

[2] At some point in time, prior to February 12, 1885, two farmers named Robert Gibson and Dickenson Hewgill, decided to purchase the 80 acres tract of land from Messrs. Trout and Jay. They agreed that each would purchase one of the two parcels of land lying to the east and west of Mill Creek. Mr. Hewgill was to purchase the 30 acres to the west of the creek, Mr. Gibson the 50 acres of land to the east.

[3] I have noted that Mr. Hewgill and Mr. Gibson purchased their respective parcels of land on the same date – February 12, 1885. I have also noted the similarities between the deeds they respectively received from Messrs. Trout and Jay.

[4] I have concluded that Hewgill and Gibson discussed, as reasonable neighbours, how best to define the boundary between their respective lands and further, how best, recognizing the realities facing them in 1885, to define their respective rights and obligations to each other as neighbouring farmers. These discussions undoubtedly took place prior to Messrs. Trout and Jay being instructed as to how Mr. Hewgill and Gibson wished to take title to their properties.

[5] I believe that I am able to determine the intentions of Mr. Hewgill and Mr. Gibson when they defined their rights and obligations from the content of the deeds and the timing of the receipt of those deeds. The deeds given by Messrs. Trout and Jay are unique in that the legal descriptions set out in those deeds appear to be in direct correlation to the needs of each purchaser.

[6] As a brief aside, some of the witnesses have interpreted the deeds to mean that Messrs. Hewgill and Gibson were in the course of constructing a fence between their properties on February 12, 1885. This interpretation may be questionable when one realizes that the purchase by these gentlemen took place on February 12, in the dead of winter, in a rural area known for its plentiful snow. I have difficulty envisioning even our hearty pioneers setting about such a task under those conditions.

[7] When setting the east/west boundary between their respective parcels of land, what choices did Mr. Hewgill and Gibson have: the east bank of Mill Creek, the west bank of Mill Creek, down the middle of Mill Creek, or somewhere else?

[8] Against this backdrop, I am of the opinion that Mr. Hewgill and Mr. Gibson arrived at a common sense consensus. As farmers, both would want to raise cattle in the course of their farming endeavours. With cattle comes the need for a readily available supply of water and fencing to keep your cattle on your land and your neighbour's cattle on his. They had to determine how best each could access the water of Mill Creek and yet contain their cattle.

[9] Fences in 1885 were not constructed in the same manner as they were in the later 1900's or even today. Fences in 1885 were often constructed of split cedar rails stacked in an interlocking fashion following a zigzag course. This type of fence was known as a snake fence, remnants of which can be seen on old farmlands and woodlots today. This type of fence would typically occupy a strip of land approximately six (6) feet wide because of the nature of its construction.

[10] How best then to define the boundary limits of the two parcels of land, allow access by the cattle to water and contain those cattle within the confines of their owner's property? If a fence was to be constructed continuously on the west bank of Mill Creek, Mr. Hewgill's cattle would be denied access to the water. If a fence was to be constructed continuously on the east bank of Mill Creek, Mr. Gibson's cattle would be denied access to the water. A fence down the middle of the creek was impractical because it would be destroyed each year in the spring floods.

[11] It is my opinion that Mr. Hewgill and Mr. Gibson devised a means to serve all their purposes – to define the boundary line between their properties using the natural boundary created by Mill Creek and to provide for the watering and containment of their cattle.

[12] I have concluded that Mr. Hewgill and Mr. Gibson agreed that the east bank of Mill Creek would define the boundary between their properties. I further conclude that to allow Mr. Gibson and his cattle access to the waters of Mill Creek, they created two "nubs" of land that crossed Mill Creek onto its west bank for a short distance. These "nubs" of land were located at the north and south extremities of their properties. Each "nub" of land extended westerly across the natural boundary of Mill Creek and intruded briefly onto Mr. Hewgill's side of the creek. These "nubs" could be fenced off. Otherwise the boundary was the east bank of Mill Creek.

[13] Having ensured that each would have access to the waters of Mill Creek, I believe that Messrs. Hewgill and Gibson addressed the possible problem of how Mr. Hewgill would contain his cattle on his property by stopping them from crossing the shallow waters of Mill Creek and entering onto Mr. Gibson's land. I have concluded that Mr. Hewgill and Mr. Gibson agreed that if Mr. Hewgill wanted to build a fence to contain his cattle, Mr. Gibson would permit him to erect that fence on Mr. Gibson's property along the east bank of Mill Creek. Messrs. Hewgill and Gibson did not intend this fence to be the boundary between their properties but rather a convenient and common sense approach to the containment of Mr. Hewgill's cattle, should he acquire cattle. There is no evidence that a rail fence was ever built.

