

The Judicial Role of The Surveyor

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County Engineers Association of Ohio

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Schneider

Discussion Topics

I. The Role of the Surveyor in Boundaries

- ✓ Art, Science and Law
- ✓ The Definition of Surveying

II. Rules of Professional Conduct

III. Boundaries and the Status Quo

- ✓ Matters of Title – Matters of Survey
 - Boundary Law
 - Unwritten Rights and the Surveyor's Role
 - Marketable Title
 - Title Insurance
 - Recordation Acts
 - Junior/Senior Rights



Discussion Topics

IV. The Judicial Function of Surveyors

V. Proposals

- ✓ A Statute of Limitations on Boundaries
- ✓ Limited License Legal Technician
- ✓ The Surveyor's Roles and Responsibilities – Facilitator/Mediator

VI. Mediation and the Role of the Mediator

VII. Examples and Scenarios



The Role of the Surveyor



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Overriding Principles

Surveying is:

- Part **Art**
- Part **Science**
- Mostly...
- **Application of the Law**



The Definition of Surveying

~ Ohio ~

(F) “Practice of surveying” means any professional service that requires the application of special knowledge of the principles of mathematics, the related physical and applied sciences, **and the relevant requirements of law** for the adequate performance of the art of surveying...

Ohio R.C. Chapter 4733 Laws, 4733.01 Professional engineer and professional surveyor definitions



Rules of Professional Conduct

NSPS Surveyor's Creed and Canons

Canon 3.

A Professional Surveyor should accept assignments only in one's area of professional competence and expertise.



Rules of Professional Conduct

NSPS Surveyor's Creed and Canons

Canon 4.

A Professional Surveyor should develop and communicate a professional analysis and opinion without bias or personal interest.



Rules of Professional Conduct

NSPS Surveyor's Creed and Canons

Canon 5.

A Professional Surveyor should maintain the confidential nature of the surveyor-client relationship.



Boundaries and the Status Quo



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"What's a Surveyor to do?"

- Apparent boundary conflict (*owners unaware*)
- Title problem (overlap) (*owners unaware*)
- Possible unwritten rights (*owners unaware*)
- Everyone was happy with the lines until the surveyor came along!
- Boundary dispute (*owners aware*)
- Plunge the neighbors (or neighborhood) into disarray followed by litigation?



Boundary and Title Conflicts

Who can resolve a boundary/title conflict?

- An attorney?
- A title company?
- A surveyor?
- A judge or jury?

Only the owners can...

- By agreement
- By court action



The Judicial Functions of Surveyors

In any case of disputed lines, unless the parties concerned settle the controversy by **agreement**, the determination of it is necessarily a **judicial act**...

The Judicial Functions of Surveyors, Thomas M. Cooley, Chief Justice Michigan Supreme Court, 1881



What is the Surveyor's Role in a Title/Boundary Conflict?

- What should the surveyor's role be?
- Survey to unwritten rights?
- Rewrite descriptions?
- Help maintain the status quo?



A Consideration

When the typical homeowner hires a surveyor, what does that homeowner think their surveyor is going to tell them?

The corner markers and plat will tell me...
What I Own



A Consideration from Gurdon Wattles

No one has the legal right nor vested authority to change any line of a recorded title without a new and proper document in the recorder's office to support it.

Writing Legal Descriptions, Gurdon Wattles



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A Consideration from Jeff Lucas

[Unwritten rights], like adverse possession, require a court decree to be perfected. This removes them from the boundary law principles that the land surveyor could and should employ in the determination of boundary location.

Jeff Lucas, Esq, PLS



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The Premise

I recommend against a policy of always staking a line based on one class of evidence and then ... simply telling the client to seek the advice of an attorney to evaluate the other evidence.

Washington State Common Law of Surveys and Property Boundaries, Jerry R. Broadus, 2009



The Premise

It is always possible when corners are extinct that the surveyor may usefully act as a mediator between parties, and assist in preventing legal controversies by settling doubtful lines.

