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The Surveyor's Role in Conflict Resolution



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Abstract

The Surveyor's Role in Conflict Resolution

We will begin with a review of the fundamental aspects of evidence relied upon by the surveyor to determine boundary locations. The court's view of evidence will be examined and comparisons between the role of the surveyor and the role of the courts will be drawn. We will look at problems with deeds, common transcription mistakes, conflicts in writings, and conflicts in evidence. We will discuss the distinct differences between written conflicts, adjoiner conflicts, and occupational conflicts. Statutory and common law presumptions, rules and principles which provide direction to the surveyor for conflict resolution will be reviewed and discussed. We will discuss tips and techniques to assist the surveyor in contracting for resolution of unforeseen problems. We will also review some real life examples of projects and court cases involving deed interpretation and resolution of conflicting terms.

Instructor Biography



John B. Stahl, PLS, is a registered professional land surveyor in the states of Utah and Montana, currently owning and operating Cornerstone Professional Land Surveys, Inc., and Cornerstone Land Consulting, Inc., in Salt Lake City. Mr. Stahl specializes in surveying land boundaries, resolving boundary conflicts, performing title and historical research, land boundary consultation services, mediation and dispute resolution. He has been qualified as an expert witness in numerous boundary, access, and negligence cases and has actively participated in the preparation of amicus curiae briefs to the Utah Supreme Court. He has furthered his mediation education by participating in a state-qualified 40-hour training program. He has also completed a 200-hour training and examination program to earn the recognition as a Certified Federal Surveyor. Mr. Stahl has served his profession as state chairman of the Utah Council of Land Surveyors and a Utah delegate to the Western Federation of Professional Surveyors. He is an adjunct professor for the Salt Lake Community College, where he has taught mathematics, ethics and liability courses for land surveying students. He continues to teach an extensive course in land boundary law comprising 54 hours of lecture per year since 1991. Mr. Stahl received his A.A.S. degree in land surveying from Flathead Valley Community College in Kalispell, Montana and has authored numerous articles and publications covering topics on boundary laws, research, and resolving conflicts of evidence.

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The Surveyor's Role in Conflict Resolution

by: John B. Stahl, PLS, CFedS

Introduction

The overwhelmingly vast majority of surveys in most regions are executed by surveyors without the slightest hint of any ambiguity, conflict, or dispute arising. The percentage of surveys where conflicts are discovered ranges in direct proportion to the survival of monuments called for in the title record, the availability of original survey records, and the legislated methods for perpetuating the evidence disclosed by subsequent survey records. Stable monuments produce stable land boundaries; land boundaries that are known, recognized and perpetuated by the landowners. When the evidence fades with time or is destroyed by development, uncertainty and disputes follow.

This presentation is not intended to address the procedures used for establishing, recovering, or retracing existing boundary locations where clear evidence can be found. Land surveyors are keen at deciphering the title records and recognizing the footsteps of prior surveyors. There seems to be a disconnect, however, between the commonly recognized duty of the surveyor when retracing recoverable boundaries and their duty when the evidence has been lost, destroyed or faded beyond recognition. Surveyors, as with those of most any profession, routinely fall short of their potential when confronted by difficult situations. This presentation is designed to address those occasional surveys, those minority of surveys, where the surveyor faces difficult choices – choices which often result in increased liability and the likelihood of disturbing settled possessions.

This presentation will offer the surveyor alternative solutions to those commonly promoted and practiced. Alternative solutions which will provide the surveyor with the tools necessary to resolve conflicts at the time they are discovered rather than to merely document their existence with the expectation that someone else will resolve them. The surveyor possesses many of the skills, knowledge and expertise necessary to assist in the resolution process. Skills which too often go unused for lack of experience. The surveyor is often the first discoverer of a potential ambiguity, conflict or dispute. Their response in light of their discovery often sets the stage for the success or failure of potential resolution. The surveyor's role in conflict resolution is vital.

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In all cases, the surveyor is bound by the laws, rules and regulations which govern both his profession and the fundamental rights of the property owners sharing the common boundary. The surveyor must be aware of these laws and he must faithfully execute them during the course of the survey. When the surveyor fails, the failure has a direct impact upon the rights of the landowners, their subsequent purchasers, and many others whose reliance upon the survey will have foreseeable results.

Chief Justice Cooley stated it best when he said of the retracing surveyor:

“The surveyor, on the other hand, must inquire into all the facts, giving due prominence to the acts of parties concerned and always keeping in mind ... that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.”

The vast majority of surveys are concluded without incident. The surveyor's findings are accepted by the landowners who rely upon the positions as established. Occasionally, the survey results are questioned. Differences with prior survey results, *ambiguities* raised by non-conforming prior occupation, or possibly the differing opinion of the landowner will cause doubt to be cast upon the survey. Occasionally the surveyor himself will discover conflicts in the record or ambiguities in the meanings of terms recited. The surveyor's ability to research and recover the evidence necessary to *resolve* the ambiguities and conflicts is indispensable to their proper resolution.

When confronted by discrepancies, the surveyor must step back and reflect upon the evidence and possibly gather additional evidence. Each additional piece of evidence will cause the determination of facts to be altered. Alteration of the facts will require the possible application of differing legal principles. The application of differing legal principles will yield different *conclusions* as to the ultimate location of the boundary. Resolution of the discrepancies is absolutely vital to assure the proper conclusion. Without proper determination of the facts, there can be no proper conclusion.

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The surveyor's opinion is not binding upon the landowners. If either of the landowners affected suspect or doubt the surveyor's findings, he may act as a mediator by assisting the landowners in settling the discrepancies and achieving an acceptable result. The landowners may seek additional opinions from other surveyors. If the landowners hire a second surveyor to confirm the findings, the first surveyor must be willing to provide the subsequent surveyor with the evidence relied upon in reaching his decision. The surveyor should assist the landowners in the form of a fact finder reporting the evidence recovered to those who are asked to evaluate his findings.

The surveyor should maintain an open *dialogue* with the reviewer to ensure that any evidence recovered before or during the review is shared between the surveyors. The goal of the surveyors should be to resolve the discrepancies using any method or procedure available so that the conclusion reached is a unanimous one. Differing opinions between surveyors *must* be resolved between the surveyors. If the problem causing the differing opinions is not resolvable and the ambiguity results in equally acceptable but differing results, the surveyors should design alternate solutions that the landowners can utilize to repair the ambiguity. The landowners are the only ones with the *authority* to resolve the discrepancies. Given the proper solutions, most landowners will readily resolve the conflict.

Occasionally, the landowners challenge the surveyor's findings in a court of law. The land surveyor serves a somewhat differing role when presenting his findings to the court. Few professions are afforded the latitude that the surveyor enjoys. The surveyor often performs two separate functions in court. One function is as a *lay witness* whose responsibility is to present the evidence that the surveyor utilized in reaching his decision. As a lay witness, only evidence directly perceived by the surveyor is presented. No opinions are expressed. The surveyor performs his role as the "fact finder" and simply presents the evidence leading to the facts concluded. The second function the surveyor may be asked to perform is the role of the *expert witness*. As an expert, the surveyor is relied upon by the court to assist the trier of fact in interpreting the evidence presented and understanding the legal principles and their proper application to the fact situation. The expert

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witness is afforded the ability to express his opinion as to the ultimate issue before the court. That is, the surveyor's opinion where the boundary is located.

The land surveyor is charged with the *responsibility* to know and to follow the laws regarding property boundary location and to execute that responsibility faithfully. It is the execution of the responsibility that takes the surveyor from the realm of merely "following the law," as if driving 55 mph, to "executing the law," as if passing judgement on the boundary location.

Chief Justice Cooley made an interesting observation regarding the land surveyor:

"Of course, nothing in what has been said can require a surveyor to conceal his own judgement, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence had fixed the rights of parties as if it were at another."

This dichotomous position that the surveyor is confronted with has caused much consternation and dialogue among the profession. In the surveyor's *haste* to complete the survey, he often will choose the solution which yields the most certainty while requiring the recovery of the least amount of evidence. The solution is likely to result in the monumentation of the record boundary position in spite of any direct evidence contrary with the occupational improvements.

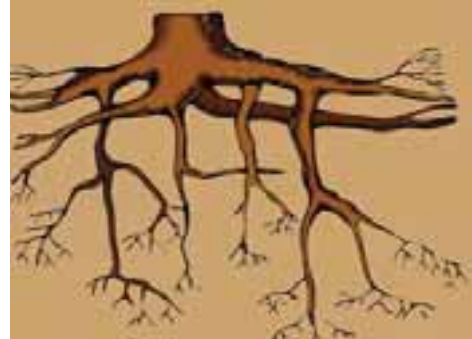
Chief Justice Cooley also observed that:

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

The surveyor's *impatience* is precisely the root of the difficulty. The surveyor, when faced with conflicting evidence, must step back, re-evaluate the evidence, perhaps begin a lengthy quest for

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additional evidence, and be willing to allow the necessary passage of time for all things to be adequately considered. The conflict, once adequately assessed, must be communicated with the landowners adjoining the boundary under consideration. They must be given the information concerning the source of the problem, the impact of the problem, and the possible remedies available to resolve the problem.



Most landowners, once thoroughly informed, will negotiate a settlement to remedy the situation. The input of the surveyor during the negotiation phase can be crucial to the outcome of their decision. The surveyor can suggest the appropriate remedies that are available to meet the needs and desires of the landowners. The surveyor must be familiar with the state and local *regulations* which may bear weight on the possible solutions to ensure the chosen remedy will not cause additional problems.

