CASE COMMENTS AND NOTES

IMPROVEMENTS UNDER MISTAKE OF OWNERSHIP: SECTION 183 OF THE LAND TITLES ACT

I. INTRODUCTION

It is not uncommon for an owner of land to make improvements to land in the mistaken belief that it is land which he owns. That can happen if A, the owner of Lot 1, is mistaken as to the location of the boundary between Lot 1 and Lot 2, and encroaches on the latter. It can also happen if A occupies the whole of Lot 1 in the belief that it is Lot 2. These problems are more likely to arise in urban areas where improvements are customarily built to or near the property line and where it is more likely that the owner will be given the wrong lot number, but they can also occur in connection with farm lands.[1]

Until recently, section 183 of the Land Titles Act, which applies in such cases, remained in obscurity except for *Nova Holdings Ltd.* v. *Western Factors Ltd.*[2] A recent spate of cases suggests that it is emerging from that obscurity. They are as follows:

(1) *Canada Permanent Trust Co. et al.* v. *Herron et al.*:[3]

In that case the plaintiff built a swimming pool and guest house which extended from his property across a 20 foot wide municipal lane and more than 20 feet onto the defendant's property. Chief Justice Milvain held that the plaintiff's belief that he owned the land was not founded upon a reasonable and adequate inquiry so that the plaintiff had no claim under section 183. The plaintiff, however, having occupied the area for more than 10 years, obtained title under the Limitation of Actions Act and was awarded costs. He failed as against the municipality because of section 420 of the Municipal Government Act.

(2) *Nessman et al.* v. *Bonke et al.*:[4]

In this case, the original owner of Lots 17 and 18 built a house on Lot 18. It was thought that the house was on Lot 17, title to which descended to the plaintiffs, who occupied the house. The defendants bought Lot 18 and successfully claimed the house by virtue of their certificate of title to Lot 18. Section 183 did not apply because the house was built by the original owner on his land.

(3) *Mildenberger* v. *Prpic*:[5]

In that case the applicant's sidewalk, which was of value only for the purpose of giving access to the garage at the rear of his residential lot, encroached on the neighbouring lot. He was held entitled to retain the area encroached upon, subject to payment of compensation.

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1. *See for example Boyczuk* v. *Perry* [1948] 1 W.W.R. 495 (App. Div.).
2. (1965) 51 W.W.R. 385.
3. S.C. 119475, Calgary, December 16, 1975, referred to at [1976] W.W.D. 62 (Milvain C.J.T.D.).
4. S.C. 11985, Edmonton, March 9, 1976 (Steer J.).
5. (1976) 67 D.L.R. (3d) 65 (D. C. McDonald J.).

(4) *Woodsworth* v. *Harvey*:[6]

The defendant removed a dilapidated fence between his property and that of the plaintiff, and built a new fence and a retaining wall. In so doing he relied on the 1959 survey certificate prepared to show that his house was within the lot boundaries, and proceeded in the face of warnings by a friend of the plaintiff that there was an encroachment. It was held that the section was not intended to protect an owner who is aware, almost from the outset, that a property dispute is a distinct possibility, and who forges ahead unilaterally. The fence and retaining wall were ordered removed. No costs were awarded; "at least one reason" was that the plaintiff's fiancee had thrown refuse into the defendant's yard.

(5) *Maly* v. *Ukrainian Catholic Episcopal Corporation of Western Canada*:[7]

This was a case of honest mistake as to the identity of lots and the plaintiff was entitled to a lien. Clearing of land may in some cases be a lasting improvement, and in other cases not. The court had difficulty because the value of the improvements would be different for a purchaser of recreational property (the plaintiffs having bought and improved the land for the purpose) and a purchaser who bought the land only for access to a larger parcel. The original claim was for $10,000 and the plaintiff's expert "tried valiantly" to reach $2,000. The award was $650. No costs were awarded.

II. HISTORY

The section reads as follows:

183. (1) Where a person at any time has made lasting improvements on land under the belief that the land was his own, he or his assigns

(a) are entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements, or

(b) are entitled to or may be required to retain the land if the court is of opinion or requires that this should be done having regard to what is just under all the circumstances of the case.

