Boundary and Title Conflicts, Surveyor Reports
~ and ~
Revisions to Rule 12
A Hands-on Workshop

Indiana Society
~ of ~
Professional Land Surveyors

Presented by
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The Schneider Corporation
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Biography of Gary R. Kent

Gary Kent is Integrated Services Director for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in Indiana, North Carolina and Iowa. He is in his 33rd year with the firm and his responsibilities include serving as project and account manager, safety, corporate culture, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a degree in Land Surveying; he is registered to practice as a professional surveyor in Indiana and Michigan. He has been chair of the committee on ALTA/NSPS Standards for ACSM/NSPS since and is the liaison to NSPS for the American Land Title Association. He is also past-president of the American Congress on Surveying and Mapping and a twice past president the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded “Outstanding Associate Faculty” and “Excellence in Teaching” awards for his efforts. Gary is on the faculty of GeoLearn (www.geo-learn.com), an online provider of continuing education and training for surveyors and other geospatial professionals. He is also an instructor for the International Right of Way Association.

Currently in his twelfth year on the Indiana State Board of Registration for Professional Surveyors, Gary is frequently called as a consultant and/or expert witness in cases involving boundaries, easements and land surveying practice. He regularly presents programs across the country on surveying and title topics, and he also writes a column for The American Surveyor magazine.

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**Course Outline**

The Board of Registration and the Attorney General’s office continue to see very substandard surveys and surveyor reports as the subject of complaints. We will discuss some basic boundary law principles, including guidance from Justice Cooley and then the audience will break into small groups to discuss the evidence related to several actual boundary/title conflicts. The small groups will then reconvene as a whole and we will have a dialogue as to what their respective opinions are, how they would attempt to resolve the problem, and what the accompanying surveyor’s report should include.

As part of the program, we will discuss and tabulate comments and suggestions on potential revisions to the Board’s Rules, including Rule 12.

**Course Objectives**

At the end of this course, the participant should be able to:

- Work in groups to:
  - Apply boundary law principles to the evidence provided on several actual boundary/title conflicts
  - Outline the elements that are to be a part of the Surveyors Reports that would accompany surveys of the properties involved in those conflicts
- Identify some desirable modifications to the Board’s Rules, including Rule 12
Boundary and Title
Conflicts
~ The Surveyor’s Judicial Role ~
Boundaries, “the Status Quo” and the Surveyor’s Role

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

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).¹

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 adjoiner.

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

¹ Fraley v. Minger, 829 NE 2d 476 - Ind: Supreme Court, 2005
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 seem to essentially rely on estoppel, whereby the adjoiners 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.

Over a century ago, our Indiana Supreme Court explained the doctrine of title by acquiescence:

As a general rule, it is affirmed by the authorities that where owners of adjoining premises establish by agreement a boundary or dividing line between their lands, take and hold possession of their respective tracts, and improve the same in accordance with such division, each party, in the absence of fraud, will thereafter be estopped from asserting that the line so agreed upon and established is not the true boundary line, although the period of time which has elapsed since such line was established and possession taken is less than the statutory period of limitation. The general rule recognized by the authorities is that a boundary line located under such circumstances, in the absence of fraud, becomes binding on the owners establishing it, not on the principle that the title to the lands can be passed by parol, but for the reason that such owners have agreed permanently upon the limits of their respective premises and have acted in respect to such line, and have been controlled thereby, and therefore will not thereafter be permitted to repudiate their acts.

*Adams v. Betz*, 167 Ind. 161, 169, 78 N.E. 649, 652 (1906). More recently, this court delineated specific circumstances under which a landowner may obtain a parcel of land via title by acquiescence:

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.
The agreement between the two adjoining landowners "need not be express and may be inferred from the parties' actions, but there must be evidence of some agreement as to the boundary line." Freiburger v. Fry, 439 N.E.2d 169, 172 (Ind. Ct. App. 1982). An agreement regarding a boundary between adjoining properties other than the actual property line "is not only binding on those parties who agree but also their successors in interest as long as there was no fraud present in the making of the agreement." Id.

Hillenburg v. Reeves, Ind: Court of Appeals 2012

When adjoining landowners agree to erect a fence and treat that as a legal boundary, they are estopped from denying that this is the legal boundary line. This line agreement is not only binding on those parties who agree but also their successors in interest so long as there was no fraud present in the making of the agreement. (citation omitted).


[T]he doctrine of acquiescence is a seldom used, nearly dormant doctrine that has been limited in Indiana case law only to boundary-line disputes or the location of an easement. As Judge Friedlander recently clarified in a case involving a boundary-line dispute:

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. 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.

Kwolek v. Swickard, 944 NE 2d 564 - Ind: Court of Appeals 2011.