Determining the Root of the Problem

As the development of the nation progresses, land use restrictions arise, and complex regulations are enacted, the surveyor's knowledge, education, and expertise in these areas must increase. The surveyor is less often viewed as the frontiersman of an undeveloped region, but as taking on a role more closely involved in the legal profession as a team player in the resolution of boundaries and development project approvals. The surveyor's knowledge in these arenas is crucial, not only in *documenting* the resolution of boundary conflicts, but also *assisting* in their resolution.

Proper resolution of any problem begins with discovering the root of the problem. Rushing head long into a solution without first defining the nature of the discrepancy can yield disastrous and expensive results. Employing the surveyor early on can yield quick and permanent solutions through the joint resolution of commonly held boundary problems. The neighbor, the unfortunate recipient of a hasty lawsuit, likely shares the same problem as the client who initiated the contact.

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The surveyor's knowledge must encompass the rules and procedures that the court utilizes in determining the position of a boundary. The surveyor already uses the same processes as the judge

An undefined problem has an infinite number of solutions. - Robert A. Humphrey

For every complex problem, there is a solution that is simple, neat, and wrong. - H. L. Mencken

and jury to reach the ultimate conclusion of where the boundary is. The courts have established the rules; the surveyor must apply the rules to the unique facts as the case admits and expresses his opinion as to the location of the boundary.

In January, 1881, a group of surveyors met for the second annual gathering of the Michigan Society of Surveyors and Engineers to discuss

the matters which concerned their profession. An invited speaker to the event was Thomas M. Cooley, Chief Justice of the Supreme Court of Michigan. Justice Cooley shared with the group his insights which have proven timeless in their wisdom. The transcript of his presentation, entitled *The Judicial Function of Surveyors* has been published and republished in surveying textbooks since that time. The article can currently be found in the Appendix of the most recent edition of *Evidence and Procedures for Boundary Location*, fifth edition, published in 2006. Chief Justice Cooley pointed out the importance for the land surveyor to follow the rules of the court when determining land boundary locations. He stated that:

“The surveyor, on the other hand, must inquire into all the facts, giving due prominence to the acts of parties concerned and always keeping in mind ... that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.”

The principle pointed out by Cooley for all surveyors to consider is that there is little distinctive difference between the role the surveyor plays when conducting a survey and the role played by the judge and jury when determining the location of a boundary between landowners before the court.

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The vast majority of rules which the surveyor applies during the survey are rules determined under common (court-made or case) law. The statutory rules which find application by the surveyor are the same statutory laws which govern the court in its decision. When one closely reviews the “lights and rules” which govern the court, it is readily apparent that they are the same “lights and rules” which govern every determination made by every surveyor of every boundary location. The surveyor cannot declare a found monument as controlling the boundary nor can he set a monument intended to control a boundary without application of some legal principle which supports the representation. Understanding the rules which govern the judicial process will give the surveyor insight to the resolution of conflicts discovered during the course of the survey.

Understanding The Judicial Process

Most of us, when we consider what we know as the “judicial process,” flash back what we’ve seen on television. We perceive images of the criminal trial argued before the judge in robe and attendant jury awaiting their decision of “guilty” or “not guilty,” or the arguments and objections made over evidence being presented and testimony being heard. What connection, if any, does this court-room drama have with the duties and responsibilities of the land surveyor? Certainly the surveyor’s technical abilities to utilize the surveying equipment are skills which aren’t governed by the court. Or, are they? Consider the court rule:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The surveyor’s opinion, according to the rules of evidence which govern the courts, must be based upon sufficient facts or data, reliable principles and methods, and the reliable application of the

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principles and methods. When this rule is applied to land boundary determination, the surveyor's techniques, methods, and equipment must be capable of proven reliability.

It is important for the land surveyor to know, understand, and apply the rules of law which govern his decisions with regard to boundaries. The surveyor's attention is primarily focused upon the statutory and common law principles which govern their final opinion, however, the rules of law which govern the courts also include procedural rules as well as evidentiary rules. The *Uniform Rules of Evidence*, adopted by at least 42 states, govern the gathering and evaluation of evidence which the surveyor and the court will review to derive the facts of the case. The *Uniform Rules of Civil Procedure* govern the disclosure of the evidence and opinions reached to all parties of the case. *Rule 26* of the *Uniform Rules of Civil Procedure* defines the contents of the expert report required to disclose the evidence, analysis and opinions expressed by the surveyor in reaching their conclusions.

Rule 26(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the data or other information considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

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- v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

The surveyor must keep in mind the *Rules of Evidence* and the *Rules of Civil Procedure* which govern the courts and juries, and should allow them to direct his research, investigation, and analysis of the evidence as well as his final decision-making process used to derive his ultimate opinions. The rules of law found in statute, common law, local regulation, or judicial code will direct and guide every step of the surveyor. An intimate knowledge of the rules which govern is vital to reaching the determined goal.

The Nature of Property Boundaries

Boundaries, a seemingly fundamental concept, are often misinterpreted or misunderstood by the various professions involved. The real property itself is thought of as being fixed in location, having specific dimensions of length and width, and perhaps height or depth when considering excavation or the height of a high-rise structure. We tend to view property as being static when, in reality, the property as well as its boundaries are affected by the passage of time. It is said that the passage of time heals all wounds, perhaps because memories of those wounds fades over time passed. Boundaries, too, have a tendency to fade with the memories of those aware of their first intent. Knowledge of their location may become lost as the physical evidence of their location deteriorates or is destroyed.

The succession of subsequent surveys which document boundary location evidence and the maintain an ongoing record of the surveys is vital to the perpetuation of stable land boundaries. The surveys can document the faded evidence as well as its rehabilitation by additional evidence or by continued refinement of the measurement process using improved technology. Discrepancies in past surveys and title records discovered during the course of the resurvey can often be resolved and documented by the surveyor. This documentation process requires an understanding of the fundamental nature of boundaries – how they are created and how they are established.

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How are boundaries created?

Creation of boundary lines is typically viewed as a unilateral transaction with some elements of bilateral accord between the grantor and the grantee. In order for a boundary line to be created, the owner (the grantor) must first intend on creating a boundary line. The *intent* of the grantor is paramount to determining the boundary line location. If there is no intent to create a boundary, then no boundary can be created. The intent of the grantor, as with any conveyance of property, can only be one of two possibilities. Either the owner intends to convey property to an existing boundary, or they intend to create a new boundary, thereby retaining ownership of a remaining portion of their land and creating a boundary dividing the two ownerships.

It is insufficient for the owner to simply intend on creating the boundary line without the necessary action taken to actually convey the property lying on the opposite side of the intended boundary to a second party (the grantee). Without the conveyance to a separate owner, there can be no separation of ownership. Without a separation of ownership, there can be no boundary created.

The conveyance process requires the fulfilment of a somewhat unique contractual relationship between the grantor and the grantee. The contract requirements are basically found in five parts:

The grantor must make an *offer* to sell a portion of his land. The offer is followed by the *acceptance* by the grantee. The price to be exchanged, known as the *consideration*, and the size or configuration of the parcel is negotiated between the parties until an agreement is reached. The agreement constitutes a meeting of the minds or *assent*.

Both parties are presumed to have achieved a mutual understanding of what has been offered and accepted. The last necessary step in the creation of the boundary line is the actual conveyance between the parties witnessed by the delivery of the deed from the grantor to the grantee, termed *execution*. Some states require recording of the conveyance instrument as necessary proof of delivery.

Elements of Boundary Creation

1. an *offer*;
2. an *acceptance*;
3. an assent or “meeting of the minds”;
4. a sufficient cause or *consideration*; and
5. *execution* or fulfillment.

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Once all four contractual requirements are fulfilled, the property conveyance has happened and the boundary line has been *created* (at least in theory). It is certain that there are two separate parcels with a common line of division between them, *i.e.* the property line or boundary. Depending upon the actions taken by the grantor and the grantee prior to the conveyance, *the boundary line may or may not have been physically run out on the ground and monumented by a survey.* Fulfillment of the four contractual requirements is all that is necessary for the boundary line to be created. The parties may or may not have taken any action or made any representation and reliance to yet establish the exact location of the boundary on the ground.

How are boundaries established?

Once the boundary has been created, a second series of requirements must be fulfilled to establish its location on the ground. These required steps are often considered as taken concurrent with the steps required to create the boundary and are best when taken together. However, there is no law which requires the steps to be taken concurrently. The process for establishing the location of the boundary can be broken down to: 1) an *intent* to establish the boundary; 2) an *assertive action* to locate the boundary on the ground; 3) a *representation* that the line as located is intended to mark the line; and 4) *assertive or passive reliance* upon the line as the boundary.

Elements of Boundary Establishment

1. ***Intent*** to establish the boundary;
2. ***Assertive action*** intended to locate;
3. ***Representation*** of the line as the boundary; and
4. ***Reliance*** upon the line as the boundary.

Preferably, the parties choose to retain the services of a land surveyor to run, monument and describe the lines of conveyance on the ground prior to the execution and delivery, thereby leaving the greatest amount of evidence possible to physically witness the locations of the boundaries agreed upon. In this preferred scenario, the surveyor's monuments would be automatically elevated to the level of acceptance as the parties would have fulfilled all four elements of action taken to establish the boundary line. The creation of the boundary concurrent with the parties *intent* to establish the

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location of the boundary, their *action* taken to survey the boundary and monument its position on the ground, their *representation* that the monuments mark the boundary, and their *reliance* witnessed by the subsequent execution of the conveyance document which creates the boundary would fulfill all elements for both the creation and establishment of the boundary. All four of the basic contract requirements to *create* the boundary are fulfilled and all four of the elements necessary to *establish* the line's location are fulfilled as well. This is why the original survey process is always the best way to create and establish boundaries. The two functions happen in one instance of time. This is also why the mantra, "*original monuments control*," is so often chanted among the surveying profession.

