



### QUOTABLE QUOTES

Mr. Marsh Magwood, Q.C., in his paper "The Law and the Surveyor", published in the booklet, Legal Principles and Practice of Land Surveying on page 16 quotes Justice Cooley of the Michigan Supreme Court on Judicial Functions of a Surveyor in replacing a lost corner:

**"The general duty of a surveyor in such a case is plain enough. He is not to assume that a movement 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 evidence of occupation and claim of titles, 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 (Sterward v. Carleton, 31 Mich. Reports, 270; Diehl v. Zanger, 39 Mich. Reports, 601; Dupont v. Starring, 42 Mich. Reports, 492)."**

### ACTION AND NEWS

The Land Titles Act has been extended into the County of Peel as of November 1, 1970. It is well to remember at this time that any land in the County to be developed into condominium properties must be brought into the Land Titles System, as required by Section 2(4) of The Condominium Act.

The seminar sponsored by A.S.T.T.O. and held at Ryerson Polytechnical Institute on November 7th was well attended both by surveyors and technicians.

In the morning a lively discussion took place concerning survey regulations, with an in-depth assessment of indexing and suggestions for complete indexes.

(continued on page 29)

### EDITORIAL

The following article is adapted from a precis on "Highways" which was prepared by the Director of Titles Office for the guidance of personnel within the Land Registration Branch. Some of the information will be familiar to recently commissioned surveyors, but to others of us who have been some years removed from our intensive studies of the law, it is hoped that this information will not only refresh our memory, but provide a ready reference for future use. The article draws together those sections of the various Acts relating to the ownership, opening and closing of public highways, with excerpts from decisions of the courts relative to specific situations.

To avoid confusion in the terminology of the article it is essential to note the distinction between the words "unorganized territory" and "incorporated" municipalities, since the terms are often used locally in a manner that would introduce faulty interpretation of the statutes.

The Municipal Act (Section 1-W) defines "unorganized territory" to mean, "that part of Ontario without county organization". It is quite common locally to refer to a township without municipal government as being unorganized when the intent is to suggest that the township is, in fact, un-incorporated. The Northern Districts, for instance, are all unorganized by virtue of The Municipal Act definition, but there is a great number of incorporated townships within the districts that are locally, but incorrectly, referred to as "organized" townships.

### MEANING OF A HIGHWAY

A highway may be defined generally as a public road or way open equally to everyone to travel. A highway may be over land or water; navigable rivers and water-courses are public highways. The term highway includes roads, streets, ways and lanes. Generally, a road is deemed to mean a highway for the use of vehicles to pass over, a way is a highway for the use of persons on foot; a street is a road with buildings on each side more or less continuous; a lane is a narrow road.

### TITLE TO HIGHWAYS

It is important to be aware that the title or ownership of a road (i.e., the vesting of the fee) is not necessarily of itself sufficient to empower a municipality to open, close, stop up, sell or convey any road or part thereof but that certain steps as set out by statute or the Common Law must be taken before the exercise of any such power.

Once a highway is established the fee is vested in the municipality having jurisdiction over it. This is set out in Sections 416 and 417 of The Municipal Act.

Section 416 of The Municipal Act provides: "Unless otherwise expressly provided the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this or any other Act." Section 417 of The Municipal Act provides: "Except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways and bridges within the municipality."

### ESTABLISHMENT OF HIGHWAYS

Section 415 of The Municipal Act sets out what shall be public highways: "Except in so far as they have been stopped up according to law all allowances for roads made by the Crown Surveyor, all highways laid out or established under the authority of any statute, all roads upon which public money has been expended for opening them, or on which statute labour has been usually performed, all roads passing through Indian lands, all roads dedicated by the owners to public use, and all alterations and deviations of and all bridges over any such allowance for road, highway or road shall be common and public highways."

(continued on page 27)

### QUESTIONS AND ANSWERS

No questions received from readers since last issue.

We again invite questions in an effort to keep this part of our page alive.

# Law and Surveying

(continued from page 7)

In interpreting the above section as to whether or not a public highway has been established it is necessary to understand the meaning of "dedication" of lands for purposes of public highway. The question whether land has been dedicated for use as a public highway is one of fact and must not be too readily presumed (Williams and Wilson Ltd. vs. Toronto (1946) O.R. 309); (Toit vs. McKellar (1951) O.R. 226). To prove dedication there must be present intent to dedicate and acceptance by the public of the dedication. (Schraeder vs. Gratton (1945) O.R. 657).