Acquiescence does not appear as an independent unwritten title doctrine in some states like North Carolina. In those states, acquiescence seems often to be inseparable from the doctrine of boundary by parol agreement (see below). Long acquiescence to a line may also be allowed as evidence of an otherwise ambiguous boundary.
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.

It is held that adjoining owners, uncertain of the true boundary line, may by parol agreement establish a boundary line, and the agreement is taken out of the statute of frauds if it is executed. 4 I.L.E. Boundaries, § 31, p. 198. "In the absence of fraud, when adjoining landowners agree as to their boundaries and take possession and make improvements accordingly, each is estopped from ascertaining that such boundary is not the true one, even though possession is taken for less than the prescriptive period." 4 I.L.E. Boundaries, § 32, p. 200; Seaver v. Vonderahe (1920), 74 Ind. App. 631, 127 N.E. 206. Scoville et al. v. Hawkins et al., 159 NE 2d 307 - Ind: Court of Appeals 1959.

Estoppel

Estoppel is rooted in the courts’ propensity to prevent unjust enrichment.

The doctrine of equitable estoppel is invoked when the following circumstances are present: (1) a false representation or concealment of material facts made with actual or constructive knowledge of the true state of facts; and (2) the representation is made to one who is without knowledge or reasonable means of knowing the true facts with the intent that he or she will rely upon it; and (3) the second party must rely or act upon such representation to his or her detriment. For silence to give rise to the application of the doctrine, there must not only be an opportunity to speak, but an imperative duty to do so. Kline v. Kramer, 386 NE 2d 982 - Ind: Court of Appeals, 3rd Dist. 1979. [internal citations omitted]

Practical Location

Boundary by practical location does not appear as an independent unwritten title doctrine in some 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.

"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]

**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,
adversary 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/ACSM 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.2

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.

The North Carolina Board of Examiners for Engineers and Surveyors has recognized the title nature of the junior/senior relationship and has emphatically warned surveyors to not even try to make such a determination unless they are totally certain.

Given that North Carolina is one of the three “race” states, it would seem possible that oftentimes in North Carolina surveyors could confidently make such a determination. Otherwise their Board admonishes them to not indicate that in an overlap situation one or the other line is more important than the other.

Title issues cannot be determined by the PLS based upon the surveyor’s research when there is a conflict as to matters affecting title to the property.

* * *

Any determination that impacts the title to any portion of the property must be agreed upon by the parties in appropriate legal documents or settled by arbitration or the courts by application of law. This is true for the application of junior/senior deed rights, since the property rights (title) have been placed in multiple parties. It cannot be a weighing of the evidence, but must be a determination of the Surveyor to full certainty as to the one line.

* * *

The Board’s … interpretation is not meant to take away the Surveyor’s right to interpret and apply the results of research to exercise professional judgment as to surveying matters, but to avoid the Surveyor representing on the survey a professional opinion on title…

**Junior/Senior Rights – Indiana**

865 IAC 1-12-13 Retracement and original survey plats

(b) (11) Adjoining parcels identified by title description or record reference. Contiguity, gaps, and overlaps with adjoining parcels shall be clearly shown and dimensioned. Show only the portion of adjoining tracts relevant to the location of the surveyed tract. Gaps and overlaps interior to the surveyed parcel shall be depicted but must be dimensioned only if the client requests.

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Unwritten Rights and the Surveyor’s Role

I recommend against a policy of always staking a line based on one class of evidence and then ... simply telling the client to seek the advice of an attorney to evaluate the other evidence. Washington State Common Law of Surveys and Property Boundaries, Jerry R. Broadus, 2009

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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3 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.

**Rule 12 – Surveyor Reports**

865 IAC 1-12-12 Publication of retracement and original survey results
Authority: IC 25-21.5-2-14
Affected: IC 25-21.5
Sec. 12. (a) When conducting a retracement survey or an original survey, a registered professional surveyor shall do the following:
(1) Furnish the client with a written surveyor’s report that, in addition to other pertinent data, identifies the type of survey, explains the theory of location applied in establishing or retracing the lines and corners of the surveyed parcel, and gives the registered professional surveyor’s professional opinion of the cause and the amount of uncertainty in those lines and corners because of the following:
(A) Availability and condition of reference monuments.
(B) Occupation or possession lines.
(C) Clarity or ambiguity of the record description used and of adjoners’ descriptions and the relationship of the lines of the subject tract with adjoners’ lines.
(D) The relative positional accuracy of the measurements.

