First Notes on Historical Context in Boundary Retracement - Monumentation

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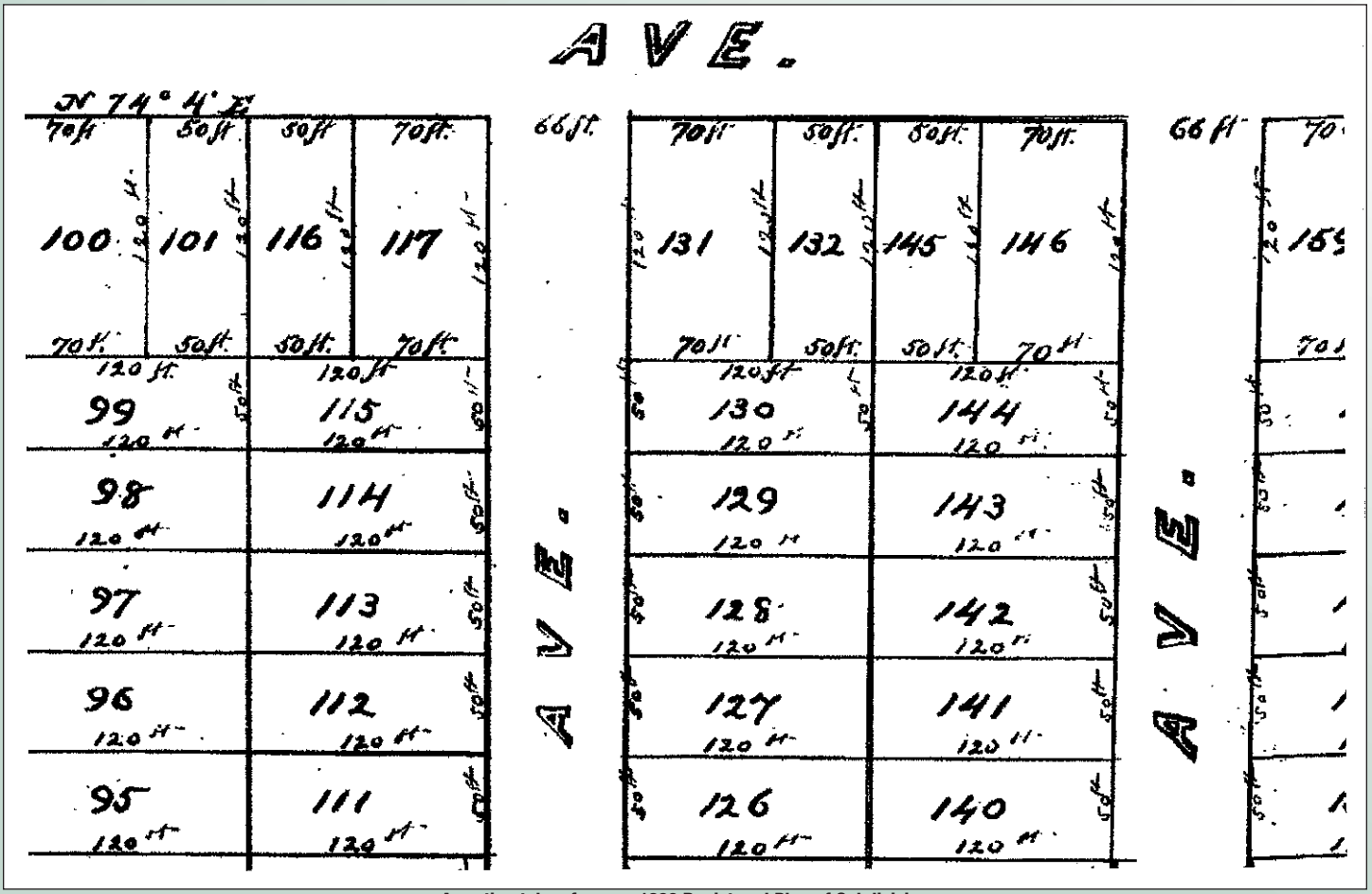
Surveyors understand that they are required to know current statutes and regulations affecting boundary survey practice. But many boundaries were created under statutory provisions that were significantly different from those currently in force. The status of those boundaries does not change with revision or repeal of statutory authority, as set out in section 3 of the *Surveys Act*, R.S.O. 1990, c. S.30, which states that

> All lines, boundaries and corners established under the authority of any Act heretofore or hereafter in force remain valid and all other things done under any such authority and in conformity therewith remain valid despite the repeal of such authority.

It is therefore necessary to understand the historical context in which boundaries were created and established on the ground.

For example, several years ago I was questioned about an 1872 subdivision plan which created tiers of regularly dimensioned rectangle lots, typical of older grid pattern subdivisions. The plan did not show any monuments, either found or planted, but was signed by a Provincial Land Surveyor. In the course of discussion, I made the comment that, in the absence of evidence to the contrary, it was reasonable to presume that stakes were planted to mark the lot corners, in spite of the fact that none were shown on the plan. My perspective was perceived to be absurd, and I was told that the presumption should be the opposite—that no monuments were either found or planted simply because none were shown. But that viewpoint was based on limited understanding of current regulations without the benefit of historical context. Was the plan a mere picture? Or is there evidence underlying the lines and corners drawn on the plan? Let's look at the history.



