BOUNDARY RETRACEMENT AND LEGAL ASPECTS OF LAND SURVEYING. INDIANA

American Law Report: Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property 117 A.L.R. 5th 23

- "...the courts recognize that surveyors have a duty to perform a survey of real property with reasonable care, skill, diligence, and ability, and that a failure to satisfy this duty of care may constitute a tort or breach of contract, forming the basis for a claim for damages suffered as a result of an inaccurate survey."

- "The general view espoused by the courts is that the duty imposed upon a land surveyor to perform a survey with reasonable care, skill, diligence, and ability only extends to parties who are in privity of contract with the surveyor, unless an exception to the privity requirement applies..."

- "...the courts have carved out a number of limited exceptions to this rule for third parties who have relied on a negligently performed survey..."

Is this the reputation you want?...
Poch v. Urlaub; 357 Mich. 261; 98 N.W.2d 509; 1959

- "We agree with the judge below that this survey could not lawfully be regarded. A surveyor has no more right than anyone else to decide upon starting points and other elements of location. We have had frequent occasion to refer to the mischief done by the officious meddling of such persons under some notion that it is within their province to unsettle possessions and landmarks."

- "We have had frequent occasion to condemn the assumptions of surveyors in determining lines and landmarks according to their own notions. They have no such right, and their assumptions are not lawful. There are few evils more annoying to public or private peace than the intermeddling with land boundaries, and the disturbance of peaceable possessions."
Why should we study Case Law? After all, most of us are not Attorneys.

- "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."

- (From “The Judicial Functions of Surveyors” By Justice Thomas Cooley)

Wisconsin – effect of common law

**City Milwaukee v. State:**

193 Wis. 423; 214 N.W. 820; 1927

- All litigated cases must be decided according to law, either statutory or the common law.
- Where the legislature has enacted statutes within the proper field of legislation and not violative of the provisions of the federal and state constitutions, its edicts are supreme, and they cannot be interfered with by the courts.
- and where legal principles have been laid down by the courts in the proper exercise of their judicial functions and have continued in force for such a period as to create vested rights, such principles are clothed with a force possessed by a statutory enactment, and should be recognized and applied ...

What about case law from other states or regions??

- Home State Cases
- Neighboring State Cases
- Leading State Cases
- All state Cases
- English Common Law
Can a surveyor quote case law?

- Absolutely!
- You may need case law on subjects that, to you, seem to need no clarification, such as junior–senior title, or that the call for a creek is the call to the center of the creek.
- If your case hinges on a principle, come prepared with proof that the principle in question is applicable to your state.

Ohio surveyor quotes common law: Kennedy v. Rose: 2008 Ohio 3929

- Harkness testified that the last call of the triangle fell within the area of Tunnel Hill Road but that the vast majority of decisions made in Ohio and other states transfer property to the center of a road unless otherwise indicated.
- We find that the testimony of Charles Harkness established that he conducted his survey in accordance with surveying standards. Harkness researched and utilized other sources of information to determine the intent of the parties in creating the original boundary lines consistent with Ohio Adm. Code 4733–37–02. Furthermore, he relied on feasible monumentation both natural and artificial.

Attorneys may quote case law out of context

- It is not unusual to see case law cited by counsel for plaintiff or defendant which has been overturned by later decisions.
- Alternatively, you may see a quotation in a later case which, upon careful consideration of the original opinion, never reflected the opinion of the justices in the earlier case.
Justice Cooley – “Knowing the Law”

- QUASI-JUDICIAL CAPACITY OF SURVEYORS
  - 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.

Communications Skills enter into Practically Everything that we Do

- The intent of the parties, Deed interpretation
- Every word placed upon a plat (whether recorded or not) will have a significance.
- Written reports (official or otherwise)
- Reading and understanding case law
- Reading and comprehending statutes, ordinances
- Presentations to city council, board of commissioners, other government agencies
- Courtroom testimony
- Contracts with clients
- Your website, or any other advertising
- Whenever you pick up the phone...

Communications by e-mail

- Never put anything in an email that you would dislike seeing on a billboard
- The recipient of the email can read neither your body language, facial expression, nor your tone of voice. This is not to say the effective email communication is impossible, but it requires extra care.
- Type your email and then re-read your own work before you hit the “send” Button.
Facebook, Twitter, and Myspace

- There now exist corporations and software devoted exclusively to “mining” various online resources for information on rival attorneys, witnesses, and experts.
- Numerous articles have been devoted to the absolute necessity of ensuring that information which could be used to embarrass or compromise a witness (expert or otherwise) be removed from public internet access.

Communication with judge and jury.

- When testifying in court, it is important to adjust your delivery to the audience – for a summary hearing before a judge, you can be more technical.
- On the other hand, a jury will almost surely be composed entirely of individuals with no familiarity with the surveying profession.
- (You can just about count on the last; at least one of the Attorneys involved has a vested interest in making sure that there is no relevant expertise on the jury.)

Common Sense in Kentucky

Linebaugh v. Carroll, 2009-CA-000888-MR (KYCA)

- "In determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution..." Arthur v. Martin, 705 S.W.2d 940, 942 (Ky.App. 1986). In attempting to ascertain intent, courts are admonished to employ common sense – all too often a rare guest in the house of the law:
- Fairness, justice and common understanding must enter into the interpretation of any instrument, and an apparent mistake in the use of words will not be permitted to impair what was the real intention of the parties or to defeat their obvious purpose.
To pursue the proper descriptions of our land boundaries, would render men's titles very precarious not only from the variations of the compass, but that old surveys were often inaccurate; and mistakes often made in copying their descriptions into the patents; leaving out lines and putting north for south and east for west; and in copying those descriptions into subsequent conveyances. Whereas the marked trees upon the land remain invariable, according to which neighbors hold their distinct lands. On this ground, our juries have uniformly and wisely never suffered such lines, when proved to be departed from, because they do not agree exactly with descriptions in conveyances.

The Rules of Construction – (Priorities, or Order of Importance)

1. Natural Monuments – creeks, streams, ridgelines, etc.
3. Adjacent tracts or boundaries (call for adjoiners)
4. Courses and / or bearings (may be combined with 5)
5. Distances – Various states are not consistent when considering the hierarchy between course and distance – most consider them of nearly equal stature.
6. Area or Quantity

Note that the Rules of Construction are guidelines, not a straightjacket!!

Rules of Construction: Indiana (1)
Matanich v. American Oil:
139 Ind. App. 145; 216 N.E.2d 359; 1966

- A specification of distance yields to a more certain location made by reference to a highway. Distance is last in the established order of precedence for location of boundaries.
- "Under the principle that where some particulars of the description in a deed do not agree, those which are uncertain and more liable to error and mistake must be governed by those which are more certain. ...
Various rules for the interpretations of descriptions of the location and the boundary of lands have been evolved and are now frequently referred to in interpreting grants and deeds.

Accordingly an order of precedence has been established among different calls for the location of boundaries of land, and, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, and thereafter to courses and distances.

In addition to the above, we note that with respect to land descriptions, this court has held that "the order of preference for the location of boundaries" is in descending order as follows: "natural objects or landmarks, artificial monuments, adjacent boundaries, courses and distances, and lastly quantity." Hollars v. Stephenson, 121 Ind. App. 410, 419, 99 N.E.2d 258, 262 (1951).

