Walker et al. and Attorney General for Ontario

[1970] O.J. No. 1634, [1971] 1 O.R. 151, 14 D.L.R. (3d) 643

Ontario Supreme Court - High Court of Justice

August 20, 1970.

[1] STARK, J.:— In these proceedings the applicants seek to have their titles quieted. The applicants' chains of title have already been examined by the Referee of Titles at Toronto and the matter came before me to determine the one remaining and outstanding question involved, namely as to whether the ownership of the applicants' lands includes the ownership of the beach down to the water's edge. Their claim to ownership of the beaches is contested by Her Majesty the Queen in right of the Province of Ontario, the Crown claiming that the beach in question is Crown land. The proceedings were lengthy, embracing 17 days in which viva voce evidence was taken, followed by 10 days of argument by counsel. Numerous witnesses, both lay and expert, testified and 126 exhibits, some of them very voluminous, were received in evidence. Considerable evidence was received which, on later examination, has proven to be of slight value, but in view of the wide freedom given to the Judge in investigating the title under s. 8 of the *Quieting Titles Act*, R.S.O. 1960, c. 340, and in view of the importance of the matter to the parties concerned, I deemed it wise in numerous cases to accept evidence which normally would not be receivable in a Court of law. For purposes of convenience, I have placed titles upon various sections of this judgment.

1. The Problem

[2] The north shore of Lake Erie in the Township of Bertie has long been attractive to summer residents. The beaches are extensive and sandy and a colony of summer residents along this area known as "the Thunder Beach area", for many years have enjoyed privacy and seclusion. They have erected quite substantial cottages, have cultivated their grounds and have enjoyed swimming and boating and other summerlike amenities. Until recently, the public made little attempt to use the beaches in front of the applicants' cottages. However, some three or four years ago, a road allowance now known as Centralia Ave. and running between lots 16 and 17 in Bertie Township was opened up, at least to the extent that the public could reach the beach via this road allowance. The result has been that in these last few years, the public using this road allowance has spread out along the beaches, both to the east and west of the road, and the summer residents have lost much of the privacy which they enjoyed over many years. In effect, large numbers of the public are now treating these beaches as public property by picnicking, camping, building bonfires and, in the eyes of the applicants, trespassing generally and committing nuisances greatly to the applicants' detriment.

[3] The Crown resists this claim, contends that the lands in question are ungranted lands and are the property of the Crown, that the beach is the bed of Lake Erie, that the public have exercised rights of user on the beach in question over a long period of time, that on a proper construction of the patents and the surveys the beach or shore was not included in the grant, and that the applicants' chain of title discloses no title to any part of the beach claimed below high water mark. Thus, the essence of the question is simply this: do the applicants own their lands to the water's edge or only to the high water mark of Lake Erie?

2. The Patents from the Crown

[4] The chain of title of the applicants commences with two patents from the Crown. The one is dated March 14, 1798, to Daniel McQueen, relating to lot 16 and the broken front and the second is dated May 17, 1802, to Alexander McQueen, with respect to lots 17 and 18 and the broken front of lot 17 of the said township. In view of the importance of these two documents, they are now quoted in full from the certified copies which appear as exs. 58 and 59 in these proceedings.

> Exhibit 58
> UPPER -- CANADA
>
> _____
>
> GEORGE the THIRD by the grace of GOD of Great-Britain, France and Ireland, King, Defender of Faith, and so forth. TO ALL TO WHOM THESE PRESENTS SHALL COME,
>
> > GREETING:
> >
> > KNOW YE, that we of our special grace, certain knowledge and mere motion have given and granted, and by these presents do GIVE and GRANT unto Daniel McQueen and his heirs and assigns forever, a certain parcel or tract of land situate in the Township of Bertie containing by admeasurement Two Hundred and forty Acres he the same more or less, being composed of lots number 16 in the 1st and 2nd Concessions with their broken fronts and situate lying and being in the Township of Bertie aforesaid, in the County of Lincoln and Home District of our province aforesaid, together with all the Woods and Waters thereon lying and being, under the reservations, limitations and conditions herein after expressed: which said Two Hundred and forty Acres of Land, are butted and bounded, or may be otherwise known as follows (that is to say) Beginning at a post in front of the front concession, marked 15/16 on Lake Erie, then North 134 Chains more or less to the third concession, then West 20 Chains, then South to Lake Erie, then Easterly along the shore of the Lake to the place of beginning —

AND whereas by an act of the parliament of Great-Britain, passed in the thirty-first year of his Majesty's reign, entitled "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, entitled, "An act for making more effectual provision for the government of the province of Quebec, in North America, and to make further provision for the government of the said Province," it is declared, that "no grant of lands hereafter made shall be valid or effectual unless the same shall contain a specification of the lands to be allotted and appropriated solely to the maintenance of a protestant clergy within the said Province;" in respect of the lands to be hereby granted, Now know Ye, that we have caused an allotment, or appropriation of Thirty four acres and two seventh's to be made in a certain triangle in the rear of the Townships of Flamborough and Beverly, beginning at the S.E. Angle of the lands appropriated for the Clergy for the Township of Humberstone, then N. 13+- W, until it intersects the Westerly boundary of the Clergy lands for the Township of Pelham 410 Chains more or less then S. 45+- E. on the Westerly boundary of the Clergy lands set apart for the Township of Pelham Thorold Stamford until it intersects a line running N. 77+- E from the said S.E Angle of the Church lands for Humber then, S. 77+- W to the place of beginning 250 Chains more or less being in the proportion of one to seven of the lands so hereby granted, as and for a reserve, and to and for the sole use, benefit and support of a protestant clergy, being as nearly adjacent thereto as circumstances will admit, and being as nearly as circumstances and the nature of the case will admit, of the like quality as the lands in respect of which the same is allotted and appropriated, and as nearly as the same can be estimated equal in value to the seventh part of the lands so hereby granted as aforesaid. TO HAVE and to HOLD the said parcel or tract of land to him the said Daniel McQueen and his heirs and assigns forever, saving nevertheless to us, our heirs and successors all mines of gold, silver, copper, tin, lead, iron and coal that shall or may now, or hereafter be found on any part of the said parcel or tract of land hereby given and granted as aforesaid: and saving and reserving to us, our heirs and successors, all white pine trees that shall, or may now, or hereafter grow, or be growing on any part of the said parcel or tract of land hereby granted as aforesaid. Provided always that no part of the said parcel or tract of land hereby granted to the said Daniel McQueen and his heirs be within any of the reservations before this grant made and marked for us, our Heirs and Successors by our Surveyor-General of Woods, or his lawful deputy, in which case this our grant for such part of the land hereby given and granted to the said Daniel McQueen and his heirs as aforesaid, and which upon a survey

thereof being made be found within any such reservations, shall be null and void and of none effect, anything herein contained to the contrary notwithstanding:

Provided also that the said Daniel McQueen his heirs or assigns shall and to within three years erect and build, or cause to be erected and built in and upon some part of the said parcel or tract of land a good and sufficient dwelling house (he the said Daniel McQueen or his assigns not having built, or not being in his or their own right lawfully possessed of an house in our said Province) and be therein, or cause some person to be therein resident for and during the space of one year thence next ensuing the building of the same. Provided also that if at any time or times hereafter the land so hereby given and granted to the said Daniel McQueen and his heirs shall come into the possession and tenure of any person or persons whomsoever, either by virtue of any deed of sale, conveyance, enfeoffment or exchange, or by gift, inheritance, descent, devise or marriage, such person or persons shall within twelve months after his, her or their entry into, and possession of the same, take the oaths prescribed by law, before some one of the magistrates of our said Province; and a certificate of such oaths having been so taken shall cause to be recorded in the secretary's office of the said Province: In default of all or any of which said conditions, limitations and restrictions, this said grant, and everything herein contained, shall be, and we do hereby declare the same to be null and void, to all intents and purposes whatsoever; and the land hereby granted, and every part and parcel thereof, shall revert to, and become vested in us, our Heirs and Successors in like manner as if the same had never been granted; anything herein contained to the contrary in any wise notwithstanding.

[5] GIVEN under the great Seal of our Province of Upper-Canada:

WITNESS the Honourable Peter Rufsele Our President administering the Government of our said Province, this fourteenth day of March in the year of our Lord, one thousand seven hundred and ninety eight and thirty-eighth of our reign.

By Command of his Honour in Council PR
Entered in the Auditor's Office
14th March 1798
Peter Rufsele Auditor General

Exhibit 59
PROVINCE OF UPPER-CANADA

_____

GEORGE the THIRD by the grace of GOD of the United Kingdom of Great-Britain, and Ireland, King, Defender of the Faith, TO ALL TO WHOM THESE PRESENTS SHALL COME,

Greeting:

KNOW YE, that we of our special grace, certain knowledge, and mere motion have Given and Granted, and by these presents DO GIVE and GRANT unto Alexander McQueen, of the Township of Humberstone, in the County of Lincoln, in the District of Niagara, in our said Province, Yeoman his heirs and assigns forever; ALL that parcel or tract of land situate in the Township of Bertie, in the County of Lincoln in the District of Niagara in our said Province, containing by admeasurement Three hundred and thirty acres be the same more or less; being Lots Numbers Seventeen and Eighteen in the first Concession, with the broken front of Lot Number Seventeen in the second Concession of the said Township of Bertie — together with all the Woods and Waters thereon lying, and being under the reservations, limitations and conditions herein after expressed: which said Three hundred and thirty acres of land are butted, and bounded, or may be otherwise known as follows:

that is to say Commencing at a Post in front of the front Concession, marked sixteen seventeen, on Lake Erie, then North One hundred and ten chains more or less, then west twenty chains, then south fifty one chains, then West twenty chains then South to Lake Erie, then Easterly along the Lake to the place of beginning —

TO HAVE and to HOLD the said parcel or tract of land hereby given and granted to him the said Alexander McQueen his heirs and assigns forever; saving nevertheless to us, our heirs and successors, all mines of gold, silver, copper, tin, lead, iron and coal that shall or may be hereafter found on any part of the said parcel or tract of land hereby given and granted as aforesaid; and saving, and reserving to us, or heirs and successors, all white Pine Trees that shall, or may now, or hereafter grow, or be growing on any part of the said parcel or tract of land hereby granted as aforesaid.