(2) The person entitled or required to retain the land shall pay such compensation as the court may direct.

Its wording is so strikingly similar to that of Ontario's Act for the protection of persons Improving Land under a Mistake of Title[8] that it is clearly copied from it or from an intervening copy. In *Beaty* v. *Shaw*[9] Hagarty C.J.O. referred to prior legislation with the same general purpose. This included provisions commencing with 1818, R.S.U.C., c. 14 by which provision was made in cases of ejectment for the assessment of damages which a defendant might sustain by improving land not his own in consequence of unskilful survey. He also referred to "Betterment Laws" in many of the United States, including Arkansas, Vermont, Ohio and Illinois where relief had been given to defendants on various grounds, which appear to have been intended to cope with problems arising under deed registry systems.

The Ontario provision did not meet with unanimous approval. In

6. (1976) 1 A.R. 241.

7. [1977] 1 Alta. L.R. (2d) 277 (Stevenson D.C.J.).

8. (S.O.) 1873, c. 22, as amended by the time of R.S.O. 1877, c. 99, s. 28.

9. (1888) 14 O.A.R. 600.

Carrick v. *Smith*,[10] Wilson J., delivering the judgment of the Queen's Bench, said:

> If a person buy lot twenty, and enter by mistake—his own mistake—on lot nineteen, under the belief that he was on lot twenty, and build a brick house on it, is the owner of nineteen to be subjected to the payment of that useless or expensive building before he can occupy his land or sell it free from encumbrances?
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> Or is the person who buys a bad title to have a lien against the true owner for his improvements? If so the one who has to pay for the improvements should have the right, at any rate, to sue the vendor of the bad title on his covenant for title, if the purchaser himself could sue him. But suppose the purchaser has taken no covenant, or only a qualified one, or the covenant is good for nothing, what is the true owner, who has to submit to the lien, to do?
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> Would it not be better to make the seller of the bad title liable on his covenant for the improvements in all cases, and not merely for the mere purchase money and interest, either for the whole value of the improvements or for such part of them as the Court might consider, on a view of all the circumstances, to be just and reasonable?
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> It would be better to do that than to let him go free, absolutely free, and to subject the innocent and unfortunate true legal owner to the payment of improvements which he may be quite unable to pay, and which must amount to a forfeiture of his land for the fault of two others who have benefited by it, and for no kind of fault or default of his own. This seems rather sharp legislation, but it is, unfortunately, too absolute in its terms, and it is directed against the only innocent man there is in the transaction, and he is without redress. He should be allowed, at any rate, if he elect, to abandon his land on being paid the value of it. There would be some equality in that.
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> Such a statute must be carefully executed in all cases.

Later cases have been more sympathetic to the purpose of the section.

III. FOR WHOSE BENEFIT?

In the *Nova Holdings* case, *Nova* agreed to buy land from *Western Factors Ltd.* Writs of execution against *Western* had previously been registered at the Land Titles Office. *Nova* built houses on the property before obtaining a transfer and discovering the writs. It will be observed that *Nova* knew who the registered owner was and who the beneficial owner was, and it was not mistaken as to the land. Nevertheless the majority in the Appellate Division held that *Nova* had satisfied the requirements of section 183(3) and went on to say:

> If a stranger to the registered owner had satisfied the requirements of section 183(1), it is clear from that section that he would be entitled to the benefits of the section. Is the position of a person who has agreed to purchase lands and believes that he is the owner and makes improvements on the lands in a less favourable position? I think not.

They affirmed the order made below under which *Nova* retained the land and improvements upon paying into court the purchase price which it had agreed to pay to *Western*. The third member of the court thought that the same result followed from the general principles of the Land Titles Act and did not consider section 183.

The court appears to have gone some distance to accommodate a purchaser acting in good faith as against an execution creditor. It would not be safe to rely upon similar indulgence in the case of another kind of encumbrance. In *Beaty* v. *Shaw*, for example, the Ontario Court of Appeal took the view that the Ontario section did not confer a lien ranking ahead of a mortgage upon a purchaser who bought in ignorance of the mortgage.