The Judicial Functions of Surveyors, Thomas M. Cooley, Chief Justice Michigan Supreme Court, 1881



Guidance from Jerry Broadus

Tell your client in advance what services you can provide and how you can help resolve conflicting evidence, and that in some cases an attorney should be consulted before the survey is finalized.

Washington State Common Law of Surveys and Property Boundaries, Jerry R. Broadus, 2009



Matters of Title vs. Matters of Survey

Survey - the “*Where*” of a boundary

Title – the “*What*” of a boundary (Law)



Matters of Title vs. Matters of Survey

Title = “Ownership”

What does the surveyed boundary represent with respect to “ownership?”



Matters of Title vs. Matters of Survey

What constitutes the line, is a matter of law;
where it is, is a matter of fact.

Smothers v. Schlosser, 163 SE 2d 127 - NC: Court
of Appeals 1968



Title vs. Survey

The vocation of a surveyor is limited to the ascertainment of definite lines.

He may ascertain where the lines and corners specified in the description of the given tract of real estate actually are.

He does not have the power to determine what the terms of such description ought to be.



Title vs. Survey

Where the line lies, and where its corners are, is a question, and on which the surveyor, on account of his superior facilities for doing so, may be called upon to officially determine.

What the lines and corners are is a matter of law, which courts can alone declare.

Wilson v. Powell, (1905) 37 Ind.App. 44, 70 N.E. 611.



Unwritten Rights



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Title vs. Survey

Unwritten Rights

- Adverse Possession
- Acquiescence
- Parol Agreement
- Estoppel
- Practical Location

Matters of Title or Matters of Survey?



Adverse Possession

~ Ohio ~

A party who wishes to acquire title to real property by adverse possession must show **exclusive** possession and **open, notorious, continuous** and **adverse** use of such property for a period of **twenty-one years**.

Grace v. Koch, 81 Ohio St.3d 577, 579, 692 N.E.2d 1009 (1988)



Adverse Possession

~ Ohio ~

The burden of proof is on the party attempting to establish title by adverse possession. If the claimant fails to prove any required element by **clear and convincing evidence**, the claim must fail. Ordinarily, the determination of whether these elements have been proven rests with the trier of fact.

Thomas v. Wise, 6th Dist. Sandusky No. S-06-043, 2007-Ohio-3467, ¶ 13 [internal citations omitted]



Adverse Possession

~ Ohio ~

In establishing the 21 year period necessary for title by adverse possession, a party may "tack" his or her period of adverse use with any period of adverse use by antecedent owners in privity.

Franck v. Young's Suburban Estates, Inc., 6th Dist. Ottawa No. OT-02-040, 2004-Ohio-1650, ¶ 23



Adverse Possession ~ Ohio ~

Possession is never adverse or hostile if it is by permission of the owner.

Van Buren v. Worley, 6th Dist. Lucas No. L-95-049,
1995 WL 704096 (Dec. 1, 1995)



Acquiescence

~ Ohio ~

The doctrine of acquiescence is applied in instances where **adjoining land owners occupy their respective properties up to a certain line and mutually recognize and treat that line as if it were the boundary** separating their properties.

Burkitt v. Shepard, 4th Dist. Pike No. 05CA744, 2006-Ohio-3673 [internal citations omitted]



Acquiescence ~ Ohio ~

The cases finding acquiescence **typically involve a fence erected to demark the boundary** between properties...

Burkitt v. Shepard, 4th Dist. Pike No. 05CA744, 2006-Ohio-3673 [internal citations omitted]



Acquiescence ~ Ohio ~

Like a claim of adverse possession, a claim of acquiescence requires **clear and convincing** proof.

ALLREAD v. Holzapfel, 2013 Ohio 3269 - Ohio: Court of Appeals, 2nd Appellate Dist. 2013 [internal citations omitted]



Parol Agreement ~ [Indiana] ~

It is held that adjoining owners, uncertain of the true boundary line, may by parol agreement establish a boundary line, and the agreement is taken out of the statute of frauds if it is executed.



Parol Agreement ~ [Indiana] ~

In the absence of fraud, when adjoining landowners agree as to their boundaries and take possession and make improvements accordingly, each is estopped from ascertaining that such boundary is not the true one, even though possession is taken for less than the prescriptive period.