When the parties choose to short circuit the original survey and conveyance process (usually in an effort to save money and/or time), no survey is run and no monuments are placed on the ground establishing the boundary location prior to its creation. Evidence of the location of the boundary line is described in the conveyance document based upon some mutually conceived notion of the boundary line placement. Because there is no physical manifestation of the boundary line made on the ground, the parties arrive at a conceptual or theoretical idea of *how* the boundary location is to be determined, but have not made any attempt to determine *where* the boundary location is. The process for subsequent determination is incorporated into the description of the property which contains the instructions necessary for a subsequent and *anticipated* surveyor to establish the boundary lines on the ground.

When such a scenario is contemplated by the grantor and grantee, it is logical to deduce that they fully *intend* to delay establishment of the boundary location until some *future* time. Occasionally, the parties will stipulate in their agreement for a subsequent survey to be undertaken by one or both parties at a mutually agreed-upon time and joint payment provision, *i.e.* the called-for survey. Certainly, it is not logical to consider that the boundary line would simply remain indeterminable without subsequent court action or reformation of the original agreement. The parties have made an agreement which contains all of the necessary ingredients to make the subsequent boundary line determination by fulfilling the four establishment provisions at some later date.

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The establishment provisions are found quoted throughout the history of common law in cases across the nation. The question put before the courts in every action regarding the location of a boundary is the same. “*Where is the boundary?*” This question is always answered in the same ways and in reliance upon the same principles of law in every instance. Evidence is gathered and presented for the purpose of determining the facts of the case, then the rule of law is applied to the facts and the determination of the boundary is made.

The rules of law are the same. The court will look for evidence of the intention to *create* the boundary and the evidence resulting from the physical action taken by the owners to *establish* its location on the ground. The boundary location will be determined upon the fulfillment of the legal and contractual requirements. Has the boundary been established by a *written* contract, by an *oral* contract, or by an *implied* contract revealed by their actions over a long period of time? Has the boundary been established by a *representation* made by one party and passive or active *reliance* by the other incurring substantial costs which now *estops* one of the owners from declaring the truth? Has the boundary been established by the *assent* of the landowners, acting in *good faith*, and evidence of their *mutual satisfaction*? Has the boundary become established by some *bona-fide right* established in reliance upon a *local corner* of *common report*? These laws, applied by the courts to determine boundary locations in every case, have no affect upon *title* or ownership of the property. These laws only deal with the *location* of the boundaries as established on the ground by the landowners.

The Nature of Real Property Conflicts

Real property conflicts can be categorized into three basic groups: 1) *Title conflicts*, 2) *Deed conflicts*, and 3) *Location conflicts*. Each of these areas of conflict have individual bodies of law which are designed to address and resolve conflicts when they arise. Title conflicts involve issues of property ownership. Deed conflicts result when the writings themselves contain ambiguities and uncertainties. Location conflicts arise from a myriad of property owner actions, both active and passive, which occur during their physical occupation of the land. Each basic group should be

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viewed independently in order to understand the various legal principles designed for achieving resolution when conflicts are discovered.

The facts of each case bring to light the nature of each conflict. A single case may occasionally incorporate more than one category, however each specific issue should be distinctly identified. The perspective for each will require the unique application of certain legal principles. Each principle is designed from a different perspective which will provide direction to resolve the particular conflict. A principle designed for resolving ambiguous deed construction is misplaced when resolving a boundary whose location has been established by mutual agreement of the landowners.



Title Conflicts

Understanding land title and the variety of conflicts which arise requires a fundamental review of the components which comprise the totality of ownership. When all components which represent real property ownership are considered, an estate is formed. The estate is made up of all rights, title and interests associated with or appurtenant to the property. Following are the definitions of the terms commonly associated with real property which must be clearly understood. The definitions are excerpted from *Black's Law Dictionary, 6th Ed.*

Title - The formal right of ownership of property. Title is the means whereby the owner of lands has the just possession of his property. The union of all the elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land; also, the evidence of such ownership. Such ownership may be held individually, jointly, in common, or in cooperate or partnership form.

One who holds vested rights in property is said to have title whether he holds them for his own benefit or the benefit of another.

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Rights - A power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage; an interest or title in an object of property; a just and legal claim to hold, use, or enjoy it, or to convey or donate it, as he may please.

Interest - The most general term that can be employed to denote a right, claim, title, or legal share in something. In its application to real estate or things real, it is frequently used in connection with the terms "estate," "right," and "title." More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title.

The term *title* is frequently used to denote not only the ownership of the property but the associated rights and interests which are, in fact, different particular components of the title. The term title should be used to specifically relate the ownership. According to *Bouvier*, "perfect title is the unity of the right of property, the right of possession, and actual possession" (3 *Bouv.* 2962; 1914). The *rights* of the title holder include such rights as access, occupation, surface, subsurface, subjacent, timber, mineral, development, etc. The interests reflect those particular outside interests which impose restrictions upon the title holder's rights. *Interests* may be imposed by governing bodies such as zoning and development requirements, statutory interventions such as wetland or shoreline restrictions, or homeowner and neighborhood associations which include particular covenants, conditions and restrictions. Interests are commonly interposed through contractual obligations with lending institutions or lien holders.

The *statute of frauds*, enacted by the English Parliament in 1677 (29 *Chas. II*, c. 3) has required that all conveyances affecting title, rights or interests in real property are to be documented in writing. The New England colonists of America, as early as 1627, required all transfers of property to not only be made in writing, but to also be duly recorded in the public records. The written record minimizes confusion in the conveyance of title by compensating for faded memories and overcoming misrepresentations or fraud, common in the ancient days of fiefdom. Recording a conveyance document in the public record also offers an additional level of protection backed by state statute assuring the *bona fide purchaser* that any subsequent purchaser will be responsible for knowing the content of the record under the doctrine of *constructive notice*.

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Title conflicts typically involve issues which expose uncertainties affecting the ownership of a particular parcel of land. The parcel may be well defined with regard to its location and the deed can be completely void of ambiguity, yet the title itself may be brought into question. The *quiet title action* was designed for the purpose of clearing questions of land ownership. Ownership uncertainties originate from numerous sources such as the process of inheritance or *descent*. Ambiguities in wills, trusts, or probate claims can result in clouds lingering over the title. Lack of heirs may revert the property ownership to the state or other sovereign through the doctrine of *escheat*. Complications in partnerships can spawn *partition actions* to settle or divide ownership interests. The outright abandonment of the property, a common occurrence during the westward settlement, resulted in *adverse possession* claims affecting ownership of entire parcels.

Title conflict resolution is typically not within the scope of the land surveyor's duty. While the surveyor may become proficient in title matters and the determination of ownership of a particular property, such determinations are ancillary being not necessary for the determination of boundary locations. The surveyor must, however, have an intimate understanding of title matters in order to properly depict the type of holding, particularly the extent of title holdings relative to easement rights. The surveyor may also develop a particular expertise regarding the research of title records.

“Before further discussing the trial court's rulings with respect to the surveys we pause to state an established rule. It is that surveys merely establish boundary lines. They do not determine title to land involved. The subject of title is no concern of the surveyor.” (*Swarz v. Ramala*, 63 Kan. 633, 66 P. 649; *Wagner v. Thompson*, 163 Kan. 662, 186 P.2d 278.)

Determinations of title matters will affect the final depiction of a boundary based upon the surveyor's understanding of the nature of the conveyance. The depiction of an ownership boundary (title) is distinctively different from that of a right of use for a utility installation or access road (right). The surveyor must be aware of the distinctive differences between title, rights, and interests in land to assure proper depiction on the final survey.

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Deed Conflicts

It is generally supposed that a proper description of a parcel or tract of land is sufficient only when the terms of the deed precisely enumerate the boundaries. Such supposition is not a requirement imposed by the courts. The purpose of the description is to merely provide a unique *identification* of the subject matter parcel. The description must be capable of isolating the subject property apart from any other parcel. The goal of the description is to iterate *what* is being conveyed; if you want to know *where* the boundaries are, get it surveyed. When the description is successful in accomplishing that goal, it is deemed sufficient.

“Furthermore, it is the established rule that the courts will be liberal in construing descriptions of premises conveyed by deed and that a description of land is sufficiently definite and certain if it is possible for a surveyor to ascertain from the description, "aided by extrinsic evidence," what property was intended to be conveyed. *Sequin et al v. Maloney-Chambers*, 198 Or 272, 281, 253 P.2d 252 (1953).

Thus, as stated in *Bogard v. Barhan*, 52 Or 121, 96 P 673 (1908), the test is:

"Can a surveyor, with a deed or other instrument before him, with or without the aid of extrinsic evidence, locate the land and establish the boundaries?"

See also *Hamilton et al v. Rudeen et al*, 112 Or 268, 272, 224 P 92 (1924).” *O'Hara v. Brace*, 258 Or. 416, 482 P.2d 726 (Or. 03/24/1971)

Many terms used in a description become antiquated and their meanings change over time. Other terms may seem to be in direct conflict with each other. It is important to view each description in light of the circumstances which surround its creation. Understanding the historical terminologies, techniques, procedures, and reasoning used to create the description are essential to understanding its meaning. Through proper analysis and application of established rules, the meaning and intent of the document can be properly construed. The rules provide a reasoned process which gives precedence to that which is most certain in the description (a *locative call*) over that which is least certain (an *informative call*).