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10. (1874) 34 U.C.Q.B. 389.

V. MISTAKE OF TITLE v. *MISTAKE OF IDENTITY*

The Manitoba and Ontario cases hold that the corresponding sections in those provinces relate only to cases of mistake of title and not to cases of mistake of identity of the land. The Saskatchewan Court of Appeal in *Schiell* v. *Morrison*[11] held that it included both, and the Alberta cases have accepted the latter proposition. D. C. McDonald J. in *Mildenberger* v. *Prpic* pointed out that in Ontario and Manitoba there was a different legislative history which made the decisions of their courts inapplicable in Alberta: in both cases a later section provided for unskilful surveys, and that indicated that the earlier section did not deal with mistake of identity. In *Schiell* v. *Morrison* it was also pointed out that the Ontario section had appeared under the heading "mistakes of title" which led towards the restricted interpretation. The words of section 183 seem quite broad enough to cover both cases, and there is no apparent reason why they should be construed so as to be inapplicable to a common problem and applicable only to an uncommon one. The interpretation of the Alberta cases is to be preferred.

V. WHAT IS A LASTING IMPROVEMENT?

This question arose in the *Mildenberger, Woodsworth* and *Maly* cases. In *Mildenberger*, Mr. Justice McDonald took his definition from Laskin J.A. in *Gay* v. *Wierzbicki*.[12] The word "improvement" involves an addition to the property amounting to more than mere repair or replacement of waste. The term "lasting" refers to "permanence" in the sense of not being easily removable, as is the case with some fixtures. He found that the encroaching sidewalk with which he was dealing which was "in excellent condition and well maintained" was "a lasting improvement." Judge Stevenson in the *Maly* case accepted the same test. The clearing of a cabin site, the filling in to provide access to the site, and placing the foundation for a cabin, created "lasting improvements", though mere cleaning up of the property, or short term improvements would not. Mr. Justice Moore in the *Woodsworth* case appears to have taken a somewhat more restricted view. He though that "the test of a lasting improvement must be such that it envisions something that will not be replaced such as a building or a house." He held that a fence and retaining wall were not "lasting improvements" and observed: "fences and boundary line separations are often replaced as indeed are sidewalks," from which it may be inferred that he did not find himself in agreement with the *Mildenberger* case to which he had referred.

The test propounded by Mr. Justice Laskin and accepted by Mr. Justice McDonald and Judge Stevenson appears to be satisfactory. The bare words of the statute or any judicial definition inevitably involve problems of characterization at the borderline.

The question is whether the "improvement" must be an improvement to the lands in the hands of the owner. The encroachment cases suggest that the answer is in the negative. The swimming pool which encroached on the neighbouring land in the *Herron* case could hardly have improved the value of the land encroached upon, but Chief Justice Milvain did not refuse relief on that ground. Mr. Justice McDonald in *Mildenberger* considered a judgment of Chief Justice Williams which suggested that the

11. [1930] 4 D.L.R. 664, 2 W.W.R. 737.
12. (1967) 63 D.L.R. (2d) 88, 93 (Ont. C.A.).

improvement must enhance the value of the true owner's land, but went on to hold that the judgment does not apply in Alberta when a claim is made under section 183(1)(b). His view, which appears to be well founded, was that if the claimant is to have a lien upon the land improved under section 183(1)(a), the value of that land must be enhanced in the hands of the owner, while if the claimant is to be left with the land upon payment of compensation under section 183(1)(b) and section 183(2) it is sufficient if the value of the land is enhanced only as an adjunct to the claimant's land.

VI. MUST THE CLAIMANT'S RELIEF BE REASONABLE?

Section 183(1)(a) confers a lien upon the claimant only to the extent of the increase in land value created by the improvement. Section 183(1)(b) in combination with section 183(2) allows the claimant to retain the improved land only upon payment of compensation.

