

Practical Use of Legislation and Common Law Practice for Surveyors

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ABSTRACT

The work of general private surveyors is diverse: their professional advice can be sought on the accuracy of a description identifying a plot of land, the location of a fence or boundary, the distance of a dwelling from a road or watercourse, or the boundary of an area on which licensed activity can occur. Common to all these activities, however, is a well-developed skill of reading and deciphering written descriptions of boundaries whether for Old System or Torrens Title (including Limited Titles) or general metes-and-bounds descriptions as encountered in Government Gazettes. This knowledge is critical in order to advise clients accurately of the facts disclosed by written descriptions of boundaries, whether or not these boundaries are land titles or lands defined for government administrative purposes. This paper explains the practical use of legislation and common law practice for surveyors giving professional advice to their clients. This is done using two case studies. The first concerns the boundaries of Pastures Protection Districts, and the second concerns the boundaries of a part of the waterway of Lake Macquarie where commercial fishing is prohibited. In both cases, the surveyor's report saved each of these clients significant financial and personal cost. Comments are also made on methods of deciphering hand-written descriptions contained within conveyances, which are the basis of many Limited Titles. Finally, examples are given of actual jobs where clients suffered considerable financial loss because they were not provided with sufficient information to evaluate the commercial risk of their project. The detailed knowledge of planning law and practice, engineering design and practice, the thorough knowledge of the legal and practical application of the laws and regulations are topics on which all registered surveyors are examined to obtain registration. They are central to the work of all surveyors in general private practice.

KEYWORDS: *Cadastral, legislation, common law, boundary descriptions.*

1 INTRODUCTION

Registered surveyors are examined for registration in boundary definition in both rural and urban areas as well as town planning, engineering design and supervision and the use of surveying instruments. However, only surveyors in small, mainly country, private practices are required to regularly use the whole range of these competencies. The discussion in this paper focuses on only a few examples from the wide range of instructions that are the daily work of small practices.

It is usual to receive instructions to subdivide land into several lots. This can be anything from two to 20 lots and occasionally more. This work involves the use of the Surveying and Spatial Information Act, Local Government Act, Roads Act, Environmental Planning and Assessment

Act, Conveyancing Act and Real Property Act (NSW Legislation, 2020) as well as the associated Regulations and, from time to time, other laws which become relevant in certain circumstances as the project progresses.

Instructions to carry out delimitation surveys are also received fairly regularly, generally as single lots but occasionally as multiple lots. These surveys, of course, give rise to the main subject of this paper because it is essential to trace the Old System Title through at least 30 years of title.

Since many of these titles are now Limited Titles, it is even more important to be skilled in locating and deciphering Old System Conveyances. Contrary to what many legal practitioners and conveyancers seem to believe, these titles *cannot* be treated as titles without a limitation. This is reinforced by the fact that the Registrar General clearly states on each plan given 'limited' status that it has *not* been investigated by that organisation. It is therefore essential that the surveyor knows how to locate the relevant title deeds and then how to read and interpret them.

It is important to remember that a conveyance can be prepared and used by anyone. The fact that a conveyance has been registered does not mean that good title has been established. However, it would appear that this is the assumption made by many (if not most) legal practitioners and conveyancers by virtue of the fact that the conveyance has been registered. In fact, the Registrar General simply places the copy of the original conveyance in the register, based solely on the assurance (by statutory declaration) that the document is an exact copy of the actual conveyance. This gives rise to many interesting investigations for surveyors. This point is explored further in the section 4. First, this paper explains the practical use of legislation and common law practice for surveyors giving professional advice to their clients, using two case studies.

2 CASE STUDY 1: PASTURES PROTECTION DISTRICTS

As already noted, surveyors are required to work with a range of statutes and regulations. This may often arise in circumstances where someone is being prosecuted for some statutory infraction. The surveyor will often be called as an expert witness in such matters. The surveyor's task is, in effect, to explain how a 2-dimensional statutory description concerning land is understood in the real world. The following case study illustrates this point.

