

ABSTRACT

The year 1992 is the sesquicentenary of the passing of an Act to incorporate the City of Sydney under the title of the "Mayor Alderman Councillors and Citizens of the city of Sydney".¹ The Act prescribed, among other things, that the Mayor and Town Clerk should perform a triennial perambulation of the boundaries of the City and its six wards. It is a reminder of special problems of social organisation (and the transfer of knowledge generally) when there are difficulties in articulating knowledge or where low standards of literacy prevail. It is also of interest in the way it attempted to adapt English ideas of local government to the circumstances of New South Wales.

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Spatial Orientation and Social Organisation

Spatial orientation is important to social and economic organisation. The law decrees that particular rights and obligations will prevail in specific places. These places may comprise individual land parcels, various administrative districts or a whole jurisdiction. Hence spatial orientation becomes a fundamental aspect of social policy and may go to the root of political constitutions. If the law is to govern the territorial behaviour of people, they need to understand the limits or boundaries of those specific places in their own terms and with sufficient accuracy for their own purposes.

The minimum requirement to ensure effective social control is a system of unique and relatively permanent landmarks together with an understanding of what the landmarks symbolise in terms of prescribed human behaviour. A natural boundary such as a river or seashore might suffice for some purposes. However they are not always conveniently located, and the case law regarding such boundaries suggests they often lack specificity. Landmarks can be created to represent artificial boundaries, and a written record can be established to describe the marks and what they symbolise. But written boundary descriptions are often technically difficult and costly to produce. Alternatively, it could be decreed that some line (of latitude or longitude for example) is to be a boundary, but its position would not be readily ascertainable on the ground by an ordinary person.

Social controls may breakdown if either the landmarks or the meaning which attaches to them is lost. Some loss of landmarks might be tolerable if surveying technology is available to record the relative position of marks. This allows reinstatement of the original positions, more or less. But precision of reinstatement can vary widely and depends on many factors including:

- the stability of marks and ground conditions
- the precision and configuration of the original measurements used to record relative landmark locations and of later measurements used for reinstatement purposes
- the configuration of lost landmarks

Methods of Recording Boundary Information

Social organisation depends on being able to create and perpetuate knowledge of the rules under which a society operates. In other words, the rules need to be memorised at a social level in what might be termed "collective memory". If the knowledge is to influence human behaviour it must be available, at least temporarily, within the short term memory of individuals. A society which is forced to rely on living human memory alone is subjected to significant organisational constraints. There is a need to pass the knowledge from person to person and from generation to generation. If communication is to take place, people need to be in the same place at the same time. If the knowledge is remembered by too few people it might be lost through their permanent absence or death. Knowledge can also be corrupted unintentionally through human error or intentionally as a perpetration of fraud. As a consequence, the knowledge pertaining to some rules, was obtained and perpetuated by a process of communal witnessing of events. It is nowhere more evident than in rules regarding property rights in land.

There is no substitute for human memory in that a person's behaviour cannot be influenced by rules unless he is cognisant of them. But a significant organisational constraint is removed when knowledge can be articulated and recorded as written language. Communication of knowledge no longer depends on people being in the same place at the same time. It can be preserved in other than living memory and carried forward in time as cultural heritage. It also becomes more broadly available and less prone to intentional and unintentional corruption when printing technology makes replication of information easier.² Even broader dissemination is possible when information can be

symbolised as the dots and dashes of Morse Code or the on-off switching of computer circuitry. Broader applications of written language, computers and telecommunications are still evolving and can be expected to have very large impacts on which kinds of human organisation are possible.

