GENERAL SURVEY LAW

Relating to Legal Survey Practice

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PART THREE - EVIDENCE

It would be sheer presumption on my part were I to attempt to cover this vast and important field in the comparatively short space of time available.

A useful purpose might be served, however, if I recapitulate the important principles and rules of the subject and briefly explain those which in my opinion are the most important in your specialized field.

A. Admissibility of Evidence

You often hear the expressions materiality and admissibility in this subject, and so may I explain briefly that, -

(a) Materiality - the use of this word is now more predicated upon propositions of fact, that is an issue "or point" rather than the evidence supporting such issue or point, as a proper part of a litigant's case.

(b) Admissibility - on the other hand is a term predicated of an evidentiary fact offered to prove a proposition of fact (issue or point) material to a case.

In simple language, I might say that if the fact is not material, evidence to establish it is not admissible - and finally on this point I prefer to say as do modern authorities that rulings on these two subjects are rather rules of substantive law or law of procedure, rather than rules of evidence.

Now a few further words about admissibility - Its main principle is that "all facts and circumstances which afford a fair presumption or inference as to questions in dispute and may fairly and reasonably aid in arriving at the true conclusion" are admissible.

The trend is therefore to extend rather than restrict admissibility unless such admission is obnoxious to an exclusionary rule, such as hearsay, (the old English decision was that evidence is not admissible through the mouth of one witness to show what a third person said for the purpose of proving the truth of what the third person said, (it is also not on oath, nor can cross examination be afforded.))

Character when not in issue, opinion evidence except by experts, e.g. experienced draughtsmen and surveyors may state their opinions as to the meaning of lines or shading on a plan.

NOTE - Boards of arbitrations and administrative tribunals are not strictly bound by the Rules of Evidence.

Written statements made by public officers in the discharge of their official duty and recorded in public documents are admitted by way of exception to the exclusionary rule. And surveys made by official surveyors of Crown lands have been admitted. Field notes of provincial land surveyors prepared and filed in pursuance of statutory duty in that behalf are admissible, but field notes not prepared or filed under a statutory duty are not admissible, even if made by a provincial land surveyor.

Instructions given to an official land surveyor by the Surveyor General in respect of Township Surveys have been admitted but let us remember that any document or plan prepared and sworn to by a surveyor as correct with reference to any survey performed by him may be filed in the appropriate registry or land titles office "subject to be produced thereafter in evidence in any court." Likewise evidence taken under oath by such surveyor concerning any boundary of any township or tract of land which he is employed to survey is admissible.

B. Admissibility vs Weight

A distinction has to be made between admissibility and weight of evidence - the former is decided by the Judge, the latter by the Jury. A jury is the constitutional judge of the facts.

That is, if the evidence is admitted, the Jury decides contraverted facts on the basis of the weight or preponderence of the evidence, pro and con and thus decides upon its effect.

C. Judicial Notice

Wherever a fact is so generally known that every ordinary person may reasonably be presumed to be aware of it, the Court "notices" it, either simpliciter, if it is at once satisfied of the fact without more, or after, such information as it considers reliable and necessary in order to eliminate any reasonable doubt.

The essential basis for judicial notice is that the fact is of a class that is so generally known as to give rise to the presumption that all persons are aware of it. Let me emphasize, however, that this excludes from the operation of judicial notice what are not general but particular facts.

Let me give some examples to illustrate -

In 1702 Chief Justice Holt said - "We are to take judicial knowledge who reigns over us, and whom we owe allegiance to: and though it be decent to take notice of the demise of the King, yet it is not of necessity."

The modern view is, however, as said by Chief Justice Duff in 1938, - "It is our duty as Judges to take judicial notice of facts which are known to intelligent persons generally."

Over the time of three centuries, some of these facts judicially noticed are, -

1. "a pint of liquor is less than five gallons or one dozen bottles."
2. an endorser has lent his name to enable the maker of a promissory note to use the note in a monetary market.
3. the Township of Thurlow is in the southern part of the County of Hastings.
4. Judicial Notice (under the Canada Evidence Act) must be taken of -
   (a) all public acts of the Parliament of Canada
   (b) all ordinances made by the Governor in Council or the Lieutenants Governor in Council of the Provinces.
5. the Court will take judicial notice of the local divisions, such as counties, municipalities and polling sections, in which the county is divided for the purposes of political government. But it has been ruled that it cannot be known judicially that a certain town has a population more than a certain number.