[6] Provided always, that no part of the parcel or tract of land hereby given and granted to the said Alexander McQueen and his heirs, be within any reservation heretofore made, and marked for us, our heirs and successors by our Surveyor-General of Woods, or his lawful Deputy; in which case, this our Grant for such part of the land hereby given and granted to the

said Alexander McQueen and his heirs as forever as aforesaid, and which shall upon a survey thereof being made, be found within any such reservation, shall be null and void, and of none effect, anything herein contained to the contrary notwithstanding.

[7] Provided also, that the said Alexander McQueen his heirs or assigns; shall and do within three years erect and build or cause to be erected and built, in and upon some part of said parcel or tract of land a good and sufficient dwelling house (he the said Alexander McQueen or his assigns not having built, or not being in his or their own right lawfully possessed of an house in our said province) and be therein, or cause some person to be therein resident for and during the space of one year, thence next ensuing the building of the same. Provided also, that if at any time or times hereafter, the land so hereby given and granted to the said Alexander McQueen and his heirs, shall come into the possession and tenure of any person or persons whomsoever, either by virtue of any deed of sale, conveyance, enfeoffment or exchange, or by gift, inheritance, descent, devise or marriage, such person or persons shall within twelve months next after his, her, or their entry in to, and possession of the same, take the oaths prescribed by law, before some one of the Magistrates of our said Province; and a certificate of such oaths having been so taken shall cause to be recorded in the Secretary's Office of the said province.

[8] In default of all, or any of which conditions, limitations, and restrictions, this said Grant, and everything herein contained, shall be, and we hereby declare the same to be null and void, to all intents and purposes whatsoever, and the land hereby granted, and every part and parcel thereof, shall revert to, and become vested in us, our heirs and successors in like manner as if the same had never been granted; anything herein contained to the contrary in any wise notwithstanding.

[9] AND WHEREAS, by an act of the Parliament of Great-Britain, passed in the thirty-first year of his Majesty's reign, entitled "An act to repeal certain parts of an act passed in the Fourteenth year of his Majesty's reign, entitled, "An act for making more effectual provision for the Government of the Province of Quebec, in North-America, and to make further provision for the Government of the said Province," it is declared, "That no grant of lands hereafter made shall be valid or effectual unless the same shall contain a specification of the lands to be allotted and appropriated solely to the maintenance of a protestant clergy within the said Province," in respect of the lands to be thereby granted; Now know ye, that we have caused an allotment, or appropriation of forty seven acres and one seventh, to be made in a certain triangle in the rear of the Townships of Flamborough and Beverly, Commencing at the South East angle of the land's appropriated for the Clergy for the Township of Humberstone, thence North thirteen degrees west until it intersects the westerly boundary of the Clergy Lands for the Township of Pelham, four hundred and ten chains more or less, thence south forty five degrees

west on the Westerly boundary of the Church Lands set apart for the Townships of Pelham, Thorold, and Stamford, until it intersects a line running North seventy seven degrees east, from the said South East Angle of the church lands for Humberstone, thence South seventy seven degrees west, to the place of beginning, two hundred and fifty chains more or less —

GIVEN under the Great Seal of our Province of Upper Canada:

> WITNESS our trusty and well-beloved Peter Hunter Esquire Our Lieut Governor of Our said Province and Lieutenant General commanding our forces in our Province of Upper and Lower Canada — in the year of our Lord one thousand Eight hundred and two and forty second of our reign.
>
> BY COMMAND of his Excellency in Council. P.H.
>
> Entered with the Auditor
>
> 31 July 1802
>
> Wm Jarvis Sect D Peter Rufsele A.G. 3. Early History of the Settlement and Surveying of the Township of Bertie

[10] It will have been noted that in the case of both patents, although lots 16 and 17, in the Township of Bertie, are designated by number, no designated plan is referred to. It is necessary therefor to consider the circumstances under which these patents were granted. An interesting account of the early settlement of the township is contained in “An Attempt at a Domesday Book”, extracts from which appear in ex. 14 and which was compiled by the Welland County Historical Society. The first lands in this area appear to have been purchased from the Indians by Sir William Johnson in August, 1764. This covered a tract of land on the west side of the “straits” of Niagara leading from Lake Erie to Lake Ontario “which have not been carried into effect beyond taking possession of a site for a military post at its southern end. This was built that year and named Fort Erie.”

[11] Then, on July 7, 1780, General Haldimand announced his intention of reclaiming the tract then ceded “which land will be divided into several lots and distributed to such loyalists who are capable of improving them and desirous of procuring by industry a comfortable maintenance for their families until such times as by peace they shall be restored to their respective homes should they be inclined to quit their situation at Niagara”. They were to hold the lots assigned to them as annual tenants without the payment of rent and would be supplied with provisions for a year and with ploughs and other necessary agricultural implements, mills for grinding grain, and breeding sows. In 1784 the Butters Rangers were disbanded and 100 acres were given to each soldier and 50 for each dependent. They were to hold the lands free

for ten years and thereafter at a rent of half a penny per acre. It appears that settlement took place before any surveying was done. According to the "Attempt at a Domesday Book" a report dated August 25, 1782, showed that 16 families consisting of 84 persons were settled and by the next year, this number had increased to 23 families. According to the same authority, Allan Macdonnell, one of the settlers was employed by Colonel Butler to mark out the lots assigned to those persons who had already occupied lands, but Lieutenant Tinling, an officer of the 29th Regiment, was sent up from Kingston to complete the survey. From the same source, we learn that four townships in this area were laid out by Tinling "but he had barely time to mark their boundaries and the limits of the farm lots fronting on the river and lake, when he was recalled". Tinling's survey has apparently been lost to posterity and in 1786 one Philip Fray was ordered to complete the Tinling survey. Fray surveyed only where he found settlers so that they might know their boundaries and he did not attempt to lay out the entire township. Then, in 1788, Lord Dorchester set up the land boards for the various districts including the district of Nassau (later called Lincoln) which first met at Niagara in the fall of 1788 and then in in the spring of 1789 at Fort Erie. The board inquired as to the loyalty and good character of the applicants and if satisfied, instructed the surveyor to give each of them a ticket or certificate stating the lands to which they were entitled. All of the early applicants were already settled on the lands they claimed. In 1789, as appears from exs. 29 and 30, rules and regulations and forms were forwarded to the land board at Niagara setting out a series of principles for the granting of land. For example, one of these principles was as follows:

> And to prevent individuals from monopolizing such spots as contain mines, minerals, fossils and conveniences for mills and other singular advantages of a common and public nature, to the prejudice of the general interest of the settlers, the Surveyor-general and his Agents, or Deputy Surveyors in the different Districts, shall confine themselves in the locations to be made by them upon certificates of the respective Boards, to such lands only as are fit for the common purposes of husbandry, and they shall reserve all other spots aforementioned, together with all such as may be fit and useful for ports and harbours, or works of defence, or such as contain valuable timber for shipbuilding or other purposes, conveniently situated for water-carriage, in the hands of the Crown.

[12] On October 20, 1792, the authority of the land board for the District of Nassau was limited to the County of Lincoln, and two years later the land boards were dissolved. On August 21, 1795, persons possessing tickets or certificates of occupation as evidence of their claims were directed by proclamation to deposit them with the Attorney-General at Niagara so that patents might issue.

[13] At least one of the early certificates, with which we are concerned, was located in the Ontario Archives at Toronto. This appears as ex. 75; first appears the certificate of the board appointed by His Excellency the Governor for the District of Napanee, in the Province of Quebec, which reads in part as follows:

> The Bearer Mr. Daniel McQueen having on the 3rd day of May 1791 preferred to this Board a Petition addressed to His Excellency the Governor in Council for a grant of Two Hundred Acres of land in the Township of Fort Erie in the District of Nassau. We have examined into his loyalty and character and find him duly qualified to receive a SINGLE LOT of about two hundred Acres, the oath of fidelity and allegiance directed by law having this day been administered to him by the board, in conformity to the fourth article of the Rules and Regulations aforementioned.

The document is signed by the members of the board and an endorsement on the left hand side of the document reads:

> Lots No. 16 in 1st & 2nd Concession & the Vacant Land in front on the Lake above Fort Erie.

This document is addressed to Augustus Jones, acting surveyor for the District of Nassau. Then follows the certificate of Augustus Jones, the acting surveyor. It reads in part as follows:

> I Assign to the Bearer Daniel McQueen the Lot No. 16 in 1st & 2d Concession in the Township of Fort Erie in the District of Nassau containing Two Hundred Acres Twenty Chains by fifty each ...
>
> With the Vacant Land in Front on the Lake above Fort Erie which Lot he is hereby authorized to occupy and improve. And having improved the same, he shall receive a grant thereof to him, and his heirs, or devisees, in due form, on such terms and conditions as it shall please His Majesty to ordain ...

This too bears the date of May 3, 1791. Thus, it is evident that the board's certificate entitling Daniel McQueen to lot 16 was granted seven years before he actually received the patent itself. It is also significant that in these early documents there is no reference to, or any distinction made between high water or low level marks. References are made to Lake Erie. Similarly, in the numerous letters of instructions to surveyors of this period which have been filed as exhibits, one finds no instructions as to how water boundaries are to be located.

4. The Original Plans

[14] A great deal of compendious research was made by the applicants and by the contestant to determine the original surveys which were relevant. M.C.D. Hadfield, who is the

Director of Legal Surveys in the administration of justice division of the Ontario Department of Justice, gave evidence of six separate original surveys. These were the following:

1. 1784 — a survey made by Lieutenant Tinling of 22 lots on the Niagara River and 35 lots on Lake Erie. This could not be produced, but it included the lands in question.

2. 1786 — Philip Fray, who was ordered to complete the Tinling survey. This, too, could not be produced.

3. 1789 — Amos Chapman. This was apparently a survey of the Quaker and Fort Erie Townships and a photocopy of this survey is reproduced in "An Attempt at a Domesday Book", extracts of which appear as exhibit 14. This sketch, while crudely drawn and lacking measurements or numbers of the lots, obviously includes the lands in question. All lines on this map are shown as extending to Lake Erie.

