SPECIAL ARTICLE

EVIDENCE

by J.E. Jackson

The following article was the subject of an address by Mr. Jackson to the Southwestern Regional Group of Ontario Land Surveyors at London, April 28, 1962. At this meeting a resolution was passed that Mr. Jackson's paper covering a subject of such wide interest, be published in "The Ontario Land Surveyor". - Editor.

Section 13 (2) of the Surveys Act states, "a surveyor in re-establishing a lost corner, an obliterated boundary or an obliterated side line of a lot in a front and rear township, shall obtain the best evidence available respecting the corner, boundary or side line, but if the corner boundary or side line cannot be re-established in its original position from such evidence, he shall proceed as follows:"
The proviso in Sec. 17 (2) is similar regarding single front townships. Sec. 24 (2) is similar regarding double front townships, also Sec. 31 (2) is similar regarding sectional townships with double fronts, etc.

The emphasis in each case is on "the best evidence available". Lost corners or boundaries should not be re-established in accordance with sub-sections (a), (b), (c), etc. until a surveyor is absolutely sure there is no available evidence as to the lost corner itself.

While working in Hamilton about 35 years ago the writer had occasion to re-establish a side line in the Township of Saltfleet which is a Front and Rear Township. We had a stone monument on the concession line 300 or 400 feet south of the brow of the escarpment and another stone monument on the same lot line at Main Street on the flat land below the escarpment. It seemed like an easy matter to join these monuments and we would have a good line, but on doing this, the line went through the Power Plant of the E.D. Smith Canning Factory some 30 or 40 feet east of the line of occupation which we considered would not do at all. So we had to disregard the monument on top of the escarpment in order to establish the lot line below the escarpment. This, I believe, was typical of other lines in the area. Ernest MacKay, O.L.S., used to contend that the lines above the escarpment were not continuous with those below.

Order of Importance of Best Evidence

1. Original monuments or imprints of same.
2. Natural boundaries if sufficiently definite.
3. Bearing trees.
4. Fences or other evidences of possession which can reasonably be related to near the time of the original survey.
5. Measurements, proportioning, etc.

Not long ago the writer had occasion to replace the corner of a lot in a subdivision. The one front corner had been dug out with a steam shovel for services. The rear corners were still marked with 1/2" iron bars. From these an angle was turned and distance measured according to the plan, and within 1 inch of this point a perfect imprint of the 1/2" iron bar was found.

About 40 years ago the writer had the job of re-subdividing a township in Manitoba on the International Boundary and 135 miles South East of Winnipeg. The whole Township had been staked with wood posts except the Township corners which had been marked with iron posts 2" in diameter and 4-1/2' long. The iron post at the corner next to the road allowance along the boundary line between Canada and the United States was missing. By measurements and bearings we were able to locate the corner within 2 or 3 feet of where we thought it should have been but it was such an important corner that this would not be good enough. There was a

shallow layer of black soil on sandy subsoil. By peeling off this top soil with a shovel we found the perfect print - a circle of black surrounded by rust. Offset stakes were set from this and we continued to peel off the soil checking the location from time to time as we continued until we were absolutely certain that this was where the original post was located.

In the year 1913 the writer was engaged in subdividing some townships along the east side of Lake St. Martin in Manitoba. The North West corner of the one township was shown on our maps as being a small island and was marked by a wood post and bearing tree 1 Ch 5 Links distant N 10 degrees W. The tree was said to be an 8" poplar.

We retraced the west boundary of this township from the south for about 3 miles to the edge of the lake finding two or three original posts in muskeg and well preserved. After subdividing the township late in December, we ran a trial line westerly along the north boundary to the lake and continued across the ice about a mile to where we thought the corner on the island should be. There was about 6 inches of snow on the ground and no post could readily be found. The post had been planted about 40 years before. The following day we continued our search. I had with me an Icelander who had been on similar surveys with J. W. Tyrrell D. L. S. for a number of years. We searched each of the large trees for a sign of a blaze but found none. My Icelander friend picked out a large white poplar tree that he thought would be an 8" tree 40 years before. There was no sign of any scar on it but he decided to cut into it above and below where he thought the B. T. might be and kept splitting it out. Finally it split off leaving a blaze over a foot in length and with B. T. as plain as it was 40 years before. With this as centre, we cut an arc 1 Ch 5 Links radius and before long we found 4 small stones in a circle with the rotted end of the post in the centre. I would never have thought to cut into the tree and without finding that B. T. we would never have found that corner without a great deal of searching, especially with the snow and the frozen ground.

