LAW AND SURVEYING

Legal Surveys Division-Department of Justice

EDITORIAL

BOUNDARY LOCATIONS AND SURVEY EVIDENCE

This article stems from a polite, but firm, request from the boss to produce a couple of technical papers on the above two subjects. I readily agreed since the proffered alternative would have left me in a precarious financial position.

In attempting to define and expand on the subject of boundary locations, I found that I would inevitably drift into a discourse on survey evidence. This **"drift"** phenomenon will become more apparent as we proceed with the article. In any event, I came to the conclusion that the two topics are inseparable and by combining them into one heading I was able to knock off this assignment in well under thirty days.

The main theme of the atricle is built around the assumption (or fact) that on the eighth day Himself created legal surveyors to divide up His great work and decreed that as surveyor begat surveyor, the fabric would be strengthened, maintained and preserved. In the plainer English version, we find that the overriding responsibility of the legal surveys branch of professional surveying is the establishing of property lines and re-establishing those lines that are lost or obliterated. In either case we are speaking of evidence planted or evidence found and you will be delighted to note that we are now back to where we started.

Legal surveying may be broken down into two main elements, the first of which may be entitled TECHNICAL. Under this heading are listed mathmatics, science, techniques, equipment and the skill to use them. These are the tools needed to gather the evidence to be used in applying the LAGAL element which will include statute law, common law, evidence rules, and most important, common sense. Harness these two elements to a well-adjusted brain and send it forth to establish and re-establish in all directions.

In the past, I have felt that training programmes for Ontario Land Surveyors provided adequate exposure to the technical element, but left the fledglings floundering in the field, learning the law as they built up experience (and tore down fences). The Association is now moving to correct this imbalance and may revoke every licence, except mine, pending graduation from a survey commission course.

Getting back to the theme of establish and re-establish, we should examine the authorities that govern the Who and How of legal surveying. I set out four authorities and could list more, but I won't get paid anything extra for my efforts. The authority that says WHO may survey is, of course, The Surveyors Act which I won't elaborate on since I can't find an up-to-date copy. The other three authorities that encompass the HOW of surveying are, (a) — The Surveys Act which, for the most part, concerns itself with the restoration of township fabric, assuming, of course, that it was storated in the first place. For most other situations recourse must be had to: (b) — decisions of the courts which fall into two distinct categories. The first of these is case law which is the sum total of decisions handed down by the courts and secondly, common law which are decisions of the Supreme Court and are deemed to have the force and effect of statute law, given the same ingredients (i.e. facts and situations). Any surveyor who has gone through his second roll of plumb bob string will (or should) have come to the conclusion that the ingredients in any survey situation are so infinitely variable that they seldom fit neatly into the slots reserved for precedents. This is when (c), the fourth authority in the HOW category must be brought into play and, as you have probably already guessed, it is known as common sense. The distinction between the professional and non-professional is not only found on the Register, but also in the judiciuos application of these authorities, in precise proportions, to the resolution of a given problem.

May I disgress from this in-depth study of evidence for a moment for a brief examination of the fundamentals of The Surveys Act.

Envision, if you will, a typical 1,000 acre section in a typical 1,000 acre sectional township (a coincidence, no doubt), and we see ten lots arranged in two tiers (concessions) of five lots each, the boundary of the section being surveyed (run) and posted (usually). The limits between the individual lots are theoretical projections (unrun lines), and if we transport ourselves back 101 years in time we find **'lo and behold'**, some **'established'** lines and some **'un-established'** lines. At that point in time, the un-established mess can be readily cleaned up by flipping to section 4002 of the Act, swinging the required angle, and a lash or two on the backs of the axemen will do the rest.

But, let us say, the unrun lines weren't run, and we can't transport ourselves 101 years into the past (although they tell me the Geodetic Science Committee is working on

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QUOTABLE QUOTES

The following excerpts were taken from a decision of the Supreme Court of Canada, delivered by Justice Locke being an appeal from the Court of Appeal for British Columbia regarding the application of the English common law **"ad medium filum aquae"** rule to land registered under a Torrens land registration system — Canadian Exploration Limited v. Frank R. Rotter, Canada Law Reports, Part 1, 1961, p. 15.

Background

"R. took conveyance to a certain sub-lot of land, except that portion thereof which had previously been conveyed to him, and which in turn was transferred by him to the Crown as the result of expropriation proceedings. This latter portion, of which the appellant company later became the registered owner, by transfer from the Crown, lay on the opposite side of a river from R.'s property."

"The description of the appellant's land was that which appears coloured red on the registered plan, the western limit of which was a line drawn along the top of the river bank. The certificate of title which issued to R. described the lands held as being sub-lot 36 save and except those parts of the lot shown outlined in red on the plan."

"The appellant having entered into the stream bed of the river opposite its lands and having carried out certain works, R. commenced an action. The appellant counterclaimed for damages and for a declaration that it was the lawful owner of the bed of the river **ad medium filum aquae."**

In explaining the exact grounds upon which a riparian owner of lands upon a non-tidal or non-navigable stream is held to own the bed of the stream adjoining his property **"ad medium filum",** Justice Locke referred to Prideaux's Precedents in Conveyancing at p. 183 which reads:

"When in the parcels the land is described as bounded on one side by a road or a non-tidal river the conveyance will, so far as the grantor has power to do so, pass the soil of the road or the bed of the river **ad medium filum,** unless a contrary intention is clearly shown. The fact that the land is described by reference to a coloured plan and no part of the road or river is coloured, and that precise measurements are given which will be satisfied without including any part of the road or river, are not sufficient indications of a contrary intention."

