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BOUNDARIES AND THE COMMON LAW

Graduate Seminar | Glenn Campbell

Boundaries and the common law

Contents

1. Introduction

> *This is a boundary dispute. To hear those words, "a boundary dispute," is to fill a judge even of the most stalwart and amiable disposition with deep foreboding since disputes between neighbours tend always to compel, as this one did, some unreasonable and extravagant display of unneighbourly behaviour which profits no one but the lawyers.*
>
> (Ward LJ: *Alan Wibberley Building Ltd v Insley* [1998] 1 WLR 881 at 882)
>
> *Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army. It is therefore important that the law on boundaries should be as clear as possible.*
>
> (Lord Hoffman: *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894 at 895)

By now most graduates have been introduced to the concept of cadastral reinstatement and the dominant role that the courts play in the determination of boundaries. The power to define boundaries rests with the courts, not the surveyor. The task of a surveyor is to describe the existing boundaries by collecting sufficient evidence and then interpreting the evidence in a way that is consistent with the precedent set by previous court decisions. In much the same way as Tolstoy described families, (*All happy families are happy alike, all unhappy families are unhappy in their own way.)* boundary surveys where the physical evidence fits the documentary evidence are all straightforward, but surveys where the physical evidence doesn't fit are all different. This means rather than apply rote solutions learned by rote surveyors have to apply general principals, laid down by the courts, to arrive at the solutions that they think a court will most likely agree with them.

2. Common law

The common law (sometimes called case law) is the body of legal opinion that is built up over time derived from the decisions of judges. The vast majority of our law is statute law that is made by Parliament, but in some cases where this law is vague or imprecise, or this law conflicts with the requirements of Australia's constitution the courts are asked to interpret what the statute law means in the particular facts of a dispute. The court will give its decision as well as an explanation of how it came to make that decision. The common law works on the principle of s*tare decisis* which is an abbreviation of a Latin dictum meaning "stand by the thing decided and do not alter that which has been established". The society benefits from certainty in the law so little is to be gained from eternally arguing the same points. When it comes to precedent, courts are bound by decisions made by higher courts and generally by decisions made at their own level. An important distinction is always how closely the facts of the case being decided coincide with the facts of the previously decided case. In each decision there is always the key fact around which the decision was made. This is referred to as the *ratio decidendi* and is the binding part of the decision. From time to time the judges will make remarks in passing about the outcome of the case had some of the facts been different. These statements are referred to as *obiter dicta. Obiter dicta* statements are not binding but may be persuasive in lower courts.

Either because surveyors do a good job or the cost of going to court is so high in relation to the cost of land, there have not been a lot of cases relating to boundary reinstatement before the Australian and New Zealand courts. For that reason other cases in other jurisdictions that share Australia's common law heritage such as the United Kingdom, Canada and the United States are often considered by Australian courts (*Donaldson v. Hemmant* (1901) 11 QLJ 35; *Equitable Building and Investment Co. v Ross* (1886) 5 NZLR SC 229) and Australian authorities (Brown (1980).

3. Evidence

When Bill Clinton campaigned against George Bush senior for the US presidency he had a sign in his office that read, "*The economy, stupid*". A surveyor learning the principles of cadastral reinstatement would do well to hang a similar sign on their desk that says, "*The evidence, stupid*". Your undergraduate study has covered the types of cadastral evidence and how surveyors go about collecting the evidence reliably. The purpose of this paper is to give students and surveyors an understanding of the relative importance of different types of evidence. Traditionally the law looks at evidence in a purely practical way that appeals to the majority of surveyors:

> *the judges and sages of the law have laid it down that there is but one general rule on evidence, the best that the nature of the law will allow.*
>
> (Lord Hardwicke : *Omychund v Barker* (1744) 1 Atk 21 at 49)

If the evidence that is found is conflicting the unique skill of the cadastral surveyor is to rank it in the order of its quality. To do this surveyors bring to bear knowledge of historical marking and measuring techniques, an ability to reliably record the position of the evidence and experience in resolving contradictions. Over time there has evolved a general agreement over the relative worth of evidence types. This list is often called the hierarchy of evidence but perhaps is better described as a manual for reinstatement. Like all technical manuals it has the solution the majority of the time but sometimes better solutions might come if it is set aside.

4. The hierarchy of evidence

Most Australian and New Zealand jurisdictions refer to the concept of the hierarchy of evidence but neglect to commit themselves a particular list. In Queensland the legislation defines the hierarchy as:

> ***hierarchy of reinstatement evidence*** *means a set of rules recognised in the surveying profession—*
>
> *(a) for giving weight to evidence of cadastral boundaries; and*
>
> *(b) used in the reinstatement of cadastral boundaries.*
>
> (Surveying and Mapping Infrastructure Regulation 2004 (Qld), s. 11(3))

This statement gives the surveyor the necessary flexibility, but is not particularly useful to the student of cadastral reinstatement. Most cadastral surveyors take this section as referring to the evidence hierarchy published by Alan Brown in 1980.

