Importance of Evidence

Introduction

An indispensable part of every perimeter survey of an existing conveyance is the discovery and evaluation of evidence. In the orderly process of performing a property survey, the surveyor follows nine steps, usually in this order to perform a complete job.

1. He obtains (often, from the client) written evidence of title in the form of a deed, abstract, or title policy.
2. He seeks evidence of maps, field notes, county and city records of surveys, state and other public agency records of surveys, and all written records that disclose evidence of monument positions pertaining to the survey.
3. He reads adjoinder deeds for evidence of seniority or conflicts.
4. He goes on the land and seeks evidence of existing monuments and evidence of possession and usage.
5. He may seek testimony (evidence) of the existence and location of old monuments.
6. He makes measurements from found monuments to determine search areas or locations to dig for missing monuments, and he makes measurements (also evidence) to tie found monuments together.
7. He makes calculations (also a form of evidence).
8. From the evidence of monuments, measurements, testimony, and computations, he comes to conclusions in accordance with the law of evidence.
9. He uses measurements to set new monuments in accordance with his conclusions.

Before a surveyor obtains knowledge of all the available evidence, it is almost impossible to make a correct boundary location. There is an old saying, change the evidence and you change the law. The important aspects of property surveying are the ability to search, find, and discover all available evidence and the ability to arrive at conclusions about where boundaries belong in accordance with the laws of evidence and the laws of boundaries. A surveyor may be able to compute, make drawings, use instruments, and stake engineering projects, but he is not qualified to make property locations until he understands the law of property lines and the law of evidence.

Types of Evidence

At law there are at least four kinds of evidence:

1. Oral evidence or testimony is evidence given by witnesses.
2. Written evidence is evidence in the form of documents.
3. Real evidence consists of material objects addressed directly to the senses such as physical monuments.
4. Judicial notice is evidence in the form of knowledge.

The courts may take judicial notice of certain facts such as:
a. The true significance and meaning of all English words and phrases.
b. Whatever is established by law.
c. The laws of nature.
d. Other well-known and commonly accepted facts.

**Classifications of Evidence**

Evidence varies in value and dignity. In general evidence may be divided into the following classifications:

1. Indispensable evidence is evidence that is necessary to prove a fact. Conveyance of property must be in writing; hence a conveyance cannot be proved without proof that there was a written document.

2. Conclusive evidence is that which the law does not permit to be contradicted. As an example, the contents of conveyance writings (recital of a consideration excluded) are conclusive as between the parties, excepting for pleadings of illegality, fraud, mistake, or reformation. Also, the written document cannot be altered by oral testimony, and, as is commonly stated, everyone is presumed to know the law.

3. Prima facie evidence is that which suffices for proof of a fact until rebutted by other evidence. In any event the original deed is prima facie evidence of the deed's contents. In many areas the results of the survey of certain official surveyors, such as the county surveyor, are prima facie evidence of the location of lines. Prima facie evidence may be disproved, but, until it has been proved incorrect, it is assumed to be correct. The law specified what is or is not prima facie evidence.

4. Primary evidence is that which is most certain. The contents of a written document are more certain than the oral testimony of what the document contained.

5. Secondary evidence is inferior to primary evidence. A copy of the original document is inferior to the original. Secondary evidence is used to prove the contents of lost or unavailable primary evidence.

6. Direct evidence proves a fact directly without resorting to presumptions or inference; for example, Jones testified, "I saw the original surveyor drive the particular stake in the ground."

7. Indirect or circumstantial evidence depends on inferences or presumptions that tend to prove a fact by proving another; for example, Jones testified, "I saw the original surveyor drive similar stakes at other corners."

8. Partial evidence is to establish some detached fact. It is often used to corroborate other evidence.

9. Extrinsic evidence is derived from sources outside the writings.
Types of Evidence Gathered by Surveyors

Evidence used by surveyors to prove property-line locations can be classified as follows:

1. Written documents, maps, and historical facts.
2. Facts that the courts takes judicial notice of (knowledge of the court).
3. Physical objects (real evidence) observed by the surveyor: surveyors' stakes, trees, fences, rivers, street improvements, and the like.
4. Parol evidence. This can be divided into:
   a. Witnesses who observed the former location of physical objects (a monument now destroyed).
   b. Witnesses who can explain a latent ambiguity.
   c. Witnesses who can testify about commonly reported facts.
   d. Witnesses who can describe the customs or conditions existing as of the date of the deed.
   e. Measurements of distance, bearing, and angles.
   f. Mathematical calculations.

Role of Surveyor

The surveyor is presumed to know the law of boundaries and the law of evidence, and, when he agrees to locate a written conveyance on the ground, he agrees to locate it in accordance with the laws governing how written conveyances should be located.