The problem of oral agreements of long term consequence being known to too few people was recognised implicitly in the *Statute of Frauds*.³ All estates and interests in land made after 24 June 1677 and not put in writing by the parties (or by their agents acting under a written authorisation) were to be regarded by the courts as having the effect of tenancies at will only.⁴ It meant that there was no lawful way of enforcing the terms of a land conveyance if it was not made in writing. Leases for three years or less were an exception,⁵ and it seems to have recognised the poor bargaining position that a requirement for written documentation might have imposed on peasant farmers as illiterate tenants. Moreover, land parcels could be identified in general terms by naming the property or the owner with only tacit understanding of boundary locations. Such tacit understanding may have satisfied the circumstances of England. However the problem was vastly different in the British colonies of North America and the South Pacific where these understandings were completely absent from the outset of colonisation. Accordingly a far greater reliance was placed on the work of surveyors. Their surveys helped to establish geographic knowledge and spatial orientation through general topographic mapping and cadastral surveys to establish property rights in land. The importance of this work often vastly underestimated, even by surveyors.

Early Methods of Perpetuating Evidence of Boundary Location

The need to perpetuate evidence of boundary location underscored ancient boundary rituals. The Roman Festival Terminalia was held annually on 23 February; the end of the old Roman Year. It was dedicated to Terminus, The Roman god of landmarks, who was said to prevail over boundaries and frontiers.⁶ The Roman ritual seems to have been incorporated into Christian traditions and may have

influenced the English custom of "beating the bounds".⁷ This ceremony was generally performed on Rogation days; the Monday, Tuesday and Wednesday following the fifth Sunday after Easter. These days preceded Ascension Day or Holy Thursday; the fortieth day after Easter.⁸ The perambulation was led by parish officials to perpetuate knowledge of parish boundaries. There were often strong religious and secular sanctions against removal or destruction of landmarks.⁹

Even where there was written evidence to record boundary locations, it seems that ceremony was used to supplement the written record to overcome problems of illiteracy. As an example, livery of seisin as a land conveyancing practice in Australian colonies and elsewhere well into the nineteenth century.¹⁰ It comprised an on-site handing over, in the presence of witnesses, of a handful of turf or foliage to symbolise the conveyance of land as property.¹¹ A recipient could thus be "seized of an estate in fee simple".¹² A similar need may well be the origin of customs such as publicly witnessing events at weddings and funerals. In these circumstances proprietary interests were certainly at stake through laws relating to marriage and succession. The formula behind successful rituals seems to be much the same in many culture; a serious element to constitute the purpose of the ritual followed by festivities to make attendance to seem worthwhile.

Parishes and counties had a social and administrative significance in England which was absent in Australia. Although Australian colonies were subdivided into parishes and counties, the divisions were used mainly as part of a spatial hierarchy to describe land and some administrative areas. However, in England, the parish was an important administrative area with many functions which are nowadays performed by local government in Australia. Much of the work associated with the administration of English parishes was performed in an honorary capacity by Justices of the Peace.

Early Local Government Law in New South Wales

Early local government law in Australia emerged as part of a more general problem of keeping the peace in an "age of revolution".¹³

There was an increase in civil disturbance in Europe and U.S.A. during the 1830's. It was attributable to the effects of the Industrial Revolution together with the disruption caused by the French Revolution and Napoleonic Wars. Many governments feared the consequences of increasing urbanisation, rise of organised working class movements, and pressures for political reforms and more democratic political institutions.¹⁴ Hence new arrangements were seen as necessary to establish law and order in urbanised surroundings.

On 6 August 1833, the New South Wales legislature passed an Act entitled "An Act for regulating the Police in the Town and Port of Sydney and for removing and preventing Nuisances and Obstructions therein".¹⁵ It seems to have been modelled on the London Metropolitan Constabulary; established as a uniformed police force in 1829.¹⁶ The Act of 1833 provided for a magistracy comprised of Justices of the Peace whose duties were described thus:

And be it further enacted That it shall be the duty of the said Justices to suppress all tumults riots affrays or breaches of the peace and to uphold all regulations established by competent authority for the management and discipline of convicts within the said town and port.¹⁷