It can therefore be argued as a matter of policy that section 183 should apply in all cases of honest error, as its effect is to ensure that the true owner will not be able to take financial advantage of the claimant but will be kept financially whole himself. On the other hand, it can also be argued as a matter of policy that the section should not apply unless the claimant had reasonable grounds for his mistake, because the law, if it assists a trespasser at all, should not assist one who has not taken reasonable care to avoid the invasion of another person's property rights.

In *Schiell* v. *Morrison*[13] the Saskatchewan Court of Appeal required that the belief be reasonable and so did Mr. Justice Dysart in *Aumann* v. *McKenzie*.[14] That requirement is a judicial gloss, as section 183 merely calls for a "belief that the land was his own." In the *Herron* case Chief Justice Milvain applied the *Aumann* case. In the *Mildenberger* case Mr. Justice McDonald, who was understandably not referred to the *Herron* case, found that the Mildenbergers "had an honest belief", which he found sufficient. In the *Maly* case Judge Stevenson pointed out that Chief Justice Milvain had not been referred to the decision of the Manitoba Court of Appeal in *Welz* v. *Bady*[15] which relied upon Ontario authority and held that it is enough that the mistake be "honest" or "honest and *bona fide*". Judge Stevenson thought it sufficient that the mistake be "honest and *bona fide*", and he was of the view that the *Herron* case should be read in the light of its facts, and that where, as in the *Herron* case, the facts suggest that the claimant "close [d] his eyes to inquiries which the circumstances commanded", the mistake is not *bona fide*. In *Woodsworth* v. *Harvey* Mr. Justice Moore did not have to grapple with that particular problem; it was enough to say that section 183 does not protect a claimant who improved land in the knowledge that his neighbour disputes his title. Similar reasons for denying relief to the claimant were given in the Ontario cases of *Parent* v. *Latimer*[16] and *O'Grady* v. *McCaffray*.[17]

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13. [1930] 4 D.L.R. 664, 2 W.W.R. 737.
14. [1928] 3 W.W.R. 233, 238 (Man. K.B.).
15. [1949] 1 W.W.R. 123 (Man. C.A.).
16. (1910) 2 O.W.N. 210, 214 (Div. Ct.), aff'd (1910) 2 O.W.N. 1159 (C.A.).
17. (1883) 2 O.R. 309 (Ch. Div.).

VII. WHAT ARE THE REMEDIES?

In the *Mildenberger* case Mr. Justice McDonald held that the section provides two distinct remedies. Section 183(1)(a) provides for a lien on the land improved. Section 183(1)(b) provides a different remedy, a right or a duty to retain the land, which may exist even if the value of the land encroached upon has not been enhanced. That is an analysis which is easy to overlook upon a casual reading of the section but which upon examination appears to be well founded.

How is the court to choose between the remedies? In the *Mildenberger* case Mr. Justice McDonald found that the value of the land improved had not been enhanced, so that only the second remedy was available. Judge Stevenson in the *Maly* case agreed and suggested that the choice of remedy will be suggested by the relationship between the amount of work done and the enhancement of the value of the land. He said:[18]

> In my view a reasonable purchaser would be interested in making some allowance for these improvements. That allowance is not, however, measured by the cost. The statute only allows a lien for an improvement which enhances value. Where a great deal of work has been expended but it is work of limited value, the appropriate application is to seek the alternative relief of, in effect, a forced sale."

It appears likely that the appropriate remedy in encroachment cases will be the forced sale of the improved land to the claimant, while the appropriate remedy in cases of building on the wrong property will likely be the lien, though if the section had been applicable in *Boyczuk* v. *Perry*,[19] the choice might be in doubt.

The question was not discussed in the *Nova Holdings* case. Mr. Justice Macdonald speaking for the majority said:[20]

> As to the relief to which a person, who makes lasting improvements on land under the belief that the land is his own, is entitled, wide powers are given under sec. 183(1)(a)(b) and (2). In determining what remedy should be available to a person coming under the provisions of sec. 183, it is clear that the court acts as a court of equity and justice.

In *Nova Holdings*, the trial judge, in the exercise of the wide powers granted by section 183, directed that *Nova,* which made the improvements, should retain the land on payment into court of a sum equal to the admitted fair value of the land without the improvements. On appeal, the majority of the court confirmed this position, and the third member of the court gave a judgment which would have the same result but for different reasons.