1. *The greatest weight must always be given to lines actually marked on the ground.*

2. *Next most important are natural monuments mentioned in the deed.*

3. *Adjoiners – "a well established line of adjacent survey" – often rank as natural monuments.*

4. *Artificial monuments rank next.*

5. *Maps or plans actually referred to in the deed rank after artificial monuments.*

6. *Unmarked lines which are well recognised rank next to maps and plans in importance.*

7. *Bearings and distances will over-ride other calls only, in most cases, where there is no trustworthy evidence of such other calls.*

8. *As between bearing and distance, neither is given overall preference – if they are inconsistent with each other the circumstances dictate which is preferred.*

9. *Area … will in general be the least valued evidence, but may in some cases be the key to the problem.*

10. *Finally, but most important of all, any one of these rules may be of more (or less) weight in one case than another. The rules set out are for cases of conflict, they are general rules, to be used as a guide but not as a straightjacket.*

(Brown (1980) p 155)

While the list detailed by Brown is correct with respect to the law it is not necessarily of great use to the surveyor. Australian and New Zealand surveyors that deal with a system of public recording of title boundary survey data under the Torrens Title legislation may wonder about the mention of deeds. They may ask how maps and plans can be separated from bearings and distances. They may wonder as how lines marked on the ground can be distinguished from artificial monuments. They may wonder where the evidence of occupation fit into the equation. This paper will attempt interpret the common law in light of the decisions that cadastral surveyors need to make about boundaries day in, day out.

5. Intention

Boundaries are legal objects that are created by individuals, corporations or governments and they come into being by an action. Before there can be an action there needs to be an intention to perform that action. Courts and legal texts have agreed that the intention needs to be the 'expressed' intention of the parties rather than what can be surmised.

> *The cardinal rule for the interpretation of deeds is to discover the **expressed intention** of the parties, gathered from all parts of the instrument, giving each word its due force read in light of existing conditions and circumstances at the time of the conveyance. It is the intention definitely expressed in the instrument that controls, **not intention merely surmised**.*
>
> (Brown 1980, p. 150)

> *…the location of a boundary is primarily governed by the **expressed intention** of the originating party or parties or, where the intention is uncertain by the behaviour of the parties.*
>
> (Hallmann 1973, p. 175)

Therefore one of the keys to ascertaining the intention of the parties is resolving how it was expressed in the actions of the parties. In *Pukallus v Cameron* (1982) 180 CLR 447 the parties entered into a contract to sell a lot with both parties under the misapprehension that a bore and area of cultivation was within the boundaries of the lot. They contracted to buy and sell the lot without any mention of the bore or mention of resubdivision. After a number of appeals the High Court found that the intention of the contract was clear and that "convincing proof" was required to maintain that the intention is other than what is clearly written in the contract.

In *Re Boundary of Jarwood Holding* (1938) 17 QCLLR 63 the court was required to decide on a conflict, within a description of a lease, between a straight line between two surveyed points and description of that line as a watershed. The judge divined that the original intention of the Minister and the Governor in Council could be ascertained from documentary evidence tendered at the hearing because the position of the survey points was known at the time the leases were offered and the location of the watershed was not.

If the intention of the parties is clear then the boundaries are clear. Likewise if the physical evidence of boundaries is in accord with the documentary evidence of the boundaries then there are no decisions for the cadastral surveyor to make. If however, the physical evidence is contradictory or it is not in agreement with the documentary evidence then the cadastral surveyor is obliged to decide which evidence gives the better indication of the expressed intention of the parties. There is a well used principle for the construction of deed.

> *…that a grant ought to be construed according to the intention of the parties, and that where any doubt arises the deed ought to be construed more strongly as against the grantor.*
>
> *(Jaques v Doyle* (1881) 2 NSWR 113 at 117)

That is to say that since the person who is granting the land has the greater power and level of control then the onus is on them to exercise that control carefully. In the case where land is originally alienated it is clear who the grantor is. It is the Crown. As the judge said in an early South Australian case…

> *… that is to say, the Crown, having received the purchaser's money and put him into possession, cannot at its pleasure take from him this or that portion of the section and grant it to another.*
>
> (*Hutchison v Leeworthy* (1860) 2 SALR 152 at 154)

However in the case of private subdivision of land where the land may be divided into lots and totally disposed of by the owner then the application of this principle is not so easy.

All the cases and authorities agree that:

> *The duty of the court is to interpret the instrument of application by ascertaining the intention of the parties, and for this purpose we must as far as possible put ourselves in the position at the time when the application was made and approved.*
>
> (*Phillips v The Crown* 12 CLR 287 (1910) at 291)

The task for the cadastral surveyor is to use evidence to divine the expressed intention of the parties that created the boundary. Before a cadastral surveyor can do this however they need to understand the weight that courts have given to different types of evidence over time.

6. *Donaldson v. Hemmant* (1901) 11 QLJ 35

In 1890 Hemmant sold a number of lots by public auction. The lots were all pegged by a surveyor prior to the auction and each of the pegs had been branded with the appropriate lot number. At the sale, lithographic plans of the lots (much like sales plans you might get from a real estate agent today) were distributed prior to the start of the auction. Donaldson bid successfully for eight lots at the auction. He returned very soon after the sale, inspected the lots with the plan in hand and signed contracts for purchase of the eight lots. The contract allowed for a long time until final settlement and the final amounts were paid in 1897. When Donaldson proceeded to register the change of ownership into his name, his surveyor drew to his attention that the size and shape of the lots on the plan of survey was different from that shown on the lithograph. He accused Hemmant of fraud by moving the pegs and wished to rescind the contract, or alternatively, sought compensation as the area of land was less that that recorded on the lithograph.