The Hollars court emphasized, "On the question of acreage, the courts have held that "the quantity of land contained in a tract is the least important element in determining the boundary."

According to 865 Indiana Administrative Code 1–12–10(1), when conducting a retracement survey, a land surveyor shall search for controlling physical monuments and, when found, weigh their reliability. In addition, a land surveyor shall search for and locate monuments that reference missing control monuments.

865 Ind. Admin. Code 1–12–10(2). "Controlling monument" means "any undisturbed artificial, physical, or record monument called for in a record plat or land title description and controls any combination of the: (1) location; (2) dimensions; or (3) configuration; of the described tract." 865 Ind. Admin. Code 1–12–2.
ARTICLE 1. GENERAL PROVISIONS (1)
RULE 12. LAND SURVEYING; COMPETENT PRACTICE

- 865 IAC 1–12–10 Field work for retracement and original surveys
- Sec. 10. When conducting a retracement or original survey, a land surveyor shall do the following:
- (1) Search for controlling physical monuments and, when found, weigh their reliability.
- (2) Search for and locate the following:
  - (A) Monuments that reference missing control monuments.
  - (B) Monuments that substantiate control monuments that have been obliterated.
  - (C) Other monuments and real evidence that are necessary to the survey.
- (3) If necessary:
  - (A) investigate possible parol evidence supporting the positions of obliterated control monuments; and
  - (B) obtain the necessary affidavit or affidavits from individuals involved.
- (4) Obtain the following:
  - (A) Necessary measurements to correlate all found evidence, including the relationship to adjoining properties.
  - (B) Sufficient check measurements to satisfactorily verify the work.
- (5) Evaluate physical evidence of possession between adjoiners and identify age of possession, for example, by parol evidence, if possible.
- (6) Survey field notes shall be in the form required by section 6 of this rule.
- (7) Any controlling corners that are original public land survey corners or other government corners such as land grants shall be:
  - (A) evaluated;
  - (B) perpetuated; and
  - (C) documented;
  - in accordance with section 30 of this rule.
It is clear that **monuments established at the time of fixing the boundary of land**, when they are **described in the deed or other writing, will control distances.** In this case, the stake at the northwest corner is mentioned, ...

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"The most widely accepted legal principle in land surveying is probably that of a monument controlling direction, distance, and area. It is in fact the most quoted principle in court decisions:

However, the term "monument: lacks an important adjective – "called for". In other words, called for **monuments control dimensions.**"

"There seems to be a growing practice in the profession of indiscriminately yielding to uncalled–for monuments that happen to be in the general vicinity of the presumed corner location.

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In some cases, the deed calls for, either directly or indirectly, original monuments of a different type. In other cases the deed calls for no monuments whatsoever – the description is pure metes with only dimensions given. **Yielding to an uncalled–for monument without predetermined justification may lead to embarrassment in court.**"
When is a monument...not a corner??
August 1990 ACSM Bulletin "Law and Ethics" section titled "Uncalled-For Monuments" by David R. Knowles.

> "When accepting uncalled for monuments or any other evidence the **surveyor should be prepared to persuade the court that this is the best evidence available** of the corner location, and not accept a monument merely because it was there."

What is a Monument?: Indiana (1)
Travellers Ins. v. Yount: 98 Ind. 454; 1883

- In describing lands, monuments must control courses and distances, and **among the natural objects which are often referred to as monuments** in deeds, and which have been the **subject of somewhat arbitrary rules**, are...
- **...streams and rivers, ponds, shores, beaches, highways, streets, and the like.** 3 Washb. Real Prop., marg. pp. 631, 632. These natural objects can be as readily ascertained by an inspection of the premises, and when ascertained serve the same purpose, as any other class of monuments.

West Virginia - Called For Monuments:
Winding Gulf v. Campbell: 72 W. Va. 449; 78 S.E. 384; 1913

- There is a well established rule that **marked lines prevail over mere courses and distances, but the statement of that rule is at times too broad**. Only marked lines or corners mentioned or called for in a deed or other muniment of title prevail over courses and distances.
West Virginia - Called For Monuments:
Winding Gulf v. Campbell: 72 W. Va. 449; 78 S.E. 384; 1913

- If a patent or deed refer to any notorious landmarks, or natural boundaries, which cannot be mistaken, and are not liable to change or decay, as the corners or angles of a plat, such notorious landmarks are to be regarded as termini, from whence straight lines are to be run from one to the other, without regard to the correspondence of either course or distance, which may in such cases be mistaken in the deed.

Bearing vs. Distance: Indiana (2)
Hedge v. Sims: 29 Ind. 574; 1868

- It is clear that monuments established at the time of fixing the boundary of land, when they are described in the deed or other writing, will control distances. In this case, the stake at the northwest corner is mentioned, and the line running thereto is to be parallel with the north line of the land assigned to Irwin, Jones and Mounts.
- This cannot be, if the northeast corner of the land assigned to Sims and Finley is established thirty-eight rods north of the northeast corner of the land assigned to Irwin, Jones and Mounts. There is, then, an ambiguity to be explained by parol evidence. The court below committed no error in admitting the evidence.

Course v. Distance U.S. Supreme Court
Preston's Heirs v. Bowmar: 19 U.S. 580; 5 L. Ed. 336; 1821

- Course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges a court to prefer the one or the other.
“More or Less”: Indiana (1)  
Adams v. Betz: 167 Ind. 161; 78 N.E. 649; 1906

- The authorities as a general rule affirm that where it appears in a deed of conveyance of land by the qualifying words "more or less," the statement of the number of acres in the deed is a mere matter of description, and not of the essence of the contract, the purchaser, in the absence of fraud, takes the risk as to the quantity of acres conveyed to him. Tyler v. Anderson (1886), 106 Ind. 185, 6 N.E. 600; Moore v. Harmon (1895), 142 Ind. 555, 41 N.E. 599.

Call for Adjoiner: Indiana (4)  
McDonald v. Payne: 114 Ind. 359; 16 N.E. 795; 1888

- It is well settled that streets, highways and the like, as well as adjoining lots or farms, may be referred to as monuments in the description of a tract of land. Simonton v. Thompson, 55 Ind. 87; Gove v. White, 20 Wis. 425; Dunham v. Williams, 37 N.Y. 251; Banks v. Ogden, 69 U.S. 57, 2 Wall. 57, 17 L. Ed. 818; Powers v. Jackson, 50 Cal. 429.

Rules of Construction–Adjoiner: Indiana (5)  
Earhart v. Rosenwinkel: 108 Ind. App. 281; 25 N.E.2d 268; 1940

- Various rules for the interpretations of descriptions of the location and boundary of lands have been evolved and are now frequently referred to in interpreting grants and deeds. Accordingly an order of precedence has been established among different calls for the location of boundaries of land, and, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, and thereafter to courses and distances...
The rule is well established in Ohio that a *misdescription in one or more particulars is of no consequence* if the residue of the description enables the court to correct the error and ascertain the land. Eggleston v. Bradford, 10 Ohio, 312 at 316; Williams v. Sparks, 24 Ohio St., 141.

It is also well established in Ohio law that when inconsistencies arise in descriptions, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjoiners, then to courses and distances, and lastly to quantity.

