

WHAT TO DO WITH FENCES

by

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BIOGRAPHICAL SKETCH

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ABSTRACT

One of the perplexing problems that land surveyors must face is what to do with fences. Fences are found on or near many boundaries, to include boundaries around woodland, farm, and residential lots. This article was written to provide some suggestions and guidance concerning fences (and for that matter walls, hedgerows, tree-lines, etc.). In particular, the legal significance, practical value, and responsible treatment of fences are examined in this article.

INTRODUCTION

Landowners generally hire surveyors, in part, to determine where they own -- they want the surveyor to locate their ownership boundary. The surveyor, for their part, has been trained to reestablish the location of the boundary as described in the records; that is, the record boundary. Under ideal conditions, the record and ownership boundaries will coincide and the surveyor will meet the client's expectations. A problem arises when the landowner or their predecessor in possession has asserted a claim, as evidenced by prior use and possession, short of or beyond the record boundary -- creating a third category of boundaries known as the possession boundary. Where the extent of use or possession does not coincide with the record boundary, the location of the ownership boundary becomes uncertain since it may coincide with either the record or the possession boundary.

Within this realm of potential confusion stands the fence, sometimes an aid while at other times the nemesis and gist of the problem. The resolution of the confusion depends on the legal significance, practical value, and responsible treatment of the fence. Unfortunately, the confusion is compounded by serenity and fed by ignorance. By its protruding appearance in the woods, along a field, or between homes in a development, a fence seems to make what would ordinarily be uncertain, certain. For the surveyor to interrupt the serenity by casting doubt on its position or prestige as a boundary marker seems sanctimonious if not an outright declaration of mistrust that is bound to start a bitter boundary dispute between the neighbors.

For this reason and others, surveyors are quick to adopt a fence, reluctant to question a fence, ignorant about the legal ramifications, or are simply uncertain about how to handle fences that are on or near boundaries.

The legal significance, practical value, and responsible treatment of a fence can be determined by three steps. The three steps are to: (1) gather information, (2) analyze the information, and (3) apply or communicate the information.

GATHER INFORMATION

The first step to determine the legal significance and practical value of the fence is to gather information on the fence. During the course of the survey, information on the fence can be gathered during the record search, interviews, and field survey. While searching the records for boundary information, the surveyor should determine if any documents cite or portray the fence in a manner that is suggestive of an intent to fix the record boundary along the fence. Any citations to a fence should be scrutinized to determine: (1) the time the fence was built; (2) the fence material, (3) the direction of the fence, and (4) the location of the fence.

Information is also obtained from interviews with the client, neighbors, long-time residents, and other knowledgeable people. During the interview, the surveyor should gather the following information: (1) the maker/builder; (2) builder's frame of mind, purpose, and apparent significance of the fence (e.g. cattle barrier, line fence); (3) approximate age; and (4) past condition of the fence.

Finally, information on the fence is obtained during the field survey (to include the reconnaissance). The most important piece of information to obtain during the field survey is the relative location of the fence with respect to other evidence. This would include any significant meanderings and the geometrical relation between the fence, existing monuments, and major features. In addition, the surveyor should also attempt to collect the following during the field survey or reconnaissance: (1) continuity of the fence (e.g. sporadic, continuous); (2) present condition of the fence (e.g. disrepair, decayed, new); (3) actual age of the fence (i.e. from tree borings); (4) fence material (e.g. woven wire, split rail); and (5) visibility of the fence.

ANALYZE THE INFORMATION

The second step is to analyze the information. The analysis should attempt to classify the fence as one of the following: (1) the best evidence to the record boundary, (2) evidence to the record boundary, or (3) no correlation to the record boundary.

Best Evidence: The fence may be the best evidence of the record boundary under one or a combination of two or more of the following: (1) rules of construction; (2) recognition/ reputation; (3) process of elimination; and (4) prima facie assumption.

Best Evidence - Rules of Construction: The rules of construction would favor the fence as the best evidence to the record boundary under two different scenarios. The most favorable scenario is when the fence is called for in a valid conveyance, cited in an authoritative record as a monument to the boundary, or constructed as a division fence according to a "fenceline" statute or boundary agreement.¹ The second, less favorable scenario is to determine the fence is in privity and conformance with the location of the original marks and monuments.² Privity stands for the concept that there exists some chain of records, evidence, logic pattern, or other rational explanation that places the fence in the same stead as the original marks. This scenario would be appropriate if the fence were built along the blazed boundary, fence posts replaced the corner marks or monuments (e.g. stakes), or the fence replaced or stands in the place of an earlier fence that was called for as a monument. Under these scenarios, the fence is favored much the same as other monuments are favored under boundary law rules of construction.³

