Minnesota
HOW THE LAND SURVEYOR CAN ASSIST IN BOUNDARY DISPUTES

Seminar Materials
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KNOW WHEN TO REFRAIN FROM SETTING MONUMENTS

I. INTRODUCTION

A land surveyor’s primary function is to show people where their boundaries are. On the surface it would appear foolish to suggest that there are cases when a land surveyor should refrain from setting monuments. The purpose of this section is to not only suggest that there are times when monuments should not be set but also to suggest that the difference between a professional and a technician is the knowledge as to when to refrain from setting monuments.

II. MAN’S TERRITORIAL NATURE

A. Books on the importance of boundaries. Man’s territorial nature has not been studied very extensively. Some books include:

- The Territorial Imperative, Robert Ardrey, Kodansha International
- Human Territoriality, Torsten Malmberg, Mouton Publishers
- Human Territorial Functioning, Ralph B. Taylor, Cambridge University Press
- Drawing the Line, Tales of Maps and Controversy, Mark Monmonier, Henry Holt and Company
- Drawing the Line, How Mason and Dixon Surveyed the Most Famous Border in America, Edwin Danson, John Wiley & Sons, Inc.
- Never Cry Wolf, Furley Mowat, American House

B. Ancient Human Boundaries. The ancient people took their boundaries seriously as is shown by the curses on this ancient boundary stone.
C. Boundaries in the Bible

1. Deuteronomy 11:22-25 (Moses describes the promised land)

If you diligently keep all these commandments that I now charge you to observe, by loving the LORD your GOD, by conforming to his ways and by holding fast to him, the LORD will drive out all these nations before you and you shall occupy the territory of nations greater and more powerful than you. Every place where you set the soles of your feet shall be yours. Your borders shall run from the wilderness to b the Lebanon and from the river, the river Euphrates, to the western sea.
2. Deuteronomy 19:14 (Moses supplements the Ten Commandments)

Do not move your neighbour's boundary stone, fixed by the men of former times in the patrimony which you shall occupy in the land the LORD your GOD gives you for your possession.

3. Deuteronomy 27:17 (One of 12 responses of the Levites to the commands of Moses)

'A curse upon him who moves his neighbour's boundary stone': the people shall all say, 'Amen.'

4. Proverbs 22:28 (One of 30 wise sayings)

Do not move the ancient boundary-stone which your forefathers set up.

5. Job 24:2 (Job describes wicked men)

Wicked men move boundary-stones and carry away flocks and their shepherds.

D. People have been killed over boundaries. From a dispute over one lot line to a dispute over international boundaries, people have died because of boundary disputes. Anything a professional can do to prevent boundary disputes can potentially save money, stress, and even lives.

III. PROBLEM AREAS

The following situations raise a red flag warning the land surveyor that it may not be wise to set monuments.

A. Unsurveyable Description. Not every description is surveyable. A professional should be able to recognize this fact and not try to force a solution. It does not matter if land is platted or unplatted.

   1. Platted land. A competent surveyor should recognize problem plats by merely inspecting them. BARKER'S ADDITION TO HASTINGS is an example of an unsurveyable plat.
2. **Unplatted land.** A description like the following is not possible to survey accurately:

The North 4 acres of the tract described as follows:
The North 5 acres of the following described tract: Beginning at a point 320.1 feet due west from the southeast corner of the Southwest Quarter of Section 30, Township 28, Range 22; thence due North 1625.42 feet to a point; thence due West 1047 feet to the center of the Sunfish Lake Road; thence in a southerly direction along the center of said Sunfish Lake Road to a point on the South line of said Section 30, 1640 feet west of the place of beginning, thence East along said section line 1640 feet to the place of beginning, containing 51.2 acres;

Also 4 acres of land lying adjacent to and immediately North of said above described 5 acre tract, and bounded on the west by the center line of said Sunfish Lake Road and on the East by the East line of said 5 acre tract extended North; all according to the Government survey thereof.
B. Ambiguous Description. If it is possible to locate a description on the ground in more than one place it is ambiguous.

IV. THE PROFESSIONAL APPROACH

The professional will recognize the red flag warning often before going in the field. Once a survey stake is set it marks at least one person’s territory. Then it is too late to negotiate. We have all heard…”I do not want any of my neighbor’s land, but I do want all of my own land.” Negotiating a boundary at this point creates a winner and a loser. Territorial people refuse to lose.

Pay attention to the red flag. Tell your client there is a problem. Give the neighbors a handful of lath and have them agree on a common boundary. Locate the new boundary, write new surveyable descriptions and have an agreement drafted. You will save time, money, aggravation and maybe lives.
KNOW THE ESSENTIALS OF INTERPRETING DESCRIPTIONS IN MINNESOTA

I. INTRODUCTION

Even though the law of interpreting legal descriptions is derived from medieval England, different states have derived their own unique way of interpreting legal descriptions. In Minnesota, all land is platted. A plat is a map which allows land to be described with reference to that map and avoid referring to physical objects, distance and direction to describe land.

The public land survey is a series of giant plats. All land in Minnesota is either directly or indirectly described by referring to one of the township plats in the public land survey. This section will highlight the laws regarding descriptions which use the public land survey, subdivision plats of part of the public land survey and metes and bounds of parts of the public land surveys.

II. PUBLIC LAND SURVEY DESCRIPTIONS IN MINNESOTA

There are many cases in Minnesota for surveying land in the public land survey. The law regarding surveys in the public land survey is divided into two parts section subdivision law and remonumentation law. The surveyor doing research must decide if a particular case involves section subdivision or a remonumentation issue. Sometimes both are involved. A common mistake by surveyors and courts is to use remonumentation law for a section subdivision case or vice versa.

A. Section Subdivision Law is Statutory. By the Act of February 11, 1805 (now 18 U.S.C. 752), Congress dictated how the sections monumented by the original surveyors and shown on the original plats were to be subdivided into smaller parcels for purpose of sale. A very basic rule in interpreting descriptions is to determine the intention of the grantor in a deed. Congress, by 18 U.S.C. 752, stated it intention.

1. 18 U.S.C. 752 states is relevant part:

The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may
designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west line, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township.

2. **Six General Rules.** The Bureau of Land Management promulgated several rules to explain the meaning of 18 U.S.C. 752 in the *Manual of Surveying Instructions of 1973*. They are known as the six general rules.

For our purposes the applicable rules are Rules 3, 4 and 5 and state as follows:

**Third.** That quarter-quarter-section corners not established in the process of the original survey shall be placed on the line connecting the section and quarter-section corners, and midway between them, except on the last half mile of section lines closing on the north and west boundaries of the township, or on other lines between fractional or irregular sections.

**Fourth.** That the center lines of a regular section are to be straight, running from the quarter-section corner on one boundary of the section to the corresponding corner on the opposite section line.

**Fifth.** That in a fractional section where no opposite corresponding quarter-section corner has been or can be established, the center line of such section must be run from the proper quarter-section corner as nearly in cardinal direction to the meander line, reservation, or other boundary of such fractional section, as due parallelism with section lines will permit.

3. **Minnesota Examples of Section Subdivision.**

a. **Regular Section.** Given that all of the section corners and quarter corners are in the same place they were set in 1854 by E.S. Norris, Section 21, Township 115, Range 20 is subdivided as follows:
1. Subdivide into quarter sections by using Rule 4 running a straight line between opposite corresponding quarter corners.

2. Subdivide into quarter-quarter sections using Rule 3.
   a. Set the quarter-quarter corners on the section line at the midpoint between the section corner and quarter corner.
   b. Set the quarter-quarter corners on the quarter line at the midpoint between the previously set center of section and the quarter corner.
   c. Run a straight line connecting opposite corresponding quarter-quarter corners.

3. Note the federal government does not have a rule defining a method for subdividing a section into a parcel smaller than a quarter-quarter section.

b. Center of Section Set Over Forty Years Ago in a “Surveyor like manner.” In Lunz v. Summier’s Estate, 172 Minn. 338, 215 N.W. 426 (1927) the Supreme Court stated the proper method to establish the center of section even though a stone monument was set in 1872 in a “surveyor like manner.”

The government does not establish the center of sections. The center is the intersection of a straight line from the quarter corner at the north to the quarter corner at the south with a straight line from the quarter corner at the east to the quarter corner at the west.
c. **Quarter-Quarter Section-North Tier.** The Northeast Quarter of the Northeast Quarter of Section 2, Township 114, Range 20 shown below

![Diagram of Section 2, Township 114, Range 20]

is surveyed as follows:

1. Locate the center of section using Rule 4

2. Set the southeast corner of the NE ¼ NE ¼ at the prorated distance between the northeast corner and the east quarter corner. For the proration use 19.92 chains as the record distance.

3. Set the southwest corners of the NW ¼ NE ¼ at the prorated distance between the north quarter corner and the center of section. For the proration use 19.91 chains \((19.90 + 19.92) / 2\)

4. Set the northwest corner of the NE ¼ NE ¼ on the north line of the NE ¼ half way between the northeast corner and the north quarter corner.

5. Set the southwest corners of the SE ¼ NE ¼ on the east-west quarter line half-way between the east quarter corner and the center of section.

6. The southwest corner of the NE ¼ NE ¼ is at the intersection of the line connecting the points set at 4 and 5 and at 2 and 3.

**Query.** Is it proper to apportion a large discrepancy? See **Goroski v. Tawney**, 121 Minn. 189 141 N.W. 102 (1913)

**d. Rule 5 – Fractional Section.** Rule 5 specifies how to subdivide a fractional section if no opposite corresponding quarter corner has been or can be established. 43 USC 752 states the boundary line shall run from established corners.
due north and south or east and west as the case may be. Rule 5 is slightly different. It states the line should be run in a cardinal direction “as due parallelism with section lines will permit.” Consider Section 24, Township 114, Range 21 (Assume all meander corners, section corners and quarter corners are in the same place Hiram C. Fellows set them in 1856).

(1) **Mean Bearing.** The east-west quarter line is run from the west quarter corner on a mean bearing of the north section line and the south section line. If the lake recedes the quarter line will have an angle point at the meander line and proceed according to state law. *Burton v. Isaacson*, 142 N.W. 325 (Minn. 1913)

(2) **Parallel with One Line.** The north-south quarter line is run parallel with the west line. The east line of the section is part of another survey. John Ryan ran the township lines.

(3) **Astronomic BEARING.** This survey of Section 35, Township 117, Range 23 was done in 1892 by G.W. Cooley. No original monuments were found on the east line. There was a meander corner on the west line.
Cooley ran the north-south quarter line astronomic north. The Supreme Court in *Beardsley v. Crane*, 52 Minn. 537, 54 N.W. 740 (1893) stated the north-south quarter line is run “north” from the known south quarter corner.

**e. Witness Corner.** The landmark case *Chan v. Brandt*, 45 Minn. 93, 47 N.W. 461 (1890) is important for several reasons. The Minnesota legislature (and those of several surrounding states) passed a law that dictated the proper location of the center of section was at the midpoint between the east and west quarter corner. The Chan Court held that the legislature was without authority to dictate where to place the center of section.

The court also ruled on how to run the east-west quarter line of Section 31, Township 127, Range 38 where the original plat shows a witness corner was set 14.88 chains north of the west quarter corner. Note the case gives the wrong township number. The following is a copy of the original Section 31 as well as the adjacent Section 36.