Scoville et al. v. Hawkins et al., 159 NE 2d 307 - Ind: Court of Appeals 1959 [internal citations omitted]



Equitable Estoppel

~ Ohio ~

Various jurisdictions tend to delineate different elements for acquiescence because this doctrine is frequently confused with and mingled with the elements of the separate doctrines of adverse possession, estoppel and agreement.

Thomas v. Wise, 2007 Ohio 3467 - Ohio: Court of Appeals, 6th Appellate Dist. 2007



Equitable Estoppel

~ [Indiana] ~

The doctrine of equitable estoppel is invoked when the following circumstances are present:

(1) a false representation or concealment of material facts made with actual or constructive knowledge of the true state of facts; and



Equitable Estoppel

~ [Indiana] ~

(2) the representation is made to one who is without knowledge or reasonable means of knowing the true facts with the intent that he or she will rely upon it; and

(3) the second party must rely or act upon such representation to his or her detriment.

Kline v. Kramer, 386 NE 2d 982 - Ind: Court of Appeals, 3rd Dist. 1979.



Practical Location

Where a fence has been treated and acquiesced in as the correct boundary line between adjacent owners for fifteen years the boundary line ought not to be disturbed even if there were some variance from the true line, and ...



Practical Location

... and a long established fence is better evidence of actual boundaries settled by practical location than a survey made after the monuments of the original survey have disappeared.

Hanlon v Ten Hove, 235 Mich 227, 230; 209 NW 169, 170 (1926)



Practical Location

A party can establish a boundary by practical location in three ways: (1) by acquiescing in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations; (2) by expressly agreeing with the other party on the boundary and then by acquiescing to that agreement; or (3) by estoppel.

Slindee, 760 N.W.2d at 907 (citing *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977))



Marketable Record Title Acts



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Marketable Record Title Acts

Allow for the removal of potential title defects of 'ancient' origin by essentially enacting statutes of limitation that act to clear away obscure property rights that might otherwise cloud title

Exist, with significant differences, in about 20 states



Marketable Record Title Acts

According to a combination of sources, states that have some form of Marketable Title Act include California (limited), Connecticut, Florida, Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Wisconsin and Wyoming



Marketable Record Title Act

~ [California] ~

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and **should be made freely alienable and marketable to the extent practicable in order to enable and encourage full use and development of the real property**, including both surface and subsurface interests.



Marketable Record Title Act

~ [California] ~

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property because the interests are no longer valid or have been abandoned or have otherwise become obsolete.



Marketable Record Title Act

~ [California] ~

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.



Marketable Record Title Act

~ Ohio ~

[See handout]

- 40 years of unbroken chain of title
- Can preserve interest by filing notice
- Exceptions
 - Lessor upon expiration of lease
 - RR and public utility easements
 - When easement is in use (whether observable or not)
 - Coal
 - Government-owned property



Title Insurance



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Title Insurance

- The U.S. land tenure system does not provide for a guarantee of ownership, except where title registration is available (and used)
- Title Insurance is how we provide for continuity, confidence and permanence in title



Title Insurance

- Two types of protection:
 - Duty to defend
 - Duty to indemnify for loss
- Two policies – Lender and owner



Title Insurance

- Insures against loss incurred due to the condition of the title being other than as insured
- Identifies potential title problems
- Minimizes the risk that a problem will occur



Title Insurance

- Endorsements available, e.g.,
 - Contiguity of multiple parcels
 - Zoning
 - ✓ Unimproved land (3.0)
 - ✓ Completed structure (3.1)
 - ✓ Proposed structures (3.2)



Title Insurance

Types of claims

- Unmarketable title
- No right of access
- Forgery, fraud, etc.
- Prior recorded lien or mortgage



Title Insurance

Types of claims

- Prior recorded easement
- Encroachment
- Prescriptive easement
- Unenforceability of lien of mortgage (for lender)
- Survey or description-related*



Title Insurance

~ Ohio ~

"Title insurance" means insuring, guaranteeing, or indemnifying owners of real property or others interested in real property against loss or damage suffered by reason of liens or encumbrances upon, defect in, or the unmarketability of the title to the real property, ...



