The Art of Retracement

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~ of ~
Professional Land Surveyors

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Presented by

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Biography of Gary R. Kent

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Gary is a graduate of Purdue University with a degree in Land Surveying; he is registered to practice as a professional surveyor in Indiana and Michigan. He has been chair of the committee on ALTA/NSPS Standards for NSPS since 1995 and is the liaison to NSPS for the American Land Title Association and chair of the joint ALTA/NSPS Standards committee. He is also past-president of both the American Congress on Surveying and Mapping and the Indiana Society of Professional Land Surveyors.

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

Gary has served on the Indiana State Board of Registration for Professional Surveyors since 2004. He is frequently sought as an expert witness in cases involving boundaries, easements, riparian rights, survey standards and land surveying practice. He has presented programs on boundary law, easements and rights of way, surveying standards and practice, and leadership in all 50 states and three times in Europe. He is also a columnist for The American Surveyor magazine. .

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Outline

I. Definitions
   A. Retracement boundary survey
   B. Original boundary survey
II. Introduce flowchart
III. Intent – the Holy Grail
IV. Revisit Flowchart – Determining if there was an original survey
   A. Yes, there was an original survey
   B. The Surveyor's Responsibility – Follow in the Footsteps
   C. The Surveyor's Challenges
      1. Identifying which footsteps
      2. Identifying the best evidence of intent
      3. Determining the best evidence of the original survey
         i. Direct
         ii. Indirect
         iii. Determining the acceptable precision of indirect evidence
V. No original survey (or I don't know if there was an original survey)
   A. Retracing when there was no – or no evidence of an – original survey
   B. Determining the best evidence to rely upon
   C. Ambiguities
      1. Definitions
         1. Patent
         2. Latent
      2. Explaining patent ambiguities in the legal description
      3. Explaining latent ambiguities by exploring and analyzing extrinsic evidence
VI. Analyzing the evidence and applying the appropriate boundary law principles
VII. Potential conflicts independent of the resolved boundary
VIII. Special retracement problems - Retracing aliquot parts
IX. Example scenarios for discussion

Preface

While reference is often heard to the "art" and "science" of boundary surveying, this author has often discounted if not criticized those terms because boundaries are much more a function of the application of the law to evidence, than they are of art and science. Art sounds like "style" and science is simply the science of measurement, which – although a major tool of retracement – is typically a minor factor in retracement. Yet, this program is entitled the *Art of Retracement* to recognize that there is, in fact, an art to the application of the law.

It is my intent that this program be part dialogue and exchange of thoughts and ideas as we work through some typical retracement problems.

It should also be noted that many of the principles explained in this program and paper could apply equally to the corner perpetuation process.

Introduction

Every professional surveyor across the Unites States knows the phrase *"Follow in the Footsteps"* as it relates to conducting a boundary retracement survey. But what does it really mean and what is the basis for following the footsteps? And exactly whose footsteps are we talking about? Surveyors also know the effect of the statute of frauds is that what is written in the conveyancing document is considered by the courts to be the highest and best expression of the parties' intentions. But what happens when the evidence of the footsteps on the ground conflicts with the written title? What if there are seemingly no footsteps to follow? What then?

In this program we will explore the concept of retracement, how it relates to and is dependent on the document of conveyance, and what controls when conflicts are inevitably encountered. When armed with a full understanding of the concept of retracement, surveyors will be much better equipped to help steer their clients (and their affected neighbors) *away* from the pain and cost of litigation, and towards an amicable solution based on well-placed confidence and understanding of their respective roles and responsibilities.

Definitions - Retracement and original boundary surveys

Indiana Administrative Code 865 IAC 1-12-2 defines a retracement survey as "*a survey of real property that has been previously described in documents conveying an interest in the real property.*" This is in contrast to an original boundary survey which is defined in the same rule as *"a survey that is executed for the purpose of locating and describing real property that has not been previously described in documents conveying an interest in the real property."* This program addresses retracement surveys and the role that the original survey plays in a retracement; we will leave the performance of original surveys for another day.

An original survey has also been defined in a variety of other ways:

- [T]he survey originally done when a subject tract was separated from its source parcel[1]
- A cadastral survey which creates land boundaries and marks them for the first time.[2]
- A survey called for or presumed to have been made at the time a parcel or parcels were created.[3]

Introduce flowchart

The flowchart developed as part of this program and included on page is a work in progress.

Intent

The author of this paper has, many times, cited the Indiana case of *Pointer v. Lucas* 131 Ind.App. 10, 169 N.E.2nd 196 (1960), viz.,

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

This decision – and there are many just like this - makes it very clear that the unambiguous intentions of the parties as expressed in the deed *and considering the surrounding circumstances* will override any unexpressed intentions. Such an approach can result in seemingly illogical outcomes, yet, the statute of frauds clearly dictates this approach.

Unfortunately, legal descriptions contained in deeds often lack the information that could be most helpful to the surveyor in determining intent. The fact that there are very frequently ambiguities in legal descriptions emphasizes the dangers associated with blindly laying out the

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[1] Wilson, Donald A., Boundary Retracement, Processes and Procedures, CRC Press, 2017, p. 89

[2] Cadastral Survey Training Staff, *Glossary of BLM Surveying and Mapping Terms*, U.S. Department of the Interior, Bureau of Land Management, 1980

[3] Robillard, Walter G., Wilson, Donald A., and Brown, Curtis M., *Evidence and Procedures for Boundary Locations*, 4th Edition, Wiley, 2002, Chapter 2.

geometry of that description onto the ground while ignoring other evidence. That specific will be discussed at length later in this paper.

But even where the description is seemingly unambiguous, the primary question is this: What most clearly represents the intentions of the parties in an unambiguous legal description?

The answer to that question, as with so many questions in boundary surveying, depends on a variety of factors.

Where there was, in fact, *no* original survey, the *unambiguous* description as written stands as the best evidence of the boundaries. But the inclusion of the phrase above "*considering the surrounding circumstances*" invokes the need for the surveyor to search for and identify the origin of the description – which would be an original survey – and, if found, retrace the boundary based on that survey.

Alternatively where (a) there *was* an original survey, (b) the legal description *is* ambiguous, or (c) the evidence on the ground indicates other unanticipated ambiguities, relying on even exacting dimensions in the written description as the best expression of intent is almost certainly a road taken in the wrong direction.

Providing thoughtful and, perhaps to an extent, provocative, guidance to the professional surveyor for use in retracing boundaries under these conditions constitutes the primary purpose of this paper.

Determining if there was an original survey

Miscellaneous thoughts on identifying the original survey

How do we know if there was, or was not, an original survey and, if so, who the original surveyor was and where we can find any information related to that survey?

In the case of acreage in rural areas, many such properties were first surveyed out of the larger tract (typically, or at least often, a quarter section) in the mid-1800s. In Indiana, most such surveys were conducted by the County Surveyor pursuant to the legal survey statute (which dates back to at least 1851) and the County Surveyor should, by law, have a legal survey record book detailing those, and more recent, surveys.

Smaller metes and bounds or acreage tracts were typically not the subject of legal surveys and finding direct evidence of those surveys can be – at the very least – problematic. Not knowing who may have conducted the survey is only the first challenge because even if the surveyor is known or can be discovered (which is far from certain), finding the corresponding survey or fieldnotes may be next to impossible given the passage of time, retiring surveyors, closed businesses and lost or destroyed records.

Thus, finding direct evidence of an original survey of a normal metes and bounds or smaller acreage tract may be very difficult unless one is aware of the history of the area, the surveyors who formerly practiced there and of their practice habits. As a result, surveyors are often forced

to rely on indirect evidence.[4]

Alternately, a subdivision is a specialized type of original survey and there is generally a presumption (albeit rebuttable) that the lots therein were, in fact, actually surveyed and located on the ground. Thus, the subdivision plat itself is the original survey, although many old subdivision plats indicate no monuments at the lot corners. However, where the platting surveyor states the that lots were, for example, "surveyed," "laid out," etc., there is a presumption that the lines were actually run on the ground.[5]

Regardless, surveyors must, in the performance of a retracement survey, find all available, relevant evidence, understand its relative importance, analyze and weigh it in order to identify which is the best to rely on, then apply it to retrace the boundary, even though that evidence may not be admissible in a court of law.

> A survey may be proven by any evidence of facts that are relevant and material, but this evidence may not be admissible.[6]

Mandatory recordation of boundary surveys and Records of Survey (of which recordation is typically required in states that require them) is a seemingly obvious answer to identifying the original survey and surveyor even though many states do not require this.

Yet, it is an ironic and discouraging fact that many professional surveyors oppose the idea of mandatory recordation surveys even though every one of them understands at least the concept of following in the footsteps of the original surveyor. Many of the same surveyors complain about the integrity of their jurisdiction's GIS even though mandatory recordation of boundary surveys would be one obvious step in the direction of providing information that would improve the accuracy and precision of a GIS.

Indiana has required recordation of nearly all boundary surveys since 1988, and although that administrative rule is generally followed in some parts of the state, in other parts it is seldom followed. Regardless, in order to provide a better means by which to identify the original surveyor, a statute was passed in 2018 requiring that the caption of a description prepared based on an original survey include the name, license number, date of certification and other identifying information of the survey that was the basis for the description.

Yes, there was an original survey

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[4] Further discussion on direct and indirect evidence is found below and an excellent primer on evidence as relating to surveyors can be found in *Evidence and Procedures for Boundary Locations*, 4th Edition, Robillard, Walter G., Wilson, Donald A., and Brown, Curtis M., Wiley, 2002, Chapter 2.

[5] "*The statement on a map "Surveyed by Wheeler in 1880" is conclusive proof that the land was surveyed, and it must be presumed that monuments were set.*" Robillard, Walter G., Wilson, Donald A., and Brown, Curtis M., *Evidence and Procedures for Boundary Locations*, 4th Edition, 2002, p. 358 (citing *Curtis v. Upton*, 175 Cal. 322 (1917))

[6] Robillard, Wilson, and Brown, p. 30

The Surveyor's Responsibility – Follow in the Footsteps

If there was an original survey, the surveyor's task is the retrace the lines and corners of that survey – follow in the footsteps of the original surveyor. This means the original survey of the tract or parcel in question – the survey that resulted in the land description that was subsequently conveyed in a deed - not some subsequent retracement survey, although in some circumstances, as we will find, that subsequent survey may be the best available evidence of the original survey.