With regard to interpreting specific parts of the above section the following considerations should be taken into account: "all allowances for roads made by the Crown Surveyor" — this contemplates the road allowances shown on the original plans of survey of the Township lots. These roads, because they are shown as a road allowance on original plans are regarded as being dedicated by the Crown to the public. The acceptance of this dedication by the public is deemed to have been made by virtue of the said Section 415 of The Municipal Act, (Badgely vs. Bender (1833) O.S. 221). Whether or not the municipality actually opens the road allowance or not does not matter. The road allowance once laid out is held in trust by the municipality as owners for all persons. It is not destroyed by non-user nor by any person fencing it or obstructing it no matter how long this is done. (Big Point Club vs. Lozon, et al (1943) O.R. 491). If the Crown issues a patent to a person of lands being on a road allowance in original Township plan, it is a nullity, (R. vs. Allan (1832) 2 O.S. 90), but at any time prior to issuing patents to any lands described by the survey it would seem the Crown could alter the survey and relocate the roads.

A distinction should be noted between road allowances on an original Crown survey and reservations of roads in a Crown patent. Roads reserved in a Crown patent are dedicated to the public but until proof of user by the public is shown, the roads so dedicated have not been accepted by the public (Badgely vs. Bender (1833) 3 O.S. 221). This is also borne out in the amendment to The Public Lands Act which is effective October 1, 1965, wherein it is provided as follows: **Where letters patent have issued for land that is in a municipality and contain a reservation of the right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons, and the Minister is of the opinion that the reservation no longer serves a useful purpose or that the release of the reservation is in the public interest, he may, upon application of the owner of the land or any part thereof and upon payment of a fee of**

**\$25.00, make an order releasing and discharging the land or part thereof from the reservation.**

It would, therefore, follow that in incorporated Townships, allowances set out in original Crown surveys are vested in the Township concerned. Although it would appear such Townships may deal with these roads including closing and sale if the requirements of The Municipal Act are met without proof of assumption, it would appear preferable to require proof of acceptance by by-law or money spent before recognizing any such closing or sale. If the roads are in unincorporated territory, then, since there is no Township council, administration of the roads would be in the Crown under the Department of Lands and Forests.

**"All Highways laid out or established under the Authority of any Statute, all Roads upon which Public Money has been expended for opening them, or which Statute Labour has been usually performed"**.

The Municipality Act authorizes municipalities to pass by-laws for opening roads. This must be done in strict conformity with the Act including publication of notice, (Batt vs. Beaverton (1922) 52 O.L.R. 159).

The expenditure of money or the performance of statute labour on a road, unless dedicated, is not sufficient in itself to open a road. At best, if done over a long period of time, it may be evidence of dedication by an owner of a road to the public and acceptance by user of the public. (St. Vincent vs. Greenfield (1887) 15 O.A.R. 567); (R. vs. Rankin (1858) 16 U.C.Q.B. 304). A highway established over private property against the will of the owner must be by expropriation with compensation and not just spending money or doing work on such roadway. (Point Abino Assn. vs. Bertie (1928) 61 O.L.R. 610).

The result of the cases shows that in order to recognize a road as being established it is necessary that either it be properly established by original township survey, by by-law with compensation being paid to the owner deprived or money spent and work performed for a great many years. **"All Roads passing through Indian Lands"**

This does not mean that every road or pathway passing through Indian lands became public highways. What is meant is that roads that are established continue as such through Indian lands even though that part of the road passing through Indian lands was not an allowance in original surveys or never had money spent or statute labour performed (Byrner vs. Brown (1851) 8 U.C.Q.B. 181).

**"All Roads dedicated by the Owner to Public Use"**

Dedication may be absolute or limited, i.e., a person may dedicate certain lands to the public as a foot-path only, but he cannot dedicate to a limited part of the

public, i.e., to the inhabitants of a municipality, (Baldwin vs. O'Brien (1917) O.L.R. 24).

Dedication of land to the public is a question of fact. There must always be an acceptance by the public (Schraeder vs. Gratton (1945) O.R. 657). This acceptance may be shown by by-law of the municipality or by use by the public. (O'Neil vs. Harper (1913) 28 O.L.R. 635); (Reaume vs. Windsor (1915) 8 O.W.N. 505). A person dedicating may impose terms, i.e., as for its uses, and if accepted can only be accepted by the public, subject to those terms (Re Peck and Galt (1861) 46 U.C.Q.B. 211). Dedication to the public and acceptance by the public may be inferred from the use of the road continuously over a period of a great many years, especially if no objections were ever raised by the owner of the lands so used. (Fulton vs. Creelman (1931) S.C.R. 221). **ESTABLISHMENT OF A PUBLIC HIGHWAY BY REGISTERED PLAN**

By Section 56 (1) of The Surveys Act, road allowances shown on plans of survey are public highways. Section 56 (1) of The Surveys Act provides: **"Subject to The Land Titles Act or The Registry Act as to the amendment or alteration of plans, every road allowance, highway, street, lane, walk and common shown on a plan of subdivision shall be deemed to be a public road, highway, street, lane, walk and common, respectively."**

In the case of registered plans, the registration of the plan under the Registry Act or the Land Titles Act is a dedication of all roads, streets, lanes, etc., shown on the plan to the municipality concerned for use as public highways. Once the plan is registered the fee in the highways is vested in the municipality. This fee is, however, until a sale (or mortgage) is made of a lot on the plan, subject to being divested by the owner of the plan by altering or closing up the highways concerned by the registration of another plan. (Re Plan 69, Dunnville (1950) O.W.N. 61 and 273); (Re Westwood Addition, Hamilton (1945) O.R. 257); (Boland vs. Baker and the Township of North York, (1953) O.R. 239).