Notwithstanding the intricacies of each party's actions, the closest to a definitive statement as to the court's opinions on cadastral evidence was delivered by Griffith CJ in 1901.

> *The object in cases of this kind is to interpret the instrument - that is, to ascertain the intent of the parties. The rule to find the intent is to give most effect to those things about which men are least liable to mistake. On this principle the things usually called for in a grant - that is, the things by which the land granted is described - have been thus marshalled in America: (1) The highest regard is had to natural boundaries. (2) To lines actually run and courses actually marked at the time of the grant. (3) If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is there by required, marked lines prevailing over those which are not marked. (4) To courses and distances, giving preference to the one or the other according to the circumstances. Words necessary to ascertain the premises must be retained, but words not necessary for the purpose may be rejected if inconsistent with the others.*
>
> (*Donaldson v. Hemmant* (1901) 11 QLJ 35 at p41)

Griffith CJ explicitly states that he is relying on the authority of American texts and decided cases. The next section is a discussion of the cases that, in part, gave rise to Griffith's hierarchy with a focus on the reasons given for why these decisions were made.

7. American cases prior to 1901

Snow v Chapman ,1 Root 528 (1793)

The defendant sold the plaintiff 110 acres of land that was described by reference to lines and bounds. It was later found that only 90 acres was contained within the description. The court found that the area between the bounds was conveyed not the 110 acres so the area should be disregarded.

Howe v Bass, 2 Mass. 380 (1807)

The land that was conveyed was described as having a 45 foot street frontage and being bound by 'certain known and visible monuments'. It was found at a later date that the distance between the monuments was 65 feet. The court found that the monuments should be held over measurements.

> *There is no rule of construction more established than this, that where a deed describes land by its admeasurement, and at the same time by known and visible monuments, these latter shall govern. And the rule is bottomed on the soundest reason.* ***There may be mistakes in measuring land, but there can be none in monuments. When a party is about purchasing land, he naturally estimates its quantity, and of course its value, by the fences which enclose it, or by other fixed monuments which mark its boundaries, and he purchases accordingly.***
>
> (*Howe v Bass, 2 Mass.* 380 (1807) at p383)

This is a theme that reoccurs in many judgements. At its essence it is a consumer view of the lot. If the person is willing to buy what he or she sees around themselves then they should be satisfied with that.

Preston' Heirs v Bowmar, 2 Bibb 493 (1811)

The first two corners of the lot in question were reliably fixed but there was no physical evidence to indicate where the other two corners were. There was a misclose in the metes describing the lot. The court indicated that if the corners are not marked and bearings and distances do not agree then there is no universal rule which requires that either bearings or distances should be adopted. Rather those that fit best with the expressed intention of the parties to the boundary should be accepted.

McIver's Lessee v. Walker, 9 Cranch ,13 U.S. 173 (1815)

There was dispute as to whether the bearings shown on a plan attached to the patent refered to magnetic or true bearings. No field survey had been made, but the lots were shown as including a known creek. If the plan was laid out using magnetic bearings then the creek would not be included in the lot. The court found that attaching the plan as required by the state law was the same as including it in the patent and the bearings should be read as true because that was the only way the creek shown on the plan could be included in the lot.

As part of the judgement Marshall CJ of the US Supreme Court explained why the monuments should prevail over a written description when he said:

> *But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.* ***The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances, are more probable and more frequent, than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described.***
>
> (*McIver's Lessee v. Walker* 9 Cranch ,13 U.S. 173 (1815) at 178)

Davis v Rainsford 17 Mass. 207 (1821)

The judgement in this case conceded the most established principle is that known monuments must govern over bearings and distances. However the judge makes a exception due to the facts of the case. He states that the reason monuments control is because they are less liable to mistake, but then he applies the legal maxim *cessante causa, cessat effectus,* which translates as "the cause ceasing, the effect must cease." The judge makes the point that the deed makes a distance as being 0.381 m (1'3") whereas the monuments make the distance to be 1.067 m (3'6") and concludes that no-one could make a 0.686 m error in a 1.067 m line. He maintains that there is no mistake (it was intended to be 0.381 m) so then there is no need for the rule (that monuments should govern). This distinction will be of use when we come to discuss the place of reference marks in reinstatement.

The judgement makes another useful statement:

> *When lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing on such plan, are to be as much regarded as the true description of the land conveyed, as they would be, if expressly recited in the deed. This is a familiar rule of construction in all those cases, wherein no other description is given in the title-deeds, than the number of the lot on a surveyor's plan of a township or other large tract of land.*
>
> (*Davis v Rainsford* 17 Mass. 207 (1821) at p3)

This allows surveyors to make the connection between the way land is subdivided and conveyed in the United States at this time with the way it is conveyed in post-Torrens Australia.

