

Monuments As Evidence

BY ANDREA E. TIEMAN, O.L.S.
Manager, Survey Review Department

An ongoing issue which the Survey Review Department deals with, when reviewing plans and files for Comprehensive Reviews, is the basis by which surveyors accept or reject evidence in determining what represents the best evidence of a boundary. There is a wide range in the types of evidence surveyors must consider, and finding and assessing this evidence to re-establish boundaries is a major part of a surveyor's work. The types of physical evidence surveyors encounter varies around the province, but all surveyors are faced with assessing monuments. With reference to some of the problems we have noted, this article will address some of the principles and issues to be considered when assessing monuments as evidence.

In considering the priority to be given to the types of evidence, the highest priority, after natural boundaries, is to be given to original monuments in their original position. The concept that original monuments govern or control the position of a

boundary is prescribed by both common law and statute law. With such an inflexible rule, it would seem that assessing this type of evidence would be very straight-forward. However, when monuments are found in the field, they do not have a sign on them stating "Original monument in original location".

When is a monument an original monument? "Original post" is defined in the *Surveys Act* as ".....any object that defines a point and that was placed, planted, or marked during the original survey or during a survey of a plan of subdivision registered under the *Land Titles Act* or the *Registry Act*". Monuments planted for a severance, whether represented on a deposited Reference Plan or undeposited plan to first establish a boundary on the ground, are also original monuments.

When we think of original monuments, there may be a tendency to think of something old, planted years ago, but original monuments are being planted all the time.

FIGURE 1

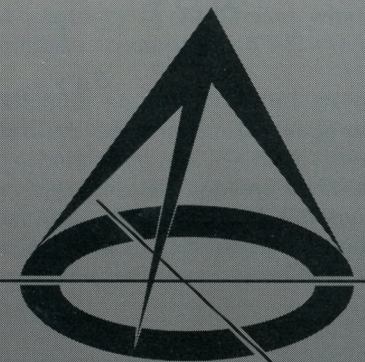
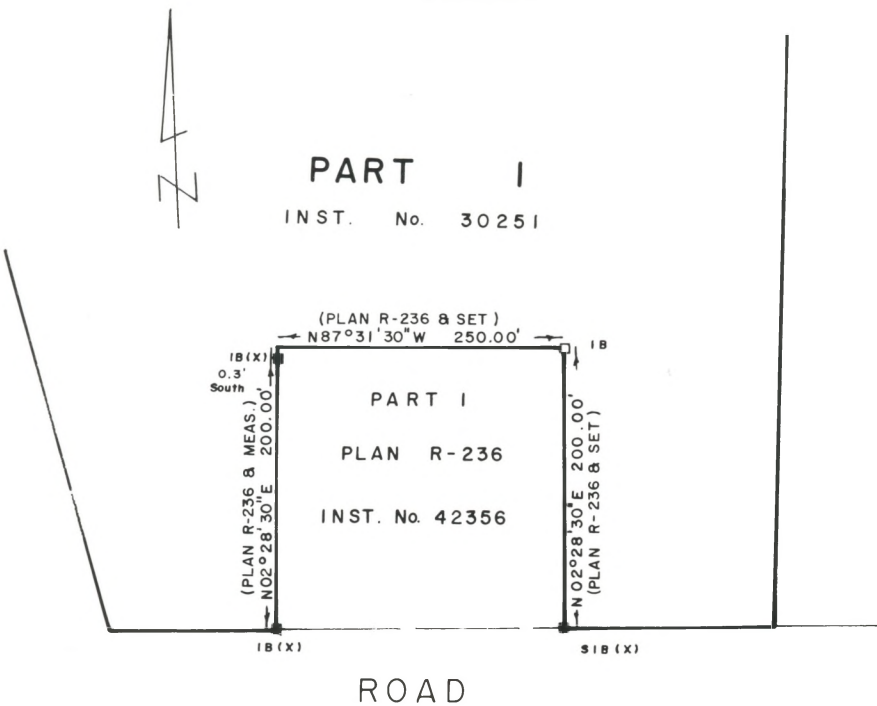


FIGURE 1

The Reference Plan, R-236, prepared by Surveyor X, represents the original survey of the lands now described by Instrument Number 42356, and the monuments planted in the course of that survey are original monuments. The original monument found at the northwest corner of PART 1, Plan R-236, if in its original position, must govern the location of the corner. We have found many examples where original monuments are not being accepted as the best evidence of property corners.

