The Judicial Role of the Surveyor

Arizona Professional Land Surveyors

Prescott, Arizona
May 6, 2016

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Synopsis

Only two persons can truly resolve a disputed boundary or title problem. Those persons do not include attorneys, title companies or surveyors. And, in a sense, they do not even include judges and juries - at least not of their own volition. This program explores the role that the professional surveyor can, and arguably should, take in helping property owners establish or maintain their common boundary in the location that they were perfectly satisfied with - at least until the surveyor showed up! We will look at the role of the surveyor as related to boundaries, not only from a statutory standpoint, but also as eloquently expressed by renowned Michigan Supreme Court Chief Justice Thomas Cooley in his seminal 1881 treatise "The Judicial Function of Surveyors." As a part of this, we will review the dynamic that exists between matters of title and matters of survey, including a close look at title insurance. We will also review several examples that demonstrate the problem, and offer an alternative to what is often the standard approach by surveyors. We will outline a new approach that has the surveyor helping property owners avoid the expense and angst of unnecessarily litigating boundaries when there has been acquiescence to an accepted line by both owners.

Program

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NOTE: The author of this paper and presentation is not an attorney. It is the author’s intent that neither this paper nor the presentation should be considered legal advice or a substitute for consultation with an attorney.
The Role of the Land Surveyor in Boundary Determinations

The Regulation of Land Surveying

The definition of surveying in all states allows the registered surveyor to rely upon the work of unlicensed subordinates working under his or her direct supervision. There are relatively few registered surveyors in the United States (probably on the order of 40,000).

The practice of Land Surveying is, in all states, regulated by a state board. Some states, like West Virginia, Maine, New Hampshire and Indiana, have boards that regulate only Land Surveyors. Many other states, however, have “joint” boards that regulate more than one profession – typically engineering and surveying.

Surveying is part Science, part Law and part Art

The science aspect is generally the science of measurement – using angle measuring devices (theodolites, total stations), distance measuring devices (electronic distance measuring instruments, steel tapes) and GPS (global positioning system which uses satellites).

The law aspects relate to the interpretation and resolution of legal descriptions and boundaries. There are no statutes or legislated laws that tell surveyors how to determine boundaries; the rules for that are from a body of common law derived from hundreds of years of court cases related to boundary disputes and legal descriptions. Surveyors cannot make proper boundary determinations without studying and understanding what the “weight of authority” has been in case law.

The art aspect could be said to apply to the judgments and decisions in the field related to where, and to what extent, to look for evidence, and how that information is all presented. For example, having a gut feeling on where to dig to try and find a stone marker set in 1840, or how to most effectively run a survey line from one location across a ravine and river and through the trees to another location.

Surveying can also be seen as part “doing” and part “thinking.” It’s one thing to make a measurement; with today’s technologies, virtually anyone can make very precise survey-grade measurements. But it’s an entirely different thing to understand where to make the measurements from, and to what, and how to apply those measurements to the facts and evidence at hand so a defensible boundary opinion can be made.

The retracement of a boundary is the professional opinion of the surveyor. That opinion is based on the evidence available to the surveyor; and if that evidence changes, the opinion may well change. Evidence comes in many forms – from the writings, from what is found in the field, from verbal and written statements, from measurements and from historical information.

Two competent surveyors faced with the same evidence will generally come to the same opinion, although there are occasions when the surveyors will simply have differing opinions as to how to interpret or weigh certain pieces of evidence. This can result in the two surveyors arriving at different conclusions as to a boundary location. If the surveyors cannot resolve the differences satisfactorily, and if the affected owners are inclined to litigate, a final determination will be made by a court.
Arizona Definition of Land Surveying

27. "Land surveying practice" means the performance of one or more of the following professional services:
   (a) Measurement of land to determine the position of any monument or reference point which marks a property line, boundary or corner for the purpose of determining the area or description of the land.
   (b) Location, relocation, establishment, reestablishment, setting, resetting or replacing of corner monuments or reference points which identify land boundaries, rights-of-way or easements.
   (c) Platting or plotting of lands for the purpose of subdividing.
   (d) Measurement by angles, distances and elevations of natural or artificial features in the air, on the surface and immediate subsurface of the earth, within underground workings and on the surface or within bodies of water for the purpose of determining or establishing their location, size, shape, topography, grades, contours or water surface and depths, and the preparation and perpetuation of field note records and maps depicting these features.
   (e) Setting, resetting or replacing of points to guide the location of new construction.

28. "Land surveyor" means a person who by reason of knowledge of the mathematical and physical sciences, principles of land surveying and evidence gathering acquired by professional education or practical experience, or both, is qualified to practice land surveying as attested by registration as a land surveyor. A person employed on a full-time basis as a land surveyor by an employer engaged in the business of developing, mining or treating ores or other minerals shall not be deemed to be engaged in land surveying practice for purposes of this chapter if the person engages in land surveying practice exclusively for and as an employee of such employer and does not represent that the person is available and is not represented as being available to perform any land surveying services for persons other than the person's employer.

Rules of Professional Conduct

TITLE 4. PROFESSIONS AND OCCUPATIONS
CHAPTER 30. BOARD OF TECHNICAL REGISTRATION

ARTICLE 3. REGULATORY PROVISIONS

R4-30-301. Rules of Professional Conduct
All registrants shall comply with the following rules of professional conduct:

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1 Arizona Revised Statues 32-1-101
2 Rules of the Arizona Board of Technical Registration
7. A registrant shall not accept an engagement if the duty to a client or the public would conflict with the registrant's personal interest or the interest of another client without making a full written disclosure of all material facts of the conflict to each person who might be related to or affected by the engagement.

8. A registrant shall not accept compensation for services related to the same engagement from more than one party without making a full written disclosure of all material facts to all parties and obtaining the express written consent of all parties involved.

12. If called upon or employed as an arbitrator to interpret contracts, to judge contract performance, or to perform any other arbitration duties, the registrant shall render decisions impartially and without bias to any party.

17. Except as provided below and in subsections (18) and (19), a registrant shall not accept any professional engagement or assignment outside the registrant’s professional registration category unless:
   a. The registrant is qualified by education, technical knowledge, or experience to perform the work; and
   b. The work is exempt under A.R.S. § 32-143.

Boundaries, “the Status Quo” and the Surveyor

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. [internal citations omitted]

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. 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.

With respect to boundaries, the surveyor deals with matters of survey, primarily location – the “where” of a boundary. Sometimes the boundary location is not in question – the deed description is unambiguous and there are no issues with the adjoiners. Many times, however, the description(s) require interpretation and/or extrinsic evidence to eliminate or resolve the ambiguities. Either way, we are in the realm of “where” - which falls in the authority of the surveyor on which to give an opinion based on his or her survey.

