

THE TOWNSHIP OF EAST }
HAWKESBURY, (DEFENDANT) ... }

APPELLANT ;

AND

THE TOWNSHIP OF LOCHIEL }
(PLAINTIFF) }

RESPONDENT.

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*Mar. 8, 9, 10.

*April. 27.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Highway—Road allowances—Reservations in township survey—General instructions—Model plan—Evidence.

Where the Crown surveyor returned the plan of original survey of a township without indicating reservations for road allowances upon the boundaries of the township and his field notes appeared to the court to support the view that no such allowances had been made by him ;—

Held, that the general instructions and model plan for similar surveys did not afford a presumption sufficiently strong for the inference that there was an intention upon the part of the Crown to establish such road allowances.

Judgment appealed from reversed. *Tanner v. Bissell* (21 U. C. Q. B. 553), and *Boley v. McLean* (41 U. C. Q. B. 260) approved.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of the trial court and declaring that an allowance for a road existed along the western boundary of Hawkesbury, located on the East Hawkesbury side of the boundary line, with the exception of certain places where eight specified lots had been granted by letters patent describing them as extending to the boundary line.

This action was brought for a declaration that a government allowance for a road existed between East Hawkesbury and Lochiel and the gores thereof,

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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located in the boundary line between them. The question had previously been considered by a board of three County Court Judges upon a reference to them as arbitrators under the Municipal Act. A majority of the board having found that the plaintiffs failed to establish the existence of such allowance for a road, and having made their award accordingly, the Township of Lochiel appealed from the award, and upon such appeal, Chief Justice Meredith decided that the arbitrators had no jurisdiction to try the question as to the existence of such road allowance and made an order directing the appeal to stand over until after the determination of an action for a judicial declaration which the Township of Lochiel should have liberty to bring, and thereupon the present action was instituted.

The action was tried before Mr. Justice Ferguson, who dismissed the action and held that an original road allowance had been laid out across the gore of Lochiel adjoining the southerly boundary of Hawkesbury. He also found that no road allowance whatever existed along the remainder of the boundary in question, sometimes called the western boundary of Hawkesbury. On an appeal from that part of the judgment which held that there was no allowance for road along the western boundary of Hawkesbury, the finding respecting the southern boundary being left undisturbed, the Court of Appeal for Ontario, (Osler J. dissenting), allowed the appeal without costs, and declared that an allowance for a road existed along the western boundary of Hawkesbury, located on the Hawkesbury side, and of the uniform width of one chain measured at right angles to the boundary line, excepting upon and across the ends of eight different specified lots in Hawkesbury which were patented with particular descriptions extending to the boundary line. The plaintiffs now appeal.

The questions at issue upon the present appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice Killam.

Leitch K.C. and *O'Brian* for the appellant.

MacLennan K.C. and *Tiffany* for the respondent.

The judgment of the court was delivered by :

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KILLAM J.—This is an appeal from a judgment of the Court of Appeal for the Province of Ontario declaring that an allowance for a public road exists between the Township of Lochiel, on the one side, and the Township of East Hawkesbury, on the other, located on and along the eastern side of the boundary line, except upon and across certain specified lots in East Hawkesbury.

The action arose out of an attempt by the township of Lochiel, assuming to act under sections 622-4 of the Municipal Act of the Province of Ontario, R. S. O. (1897) c. 223, to compel the Township of East Hawkesbury, which is the adjoining township on the easterly side of Lochiel, to join with the Township of Lochiel in opening up of a highway upon an allowance for a road claimed by the last mentioned township to have been laid out or devoted to the purpose by the Provincial Government upon the original surveys of the township or by subsequent acts.

