



Ontario

Ministry of
Consumer and
Commercial
Relations

Legal and
Survey
Standards
Branch

The Boundaries Act

The case summarized here contains a number of interesting points of survey law. Firstly, a lot line by a non-professional surveyor is contended for. The question is: can it be regarded as a valid first running of the lot line? Secondly, there is some evidence of a previously existing old fence in the same area as the line by the non-O.L.S. and different by some considerable distance in position. The question is: can this old fence be held to be a valid first running of the lot line? Thirdly, there is a recent survey by a party to the hearing, surveyor 1, who appeared as an objector to the Application. Surveyor 1 ran the lot line by the Surveys Act method, namely on the astronomic course shown on the original plan and field notes. Finally, there is the problem which is created by the acceptance of a lot line fence which runs only part way through the depth of a lot. If you have no valid first running of the lot line in the remainder of the lot can you accept the end of the fence as a "last ascertainable point" and if you do, on what bearing do you establish the previously un-run portion of the line?

In the first instance Surveyor 2, the surveyor who acted for the Applicant A, accepted the line by the non-professional surveyor and this is the boundary under application. In the third instance the Objector, Surveyor 1, is contending that his line run by The Surveys Act method, should prevail. The evidence is as follows:

The boundary under application was part of the line between lots 26 and 27, Concession 5, extending southerly from the former railway right-of-way to the "blind line", an un-run line in the original survey.

In 1971 surveyor 1 surveyed the lands described in Instrument 18355, extending some 1185 feet south of the railway and adjacent to the lot line in lot 27. These lands had originally been conveyed in 1931 to an Agricultural Society for a fairgrounds. The instrument was described by reference to concrete posts at its corners with a concrete post witnessing the intersection of the south boundary of the railway and the lot line and another concrete post on the lot line some 976 feet south of the one at the railway intersection. The evidence was that the concrete posts referred to had been set by a non-professional surveyor in 1931.

Surveyor 1 testified that he had found the southerly concrete post described as being on the lot line but could

not find the one at the railway intersection. At the railway intersection he accepted an existing fence corner on the oral evidence of A, the applicant in this case. He joined this corner post to the concrete post south of the railway intersection to establish the westerly limit of lands conveyed by Instrument 18355. However, he did not make this property boundary coincident with the lot line which he positioned in accordance with Section 34, Subsection 1 of The Surveys Act southerly from the wooden post found at the northwest corner of lot 27 as shown by a dashed line on the sketch. The Surveys Act line is 4 feet west of the fence corner at the south side of the railway and 49 feet west of the southerly concrete post.

In 1976 surveyor 1 surveyed part of Lot 26 south of the railway for A. He again positioned the lot line in accordance with The Surveys Act and advised his client that in his opinion any claim beyond this line east to the remains of an old fence would be by adverse possession. A did not agree with this positioning of the lot line and employed surveyor 2 to survey the boundary and prepare a plan in support of a Boundaries Act application.

Surveyor 2 testified that he found both of the concrete posts previously referred to as planted by the non-O.L.S. The post at the intersection of the railway and the lot line which surveyor 1 did not find, was discovered under 4 feet of fill, some 16 feet east of the fence corner accepted by surveyor 1. At the southerly concrete post surveyor 2 also found an old fence post some 16 feet west, which he believed to be the only remaining evidence of an old fence line. A contended that an old fence line had run southerly from the railway to a point in the swamp some 200 feet south of the southerly concrete post.

Surveyor 2 attempted to verify the positions of the concrete posts on the west side by checking the east-west measurements of the deed. The deed measurement on the south side presented a good verification, within a foot, but the measurement on the north side disclosed that the westerly monument had been disturbed and could not be relied on.

A advised surveyor 2 that the old fence line which had previously run southerly from the railway, was a fence of convenience to contain farm animals and not a boundary fence. Based on this understanding, surveyor 2 then consider-

ed the line joining the concrete posts, run by the non-O.L.S., to be a valid first running of the lot line in accordance with The Surveys Act in force in 1931. At the hearing surveyor 2 referred to the decision of the Director of Titles in BA-168 on the legal principles of conventional boundaries by parole agreement, peaceful settlement and acquiescence equitable estoppel and the principle that the onus of proof lies on he who affirms not on he who denies, all of which he believed applied in the case before the hearing.