It should be noted that the actual phraseology of the section appears to give the claimant, once the fundamental facts are proved, an absolute right to one of the remedies. "He or his assigns . . . are entitled to a lien . . . or . . . are entitled to or may be required to retain the land". It appears that in the first instance he is entitled to the lien, and that the alternative remedy is to be made available "if the court is of the opinion or requires that this should be done having regard to what is just under all the circumstances of the case." The requirement to pay compensation in the latter event is also mandatory. The *Nova Holdings* case suggests that the courts will take a somewhat broad interpretation of their powers under the section.

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18. *Supra*, n. 7 at 282.

19. In that case, several acres from one parcel had been mistakenly fenced in with the adjoining parcel and the owner of the latter had built a house and buildings on the encroachment.

20. *Supra*, n. 2 at 391.

There can be a question as to mechanics of the remedy. If the claimant is to "retain" the land under section 183(1)(b), it would seem to follow that the court must have power to direct the cancellation of the owner's certificate of title and the issue of a new certificate of title in the claimant's name, and the discussion of section 188 in the *Nova Holdings* case appears to confirm that proposition. In the *Mildenberger* case Mr. Justice McDonald said "there will therefore be an order in those terms, the details of which can be set if necessary after the parties have had an opportunity to satisfy themselves as to the precise form which the order should take in order to enable it to have effect with the Registrar of Land Titles," which appears to contemplate an order such as that suggested above.

The section itself does not provide any mechanism for the enforcement of a lien under section 183(1)(a). In the *Maly* case, the only one of the Alberta cases in which such a lien was granted, a declaration of lien was made but the judgment did not deal with enforcement. It is therefore necessary to consider whether the word "lien" implies a remedy.

There are some kinds of lien which involve only a right of possession. An equitable lien, however,[21]

> is in the nature of a charge on the land and entitles the person in whom it resides to apply to the court for a sale of the property in satisfaction of his claim. Unlike a common law lien it is not dependent upon possession.

A common example is the vendor's lien on real property for the unpaid purchase price, which is enforceable by sale.[22] A less common one is a lien for taxes paid under a mistaken belief as to ownership, when the owner ought to have known the payments were being made, in which case the judgment provided that if payment was not made in a specified time the plaintiff might apply "to enforce the lien", which probably contemplated sale.[23] Practical considerations suggest that a lien under section 183(1)(a) must be treated as implying a right of sale, as there is no other remedy which is likely to give it any substantial effect other than as a cloud of indeterminate composition on the title. That was the view expressed by Mclennan J.A., Hagarty C.J.O. and Burton J.A. concurring, in *M'Kibbon* v. *Williams*,[24] who said in respect of the Ontario section:

> A lien is defined by Lord Westbury in *Cooper* v. *Phibbs*, L.R. 2 H.L. 171, to be a charge in the nature of a mortgage charge upon the land; and the Legistature must have intended its lien to be of the same nature as the liens already known to the law, and to be enforceable in the same manner. It is not a mortgage in the sense of conferring a legal title, but a charge enforeceable in equity and not at law. Therefore, when James Hamilton died, Williams had no longer a legal title, but only a right to enforce a charge against the land. He was liable to be turned out of possession by the owner, and to account for the mesne profits or an occupation rent for such time as he remained in possession after his title expired. On the other hand, he had a right to enforce his lien with the aid of the Court by a sale of the land. These respective rights arose in April, 1886. Williams might then have gone out of possession. He had no right to retain possession. A lien holder, having no legal title, can neither recover possession if he is out, nor can he retain possession if he is in. No doubt he would be entitled to a receiver under the same circumstances as an equitable mortgagee, but that is the most he could have.

It seems likely that an Alberta court would follow the same line of reasoning.

21. Cheshire, *Modern Law of Real Property* (11th ed.), p. 712.
22. McCaul, *Remedies of Vendors and Purchasers*, p. 40.
23. *Riddell* v. *McRae* [1917] 2 W.W.R. 546 (App. Div.).
24. (1896) 24 O.A.R. 122, 129.