Alternatively, the law deals with “what” that boundary line is – in essence, what the boundary represents with respect to title (ownership). These concepts of “where” and “what” are often, however, not mutually exclusive. The best example of that is with unwritten rights.
Unwritten Rights – Title Doctrine or Evidence of Intent?

There are a number of means by which boundaries can be established by unwritten means. Yet each of these doctrines would seem to be contrary to the otherwise inviolate Statute of Frauds, which requires that conveyances of real property must be in writing. The courts have found a way around this conundrum; however, by determining that in some cases these doctrines do not necessarily transfer title, but rather merely fix what were otherwise uncertain lines.

In other cases, particularly when the intent of the words in the conveyance is exceptionally ambiguous, they may point to acquiescence, estoppel, parol agreement or practical location as the best evidence of that intent.

When applied in the former manner, these are simply title doctrines, the evidence of which surveyors normally locate, note and show as evidence contrary to the written title.

However, surveyors often neglect to recognize that when considered in the latter manner, this evidence can provide proper guidance when “trying” to resolve a particularly intractable boundary property. Rather, they will harken back to their comfort with mathematics and concoct a solution that - relative to the long-standing lines of possession is entirely irrational - but provides a clear means by which they can justify their opinion: Math!

Adverse Possession

Everyone can agree that the doctrine of adverse possession falls in the realm of title, not survey. The necessary elements typically include all, most, or some version of, the following: adverse or hostile, open and notorious, visible, actual, exclusive and with a claim of right or color of title. Some states also require payment of the property taxes due on the area being claimed. The statutory period varies from 3 to 21 years depending on the state, with some states providing for shorter periods if the claimant can show color of title, that the taxes had been paid, and/or if the nature of the possession was especially open.

Courts do not look kindly on the doctrine of adverse possession which is why every single element must be proven - typically by “clear and convincing” evidence. Failure to prove only one of the elements is enough to defeat the entire claim. However, when a claim of unwritten rights is perfected in a court of law, it (1) confirms that the boundary of the ownership has changed from the original written title line, and (2) creates marketable title to the ownership line.

Adverse Possession – Arizona

"Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.³

"A party claiming title to real property by adverse possession must show that his or her possession of the property was actual, visible, and continuous for at least ten years and that it was under a claim or right, hostile to the claims of others and exclusive."


³ Arizona Revised Statutes Title 12, Chapter 5, Article 2, Section 12-521
A claimant of title by adverse possession must show that the adverse possession was actual, open and notorious, hostile, under a claim of right and was exclusive and continuous for ten years. Lewis v. Pleasant Country, Ltd., 173 Ariz. 186, 189, 840 P.2d 1051, 1054 (App.1992); A.R.S. §§ 12-521(A) and 12-526(A). We follow, as we must, the statute as enacted by the legislature


Acquiescence, Parol Agreement, Practical Location, Estoppel and Repose

As suggested above, with a few exceptions, the courts view other unwritten boundary doctrines - acquiescence, practical location and parol agreement - as being either manifestations of prior boundary line agreements or the best evidence of an otherwise ambiguous intent. This is contrary to adverse possession which arises out of contentious situations. Even the doctrines of estoppel and repose could be seen as representing boundary line agreements – in essence, inverse agreements, whereby the inaction of one party can be taken as an implied acceptance of a claim by an adjoining.

Each of the various unwritten boundary doctrines has its own set of specific requirements that must be met in order for a court to perfect a claim of title. Some requirements are problematic in that they require a look inside the mind of the claimant; and some requirements are counterintuitive. As an example of the former, in some states a claim of adverse possession is defeated if it can be shown that the claimant did not intend to possess someone else’s land (i.e., it was ‘by mistake”). With regard to the latter, in some states, a parol agreement between two parties to set a common line is not valid if there is no conflict in the written title or if a survey would have otherwise resolved the uncertainty.

Acquiescence

There are several theories that the doctrine of acquiescence is based on. One is the situation in which acquiescence is considered evidence of some prior oral agreement between two adjoining owners who were either uncertain or in dispute over the location of the true boundary. Long acquiescence to a line (usually a fence) by both parties is considered evidence of that parol agreement. In some states, definitive evidence of the dispute or uncertainty must be provided to prove boundary by acquiescence.

Another theory is simply that long acquiescence in a line, without objection by either party (for the statutory period, which can vary state-to-state), establishes the boundary.

Both of these theories could be seen to essentially rely on estoppel, whereby the adjoining are prevented from disputing the line because of their - or their predecessors’ - previous agreement, or because of their long acceptance to the line.
Finally, if a conveyance is made that mistakenly does not describe to an intended boundary, long acquiescence to the intended line can cause the line to move to the intended line.

To support a finding of boundary by acquiescence, the boundary in question must be definite, visible, and clearly marked. *Calthorpe*, 441 A.2d 284, 289 (Me. 1982) (line must be "visible line marked clearly by monuments, fences or the like"); *Manz v. Bohara*, 367 N.W.2d 743, 746 (N.D. 1985) (line must be "definite, certain, and not speculative, and open to observation"); *Platt*, 563 P.2d at 587 (line must be "clear and certain ... (such as a fence)") (quoting *Sachs v. Bd. of Trs. of the Town of Cebolleta Land Grant*, 89 N.M. 209, 214 (1976)); *Monroe v. Harper*, 619 P.2d 323, 324-25 (Utah 1980) (line must be a "visible line marked by monuments, fences, or buildings"); *Lamm v. McTighe*, 72 Wash.2d 587, 434 P.2d 565, 569 (1967) (line must be "certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc."); *Kemper*, 3 COA at 748-49 § 8 and 768 § 15. A party cannot be said to acquiesce in a boundary unless the boundary can be identified with certainty. *Calthorpe*, 441 A.2d at 290. *Mealey v. Arndt*, 76 P. 3d 892 - Ariz: Court of Appeals, 1st Div., Dept. E 2003.

Although Arizona has acknowledged the doctrine of boundary by acquiescence, it has not clearly defined the elements. We therefore look to other jurisdictions. Generally, to establish the doctrine of boundary by acquiescence, the party asserting the doctrine must prove (1) occupation or possession of property up to a clearly defined line, (2) mutual acquiescence by the adjoining landowners in that line as the dividing line between their properties, and (3) continued acquiescence for a long period of time. In Arizona, the required period of time for acquiescence is ten years, the same as that for adverse possession. A.R.S. § 12-526(A) (2003). *Mealey v. Arndt*, 76 P. 3d 892 - Ariz: Court of Appeals, 1st Div., Dept. E 2003 (internal citations omitted).