The magistracy was authorised to appoint police and make regulations to govern their conduct.¹⁸ A policeman was empowered to arrest persons within the town who were drunk in public places at any time. In the hours between sunset and 8am he could arrest "all loose idle drunken or disorderly persons" found "lying or loitering in any street highway yard or other place within the said town and not giving a satisfactory account of themselves".¹⁹ Police integrity was also suspect, and penalties were prescribed for any victualler, licensed publican or other person who harboured or entertained an on-duty policeman.²⁰

Apart from keeping the peace, the Act contained provisions aimed at improving public health and safety. It also required the Surveyor General, or persons delegated by him, to expedite the setting out of footpaths and carriageways in streets and public places,²¹ supervise footpath construction, place street names on suitable walls, and allot numbers to individual tenements.²² The 1833

Act was followed in 1834 by "An Act for better regulating the Alignment of Streets in the Town of Sydney". The preamble made reference to the deficiency of early records of Crown land alienation, the encroachment of buildings onto public space and the deterioration of properties by projection of houses beyond an established line.²³ Important provisions in respect of building alignment were contained in section 2 which read:

And be it further enacted That before the said Surveyor General shall set out the footway in any street or part of a street or public place in the said town after the passing of this Act he shall lay before the Governor and Executive Council a plan of the same setting forth the proposed breadth of the carriage and footways and thereupon it shall and may be lawful for the said Governor and council by Notice in the New South Wales *Government Gazette* to fix and declare the distance from the curb-stone or exterior edge of the said footway in any such street or part of a street or public place within which it shall not be lawful to erect any building provided that such distance shall in not case exceed twelve feet unless with the consent of the proprietor of the soil.

The provisions of the Acts and 1834 were substantially reproduced in a further Act of 1838 which extended local government to the Towns of Parramatta, Windsor, Maitland and Bathurst.²⁴ There was provision for the Governor to declare further towns by proclamation.²⁵ In 1838, the jurisdiction on New South Wales included areas now contained within Queensland and Victoria. Included among the purposes of the Act as set out in its preamble, was the need to make better provisions for the alignment of the streets in the towns.²⁶ (The texts by Hallmann and Brown each make special reference this Act.)²⁷

The Early Boundaries of the City of Sydney

English customs regarding perambulation of boundaries were adapted to the 1833 Act which established Sydney as a Town, the 1838 Act which extended local government and police administration to other towns, and 1842 Act which constituted Sydney as a city. ("An Act for protecting Crown Lands of this Colony from Encroachment Intrusion and Trespass" also contained provision for per-

ambulations but they were not mandatory.)²⁸

The statutes relating to boundary perambulations of city, town and ward boundaries generally contained the following requirements:

- mandatory perambulations with penalties for non-compliance
- perambulations timed to coincide with Easter
- location of town and ward boundaries on roads or other public areas wherever practicable to limit the need to enter private property
- powers of entry to private property, and penalties for obstructing persons lawfully engaged in the perambulation
- penalties for interfering with or destroying boundary marks

It seems that the need to perpetuate knowledge of boundaries outweighed any temporary inconvenience caused to owners of private property. It therefore provided a statutory imprimatur for many of the customs of England which had become part of the common law.²⁹

The 1833 Act (passed on 6 August 1833) required the Surveyor General to mark out and describe the limits of the Town of Sydney, the port of Sydney Cove and Darling Harbour within one month. The requirements regarding perambulations were expressed as follows.:

47. And in order to uphold the limits of the said town Be it further enacted That some one of the Justices appointed under this Act shall perambulate with proper assistants the said limits on some convenient day in Easter week in each and every year and shall make a record thereof to be filed and kept in the Office of the Clerk of the Peace for the said town and neither the said Justice nor any of his assistants shall be deemed to have committed any trespass in passing over the property of any individual in making such perambulations shall on conviction or on the view of the said Justice forfeit and pay the sum of five pounds.