![Map Diagram of Section 36 and Section 31, Township 127, Range 38]

SECTION 36, TOWNSHIP 127, RANGE 38  
SECTION 31, TOWNSHIP 127, RANGE 38

The west quarter corner is on a line between the southwest corner and the witness corner and the east-west quarter line is run to that point from the east quarter corner. Ignore the fact that the east quarter corner of Section 36 may be in a different place than the west quarter corner of Section 31. Surveys in Section 31 are done using the original plat of Township 127, Range 38. Note there would probably be an angle point at the witness corner.

**f. Tract Not Known in Subdivision of the United States Surveys.** A deed to the East half of Lot 4, Section 25, Township 29, Range 24 conveys half of the lot by area divided by a north-south line.
In *Cogan v. Cook*, 22 Minn. 137 (1875) the Supreme Court held the following evidence inadmissible:

(1) The usual and customary way of sub-dividing similar government lots into halves was by a line running midway between and parallel to the opposite lines of said lot.

(2) There was a fence running midway between the east and west lines of the lot.

It is interesting to note that the result would be different in some other states. See *Lawrence v. Weiss*, 145 N.W. 308 (Iowa 1914) An argument can also be made that *Cogan v. Cook* was wrongly decided because of the moving boundary. This is how that government lot looks today.
III. PLATTED LAND DESCRIPTIONS IN MINNESOTA

A. Extent of Ownership of a Lot. The general rule is the ownership of a lot extends to the center of the street subject to the rights of the public in the street. *White v. Jefferson*, 124 N.W. 373 (1910). An exception would be a case like *Lamprey v. American Hoist & Derrick Co.* 266 N.W. 434 (1936) where the owners of Lots 1 through 5, Block 1 own across Water Street to the river.

![Diagram](image)

**Lamprey v. American Hoist & Derrick Co.**

B. Significance of Referring to a Plat. A plat referred to in a deed becomes a part of the deed for purposes of the description and identification of the land. *Nicolin v. Schneiderhan*, 37 Minn. 63, 33 N.W. 33 (1887). The plat can be used to determine the intention of the parties to identify the land conveyed, even if the plat does not meet the statutory requirements for a plat. *Sanborn v. Mueller*, 38 Minn. 27, 35 N.W. 666 (1887). *Reed v. Lammel*, 28 Minn. 306, 9 N.W. 858 (1881).

The validity of the deed is not affected by the fact that the plat is not recorded. In *Raines v. Village of Alden*, 252 Minn. 530, 90 N.W. 2d 906 (1958), the court held that the owner was estopped to deny the existence of a street shown on an unrecorded plat because he took title by deed which referred to the unrecorded plat name. The court also said if the location, area and identity of the land can be ascertained from the plat, then the plat becomes a part of the deed and the fact that the plat is not recorded does not affect its validity. However, the plat must provide enough information so a surveyor is able to locate on the ground the land described in the deed with reference to the plat or the deed is void for uncertainty in the description. *Reed v. Lammel*, 28 Minn. 306, 9 N.W. 858 (1881).

C. Surveying Platted Land. Since the plat becomes a part of the deed, the monuments and landmarks shown on the plat are conclusive evidence of the location of property lines. *Dittrich v. Ubl*, 216 Minn. 396, 13 N.W. 2d 384 (1944). The surveyor, in surveying a platted lot, should first attempt to find the original monuments set by the

The extent of the platted lot is only as indicated on the plat. The plat in **Owsley v. Johnson**, 93 Minn. 158, 103 N.W. 903 (1905) showed a strip of land between the lot and the lake. It was held that the lots did not have access to the lake.

LOT 1, NICOLINS ADDITION was found to extend from Water Street to Sand Creek in spite of the distance. Monuments control over distance. Monuments shown on the plat become a part of the deed. See **Nicolin v. Schneiderhan**, 33 N.W. 33 (1887).

**NICOLIN v. SCHNEIDERHAN**

If the surveyor is unable to locate the position of the original monuments for the lot to be surveyed, the proper method of surveying the lot is to locate the position of other original monuments in the block and in the plat. Since all of the lots in the plat were created at the same time, none of the lots have priority over any of the others. Accordingly, the surveyor should then apportion the distance between the positions of known monuments to survey the lot. The surveyor should attempt to locate the platted lot in the same place it was set by the surveyor who made the plat.
The Supreme Court recognized an exception to the proration rule in Barrett v. Perkins, 130 N.W. 67 (1911) where the block along University Avenue measured 25 feet short. The Court stated the error was made in Lot 22 and placed all of the error where it was made.
IV. METES AND BOUNDS DESCRIPTIONS IN MINNESOTA

A. Introduction. Generally surveyors are trained to follow metes and bounds descriptions. Problems arise when there are conflicts between the descriptions of adjacent land or within the description itself. In resolving these conflicts the courts have established the following order of priority: possessory rights, recording statute priorities and the intension of the parties as expressed in the deed.

B. Possessory Rights. The primary priority involves rights acquired by the parties because of possession. Adverse possession and boundaries by practical location are discussed in other sections herein.

C. Recording Statute Priorities. After considering possessory rights, the court will consider rights determined by the recording statute as the next order of priority. Our recording statute is Minn. Stat. §507:34 which states:

507.34 Unrecorded conveyances void in certain cases.

Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to the recording of such conveyance. The fact that such first recorded conveyance is in the form, or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchaser or be of itself notice to the subsequent purchaser of any unrecorded conveyance of the same real estate or any part thereof.

The Minnesota recording statute is what is known as a race-notice statute. The first bona fide purchaser for value without notice of a prior interest to record has priority.

Notice can be actual notice Nussbaumer v. Fetrow, 556 N.W.2d 595 (Minn. App. 1996) (third party in possession of the land) Oxborough v. St. Martin, 142 Minn. 34, 170 N.W. 707 (1919) (actual knowledge of an unrecorded deed) implied notice or constructive notice. A recorded instrument gives constructive notice to the world of the contents on the document. Minnesota Cent. R. Co. V. MCI Telecommunications Corp., 595 N.W.2d 533 (Minn. App. 1999)
D. Intention of the Parties Expressed in the Deed. After considering possessory rights and recording act priorities the courts determine the intension of the parties expressed in the deed to determine conflicting descriptions. The courts are limited to interpreting the four corners of the instrument unless the description is ambiguous. This is known as the parol evidence rule. If the language is ambiguous, and it is necessary to determine the intent of the parties, the court will hear evidence of the circumstances including the situation of the parties and the property, and the state of the titles. Witt v. St. Paul & N.P. Ry Co., 38 Minn. 122, 35 N.W. 862 (1886)

If there are conflicting calls in a description the intention of the parties is determined by the following priorities: call for a survey or plat, call for distance, direction, area, coordinates.

1. Call for Survey or Plat. A plat called for in a deed becomes a part of the deed. Nicolin v. Schneiderhan, 37 Minn. 63, 33 N.W. 33 (1881) All words, lines and marks on the plat become a part of the deed.

2. Call for Monuments. Anything called for in the description becomes a monument. Fixed and known monuments or objects called for in a description must prevail over courses and distances with calls to natural monuments taking priority over artificial marks. Yanish v. Taxbox, 49 Minn. 268, 51 N.W. 1051 (1892) The location of the monument at the time of the conveyance is controlling and not the present location of the monument. Dittrich v. Ubl, 216 Minn. 396, 13 N.W.2d 384 (1944)

   a. Call for Natural Monument. Natural monuments such as trees, lakes, streams and rivers are usually clearly visible to the parties drafting the description and as such are the highest priority of conflicting calls.

   b. Call for Artificial Monuments. Artificial monuments such as fences, roads, iron pipes, stone or granite monuments are less obvious than natural monuments, but more obvious than record monuments. Some of the problems with artificial monuments are they are easier to move than natural monuments and are more difficult to identify and differentiate. For example, it is not unusual for a surveyor tracing a survey in the field which calls for an iron pipe at a particular point to find more than one pipe in the vicinity. It is also not unusual for property owners to set their own stakes, making identification difficult.

   c. Call for Record Monuments. Record monuments such as section, quarter section and lot lines are the least likely of the monuments to be identifiable by the parties drafting a description. Ordinarily, parties cannot see the section line and would be less likely to know the location of the section line than the location of a road or a stream when drafting a description.
d. **Distance and Direction.** There is no universal rule which favors either distance or direction over the other.

e. **Area.** Words expressing the quantity, in a deed of a tract otherwise definitely described, are held to be merely additional description, and are controlled by definite calls in the deed, and, therefore, immaterial. **Austrian v. Dean**, 23 Minn. 62 (1876). If quantity is made the essence of the description, then the area call controls.

E. **Interpreting Words Used in Metes and Bounds Descriptions.**

1. **Uncertain terms** ("about," 'approximately," "more or less.") Disregard these terms unless controlled or explained by monuments or boundaries. **Ingelson v. Olson**, 199 Minn. 422, 272 N.W. 270 (1937)

2. **Call "to" an object, point or line.** The object called for is treated as a monument and controls. **Holtz v. Beighley**, 211 Minn. 153, 300 N.W. 445 (1941) ("to a well" means to the center of the well.) **Pratt v. Quirk**, 119 Minn. 316, 138 N.W. 38 (1912) ("to a highway" usually means to the center of the highway.) **Owings v. Freeman**, 48 Minn. 487, 51 N.W. 476 (1892) ("to the place of beginning" means go to the place of beginning and ignore the last course and distance as erroneous if they do not go to the place of beginning.) **Korroll v. Board of Trustees of School District No. 24, Ramsey County**, 175 Minn. 172, 220 N.W. 413 (1928) ("to the bank of the lake" means to the water of the meandered lake.) **Park Elm Homeowner's Association v. Mooney**, 398 N.W.2d 643 (Minn. App. 1987) ("to the high-water line on the west shore of Lake St. Croix; thence northerly along the lake shore..." means to the water and not to the high water lines.)

3. **"Of" Descriptions.** Generally, the word "of" in a description such as the East 600 feet of Lot 2 is a term of art as defined in mathematics. It means the west line is parallel with and 600 feet west of the east line of Lot 2 measured at right angles. The word "of" is enough as any mathematician or surveyor knows. Some lawyers, not trained in mathematics, want to add the extra verbiage but are merely showing their major was in political science.

    In a description such as the East 1.5 acres of Lot 1 the west line is parallel with east line of Lot 1 and a sufficient distance west to subscribe 1.5 acres.

    In a description such as the East half of Lot 1, the west line is parallel with the east line of Lot 1 and a sufficient distance west to subscribe half of Lot 1 by area.

    If the parcel divided is part of the public land survey and is at least as large as a quarter section, the fraction of the whole is usually surveyed by fractional distances rather than by area.
Because "of" descriptions divide part of a whole by parallel lines and distance, area or fractional part and the divided parcel rarely has parallel lines and distances which are uncertain, they are the source of many problems. Too many times people writing descriptions make assumptions and cause gaps, overlaps or title problems.