D. Expert Evidence

The Ontario Evidence Act* provides that - not more than three witnesses "entitled according to our practise to give opinion evidence" may be called by either side without leave of the Judge or other person presiding.

Though not stipulating experts, it is headed expert evidence and the view is taken that it includes opinion evidence founded in part or in whole on some special knowledge or qualification not possessed by the ordinary witness - hence expert is inferred.

* With the exception of one province, the others have no such rule.

The Attorney General's Administration of Justice Committee, of which I am member, is considering an expansion of the rule, i.e. to permit more, but by leave of the Court, before any are called.

E. Preferencial Rules

1. Best Evidence Rule -

In 1700 Chief Justice Hall said that "the best proof that the nature of the thing will afford is only required - - - he later said, - "the law requires the best evidence that can be had."

Now with rules of evidence so well developed, such a maxim affords but little guidance, and is but roughly descriptive of two or three rules which have their own reasons for existence apart from this alleged main rule - and they are

1. Real Evidence - that is evidence afforded by production of chattels or other physical objects for inspection by the Court, e.g. documentary original, view of scene of accident, photographs (if not objectionable).
2. Secondary Evidence - evidence from copies of documents, lost, destroyed or unavailable.

   One famous judge said in England in the late 1700's - "If a foundation can be laid that a record or deed existed, and was afterwards lost, it may be supplied by the next best evidence to be had."
3. Conclusive Evidence - in some cases certain testimony when produced is taken as final and error cannot be shown by other testimoney - e.g. written document of the parties, judgement of a court, official certificates when authorized by statute.

F. Burden of Proof

The phrase may be used in two different senses -

1. the burden of establishing any proposition of fact according to the substantive law and law of pleading, necessary for a party to establish in order to succeed in his case, which might be simply called "a risk of non-persuasion of a jury".
2. the burden of producing evidence on or further evidence during a trial in order to avoid an adverse ruling of the presiding Judge.
   or simply "the duty of producing evidence to the Judge".

Here we need not discuss the shifting of onus from proponent to opponent in the course of a trial, which may frequently happen.

I might, however, state here in simple language that, - If the Plaintiff does get so far with his evidence, that is evidence which if unanswered would justify men of ordinary reason and fairness in affirming the proposition which the plaintiff is bound to maintain, then his burden passes to the defendant, who must adduce other evidence, either contradicting the plaintiff's or proving other facts which leaves the question in real doubt.

Could we not reduce this to a simple equation, namely - the burden of proof is at any stage of the progress of the trial upon the party who would fail if no evidence or no further evidence were given.

Under the 2nd item, i.e. The production of evidence during trial, there are

(a) Presumptions, e.g. Proof of death (or absence for 7 years and no one likely to hear from him having heard), there is a presumption of death.
(b) Prima Facie Evidence
    (i) in the first sense it means that a plaintiff has submitted enough evidence as to entitle him to have the question left to the Jury
    (ii) or representing the stage where the proponent (plaintiff) has by a mass of strong evidence entitled himself to a ruling that his opponent should fail if he does nothing more in the way of producing evidence.

The expression Prima Facie Evidence is frequently used in Statutes and what constitutes it is usually therein spelled out -

The Parnership Act
The Ontario Evidence Act
The Canada Evidence Act
The Criminal Code
The Bankruptcy Act.
The Bank Act
The Bills of Exchange Act,
and many others, -

e.g., in the Partnership Act, as - The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share or payment . . . . . does not of itself make him a partner.

Now, gentlemen, I shall skip the Burdens & Presumptions in specific issues, such as sanity, undue influence, marriage, legitimacy, life and death, etc., and move on to -

G. The Parol Evidence Rule

This is also part of the Substantive Law rather than one of evidence. However, let us look at it -

It is not a single rule but a group of rules, and in this case may I say that it deals primarily with when and when not oral evidence may be received to cut down or defeat the sufficiency of a written document which upon proof of its actual existence is presumed to give effect to its terms.

Innumerable examples of this may be found in the cases of contract, consideration, delivery of a deed, agency, warranty, suretyship, etc.

Speaking now in a field which is particularly applicable to the Survey Profession, there is a legal maxim namely, Falsa Demonstratio Non Nocet, which means

False description does not vitiate.

In construing a description contained in a deed, extrinsic evidence of monuments and actual boundary marks found on the ground but not referred to in the deed, was held inadmissible to control the deed, but if in the deed, reference is made to such monuments and boundaries, they govern although they may call for courses, distances or computed contents, which do not agree with those stated in the deed.