4. 1790 — Augustus Jones. His plan is variously known as the "A.2" plan and the Smith plan. On this plan are clearly depicted the lot numbers, the names of the persons who had settled on the land, including the names of the two original patentees in the case at hand. It is submitted by the applicants "that the patents granted to the two McQueens were based upon this original survey (which appears in the record as exhibit 13) of the Township of Bertie done by Augustus Jones, O.L.S. and that each patentee had his lot described by Augustus Jones and his name entered upon the original plan of survey done by Augustus Jones held by the land board of Lincoln and that it was the intent of the crown, through its duly authorized agents, to give to each patentee the land he effectively controlled, to the waters of Lake Erie and that the crown never intended to reserve any part of the beach lands to its own use".

The only southern boundary of lots 16 and 17 that appears on this plan is the line following the meanderings of the lake and below this line appears the words "part Lake Erie".

[15] The Deputy Surveyor-General of Ontario, Stephen B. Panting, in a certificate accompanying the plan certified "that the document hereunto annexed is a photostatic copy of the original plan of the survey of the Township of Bertie, in the County of Welland, which original plan is of record in the Department of Lands and Forests at Toronto and that I am the officer to whose custody the original plan has been entrusted". However, at first, in his evidence-in-chief, he said that "in the case of original field notes and original plans, I found that neither existed in the department and I am not aware of any original plan per se, nor any original field notes". Later, the same witness testified that "there are two plans of record in the department. One of which is a very rudimentary type plan and I believe this was the one signed by D.W. Smith either in his capacity as Surveyor-general or acting Surveyor-general. This particular plan is undated. D.W. Smith, I believe, was acting Surveyor-general between 1791

and 1800, so I would presume that this plan was received by the department of crown lands during that period. This plan does not show the whole of the Township of Bertie as we know it today. The block of lots lying west of no. 24 and south of the Garrison Road are not shown. In addition, there are lots appearing in the plan which do not appear to comprise the township as we know it today. It is a rudimentary type plan in that there is very little evidence on this as resulting from a survey."

[16] However, Mr. Panting was examined and cross-examined for several days, as was Mr. Hadfield, the Director of Legal Surveys, and during the course of the trial other documents and correspondence and plans were produced which threw further light on the matter and in the result, I am satisfied that both these two expert witnesses did in fact agree that ex. 13 was the Augustus Jones plan and that it did in fact represent the original plan of the Township of Bertie. It is true that at one point Mr. Hadfield testified concerning ex. 13, "I don't believe it to be the original plan of the Township of Bertie. I believe it is one of many plans which appear to have the appearance of original plans."

[17] Reference should also be made to ex. 70, which also confirms that Jones's surveys are in fact the only original ones available to us to determine the boundaries of the lots in question. Unfortunately, his field notes have never been located, but much of his correspondence was made available and there is no suggestion anywhere that he was using as the boundary of lots fronting on Lake Erie any boundary other than the natural visible water's edge. Nowhere in any of these early documents is any reference made to a "high water mark" and the first reference to a high water mark is made at a much later date when Colonel Burwell made a traverse of the shore, which traverse will be discussed under another heading.

[18] It is my view that the original southern boundaries of the lots in question were originally fixed by Lieutenant Tinling followed by Philip Fray and Amos Chapman and Augustus Jones, in which, in a rough way, in keeping with the times, the visible waters of Lake Erie were accepted as the southern boundary. In any event, whether Augustus Jones actually wrote the descriptions which appear in the patents or whether, as is more likely the case, the patents were prepared from Jones's plans and surveys and field notes, it appears clear to me that the Crown interpreted Jones's findings as providing the waters of Lake Erie for the southern boundary of the lots. This was a natural monument or boundary line readily accessible to the surveyors of this early date and there would appear to be no reason why they should depart from it.

[19] All the witnesses were agreed that original surveys, where they can be found, must be adhered to and boundaries thus fixed are to be accepted for all time.

5. Colonel Burwell's Traverse of 1825

[20] Exhibit 31 is a plan of Bertie prepared by M. Burwell, deputy land surveyor, May 28, 1828. He examined earlier surveys, incorporated some of them and himself made a traverse of the shore. A copy of his field notes appears in the record as ex. 32 and a typewritten translation of these field notes as ex. 33. Exhibit 79 was a letter from Mr. Burwell to Thomas Ridout, the Surveyor-General, dated May 27, 1825. In this letter Mr. Burwell says, in part, the following:

> I have had occasion to be at Fort Erie four or five weeks this Spring, and while there I examined the connection of the surveys made in Bertie by Mr. Jones, and the addition of the 11 lots by Messrs. Grant and Hambly on which subject, as soon as I can take time to make a Plan of the Township of Bertie, and copy my Field Notes, taken on an examination in that Township, I shall be able to furnish you with a good deal of information. While at Bertie, amongst other examinations which I attended to, I took a Traverse of the Lake Shore from Lot No. 12 Westerly around Point Abino, to the limit between Bertie & Humberstone, where I found the corner made by Mr. Grant, and the one made by Mr. Hambly. — I never heard before that there were two corners, but have now informed myself how the circumstances happened. — The distance from Mr. Hambly's corner between Bertie & Humberstone, to the Garrison line is 231.C. 16.L ...

[21] Great emphasis was placed upon this plan, a copy of which appears as ex. 31 and an enlarged copy of which appears as ex. 96. The Crown witnesses placed great reliance upon this plan because they contended that the traverse was directly along the high water mark and because of references in Burwell's field notes in at least three places to identifiable points at or near the high water mark. On the other hand, the traverse itself covers a distance of over 10 miles and the field notes indicate that for at least a mile of this distance, on the western portion of the plan, the traverse was definitely along the sandy beach. In any event, it must be borne in mind that the scale adopted was 40 chains to one inch, that the traverse line itself is a heavy black line and since each inch on the map represents a distance of 2,640 ft., it is difficult to come to any firm conclusion as to the exact point or location of the traverse itself.

[22] I am of the opinion that the probabilities are that the traverse was made up from the water's edge along a hard portion of the sand where travelling would be easier and I do not think it can necessarily be concluded that the traverse followed, with any accuracy, the high level of the water in the technical sense now used by present day surveyors. In any event, all the surveyors agreed that Burwell had no authority to fix the southern boundaries of these lots and that these boundaries, wherever they were, had been determined by the original surveys. I am in agreement with the submission of the applicants that the plan prepared by Colonel Burwell was an examination survey only, done with no intent to define the fronts of the lots in the broken front concession and that his traverse of part of the shore in Bertie Township was done to obtain the configuration of the shore and that his references to a high water mark and

the water's edge were made from time to time as conveniences and reference points only. I do not see how this examination or retracement survey can establish either the high water mark of Lake Erie or the water's edge of Lake Erie as the southern boundary of these lots in the broken front concession. It must be borne in mind that there were frequent errors found in the early surveys. For example, in his retracement survey, Colonel Burwell finds two very differing corners as constituting the south-east angle of Humberstone Township, which is the township next adjoining to the west of Bertie Township. Colonel Burwell's survey did perform the important function of ascertaining the correct line dividing the two townships and pointing out the error that Grant had made in his surveying. It is true that both Hambly's corner and Grant's incorrect corner were marked by trees or posts either on or very close to the high water mark. But as the surveyors explained in their evidence, this was common practice since posts and trees planted or marked too close to the water's edge could not be expected to last and careful surveyors almost invariably chose positions either below, at or above the high water mark to ensure permanence of locations. It must be borne in mind also, that Burwell had no power or authority to change or alter boundaries which, as I have indicated, in my view, had already been fixed by original surveys.

[23] In so far as this case is concerned, it seems to me that far too much time was spent in minutely analysing and arguing about the minutiae contained in Colonel Burwell's field notes. The evidence of Mr. H.D.G. Currie, senior partner in the firm of Speight, van Nostrand, an expert surveyor called by the applicants, indicated that his view was that there were a great number of ambiguities in Burwell's field notes and that it was impossible to tell precisely what line he was indicating by the black line on his plan. He pointed out that at one place in the field notes, Burwell apparently thought the boundary was the high water mark, whereas, at another point, he states:

> From the beginning corner — to ascertain the distance from the water's edge it must be chained from the beginning corner South to the Shore of the Lake ...

Mr. Currie thought that in that instance Burwell considered the line to end at the water's edge. Mr. Currie points out that in another instance, Colonel Burwell describes a point as being to a "dry pine stump standing on the bank of the lake a little above high water mark". The conclusion reached by this witness was that the black line shown on Burwell's plan represents the shore line of the lake and was probably neither the high water mark nor the water's edge. He adds:

> The purpose of the shore traverse was to obtain the configuration of the shore line and it is noted from Mr. Burwell's records that he took no measurement to the high water mark or to the water's edge. If these measurements had been taken, it would have been

> almost impossible to illustrate both lines on his final plan. If it was drawn at a scale of one inch equals 40 chains, one chain would be just a 40th of one inch.

Mr. Currie contended that, had Burwell been actually surveying either the water's edge or the high water mark, he would have needed to have shown in his field notes the offset ties to both high water mark and water's edge which would be a split line type of field notes. This witness was further asked a question:

> Q. And he was not really concerned with plotting the exact high water mark or the low water mark?
>
> A. That is my belief, and it is borne out in the fact his field notes indicate only measurements along his traverse line.

Evidence was given that this split line method of note taking suggested by Mr. Currie as required if the high water mark traverse were to be accurately plotted was recognized and in use at this time.

[24] At a later stage, Mr. Currie had this further to say concerning Colonel Burwell's traverse:

> Well, as I mentioned before, my opinion is that the black line represents neither the high water mark nor the water's edge. There is really no reasonable basis to presume that it is, that it does. The courses are long in many cases. The absence of measurements from the traverse line, the speed with which the traverse was made, the number of times the stations came out to nice even chain lengths, the traverse notes are dated the 28th and 29th of March and I notice that on the 28th of March Mr. Burwell retraced the front of the 1st Concession from lots 22 to 23, a distance of two and one-half miles. The length of the traverse is approximately 10 miles, making a total of 12½ miles. I think it is very remarkable that a survey party could measure 12½ miles accurately, set stations, allegedly occupying a natural phenomenon, do the chaining, the note keeping and cover 12½ miles in two days.