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Call for Adjoiner: Ohio (1)

- When different descriptions appear for the location of boundaries, a general order of precedence has been established. **First, natural objects or landmarks are considered, then, in order of precedence, artificial monuments, adjoiners, courses and distances, and quantity.** 2 Ohio Jurisprudence 3d (1977), 79, Adjoining Landowners, Section 63.
- Original marked trees, as monuments, govern courses and distances (Buckley v. Gilmore (1843), 12 Ohio 63) since courses and distances may be incorrect due to the difference in instruments and the care of surveyors.

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Area Cited in Deed: Indiana (1)
Geson v. Minton:
77 Ind. App. 407; 132 N.E. 654; 1921

- It is well settled that recitals in a deed as to quantity of land conveyed are not necessarily conclusive. In describing a tract of land, monuments, if named, control, and, after monuments, courses and distances. **It is only in the absence of monuments, courses and distances, that the quantity of land named in a deed will govern.**
- This principle has been applied with equal force to devises.
this court held, in a complaint to condemn land for an electric transmission line, that a description of the land sought, as lying "immediately north of, and adjoining the right of way" of a designated railway company, was sufficient on objection raised for indefiniteness. However, in the Mull case, it was not alleged, as here, that the railway company held its easement by prescription.

A description of land, from which a surveyor or skilled person, may locate the tract, is sufficient. Where land is described as bounded by a river, street or public highway, the description is sufficient.

The law governing the establishment of a lost line is merely the expression of common sense. It is settled practice, in locating lines, to begin at a known corner, where the other corners are lost, and locate the other corners by the courses and distances mentioned in a survey. Allowances should be made for the variation of the magnetic needle from the true meridian as well as for the unevenness of the ground over which each line passes.
Artificial Monuments – a “Stake”

- What is the significance of a call to a stake?
- Is a call for a stake an artificial monument or is it in fact merely on par with a call for a point?

The Stake according to Gary Kent

The call to a Stake—excerpt from “Court Decisions regarding trees and woods” – Donald A. Wilson
Stake as a Monument: Indiana (1)
Wingler v. Simpson: 93 Ind. 201; 1884

- from the east side thereof to the Driftwood fork of White river, and wide enough north and south to include one hundred and fifty acres, the northwest corner of said tract being indicated by a stake as a monument in a survey made by R. M. J. Cox in the year 1882, which monument was placed on the east bank of said river; the northeast corner of said tract being designated by a stake placed on the east line of said fractional section by said Cox in making said survey;

Government stake as a Monument: Indiana (1)
North v. Jones: 53 Ind. App. 203; 100 N.E. 84; 1912

- If the original stakes or monuments set by the government surveyors to mark these two points can be found they control.
- ...but if one or both of such monuments are obliterated or lost the point of the former location of such monument or monuments must be determined from the evidence, and when so determined such points will mark the terminations of such line and will be controlling.

Call for a Stake: Ohio sums it up...
Mooren v. Cleveland: 15 Ohio Dec. 456; 1904

- Where a deed conveys certain blocks according to a certain plat not entitled to record and such blocks are described on the plat as containing a certain area, and the lots therein as having certain dimensions, but the original stakes at the corners of the blocks are still standing or can be established, the positions of such stakes must govern in ascertaining the true boundaries of the lands conveyed. It is not error to exclude oral evidence that to obtain the area and dimensions named, the lines of such blocks must be run so as to include in each one-half of a strip marked as a street.
Artificial Monuments – a “Stake”

- The call for a surveyors “Stake”
- Is enough to make all of us shake
- Whether Imagined or Real
- The Decision, I feel
- Is one that we’ll all have to make...

- As in many cases, it is all a matter of proving to the court that the stake existed...

Replacing an old Wood hub
Original marked trees, as monuments, govern courses and distances (Buckley v. Gilmore (1843), 12 Ohio 63)
since courses and distances may be incorrect due to the difference in instruments and the care of surveyors.
Call for a Tree: Indiana (1)  
Wingler v. Simpson: 93 Ind. 201; 1884

- Parol evidence is admissible to prove the former existence, identity and location of ancient monuments since removed, such as marked trees and stones, indicative of the location of lines and corners; and we see no reason why the acts of the interested parties, contemporaneous with the alleged existence of the monuments, as tending to prove their existence, should not be also admissible in evidence.

West Virginia considers the “tree”  
Herbert v. Wise: 7 Va. 239; 1802

- Whereas, the marked trees upon the land remain invariable, according to which neighbours hold their distinct lands. On this ground, our juries have uniformly, and wisely, never suffered such lines, when proved, to be departed from, because they do not agree exactly with descriptions in conveyances.

West Virginia considers the “tree”  
Winding Gulf v. Campbell: 72 W. Va. 449; 78 S.E. 384; 1913

- As monuments, trees would be of equal dignity with those marked for the termini of the line. But not having been so marked, courts and juries are allowed more latitude in respect to their probative value.
Consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects. When it comes to courses and distances, the latter yield to the former.

Do calls in a grant or deed for trees as corners prevail over further call therein that a line between such trees is with an old established line of an adjoining tract or survey, when it is found that such calls are inconsistent? In other words: In a description of land, in a conveyance, when there is repugnancy between them, which yields—calls for natural objects or calls for adjoining?

Shall they be compelled to stop at these corner trees, for which their title papers call, or may they go southward beyond them, several hundred feet, to Preston's line, which their title papers may mistakenly suppose is between these two corners marked by the trees?

We must presume that the commonwealth intended only to grant to the trees, since they are fixed and certain.

There should be no mistake as to their location; there could be, and was, as to the Preston line. Even though it was intended to grant to that line, most certainly it was not done, for the trees are not on it.
The location of the lines of a survey is to be determined by the lines as actually run upon the ground, where this can be ascertained; nor will this rule be varied by the fact that an adherence to it would give to the locator less land than he was entitled to by his certificate. Nor is the rule varied by the fact that a call is made to run to the line of an older survey, if that line was never reached in the survey actually made, but the surveyor stopped at another line which was mistaken for it. [kk note: quoting Burnett v. Burriss, 39 Tex. 501. This opinion quotes Mass., N.Y., and Ohio]

“It just doesn’t fit...”

Is a phrase that could indicate an addiction to Coordinate Geometry...
Doesn’t fit what?
ALTA wants it to fit...
The Attorney wants it to fit...
The landowner wants the acreage to fit...
A pole, as a surveyor’s unit of measurement, is one-fourth of a surveyor’s, or Gunter’s chain. Gunter’s chain, named for Edmund Gunter (d. 1626), is 66 feet long and consists of 100 links, each 7.92 inches in length. A pole is therefore 16.5 feet in length. 8.8’ X 16.5’ = 145.2’.

Surveyors should not fall into the trap of replacing the Rules of Construction and other established surveying principles with pure mathematics, nor with drafting and coordinate geometry software.

As stated in the third edition of “Evidence and Procedures for Boundary Location” (Curtis Brown, Walter Robillard, and Donald Wilson) pg. 185, “…all original corners have equal weight in location of the parcel. Each corner monument called for has just as much control as any other monument called for; all are to be given control, if possible…”

Over-reliance on software (COGO slaves)
On the plat, the surveyor shows...

- How will you depict the information in the previous example on your plat.
- Will you show Deed dimensions, actual measured dimensions, or both?

Quote from Justice Cooley “The Judicial Function of Surveyors”

- 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 place 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.

A common misconception...