4. Descriptions Using Both Courses and Distances and Plat Descriptions. If a deed described a parcel using parts of platted lots followed by words such as "also described as" and then redescribes the parcel by courses and distances, the plat description will usually prevail. Colter v. Mann, 18 Minn. 96 (Gil. 79). The reason for the rule is that the description or call which is more likely to show the intention of the parties, and least likely to be a mistake will take precedent. Coles v. Yorks, 36 Minn. 388, 31 N.W. 353 91887).
KNOW THE BASICS OF BOUNDARY LAW

I. REFORMATION

A. Introduction. Reformation of deeds is a concept which is often overlooked in boundary litigation. A court of equity has the power to reform deeds to conform to the intentions of the parties. Reformation can be used when adverse possession or practical location would be difficult to prove.

An excellent example of a case where reformation applies is Crookston Imp. Co. v. Marshall, 57 Minn. 33, 59 N.W. 294 (1894). Because this is such a well crafted opinion it is reproduced in full. Note how Justice Mitchell:

a. Sets out the issue on appeal;

b. States the standard of proof;

c. States the important facts;

d. Outlines the elements for reformation;

e. Applies the facts to the law;

f. Distinguishes these facts from those which would not allow reformation;

g. States the decision; and

h. Gives the reason for the decision.
CROOKSTON IMP. CO. v. MARSHALL
et al.
(Supreme Court of Minnesota. May 25, 1894.)
Reformation of Deed—Mistake—Fraud.
1. Evidence held sufficient to justify the reformation of a deed.
2. Although the terms of a deed are stated according to the intention of both parties, yet a reformation may be had if they were in error in respect of the thing to which these terms apply.
3. The mistake of one party, accompanied by fraud or other inequitable conduct of the other party, may be good ground for the reformation of a written instrument.
(Syllabus by the Court.)
Appeal from district court, Polk county; Frank Ives, Judge.
Action by the Crookston Improvement Company against Annie L. Marshall and others to reforest a deed. Verdict for the plaintiff. From an order refusing a new trial, defendants appeal. Affirmed.
A. A. Miller, for appellants. H. Steenerson, for respondent.

MITCHELL, J. The only question in this case is whether the evidence justified the decision of the trial court that plaintiff was entitled to a reformation of its deed to defendants, having in mind the rule that to entitle a party to such relief the proofs must be clear, satisfactory, and convincing—that a mere preponderance of evidence will not suffice. The situation will be readily understood by reference to the plat on page 105 of the paper book.
One Bjornstad (plaintiff's grantor) owned government lots 6 and 7 in section 25, and lot 4 in section 30, lot 4 lying immediately east of lots 6 and 7. He platted Sampson's Woodland addition to Crookston as on lots 6 and 7, the east line of the addition being supposed and intended to be the line between those lots and lot 4, but, as staked out on the ground, the plat in fact extended, as has since been ascertained, from 40 to 75 feet eastward over upon lot 4. When the survey was made, stakes were stuck at the corners of the lots and blocks, including those on the east line of the plat. What was east of the plat was marked "Reserved for Park," and was supposed to comprise the whole of lot 4. All of this property, both platted and unplatted, was subsequently conveyed to defendant, which had, prior to the deed in controversy, conveyed several of the lots on the east side of the plat to various parties, who had erected houses and made other improvements thereon. The transaction between the parties to this suit was entirely conducted on behalf of the plaintiff by one Sampson, its president, and on behalf of the defendants by one Munch. The evidence is very strong to the effect that what Sampson agreed and intended to convey was the unplatted portion of the land, he supposing that its west line was the west line of lot 4, or substantially so; that he so informed Munch, and pointed out to him the stakes on the east side of the plat as being the line of the land proposed to be sold and conveyed. Under this condition of things, the deed was executed, describing the premises as lot 4, which, for the reasons stated, includes from 40 to 75 feet of the platte ground. It is true the terms of the deed are stated according to the intent of both parties, but there was a mistake of both (taking the view of the facts most charitable towards Munch) in respect of the thing to which those terms applied, to wit, boundary. What was intended was to convey the unplatted, and not any part of the platted land, and they used the description they did because of their mistake in supposing that the west line of the unplatted land was the west line of lot 4. This was a mistake of fact which would justify a reformation of the deed. 2 Pom. Eq. § 863. The only other hypothesis is that Sampson was laboring under the mistake, and that Munch, knowing that fact, concealed the truth from him in order to secure a conveyance of land which he knew Sampson never intended or agreed to convey. This would be a case of a mistake of one party accompanied by fraud or inequitable conduct of the other party, which is also good ground for reformation of a written instrument. 3 Pom. Eq. § 1376. Had the agreement been to convey lot 4, and had there been merely a mutual mistake as to its boundaries, this would have constituted no ground for a reformation of the deed. But, assuming the presence of good faith on the part of Munch, it seems to us that there was ample proof of mutual mistake; that is, that there was a meeting of the minds of both parties—an agreement actually entered into—that it was the unplatted land that was to be conveyed, but that they used the description they did because of a mistake in respect to the land to which that description applied. With knowledge of the existence of the improvements made by plaintiff's grantees on several of the lots on the east side of the plat, it is hardly possible that Munch could have honestly believed that he was buying, or that Sampson intended to sell, those lots. Order affirmed.

BUCK, J., absent, sick, took no part.
B. **Elements of Reformation.** The elements of reformation are set out in *Fritz v. Fritz*, 94 Minn. 264, 102 N.W. 705 (1905)

1. **Facts to Prove.** Before a court of equity will interfere to reform a written instrument, it must appear, substantially as alleged in the pleadings.

   a. **Valid Agreement.** That there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties;

   b. **Written Contract.** That there was in fact a written contract which failed to express such true intention; and

   c. **Mutual Mistake.** That this failure was due to mutual mistake or to mistake of one side and fraud or inequitable conduct of the other.

2. **Weight of Evidence Required.** These facts must be established by competent evidence, which is consistent and not contradictory, clear and not equivocal, convincing and not doubtful. Mere preponderance of testimony is not sufficient.

3. **Clean Hands.** Such relief will be extended to those only who have not by their own conduct (as laches, negligence, or otherwise) put themselves in such a position as to render it unjust to change the situation; especially when such change might injuriously affect the rights or status of innocent third parties.

C. **Reformation of Registered Land.** In *Nolan v. Stuebner*, 429 N.W.2d 918 (Minn. App. 1988) the Court of Appeals applied reformation to revise a Torrens certificate to show an easement.

D. **Special Considerations.** The case of *Aldrich v. Wilson*, 205 Minn. 150, 120 N.W.2d 849 (1963) is instructive for boundary litigation.
The owner of the land placed iron pipes every 50 feet along the diagonal road and then sold lots using "of" descriptions from the east. The buyers occupied the land with reference to the stakes. In spite of the fact that this is a perfect case for reformation; an adverse possession suit was started. At trial plaintiffs tried to argue reformation but the court ruled it was too late.

It is good practice to join all persons in the chain of title; however, this is not absolutely necessary. See Flowers v. German, 1 N.W.2d 424 for a discussion of necessary parties to a reformation boundary action.
II. ADVERSE POSSESSION

A. The Legal Theory. Adverse possession comes from the medieval feudal concept of seisin. An actual unwritten conveyance takes place with this doctrine. A much abbreviated explanation is found in Mellenthin v. Brantman, 211 Minn. 336, 1 N.W.2d 141, 143 (1941).

The title of the owner of a freehold estate is described by the terms “seizin,” or seizin in fee,” yet in a proper legal sense the holder of the legal title is not seized until he is fully invested with the possession, actual or constructive. When there is no adverse possession the title draws to it the possession. There can be but one actual seizin, and this necessarily includes possession; and hence an actual possession in hostility to the true owner works a disseizin, and if the disseizer is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished.

Minnesota has codified the doctrine in Minn. Stat. §541.02 which states as follows:

No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff’s ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.

Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party’s ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.

The provisions of paragraph two shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation.

This statute is basically a statute of limitations. The common law period was 40 years. Originally, Minnesota reduced that time to 20 years and in 1889 reduce it to 15 years. Different states have different requirements for adverse possession.

B. The Legal Requirements. In order to prove adverse possession, possession must be actual, open, continuous, exclusive and hostile for 15 years for
boundary disputes. An additional element is added for non-boundary disputes, namely payment of the real estate taxes for 5 years.

1. **Standard of Proof.** Adverse possession must be established by clear and convincing evidence. Rogers v. Moore, 603 N.W.2d 650, 657 (Minn. 1999) which revises Village of Newport v. Taylor, 225 Minn. 299, 30 N.W.2d 588 (1948) – (clear and positive proof based on a strict construction of the evidence.)

2. **Actual Possession.** The actual owner does not have to be in actual possession of the land. Constructive possession is good enough. In Minnesota one can acquire title by adverse possession without color of title. The party with color of title has a slightly easier path to adverse possession. This concept is explained in Barber v. Robinson, 78 Minn. 193, 80 N.W. 968, 969 (1899)

"...when a man enters upon land claiming a right and title to the same under color of a conveyance, and acquires a seizin by his entry, his seizin will extend to the whole tract, there being no adverse actual possession in the way, is because an entry on part of the land is deemed to be an entry and an ouster as to the whole. The entry and the possession are referred to the claim of title, and are co-extensive with boundaries stated in the conveyance or other written instrument under which entry has been made. But when an entry is not under color of title there is no invasion or disseisin which notifies the true owner of a claim asserted by another person, or which gives him a right of action, except as to the land actually occupied. As between the owner and the invader, actual occupation of a part divides the possession which has therefore been, constructively, in the former, so that as to the occupied land possession is in the latter. The true owner is not subsequently dispossessed and disseised by the obtaining of color of title to the whole tract by the adverse claimant. Possession of the whole cannot be drawn to the occupant of a part in that way.

In Romans v. Nadler, 217 Minn 174, 14 N.W.2d 482 plaintiff's eves encroached onto defendants' land. Twice a year plaintiffs, in order to change their storm, windows and screens, placed a ladder on defendants' land and walked on defendants' land. Plaintiffs did not acquire any right to change their storm windows but did acquire the right to have their eves and gutters encroach.

3. **Open Possession.** The possession must be visible such as to charge the owner with notice that the disseizer is claiming title to the land and the owner must act to prevent a disseizeen. The disseizer must claim adversely and make the fact known to the owner. “He must keep his flag flying.” Romans v. Nadler, 217 Minn. 174, 14

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N.W.2d 482 (1944); Aldrich v. Dunn, 217 Minn. 255, 14 N.W.2d 489 (1944); Dean v. Goddard, 55 Minn. 290, 56 N.W. 1060 (1893). In Stanard v. Urban, 453 N.W.2d 733 (Minn. App. 1990) mowing and maintaining the property each summer, storing lake equipment on the property each winter and allowing their children and grandchildren to play on the property was held not to trigger the running of the 15 year period.

4. Continuous Possession for 15 Years. Possession must be continuous for the entire statutory period. Engquist v. Wirtjes, 243 Minn. 502, 68 N.W.2d 412 (1955). Occasional and sporadic trespass for temporary purposes has been held to not interrupt the continuity even though the trespass continues throughout the statutory period. Romans v. Nadler, 217 Minn. 174, 14 N.W.2d 482 (1944). The requirement of continuity depends upon the nature of the right claimed and on the circumstances of the possession.