Title Insurance

~ Ohio ~

... guaranteeing, warranting, or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property, or doing any business in substance equivalent to any of the foregoing.

ORC Title 39 Insurance, Section 3953.01



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Title Insurance

~ Ohio ~

No policy or contract of title insurance shall be written unless it is based upon a reasonable examination of the title unless a determination of insurability of title has been made in accordance with sound underwriting practices...

ORC Title 39 Insurance, Section 3953.07



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Title Insurance ~ Ohio ~

10% unearned premium reserve

ORC Title 39 Insurance, Section 3953.11



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Title Insurance

~ Washington (RCW 48.29.010)~

(3)(c) "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and **are offers to issue a title policy subject to** the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference.



Title Insurance ~ Washington ~

... **The reports are not abstracts of title**, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. **The report is not a representation as to the condition of the title to real property**, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted.



Title Registration



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Title Registration

Title Registration is a statutory process whereby a system of registering land titles is established, and indefeasible title to those properties included in the register is guaranteed by the state.

Basically, the state is your title company.



Title Registration

States with statutory provisions for registering title are Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Virginia and Washington.

In recent years, Illinois repealed its title registration act. (See Handout)



Title Registration

- Torrens System – originated in Australia
- Application made
- Survey performed and Title examined
- All disputes and claims settled
- Title Registered



Recordation Statutes



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Recordation Statutes

- Race
- Notice
- Race Notice



Recording Statute ~ Race Statute ~

AKA “the race to the courthouse.” The document recorded first wins and will have priority over any later recordings.

Race States: Delaware, Louisiana, North Carolina



Recording Statute ~ Notice Statute ~

A later buyer who pays fair value for the property and does not have notice that there were any other earlier conflicting interests, wins and will have priority over any later recordings.

If a prior interest records first, but not until after a subsequent purchaser paid fair value without notice, the earlier recordation has no effect.



Recording Statute ~ Notice States ~

Alabama, Arizona, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia.



Recording Statute

~ Race-Notice Statute ~

A later buyer who pays fair value, does not have notice of any other earlier conflicting interests, and records first, wins and will have priority over any later recordings.



Recording Statute

~ Race-Notice States ~

Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.



Recording Statute

~ Ohio (Race-Notice) ~

All deeds, land contracts ... and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments ... shall be recorded in the office of the county recorder of the county in which the premises are situated.



Recording Statute

~ Ohio (Race-Notice) ~

Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

ORC Title 53 Real Property Section 5301.25



Junior/Senior Rights



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Junior/Senior Rights ~ Ohio ~

The surveyor shall consult deeds and other documents, including those for adjacent parcels, in order to assemble the best possible set of written evidence of every corner and line of the property being surveyed.

OAC Section 4733-37-02(A)



Junior/Senior Rights

~ Brown, Robillard, Wilson ~

“A surveyor performing a survey based on a title policy description need not research senior rights other than as disclosed in the policy; the title company is assuming responsibility for the correctness of the title as written.”

Brown’s Boundary Control and Legal Principles, Brown, Robillard and Wilson



Junior/Senior Rights

~ ALTA/ACSM Standards (6.B.vii.) ~

“The relationship of the boundaries of the surveyed property (i.e. contiguity, gaps, or overlaps) with its adjoiners, where ascertainable from Record Documents and/or from field evidence gathered during the process of conducting the survey of the property being surveyed. ...



Junior/Senior Rights

~ ALTA/ACSM Standards (6.B.vii.) ~

*“... If the surveyed property is composed of multiple parcels, **the extent of any gaps or overlaps between those parcels** shall be identified.*”



Junior/Senior Rights

~ ALTA/ACSM Standards (6.B.vii.) ~

“Where gaps or overlaps are identified, the surveyor shall, prior to preparation of the final plat or map, disclose this to the insurer and client for determination of a course of action concerning junior/senior rights.”



Junior/Senior Rights

Can a surveyor **resolve** a Junior/Senior conflict as part of a boundary survey?

Some Surveyors in many states take it upon themselves to do this.