Court Cases

Feb. 1st, 1955 - Bateman & Bateman vs Pottruff

This is an appeal from the judgment of His Honour Judge Anderson of the County Court of the County of Hastings heard by Roach, Aylesworth and Chevrier, Supreme Court Judges. The respondents were the owners of lot 4 on the West side of Pinnacle Street in the Town of Belleville according to the McNabb Block plan registered as Plan No. 21.

Appellant is the owner of the premises immediately to the North of respondent's lands. The dispute arises over the Northerly 12 feet of Lot 4. Three arguments were put up at the former trial:

1. That the respondents were not the owners of the 12 feet in question.
2. That if they were, a private right of way existed in favour of the appellants.
3. That the 12 feet had been dedicated to the city as a right of way.

The Trial Judge found against the Appellants in all three respects. The Defence raised respecting respondents title puts in issue the location of the boundaries of lot 4. The Trial Judge accepted the evidence of the respondents witness, J. T. Ransom, O. L. S. and found that the 12 feet in question actually formed part of lot 4. Chief Justice Aylesworth gave the decision of the appeal. He states that "Ransom after searching the titles of the owners in the area went on the ground and found that the several plans in the Registry Office did not depict the actual measurements on the ground. Ransom's plan on the whole was as follows: "To take the lot lines and scale measurements as depicted on the original plan of Belleville which was upwards of 100 years old and to check these measurements and lot lines by actual

survey made on the ground with respect to existing buildings, walls, laneways and remnants of the boundary line fences which enabled him and, to me at least, in a convincing way to ascertain the real boundaries of lot 4 within a few inches. His method of procedure in the circumstances with which he was confronted is approved, I think, in "Home Bank of Canada V. Might Directories Limited. ((1914) 31 O.L.R. 340 20 D.L.R. 977) I quote in part from the judgment in the Appellate Division of the majority of the court as delivered by Meredith C.J.O. at pp. 345-6. who said "The original posts or monuments, not being in existence, and there being no direct evidence as to their position, some other mode of ascertaining the boundaries of the lots must be restored to, and in such case the best evidence is usually to be found in the practical location of the lines made at a time when the original posts or monuments were presumably in existence and probably well known".

Chief Justice Aylesworth continued as follow:-

"In Diehl v. Zanger ((1878) 39 Mich. 601) - it was said by the Supreme Court that a re-survey made after the monuments of the original survey have disappeared, is for the purpose of determining where they were, and not where they should have been; and that a long established fence is better evidence of the actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared.

And again at P. 346 he quoted from Diehl v. Zanger. "The city surveyor should therefore have directed his attention to the ascertainment of the actual location of the original land marks set by Mr. Campau and if these were discovered, they should govern. If they are no longer discoverable, the question is where they were located and upon that question, the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known".

Ransom had this to say - "The limit between lots 37 and 38 is now defined by Graham's warehouse. There was an old blacksmith shop, one wall of which is still in existence. These buildings date back 100 years and were never owned by one man - always different owners, etc.

The Chief Justice continues as follows: "Reading Ransom's evidence as a whole, I conclude that even if it could be said that certain of the testimony falls within the realm of hearsay, there is more than sufficient of it, direct evidence of Ransom's individual discoveries and research, which the trial judge was quite entitled to rely upon in coming to his decision as to the boundaries of Lot 4."

The Justices of the Supreme Court dismissed the appeal with costs including the contention that the 12 feet was public right of way even though it had been used by the public many years. "On at least one occasion the respondents had erected temporary barriers preventing its use for a time." "What respondents did was as consistent with toleration on their part, of use of the lands in question by the public as a right of way, as it was with the intention to dedicate those lands for such use. No evidence had been given of the acceptance by the municipality".

Summaries of Some Court Cases Taken From "The Canadian Abridgement"

1. Importance of Original Monuments

"A" The rule is well established that it is the work on the ground that governs and it is only where the site of a monument on the ground is incapable of ascertainment that a surveyor is authorized to apportion quantities between known boundaries".

"Therefore where a surveyor locates the angle of a certain lot by finding the original monument, and makes his measurements accordingly, his survey will be accepted for the determination of the proper boundaries of the lot, and

subsequent surveys made in total disregard of the original monuments will be rejected". Artley v. Curry (1881) 29 Gr. 243.