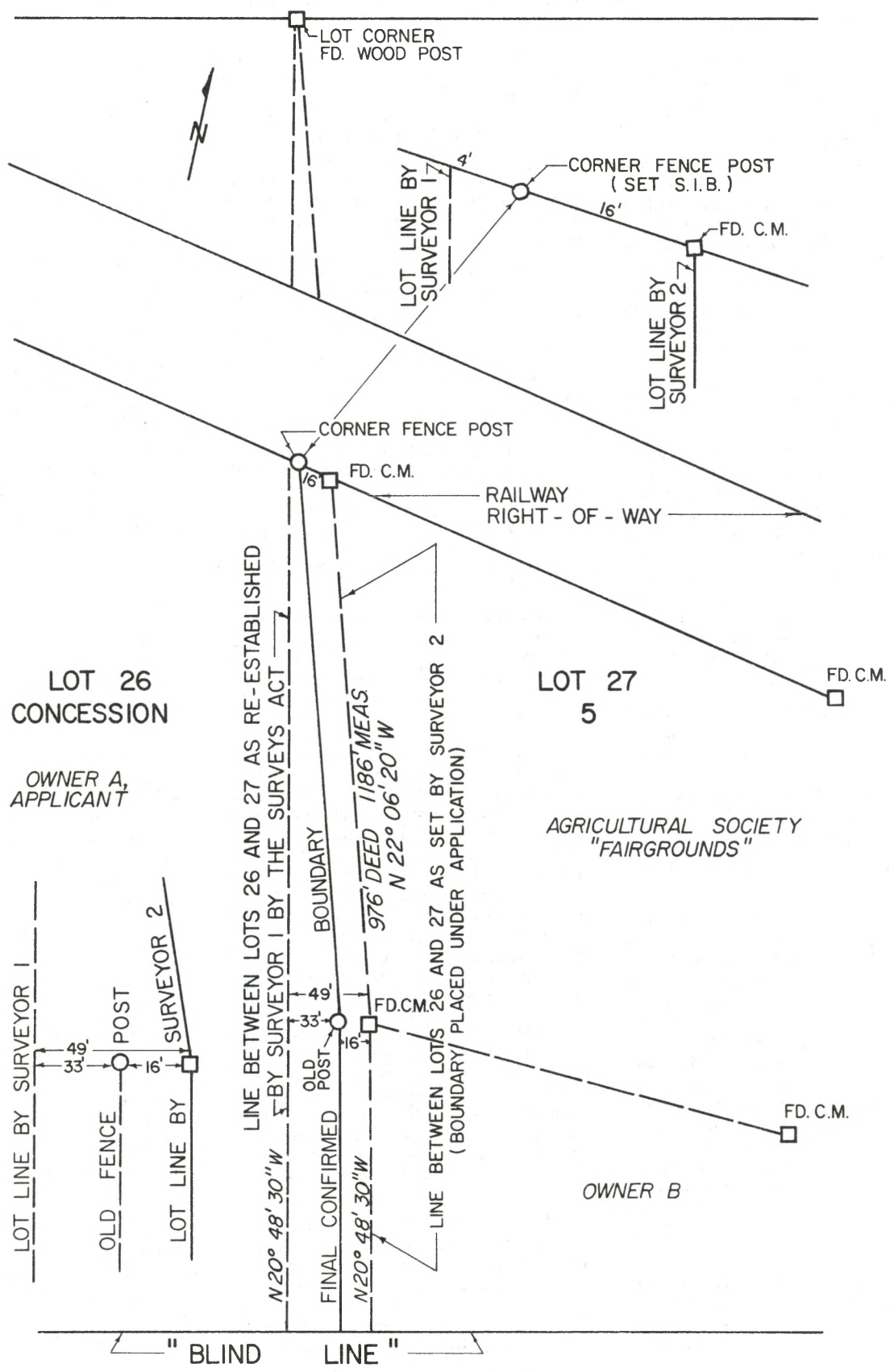
The applicant A and the adjoining owner south of the Fairgrounds, B, both of whom have lived in lot 27 and lot 26 respectively for over forty years, both testified that an old fence had existed southerly from the railway to a point in the swamp some 200 feet south of the Fairgrounds from before 1931 to about 3 years ago when A removed the fence while making improvements to his property. A testified that he had always understood that a previous member of his family had erected the fence solely to contain farm animals. B was aware of the circumstances surrounding the construction of this fence, but testified that the fence was not erected as a new fence at that time but simply replaced part of the original barbed wire with a page-wire fence.