The surveyor does not take verbal evidence to explain the law. The law is a matter of judicial notice and is gathered from statutes and writings of learned people. Everyone is presumed to know the law, and the surveyor is no exception. This is an irrefutable presumption that may not be overcome by contrary evidence. If the surveyor agrees to monument a certain written conveyance on the ground, he also agrees to locate the conveyance in accordance with the laws regulating the interpretations of written conveyances. The surveyor is a professional specialist who knows how to read and interpret deed words and how to set monuments in accordance with the words. Understanding and applying the correct law (and that includes the laws of evidence) are certainly part of his duties.

The surveyor may not practice law; he merely obeys the law, as it exists. Law is written. It is not the opinion of a lay witness. When performing a property survey it is the prerogative and duty of a surveyor to interpret the meaning of the written words of a conveyance. It is this fact that elevates him above the layman and promotes him to professional stature.

Best Evidence Rule

After a conveyance is made, the location of the land is determined by conclusions drawn from the best-available discovered evidence, all in accordance with the law of evidence. The surveyor's area of necessary knowledge includes what is acceptable evidence, what conclusions can be drawn from evidence, and what evidence must be rejected. The law of evidence, in effect, assigns an order of
importance to evidence, and, if two pieces of evidence are in conflict, conclusions are drawn in accordance with the evidence's importance as stressed in the law of evidence.

**Conclusive Evidence, Senior Rights, and Third Persons**

The words of a written conveyance are conclusive evidence as between the buyer and seller, but they are not conclusive evidence as against a third party who has senior rights or a person with occupancy right.

If a person conveys part of his land, he cannot at a later date convey more than his remainder. The first buyer has what is known as senior rights, and the second buyer has junior or remainder rights. The senior buyer is entitled to all land conveyed to him according to his description; the junior buyer is entitled to all land conveyed to him, provided it does not interfere with the senior rights. If such interference occurs, the junior deed loses. Evidence proving senior rights ranks first in the order of importance of written evidence.

**Writings as Indispensable Evidence**

A written conveyance is indispensable evidence in the proof of ownership.

The law, as enforced by the Statute of Frauds, requires all conveyances to be in writing; some form of written proof of title is indispensable evidence. Because of this, surveyors survey from written conveyances in accordance with law. After the written conveyance is located on the ground, the surveyor then notes possession not in agreement with the writings and, as a minimum, informs the client of the possible significance of prolonged possession.

Descriptions do not identify themselves, and all that is required of a deed is that it furnishes evidence of a means of identification. If the description in a deed is sufficient when the deed is made, no subsequent change in conditions or loss of evidence can render it insufficient.

Although a description may have been sufficient at the time it was written, subsequent disappearance of evidence may render the certainty of location exceedingly doubtful. But courts declare where property is located irrespective of the poor quality of evidence presented; the best available evidence is accepted even though the evidence may not be admissible in other types of litigation. Courts have held that vagueness in a description will render a deed void or voidable.

When the terms of an instrument, deed, or will have been reduced to writing, it is to be considered as containing all those terms, and there can be, between the parties or their representatives or successors in interest, no evidence of the terms of the instrument other than the contents of the writing, except in the following:

1. Where the Attorney, Abstractor, and title company pleadings put a mistake of imperfection of the writing in issue.
2. Where the validity of the agreement, deed, or will is the fact in dispute.
3. To establish illegality or fraud.
4. To explain an extrinsic ambiguity.
5. To show the circumstances under which the instrument was made for the purpose of properly construing the instrument.

The conclusiveness of the written words of a deed also applies with the same force to all documents called for in the deed. If a certain map is called for, all the writings and monuments called for on the map have just as much conclusive control as though the writings and monuments were called for by the deed itself. Because of the conclusiveness of the written documents, the writings themselves are often called the best available evidence.

Words expressed in a deed or conveyance reflects the intent and meaning of words of the parties at the time of preparation, not necessarily the present meaning. Most frequently, the need for explanations of words arises from local customs such as a local name for a tree. What does the term "spotted tree," mean?

The evidence of writing (including the writings of plats) always includes in scope the document and all writings referred to by the document. Further, the document or plat referred to may also call for additional writings that may also serve as evidence of the original intent.

A New Hampshire case allowed a deceased surveyor's written records are admissible evidence. The principle is not applicable in all states, especially where records are commonly filed. In the majority of states, only publicly stored field notes, as, for example, government-sectionalized land surveys, are admissible for the reason that a land owner should not be held to know what is contained in private files. In states where extensive obliteration of surveys has occurred and the location of the descriptions of monuments are unknown, the strict rules for boundary locations are often relaxed toward allowing reputation and inferences to be of importance, especially in older eastern states.

The usual rule is that someone must testify as to the accuracy of field notes of private surveyors, and, even if the notes are admissible, they may not be used to prove the clearly stated words in a conveyance are in error.

Evidence of the field notes of a survey, if filed in a public place, is easily introduced in court. Private field notes must, in general, be identified by the person taking then, and in the absence of such evidence, the notes are rarely admissible. At times, private notes prepared by surveyors who act in an official or semi-official capacity may be considered as prima facie evidence according to county or state statutes. Even in the event that private field notes are introduced to explain an error or omission, others cannot be held to know the secret information of the surveyor. For this reason private survey notes, kept in private files, have little effect on the outcome of litigation involving the interpretation of written documents.