Fulwood v Graham, 1 Rich. 491 (1844)

The judge in this case lists a hierarchy and makes an important qualification that will be mentioned repeatedly in reference to any hierarchy.

> *They all maintain that in locating lands, we are to resort, 1st. To natural boundaries, 2d. To artificial marks, 3d. To adjacent boundaries, 4th. To course and distance*; but it has never been said, that each of these occupied an inflexible position. It sometimes might occur, that an inferior means of location might control a higher, when it was plain there was a mistake.
>
> *(Fulwood v Graham,* 1 Rich. 491 (1844) at p3)

This is a critical point, the hierarchy is merely an indication and it should yield to the particulars of a case or survey. This is not a *carte blanche* for any surveyor to go straight to an 'I reckon' solution. But it does allow the surveyor flexibility for the situation where the application of a rigid hierarchy would result in a manifest idiocy being performed.

Walsh v. Hill 38 Cal. 481 (1869)

In *Walsh v. Hill* there was a conflict between a natural monument, the low water mark, and a number of artificial monuments. The judge repeats the maxim that "if there are conflicting calls, those which, from their nature, are *less* liable to mistake, must control those which are *more* liable to mistake" (p486 original emphasis) but goes on to point out that all the artificial monuments are consistent with each other and are consistent with the high water mark being the point of commencement. He takes a similar view to the Judge in *Fulwood v Graham* to allow common sense to be applied to the interpretation of deeds.

> *… in the construction of written instruments, we have not derived much aid from the technical rules of the books. The only rule of much value – one that is frequently shadowed forth, but seldom, if ever, expressly stated in the books-- is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed: then taking it by its four corners, read it.*
>
> (Walsh v Hill 38 Cal 481 (1869) at 487)

8. Monuments

Hallmann (1973) makes the point that the term monument, while used in judicial decisions and legal texts is rarely defined. He suggests that the vital requisite to convert some durable object into a boundary monument is that it be referred to in a document of title. This definition is later used in *Registrar General v Tuckfield* [1991] NSWLEC 121**.** Thanks to *Davis v Rainsford* surveyors are comfortable in considering a cadastral survey plan as an appropriate document. Brown (1980, p. 149) writes that monuments need to be visible, permanent, stable, certain of identity and independent of measurement.

In *Resurrection Gold Mining Co. v. Fortune Gold Mining Co*, 129 F. 668 (1904) the identity of the monument was of critical importance. A mark was found that did not agree with the written description and it was not found in the described position. The surveyor's field notes described the monuments as square posts with figures carved into it. Several other monuments matching this description were found at other corners but at the corner in dispute a round stake with blaze in the side and pencil marks of the lot number was found 28 feet northwest of the corner as described by the bearings and distances. The judges agreed that if this mark was the original corner mark then it would control the boundary. The court was split as to whether this stake was the mark that was originally placed. The majority thought it should have been ignored and the dissenting judge thought the mark was placed by the original survey.

Notwithstanding the judges opinion of where the stake had come from, all the judges agree that if a monument has been lost or removed and its original position can be shown by parol (i.e. oral) or other competent evidence then this location will prevail over dimensions. Where they differed was that the majority of the court thought that the evidence was not sufficient to substitute a different monument.

> *In cases of this character the original monuments called by the patent, if they still remain in place, prevail over the courses and distances noted in the description. If the monuments called have been lost or removed, the places where they were originally located may be shown by parol or other competent evidence, and, if proved to the satisfaction of the jury by a fair preponderance of evidence, these original locations will prevail over the courses and distances, and control the application of the description to the land. … If the monuments are lost or removed and their original locations are not established by competent proof, the courses and distances prevail, and control the description.*
>
> (*Resurrection Gold Mining Co. v. Fortune Gold Mining Co*, 129 F. 668 (1904) at 671)

This idea of a chain of evidence was used in *Mt Bischoff Tin Mining Co. v Mt Bischoff Extended* (1913) 15 CLR 549. This case revolved about a boundary that separated two mining leases. The first lease had been created in 1874 and although it was not certain the judge found it probable that the lease had been surveyed and marked at that date. Ten years later a change in legislation gave an obligation to lessees to maintain posts and lockspits at their corners. In 1891 a surveyor was employed to remark the leases. He found marks at the corner and renewed them. At the time of the conflict in 1913 the judge was satisfied that these marks marked the corner of the lease even though they were not physically the marks placed by the original surveyor. Similarly in a decision from the NSW land and Environment Court (*Registrar General v Tuckfield* [1991] NSWLEC 121) the judge was quite prepared to accept a survey mark that had been lost but "re-established in a survey done by Mr Hogan's firm". It would appear that knowledge of who, when and for what purpose a monument is placed is a decisive factor. An original mark or monument in the legal sense need not be the mark first placed by the original surveyor but it is a mark of known origin.

As to the recognition of monuments *Turner v Hubner* (1923) 24 SR 3 makes some useful remarks.