A farmer and grazier was moving a truck load of his own cattle from one of his farms to another of his properties. At around sundown he parked his truck in a picnic area on the side of a creek. A short time later a Pastures Protection Board inspector arrived and issued the grazier with a fine for transporting stock after sundown. This is a usual proscription in many Pastures Protection Board regulations. However, it is not used in all such districts.

An examination of the boundaries of the relevant Pastures Protection District disclosed that the alleged offence took place very close to the boundary of two Pastures Protection Districts. The boundary was described as being the boundary between two shires. At the end of the picnic area, remote from a bridge over the Hunter River (which formed a boundary of the picnic area), there were signs on both sides of the road stating entry into one shire going in one direction and entering the adjoining shire going in the opposite direction. The Pastures Protection Board inspector stated that the picnic area between the signs and the bridge over the creek was in his

area and he therefore issued a fine.

The boundary of the Pastures Protection District was stated in the gazette as being the boundary between two shires. The Pastures Protection Board inspector accepted that the road signs showing the boundary of the two shires were correct. It was therefore necessary to find the legal boundary between the two shires. For this purpose, the surveyor was consulted and retained as an expert witness when the fine was challenged.

The relevant Government Gazette described the boundary between the shires by a metes and bounds description which said, in part, "...thence by the centre line of the Hunter River downstream to the confluence... etc" (Figure 1).