The original survey carries with it a particularly special status that subsequent surveyors must attend to.

> First, the surveyor can, in the first instance, lay out or establish boundary lines within an original division of a tract of land which has theretofore existed as one unit or parcel. In performing this function, he is known as the `original surveyor' and *when his survey results in a property description used by the owner to transfer title to property* that survey has a certain special authority in that the monuments set by the original surveyor on the ground control over discrepancies within the total parcel description and, more importantly, control over all subsequent surveys attempting to locate the same line.
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> Second, a surveyor can be retained to locate on the ground a boundary line which has theretofore been established. When he does this, he `traces the footsteps' of the `original surveyor' in locating existing boundaries. Correctly stated, this is a `retracement' survey, not a resurvey, and in performing this function, the second and each succeeding surveyor is a `following' or `tracing' surveyor and his sole duty, function and power is to locate on the ground the boundaries [*sic*] corners and boundary line or lines established by the original survey; he cannot establish a new corner or new line terminal point, nor may he correct errors of the original surveyor. He must only track the footsteps of the original surveyor. The following surveyor, rather than being the creator of the boundary line, is only its discoverer and is only that when he correctly locates it." (Emphasis in original.) *Rivers v. Lozeau,* 539 So.2d 1147, 1150-51 (Fla.Dist.Ct.App.1989) cited in *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.
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> Under California law, the location of a disputed boundary line is proven by retracing, as nearly as possible based upon existing evidence, the footsteps of the original surveyor whose survey fixed the boundaries. (See *Pauley v. Brodnax* (1910) 157 Cal. 386, 396-397 . . . [`"The survey as made in the field and the lines actually run on the surface of the earth . . . must control." [Citation.]' *BERTOLLI PROPERTIES, LLC v. HEADWATERS RANCH, INC.*, Cal: Court of Appeal, 1st Appellate Dist., 3rd Div. 2018 (Not for Publication).
>
> `[T]he question presented to the court in a boundary dispute is not that of making a resurvey but one of determining as a question of fact from the preponderance of expert and nonexpert evidence (as in all other civil cases) the actual location of the monuments, corners or lines as actually laid out on the ground by the official surveyor.' [Citation.]*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 736-737.

> In a boundary dispute, the actual boundary as fixed by the original survey must control unless another boundary has been established by practical location. *Benz v. City of St. Paul*, 89 Minn. 31, 36, 93 N.W. 1038, 1039 (1903).

This does not generally mean simply mathematically tracing the *legal description* written based on that survey onto the ground, blindly following the *fieldnotes* from that the surveyor, or even recreating the lines and corners based on the *plat* produced as an instrument of that survey, but rather retracing the lines and corners *as run on the ground*. The distances and directions reported in the fieldnotes, on the plat, or in the record description are overridden by the lines run, and corners set, on the ground.

> [The surveyor] is considered preeminently a measurer of land. This is very true, and in certain localities and under certain conditions this may compose almost the entire work of the surveyor. But in the vast majority of cases the actual measuring of land forms the smaller portion of his duties. His hardest work is often, to use a colloquial phrase, to "find the land" to be surveyed.[7]

> It is needless to say that the successful surveyor must be accurate in his instrument work and his computation; yet, if he would really be successful, he must go beyond this. He must add to this the patience to collect all the evidence which can be found bearing upon the case in hand, together with the ability to weigh this evidence to a nicety and to determine clearly the course pointed out by the balance of probability.[8]

> Although boundaries arising from the conveyance of land are determined with reference to the intention of the grantor, as expressed in the instrument of conveyance, "[t]he highest and best proof of this intention, ordinarily, lies not in the words of expression of the deed, but rather, in the work upon the ground itself, where the survey was made prior to the conveyance." Griffin, *supra,* at 495.[9]

> [W]hat the original surveyor actually did by way of monumenting his survey on the ground takes precedence over what he intended to do as shown by his written plat of survey. *Tyson v. Edwards,* 433 So.2d 549, 552-53 (Fla. 5th Dist.App.1983).

> Each party received a deed which refers to a recorded plat or survey and there is no question but that the measurements, courses, and monuments shown on the recorded plat are incorporated in each deed by reference. The descriptions therefore embody, just as would a metes and bounds description, the monuments, courses and distances set forth in the plat to describe the actual land owned by each party. However, this description and this plat is a symbolic representation of something which has been physically marked out on the surface of the earth. The actual physical markings and location by monument or

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[7] Mulford, A.C., *Boundaries and Landmarks*, A Practical Manual, Van Strand , 1912, p. 1

[8] Mulford, p. 87

[9] Robert J. Griffin, Comment, *Retracement and Apportionment as Surveying Methods for Re-establishing Property Corners,* 43 Marq. L.Rev. 484, 484 (1960) cited in *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

> otherwise is the primary thing. It locates the land. The map or plat is secondary to this purporting to symbolically represent that which has been physically located. *Sellman v. Schaaf*, 26 Ohio App. 2d 35 - Ohio: Court of Appeals 1971.

The Surveyor's Challenges

The Best Evidence of Intent

As noted above, the courts have deemed the lines and corners surveyed on the ground by the original surveyor to be far and away the most significant evidence of the parties intentions. The original survey sits alone at the top of the hierarchy where there are conflicts in determining the intentions of the parties with respect to boundary locations.[10]

> In determining the location of a boundary line, it is not where the surveyor intended to run a boundary or should have run it, but where the boundary was actually run that controls.[11]
>
> It is a fundamental principle of law that boundaries are to be located on a resurvey where the original surveyor ran the lines and called for them to be located in his fieldnotes.[12]
>
> In Clark on Surveying and Boundaries, 3rd § 9, the surveyor's function is stated in this language:
>
> > "As has been pointed out heretofore it is not the surveyor's responsibility to set up new lines except where he is surveying heretofore unplatted land or subdividing a new tract. Where title to land has been established under a previous survey, the surveyor's duty is to solely locate the lines of the original survey. He cannot establish a new corner, nor can he even correct erroneous surveys of earlier surveyors. He must track the footsteps of the first."
>
> *McKinley v. Hilliard*, 454 SW 2d 67 - Ark: Supreme Court 1970

When there is no original survey – or no remaining, reliable evidence of an original survey – one is faced with an entirely different challenge that will be addressed later in this paper.

The Best Evidence of the Original Survey

If there is conclusive evidence that there was, in fact, an original survey, the issue becomes simply, What is the best evidence of that survey?

Direct Evidence

In the context of this paper, the term '*direct evidence*' is not *necessarily* intended to be a reference to the legal definition of direct evidence. However, definitions from Black's Law

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[10] Innumerable court decisions and learned texts have documented this fact, e.g., Mulford p. 11

[11] Wilson, p. 64

[12] Wilson, p. 64

Dictionary ("*that which immediately points to the question at issue*") and from Wilson ("*that means of proof which tends to show the existence of a fact in question without the intervention of the proof of any other fact*" [13] support the idea of direct evidence being that evidence convincing enough to the *surveyor* for him or her to opine that there was, in a sense, indisputably, an original survey. Of course, surveyors always keep in mind what their arguments will be and how they will hold up under cross examination in a court of law.

The same can be said for the term '*indirect evidence,*' (discussed further below) which has been defined as "*Evidence that establishes immediately collateral facts from which the main fact may be inferred.*" [14]

If we have direct evidence of the original survey – for example, monuments found on the ground that correspond with the original plat or fieldnotes, or improvements that can be shown as to have been built soon after the original survey (see footnote 3) - the surveyor's job is theoretically straightforward: Retrace the lines and corners based on that evidence and make the case for why they represent the lines and corners as run.[15] Of course, ambiguities will almost always be found, but those are not fatal to the retracement effort, they merely call for the evidence to be analyzed and the rules of construction to be applied as appropriate.

- Is there still direct evidence of that original survey? And what constitutes such direct evidence?
    - Lines run and marked on the original survey
    - Monuments found in the field corresponding to the original plat of survey
    - Monuments found in the field corresponding to the original field notes
    - Improvements built based on the original monuments[16]

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[13] Wilson, Donald A., *Forensic Procedures for Boundary and Title Investigation*, Wiley, 2008).

[14] https://www.merriam-webster.com/dictionary/indirect%20evidence

[15] The desirability (arguably, the *necessity*) of explaining the evidence and justification that support the surveyor's boundary opinion is an argument for the use of a Surveyor's Report on every boundary survey. Among other things, the advantages of a Surveyor's Report include – to the point of this paper – "[R]ecords the weight given by the surveyor to the evidence studied" and "[A]llows a resurvey to be made at less cost" (i.e., with fewer problems). F. Henry Sipe, L.L.S., *The Report of Survey*, undated.

[16] Relying on old fences without careful consideration can be a snare and a delusion. If relying on the doctrine of acquiescence as evidence of some prior parol agreement, the surveyor may be taking on a legal role in determining whether or not acquiescence has operated. If, however, the original parties to the parol agreement that the acquiescence claim is rooted in are still the current owners, there would seem to be ample opportunity to illuminate the agreement and to strongly urge the parties to put the agreement to writing. Alternately, if the legal description is patently ambiguous or if there are other latent ambiguities relating to a boundary, old fences that have been long-acquiesced in may aid in solving those ambiguities by providing satisfactory proof of where the original lines were run.

Indirect Evidence

Very frequently, unidentified monuments are recovered at or near the apparent corners of the tract being surveyed. But are they from the original survey? Some questions to consider…

1. Is there a plat indicating that there was an original survey?
2. The monuments found do not match what the plat says, or the plat does not indicate any monuments, but are the monuments of a type and condition that could plausibly represent those set on an original survey given the date the parcel was first conveyed out of its parent?
3. Are the locations of those monuments with respect to themselves and other boundaries and improvements within a precision that would have been acceptable as of the date the parcel was first conveyed out of its parent?

If the answer to all three of those questions is yes, then an opinion that the monuments recovered were set on the original survey may be defensible. However, if the answer is yes to only the second and third questions, while the answer to the first is no, such an opinion is not as strong and will be more difficult (but certainly not impossible) to defend in court (which is the measure of credibility that the surveyor must ultimately consider).