In Schedule A of the 1842 Act, the earlier boundaries of the Town of Sydney were adopted as the external boundaries of the newly constituted City thus:

The space within the present boundaries of the Town of Sydney as defined in a Government Notice dated 6th September

1833 and published in the *Government Gazette* of the 11th of that month - to wit "Bounded on the north by the waters of Port Jackson from a landmark at the head of Blackwattle Bay to Rushcutters' Bay on the east by the stream entering Rushcutters' Bay to a bridge on the South Head Road at the north-west corner of Sydney Common and by the western boundary of that common to a road extending westward to the back of Cleveland House on the south by that road and its western fence prolonged to a landmark on the road to Cook's River on the west by the western side of the road to Cook's River and that line prolonged to the landmark at the head of Blackwattle Bay."³⁰

Schedule B gave metes and bounds description to define boundaries of the six wards into which the City was subdivided. They were named as Gipps, Bourke, Brisbane, Macquarie and Phillip.³¹ The requirement for annual perambulation of Town Boundaries by Justices of the Peace was repealed.³² It was replaced by provisions in ss.9-11 as follows:

9. And whereas it is expedient that the metes and bounds of the said City and of the several wards into which the same is directed to be divided be constantly maintained and generally known Be it enacted That the Mayor of the said City within six months after the first election of Mayor under this Act shall cause to be set up at the expense of the body corporate permanent and conspicuous boundary marks of iron wood stone or other durable material in exact conformity with or as near as circumstances will admit the respective metes and bounds of the said City and the several wards thereof and in the most public and convenient place along or near the line of such metes and bounds and further within the period of six calendar months after the expiration of three years thereafter a circuit of perambulation of the metes and bounds of the said City and of the several wards into which the same is divided shall be made by the Mayor accompanied by the Town Clerk of the said City and the Town Clerk shall at the time of making such perambulation inquire whether the name or names whereby the same metes and bounds or any part thereof are or is described have or has been changed and by what name or description the same are or is there commonly known and distinguished and if any change in the description thereof shall have taken place shall note the same in a book to be kept by him for that purpose to be called

the "Boundary Book" of the said City and the Mayor is hereby required in the event of any of the said boundary marks or marks as aforesaid being obliterated or defaced to cause the same to be renewed at the expense of the body corporate within three months next after such perambulation as aforesaid.

10. And be it enacted That every Mayor or Town Clerk who shall neglect to perform the duties herein before prescribed shall forfeit and pay the sum of twenty pounds to be recovered by action in the Supreme Court of the said Colony by any person who shall sue for the same one-half to be paid to the person who shall sue for the same and the other half after deducting expenses for so suing to be ascertained by such Court to be paid to Her Majesty Her Heirs and Successors for the public uses of the said Colony.

11. And be it enacted That every person who shall wilfully or maliciously pull down deface obliterate injure conceal or destroy any such boundary marks shall for every such offence forfeit and pay in addition to the value of such boundary mark or marks as aforesaid any sum not exceeding forty shillings to be recovered paid and levied according to the provisions of this Act relative to offences against the same punishable upon summary conviction.

It may have become a practice to advertise proposed perambulations in the *Government Gazette*. Such a notice appeared on 10 April 1846 thus:

Town Clerk's Office,
Sydney, 8th. April. 1846.

PERAMBULATION OF THE CITY OF SYDNEY

Notice is hereby given, that in terms of the 9th section of the Act of Council, 6 Victoria, No.3, the Right Worshipful the Mayor, accompanied by the Town Clerk, will make a circuit of perambulation of the metes and bounds of the City of Sydney, on Monday next, the 13th instant.

JOHN RAE
Town Clerk.

Conclusion

The early legislation pertaining to the boundaries of Sydney is a reminder of the significance which society gave to preserving evidence of boundary locations in former times. Moreover the nexus between preserving boundary evidence and preserving law

and order seemed to be much clearer to people then than it does now. There may well be advantages if people simply do not need to worry much about boundaries and can get on with doing other things. However it provides an interesting economic conundrum of how to value a service which acquires most of its value from the fact that it can be taken for granted.