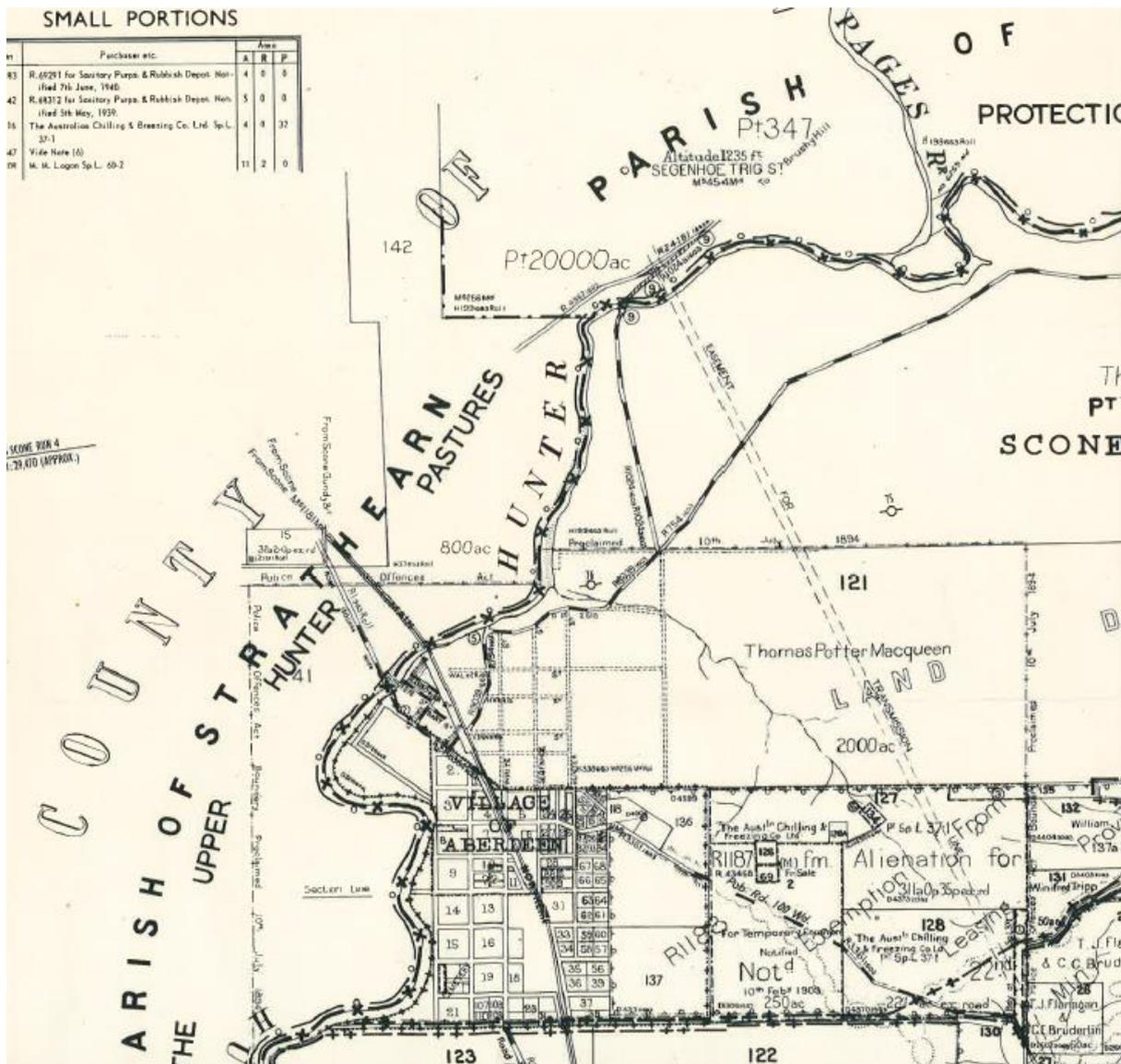


Figure. 1: Shire map.

An investigation showed that the actual boundary between the shires was the centreline of the river (Figure 2). Both shires were described in this way.

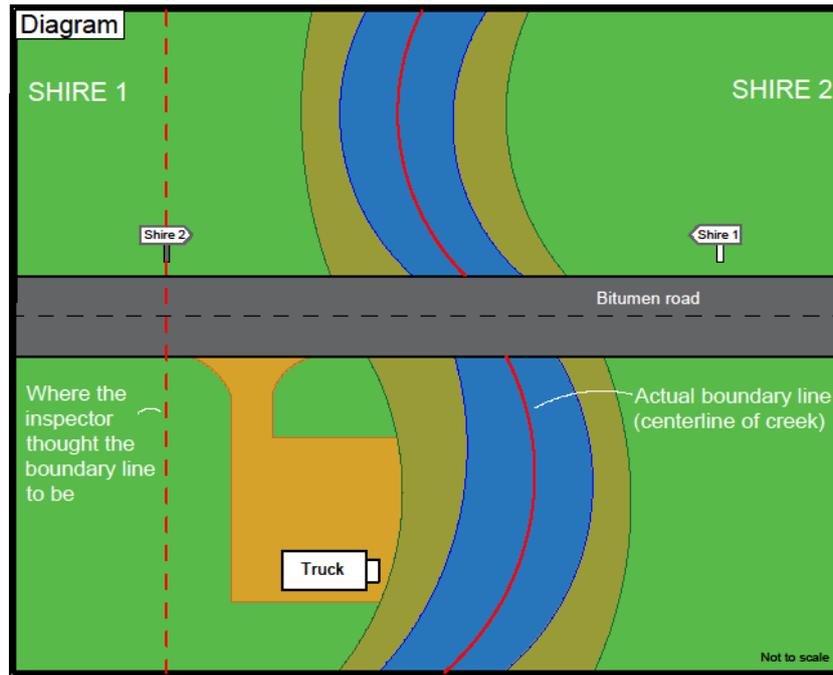


Figure 2: Shire boundaries.

Therefore, the signs mentioned above were placed for convenience rather than over the centreline of the river on the bridge. The other material aspect of these facts was that the Pastures Protection Board inspector who issued the fine was outside his jurisdiction and therefore had no authority to issue the fine. Another interesting fact to emerge was that the Pastures Protection Board for the land in question did not have a restriction on the transport of stock for any time, either day or night.