> A physical monument not recited in the description, but identified as set prior thereto, and on which the description is based, and which is substantially conformable with the dimensions in the description and known to be in the original position, will hold as physical evidence of title conveyed by the description, as preferable to the recited record monument in the description.[17]

Indirect evidence above and beyond monuments must also be sought and considered as evidence of an original survey. This might include:

- Unidentified monuments found
  - that could date to the original survey
  - that have been relied upon by the owners (and, perhaps, surveyors) for a long period of time
  - that are consistent with improvements that relate to the boundary
- Improvements found relating in some manner to the boundary (See footnotes 16, 18 and 19)
  - that could plausibly date to the original survey

[17] Wattles, William, *Land Survey Descriptions*, Gurdon H. Wattles, 1974, p. 10

- that have been relied upon by the owners (and, perhaps, surveyors) for a long period of time

Disregarding direct – or even indirect – evidence of an original survey simply because it does match the geometry of the legal description can have serious consequences. The challenge, however, for the surveyor is to sift through the disparate evidence that was not called for in the conveyance and determine which, if any, is acceptable.

A primary consideration in weighing the applicability of indirect evidence or assessing the plausibility of ostensibly direct evidence, the surveyor must consider whether it accurately emulates the locations based on the courses and corners of the original legal description *given the date of the original survey*. (i.e., would the precision that the evidence currently represents have been acceptable as of the date of the original survey? If so, it would seem to be part of a good argument for respecting that evidence; if not, perhaps it should discarded or at least at a minimum, looked at with a critical eye.

Professional surveyors must cast their nets far and wide to find all possible physical evidence of the original survey.

> The position of old fences may be considered in ascertaining disputed boundaries. As between the old boundary fences and any survey made for the monuments after dispute, the fences are far better evidence of what the lines of the lot actually were.[18]
>
> If a record map shows no bearings, and insufficient distances to determine direction or position of lot lines, the occupation of long standing will have control preference in spite of possible apparent differences from record.[19]
>
> Certain landmarks may be specifically mentioned in a description. These may perhaps be called special landmarks and must be identified as far as possible from the characteristics named in that description. But beside these there are a large number of general marks not mentioned perhaps in the deed, but which are nevertheless of the greatest possible value. Yet there can be no hard and fast classification of these, because they vary greatly with locality.[20]
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> ¶ 15 As noted, the original survey of a given parcel "control[s] over all subsequent surveys attempting to locate the same line." *Rivers,* 539 So.2d at 1151. We acknowledge that an occupation line might be of value in setting the boundary between the properties on either side of *that* line. Occupation lines might also correspond to improvements on property. "The evidentiary value of improvements depends upon the probability that their builders had, at the time of construction[,] a better means of knowing where the original lines were located than is now available." Griffin, *supra,* at 500. *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

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[18] Mulford, p. 12.

[19] Wattles, p. 79.

[20] Mulford, p. 13.

> A more accurate statement of law would be: (1) where original stakes which mark boundaries of old plats have disappeared, surveys should try and determine where the original stakes were placed. *Carpenter v Monks,* 81 Mich 103; 45 NW 477 (1890); (2) In determining where the original stakes were located, various types of evidence are admissible including new stakes or monuments which replace old stakes, reference points correlated to other established points, and occupational lines established by long usage. All of these may be considered by the fact finder, but no one factor, such as occupational lines, dominates the others as a matter of law. FN 6 , *Kahn-Reiss, Inc. v. Detroit & Northern Savings & Loan Ass'n*, 228 NW 2d 816 - Mich: Court of Appeals 1975.

In his concurrence, Judge Friedlander discussed the case of *Wingler v. Simpson,* 93 Ind. 201 (1884), in which the Indiana Supreme Court invoked the doctrine of title by acquiescence, ruling "that the parties' actions proved that the original establishment of the boundary accurately reflected the intent of the parties in completing the transfer of property." *Id.* at 1272. In so holding, the *Wingler* Court underscored the policy of the doctrine, stating:

> Parol evidence is admissible to prove the former existence, identity and location of ancient monuments since removed, such as marked trees and stones, indicative of the location of lines and corners; and we see no reason why the acts of the interested parties, contemporaneous with the alleged existence of the monuments, as tending to prove their existence, should not be also admissible in evidence. *Garrett v. Spear*, 998 NE 2d 297 - Ind: Court of Appeals 2013.

The Ohio Court of Appeals has likewise given direction on the “best evidence,” viz.,

> {¶39} Appellants maintain the old boundary fence and a stone located near the entrance of their driveway, which appellees removed, is the best evidence and the trial court should have used it in determining the boundaries. The trial court specifically found that appellants did not submit a boundary-line survey of their property lines and therefore, the trial court was unable to make any findings regarding the property lines of appellants from their deeds. Findings of Fact, May 5, 2003, at ¶ 17. Without a survey to support their argument regarding the location of the old boundary fence, the only evidence the trial court had to rely upon was the survey submitted by appellees. Therefore, the trial court properly relied upon appellees' survey. *Robinson v. Armstrong*, 2004 Ohio 1463 - Ohio: Court of Appeals, 5th Appellate Dist. 2004.

In Michigan, no less than Justice Cooley - not surprisingly - continues to weigh-in nearly 150 years later…

> Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity.

> But no law can sanction this course. ... The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance,—a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks . . . and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. . . . As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are, and it would have been surprising if the jury in this case, if left to their own judgment, had not so regarded them. [*Diehl v Zanger,* 39 Mich 601, 605-606 (1878) (COOLEY, J., concurring) (internal citation omitted), quoted with approval in *Jonkers,* 278 Mich App at 267-268.]. *DEAVEN v. Paulson*, Mich: Court of Appeals 2011.

Intent, Direct and Indirect Evidence - Summarized

This discussion of direct and indirect evidence and their roles in ascertaining intent can be summarized with the following from the Pennsylvania Supreme Court's decision in the case of *Long Run Timber Company v. Dept. of Conservation & Natural Resources*, 145 A.3d 1217 (Pennsylvania) (2016), viz.,

> In boundary dispute matters, the purpose of the adjudicator "is to ascertain the intent of the grantor at the time of the original subdivision."
>
> The general rule provides that "[w]here the calls for the location of boundaries to land are inconsistent, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances."
>
> "[W]here there is a conflict between courses and distances or quantity of land and natural or artificial monuments, the monuments prevail."
>
> However, the rules of construction with regard to boundaries "[are] not ... imperative or exclusive" but are aids in construction "to ascertain, or to aid in determining, the intention of the parties" that must yield to a contrary showing. Thus, these rules do not apply "where the monument claimed is so manifestly wrong as to lead to an absurd result."
>
> Monuments not mentioned in a deed may be utilized if "said monuments are afterward erected by the parties with intent to conform to the deed."
>
> Nevertheless, if "the monuments are doubtful, a resort will be had to the courses, distances, and quantity."

> "Before a physical monument is accepted as a boundary line, there must be evidence other than its mere existence that the monument was intended for that purpose" which may be shown if it is mentioned in deeds related to the chain of title or there is "evidence that any past parties erected it as a monument to mark the boundary."
>
> Viewing the evidence in the light most favorable to DCNR as the prevailing party, the Board's determination is supported by substantial evidence.
>
> Thus, given the consistency of the credited evidence relied upon the Board, "the monument[s] claimed [by DCNR and the Board are not] so manifestly wrong as to lead to an absurd result."

The court's cautionary comment regarding blind adherence to the rules has been echoed many times in many cases and by no less authority than Curtis Brown, Walter Robillard and Donald Wilson in their discussion on the *Order of Importance of Conflicting Title Elements*.[21]

> The order of importance of conflicting deed elements…, while generally true, can vary from state to state, and with the same jurisdiction it can vary under different circumstances.

Indeed a number of prominent surveyors expressed concern that the publishing of Brown's seminal text Boundary Control and Legal Principles would result in retracement surveyors electing to follow the rules of construction without thinking critically about the effect on bone fide rights and neighbors who were – to that point – happy with their boundaries.[22]

No – There was no original survey, or at least no conclusive direct or indirect evidence of one.

If there is no plat found of the original survey, that is one indication – albeit not conclusive - that there may not, in fact, have been an original survey. It certainly means that the surveyor has no direct evidence that there was an original survey[23] in which case the boundary resolution hinges on indirect evidence of the original survey. And if there is not even any indirect evidence, the practical effect would seem to be the same as if, in fact, there definitively never was an original survey (see flowchart).

Where there was no original survey or no direct or indirect evidence of one, the surveyor first needs to study the legal description: is it patently ambiguous? If so, an attempt must be made to uncover all possible sources of information that could explain the ambiguity. That extrinsic evidence must be carefully weighed and analyzed to determine the most defensible explanation of the meaning of the description's ambiguous words.

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[21] Brown, Curtis, Robillard, Walter and Wilson, Donald, *Brown's Boundary Control and Legal Principles*, 6th Edition, Wiley 2009, p. 325.

[22] Pallamary, Michael J., Ed., *The Curt Brown Chronicles*, AuthorHouse, 2011, p. 8-9 .

[23] The most common direct evidence of an original survey is probably the existence of a plat of survey, the date of which corresponds to the original conveyance out of the parent tract.

Ambiguities

> According to Black's Law Dictionary, a patent ambiguity is one that appears on the face of a document and arises from the language itself. A latent ambiguity does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed (*see id.*). *L&L Painting Co., Inc. v. CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK* 68 AD 3d 594, 892 NYS 2d 55 - NY: Appellate Div., 1st Dept., 2009.

However, there has a been a recent trend in the courts in some states to erase the differences between the two when interpreting contracts.

> We are satisfied that the trial court correctly denigrated the usefulness of a distinction between patent and latent ambiguities for determining what type of extrinsic evidence should be considered when construing ambiguous or contradictory provisions. Because it is reasonable for the Minnesota judiciary to weigh evidence of the testator's declarations of intent, the basis for the patent/latent distinction appears outmoded. *In re Estate of Cole*, 621 NW 2d 816 - Minn: Court of Appeals 2001.