**Parol Agreement**

In general, parol agreements to set boundaries between adjoining landowners have effect only when there is an uncertainty or dispute as to the true location of the line; however, the exact requirements vary state-to-state and the doctrine is more stringently viewed in some states. In other states, the doctrine, on its own, is seen as violating the statute of frauds and it exists only in concert with other doctrines like acquiescence or practical location.

**Estoppel**

Estoppel is rooted in the courts’ propensity to prevent unjust enrichment and boundaries can be established based on this doctrine.

There are three elements of estoppel: first, the parties to be estopped must have committed acts inconsistent with their current position; second, reliance by the other party; and third, injury by the repudiation of the prior conduct. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 28, 156 P.3d 1149, 1155 (App. 2007). We examined estoppel in *City of Tucson v. Melnykovich*, an inverse condemnation action. 10 Ariz. App. 145, 457 P.2d 307 (1969). There, the Pima County Board of Supervisors condemned twenty feet of Melnykovich's property in 1948 to widen Speedway.
Boulevard, but he was not notified until the City of Tucson sent bulldozers to widen the road in 1965. *Id.* at 146, 457 P.2d at 308. Melnykovich sued. The City of Tucson argued that he was estopped from alleging a taking of his property because his tax bills since 1953 did not include the disputed twenty feet, and his 1963 mortgage did not include the extra twenty feet in the legal description. *Id.* at 148, 457 P.2d at 310.

On appeal, we held that estoppel was inapplicable because Melnykovich had no notice of the taking and there was no evidence to show why the twenty-foot strip was omitted from the tax rolls or that he prepared the legal description for the mortgage. *Id.* at 149-50, 457 P.2d at 311-12. We also rejected the argument that Melnykovich was estopped because he failed to inquire about his tax bills, or that he had taken inconsistent positions with his belief that he owned the disputed twenty feet. *Id.* at 150, 457 P.2d at 312.


**Practical Location**

Boundary by practical location does not appear as an independent unwritten title doctrine in most states, but it is addressed in other states. In those states, it seems to be a doctrine that relates to other unwritten boundaries such as those by acquiescence, parol agreement and estoppel.

In 110 American State Reports, page 681, under the title of "Resurveys and their Purpose and Effect", the following is found: "* * * In *Diehl v. Zanger*, 39 Mich. 601, where the first survey of lots involved in litigation was made by one Campau, and a resurvey made years afterward by the city surveyor showed that the practical location of the whole plat was wrong, it was declared that a resurvey, made after the disappearance of the monuments of the original survey, is for the purpose of determining where they were, and not where they should have been, and that 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. `Nothing is better understood,' said Justice Cooley in delivering the opinion of the court, `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. But no law can sanction this course. The (city) surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. * * * The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and when those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known: *Stewart v. Carleton*, 31 Mich. 270. As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are.' * * *" *Wacker v. Price*, 216 P. 2d 707 - Ariz: Supreme Court 1950.
"Practical location of a boundary line, to be effectual, `must be an act of the parties, either express or implied; and it must be mutual, so that both parties are equally affected by it. It must be definitely and equally known, understood and settled. If unknown, uncertain, or disputed, it cannot be a line practically located.' (Hubbell v. McCulloch, 47 Barb. 287, 299.) Where land is unimproved and uncultivated, the mere running of a line through the woods, ex parte, by one of the owners, so long as such line is not settled upon and mutually adopted by the adjoining owners as a division line, is an immaterial fact. In such a case, until the adjoining owner shows his assent to it, it would amount to a mere expression of the individual opinion of the owner who ran the line" (Adams v Warner, 209 App Div 394, 397; see also, 1 NY Jur 2d, Adjoining Landowners, § 142).


"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)).

To establish a boundary by practical location through acquiescence, "a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations," which is 15 years in Minnesota. "The acquiescence required is not merely passive consent but conduct from which assent may be reasonably inferred." Id. Besides arguing that respondents acquiesced in the gravel road as the boundary line because they knew about the garage, concrete slab, and shrubs on the land in dispute and did not object, appellants did not present any evidence of conduct on the part of respondents from which to infer that they acquiesced in the new boundary line. Accordingly, the district court did not err in determining that appellants failed to provide evidence of direct conduct, as opposed to mere passive consent, from which assent could be reasonably inferred.

To establish a boundary by practical location through express agreement, a person must prove that "an express agreement between the landowners set an `exact, precise line' between [their properties] and that the agreement had been acquiesced to `for a considerable time.'" "Without a specific discussion identifying the boundary line or a specific boundary-related action clearly proving that the parties or their predecessors in interest had agreed to a specific boundary, a boundary is not established by practical location based on express agreement." 

"[A]n express agreement requires more than unilaterally assumed, unspoken and unwritten mutual agreements corroborated by neither word nor act." Appellants argue that the district court "failed to recognize the specific boundary-related actions of the parties, including [their] maintenance of the yard up to the road, the construction of a garage, and the placement of a cement slab up to the road, all with no objection by [r]espondents." But again, appellants failed to present evidence that respondents agreed to the new boundary line beyond their passive failure to object to appellants' use of the disputed land.
Finally, to establish a boundary by practical location through estoppel, a person must show that "the parties whose rights are to be barred . . . silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have had the line been in dispute." 

"[E]stoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other." Because neither party claims to have had knowledge of the true boundary line between their properties prior to the 2001 survey, the district court correctly determined that appellants’ estoppel claim fails as a matter of law.

Watkins v. Patch, Minn: Court of Appeals 2013 (Memorandum Decision, not for publication) [internal citations and quotation marks omitted]

Unwritten Rights and the Surveyor’s Role

All of the doctrines that alter ownership by unwritten means represent matters of title, not survey. And title by unwritten means can only be perfected by a court. If a surveyor decides to act on his or her ‘opinion’ that unwritten rights have operated and move a written boundary line to conform to that opinion, he or she has stepped over the line - out of survey and into title.

However, no less than Thomas Cooley, Chief Justice of the Michigan Supreme Court in 1881, wrote:

“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...”

Thus, if the surveyor can bring the affected parties together and convince them to acquiesce to a long-established, and ostensibly a long-agreed upon line, then the surveyor might have ‘cover’ to survey to the agreed-upon line.

In such cases, however, it is virtually a given that the surveyor, after preparing such a survey, should also prepare descriptions and an exhibit showing and describing to the agreed upon line, and then go no further until the owners engage an attorney or attorneys to see that the proper written documents are prepared and recorded memorializing and providing notice of the agreed-upon line. Otherwise, what may have been an agreement in the moment could easily devolve into a dispute later and into which the surveyor will most assuredly be dragged into.