- Some will say, “My intent was to create the dimensions shown on the plat, and therefore the dimensions should control...”. According to “Clark on Surveying and Boundaries” (see pg. 369 – 7th ed., Walt Robillard and Lane J. Bouman), “…Because of sound surveying principles based on established surveying practices, the correct answer is that what the original surveyor actually did by placing monuments and running lines on the ground will take precedence over what he intended to do…”
- Or “We live in modern times! We can survey much more accurately, so things are different now…”
Quote from Justice Cooley “The Judicial Function of Surveyors”

- 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 90 acres and the one adjoining, 70; 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.

Cooley – The Duty of the Surveyor

- 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.

Roads as Monuments

- Roads are not waterways – it is the surveyors job to re-locate the original road as it was at the time of the original survey which created the boundary in question.
- The principles of accretion and avulsion do not apply to roads or canals.
- Later survey work may define a right of way in a different location from the original boundary.
As has been in effect said, the essential description of a public highway includes its beginning, course and termination, including its width.

If in any of these particulars the description is so uncertain and ambiguous as that a practical surveyor could not locate the highway from the descriptions contained in the petition, report of viewers, and the final order of the board, then the entire proceeding is void, and it must necessarily fall to the ground. Smith v. Weldon, 73 Ind. 454; Ruston v. Grimwood, 30 Ind. 364.

Ordinarily, it is true, the line described or mentioned in giving the course of a public highway as the line along which the highway is to run is presumed to be the center line of the highway.

...but this presumption may be excluded by the very description itself in case that shows a contrary intent.

If the line of a highway were described as running for a certain distance along the north bank of a river or stream, ...there would be no presumption that one-half the road would be in the river or stream. Taking it as true that a public highway can not possibly be laid so that one-half of it would be upon the right of way of a railroad, we must assume that the intention was that the whole width of the road should lie north of and adjoining the right of way of the railroad company.
Roads as Boundaries

- Just because a road is moved or improved does not mean that the boundary moved with it!
- Just because it is a public way does not mean you can afford to let down your guard...

Survey of Lake Shore: Indiana (1)
Knickerbocker Ice v. Surprise:
53 Ind. App. 286: 97 N.E. 357: 1912

- It is the rule that where the land bordering on a lake has actually been surveyed, platted, sold and conveyed as a "lot" containing a number of acres of land, the grant takes the land under the water far enough from shore to make out the full subdivision in which the land is situated.
- It is true that if a description in a deed is made by metes and bounds, and indicates the shore of a lake as one of the boundary lines, such deed conveys no rights to the land covered by the waters of the lake.
- Each devisee was given a share in the large tract, and then each was given a small strip having water on a part thereof, it seemingly being the intention to thus make each one a riparian owner.
Simultaneous vs. Sequential Conveyance

- Simultaneous conveyance occurs when a plat is recorded showing multiple lots in a subdivision; each lot has equal rights regardless of which is sold first.
- Sequential conveyance occurs when properties are sold individually, each by its own survey and deed.
Junior – Senior Title. General

- If the owner of a large parcel (Smith) sells the eastern 100 ft. of his land to a new buyer (Jones), the buyer has Senior rights, because he is entitled to everything that his deed describes, and Smith “only” gets the remainder, be it more or less than expected.
- Subsequent mense conveyances of both junior and senior parcels do not change the original rights originating from the first conveyance – the conveyance which creates the line in question controls.
- A sequential conveyance can create a situation which operates by the rules of simultaneous conveyance. [Ex. “The Eastern Half”]
- Attention to detail and thorough research are the key.

Ohio agrees with this principle:
Kennedy v. Rose: 2008 Ohio 3929

- Therefore, based upon the evidence presented it was reasonable for the trial court to give deference to the Harkness survey which used the original deed description of the parent property and the deed description for the conveyance in 1949 to first establish the boundary lines of the property for the most senior conveyance from the parent parcel, rather than to much later surveys which did not take the parent property boundaries into consideration and the language of the original 1949 conveyance into consideration.
In order to determine the correct solution in a sequential conveyance scenario, the surveyor must search the chain of title for each lot that affects his solution.

Is there any possibility that a description, copied in several iterations from an original survey, may include one or more transcription errors?

Additional research may be necessary to determine the appropriate age of trees called for as monuments.

How many Standards for sufficiency of research

1. Current deed descriptions of subject parcel and any adjoiners
2. Research subject parcel back to source of present description.
3. Research back to creation of each boundary line
4. Research back to State Grants.
5. Complete Title Search.
6. Definition used by the courts: If missed evidence, you didn’t do enough research!
7. To know the answer

Three questions that we should ask

Is there any information or evidence that you do not understand on your project?
Can you make a clear statement defending why you hold/set/don’t agree with every corner?
Have you paid adequate attention to rights of way and easements providing access to or crossing your project?
The Constellation of Evidence.

- The Surveyor needs to consider all available evidence – Deeds, conversations with neighbors, Sketches on grocery bags, as well as all physical evidence on the ground. Balk lines, old creek beds, fences, age of trees, creek fords, old road beds are all helpful.
- A program presently available on the NGS website to calculate approximate magnetic variance is very useful.
- The idea is to build a “high degree of professional surety” by developing a strong preponderance of evidence.

Justice Thomas Cooley

- 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 his opinion nor his survey can be conclusive upon 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.

Evidence and the West Virginia Surveyor
Capper v. Gates: 193 W. Va. 9; 454 S.E.2d 54; 1994

- Rule 703
- Bases of Opinion Testimony by Experts
  - The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
  - If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Consider that, if the monument that you recovered is not original and that supporting evidence is less than overwhelming, a consideration of the accuracy of the original survey and the accuracy standards prevalent in that area when the replacement corner was set may give an indication as to whether or not a replacement corner is "good enough".

Note that there is no set standard distance that meets this criteria. Each situation is unique.
A quote from “Brown’s Boundary Control and Legal Principles” fourth edition, pg. 321: “Excess or deficiency within a block, caused by a mathematical error in a lot, is given to the lot in which the error occurs.” Pg. 322 “an error should be placed where the error occurs, if it can be so ascertained.”

Again, according to “Brown’s...” it is possible to create a proportioning situation with senior and junior title if an owner sells half of his land and describes it as such with no dimensions given.

“Brown’s Boundary Control and Legal Principles” fourth edition, pg. 323: “Excess of deficiency occurring within a block should not be prorated among other blocks...does not always indicate that intervening streets should be located by proration.”

Proportioning Distances in a Subdivision
Adverse Possession and Prescriptive Easements

(Brown’s Boundary Control and Legal Principles, 4th ed. “Sources of Title”

- Title by Conquest of war
- Title by Patent from the United States
- Title by Deed or private grant
- Title by Will
- Title by involuntary alienation
- Title by adverse possession
- Title by Eminent Domain
- Title by Dedication
- At Law (title to accreted lands, etc.)
Boundary lines never move after the moment of their creation; however, title to new lands can be acquired through other legal mechanisms including adverse possession and accretion.

Driven by State Statute, this is a title doctrine which must be affirmed by the court in order to establish marketable title.