In Texas, and perhaps a few other states, they seemingly have to by law.

But can they **really**?



Junior/Senior Rights ~ North Carolina ~

“The use of equal line weights on the plat for the conflicting boundary lines is based upon Board Rule 21-56.1602(f) requiring that the results of the survey be reported in a clear and factual manner. The surveyor should not represent or imply that one boundary line is more significant than another when an overlap occurs and can only do so once the boundary issue is resolved by agreement or the court. The boundary line described in the reference deed of the tract being surveyed is certainly significant, but no more significant than that of the adjoiner, and that fact can be noted, but not by giving greater significance by line weight or otherwise.

From a Sept. 8, 2011 letter from the North Carolina Board of Examiners for Engineers and Surveyors



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Junior/Senior Rights ~ North Carolina ~

The questions that were raised boil down to property title issues. Title issues cannot be determined by the PLS based upon the surveyor's research when there is a conflict as to matters affecting title to the property. Only if the Surveyor is able, through research and by applying the tenets of survey construction, that a line is in fact the correct boundary line and any other line is not correct, then the determined line may be represented as the boundary line: Any other line may be represented for information with a note of explanation as to why that line cannot be the boundary line, but is shown for information.

From a Sept. 21, 2012 letter from the North Carolina Board of Examiners for Engineers and Surveyors



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Justice Thomas M. Cooley

~ "The Judicial Functions of Surveyors" ~

- Chief Justice Michigan Supreme Court 1881
- High interest in boundaries; wrote many important decisions in boundary cases
- Treatise presented to the predecessor of MSPS in January 1881



Justice Thomas M. Cooley

~ Recovering Lost Corners ~

“If ... disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors.



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Justice Thomas M. Cooley

“However erroneous may have been the original survey, the monuments that were set must nevertheless govern; ... for parties buy or are supposed to buy in reference to these monuments, and are entitled to what is within their lines and no more, be it more or less.”



Justice Thomas M. Cooley

“While [evidence of the original survey] remain[s], there can generally be no difficulty in determining the locality of the stakes. When the [evidence is] gone, so that there is no longer ... evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor.”



Justice Thomas M. Cooley

*“It is by no means uncommon that we find [surveyors], whose theoretical education is thought to make them experts, who think that when the monuments are gone, the only thing to be done is to place new monuments where the old ones **should have been, and would have been if placed correctly.**”*



Justice Thomas M. Cooley

*“This is a serious mistake. The problem is now the same that it was before: **To ascertain by the best lights of which the case admits, where the original lines were.**”*



Justice Thomas M. Cooley

~ Extinct Corners ~

“It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain.

It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains a potential fact so long as he can present better evidence than any other person.



Justice Thomas M. Cooley

“And it may often happen that notwithstanding the loss of all trace of a ...corner or ... stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was....”



Justice Thomas M. Cooley

“There are two senses in which the word extinct may be used in this connection: one is the sense of physical disappearance: The other the sense of loss of all reliable evidence.”



Justice Thomas M. Cooley

“[I]f by [“]extinct corner[“] is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent.

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the [original] surveyor where the field notes indicated it to be.



Justice Thomas M. Cooley

“2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.”



Justice Thomas M. Cooley

*“4. In any case of disputed lines, **unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act**, and it must proceed upon evidence, and give full opportunity for a hearing.*

No arbitrary rules of survey or evidence can be laid down whereby it can be adjudged.



Justice Thomas M. Cooley

~ The Facts of Possession ~

“The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it.

Even then he should hesitate long before doing anything to the disturbance of settled possessions.



Justice Thomas M. Cooley

*“Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary **when no other is attainable**; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence.*”



Justice Thomas M. Cooley

“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.”



Justice Thomas M. Cooley

“It is often the case when 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,...