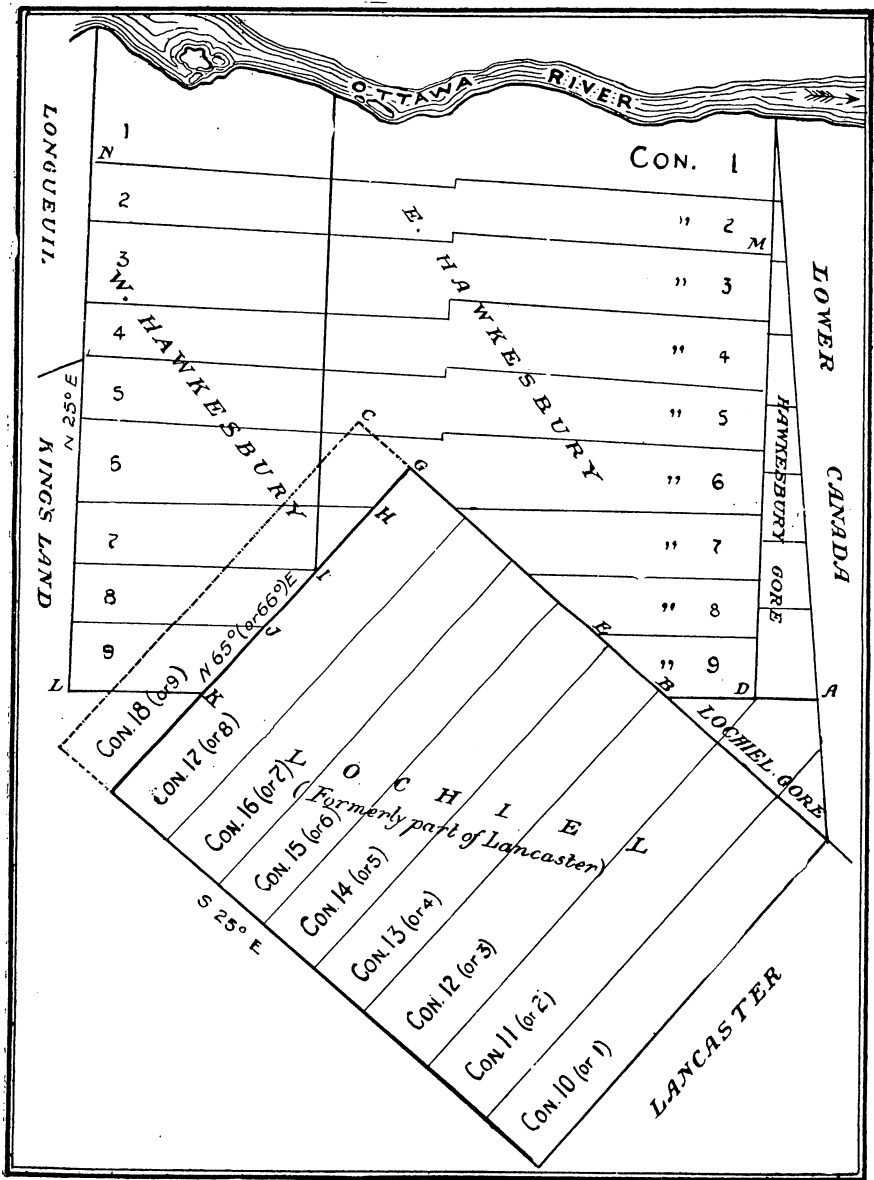
The council of the Township of Lochiel having passed a by-law for opening up such highway, to go into force upon the passing of a by-law in similar terms by the council of the Township of East Hawkesbury, and the council of the latter township having failed to pass such by-law, the matter was referred to arbitrators a majority of whom found that the Township of Lochiel had failed to establish the existence of the alleged road allowance ; and upon an appeal from

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their award to the High Court of Justice of the Province of Ontario, it was ordered that the appeal stand adjourned until the final determination of an action to be brought by the Township of Lochiel to determine the existence and location of the road allowance in dispute.

The statement of claim asked for a declaration that a government allowance for a public road exists between the township of Lochiel in the county of Glengarry and the township of East Hawkesbury in the county of Prescott and between the respective gores of said townships, and that such Government allowance for a public road is located in the boundary line between said townships and the said gores thereof respectively.

The following plan indicates the respective positions of the townships of Lochiel and West Hawkesbury and the gores just mentioned :



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The action was tried before Mr. Justice Ferguson on the 18th, 19th and 20th December, 1900, and he delivered judgment on the 21st of the following February.

By his judgment he declared that no public highway or allowance for road existed on the line between the townships of East Hawkesbury and Lochiel, but that an original allowance for a public road existed along the line between the gore of the Township of Lochiel, on the one side, and the Township and the gore of East Hawkesbury, on the other side.