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“The court also found applicable well-established rules of priority of references; rules for harmonizing calls in deeds or surveys; and the requirement that the court consider all the evidence. Applying these rules to the evidence, the court determined that the White survey controlled, that it more accurately set forth the boundary, and that it set forth the true boundary. The court found significant Mr. White's conclusion that the white oak referenced in both deeds was the corner boundary of the tracts and Mr. White located the tree. "This monument is a natural or fixed object which is a locative call, served to fix the boundaries. It is not unreasonable in determining this boundary dispute that this white oak is the fixed object which, when applied, harmonizes the Ezell and Duncan deeds." *Ezell v. Duncan*, No. M2003-00081-COA-R3-CV (Tenn.App. 12/15/2004)

There are three basic styles of written descriptions in use in various parts of the country and for various reasons. Some styles are more common than others and some are more often preferred, but each style is appropriate for the individual circumstance and custom as long as it is sufficient. The three most common types of descriptions are: 1) *reference descriptions*, 2) *bounding descriptions*, and 3) *metes and bounds descriptions*. *Reference descriptions* commonly refer to a map or survey which is filed in the record and which identifies a certain tract either by number or letter. A *bounding description* identifies the boundaries of the subject property by referencing locative calls for lines of record such as adjoining properties, streets, or natural features. Bounding descriptions may or may not contain a combination of informative course measurements incorporated with the locative bounding call. *Metes and bounds* descriptions provide a series of consecutive courses delineated by informative measurements and directions with locative calls for physical features which represent the boundaries or corner monuments. Determination of when a locative call controls over an informative call is critical to the proper construction of the intent of the description.

Location Conflicts

The conveyance of a portion of a parcel of land by a landowner is presumed to follow a set pattern of events. The conveyance requires the entering of a contractual agreement between the buyer and the seller. This agreement is somewhat unique in comparison with the typical formation of an agreement. The contractual agreement contains certain necessary elements. It is essential to the

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existence of a contract that there be an offer, an acceptance, an assent or “meeting of the minds, a sufficient cause or consideration, and execution or fulfilment.

The typical agreement is a two-party document which requires the signature of both parties forming a mutual covenant. The instrument of conveyance for a land transaction, however, contains the signature of only one party, the grantor. The reason that the grantor’s signature is the only one required is that the grantor is in complete control of the transaction. It is the grantor who determines the price of the sale and it is the grantor who determines the placement of the boundaries of the parcel being sold. The grantee does have the ability to negotiate the sale price or to negotiate the size of the parcel being purchased; it is the grantor, however, who has the ultimate control over the final conditions of the property transfer. It is for this reason that the terms of the conveyance document are interpreted *against* the grantor.

The grantor and the grantee are presumed to have entered into the final agreement with full knowledge of the location of the boundaries of the parcel. They have, in the normal contractual sense, entered into a “meeting of the minds” and the agreement is formed. The conveyance document is prepared which identifies the parcel of land being conveyed, the consideration is exchanged, and the document is executed and delivered.

In an ideal world, the monuments placed on the ground prior to the conveyance will be fully described in the conveyance document while perfect measurements will depict their locations. The monuments will be easily recognized and well known to the adjoining owners, will be consistently relied upon by them, and will remain undisturbed for eternity. Unfortunately, none of us exists in this ideal world. The landowners don’t always have a survey performed when the boundary is first contemplated. The surveys are not done with perfection and never will be. The descriptions do not always reflect complete descriptions of every monument intended to mark the boundaries and the landowners are unaware of the monuments which become obscured or destroyed.

As ambiguities, uncertainties, or doubt arises regarding the location of a boundary, the duty to ascertain its location falls upon the adjoining owners. They may or may not call in the surveyor to assist them in recovering the obscured monuments. They may choose to resolve the location

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according to their own satisfaction. They may even rely upon monuments which were placed in error or may make improper assumptions when resolving the location. The conflicts which result are as varied as the reasons used to create them.

Fortunately, the law does not prevent the landowners from resolving the uncertainties and require them to forever live in doubt. The law provides remedies which are designed to resolve the location of the boundary by allowing the owners to establish its location with confidence. These legal remedies, when recognized and applied, are designed to stabilize boundary locations and prevent their disturbance by constant revision. However, in order for these remedies to work, they must be applied by the persons charged with their application: the surveyors. The surveyor must be vigilant, when conducting the survey, to be aware of the indications that the boundary location has been established. Monuments uncalled-for in the conveyance documents, physical evidence of improvements which appear to reflect the boundary location, testimonial evidence of current beliefs or evidence of historic occupation of the land might provide the surveyor with evidence that the boundary location has been established prior to the surveyor's visitation.

Resolution of Conflicting Evidence

The surveyor's duty changes dramatically whether they are locating a boundary for the first time or whether they are locating a boundary which has been established before their visitation. When laying out a boundary for the first time, the surveyor is tasked with simply following the instructions of the grantor. Whether those instructions are followed before or after the conveyance is of little consequence. The instructions must be followed. When locating a boundary which has already been located, the surveyor's task is entirely different. The surveyor must gather the evidence necessary to determine the location of the boundary as established by the evidence.

“These fundamental survey principles provide that the parties' intent is paramount to all other considerations when interpreting surveys and conveyances.” *Olson v. Jude*, 73 P.3d 809 (MT 2003)

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When physical evidence of a boundary location is recovered by the surveyor, it is doubtful that the evidence recovered will be in complete harmony with the written record. Discrepancies or conflicts in the evidence are routinely addressed by surveyors, often becoming a second nature requiring little forethought. While application of the legal principles designed to resolve conflicts in evidence may seem routine to the surveyor, the landowners and the courts are not nearly as adept to the process. The surveyor must be aware of the fundamental rules established by the courts for the resolution of conflicts and must apply them accordingly. The better the surveyor can understand and explain those rules, the more certain their application of the rules will be accepted.

Intent

The intent of the landowners when creating any boundary, if properly ascertained by the surveyor, will provide certainty in the location of the boundary. The landowners' *intent* is found not only expressed in the words of the conveyance, but in their mutual understanding of the contractual agreement and their subsequent actions taken as a result of that understanding. The intent of the landowners is paramount to the resolution of conflicts between adjoining parcels. When the descriptions of two parcels are perceived as causing an overlap or gap, study of the landowners' actions and subsequent treatment of the land will yield important clues as to their intent.

The state of Oregon, unlike many other states, has incorporated several common law principles for construing descriptions into their statutes. This action has yielded a concise resource showing the interaction between statutory provisions and their application by the courts.

"In interpreting the deed, we resort to the familiar methodology established by statutes and case law. Our objective is to ascertain the meaning that most likely was intended by the parties who entered into it. ORS 42.240 ("In the construction of an instrument the intention of the parties is to be pursued if possible[.]"); see *Tipperman v. Tsiatsos*, 327 Or 539, 544-45, 964 P2d 1015 (1998) (construing deed); *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997) (construing a contract). We look first to the language of the instrument itself and consider its text in the context of the document as a whole. If the text's meaning is unambiguous, the analysis ends, and we interpret the provision's meaning as a matter of law. *Yogman*, 325 Or at 361.

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To determine whether a term in a document is ambiguous, the court can consider evidence of the circumstances surrounding its execution. *Abercrombie v. Hayden Corp.*, 320 Or 279, 292, 883 P2d 845 (1994); *Batzer Construction, Inc. v. Boyer*, 204 Or App 309, 129 P3d 773 (2006); ORS 42.220; ORS 41.740.* A provision is ambiguous only if it is capable of more than one plausible and reasonable interpretation. *Batzer Construction, Inc.*, 204 Or App at 313. If the court determines that the document's provisions are ambiguous, the court may then examine extrinsic evidence with the goal of resolving the ambiguity. *Tipperman*, 327 Or at 544-45; *Yogman*, 325 Or at 363-64. If an ambiguity nonetheless remains, the court may resolve the contract's meaning by turning to applicable maxims of construction. *Id.* at 364-65. The goal is always to give effect to the parties' intentions. That objective applies to the interpretation of deeds as well as contracts."

*ORS 42.220 provides:

"In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting."

ORS 41.740 provides, in part:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties * * *, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties." *Connall v. Felton*, 201 P.3d 219, 225 Or.App. 266 (Or.App. 01/14/2009)

One must keep in mind that the purpose for the *rules of construction* are to construe the intent of the grantor. It is not possible for the words of the description to identify all evidence necessary for the determination of its boundaries. The description is but one piece of the evidence which the surveyor must discover before a proper determination can be made. The actions of the landowners before,

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during and after the conveyance as well as their testimony concerning the boundaries provide the surveyor with extrinsic evidence which must be considered. The surveyor's skill in gathering and interpreting the extrinsic evidence used to construe the intent of the scrivener is critical.

“It is not necessary, and it is not humanly possible, for the symbols of description, which we call words, to describe in every detail the objects designated by the symbols. The notion that a description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted. ... *Wigmore's compendium on "Evidence"*, 2nd. Edition, Vol. 5 § 247”

The surveyor must keep an open mind when running the lines of the description on the ground. Extrinsic evidence discovered during the course of the survey must be considered and evaluated. The ambiguities that arise during the course of the survey may be considered as latent ambiguities which exist within the framework of the deed. Such ambiguities may signal a re-visitation of the deed terms to determine if the evidence recovered is locative or informative in nature.

Practical Construction

The courts presume that, in the process of negotiation and assent, the parties have had opportunity to enter into a complete understanding of specifically what is being exchanged. They have taken the opportunity to identify the proposed boundaries on the ground by the placing of monuments, a description of the proposed boundaries is prepared and placed in the conveyance document, consideration is exchanged, the document is executed, and the transaction completed. Both parties are presumed to be fully aware of the location of the boundaries of the parcel on the ground. It is also presumed that any subsequent occupation is made in accordance with the mutual agreement. This presumption may be overcome by evidence to the contrary, however, absent such evidence the presumption will prevail.