It may be possible to find another remedy in a particular case. In *M'Kibbon* v. *Williams* the court held that there was an equitable set-off between the improver's lien and the owner's claim for mesne profits. In *McCarthy* v. *Arbuckle*[25] it appears that the plaintiff succeeded in ejectment but was not to have execution until the value of improvements made by the defendant was ascertained and paid. In *Welz* v. *Bady*,[26] the trial judge, who was sustained on appeal, granted the plaintiff a lien and directed that in default of payment within a specified time the plaintiff should pay the value of land without the improvements and receive a transfer; in other words the remedy under section 183(1)(b) was made the sanction for failure to satisfy the lien granted under section 183(1)(a). However, sale is usually likely to be the most appropriate means of enforcement of a lien.

VIII. WHO IS AN ASSIGN?

Section 183 says that the "assign" of a person who made lasting improvements on land may claim its protection. Who then is an "assign"? In the *Maly* case, Mr. Maly had died and a question could have arisen as to who should put forward his claim, but it appears to have been agreed that the trial was to be conducted on the basis that Mrs. Maly was the assign of her husband notwithstanding any technical legal defect. The more likely case in which the problem may arise is that in which the claimant buys property A in the belief that it includes the part of property B which has been improved by his predecessor in title under the belief that the land was his own. The question then will be whether the predecessor in title, by conveying property A (both parties, *ex hypothesi*, being ignorant of the fact that the improved property was not property A or part of it), automatically assigns his rights under section 183 to the claimant. Practicality suggests that he will be held to do so as the reference to "assigns" will otherwise be restricted to cases in which the original claimant, having become conscious of his claim, sells his land before enforcing it, or in which the predecessor specifically assigns all possible claims in general terms, cases which are at least uncommon and probably non-existent.

IX. RELATION TO OTHER ASPECTS OF THE LAW

There is an equitable doctrine of acquiescence which, according to Halsbury[27] includes the following proposition:

> . . . where a person who mistakenly believes that he has an interest in land, being ignorant of his want of title, expends money on it in buildings or other improvements or otherwise dealing with it, and the true owner, knowing of the mistaken belief and the expenditure, raises no objection, equity will protect the person who makes the expenditure, as by confirming that person's supposed title, or by requiring that he be compensated for his outlay, or by giving him such a charge or lien.

Section 183 covers the same ground with two significant differences. One is that A, the innocent encroacher, is not required to prove that B, knowing of his mistake, allowed him to proceed. The second is that under the section A must pay for the land. The section does not purport to override the equitable rule, which presumably still exists.

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25. [1901] 2 O.L.R. 442 (C.A.).
26. [1947] 2 W.W.R. 1003 (Man. K.B.), aff'd [1949] 1 W.W.R. 123 (Man. C.A.).
27. 16 Halsbury (4th) 997, paragraph 1475.

Then, it is not clear what relation the section bears to the rest of the Land Titles Act. The right to a lien, or the right to retain the land, until perfected by some form of registration, is an unregistered interest and should be treated as such; it would be a serious derogation from the principles of the Land Titles Act to hold A's right to survive the issue of a new certificate of title to the land encroached upon to a bona fide purchaser for value. However, a court might look at the fact that the section is in the Land Titles Act itself and that there is no specific limitation in it which would prevent it from surviving, and hold that the claims conferred by it override those provisions of the Act which exclude unregistered interests.

Then there is the relation of the section to the Limitation of Actions Act in a case in which A has had possession of Whiteacre, or the part encroached upon, for 10 years. That was what had happened in the *Herron* case. Chief Justice Milvain appeared to consider both remedies applicable, the remedy under section 183 and the remedy under the Limitation of Actions Act. He first held that A was not entitled to relief under section 183 because his mistaken belief was not reasonable; if he had held otherwise A would either have had a lien on the land, or would have had to pay for it. It may be that claims under section 183 should be merged in, or terminate upon, the coming into being of a right to obtain title under the Limitation of Actions Act, but whether or not that is correct relationship, some adjustment should be made. It seems paradoxical that the encroacher in *Herron* failed in his assertion of a claim under section 183 and yet was awarded title under the Limitation of Actions Act to the land on which he had encroached.