865 IAC 1-12-13 Retracement and original survey plats
Authority: IC 25-21.5-2-14
Affected: IC 25-21.5; IC 32-19
Sec. 13. (a) When conducting a retracement or original survey, a registered professional surveyor shall furnish the client with the surveyor’s report and a copy of the plat of survey of the premises drawn to an appropriate scale in such a manner that the data shown will be clearly legible when the plat is reduced to sheets suitable for recording in the county in which the survey was conducted.
(b) The plat of survey, together with the accompanying surveyor’s report, shall show or otherwise contain the following information at a minimum:

* * *

(15) The following:
(A) Sufficient data to clearly indicate the theory of location applied in finalizing the locations of the corners.
(B) Any data at variance with this theory of location.
(C) Sufficient data to allow the retracement without difficulty of all pertinent lines and corners shown on the plat. Detail that cannot be legibly depicted on the survey plat shall be otherwise explained in the surveyor’s report.
THE [QUASI]-JUDICIAL FUNCTIONS OF SURVEYORS

Thomas M. Cooley, Chief Justice Michigan Supreme Court - January, 1881

[italicized and underlined highlights added]

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 imparts 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 tract of land containing 1.87 acres more or less three hundred twenty-five (325) feet deep North and South off of the south end of the following describe tract, to-wit:

From a point 1906.4 feet North of the Southwest corner of the Southeast Quarter of Section Ten (10) Township Ten (10) North, Range Nine (9) East; measure South 640 feet for a place of beginning; thence East 250 feet; thence South at right angles 775 feet; thence West at right angles 250 feet to the half section line; thence North 775 feet to the place of beginning containing 4.45 acres more or less but subject to all existing legal highways.

Said tract to be designated as Lot Number Five (5) in "COUNTRY CLUB MANOR" as platted in accordance with the certification of Buell Wilson, Reg. Land Surveyor, as shown in Miscellaneous Record 26 Page 258 of the records of the Recorder's Office of Decatur County, Indiana.
Considerations for Revisions to Registration Board Rules*
~ Rules 2, 12, and 15 ~

* NOTE – The following list represents the personal opinion of the author. It does not represent the consensus of the Registration Board other than with respect to Rule 2.
865 IAC 1-2-1 Qualifications for Examination

Under the current Governor’s administration in Indiana, it is unlikely that the Board will be able to make any changes to Rule 12.

As of the preparation of this handout, the administration is considering allowing the Board to hold hearings related to changing the Rule 2 education requirements. This proposal was first sent to the agency well over a year ago.

The Rule has not kept up with current practice, technology and current surveying programs and this change is aimed at addressing that shortcoming. The suggested wording that is under consideration is (keep in mind, however, that the state is merely considering letting the Board proceed; there will still be notices and public hearings):

- 865 IAC 1-2-1(c)(1) Twelve (12) semester credit hours in college level mathematics, including at least a three (3) semester credit hour course in calculus or differential equations. One course of no more than 3 semester hours in statistics may count towards the required twelve (12).

- 865 IAC 1-2-1(c)(4) Twenty-seven (27) semester credit hours in college level surveying courses consisting of the following:
  
  (A) Courses totaling at least twenty-four (24) semester credit hours that include substantial coursework in each of the following eight (8) six (6) subjects totaling at least eighteen (18) semester credit hours:
   
   (i) Land survey systems with substantial content related to the U.S. Public Land Survey System including the various instructions for surveys of the public lands, original surveys and resurveys, section corner perpetuation, lost and obliterated corners, and subdivision of sections.
   (ii) Property surveying surveys.
   (iii) Analysis of and writing of property descriptions, writing, and analysis.
   (iv) Surveying Boundary law.
   (v) Surveying calculations, including mensuration statistics.
   (vi) Subdivision planning and design.
   (vii) Control surveying including GPS
   (viii) Geographic information systems (GIS)

  (B) Courses totaling at least three (3) semester credit hours that include substantial coursework in at least three (3) one or more of the following subjects totaling at least nine (9) semester credit hours:
   
   (i) Topographic surveying.
   (ii) Photogrammetric surveying.
   (iii) Route surveying.
   (iv) Construction surveying.
   (v) Control surveying.
The Board would also like to fulfill the promise of a new statute from a few years ago allowing it to assess a fee on registrants to help fund an investigative fund to help the agency and the attorney general pursue complaints more expeditiously, but the agency held that up for several years. Hopefully, we will see some progress in that area also.

With regard to Rule 12, following is a list of sections of Rule 12 that been brought to my attention, or that I have conceived, as perhaps needing some revisions or consideration:

865 IAC 1-12-4 Professional surveyor duty to accumulate, preserve and share data

A professional surveyor shall do the following:

... (4) Provide for the long term preservation (maintenance) of the survey data. Filing of public records will partially meet this obligation. If possible, a registered professional surveyor should make arrangements for the transfer of the professional surveyor’s records upon retirement or death.

[May need some additional clarification, e.g., how long is “long term” particularly when the surveyor is unable to sell his/her records?]