> *Fences are the most unsatisfactory of monuments because they are not durable and are easily shifted. In the absence of some indication or evidence of identity it is a large assumption to make that a fence round an allotment in a plan of 1862 is identical with a fence shown round the same allotment in 1868 or 1874. They may be the same but if the measurements do not tally I do not think I am justified in coming to the conclusion that the fences must be identical and the measurements therefore wrong.*
>
> *(Turner v Hubner* (1923) 24 SR 3 at p8)

This should sound a word of warning as the same can be said of survey pegs. The judge makes the point that since the fence was shown in different positions by two surveys then it is a stretch to make the presumption that it is the same fence. It is reasonable to extend this reasoning to pegs. If the peg that is found conforms with neither dimensions nor other monuments then the surveyor may not necessarily be required to fix the boundary to the peg.

9. Abuttals

If a boundary is a theoretical line that marks the limit of a parcel of land, then it is desirable that adjoining parcels have the same boundary, otherwise there would exist small strips of ownerless land or worse still strips of overlapping land that are in dispute.Where the dimensions on a plan would lead to a wrong inference as to the dimensions of the land, but

the abuttals are shown correctly, the owner is entitled to all the land which actual measurement on the ground would show to lie between those abuttals (*Archard v. Ellerker* (1888) 10 ALT 196).

In *Bank of Australasia v Attorney-General* (1894) 15 NSWR 256 land had been granted by the Crown with four boundaries running in the cardinal directions. The northern and southern boundaries already existed. The grant was stated as being 660 acres but the area between the two known boundaries was approximately 1000 acres. The court found that the adjoining boundaries were sufficient to describe the land and the grantee was entitled to all that land between. The judge said:

> *The question of quantity is mere matter of description, if the boundaries are ascertained…*
>
> **(***Bank of Australasia v Attorney-General* (1894) 15 NSWR 256 at 262)

This was similar to the position the court found itself in *Hutchison v Leeworthy* (1860) 2 SALR 152. The lot was described as being bounded by a river on two sides, a road and an existing lot. The plan showed the area as 134 acres but in reality it was closer to 190 acres. The action started when the Crown attempted to recover the difference of 56 acres and grant it to another person. The court found that the description of the land was unambiguous and the Crown could not grant what it no longer had. The judge makes the comment that it was not the purchaser's fault that the survey was inaccurate. The judge went on to say that it made no difference as to how big the mistake was, but in some circumstances it may raise a question as to the intention.

In *Small v Glen* (1880) 6 VLR 154 a lot was shown as bounded by three roads. The distance shown on the plan between two of the roads was shorter than true distance between the roads. The court decided that the dimension could be ignored by applying the principle *falsa demonstratio non nocet.* That is if part of a description is true and part false, if the true part describes the subject with sufficient certainty, the untrue part will be rejected or ignored (Osborn's Concise Law Dictionary, 1983). In this case if the distance was adopted the lot could not be unambiguously defined. The distance could be laid in from the first road and the lot not be bounded by the second road or the distance could be laid in from the second road and fall short of the first or the lot centre could be equidistant from each road and not be bounded by either. However if the distance was ignored then the lot could unambiguously be bounded by all three roads. Therefore the distance was ignored as *falsa demonstratio*.

The same type of reasoning was applied in *Archard v Ellerker* (1888) 10 ALT 196**.** A surveyor had been asked to prepare a plan which showed a lot as be 18' wide and bounded on one side by a party wall. In fact the two sides of the lot were not parallel and the lot was 0.115 m wider at the rear of the lot. While finding that the surveyor was negligent, the court found that the wrong dimension on the plan did not change the boundary and it was still the centre of the party wall. The original trial judge had made the point, when assessing damages, that if the wall had been destroyed the plaintiff ran the risk of losing the area between plan boundary and the true boundary.

The critical point when fixing boundaries by abuttals is the order in which the boundaries are created. The fact that one lot was in existence before the other was an important point in *Mt Bischoff Tin Mining Co. v Mt Bischoff Extended* (1913) 15 CLR 549.

> *The plaintiff's southern boundary, wherever that was, was the defendants' northern boundary, which was, in 1891, eight years before the defendants' title began, denoted by old marks on the ground and was then marked afresh.*

(*Mt Bischoff Tin Mining Co. v Mt Bischoff Extended* (1913) 15 CLR 549 at 554)

Likewise, in *Stevens v Williams* (1886) 12 VLR 152 Allotment 2 had been granted by a metes description that did not agree with position of the boundary of Allotment 1 which had been granted previously. The judge said:

> *…the defendant has shown that the land in dispute has been already conveyed to her by a certificate of title at least as equally conclusive with that of the plaintiff.*
>
> *(Stevens v Williams* (1886) 12 VLR 152 at 158)

The Crown could not convey land to another person after it had already conveyed to someone previously nor could plans for adjoiners that come after the original necessarily control.

> *A man's title to land is not to be placed in jeopardy by hearsay evidence as to what some surveyor may have done or placed upon record in the shape of a map …a man's title to land is not to be affected by some description contained in a deed or grant to which he is no way privy, and of a date subsequent to the grant under which he holds the land.*
>
> *(Smith v Neild* (1889) 10 NSWR 171 at 174)

10. Occupation

With respect to evidence provided by the owner's occupation of a lot the most commonly cited case is *Equitable Building and Investment Co. v Ross* (1886) NZLR 5SC 229 which is often referred to as the *Lambton Quay Case.* The parties contended over an encroachment in an area where the surveyed boundaries were unclear because there were no original survey marks.