Another question is whether or not a claim under section 183 is subject to any limitation period. No period is prescribed by the section itself, nor is any specific period assigned to it by the Limitation of Actions Act. The six-year period prescribed by section 5(1)(g) of the Limitation of Actions Act may apply, but that is far from clear, and, indeed, the possibility of a limitation period is not mentioned in Chief Justice Milvain's judgment and therefore was not presumably thought worthy of being raised, though the improvements had been made more than 10 years before the commencement of the action. The imposition of a limitation period would go a long way towards defeating the purpose of section 183, as by its very nature it applies in cases of mistake in which the error may be undetected for many years.

There is also a question as to the relationship between section 183 and the Planning Act. In a case in which improvements on one lot encroach upon the next lot and in which it is ordered that A, the owner of the first, retain the area encroached upon, there is a subdivision of part of the second lot. In many cases it will not give rise to a serious planning problem that a strip of one property be added to another, as was done in *Mildenberger* v. *Prpic*, but there could be a case with more serious consequences. Probably any planning problem has been resolved in favour of the Planning Act by the recent amendment to that Act which requires planning approval of a court order which results in a subdivision[28] though it may be anomalous for planning authorities to intervene in such a case.

Finally, there is a question whether there should be some form of relief

28. S.A. 1976, c. 44, s. 3.

in the case of a minor encroachment on a street or road. The *Herron* case shows that section 420 of the Municipal Government Act[29] effectively prevents title being acquired by adverse possession, and public policy would normally preclude any encroachment which would interfere with the use of a street or road, of which the swimming pool constructed across the road in the *Herron* case is an example. However, it would require a strained interpretation of section 420 to hold that section 183 does not apply to a road or street vested in a municipality, and it may well be that it does apply. The consequences of holding that it does could be very serious if a necessary roadway becomes effectively blocked, or benign if it protects an encroachment which is inadvertent and insignificant.

X. CONCLUSION

The policy behind section 183 is sound. It is very easy to make a mistake about boundaries, and once money has been laid out in improvements, it will in many cases be much more detrimental to A as owner of Blackacre to have to remove them or be denied the use of them than it will be to B, as owner of Whiteacre, to give up the land upon which they are situated in exchange for fair compensation. In cases of complete mistake of identity of property, it seems unfair that B should be able to retain the benefit of a building or other improvements without paying for them. Perhaps the points mentioned above should be clarified and perhaps the legislation could give greater guidance as to the principles upon which the court should proceed, but in the two recent cases in which the plaintiff was successful, *Mildenberger* v. *Prpic* and *Maly* v. *Ukrainian Catholic Episcopal Corporation of Western Canada*, it seems appropriate that the relief was available.

—W. H. HURLBURT*

29. R.S.A. 1970, c. 246.

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FAILURE OF THE ACCUSED TO TESTIFY: *VEZEAU* v. *THE QUEEN*

In a seven to two decision[1] the Supreme Court of Canada in *Vezeau* v. *The Queen*[2] dismissed an appeal by the accused from a judgment of the Court of Appeal for Quebec[3] which had allowed an appeal by the Crown from acquittal and had ordered a new trial. The accused had been charged with non-capital murder and the Crown relied heavily on identification evidence to prove its case. The defence sought to question the accuracy of that evidence in addition to relying on the defence of alibi. The accused did not take the stand. The error of law argued by the Crown as the basis of its appeal in the Court of Appeal was alleged to be in the last sentence of the trial Judge's instructions to the jury:[4]

1. The majority judgment was given by Martland J.; Judson, Ritchie, Spence, Pigeon, Beetz and de Grandpre JJ. concurring. The dissent was written by Dickson J., Laskin C.J.C. concurring.
2. (1976) 28 C.C.C. (2d) 81.
3. 15 C.R.N.S. 336, [1971] Que. C.A. 682n.
4. *Supra*, n. 2 at 83.