Grassett vs. Carter (1884) 10 S.C.R. 105, at 114 & 115.

If all the terms in a description fit some particular property, you cannot enlarge them by extrinsic evidence. But if they do not fit with accuracy the whole thing must be looked at fairly to see what are the leading words of description and what is the subordinate matter, and for this purpose extrinsic evidence is admissible.

H. Significance Respecting Boundaries

Having discussed the various facets of evidence, we should now observe the significance that the courts attach to the different types of evidence of boundaries.

(1) "In order to prove the proper location of a boundary line between adjoining property, one must first prove the original boundary, for example by a monument, such as a post planted thereon; but in the absence of some such evidence, possession may be proved, and in the absence of both of these, one may resort to measurements."

Wolverton v. Clarke (1825) N.B.R., 453 (CA) P. 1147, Canadian Abridgements.

(2) Per Graham, C.J. "In Diehl U. Zanger, 39 Mich. 601, Colley J. said "As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the best evidence of what the lines of a lot actually are . . ."

McIssac v. McKay 1916, N.B.R. 476, 27, D.L.R. 184 (CA) P. 1198, Canadian Abridgements.

(3) "Where original posts or monuments are not in existence to prove the location of a boundary line between lots on a subdivision . . . . . resort must be had to lines made at a time when the original posts or monuments were presumably in existence and probably well known, such as long established fencelines."

Home Bank v. Might Directories Ltd. (1914) 31, O.L.R. 340, 20, D.L.R. 977 (CA).

The above noted cases are a good cross-section of a plethora of such, indicating in definite terms that a surveyor shall when re-defining boundaries rely on the following evidence in the order named:-

(a) Natural boundaries
(b) Original monuments
(c) Fences or possession which can reasonably be related back to the time of the original survey
(d) Measurements

Some comments on (c) and (d) are necessary, I think.

Very few plans that I have seen show or attempt to show, the age of fence lines. This is of course particularly important for several reasons. Firstly, the establishment of 10 years of occupation laid down by the Statute of Limitations, may turn upon the age of a fence. Secondly, when a surveyor lacking primary evidence of a boundary, seeks to establish whether a fence is or is not the best evidence of the

original location of a lost boundary, he must attempt to establish that the fence existed at or reasonably near to, the time when the original monuments were in existence. Such evidence of age may be obtained in affidavit form and sometimes perhaps by the very nature of the physical construction of the fence itself.

The reason why measurements carry least weight, is due to the fact that a surveyor's intention as expressed by courses on a plan and field notes, has in the past borne little, if any, resemblance to his intention as expressed by the monuments he has planted in the ground. The actual methods of reading angles and the chaining of lines (in title surveys) has shown little if any improvement in Canada during the last century, and it is only comparatively recently that survey agencies have been insisting on a more or less common standard of accuracy. Therefore it is not reasonable to expect that the courses on a plan and the monuments planted will universally bear a more accurate relationship to each other, for some time to come yet.

Many countries have found it necessary to control their title surveys by networks of geodetic control in order to limit progressive, accumulating errors and to prevent accidental errors to some degree, and it would be wise if efforts were to be made to do so in Canada as soon as possible.

THE MAIL BAG

Opinions Wanted On By-Law 44

The Editor,

I would like to hear the opinion of some of the members of the Association on the implementation of By-Law 44 which provides for the marking of all surveyors monuments.

In the Toronto area many of the surveyors stamp their number or initials on the bars and pipes prior to planting in the ground. This stamping is usually done near the top of the bar on one of the faces. We have found that this method of marking monuments is very unsatisfactory for the following reasons:

1. The numbers are often stamped very lightly on the side of the bar and soon become invisible.
2. It is very difficult to find any type of stamped number on the side of a bar planted flush with the ground surface.
3. Stamping on iron pipes is difficult and is virtually impossible to read.

Of course, the by-law provides for a more satisfactory method of marking identification on monuments, such as by tags or caps. Some surveyors are using cast bronze caps which are very effective. They are also quite expensive. However, if the practice of using them was universal they could be mass-produced to some extent and the cost reduced.

An economical, effective method of marking iron pipes is not readily apparent to me, although a light gauge stamped cap has possibilities.

In my opinion, the intent of By-Law 44 is not being complied with in most cases, since the method of marking monuments in use generally in the Toronto area does not provide readily the identification of the land surveyor who planted them.

J. W. L. Monaghan