A was unable to tell the hearing if his predecessors in title had considered the old fence line as a boundary fence. He testified that since the survey by the non-professional surveyor in 1931, he had always considered the line joining the concrete posts as the boundary line. A did acknowledge that about 3 years ago, after he had removed the fence, when he had constructed a small building in the immediate vicinity, B had advised him that part of the building was on the wrong property.

B's testimony varied considerably from A's. He stated that he, and his father before him, had always laid claim to the lands east of the old fence line and that his father prior to conveying the area to the Fairgrounds, had farmed these lands. B was aware of the existence of the concrete posts but presumed they were simply planted to define the extent of his father's conveyance for the Fairgrounds in 1931.

Surveyor 1 who was also an objector to the survey by surveyor 2, testified as to the methods of his previous surveys in the area of the lot line. He pointed out that a Provincial Government Department had previously run the lot line by

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the same method he had used, namely on the astronomic course of the original plan and field notes. It was his opinion, based on his 1971 survey, that the concrete post found by surveyor 2 at the northwest corner of the Fairgrounds, had been moved some 16 feet east of its original position. He also expressed doubt that the old fence post 16 feet west of the concrete post at the south-west corner of the Fairgrounds, was evidence of an old north-south fence line and speculated that it may simply have been a post on an east-west fence on the southerly boundary of the Fairgrounds. Surveyor 1 also expressed the opinion that had he known in 1971 of the prior existence of a fence throughout he would have accepted the fence for the position of the lot line, as far as it extended. Only a short section of the fence existed in 1971.

In summarizing the argument of counsel for the Applicant and of the objector, the tribunal wrote:

"Applicant's counsel argued that the (line by the non-professional surveyor) was the first running of this boundary and even if run by a non-professional surveyor, once ownership is referred to it and accepted by the parties it should be held, and that the fact of acceptance is evidenced by the conveyance from (B) to the Agricultural Society and the testimony of (A). Counsel further argued that no objections were made when (A) removed the old fence line.

"The main thrust of the objector's argument was for acceptance of the old fence line in preference to the (line of the concrete posts) in the event the positioning of the boundary in accordance with Section 34 subsection 1 of The Surveys Act is not accepted.

In delivering judgement the tribunal wrote as follows:

"The evidence presented during the hearing suggests three possible positions for the line between Lots 26 and 27 in Concession 5, south of the railway right-of-way. The . . . line as evidenced by the concrete posts planted . . . in 1931; the line of the old barbed wire and page wire fence, approximately 16 feet to the west of the (line by the concrete posts); and the line in accordance with The Surveys Act for unrun lines in the original township survey run by surveyor (1) in 1971 which line is (4) feet west of the fence line at the former railway right-of-way and approximately 33 feet west of an old fence post at the south-west corner of the lands owned by (the Agricultural Society).

"The objector is asking that the (line by the non-professional surveyor) be disregarded as it was run by an unqualified surveyor, and that the fence was a fence of convenience and as such has no legal

significance. The Objector maintains that his survey of 1971 was the first running of that part of the lot line south of the former railway right-of-way in strict compliance with The Surveys Act.

"Section 3 of The Surveys Act embodies the common law principle of unalterability of first surveys and Section 9 is a direction to surveyors to be guided in the re-establishment of those boundaries by the evidence of those prior surveys. It is my view that sufficient evidence was presented to indicate that the lot line had been run prior to surveyor 1's survey of 1971.

"Argument and evidence, much of it conflicting, was presented concerning the position of the concrete post set . . . at the north-west corner of the Agricultural Society's lands. I am satisfied and find as a matter of fact that the post found by surveyor 2 is in its original position as set in 1931.