In considering if a monument is in its original position, disagreement with plan dimensions alone is not sufficient reason to conclude that the monument is not in its original location.

FIGURE 2

The first example represents a straight-forward situation where the conclusion that the found monument should have been held is reasonably certain. In many cases, it may not be clear if the monument found is an original monument.

When we look at plans, as in Figure 2, where a monument of unknown origin is rejected as evidence of a corner in favour of a deed distance, the first question that arises is whether any effort was made to determine who planted the monument. In assessing the significance of any evidence, research is essential. Is it an original monument? Does it replace an original monument? Is there direct evidence available to prove it is not in its original location? Was it planted in the course of re-establishing an existing limit? Was it planted as a witness to the corner?

FIGURE 2

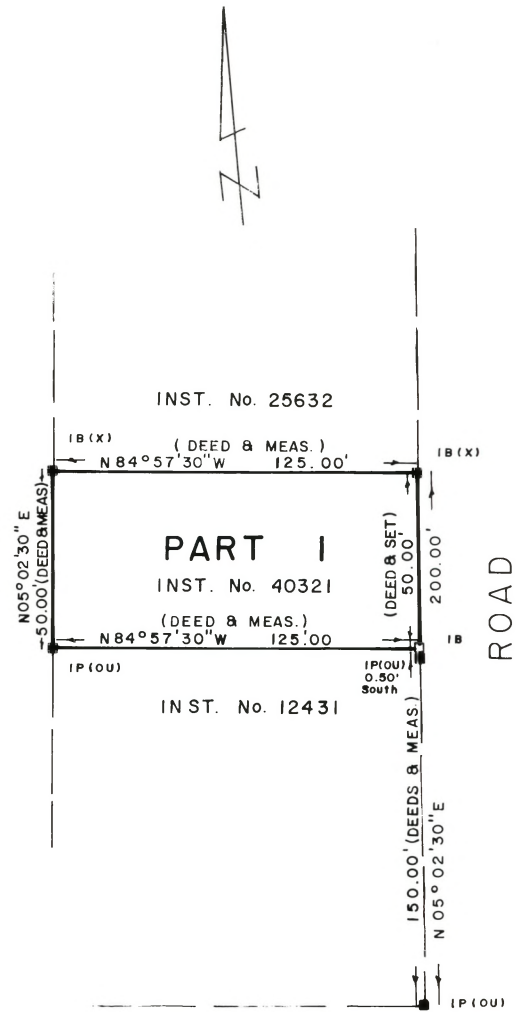
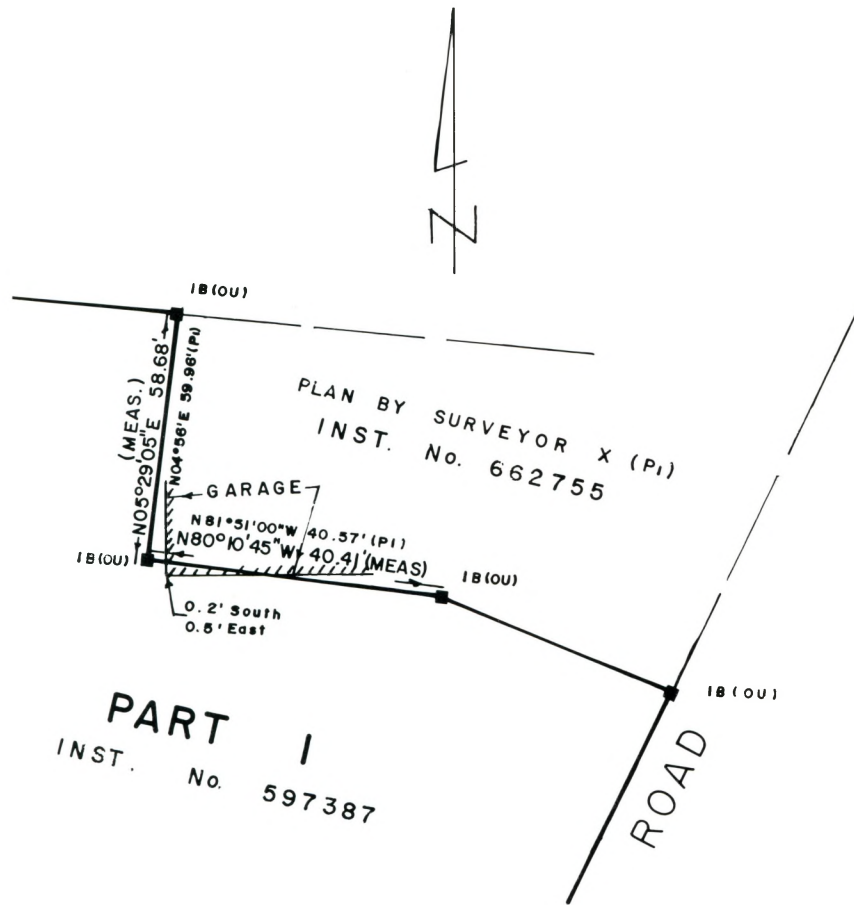


