GENERAL SURVEY LAW

Relating to Legal Survey Practice

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PART TWO

SCOPE AND FUNCTION OF A SURVEYOR

A. Province of a Surveyor

A surveyor is carefully trained in the theory and practice of the linear and angular measurement of boundaries of land and this in general, determines the scope of the greater part of his functions.

While it is true that certain surveyors receive a more intensive and scientific training, usually by the Government of Canada for the express purpose of conducting geodetic, hydrographic and topographic surveys, in the main the surveyor carries out the following functions, which may be indicative of the province or scope of his work:-

(1) plane surveying, including mining surveys, engineering surveys, building location surveys, etc.;
(2) subdivision surveys of land;
(3) re-definition of properties for various purposes.

It is in connection with the last two functions that the surveyor requires a thorough knowledge of the law relating to transactions of land and it is on this aspect of law that these lectures are designed.

B. Judicial Functions of a Surveyor

I do not know of a better definition of this function than that given by Justice Cooley of the Michigan Supreme Court, and the following is the substance of his opinion, excluding only those references to statutes which do not apply here:-

"When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

"In the State of Michigan all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan of subdivision was simple and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth unfortunately is that the lines were very carelessly run, the monuments inaccurately placed; and, as the recorded witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed it is impossible to determine by the record, with the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

"If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern, even though the effect be to make one-quarter section ninety acres and the one adjoining but seventy; for parties buy or are supposed to buy in reference to those monuments, and are entitled to what is within their lines, and no more, be it more or less. (1)

"While the witness trees remain there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men whose theoretical education is supposed to make them experts who think that when the monuments are gone, the only thing to be done is to place new monuments where the old ones should have been, and where they would have been if placed correctly. This is a serious mistake. The problem is now the same that it was before: to ascertain, by the best lights of which the case admits, where the original lines were.

"It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains as a potential fact so long as he can present better evidence than any other person. And it may often happen that, notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

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(1) McIver v. Walker, 4 Wheaton's Reports, 444; Land co. v Saunders, 103 U.S. Reports, 316; Cottingham v. Parr, 93 Ill. Reports, 223; Bunton v. Cardwell, 53 Texas Reports, 408; Watson v. Fones, 85 Penn. Reports, 117.

"There are two senses in which the word extinct may be used in this connection: one the sense of physical disappearance; the other the sense of loss of all reliable evidence. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that if a man lose his deed he shall lose his land altogether.

"But if by extinct corner is meant once in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent:

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field-notes indicated it to be.
2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.
3. No statute can confer upon a county surveyor the power to "establish" corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and Federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made must govern, because the land was bought in reference to them; and any legislation, whether State or Federal, that should have the effect to change these, would be inoperative, because disturbing vested rights.
4. In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence, and give full opportunity for a hearing. No arbitrary rules of survey or of evidence can be laid down whereby it can be adjudged.

"The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State statute, disregard all evidences of occupation and claim of title, and plunge whole neighborhoods into quarrels and litigation by assuming to "establish" corners as points with which the previous occupation cannot harmonize. It is often the case that where one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit when the people concerned do not question them not only breeds trouble in the neighborhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common-sense must declare that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared. And county surveyors, no more than any others, can conclude parties by their surveys. (2)

"The mischiefs of overlooking the facts of possession must often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting-point in the original survey of the town plat; or a surveyor settling in the town may take some central point as the point of departure in his surveys, and assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

"Suppose, for example a particular village street has been located by acquiescence and use for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot-owners quarrel, and one of them calls in a surveyor that he may be sure that his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was, or not, and the first result is, he notifies the lot-owners that there is error in the street line, and that all fences should be moved, say, one foot to the east. Perhaps he goes

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(2) Sterwart vs. Carleton, 31 Mich. Reports, 270; Diehl vs. Zanger, 39 Mich. Reports, 601; Dupont vs. Starring, 42 Mich. Reports, 492.

on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the lot-owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding some one disposed to do so. We shall then have a lawsuit; and with what result?