Upon completion of the title transfer, the grantee may proceed to enter into possession of the parcel and to erect improvements. These improvements are located with reference to the boundaries established and made known to both parties prior to the transaction. Fence lines are erected along the monumented boundaries and buildings are constructed with reference to the boundaries and local

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set back ordinances. The actions of the parties involved from the time of the initial assent to the period of occupation are expected to be made in accordance with the agreement and form the trail of evidence which the retracing surveyor may recover and consider. Such actions are found to result in a *practical construction* of the intent of the parties upon the ground.

“Where the description of the land in a deed is uncertain or ambiguous as to the quantity conveyed, which is latent in character as here, it is proper for courts to resort to parol evidence, not to contradict the instrument but to explain the ambiguity or uncertainty, in order to show the situation and condition existing upon the property conveyed, the circumstances under which the conveyance was made and the practical construction put upon the conveyance by the parties for the purpose of ascertaining their intention. This inquiry should be confined to the time of the execution of the deed without reference to subsequent circumstances. (*Mayberry v. Beck*, supra, and see cases accumulated in *Swaller v. Milling Co.*, supra.) Thus, where a vendor places his purchaser in possession of land, as here, under a certain description in the deed, the vendor cannot afterward avail himself of any ambiguity in the conveyance, their contemporaneous construction fixing the intention of the parties.” *Brewer v. Schammerhorn*, 183 Kan. 739, 332 P.2d 526 (Kan. 12/06/1958)

“There is no more certain way of finding out what the contracting parties meant than to ascertain what they have actually done in carrying out the contract.” *City Messenger Co. v. Postal Tel. Co.*, 74 Or. 433, 441, 145 P. 657 (1915). [*Accord Tarlow v. Arntson*, 264 Or. 294, 300, 505 P.2d 338 (1973) (“How the original parties and their successors conducted themselves in relation to the agreement is instructive * * * of what must have been intended.”); *Wood et al. v. Davin et al.*, 122 Or. 74, 78-79, 257 P. 690 (1927) (“This court should not interfere with the practical construction placed upon their contract by those people who well understood their own contract and acted upon it for more than twenty years.”)]” *Goodman v. Continental Casualty Co.*, 141 Or.App. 379, 918 P.2d 438 (Or.App. 05/29/1996)

The monuments are often destroyed during the construction of the occupational improvements. Many landowners, intending to perpetuate the monument, will replace the monument with fence corner posts in the same position. In such a case, the fence line or post coupled with the testimony

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of the installer will be conclusive evidence of the position of the intended boundary location. Unfortunately, the retracing surveyor is typically not privy to such direct evidence after the property has undergone one or two conveyances and the original landowners or the fence constructor are no longer available.

The loss of direct evidence does not change the fact that the improvements were constructed in accordance with the original monuments. The simple fact remains but is more difficult to prove. Such is commonplace when retracing old boundaries. Time fades all evidence but the fading or loss of evidence does not result in the fading or loss of title or its boundaries. The boundary still remains as legally defined on the day of its creation; it just becomes more difficult to prove.

The retracing surveyor must look for additional evidence which may corroborate the position of the improvements. Such *corroborative evidence* may be found in the harmony of the improvements with those placed on other boundaries compared to the configuration of the boundaries identified on the original conveyance document. The proximity of the age of the improvements compared with the date of the original conveyance may also provide sufficient evidence to substantiate the original boundary location. The retracing surveyor often will look to historical records such as aerial photos, testimony of prior landowners, building permits, or site plans which may reveal the location of improvements relative to the boundaries.

When the *preponderance* of the evidence recovered suggests that the improvements were erected with reliance upon the original survey monuments which best express the original intent of the parties, the original boundaries may be reestablished in accordance with the evidence. The boundary location is not one based upon any form of occupational boundary or subsequent agreement, but is based upon the recovery of best available evidence remaining of the original intent. The boundary recovery is a process of retracement of the survey techniques and subsequent reliance upon them which establishes the original boundary as intended by the initial parties.

Some key elements to look for when recognizing evidence of *practical construction* are:

- (1) Age of the improvements in proximity with the date of the original conveyance;

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- (2) geometry of the original parcel relative to the improvements along successive boundaries;
- (3) harmony of improvements along successive boundaries of adjoining parcels;
- (4) lateral displacement of improvements along successive boundaries of the subject or adjoining parcels; and
- (5) rotational displacement of improvements along successive boundaries of subject or adjoining parcels.

Mistakes

The original grantor and grantee often enter into a mutual agreement based upon mistaken or erroneous information or a misrepresentation or fraud. Such misinformation may result in the establishment of a boundary which conflicts with the mutual intent of the parties. From the contractual perspective, there was sufficient meeting of the minds, however, both minds were equally dissuaded by the misinformation and the subsequent agreement results in a mutual mistake.

Upon discovery of the mistake or fraud, the original parties are not bound by the mistake and may modify the original conveyance to correct the deficiency. The modification of the original agreement requires recognition of the mutual mistake by both of the original parties and a mutual understanding as to the effect of the mistake. The parties can “open” the original conveyance document and “reform” the agreement to reflect their true intent. The *reformation* is not a process which is intended to alter the original agreement, but is one which alters the words of the document to reflect the original agreement.

“Parol evidence is admissible to show that because of mutual mistake the writing did not reflect the intentions of the parties.” *Unlimited Equip. Lines, Inc. v. Graphic Arts Centre, Inc.*, 889 S.W.2d 926, 933 (Mo. App. E.D. 1994); see also *Morris v. Brown*, 941 S.W.2d 835, 840 (Mo. App. W.D. 1997). When a party seeks to reform a contract based upon mutual mistake, “parol or extrinsic evidence is admissible to establish the mistake and to show how the writing should be reformed to conform to the parties’ intention.” *Everhart v. Westmoreland*, 898 S.W.2d 634, 638 (Mo. App. W.D. 1995). “[A] mutual mistake occurs

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when both parties, at the time of contracting, share a misconception about a basic assumption of vital fact upon which they based their bargain." *Alea London Ltd. v. Bono-Soltysiak Enters.*, 186 S.W.3d 403, 415 (Mo. App. E.D. 2006) (internal quotation omitted). "[W]hether parties are laboring under a mutual mistake is normally a question of fact." *Id.* (internal quotation omitted)." *Brown v. Mickelson*, 220 S.W.3d 442 (Mo.App. W.D. 03/27/2007))

"The existence of a factual mistake is a prerequisite for relief in a reformation action. *Friedman v. Development Management Group, Inc.*, 82 Ill. App. 3d 949, 953, 403 N.E.2d 610 (1980). Mistakes are divided into two groups. The first group consists of "those fundamental in character, relating to an essential element of the contract which prevent a meeting of the minds of the parties and so no agreement is made." *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 28, 37 N.E.2d 760 (1941). Mistakes relating to the identity of the subject matter of the contract are included within this first group. *Harley*, 378 Ill. at 28. The second group of mistakes involve circumstances in which an actual understanding has been reached by the parties but, through some error, their written contract does not express their actual understanding. "The former of these classes constitutes ground for rescission but not reformation, while the latter may be reformed." *Harley*, 378 Ill. at 28." *Wheeler-Dealer, Ltd. v. Christ*, 885 N.E.2d 350, 379 Ill.App.3d 864, 319 Ill.Dec. 79 (Ill.App. Dist.103/04/2008)

When one of the parties refuses to recognize the mutual mistake, the other party may seek remedy in court under a claim of reformation based upon the mutual mistake. The burden of proof of the mistake will be upon the challenging party but, if proven, the court can order the reformation of the original conveyance.

Rules of Construction

The courts have set forth numerous presumptive rules which form a basis for resolving ambiguities found within deeds. These rules are part of the rules commonly referred to as *rules of construction*. The ambiguities found in deeds may be classified in two separate categories; latent ambiguities and patent ambiguities.

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Latent ambiguity. A latent ambiguity is a defect which does not appear on the face of the language used. The language is usually clear and intelligible, suggesting a single meaning; however, the introduction of extrinsic evidence reveals a possibility of multiple interpretations or meanings.

Patent ambiguity. A patent ambiguity is apparent or obvious on the face of the instrument or inherent in the uncertainty of the language used such that its effect is to convey no definite meaning.

One of the requirements of a deed is that the description be sufficient to convey a single, identifiable parcel of land. The ultimate test of the description is whether it can be located on the ground by a land surveyor. An ambiguity in a deed description may be resolved by the surveyor by following the appropriate rules established by the courts. Applying rules of construction, however, does not constitute reformation of a deed. The description in the deed is followed.

ORS 93.310 Rules for construing description of real property. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it:

(1) Where there are certain definite and ascertained particulars in the description, the addition of others, which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by such particulars, if they constitute a sufficient description to ascertain its application.

(2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

(3) Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

(4) When a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title.

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(5) When tidewater is the boundary, the rights of the grantor to low watermark are included in the conveyance, and also the right of this state between high and low watermark.

(6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them, if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

Application of the rules of construction does not mean that a rigid or dogmatic approach should be taken to attribute all evidence to the four corners of the deed. The deed language must be viewed in light of the circumstances surrounding the preparation and the knowledge of the parties at the time of the writing. When latent or patent ambiguities arise, *extrinsic evidence* must be relied upon to assist in the construction. When convincing evidence is recovered showing a mutual mistake by the parties in drafting the document, such extrinsic evidence might be sufficient to justify reformation of the conveyance document language.