A portion taken from an 1890 Registered Plan of Subdivision

Practice Prior to 1899

A perusal of survey plans drawn prior to 1899 will demonstrate that the illustration of monuments on plans, either found or planted, was a very rare occurrence. Towards the end of the 1800s, subdivision plans occasionally showed 'found' monuments at some (but not all) corners of subdivided lands, but never (to this writer's knowledge) showed 'planted' monuments. At first glance—at least to a lay person—this could lead to a conclusion that posts were not planted at all in surveys underlying subdivision plans of that era.

The general perception in 19th century survey practice was that if monumentation was to occur, posts would be planted and scribed with distinguishing features, but not shown or noted on any returned plans. In very early township subdivisions (late 1800s and early 1900s), in general, neither the plans nor the field notes indicated that posts were planted. But Crown Instructions issued to surveyors specifically (or by implication, as defined by the system of survey) required posts to mark particular corners of lots or sections. Most field notes for later 19th century township surveys indicated (sometimes in an irregular fashion) that posts were planted, but the corresponding township plans did not include any indication of monuments—it was simply understood that posts were planted pursuant to the particular Township Survey System specified in the surveyor's Instructions, both General and Specific; the latter at times varying the specifications of the particular System.

The original township surveys served two basic purposes: (a) to acquire topographic, geologic and other information about the land (as specified in Instructions); and (b) to set lot corner posts, scribed for concessions and lots, to guide would-be settlers (and timber men) to their allotted parcels. Without the posts, how would settlers locate their allotment?

In addition to original townships (the plans of which were not recorded in Land Registry Offices for many decades—and many are still not to this day), many subdivisions were done for 'Town' or 'Village' lots that were not recorded in Land Registry Offices, including Crown Surveys used for settlement. Many town or village plans were, however, eventually recognized and recorded in Land Registry Offices in some way or other; the plans were usually 'filed' (today's word is 'deposited') for reference, often (but not always) being noted in existing abstract indices.

In general, similar to township plans, 19th century town or village subdivision plans were drawn to represent the sizes of the various subdivision units, but posts were not shown on the plans even though in most cases posts were actually planted, as evidenced by accompanying field notes, reports and, on occasion, diaries. When field notes are not available, the question arises as to whether posts were planted or not.

The *Registry Act* Prior to 1899

In 1865, the *Registration of Deeds Act* was amended to require Land Registrars to create abstract indices based on geographic fabric, as opposed to the former methods of abstracting by date and/or alphabetical listing. From that time on, new abstract indices were opened for each lot created by registered subdivision plans. Sometimes the abstract indices were opened at the time of registration of the plan. Others were opened when needed; for example, when a document was received for filing or registration that, in the description, referred to a particular geographic unit for the first time.

The statutory requirements for registration of subdivision plans immediately prior to 01 April 1899 were set out in section 100(1) of the *Registry Act*, R.S.O. 1897, c.136, which dealt with timing, scale, lot fabric (both new and underlying), and dimensioning. However, there was no requirement to show lot fabric monumentation on subdivision plans and, in fact, (to the author's knowledge) new monumentation was never shown on subdivision plans prior to 01 April 1899, whether any was actually placed or not.

Significant *Registry Act* Amendment

A significant change to section 100(1) is set out in section 9, S.O. 1899, c.16. Subsequent to enactment of the amendment, in preparation of subdivision plans for registration, the statute required that

> the position of all the posts or monuments, if any, planted by the surveyor, or of other objects marking the boundaries of any of the said lots or the corners thereof shall also be shown [on the subdivision plan].

From that time on, with few exceptions, registered subdivision plans showed the location of any posts that were planted for new subdivision fabric. However, some subdivision plans were still being registered without showing posts at all corners; there was no requirement to plant posts, only to illustrate on the plan any that were found or planted. As a result, some subdivision plans show monumentation of some lots, but not others. In such cases, actual monumentation is clear. But what about early 20th century plans that do not show any posts?

The 1899 statutory provision was consolidated in R.S.O. 1914, c.124, s.81(4) and continued in force for decades thereafter, being replicated as section 86(4) in R.S.O. 1960, c. 336. The first statutory specifications for subdivision monumentation were introduced in a 1915 amendment to the *Surveys Act* (S.O. 1915, c.29), which required the 'exterior angles' to be marked by monuments of specified composition. When Ontario regulations governing survey plans prepared for registration were introduced in 1958 under the *Land Titles Act* (Regulation 111/58, and see S.O. 1958, c.49, s.6), then brought *mutatis mutandis* under the *Registry Act* in 1964, section 86(4) of the *Registry Act* became redundant and was repealed by S.O. 1964, c.102, s.22. The 1964 amendment introduced a reworded section 86 that, in subsection (1), simply stated

> A plan of subdivision shall not be registered unless it has been prepared by a surveyor and unless it complies with the regulations.