Additionally, there are very important, but not always obvious issues such as the treatment of mortgages, setback requirements, and jurisdictional regulations such as “lot line adjustments” that might affect - or be affected by - the new line and which must be properly vetted by an attorney.

Also, if the elements of whatever doctrine the surveyor relied on as the basis for his or her opinion were actually not met (including those elements that impossibly require one to climb inside the head of one or both of the parties), the surveyor is at great risk if the written title line was disregarded and there was actually no acquiescence by the parties to the surveyed line.

But the surveyor may be uncomfortable or concerned about violating standards, practicing law or determining a matter of title. Or perhaps, despite an attempt, the neighbor and client simply could not be convinced to agree to the line that represents the surveyor’s opinion. Either way, the surveyor will be left with surveying to the written title line and showing any conflicts with

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4 The Judicial Function of Surveyors, Thomas M. Cooley, 1881 (included later in this handout)
adjoiners’ deeds or with occupation/possession. Except in a few states, this is actually what is expected of surveyors, and/or required by state statutes or administrative code/rule (standards).

Either way, no matter what line the surveyor decides to go with, there must be clear communication of the necessary information so the client does not act ill-advisedly and cause a problem with an adjoiner. For example, perhaps there is a five foot overlap with an adjoiner and the client’s written title line falls five feet over the neighbor’s fence. If the surveyor deems it necessary to monument that location (or if the parties could not otherwise be brought to agreement), he or she had better clearly understand what is going on and advise the client accordingly. Why? Because the client will most assuredly assume that she owns to the rebar and take steps to exercise domain over to that line (5 feet over the fence) to the detriment of the adjoiner’s rights.

Surveyors also need to be familiar with what their state courts have said about the nature of boundary line agreements.

**Marketable Record Title Acts**

Marketable Title Acts exist in about 20 states under a variety of names. The purpose of these acts is to 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.

Under a Marketable Title Act, it is possible to extinguish ancient interests, whether they are revealed in the present day or in the future, unless the holders of such interests act to protect their interests by recent recordation.

Marketable Title Acts vary substantively in the states that have them. Differences include the property interests that are subject to the act, the statutory period of limitation, the period of time allowed for recording of notices preserving rights, and exceptions contained therein.

According to one source, states that have some form of Marketable Title Act include California, Colorado, Connecticut, Florida, Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

**Marketable Record Title Act – North Carolina**

§ 47B-1. Declaration of policy and statement of purpose.

It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

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5 North Carolina General Statutes, Chapter 47B – Real Property Marketable Title Act
Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

(b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or
(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;

with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1; c. 881; 1981, c. 682, s. 11.)

Title Insurance

In the United States, the system of land tenure does not, in and of itself, provide for a definitive guarantee or even assurance of ownership, except in the half dozen states where title registration is available (and even in those states it is not required and is seldom used).
Thus we rely on title insurance companies to provide for the continuity, confidence and permanence in title that is necessary for a functioning society. Because the system does not inherently provide the necessary assurances, title companies conduct searches and risk analyses and then provide insurance, so conveyances, mortgages, and other actions and transactions involving real estate can take place generally without the concern or liability associated with finding that someone else owns the property that you paid for and thought was yours.

Because of its importance and ubiquity in real estate conveyancing title insurance is relatively heavily regulated in most states.

It is important for surveyors to note that a title commitment is not a statement as to the condition of title of a property. It merely states the terms and conditions under which the insurer is will to issue the policy. The Insurance Code of California does a good job of pointing this out, viz.,

12340.11. "Preliminary report", "commitment", or "binder" are reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. 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. Any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted. [emphasis added]

**Title Registration ("Torrens")**

Torrens Title Registration is a system of registering land titles whereby the state essentially guarantees an indefeasible title to those included in the register. Once title to real estate is registered, it is transferred not by the traditional deed, but rather through the written registration.

In short, in an “abstract system” of title, the abstract is evidence of title. In the Torrens system, the Certificate of Title is the title.

The primary advantage of title registration is that it simplifies conveyances of real property and provides for a state guarantee as to the ownership of absolute title. It is very common in many parts of the world; however, in the United States the only states that provide for some form of title registration are Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Virginia and Washington. It is not widely used in any state and Illinois repealed its registration of title law a few years ago. At one time, twenty states had statutes authorizing title registration.⁶

Disadvantages of title registration include the time and costs involved in the preparation and review of a complete abstract of title and survey, and the remedying of any deficiencies.

**Recordation Statutes**

Where there is a gap or overlap between properties – representing some sort of conflicting junior/senior rights - some surveyors will (and in some states, like New England and Texas,

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research the chain of title to attempt to determine which deed is senior. Surveyors need to recognize that this is an exercise in title, and not a matter of survey. In doing so, the surveyor is essentially deciding who “owns” written title to the area in question. However, the answer is not always clear by simply examining the written record. This is because the effect and order of recordation and the date of execution of conflicting deeds can differ from state to state and may be dependent on whether there was notice to subsequent purchasers of prior conveyances. Another very simply way of saying this is that the first deed recorded is not necessarily the senior deed.

**Race statute**

Also known as the “Race to the courthouse.” The rule that the document recorded first wins and will have priority over any later recordings.

- States that follow the Race statute: Delaware, Louisiana, and North Carolina. [One source found also included Maryland]

**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, that recordation has no effect.

- States that follow the Notice statute: 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.

**Arizona Revised Statutes 33-411. Invalidity of unrecorded instrument as to bona fide purchaser; acknowledgment required for proper recording; recording of instruments acknowledged in another state; exception**

A. No instrument affecting real property gives notice of its contents to subsequent purchasers or encumbrance holders for valuable consideration without notice, unless recorded as provided by law in the office of the county recorder of the county in which the property is located.

**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.

- States that follow the Race-Notice statute: 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 (regarding mortgages, Ohio follows the Race statute), Oregon, Pennsylvania (regarding mortgages, PA follows Race), South Dakota, Texas, Utah,

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Washington, Wisconsin, and Wyoming. [Note one source found stated that Maryland is a race state]

There is a simple yet excellent diagram from The National Paralegal College (http://nationalparalegal.edu/) viz, http://nationalparalegal.edu/public_documents/courseware_asp_files/realProperty/RecordingSystem/NoticeandRace.asp that graphically depicts the effect of the three types of recording statutes.