3 CASE STUDY 2: FISHING IN LAKE MACQUARIE

Professional fishers are banned under legislation from fishing in certain parts of Lake Macquarie, near Newcastle, NSW. The penalties for fishers who are prosecuted for infringing these rules are extremely harsh, including the confiscation of the equipment used in the illegal act. This includes, the boat, nets, traps, the catch and everything used by the fisher at that location. Additionally, there is a substantial monetary fine. Clearly, unless the fisher has other equipment, the confiscation of the equipment prevents them from earning an income until the equipment can be replaced.

It is therefore understandable that a fisher being prosecuted under relevant legislation for illegal fishing will challenge the validity of the prosecution if they can. In such circumstances, a surveyor may well be retained as an expert to locate the relevant boundaries delineating the areas in which fishing is and is not legal.

Lake Macquarie is an enormous body of water, and in some parts of the lake fishing is permitted. The Government Gazette describes the area where professional fishing (in fact all fishing using nets) is prohibited as being all of that part of Lake Macquarie to the west of a line drawn from the intersection of Thompson Road and The Esplanade at Speers Point to Marmong Point. A fisher was prosecuted for fishing in this area. The prosecution claimed that the offence took place at 3 am at a location about 500 m from Marmong Point and about 200 m to the west of the gazetted boundary line. This incident took place before the advent of Global Positioning

System (GPS) technology. Therefore, it became a question of how the fisheries inspectors located the position of the fisher at the time of the alleged offence.

A daytime field inspection at the Thompson Road and The Esplanade intersection looking towards Marmong Point showed that it was difficult to see the actual 'point' of Marmong Point. The reverse inspection from Marmong Point showed that it was even more difficult to identify the location of the intersection of Thompson Road with The Esplanade at Speers Point (Figure 3). This was during daylight on a clear day. The alleged offence was at 3 am. Unless clear beacons (lights) had been set up at both ends of the boundary, it was not possible at night to identify the ends of the line, and therefore the line of the boundary.



Figure 3: Fishing boundary at Lake Macquarie.

Since the fisher was alleged to have been about 200 m inside the prohibited area, it was critical to show how the location was determined, and how the terminal ends of the line were identified at night. Also, it had to be shown by the fisheries inspectors how, from a small boat, they could determine the location of the alleged offence, even if they could see the terminal ends of the boundary line. As noted previously, this took place before GPS was available, so the inspectors had to convince the court that they knew where the boundary line was, in relation to the position of the nets of the fisher.

The surveyor was retained by the alleged offender's legal representatives to ascertain the boundaries described in the Government Gazette. He was also instrumental in assisting the formulation of the appropriate questions that were put to the fisheries inspector in court, to test

how the latter established the relevant boundary in order to determine that the fisher was in fact breaking the law. In carrying out this work, the surveyor located the boundaries of the relevant part of Lake Macquarie and examined the map supplied by the prosecution which showed the location of the alleged offence and the time it took place.

As a consequence of the surveyor's professional expertise, the fisher successfully defended the charge because, at the end of the day, the inspectors were unable to demonstrate to the court how they had established that the fisher's nets were in illegal waters.

Once again, the skill of the surveyor was in translating the metes and bounds description in the Government Gazette into 'real-world' boundary locations, i.e. translating the 2-dimensional description in the Government Gazette into the actual location of the boundary. Any qualified surveyor can establish where a boundary is located as this merely requires being able to read a metes and bounds description. This is the competency tested for qualification. However, the *skill* of the surveyor in this respect lies in converting written metes and bounds descriptions as shown in legal documents (in this case a Government Gazette) into the actual boundary locations of the physical world.

4 READING HANDWRITTEN CONVEYANCES

As noted above, many legal practitioners and conveyancers appear to assume that the fact that a conveyance is registered by the Registrar General means that the parcel of land to which the conveyance relates has good title. In respect of a Limited Title, this must actually first be established before the limitation can be removed. This, in turn, will involve locating, reading and interpreting Old System Title deeds, many of which will be handwritten. Here again, there is a difference between the *competence* of a surveyor to read a title deed and the *skill* involved in doing so. Technological advances in recent years mean that reading and deciphering copies of such documents has become much easier.