Best Evidence - Recognition/Reputation: A second way a fence may be the best evidence of the record boundary is by recognition and reputation. This concept treats the fence as an "undocumented" monument with authority based on its recognition and reputation. Recognition and reputation as a boundary or "line" fence is based in part on equity and in part on logical assumptions. Equity by way of laches, estoppel, and other equitable principles, would keep settled what has been settled. With the same results, a logical analysis could be constructed to show that the recognition and reputation of a fence as a boundary marker must have been based on some authority since obscured or some intent expressed and accepted long ago.⁴

Best Evidence - Process of Elimination: Recognition and reputation are usually combined with the process of elimination (although not always). The process of elimination, simply described, is that there is no better evidence available to prove the fence does not stand on the record boundary. What better evidence that may have once been available is now unavailable, lost, or suspect. In some cases, there may never have been better evidence other than the fact the people living along or near the fence have always supposed and accepted the fence as the boundary marker.

Best Evidence - Prima Facie Assumption: By way of a *prima facie* assumption, some courts will assume at the outset that the location of an existing fence accurately marks the location of the record boundary.⁵ To understand this concept, recognize that under the previous methods of interpretation, judges would ordinarily reserve judgment until the party with the burden of proof produces sufficient evidence to show that the fence marks the boundary or the moving party, by a preponderance of evidence, shows the fence in all likelihood coincides with the record boundary. However, if at the outset of the trial the court adopts a *prima facie* assumption in favor of the fence, the court assumes that the fence marks the

location of the record boundary unless other, better evidence is introduced by the opposing party that shows it does not. This last assumption is founded partially on convenience and partially on the premise that: (1) the builder knew where the record boundary was located, (2) the record boundary was discernible to the builder at the time the fence was constructed (e.g. blazed trees), and (3) the builder followed the marks in constructing the fence.⁶

Best Evidence - Prima Facie Assumption (Modified): As a slight modification to the best evidence by prima facie assumption, some courts do not use a prima facie assumption until the fence is shown to have existed undisturbed and uncontested for a period exceeding the statute of limitations (Acquiescence).⁷ This is based on the premise that any fence that has been allowed to stand uncontested for a long time must have been built on the record boundary or else someone should have come forward to dispute (i.e. litigate) its location before the present time. If the fence is shown to have existed for a long time without question or conflict, the opposing party has the burden of coming forward with evidence (not the same as the burden of proof) to show the fence is not on the record boundary.

Evidence: The fence may be classified as evidence (as opposed to the "best" evidence) to the boundary when the fence supports other comparable or better evidence to the record boundary. This classification uses the location of the fence as one piece of evidence among many (e.g. other undocumented monuments, measurements, area, and parol testimony) to help fix the record boundary. Naturally, the evidentiary value of the fence can be improved or minimized by proving or failing to prove such factors as: (1) the fence was built at a time when marks and monuments to the record boundary still existed; (2) the person constructing the fence was a disinterested party and intended to set the fence on the record boundary; or (3) the fence was constructed by previous landowners to stand on the common boundary between them.⁸

No Correlation To The Record Boundary: By eliminating the possibility that the fence is the best evidence or, less favorably, evidence to the boundary, the surveyor is left with the last possibility -- there is no correlation between the fence and the client's record boundary. In other words, the fence represents the position of another record boundary or a possession boundary not related to the client's record boundary -- possibly creating a cloud on the client's or neighbor's title. Estoppel and adverse possession are two common legal doctrines where a fence, standing as a possession boundary apart from the client's record boundary, may alter the client's rights and cloud the record title.

Estoppel: Estoppel is a legal doctrine that denies a person a legal remedy that would ordinarily be theirs to claim. With estoppel, one landowner is denied the right to claim to their record boundary and the other landowner has the right to claim to the fence lying beyond their record boundary. Estoppel arises when one landowner, by design or innocence; by action or, in some cases, acquiescence (e.g. where the

landowner had a duty to assert the truth and did not); misleads another to that person's detriment; to believe that the fence controls or stands in the location of the ownership boundary.⁹ Examples include an oral agreement followed by possession;¹⁰ acquiescence coupled with possession; and detrimental reliance.¹¹ Estoppel, by itself, does not ordinarily create title until adverse possession is maintained for the time period prescribed by the statute of limitations.¹²