FIGURE 3



Without researching other surveyors' records, these questions cannot be answered. If no record can be found, then consider whether it can be concluded that it is **not** an original monument.

An important principle in real property law is that the burden of proof lies upon the party who wishes to upset the settled situation. In *Palmer v. Thornbeck*, it was held that in any action brought to determine the true boundary line between properties, the burden of proof lies upon the plaintiff who seeks to change the possession. This principle must be applied when assessing physical evidence on the ground, including monuments.

When this issue is raised, surveyors often state that the found monument should not be held because there is no record of any surveyor planting the monument, or because it is felt that the monument is not an original monument, or because of an assumption, based on disagreement with deed dimensions, that it is disturbed. These reasons indicate that the burden of proof principle is reversed in the minds of many surveyors. Dis-

agreement with dimensions contained in deeds or as shown on plans alone is not sufficient reason to reject a found monument as evidence of a property corner.

In defining the judicial functions of a surveyor, W. Marsh Magwood, Q.C., quoted Justice Cooley of the Michigan Supreme Court. The following is part of that quotation: "When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible to accurate solution, he is likely to be not a little impatient when he is told that under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors".

When a monument does not fit the theoretical corner, the idea that it is necessary to prove that it marks the corner before it can be accepted is a faulty application of the burden of proof principle. It is necessary to prove that it **does not** mark the corner. This is not an argument for accepting all found monuments. Before accepting a monument, you must be satisfied, through research, that there is nothing to prove that the monument does not mark the corner. Discussions with property owners may reveal that a monument has been moved from its original position. This is one example of sufficient proof. Figure 3 is another example.

FIGURE 3

This is an example where a previous survey provides sufficient proof to not accept a monument for the corner.

In this case, Surveyor X did a survey of the lands now described in Instrument Number 662755 and prepared a plan, P-1. No monuments were found or planted at the northwest and southwest corners of the property. P-1 did show ties from the garage to the south limit and also showed the IB on the south limit at the bend. For the current survey of the adjacent lands an IB (OU) was found and held for the southwest corner of the lands described in Instrument Number 662755. The dimensions and building ties shown on P-1 indicate that this corner is approximately 1 foot south of the found IB (OU). This direct evidence provides a good reason not to accept the monument as the property corner.