> *Where there are no natural boundaries, and the original survey-marks are gone, and* ***there is no great difference in admeasurement****, a long occupation originally authorised by the proper public authority, and acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which the deed conveys. Even where monuments exist which enable a more accurate survey to be made, no trifling discrepancy can be allowed to over-rule the practical interpretation put upon the instrument by such an occupation. The occupier is not to be driven to rely on a mere possessory title; but has a right to assert that the land he holds is the very land granted.*
>
> (*Equitable Building and Investment Co. v Ross* (1886) NZLR 5SC 229 at 234)

Australian courts have also considered the status of occupation. *Attorney-General v Nicholas* [1927] GLR 340, commenting on the *Lambton Quay Case,* considered that whether or not the Local Authority authorised the occupation was irrelevant. *National Trustees Etc. Co. v Hassett* [1907] VLR 404 made the point that in the absence of survey marks there can be no better indication of the land to which the grant relates than long and unchallenged occupation but it does not rely on adverse possession, the fence shows where the original boundary was.

In *Turner v. Myerson* (1917) 18 SR (NSW) 133 the judge was critical of the fact that the NSW legislation did not allow any possessory title. Perhaps it was this preference that led him to say:

> *Where possession of land, purporting to be occupation of the land described in a certificate of title as a lot on a deposited plan, has been uninterrupted for 30 years, the most positive evidence is required to rebut the presumption that the land as occupied is in accordance with the boundaries as originally plotted.*
>
> *(Turner v. Myerson* (1917) 18 SR (NSW) 133 at 135)

The judge conceded that occupation as evidence relies on its connection to the original survey but he thought that surveyors could not be certain enough to show an encroachment in this case.

This idea of a connection to the original survey may have meant that the court in *Cable v. Roche* (1961) NZLR 614 took particular note of the phrase 'there is no great difference in admeasurement' to rule that the position of the occupation in question in that action was too different to the boundary position as described by the plan to be considered evidence of that boundary.

> *Occupation* simpliciter *may be taken as sufficient in the absence of good evidence countervailing it, but mere proof of long and uncontested occupation does not relieve the Court of the duty of inquiry and of considering the history of the property and the technical evidence bearing on the dispute.*
>
> *(Cable v. Roche* (1961) NZLR 614 at 616)

Turner v Hubner (1923) 24 SR 3 found that if the dimensions of the occupation did not tally with the dimensions of the plan then the surveyor was justified in coming to the conclusion that the fence was not the original and so it could be disregarded. These cases reasoned that to be evidence of the original survey that occupation should reflect that survey and that occupation that differed greatly from the expected position may be disregarded. Obviously there can be no absolute value of disparity but it must reflect the age of the original survey and the consistency of the other evidence.

Cases have taken into consideration the type of occupation when assessing its usefulness as evidence of the boundary. As discussed in the section on monuments, *Turner v Hubner* found that fences were unsatisfactory because they were not durable and were easily shifted. In addition it would be reasonable to assume that people would take more care in erecting an object that would take more time and money to remove if it was found to be in the incorrect position. Considering these reasons it is clear that a surveyor is entitled to consider that buildings are preferable to fences as occupation evidence. The method of construction of the occupation was in question in *Attorney-General v Nicholas* [1927] GLR 340 the judge considered it significant that the fence in dispute had no ditch beside it like the other boundary fences in the area and so decided that it was not intended to mark the boundary. In *James v Stevenson* [1893] AC 162 a fence that had been in position for upwards of forty years was accepted as "no legal origin can be shewn to this fence, except the boundary drawn by the release of 1839" (at p166). The fact that this fence had been erected in "1839, or very soon after" led the court to the compelling presumption in favour of the fence being on the line intended to be the boundary.

Like NSW at the time of *Turner v. Myerson* (1917) 18 SR (NSW) 133 Queensland has no title by occupation for part of a lot. In other words the fact that the fence has been there for a long time does not shift the boundary. Surveyors should be careful when using other jurisdictions to interpret how occupation can be used. In some jurisdictions it is possible to fix a boundary by agreement if the boundary has been lost, but in the United States *Myrick v Peet* 56 Mont. 13, 180 (1919) made the point that no valid agreement could be made if the

original monuments could be shown to be in place. Similarly, in Canada cases like *Thelland v. Golden Haulage Ltd.*, [1989] O.J. No. 2303 (Dist. Ct.) and *Nicholson v. Halliday*, [2005] O.J. No. 57 it would appear at first impression that the fence was being adopted even though it was in a considerably different position to that shown on the plan. A careful reading will show that the practice in very early cadastral surveys in Canada was to monument the corners of the lot but not *run the lines.* In these cases the courts point out that it is not necessary for the boundary to be first run by a surveyor and the occupants when constructing the fence were the first people to run the line. In this case the fence has attained the status of *lines actually run* in Brown's hierarchy.