> Last year in interpreting a trust, our Supreme Court held that the distinction between patent and latent ambiguities no longer served any useful purpose and concluded that "where an instrument is ambiguous, relevant extrinsic evidence may be properly considered in resolving the ambiguity." *Univ. of Southern Ind. Foundation v. Baker,* 843 N.E.2d 528, 535 (Ind.2006). Although *Baker* involved the construction of a trust, it would logically follow that the abrogation of the patent/latent distinction would also apply in the construction of easements. However, the present parties argue either that there is latent ambiguity or the complete absence of ambiguity. Therefore, no distinction in the type of ambiguity is requested, and we address the issue in the terms employed by trial court, the parties, and the relevant cited caselaw. Footnote 1, *Drees Co., Inc. v. Thompson*, 868 NE 2d 32 - Ind: Court of Appeals 2007.

Patent Ambiguities

A patent ambiguity is one that is obvious in a reading of the legal description (See *L&L Painting Co., Inc. v. CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK* above).

> A contract will be considered ambiguous if it is capable of being understood in more sense than one. *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

> [A] patent ambiguity is an] ambiguity in a legal document (as a contract or will) that is apparent on the face of the document and arises from inconsistent or uncertain language.[24]
>
> Patent ambiguity refers to uncertainty on the face of a legal document. This gives the agreement or contract an indefinite meaning. When a document includes a patent ambiguity, no external evidence can show the testator's intention, which remains unclear. A patent ambiguity may invalidate an agreement or contract.[25]
>
> A document is found to be ambiguous only when reasonable persons find the contract subject to more than one interpretation. *Drees Co., Inc. v. Thompson,* 868 NE 2d 32 - Ind: Court of Appeals 2007.

The surveyor should attempt to solve the problem of a patent ambiguity by applying the "rules of construction" which refer to the collection of (generally non-codified) rules that govern the interpretation of ambiguous or uncertain legal documents and contracts. Their aim is to guide the investigator to the intentions of the parties to the document.

Curtis Brown, Walter Robillard and Donald Wilson in their discussion on the *Order of Importance of Conflicting Title Elements*[26] state:

> It should always be kept in mind that while the order of conflicting elements may serve to resolve differences between calls, for a variety of reasons, strictly speaking the order of conflicting elements applies to the resolution of ambiguities within a written description. This set of rules is not intended to resolve all conflicts, or conflicts between written evidence and physical evidence.[27]

It is important, however, to emphasis yet again that the *unambiguous* description may only be interpreted based on the words within the four corners of the document; parol evidence is not allowed to clarify or otherwise change the clear terms of a legal description. In the same breath, the concept of the words within the four corners must be somewhat liberally construed because, as noted above, the courts have also given guidance on what the best evidence of the intent of those words is - and they, inevitably point to the original survey.

> Although boundaries arising from the conveyance of land are determined with reference to the intention of the grantor, as expressed in the instrument of conveyance, "[t]he highest and best proof of this intention, ordinarily, lies not in the words of expression of the deed, but rather, in the work upon the ground itself, where the survey was made prior

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[24] https://www.merriam-webster.com/legal/patent%20ambiguity

[25] https://www.upcounsel.com/patent-ambiguity

[26] Brown, Curtis, Robillard, Walter and Wilson, Donald, *Brown's Boundary Control and Legal Principles*, 6th Edition, Wiley 2009, p. 324.

[27] Ibid, p. 325

to the conveyance." *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

Beyond the looking to the original survey, every professional surveyor is – or should be - familiar with the hierarchy of elements in a description and which terms control over which other terms when the words are ambiguous.

> It is true that where a dispute exists as to the designation of a boundary, the intent of the parties should control. However, where there is a discrepancy in deed calls, the rules of construction require that resort be had first to natural objects, second to artificial objects, third to adjacent boundaries, fourth to courses and distances and last to quantity. Furthermore, where, as here, a deed refers to physical objects as well as measurements based on lines of adjacent property, a court may accept the physical objects over the measurements based on the other lines. *Thomas v. Brown*, 145 AD 2d 849 - NY: Appellate Div., 3rd Dept. 1988 [internal citations intentionally omitted]

> [W]e note that with respect to land descriptions, this court has held that the order of preference for the location of boundaries is in descending order as follows: natural objects or land marks, artificial monuments, adjacent boundaries, courses and distances, and lastly quantity. *Bowling v. Poole,*756 N.E.2d 983, 989 (Ind.Ct.App.2001) cited in *Harlan Bakeries, Inc. v. Muncy*, 835 NE 2d 1018 - Ind: Court of Appeals 2005.

> [T]he rule is well settled that in ascertaining boundaries, visible monuments, such as stones, trees, stakes, and the like, are held to control other designations not obvious to the senses. The south line of the section may be mistaken; a visible stake can not be...."); *Earhart v. Rosenwinkel,* 108 Ind. App. 281, 292, 25 N.E.2d 268, 272-73 (1940) ("Under the principle that where some particulars of the description in a deed do not agree, those which are uncertain and more liable to error and mistake must be governed by those which are more certain. Various rules for the interpretations of descriptions of the location and boundary of lands have been evolved and are now frequently referred to in interpreting grants and deeds. Accordingly an order of precedence has been established among different calls for the location of boundaries of land, and, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, and thereafter to courses and distances. Natural objects, of course, include mountains, lakes, rivers, etc., whereas artificial monuments and objects consist of marked lines, stakes, and similar matters marked or placed on the ground by the hand of man."), *trans. denied. LTC INVESTMENTS INC. v. EGR INDIANA PROPERTIES, LLC*, Ind: Court of Appeals 2013 (not for publication).

{¶ 36} As noted in *Broadsword* at 533-35:

> > It is well settled that monuments are of prime importance in settling boundary disputes. The general rule is well stated in 6 Thompson on Real Property (Perm.Ed.), 519, Section 3327, as follows:

> "A `monument' is a tangible landmark, and monuments, as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary, even though this means either the shortening or lengthening of distance, unless the result would be absurd and one clearly not intended, or all of the facts and circumstances show that the call for course and distance is more reliable than the call for monuments. This rule does not apply when it is evident that the call for a natural object or established boundary line was made under a mistaken belief with reference to the survey. Generally, in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description, in the absence of which the following calls are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance, course controlling distance, or distance course, according to cirumstances (sic). Area is the weakest of all means of description. The ground of the rule is that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent. The reason assigned for this rule is that monuments are considered more reliable evidence than courses and distances. A description by course and distance is regarded as the most uncertain kind of description, because mistakes are liable to occur in the making of the survey, in entering the minutes of it, and in copying the same from the fieldbook. `Consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects.' When it comes to courses and distances, the latter yield to the former."

Perry v. Davis, 2013 Ohio 4078 - Ohio: Court of Appeals, 2nd Appellate Dist. 2013.

As noted above, the courts have been clear that, in general, parol evidence may not be used to alter, contradict or add to a legal description as part of resolving a patent ambiguity.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. * * * It is well settled that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *WWW Assocs. v. Giancontieri*, 77 NY 2d 157 - NY: Court of Appeals 1990.

> The rules governing the interpretation of deeds are well-settled and are designed to enable the courts to ascertain the intention of the parties to the deed. The courts should first seek the parties' intention by examining the words in the deed, and by considering these words in the context of the deed as a whole. * * * The courts customarily decline to consider parol evidence that adds to, varies, or otherwise contradicts the language of the

deed. *Mitchell v. Chance*, 149 SW 3d 40 - Tenn: Court of Appeals 2004 (internal citations intentionally omitted).

The parol evidence rule posits that "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous."

This rule is subject to several exceptions, which this Court articulated in *Hamade*, supra at 145:

> First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. For this reason, "[e]xtrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an `integrated' agreement." Second, extrinsic evidence may be presented to attack the validity of the contract as a whole. Thus, extrinsic evidence may be presented to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *Markham v. SUNOCO OIL COMPANY*, Mich: Court of Appeals 2008 (internal citations intentionally omitted).

However, parol evidence *can*, in fact, be used in some circumstances. With regard to interpreting legal descriptions, its application is generally limited to helping explain the circumstances surrounding the conveyance, to explain the meaning of the words used, or to help complete an otherwise incomplete description. The primary consideration is that parol evidence may *not* be used to change the unambiguous terms of the description.

> This rule provides that in construing [a] written instrument, the language of the instrument, if unambiguous, determines the intent of the instrument such that parol or extrinsic evidence is inadmissible to expand, vary, or explain the instrument unless there has been a showing of fraud, mistake, ambiguity, illegality, duress or undue influence. Even if ambiguity exists, extrinsic evidence is only admissible to explain the instrument and not contradict it. *Id.* at 757-58 (quoting *Lippeatt,* 419 N.E.2d at 1335). *Poznic v. Porter County Development Corp.*, 779 NE 2d 1185 - Ind: Court of Appeals 2002.

The application of parol evidence has been explained in depth by the courts.

> In general, where the parties to an agreement have reduced the agreement to a written document and have included an integration clause that the written document embodies the complete agreement between the parties, ... the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding to the terms of the written contract. *However, the prohibition against the use of parol evidence is by no means complete. Indeed, parol evidence may be considered if it is not being*

offered to vary the terms of the written contract, and to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract.... In addition, parol evidence may be considered to apply the terms of a contract to its subject matter and to shed light upon the circumstances under which the parties entered into the written contract. Harlan Bakeries, Inc. v. Muncy, 835 NE 2d 1018 - Ind: Court of Appeals 2005 (italics in original).[28] (footnotes intentionally omitted).

"Parol evidence is therefore often necessary to make descriptions intelligible." *Id.; see also Randolph v. Wolff,* 176 Ind.App. 94, 98, 374 N.E.2d 533, 536 (1978) ("It is well established that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property.") *Harlan Bakeries, Inc. v. Muncy*, 835 NE 2d 1018 - Ind: Court of Appeals 2005.