865 IAC 1-12-5 Property surveys affected

All retracement and original surveys, including all ALTA/ACSM Land Title Surveys, and all updates or recertifications of previously completed surveys must fully comply with this rule except the following:

... (3) Delineation or demarcation and placement of any monument or markers, for example, wood stakes, flags, and rebar, for the purpose of constructing [fences, buildings, walls or other improvements;] on or in close proximity to a land boundary must be executed by a registered professional surveyor, but are only subject to sections 1 through 4 and 6 of this rule provided the professional surveyor has found acceptable evidence of the boundary location in accordance with this rule.

[This section may need some clarification, e.g., "Any permanent monument such as a rebar, set on a property corner, automatically triggers the requirement to follow all sections of this rule, including the preparation of reports and survey plats."]
865 IAC 1-12-5 Property surveys affected

When conducting an original or retracement survey, if the professional surveyor determines that the owner of the surveyed property and any of his or her adjoiners are, by their own written admission and as of the time of the survey, peaceably acquiescing in and occupying to a well-defined line,

(A) that is, in the opinion of the professional surveyor, substantially at variance with the corresponding written title line(s), or

(B) the corresponding written title line(s) is/are, in the opinion of the professional surveyor, ambiguous,

the professional surveyor may survey to and describe the acquiesced-in line or a reasonable facsimile thereof as the common boundary, provided,

1. all of the affected owners respectively sign a statement on said survey affirming the location of the agreed upon line,
2. the establishment of such line is clearly explained and documented in the surveyors report of the retracement or original survey,
3. the plat of survey and surveyors report are recorded pursuant to section 12 of this rule and cross-referenced to the owners’ respective deeds,
4. any affected mortgagees acquiesce to and accommodate such line in writing,
5. the owner’s respective title companies, if any, accommodate such line, and
6. any laws or ordinances that regulate such a boundary line modification are complied with.

865 IAC 1-12-13 Retracement and original survey plats

(b) The plat of survey, together with the accompanying surveyor’s report, shall show or otherwise contain the following information at a minimum:

(2)(B) For original surveys, a metes and bounds description with appropriate controlling calls and calling for an accurately describing controlling physical monuments, marked in accordance with section 18 of this rule, except, however, that a metes and bounds description is not required for individual, platted subdivision lots.

[This section disallows the use of an aliquot part description for original surveys. Probably intended, so that there are footsteps for the subsequent retracing surveyor to follow, but if the plat of survey is recorded is a metes and bounds description necessary? Maybe require a statement in the aliquot parts description, e.g., “as shown on the survey by [name] dated [date]?”]
865 IAC 1-12-21 Route survey fieldwork

When conducting a route survey, a professional surveyor shall do the following:

(1) Establish the location of the control survey points monuments upon which all subsequent work will be based so that they can be retraced and are recoverable by other surveyors without difficulty during and after construction.

[Monuments is the proper word here.]

865 IAC 1-12-22 Measurements for route surveys

(c)(2)(A) The nearest United States Public Land Survey subdivision corners that are reasonably accessible on both sides of the controlling survey line.

[Except for this section, reference to the controlling “survey line” was eliminated a number of years ago because in current practice, the control survey for routes tends to be in the realm of a network, rather than a line. Suggest substituting “route” for “controlling survey line” would remove any insinuation that there must be a control survey line.]

865 IAC 1-12-24 Route survey monumentation

(a) When conducting a route survey, a registered professional surveyor shall be responsible to set monuments in accordance with the following:

(1) Control survey points that are to be shown on the route plat shall be monumented at:

(A) each angle point; and if there is a control survey line, but in any event,

(B) at intervals that typically do not exceed one quarter (1/4) mile.

...

(4) Monuments shall be referenced in such a manner that will facilitate recovery of the monuments. Where Indiana state plane coordinates have not been reported and documented in accordance with section 22 of this rule, a minimum of three (3) permanent points referencing each controlling survey line monument shall be established, preferably at locations outside the planned construction area.

[Taking three reference ties is unnecessary and redundant given the pervasive use of GPS, assuming the proper documentation has been reported.]
865 IAC 1-12-25 Route survey plats

(a) When conducting a route survey, a registered professional surveyor shall prepare a route survey plat as follows:

(2) Show the following:

(E) All:

(i) survey line control

... 

monuments that were set or found, and any reference ties thereto.

[Another removal of reference to the survey ‘line’]

865 IAC 1-12-25 Route survey plats

A general suggestion that the rule specifically state that State Plane Coordinates will control over stations and offsets when there is a conflict.

865 IAC 1-15-8 Distance learning requirements

There needs to be some sort of requirement that the time the typical registrant would take to complete a distance learning course and exam must be reasonably commensurate with the hours granted/earned.

Other considerations?!