Field notes kept by public officials, as required by law, have a similar effect as does recording a deed; the public is charged with knowledge of information contained within them. In the survey of the public domain, a call for Section 19, Township 12 South, Range 2 East, San Bernardino Meridian, automatically includes all field notes required by law. Further, the contents of the field notes are usually more certain than the plat itself; the field notes represent what the surveyor did, whereas the plat is a copy of what he did.
Normally, the field notes augment the plat; they explain what was omitted from the plat. In the event of conflict between the two, the courts' interpretation of which controls has varied. Where the parties acted by the plat without considering the field notes, the courts have generally held that the plat controls. In the normal situation, neither refutes the other—in which circumstance both would control.

**Extrinsic Evidence of the Writings**

*Principle.* Extrinsic evidence may be sought.

1. To explain the meaning of words existing within a written conveyance.
2. To explain the conditions existing as of the date of the deed.

Extrinsic ambiguities are ambiguities that must be explained from some source of evidence other than the writings. Once a conveyance is reduced to writings, words may not be added to or subtracted from a deed, but extrinsic evidence may be gathered to explain existing words of the deed or to explain a latent ambiguity. If a deed is exact and explicit, no amount of verbal testimony can change it. A deed reading "thence to a stone mound" goes to the stone mound regardless of verbal protests. But it must be proved by evidence.

1. That the stone mound is the one referred to.
2. That the stone mound has not been disturbed.

Parol evidence may be taken to prove or explain these two points, but it may never be taken to refute the fact that the line goes to the spot occupied by the stone mound as of the date of the deed.

**Evidence of Practical Location**

*Principle.* Evidence of practical location, when appropriate, may be received to clarify ambiguity of writings.

On occasion deeds may not be definite in defining the limits of a particular thing. For example, a deed reading "all of lot 1 and a 20-foot wide road easement across Lot 2" lack an exact location for the easement mentioned. But if the owner of Lot 1 uses a particular place for a period of time, that particular place becomes the correct easement line by practical location. The reasoning is simple; since that location was used, there must have been an agreement, either verbal or implied, between the parties. Seeming ambiguities may not be ambiguities at all; a simple inspection of the land for evidence of usage sometimes provides the answer.

**Ancient Survey Plats and Documents**

*Principle.* An ancient survey, recorded or accepted as a public document, made by a competent authority, and produced from proper custody, is generally admissible as evidence to prove the location of a boundary line.
A private survey may be admissible on proof of its correctness by the party making it, whereas an ancient survey, by proper authority, and recorded as a public record, may be accepted without further verification. Private surveys in general, are not accorded the same standing as publicly recorded surveys.

Each state usually has a statute declaring how old a document must be before it can be classified as ancient, and it is often 30 years. Such items as deeds, wills, and other documents used in conveyances are most often applicable to surveying evidence. The following court cases indicate what is found in the law library.

**EVIDENCE TO PROVE INTENT OF CONVEYANCES**

**Interpreting Conveyances**

The meaning and intent of words is normally the subject of judicial notice; that is, the meaning is sought from evidence found in books or authoritative sources but not from the opinions of the parties to the deed. It is only when words have a particular meaning for a particular locality or a particular profession that the courts resort to evidence to determine the meaning of a term. Normally in the matter of surveys, the surveyor is the expert who interprets the meaning of unusual words as applied to his profession. Under certain circumstances, it may be necessary to seek verbal explanations of a word from others. The value of a vara, for example.

**Evidence that Determines the Intent of a Conveyance**

The intentions of the parties to a conveyance, as expressed by the evidence of the writings, are the paramount considerations of the court in interpreting the meaning of a deed, and that intent is gathered exclusively from the written words of the deed, except where the written words have extrinsic ambiguities or where explanations of conditions existing as of the date of the deed are necessary.

Surveyors do not ask a person what he intended; the surveyor reads what was signed, takes into account explanations of extrinsic ambiguities and the legal and survey meaning of words and phrases, then decides for himself what the written intent was. The written deed is conclusive evidence; verbal testimony is of no avail except to explain an extrinsic (latent) ambiguity or to explain a condition existing as of the date of a deed.

Circumstances existing as of the date of the deed may be inquired into to explain the situation meaning of words as of that date. A deed written in the Gold Rush days that failed to specify the basis of bearings was interpreted to be on a magnetic basis. Witness evidence and other documentary evidence revealed that this was the custom at the time. Allowing witness evidence to reverse the usual interpretation placed on bearings is not altering the meaning and intent of the deed's words; it is merely explaining the meaning and intent of the words as of the deed's date.
Evidence of Intent of Senior, Equal, or Junior Rights

Depending on the evidence discovered, a conveyance is classified with respect to the adjoiner as being senior in rights, as being equal or simultaneous in rights, or as being junior in rights. Intent, gathered from the written evidence, cannot alter senior rights.