“The purpose of reformation based on mutual mistake is to make an erroneous instrument, or instruments, correctly express the real agreement between the parties. *Manning Lumber Co. v. Voget*, 188 Or 486, 500, 216 P2d 674 (1950).

"Where [the] written instrument is merely intended to record a prior, definite, and specific oral understanding of the parties, but, because of a mutual mistake, that instrument fails to set out the prior agreement correctly in some material respect, a court of equity will ordinarily reform it." *Id.*

The trial court found that the parties intended the garage be conveyed with Lot 6--instead of Lot 5--and that the boundary description contained in the sale contract was not consistent with that intention. That finding, if upheld, would justify reformation of the contracts to include the disputed land. See *Linenberger et ux. v. Schick*, 193 Or 14, 16, 236 P2d 925 (1951) (mutual mistake concerning location of garage justified reformation to eliminate encroachment); see also *Zink et ux v. Davis et ux*, 203 Or 49, 277 P2d 1007 (1954).” *Edwards v. Saleen-Degrange*, 161 Or.App. 156, 984 P.2d 854 (Or.App. 06/16/1999)

It is important for the surveyor to keep in mind that their survey should not be undertaken in such a way as to introduce language into a conveyance which isn't included or to neglect language that

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is included. Such actions might constitute the unwarranted reformation of the language contained in the instrument. The surveyor must remember that extrinsic evidence can only be used to provide clarification when an ambiguity arises; the same extrinsic evidence cannot be used to modify or contradict the clearly expressed terms of the conveyance.

Order of Importance of Conflicting Evidence

The land surveyor is guided by legal principles in his evaluation of the evidence for a boundary location. As conflicts are discovered between the various forms of evidence, application of the legal principles provides for their resolution. One such principle is the *order of importance of conflicting evidence*. The order of importance is a presumptive principle which can be used to preliminarily categorize certain evidence contained in the written record while recognizing the priority of rights created by a sequence of conveyances. The principle also recognizes the presumptive right of the landowners to stabilize the location of their boundaries through legal recognition of their agreement. The resolution of conflicts between recovered evidence is one of the most misunderstood problems for both surveyors and lawyers. Conflicting terms contained within the deed or other written conveyance occur frequently. Clearly written and unambiguous expressed language of the written conveyance occasionally is found to conflict with other writings or with the occupation of the land. Understanding the legal principles at play is crucial to the proper analysis and resolution of any boundary location.

**Order of Importance
of Conflicting Evidence**

1. Possessory Rights
2. Seniority Rights
3. Written Intentions
 - a. Call for a survey
 - b. Call for monuments
 - i. Natural
 - ii. Artificial
 - iii. Record
 - c. Direction (or Distance)
 - d. Distance (or Direction)
 - e. Area
 - f. Coordinates

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“Monuments, of course, are among the more important indicia of boundaries. They are classified into natural and artificial. Natural monuments are permanent objects found on the land as they were placed by nature. Artificial monuments are landmarks or signs erected by the hand of man. *11 C.J.S. Boundaries*, §§ 6 and 7, pages 546, 547. [“It] is one of the settled rules of the law of boundaries that calls for courses and distances, quantity, etc., will, in case of a conflict, be controlled by, and yield to, one for a natural object or landmark or permanent artificial monument.” *12 Am.Jur.2d Boundaries*, § 67, page 604; *Houska v. Frederick*, 447 S.W.2d 514, 518 (Mo. 1969). A monument has been defined as being a “fixed, visible object”. *Koch v. Gordon*, 231 Mo. 645, 133 S.W. 609, 610 (1910).” *Czarnecki V. Phillips Pipe Line Company*, 524 S.W.2d 153 (1975)

The courts have long recognized an order or hierarchy of evidence used in the interpretation of land boundaries. The hierarchy is based primarily upon the variation in the level of certainty that exists with each form of evidence. When terms contained within a deed are found to conflict, the surveyor must analyze the terms in their order of certainty and their classification as either locative or informational. A *locative call* is one which is found higher in the list and the informational term is typically found lower in the list. The locative term will have more certainty of recognition and position, the *informational call* will have the least significance. However, if the results obtained by adhering to the ranking of elements is clearly contrary to the overall intent of the deed, the clearly stated contrary intent of the deed will control.

The priorities are based on presumptions about the relative certainty of each type of evidence. There is an underlying fundamental principle which forms the foundation of the rules. When the reasons for adhering to the presumed priority ranking no longer exist, the presumed ranking should fail and the best available evidence should prevail.

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Boundary Agreements

Boundary agreement doctrines recognize a remedy which allows the landowners to settle an uncertainty or dispute over their existing boundary. The owners are encouraged to avoid litigation as a means of resolving disputes. If they can work together as neighbors, resolve any ambiguity discovered in their common boundary, the court will not intervene. There are numerous reasons that uncertainty exists. Faulty surveys, inability to measure with precision, destruction of monuments, and the loss of survey records all can attribute to the presence of ambiguities. Are the monuments recovered the identical monument called for in the conveyance? Are they a proper perpetuation of the former position of the called for monument? Can the boundaries be reestablished with certainty?

“In a long line of cases this court has recognized the principle that where parties by mutual agreement fix a boundary line between their properties, acquiesce in the line so fixed and thereafter occupy their properties according to the line agreed upon, it must be considered as the true boundary line between them and will be binding upon the parties and their grantees. The line becomes the true dividing line between the lands in question by virtue of such an agreement, even though a subsequent survey should establish a different boundary line. (*Beams v. Werth*, 200 Kan. 532, 438 P.2d 957; *In re Moore*, 173 Kan. 820, 252 P.2d 875; *Wagner v. Thompson*, 163 Kan. 662, 186 P.2d 278; *McBeth v. White*, 122 Kan. 637, 253 P. 212; and *Steinhilber v. Holmes*, 68 Kan. 607, 75 P. 1019.) Another established principle related to the issue is that the establishment of a boundary line by a survey, whether official or otherwise, does not determine the title to the land under controversy. (*Gnadt v. Durr*, 208 Kan. 783, 494 P.2d 1219; *In re Moore*, *Supra*; *Wagner v. Thompson*, *supra*; and *Swarz v. Ramala*, 63 Kan. 633, 66 P. 649.)” *Moore v. Bayless*, 215 Kan. 297, 524 P.2d 721 (Kan. 07/17/1974)

The evolution of survey equipment and techniques has undergone rapidly increasing improvements. These improvements have significantly increased the surveyor’s ability to measure locations with higher degrees of precision than at any time in history. The same passage of time that resulted in an increase of precision has also resulted in the degradation of the evidence left by the earlier surveyors. It is the protection, recovery and perpetuation of the original monumentation that

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increases certainty in boundary locations, not precision in measurements. Once the evidence of the original monuments is destroyed, the surveyor and landowners must rely on secondary forms of evidence to reestablish the monument's former position.

The replacement of the original position becomes more susceptible to error as the evidence of its former position fades. This uncertainty may, at times, escalate to an unacceptable degree that requires the landowners to enter into agreement as to the former position of the boundary line. The agreement of the landowners is not an agreement to create a new boundary to replace the former; nor is it an agreement to exchange portions of their land or to transfer ownership between the parties. It is an agreement meant to settle the uncertainty that exists in the location of the existing boundary. As such, the agreement will not fall under the purview of the Statute of Frauds and is an acceptable remedy.

“Where a boundary line between two tracts is unascertained or in dispute, the line may be established by parol agreement and possession or by an agreement implied from the unequivocal acts and declarations of the parties and acquiescence for a considerable period of time. (*McLeod v. Lambdin* (1961), 22 Ill.2d 232, 174 N.E.2d 869; *Ginther v. Duginger* (1955), 6 Ill.2d 474, 129N.E.2d 147; *Jones v. Scott* (1924), 314 Ill. 118, 145 N.E. 378.) When an unascertained or disputed boundary is established by either of these methods it will be binding on the parties to the agreement and their privies in estate. (*McLeod*.) The boundary, once established, will control the parties' deeds notwithstanding the statute of frauds. (See *Ginther*.) The principle upon which this conclusion is reached is that the effect of the agreement is not to pass real estate from one party to another but simply to define the boundary line to which their respective deeds extend. (See *Ginther*; *Jones*; 11C.J.S. *Boundaries* sec. 67, at 639 (1938).) The requirement that the boundary be unascertained or in dispute is therefore a necessary prerequisite to any agreement, since “[i]f the location of the true boundary line is known to the owners they cannot transfer the land from one to the other by an agreement changing such location.” See *Jones v. Scott* (1924), 314 Ill. 118, 121, 145 N.E. 378, 380; see also *Loverkamp v. Loverkamp* (1942), 381 Ill. 467, 45 N.E.2d 871.” *Hartzler v. Uftring*, 114 Ill. App.3d 427, 450 N.E.2d 1208 (Ill.App. Dist.1 05/09/1983)

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The agreement doctrines are founded on common law principles which have been codified by state statute in some jurisdictions. The doctrines are applicable in the vast majority of jurisdictions in the states, the common exception being those regions under the *Torrens* title system. The Torrens title system requires that every boundary be established by survey and provide for a method of establishment by adjudication process. The surveys are filed in the public record and are perpetually updated with each consecutive survey. The availability of survey records and the public maintenance of the record system decreases the likelihood of uncertainty or doubt in the location of any particular boundary line. Any attempt to locate a boundary line through agreement is typically disallowed in the Torrens system.