The Township of Lochiel appealed against the finding that there was no public highway between the original townships. There was no appeal as to the finding of a public road along the gore of Lochiel.

Upon the appeal the court was composed of five judges, one of whom, Mr. Justice Lister, died before the judgment was delivered. Osler J. was of the same opinion as Ferguson J.; Maclellan J. and Moss J. were of the opinion that there was a road allowance originally laid out between the townships of Lochiel and East Hawkesbury; Armour C. J. agreed with Ferguson J. that there was no road allowance laid out between these townships upon the original surveys, but held that by subsequent acts the Crown had made a road allowance between those two townships along the east side of the eastern boundary of the present Township of Lochiel. As, however, subsequent to the original surveys and before the acts referred to, grants had been made of certain lots extending up to the eastern boundary of the Township of Lochiel, the learned Chief Justice held that the road allowance did not extend across these lots. The result of these conflicting opinions is the judgment already referred to, excepting certain lots upon the line of the road allowance found by the court to exist in other respects.

The Township of Lochiel forms part of a township originally laid out and partially surveyed about 1784 or 1785, under the name of the Township of Lancaster, provision being then made for its being composed of seventeen concessions only. The northerly and southerly boundary of the Township of Lancaster, as laid out, ran on a course N. 65° (or 66°) E. the easterly and westerly upon the course S. 25° E. Subsequently an addition was made, at the west end, of another concession, No. 18, and in the year 1818 the concessions from 10 to 18 were separated from the Township of Lancaster and formed into the present Township of Lochiel, the numbers of the concessions being made from 1 to 9.

The Township of Hawkesbury, now divided into East Hawkesbury and West Hawkesbury, was subsequently laid out fronting on the River Ottawa with the easterly and westerly boundaries upon a course N. 25° E. The first and second concessions of this township were surveyed, commencing at the river Ottawa, before the year 1798. In the latter year, William Fortune, D.P.S., assisted by son, Joseph Fortune, laid out the balance of this township and partially subdivided it. Their field notes were put in evidence at the trial. Fortune began his survey in 1798 at a post which had previously been planted by him on the eastern boundary of the Township of Hawkesbury, at the rear of the second concession. He left there an allowance for road along the rear of the second concession, and then went on a course S. 25° W. along the eastern boundary of the township, laying off seven additional concessions, putting a road allowance upon every alternate concession line, the last of these being placed upon the line between the 8th and 9th concessions. On reaching the point marked "D" on the accompanying plan, he turned westerly

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upon a course north 65° W., in order, as he said in his notes, to intersect the eastern boundary line of the Township of Lancaster. Proceeding upon that line he laid off lots supposed to be in that concession until he reached lot No. 10, without having struck the eastern boundary of Lancaster and supposing it not to have been run. He then went back to lay out lots in the 3rd, 4th and 5th concessions. He was afterwards instructed

to continue the concession lines of Hawkesbury to their full extent, with the divisional line between the Township of Longueuil and Hawkesbury

and commenced the work on the line on the west-
erly side of the township then being laid out by him. He began this work at the rear of the first concession and proceeded upon a course S. 25° W., marking off the concession lines at the west side of the township. After doing this he passed beyond the easterly boundary of Longueuil and along the easterly boundary of King's Land until he reached the point marked "L" on the plan, where he turned easterly upon a course S. 65° E. until he came, as he said in his notes, to the line of the Township of Lancaster, bearing N 65° E., on lot No. 28, where he planted a post marked on the western side "H" for Hawkesbury and on the eastern side "L" for Lancaster. Then he measured on a course N. 25° E. the depth of one concession, and ran the line between the 8th and 9th concessions, which struck the boundary of Lancaster again bearing N. 66° E. on lot No. 21, where he again planted a post marked to show that it was on the boundary between the two townships. Similarly he continued the lines between the 7th and 8th and the 6th and 7th concessions to the boundary of Lancaster, striking it on specified lots in the 17th concession of that township. Afterwards he proceeded to what he called the northern corner of