The surveyor, if he is to correctly survey a given parcel, must usually classify the seniority of that parcel with respect to the adjoiner, and such classification is sometimes difficult or impossible to derive from discovered evidence.

If parcels are created in sequence with a lapse of time between them, senior rights exist. Metes and bounds descriptions are usually created with a lapse of time between each creation and hence are created in sequence; whereas, all lots on a subdivision map are normally created at the same moment of time (when the map is filed or accepted), even though the lots are sold in sequence. Lots created simultaneously will have equal rights.

Example of simultaneous descriptions appear in the following:

1. Wills and gifts, wherein none of the heirs or benefactors is designated to receive a remainder.
2. Lots in subdivision, wherein a map is filed with a governing body and no lot is sold prior to filing the map.
3. Lots in any legal subdivision, wherein it is impossible to distinguish intent to give senior rights to buyers in sequence.
4. Court proceedings in partition, wherein each litigant is given a proportionate share of the whole, and no one is designated to receive the remainder.
5. Metes and bounds descriptions that are created simultaneously, and no one is designated to receive a remainder.

VALUE OF EVIDENCE OF A SURVEY

Evidence of a Survey

For a survey to be a consideration of a conveyance, it must be called for by the conveyance, or it must be required by law as a part of the conveyance proceedings, or, in a few states, if a survey is made soon after the conveyance proceedings by the parties of the deed and approved by them, the survey becomes controlling.

If the evidence of a survey is to have force, it must be called for in the writings or law must presume it. A survey not called for by the written conveyance cannot be considered a part of the writings; words cannot be added to a conveyance. But where the law requires a survey to be made as a part of the conveyance, it is presumed that the law was obeyed. The United States required, by law, surveys of sectionalized lands; Texas, since 1879, required surveys of patents; hence, whether or not a survey was called for in the writings for Texas or U.S. patents, it is presumed that one was made.
The evidence of intent of a survey as called for in a conveyance is to be interpreted from the map of the survey, the field notes of the survey, and the acts of the surveyor, but not from the unwritten, unexpressed intent of the surveyor.

The survey called for cannot be interpreted in the light of the secret or hidden intentions of the surveyor. What the surveyor did and what he recorded in the evidence of writings count. The surveyor's testimony that he intended to include all the lands up to the adjoiner cannot enlarge a survey to include omitted lands.

The surveyor can, of course, testify about things he actually did but not about his intent. A statement by the surveyor that a certain found monument was the one that he set would have force. But a statement to refute writings would more than likely be rejected, since parol evidence is inferior to written evidence.

Evidence of Monuments

Generally for a monument to be a controlling it must be called for in the written evidence proving conveyance or it must have been required by law. A call for a specific survey also calls for monuments set by that survey. The call for a monument is a call for the spot occupied by the monument as of the date of the written conveyance.

A monument to control the intent of a deed must be called for either directly, indirectly by reference, or required by law. A deed may call for an oak tree in the writings, or the deed may call for a map, which in turn calls for an oak tree, or the deed may call for a survey by Jones, and Jones' field notes may call for an oak tree. If the law requires a survey and set monuments, extrinsic evidence may be taken to explain what monuments were set as required by law. One very important fact that is sometimes overlooked is that a call for a monument is in actuality a call for the particular spot occupied by the monument as of the date of the deed. The monument itself is merely a symbol or object to mark the spot. A found monument that is uncalled for or is not referred to has no weight in substantiating that survey unless it can be shown by other evidence that it is occupying the spot of the original monument.

If there is a call for a monument, the monument, if discovered undisturbed and uncontradicted by the remainder of the writings, is conclusive. Giving control to a monument found in the vicinity of the bearing and distance termination cannot alter a deed that calls for bearing and distance but does not call for a monument directly, indirectly, or by reference, and is not required by law.

As noted, the spot occupied by the original monument, as of the date of the deed or as of the date of a survey called for by the deed, waters excepted, is the controlling consideration. All monument evidence sought is to explain where that particular spot exists on the ground. Discovery of the original monument itself is not a necessity, since many types of evidence can be resorted to that will suffice as proof of the original location. A disturbed monument may be of no value; the original spot occupied by the monument may not be identifiable. An obliterated monument-that is,
one lost from view—may be restored to its former position by competent witness evidence. Evidence is to prove where it was as of the date of the deed, not where the measurements say it ought to have been set.

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The surveyor, if he is to correctly survey a given parcel, must usually classify the seniority of that parcel with respect to the adjoiner, and such classification is sometimes difficult or impossible.

Evidence of Fences to Prove Boundary Locations

Frequent allusions have been and will be made to the value of fences in determining the correct location of boundaries. One of the most difficult tasks of the surveyor is to determine when he should or should not use existing fences as proof of original survey location.

The first wire fence was erected about 1816, with most of the barbed wire patents, as now known, coming along in the 1880s. Fences called for in early descriptions may have been board fences, stump fences, or stonewalls. Wire may have been erected later, however, and the fence thus perpetuated.