FIGURE 4

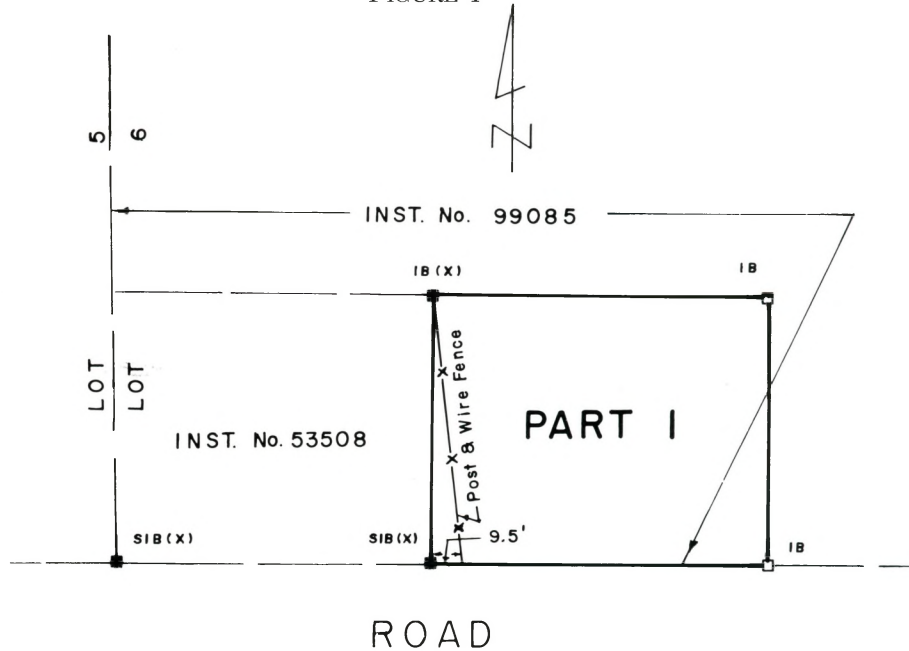


FIGURE 4

Monuments planted in the course of re-establishing an existing boundary represent that surveyor's opinion and do not necessarily govern the position of that boundary. Better evidence must be considered.

When monuments are found to disagree with another form of physical evidence, as in Figure 4, a decision as to what represents the best evidence cannot be made without doing research. Do the monuments represent original monuments, planted to first establish the boundary? If they were planted to re-establish an existing limit, on what basis were they planted? Was there other physical evidence present when the monuments were planted? How and when did the physical evidence originate? What do the property owners recognize as their boundary?

In this case, the monuments were planted by Surveyor X to re-establish an existing limit, the east limit of the lands now described in Instrument Number 53508. These monuments were set in accordance with the dimensions called for in Instrument Number 53508. Surveyor X's field notes show that the post and wire fence was existing at the time the monuments were planted. The fence was built when the property was severed and is recognized by the owners (Instrument Number 53508) as their boundary.

When found monuments are not original and have not been recognized by property owners, and better evidence is available, there should be no hesitation in rejecting these monuments.

FIGURE 5

As stated above, monuments planted in the course of re-establishing an existing boundary represent that surveyor's opinion and do not necessarily govern the location of that boundary. In considering what constitutes better evidence, it is necessary to distinguish between better evidence and "better method".

In this example, all of the monuments shown as found were planted by other surveyors to re-establish existing limits. Some of these monuments were accepted and others were not. We have seen a number of surveys where boundary retracement appears to be a technical exercise of obtaining the best mathematical fit. The monuments that agree with the mathematical solution are accepted and the monuments that don't agree are rejected. Is this a case of better evidence or "better math"?