Nevertheless, the standard of handwriting in documents varies considerably. It will be difficult to read and comprehend a document if it is necessary stop at every few lines to interpret what is actually written (Figure 4).

It saves considerable time if the difficult words can be separately deciphered so that reading the document is possible without the 'stop-start' caused by having to guess what a word actually says. A simple yet effective way of preparing such a document for analysis is to photocopy the document and read it with the use of a 'highlighter' pen in hand. Whenever an unclear word appears, that word is marked, and reading continues until all the unclear words are marked with the highlighter. Then comes the somewhat tedious task of looking at each marked word, trying to decipher its meaning from the context of the surrounding words and then writing the correct word over the marked word. When all words are clear, the whole document can be read and understood in its entirety. It is essential that every word in the document is read and understood. Only thus can the (often strange) nuances which appear be understood.

Once the handwritten document is understood, it is usually necessary to plot the metes and bounds, i.e. the bearings, distances and abutments, in order to check the accuracy or otherwise of the conveyance.

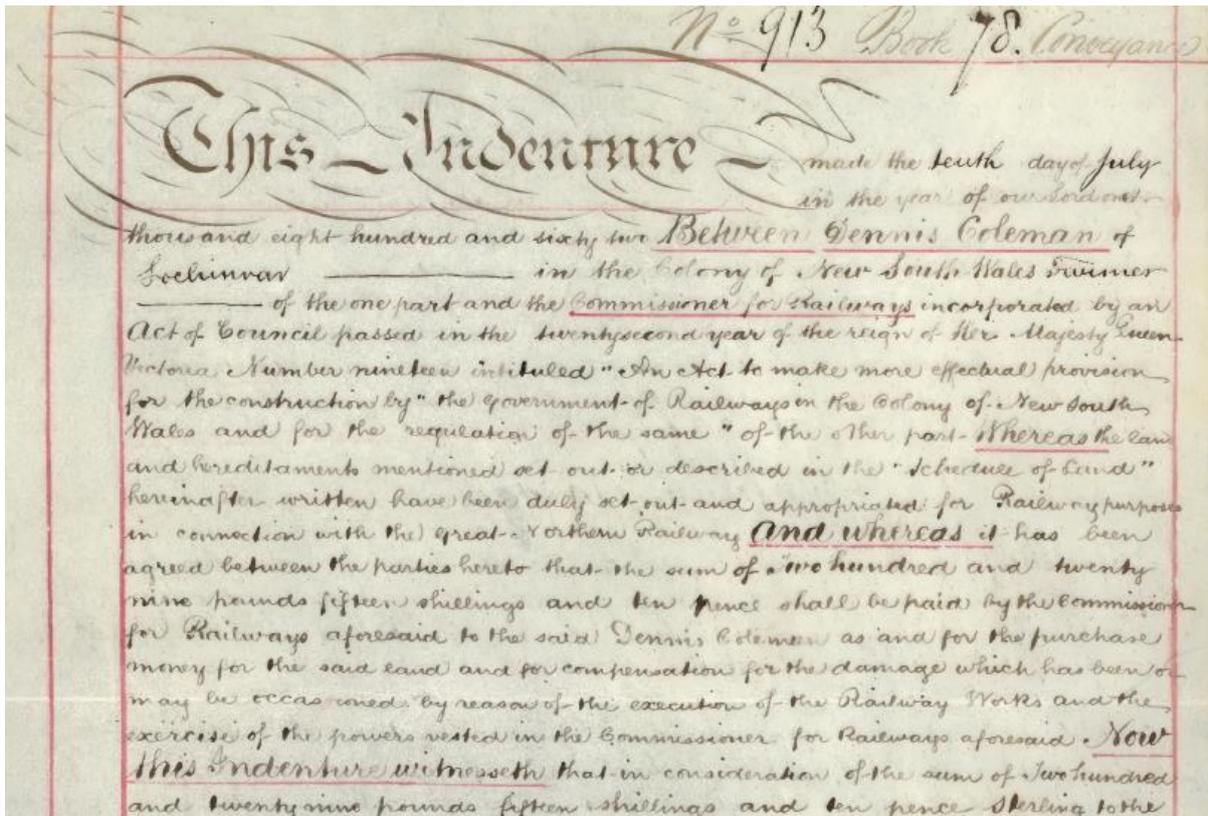


Figure 4: Handwritten conveyance.

5 IDENTIFICATION SURVEYS

In recent years it has become most unusual for legal practitioners and conveyancers to obtain identification surveys for clients purchasing property. This is most likely due to the fact that the client is looking to save money. It is almost certain that such clients are either unaware of or underestimate the risk involved in not having accurate information identifying the parcel of land they are purchasing. This can lead to costly consequences, as the following example illustrates.

