

the *American* Surveyor

AUGUST/SEPTEMBER 2015

REVISITING COOLEY

Mobile Mapping

A decade of experience

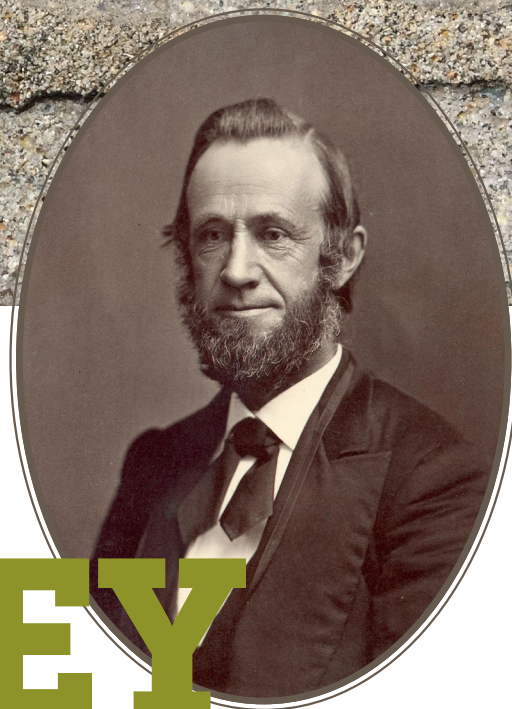
Soldier/Surveyor

Transforming our Capital

Test Yourself

Sharpen your pencils!





UNIVERSITY OF MICHIGAN LIBRARY DIGITAL COLLECTIONS.
BENTLEY IMAGE BANK, BENTLEY HISTORICAL LIBRARY.

Revisiting COOLEY

It is time to revisit Cooley.

Over the last few years, there has been a precipitous and noticeable decline in the quality of boundary line surveying, evidenced by an upswing in these kinds of disputes, as well as anecdotal stories that travel across the waves of the Internet.

Regrettably, with the proliferation of fancy, push-button measuring equipment, less attention is being paid to the principles of boundary surveying and more is being paid to the equipment. With each passing day, as more and more people are mesmerized by the ability to measure things with great precision, there is a corresponding rise in the level of inaccuracy. More and more people know how to measure while fewer and fewer know how to survey.

It is therefore time to drop in on Justice Thomas McIntyre Cooley.

Justice Cooley was one of the main reasons the late Curtis Maitland Brown began researching boundary law, resulting in the publication of his own informative articles and popular textbooks. Like many other Land Surveyors, Curt was drawn to Cooley because of his skills as a jurist as well as his expertise with the pen. Judge

Cooley is one of the best known judges in the country, an honor earned when he served the Great State of Michigan as a State Supreme Court Justice. His legal acumen is notably memorialized in his well-respected tome, "A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union." Written in 1868, his treatise has been long recognized as one of the most important treatises on constitutional law. He was also the first legal scholar to definitively interpret "due process of law," mentioned in the Fifth and Fourteenth Amendments to the Constitution. Legal scholars have long recognized Cooley for "consistently defending constitutional government and its ability to protect the rights of individuals from arbitrary actions by the state."

Within the land surveying community, Cooley is best known for his seminal paper, "The Quasi-Judicial Functions of the Land Surveyor." Amongst the many observations and opinions Cooley made regarding the responsibilities of the Professional Land Surveyor, the following observations remain poignant, particularly in today's testosterone driven and technologically fueled world of instantaneous measurement.

» MICHAEL J. PALLAMARY, PS

Above: These monuments are found in a commercial area in a Southern California beach community. One of these agrees with the improvements; the foundation for litigation has been laid.

Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State statute, disregard all evidences of occupation and claim of title and plunge whole neighborhoods into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize.

It is often the case that, where one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit, when the people concerned do not question them, not only breeds trouble in the neighborhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common sense must declare

that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared.

The mischiefs of overlooking the facts of possession most often appear in cities and villages.

Two lot owners quarrel, and one of them calls in a surveyor, that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is error in the street line, and that all fences should be moved, say 1 foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled.

It is not likely that the lot owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding someone disposed to do so. We shall then have a lawsuit; and with what result?

I have thus indicated a few of the questions with which surveyors may now and then have occasion to deal, and to which they should bring good sense and sound judgment. Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions. What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value

From 1864 to 1885, Cooley was in a unique situation to comment on the formative years of American boundary surveying while serving as the Chief Justice of the Supreme Court of Michigan, a role that permitted him to lay the legal



With the passage of time, original monuments are destroyed and when this happens, fences are the best evidence as to the location of boundary lines.



When walls and fences are built and the original monuments, often wooden hubs, are destroyed, the improvements built in reliance on the markers define the line, not a new mathematical solution.



Constant remeasurements that do not take into consideration improvements based on original evidence fosters litigation. GPS is a tool and not a weapon.