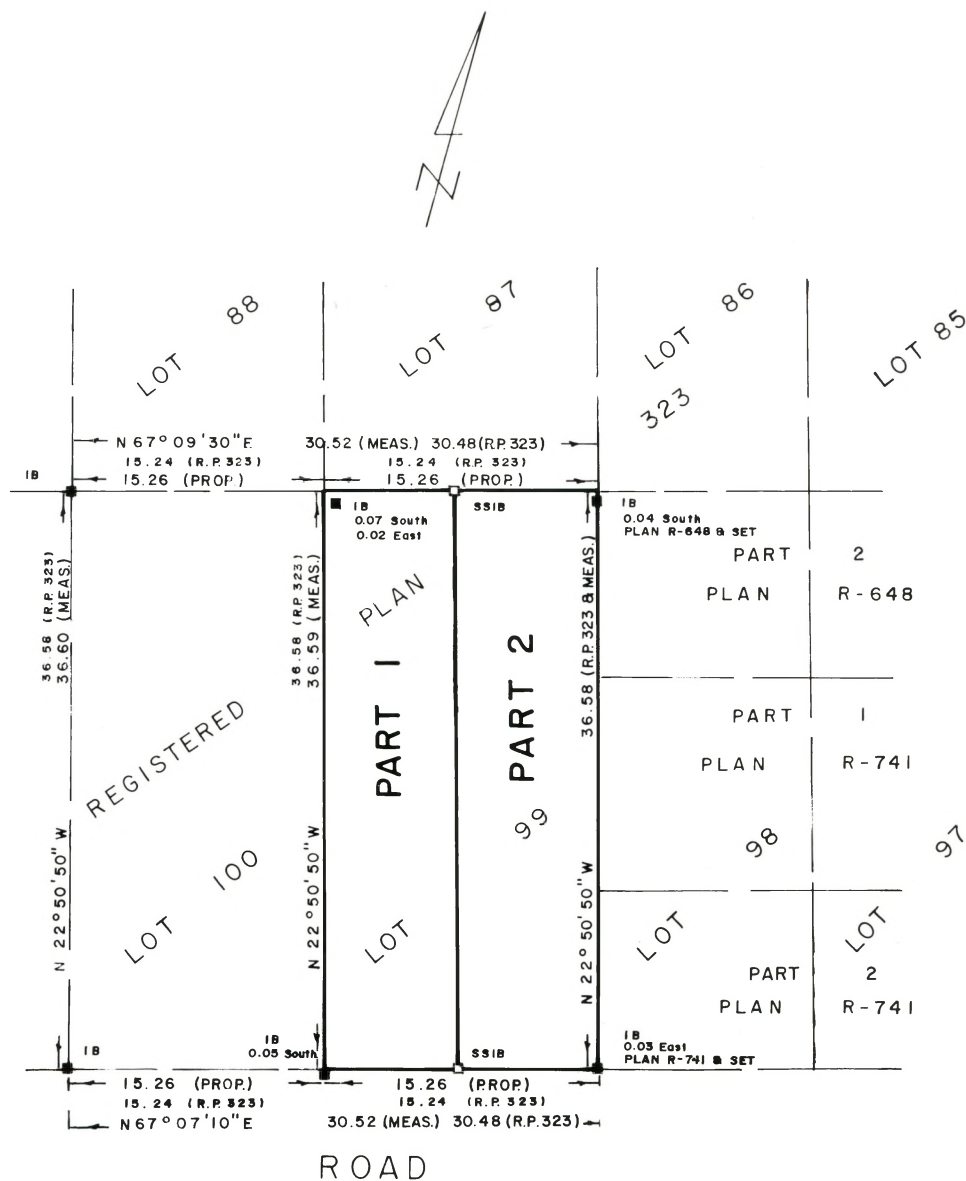
For this survey, the IB was not accepted as marking the northwest corner of Lot 99. A review of the previous surveys in the area by a number of surveyors show that this monument was planted during the course of surveying Lot 88. It was accepted as marking the northwest corner of Lot 99 for a previous survey of that lot. For a survey of Lot 87, it was held to be 0.05m west. For a survey of Lot 85, it was held to be 0.04m south. In each case, the property corner was different relative to the monument on the basis of the lot surveyed and the evidence and method used. It would seem that "better math" will lead to a different solution almost every time.

Although these found monuments were not original monuments and as such represent another surveyor's opinion, is it really worth putting forth a "better" opinion when the differences are minor?

These five examples raise some of the issues that have to be considered when assessing monuments as evidence. It is clear that a decision to accept or reject a monument is not straight forward. To adequately assess the significance of any evidence, including monuments, research is essential. The reasons for accepting or rejecting monuments as evidence must be in accordance with common law and statute law.



FIGURE 5



Coming Up ... in the Summer Issue

Survey Plans and the First Running of the Line

(by Andrew Mantha)

Disclaimers, Waivers and Indemnities: Limiting the Liability in Data Sharing Relationships

(by Izaak de Rijcke)