[25] No doubt, Mr. Burwell's plan provided a useful view of the meandering configuration of the shore of Lake Erie. It appears to have been accurately done. Mr. Panting for the Crown caused to be made a new plan of Mr. Burwell's traverse using the same stations that he had chosen and following the same course as set out in the field notes and a transparency made by Mr. Panting indicated a very close compliance with Mr. Burwell's black line, except at the westerly portion of the map where Mr. Burwell adopted a slightly different course. But I do not consider it necessary to comment further on the voluminous evidence and argument concerning Mr. Burwell, his plan and his field notes. At the time he made his traverse, there was no dispute or argument concerning ownership of the beach and Colonel Burwell had

neither reason nor authority to even consider what constituted the southern boundary of the lots in question. Mr. Burwell's letter, referred to above, makes it clear that the real purpose of his examination was to reconcile a conflict between the surveying done by Messers. Grant and Hambly covering lots 25 to 35 on the west half of the township, which had resulted in two different corners being plotted by Grant and Hambly, and the general relation to Mr. Jones's survey of the easterly lots, that is the lots from 13 to 24 which include the two lots in question in this case. Mr. Panting, on cross-examination finally agreed with this view as the following questions and answers indicate:

> Q. Well, I put it to you that the fair inference from what he says himself he was doing he simply ran a traverse of the lakeshore and he was trying to figure out the problem of the west boundary of the township. That's one of the problems he was trying to figure out. Is that not a fair inference from what he says?
>
> A. Yes, it is.
>
> Q. And there's no suggestion in there that he was concerned along the lake front either to fix the high water mark or the edge of the water?
>
> A. In his traverse?
>
> Q. Yes?
>
> A. That's correct.

[26] Finally, in leaving this brief account of the Burwell documents, which alone occupied several days of discussion in Court, I accept the statement of Mr. Panting, who on his examination-in-chief provided this description of the traverse:

> Q. Now, you mentioned the word traversing. Would you explain to his Lordship what is meant by that?
>
> A. You will find that in Mister — possibly in Mr. Welsh's notes but in many of the field notes of that particular time that a traverse was carried out across the front of the Townships. The traverse was a series of straight lines from point to point preferably along the beach where clear sight could be obtained from one station to another. The surveyor would determine the magnetic time or azimuth of the line and, of course, chain the distance between the two end points on a traverse line. In this fashion he would move across the front of a township commencing at some known point. Not always but sometimes ending on some known point. This would provide some control for the traverse that was carried out across the front of the township. The end purpose was to be in a position to accurately plot the position of the shore.

[27] Again, at a later stage, Mr. Panting adds in answer to the question:

> Q. He's not sticking to the high water mark, is he?
>
> A. No. He traversing out on the beach where he can get clear sight, possibly where it is easier chaining. He's not in this traverse, in my opinion, defining what constitutes the front of the lots.

And again:

> Q. Could you explain that a little bit more fully as to what he was doing on the beach? That is he wasn't fixing the front of the lot then?
>
> A. Well, he was merely — he was traversing across the front of the township or front of the broken front concession for the purpose of determining the configuration or shape of the shoreline.

[28] It appears to me therefore that whether Colonel Burwell was traversing along the water's edge or along the high water mark or points in between the two throws little light on our problem. I see nothing, therefore, in this portion of the testimony relating to Colonel Burwell's plans and notes to suggest that the southern boundary of lots 16 and 17 was anything other than the natural visible water's edge of Lake Erie.

6. DeCew's Survey

[29] We turn now to the consideration of a plan of lots numbers 16 and 17 in broken front and first and second concessions of the Township of Bertie, described as municipal survey No. 155, the work being done by Edmond DeCew in October, 1861. The plan itself appears as ex. 35D, 35A consisting of accompanying affidavits and letters, 35D being copies of the instructions for this municipal survey and 35C being the field notes made by Mr. DeCew with accompanying sketches.

[30] At these proceedings, considerable controversy developed as to the importance and significance of these documents. Mr. DeCew was instructed to perform this particular survey by the Assistant Commissioner of Crown Lands under the authority of "An Act respecting the Survey of Lands in Upper Canada", C.S.U.C. 1859, c. 93. He was told: ... to survey lines in front of lots 16 & 17 in Broken front & first and second Concessions of Lake Erie of the township of Bertie — and to plant stone or other durable monuments at the front & rear angles thereof ...

Application had apparently been made by the Corporation of the Township of Bertie in accordance with s. 11 of the Act referred to, which section reads as follows:

> 11. Whenever the Municipal Council of any Township, City, Town or Incorporated Village in Upper Canada adopts a resolution on application of one half the resident land-holders to be affected thereby, that it is desirable to place stone or other durable monuments at the front or at the rear, or at the front and rear angles of the lots in any Concession or Range or part of a Concession or Range in their Township, City, Town or Incorporated Village, such Municipal Council may make application to the Governor, in the same manner as is provided in the sixth and four following sections of this Act, praying to him to cause a survey of such Concession or Range of part of a Concession or Range to be made, and such boundaries to be planted, under the authority of the Commissioner of Crown Lands.

Also included in the instructions, was the direction that he was to:

> Make diligent search for, and adhere to, the lines drawn and posts planted in the original survey, or legally established by the Boundary Commissioners.

He was further told that:

> On completing your operations in the field, you will prepare plans thereof, on a scale of 40 chains to an inch, showing the positions of the permanent monuments you have placed, the Astronomical courses of the line and their lengths, also field notes and copies of the evidence of any witnesses you have examined touching the positions of the original lines or posts, or of those established by the Boundary of Commissioners, with a report of survey ...

[31] An examination of the plan, ex. 35D, shows, as Mr. Panting pointed out, that essentially what Mr. DeCew did was to run the boundary between the broken fronts and the first concession between or across lots 16 to 22 inclusive. He also ran the concession line between concessions one and two, across lots 15 to 18 inclusive. He also ran the limit between concessions two and three across lots 15 to 18 inclusive and he ran the road allowance between lots 16 and 17 through the broken front and concessions one and two. Mr. Panting testified that he also established the west limit of lot 17 and the east limit of lot 16 in the broken front concession.

[32] While the plan itself is none too legible, it does appear to show that the lines of the road allowance between lots 16 and 17 terminate at a point at or very close to wavy lines indicating Lake Erie. On the last page of ex. 35C, being Mr. DeCew's field notes, he provides a sketch showing the road allowance leading, apparently, to the waters of Lake Erie. On the sketch, he has marked an "oak tree — original corner" and he gives this chainage from the line between the broken front and the first concession at 25.43 chains. The next measurement is 50 links south of what he calls "oak tree — original corner" to a stone monument four feet long buried

three and one-half feet in the sand. Then a final measurement appears from the sketch to be at the water's edge and which is either 27.63 or 26.63 since the "6" and the "7" appear to have been written one on top of the other. Handwriting evidence was given to suggest that the "6" figure had probably been added lastly, although the witness seemed to think that the writing was not necessarily in the same hand as originally penned. Most of the witnesses had assumed in their testimony that the correct figure was 27.63, whereas if the correct figure was 26.63, the point measured might not be as close to the water's edge as it would otherwise have been. On the evidence, I am unable to make a definite determination of this point. However, I do not consider the matter to be consequential, since either the figure "26.63" or "27.63" necessarily take one very close if not to the water's edge.

[33] In his report to the Commission, which appears as ex. 35A, Mr. DeCew makes this statement:

> The original South East corner of Lot No. 17 in the Broken Front stood on a high bank or ridge of fine sand — which the wind fast drifting away and the tree has fallen down. The sand also seems to be piling on the north side of the ridge.
>
> I therefore placed my stone 50 links south of the oak at the foot of the ridge — that it might not be covered ...

The letter to which I have referred indicates that the chief purpose of this particular survey was to settle certain disputes which had arisen with respect to other portions of the lot, other than the portions with which we are concerned in these proceedings. Apparently, in some respects, with which we are not here concerned, there had been some deficiency in widths. In one portion of his report, Mr. DeCew refers to his procedure in running a line and writes:

> It does not appear that a line ran southwards from said corner but a line was run from the Lake as far as to the marsh in the Broken Front ...

There appears to be no doubt that DeCew's monument, the top of which had been broken off, was located on the beach by the Crown surveyors, who contend that the monument replaced or witnessed the location of the old oak tree, that this was the original corner of the lot and that on the principle of monumentation, its position is unalterable and fixed for all time. As against this proposal, the applicants point to the plan itself, which shows the lot lines apparently extending to the water;s edge and they point to the field notes which show the road allowance and the lot lines of lots 16 and 17 extending clearly beyond the limestone monument and touching what appears to be the water's edge and they contend that the only purpose of DeCew's monument was to mark the course of the line defining the eastern boundary of lot 17. The applicants contend that the obligation of the surveyor in this case was to mark the boundaries of certain lots and the only boundary defining the broken front shown on the plan is

the water's edge. The term "high water mark" is not used by Mr. DeCew in his plan or in his notes. The controversy then is as to whether DeCew's monument is a witness post witnessing the oak tree as an original south-east corner of the lot to enable lines to be drawn in two directions at right angles to each other, or whether it is purely a witness post referencing or indicating the Easterly boundary of lot 17. Of course, the contestants claim that the monument of DeCew's indicates the location of the old oak tree, the original south-east corner of lot 17 and that this in fact must be the post referred to in the patent as being marked "16/17". There is no evidence, however, that the oak tree which Mr. DeCew found and which he states to be the south-east corner of lot 17 was a post as indicated in the patent or that in fact it was such a post. Mr. Panting agreed that at no place in the notes was there any indication that the oak tree was marked in any way.

