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Extrinsic Evidence: The Key to Accurate Retracement

The silent helper in boundary retracement is extrinsic evidence. Extrinsic evidence is defined as evidence external to the writing, which, in the context of accurate retracement, means external to the writing constituting the controlling grant (or referenced by the controlling grant, as in the case of a subdivision plat). Understanding the doctrines surrounding this topic is essential to correct placement of boundary lines, because we typically are confronted by more extrinsic evidence than any other kind of evidence during the work.

A little groundwork first. As most surveyors can recite, the reason grants or other transfers of land interests must be in writing stems from the provisions in the Statute of Frauds, passed by the English Parliament in 1677. That law, as its name suggests, was concerned primarily with the prevention of frauds, such as had been perpetuated against grantees to land as a result of unwritten transfers like *livery of seisin*. The Statute required that thenceforth any litigation over land grants had to be based on written documents, essentially declaring unwritten transfers to be revocable licenses. After the Revolution, all of the states adopted that Statute (among other provisions of English law) as part of our law. Hence, its application to us today.

The underlying presumption with the Statute is that the total understanding between the parties is expressed in the writing. Thus, the writing testifies to third parties (like courts and surveyors) as to the nature and intent of the transaction, and stands as a protection for both parties should someone later claim a contrary effect. Unfortunately, reducing human intent to prose is an inexact science, prone to inaccuracies and ambiguities. Nevertheless, the courts have held that the writing is the first resort in understanding the agreement.

Kinds of Ambiguities

But what to do when the document is unclear? Recognizing that ambiguities are a frequent occurrence in legal writings, the courts generally have honored the maxim "that is certain which can be made certain." Here we find another wrinkle: There are two species of ambiguity: patent and latent. A patent ambiguity is one which is obvious on the face of the document as being unknowable, the classic example of which is a deed conveying "a lot on Main Street" with no further clarification. Patent ambiguities fail on their face; extrinsic evidence is not competent to clarify their meaning, although there is a trend among jurists to bend over backwards attempting to give effect to otherwise void transactions. (Perhaps the easiest patent ambiguity to recognize as a failure is *no description at all* in the document. Clearly that is a non-starter, and as a result, the conveyance is void.)

Latent ambiguities, on the other hand, are those defects brought to light only after analysis. The iron pipe called for at the end of 100.00 feet is actually found at 100.20 feet. Or there is no iron pipe found at all. These anomalies are only discovered after introducing extrinsic evidence into the mix. They cannot be detected by examining the document alone. Your measurements in retracing that line, as well as the characteristics of the monument (or its absence!) are forms of extrinsic evidence. Only the rarest of artificial monuments can be identified without taking into account the apparent age, condition, character and surrounding circumstances of the object–in other words, extrinsic evidence. Thus, whether recognized as such or not, extrinsic evidence has been the surveyor's companion since time immemorial.

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Deeper Link

But there is a more basic link between our practice and this doctrine: the Rules of Construction are triggered only as a result of it. Think about that: were

it not for latent ambiguities, boundary retracement would be a mere geometry exercise. Where there is no conflict between the various title elements, there is no "pecking order" among them; all are equally to be gratified. Don't despair: latent ambiguities are present in *every* retracement, without exception. Is the courts' trust in the supremacy of the writing misplaced? Not necessarily. I suspect the root causes of the problem have to do with the nature of measurement itself and the activities normally occurring on property. In the most abstract sense, the land *itself* is extrinsic to the writing. Viewed from that perspective, it is no wonder that anomalies are found when trying to reconcile a document of a few hundred words with something as complex and as susceptible to change over time as a tract of land.

However, plain, unambiguous language must be taken at face value as expressing the intention of the parties. Thus, one will find references in case law to "examining the four corners of the document" and the like, which refers to considering the document as a whole and trying to discern its meaning, without resort to external clarification. We must be careful on this point. Surveyors (and I mean the "good guys" here) sometimes over-analyze the evidence and ignore clear directives in the original grant, where we have no authority to do so–all in the name of "intent."

Here is a common example: an agreement for a sewer easement unambiguously defines the easement to be in a certain place, but you have found the constructed sewer four feet away from that location. The construction documents indicate that the sewer was intended to be in the center of the easement. Which controls, the agreement or the sewer?

Simply put, external evidence cannot be used to alter or modify unambiguous wording in a grant. The logic here is extremely compelling: if even clear language can be disregarded, why write *anything* down?

Clarification

So our use of extrinsic evidence is one of clarification, not substitution. We stand not in the shoes of the parties, but in the shoes of their audience. Only when they fail to give us sufficient guidance as to what they meant to do can we look around for clues.