"Of course nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of parties as if it were at another. But he would do mischief if he were to attempt to "establish" monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him, and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong, if not conclusive, evidence of such settlement. The peace of the community absolutely requires this rule.

"From the foregoing it will appear that the duty of the surveyor where boundaries are in dispute must be varied by the circumstances. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant.

"It is merely idle for any State statute to direct a surveyor to locate or "establish" a corner, as the place of the original monument, according to some inflexible rule. The surveyor on the other hand must inquire into all the facts; giving due prominence to the acts of parties concerned, and always keeping in mind, first, that neither his opinion nor his survey can be conclusive upon parties concerned; second, that courts and juries may be required to follow after the surveyor over the same ground and that it is exceedingly desirable that he govern his action by the same lights and rules that will govern theirs. On town plats if a surplus or deficiency appears in a block, when the actual boundaries are compared with the original figures, and there is no evidence to fix the exact location of the stakes which marked the division into lots, the rule of common-sense and of law is that the surplus or deficiency is to be apportioned between the lots, on an assumption that the error extended alike to all parts of the block."

C. Duties of Surveyor To Client

Following one of the important principles laid down by Justice Cooley, a surveyor should in re-defining boundaries, conduct his search for evidence and assess it in the same manner as it might be assessed in a court.

Clearly therefore, one of the important duties of a surveyor is to search for evidence, and that means all the evidence available to the particular boundaries or limits he may be called upon to re-define.

Whereas the majority of surveyors appear to understand very well that all the evidence of a client's property may not be contained in his deed alone, there are a great many surveyors who feel, if a client or his lawyer hands them a deed with the simple instructions to "survey it and report any encroachments," his duty to his client is satisfied if he adheres strictly to, and monuments the limits therein described, showing the various encroachments.

I do not know how or where this conception came into being, but I can speak with considerable authority on the deplorable results of such practice.

Let us try to examine this situation in a logical manner. Each and every property line, limit, boundary, etc., separating one ownership from another is or should be a matter of interest to both owners. In effect, all properties have adjoiners and the lines separating properties are not the exclusive responsibility of any one owner. Theoretically therefore, all deeds should reflect this condition of contiguity and if this were so there would be no overlaps of paper title.

In fact of course contiguity of title is not as common as it might be owing to faulty descriptions, physical loss of evidence, erroneous surveys and poor conveyancing practice. It is a rule of law that the limits of land described in a deed may under certain circumstances be varied by extrinsic evidence, and in surveying a particular deed, it must be realized that a lead to the existence of further evidence may be found in adjoining deeds.

The duty of a surveyor therefore is not merely to lay out his client's deed, but lies more in the direction of determining from all the evidence available that to which his client is entitled, no more and no less, and in so doing the surveyor is bound to consider the rights of adjoiners.

The necessity then for searching adjoining titles devolves upon someone. The question is, upon whom? Should a boundary prove to have been erroneously re-defined owing to failure to search adjoining titles, then in the lawyer's opinion the surveyor was negligent, and in the surveyor's opinion the lawyer was negligent in not providing him with adjoining searches.

It seems to me that the answer must be sought in the respective training and interests of the two professions. In conveying land, a lawyer in accordance with the best practice, is interested in giving a good paper title. He concerns himself with tracing ownership back through a 40 year period and thus establishing a good chain of title. Such things as mortgages, liens, easements and other rights and interests are exclusively in his province. He is also interested in the physical extent of ownership but in this connection he relies upon the surveyor who is trained to detect in a deed any references to natural or artificial features which will most likely still exist on the ground and which frequently are all important in defining the limits of the property.

The surveyor with his training in the science of measurement of distance and bearings, his familiarity with the survey statutes, etc., is in a far better position to deal with various governing factors in descriptions. His interest therefore in searching title is very specialized and quite different to those of a lawyer.

With this in mind, and in view of the fact that the surveyor signs the plan, I think a good case is made for the surveyor to do his own searching.

