

Falconbridge, C. J., Street, J.]

[Oct. 4.

WASON v. DOUGLAS.

*Deed—Description—Boundary—Medium filum aquæ—Ascertainment of centre line—Jury—Misdirection—Objection not taken at trial—New trial—Costs—Evidence—Statute of Limitations—Occasional acts.*

In a question of boundary between two persons claiming under a paper title, where there has been no enclosure. Occasional acts, which would be merely acts of trespass if done by one not the owner, do not operate to give a statutory title; and evidence of such acts offered by the defendant was in this case properly rejected.

The plaintiff and defendant were the owners of adjoining farms: the division line was a small stream running about south-west: the plaintiff owned the land on the north-west side of the stream, and the defendant that on the south-east side. The dispute was as to the ownership of an island in the stream. Down to the 5th March, 1883, both parcels were owned by R., who on that day conveyed to the defendant the land lying south-east of the stream, describing it by metes and bounds, the boundary on the north-west being "the southerly edge of the stream." In 1884 R. conveyed to the plaintiff the residue of the lot by a description which expressly crossed the stream and ran along its south-easterly edge. At the time of this action there were signs of a channel on each side of the island, but the main stream at all times, and the whole stream in the dry seasons, flowed in a channel on the north-west side. It was contended by the plaintiff that in 1883 and 1884 the stream ran very largely in the southerly channel, and by the plaintiff that the northerly channel had always been the only regular one.

*Held*, that the description in the conveyance to the defendant entitled him to the medium filum aquæ as his boundary, and the plaintiff's deed, being subsequent, could not entitle him to claim anything beyond that boundary. The boundary line was, therefore, the centre line of the stream, and the position of that line was the matter to be determined. The centre line of whichever channel was the main channel in 1883 would be the centre line of the stream. The question left to the jury was whether there was any southerly channel at all, and they were told that, if they found there was, the plaintiff was entitled to succeed. They should have been asked to find, if there were two channels, which was the main channel in 1883.

Effect was given to an objection to the Judge's charge not taken at the trial, and a new trial ordered, but without costs.

Cases involving the title to land should be tried without a jury, so that the necessity for a second trial may be avoided.

G. Edmison, for plaintiff. E. B. Edwards, K.C., for defendant.