Where a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended. *Farm Credit Bank of St. Louis v. Whitlock*, 581 NE 2d 664 - Ill: Supreme Court 1991 (internal citations intentionally omitted).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." In light of this cardinal rule, and to effectuate the principle of freedom of contract, this Court has generally observed that "[i]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." "However, we will not create ambiguity where the terms of the contract are clear." *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

The testimony of the relator is parol evidence which is offered to explain or vary the terms of the written deed of easement for the subject channel improvement. It is well established law that parol evidence of prior conversations, offered to vary or contradict the terms of a written agreement which are plain and unambiguous on the face of the instrument, is incompetent. *State ex rel. Goldsberry v. Weir*, 60 Ohio App. 2d 149 - Ohio: Court of Appeals 1978.

Latent Ambiguities

A latent ambiguity does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed (*see id.*). *L&L Painting Co., Inc. v. CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK* 68 AD 3d 594, 892 NYS 2d 55 - NY: Appellate Div., 1st Dept., 2009.

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[28] Footnote 9 in that decision states *"The final settlement agreement did contain an integration clause. See Appellant's App. at 155."*

A latent ambiguity … is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Black's Law Dictionary (7th ed.). Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." In other words, "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." Thus, the question becomes whether an ambiguity exists [in the contract]. *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the "*necessity for interpretation or a choice among two or more possible meanings*." *Hayes v. GINOSKO DEVELOPMENT COMPANY*, Mich: Court of Appeals 2019 (unpublished).

[A] [l]atent ambiguity is an ambiguity that does not readily appear on the face of a document. The ambiguity becomes apparent only in the light of knowledge gained from a collateral matter. Extrinsic evidence can be used to clarify latent ambiguities, but not patent ambiguities.[29]

The legal principles concerning latent ambiguities, although at times difficult to apply to the facts of a given case, seem to be generally recognized. A latent ambiguity occurs where a writing appears on its face clear and unambiguous, but which, in fact, is shown by extrinsic evidence to be uncertain in meaning; or where a description apparently plain and unambiguous is shown to fit different pieces of property, and in such cases, the ambiguity being raised by extrinsic evidence, the same kind of evidence may be admitted to explain it or identify the property referred to in the writing. A latent ambiguity in a contract can be explained by parol evidence. In construing a written instrument the court may place itself in the parties' position to ascertain their intent from the language used. Deeds should be construed most favorably to the grantee and the intention of the parties is the test by which to determine the effect of a deed, including the description therein. Furthermore, there is a presumption that a grantor in executing a deed intended to convey only property which he owned. *Allendorf v. Daily*, 129 NE 2d 673 - Ill: Supreme Court 1955 (internal citations intentionally omitted).

A latent ambiguity is a defect which does not appear on the face of language used or an instrument being considered. It arises when language is clear and intelligible and suggests but a single meaning, but some intrinsic fact or some extraneous evidence creates a necessity for interpretation or a choice between two or more possible meanings, as where the words apply equally well to two or more different subjects or things. ... Latent ambiguities are frequently considered as they relate to wills, in which the language may

[29] https://definitions.uslegal.com/l/latent-ambiguity/

> be clear but can apply to different people based on extrinsic evidence. In *Conkle,* a gift was given to the testator's "grandchildren" but the matter was complicated by circumstances surrounding adopted children. *Id.* at 52. In such cases, the language contained in the document is unambiguous but circumstances outside of the document create an ambiguity. *VIOLANTE v. VILLAGE OF BRADY LAKE*, 2012 Ohio 6220 - Ohio: Court of Appeals, 11th Appellate Dist. 2012 (internal citations intentionally omitted).

When a latent ambiguity is revealed by the survey, extrinsic evidence must be sought to explain the parties' intentions. Extrinsic evidence could include, but is not limited to, prior surveys, statements from knowledgeable parties or landowners, evidence found on the ground (e.g., fences, monuments of unknown origin), and even calculations made by the surveyor.

Analyzing the evidence and applying the appropriate boundary law principles

To the layperson/property owner, boundary retracement is merely a simple exercise of finding the existing corners, laying the geometry of the deed onto the ground, or even simply providing them with the "GPS coordinates" of their property so they can locate their corners themselves.

Surveyors, of course, know otherwise. Aside from the challenges of uncovering all the available evidence, analyzing it and applying the appropriate boundary law principles to determine the boundary location, even the courts acknowledge that all surveyors do not view the evidence in the same way.

> [T]he court noted that land surveying is not always an exact science and that qualified and experienced surveyors can and sometimes do arrive at different conclusions in interpreting legal descriptions in deeds and reconciling those descriptions with monuments observed on the property. *Turner v. Albert*, 2015 Ohio 809 - Ohio: Court of Appeals, 11th Appellate Dist. 2015.
>
> Boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question… *Summers v. Dietsch*, 849 SW 2d 3 - Ark: Court of Appeals, 2nd Div. 1993.

That is why boundary law classes and seminars are so critical to the integrity of the surveying profession. Professional surveyors must understand boundary law intimately – or know how and where to readily find clues to the answers to their boundary questions – and, just as importantly, be able to express persuasive and defensible arguments in support of their opinions in a way that even a lay person can understand.

There are plenty of texts that delve into boundary law – some in more depth than others - including but not limited to, a number that are otherwise cited in this paper, such as:

- *Boundary Retracement*, Wilson, CRC Press, 2017
- *Brown's Boundary Control and Legal Principles*, Brown, Robillard and Wilson (multiple editions), Wiley
- *Brown's Evidence and Procedures for Boundary Location*, Brown, Robillard and Wilson (multiple editions), Wiley

- *Clark on Surveying and Boundaries*, Robillard, Bouman and Shelton (multiple editions), LexisNexus
- *Skelton on the Legal Elements of Boundaries & Adjacent Properties*, Skelton, Bobbs Merrill, 1930
- *Boundaries and Landmarks*, Mulford, 1912, Van Strand, 1912

It is not the intent of this program and paper to reexamine boundary law other than as support for the premise which is as a practical guide to retracement.

Boundary or title conflicts independent of the resolved boundary

If, in the process of conducting the records research, a potential title conflict is discovered, or, once the surveyor has formed an opinion as to the location of the boundary lines and corners, he or she finds possession or occupation evidence substantively[30] to the contrary, it is strongly advised that the surveyor proceed carefully lest he or she create a dispute where none existed before. As a practical matter, a number of presenters and authors promote the idea that work on such a project be at least temporarily suspended.

This seemingly drastic step is not as severe as it may seem because title and boundary conflicts can only be resolved by the affected parties; surveyors have no authority to solve them on their own. In fact, by completing surveys and setting monuments or reporting conditions that are contrary to the preconceived beliefs of one or both of the affected owners, surveyors may very well launch those parties into expensive, time-consuming, illogical, ill-advised and emotion-driven litigation - and be pulled into the fray themselves.

The concept of suspending work must be supported by a written contract that allows the surveyor to take such an action. Following is an example of such wording.[31]

> **Scope of Services:**
>
> Prepare a boundary survey pursuant to Indiana Administrative Code requirements in 865 IAC 1-12. This includes monuments set or found at (or a witness to) each boundary corner, a signed, certified plat of survey and accompanying Surveyors Report.
>
> It should be noted, however, that boundary determinations not infrequently disclose unseen or unknown conflicts between record documents and/or between record documents and the location of physical improvements. Thus, if in the process of conducting the research, fieldwork or analysis, the surveyor identifies a possible boundary or title conflict, a sketch showing the revealed conditions will be prepared and a meeting with the client – and the affected neighbor(s), if desired – will be scheduled. During that meeting, the problem will be explained, alternatives for possible resolution

[30] Substantiality is a subjective judgment. In the case of few uncertainties, unambiguous legal descriptions and the retracement of contemporary surveys, a substantial difference might be quite less than a foot. Alternately, where there are significant uncertainties, ambiguous legal descriptions and/or when retracing ancient surveys, a substantial difference might be a dozen feet or even more.

[31] Credit is given to John Stahl, PS (Utah) for some of this content. Note that any contract should be vetted by the surveyor's attorney in order to account for state-specific statutes and regulations.

will be presented and any additional survey work that would be required to achieve resolution will be outlined.

Following that meeting, if the client wishes to engage the surveyor to assist in pursuing resolution of the problem as a consultant, expert and/or formal or informal mediator, the contract will be modified accordingly. Otherwise the client will be invoiced only for the time expended to that point, and work on the survey will be suspended until or unless the client is able to resolve the issue by agreement or litigation, at which time a subsequent contract may be executed to complete the survey pursuant to that agreement or litigation.

A number of nationally-recognized authors and speakers have acknowledged the surveyor's limitations and/or encouraged what have heretofore often been considered unconventional strategies that have been generally avoided when conflicts are revealed.

> "I recommend against a policy of always staking a line based on one class of evidence and then … simply telling the client to seek the advice of an attorney to evaluate the other evidence. * * * Tell your client in advance what services you can provide and how you can help resolve conflicting evidence, and that in some cases an attorney should be consulted before the survey is finalized." *Washington State Common Law of Surveys and Property Boundaries*, Jerry R. Broadus, 2009.
>
> [T]here is support for the land surveyor to take an affirmative and responsible position with respect to identifying and making recommendations concerning boundary lines established by unwritten means. *Establishment of Boundaries by Unwritten Methods and the Land Surveyor,* John G. McEntyre and Darrell R. Dean, Jr., Indiana Society of Professional Land Surveyors and School of Civil Engineering, Purdue University, circa 1976.
>
> In my early writings, I generally advocated that surveyors should locate land boundaries in accordance with a written deed; all conveyances based upon unwritten rights should be referred to attorneys for resolution. Within recent years there have been cases, and one in particular, wherein surveyors have been liable for failure to react to a change in ownership created by prolonged possession. * * *
>
> From my experience with clients, very few know that there is a difference between [ownership and the written deed]; most clients want to know what they own. * * *
>
> As a summary of the discussion presented, the following is offered:
>
> 1. The surveyor in finding an encroachment on his client's land, must fully inform the client of its significance; further the information must be presented in such a manner that third parties also understand the significance of any encroachment;
> 2. Nothing in the law prevents the surveyor from deciding who has ownership to encroachments, and he may monument ownership lines rather than written title lines;
> 3. In some circumstances the surveyor may be justified in monumenting the line that he believes to represent [the] true ownership line. In my experience, this occurs when (1) the client has color of title, (2) the client has paid taxes on the land described with color of title, and (3) the client has possession by an enclosure for

a time more than the statute of limitations. In cases involving adverse relationships (adverse possession), estoppel, or recognition and acquiescence, the surveyor is probably foolish to try to establish ownership.