the Township of Lancaster, which would be at the point "G" on the accompanying plan. There he found an old post marked "17-18" and "common" and erected at the same point another post marked on the north eastern and north-western sides "H." for Hawkesbury, and on the opposite sides "L." for Lancaster. His two posts were subsequently found there in the year 1816 by Duncan McDonald, D.P.S., who was then completing a survey of a portion of the Township of Hawkesbury. A witness, William McKenzie, examined at the trial, told of seeing there three posts about forty-five years before the trial took place. After planting his post at the northern corner of Lancaster, Fortune proceeded to run what he called the eastern boundary of Lancaster upon a course S. 25° E. In doing this he planted posts at distances of 104 chains and 12 links apart, going on until he intersected the southern boundary of the Township of Hawkesbury as previously run by him, at a distance of 1 chain and 3 links "from a post marked 7 and 8 on the left of Lancaster line," and planted a post where the lines intersected, which post he marked on the eastern side "H" for Hawkesbury and on the western side "L" for Lancaster. Thence he proceeded to the rear boundary line of the 8th concession upon the easterly boundary line of Hawkesbury, and ran the line in rear of that concession until he struck again the easterly boundary of Lancaster at the point marked E on the accompanying plan, where he again planted a post marked on the western side "L" for Lancaster and on the eastern side "H" for Hawkesbury. In running up the line of the 8th concession he laid out and marked the various lots until he came to lot No. 14, upon which he struck the Lancaster line. He does not seem to have continued the division of 8 into the broken lots to the west of that point, but returned to the eastern boundary and

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laid out seven lots in the seventh concession, at which point his notes stopped.

He made out a plan shewing a complete subdivision of the Township of Lancaster, as thus laid out by him, into concessions and lots, putting around the township, including the portion where Lancaster projected into his rectangle, only single lines, and also leaving only single lines between the different concessions. The only parts in which he left the double lines commonly used by surveyors to indicate road allowances were between some of the lots into which the concessions were divided.

When this plan reached the Department it was altered by indicating upon it a continuation of the Township of Lancaster by the addition of another concession, thus further projecting the Township of Lancaster into the Township of Hawkesbury.

In the year 1802 several patents were granted of lots in Hawkesbury along the eastern side of Lancaster, by which they were described as running to the boundary line of the Township of Lancaster.

Mr. Justice Maclellan was of opinion that there had been a previous survey of the Township of Hawkesbury before that of Fortune. With all respect, it appears to me, that in arriving at this conclusion, the learned judge was misled by the memoranda upon copies of the descriptions of lots in Hawkesbury near the boundary of Lancaster contained in the letters patent issued therefor, which were put in evidence. Upon a number of these copies were the words "Order in Council", with dates some of which were in the year 1797. The learned judge appears to have assumed that these dates were the dates of the issue of the letters patent; and the descriptions being by metes and bounds, he naturally inferred that there had been some previous survey upon which these de-

scriptions were based. Looking at the documents, however, it appears to me that these dates were intended only to indicate the orders in council under the authority of which the officials were acting in issuing the letters patent which would be of subsequent dates. And referring to the list of such patents, which is found among the papers in the case, it appears that these patents were really issued after the year 1802, and one of them as late as the year 1829. Nothing has been produced from the records of the Department which shews that there had been any previous survey of any portion of the Township of Hawkesbury, except the first and second concessions, before Fortune's survey of 1798, which must, therefore, be treated as the original survey of the remaining portion of that township. It appears to me clear that Fortune laid out the Township of Hawkesbury abutting directly upon the northern and eastern boundaries of the Township of Lochiel, without any road allowance between them. His concession lines upon the north side, having reference to his notes, clearly came to the line of the 17th concession, and the southern boundary of the 9th concession and the line between the 8th and 9th were run to the line which he had laid out as the eastern boundary of Lancaster, and that line was run from the point where he found the post mentioned by him and planted another of his own, clearly on the north corner of the lot designated "common" and not at a distance of a road allowance therefrom. As to his conduct in marking off approximately the concession lines of Lancaster without making any allowances for roads, it is to be remarked that he was not concerned with finding the exact point at which the concession lines intersected the eastern line of the Township of Lancaster. He was marking that line merely for the

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purpose of enabling him to run the line of Hawkesbury at that part of the township, and although his plan gave no indication of the road allowances between the concessions of Hawkesbury, he had marked them down upon the ground, which would govern so far as they are concerned. No marks are found upon the ground to shew that Fortune left any road allowances along the eastern boundary of Lancaster. His plan indicates none. His field notes shew that he did not.