[34] Mr. Currie gave evidence concerning the DeCew municipal survey, pointing out that he could find no mention of the words "high water mark" in DeCew's field notes or his plan and pointing out also that the wavy line shown in his field notes and on the plan depicted the edge of the water and that the side lines depicted in his field notes go right through to the water's edge and the measurements shown in his field notes extend through also to the water's edge. Mr. Currie then continued:

> I notice that the measurements along the east line of Lot 16 on his plan — excuse me, my Lord — Lot 17 is from the north limit of the lot to the stone monument which was never intended to be the lot corner. These things apply equally to the municipal survey he made. (Mr. Currie is referring at this point to another survey made by Mr. DeCew in a different portion of the Township of Bertie, being a plan of lots numbers 4 and 5 in which lot lines are shown extending to monuments or posts and then continuing on to the edge of Lake Erie.)
>
> Q. You say that is not the corner of the lot?
>
> A. It is my opinion, my Lord, it was never intended to be the corner of the lot.
>
> Q. What was it intended to be?
>
> A. It was intended to be a witness point marking — or witnessing the corner wherever it might be. It might be either to the high water mark or at the water's edge.
>
> ...
>
> Q. Where is the point of commencement in the patents?
>
> A. It merely states the point of commencement was the post marked 16 and 17.

...

Q. Has that post never been found?

A. I have no knowledge of that, my Lord.

...

[35] Q. DeCew's monument was intended to be a witness point or post?

A. That's right.

Then the witness continues:

> Now the same comments apply to the municipal survey made by Mr. DeCew on Lots four and five in the first concession [ex. 60B]. I believe the number of the municipal survey is 285 and again the only line shown on his plan depicting the south limit of the lot is the water's edge.

The witness then referred to ex. 67, being a letter dated November 10, 1795, addressed by the Surveyor-General to all his deputy surveyors and a sketch which accompanies that letter in order to indicate to surveyors where monuments should be planted to indicate the corner of a township. The witness then explained:

> In the first illustration the monument shows the intersection of the boundaries of four townships, York, Edinburgh, Dublin and London, and this monument is at the intersection of the centre lines of the two roads. The second illustration shows that the monument to be planted between two townships where those townships about a lake or river ... is to be ... on the boundary where it intersects the magisterial line.

The witness was then asked:

> Q. You say that monument in that lower sketch is not what we call a corner monument or monument marking the corner of a township?
>
> A. No, my Lord. It would be simply marking the line between two townships and it would be a better place than having it down to the edge of the river or lake. Some of the evidence of Mr. Hadfield on cross-examination was of interest in this connection. He was asked this question:
>
> > Do you agree with me that nowhere in Exhibit 35 is the location of the oak tree used by surveyor to make an angle or corner graphically depicted as such? Do you agree with that?

There's no line on his field notes indicating a corner.

Q. Right. And would you turn to the first page of the formal instructions he received which are in Exhibit 35(b). Do you have those?

A. Yes.

Q. And I read to you that he was instructed to survey lines in front of Lots 16 and 17 in Broken Front and first and second concessions and I put it to you that either he completely ignored the instructions or to the satisfaction of his superiors in the approved survey which is Exhibit 35(d) the only line in front of 16 and 17 Broken Front is the line marking the water's edge. Is that correct or incorrect?

A. The only line in front of the Broken Front is the line of the Broken Front?

Q. Is the line representing the water's edge?

A. Ummmm

Q. Do you agree or disagree with that?

A. I agree if by water's edge you mean the water's edge at the back of the beach.

[36] If reference is made to ex. 60B in which this same surveyor produced his plan of lots four and five in the same township, it seems to clearly appear that the monuments or posts which he has planted in respect of lots four and five are substantial distance north of either the water's edge or the high water mark; and in this case, Mr. DeCew has clearly used these posts as witness posts to mark the line to the limits of the lake boundary.

[37] After a careful review of all the evidence and all the exhibits, it appears to me far more probable that the oak tree, DeCew's stone monument, and the original posts referred to in the patent, whatever and wherever they may have been, were all used in the sense of witness posts as indicative of the important line of division between the lots which could only be marked at a sensible distance from the water's edge to ensure permanency, and which could only meet the southern boundary of the lot by production of the line to the water's edge.

7. Neighbouring Water Lots

[38] I turn now to consider briefly the argument advanced by the Crown that the boundary of lots 16 and 17 must be the high water mark, since water lots on neighbouring properties when granted by the Crown were uniformly measured from the high water mark to a specified distance out in the water itself. As in every other facet in this case, considerable evidence was made available to me. I do not, however, believe that this evidence assists us in the

determination of the particular question at hand. The fact that almost 100 years later, a series of water lots based on a high water mark boundary are granted by the Crown, cannot in any manner adversely affect prior grants made since obviously the Crown could not derogate from its own grant. It is significant that the manner of granting water lots along this shore from 1890 to approximately 1905 was determined by one surveyor, George Ross, O.L.S., who appears to have been dedicated to the principle of the high water mark. Mr. Pierce, one of the surveyors called on behalf of the Crown, when he came to survey the east half of lot 17, which is ex. 49, started his survey directly at DeCew's stone monument, which was incorrect even on the basis of the Crown's submissions since it was not marking the corner itself but only witnessing it, being placed 50 links south of the oak tree and since there is no evidence that it was directly on the high water mark. Moreover, it was pointed out in evidence that in the granting of water lots, greater accuracy would be obtained by tying the dimensions of the water lot to the northerly corners of the lot, which were in fact fixed, rather than tying the dimensions to the high water mark, which though not as variable as the water's edge, is still recognized as being a line which may vary from year to year.

[39] I regard, therefore, this evidence relating to the matter of water lots as simply representing the opinion of one man, namely, the surveyor in question. It is therefore of no greater relevance or weight in these proceedings than any other legal or surveyor's opinion. In this case because of the inaccuracies discovered in Mr. Ross's work, it is probably of less weight. It might, however, be treated in the same manner as the opinion expressed in ex. 18 by an eminent solicitor who expressed the opinion that the boundary of the lots in question was the water's edge; or the opinion expressed in ex. 17, which was a letter dated September 17, 1963, from R.G. Code, Surveyor-General for the Province of Ontario, in which he expressed the view that the southern boundary of lot 16 was the water's edge. Since the wording of most of the patents in this area is not without some confusion, it appears to me that any owner who was seeking water lot privileges was well advised to remove any possible doubt concerning the beach by obtaining a water lot grant which would include not only the water lot, but the beach itself to the high water mark.

8. The Crown's Reservation of One Chain along the Niagara River

[40] It is of some significance that the same surveyor, Augustus Jones, who prepared ex. 13 which may, I have concluded, be now accepted as the first original surveyed plan of the township (but not necessarily the first survey of the individual lots 16 and 17) was the acting surveyor for the District of Nassau, in the Province of Quebec as it was known at that time, and in this capacity prepared certificates to lots along the Niagara River, on the basis of which patents were subsequently issued. In each of these cases, the descriptions of the properties make a definite reservation of one chain along the shore by describing, for example, as in ex.

82, the westerly boundary of a particular lot as follows: “Then Westerly, along the Bank always at the distance of one chain from the water’s edge ...” Similar language was used in the grants of others lot fronting on the Niagara River and thus leads one to the natural inference that where the Crown desired to reserve lands to itself, whether for the benefit of the public or otherwise, it did not hesitate to do so. This is not, of course, a conclusive argument but I consider it of some evidentiary value. Certainly, a careful reviewing of the various instructions from time to time issued to surveyors by the Crown concerning the area with which we are concerned spell out quite definitely such reservations as were to be withheld in the granting of lots, such as lands for schools, gaols, churches and the like, but no intention is ever indicated or expressed that there should be any reservation of the beach as such, or that the surveyors should adopt the high water mark as the water boundary to be used.

9. The Effects of Surveying Legislation

[41] I have considered the effect of the various legislation which had been passed as affecting surveys, and those with which we are chiefly concerned would appear to be the following:

> 1785 — 25 Geo. III, c. 3 – “AN ORDINANCE Concerning Land Surveyors, and the admeasurement of Lands.”
>
> 1791 — INSTRUCTIONS TO LORD DORCHESTER as governor of Upper Canada.
>
> 1798 — 39 Geo. III, c. 14, being “An act to ascertain and establish on a permanent footing, the boundary lines of the different townships of this province.”
>
> 1818 — 59 Geo. III, c. 14, being a further surveys amendment act.
>
> 1851 — 14 & 15 Vict., c. 5, being “An Act to make certain alterations in the Territorial Divisions of Upper Canada.”
>
> 1859 — 22 Vict., c. 93, “An Act respecting the Survey of Lands in Upper Canada.”

[42] While these Acts, of course, establish the principle of monumentality, I can find nothing in them which requires that a survey or a line post or a monument be taken to be anything more than what it was intended to be by the surveyor who set such line, post or monument. That is to say, if as I believe, DeCew’s monument was only intended to indicate or reference the direction of a line and not to witness or reference a “corner” in the strict sense of an angle from which a line must be drawn at right angles to mark a southern boundary, then the survey Acts do not assist us in changing the nature of that monument so as to give it a deeper significance than the original surveyor intended. It is interesting to note that in none of the early survey Acts nor indeed in the present legislation is there any suggestion that, in marking the boundaries of

lots fronting on lakes or rivers, the surveyor is to employ the high water mark as opposed to the variable water's edge as his boundary on that side. Although we are not so fortunate as to be able to examine Augustus Jones's field notes on which his original survey was placed, we do know from many references in later surveys that Augustus Jones frequently made use of posts and monuments as witnessing lines and corners rather than actually being placed on the actual line or corner itself. There appears to be nothing unusual in the proposition that side lines may have to be extended to meet water boundaries, since the post or monument designating the line is for very practical reasons placed back of the water's edge where it will not be destroyed or washed away. Section 27 of c. 93 of 22 Vict., 1859, while not applicable to the case at hand, does indicate the nature of this kind of extension. The opening words of s. 27 are these:

> 27. In those Townships in Upper Canada which are bounded in front by a river or lake where no posts or other boundaries were planted in the original survey on the bank of such river or lake to regulate the width in front of the lots in the broken front concessions, the division of side-lines of the lots in such broken front concessions shall be drawn from the posts or other boundaries on the concession line in rear thereof, parallel to the governing line determined as aforesaid to the river or lake in front ... 10. *The Beds of Navigable Waters Act*

[43] At this point, I should make some reference to the *Beds of Navigable Waters Act* as it appears in its present form in R.S.O. 1960, c. 32, s. 1 of which reads as follows:

> 1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

Of course, in the case at bar the applicants contend, and I agree with them, that this section does not assist in the determination of the problem since, in the absence of express legislation to the contrary, the bed of the lake extends only to low water mark. It is interesting to recall, however, that in 1940 and until 1951, the legislation had been amended in such a way as to defeat the applicants' claim in this case and to uphold the views now being put forward by the Crown witnesses. During that intervening period, the effect of the *Statute Law Amendment Act*, 1940 (Ont.), c. 28, s. 3, was to provide for the first time a definition of "bed" and "high water marks" as follows:

> 1. In this Act, —
>
> a) "bed" used in relation to a navigable body of water shall include all land and land under water lying below the high water mark; and

b) “high water mark” shall mean the level at which the water in a navigable body of water has been held for a period sufficient to leave a watermark along the bank of such navigable body of water.