"there is a difference between the transfer of title (adverse possession) or ownership of land vs. fixing the location of a boundary (acquiescence, estoppel, parol agreement and practical location), which, as you know, requires its own certain elements, and does not serve to transfer title otherwise if would be contrary to the statute of frauds." – Don Wilson by email May 21, 2010
New and Perfect Title: West Va.  
Core v. Faupel: 24 W. Va. 238 (1884)

- The effect of the statute of limitations to real estate is to render a continued adversary possession for 10 years conclusive in the action of ejectment not only against the possession but the title of the true owner. **This result is so absolute, that such adversary possession operates as a transfer of the legal title** and is not only a sufficient defense on the part of the defendant, but is sufficient ground for the plaintiff to recover the land, to which he has so acquired title, against the strongest proof of better title.

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Adverse Possession is not always popular: W.Va.  
O'Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

- Hence, there have been some calls to abolish the doctrines of adverse possession and easement by prescription...
- prescriptive easements “serve no legitimate independent function and should be abolished” because “awarding a permanent property right to a willful trespasser hardly preserves the peace, and the law of prescription actually breeds litigation by forcing the landowner to sue a trespasser before the statutory period runs.
- William G. Ackerman and Shane T. Johnson, "Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession..."
- “[T]he public policy supporting [the usage of prescription and adverse possession] has long since gone the way of the cattle drive and the chuckwagon...”  
- [T]hey represent a significant imposition on landowner rights...[and] reward the theft of land.”.
Adverse Possession – Early History.

…As early as 1720 B.C. the Code of Hammurabi discussed adverse possession and the misuse of land, including provisions that punished land waste, rewarded long-term development, and allowed one who worked the land of another for three years to take and keep the land…

…In England, the history of adverse possession can be traced back to the Norman Conquest in 1066. …

The common law doctrine of adverse possession was applied to resolve land disputes between colonists in Virginia as early as 1646, where it was used “in an effort to help resolve the proverbial conflicts between speculators and squatters.” …

The first statutory recognition of adverse possession in the New World appeared in a 1715 statute of limitations in Ohio.

Cumulus Broadcasting Inc. v. Shim

Historically, there are several policy reasons used to justify adverse possession, such as: (1) the stabilization of uncertain boundaries through the passage of time; (2) a respect for the apparent ownership of the adverse possessor who transfers his interest; and (3) assurance of the long-term productivity of the land. Title by either possession or prescription are old subjects in the English Law, according to one treatise, with counterparts in the Roman Law. Boyer,

O’Dell v. Stegall: 226 W. Va. 590; 703 S.E.2d 561; 2010

Prescription doctrine rewards the long-time user of property and penalizes the property owner who sleeps on his or her rights. In its positive aspect, the rationale for prescription is that it rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property. The doctrine protects the expectations of purchasers and creditors who act on the basis of the apparent ownerships suggested by the actual uses of the land.

“[I]ts underlying philosophy is basically that land use has historically been favored over disuse, and that therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner.”
**Adverse Possession (General)**

- Remember “OCEANS”
  - Occupation,
  - Continuous,
  - Exclusive,
  - Adverse (to the true owner)
  - Notorious (open and),
  - for the Statutory Period.

**Adverse Claims – Indiana Statutes**

- § 32–21–7–1 – Payment of taxes required to claim adversely (circa 1927) may not be applied retroactively
- § 32–21–7–2 – No adverse claims against the state
- § 34–11–1–2 – 10-year statute of limitations after 1982 – 15 year statute of limitations before 1982
- § 32–23–1–1 – prescriptive easements require 20 years
- § 36–2–11–19 – Surveyor’s affidavit prima facie evidence

**Adverse Claims – Early Indiana Ruling**  
*Doe v. West: 1 Blackf. 133 (1821)*

- The first and lowest grade of interest in real estate is actual occupancy, which, in a lapse of time, may ripen into a perfect and indefeasible title.
- ...So far as it goes, however it is a legal interest, and gives a right against every man who cannot show a better title. ...In England, and in some of our sister states, it has been decided that 20 years' peaceable possession gives a right which is sufficient to maintain ejectment.
...strict proof must be made not only that the possession was, from its inception, under a public claim of title adverse to that of the real owner, but that both such claim and possession have been continuous and uninterrupted. And this continuity must be kept unbroken through the full period of twenty years. If the chain is broken at any point within that period, no title is acquired. In the case where several tenants have, during the time, successively occupied the premises, to make their possession available it must be shown that each one claimed to hold, and was in possession, under his predecessor.

It is not essential to the acquisition of title by adverse possessions that the entry should be under color of title. The absence of color of title only affects the extent of possession. The rights of those who enter upon lands without color of title are confined to that portion which is subjected to their actual possession. There can be no constructive possession.

In this State, when an owner of land, by mistake as to the boundary line of his land, takes actual, visible and exclusive possession of another's land and holds it as his own continuously for the statutory period of twenty years, he thereby acquires the title as against the real owner.

In 1951, the General Assembly shortened the applicable statute of limitations from twenty to ten years, but the amendment provided that as to "causes of action for the recovery of the possession of real estate accrued prior to the effective date of this amendatory act (March 7, 1951), the time in which such actions shall be commenced thereon shall be the same as if this amendatory act had not become law." Ind. Anno. Stat. § 2-602 (1967 Repl.) Thus, to causes of action which accrued prior to 1951, a twenty year statute of limitations is still applicable.
“Hostility” Required for Adverse Possession” (North Carolina)

- PEGG v. JONES – NO. COA07–147 Filed: 4 December 2007 (N.C.)
- Additionally, the trial court made a finding of fact that there was no adverse possession after the incident in which Cecil pointed a loaded shotgun at Carl Pegg in 1965. Specifically, the trial court stated that it did “not infer that the act of pointing a gun and telling Carl Pegg to get out means that Cecil Jones considered that he owned any property in fee simple or that that message was communicated to Dr. Pegg.”

Adverse with Color of Title – Indiana

- Cooper v. Tarpley: 112 Ind. App. 1; 41 N.E.2d 640 (1942)
- It is not essential to the acquisition of title by adverse possession that the entry should be under color of title. The absence of color of title only affects the extent of possession. The rights of those who enter upon lands without color of title are confined to that portion which is subjected to their actual possession. There can be no constructive possession.
- In this State, when an owner of land, by mistake as to the boundary line of his land, takes actual, visible and exclusive possession of another’s land and holds it as his own continuously for the statutory period of twenty years, he thereby acquires the title as against the real owner.

Fraley v. Minger: Benchmark – Indiana (1)

- 829 N.E.2d 476 (2005)
- Each of the elements of adverse possession must be strictly proved by evidence that is clear, positive, and unequivocal....
- Deferring to the majority of cases that have actually discussed the quantum of proof issue, we find that the heightened standard is appropriate. Employing current terminology, however, we believe that “clear and convincing” is a preferable way to describe the heightened standard needed to establish adverse possession...
Synthesizing and rephrasing these varying expressions to reflect a simplified articulation of the common set of shared concerns and the essence of the common law doctrine, we hold that the doctrine of adverse possession entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, notice, and duration, as follows:

(1) Control -- The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);

(2) Intent -- The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");

(3) Notice -- The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,

(4) Duration -- the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).
We agree with the State in its assessment of law with regard to this consequence of the statute. Our Supreme Court made clear in *Fraley v. Minger* that the adverse possession tax statute may not be totally disregarded. Insofar as the State is exempt from paying property taxes, enforcement of the adverse possession tax statute therefore precludes any governmental unit from acquiring land through adverse possession. There is no exception in the adverse possession tax statute for governmental units that are exempt from paying taxes. If an exception is to be made, it is for our legislature to so provide.