Adverse Possession: Adverse possession is a legal doctrine that creates title in a possessor. Most states recognize adverse possession through statute or common law. Under the common law, adverse possession is founded on the premise (i.e. legal fiction) that any long possession must have been founded on a grant that has since been lost (i.e., lost grant theory). A person asserting title by adverse possession must prove the following six elements (although different jurisdictions may require more, less, or slightly different elements depending on the circumstances): (1) the land was held adverse or hostile to the record owner's title; (2) possession has been actual (v. constructive); (3) it has been open and notorious (i.e., visible and known); (4) possession has been exclusive or the use by others has been controlled by the possessor; (5) possession has been continuous for the period set forth in the statute of limitations; and (6) possession has been under claim-of-title or color-of-title.¹³

Other Record Boundary: A fence standing apart from the client's record boundary may also represent another person's record or ownership boundary (e.g. the neighbor's). In some cases, this may result in a gap between record titles, while in other cases it may result in an overlap of record titles. In any event, a question of title is usually involved. In most of these cases, the surveyor should treat the fence as an encroachment on the client's title or a possessory claim for the client.

Apply or Communicate the Information

The last step is for the surveyor to apply the information or communicate the information along with his or her analysis and opinion to the client. This step focuses on the proper treatment of the fence. Generally, if the surveyor determines that the fence is the best evidence or, in the alternative, evidence to the boundary, the surveyor uses the fence to help fix the location of the record boundary. In contrast, if the surveyor determines there is no correlation between the fence and record boundary, the surveyor should communicate this information to the client along with the legal ramifications that may result or may have occurred.

Fence as the Best Evidence: If the fence is the best evidence to the record boundary, the fence is used to fix the location of the record boundary. This normally requires the record boundary coincide with the location of the fence (even though the fence may deviate from a straight line).¹⁴ This conforms with the rule of construction that generally holds monuments superior to measurements (i.e. straight lines) should they conflict. Furthermore, the call for a monument is a call for

the center, where it stood at the time the original description was prepared.¹⁵

Fence Used As Evidence: On the other hand, if the surveyor has determined the fence is evidence to the record boundary, the fence usually falls partly on the boundary and partly off from the record boundary. The fence is used as one piece of evidence among others to relocate where the corner monuments or the record boundary once stood. All evidence, including the fence location, is analyzed and used in the most favorable light (i.e. the conform rather than conflict), keeping in mind the conditions and situation at the time of the conveyance. As evidence (as opposed to the best evidence) of the record boundary, the record boundary will not be made to follow the meanderings of the fence. Since the fence will not ordinarily coincide with the record boundary along its entire length, one of two different interpretations are used to reestablish the record boundary.

Under one interpretation, only part of the fence is used to help fix the corner locations. This interpretation assumes the builder attempted to place the fence on a straight line between two corner monuments, starting at one corner and building the fence toward the the other corner. As he moved away from one corner monument and was out of sight of the other corner, the direction of the fence deviated from a direct line between the corners. However, once he came close enough to the other corner, the fence builder was able to visually correct his direction and head more or less back toward the second corner. The result is that the fence, as it stands, "bows" or "curves" away from the record boundary (i.e. a straight line). Therefore, under this interpretation, only the end segments of the fence would be used to help fix the location of the property corners. Once the corner locations are reestablished, a straight line is protracted between the corners and any deviation of the fence from the straight line is treated as an encroachment or adverse claim, as the case may be.

Under a second interpretation, the fence builder is assumed to have stayed on or near the boundary, sometimes going off to one side and at other times crossing and going off to the other side -- crossing and recrossing the record boundary. In other words the fence zig-zags along the length of the record boundary. Given this interpretation of the fence construction, the record boundary is located by projecting a "best fit" straight line along the fence (i.e. a least squares best fit). In other words, a straight line is chosen for the record boundary that minimizes the deviations of the fence from the record boundary.

It should be noted that one interpretation does not necessarily always have to be favored over another. The existing pattern of the fence location (bow v. zig-zag), the character of the corner marker (e.g. stream or road v. tree or ridge), and the character and frame of mind of the builder (conscientious v. noncaring) will influence whether the first or second interpretation is chosen. For example a bow in the fence line would tend to fit the first interpretation while a fence that zig-zags would fit the second interpretation. On the other hand, if the fence builder was heading toward a linear monument, a monument not easily visible to the builder, there is less reason to choose the first interpretation. In contrast, if the builder had a

tall tree or point on a ridge that was generally visible along the entire boundary while the fence builder constructed the fence, there is a good reason to choose the second interpretation since the builder would have been able correct the direction of the fence from time to time.