However, in the *Beds of Navigable Waters Amendment Act*, 1951, c. 5, this legislation was repealed and the present legislation introduced so that the old common law rule as to the boundary between land and water placing it at the water’s lowest mark or the water’s edge is the law as it stands at the moment.

[44] It appears to me in the present case that if the applicants are to be deprived of their proprietary rights to the beach as I construe the early surveys and the patents following them to have intended, it can only be done by some such similar legislation or indeed by expropriation of the lands in question.

11. Interpretation of the Patents and a Consideration of the Relevant Law

[45] Most of the evidence introduced during these proceedings was to assist the Court in interpreting the two original patents from the Crown, bearing in mind the latent ambiguity which arises in order to determine the bounds of lots 16 and 17, and in order to extract a meaning to the descriptions of these lots as they appear in the patents. The interpretation of the patents was not helped by the chain measurements which they contain. Upon examination, it was found that these chain measurements were most inaccurate and in some cases embodied differences running into hundreds of feet. It is explained in evidence that the early surveyors lacked the accurate instruments available to those in modern practice and that it was “usual to find grave inaccuracies in the measurement of distances”. I have already indicated that in none of the early surveys, that is the original surveys, are any other lines drawn marking the southern boundary of these lots save the natural boundary provided by the lake itself. The visible natural water’s edge variable though it might be was a much more easily ascertainable boundary for the early settlers than the determination of the exact high water mark in the sense of that limit of vegetation which has been wrested from the land by the movement of the waters throughout the years.

[46] It appears to me that this view is supported by the unambiguous descriptive phrases used in each of the letters patent. Thus, in the description of the patent contained in lot 16 (see ex. 58) the words used are:

> Beginning at a post in front of the front Concession, marked 15/16 on Lake Erie, then North 134 Chains more or less to the third Concession, then West 20 Chains, then South to lake Erie, then Easterly along the Shore of the Lake to the place of beginning.

With respect to lot 17 (ex. 59), the corresponding words are these:

> Commencing at a post in front of the front Concession, marked Sixteen Seventeen, on Lake Erie, then North One Hundred and ten chains more or less, then west twenty chains, then south fifty one chains, then west twenty chains then south to Lake Erie, then Easterly along the Lake to the place of beginning.

The precise position of these posts cannot now be determined. From the evidence of all the surveyors we can assume that the posts were planted above the beach and probably somewhere near the high water mark. We are not entitled to assume that they were precisely on the definitive high water mark. The Crown argues, of course, that if the posts in question were precisely on the high water mark or so close to it as to permit a slight distance to be disregarded, and if the subsequent description in the patents referring to the shore of the lake can be read to mean the high water mark, then four lines can be drawn and the four courses will meet. The Crown further contends that if the applicant's submission is to prevail, then the description is unreadable since the returning line along the water's edge will not meet the post. But again, it seems to me that the difficulty is resolved if the posts in question are treated as witness or reference posts marking the line only and if in effect the description can be read so as to permit the extension of the line from the posts southerly to the water's edge. In the absence of the field notes of Augustus Jones, it seems to me that the patents themselves which must be read in their entirety provide the best evidence to assist in deciding as to just what Augustus Jones used or constituted as the southern boundary of these two lots. We have no way of knowing whether Augustus Jones himself actually prepared the descriptions in the patents, although the evidence suggests that he probably prepared the descriptions in the certificates prior to the patents. But whoever did prepare the patent descriptions was surely in a better position to interpret Angustus Jones's surveys than those who came later; and by the phrases used in the patents in conjunction with whatever is available of Lieutenant Tinling's and Chapman's earlier surveys and must have been available then, it seems clear to me that the intended boundary was the natural variable and changing boundary of the water's edge.

[47] Such phrases as occur in the patents have, of course, been interpreted on many occasions. It is not necessary to refer to the many decisions on this type of language that were placed before the Court, but they have been ably and recently summarized in *Attersley et al. v. Blakely et al*., [1970] 3 O.R. 303 at p. 308, 13 D.L.R. (3d) 39 at p. 44, by Lane, Co.Ct.J., by saying that:

> It would seem, therefore, that the old common law rule as to the boundary between land and water placing it at the water's lowest mark is the law as it stands at the moment ...

The Court of Appeal dismissing an appeal from this decision stated that [at p. 313 O.R., p. 49 D.L.R.]: "... We agree entirely with his reasons and conclusions".

[48] In the case of *Georgian Cottagers' Association Inc. v. Township of Flos and Kerr*, [1962] O.R. 429 at p. 436, 32 D.L.R. (2d) 547 at p. 554, Gale, J., as he then was, used this language:

> In this Province it has been well settled by the Courts that when applied to navigable, non-tidal bodies of water the terms "bank", "line of the bank", "shore", "line of the shore", "margin of the water", and "water's edge" are synonymous as lines of demarcation. For example in *Parker v. Elliott* (1852), 1 U.C.C.P. 470, one limit was described as being "along the bank of the lake to the place of beginning". While Chief Justice Macaulay held that "the ... bank, as intended ... must be taken to mean the land line defined by the high water-mark" it is certain that Mr. Justice Sullivan was of the opinion that the grant ran "to the edge of the lake" and Mr. Justice McLean apparently agreed that a distinction of high or low water could only be drawn where tides exist and not in the inland waters of this Province.

[49] In the case of *Parker v. Elliott* (1852), 1 U.C.C.P. 470, the majority of the Court held that in the case of inland waters, a grant having a river or lake boundary extends to the water and that the law of foreshore as it is applied in England with respect to tidal waters is not properly of application in the inland waters of the Province of Ontario, and that the distinction of high and low water marks will not hold, save where the tide exists.

[50] Five years later, in the cases of *Throop v. Cobourg & Peterboro' R. Co*. (1856), 5 U.C.C.P. 509, and in *Buck et al. v. Cobourg & Peterboro' R.Co*. (1856), 5 U.C.C.P. 552, it was held that the descriptions which read "to the bank of Lake Ontario" and "to Lake Ontario" meant to the water's edge.

[51] In *Stover v. Lavoia* (1906), 8 O.W.R. 398, Chancellor Boyd, who was affirmed by the Court of Appeal in 9 O.W.R. 117, held that a description extending land "to the shore of Lake St. Clair" carried the boundary to the edge of the water in its natural state "at low water mark". Chancellor Boyd used this language at pp. 398-9:

> Plaintiff is the owner of land ... extending to the shore of Lake St. Clair. This land lies between the Great Western Railway and the water, and is in form a low sand bank, sloping to the water's edge. Beyond the water's edge lies a shoal or flat, sloping gradually down to the deep water, which forms the strictly navigable part of the lake. There is thus, first of all, plaintiff's land going to the shore of the lake, then the shoal belt beyond, ending in the deep navigable water. No doubt, the soil and bed of the lake, shoal and navigable, is vested in the Crown, subject to the rights of the public and of the adjoining riparian proprietors to have access to the navigable waters over the flats and shoals. The point to be first determined is to what limit plaintiff's title extends. I have no

> doubt that the boundary to the lake shore means and carries to the edge of the water in its natural condition at low-water mark.
>
> Along the shore of a non-tidal river, or of a navigable inland lake, is now well understood to mean along the edge of the water at its lowest mark, both in this country and in the United States. That may be called the American use of the word "shore," which in England is reserved for the ocean, and has there a more limited meaning. Still, since *Throop v. Cobourg and Peterborough R.W. Co.*, 5 C.P. at pp. 531 and 549 (1854), that definition may be considered as not only colloquially but legally accepted. The shore is the space between the bank and the water's edge at still water — the space between high and low water marks.

[52] The case of *Williams v. Pickard* (1908), 17 O.L.R. 547, is interesting from two standpoints. In the first place, it was held that the following description [at p. 549]:

> Beginning at a post marked 4/5 on the bank of the River Thames, then south 45(DEGREES) east 68 chains, then north-easterly parallel to the said river 30 chains, then north 45(DEGREES) west to the said river, then along the bank with the stream to the place of beginning.

meant to the edge of the water and not to the physical bank of the river.

[53] This case is interesting from our standpoint for a second reason, namely, that the description in the Crown patent commenced at a post which was, obviously, not directly on the water's edge. In the hearing of this case before the Divisional Court, which is reported in 15 O.L.R. 655, Chief Justice Meredith used this language as indicating that the post in question was a reference or witness post similar to the post referred to in the patents in the case at bar. At pp. 657-8, Meredith, C.J.:

> If the third course, or, as it would be termed in the courts of the neighbouring republic, the "third call," in the patent, had been, instead of "then along the bank with the stream to the place of beginning," "then along the river with the stream to the place of beginning," it would seem to be beyond question that the river would form the northerly boundary of the lot, notwithstanding that the point of commencement is a post on the bank, for the monument in such a case is referred to as giving the direction of the line from the river, and not as restricting the boundary on the river ...