Justice Thomas M. Cooley

*“...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 long acquiesced in is better evidence of where the real* line should be than any survey made after the original monuments have disappeared.***

[* original]



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Temporary Regroup

Surveyors: Note that an old fence acquiesced in by the common owners, may be:

1. Evidence that the boundary has moved by virtue of the common law doctrine of acquiescence or parol agreement or estoppel
2. The best evidence of the original boundary line **irrespective of whether or not the surrounding circumstances meet the requirements of one of the common law doctrines.**



Justice Thomas M. Cooley

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

In towns the block and lot stakes soon disappear; there are no witness trees, and no monuments to govern except such as have been put in their places, or where their places were supposed to be.



Justice Thomas M. Cooley

“The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther.

Now it may perhaps be known in a particular case that a certain monument still remaining was the starting point in the original survey of the town plat; ...



Justice Thomas M. Cooley

“... or a surveyor settling in the town may take some central point of departure in his surveys, and assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure.”



Justice Thomas M. Cooley

“This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere.

*Yet this is what is sometimes done; **the surveyor himself being the first person to raise the disturbing questions.***





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Justice Thomas M. Cooley

“Suppose, for example, a particular village street has been located by acquiescence and used for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location.

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.



Justice Thomas M. Cooley

“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 an error in the street line, and that all fences should be moved, say one foot to the east.*

Perhaps he goes on to drive stakes through the block according to this conclusion.

** Cooley clearly meant “precise” here*



Justice Thomas M. Cooley

“Of course, if he is right in doing this, all the lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding someone to do so.

We shall have a lawsuit; and with what result?



Justice Thomas M. Cooley

~ Fixing Lines by Acquiescence ~

“It is a common error that lines do not become fixed by acquiescence in less time than [the statutory period]; ... [but] there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, and all concerned have cultivated and claimed up to it.”



Justice Thomas M. Cooley

“Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of considerable time.

The litigant, therefore, who in such a case pins his faith on the surveyor is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.



Justice Thomas M. Cooley

“Of course nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another.

He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of the parties as if it were at another.



Justice Thomas M. Cooley

*“**But** he would do mischief if he were to attempt to establish monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him, and who might otherwise be misled, ...*



Justice Thomas M. Cooley

“... that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement.”



Justice Thomas M. Cooley

“The peace of the community absolutely requires this rule.”



Schneider

Justice Thomas M. Cooley

~ The Duty of the Surveyor ~

“From the foregoing it will appear that the duty of a surveyor where boundaries are in dispute must be varied by the circumstances.”



Justice Thomas M. Cooley

“1. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant.”



Justice Thomas M. Cooley

“2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely.

It is merely idle for any State statute to direct a surveyor to locate or establish a corner, as the place of the original monument, according to some inflexible rule.



Justice Thomas M. Cooley

*“The surveyor, on the other hand, must inquire into all the facts; giving due prominence to the acts of parties concerned, and always keeping in mind, first, that **neither is opinion nor his survey can be conclusive upon the parties concerned; ...***



Justice Thomas M. Cooley

*“ ... second, that courts and juries may be required to follow after the surveyor over the same ground, and that **it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.**”*



Justice Thomas M. Cooley

“It is always possible when corners are extinct that the surveyor may usefully act as a mediator between parties, and assist in preventing legal controversies by settling doubtful lines.”



Justice Thomas M. Cooley

“Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow his judgment, cannot on the basis of mere consent, be compelled to do so; but if he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them.”



Justice Thomas M. Cooley

“Of course, it is desirable that all such agreements be reduced to writing; but this is not absolutely indispensable if they are carried into effect without.”



Justice Thomas M. Cooley

*“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.”*



"It is important for them to know by what rules they are to be guided in the discharge of their judicial functions."



Boundary Law Principles

~ Theory of Location
in Sequential Conveyances ~

~ Theory of Location
in Simultaneously-created Boundaries ~



ALTA/ACSM Land Title Surveys ~ 2011 Standards and Title ~



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Ensuring the American Dream

~ What is the Role for the Professional Surveyor? ~



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The Surveyors' Role

- Surveyors can, and arguably should, play a role in resolving disputes and uncertain lines.
- This can generally only happen with the acquiescence of the parties
- But what is that role?



A Long-Term Solution?