(a) Commencement of the statutory Period. The statute of limitations for adverse possession begins to run when all of the elements are present and all of the elements must continue for the 15 year period. In Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980) plaintiff started the action about 6 months prior to the completion of the 15 years. There was no hostile possession until the land was transferred so the adjoining property was not owned by close family relatives or until the presumption of permissive use between close relatives was rebutted.

If the original entry was permissive, the statute of limitations begins when the disseizor gives notice to the owner either by words or action that the possessor is claiming an interest adverse to the true owner. Johnson v. Raddohl, 226 Minn. 343, 32 N.W.2d 860 (1948); Norgong v. Whitehead, 225 Minn. 379, 31 N.W.2d 267 (1948).

The 15 year statutory period is all that is necessary. If the possession is interrupted after the 15 years has run the title acquired is not lost merely by the interruption. Dean v. Goddard, 55 Minn. 290 56 N.W. 1060 (1893) On the other hand the true owner can wait to evict until the 15 years is about to run to bring the action without losing the right to evict because of latches. Mueller v. Fraen, 36 Minn. 273, 30 N.W. 886.

(b) Interruption in Continuity. Once any of the elements of adverse possession are discontinued the statute no longer runs. Recognition of the owner’s title by quit claiming interrupted the continuity in Simms v. William Simms Hardware, 216 Minn. 456, 103 N.W. 335 (1905). It does not break the continuity of adverse possession to take written conveyances from other parties claiming an interest in the land as this may give the possessor color of title and may help define the boundaries of the premises claimed, Dean v. Goddard, 55 Minn. 290, 56 N.W.1060 (1893) nor does it break the continuity if one in adverse possession of land to which the title is in several persons to purchase the title of one of them. City of St. Paul v. Chicago M. & St. P. Ry. Co., 45 Minn. 387, 48 N.W. 17 (1891). An adverse possessor can lease the land to another without interrupting the continuity. Sherin v. Brackett, 36 Minn. 152 30 N.W. 551 (1886)
Temporary absence from the premises used as a residence did not break the continuity of possession in *Kelly v. Green*, 142 Minn. 82, 170 N.W. 922 (1919) and in *Costello v. Edson*, 44 Minn. 135, 46 N.W. 299 (1890) nor did the fact that the adverse possessor’s cattle did not use a passage way for 2 years break the continuity in *Bahmeman v. Fritche*, 147 Minn. 329, 180 N.W. 215 (1920).

(c) Tacking Successive Possessions. If there is privity between successive disseizors the time of possession of each can be added together to make the statutory period. Privity exists between successive possessors when the later takes by descent, will, or grant, or by voluntary transfer of possession. *Marek v. Holey*, 119 Minn. 216, 137 N.W. 969 (1912); *Sherin v. Brackett*, 36 Minn. 152, 30 N.W. 551 (1886) The transfer must be voluntary. *Hall v. Connecticut Mutual Life Ins. Co.*, 76 Minn. 401, 79 N.W. 497 (1899). There is no continuity of possession if one enters abandoned property, *Witt v. St. Paul & N.P. Ry. Co.*, 38 Minn. 122, 35 N.W. 862 (1888).

5. **Exclusive Possession.** The adverse possessor must exclude not only the true owner but all persons. This action is consistent with the requirement to treat the property as though the adverse possessor owns it and by that action serve notice to the world of the adverse claim. *Dean v. Goddard*, 55 Minn. 290, 56 N.W. 1060 (1893); *Maas v. Burdetzke*, 93 Minn. 295, 101 N.W. 182 (1904); *Lamprey v. American Hoist & Derrick Co.*, 197 Minn. 112, 266 N.W. 434 (1936)

6. **Hostile Possession.** For possession to be hostile requires that the disseizor take possession of the land as the owner with the intention of holding the land exclusive of all others including the true owner. *Carpenter v. Coles*, 75 Minn. 9, 77 N.W. 424 (1898); *Bjerketvedt v. Jacobson*, 232 Minn. 152, 44 N.W. 2d 775 (1950). The good faith or bad faith intention of the disseizor is not important. *Rupley v. Fraser*, 132 Minn. 311, 156 N.W. 350 (1916); *Thomas v. Mrkonich*, 247 Minn. 481, 78 N.W. 2d 386 (1956); *Cain v. Highland Co.*, 134 Minn. 430, 159 N.W. 830 (1916). Hostile possession does not require ill will or conscious opposition to the claim of another but merely the assertion of exclusive ownership. *Carpenter v. Coles*, 75 Minn. 9, 77 N.W. 424 (1898); *Cool v. Kelly*, 78 Minn. 102, 80 N.W. 861 (1899). It is not even necessary that the disseizor know the land being claimed belongs to another. The possession of another’s land can be by mistake as long as the disseizor intends to claim the land as the true owner excluding all others. *Mellenthin v. Brantman*, 211 Minn. 336, 1 N.W. 2d 141 (1941); *Ehle v. Prosser*, 293 Minn. 183, 197 N.W. 2d 458 (1972).

Because possession with the permission of the record owner is not hostile, the relationship of the parties may be an important consideration and make it more difficult for certain parties to obtain title by adverse possession. For example if the parties are joint tenants or tenants in common, donee and donor, blood relatives, friendly next door neighbors, mortgagor and mortgagee, life tenant and remainderman, or grantor and grantee, the assertion may be that the possession is not hostile but permissive.
(a) **Joint Tenants or Tenants in Common.**

"Where one tenant in common enters and possesses land, his possession is regarded as possession by all the cotenants, not as a disseisin. Thus, there is a presumption that the cotenant holds land with the implicit permission of the others even if the possessor should maintain the property as his own and keep the profits for himself. In order to overcome this presumption, not only must possession be open and notorious so that the owners may know of it, there must be an express or implicit ouster of them, such ouster consisting of acts or declarations of hostility sufficient to indicate a truly adverse possession and to start the statute of limitations running. An express notice is not necessary; an intention to hold the land adversely to the owners may be derived from all the circumstances of the case, especially the amount and nature of control exercised by the cotenant over the property. American Law of Property. Section 15.2 to 15.4; Annotation, 82 A.L.R.2d 5, 23."

**Adams v. Johnson,** 271 Minn. 439, 136 N.W.2d 78, 81 (1965). Important considerations in deriving intention from all of the circumstances include the relationship of the cotenants and the exclusive use by the disseisor. The exclusive use by ousting cotenant must be more explicit than that required of an ordinary disseisor. A deed to the land by a cotenant creates a presumption that the conveyance is of that cotenant's interest only. **Stanford v. Safford,** 99 Minn. 380, 109 N.W. 819 (1906)

(b) **Donee and Donor.** The donee who possesses land pursuant to a parol gift and claims ownership can be an adverse claimant. **Sinclair v. Matter,** 125 Minn. 484, 147 N.W. 655 (1914)

(c) **Blood Relatives.** There is an inference if not a presumption that possession or use of one brother of the land of another is permissive and not adverse. In that case the strictest proof of hostility of use is required. **Lustmann v. Lustmann,** 204 Minn. 228, 283 N.W. 387 (1939); **Wojahn v. Johnson,** 297 N.W.2d 298, (Minn. 1980) The same is true of parent and child, **Alstad v. Boyer,** 228 Minn. 307, 37 N.W.2d 372 (1949)

(d) **Friendly Next Door Neighbors.** Friendly neighbors are not treated the same as blood relatives even though friendly neighbors permit certain liberties with each other; their relationship is entirely different in character and degree. **Alstad v. Boyer,** 228 Minn. 307, 37 N.W.2d 372 (1949).

(e) **Spouses.** Because one spouse has another removed from the home during a domestic dispute does not mean the spouse who remains in the home now possesses the house adversely to the ejected spouse's title. Where the original entry was permissive the statute does not begin to run against the legal owner until an adverse
holding is declared and notice of such change is brought to the knowledge of the owner. Meyers v. Meyers, 368 N.W.2d 391 (Minn. App., 1985)

(f) Mortgagor and Mortgagee. A mortgagor who remains in possession of the property after foreclosure of the mortgage is presumed to be in possession in subordination to the mortgage until the contrary appears before the time begins to run. Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W.2d 421 (1943)

(g) Life Tenant and Remainderman. Since the remainderman in a tenancy for life does not have the right to possession, the life tenant or the grantee of the life tenant cannot hold adverse to the remainderman until the death of the life tenant. Hanson v. Ingwaidson, 77 Minn. 533, 80 N.W. 702 (1899); Faulkenburg v. Windorf, 194 Minn. 154, 259 N.W. 802 (1935)

(h) Grantor and Grantee. A grantor who remains in possession after a valid conveyance is presumed to occupy with the permission of the grantee. The same is true of one who receives possession from the grantor. Hostile possession does not begin until the party in possession asserts a claim of title and such claim is known to the grantee. The adverse possessor can give notice by acts or by words to show the true owner of the adverse claim. Kelly v. Palmer, 91 Minn. 133, 97 N.W. 578 (1903)

7. Payment of Taxes. The statute provides that the party claiming title by adverse possession or that party’s predecessor in title must have paid taxes on the real estate for five consecutive years of the time during which the lands are claimed to have been occupied adversely. Bryant v. Gustafson, 230 Minn. 1, 40 N.W.2d 427 (1950). Boundary line disputes, actions concerning the lands between the government or platted line, and lands not assessed for taxation are specifically excluded. If the land claimed is not separately assessed the adverse possessor does not have to pay the taxes to claim title by adverse possession. Mellenthin v. Brantman, 211 Minn. 336, 1 N.W.2d 141 (1941)

In Grubb v. State, 433 N.W.2d 915 (Minn. App., 1988) the plaintiff claimed title by adverse possession to a fence and ownership of 13 acres of his neighbor’s 16 acre parcel. Plaintiff failed to establish that this was a boundary line dispute and thus was not exempt from the statutory requirement to pay taxes. Grubb opened up vast new possibilities for future litigation. Examples include LeGro v. Saterdalen, 607 N.W.2d 173 (Minn. App. 2000) and Ganje v. Schuier, 659 NW.2d 261 (Minn. App. 2003) both of which are easier to understand by referring to the attached drawings.

In LeGro the problem was caused by a misunderstanding of the location of the north-south quarter line of section 17. Yantes’ deed is to land in Government Lot 2 but her 2 cabins are in Government Lot 3. This is the land occupied by the 2 cabins owned by Yantes. When he purchased this land he knew Yantes was on the land he purchased for more than 20 years. LeGro sued to quiet the title to their resort land and the other parties cross-claimed for adverse possession.
At trial the Cass County assessor testified that for 20 years Yantes paid taxes on 2 cabins on Government Lot 2. LeBlanc argued he paid taxes on Government Lot 3 and cited Grubb. The district court was affirmed that Yantes had paid taxes on the land she claimed and had the land she claimed and had acquired title by adverse possession.

In Ganje, Schuler acquired title by adverse possession to 0.4 acre or 9% of the Ganje land. Citing Grubb the Court of Appeals stated that taking 9% of this land, however valuable, was not enough to require payment of taxes. Evidence was not presented which would show the Ganje parcel was only partly inhabitable because of a steep slope down to the river. The map presented to the court and the map not in evidence is reproduced herein.
C. Land Subject to Adverse Possession.