"The applicant through counsel argued that his line, even though run by an unqualified person, is the first running of the lot line which was accepted by the owners and as such should be held.

"Section 2 of The Surveys Act, R.-S.O. 1970, Chapter 453 states:

"No survey of land for the purpose of defining, locating or describing any line, boundary or corner of a parcel of land is valid unless made by a surveyor or under the personal supervision of a surveyor".

"Section 1 of the Act in force at the time of the survey by the non-professional surveyor, in essence, is identical. It is my view that this section of the Act would not necessarily invalidate the line providing the owners on either side had accepted it as the true line, limited their occupation to it and as such established a conventional boundary as alleged by the applicant's surveyor. The evidence, in my view, does not support or meet the requirements of a conventional boundary as set down by previous court decisions.

"Although (the non-professional surveyor) in 1931 placed his monuments to the east of the old fence line, owners on either side continued to live to and treat the fence as the boundary line at least until a few years ago when the applicant commenced removing sections of the fence during his improvement of the property.

"I also reject the argument of the objector that the conveyance . . . in 1931 by Instrument 1087 and subsequently to the Agricultural Society by Instrument 18355 extends westerly only to (the line of the concrete posts) and that there, in fact, exists a sliver of land between that line and the line between Lots 26 and

27, and that this sliver of land is presently owned by (B) successors in title to the father, (of B) the Grantor in Instrument 1087. My reading of Instrument 1087 clearly indicates that the conveyance was to extend to the lot line, wherever it may be.

"Much evidence was presented that the old fence line had existed for a great many years, dating prior to the survey of 1931. The applicant had no knowledge whether the fence was treated as a boundary fence prior to his ownership, but testified that it was his understanding that the concrete posts defined the true position of the boundary. (B) testified that the fence line during his father's ownership and subsequently during the ownership of the Agricultural Society and for that part of the fence line south of the Agricultural Society's lands during his ownership since 1947, had always been treated as the boundary line. This is further evidenced by the testimony of (B) and acknowledged by (A) that he informed (A) some three years ago that he was erecting the new frame office building partly on the wrong property at which time the need for a survey was discussed.

"Although the conveyance from (B's father) in Instrument 1087 purported to convey to the (line of the concrete posts), the owners on either side appeared to have ignored this definition of the lot line and continued their occupation to the fence line.

"The courts have held that the onus of proof lies upon the party who seeks to change the possession. Quoting from *Palmer v. Thornbeck*, (1877) 27 U.C.C.P. 291 (C.A.):

In all actions brought to determine the true boundary line between properties, the burden of proof lies upon plaintiff who seeks to change the possession".

"Further, in regards to occupation often being considered satisfactory evidence of the position of the boundary, it was said in *Bateman and Bateman v. Pottruff* (1955) O.W.N. 329 (C.A.), quoting from *Diehl v. Zanger* (1879), 39 Mich. 601:

". and that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared."

"I take "original survey" to include the first running of a boundary under instructions of the owner. The location and direction of the old fence line clearly indicates that it was not erected at random as might be expected of a fence merely to contain farm animals. Acceptance

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of the fence is supported by the testimony of surveyor 1 that had he known in 1971 of the extent and history of the fence, he would have accepted it as best evidence of the boundary as far as it extended.

“I find that both the applicant and objector have failed to shift the burden of proof away from long established occupation and find that the old fence line, as far as it extended, is the best available evidence of the original running of the line between Lots 26 and 27 in Concession 5,

“A practical problem exists in following the above stated finding in that most of the old fence line has now been removed. I would direct the surveyor to join with a straight line the standard iron bar in the old fence corner at the southerly limit of the former railway right-of-way to the old fence post noted on the draft plan, as being opposite the concrete post at the south-west corner as I am satisfied that this fence post is evidence of the fence line. Failing evidence of the fence south of the last mentioned point, the line shall be run southerly from that point to the southerly limit of the concession in accordance with Section 34, Subsection 1 of The Surveys Act.”

Confirmation and Condominium Section, Legal and Survey Standards Branch.

February, 1981.