Parol Agreement

When an uncertainty or dispute arises, the landowners may enter into a parol (oral) agreement to settle the uncertainty. The *oral agreement* will be upheld in a court of law, however, litigation of oral agreements is rare. Disputes over oral agreements are difficult to litigate as they typically are reduced to a he-said she-said argument. One party may complain that the agreement settled a right of use rather than a fee interest. Another party may deny the very existence of the agreement altogether. Proof of the agreement is reduced to circumstantial evidence and becomes speculative.

- An Oral Agreement
- Between Adjoining Landowners
- Settling a Boundary of Uncertainty or Dispute
- Executed by Actual Location of the Boundary

There are occasions, however, when the landowners have rightly entered an oral agreement and continue to report their mutual understanding of the terms of the agreement. Such an agreement is proper and acceptable. The difficulty with oral agreements is that the original parties will eventually transfer the land to another and forget to inform them of the agreement or will take the memory of the agreement with them to the grave. The subsequent purchasers are left with the remnant of the agreement with nothing but faded memories to reestablish the original agreement terms.

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"An agreement between adjoining owners as to the location of a boundary line, though merely oral, is not, it is generally conceded, invalid as being within the Statute of Frauds, provided the agreement is followed by actual or constructive possession by each of the owners up to the line so agreed upon, and provided further, that the proper location of the line is uncertain or in dispute; the theory being that the agreement does not, in such case, involve any transfer of title to land, but merely an application of the language of the instruments under which the owners claim. On the other hand, it has been held that, if the boundary line is not doubtful or in dispute, an oral agreement for its change is invalid, this involving an actual transfer of land, within the statute." Tiffany, Real Property (2d Ed.) § 294

The rule of law recognizing the landowners' right to settle any uncertainty or dispute over their common boundary has been long recognized by the courts. The landowners' ability to resolve any uncertainty or dispute over their common boundary is fully recognized if not even encouraged by the court. There is much preference given to the owners when they choose to amicably settle their differences and establish their boundary by common accord than to resort to litigation as a solution to their uncertainty or dispute.

The unique and often overlooked distinction with the doctrine of oral agreement is the fact that the passage of time is irrelevant. The parties enter into a contractual agreement orally which has the intended purpose of fixing the location of their boundary and resolving any dispute or uncertainty they share. The fulfillment of that agreement is found in the erection of the fence or marking of the line in accordance with their agreement. The parties have entered into a contract by agreeing to establish the line and the terms of the contract are considered fulfilled when they do what they agreed to do; they make an assertive effort to mark the line in accordance with their agreement. Once the terms of their agreement are fulfilled, the line is established. There is no time element required to fulfill their contract. The parties don't have to wait for the line to be accepted. Their agreement and fulfillment of its terms is proof of their acceptance and satisfaction.

The goal of the land surveyor when confronted by evidence of a valid parol agreement is to encourage the landowners to remedy the record title by documenting the agreement. As Chief

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Justice Cooley suggested, “it is desirable that all such agreements be reduced to writing, but this is not absolutely indispensable if they are carried into effect without.” The land surveyor may act as a mediator to encourage and assist the landowners to properly document the agreement thereby correcting the record by converting the unwritten agreement to a written boundary line agreement. The surveyor has no authority to remedy the record without the mutual consent of the landowners. Should the landowners refuse to remedy the record, the surveyor can then resort to documenting the agreement by notation on the survey. The surveyor may include a narrative statement regarding the testimony received from the landowners stating the particulars of the parol agreement. The agreed boundary line location should be indicated on the survey along with an indication of the record boundary line which has been superceded by the agreement if ascertainable.

Implied Agreement (Acquiescence)

The implied agreement doctrine exists as a remedy to the longstanding occupation line which has been consistently treated as a boundary line between contiguous landowners. The landowners may have little or no recognition of a specific occasion resulting in an oral agreement. Neither of the current landowners may have installed the boundary line improvement and can give little or no evidence regarding the origin of the improvement. It may be that the improvement was installed by a former landowner who is no longer available or can not recall the conditions existent at the time the improvement was erected. For whatever reason, the evidence of the origin of the fence line has faded with the memories of the landowners and no clear evidence exists to explain why the fence line is located where it is.

- Occupation to a Visible Line Marked by Monuments, Fences or Buildings
- Mutual Recognition and Acquiescence in the Line as a Boundary
- For a Long Period of Time
- By Adjoining Landowners

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Implied agreements have been seen as a legal fiction that is required to bring stability to boundary lines established by the landowners most familiar with the original monument locations. The courts have long recognized the inaccuracies of the original surveys and the fundamental right of the landowners to settle the uncertainties in their boundary lines. It is presumed that the parties responsible for the erection of the improvement either knew where their boundary lines were or, if not, settled the uncertainty through negotiation and agreement. The fence line was constructed where the parties understood the boundary line to be. The actions of the landowners are readily apparent as the boundary line improvement is there for all to witness. It stands as a memorial to a legitimate agreement that was at one time entered in to by the parties, was consummated, and has been continually honored even though the memory of the agreement has long since perished.

“We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever expressly agreed as to the location of the boundary between them, if they have occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it as the dividing line between them, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing, and will not permit the parties nor their grantees to depart from such line. *Holmes v. Judge*, 31 Utah 269, 87 P. 1009. This rule is sometimes referred to as the doctrine of boundary by acquiescence. In the recent case of *Glenn v. Whitney*, Utah, 209 P.2d 257, Mr. Justice Latimer explained that the rule is bottomed on the fiction that at some time in the past the adjoining owners were in dispute or uncertain as to the location of the true boundary and that they compromised their differences by agreeing upon the recognized boundary as the dividing line between their properties. In *Holmes v. Judge, supra*, we declared that the doctrine of boundary by acquiescence 'rests upon sound public policy, with a view of preventing strife and litigation concerning boundaries' and that 'While the interests of society require that the title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law, these same interests demand that there shall be stability in boundaries'.” *Brown v. Milliner*, 120 Utah 16, 232 P.2d 202 (Utah 1951)

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The implied agreement doctrine is founded on the principles of acquiescence and repose. The principle of repose recognizes that the landowners tend to accept the locations of improvements. Whether the improvements are located correctly or not, the boundary line location is accepted by the landowners and peace settles over the neighborhood. The landowners occupy their land in accordance with the accepted boundaries and erect improvements upon what is perceived to be their property. Once the period of repose has run, no subsequent survey is allowed to upset the peace by supposedly fixing the boundary lines where the record position cannot harmonize.

The evidence available typically proves that the current landowners have mutually recognized that the improvement properly marked their common boundary line and that they have each occupied up to the improvement. No contrary evidence can exist that either landowner at any time prior to the running of the required time period was informed of the true location of the record boundary. Knowledge of the record boundary will interrupt the period of acquiescence. Once the landowner is aware of the true position of the record boundary line, the Statute of Frauds prevents the continued acquiescence in any other line. The continued acquiescence can be equated to a knowledgeable attempt to transfer title to land without a writing as required by the Statute of Frauds.

"Where a boundary between two tracts is unascertained or in dispute, the line may be established, first by parol agreement and possession; second, by an agreement implied from unequivocal acts and declarations of the parties and acquiescence for a considerable period of time; and third, in the absence of any agreement, by undisturbed possession for more than twenty years." *McLeod v. Lambdin* (1961), 22 Ill. 2d 232, 235, 174 N.E.2d 869, 871.

"If the dispute only relates to the location of the actual boundary line as determined by the subdivision plat, and that line can actually be ascertained from existing survey pins, then the actual survey will prevail over a parol agreement." (*Wright v. Hendricks* (1944), 388 Ill. 431, 434-35, 58N.E.2d 453, 454; *Darter v. Darter* (1980), 91 Ill. App. 3d 322, 325, 414 N.E.2d 862, 864.)

Evidence of knowledge of the record boundary line location could be presented in the form of prior surveys or the existence of original survey monuments known by the landowners to represent the record boundary line. Once the acquiescence period has run its course while the other elements are

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fulfilled, the occupation rights have ripened. The subsequent execution of a retracement survey of the record boundary line can not contradict the establishment of the line by established right. In a dissenting opinion written by Colorado Justice Kourlis in *Salazar v. Terry*, 911 P.2d 1086 (Colo. 02/12/1996) it was stated that:

“An acquiesced boundary often will not lie on the surveyor's true location. When this occurs, the legal effect of the doctrine of acquiescence is to rewrite the deed or document of title by operation of law to reflect the acquiesced change so that the agreed upon boundary becomes the true dividing line. *Duncan v. Peterson*, 3 Cal. App. 3d 607, 83 Cal. Rptr. 744, 746 (Cal. App. 1970); *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006, 1010 (Idaho 1953). An acquiesced line "becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location." *Young v. Blakeman*, 153 Cal. 477, 95 P. 888, 890 (Cal. 1908). "Thus, if the distance call in the deed is '500 feet,' it may henceforth be treated as if it read '517 feet' or '483 feet,' and every future deed of the land which copies or incorporates the original description will also be so read." Roger A. Cunningham *et al.*, *The Law of Property* § 11.8, at 765 (1984). See also Olin L. Browder, *The Practical Location of Boundaries*, 56 Mich. L. Rev. 487, 530 (1958).”

Once the statutory or common law requirements are fulfilled, the boundary between the contiguous properties has become established. No subsequent survey, even one which correctly discloses the location where the boundary “should have been,” will be allowed to upset or disturb the established location. The rules of law which regard the landowners’ right to jointly establish their boundary will trump any subsequent action to upset that right.

