

LAW AND SURVEYING

Legal Surveys Branch
Ministry of Consumer & Commercial Relations



EDITORIAL

We had occasion recently to reread an address given to the Association of Ontario Land Surveyors in February of 1963 by the late W. Marsh Magwood, Q.C., Director of Titles for Ontario and Master of Titles for the County of York. Mr. Magwood made some cogent comments regarding the status of fences in legal surveying which, we believe, merit reprinting.

Fences and their relationship to boundaries and title is a question constantly before the Legal Surveys Branch in the examination of plans to be registered or recorded under the various statutes.

"The graduate surveyor must understand the basic principles behind the division of land. Does he realize that the division of land presupposes monumentation? He must have the answer to the perennial question of fences. One might almost reduce this to a question of "when is a fence not a fence?" Perhaps the answer is "when it is a monument."

"The student must understand what constitutes an original survey. The Surveys Act sets out in very clear terms what an original survey is within the meaning of that Act. However, The Surveys Act deals mainly with Statutory limits. There are, of course, literally hundreds of thousands of boundaries in the Province which are not statutory limits and therefore not dealt with under The Surveys Act.

"This in no way reduces the principle upon which the original survey definition in The Surveys Act is built; this is the principle that under certain conditions, the survey of boundaries setting out the first division of land forms part of an original survey and, as original surveys under The Surveys Act, is true and unalterable.

"I would like at this time to comment briefly on the 'fence' question, which appears to be always of interest.

"There are surveyors who tell us in correspondence that they have disregarded the fences in their establishment of lost corners because the land is registered under The Land Titles Act.

"Discussions have taken place where the suggestion has been made that the wholesale adoption of fences without question as to their legal status is the simplest way to solve boundary problems. In my opinion, gentlemen, both of these principles are quite wrong.

"The problem of fences might be simplified by the suggestion that there are two types of fences in Ontario. The first fence is a fence of convenience, a fence which is erected without the benefit of survey, a fence which bears no known relationship to a property boundary. One might term this a cattle fence — a fence of convenience.

"In the re-establishment of lost boundaries this fence has no legal significance. Its effect on known boundaries is limited to the Registry Office lands in the Province. In these areas, after a period of ten years, open, notorious and undisputed possession, the person enclosing his neighbour's lands by such a fence can seek to claim these lands through the normal legal channels. It should be noted that the existence of such a fence for any period of time does not convey title. It only provides the right to claim title as long as the conditions of the Statutes of Limitations can be met and proven.

"I would mention at this point, gentlemen, that for a fence to create rights adverse to the rights of the adjoining owner, the position of the boundary which the fence is adverse to must be known and firmly established on the ground.

"As I suggested earlier, the second type of fence might be referred to as a monument. This is a fence which having been erected along a surveyed limit between properties, and when the primary evidence of the survey disappears, can become the best available evidence of where the original survey line was located. Such is occupational evidence, which can be connected to the original survey and which can be accepted under best evidence rules.

"The Land Surveyor when confronted by the problems of retracement in which there exists a fence must decide into which category the fence falls. Is it a sign of adverse occupation? A cattle fence — a fence of convenience? If so, he must disregard it in his assessment of evidence. Or is it the best available evidence of the first survey.

"I will not attempt to minimize, Gentlemen, the difficulties of making such a decision. However, I do feel that your training of your student surveyors must be such that the surveyor, when admitted to practise, is aware of such legal problems and is equipped to solve them.

"My contact with the Ontario Land Surveyor, through Hearings under The Boundaries Act, or The Land Titles Act, or The Certification of Titles Act, and my association with your problems through my Examiner of Surveys, are, of course, quite close. Title and Survey are inextricably bound together, as I mentioned earlier. Chain of title and extent of title, i.e. surveys, are indivisible.

"My view of the Ontario Land Surveyor, is then, by necessity, channelled into the legal aspects of a surveyor's work."

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will require some years to resolve.

Our membership will vote in February on the formation of a national body of land surveyors. I can report that the Nova Scotia land surveyors unanimously endorsed the concept and the assessment of a four dollar levy per member to make it possible.

The Workmen's Compensation Board is a tough nut to crack, but they have granted us, at least, further consideration. This was accomplished by the old GET SMART trick of writing every member of Parliament that the individual members of Council knew!

Our public relations committee has been particularly active this year and, as an experiment has tried to keep the membership up to date with a monthly publication as an addition to the regular Ontario Land Surveyor issue.

A committee is now reviewing once again the tariff and, while unrelated, the O.L.S. exhibit at the Photogrammetry Congress, was declared to be outstanding.

As for discipline, the first person on the docket should be the President. He is not only long-winded, but he has used this publication as a preview for his presidential address at the next annual meeting.

Which reminds me — please keep your calendar open for three important days in February, 1973 — the 5th, 6th, and 7th. They are the days your annual meeting will be held — and it will be centred in the Royal York Hotel, Toronto, Ontario.