11. Area

Many cases have explicitly stated the reported area of the lot is to rank lowly as evidence of the boundary location. However in some notable cases it has been area that has been considered the decisive fact over which the case has been decided. The court in *Watcham v. East Africa Protectorate* [1919] AC 533 used the granted area as a way to pick between two different constructions of a deed where it was doubtful where the deed intended the boundaries should run. In the South African case of *Horne v Struben* [1902] AC 454 the judge comments that because the boundary position put forward by the respondent Struben meant that he was in fact receiving considerably less land than the boundary preferred by the Surveyor General Horne. The judge believed that this told in the respondent's favour. It is also interesting to note that the judge considered the probability that the river was the true boundary was increased by the fact that the property could be profitably occupied if it had access to fresh water.

12. Sundry cases

This following are decisions or aspects of decisions that cannot be neatly categorised but are still worthy of note.

In *Mt Bischoff Tin Mining Co. v Mt Bischoff Extended* (1913) 15 CLR 549 the judge make the comment that it made no difference to the case that fact that the land in dispute was Crown land.

> *…it must be assumed, from the nature of the occupation, the requirements of the regulations and the length of time, with the knowledge and permission of the Crown; and so, whatever may be the law as to a mere intruder, the plaintiffs' position here is as strong as if the land were private property.*
>
> (*Mt Bischoff Tin Mining Co. v Mt Bischoff Extended* (1913) 15 CLR at 563)

It is then reasonable to assume that all the previous discussion about evidence is equally valid to road boundaries and where the lot abuts unallocated state land (USL).

In *National Trustees Etc. Co. v Hassett* [1907] VLR 404 the best evidence for the boundary was found to be a fence. However the boundary was shown as straight on the plan but the fence was not straight. In finding the fence as the boundary the judge said:

> *…these old surveys are just as likely to be wrong in respect of a want of straightness of boundaries intended to be straight as in any other respect.*
>
> (*National Trustees Etc. Co. v Hassett* [1907] VLR 404 at 413)

The judge appears to have based his comment on the fact that distances were step chained. Our knowledge of the way surveys were done as described in SVY3304 means we might take this statement with a grain of salt. However in hilly country a surveyor may well be justified in bending a straight line if it is not possible to see from one corner to the other.

Perhaps the most celebrated boundary dispute in Australia was *South Australia v Victoria* (1914) AC 283. In 1836 letters patent created the Province of South Australia and made its boundary with NSW to be the 141º line of longitude. In 1845 both colonies agreed to mark the line from the ocean, north to the River Murray. When this line was finally marked on the ground both colonies issued proclamations adopting the line as the border. In truth, the longitude observations by the surveyor were subject to error in the method of determination and the line marked was 2½ miles further west than the 141º line of longitude. The Privy Council rejected the idea that the boundary's position on the earth would be subject to the accuracy of the determination methods. It said that for the sake of jurisdictional certainty it had to be fixed on the earth, and since the original survey was publically agreed to by NSW and South Australia then it should form the boundary. Since NSW could only create Victoria from its own territory then by implication the boundary became the Victorian – South Australian border as well. When the boundary was marked north from the Murray River later new technology allowed a more accurate fixation and the 2½ mile step can still be seen in the boundary.

13. Revisiting Brown's hierarchy

At the start of this paper the evidence hierarchy published by Alan Brown in 1980 was quoted. It is useful to revisit the hierarchy in the light of some of the other decisions that have been discussed in this paper.

Firstly, it is reasonable to rely on the authority of *Davis v Rainsford* 17 Mass. 207 (1821) to substitute of the cadastral survey plan for mentions of the deed.

The initial statement that the greatest weight should be given to lines actually marked on the ground is fundamentally sound. However it is clear from decisions in *Donaldson v Hemmant* (1901) 11 QLJ 35**,** *Howe v Bass,* 2 Mass. 380 (1807), *McIver's Lessee v. Walker,* 13 U.S. 173 (1815) and *Mt Bischoff Tin Mining Co. v Mt Bischoff Extended* (1913) 15 CLR 549 that the corners that mark the termini of lines have been equally well thought of. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co*, 129 F. 668 (1904) showed the court's uncertainty in dealing with the origin of the marks. A line is in some ways self corroborating because if one point is moved or disturbed then the line is no longer straight. Courts have been happy to take corner information when they are certain the marks are those placed by the original surveyor and the marks are in the same place.

Natural monuments clearly should be shown next.

Stevens v Williams (1886) 12 VLR 152 and *Smith v Neild* (1889) 10 NSWR 171 both argue for a distinction to be made in the case of adjoiners. There are valid practical reasons why adjoiners should be allowed to be used as a way of ensuring a 'seamless' cadastre, but both of

these cases make it clear that what happens before the grant in question should be given a higher status than that which happens after.

Evidence of occupation has been used many times in cases to resolve the boundary position. Sometimes it has been done with reservation. However courts have indicated the qualities that make the good occupation evidence. That is, it should be contemporary with the boundary creation (*Attorney-General v Nicholas* [1927] GLR 340 and *James v Stevenson* [1893] AC 162) and that it should be more or less in the boundary position shown by the plan (*Equitable Building and Investment Co. v Ross* (1886) NZLR 5SC 229, *Cable v Roche* (1961) NZLR 614**,** *Registrar General v Tuckfield* [1991] NSWLEC 121 and *Turner v Hubner* (1923) 24 SR 3).

