

Misdescriptions and Registered Plans

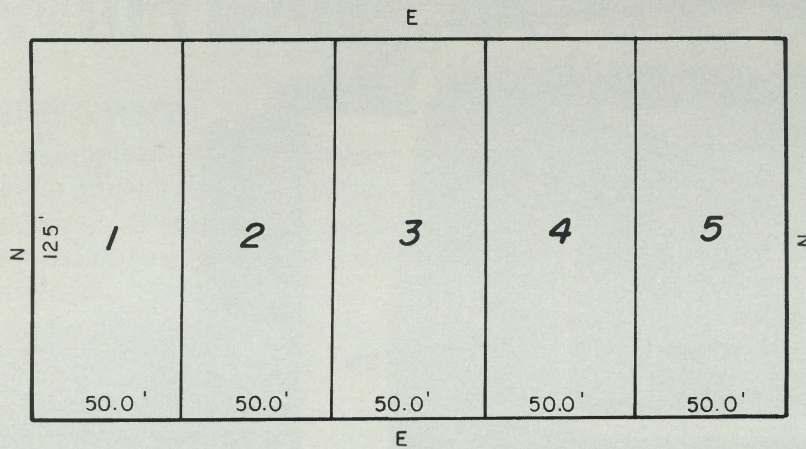


FIG. 1 R. PLAN 98 - (1892)

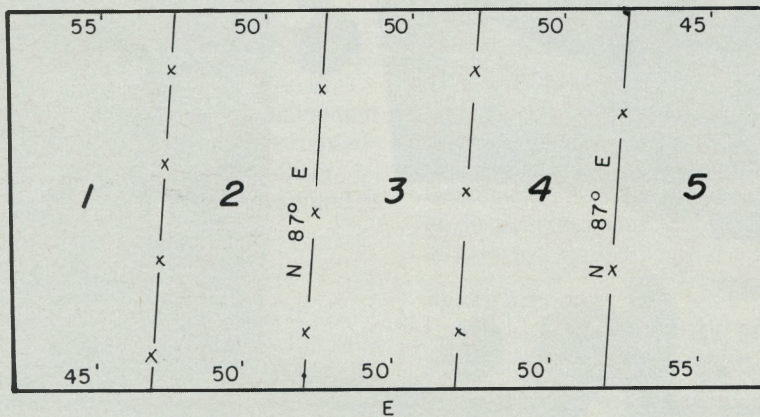


FIG. 2 POSSESSION TO-DAY

LAST MONTH in the Continuing Education column theoretical lot lines were discussed as opposed to lot lines re-established according to the best evidence. The column in the Fall "Quarterly" did not intend to infer in any way that fences must always be accepted as the best evidence of the lot line; however, it did intend that fences or other signs of occupation or possession must always be considered when re-establishing the lot line as it was established the first time. Remember, we are emphasizing that one must **re-establish** the original line as it was either surveyed or established and not necessarily depend on measurements or the theoretical location of the line.

This column will deal mainly with the re-establishment of lots on registered plans of subdivision. There is no difference in the re-establishment of these parcels, whether or not they are in land titles or in the registry system. The rules of best evidence must be considered in each regard.

You will note that we have two sketches (Fig. 1 and Fig. 2) regarding a registered plan of subdivision which was registered in 1892. This plan has five lots, each supposedly having a frontage of 50 feet and a depth of 125 feet. In surveying these lots today, in 1982, one finds that the possessory limits between Lots 1 and 5 run at approximately 3° off

the angle as shown on the original plan. Research shows that no survey monumentation was probably planted when the plan was registered in 1892. In fact, there is no record, either on the ground, or in documentation, that surveys had ever been undertaken to establish Lots 1 to 5. One does find however, in searching on the ground, that the possessory or occupation limits between Lots 1 and 5 appear fairly parallel to one another, and each Lot measured at its rear width and front width appears close to the 50 feet, as on the Plan. This however, leaves Lots 1 and 5 with a difference in dimensions from the original Plan.

The problem here of course is, how does one stake out Lots 1 to 5 on Registered Plan 98? We must return to the premise that we must re-establish the parcels where they were established the first time, which may not agree necessarily with where they were described, whether this description was on a Registered Plan or in a metes and bounds description. Looking at the sketches and determining that there is no evidence other than what is shown on the sketches and what has been indicated earlier, we must go down the rules of evidence. There being no original monumentation, we must look for evidence of where the lines were established the first time, or where the monuments were planted the first time. There appears to be only possessory evidence in this regard, showing the fences and old fence posts as marking the limits between Lots 1 and 5. Our task now is to determine whether or not these possessory limits are the best evidence of where the limits between Lots 1 and 5 were originally set. Remember, as stated in the article of the Fall "Quarterly" the courts have held 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.)