With reference to the point made by Mr. Justice Maclellan respecting the place at which Fortune, in tracing the eastern boundary of Lochiel, struck the southern boundary of Hawkesbury, and the distance which he found from the post upon the line between lots 7 and 8, in the 9th concession, the learned judge again bases his conclusion that an inference was afforded in favour of an intention to put a road allowance there, upon a similar error to that which has already been pointed out. He assumed that lot No. 8 had been patented in the previous year, whereas the patent was not issued until the year 1806.

The gore of Hawkesbury was surveyed by Joseph Fortune in the year 1816, and the gore of Lancaster by Angus Cattenach, in the year 1823. It is upon these later surveys, and not upon those of William Fortune in 1798, that the finding of the road allowance between Hawkesbury and its gore and the gore of Lochiel is based.

After the year 1802 various lots in Hawkesbury, along the boundaries of Lancaster, were granted by letters patent from the Crown. In some of these patents the lands were described by metes and bounds with reference to a specified road allowance along the boundary between Lancaster and Hawkesbury, or "in rear of" one of the concessions of Hawkesbury.

Upon close examination, however, it does not appear to me that so much weight should be given to these grants as has been given by the Court of Appeal.

The first of those to which importance has been attached in this respect was made in 1804, to Marjory McDonald and others, of lots 14, 17 and 18, in the 8th concession of the Township of Hawkesbury. These were described as going to within one chain of the eastern boundary of Lancaster. Two errors appear in the description of the lots in this patent. The point of beginning was stated as being at the north-east angle, and then, after proceeding to the south-east angle, the description turns eastward; and one boundary is specified to be the allowance for road in front of the 8th concession, whereas Fortune left no road allowance in front of the 8th concession.

In 1806 three grants of land were made to Cyrus Anderson, these being of lots 8, in the 8th and 9th concessions, and lot 9 in the 9th concession, and lots 24 and 25 in the 7th concession, of the Township of Hawkesbury. Lots 8 and 9 were specified to run to the allowance for road "in the rear of the said concessions" which would mean both 8th and 9th. And another boundary was specified to be "the allowance for road in front of the said concessions." Here again is an obvious error as no allowance for road had been left in front of the 8th concession. It is, then, not unreasonable to suppose that the reference to a road as in the rear of both concessions was a similar error. The description of lot No. 9, in the 9th concession, was also erroneous, as the width upon the front and the rear was made the same, 19 chains, whereas it is evident that the rear of the lot, being upon a diagonal line, would be much wider than the front; and if the reference to the road allowance as in the rear of lot No. 8 in the 9th concession

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arose through error, the other two patents of lot 9 in the 9th concession and of lots 24 and 25 in the 7th concession, being drawn at just about the same time, may have been drawn as they were through a similar error.

In 1809 a patent of lots 28, 29 and 30, in the 6th concession of Hawkesbury, was granted to Alexander McDonald, describing them as running to an allowance for road between Hawkesbury and Lancaster. In this patent also is found an error similar to that in the description of lots 8 in the 8th and 9th concessions, one boundary being made to be "an allowance for road in front of the said concession," where again no road allowance had been left.

In 1818 lot 32 in the 5th concession was granted to Alexander McDonald, it being described as running to an allowance for road on the eastern boundary of Lancaster. This lot abuts upon the line of the 18th concession, which had not been laid out at the time of Fortune's survey.

In 1830 lots 12 and 13, in the 9th concession, were granted to Charles Bethune, being described as running "to the allowance for road between the townships of Lochiel and West Hawkesbury"—an evident error, as the lots were in East Hawkesbury and not in West Hawkesbury.

In 1832 a grant was made to George Mode of lots 34 and 35, in the 5th concession, and lot 36, in the 6th concession, which were described as running to the allowance for road between the townships of Hawkesbury East and Lochiel. These, however, abutted on the 18th concession of Lancaster, and almost wholly on its northern side, and not upon any line run by Fortune.

In 1837 a grant was made to Peter McLaurin, of lot 33 in the 5th concession, specified as running to the

allowance for road between the townships of Hawkesbury East and Lancaster. This is in a similar position to the lots granted to Alexander McDonald.

