

decided **guidance:** case examinations

Applying Our Knowledge

We spent a lot of time on *Wacker v. Price*. I need a break! This month I want to focus on the underlying motivation of Decided Guidance. Hint: It's not just a collection of snappy Foosisms. Boundary retracement surveying is the component of this profession that sets us apart from all others. Academia spends a few credit hours on boundary surveying; however, actual experience, wisdom, and professional mentors are the primary instructors of boundary retracement surveyors. The instructions for boundary retracement surveyors are presented in the decisions handed down by our high courts.

Topographers, Geodesists, and Construction Surveyors possess a skillset founded in science, mathematics, and technology. The public knows these folks as surveyors. Their contribution to society is the superhuman ability to lay down terrestrial measurements to the precision of a beezel... and do it fast...and do it cheap. For those that don't know, twenty beezels lined up wing to wing can fly straight up that unit of measure best described by a gnat's posterior. Now that's precision!!! Technology has advanced so far that any vector, anywhere, anytime, can be strung out on this big old geoidal rock to the perception of perfection. The ability to make terrestrial measurements is pretty much resolved as a matter of science and by the grace of technology is shelf ready for sale to every wannabe with a credit card and an IP address. Most important regarding scientific measure is that the numbers don't lie because they are the object being measured.

The boundary retracement surveyor on the other hand is expected by the court to report measurements competently and know

how to evaluate evidence. As noted above we've all got a good handle on the measuring part. The evidence part...well that has proven to be somewhat problematic over time. Let's start with Chief Justice Cooley's beef.

"When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors."

—The Judicial Functions of Surveyors by Thomas M. Cooley Chief Justice, Supreme Court of Michigan, 1864-1885.

Cooley's operative point is "govern his action by facts". This is the charge of the boundary retracement surveyor. This includes the specialized knowledge of identifying evidence, constructing a chain of title, and understanding common law. So here are a few facts to gnaw on while you're setting your pin within a kielbasa's reach of existing monuments.

Fact: The written description does not match the physical parcel, not the other way around.

A "two by four" does not measure 2"×4" but my receipt proves I bought a dozen of them. I don't have a stack that is 24" tall but I don't call the lumber "wrong". That's because the object I'm buying is lumber, not inches. Similarly, that piece of ground is the physical object. The deed is merely a receipt of the

transaction with somebody's best crack at describing that piece of dirt. "All of my land in El Paso County, Colorado" is just as valid a legal description as "Section 1, Township 1 North, Range 1 West, of the G. & S.R. Baseline and Meridian, Maricopa, County, Arizona, containing 639.43 acres more or less." The legal description is merely a representation of something that physically exists on the face of the earth. The fact is that the parcel exists, whereas the deed is a piece of the evidence of that fact. The true location of the parcel is the bigger fish here, not the theoretical.

Fact: A newly placed monument has been relied upon by no one in history except the surveyor setting it.

Any physical evidence found relative with a grant has at least provided the opportunity for notice of the true boundary. At best your newly debuted "alternate" monument might persuade neighbors that a feud is unecological and at worst it may start the fight. A newly placed alternate monument serves notice of your opinion of a boundary conflict. You may be initiating a boundary conflict based on the lowest form of boundary evidence, computations. The best available evidence of the true boundary may be no secret to the adjoining owners and thus no secret to the Court. Your "new" monument should substantiate existing evidence rather than alienate it. I won't make a specific case citation but can assure you that I have seen this scenario as a witness.

Fact: Property can be subdivided and conveyed in full force without a professional survey.

Your obligation is to retrace the boundary agreed on by the parties of that original

transaction. In the absence of an original survey, occupation can be the physical legacy of the original boundaries agreed on. Check out *Atwell v. Olson* in Decided Guidance January 2017.

Fact: The definition of evidence includes testimony, documents, and tangible objects.