~ Jeffery Lucas, Esq., PS ~

See handout - POB column “*A Statute of Limitation on Boundaries.*”

<http://www.pobonline.com/articles/97347-a-statute-of-limitation-on-boundaries>



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A Statute of Limitation on Boundaries

~ Jeffery Lucas, Esq., PS ~

“A survey on the record that goes unchallenged for over thirty years should become the “root of location” and settle the question of location, extinguishing all previous surveys and boundary evidence to the contrary.

Once it has reached this status, it should also settle all future location questions.”



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The Surveyor's Roles and Responsibilities

~ Gary Kent ~

See handout - American Surveyor Column
"The Surveyor's Roles and Responsibilities"

<http://www.amerisurv.com/content/view/12794/153/> (last of a series of 3)



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The Surveyor's Roles and Responsibilities

~ Gary Kent ~

- Encouraging the owners to maintain the status quo (“early intervention”)
- They were happy until the surveyor showed up!



The Surveyor's Roles and Responsibilities

~ Gary Kent ~

- Communication skills
- Contractual considerations
- State standards considerations
- Ethical considerations
- Facilitation/Mediation Skills



A Long-Term Solution?

~ State of Washington ~

- Cost has eliminated access to the legal system for millions of people
- Limited License Legal Technician (LLLT)
- The Washington Supreme Court adopted rule effective 9/1/12
- Authorizes one who meets certain educational requirements to advise and assist clients in approved practice areas of law (currently only family law)



Mediation

~ Ohio ~

- See P. 39-44 of the handout
- Who can be a mediator and under what conditions? (p. 39)
- Training



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Justice Thomas M. Cooley

“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.”



The Order of Importance of Conflicting Title Elements

A Right of Possession (Unwritten Rights)

B Senior Rights

C Written intentions of parties

1 Call for a survey

2 Call for monuments

3 Direction and Distance

4 Direction or Distance

5 Area

Coordinates



The Order of Importance of Conflicting Title Elements

A Right of Possession (Unwritten Rights)



Unwritten Rights - The Surveyors' Role

- Historically: Locate written title lines and show their relationship to lines of possession
- Surveyors do not have the legal authority to declare who has *ownership* or right of possession
- A new paradigm: Encourage locking into the status quo before disrupting the neighborhood



The Order of Importance of Conflicting Title Elements

- A Right of Possession (Unwritten Rights)
- B Senior Rights**



The Order of Importance of Conflicting Title Elements

- A. Right of Possession (Unwritten Rights)
- B. Senior Rights
- C. [Written] Intentions of the Parties



Intent of the Parties

- Intent must be determined from the description in the written instrument – which, if there was a survey - is itself controlled by that survey because it is considered the manifestation of that survey.



Intent of the Parties

- Unless there are ambiguities in the record, allowing oral statements of parties to the transaction as determination of intent is the equivalent of permitting transfer by parole means - which violates the Statute of Frauds



Intent of the Parties

The grantor's intention controls, and the question for the court is not what the parties meant to say, but what they meant by what they did say.

*Pointer v. Lucas (1960) 131 Ind.App. 10, 169
N.E.2nd 196*



The Order of Importance of Conflicting Title Elements

- A. Right of Possession (Unwritten Rights)
- B. Senior Rights
- C. [Written] intentions of parties
 - 1 Call for a survey – Following the Footsteps



The Order of Importance of Conflicting Title Elements

- “Following in the Footsteps” vs. the written intentions of the parties?
- The conveyance is the written manifestation of the survey
- The best evidence of the survey are the points on the ground



The Order of Importance of Conflicting Title Elements

A Right of Possession (Unwritten Rights)

B Senior Rights

C Written intentions of parties

1 Call for a survey

2 Call for monuments

i. Natural

ii. Artificial

3. Record (Adjoiners)



The Order of Importance of Conflicting Title Elements

- A Right of Possession (Unwritten Rights)
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- C Written intentions of parties
 - 1 Call for a survey
 - 2 Call for monuments
 - 3 Record (Adjoiners)
 4. Distance and Direction
 5. Distance or Direction



The Order of Importance of Conflicting Title Elements

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 - 5. Distance or Direction
 - 6. Area



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 4. Direction and Distance
 5. Direction or Distance
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Coordinates



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Boundary Law Principles

~ Theory of Location
in Simultaneously-Created Boundaries ~



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Conflicting Monuments Within a Subdivision

1. Original Natural Monuments
2. Original artificial monuments set within the subdivision
3. Original Monuments correctly set to mark the perimeter of the subdivision
4. Uncalled for monuments may control by “common report”



Monuments by Common Report

A monument by common report is the common acceptance by numerous surveyors of a monument which is reputed to correct, whose history is lost in antiquity, and the integrity of whose position cannot be proved nor disproved.