In an older part of Newcastle, a property owner had spent over \$10,000 on designs and plans to demolish an existing garage and to erect a double garage with a studio apartment above. A usual condition of the local council for approving such development was that, before any building work commenced, the relationship of the existing house to the boundary had to be determined by a registered surveyor. Thus, the owner gave instructions to have the boundary marked so that the planned development could continue. Unfortunately for the property owner, the survey disclosed that the boundary fence stood on the adjoining property by about 250 mm (Figure 5).

This meant that there was insufficient land between the boundary and the existing house to allow the passage of even a small car. In other words, the money the property owner had expended on the designs and plans for the garage development was completely wasted. This could have been avoided if the owner had first paid for the identification survey.

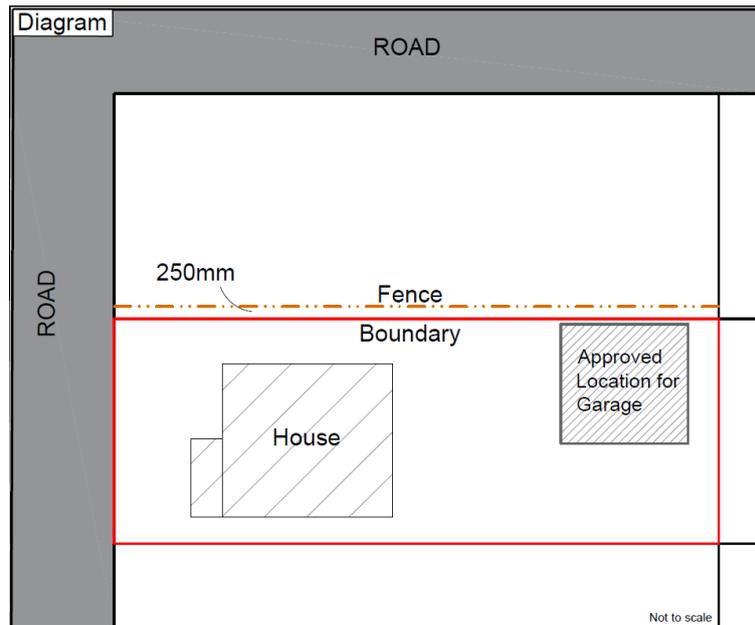


Figure 5: Garage and boundary.

6 CONCLUDING REMARKS

The purpose of this paper has been to give some insight into the diversity of work undertaken by small private surveying practices. The examples used show only a small part of the work done in small private practices. Hopefully, however, for colleagues working in other areas, they are a window on the usual daily activities of their private practice colleagues.

As shown, the detailed knowledge of planning law and practice, engineering design and practice, and the thorough knowledge of the legal and practical application of the laws and regulations, are central to the work of surveyors in general private practice.

REFERENCES

NSW Legislation (2020) NSW legislation, <https://www.legislation.nsw.gov.au/#/> (accessed May 2020).