In 1855 a grant was made to Roderick McRae of the west half of lot 16 in the 8th concession of East Hawkesbury, described as running "to the allowance for road between the townships of East Hawkesbury and Lochiel."

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These references appear to exhaust the cases of grants in Hawkesbury particularly referred to by Mr. Justice Maclellan in the Court of Appeal, except that of the grant to Anne McKay, of lot No. 1 in the 9th concession of Hawkesbury, made in 1829, erroneously assumed by the learned judge to have been made in 1797. This lot did not touch the boundary of the original Township of Lancaster at all, but was upon the southerly line of Hawkesbury, adjoining what is now the gore of Lochiel, where the original judgment of the court finds that there is in fact an allowance for road. One of the two grants in the Township of Lancaster, referred to by the learned judge, was of a lot in the gore. In the case of the other it is uncertain whether the allowance for road referred to was assumed to be on the east or on the west side of the line recognized as the boundary between the two townships.

It has been argued that, in speaking of the line of the Township of Lancaster, Fortune referred, or may have referred, to the line of a road allowance around the outside of the Township of Lancaster; but a consideration of his notes seem to me to leave no doubt that, in referring to the line of the township, he meant the mathematical line forming the boundary of the township itself, and not a road allowance. When he first struck that line going down from the north he specified the lot in Lancaster which he reached, and similarly for the other concession lines brought down

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from the north. The post which he found on the northern corner, as he called it, of the Township of Lancaster, having reference to these marks, was undoubtedly on the line of the township itself upon which the "common" lot abutted, and he carried that line down until he struck the line which he himself had surveyed as the eastern line of the Township of Hawkesbury. Evidently, the posts which he planted were on the eastern boundary of the township, and that placed where the rear line of the 8th concession was said to strike the eastern boundary of Lancaster was planted upon that line and not upon the outside of a road allowance. There is no indication of his having left a road allowance by marks upon the ground; his notes afford no evidence of any such allowance having been intended by him; they seem to me to be inconsistent with any such intention.

In February, 1789, before Fortune's survey of that year was made, a series of "rules and regulations for the conduct of the Land Office Department" was made by order in council.

Among these were the following provisions:

X.—The dimensions of every inland township shall be ten miles square and such as are situated upon a navigable river or water shall have a front of nine miles and be twelve miles in depth, and they shall be laid out and sub-divided respectively in the following manner viz :—(See the note) and the Surveyor General's office shall prepare accurate plans according to the above particulars, which shall be filed in the council office to be followed as a general model, subject to such deviations respecting the site of the town and direction of the roads, as local circumstances may render more eligible for the general convenience of the settlers. But in every such case it shall be the duty of the surveyor-general and his agents or deputy surveyors to report the reasons for such deviations to the Governor or Commander-in-Chief for the time being with all convenient speed.

NOTE—The detail for the sub-division of townships, above alluded to, referring to diagrams to be filled in the council office is omitted.

The copies of model plans produced with the regulations shew rectangular townships, divided in

different ways, and usually indicating reserves for different purposes.

Around these townships, in all cases, are double lines. It is to be observed, however, that none of these reserves were made in Hawkesbury, and that, when Lancaster was reached, the rectangular form was broken in upon. It is possible that these circumstances formed the subject of a special report, although none has been produced.

It does not seem to me that, from these instructions and the model plan, it should be inferred, in view of the other circumstances, that road allowances were intended to be left on the eastern and northern sides of Lancaster where the rectangle was broken.

Mr. Justice Moss (now Chief Justice) thought it clear that it was the invariable practice of the Department, and of surveyors making surveys under the direction of the Department, to leave an allowance for road between adjoining townships. But, as Mr. Justice Osler pointed out, the Legislature has itself made provision for dealing with cases in which no such allowance was made. While this may not afford reliable evidence of the existence of such cases, it serves at least to throw some doubt upon the invariability of the practice.

If the learned judges in Ontario had been unanimously of opinion that there was such a well established practice in this respect that a presumption of its having been followed arose, this court would probably have accepted that view. But where three out of five of the judges who have dealt with this case have not felt that the circumstances warranted the presumption, it seems necessary for this court to deal with the appeal upon the actual evidence.