It is difficult to say when a fence was erected, since the fence may have been put up years after the wire was purchased. However, knowing when a particular type of fence was invented (there are about 1000 different patents) one can be sure when the fence was not there. Sometimes a probable age of a fence can be determined. Ring comparison of fence posts with living trees can illustrate approximately when the post was cut, and a determination can be made of when wire was attached to a tree by examining the rings.

Fences are not always erected on boundary lines. There are, of course, all sorts of interior fences on farms for various purposes. Sometimes fences were put up the keep animals from straying into the woods or going into a brook or swampy area, with no intention of marking any boundaries. Even when fences were erected at or near the boundary they would not be put up according to any survey so that the boundary indicated by them can only be close at best. Farmers would set posts where they could dig a hole without hitting a big rock, or they would tack the fence to a convenient tree. If intending to be relative to the line, the fence builder would put the fence where he thought the line was or often slightly inside the true line to avoid encroaching on his neighbor. Today, fences are sometimes accepted as the best available evidence, or the only evidence remaining to indicate the line.

Duties of Surveyors in Finding Evidence Needed to Locate Deed Writings

Deeds valid when formed are not made invalid because of a loss of evidence of location; the surveyor must hunt, seek, and find the best available evidence that determines a deed's location on the ground. In those areas where there has been widespread obliteration and loss of evidence, it may become necessary to accept evidence of an inferior type, such as hearsay and reputation, but
whatever is accepted, it must be the best of that found after an extensive and complete search of the record, the ground, and adjoiners.

The fact that a valid written deed has a location on the ground is not to be disputed; the surveyor is charged with finding the ground location in conformity with the law of evidence.

Ownership of land can be obtained by either of two methods:

1. A lawful written title.
2. An unwritten possession right (called an unwritten title)

An unwritten right to land ownership can never be transformed into a written right without either a court decree or a written agreement between adjoiners. In title insurance offices, written titles are classified as marketable, and unwritten titles, as nonmarketable. Lending agencies will not loan money on the basis of an unwritten title. In other words, land claimed by some unwritten right to title has a lower market value than land claimed by a written title and possession. For this reason, surveyors are obligated to distinguish between each type of ownership right.

**Monuments as Indispensable Evidence**

When locating a conveyance, the locations of at least two monument positions are indispensable evidence. All measurements commence from a monument and go in a direction determined by another monument (star, magnetic pole, north pole, or physical object).

Normally, in the interpretations of the intent of a deed, all monuments called for by the writings are given preference over conflicting calls of distance, directions, or area.

In locating written deed lines, not all discovered monuments are of value as evidence; some are accepted; others are rejected in accordance with the law of evidence. In general, for a monument to be controlling as evidence, it must be called for by the writings, either directly or by reference. A call for an oak tree is a direct call for a monument. A call for a survey by a particular surveyor is a call for any monuments set by him. Many of the old maps have statements on them that read "surveyed by John Doe." Although on the face of the map there is no mention of monuments set, it is always necessary and proper to seek an explanation of what was meant by "surveyed by John Doe." If this named person set monuments, they can be accepted. This is a question of proof by evidence.

**Sufficiency, Amount, and Kind of Evidence to Prove Monuments**

The amount, kind, and quality of evidence necessary to prove the correctness of a monument is variable, depending on the circumstance. The law of evidence is not an exact law but is a relative thing stating general principles that may have flexibility, depending on the circumstances. In questions of civil litigation, under which land disputes fall, the courts accept the premise of the "preponderance of evidence," which is not the same as "beyond a reasonable doubt." Proving a monument, or rather proving the position as occupied by a monument as of the date of the deed, is done by the following evidence:
a. The physical characteristics of the monument itself.
b. Probability or possibility of being disturbed or moved.
c. Witness monuments.
d. Public records and sometimes-private records, such as maps, notes, and documents, that prove historical sequence.
e. Parol evidence.
f. Hearsay evidence, common report and reputation.
g. Measurements to prove proximity to record measurements.
h. Old fences, and old lines of possession.

Physical Characteristics of Monuments

Some monuments are conclusively identifiable by the evidence of their physical characteristics alone. No trouble should be encountered when identifying the Great Lakes or a particular river. To be sure, the exact spot that locates the average watermark on the shore or the exact location of the thread of the stream may be difficult to determine, but there should be no trouble identifying the monument called for. An oak tree with a particular type of blaze mark should not present identity troubles, but an oak tree without a blaze mark and located in an oak grove could give substantial troubles. In the first case, if a blazed oak tree were found, witness evidence would be incompetent to overcome the location of the blazed tree. But if two blazed trees are found, witnesses can identify between the two trees. In the case of no identifying marks, called-for measurements from other known monuments are the best evidence to distinguish between the various trees. However, if measurements are not certain and conclusive, witness evidence may be resorted to. Where the monument is certain of identification from the physical characteristics of the monument itself, witness evidence is incompetent to prove any other monument. But if the wording of the writings is ambiguous so that alternate monuments are possible, less conclusive witness evidence may be used to distinguish between the monuments.