1. General Rule. Generally any type of land can be subject to adverse possession. Some exceptions are land owned by government and land registered under the Torrens act.
2. **Railroads.** Unlike some states, Minnesota allows adverse possession of railroad land. M.S.A. 160.05 subd. 2 provide the only exception:

"The continued use of any road by the public upon and parallel to the right of way of any railway company shall not constitute such a road a legal highway or a charge upon the town in which the same is situated, and no right shall accrue to the public or any individual by such use."

3. **Water Lands.** The owners of land bordering the shore of a non-navigable lake own the bed of the lake in conveying the shoreland unless a contrary intention appears. Title to such land is also capable of being acquired by adverse possession. *Schmidt v. Marschel*, 211 Minn. 539, 2 N.W.2d 121 91942). Where the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity, and the riparian owner takes the fee only to the waters edge, but with all the rights incident to riparian ownership, including the right to accretions or relictions. Accretions and relictions may be transferred separately from the upland to which they are attached. Such land is also capable of being acquired by adverse possession. *Schmidt v. Marschel*, 211 Minn. 539, 2 N.W.2d 121 (1942)

The title of a riparian owner to an island in a non-navigable stream may be obtained by adverse possession. *Briard v. Hashberger*, 107 Neb. 199, 185 N.W. 430 (1921) cited in *Schmidt* (supra) lands which are the subject of private ownership may be covered by water. *Schmidt* (supra)

4. **Land Owned By a Governmental Body.** The general rule is that one cannot acquire adverse title against the sovereign under our statutory scheme Minn. Stat. §540.01. This rule has been in effect since 1899. *Hopkins v. Dahl*, 183 Minn. 393, 236 N.W. 706 (1931). It applies whether or not the property is owned in a governmental or proprietary capacity and to all governmental units. *Fischer v. City of Sauk Rapids*, 325 N.W.2d 816 (Minn. 1982)

While the general rule is that a public street may not be subject may to adverse possession the fee title in the street can acquired by adverse possession. *Rupley v. Fraser*, 132 Minn. 311, 156 N.W. 350 (1916) A city which does not use and develop a dedicated city street does not subject that street to being acquired by adverse possession by the owner of the fee. *State v. Marcks*, 228 Minn. 129, 36 N.W.2d 594 (1949) It is possible for a city to abandon a street and thus subject the street to adverse possession. *Village of Newport v. Taylor*, 225 Minn. 299, 30 N.W.2d 588 (1948) It is also possible for a city to be estopped from asserting a right to the street if it had knowledge of the adjacent land owner making valuable improvements in the street, and issued permits for the building without objection. *City of Rochester v. North Side Corp.*, 211 Minn. 276, 1 N.W.2d 361 (1914)
Mere non use of the street by the city even for a long time is not enough to show abandonment or estoppel against a city. This issue is discussed in Village of Newport v. Taylor, supra, at page 593.

In order to raise an estoppel in pais against a municipality, there must, in addition to non-user and acquiescence, be some affirmative or unequivocal act of the municipality which, in view of all the circumstances, induced a third person reasonably to believe in and to rely upon such act as constituting a representation of an intent in fact to abandon the street, which representation of abandonment, were the municipality now permitted to deny it as not conforming to actual fact, would cause substantial injury to such third person, who in good faith relied thereon.

The Court in the Village of Newport case stated that the affirmative acts in the Rochester case where the court found estoppel against the city were as follows:

1. The long continued nonuser;

2. The actual physical relocation of the street and its improvement and maintenance as relocated over a period of many years;

3. The laying of municipal sewers and water mains in the street as relocated; and

4. The issuance by the City of Rochester of building permits authorizing defendants and their predecessors to erect the buildings in question upon the unoccupied though platted street area.

5. **Land Registered Under the Torrens Act.** Minn. Stat. 508.02 provides "...No Title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession." It should be noted that a person in possession of realty either by adverse possession or practical location of boundaries is entitled to notice and the opportunity to be heard in the registration proceedings. Failure to notify and give opportunity to be heard will not extinguish the interest of the adverse possessor. Konantz v. Stein, 282 Minn. 33, 167 N.W.2d 1 (1969) The purpose of the title registration under Minn. Stat. Chapter 508 is to have the title certificate act as a conclusion as to all rights and interests in the land, except for certain statutory exceptions, rather than to have owners draw their own conclusions from various recorded instruments. That is the rationale behind not allowing adverse possession (an unwritten conveyance) of registered land. The court does, however, have the authority to determine boundaries of registered land unless such boundary has already been determined. Minn. Stat. §508.571 provides a procedure whereby the court can judicially determine boundaries of registered land. The statute does not restrict the court from determining a boundary in a location which does not agree with a
survey. The boundary can be determined by practical location. Because the Court of Appeals, in a series of opinions, decided practical location of boundaries is the same as adverse possession, in 2008 Minn. Stat. §508.02 was amended to reverse these opinions. The statute now reads:

Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land. This chapter shall not operate to relieve registered land or the owners thereof from any rights, duties, or obligations incident to or growing out of the marriage relation, or from liability to attachment on mesne process, or levy on execution, or from liability to any lien or charge of any description, created or established by law upon the land or the buildings situated thereon, or the interest of the owner in such land or buildings. It shall not operate to change the laws of descent or the rights of partition between contennants, or the right to take the land by eminent domain. It shall not operate to relieve such land from liability to be taken or recovered by any assignee or receiver under any provision of law relative thereto, and shall not operate to change or affect any other rights, burdens, liabilities, or obligations created by law and applicable to unregistered land except as otherwise expressly provided herein. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land.

(Emphasis added)

Note the change is meant to be retroactive to overturn the line of decisions to the contrary by the Court of Appeals.

D. Obtaining Record Title. To obtain record title as well as the fee title the adverse possessor must bring an action to determine adverse claims pursuant to Minn. Stat. 559.01 et. seq. naming the record owner as a defendant. The court must make precise factual possession. Konantz v. Stein, 283 Minn. 33, 167 N.W.2d 1 (1969) and the adverse possessor must record a certified copy in which the land is located. The recorded judgment is evidence of record title in the adverse possessor.
III. PRACTICAL LOCATION OF BOUNDARIES

A. INTRODUCTION. It is not proper to relate practical location to adverse possession. They are two separate and distinct concepts. Engquist v. Wirtjes, 243 Minn. 502, 68 N.W.2d 412 (1955). Theros v. Phillips, 256 N.W.2d 852 (Minn. 1977) The leading Minnesota case on the doctrine or practical location is Beardsley v. Crane, 52 Minn. 537, 54 N.W. 740 (1893). In Beardsley the court described three different ways to establish a boundary by practical location:

...To establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be either (1) a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations, or (2) the erroneous line must have been agreed upon between the parties claiming the land, on both sides thereof, and afterwards acquiesced in, or (3) the party whose right is to be barred must have silently looked on while the other party acted or subjected himself to expense in regard to the land, which he would not have done if the line had not been so located. But to establish a practical location which is to divest one of a clear and conceded title by deed, the extent of which is free from ambiguity or doubt, the evidence establishing such location should be clear, positive and unequivocal. (Numbers added)

These three ways are referred to as: (1) acquiescence, (2) agreement and (3) estoppel.

Even though a boundary clearly and convincingly established by practical location may prevail over the contrary result of survey, before beginning litigation a party should obtain an accurate survey. In Gifford v. Vore, 245 Minn. 432, 72 N.W.2d 625 (1955) the court held that the claimant’s failure to furnish an up-to-date survey made it impossible for claimant to establish practical location by clear and convincing evidence. See also Aldrich v. Wilson, 265 Minn. 150, 120 N.W.2d 849 (1963) and Phillips v. Blowers, 161 N.W.2d 524 (Minn. 1968). The claimant will also need an accurate survey to present to the court a legal description of the land being claimed.

The boundary established by practical location becomes the actual boundary as between the parties to the action. Because there is no unwritten conveyance of the land, as in adverse possession, the legal description may not change except to refer to judicial landmarks. Consider the case where all surveyors agree to the location of the East line of Lot 1, Block 1, BLACKACRE but the parties have established a different location of that line by practical location. It is entirely proper to describe the line located by practical location and marked by judicial landmarks as follows:
Lot 1, Block 1, BLACKACRE the East line of which is marked by judicial landmarks set in Court File No....

Subsequent surveyors must look in the court file or in the land records which should include the survey. Be careful not to rely solely on these judicial landmarks to survey other lots in this plat.

B. PRACTICAL LOCATION OF BOUNDARIES BY ACQUIESCENCE

1. In General. Since it is rare that a party will know the location of the true line and allow the adjacent landowner to make improvements on other than the true line to establish an estoppel and since the court rarely finds a valid agreement, by far the most common method of establishing practical location is by acquiescence.

"Acquiescence: the location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations." Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980).

The statutory period is 15 years, (see Minn. Stat. Section 541.02) under the acquiescence theory of practical location.

Under the acquiescence theory of practical location, the acquiescence required is not merely passive consent to the existence of a fence but rather is conduct or lack thereof from which assent to the fence as a boundary line may be reasonably inferred. Engquist v. Wirtjes, 243 Minn. 502, 68 N.W.2d 412 (1950). The evidence of acquiescence must be clear, positive and unequivocal. Engquist at 417. When a fence is claimed to represent a boundary line under an acquiescence theory, one of the most important factors is whether the parties attempted an intended to place the fence as near the dividing lien as possible. Allred v. Reed, 362 N.W.2d 374 (Minn. Ct. of Appeals, 1985); Wojahn, supra; Engquist, supra.

2. Necessity of Knowledge of the Location of True Line of Practical Location by Acquiescence. Our court in Simms v. Fagan, 216 Minn. 283, 12 N.W.2d 783 (1943) related practical location by acquiescence to the principle of estoppel and thus required knowledge of the true line. In Simms, the party setting the boundary was the one trying to assert it in court while the other party merely failed to protest. The court relied on Benz v. City of St. Paul, 89 Minn. 39, 93 N.W. 1040 (1903) which was an estoppel case. It appears that the Simms court came up with a correct result but for the wrong reason.

The Court had the opportunity to overturn Simms in Fishman v. Nielson, 237 Minn. 1, 53 N.W.2d 553 (1952) but merely distinguished the case on its facts. In Engquist v. Wirtjes, 243 Minn. 562, 68 N.W.2d 412 (1955), the court stated at page 416

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It is now clear that the principles of estoppel except perhaps in a very general sense have no application to the location of a practical boundary by means of the first method (acquiescence) set out in the Benz case.

It appears that knowledge of the true line is not necessary for a boundary by practical location relying on acquiescence but that a person who establishes the boundary will have a difficult time prevailing if the other party merely does nothing. The evidence must either show the attempt was made to set the fence on the true boundary and the other party recognized it as a boundary for 15 years or else the evidence should prove the elements of adverse possession.

C. PRACTICAL LOCATION BY AGREEMENT.

1. In General. The rule to establish a boundary by practical location by agreement is stated in Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980).

   "The line must have been expressly agreed upon by the interested parties and afterward acquiesced in."

Note that both agreement and acquiescence are necessary.