PROCEEDINGS OF COUNCIL

THE BOUNDARIES ACT - Prior to the July meeting it was brought to the attention of Council that an application had been made, under the provisions of this Act, for the confirmation of a survey of Finch Ave. between Bayview Avenue and Leslie Street (side road allowance between Lots 20 and 21, Concession 2, East of Yonge Street, Township of North York).

Representatives of Council attended hearings in the office of the Director of Titles on the 8th and the 15th of July. Council objected to the use of the Boundaries Act for establishing the limits of original road allowances on the grounds that this conflicted with the procedure laid down in The Surveys Act.

A Committee composed of R.H. McBain (Chairman), H.D.G. Currie, M. Hewett and F.W. Beatty was appointed to consider the problems of this confliction and to suggest remedies.

CHECKING OF PLANS - REGISTRY ACT - A Committee under R.H. McBain had been working on this for some time. A report was submitted at the August meeting. As the request for this committee had originated with the Toronto Guild, it was decided to send a copy of its report to the Guild.

It was resolved at this meeting that a committee under the same chairman, the members to be named by the chairman, should be asked to continue its investigation. As so many of our problems are overlapping and interlocking, the committee was instructed to prepare a long-range programme to deal with such matters as: administration and maintenance of the proposed geodetic net, supervision of second order control surveys, restoration of monuments programme, field inspection of private surveys, central repository for survey information, establishment of authority to advise surveyors, on request, on problems of retracement.

STANDARDIZATION OF MONUMENTS - A draft copy of the proposed regulations to be issued under authority of The Surveys Act was presented at the September meeting by Mr. N.D. Bennett, Chairman of the Legislation Committee. Council did not approve of some of the proposals. An amended draft is to be presented at the October meeting.

CODE OF ETHICS - Mr. McAlpine presented a revised code at the September meeting. This revision incorporated some of the ideas expressed in the article on Ethics appearing in the June, 1960, issue of 'Surveying and Mapping', also some of those proposed at the Open Forum at our 1960 General Meeting. Discussion was postponed until the October meeting.

At the same meeting a letter was received from the Toronto Guild asking for an interpretation of the Code as it related to the size of lettering on signs and trucks. This matter had been investigated by a committee in 1956. It was decided that the recommendations made by this committee should be brought to the attention of the Guild, and that they should be advised that these recommendations could be accepted as a guide.

REGIONAL GROUPS - As previously reported, a sub-committee of Council under Mr. Hewett had prepared and submitted a draft of a by-law to govern the organization and operation of local groups of surveyors. Certain amendments to this draft were made on the advice of our Solicitor. The final draft was accepted and passed as By-law No. 51 at the September meeting.

In its final form the by-law gives considerable latitude to local groups, but forbids the use of the words 'Branch' and 'Association' on the grounds that these groups cannot be considered as 'Branches' of the 'Association'.

COMPLAINTS - As mentioned in our July issue, a sub-committee of Council was formed to deal with complaints.

During the three months under review, fourteen complaints were handled by the Committee. In ten cases the disputes were settled, it is hoped and believed, to the mutual satisfaction of both the complainants and respondents. The remaining four are still active.

ACCOUNTS - During the three months under review, approval was voted for the payment of accounts as follows:

	July	August	September
Salaries	$ 787.32	$ 660.32	$ 733.32
Rent and Light	234.83	234.50	234.98
Telephone & Telegraph	61.05	27.10	26.30
Printing & Stationery	37.72		301.20
Office Expense	63.85	10.75	7.00
Petty Cash (incl. postage)	47.52	99.15	49.52
Council Expense	188.00	133.00	138.50
Income Tax (Employee)	19.60	19.60	19.60
Annual Meeting 1960	51.00		
Legal & Audit	85.80		
Examinations (September)	16.32		
Travelling Expenses	18.60		
Annual Report (Printing)			2,193.63
C.E. Stauffer (O.L.S. Quarterly)		193.40	
Insurance (Received - $4,114.54)		4,073.41	
Total	$1,611.61	$5,451.23	$3,704.05