Two issues emerge from this state of affairs:

- policy advisers may well overlook the significance of the work that cadastral surveyors do simply because it can be taken for granted
- surveyors themselves may lose sight of the value of their own work in terms of its fundamental social and economic significance

Notes

1. "An Act to declare the Town of Sydney to be a City and to incorporate the Inhabitants thereof", (6 Vic. No.3), s.1, assented and commence 20 July 1842
2. Elizabeth L. Eisenstein. "Some conjectures about the impact of printing on Western thought: a preliminary report". *Journal of Modern History*, Vol.40 (1968) pp.1–56, rpt. in *Western Civilisation: recent interpretations*, Vol.1, "From earliest time to 1715", ed. by Charles D. Hamilton, (New York: Thomas Y. Crowell, 1973) p.355
3. "An Act for prevention of Frauds and Perjuries", (29 Car.2, c.3)(Imp.)
4. *ibid.*, s.1
5. *ibid.*, s.2
6. W. Warde Fowler. *The Roman festivals of the period of the Republic: an introduction to the study of the religion of the Romans*, (London: Macmillan, 1899) pp.230–231, 324–327 & 334. H.H. Scullard, *Festivals and ceremonies of the Roman Republic*, (London: Thomas and Hudson, 1981) pp.79–80
7. A.C. McEwan. "Beating the bounds". *Survey Review*, Vol.27 No.207 (January 1983) p.13
8. Jowitt (Earl) and Clifford Walsh. *Jowitt's dictionary of English Law*, 2nd. edn. ed. by John Bourke (London: Sweet & Maxwell, 1977). See "Ascension Day", "Fast Days", "Feasts", "Parish boundaries" and "Perambulation".
9. McEwan, "Beating the bounds", pp.13–14
10. See, for example, Peter Butt, *Land Law*, 2nd. edn. (North Ryde, New South Wales: Law

Book Co., 1988) paras.1916–1917, pp.454–456

11. *ibid.*, para.804, pp.91–92.
12. These words appear in many current certificates of title in Queensland.
13. E.J. Hobsbawn, *The age of revolution*, (London: Abacus, 1962)
14. Michael Sturma. "New police. new country", *Journal of the Royal Australian Historical Society*, Vol.77 Part 3 (December 1991) p.4
15. (4 Wm.4, No.7)
16. Sturma, "New police. new country", p.4
17. (4 Wm.4, No.7), s.3
18. *ibid.*, ss.4–5
19. *ibid.*, s.6
20. *ibid.*, s.9
21. *ibid.*, s.49
22. *ibid.*, s.50
23. (5 Wm.4, No.20), s.1
24. "An Act for regulating the Police in the Towns of Parramatta Windsor Maitland Bathurst and other Towns respectively and for removing and preventing Nuisances and Obstructions and for the better alignment of Streets therein. (2 Vic., No.2), assented on 10 August 1838, commenced on 1 January 1839 (pers.68)
25. *ibid.*, s.64
26. *ibid.*, s.1
27. Frank M. Hallmann, *Legal aspects of boundary surveying as apply in New South Wales*, (Sydney: Institution of Surveyors, Australia: New South Wales Division, 1973) pp.102–105. A.G. Brown, *Law relating to land boundaries & surveying*, (Brisbane: Association of Consulting Surveyors, Queensland, 1980) pp.115–119
28. (4Wm.4, No.10), assented and commenced 28 August 1833, ss.2–4
29. References to the case law on the matter of perambulations are contained in McEwan, "Beating the bounds", pp.13–19: *Halsbury's Laws of England*, 4th edn., Vol.4, (London: Butterworths, 1973) under "Evidence of boundaries" at para.872, pp.380–381; *The English and Empire Digest*, Vol.7 (London: Butterworths, 1979), "Evidence of boundaries", s.6 "Perambulations", paras. 2158–2162, pp.311–312
30. (6 Vic., No.3), s.2 and Schedule A
31. *ibid.*, s.3
32. *ibid.*, s.8