As a comment on this case, I must say that it is very important to make every effort to find original monuments or monuments set by early surveys and recognized as marking the true lot limits. The writer of this article knows of a case where monuments were either not found or were disregarded the surveyor's plan of subdivision was rejected and it had to be corrected.

"B" "Where the owners of adjoining properties cannot agree as to the boundary between them or upon the employment of a surveyor to settle the same and one of them employs a surveyor who runs the line in accordance with the nearest old monuments recognized as marking the true boundaries of other lots in the neighbourhood, there being no plan of the lots, no objection can be made to the owner who employed the surveyor for erecting a fence on the line so established". Couturier v. Ouellette (1933) 6 M.P.R. 352 (N.B. C.A.)

2. Conflict between Map attached to a grant, Field notes, and work on the ground

"Where a map attached to the original crown grant, the field notes of the Government Surveyor and his work on the ground differ, the work on the ground should be taken to govern and the grant should be interpreted according to what the work on the ground suggests to be the proper boundaries." Johnston v. Clarke (1884) 1 B.C.R. etc.

3. Duty of Surveyor where boundary marks lots - Disturbance of settled possession

Per Barry J. "It is by no means uncommon that we find men --- who think that when monuments are gone, the only thing to be done is to place new monuments where the old ones should have been and would have been if they had been placed correctly. This is a serious mistake. The problem is --- to ascertain by the best lights of which the case admits, where the original lines were. The original lines must govern and the laws under which they were made must govern because the land was granted, was divided and has descended to successive owners under the original lines and surveys: It is a question of proprietory right. The general duty of a surveyor in such case is plain enough. He is not to assume that a line is lost until 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 enquire when it is originated, how and why the lines were located, where they were and whether claim of title has always accompanied the possession and give all the facts due force as evidence". Kingston v. Highland ((1919) 47 N.B.R. 324).

"In all actions brought to determine the true boundary line between properties, the burden of proof lies upon Plaintiff who seeks to change possession". ((1861) Can. C 64).

Section 34 of the Survey Act states "A surveyor in establishing in a sectional township with double fronts, a side line of a lot that was not surveyed in the original survey shall proceed as follows: etc.

If a side line in a block has been established when the lines were to run on the same astronomic course as the Governing line, then that particular line should not be re-run in accordance with the new act but all other lines in the block should be run in accordance with the present act.

That particular section gives no authority to a surveyor to re-establish a line but only to establish lines.

We must always bear in mind that the final decision rests with the courts and must govern ourselves accordinly.

I would like to quote from "A Summary of the law relating to Surveying in New Zealand" to show the similarity to our own.

> "When there is a contradiction of terms or when the central points are disturbed, it is remarkable how many there are who mistake altogether the duty that now develops upon the Surveyor. It is by no means, uncommon to 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 they had been correctly placed. This is a serious mistake. The problem is now the same as it was before; to ascertain by the best evidence possible of which the case admits, where the original ones were, " ---" and it may so happen, that notwithstanding the loss of all survey data, there will still be evidence from which the surveyor will be able to determine, with almost absolute certainty, where the original boundary was".
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> "Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is obtainable, and the Surveyor should enquire when it originated, how and why the lines were located as they were, and whether claim of title has always accompanied possession and give all facts due force as evidence".

Our court decisions are based on "British Common Law" as are those of New Zealand.

SPECIAL ARTICLE — SURVEYOR AND PLANNER: TEAM OR RIVALS? *

by Noel Dant
Director of Planning, Province of Alberta

Historically the surveying profession is old and the planning profession relatively new, although both surveyors and planners have been known since before Biblical times. In this country, up to about ten years ago, subdivision plans were prepared almost entirely by registered land surveyors. Since the general acceptance of urban and rural planning in this last decade, the surveyor has sometimes taken a dubious view of the increasing number of subdivision plans designed by planners, to the partial exclusion of the traditional surveyor's work. (I say partial because in every province in this country the final plan of subdivision must, by statute, be prepared and submitted by the registered land surveyor.) At the same time, the professional planner takes an equally dubious view of the subdivision plans that are still designed by the professional surveyor.

Does the professional surveyor feel that the professional planner is encroaching on his field of work, and is the planner in fact doing so? When the