The period of acquiescence can be less than 15 years if accompanied by the agreement. In Nadeau v. Johnson, 125 Minn. 365, 147 N.W. 241 (1914) the period of acquiescence was for 10 years after the agreement; and in County of Houston v. Burns, 126 Minn. 206, 148, N.W.115 (1914) acquiescence was for a period of 10 years after the agreement.

2. Knowledge of True Line But Agree on Another. We would not expect to find cases where the parties know the location of the true line but agree on another line without reducing the agreement to writing. Such an agreement would be contrary to the statute of frauds and would require 15-year acquiescence.

3. Attempt to Place Boundary on the true Line but by Mistake Agree on Another. The Minnesota court seemed to follow the generally accepted rule in other jurisdictions in Beardsley v. Crane, 52 Minn. 537 54 N.W. 740 (1893) where the parties were misled by an inaccurate survey, built a fence upon the erroneous line and thereafter acquiesced in the line for 9 years. The parties in that case were not bound by the agreement which was based on a mistake. Generally, it has been held that the line must be in dispute and the true line uncertain, so if the parties merely tried to place the fence on the true line as a part of their agreement, the agreement was not operative. Peters v. Reichenbach, 114 Wis. 209, 90 N.W. 184 (1902).

In two cases since Beardsley v. Crane, the court ignored the fact that the parties agreed on a line they thought was the true line. When the true line was discovered, the parties were held to their agreement.
The parties in *Nadeau v. Johnson*, 125 Minn. 365, 147 N.W. 241 (1914) all participated in measuring for the purpose of locating the true line and placed stakes for future guidance. They then acquiesced in the agreed-upon line as a boundary for 10 years. Defendant constructed buildings with reference to the lines and plaintiff sold part of his lot based on a measurement from said line. There is no doubt the parties thought they had located the true line. The court said the parties deliberately established and agreed upon the dividing line and subsequently acquiesced in it and stated this brings the case within the rule of *Beardsley*.

In *Houston County v. Burns*, 126 Minn. 206, 148 N.W. 115 (1914) the county and Burns owned adjacent parcels. A question arose as to the true division between the tracts so the county had the county surveyor survey the line. The parties then built a fence on the line as surveyed and maintained it for 10 years. In the suit the county claimed that its predecessor had acquired part of the Burns land by adverse possession and claimed to the old line. The court held that the survey and location of the boundary line, its acceptance and recognition by the respective owners as the line separating their lands, and the joint maintenance of a division fence thereon for almost 10 years established the line as a true boundary and precluded either owner from asserting another. This was true in spite of the fact that the parties knew the location of the two lines and agreed to locate the boundary on the true line. Perhaps *Burns* is better read as an estoppel case.

**D. PRACTICAL LOCATION OF BOUNDARIES BY ESTOPPEL**

1. **Equitable Estoppel in General.** The foundation of equitable estoppel is justice and good conscience. It arises from the spoken or written words of a party and that party's positive acts, silence or negative omission to do anything. In general terms, equitable estoppel is such conduct by a party that it would be unconscionable to the rights of another for that party to afterward repudiate and set up claims inconsistent with it. The conduct need not be such as to rise to the level of fraud but fraud often is a part of equitable estoppel.

   "Equitable estoppel is the effect of a voluntary conduct of a party whereby he is absolutely precluded, both at law and equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who in his part acquires some corresponding right, either of property, of contract, or of remedy."

   *In re Beier's Estate*, 205 Minn. 43, 284 N.W. 833 (1939)
2. **Elements of Equitable Estoppel.** An excellent discussion on estoppel is found in 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence, 5th Addition*, Section IX. The elements set forth in Section 805 of Pomeroy may be useful to understand practical location by estoppel.

   "a. There must be conduct – acts, language, or silence – amounting to a representation or a concealment of material facts.

   b. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.

   c. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him.

   d. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.

   e. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.

   f. He must in fact act upon it in such a manner as to change his position for the worse."

3. **Necessity of Knowledge of True Line For Practical Location by Estoppel in Minnesota** – This method of establishing a boundary is somewhat rare because it seems to require knowledge of the true line by the party being estopped.
"Estoppel: the party whose rights are to be barred must have silently looked on with knowledge of the true line while the other party encroached thereon or subjected himself to expense which he would not have incurred had the line been in dispute." Wojahn v. Johnson, 297 N.W.2d 298, 304 (1980). See also the cases cited therein.

In Wojahn, the court would not consider practical location by estoppel because there was no evidence that the defendants stood by in knowledge of the true boundary line. The court in a footnote at page 305 and 306 stated

"We have never indicated that knowledge of this true boundary line by one sought to be estopped was not a necessary element under the estoppel theory of practical location."

The Court, however, in Benz v. City of St. Paul, 89 Minn. 31, 93 N.W. 1038 (1903) found that adjacent landowner Stevens was estopped from disputing a line he pointed out as the true line even though he did not know the true line because plaintiff built a building in accordance with the line pointed out by Stevens. Stevens was estopped only to that portion of the lot occupied by the building.

It would seem that circumstances could arise whereby a party could be estopped even though that party did not have actual knowledge of the true line. In the oftencited case of Stevens v. Ludlum, 46 Minn. 160, 48 N.W. 771 (1891) Chief Justice Gilfillan states:

"To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows or ought to know, the truth, and they are intentionally made under such circumstances as how that the party making them intended, or might
reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth."

In Thompson v. Borg, 90 Minn. 209, 95 N.W. 896 (1903) it is not clear if plaintiff had actual knowledge of the true line. The plaintiff was estopped from claiming the old survey line when he induced defendant to buy the adjacent land after pointing out the new survey line. That case also points out the fact that there can be no estoppel if both parties know the facts.

While not a boundary case Schaefer v. Nylin, 162 Minn. 170, 202 N.W. 439 (1925) states some general elements of estoppel which imply that estoppel will be invoked in the case of culpable negligence but not in the case of ignorance founded on an innocent mistake.

If indeed knowledge of the true line is necessary to show practical location by estoppel, consider Smith v. Otto Henderson Post 212, American Legion, 241 Minn. 46, 62 N.W.2d 354 (1954) where the fee owner of a lot was presumed to know the true location of its boundaries and could not escape tort liability by claiming it did not know a certain chute was on its property.
V. JUDICIAL DETERMINATION OF BOUNDARIES

A. INTRODUCTION

The court pursuant to M.S.A. §559.23 can establish one or more boundaries to a parcel. As a part of the proceedings the court determines any adverse claims necessary to have a complete settlement of the boundary lines. Krabbenhoft v. Wright, 101 Minn. 856, 112 N.W. 421 (1907). All parties affected by the boundary determination must be parties to the action or they are not bound by the action. Konantz v. Stein, 283 Minn. 33, 167 N.W.2d 1 (1969). Assuming all the proper persons are parties to the action, once the court has determined boundaries all disputes between the parties are resolved. Minn. Stat. §559.24 allows the court to require additional parties to come in if they are necessary for a full adjudication of all questions involved.

They court also has the authority to require that Judicial Landmarks be set. It is possible to bring an adverse claims action for abstract land without setting Judicial Landmarks but this is not advisable. Without setting Judicial Landmarks an ambiguity on the ground could possibly exist. Surveyors sometimes disagree with each other and may locate the same description in different places. Judicial Landmarks are not dependant on differences in measuring skills or differences of opinion as to certain reference points. An adverse claims action without a boundary determination leaves the question open as to the location of the boundary on the ground. See Rouse v. Boye, 161 Minn. 431, 201 N.W. 919 (1925). A court order that a certain parcel of land is owned by a party does not establish the location of that parcel on the ground.

The relevant statutes are as follows:

559.23 ACTION TO DETERMINE BOUNDARY LINES. An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just. The decree of the court shall be filed with the court administrator, and a certified copy thereof shall be recorded in the office of the county recorder or in the office of registrar of titles or both, if necessary; provided that such decree shall not be accepted for such recording or filing until
it shall be presented to the county auditor who shall enter the
same in the transfer record and note upon the instrument
over the auditor's official signature the words "ENTERED IN
THE TRANSFER RECORD."

559.24 PLEADINGS; ADDITIONAL PARTIES. Such
actions shall be governed by the rules governing civil
actions, except as herein otherwise provided, but every
allegation in every answer shall be deemed in issue without
further pleading. When in any such action it appears to the
court that any owner, lien holder, or person interested in any
of the tracts involved ought, for a full settlement and
adjudication of all the questions involved, to be made a
party, the court shall stay the proceedings and issue an
order requiring such persons to come in and plead therein
within 20 days after service of the order, which shall be
served upon them in the same manner as a summons in a
civil action. Any person so served who shall fail to file an
answer within 20 days thereafter shall be in default. All
pleadings or copies thereof shall be filed before such order is
made. The court may also, in its discretion, in like manner,
order the owners and persons interested in other tracts than
those originally involved to come in and plead, in which case
the order shall describe such additional tracts, and state that
the purpose of the action is to establish the boundary lines
thereof.

559.25 JUDGMENT; LANDMARKS. The judgment shall
locate and define the boundary lines involved by reference to
well-known permanent landmarks, and, if it shall be deemed
for the interest of the parties, after the entry of judgment, the
court may direct a competent surveyor to establish a
permanent stone or iron landmark in accordance with the
judgment, from which future surveys of the land embraced in
the judgment shall be made. Such landmarks shall have
distinctly cut or marked thereon "Judicial Landmark." The
surveyor shall make report to the court, and in the report
shall accurately describe the landmark so erected, and
define its location as nearly as practicable.

An action to determine boundaries can also be brought as part of an action to register
title to land. Some of the requirements for including a boundary determination in a
registration proceeding is set forth as follows:

508.23 Subd. 1a. Judicial determination of boundaries.
If one or more boundary lines are judicially determined, the
land description in the decree of registration shall make reference to that fact and to the location of the judicial landmarks that mark the boundary lines. When any of the boundary lines are registered, the court administrator also shall file with the registrar a certified copy of the plat of the survey which contains a certification by a licensed land surveyor that the boundaries registered have been marked by judicial landmarks set pursuant to the order of the court. The registrar of titles shall enter the certified copy of the plat of the survey as a memorial upon the certificate of title issued for the land registered by the decree. If any of the adjoining lands are registered, the decree of registration shall direct the registrar of titles to show by memorial upon the certificates of title for the adjoining lands which of the boundary lines of these lands have been determined in the district court case.

Whether an action to determine boundaries is a part of a registration proceeding or not Minn. Stat. §559.23, 559.24 and 559.25 must be followed.