At p. 658:

> In support of this view, sec. 31 of the *Surveys Act*, R.S.O. 1897, ch. 181, in which the purpose of planting posts in the original survey on the bank of the river or lake is spoken

> of as being to regulate the width in front of the lots in the broken front concession, may be referred to.

[54] In 1919 in the case of *Carrol v. Empire Limestone Co*. (1919), 45 O.L.R. 121, 48 D.L.R. 44, the Court of Appeal for the Province of Ontario held that in a Crown grant "beginning" at the south-east angle of lot 6 "on the bank of Lake Erie" and two of the courses along south "to the bank of the lake" and west "along the bank" to the place of beginning, that the grant was to the water's edge and not the high bank of the lake. An appeal from this decision to the Supreme Court of Canada was dismissed. The reasons given for the dismissal of the appeal do not appear to have been reported, but counsel obtained a copy of the reasons for judgment and from the reasons of Anglin, J., I quote these words: "On the argument it was assumed that the entire beach in front of lot 5 down to low water mark passed to the original grantee of that lot under his Patent from the Crown."

[55] In *Re Todd and Walker*, [1954] O.W.N. 814, [1955] 1 D.L.R. 495, Fuller, Co.Ct.J., held that in an application under the *Vendors and Purchasers Act*, the phrase [at p. 815 O.L.R., p. 496 D.L.R.]:

> Beginning at the southwest angle of Lot No. 24 on Lake Erie; thence north to the front of the second Concession 139 chains more or less; thence west 16 chains; thence south to Lake Erie 127 chains more or less; thence easterly along the bank of the Lake to the place of beginning, containing about 750 acres.

meant that, without doubt, the boundary of the lands was the low water mark of Lake Erie. I have already referred to the later cases which have followed this line of reasoning, culminating in the most recent case of *Attersley v. Blakely* and which, in my view, represent the law in the Province of Ontario.

[56] It appears to me, therefore, that I am driven to this conclusion, that any Crown patent which indicates that one of the boundaries of the lands granted is to be a boundary of water, then it establishes that boundary as at the water's edge and not upon any bank or high water mark unless, of course, the grant clearly reserves by description or otherwise a space between the lands granted and the water boundary or unless the boundaries of the lot can be so clearly delineated by reference to an original plan of survey as to clearly except or reserve to the Crown a space between the lands granted and the water's edge.

[57[In endeavoring to interpret the language used in the two patents with which we are concerned in this case, and bearing in mind the volume of material which was placed before the Court for its examination, I have found it exceedingly helpful to consult some of the early decisions in this Province in which our Courts have had to deal with somewhat similar problems, but at times much closer to the dates when the problems were created. In many of

the cases, the language which the earlier Judges have used seems to me to be peculiarly applicable to the situation in hand. Thus, in 1833, *Badgely v. Bender*, 3 U.C.K.B. (O.S.) 221, the headnote of which reads:

> A piece of land, marked out in the original plan of the township, as an allowance for road, does not lose that character, because it has never been used as a road for a period of forty years, and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled.

The decision itself is not helpful to us, but some of the comments of Robinson, C.J., are of interest. After deciding to admit in evidence a copy of the original plan of the township, Chief Justice Robinson at pp. 225-6 said this:

> That the evidence was legal evidence has not, I think, been seriously questioned. It is probably forty years or more since this township was laid out. It is but seldom now that recourse can be had to the viva voce evidence of the individuals who actually made the original survey of these early settled townships. More than a generation has gone by, some few of them may yet be left, but a few years will place their evidence out of reach, and even where it may yet be had, their verbal account from memory, of what they did forty years ago, would be in truth a much less safe and satisfactory description of evidence than their official return of their survey delineated on paper at the time; and besides, when we know that it is on these official documents that the patents have been subsequently framed, we must be convinced of the extreme danger of trusting so implicitly to anything else as to these official diagrams, for information upon the plan on which the several townships were laid out. This has not been questioned in our courts, at any time, within my knowledge. I mean the court has never hesitated to receive the original plans called the Quebec plans (in reference to these old surveys made before the division of the province), as evidence of the manner in which the respective townships have been subdivided; with respect to the numbers of lots, allowances for roads, and, in short, the general scheme of the survey, it is our established practice to admit them; and I conceive it to be undoubtedly warranted by the principles of evidence according to the law of England.

On pp. 226-7, Chief Justice Robinson continues:

> What is the known course of these things? A surveyor is directed by the government (in the case before us probably more than forty years ago) to survey a township under certain instructions. He performs the work, and returns an official diagram to the office of the Surveyor-General, exhibiting the manner in which he has divided the township —

> the number of lots he has made, their shapes and dimensions, and the allowances he has left between them for roads. If he placed monuments along these roads to mark them, they were doubtless of wood, and have long ago perished; at all events no proof was attempted to be given here respecting them. At this day a dispute arises, whether there was any allowance for road left at the end of fifty chains, measuring from the rear of a particular lot. The natural recourse for clearing up this doubt is to the original records in the Surveyor-General's office, where we find evidence stamped with public authority, free from the suspicion of being biased by individual interest, or of being manufactured to suit the purposes of either party in this contest. There we see the map exhibiting now, precisely as it did from the beginning, the spaces of land which the king intended to grant, and those which he intended to withhold from granting; and knowing, as we do, that the grants were framed from this plan, and meant to carry into effect the scheme which it exhibits, it becomes the duty of courts and juries to give to the words of the patent such a construction (if they are capable of it), as will be most consistent with the known and evident intention. It is only by doing this that public convenience and private interests can be secured.

Again at p. 228, the learned Judge says:

> I am well aware, and so is every one at all conversant in such things, and I have heard it several times proved in other trials, by surveyors on their oaths, that unless surveyors are directed by the government for some special purpose to lay down accurately the rivers, lakes or streams which border upon or intersect the townships which they are surveying, they never do so in fact, but content themselves with giving a general idea of them from the eye, or by noticing the points where their lines actually intersect them, not pretending to delineate minutely their several indentations.
>
> To do so, would require a multitude of offsets, and make the survey much more tedious and expensive. It is not necessary either for the object of the survey, because the grants of land are made with the qualifying words, more or less, as to quantity of land, and length of side lines, so as to extend to the front of the water where that is meant, whether it be more or less remote than is supposed.

[58] Further interesting and I submit helpful observations are found in the case of *Keeley v. Harrigan et al*. (1852), 3 U.C.C.P. 173. At pp. 198-9 Sullivan, J., uses this language:

> Before the statute of Upper Canada 38 Geo. III. chap. 1, the rights acquired by the grantees of the crown regarding their boundary lines, and the locality of the allowances for public highways, or easements intended for the public benefit, depended upon the language used in the grant or other document by which the crown parted with its rights

> in favour of the subject; and where the terms of the grants of dedications happened to be conflicting, as applied to the subject matter thereof, then the rights acquired thereunder depended upon the priority of the instruments by which concessions were made by the crown to the subject, the same rules of construction applying which we now use in giving effect to conveyances from one subject to another, when not interfered with by statutory provisions. Thus a township was legally placed not where an erroneous surveyor located its boundaries, but where he should have placed them according to his instructions; and particular allotments to grantees were legally placed in their intended positions, and not according to the erroneous placing of posts and monuments on the ground. Natural boundaries, such as rivers, lakes, trees, or monuments, where the description in the grant called for them, prevailing as they now do, over descriptions by courses and measurements, if the one should be found inconsistent with the other.

[59] At p. 202, the learned Judge comments upon the effect of the *Surveys Act* and upon the effect in the case with which he was dealing, of a survey made later than the original survey and he said this: If then that survey be not helped by this statute, and if grants by letters patent or location tickets were made upon the disputed concession line previously to 1831, it appears to me that as the line then stood, the settlers had then a right to take possession of these lands, and to enjoy the allowances for road through them, according to the construction of the letters patent, or the plans returned to the government, or as the one might explain the other; and the executive government had no right *ex mero motu*, by such a survey as is in proof in this case, to alter or abridge the rights so conceded.

[60] Useful also is the case of *Doe Dem. Murray v. Smith* (1845), 5 U.C.Q.B. 225, the headnote of which reads thusly:

> Where land is described generally in a deed, as being part of Lot No. 4, and the particular and specific description that is afterwards given, clearly shews it to embrace a part of Lot No. 3, as well as Lot No. 4 — the specific, and not the general description must be taken to govern.

At p. 226, Robinson, C.J., said this:

> Similar mistakes have been committed, in the multiplicity of business transacted in the land offices, and we have had occasion in other actions to determine what shall be the effect of a patent under such circumstances.
>
> *Doe dem. Owen v. Curtis* (Mich. Term, 1840) was a case of this kind, and we held there, as we have held in other cases, that if the crown makes a grant with a description, which, according to visible boundaries, natural or otherwise, does clearly embrace

> certain lands, then those lands must pass, and the patentee must be allowed to hold up to the specific fixed boundary mentioned, provided the crown had a right to grant the land thus described.
>
> The two inconsistencies in this case are: 1st. The quantity of land; but that is of frequent occurrence, and we should introduce great confusion, if, where a boundary so marked as a river has been referred to, we were to shut the party out from it by any close adherence to the quantity of land. The 2nd is, in calling by the name of lot No. 4, what in fact composes lots No. 3 & 4.
>
> That presents the question, whether the mere name of the tract, of the certain and specific description of it, is to prevail; and there the law is clear, that where either the thing or the person meant in a deed is evident, the name that happens to be given is not the material point, and does not govern. Of this there are numerous instances given in the books. But does or does not our *Surveys Act*, 59 Geo. III., ch. 14, interfere with this principle, as applied to lots of land designated by the numbers applied to them in the original survey? We think not, for the only object and effect of that act is to settle the boundaries between lots and concessions, not between one man's rights and another's.
>
> A valid grant of land might be made, without naming either lot or concession, provided the tract intended to be granted were made certain.

Finally, the Judge concludes:

> It may indeed be urged, that what was intended in the case before us to be granted was lot No. 4, and that only; and that the only mistake was, in imagining that it extended to the river, and that the quantity of land expressed shews that; but, on the other hand, it cannot for a moment be maintained, that the king did not intend the grantee to hold the land up to the river, when the river itself is made expressly to constitute its boundary along one whole side of it, and the very course of the river is mentioned.