**Junior/Senior Rights**

In most public land survey states and in many of the colonial states, surveyors do not routinely attempt to resolve junior/senior conflicts. Rather they simply report the potential conflict, which is what the ALTA/ACSM Standards require.

In some states like in New England and Texas; however, surveyors must attempt to ‘resolve’ junior/senior relationships in order to comply with their respective states’ laws.

Some surveyors around the country, outside New England or Texas, would suggest that there is only one boundary; and in order to properly determine its location, the surveyor must resolve the junior senior relationship. This argument creates an interesting dichotomy in attitudes towards title. No knowledgeable surveyor would suggest that title should or could be resolved by a surveyor when it is potentially affected by unwritten rights (e.g., adverse possession, acquiescence) because they know it is the purview of the courts to ascertain whether or not such rights have been successfully achieved, and to perfect written title if they have.

Yet, most real estate attorneys would assert that resolving junior/senior rights is also a title issue, not a survey issue. The ALTA/ACSM Survey Standards ever since 1962 and in the 2016 version, in particular, also take this stance. When preparing an ALTA/NSPS Land Title Survey, the surveyor is to disclose the gap or overlap to the title company and client “prior to or upon delivery of the final plat or map.”

Aside from boundaries per se, surveyors do get indirectly involved in title when performing an ALTA/ACSM Land Title Survey. The primary purpose of the ALTA/ACSM Survey Standards is for the surveyor to locate and show those conditions observed that could adversely affect title to the property being surveyed. Such conditions would include potential prescriptive easements and adverse claims by others. By virtue of a proper and complete Land Title Survey, the title company is appropriately informed of such conditions and can, by virtue of listing them in the title commitment, likewise inform the interested parties, and help facilitate responses or solutions that will eventually aid in a successful real estate transaction.

**Junior/Senior Rights – Arizona**

The rules of the Arizona State Board of Technical Registration do not indicate that the relationship of the lines of the surveyed tract with its adjoiners must be determined, only referencing that fact that the record documents needed to complete the survey must be obtained.

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8 2016 Minimum Standard Details Requirements for ALTA/NSPS Land Title Surveys, Section 6.B.vii.
9 https://btr.az.gov/sites/default/files/documents/files/ARIZONA%20BOUNDARY%20SURVEY%20MINIMUM%20STANDARDS(1)_0.pdf
It is typically the practice of surveyors in nearly all states – and in fact is required in most states’ standards and in the ALTA/NSPS Land Title Survey standards – to make a determination as to the relation of the surveyed lines with its adjoiners. In at least one case, it would appear that surveyors told they must resolve junior/senior conflicts, although the author has been told this regulation has more to do with the seniority of surveys, not deeds. But can they really do this?

The reality is that where there is a title or boundary conflict there are only two parties who can resolve the issue. Those parties are not the title company, attorneys, surveyors or even judges and juries - except in only one case.

No, only the two affected owners can resolve the problems. And they can do it by agreement … or by litigation (which is the only time that judges and juries can get involved). But surveyors can assist owners by not misleading them and by guiding them based on their extensive understanding of boundary law.

Surveyors mislead owners every day without realizing it. This is because the typical owner thinks surveyors “tell them what they own.” Yet, every surveyor knows that professional surveyors do not have the legal authority to determine ownership. Whether or not surveyors should be having that conversation up-front is open for debate, but one thing is not debatable. If we surveyors do not recognize the disconnect between what owners think we are doing and what we are really doing, we are leading them down a path to – at best - completely unnecessary and often indefensible conflicts with their neighbors, and – at worst – litigation that will cost tens of thousands of dollars.

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10 General Rules of Procedures and Practices, Texas Board of Professional Land Surveying §663.16. Boundary Construction – “(a) When delineating a property or boundary line as an integral portion of a survey, the land surveyor shall respect junior/senior property rights …”
THE [QUASI-]JUDICIAL FUNCTIONS OF SURVEYORS
Thomas M. Cooley, Chief Justice Michigan Supreme Court - January, 1881

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

In the State of Michigan all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth unfortunately is that the lines were very carelessly run, the monuments inaccurately placed; and, as the recorded witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed, it is impossible to determine by the record with the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed, as indeed they should have been, for in general there can have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should have become dear. The fact probably is that town surveys are quite as inaccurate as those made under the authority of the general government.

Recovering Lost Corners

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold, and the work of improvement begun. A generation has passed away since they were converted into cultivated farms, and few if any of the original corners and quarter stakes now remain. The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing was substituted in its place, the adjoining proprietors might in a few years be found disputing over their lines, and
perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

*If now the 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. However erroneous may have been the original survey, the monuments that were set must nevertheless govern, even though the effect be to make one half-quarter section ninety acres and the adjoining seventy; 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. While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor.*

*It is by no means uncommon that we find men, 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. 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. The mistake above alluded to, is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we will refer is not what is commonly supposed.*

An act passed in 1869, Compiled Laws 593, amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows:  *Second. Extinct interior section corners must be reestablished at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it. Third. Any extinct quarter-section corner, except on fractional lines, must be established equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line. The corners thus determined the surveyors are required to perpetuate by noting bearing trees when timber is near.*

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from the government bought such land as was within the original boundaries, and unquestionably owned it up to the time when the monuments became extinct. If the monument was set for an interior section corner, but did not happen to be at the intersection of two right lines joining the nearest known points east and west and north and south of it it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

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

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. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that if a man loses his deed, he shall lose his land altogether.

But if 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 government surveyor where the field notes indicated it to be.

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

3. No statute can confer upon a county surveyor the power to establish corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made must govern, because the land was bought in reference to them; and any legislation, whether state or federal, that should have the effect to change these, would be inoperative, because it would disturb vested rights.

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.

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. 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. 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 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, 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. Stewart vs Carleton, 31 Mich. Reports, 270; Diehl vs. Zanger, 39 Mich. Reports, 601. And county surveyors, no more than any others, can conclude parties by their surveys.

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. 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; 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. 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.

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. 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. 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?

Fixing Lines by Acquiescence

It is a common error that lines do not become fixed by acquiescence in less time than twenty years. In fact, by statute, road lines may become conclusively fixed in ten years; and 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. 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.

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. 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 imputes the information to those who employ him, and who might otherwise be misled, 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. The peace of the community absolutely requires this rule. It is not long since, that in one of the leading cities of the State an attempt was made to move houses two or three rods into a street, on the ground that a survey under which the street had been located for many years, had been found in a more recent survey to be erroneous.

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.

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. By monuments in the case of government surveys we mean of course the corner and quarter stakes: blazed lines or marked trees on the lines are not monuments: they are merely guides or finger posts, if we may use the expression, to inform us with more or less accuracy where the monuments may be found.