If a boundary to registered land has not already been determined the court can determine said boundary. Minneapolis and St. Louis Ry. v. Ellsworth, 237 Minn. 439, 54 N.W.2d 800 (1952), Moore v. Henricksen, 282 Minn. 509, 165 N.W.2d 209 (1968). This authority has recently been codified as follows:

508.671 DETERMINATION OF BOUNDARIES. Subdivision
1. Petition. An owner of registered land having one or more common boundaries with registered or unregistered land or an owner of unregistered land having one or more common boundaries with registered land may apply by a duly verified petition to the court to have all or some of the common boundary lines judicially determined. The petition shall contain the full names and post office addresses of all owners of adjoining lands which are in any manner affected by the boundary determination. At the time of the filing of the petition with the court administrator, a copy of it, duly certified by the court administrator, shall be filed for record with the county recorder. If any of the adjoining lands are registered, the certified copy of the petition also shall be filed with the registrar of titles and entered as a memorial on the certificate of title for those lands. When recorded or filed, the certified copy of the petition shall be notice forever to purchasers and encumbrancers of the pendency of the proceeding and of all matters referred to in the court files and records pertaining to the proceeding. The owner shall have the premises surveyed by a licensed land surveyor and
shall file in the proceedings a plat of the survey showing the correct location of the boundary line or lines to be determined. There also shall be filed with the court administrator a memorandum abstract, satisfactory to the examiner, showing the record owners and encumbrancers of the adjoining lands which are in any manner affected by the boundary line determination. The petition shall be referred to the examiner of titles for examination and report in the manner provided for the reference of initial applications for registration. Notice of the proceeding shall be given to all interested persons by the service of a summons which shall be issued in the form and served in the manner as in initial applications.

Subd. 2. Order. Before the issuance of any final order determining the location of the owner's boundary lines, the court shall fix and establish the boundaries and direct the establishment of judicial landmarks in the manner provided by section 559.25. The final order shall make reference to the boundary lines that have been determined and to the location of the judicial landmarks that mark the boundary lines. A certified copy of the final order shall be filed by the court administrator with the registrar of titles. If any of the adjoining lands are registered, the final order also shall be filed upon the certificates of title for these lands and it shall direct the registrar of titles to show by memorial which of the boundary lines of the adjoining lands have been determined in the district court case. Upon the filing of the final order, the registrar shall omit from future certificates the memorial of the petition for registration of the boundary lines.

Subd. 3. Plat of survey to be filed. The court administrator also shall file with the registrar of titles a certified copy of the plat of the survey which contains a certification by a licensed land surveyor that the boundaries as registered have been marked by judicial landmarks set pursuant to the order of the court. The registrar of titles shall enter the certified copy of the plat of the survey as a memorial upon the certificate of title.

Note that unlike abstract land the torrens statute specifically requires that Judicial Landmarks be set in a judicial determination of boundaries for registered land. It is good practice to follow many of the requirements of Minn. Stat. §508.671 even if the land is abstract.
B. PROCEDURE

The procedure in an action for a judicial determination of boundaries is similar to that in an adverse claims action except if Judicial Landmarks are to be set the court will issue an Interlocutory Order Determining Boundaries ordering the surveyor to set Judicial Landmarks. Once the Judicial Landmarks are set the Court will then issue the final order which will include a finding as to Judicial Landmarks.

Some courts will require a second hearing at which the surveyor must testify that the Judicial Landmarks have been set but most courts will issue the final decree based on the properly certified survey showing the monuments as being set without additional testimony.

C. FACTORS TO DETERMINE VALIDITY OF JUDICIAL LANDMARKS

1. Introduction. A surveyor is not obligated to use every Judicial Landmark which may affect the survey. If the client’s description calls for Judicial Landmarks, then the surveyor is obligated to use those monuments called for. However, it is not unusual to find Judicial Landmarks which were not set pursuant to court order or that control certain property but not others. The Judicial Landmark is only valid if the court had jurisdiction over the parties and if the statute was followed.

2. Jurisdiction. Before using a Judicial Landmark not called for in a description it must be determined if the persons or their predecessors affected by the monument were parties to the action and if service of process was proper. The best way to check parties and service of process is by checking the court file. The names of parties who owned the land affected by the monuments at the time of the action can be found in the County Recorders Office. Sometimes an Owner’s and Encumbrancer’s Report of adjacent land will be in the court file.

   The file should also include valid affidavits of service or an Answer from each defendant. The affidavits must follow the relevant rule or statute for service of process to be valid. Service of process is ruled by Minn. R. Civ. P. 4.

3. Follow the Statute. If the statute is not followed the monuments are not binding on the surveyor. Accordingly, the court file must be checked for the following:

   (a) The decree must be filed with the Court Administrator.

   (b) A certified copy of the decree must be filed with the County Recorder or Registrar of Titles for registered land.

   (c) There must be an order from the Court to the surveyor ordering that Judicial Landmarks be set.
(d) The surveyor must write a report or map accurately describing the
landmark and defining its location as nearly as possible and this must be filed
with the court.

In addition the monument must state Judicial Landmarks on it. The fact should be
noted on the survey or report.

D. MISSING JUDICIAL LANDMARK.

A missing judicial landmark can only be replaced by a court order pursuant to a motion
with notice to all affected parties. The court should require testimony from a land
surveyor that the Judicial Landmark was set in the same place as the last one.
Because of that fact it is good practice to show the location of newly set judicial
landmarks relative to known monuments so they can be accurately replaced. This is
now often done using GPS or accurate county coordinates. It is bad practice to include
this location as part of the description which refers to the judicial landmarks.
LEARN HOW TO LIE WITH MAPS

I. INTRODUCTION

The politicians and the media have perfected the art of using graphics to lie. They would argue they only use graphics to persuade; however, their use of color, scale and distortion as a means of persuasion can only be called a lie. Land surveyors have yet to fully explore the art of using graphics to win boundary litigation cases.

After giving some illustrations of the use of graphics by the media and politicians, this discussion will be restricted to graphics for boundary litigation.

II. POLITICAL GRAPHICS

A. Republican Flyer
B. Newsweek
C. Forbes
D. Famous Map

III. BOUNDARY LITIGATION GRAPHICS

A. Introduction. Maps are necessarily generalizations. It is impossible to show everything on a survey. Editing is necessary in the field and in the office. The land surveyor uses signs and symbols to represent graphically the land being surveyed along with some physical objects. When preparing a survey for boundary litigation it is important to work with the lawyer to be sure the survey includes the necessary information. A surveyor who is unable or unwilling to provide the survey the lawyer wants should refuse to take the job.

There are many different ways to represent the same boundary survey. The following are some things to consider.

B. Scale. Many times the survey will be attached to the pleadings and the final decree. The court rules specify 8 ½ X11 documents. If necessary 11X17 will fit but this is clumsy. For trial, often times a large mounted exhibit is helpful.

If helpful to your case, use detail “not to scale” or to a larger scale. If it hurts your case and honesty requires that you show detail, squeeze it in so it is not obvious.
C. **Symbols.** Line weight is a useful tool to show important information and deemphasize other information. For example it is easier to show ownership to a fence that is straight than one that is not straight. Thoughtless surveyors show every little angle point in a fence. Try using a heavy line to symbolize the fence and make it straight. Judges typically do not understand how small a few seconds deviation is.

In Minnesota water damage cases are common. Drainage can be shown with symbols for contours and arrows can be added.

In an eminent domain case, show the ugly pipeline easement with bold lines and make it purple. Demonstrate how intrusive this is to the remaining land. After the taking, a revised survey can show the easement with faint dashed lines so prospective buyers are not repulsed by this easement.

A useful symbol is a tree symbol. Landscape architects use tree symbols to show how lovely the new development will look. Trees near a boundary help people orient the property lines on the ground.

D. **Written Notes and Labels.** Surveyors label lines and monument symbols. Watch out for the devious opponent. The following detail was used on a survey for boundary litigation:

Surveyor A set iron stakes on line. His client set 2 stakes a given distance on his side of the line for each stake on line in case his neighbor removed the stakes. Surveyor B showed only 1 of each the offset irons and labeled them “IP Recovered by __________.” In surveying “recovered” is a term of art meaning a found original monument. It is not the same as “found.” Surveyor B wanted to
give more weight to the offset irons to show they were closer to his location for the lot line. Be alert to mislabeling by your opponent.

E. **Color.** Consider the use of color to make a feature appear attractive or unattractive. Color creates an emotional response. For example red is danger, stop, Communism, love. Blue is cool, water, sky and comforting.

    Color preferences vary with culture, life cycle, and other demographic characteristics. For instance, men tend to prefer orange to yellow and blue to red, whereas women favor red over blue and yellow over orange. Preschool children like highly saturated colors, such as bright red, green, and blue, whereas affluent middle-aged adults generally prefer more subtle, pastel shades. Among the spectral colors, North American adults seem to prefer blue and red to green and violet to orange and yellow. Least appreciated is a vomit like greenish yellow.

    Preferences also extend to groups or ranges of colors. A range of greens and blues, for instance, is generally preferable to range of yellows and yellow-greens. Among people who like earth tones, a yellow-brown sequence would be attractive.

Monmonier, *How to Lie With Maps*, 2nd Ed, p. 170

    If you use color to show various lines on a survey, consider noting on the survey that the original is in color. Too many surveys are sent by fax or reproduced in black and white.

F. **Photo.** Consider taking digital color photos of important features and adding it to the survey. This will emphasize occupation or lack of occupation right on the survey. A photo added to the survey may help sell the building or settle a case.

G. **Time.** The survey map can illustrate where objects were located in the past. Roads, railroads, fences, driveways and water are commonly shown in their former location. The former location can be obtained from a photogrammetrist or by a surveyor doing archeology. When locating shoreline it is important to show the date it was located.
KNOW THE ESSENTIAL THINGS TO SHOW ON THE FINAL SURVEY TO BE FILED WITH THE LAND RECORDS

I. INTRODUCTION

The survey which is filed with the land records after a judicial boundary determination is very important because it is to be used for many years to locate the land in the same place as determined by the court. The statutes are not very helpful. There are some differences between abstract and Torrens.

A. Abstract Land. A boundary of abstract land is judicially determined pursuant to Minn. Stat. §559.23 and 559.25 which state as follows:

559.23 ACTION TO DETERMINE BOUNDARY LINES. An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just. The decree of the court shall be filed with the court administrator, and a certified copy thereof shall be recorded in the office of the county recorder or in the office of registrar of titles or both, if necessary; provided that such decree shall not be accepted for such recording or filing until it shall be presented to the county auditor who shall enter the same in the transfer record and note upon the instrument over the auditor’s official signature the words “ENTERED IN THE TRANSFER RECORD.”

559.25 JUDGMENT; LANDMARKS. The judgment shall locate and define the boundary lines involved by reference to well-known permanent landmarks, and, if it shall be deemed for the interest of the parties, after the entry of judgment, the court may direct a competent surveyor to establish a permanent stone or iron landmark in accordance with the judgment, from which future surveys of the land embraced in the judgment shall be made. Such landmarks shall have distinctly cut or marked thereon “Judicial Landmark.” The surveyor shall make report to the court, and in the report

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shall accurately describe the landmark so erected, and define its location as nearly as practicable.

Note that a boundary can be judicially determined and judicial landmarks ordered on abstract land. In fact, when abstract land is converted to Torrens Minn. Stat. §559.25 is used rather than the Torrens law.

Some clumsy things to note about §559.25 include:

1. Judicial landmarks are optional. The statute states "...the court may direct a competent surveyor to establish a permanent stone or iron landmark..."

2. A map is not required. Only a surveyor's report is required by the statute.

In spite of what the statute states good practice requires the following when judicial landmarks are set:

1. The surveyor should make a map accurately locating the judicial landmarks relative to some known monuments.

2. Redraft the land description to refer to the judicial landmarks. Examples include:

   a. Lot 1, BLACKACRE the Easterly line of which is marked by judicial landmarks set in Court File No. ....

   b. Thence North 30 degrees East 50 feet to a judicial landmark set in Court File No. ..... 