Once a sale (or mortgage) of a lot is made, then such dedication cannot be withdrawn by the owner of the plan and he is irrevocably bound by his dedication (Section 162, The Land Titles Act). For Land Titles purposes, at this point, (i.e., plan registered, a lot sold or mortgaged) we are willing on application to recognize on our registers the ownership of all highways laid out in the plan to be in the name of the municipality. We do not for purposes of showing such ownership require proof of by-law accepting such highways nor do we require proof of money being spent thereon by the municipality; it is sufficient proof when plan registered and the **parcel register shows a lot sold or mortgaged.**

(continued on page 29)

# Law and Surveying

(continued from page 27)

In order to deal with such highways, i.e., close, sell, convey, etc., the municipality, even though the fee of the highways is vested in it, must accept dedication. This acceptance of the dedication may be proven in either of two ways: (1) the municipality may pass a by-law accepting such dedication, or, (2) by the fact, such as shown by affidavit of treasurer or engineer of the municipality that money has been expended on the highway and/or work done on it. It is to be noted that a municipality is not obliged to accept any or all of the streets on a plan, but may accept only certain streets or parts thereof. The municipality on acceptance has assumed full responsibility for the opening and maintenance of the highways so accepted. Equally so, once assumed by the municipality, only the municipality may close up such highways, (Re plan 69 Dunnville (1950) O.W.N. 61 and 273); (University of Western Ontario vs. Wilson et al (1961) O.R. 69).

## CLOSING PUBLIC HIGHWAYS

When a plan has been registered and no lots sold (or mortgaged) the owner or owners for the time being may alter or close up the streets shown thereon by the registration of another plan.

Provided the municipality has not accepted the dedication, once a sale (or mortgage) is made of a lot, then since the dedication is irrevocable, the owner is not empowered to alter or close up the streets on the plan. The only way at this point that a road may be closed is by the procedure outlined in Section 92 of the Registry Act or Section 162 of the Land Titles Act. The municipality cannot close up the street

by by-law, but must also follow this procedure.

If a highway or part thereof is assumed, then such highway or, such part thereof can only be closed by by-law under the procedure set out in Sections 459 and 462 of The Municipal Act. With respect to roads being closed that lie within Metropolitan Toronto, the requirements as set out in The Municipal Act are modified by Section 107 of The Municipality of Metropolitan Toronto Act.

## RESULTS OF CLOSING A HIGHWAY ON A REGISTERED PLAN

If closed prior to sale (or mortgage) of a lot, by registration of another plan, then fee in highways so closed re-vests in owner of the land on the plan. No difficulty arises under Land Titles procedure as the registering of a new plan supercedes the original plan and we show the new streets as being owned by the person registering the new plan until such time a lot is sold (or mortgaged).

If the procedure as set out in Section 92 of the Registry Act and in Section 162 of the Land Titles Act is applicable and is used, and an order closing has been given, then the fee in the streets so closed vests in the adjoining owners but by Section 56 (8) of the Surveys Act the municipality must give a proper deed.

If the highway has been assumed by the municipality, then on being closed by by-law, if the municipality wishes to sell, it must, by Section 477 of The Municipal Act, offer the lands in the highway so closed to the adjoining owners and if offer not accepted may then sell to the public.

For Land Titles purposes we would require in addition to knowing that the plan is registered and a lot has been conveyed

or mortgaged, proof of assumption by the municipality of the street, that the municipality closed the street and had sold to an individual. Therefore, we would ask for:

- (1) Copy of by-law assuming the street or affidavit by Treasurer that money spent on it or affidavit by engineer that public work done on it.
- (2) Copy of by-law closing the street and affidavit by Clerk that necessary notices, etc., as required by The Municipal Act have been complied with.
- (3) Deed from Municipality. In this connection if deed not to adjoining owners would require affidavit by Clerk that the lands had been offered to adjoining owners at a fair price and have been refused. In addition, we should have a by-law by the Municipality authorizing the sale to the person named in deed.

The relevant sections of The Municipal Act, R.S.O. 1960 are as follows: Sections 413 to 419 inclusive, 459 to 466 inclusive and 477 to 481 inclusive.

---

## Action and News

(continued from page 7)

In the afternoon a panel of survey specialists discussed the monumentation problems of the Province and suggested solutions. Stimulated by the panel, those attending the seminar then broke up into small groups, continued the discussion and reported back to the seminar as a whole. It was hoped that the discussion on monumentation would continue on a personal level and that test projects could be undertaken to assess any new approach or method.