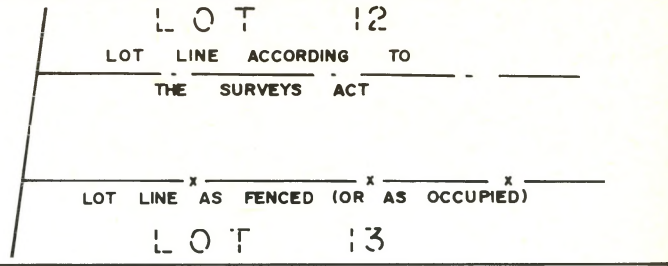


"Theoretical" Lot Lines Are Troublemakers



IF ONE demon exists in the practice of legal land surveying in Ontario, it is that imaginary one called

"The Theoretical Lot Line".

It has other aliases such as "The Lot Line according to The Surveys Act", "The Deed Line", etc. etc.

The above troublemakers surface when plans are being prepared subsequent to a survey which re-establishes certain boundaries.

In re-establishing a boundary, whether it be a township lot line or a subdivision lot line, or a metes and bounds limit, a surveyor must consider the best evidence and re-establish on the ground the boundary in the location where it was **first established** and not where it was necessarily described, whether on a deed or on a plan.

Let us first look at the re-establishment of the limits of township lots. The sketch above shows what is often placed on a plan of survey which involves the re-establishment of a township lot line.

As you will note from the above, two lot lines appear to exist. One, which has been designated as the lot line as occupied or the lot line as fenced and another, dotted on the plan, which indicates the lot line according to the Surveys Act.

Is it possible to have two lot lines? The answer has to be - NO! If that is so, then why are two shown?

As the surveyor's duty is to re-establish the limit between Lots 12 and 13 in the location where it was first established or run, he must consider the evidence regarding that re-establishment in the recognized order, which has been developed by Case Law, and that order, as you are aware, is as follows:

1. natural boundaries
2. original monumentation or evidence as to the location of the original monumentation
3. evidence of possession, reasonably relating back to the time of the first establishment of the line
4. other limits as called for in the deeds, and

5. measurements as shown on the deed or plan.

In the above sketch regarding Lots 12 and 13 neither evidence (1) being natural boundaries, or (2) being original monuments, appear to exist, therefore the surveyor must consider the next priority of evidence, being evidence of the original monumentation or occupation reasonably relating back to the time of the first establishment of the limit of the lot.

From the above, it would appear that the only evidence existing on the ground regarding the first running of the lot line would be the fence. (In other instances, it might be a line of trees). If the fence is the only evidence found after a thorough search of all physical and documentary evidence, then the line shown on the plan as "the lot line as fenced" IS THE LOT LINE.

Once the occupation line has been settled and used, the onus of proof rests on the person who seeks to disprove the line. This has been held by the courts that **"in all actions brought to determine the true boundary line between properties, the burden of proof lies upon the plaintiff, who seeks to change the possession"** Palmer v. Thornbeck (1877) 27 U.C.C.P. 291 (C.A.)

One may say that it is not possible to prove that the line was ever surveyed or established by a qualified surveyor. Note then, the following case: Kingston v. Highland (1919) 47 N.B.R. 324 which states:

"erroneous as may have been the original survey, or even if there were no survey at all, technically speaking the monuments that were set, the trees that were marked and blazed, must nevertheless govern, even though the effect be to give one proprietor a much greater acreage than his deed would seem to entitle him and give to the adjoining proprietor very much less".

The next question that arises is, "Can the line as re-established from possessory evidence be considered the lot line?" In the Landmark Case that is so often quoted in surveying, Diehl v. Zanger, 39 Mich. 601, Justice Cooley said: *"As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the*

best evidence of what the lines of the lot actually are".

Therefore, the argument that one cannot prove that the line of the fence was ever surveyed, is not relevant as indicated by the Case Law above. Further, precedent has indicated that the onus is on the person who is going to disrupt possession to prove that the possession should not be accepted. In other words, one cannot resort to the theoretical measurements in the deeds unless he can disprove the line as occupied by something more than the measurements.

In the diagram shown no evidence appears to exist for the lot line according to The Survey's Act other than the measurements as shown on paper, in this case being the original township plan. Stronger evidence does exist for the acceptance of the line as fenced or as possessed as being the original lot line.

Therefore, the "lot line according to the Surveys Act" should not be shown on the plan any more than the "theoretical lot line" should be shown on the plan, as this animal does **not exist**. The terminology could be "lot line as re-established" or "post and wire fence marking the lot line", although "lot line" in itself is sufficient. Other terminology may also be suitable.

The dotting in of this imaginary limit is in contravention of the accepted survey law that the deed or plan is not conclusive as to the extent of the boundaries. This is stated in the Land Titles Act and has been reiterated through Case Law precedent.

Do not fall into the trap of confusing clients and throwing areas into disarray by indicating on a plan of survey the "theoretical lot line", if no evidence exists on the ground to substantiate the same, and further, if possessory evidence does exist, which would indicate the line to be elsewhere.

Also, beware of placing on a plan of survey the theoretical lot line simply to pacify the client who wishes the same placed on the plan.

(In the next issue of the "Quarterly" we will be dealing with the misdescription on registered plans of subdivision and metes and bounds parcels). ●