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. 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; and, 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.

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. 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. 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.

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.
A Statute of Limitation on Boundaries

By Jeffery N. Lucas, PLS, Esq.
June 16, 2014

One of the things that has often fascinated me about the law as I continue to read and write about it is the concept of a statute of limitations. That after a certain amount of time something that was once a wrong, while it may not ever become a right, will eventually be forgiven and we can move on and not worry about it anymore. Limitations on negligence is a good example. To clarify, I am talking in the civil context and not the criminal.

I have often told surveyors that property law, especially boundary law, has built-in limitations periods. These are not statutorily enacted limitations, but court-made limitations. The most common in the boundary context are the so-called location doctrines; the common grantor doctrine, the doctrine of monuments, boundary by oral agreement, boundary by acquiescence, boundary by practical location, estoppel and the all-encompassing rule of repose. Most rules of repose are in the 20 to 30 year range.

Since McArthur v. Carrie's Admr., 32 Ala. 75 (1858), this State has followed a rule of repose, or rule of prescription, of 20 years. This principle of repose or prescription is similar to a statute of limitations, but not dependent upon one, and broader in scope. It is a doctrine that operates in addition to laches. Unlike laches, however, the only element of the rule of repose is time. It is not affected by the circumstances of the situation, by personal disabilities, or by whether prejudice has resulted or evidence obscured. It operates as an absolute bar to claims that are unasserted for 20 years.[1]

Adverse possession is also a boundary establishment doctrine, but it is more than that. It will also settle the title question along with the location question. More than this, however, since it is always statutorily enacted it also serves as a statute of limitations.

Falling right on the heels of these doctrines are the fundamental principles of land surveying. You are either an original surveyor laying out original lines for the first time or you are a following surveyor whose only function is to retrace where these lines were originally laid out, not to correct them. As we all know, there is a lot more that goes into that discussion and I’m not going there with this column because I have other ground to cover.

The point to be made is that unlike a statute of limitations where a wrong may never become a right, in the boundary context a mistake in location will eventually be the correct location in due course because of the fundamental principles of land surveying and the built-in court-made limitations—if surveyors would allow this to happen.

But many surveyors simply can’t or won’t allow this to happen and this is the point of this column and has been the point of several of my most recent columns—how can we work towards a practice model that maintains the status quo as opposed to constantly upsetting the applecart?

Good Public Policy

The reason we have statutes of limitation is that they fulfill valuable public policy needs. Life is too short, after a certain amount of time we need to be able to move on. Adverse possession says, in essence, if you aren’t going to take care of your property we will give to somebody who is already doing that job. This goes back to the ancient idea that we do not want to see property go unused, especially if someone else is willing to use it and make it productive for society as a whole.

As a matter of public policy and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into.[2]

I recently covered a statute of limitations case, guised as an easement case, for my monthly newsletter. It is a case I have covered in this column in the past, *H&F Land, Inc. v. Panama City-Bay County Airport and Industrial District,*[3] but this time around I had a totally different takeaway given my somewhat recent interest in exploring ideas that could fundamentally change the way land surveying is practiced—hopefully for the better—and keep traditional land surveying relevant well into the 21st century.

The Marketable Record Title Act

The reason I first covered the case was because it dealt with the Marketable Record Title Act (MRTA) as it has been enacted in Florida. My most recent reason for revisiting the case was MRTA’s impact on a common law way of necessity—an implied easement servicing a landlocked piece of property. As the Florida Supreme Court noted, MRTA is both a recording statute and a statute of limitations on old stale claims. The court gave us a basic explanation of MRTA:

In landmark legislation fundamentally revamping Florida property law, the Florida Legislature adopted MRTA in 1963 for the purpose of simplifying and facilitating land title transactions. MRTA was designed to simplify conveyances of real property, stabilize titles, and give certainty to land ownership. MRTA is based on the Model Marketable Title Act, which was proposed in 1960 with multiple objectives: (1) to limit title searches to recently recorded instruments only; (2) to clear old defects of record; (3) to establish perimeters within which marketability can be determined; (4) to reduce the number of quiet title actions; and (5) to reduce the costs of abstracts and closings.[4]

Do you see what I see? The title attorneys and title companies got together and decided that they wanted a model law that would simplify the task of searching and insuring title. A process that would eliminate old problems, ensure marketability, reduce litigation and associated liability,
and reduce costs. Another thing that it does is it levels the playing field so that all of the title companies and title attorneys are working from the same basic parameters. It also establishes a correct answer. Couldn’t the land surveying profession—the guys and gals in charge of the location question—use something akin to MRTA?

MRTA sets up something called the “root of title,” which refers to the last title transaction creating the estate in question and which was recorded at least thirty years ago. Once there is a root of title it extinguishes all earlier claims in the record to the same property. In essence, this is now the superior conveyance. The public policy issue here are clear. Society hates ancient controversies and MRTA extinguishes them after 30 years.

Here’s The Rub

I am almost loath to say what I’m about to say next because I know I am going to get the flaming-arrow e-mails, I can already hear the cries of heresy, the wailing and gnashing of teeth, and the inevitable lynch mobs gathering at the next conference I attend. This actually happened once. The only reason I was spared is that my wife was there and they took pity on her because they did not want her to see me dangling by the neck from a second-story balcony. But I digress.

Folks … after thirty years the location question should be a settled matter. I don’t care if you find an original monument set by George Washington. If it doesn’t match the status quo as has been established for the last thirty years, pull it up, take it home and put it on the mantle. Everybody else wants to move on save the land surveying profession. Life is too short and our standing in society is too precarious for us to continue to be the source of ancient controversies when it comes to boundaries. We need to be problem solvers not trouble makers.

One of the built-in rubs that we have within the land surveying profession, which is actually part of the land surveyor’s DNA, is our never-ending search for ancient controversies. We are taught at the very beginning of our career that we must find the original monuments set by the original surveyor, no matter how long that takes or how long these monuments have come up missing. Even if the rest of the world has moved on, it seems the surveyor’s duty is to remain focused on the past.

Another problem that we have, that is fairly wide-spread, is surveyors of the past did not do this work diligently. They didn’t exhaust all measures to find missing original monuments. Shortcuts were taken, evidence ignored, math applied and new corners set. These new corners get accepted by the local landowners, improvements get built to them, new subdivisions hang off of them, reliance sets in, and then some county surveyor decides to dig up the intersection and finds the original sandstone monument six feet down and 8.25 feet away from the spike that was in the middle of the intersection and used by everyone for the last 60 years. To what end?