Fence Does Not Coincide: In almost all cases where the record boundary and possession boundary (fence) do not coincide, the surveyor should not ignore the difference or attempt to solve the problem independent of written authority to do so.¹⁶ Where the client's record boundary is in a different location than the possession boundary, the question of what is the (ownership) boundary becomes a question of law. The surveyor's responsibility is limited to showing where the boundaries are located, which is a question of fact. As one early practitioner said in the 1800s: "Old fences must generally be accepted by right of possession; though such questions belong to the lawyer [rather] than to the surveyor."¹⁷

In this situation, the surveyor has a duty to inform the client of any problems that may affect his or her title. Thereafter, it is the client's problem and prerogative to ignore or take steps to remove the problem affecting their title. If the surveyor fails to properly inform the client or, in the alternative, attempts to decide title questions on his or her own, the surveyor will increase their liability considerably.

Unfortunately, many surveyors find it difficult to come to the client with a potential title problem they have discovered and are unable to solve. In real life, the client is not happy to find out they have a problem, is annoyed that the surveyor cannot solve the problem, and, on top of it all, is mad at the surveyor for demanding to be paid. However, the fault is not with the surveyor because he or she identified and described the problem; the fault is with some prior landowner who failed to have the property surveyed and subsequently failed to build the fence on the record boundary.

If the surveyor should determine a fence does not coincide with the record boundary, the surveyor should take several actions on behalf of their client: (1) The surveyor should carefully locate where the fence stands and describe the fence in relation to the record boundary. (2) The surveyor should describe and document all evidence that would support or refute a possessory claim on behalf of or against their client. (3) If the area is not inconsequential ("de minimis non curat lex"), the surveyor should calculate the area for the client. (4) The client should be notified of the possible adverse or beneficial consequences that result when the possession boundary does not coincide with the record boundary. (5) Finally, the surveyor should suggest some possible actions the client should consider and discuss with his or her attorney. These include: (a) do nothing, (b) maintain the status quo, (c) negotiate and compromise with the neighbor (e.g. boundary line agreement), (d) recognize any adverse claims, (e) arbitrate, or (f) litigate.

CONCLUSION

A fence is a common object found on or along boundaries. The surveyor should not ignore a fence since the fence may be evidence of the record boundary or, in the alternative, may represent a possession boundary that extends or usurps (i.e. clouds) the client's title. It behooves the surveyor to determine the relative location of the fence, who built the fence, when it was erected, the conditions under which it was erected, the manner in which it was erected, the purpose for its erection, and the authority or weight of the fence as evidence to the record boundary.

If the fence is evidence to the record boundary the surveyor may use it to reestablish or support the location of the record boundary. On the other hand, if the fence does not coincide with the record boundary, the surveyor must explain the possible significance of the difference. The responsibility of the surveyor is not to resolve any conflicting title claims but identify and locate any potential conflicting title claims. This information is communicated to the client (or their attorney) in a clear, understandable, and comprehensive manner. The client may, after receiving legal advice, decide to do nothing, maintain the status quo, negotiate and compromise with the neighbor, recognize any adverse claims, arbitrate, or litigate.

REFERENCES

1 See *Pencil v. Buchart*, 551 A.2d 302, 306-307 (Pa.Super. 1988), *Yoho v. Stack*, 540 A.2d 307, 310 (Pa.Super. 1988). Also see, e.g., (dissenting opinion) *West Virginia Pulp & Paper Co. v. J. Natwick & Co.*, 123 W.Va. 753, 777 (1941); *Caputo v. Mariatti*, 113 Pa.Super. 314, 173 A. 770 (1934); *Cole v. P. & L. E. R. Co.*, 106 Pa.Super. 436 (1932); *Adams v. Tamaqua Underwear Co.*, Pa., 161 A. 416 (1932); *Keech v. Delaware County Trust Co.*, 297 Pa. 442, 147 A. 96 (1929); *Zirkle v. Three Forks Coal Company*, 103 W.Va. 614, 622, 138 S.E. 371 (1927); *Winding Gulf Colliery Co. v. Campbell*, 72 W.Va. 449, 466 (1913); *Wilcox v. Snyder*, 22 Pa.Super. 450 (1903); and *Kime v. Polen*, Pa., 8 A. 783 (1887). Also cf. *Roth v. Halberstadt*, 258 Pa.Super. 401, 392 A.2d 855, 857 (1978); *Allison v. Oligher*, 141 Pa.Super. 201, 14 A.2d 560, 571 (1940); *United Thacker Coal Co. v. Red Jacket Jr. Coal Co.*, 146 C.C.A. 241, 232 F. 49, 58 (1916); *Thompson v. Hill*, 137 Ga. 308, 73 S.E. 640, 643 (1912); *Koch v. Gordon*, 231 Mo.645, 133 S.W. 609, 610 (1910); *Grier v. Pennsylvania Coal Co.*, 128 Pa. 79, 154 A. 449, 451 (1889).