In the year 1826 a plan was made which was thereafter used in the Crown Lands Department as an office

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plan of the Township of Hawkesbury. Around the eastern, southern and western sides, and between Hawkesbury and Lancaster, were drawn double lines apparently indicating the existence of road allowances. It has been suggested that there was in existence, between the date when Fortune's plan was returned to the Department and the making of this plan of 1826, another office plan shewing similar road allowances. This seems to me to be founded upon conjecture only. Upon Fortune's plan the names of parties were written upon a large number of lots as if to shew the names of patentees thereof. It seems to me not improbable that Fortune's original map was used for a considerable time in the office as the office plan. The road allowance apparently shewn on the plan of 1826 extends all the way along the eastern boundary of Lancaster cutting off from the boundary of Lancaster the lots which had been patented in 1802, as extending to the boundary line of Lancaster, along with all other lots along the boundary. If then any inference is to be drawn from this and similar plans of the existence of an intended boundary road along the east side of Lancaster, it would rather seem to be in favour of its being outside of all those lots and westward of the original eastern boundary of Lancaster, instead of being along the eastern side as declared by the judgment of the Court of Appeal, and as contended for on the part of the Township of Lochiel.

In the year 1833 some of the inhabitants of the Township of Hawkesbury petitioned the Government for the completion of the survey of the 7th and 8th concessions of the Township, only a portion of which had been laid out on the ground by Fortune. The result was the employment of Duncan McDonald, D.P. S., who was instructed

to survey the line between the 7th and 8th concessions from lot 9 to the boundary between the Townships of Lancaster and Hawkesbury, and the line from lot No. 1 to the said boundary between the 6th and 7th concessions.

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McDonald was provided with a copy of a plan of the Township of Hawkesbury, and was recommended by the surveyor to pay "a strict adherence to all original monuments" and to make "an equal division of the unsurveyed spaces." McDonald then proceeded to survey the line between the 7th and 8th concessions, and that between the 6th and 7th concessions, leaving, as he stated in his notes, an allowance of one chain for a road between the townships of Lochiel and Hawkesbury.

The only patent shewn to have been issued after the date of that survey for any lot in the 7th or 8th concession, specifying a boundary upon an allowance for road between Hawkesbury and Lochiel, was that issued to Roderick McRae in March, 1855, for the west half of lot No. 16 in the 8th concession. The only other grant shewn to have been made after that date of any land in one of those concessions, was that of the east half of the same lot, made in 1895 to Finlay McAskill. The description in this last grant was not given by metes and bounds but only by the number of the lot.

Having regard to the decisions in *Tanner v. Bissell*, (1) and *Boley v. McLean* (2), it would seem that McDonald, being employed to survey only an old line, could not conclusively establish a road allowance along the boundary if none had been established by the original survey, although the adoption of his work might afford some evidence of an intention on the part of the Crown to dedicate as a highway portions left for the purpose upon such a survey.

(1) 21 U. C. Q. B. 553.

(2) 41 U. C. Q. B. 260, at p. 271.

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The conclusion which I reach is that no road allowance was left between the boundaries of the townships of Lancaster and Hawkesbury upon the survey of either, and that the evidence of the establishment of any such road allowance by the officers of the Crown, after those surveys, was too uncertain to warrant the judgment of the Court of Appeal. The burden was upon the Township of Lochiel to establish the existence of the road allowance and to offer evidence which would enable the court to come to some definite conclusion upon its location. It may be that, on account of the original placing of lots designated as "common" at the eastern end of the concessions of Lancaster, it was considered by Fortune, or by the Department afterward, that portions of the east lots could be used as a highway. But the plaintiff municipality has not sought to prove the existence of a highway on the Lancaster side of the boundary, and it does not appear that we would be justified, upon any surmise that may be suggested, in finding a road allowance upon that side.

As to the evidence afforded by the patents, it appears to me that the remark of Mr. Justice Ferguson was well justified, when he said, "they seem to me to shew only confusion on the subject."

In my opinion the appeal should be allowed and the original judgment restored, the plaintiff township to pay the costs both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *O'Brian & Hall,*

Solicitor for the respondent: *E. H. Tiffany.*