4. Since, to avoid liability, the surveyor must fully disclose the significance of encroachments; surveyors must have knowledge of how and when unwritten conveyances occur It is my recommendation that all surveyors should be required to understand the subject.

A practice that would save the land surveyor harmless is the practice of drafting "Property Line Agreements." * * * This is accomplished by causing the client and all adjoiners to sign a map stating that they agree that the lines shown thereon are their common property lines. This is a good way to resolve the problem under discussion and all land surveyors should attempt to settle their boundary disputes in this way.[32] *Land Surveyors' Liability to Unwritten Rights*, Curtis M. Brown, NMACSM Legal Seminar, January 1979.

"Uncertainty of record description and/or uncertainty or indeterminability of physical monuments may make location impossible; in such an event, the only solution is establishment of a substitute line or lines, by agreement deed, with mutual quitclaim, or by court action. In many cases, the agreement is a more satisfactory method for fixing a line than all the labor of analysis and extended survey, even though the relocation is reasonably possible." *Land Survey Descriptions*, William C. Wattles, Gurdon H. Wattles, 1974, p. 81.

Suspending work on a boundary pending resolution by agreement or litigation, and/or the surveyor encouraging or even participating in the facilitation of an agreement are some of those strategies.

Completing the survey

In is the opinion of the author of this paper that the completion of a retracement survey should be accompanied by a plat/map of that survey and a surveyor's report regardless of the client's wishes.[33] A principal focus of this paper and one of the most inviolable rules of retracement surveying is to follow in the footsteps of the original surveyor. This directive is extremely difficult, if not bordering on impossible, to comply with if original surveyors do not produce any footsteps to follow by monumenting their boundaries, calling for those monuments in their descriptions and writing a surveyor's report to document and support the decisions made.

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[32] Individual surveyors should be knowledgeable of the processes, laws and regulations in their areas that would result in the outcome sought by a boundary line agreement. Simply having the client and affected adjoining owners sign the survey likely is not enough to accomplish the agreement. Manifesting the agreement line as shown on the survey by a subsequent exchange of deeds describing the agreed upon line(s) would be most desirable.

[33] A plat of survey and accompanying surveyors report are required under Indiana law (865 IAC 1-12-12)

The footsteps of retracement surveyors, while not as critical, are part of the evidence. Explaining the search for the evidence - what records and locations were searched, and with what results (i.e., what was found and not found) – and the evidence rules, doctrines and evidence relied upon to retrace the boundary is part of the record that could very well help the subsequent surveyor reach back to the original survey.

The final step to complete the circle is the placement of the plat of survey and surveyor's report into the public record. Not only does this provide a permanent record, it also permits the information to be used to improve the parcel layer of the jurisdiction's GIS (which many surveyors are notoriously fond of criticizing (i.e., GIS means "Get it Surveyed"), but do little to help improve it when they have the information in their own records).

Part of closing the loop on easing the search for evidence of the original survey is found in the descriptions written as a part of those surveys. Indiana recently passed a statute requiring that the caption of any new description produced as a part of an original (or retracement) survey contain specific information identifying the surveyor and the survey that resulted in that description.[34]

Some special retracement problems

Retracing aliquot parts

Properties that are described as aliquot parts of a public land survey section often represent the epitome of the essence of this paper. Whether or not a record of the original survey of that aliquot part can be found (e.g., in Indiana, the county surveyor's legal survey record book), the evidence found on the ground is very often, if not typically, instructive as to intent.

When faced with evidence of possession or occupation that is contrary to the legal description, the retracing surveyor should feel compelled to determine how and why that evidence is located where it is. Is there a logical answer to the fence's location? Fences often, if not usually – but as noted earlier in this paper, not always – ended up in their location by design (i.e., based on a survey or at least some sort of agreement which can be a strong indicator of intent). But blindly accepting a fence is evidence of incompetence. An argument supported by a doctrine or rule of construction must be made for holding a fence over the written description. That argument may be that the fence is the best evidence of the original survey, in which case, substantial support for that argument must be provided.

Particularly when the aliquot parts were created in much earlier times, questions of who set the fence in that location, why, and on what basis, are often, if not usually, lost in antiquity. In those cases, surveyors must look for indirect evidence that points to the answers to those questions, evaluate that evidence – giving due consideration to the time period and who may have actually

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[34] Any new or modified real property description prepared by a professional surveyor as a product of an original survey or a retracement survey must include a caption that identifies: (1) the name and professional surveyor registration number of the professional surveyor who prepared the description; and (2) the plat of survey produced as a part of the original survey or retracement survey, including the following information: (A) The date of the surveyor's certification, (B) The date of the last revision, if any, to the survey, (C) Any associated project or job number, (D) The name of the survey company, if any. See IC 25-21.5-9-9(b).

made the measurements[35] – and form an opinion consistent with, and accounting for, those variables.

Summary

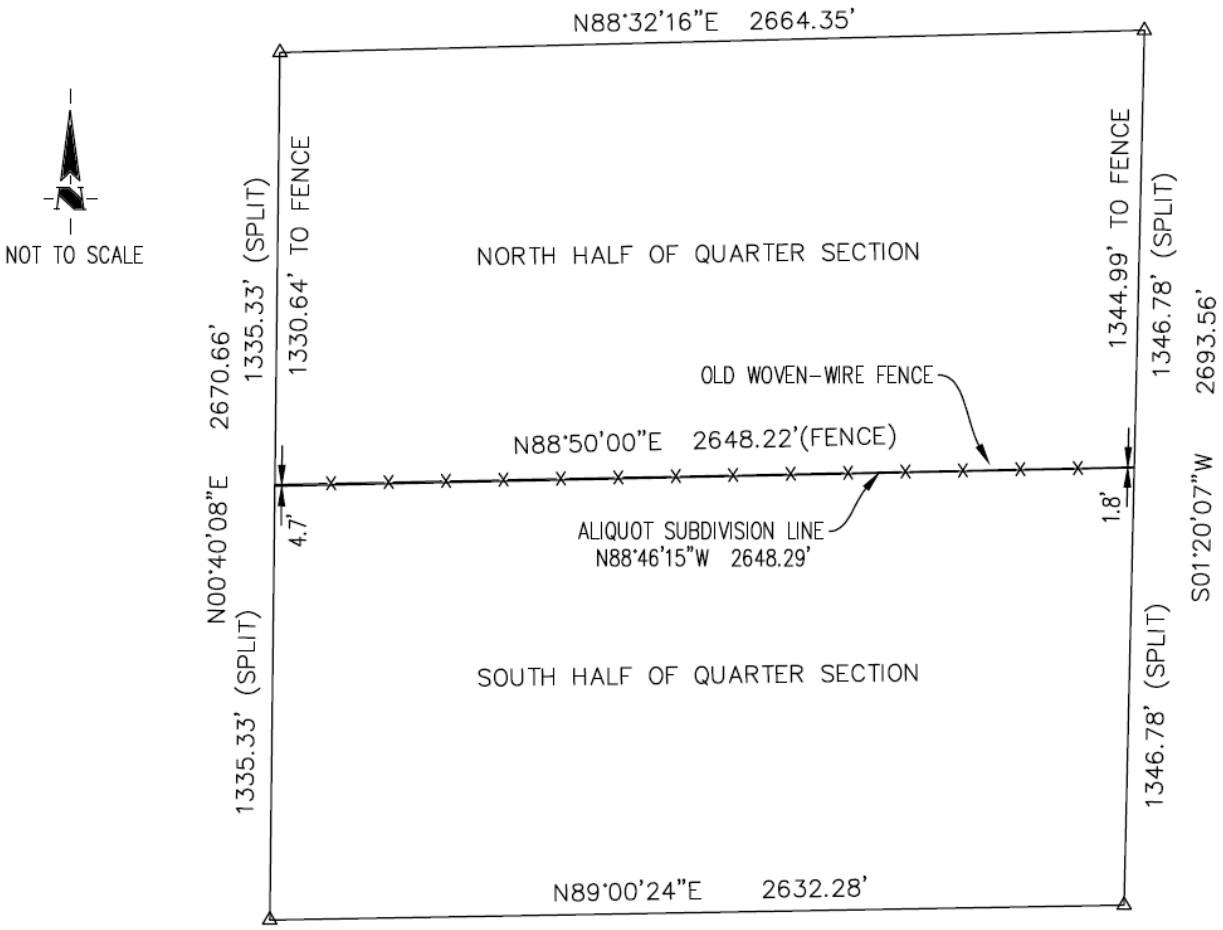
This paper and program are planned as the first step towards a more comprehensive look at the process of conducting a proper retracement. It is hoped that in the meantime, readers and attendees will find it helpful and instructive in their work.