[61] Finally, the language of Harrison, C.J., in the case of *MacGregor v. McMichael et al*. (1877), 41 U.C.Q.B. 128 at p. 133:

> The existence of a completed survey previous to a grant from the Crown, although convenient, and for that reason usual, is not essential to the validity of the grant. No one disputes the power of the Crown to grant land before any survey is made, and so long as the land described in the grant can be found on the ground the grant must be operative.

Again, at p. 134:

> Where a grant of lots is made before a survey or completed survey, the situation and boundary lines of the land granted on the ground must be ascertained as they were ascertainable before the passing of any survey Act, that is by the courses and distances expressed in the grant, and where there are original plans, instructions, field notes, diaries, or description for patent, these may be referred to for the purpose of aiding the grant.

11. Occupation and Possession of the Lands

[62] On this question, evidence was given by the applicants, by their neighbours and their respective predecessors in title as to their possession of the properties in question. There is no doubt that the applicants have believed in and exercised their possessory rights, in ownership of their respective lands to the water's edge. I do not consider it necessary to review this evidence in detail, but by way of illustration the following may be pointed out.

1. The evidence of *Welles V. Moot* from whom William H. Walker derived the title to his lands; his conveyance in 1921 relates to the lands in question to the east of the road allowance between lots 16 and 17. Mr. Moot had resided in the area since 1920. Before purchasing, he asked and received assurance from Colonel Raymond that Hawley could give a good title of the beach to the water's edge. He testified that he had always paid taxes on all property to the water's edge and until the opening of Centralia Ave. road allowance in or about 1966, he only saw a very occasional trespasser on the beach whom he took occasion to warn off.

2. Phillip Boocock testified that as a camp director in the years 1927 to 1932 he had asked permission of Mrs. Stockton to use the sandhill and beach on her property and that he always considered the beaches private.

3. William Wright testified that this parents had bought property in 1916 at Thunder Beach near Bernard Ave. and that he recalled from the early twenties that Bernard Ave. was fenced off and that all beaches to the east and west of Bernard Ave. were considered private and the privacy was enforced. He felt there was no significant problem with trespassers until the summer of 1966.

4. A Mr. R.L. O'Brian, aged 85, settled in Bertie Bay in 1889, erected his own house in 1909. He testified that the beaches were utterly deserted at this time and the only houses anywhere near the beach were owned by Messrs. Curtis and Stockton. He testified that Louis Stockton and he himself not only permitted but encouraged farmers to take gravel from the beach.

5. John Walsh, Jr., testified that he had spent all his summers at Thunder Bay Beach from the period 1932 to 1943, that there were only very infrequent strangers who occasionally appeared on the beach and that he recalled police warning members of the public off the beach area.

6. There was the evidence of Mrs. Oppenheimer, who had been on the beach since 1919 near the lots in question. She testified that complete privacy was observed on the beaches.

7. There is the evidence of Mrs. Mary Stockton, aged 80 years, who stayed all summer first at the Louis Stockton residence from 1912 and later in her own home, constructed from a barn on the beach, from 1914 to date. She testified that throughout all the early years, she never saw anyone on the beach except children and she was never bothered by trespassers until the Centralia Ave. road allowance was opened in 1966. She bought all her supplies throughout the years from local residents and she had never heard any suggestion that the beaches were not privately owned.

[63] Mr. Edgar Hexemer, township assessor since 1947, testified that it has always been taken that the properties go to the water's edge. Indeed, the lands were assessed from the year 1957 by actual measurement of the depth of the lots to the water. As long as he could remember, fences have been erected particularly at Bernard Ave., Bertie Bay, Crescent Rd. and Kraft Rd, He stated that all the people he knew always respected the beaches as privately owned.

[64] Harry Claus, who was born in 1908, lived in the old stone house of his ancestors located on lot 20 until 1918. He testified that his grandfather and father sold gravel from their beach, that is from lots 20 to 21, and that his father rented the use of the beach to campers. He stated that he was well acquainted with the beach in front of the L. Stockton property, that it was always reputed private and that he never went down there until the owners left in the fall.

The evidence of John Lord O'Brien was that he was born in 1874, that he first visited the area beaches in 1887, that he has continuously visited them since, that he had always considered that the property of the shore owners went to the water's edge and that the question of challenging the rights of the shore owners simply never came up until recently in the past few years.

[65] There were other similar witnesses, whose evidence it is not necessary to review, but it did appear to me that the applicants had proved effective possession of the lands in question, save for occasional trespass for a period stretching back to a point beyond 1900.

[66] As against the evidence of the applicants, a number of witnesses were called on behalf of the complainant and their evidence may be briefly summarized thusly.

[67] Frank J. LeJeune, 429 Windmill Point Rd. E., testified that he used the beach for swimming, horseback riding, ice fishing, strolling and that he sometimes took cars on the beach.

[68] Edith Jackson testified that her father owned property adjoining the Hawley farm and that she had camped on the sandhill between the Stockton and Curtis homes and had wiener roasts each year with the high school on the Claus farm. She agreed that Mr. Stockton had given her permission or her brother permission to take sand and that no one "would ever have told them to get off the beach".

[69] Marjorie Burger testified that she bathed at these beaches without objection from anyone.

[70] Wilfred Teal, a local gardener, was familiar with the beaches and did not hesitate to use them for hunting and fishing purposes. He admitted that he had been instructed to leave the beach but had refused to do so.

[71] George Miller testified that he hauled gravel from the beach to do work on the farm and that he frequently took his family to the beaches on Sundays but that few people were around; it was practically all vacant land. He admitted that when he was young, all the residents knew each other and "it would never enter their heads to throw anyone off the beach".

[72] Morley Athoe, born 1896, used the beach for swimming when he was a lad and never asked permission to do so. Mrs. Dorothy Burd, aged 72 years, testified that she rode down the beach several times and that she never asked permission because "there wasn't anybody to ask".

[73] Harold Sexsmith owned property adjacent to the Stockton property. He testified that he had played on the beaches as a child, but that he did ask permission of Stockton to take any sand or gravel.

[74] Hilliard Teal testified that he had hauled lumber in a wagon along the beach in order to build beach houses.

[75] Similarly Ronald Sexsmith, aged 68 years, testified that he had used the beaches as a youngster for swimming, corn roasts and wiener roasts. He expressed the view that he had always thought that the Crown owned the land up to the high water mark.

[76] It appears to me that the applicants have proven continuous and effective and undisturbed possession of the lands, save either for occasional trespassers or for occasional

permissions granted for limited purposes. However, in so far as the Crown is concerned, it is my view that the applicants are not entitled to succeed in their claim to ownership of the beaches on a prescriptive title. The relevant sections of the *Limitations Act*, R.S.O. 1960, c. 214, appear to be s. 3(1) reading as follows:

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

Then s. 16 of the same Act reads:

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

[77] As I have already indicated, it is my view that the beaches in question form parts of lots 16 and 17 as contained in the original surveys and described in the patents. However, if I am wrong in that view, then it appears to me that the lands fall within the description of "waste or vacant" land within the meaning of s. 16 of the *Limitations Act*.

[78] In the case of *R. v. McCormick* (1859), 18 U.C.Q.B. 131, the defendants for a long period of time had occupied Point au Pele Island in the County of Essex, being an island in Lake Erie. It was held in that case that the Crown was not barred by such possession. Robinson, C.J., at pp. 135-6 used this language:

> But for all that appears this island had not for sixty years been part of the organised territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it, but may have been suffered to lie like other waste lands from which the Crown had never derived either rents or profits, and which can never be supposed to have been under the actual supervision and charge of its officers. As to all waste lands so situated, I apprehend the entry of any stranger, and his continued possession for sixty years, would not, under the statute, bar the Crown, and certainly not unless it were shewn that the Crown knew of such occupation sixty years ago, and that it was taken adversely to the Crown, and with

> the intention of setting up a title against the Crown. That, in my opinion, would be the case in regard to any trespasser, or succession of trespassers, who might for sixty years past have been occupying lands in the remote parts of Upper Canada, north of our lakes; and it would make no difference if there had been a succession of trespassers who had pretended to convey the land from one to another; and if so, we cannot on any principle draw any distinction between lands so situated and lands similarly circumstanced laying nearer to the settled portions of the province.

[79] The most that can be said for this evidence of continued and undisturbed possession of the beaches, is that it appears to me to at least lend some support to the views already expressed as to the construction of the patents; and that, if in some respects the paper title is not always consistent in the description of the lands conveyed, then, at least as far as the Crown is concerned, it is quite evident that there is no intention given effect to at any time by any of the applicants or their predecessors in title to relinquish the possession which they claim.

[80] At the outset of this hearing, I was advised by counsel that the paper title to the properties claimed by the applicants had already been examined in great detail by the referee of titles at Toronto, that he appeared reasonably satisfied with the same, that no other contestants, except the Crown, had appeared to dispute the applicants' claims, but, of course, that the question of the beaches remained open.

[81] For the reasons I have given it appears abundantly clear to me that the applicants have established their claim to the beaches in question. Having made this finding, I now direct that the matter be referred back to the referee of titles together with a copy of this report so that if the referee remains satisfied as to the paper title, he can prepare the usual certificate for his and my signature.

[82] Bearing in mind the long period of possession in which the applicants have enjoyed these beaches and in view of the long periods of time which the Crown has allowed to elapse before asserting its claims, it seems to me that the applicants have been unfairly put to unusual and extraordinary expense while the Crown has been asserting a claim based upon its supposed right to ownership of lands up to the high water mark wherever they bound upon water, which was a right it could only expect to obtain either by legislation or expropriation. The Surveyor-General for the Province of Ontario did not himself give evidence, but it did appear to me that the evidence of his two highest officers indicated an unfortunate bias towards the views that they were expounding.

[83] Under all the circumstances, and bearing in mind the wide powers given me under s. 19 of the Quieting Titles Act, the applicants are entitled to their costs against the Crown as between solicitor and client, including, of course, all proceedings before the referee of titles.

Judgment accordingly.