[14] I have reached this conclusion based on a plain reading of the deeds executed on February 12, 1885. Both of the deeds describe the east/west boundary of the two parcels of land as the east bank of Mill Creek (excluding the northerly and southerly "nubs"). Although both deeds refer to the east bank of Mill Creek as being the boundary, the description in the deeds goes on to state: "and (my emphasis – note the conjunctive) a sufficient distance on top of said Bank (say six feet) to admit of a rail fence being built for a line fence on top of the said Bank."

[15] Webster's Encyclopedic Dictionary defines the words "to admit of" as "to allow as a possibility." Applying this definition, the relevant portion of the description would read: "and (my emphasis) to a sufficient distance on top of said

Bank (say six feet) to allow, as a possibility, a rail fence being built for a line fence on top of the said Bank.”

[16] Neither the Gibson deed nor the Hewgill deed state that the boundary between their properties will be six feet east of the east bank of Mill Creek. As earlier stated, Messrs. Gibson and Hewgill intended the east bank of Mill Creek to be the boundary, but agreed that Mr. Hewgill could erect a fence, if he so chose, on the top of the east bank to contain his cattle. Mr. Gibson gave Mr. Hewgill a license to use his land to erect a fence. I will refer to the six foot strip of land to the east side of Mill Creek as the “license.”

[17] Over the past century plus, the east and west properties have been transferred several times – the east parcel more so than the west parcel. In 1891, Gibson sold to Carefoot. The transferring deed referred to the six foot “license.” In 1910, Carefoot sold the property. In that transferring deed, there was no reference to the “license.” Thereafter in the numerous transfers of the “Gibson” property there was no reference in any of the deeds to the six foot “license.”

[18] All conveyances of the west parcel (the “Hewgill” property) included in the transferring deeds a legal description that contained reference to the six foot “license”, up to the executor’s deed granting Ucoba Kaake ownership of the west parcel on May 25, 1989. When Ucoba Kaake presented the executor’s deed for registration, the deed was stamped by the Deputy Land Registrar with cautionary words: “The description of the land in this instrument does not comply with the

Regulations under the Registry Act. A Reference Plan may be required to describe this land in subsequent registrations.” The offending description was that which pertained to the six foot “license.”

[19] In 1885, Messrs. Gibson and Hewgill reached an agreement whereby Mr. Hewgill was permitted to use, but not own, approximately six feet of Mr. Gibson’s land. That agreement having been reached and etched in each other’s deeds, it could not be unilaterally rescinded. Once granted, the “license” could not be revoked by Mr. Gibson or his successors in title without the consent of Mr. Hewgill or his successors in title. Although Mr. Gibson’s successors in title, after 1910, deleted any reference to the “license” in passing title to the easterly parcel, that deletion had no effect as it had not been consented to by the owners of the adjoining westerly parcels. That changed when Keith McGowan purchased the west parcel from Ucoba Kaake in 2001.

[20] Mr. McGowan, having purchased the west parcel, retained Mr. Ted Horton to act for him concerning the real estate transaction. Mr. Horton’s staff conducted a search of the title to the land and discovered the cautionary stamp imprinted on the executor’s deed by the Deputy Land Registrar.

[21] Mr. Horton advised Mr. McGowan that he would either need to retain a surveyor to prepare an R-Plan or present the officials at the Registry Office with a legal description of the lands being purchased that satisfied the Registry Office’s requirements. Mr. McGowan wanted to close the real estate transaction on the stated closing date. The surveyor’s report would delay the closing by several

months and was expensive. Mr. McGowan instructed Mr. Horton to draft a legal description satisfactory to the Registry Office personnel. Mr. Horton accomplished this by “marrying up” the legal description of the west parcel to the description of the adjoining east parcel. In doing so, Mr. Horton, acting on behalf of Mr. McGowan, deleted any reference to the six foot “license” parcel and confirmed that the easterly boundary of the lands being purchased by Mr. McGowan was the east bank of Mill Creek.

[22] When the real estate transaction between Ms. Kaake and Mr. McGowan closed, she transferred her interest in the west parcel to him with the boundary set as the east bank of Mill Creek. She did not transfer to him the six foot “license.” Absent the transfer of the six foot “license” by Ms. Kaake to Mr. McGowan, the right to use that area to the east of the east bank of Mill Creek to build a fence was extinguished.