Courts routinely depose witnesses to gather testimonial evidence. It is incumbent on the surveyor to find and package the best available evidence supporting his opinion. By definition, the best available evidence may include the owners' knowledge or observation of certain objects and actions over time. Check out *Harris v. Robertson* 813 S.W.2d 252 306 Ark. 258 in Decided Guidance November 2016.

Fact: Individual town plats are separate surveys whereas the evidence from one may be subordinate to evidence from another.

We reviewed *Erickson v. Turnquist* 247 Minn. 529 (1956) 77 N.W. (2d) 740 in February 2017. Take a good look at this one as well as *Dittrich v. Ubl* covered in Decided Guidance December 2016. Blind reliance on city monument networks may put you at odds with this guidance. Validate your evidence by showing a direct pedigree to the original plat. A good example of validation in "Dittrich" is testimony from the City Engineer which identified local building corners with ties from the original monument and that the original position could be definitely and accurately replaced.

Fact: Acquiescence does not alter the record description.

Acquiescence is honest and highly respected in law as the common owners' right. "*Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines. The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was*

the case they must govern, notwithstanding any errors in locating them." *Flynn v. Glenn*, 51 Mich. 580.

Fact: California Law Review

Volume IV. March, 1916 Number 3, refers to the practical location of boundaries as follows:

*"I. LINES ESTABLISHED BY AGREEMENT.
As the result of a gradual evolution, traceable in the opinions of our Supreme Court, this rule has been developed: When the owners of adjoining estates, being uncertain of the true position of their boundary as described in their respective deeds, agree upon its true location, such line becomes, in law, the true line called for by the descriptions of their respective deeds, regardless of the accuracy of the agreed location as it may appear by subsequent measurements. The line thus defined will attach itself to and define the deeds, and to that extent prevails over the written instruments, notwithstanding the statute of frauds."*

This rule clearly identifies a subordination of a written description to the location on the ground and recognizes an authority of owners to define boundaries in good faith. This is the boundary retracement surveyor's "decided guidance" and the foundation of the specialized knowledge required to form a valid opinion of a land boundary location.

I can't emphasize enough why "over staking" existing monuments is a subprofessional act when performed by any surveyor. Exactly matching a written description does not make you "more righter" than any other surveyor's attempt at the dance. However, a clear understanding of boundary evidence and common law decisions will enable you to provide the best available evidence to the landowners and ultimately the Court.

Next month we'll be back on a new case! ■

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**The Barbershop Barrister
The Boundary Retracement Degree**

A curriculum addressing our quasi-judicial role simply does not exist. Surveying has been relegated to the dark corners of Engineering curricula because modern academia thinks we fit behind engineers. This misnomer has proven economically unviable where any school has trouble maintaining a surveying curriculum.

My colleagues indicate that "the profession is dying" and "kids aren't interested" in surveying. Sure the crafts of sewer staking, dirt work, mapping, and topography have been automated to the point of professional extinction but every time a property splits the public relies on a professional to interpret the boundaries of that conveyance. The boundary retracement surveyor is secure in his work as long as private property rights prevail over socialism. That doesn't mean we can accommodate 40,000 graduating surveyors every year but there is a sustainable necessity for a relevant curriculum.

What is a "relevant" curriculum? Well here's my current spin: How about a year of land title, a year of traditional subdivision methods and field techniques, a year of boundary case law review, and a year on professional conduct, liability, and public presentation? Yes it's an arts degree and might be best served up by the lawyer folk rather than the engineering crowd. Double proportion and running a GPS receiver can be wrapped up in a five minute pop quiz in the second semester.

I would add that we should stop presenting brochures with pictures of a kid in a polo shirt, orange vest, and hard hat looking through a cheap construction level. That's a construction surveyor and we know he's being phased out by technology. Boundary retracement surveying can honestly be imagined with a middle aged to older person in a business suit standing next to a case full of reference and law books. It takes time to become a successful surveyor and there's no shame in professional seasoning. As far as the "disinterested kids" are concerned, well then, bill your services like a doctor or lawyer instead of a plumber and drive to career day in a BMW and your best business suit. Success garners interest.