Maps and plans in the Australian context are really indistinguishable from bearings and distances. With the exceptions of showing bounds by adjoiners and natural monuments the plans consist of bearings and distances. The maxim relied upon in *Davis v Rainsford* 17 Mass. 207 (1821), c*essante causa, cessat effectus* is very useful to consider in regards to recovery marks. Providing the connection to the corner is not of an excessive distance then surveyors should be able to rely on this maxim to support using a previously measured connection bearing and distance in preference to a longer boundary bearing and distance that may have been surveyed by the same surveyor at the same time.

To reflect the court's concern in *Resurrection Gold Mining Co. v. Fortune Gold Mining Co*, 129 F. 668 (1904) and its reservation about fences in *Turner v Hubner* (1923) 24 SR 3 some mention should be made about genuine cadastral evidence in extraordinary positions. Some weight should be attached that to the fact that an uncorroborated peg or recovery mark is just as likely if not more likely to have been moved or disturbed than to have been placed in the 'wrong' position by the original surveyor.

As before, area should be considered the least evidence as expressly stated in *Snow v Chapman*, 1 Root 528 (1793), *Melville-Smith v Attorney-General* [1996] 1 NZLR 596 and *Bank of Australasia v Attorney-General* (1894) 15 NSWR 256.

Likewise, the caveat mentioned in Brown's last point will always be appropriate when consider a rules based approach.

1. The greatest weight must always be given to lines and corners marked on the ground and corroborated by other physical evidence.
2. Natural monuments shown on the plan.
3. Adjoiners – "a well established line of adjacent survey" in existence before the original grant.
4. Adjoiners created after the original grant.
5. Artificial monuments corroborated by documentary evidence.
6. Occupation evidence that is contemporaneous and consistent with the documentary evidence.
7. Bearings and distances. Bearings and distances of short lines will over-ride bearings and distances of longer lines. Neither bearing nor distance is given overall preference.
8. Artificial monuments uncorroborated by documentary or physical evidence.
9. Area … will in general be the least valued evidence, but may in some cases be the key to the problem.

10. Finally, but most important of all, any one of these rules may be of more (or less) weight in one case than another. The rules set out are for cases of conflict, they are general rules, to be used as a guide but not as a straightjacket.

List of references and further reading

Brown, AG 1980, *Law relating to land boundaries & surveying*, Association of Consulting Surveyors Queensland, Brisbane.

Hallmann, FM 1973, *Legal aspects of boundary surveying as apply in New South Wales*, The Institution of Surveyors Australia New South Wales Division, Sydney.

List of court cases

Archard v Ellerker (1888) 10 ALT 196

Attorney-General v Nicholas [1927] GLR 340

Bank of Australasia v Attorney-General (1894) 15 NSWR 256

Cable v Roche (1961) NZLR 614

Davis v Rainsford 17 Mass. 207 (1821)

Dempster v Richardson (1930) 44 CLR 576

Donaldson v Hemmant (1901) 11 QLJ 35

Dufrene v. Bernstein, 181 So. 859 (1938)

Equitable Building and Investment Co. v Ross (1886) NZLR 5SC 229

Fulwood v Graham, 1 Rich. 491 (1844)

Horne v Struben [1902] AC 454

Howe v Bass, 2 Mass. 380 (1807)

Hutchison v Leeworthy (1860) 2 SALR 152

Jaques v Doyle (1881) 2 NSWR 113

James v Stevenson [1893] AC 162

McIver's Lessee v. Walker, 13 U.S. 173 (1815)

Mellor v Walmesley [1904] 2 Ch. 525

Melville-Smith v Attorney-General [1996] 1 NZLR 596

Moore v Dentice (1901) 20 NZLR 128

Morris v Jody, 216 Ky. 593 (1926)

Mt Bischoff Tin Mining Co. v Mt Bischoff Extended (1913) 15 CLR 549

National Trustees Etc. Co. v Hassett [1907] VLR 404

Nunez v Nunez, 423 So.2d 1270 (1981)

Overland v Lenehan (1901) 11 QLJ 59

Phillips v The Crown (1910) 12 CLR 287

Pukallus v Cameron (1982) 180 CLR 447

Registrar Genera v Tuckfield [1991] NSWLEC 121

Resurrection Gold Mining Co. v. Fortune Gold Mining Co, 129 F. 668 (1904)

Russell v Mueller (1905) 25 NZLR 256

Small v Glen (1880) 6 VLR 154

Smith v Bews (1868) 2 SALR 149

*Smith v Neil*d (1889) 10 NSWR 171

Snow v Chapman,1 Root 528 (1793)

South Australia v Victoria (1914) AC 283

Stafford v. King, 30 Tex. 257 (1867)

Stevens v Williams (1886) 12 VLR 152

Turner v Hubner (1923) 24 SR 3

Turner v Myerson (1917) 18 SR 133

*Walsh v. Hil*l 38 Cal. 481 (1869)

Watcham v. East Africa Protectorate [1919] AC 533

Williams v Booth (1910) 10 CLR 341