There Needs to be an End

We could use a model code similar to MRTA, except with a focus on settling the location question as MRTA settles the title question. Notwithstanding many of the obvious problems with accomplishing such a task (lawyers, guns and money, to name a few), the Model Marketable
Title Act was first promulgated in 1960. Last time I wrote about this I did an internet search to try and find out how many states had adopted the model act. At that time I read an article that said about 22 out of 50 states had adopted some form of the act. It only took 50 years to get that many jurisdictions onboard. I don’t think we have that kind of time on our hands, at least I know I don’t.

That does not mean that we could not use a MRTA type code as a model for what should be acceptable practice. 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.

I certainly can’t predict the future, but one thing I am fairly confident of is that our current practice model, which is let the chips fall where they may, will eventually bring an end to traditional surveying as we currently know it (that part of surveying that requires licensure). If that’s all we have to offer there will be faster and easier ways to do it and the land surveyor’s services will no longer be needed—after all—there will be an app for that.

Footnotes


[2] Id. at 552.

[3] Panama City-Bay County Airport and Industrial District, 736 So.2d 1167 (Fla.1999).

[4] Id. at 1171.
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**Reconnaissance**

The Surveyor’s Roles & Responsibilities
Ensuring the American Dream, Part 1

A few weeks ago, I appeared on ISPE Executive Director Curt Sumner’s radio show (broadcast weekly on American Rebel Radio) along with well-known author and speaker Jeff Lucas and noted New Jersey surveyor Bruce Blair. The theme of the program was to encourage professional surveyors to broaden their view and understanding of the role they can, and arguably should, play in helping resolve boundary and title problems between property owners.

In order to begin a conversation on this topic, we have to acknowledge two key points. First, is that there are only two persons who can truly resolve a disputed boundary or title problem. These persons do not include attorneys, title companies or surveyors. And, in a sense, they do not even include judges and juries—at least not of their own volition.

No, the only persons who can resolve such conflicts are the two owners involved. And they can do it one of two ways: the painless, low-cost way—by agreement—or by the expensive, painful litigation path—which is when judges and juries get involved.

The second key point—one that I believe is completely indisputable and critically important is that surveyors recognize that the average land owner believes what a surveyor does is “tell me what I own.”

Of course, surveyors know that in the United States, they do not have the legal authority to determine ownership; but there is a distinct and serious disconnection when property owners think they do.

So if surveyors cannot determine ownership or resolve boundary and title problems, why reassure the idea that they should take a more active role in doing just that? Michigan Supreme Court Justice Thomas Cooley in his seminal 1881 treatise entitled The Judicial Functions of Surveyors addressed this issue head-on by stating:

> It is always possible ... that the surveyor may usefully act as a mediator between parties, and assist in preserving legal controversies by setting down their lines.

It is a well-known fact that surveyors, in the process of conducting boundary surveys, very frequently encounter and identify potential boundary and/or title conflicts. Such problems most frequently manifest themselves as deed overlaps, ambiguous descriptions, potential claims of unwritten rights (typically adverse possession, acquiescence and prior agreements), and simple boundary disputes.

When faced with these problems, many surveyors go ahead and—based on the best available evidence—set corners representing their interpretation of where the record title lines and corners belong. The impetus for setting those corners, in many cases, may have been a state’s regulatory standards, although doing so is also an expression of the surveyor’s historical role. But, most often, setting these corners also results in lines that are contrary to what the owners—before the surveyor showed up—had believed to be their boundaries, and had acquiesced to.

In any event, the result is that one owner is inevitably left happy (and likely confused) and the other is left upset and confused. Why? Because the two owners believe the surveyor has just told them that one “owns” the line marshaled—which, as often as not, is 5 feet over the fence and includes half of the neighbor’s driveway. One or both owners are now poised to spend tens of thousands of dollars litigating something that—until the surveyor showed up—was a boundary that had been mutually acquiesced in. And perhaps worst of all is that the surveyor’s guidance is often limited to the rather cavalier “You need to contact an attorney.”

So, how do surveyors balance their responsibility to survey lines of written title, with the reality that in doing so they are often condemning owners to a litigation hell and neighborhood despair; all while keeping in mind that they themselves cannot determine ownership or resolve disputes? Join me next time when we will delve further into what Justice Cooley said, and explore how surveyors might apply ‘early intervention’.

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Reconnaissance

The Surveyor’s Roles & Responsibilities
Ensuring the American Dream, Part 2

In Part One, I explained an initiative by a number of noted professional surveyors from across the country promoting the idea that surveyors should take an active role in the resolution and prevention of boundary disputes. In this column, we will explore that idea in more detail.

There are at least two important issues that we need to study. The first is to understand how surveyors unwittingly and unintentionally encourage unrest and even litigation between neighbors. We will discuss that issue in this column. The second is to show surveyors that there are things they can lawfully do to help avoid the first; we will delve into that in my next column.

In addressing the first issue, I repeat the assertion made last time: the average landowner believes that surveyors have the responsibility and authority to determine ownership. We surveyors know this is not true, but we must recognize that clients think it is true. Thus, when we set corners based purely on written title, clients believe we have told them what they own.

I am not convinced that we surveyors need to clarify with clients what our authority is regarding ownership actually is—at least not until we have a better understanding of the decisions we make in the course of performing the survey. For example, if our work indicates that the corner will fall 5 feet over the neighbor’s fence, I believe we should suggest our work right then. Why? Because it is so patently obvious that ‘something’ is wrong. That ‘something’ is generally one of four things.

The first is that we are simply in the wrong place because we did not find all of the appropriate evidence. In that case, we need to redouble our efforts to look for more and better evidence and resurvey our solution. If, however, we still end up with what appears to be a contrary boundary location, we should consider the next three scenarios.

The second possibility is that we see in the wrong place because—lacking good, solid, conclusive evidence—we connected a purely mathematical solution based on our interpretation of the evidence. This is what some call mathematical ‘deed-stalking.’ Such solutions are inevitably the result of one or more relatively arbitrary decisions. That’s fine, it’s what we surveyors do from an opinion based on our interpretation of what we often know is imperfect and incomplete evidence. But when that interpretation and opinion results in a solution that is going to disturb what may be established rights, we should rethink the wisdom of continuing with it. Conley addressed this, saying,

It is known that surveyors sometimes … disregard all evidence 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.

The third possibility when a line or corner falls contrary to a line of possession or occupation (usually, but not always, a fence) is that one of the doctrines of unwritten title may have acted to move ownership from the written title line over to the fence. Adverse possession, acquiescence (called by a different name in some states), patent agreement, estoppel or practical location can operate to move an ownership line based on the actions of one or both of the owners.