Gary R. Kent, PS, Indiana and Michigan

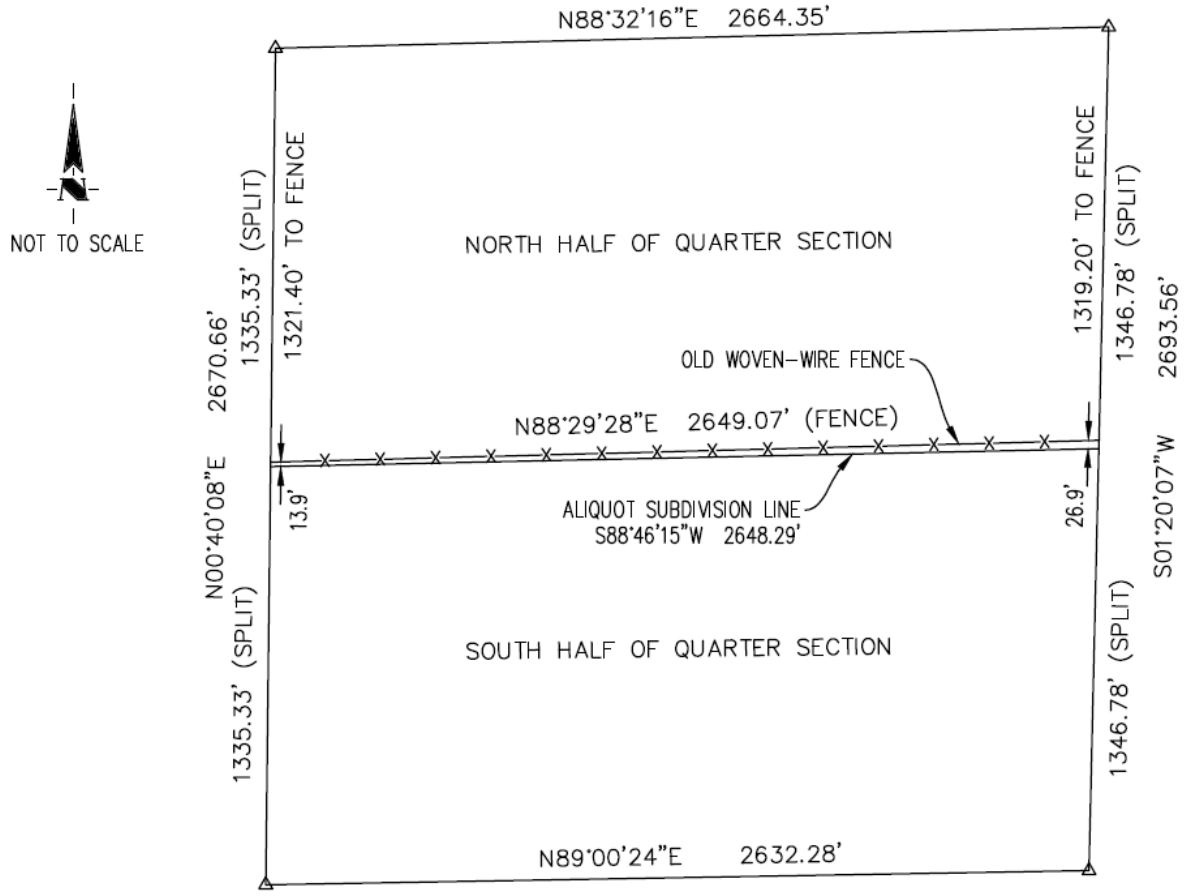
[35] Surveyors were not licensed in any state until around 1900. Who conducted the early surveys and how competent/experienced were they? Often landowners were part of the crew that conducted the survey.

Example Scenarios for Discussion

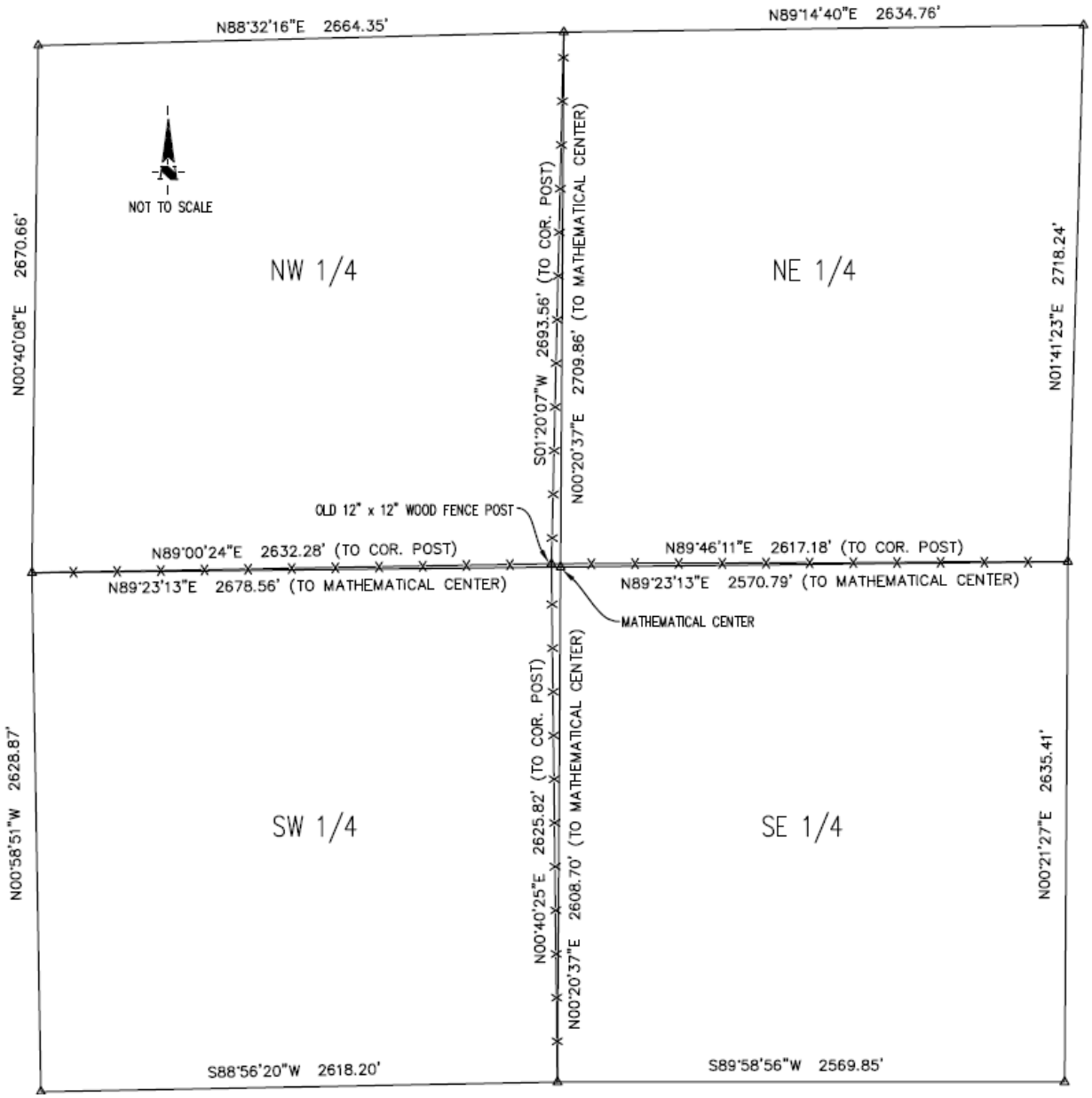
SCENARIO #1



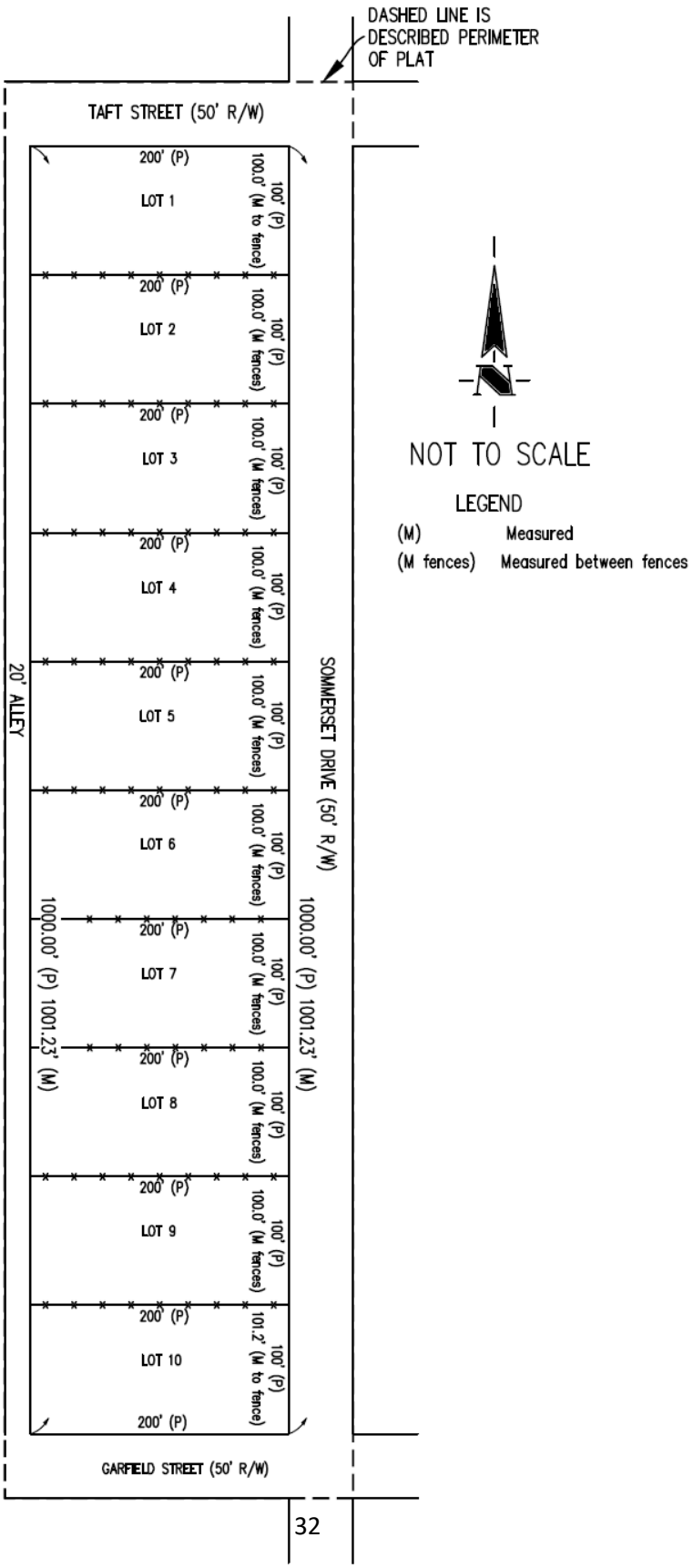
SCENARIO #2


N
NOT TO SCALE
N88°32'16"E 2664.35'
NORTH HALF OF QUARTER SECTION
SOUTH HALF OF QUARTER SECTION
OLD WOVEN-WIRE FENCE
N88°29'28"E 2649.07' (FENCE)
ALIQUOT SUBDIVISION LINE
S88°46'15"W 2648.29'
N89°00'24"E 2632.28'
N00°40'08"E 2670.66'
1335.33' (SPLIT)
1335.33' (SPLIT)
1321.40' TO FENCE
13.9'
S01°20'07"W 2693.56'
1346.78' (SPLIT)
1346.78' (SPLIT)
1319.20' TO FENCE
26.9'

