, not a mile of it. No doubt the part within the map edged yellow is less than the acreage stated in the certificate. The extent of the river frontage of it is not so inconsistent with the area as it is with the boundaries. A trifling removal of the southern boundary of the lot further southward would obviously increase the contents by 27 acres and bring the area up to the figure named.

It is, their Lordships think, clear from these facts that the statement of the boundaries contained in the certificate is no true guide to the ascertainment of the property intended to be conveyed. There is only one other guide—the area. The choice lies between them; one or other must be a falsa demonstratio. The area comes first and is repeated after the
546 boundaries. In their Lordships' view the description of the boundaries is the falsa demonstratio, and the other description being complete and sufficient in itself, that of the boundaries should be rejected.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Thompsons, Quarrell & Jones.*
Solicitors for respondent: *Burchells.*