The onus now is on us to disprove the possession lines as being the best evidence of the limits between Lots 1 to 5. One will say right away, "well I can't prove Lots 1 to 5 were ever surveyed the first time, therefore the owners probably built the fences in the wrong location, and I should resurvey the parcel according to the original Registered Plan". This does not necessarily hold true. The article previously referred to in the Fall of 1982 also quoted the *Kingston v. Highland* case which indicated that even if there were no survey originally, the lines that were established must hold. The problem in the above subdivision would be to determine if the possessory limits relate reasonably back to the time of the severances, and if they are the

cont'd on page 6

best evidence of the first establishment of the limits between Lots 1 to 5. If so, then these **lines are the lot lines**. The lots simply have been misdescribed on Registered Plan 98.

You will be hearing that word "misdescription" more and more. In the discussions with the legal profession and in the discussions with our own Regional Groups, it is found that the surveyor and the lawyer do not understand the difference between "possession" which is the best evidence of the original boundary, and "adverse possession" which occurs when both the original boundary and the adverse possession line are known. The word "misdescription" is a clearer word to use when meaning "possession" which is the best evidence of the original boundary. In the above mentioned subdivision, in Fig. 1, Lots 1 to 5 have been misdescribed on the Plan, and in Fig. 2, Lots 1 to 5 have as their lot limits, lines which were established and have been occupied over a period of years. In other words, in Fig. 2 the possessory limits of Lots 1 to 5 are the **best of evidence of the original limits**.

Does this mean to say that every time we are surveying a Registered Plan of Subdivision we must accept fences which do not agree with the original line? Definitely not! It is up to the surveyor to determine by investigation, whether or not higher evidence is in existence regarding the original location of the lines. Some of the questions he can ask himself are the following:

1. Is there evidence that the Plan was ever surveyed, and monumentation planted?

2. If the Plan was surveyed and monumentation planted is there any record today of this monumentation?
3. If there is evidence on the ground of the monumentation, do the possessory limits agree with this monumentation or disagree with it?
4. Does the monumentation found today agree with the original Plan?
5. If there can be found no record of a survey or monumentation, do the possessory lines on the ground relate reasonably back to the time of the severance?

Just how does this theory or consideration of evidence relate to lots on recent Registered Plans of Subdivision? As you can well understand, the above problem generally surfaces on plans that were prepared prior to the monumentation regulations requiring each lot to be surveyed and monumented prior to sale. In recent years, all lots on registered plans of subdivision have been monumented. However, one finds today that several of these recent lots may have anywhere from one to three bars at each corner of the parcel. It appears that surveyors re-establishing lots on recent plans of subdivision are not accepting monuments found because they do not agree **exactly** with the measurements as shown on the Registered Plan of Subdivision. We must again remind you that in re-surveying a recent plan of subdivision, and on finding monumentation which may be the original monumentation, one must first determine if (1) it is the original monumentation and (2) is it in its original location. If both these items have the answer "yes", then the monument must be accepted

even though it is technically not in the location as shown on the M plan of Subdivision. Remember in the order of evidence, original monumentation is considered among the highest that can be found, and this monumentation must be accepted even though it is not theoretically where it was described, either on the Plan, or in the metes and bounds description.

We must caution you that this does not mean that one accepts every monument found, but rather one determines if that monument is the **original monument** and is in its **original location**. There seems to be some misunderstanding regarding land titles, in that land titles do not guarantee extent of title, therefore, the re-establishment of lots under the land titles system is the same as the re-establishment of lots under the registry system. Monuments govern if they are in their original location and if there are no original monuments, then evidence of the monuments that were placed originally or the line that was established originally must hold over measurements.

It is the duty of the surveyor to determine where the lines were established originally, or where they were monumented originally, and to show this on his Plan. It is not sufficient for the surveyor to simply show the theoretical deed or the registered plan lines and also show the occupation lines, not indicating to the client whether the occupation is the best evidence of the original limit, or if the reverse, the occupation represents an adverse possession problem. (We will be continuing this line of dialogue in the next issue of the "Quarterly", dealing with metes and bounds descriptions). ●