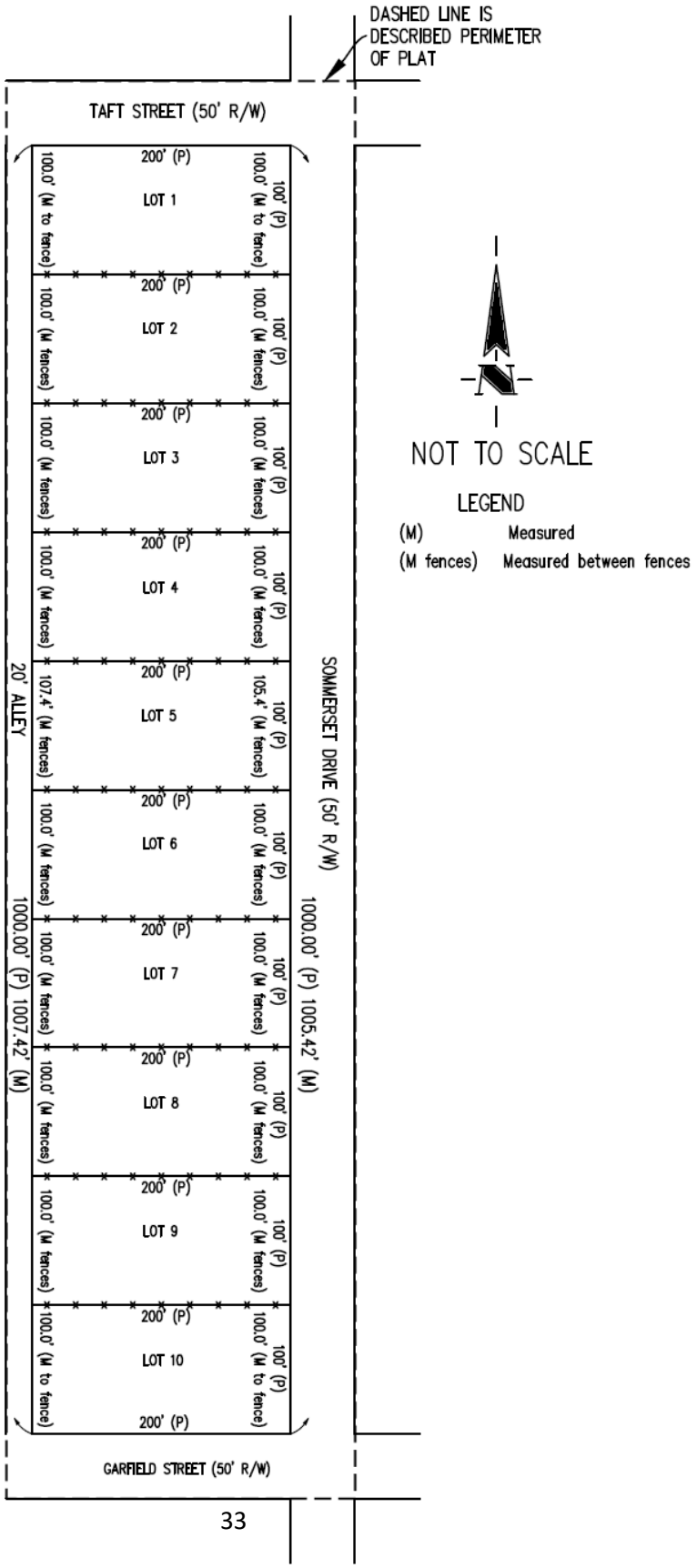
SCENARIO #3


N88°32'16"E 2664.35'
N89°14'40"E 2634.76'
NOT TO SCALE
NW 1/4
NE 1/4
SW 1/4
SE 1/4
N00°40'08"E 2670.66'
N01°41'23"E 2718.24'
N00°58'51"W 2628.87'
N00°21'27"E 2635.41'
S01°20'07"W 2693.56' (TO COR. POST)
N00°20'37"E 2709.86' (TO MATHEMATICAL CENTER)
OLD 12" x 12" WOOD FENCE POST
N89°00'24"E 2632.28' (TO COR. POST)
N89°23'13"E 2678.56' (TO MATHEMATICAL CENTER)
N89°46'11"E 2617.18' (TO COR. POST)
N89°23'13"E 2570.79' (TO MATHEMATICAL CENTER)
MATHEMATICAL CENTER
N00°40'25"E 2625.82' (TO COR. POST)
N00°20'37"E 2608.70' (TO MATHEMATICAL CENTER)
S88°56'20"W 2618.20'
S89°58'56"W 2569.85'

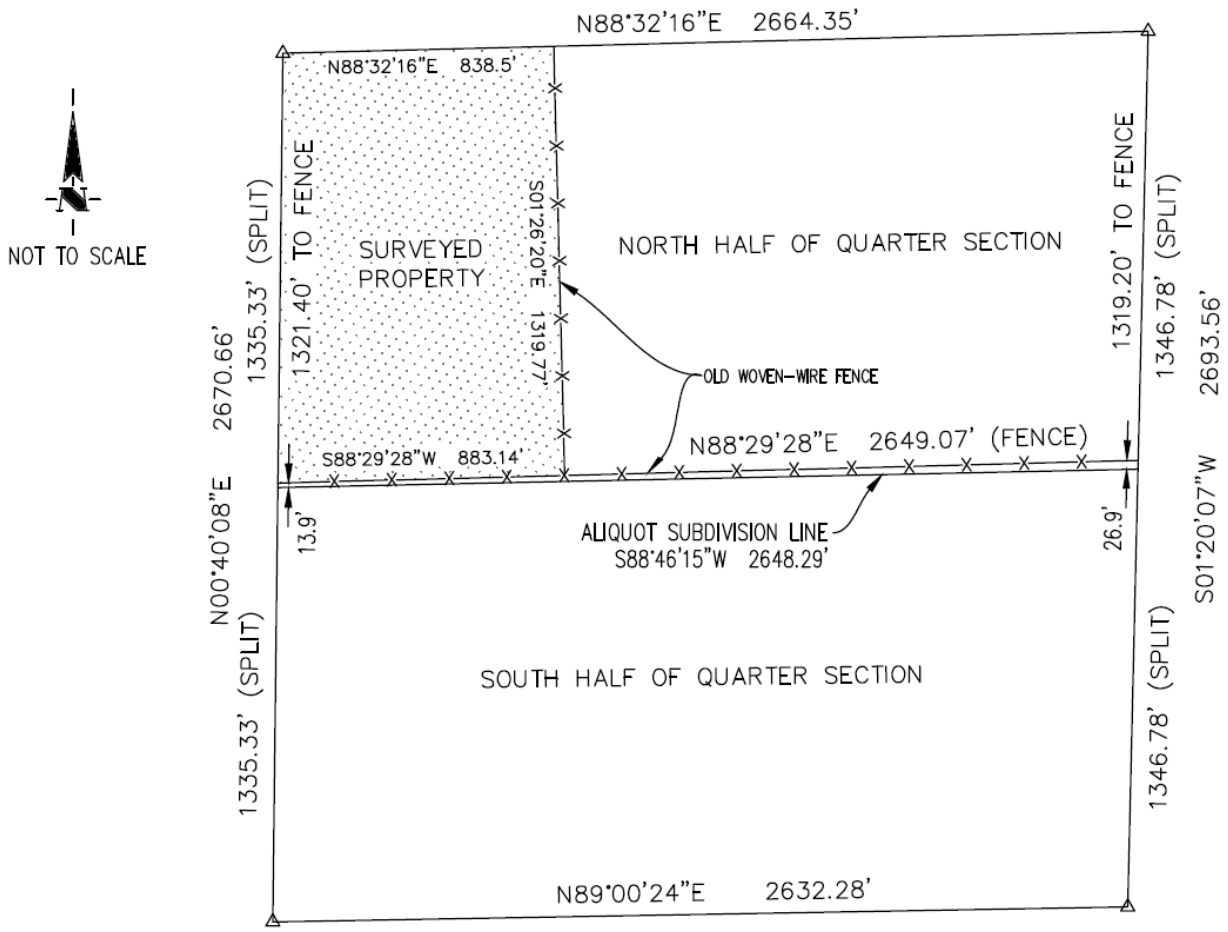
SCENARIO #4


DASHED LINE IS DESCRIBED PERIMETER OF PLAT
TAFT STREET (50' R/W)
200' (P)
LOT 1
100.0' (M to fence)
100' (P)
LOT 2
100.0' (M fences)
LOT 3
LOT 4
LOT 5
LOT 6
LOT 7
LOT 8
LOT 9
LOT 10
101.2' (M to fence)
20' ALLEY
SOMMERSET DRIVE (50' R/W)
1000.00' (P) 1001.23' (M)
GARFIELD STREET (50' R/W)
NOT TO SCALE
LEGEND
(M) Measured
(M fences) Measured between fences

SCENARIO #5


DASHED LINE IS DESCRIBED PERIMETER OF PLAT
TAFT STREET (50' R/W)
LOT 1
LOT 2
LOT 3
LOT 4
LOT 5
LOT 6
LOT 7
LOT 8
LOT 9
LOT 10
200' (P)
100.0' (M to fence)
100.0' (M fences)
107.4' (M fences)
105.4' (M fences)
100' (P)
20' ALLEY
1000.00' (P) 1007.42' (M)
SOMMERSET DRIVE (50' R/W)
1000.00' (P) 1005.42' (M)
GARFIELD STREET (50' R/W)
NOT TO SCALE
LEGEND
(M) Measured
(M fences) Measured between fences

SCENARIO #6



Legal Description

Part of the North Half of the Northeast Quarter of Section 17, Township 19 North, Range 8 East of the Second Principal Meridian in Henry County, Indiana being described as follows:

Beginning at the northwest corner of said half-quarter section; thence East along the north line thereof a distance of 840 feet; thence South a distance of 1320 feet to the south line of said half-quarter section; thence west 840 feet to the southwest corner of said half-quarter section; thence north to the point of beginning. Containing 25½ acres, more or less.

Retracement Guidance Flowchart