2 See, e.g., *Barba Inv. Co. v. Walker*, Fla.App., 350 So.2d 509, 512 (1977); *Kahn-Reiss v. Detroit & Northern Sav. & Loan*, Mich., 228 N.W.2d 816, 824 (fn.6) (1975); *Siegel v. Renkiewicz Estate*, Mich., 120 N.W.2d 876, 879 (1964); *Di Virgilio v. Ettore*, 188 Pa.Super. 526, 149 A.2d 153 (1959); *Chicago Club of Lake Geneva v. Ryan*, 203 Wis. 272, 234 N.W. 488, 491 (1931); and *W. P. Thompson v. W. P. Zartman Lumber Company*, 55 Pa.Super. 302 (1913)

3 See, e.g., *Metcalf v. Buck*, 36 Pa.Super. 58 (1908)

4 See, e.g. *W. P. Thompson v. W. P. Zartman Lumber Company*, 55 Pa.Super. 302 (1913) and *Reilly v. Mountain Coal Co.*, 204 Pa. 270, 54 A. 29 (1903). Also cf. *West Virginia Pulp & Paper Co. v. J. Natwick & Co.*, 123 W.Va. 753, 765 (1941). See also, *Lewis v. Yates*, 62 W.Va. 575, 592 (1907) quoting from *Owen v. Bartholomew*, 9 Pick. 520

- 5 Cf. *Ralston v. Groff*, 55 Pa. 276 (1867)
- 6 Contra. *Reiter v. McJunkin*, 8 Pa.Super. 164 (1898) and *Potts v. Everhart*, 26 Pa. 493 (1856)
- 7 Cf. *Di Virgilio v. Ettore*, 188 Pa.Super. 526, 149 A.2d 153 (1959); *Kron v. Daugherty*, 9 Pa.Super. 163 (1898); *Ralston v. Groff*, 55 Pa. 276 (1867); *Ogden v. Porterfield*, 34 Pa. 191 (1859); and *McCoy v. Hance*, 28 Pa. 149 (1857) 8 *Cole v. P. & L. E. R. R. Co.*, 106 Pa.Super. 436 (1932)
- 9 *Caputo v. Mariatti*, 113 Pa.Super. 314, 173 A. 770 (1934); *State v. Herold*, 76 W.Va. 537, 542 (1915); and *Morris v. Dalrymple*, 18 Pa.Super. 287 (1901). But c.f. *Hatfield v. Workman*, 35 W.Va. 578, 585 (1891) quoting from *Manufacturing Co. v. Packer*, 129 U.S. 688, 9 Sup.Ct.Rep. 385; *Ogden v. Porterfield*, 34 Pa. 191 (1859); *Hagey v. Detweiler*, 35 Pa. 409 (1860); *Armstrong v. Hall*, 15 Pa. 23 (1850); and *Sweigart v. Richards*, 8 Pa. 436 (1848).
- 10 See *Huffman v. Mills*, 131 W.Va. 219, 223, 46 S.E.2d 787 (1948) quoting *Teass v. City of St. Albans*, 38 W.Va. 1, 17 S.E. 400 (1893), *Clear Fork Coal Company v. Anchor Coal Company*, 111 W.Va. 219, 229, 161 S.E. 229 (1931); *George v. Collins*, 72 W.Va. 25, 28 (1913); and *Harman v. Alt*, W.Va., 71 S.E. 709, 710 (1911).
- 11 See *George v. Collins*, 72 W.Va. 25, 28 (1913) and *Harman v. Alt*, W.Va., 71 S.E. 709 (1911)
- 12 See *Harman v. Alt*, W.Va., 71 S.E. 709, 710 (1911) but cf. *State v. Lillie Mounts*, 118 W.Va. 53, 56, 150 S.E. 513 (1929)
- 13 *Somon v. Murphy Fabrication & Erection Co.*, 160 W.Va. 84, 90, 232 S.E.2d 524 (1977), quoted from, *Bitonti v. Kauffield Co.*, 94 W.Va. 752, 120 S.E. 908 (1923)
- 14 Cf. *McCoy v. Hance*, 28 Pa. 149 (1857)
- 15 See, e.g., *Yonker v. Grimm*, 101 W.Va. 711, 719-720, 133 S.E. 695 (1926) and *State v. Herold*, 76 W.Va. 537, 542 (1915)
- 16 Cf. *Reiter v. McJunkin*, 8 Pa.Super. 164 (1898)
- 17 quoted from Gillespie A Treatise on Land-Surveying at page 155 (Appleton & Company, New York, NY: 1881).