B. Torrens Land

In 1983 the Torrens law was amended to add Minn. Stat. §508.671 which states as follows:

508.671 DETERMINATION OF BOUNDARIES. Subdivision 1. Petition. An owner of registered land having one or more common boundaries with registered or unregistered land or an owner of unregistered land having one or more common boundaries with registered land may apply by a duly verified petition to the court to have all or some of the common boundary lines judicially determined. The petition shall contain the full names and post office addresses of all owners of adjoining lands which are in any manner affected by the boundary determination. At the time of the filing of the petition with the court administrator, a copy of it, duly certified by the court administrator, shall be filed for record
with the county recorder. If any of the adjoining lands are registered, the certified copy of the petition also shall be filed with the registrar of titles and entered as a memorial on the certificate of title for those lands. When recorded or filed, the certified copy of the petition shall be notice forever to purchasers and encumbrancers of the pendency of the proceeding and of all matters referred to in the court files and records pertaining to the proceeding. The owner shall have the premises surveyed by a licensed land surveyor and shall file in the proceedings a plat of the survey showing the correct location of the boundary line or lines to be determined. There also shall be filed with the court administrator a memorandum abstract, satisfactory to the examiner, showing the record owners and encumbrancers of the adjoining lands which are in any manner affected by the boundary line determination. The petition shall be referred to the examiner of titles for examination and report in the manner provided for the reference of initial applications for registration. Notice of the proceeding shall be given to all interested persons by the service of a summons which shall be issued in the form and served in the manner as in initial applications.

Subd. 2. Order. Before the issuance of any final order determining the location of the owner's boundary lines, the court shall fix and establish the boundaries and direct the establishment of judicial landmarks in the manner provided by section 559.25. The final order shall make reference to the boundary lines that have been determined and to the location of the judicial landmarks that mark the boundary lines. A certified copy of the final order shall be filed by the court administrator with the registrar of titles. If any of the adjoining lands are registered, the final order also shall be filed upon the certificates of title for these lands and it shall direct the registrar of titles to show by memorial which of the boundary lines of the adjoining lands have been determined in the district court case. Upon the filing of the final order, the registrar shall omit from future certificates the memorial of the petition for registration of the boundary lines.

Subd. 3. Plat of survey to be filed. The court administrator also shall file with the registrar of titles a certified copy of the plat of the survey which contains a certification by a licensed land surveyor that the boundaries as registered have been marked by judicial landmarks set pursuant to the order of the court. The registrar of titles shall enter the certified copy of
the plat of the survey as a memorial upon the certificate of title.

This statute is more specific than §559.25 and is different in several ways:

a. Judicial landmarks and a plat of survey are mandatory

b. the court orders that judicial landmarks be set before the final order. This is by way of an interlocutory decree ordering judicial landmarks

c. Precautions are taken to be certain to agree with judicial landmarks previously set on adjacent land.

II. ESSENTIAL THINGS TO INCLUDE

Once judicial landmarks have been set, assuming all necessary parties are part of the action, future surveyors should be able to locate the land on the ground with no variation. To assure this is true the surveyors’ plat of survey should show the following:

1. **Revise the land description to call for judicial landmarks and the court file number which identifies the action in which they were set.** In the example which follows this section the description calls for judicial landmarks set in three different court actions. It is not unusual to find judicial landmarks that were set without a court order. Judicial landmarks set without a court order have no legal effect. Referring to the court file helps the surveyor to find the original action and the original survey filed therein.

2. **Show the judicial landmarks relative to known monuments.** In most cases the surveyor can graphically show distances and bearings to permanent monuments such as section corners and section lines. Except in very few cases, it is not necessary and bad practice to incorporate those bearings and distances into the description. The graphics will be enough to relocate the judicial landmarks.

   An example would be the plat BLACKACRE is impossible to accurately locate on the ground. All the neighbors agree to the boundaries of Lot 2. In the final decree describe the land as:

   Lot 2, BLACKACRE the corners of which are marked by judicial landmarks set in Court File No. ...

The plat of survey should give distances and bearings to a section corner and section line which would allow future surveyors to find the judicial landmarks. Do not incorporate this location into the description.

3. **Describe the judicial landmarks.** The plat of survey should give the physical description of the judicial landmarks. The judicial landmarks should be marked
"Judicial Landmark." Future surveyors should be able to determine if a found monument is the same monument shown on the plat of survey.
That part of the Southwest Quarter of section 30, Township 28, Range 22 described as follows:

Comencing at a Judicial Landmark set in Torrenza Case No. 97887 to mark the Northwest corner of PINE MEADOWS; thence South 89 degrees 59 minutes 59 seconds East (assumed bearing) along the North line of PINE MEADOWS 116759 feet to a Judicial Landmark set in Torrenza Case No. 97887 to mark the Northeast corner of PINE MEADOWS; thence Northeast 37.30 degrees along a non-tangential curve concave to the East, radius 660.87 feet, central angle 3 degrees 31 minutes 37 seconds, chord of 37.25 feet bearing North 2 degrees 02 minutes 16 seconds East to the point of beginning of the property to be described; said point being the point of intersection of curve of radius 660.87 feet tangent to the last described curve 184.64 feet due to a point marked by a Judicial Landmark set in Court File No. 1916–CV–08–3166; thence continuing Northwesterly along the line of Centerline of Charlton Road 0.04 miles to the point; thence North 67 degrees 19 minutes 22 seconds East 1048.20 feet to a point marked by a Judicial Landmark set in Court File No. 1916–CV–08–3166; thence South 89 degrees 43 minutes 17 seconds West 1048.20 feet to a point marked by a Judicial Landmark set in Court File No. 1916–CV–08–3166; thence North 89 degrees 43 minutes 17 seconds West 1048.20 feet to a point marked by a Judicial Landmark set in Court File No. 1916–CV–08–3166; thence South 89 degrees 43 minutes 17 seconds West 1048.20 feet to a point marked by a Judicial Landmark set in Court File No. 1916–CV–08–3166.
PROPOSED PROPERTY DESCRIPTION AS PROVIDED BY CLINTON MCLAGAN, ATTORNEY

Lot 15, the Southwesterly 30.07 feet of Lot 14, Block 6, WACOUTA BEACH, and that part of the adjoining Sand Beach lying between the extensions Northwesterly of the Southwesterly line of said Lot 15 and the Northwesterly line of the Southwesterly 30.07 feet of said Lot 14.

CERTIFICATE OF SURVEY FOR:

JAMES PLEHAL

JOHNSON & SCOFIELD INC.
SURVEYING AND ENGINEERING
1203 MAIN STREET, RED WING, MN 55066
(651)388-1558, (800)736-0585

I hereby certify that this survey, plan or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State of Minnesota.

Alan K. Scofield
Minnesota License No. 15473
Date: July 14, 2008

Revised: July 15, 2008

PLATS\WACOUTA BEACH\BLOCK 6\PLEHAL DRAWING NUMBER
SHEET 1 OF 1 SHEETS W.O.# 08-300 S-4257
KNOW HOW TO TESTIFY IN COURT

I. BASIS OF EXPERT TESTIMONY

Minn. R. Evid. 702 TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

A. Helpful to assist the trier of fact to understand the evidence.

B. Reliable because of qualification by knowledge, skill, experience, training or education.

C. Trustworthy is shown by laying a reliable foundation.

II. ESSENTIAL ATTRIBUTES

A. Integrity. The expert must be believable. Only take a case you can believe in. Be honest and up front. If the lawyer does not have a case, be frank and say so.

B. Communication skills. The expert witness has to educate the fact finder, sometimes on the most basic concepts of surveying. Enjoy teaching the uninitiated, even those who think they know it all.

C. Qualifications. Note Rule 702 states qualified by knowledge, skill, experience, training or education. Do not take the job of you are not qualified, even for money. A surveyor may be an expert in one area but not in another. It is important for an expert to know what that expert does not know. Included in the attribute of qualifications is whether the expert has the time and dedication to work on the case. Know who the opposing attorney and parties are. Disqualify yourself if you are afraid of losing future business from the opposing lawyer or party.

III. PREPARATION FOR TRIAL

A. Educate the Lawyer. Usually the surveyor is more familiar with survey literature, case law, aerial photos and local history than the lawyer. The surveyor and
lawyer should work as a team. Tell the lawyer about your experiences in producing graphics to help explain the case.

B. Do Not Create a Paper Trail. Assume that everything you send to the lawyer or client will be given to the other side. Discuss strategy with the lawyer. Reports are good if done properly.

C. Educate Yourself. The lawyer should send to you the opposing expert’s reports. Review them and help the lawyer attack those reports if possible.

IV. TRIAL PRESENTATION.

A. Helpful Personal hints.

   1. Dress like a professional.

   2. Do not act like an advocate for your survey and report. The fact finder looks to the expert as a teacher. A surveyor who sits at the counsel table to coach the lawyer loses credibility. Sometimes it is good technique to be present in the court room only for your testimony. Ask the lawyer for advice.

   3. Do not look at your lawyer during cross examination. Look at the lawyer who is questioning you and reply to the finder of fact.

   4. Speak in a matter of fact voice on both direct and cross examination. Arguing with the opposing lawyer is really a bad idea even if that lawyer is an idiot. Be polite, firm and instructive.

B. Direct Examination.

   1. Foundation. The lawyer will start with your qualifications. It is better if the lawyer does most of the bragging about you. Be sure to bring out your expertise.

   2. Work with the lawyer ahead of time for questions to ask about graphics, local history and custom, survey literature and case law.

   3. Prepare a rough draft of questions for direct examination. The lawyer may want to do some editing. Make sure you agree with the editing.

   4. Practice direct examination with the lawyer. Be careful not to sound rehearsed or scripted even though you are. Changes will be made on the fly at trial as the evidence comes in.

   5. Get updated just before your testimony. If you are not present to hear what others have said, find out before you testify.
6. **Teach the fact finder.** Your job is to help the finder of fact to understand your profession.

7. **Have only one opinion.** You are the expert and can teach the judge how to reach the correct solution.

8. **Be interesting and credible.** The use of maps, records, notes and photographs are useful to help being interesting. If you are excited about your job your testimony will be more interesting.

9. **Destroy the opposing expert.** Address the opposing theory head on and pick it apart. Explain why you are right without being personal. Leave no doubt about who is correct.

**C. Cross Examination.**

1. **Prepare.** Your lawyer should let you know what to expect.

2. **Treat opposing lawyer with respect without suggesting agreement.** Be sure to remain credible. Act as though opposing counsel is fundamentally wrong but in a very courteous way.

3. **Do not look at your own lawyer.** A witness who checks with his/her own lawyer before answering on cross loses credibility.

4. **Take advantage of mistakes by other lawyer.** If the lawyer asks an open ended question talk until you think you have fully answered the question. For example...Can you explain why you first said X and later said Y?...leaves you wide open to once again get your point across.

5. **Do not become unhinged.** A common trick on cross examination is to ask you if you are really certain of “X” and follow up with is “X-1” possible? You testified to “X” and should emphasize that “X” is the answer and no other.