"The kind of possession which will be sufficient must depend largely upon the character of the land, the locality, and the purposes to which it can be put. * * *
And where the land is so situated as not to admit of any permanent useful improvement, neither residence, cultivation, nor actual occupation are necessary where the continued claim to the premises is evidenced by notorious acts of ownership, such as a person would not exercise over lands which he did not own.

"Continuous" has variable definitions.
*Somon v. Murphy*: 160 W. Va. 84; 232 S.E.2d 524; 1977
For the possession to be "continuous" is merely to state that it must last for the statutory period, which, as we have seen, is the fundamental basis for the doctrine of adverse possession. *Parkersburg Industrial Co. v. Schultz*, supra; 2 C.J.S. *Adverse Possession* § 149.
In order to establish the requisite control, the claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land; this element includes the former elements of actual and exclusive possession.

In a controversy affecting land, when a person claiming under a patent, deed or other writing shall enter upon and take possession of any part of the land in controversy under such patent, deed or other writing, for which some other person has the better title, such adversary possession under such patent, deed or other writing shall be taken and held to extend to the boundaries embraced or included by such patent, deed or other writing, unless the person having the better title shall have actual adverse possession of some part of the land embraced by such patent, deed or other writing.

Overlapping Claims – General
There can be no absolute property in the air or light. There is not in the range of the books, or in legal lore, a definition of property which will include them. They are neither appurtenances nor hereditaments; they appertain to nothing and inhere in no substance, except themselves, and are bound to no place. An incorporeal hereditament, the most ideal of all objects of property, while it is not a thing corporeal itself, must issue out of, be annexed to, or exercised within, something that is corporeal, and in most instances is bound to place. Neither light nor air belongs to this class of property.
The foregoing definitions are at best fragile guidelines to outline in a general way the elements of adverse possession, which in the main... cannot be naturally compartmentalized in a given case. They serve only as a beginning point, as no attempt has been made to fit within them subsidiary principles and exceptions that have long been recognized.

Acquiescence is not a separate theory for acquiring ownership of another person’s real property not by providing compensation, but instead by openly using the land as if he or she was the true owner. It does not stand with the doctrine of adverse possession as an alternate theory to be applied in the same circumstances as adverse possession.

Rather, acquiescence applies only when a specific set of circumstances exists—circumstances in which adverse possession does not apply.

Only a bare Outline: West Virginia:
Somon v. Murphy: 160 W. Va. 84; 232 S.E.2d 524; 1977

"Acquiescence": Indiana (4)
Kwolek v. Swikhard: 944 N.E.2d 564; 2011
That set of circumstances is this: Two adjoining property owners (1) share a good-faith belief concerning the location of the common boundary line that separates their properties and, (2) although the agreed-upon location is not in fact the actual boundary, (3) use their properties as if that boundary was the actual boundary (4) for a period of at least twenty years. It is the original agreement between the adjoining owners that takes this and all other “acquiescence” cases out of the realm of adverse possession.

The doctrine of acquiescence has lain largely dormant in real estate litigation since the end of the nineteenth century, and understandably so, given not only the very narrow set of circumstances in which the doctrine may be invoked, but also the continuing evolution of land surveying, legal descriptions of property, and recording real estate transactions.

It is my hope that these comments will prolong that slumber.

…suggest that, in this modern era, “[t]he related concepts of adverse possession and prescriptive easements have been called into question.” The reason is because the concepts do not “always square with modern ideals in a sophisticated, congested, peaceful society.” …The prescriptive easement doctrine “discourages neighborly conduct and accommodation.

Landowners are required either to formalize permissive arrangements, or to prevent use by others to avoid the risk that rights will be established by prescription. Prescription tends to increase the costs of land ownership by creating a need for periodic monitoring to detect adverse uses.”
A prescriptive easement is established by actual, open, notorious, continuous, uninterrupted, adverse use for 20 years under a claim of right, or by continuous adverse use with the knowledge and acquiescence of the servient landowner. See IND. CODE § 32-5-1-1...

...We agree with the Coulsons that the presence of other utilities in the area adjacent to the road does not establish an easement in favor of Contel.

A prescriptive easement is limited to the purpose for which it is created and cannot be extended by implication.

"In the absence of a statute, and we find no statute here, an easement cannot be acquired by prescription against the government."

Because the 1985 act did not specifically provide that a prescriptive easement could be acquired on property owned by the State, nor did the 1998 act specifically provide that a prescriptive easement could be acquired on property owned by a political subdivision, Realty Trust's second argument fails...

A prescriptive easement is established by actual, open, notorious, continuous, uninterrupted, adverse use for 20 years under a claim of right, or by continuous adverse use with the knowledge and acquiescence of the servient owner.

... IND. CODE 32–5–1–1 (1993). The statutory period need not be maintained by one adverse user. Continuity of use for the requisite twenty-year period may be established by tacking the adverse use of predecessors in title.
Prescriptive Easement – Indiana (2)
Fleck v. Hann: 658 N.E.2d 125; 1995

...(statutory period of adverse possession need not be maintained by one person and successive periods of adverse possession may be tacked together to constitute necessary period for adverse possession to defeat title of the record owner by continued disseizin for more than twenty years).

Prescriptive Easement – Indiana (3)
Fleck v. Hann: 658 N.E.2d 125; 1995

Further, the unexplained use of an easement for 20 years is presumed to be under a claim of right, adverse, and sufficient to establish title by prescription unless that use is contradicted or explained. ...In other words, a rebuttable presumption that use is adverse arises under those circumstances, and in order to rebut that presumption the owner must explain such use by demonstrating that he merely permitted the claimant to use his land.

Prescriptive Easement (Recent) – Indiana (1)
Shields v. Taylor: 976 N.E.2d 1237; 2012

A party claiming the existence of a prescriptive easement must provide evidence showing "an actual, hostile, open, notorious, continuous, uninterrupted adverse use for twenty years under a claim of right." ...see also Ind. Code § 32-23-1-1 ("The right-of-way, air, light, or other easement from, in, upon, or over land owned by a person may not be acquired by another person by adverse use unless the use is uninterrupted for at least twenty (20) years."
However, in *Fraley v. Minger*, 829 N.E.2d 476, 486 (Ind. 2005), the Indiana Supreme Court reformulated the elements of adverse possession. These new elements apply to establishing prescriptive easements, except for those differences required by the differences between fee interests and easements.

Therefore, a party claiming the existence of a prescriptive easement "must establish clear and convincing proof of (1) control, (2) intent, (3) notice, and (4) duration."