The 'exterior angle' requirement introduced in 1915 last appeared in section 55 of the *Surveys Act*, R.S.O. 1960,

c.390. Today, all monumentation, both found and placed, must be shown on Plans of Survey as required by Regulation 525/91 under the *Surveyors Act*, R.S.O. 1990, c.S.19.

Discussion

Analysis of the historical context leads to certain observations and considerations.

1. In interpreting subdivision plans of the 1800s—those dated prior to the 1899 amendment—in the absence of field notes (which is usually the case with private subdivisions), the question of monumentation arises: were posts planted or not? The issue can be important. For example, suppose a situation where 20th century iron bars or pipes are found on the ground that do not fit plan measurements by a significant amount. In the absence of any other evidence, three propositions could be considered:

(a) if there was no original monumentation, the found posts could be considered as best evidence of the first marking, which will govern based on well-known common law principles enshrined in many cases such as *Palmer v. Thornbeck* (1877), 27 U.C.C.P. 291 (C.A.);

(b) if original monuments were planted, the found posts could be simply replacements of originals which were removed or have since deteriorated, as in the much-cited reasons of Justice Cooley in *Diehl v. Zanger* (1878), 39 Mich. 601, which was cited with approval in several Canadian cases such as *Home Bank of Canada v. Might Directories Limited*, (1914), 31 O.L.R. 340, 20 D.L.R. 977 (C.A.), and *Bateman and Bateman v. Pottruff* [1955] O.W.N. 329 (C.A.); or

(c) the found posts may have been planted by someone who presumed that there were no original monuments and blundered in attempting to mathematically construct the lot fabric. It is clear law that boundaries cannot change in position based simply on interested parties' acceptance of, or acquiescence to, errant retracement. Such a change would be contrary to (a) the *Statute of Frauds*, R.S.O. 1990, c.S.19, and the *Conveyancing and Law of Property Act*, R.S.O. 1990, c.C.34, which require paper to evidence the resulting transfer of property; and (b) the *Planning Act*, R.S.O. 1990, c.P.13, which requires land division consent. (See *Bea v. Robinson* (1977), 18 O.R. (2d) 12, 3 R.P.R. 154, 81 D.L.R. (3d) 423 (H.C.); and *Re Turner et al. and Turner Funeral Home Ltd.*, [1972] 2 O.R. 851, 27 D.L.R. (3d) 30.)

On the basis of historical context, it is suggested that in such cases it should be presumed that original monumentation was in fact planted and that the measurements set out on the 19th century plan represent evidence of the location of those posts, notwithstanding the absence of any posts being shown on the plan. If, by reference to field notes (for example), it can be shown that the found posts were not planted with reference to pre-existing monuments (viz. they were set out by mathematical method—or blunder—without reference to original posts), would not the measurements of the original plan be sufficient to override the found monuments if any of the original fabric can be retraced? The notion of subservience of measurements, set out in the well-known evidentiary principle colloquially recognized as 'priorities of evidence', only applies where evidence of intention is equivocal; where evidence is clear, measurements can take priority over existing survey markers, as confirmed in *Richmond Hill Furriers v. Clarissa Developments* (1996), 141 D.L.R. (4th) 536. *(See article by David Lambden, O.L.S. in The Ontario Land Surveyor, Vol. 40, No. 1, page 7.)*

2. It was noted above that, except for the 'exterior' angle provision introduced in 1915, *Registry Act* subdivision plans from 1899 to 1964 may or may not have been monumented and, in accordance with the *Registry Act* in force at that time, if none were planted, then none would appear on the corresponding subdivision plan. But there is the possibility that a surveyor in the early 1900s may not have been aware of the 1899 statutory change—or may have simply ignored it by continuing their pre-1899 practice.

It is suggested that, in the absence of field notes or other records to answer the question (again, usually the case in private subdivisions), plans of that vintage can be viewed as *ancient documents*. From *Black's Law Dictionary* (5th edition), these are:

> Documents bearing on their face every evidence of age and authenticity … and coming from a natural and reasonable official custody. These are presumed to be genuine without express proof, when coming from the proper custody.

This definition does not speak to the accuracy of the information contained in the document—only that the ancient document can be accepted as being a valid representation of the document itself for admissibility purposes. However, in the absence of evidence to the contrary, it must be presumed that the document—or, specific to our topic, the old subdivision plan—was a valid representation of contemporary conditions and was prepared in accordance with any statutes or regulations in force at that time. By corollary, and again in the absence of evidence to the contrary, it can be presumed that no monuments were planted if none were shown on the plan and, consequently, that the lot fabric was all theoretical.

There are, potentially, many other possible considerations and questions regarding monumentation, which will only arise in specific circumstances. Certainly readers will identify their own experiences with respect to statutory change, and not just with respect to monumentation.

The principles discussed above have been considered with an Ontario background, but will apply in other common law jurisdictions as well. However, the purpose of this article is to instill a perspective of historical context when interpreting old documents and plans which can play a significant role in boundary retracement issues.

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