Evidence of Being Disturbed

An original monument to be of value must be located in the same spot occupied as of the date of the deed, waters subject to riparian rights excepted.

Evidence, either real or parol, may be sought to prove this point. Often the condition of the monument itself will prove whether it has been moved. A monument found in a cut bank is doubtful without further proof. A monument not in the measured proximity of where it ought to be casts doubt and suggests seeking further evidence.

Water is an exception to the rule that the spot occupied by the original monument as of the date of the deed in the controlling consideration. Whenever a deed calls for naturally occurring waters (rivers, lakes, ocean, etc., but not artificial sources of water such as dams or canals), the location of the governing line of water at any particular moment is controlling. Since the subject of waters is quite complex, better treatment of the subject calls for a separate chapter including evidence and location procedures.
Evidence of Witness Objects

Witness objects called for by writings, if found undisturbed, are evidence proving original corner locations and have the same weight and dignity as the object itself.

When alienating land, the sovereign often required a survey, monumentation, and measurements to nearby identifiable witness objects. When found, witness objects are considered equivalent in value to the monument itself and constitute proof of where the monument was. If a corner monument is easily movable, witness trees and other immovable objects may be a more certain means of identifying the original monument position than is the monument itself.

Chain of History of Monuments

The best evidence of a monument's original position is a continuous chain of history is acceptable record, usually written, back to the time of the original monumentation.

Deeds have a chain of title back to their inception, and the validity and correctness of a deed is based on this chain of title. Similarly, monuments should have a continuous chain of history. The original surveyor set a stone mound for the section corner. Surveyor number two finds the stone mound and sets a 2-inch iron pipe. Surveyor number three finds the 2-inch pipe and sets reference points 30 feet on each side of a new proposed road. Surveyor number four finds the reference monuments and resets the true section corner in the centerline of the new road. Surveyor number five finds the new monument in the centerline and wants to prove its identity and the correctness of its position. How can surveyor number accomplish his goal without a continuous record of what each previous surveyor did? It is because of the need for continuous records the California has a law making it mandatory to file a record of survey under certain circumstances.

History or chain of record for monument position is valuable evidence, but all too often there is an interruption in the history, and a continuous chain of records cannot be proved. In such an event a different type of evidence must be resorted to.

Surveyors' Records on Monument Location

In general but not always, the county surveyor's records (or city engineer's) are prima facie evidence, whereas that of private surveyors is not.

Proof of monument positions is frequently dependent on surveyors' records and surveyors' testimony in court. But not all records of surveyors can be admitted in evidence. With regard to admissibility of evidence, surveyors can be divided into two classes:

1. Public.
2. Private surveyors.

A regularly written record of a public officeholder or public employee, whose records were written as part of his job, is usually acceptable in evidence; but the records of a private surveyor, without
the testimony of the private surveyor, are difficult to use as evidence in court since they would be hearsay.

Public surveyors and deputy surveyors have an official duty to run lines, establish boundaries, and make and file reports of their results. When such reports are publicly filed, no question exists about their admissibility as evidence. Sectionalized land field notes are difficult or almost impossible to impeach despite the fact that numerous instances of definite fraudulent surveys are known.

Parol Evidence to Prove Monuments

Parol evidence may be used to locate the former position of a monument. But evidence cannot refute a found, undisturbed monument called for by the written conveyance.

Those who have personal knowledge may testify about where the monument was, and such evidence, if by a reliable witness and undisputed, is conclusive. In California the law allows the surveyor to administer oaths and take verbal evidence concerning monument position. It might be pointed out that this oath and evidence are of no value in court as long as the person giving the evidence is alive, since the witness will be called into court and be required to testify directly. In the event of death the oath may be of value, and it also serves as a deterrent to a change in testimony.

Summary of Competent Parol Evidence

The surveyor should not receive verbal evidence that is not competent under rules of law. A lay witness cannot:

1. Testify about what the laws pertaining to boundaries.
2. Testify to alter written words of deeds.
3. Express opinions.

The general rule is that testimony may not contradict, vary, or modify writings. Testimony in general is limited to the following items, although there may be other:

a. Testimony may be taken to explain a latent ambiguity that is not a question of law.
b. Testimony may be taken about the former location of a monument, about the identity of a monument if the writings are not clear, about whether the monument has been moved, but testimony may not be taken about the location of a monument identifiable from the clear, unambiguous written words of the conveyance.
c. Testimony may be taken about the usual customs and meaning of words as of the date of the deed.
d. Testimony, if needed, may be taken about the general reputation of a monument.
e. Testimony may be taken about the surrounding circumstances as of the date of the deed.

A lay witness may testify to facts within his own perception but not about conclusions, opinions, inferences, or facts contrary to the writings.
Evidence of Common Report, Reputation, and Hearsay

By common report or by reputation, monuments or former monument positions are sometimes proved. But title to land can never be proved by reputation.