Berridge v. Ward (1861), 10 C.B.N.S. 400 and Micklethwait v. Newlay Bridge Co. (1886), 33 Ch. D.133 at 145.

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ACTION AND NEWS

Hope to see you all at the O.L.S. convention in Thunder Bay.

Law and Surveying

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that one too), so fade back on camera and bring into focus a new image — corn fields, rolling grasslands and girl with long wavy hair looking through a transit — zoom in on girl. It's Lotta Letteringdone, O.L.S. who, it is said, made the field notes for 8 miles of a right-of-way survey on the back of a Tiparillo cigar box — with her lipstick. Lotta is at this moment diligently deliberating the delineation of the demarcation dividing lot X from lot Y. Stop action and fade back to blackboard on which are lettered certain words. See fig. 2 (Editor's note — fig. 1 was deemed ridiculous and was deleted.)

Fig. 2

PARTIAL SYNOPSIS OF SURVEYS ACT SECTIONS GOVERNING ESTABLISHMENT OF UNRUN LINES AND RE-ESTABLISHMENT OF LINES OR CORNERS LOST OR OBLITERATED

Problem	Solution	
	Alternative 1	Alternative 2
(1) Section Corn. Lost	Best Evidence	Intersect, etc.
(2) Lot Corn. Lost	Best Evidence	Proportional Division, etc.
(3) Stat. Line Oblit.	Best Evidence	Join Last Asc. Points, etc.
PROBABLE RESULT	RESTORED IN ORIG. POSITION	CLOSE BUT USE ONLY AS LAST RESORT
(4) Estab. Unrun Line	On Astronomic Course of Gov. Line, etc.	NIL
Probable Result	Chaos in Settled Areas	

The significance of the information in fig. 2 is not immediately apparent to the writer, but it was to Lotta and suffice to say that our story has a happy ending.

Now back to whatever it was we were talking about, and I'd like to say this about that:

A fellow named Greenleaf from Providence,
Once wrote a book about evidence,
Being difficult to read,
With acceptable speed,
I didn't read it.

However, most of us have seen one passage of particular interest to surveyors and the wisdom of it makes it worth repeating here. "**The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake. On this principle, the things usually called for in a grant, that is, the things by which the land granted is described have thus been marshalled: First the highest regard had to natural boundaries; secondly, to lines actually marked at the time of the grant; thirdly, if the lines and courses of an adjoining tract are called for the lines will be extended to them, if they are sufficiently established; fourthly to courses and distances, giving preference to the one or the other according to circumstances.**"

In my search for a comprehensive definition of **"natural boundaries"**, I turned to my wife, whose expertise on all nature of things is renowned throughout the land. Her advice to me was that I shouldn't clutter up my brain with such silly abstractions while doing the dishes and to this day I have thought little more about it.

I may be stoned (in the Biblical sense) for throwing Greenleaf's Rules of Evidence at you again, but I have found from my involvement in remedial survey projects that so much of the anguish, displacements and dispossessions are directly attributable to surveyors who have either read these rules upside down or not at all.

Mr. Greenleaf places courses and distances at the very bottom of the ladder and I am still a bit shaken to hear a surveyor tell me that when staking property, his sole responsibility is to lay out deed distances and that the lawyers will straighten out the résultant mess. To them I would suggest that given 4 consecutive days (on company time) I could teach my 7 year old daughter to stake out a deed to those specifications. I doubt, however, that she would then qualify for a licence to practise professional land surveying. Geodesists maybe, but my daughter — no way.

This naturally, although I don't know why, leads us into an examination of the unalterability of boundaries, but, time and space being limited, I had hoped to make this the subject of a future article. However, the boss has politely, but firmly, requested that I not write any more technical papers, and I readily agreed since the proffered alternative would have left me in a precarious financial position.

G. F. MACKAY, O.L.S.

Quotable Quotes

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And Maclaren v. Attorney-General of Quebec, (1914) A.C. 258, Lord Moulton said in part (p. 272):

"In the Courts below the learned judges have held that the presumption that the bed of the river **ad medium filum aquae** was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the letters patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed."

On pages 25 and 26, Justice Locke states:

"It must be taken, in my opinion, to be conclusively established that if the area of land described by reference to the plan in the appellant's certificate of title was held by it under a registered Crown grant issued under the provisions of the **Land Act** of British Columbia, the appellant would have title to the bed of the stream **ad medium filum,** with all the rights and benefits which accrue to a riparian owner by virtue of that fact. That appears to me to be determined by the judgments of the Judicial Committee in **Lord v. City of Sidney** and **Maclaren v. Attorney General of Quebec** and by the House of Lords in **Bristow v. Cormican,** above referred to. The rights of the grantee would not be held to be limited in any respect by the fact that the lands were described in reference to such a plan showing the boundary as the bank of the river containing the stream and not in mid-stream."

and on page 32:

"The question to be decided in this action is the proper construction of the grant by the respondent to His Majesty dated May 28, 1945. That question cannot, in my opinion, be affected by the terms of ss. 53, 125, 141(1) and 156 of the **Land Registry Act** "(Torrens System)" which deal with the manner of registration of conveyances and the duty of the registrar to register the title claimed if the statutory conditions are complied with. The failure of the Crown to ask that the grant be construed as conveying title **ad medium filum** cannot deprive the appellant of the right to insist as against the grantor that it should be so construed."

On page 33, Justice Locke gives the judgment of the Court in part as follows:

"I would allow this appeal with costs and direct that the judgment at the trial be amended by directing that the certificate of indefeasible title issued to the appellant

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