An easement, whether acquired prescriptively by adverse use or expressly in writing, can be abandoned. An easement "acquired by prescription by continuous use for 20 years" may be deemed abandoned after "nonuser for a like period." "[A] complete discontinuance of all use of an easement . . . with the intention thereby wholly to abandon it, [constitutes] such a surrender as will terminate the easement. But an intention to abandon and put an end to it is a necessary element of such abandonment." "[M]ere proof of non-use for a number of years is insufficient to show an intention to abandon."
Easements – General overview
(By Implication – Also by operation of Law)
Easement by Recorded Plat widely recognized

- Easement by Prior Use
- Easement by Necessity
- Implied by Recorded Plat
- Easement by Prescription
- Easement by Estoppel

Creation of Easements: Implication

- Easement by Prior use
- Easement by Necessity
  - Easement by reference to Subdivision Plat
- Other Operations of Law:
  - Easement by Prescription
  - Easement By Estoppel

“Dominant – Servient Estate”: Indiana (1)
Kwolek v. Swikhard: 944 N.E.2d 564; 2011

- The owner of an easement, known as the dominant estate, possesses all rights necessarily incident to the enjoyment of the easement. The dominant estate holder may make repairs, improvements, or alterations that are reasonably necessary to make the grant of the easement effectual.
- The owner of the property over which the easement passes, known as the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use.
The **nature, extent and duration of an easement** created by an express agreement or grant must be determined by the provisions of the instrument creating the easement. … Furthermore, "an easement is appurtenant if it passes with the dominant tenement by conveyance or inheritance.

An easement in gross if it is a mere personal right which cannot be granted to another person or transmitted by descent."

… When an easement can be fairly construed to be appurtenant to the land, it will not be presumed to be in gross.

A **way of necessity** is implied by law where there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road. …

…Where a grantor conveys a parcel of land which has no outlet to a public road except over his remaining land or over the lands of a stranger, a way of necessity over the remaining lands of the grantor is implied.

Generally, an easement will be implied where during the unity of title, an owner imposed an apparently permanent and obvious servitude on one part of the land in favor of another part, and the servitude was in use when the parts were severed, if the servitude is reasonably necessary for the fair enjoyment of the land.
“Quasi-Easements”: Indiana (3)

- ...Stated differently, an easement will be implied where
- (1) **there was common ownership** at the time the estate was severed;
- (2) the common owner's use of part of his land to benefit another part (a quasi-easement) was apparent and continuous;
- (3) the **land was transferred**; and
- (4) **at severance it was necessary** to continue the preexisting use for the benefit of the dominant estate.

Implied Easement by Prior Use: Indiana (1)

- A landowner cannot possess an easement in his own property.
- Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use.

Implied Easement by Prior Use: Indiana (2)

- In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of **all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage**, in substantially the same condition in which it appeared and was used when the grant was made.
Easement by Necessity: Indiana (1)
Haak v. Wilusz: 949 N.E.2d 833; 2011

- if a landowner conveys a piece of real estate that is completely surrounded by the landowner's remaining property, then we imply that the conveyance includes an easement across the landowner’s remaining property.
- an easement of "necessity cannot arise against the lands of a stranger.
- To demonstrate that the easement is "of necessity," a plaintiff must demonstrate more than that the easement would be beneficial or convenient.
- Both the corporeal property and the incorporeal right pass from the grantor at the same time—one as the inseparable incident of the other

Easement by Necessity: Indiana (2)
Haak v. Wilusz: 949 N.E.2d 833; 2011

- If, at one time, there has been unity of title, as here, the right to a way by necessity may lay dormant through several transfers of title and yet pass with each transfer as appurtenant to the dominant estate and be exercised at any time by the holder of the title thereto.
- Plaintiffs’ land is entirely surrounded by property of strangers and the land of the defendant from which it was originally severed. The fact that the original grantee and his successors in interest have been permitted ingress to and egress from the 40 acres over the land owned by surrounding strangers is immaterial.

Necessity to Portion: Indiana (1)
Reed v. Luzny: 627 N.E.2d 1362; 1994

- In Indiana, a landowner seeking an easement to access part of his lot, when only a portion of the land is inaccessible, faces a heavy burden. . . . This court emphasized that a means of access will not be granted if another reasonable means exists.
- . . . ‘a way of reasonable necessity must be more than convenient and beneficial, for if the owner of the land can use another way, he cannot claim by implication the right to pass over that of another to get to his own.’
Easement by Necessity: Indiana (1)
Wilson v. Glascock: 74 Ind. App. 255; 126 N.E. 231; 1920

- If the way across the land of appellant was a way of necessity, it ceased to exist when the necessity ceased.
- If, however, said way was an appurtenance to the tract of land conveyed to and now owned by appellee, the fact that appellee purchased other land connecting the tract of land so purchased from Thomas Glascock in 1874 with a public highway will not have the effect of destroying the easement over and across the land now owned by appellant.

“Easement by Implication”: Indiana (2)
Wilson v. Glascock: 74 Ind. App. 255; 126 N.E. 231; 1920

- As a basis for the application of the doctrine, there must have existed a unity of seizin, and a disposition and arrangement of the several parts of one estate with relation to each other, followed by a severance in the ownership. During the unity of title, the owner may subject one of several tenements or adjoining parcels of land to such arrangements, incidents or uses, with respect to the other, as may suit his taste or convenience, without creating an easement in favor of the one as against the other.

“Easement by Implication”: Indiana (3)
Wilson v. Glascock: 74 Ind. App. 255; 126 N.E. 231; 1920

- This is so because the owner cannot have an easement in land of which he has the title. The inferior right is merged in the higher title. By the common law it is said to be extinguished by the unity of title. In the civil law it is lost by ‘confusion.’ By both, if the easement existed before the unity of seizin, it may revive upon a severance, or, if none existed, such arrangements may be adopted while the seizin is united, as that upon a severance an easement will be created by implication of law.
“Easement by Implication”: Indiana (4)
Wilson v. Glascock: 74 Ind. App. 255; 126 N.E. 231; 1920

- Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then,...
- ... upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved...

“Easement Appurtenant”: Indiana (5)
Wilson v. Glascock: 74 Ind. App. 255; 126 N.E. 231; 1920

- The appellant claims that the way was appendant or appurtenant to the land conveyed by that deed. If so, the right to the way passed by the deed conveying the land, and not by the separate quitclaim deed.
- 'Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be essentially necessary to their enjoyment. They are of the nature of covenants running with the land, and like them must respect the thing granted or demised, and must concern the land or estate conveyed.'"

Relocated Easements: Indiana (7)
Kwolek v. Swikhard: 944 N.E.2d 564; 2011

- We are of the opinion that if a relocated easement is unacceptable then a timely expression of complete rejection and dissatisfaction should be made. Any action which would tend to deceive or mislead may constitute sufficient grounds for a court to find acquiescence or an implied consent to the relocated easement.
- The doctrine of acquiescence may, on proper facts, be applied to settle the location of an otherwise poorly defined easement or a boundary-line dispute. But the doctrine does not apply where, as here, the question presented is the scope of the rights granted by an express easement.
An indefinite easement or right of way which is not specifically located and described is too indefinite to be established and protected by a court of equity. When an unlocated right of way is granted, or reserved, the owner of the servient estate may, in the first instance, designate a reasonable way, and if he fails to do so, when requested, the owner of the dominant estate may designate it.

However, when the owner of the dominant estate or easement designates the location of the easement, he is required to select a route that is reasonable as to both parties, in view of all the circumstances, and one that will not unreasonably interfere with the grantor, or owner of the servient estate, in the enjoyment of his property. When such way is once selected and located it cannot be changed by either party without the consent of the other.