[23] This litigation is as a result of Mr. McGowan, after purchasing Ms. Kaake’s property, deciding that he wishes to lay claim to certain lands to the east of the east bank of Mill Creek. The title to these lands is in the name of Rainmaker Estates Inc.

[24] In particular, Mr. McGowan has stated:

- (i) he owns all the land that lies to the west of a fence or remnants of fences to the east bank of Mill Creek. This fence or remnants of fences meanders somewhat along the course of Mill Creek northwards towards a flood plain. The course of these old fences

or pieces of fence sometimes almost abut the waters of Mill Creek and at other points are several feet from the creek. At the flood plain the fence/remnants goes along the top of the bank of the flood plain in a northeasterly direction. It is his position that these fences and remnants are the best evidence of the real boundary between the two properties. He states he is the real owner of the flood plain area.

- (ii) that Mill Creek once flowed further to the east and that its banks were those of the flood plain bank. He states that the fence at the top of the flood plain bank is evidence of this. He called expert evidence that Mill Creek, at some point in the past, changed its course and now flows more to the west; and
- (iii) that he acquired possession of the disputed lands to the east of Mill Creek by adverse possession.

[25] During the trial much evidence was presented relating to the location of various fences and remnants of fence on both the east and west sides of Mill Creek. Although considerable effort was expended to convince me that portions of these fences represented the true boundary between the east and west parcels of land, when all was said and done there was a dearth of evidence to support the proposition that neighbours on the east and west parcels ever intended that a fence should mark the boundary between their properties. The preponderance of evidence was that the neighbouring parties intended the

various fences built over time to be fences of convenience – to keep their cattle from wandering onto neighbouring lands, away from roadways, treacherous landfalls and flood plains strewn with debris deposited by flood waters. Over the past century or more these lands were occupied by farmers who were interested in controlling the movement of stock by practical means. Their lives were built on neighbourly co-operation, not the resurrection of false boundary monuments. That task has only been practised by more modern inhabitants.

[26] At the northerly end of the disputed lands lies a flood plain. This flood plain is to the east of Mill Creek. While Mill Creek has a bank (where its waters meet the land) there is an elevated bank at the easterly edge of the flood plain. On top of the flood plain bank there is a portion of older fencing.

[27] It is Mr. McGowan's position that the fence at the top of the flood plain bank represents the true boundary between the two parcels of land. It is his suggestion (and evidence was called to support his contention) that, at one point, Mill Creek flowed further to the east and that the flood plain bank was the bank of Mill Creek before it changed its course and moved to the west. The reasoning is that while the creek moved, the fence at the top of the bank of the flood plain remained as the boundary.

[28] Mr. McGowan called experts who gave their opinion that Mill Creek had, over the past 100 years or so, changed its direction of flow in its main channel in a manner supportive of Mr. McGowan's position. They came to this conclusion on the basis of an analysis of historic aerial photographs and an analysis of some

of the physical evidence. On the other hand the opposing party, Rainmaker, presented its own experts who opined that Mill Creek flows now where it did centuries ago. To support their conclusions, they examined the physical evidence in the area including the layering of sedimentary deposits. I by far prefer the evidence of these latter witnesses. I also concluded that to accept Mr. McGowan's experts' opinions, I would have to accept that at some time in the past water ran uphill. The foundation of Rainmaker's experts rests on understandable facts and reliable evidence while the foundation of Mr. McGowan's experts is speculative and rests on shaky facts and questionable interpretation. The boundary between Mr. McGowan's property and Rainmaker Estate's property in the area of the flood plain (as it is elsewhere, excluding the "nubs") is the east bank of Mill Creek where its waters touch land.

[29] The fence on the top of the flood plain bank was never intended as a boundary but rather was a fence of convenience intended to control the movement of livestock. It was intended to keep the animals from the embankment of the flood plain and the dangers of the flood plain itself.

[30] Mr. McGowan has claimed possessory title, based on the principle of adverse possession, to lands titled to Rainmaker and its predecessors on title. There is not an iota of evidence to support this contention. None of the evidence is capable of establishing any of the necessary ingredients to a successful prosecution of an adverse possession claim. This claim is without merit.

[31] The plaintiff's action is dismissed. The boundary line between the east and west limits of the McGowan and Rainmaker properties where they adjoin is as described in their respective deeds. If the parties cannot agree as to costs, I may be addressed in writing on or before November 15, 2008.

Mr. Justice R.M. Thompson

DATED: October 24, 2008