Of course, surveyors do not have the legal authority to make boundary determinations based on unwritten rights, but they need to be well versed enough in each of the doctrines to recognize the possibility—particularly when the respective owners have been peacefully occupying to the line of occupation. In this situation, as with the others, the surveyor has to consider alternatives to simply setting the corners, which will likely set the neighbors on the painful and expensive path to litigation. As Conley said,

[The surveyor] would do much if he were to attempt to establish monuments which he knew would tend to disturb settled rights…

The last possibility—one that is not entirely unrelated to the third—is that the fence does not, in the surveyor’s opinion, seem to fit the criteria for one of the doctrines of unwritten title, yet the owners are happy with it.

So, based on one of those scenarios, we have already suspended our work. What alternatives should we now investigate? And what can we do without violating our state’s standards of practice or practicing law? Quite a lot… as we will find out next time.

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Reconnaissance

The Surveyor’s Roles & Responsibilities
Ensuring the American Dream, Part 3

In the first two installments of this series, we looked at the background of the problem that boundary surveyors face and, more often than not, propagate. That misfortune is this: the tory of surveyors (a) often doing their job by retracing record descriptions and not, in the process, (b) leaving clients and their adversaries—if not entire neighborhoods—in confusion and despair; if not litigation.

Interestingly, the way out of this quandary is the same whether surveyors arrive at their boundary solutions by the unfortunate practice of “fence-line” surveying, by the equally egregious practice of mathematical “dead-staking,” or by properly applying the applicable boundary law principles based on a thorough analysis of the facts and evidence.

Of course, we always hope and trust that surveyors resolve boundaries in accordance with proper training and experience, the usual standard of care exercised by the prudent surveyor in the same circumstances, and any written standards that the jurisdiction has adopted. But that decision would be at the mercy of the means that the surveyor employed.

The answer lies directly in the fact that only the two affected owners can resolve a boundary or title problem. And they have two choices: agreement or litigation. Hopefully, no one would suggest that litigation is the more desirable of the two. Although one or both of the affected landowners cannot, or will not, compromise, they will likely be destroyed in court.

Of course, sometimes the surveyor has been drawn into a situation by an owner or attorney long after the dye to a dispute has been cast, in which case, it is likely too late to foster an agreement (although there is nothing to prevent that discussion with the attorney and owner). Also, if the boundary is part of an AEX/ACSM Land Title Survey, there will be a title company and normally several attorneys who merely need the surveyor to clearly present the facts so they can determine the means they deem most appropriate to get the transaction closed.

Otherwise, when the surveyor is “first on the scene” why provoke owners by setting corners and drawing plans/maps/plans that show lines and corners contrary to what appear to be long-standing and/or accepted boundaries? By stopping short of setting two affected owners in a conversation about the situation on the ground, what the records say, and the fact that only they can resolve the issue. The conversation should include the possibilities—agreement or litigation—and the potentialities. In order to have a chance at successfully leading owners to agreement rather than litigation, surveyors need a number of tools.

The first is a contract that spells out what the surveyors will do: raise the boundary to a final resolution unless a title or boundary problem is revealed, in which case, the contract is fulfilled, pending resolution of the problem. The surveyor could then use a second contract under which he or she would work with the affected parties to try to help them come to agreement. If agreement is reached, the third step would be to undertake an engagement to write the descriptions and prepare the necessary plans, maps or plans to bring that agreement to fruition.

Of course, different jurisdictions have different requirements, of which the surveyor must be fully informed. Some will allow the simple exchange of deeds; while others may require a survey, lot line adjustment, administrative plat or restitution, etc. Also, surveyors must make it very clear that they cannot offer legal advice and that, at some point, it will likely be desirable, if not

“Setting a corner when it conflicts with possession will take the hidden, make it blatantly obvious, and sow the seeds of a dispute.”
necessary, to bring the owner's attorney to
the table to address the legal necessities (i.e.,
mortgages, title insurance, taxes, judgments,
exchange of consideration, and preparation
of any legal documents if the owners are
unable or unwilling).

The second tool surveyors will require is
two-fold: (1) an interest in, and the ability to,
engage with the owners on this sort of level,
and (2) the training to facilitate an effective
agreement. The former is contrary to the
name of most surveyors and will therefore
take some practice to overcome. The latter
can be gained through attending a course
on alternative dispute resolution (there are
many sources of such training), and anyone
interested in becoming, for example, a
mediator, should also review their state's
related rules and laws.

Lastly, surveyors need to be very well-
versed in the legal aspects of boundaries
and unwritten rights. While they cannot
give legal advice, they should understand
the requirements of each type of unwritten
right for their state (e.g., adverse possession,
recognition and acknowledgment, custom
agreements, estoppel, and, in some states,
common grantor doctrine and practical
location, etc.). This knowledge will greatly
assist them as they try to guide the owners
to an agreement.

In summary, we are not talking about
surveyors retracing boundaries based on
unwritten rights (which they do not have
the authority to do), forcing owners into
ill-advised agreements, or hiding the facts
from them. What we are talking about is
surveyors recognizing conflicts or potential
conflicts early-on, not unnecessarily and
prematurely finalizing surveys and setting
points that exacerbate those problems,
and encouraging surveyors to work with
the only people that can actually solve the
problems—the affected owners.

Let's be the facilitator to solutions to the
problems we find. As has been said many
times, if we find no problems, and if we offer
no solutions, perhaps we are
the problem!

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Mediation in the State of Arizona

Mediation is process whereby the parties come to an agreement facilitated by a mediator. One major advantage of mediation is that the parties involved – by remaining in control of the decision making – thereby remain in control over the outcome of their dispute rather relying on a judge or jury to decide for them. Mediators are judges; they are facilitators who work to build a consensus between the parties.

Mediation is not directly regulated by the State of Arizona nor is it in many other states, although there are typically some laws or regulations related to mediation. Alternate dispute resolution organizations operate in many if not all states, however, and among other things, they typically have an ethical code for their members. They also often provide training and education for persons wishing to become mediators.

Although mediation has the trappings of a legal process, does not require attorneys to be involved lawyers to conduct it. Many mediators are simply professionals or experts in a particular profession or industry who have training and skills that are helpful in helping people in disputes find common ground.

Many of the Justice Courts in Arizona require that small claim lawsuits must be mediated before the lawsuit is allowed to proceed to a judicial hearing.

\[\text{12 The Arizona State Bar Association has an excellent web page on mediation at http://www.azbar.org/legalhelpandeducation/consumerbrochures/alternativestotrial/}\]