When a way is not located by the grant, the parties may locate it by parol agreement at any point on the premises over which the right is granted. ... and evidence of such agreement is admissible and does not contradict or vary the deed, provided the way is located within the boundaries of the land over which the right is granted."
The law is well settled that an easement can be created even though its location is not fixed contemporaneously therewith. Where the location of the easement is unknown initially, it can be fixed subsequently "by express agreement or by a selection that can be inferred by proof of the use of a particular way." Helgeson, 988 S.W.2d at 548; see also Edward Runge Land Co., 594 S.W.2d at 650. However, if the easement is not fixed by subsequent express agreement or by a selection that can be inferred by proof of the use of a particular way, then the trial court must fix the location of the easement. In doing so, the beneficiary of the easement is entitled to a convenient, reasonable and accessible use.

...the plaintiffs had an express easement in an alley designated on a filed plat and, thus, had by grant the right to use the alley. There, as here, the defendant had chosen to deny the plaintiffs the use of a portion of the express easement.

We said that a grant of a right to use a piece of property includes "the last inch as well as the first inch," and therefore it is clear that the fence or obstruction placed upon it by defendant is an invasion of the plaintiff's legal rights, for which an action may be maintained.

The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais...

there must exist a false representation or a concealment of material facts;

it must have been made with knowledge, actual or constructive of the facts;
Easement by Estoppel: W.Va.
Folio v. Clarksburg:
221 W. Va. 397; 65 S.E.2d 143; 2007

• the party to whom it was made must have been without knowledge or the means of knowledge of the real facts;
• it must have been made with the intention that it should be acted on;
• and the party to whom it was made must have relied on or acted on it to his prejudice.
• this Court observed that before an easement by estoppel can be established, "there must be a showing that a representation was made and the party relied upon that representation."

“Ingress–Egress & Parking”: Indiana (3)
Kwolek v. Swikhard: 944 N.E.2d 564; 2011

• The plain meaning of the terms "ingress" and "egress" do not include parking. "Ingress" is "[t]he act of entering." Black's Law Dictionary 786 (7th ed. 1999). And "egress" is "[t]he act of going out or leaving."
• Indeed, it is well settled under Indiana law that "there is no ambiguity in applying the terms 'ingress and egress.'"... Thus, the easement does not confer upon the Swickards the additional right to park vehicles within the easement.

A problem case from Virginia... (1)
Record No. 981673 – Va. – 1999 Prospect Development Co. v. Steven M. Bershader,

• ...a lot premium of $15,000 because Lot 23 was adjacent to Outlot B, which was "preserved land." The designation of Outlot B as "preserved land" was an integral part of the Bershaders' decision to purchase Lot 23.
• The Bershaders closed on Lot 23 in October 1993. A house, constructed on that property, was situated so that the Bershaders would have an optimal view of the "preserved land."
A problem case from Virginia...(2)

Record No. 981673 - Va. - 1999 Prospect Development Co. v. Steven M. Berghader,

- The Bershaders expended approximately $115,000 for landscaping “to naturalize their entire lot to match the ‘preserved land’ on Outlot B. They spent an additional $67,000 to create a “park-like” atmosphere on their lot.
- Prospect Development had submitted a resubdivision plat to Fairfax County, and Prospect Development sought to “resubdivide” Outlot B so that a house could be constructed upon that lot.

Easement by Custom – hard to find
Trepanier v. County of Volusia

- 2007 Fla. App. 965 So. 2d 276;
- In Florida, courts have recognized that the public may acquire rights to the dry sand areas of privately owned portions of the beach through the alternative methods of prescription, dedication, and custom.
- It is also worth noting that Justice Scalia, joined by Justice O'Connor, in the dissenting opinion to the high court's denial of certiorari in Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S. Ct. 1332, 127 L. Ed. 2d 679 (1994), pointed out that the Hay court “misread Blackstone” in applying the law of custom to the entire coast of Oregon.
Easement by Custom – Texas
Severance v. Patterson: 54 Tex. Supreme J. 172

- "No one doubts that proof exists from which the district court could conclude that the public acquired an easement over Galveston's West Beach by custom" (discussing evidence presented at the trial court that showed "public use of West Beach since before Texas gained its independence from Mexico").
- These rights of use were proven in courtrooms with evidence of public enjoyment of the beaches dating to the nineteenth century Republic of Texas.

“Common Scheme Doctrine”: Indiana (1)
Corner v. Mills: 650 N.E.2d 712; 1995

- Plaintiffs next contend the trial court erred in finding a general scheme or plan of residential development to exist in Christiana Acres.
- However, the lack of uniformity in restrictions in a subdivision does not conclusively prove the nonexistence of a general plan or scheme for residential development.
- ... Nor does the fact that some of the lots contain no restrictions, that a few lots were conveyed before the plat was recorded, or that the recorded plat itself contains no restrictions, conclusively show the non-existence of such a plan.

“Common Scheme Doctrine”: Indiana (2)
Corner v. Mills: 650 N.E.2d 712; 1995

- "Where a common grantor opens up a tract of land to be sold in lots and blocks, and before any lots are sold, inaugurates a general scheme of improvement for such entire tract intended to enhance the value of each lot, and each lot subsequently sold by such grantor, is made subject to such scheme of improvement, there is created and annexed to the entire tract what is termed a negative equitable easement, in which the several purchasers of lots have an interest, and between whom there exists mutuality of covenant and consideration."
“Common Scheme Doctrine”: Indiana (3)
Corner v. Mills: 650 N.E.2d 712; 1995

The failure of the developer to include uniform restrictions in all deeds, or his failure to include any restrictions in one or more deeds,... would not of itself take away all of the rights of the other purchasers to have the district maintained as a restricted residential district, ...

“Common Scheme Doctrine”: Indiana (4)
Corner v. Mills: 650 N.E.2d 712; 1995

If [such a] proposition is correct then a sub-divider might sell hundreds of lots for enhanced prices, upon the representation that the district was to be a restricted residential district, ...

...and then by his failure either through inadvertence or otherwise, to include such restrictions in one or more deeds, destroy the entire scheme or general plan for a restricted residential sub-division. We are of the opinion that a general plan or scheme may exist, although some of the lots were sold without restrictions.*

Slander of Title

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
George C. Greene, III and Molly F. Greene,
Respondents,
v.
Jack W. Griffith, Appellant,
and
The State of South Carolina, Respondent.
Appeal From Charleston County
Roger M. Young, Master-in-Equity
Heard December 12, 2003 – Filed January 29, 2004
AFFIRMED
Slander of Title

In South Carolina, slander of title has been recognized as a common law cause of action. See Huff v. Jennings, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995) (holding that, although the court was directly addressing a claim for slander of title for the first time in South Carolina jurisprudence, "South Carolina law, through its incorporation of the common law of England, recognizes a cause of action for slander of title").

To maintain a claim for slander of title, our courts have held “the plaintiff must establish

1. the publication
2. with malice
3. of a false statement
4. that is derogatory to plaintiff’s title and
5. causes special damages
6. as a result of diminished value in the eyes of third parties.”

Id. at 149, 459 S.E.2d at 891 (adopting the elements of slander of title outlined in the Restatement (Second) of Torts § 623A (1977)).

(surveyor)...testified that, when he prepared the plat, he had no evidence that (client) had any ownership interest in the disputed strip...
Just Remember...

- You will, at all times, be under pressure from Clients, Attorneys, other Surveyors, as well as from State & Municipal Governments to do what they expect – sometimes in direct violation of the common-law rules that all must follow.
- Your only defence is to know the Law and work within the established framework.