Although there is a general rule that hearsay evidence—that is, evidence of what you heard someone else say, is not admissible in court, many exceptions to the rule exist. In a court trial over land boundaries, the court is charged with making a location of the boundaries based on the best available evidence, and if hearsay evidence is the best available, it can be used. The reputation of a monument as being correct is mere hearsay, and if better evidence of a monument's stature is not available, the reputation may be sufficient to prove its authenticity.

Although differences of opinion do exist about the application of the principle of reputation, none exists regarding the legal force of the principle. The rule is, of course, one of last resort.

Once a boundary or line is run and the survey is called for, the line is fixed in position although it cannot be heard, seen, or felt. All living things die, decay, and return to the earth that once nourished them. Stones, mounds, and physical objects disappear. Finally, all original markings of lines are gone. The original position of the ground remains the same, but how can it be monumented after the locative objects are gone? Can the certainty of title vanish with the objects, or can the land be located from the best available evidence?

After all original monuments in a subdivision have been lost along with the chain of records proving the new monuments to be replacements of the originals; no method exists, other than common report, to prove the stature of some monuments. All surveyors at times accept monuments and use monuments that cannot possibly be proved by direct evidence or chain of history evidence to be in their original positions. Reputation evidence is important to prove monuments that are not originals but are accepted as replacements of the originals.

After numerous surveyors have used a monument, the proof of error of location must be conclusive, not just surmised. The mere fact that all surveyors use a monument, without additional proof, does not and will not make it correct by continued use; the monument must be initially correct. Thus, in a superior court case in Alpine, California, it was shown that at an early date the State Highway surveyors tied in a fence corner and for some unexplainable reason described it as a section corner. A later surveyor in 1928 accepted the fence corner and set numerous corners from the accepted section corner. Up until 1950 some 10 or 15 surveyors filed maps and accepted the old fence corner as correct. When surveying an old holding dating back to 1900, another surveyor found that fences did not fit the proclaimed section corner. In a routine check it was discovered that the original government field notes stated, "Set a rock mound 3 feet south of a 12-foot-high boulder." Not only was the 12-foot-high boulder found but also a witness testified that in 1898 he had seen a stone mound just south of the boulder. All the expert testimony, reputation, and recorded plats could not overcome the fact that the true corner was 70 feet east of the accepted fence corner. The best available evidence was the written government field note, and it prevailed. Reputation evidence does not overcome contrary proof, but the contrary must be proved, not just surmised. As a side light on that Alpine case, those with substantial enclosures were awarded title.
as based on unwritten occupancy rights, and said occupancy was described from the old original location of the section corner.

Reputation evidence is hearsay evidence and is an exception to the hearsay rule. Reputation is resorted to only when other means of proof are lost because of a long time lapse. The necessity of such evidence can only arise from the lack of better evidence. The courts have set up certain safeguards so that the usage of reputation will not be abused. First, the reputation must be of ancient matters such as an old fence of unknown origin and reputed to be a property line. Recent surveys are excluded. Second, the reputation is of a former generation. What has happened in the present generation is provable by other evidence. Third, the reputation must predate the boundary litigation; otherwise the reputation will merely be a contention by one party. Fourth, if the reputation is based on the statements of an individual are generally, although not always, required to be in reference to some monument or be supported by occupation. The reason is that a witness can remember a certain fence or monument but has no way of remembering isolated spots.

**Evidence of Deceased Persons' Sayings to Prove Monument Reputation**

What a person heard a deceased person say regarding a boundary line might be admissible evidence provided:

- Better evidence is not obtainable.
- The deceased person had peculiar means of knowledge of the boundary.
- The deceased person was disinterested at the time of declaration.
- In some jurisdictions, the declarations of the deceased person were part of the res gestae.

The sayings of deceased property owners, adjoining owners, surveyors, and tenants are the ones commonly coming under this rule. Surveyors as a group are usually considered disinterested. The sayings of deceased owners are sometimes excluded because of interest, but deceased owners' sayings with regard to things against their interest are always admitted.

In general, but not in all jurisdictions, to be admissible, the saying must be part of the res gestae; that is, the saying must have been in connection with some act. The sayings of a surveyor in connection with his professional duties, such as telling the owner the stake being driven is his property corner, would meet this requirement. The declarations of a deceased owner could be made in connection with pointing out boundaries.

**Measurement Evidence to Prove the Proximity of Monuments**

Measurements may be used to prove the validity of monuments. Such monuments to be acceptable should be within reasonable proximity of the record measurement.

There are many circumstances that can vary the meaning of the word "reasonable." Some deeds are written without the benefit of a survey; hence measurements may be mere estimates. Surveyors have been known to make gross errors. No definite rule exists that identifies exactly how close a monument should come to the record measurement. If an iron pipe shows signs of having been disturbed by cultivation, it is only right that it should be bent back a fraction of a foot to its
measured position. However, if an oak tree were identified as the one called for, a substantial measurement error probably would not disprove it. An error of 100 feet measured to an easily movable stone mound would present serious doubts. The amount of measurement error allowed is dependent on the movability of the monument and the certainty of identification of the spot occupied by the monument as of the date of the deed.