Conflicting Monuments Within a Subdivision

1. Original Natural Monuments
2. Original artificial monuments set within the subdivision
3. Original Monuments correctly set to mark the perimeter of the subdivision
4. Uncalled for monuments may control by “common report”
5. Long-standing lines of possession



What about Possession?

For possession to be considered evidence of original survey lines:

1. There must have been an original survey that, if located, would control the lines between the adjoiners



What about Possession?

For possession to be considered evidence of original survey lines:

2. Lines of possession are along the lines surveyed or presumed to have been surveyed by the original surveyor



What about Possession?

For possession to be considered evidence of original survey lines:

3. A series of possessions in agreement with one another substantiate one another



What about Possession?

For possession to be considered evidence of original survey lines:

4. The possession is of a former generation (ancient)



What about Possession?

For possession to be considered evidence of original survey lines:

5. Possession has the reputation of being on the correct survey lines



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WOOD PRIVACY FENCE
3.5' N OF LINE AT E. END

LOT CORNER IN
WOOD PRIVACY FENCE
(MONUMENT NOT SET)

N 72° 07' 06" E
141.98' (140.06' Plat)

6" R REBAR W/RED CAP
STAMPED "RANDOM" SET 18" E.
E. OF COR. & ON LOT LINE
(0.8' S. OF FENCE)

151

TRM
(TYPICAL)

84.00' (84' Plat)
N 32° 07' 59" W

WOOD PRIVACY FENCE
UP TO 1.5' TO DRILL LINE

6" R REBAR W/RED CAP
STAMPED "RANDOM" SET 18" E.
E. OF CORNER AND ON LOT LINE

LOT CORNER IN
WOOD PRIVACY FENCE
(MONUMENT NOT SET)

CENTER OF
MULTIPLE TRUNK
TREE 7' 4" N. OF LINE

CENTER OF
30" MULTIPLE TRUNK
TREE 7' 2" S. OF LINE

72.00' (72' Plat)
N 27° 16' 44" W

4" WOOD FENCE
1'-4" W. OF LOT LINE

N. END OF S.C.L.E.
1' N & 1' E OF LOT COR.
S.C.L.E. ON E. OF LOT COR.

WOOD FENCE
UP TO 1.5' S. OF LINE

149

6" R BY 24" W/
YELLOW CAP STAMPED
"SCHNEIDER FIRM #6681"

LANDSCAPING
8' N OF LINE

IRON PIPE ED.
3.5' NW OF COR.
ON ROW LINE

7" FD.

9 76'-1001" W
(RADIAL LINE
FROM LOT COR.)

CENTRAL AVENUE
(70' P.W.M.)

71.88' (74' Plat)
R 112-70'

WOOD PRIVACY FENCE
TWO STORY
BRICK DWELLING

CENTER OF
40" TREE
7'-1" S. OF LINE

BRICK DRIVE
CENTER OF
25" TREE
14'-9.5" N. OF LINE

N 57° 23' 47" E
120.14'
(120.50' Plat)

150

TWO STORY
BRICK DWELLING

111.40' (108.40' Plat)
S 67° 22' 19" W

8 67° 50' 10" W
(RADIAL LINE
FROM LOT COR.)

7" FD.

71.78' (70' Plat)
R 112-70'

7" FD.

8 71° 01' 26" W
(RADIAL LINE
FROM LOT COR.)

7" FD.

Resolving Excess and Deficiency within a Subdivision

1. Proration should be a last resort
2. Errors found in a plat should be left where they occur and not prorated and spread throughout the subdivision



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