Measuring equipment, if used properly, can aid the surveyor. Common sense and an understanding of the law, are the best tools. One must "follow in the footsteps."

A SAMPLING OF LAWSUITS REFERRING TO COOLEY

Oregon, 2004

Joseph Dykes and Zan Dykes, Appellants - Cross-Respondents, v. Joe D. Arnold, Trustee for the Arnold Living Trust, 015185; A121699, Appeal from Circuit Court, Lincoln County, Charles P. Littlehales, Judge.

Maine, 1998

Mary A. Steinherz v. Richard D. Wilson, Maine Supreme Judicial Court, 1998 ME 22, Yor-96-723.

Michigan, 1992

Adams v. Hoover, 493 NW2d 280, Court of Appeals.

Utah, 1988

Hansen v. Stewart, 761 P.2d 14 (1988), No. 19383, Supreme Court of Utah.

California, 1899

H. W. Hellman, Respondent, v. City of Los Angeles, Supreme Court of California, Department Two, 125 Cal. 383; 58 P. 10; 1899 Cal. LEXIS 868.

framework for some of the country's most important rules of land surveying, rules that empowered the Land Surveyor. Regrettably, over the passage of time, many of the important rules and principles espoused by Cooley have been neglected by people who push buttons and measure things with satellites. Nonetheless, and in spite of the power of technology, his commentary remains an impressive effort to define many important precepts of law relating to boundary conflicts at a time when the first wave of original survey monuments began to disappear and the all too familiar defects with older subdivision maps came to light. In commenting on the original "record" monuments placed in connection with these early maps, Cooley succinctly described them as "nothing but green sticks driven into the ground."

One of Cooley's definitive cases attained even broader legal recognition because

it was the product of litigation, imbuing it with legal authority. The case, entitled "John C. Diehl and Christine Diehl v. Ferdinand Zanger and Magdalene Zanger," (39 Mich. 601), offers the following conclusions of law:

"A re-survey, made after the monuments of the original survey have disappeared, is for the purpose of determining where they were, and not where they ought to have been."

"A long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared."

"Long practical acquiescence in a boundary, between the parties concerned, may constitute such an

agreement on it as to be conclusive, even if it had been erroneously located."

"If all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity."

Computers are fascinating devices. They change the way we look at the world and in many cases, define the world as we know it or, as many carelessly accept it - decisions driven by intellectual apathy or analytical anemia. All too often, it is the computer that does the thinking by "solving" the problem with a simple click of a mouse or the pressing of a button, producing a solution to the query, limited



How many times must a line be measured before it is deemed correct?

as it may be. And yet, no matter how fast and accurate computers are, they cannot solve surveying problems. These electronic boxes, powered by 120 volts of electricity along with an array of Bluetooth enabled measuring devices remain nothing more than tools; they are merely calculation and measuring devices. For too many button pushers who rely excessively on these tools are good at measuring things and drawing lines, as competent as my granddaughter is at such things and as with her, they do not understand the rules of land surveying. Just because one can measure, that does not make them a surveyor.

As to the application of the venerable Justice Cooley to this dilemma, let us discuss an urbanized neighborhood, one where the lots are small and every inch has value. In these localities, people do not build their homes casually; their residence is their greatest single investment. Homes like these, and appurtenant improvements such as walls, fences and streets are all laid out based upon monuments, maps, and measurements with the measurements both logically and legally

derived from the monuments and maps. It is the chicken and not the egg. As Cooley so pertinently noted, the homes and surrounding fences are often, if not always, the best evidence as to where the original lines were laid out. Houses don't fall out of thin air Dorothy; we're not in Kansas anymore. My distinguished friend and colleague Jeff Lucas touched on Cooley in his insightful and valuable work, "The Pincushion Effect" (ISBN: 978-1-257-86758-5).

"One thing we can say about Justice Cooley and his opinion in Diehl v. Zanger, is that it never gets old. The fact that the courts today still have to refer to Cooley is an indictment of the land surveying profession. Paraphrasing Cooley from that opinion, land surveyors have mistaken entirely the point to which their attention should have been directed. Instead of focusing on trying to make technically correct surveys based on new measurements, land surveyors should be focused on retracement of the original boundaries, the law and equity. Diehl was decided in 1878. After 133 years you would think the land surveying profession would have gotten the message by now. How much longer will the general landowning public put up with this nonsense?"

Across the country, courts continue to invoke Cooley's valuable words when ruling on boundary line disputes. I submit that if one wants to understand that laws of surveying, turn the satellites and monitor off. Justice Cooley is calling, pick up the line.

In many instances, a longstanding fence, built in harmony with original monuments, may define the line. All evidence must be considered before proration—a rule of last resort.

Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity.

—Justice Thomas Cooley ■

Michael Pallamary, PS, is the author of several books and numerous articles. He is a frequent lecturer at conferences and seminars and he teaches real property to attorneys and other members of the legal profession. He has been in the surveying profession since 1971.