In the order of importance of items that may prove the intent of a deed, evidence of measurements ranks below senior rights and monuments. A surveyor who needs his ego deflated needs only to reflect on the fact that the courts in the matter of interpreting deeds have placed the least importance on measurements.

**Principle:** Unless proved otherwise, measurements of distances are presumed to be horizontal. In the colonies early measurements were often surface distances, and, when proved as such, surface measurements may control.

In some areas of the United States, especially along the eastern seaboard, early linear measurements were made on the ground without corrections for slope. When it can be shown that the original surveyor did use surface measurements as a local custom, the presumption of horizontal distance is overcome.

In most states the presumption is that bearings are relative to the astronomic north, unless otherwise specified. In a few states, especially along the eastern seaboard, the presumption for older surveys is that the magnetic meridian as of the date of the measurement was used.

Basic presumptions can be overcome by contrary evidence. In the western mining areas where it was shown that the custom was to survey on the basis of magnetic north, the courts have upheld such basis of bearings. In the original 13 colonies, until about 1800, and in certain places after that, it was the custom to survey by the compass without correcting for declination. Which method was used, magnetic north or true north is a question to be proved by evidence, but if contrary evidence is not presented, the presumption will prevail.

In the act of Congress of May 18, 1796, all sectionalized lands were to be surveyed as based on true north (astronomical north). Although the compass was to be used, the direction of magnetic north was to be corrected to true north.

From the foregoing it is readily apparent that the burden of proving what the basis of bearing was for a deed is the responsibility of the surveyor. After it has been decided that the original deed was based on a magnetic bearing, then comes the task of determining what the magnetic variation was as of the date of the survey or deed.

If there is a conflict within a deed and a choice must be made between bearing and distance regarding which controls, no uniform rule has been laid down by the courts. Variations between states do occur.

In the sectionalized land system of the Federal Government, in replacing lost corners in accordance with BLM rules, distance are always kept in their original proportions and bearings yield. In Texas
bearing is given definite preference to distance. Since it takes bearing and distance to determine a line, it would be a rare instance to give one control over the other. In the usual situation, the surveyor gives control to as many items in the deed as is possible, rejecting as few as possible. In this situation, N 20°10'E, 100 feet to the south line of Palmdale Avenue, the bearing would be given force and 100 feet would yield. In this situation, N 80°10'E along Palmdale Avenue, the distance would hold and the 100 feet would go along Palmdale Avenue regardless of the bearing. The custom is to reject as few terms in a deed as is possible.

**Principle:** In a metes and bounds description each course is normally run in the order described in the deed; in general no one course is superior. In California, the first cited course governs.

**Possession Evidence**

**Principle:** Possession representing the location of original survey lines may be used to prove original survey lines.

Possession that represents the original location of original monumented lines is distinctly different from unwritten title lines. In many instances, after all original monuments have disappeared from view, the best available evidence about where the original lines were is evidence of old fences built soon after the original stakes were set.

For possession to represent the original lines of the original surveyor, the following five facts must pertain:

I. There was an early survey that, if located, is controlling the line between the adjoiners.
II. The lines of possession are along the lines surveyed or presumed to have been surveyed by the surveyor.
III. Usually, but not always, a series of possessions, in agreement with one another, substantiate one another.
IV. Possession is an ancient matter of a former generation (if it is of a present generation someone can testify about its origin).
V. Possession has the reputation of being correct survey lines.

Not all possession represents controlling survey lines. Although some lines of occupancy may become title lines by the process of unwritten agreement, adverse rights, or other unwritten means, such lines should not be confused with original survey lines. The surveyor relates possession to his survey lines, and he tries to gather evidence explaining the origin of possession. If possession came about merely for the purpose of a cattle enclosure and the person erecting the fence had no idea of ownership lines, or if possession follows a line that was not originally surveyed, obviously possession cannot represent original survey lines.

Where possession could be an original survey line, it is one of the duties of the surveyor to seek evidence to explain its origin.
Evidence is an essential part of every property-line survey. For a property surveyor to gain prominence and for him to keep himself free of liability for negligence, he must have an intimate acquaintance with the laws of boundaries and the laws of evidence to prove boundaries.

Surveyors rarely fail to come to an agreement about the distance existing between two known monuments. Disagreements more often result from differences of opinion over which of two known monuments should be used. Perhaps the worst disagreements arise from a failure of one surveyor to uncover all available evidence. Two surveyors having the same evidence, if equally educated and equally intelligent, should come to the same conclusions. Unfortunately, all surveyors are not equally diligent in their search. The one with all the evidence usually comes to the correct conclusion, whereas the one with partial evidence makes faulty locations.

All surveyors are presumed to know the laws of evidence as pertaining to the location of land boundaries described by writings, and they are charged with the responsibility of knowing how to apply the laws of evidence when they located deed boundaries.

It is the responsibility of the surveyor to obtain all the evidence available to make a correct property-line location in accordance with controlling writings; failure to find all the necessary evidence to make a correct location is not an excuse for an incorrect survey.