Equitable Estoppel

Equitable estoppel is a principle involving a representation made by one party which becomes binding if reliance by the second party based on the representation results in a detriment or injustice. The representation is typically founded upon either a mistake or fraud and the reliance must result in substantial costs for the boundary line to become fixed. The term “substantial” is rather subjective and varies in a case-by-case situation. What may amount to substantial costs in one case may not be considered substantial in another.

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- Misrepresentation by Record Title Holder
- Reliance in Good Faith by Adjoiner
- Substantial Costs Incurred

In *Barbara Van Kampen V. Jesse W. Kauffman*, 685 S.W.2d 619 (02/06/85), as relating to elements of estoppel, the Missouri Court of Appeals, Southern District Division Two, said:

"Equitable estoppel" or "estoppel in pais" is that condition in which Justice forbids that one speak the truth in his own behalf. *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 665[13] (Mo. 1970). It stands simply on a rule of law which forecloses one from denying his own expressed or implied admission which has in good faith and in pursuance of its purpose been accepted and acted upon by another. *Id.* at 665[14]. To constitute estoppel in pais, three things must occur: first, an admission, statement or act inconsistent with a claim afterwards asserted and sued upon; second, action by the other party on the faith of such admission, statement or act; and third, injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Id.* at 665-66[15].

The Kansas courts have addressed the elements necessary to prove the occurrence of an estoppel.

"The Court of Appeals recently summarized the doctrine of equitable estoppel in *Levi Strauss & Co. v. Sheaffer*, 8 Kan. App. 2d 117, 122, 650 P.2d 738 (1982), quoting *Bowen v. Westerhaus*, 224 Kan. 42, 45-46, 578 P.2d 1102 (1978), and *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 (1977):

"Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts."

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See also, *Iola State Bank v. Biggs*, 233 Kan. 450, 458, 662 P.2d 563 (1983).” *Turon State Bank v. Bozarth*, 235 Kan. 786, 684 P.2d 419 (Kan. 07/13/1984)

Elements of the doctrine, as applied to boundary establishment context have also been discussed.

“Mere silence on the part of the plaintiff does not work an estoppel against her. Before plaintiff can be held to have lost her land by estoppel she must have done something or concealed something from defendants which they did not know, upon which defendants relied in going upon her place and making improvements. She is charged here with nothing but "inactivity." Plaintiff must have had knowledge of facts of which defendants were ignorant. In this case the reverse is true. Davis moved the east line fence on plaintiff's land. The plaintiff did not. She may have had knowledge of Mavity's survey. Certainly Davis did. She may have had constructive knowledge that the survey was wrong. Davis had exactly the same knowledge. Davis knew as much or more about the Mavity survey than the plaintiff did. He knew the survey was made without notice to plaintiff, and in fact secretly as to her. If there is any concealment here it was by the defendants. (See, *Chellis v. Coble*, 37 Kan. 558, 15 P. 505; *Harris v. Deffenbaugh*, 82 Kan. 765, 109 P. 681; *Bank v. Commission Co.*, 113 Kan. 545, 215 P. 828; *21 C.J. 1150*; *31 C.J.S. 301*.) The result is the case of *Neiman v. Davis*, supra, settled the boundary line between the west half and the east half of the quarter section in question. Plaintiff alleged that she owned the west half of the quarter section, and defendants admitted that allegation. Their answer claimed no title nor right to possession of any portion of the west half of the quarter section. The allegations of the answer do not bring defendants within the statute pertaining to occupying claimants. Inactivity on the part of plaintiff did not constitute laches or estoppel which denied her right to recover.” *Neiman v. Davis*, 170 Kan. 208, 225 P.2d 124 (Kan. 12/09/1950)

Situations involving the establishment of boundaries by the doctrine of equitable estoppel are somewhat rare. The exchange of less than fee title are common remedies in situations dealing with access and building rights. In a California case, *Roman v. Ries*, 259 Cal. App. 2d 65, 66 Cal. Rptr. 120 (Cal.App.Dist.1 02/16/1968), a finding of equitable estoppel was determined. The facts of the case are as follows:

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“In May of 1959, defendants purchased land which presently adjoins plaintiffs' property. At that time plaintiffs' land was owned by Onni Reinikainen. When defendants purchased the property they did not know where the boundary line between the two properties was located. A month to three months after purchasing the land defendant A. B. Ries had a conversation with Mr. Reinikainen concerning the location of the boundary. At that time defendants were still in doubt as to the location of the boundary. Mr. Reinikainen purported to know the true location of the boundary and pointed this location out to Mr. Ries. Mr. Reinikainen, believing this to be the true line, acquiesced in defendants' improvement of their property up to this line. If the line was as Reinikainen stated, then defendants' house was built on their own property. Subsequently plaintiffs purchased Mr. Reinikainen's land. A survey, based upon the deeds of plaintiffs and defendants, as well as a subdivision map, disclosed that Mr. Reinikainen was incorrect. The survey showed defendants' home to be partially located on plaintiffs' property.”

“The court found that Reinikainen and Ries had agreed to the boundary line, and that in reliance thereon Ries had constructed a house and made other improvements on land which was in fact Reinikainen's property.” The court also noted “that the southerly ends of the original boundary and the agreed boundary commence at the same point. Each proceeds in a general northerly direction forming the sides of a narrow right-angle triangle several hundred feet in length, which at the northerly end of the Ries property has a base of approximately 40 feet. The Ries home encroaches on the southerly and narrower half of this triangle. The judgment accordingly awards to Ries at the northerly end of his property a portion of Roman's land which has no substantial relation to Ries' reliance or the extent to which he would suffer substantial damage because of such reliance. Such a result is obviously inequitable.” The judgement was reversed and remanded to the lower court to “make a determination as to the portion of land reasonably required to be awarded defendants in order that they will not suffer substantial loss by reliance upon the agreed boundary line.”

Physical evidence of improvements discovered along a boundary should always be considered by the surveyor. It is not enough for the surveyor to simply locate the improvements and show their relationship with respect to the written record or recovered survey monuments. The evidence must

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be considered and given its due prominence. It should be considered as a resounding trigger which brings the surveyor to a realization that additional evidence may need to be discovered before a solution can be found regarding the boundary location. Testimony of the landowners which help the surveyor to reconstruct the circumstances surrounding the erection of the improvements will provide critical clues to whether the boundary has been established in accordance with the law, or whether the parties have been simply mistaken in their belief.

Sequential and Simultaneous Conveyances

Parcels of land which are subsequently divided into several parcels can occur under two distinct bodies of law. They may be divided by *sequential* conveyance by a series of conveyances, or they may be divided *simultaneously*. A simultaneous division occurs typically by recording a subdivision plat which depicts a division of a single parcel into several tracts which might include streets, alleys, blocks, and individual lots. Each of these tracts are considered to be simultaneously created by the act of filing the plat. Because all of the tracts are created under a single act, they are considered to be equal in time and circumstance and, therefore, equal in right. Other examples of protracted and simultaneously created boundaries are found in wills, court decrees, and much of the fabric of the Public Land Survey System. *Aliquot* or “fractional part of the whole” descriptions such as half or quarter are considered simultaneous creations as one cannot create half of a parcel without simultaneously creating both halves. The same can be said with any aliquot division.

Often in such circumstances, monuments may be placed by the surveyor at each intervening block corner or section corner, leaving the individual lots or interior subdivisions defined by a protraction diagram of the lot or fractional boundaries. *Protracted lines* are depicted on the plat without the benefit of having been located on the ground by survey and monuments. Any differences discovered between the dimensions of a given block as depicted on the plat and those found between the monuments on the ground are generally distributed equally amongst the lots, each being given its proportionate share of any excess or deficiency.

The principle of law designed to resolve discrepancies is referred to as the *rule of apportionment*. The apportionment rule is widespread and typically well established in most jurisdictions with a few

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exceptions, some regions of upper New York being an example. The apportionment rule, while being widely accepted, is nonetheless limited in its application.

“The law is well established that where a tract of land is subdivided into lots, title to which becomes vested in different persons, and the actual aggregate dimensions of such lots are either less or more than the aggregate dimensions called for in the plat, the deficiency or excess is borne by all the lots in proportion to their areas as indicated by the plat. (*Nitterauer v. Pulley*, 401 Ill. 494, 82 N.E.2d 643 (1948); *Balzer v. Pyles*, 350 Ill. 344, 183 N.E. 215 (1932); *Nilson Bros., Inc. v. Kahn*, 314 Ill. 275, 145 N.E. 340 (1924); *Martz v. Williams*, 67 Ill. 306 (1873); *Francois v. Maloney*, 56 Ill. 399 (1870); *May v. Nyman*, 3 Ill. App.3d 580, 278 N.E.2d 97 (3d Dist. 1972).) This is the so-called apportionment rule and its application necessarily requires the changing of the boundaries of all of the lots in the block to apportion the shortage or excess to each, thereby unsettling all lot lines. (*Nitterauer v. Pulley*.) As the application of this rule affects all lots, relief cannot be provided until all interested and necessary parties are joined in one action. *Nitterauer v. Pulley*; 11 C.J.S. Boundaries § 124 (1938).” *Evers v. Watkins*, 390 N.E.2d 612, 72 Ill. App.3d 113 (Ill.App. Dist. 05/23/1979)

The rule only applies to simultaneously created parcels having equal rights in the excess or deficiency and is applied between the nearest established boundary in each direction. The result is to distribute the excess or deficiency proportionately between each of the successive parcels holding equal right to the whole. The apportionment rule is only applied to parcels having equal rights and which have never been established on the ground by survey or subsequent occupation. The apportionment rule cannot be used to overcome the location of a boundary which has been previously established by another method. The rule is applied in a limited sense in that it is considered a “*rule of last resort*” applied only when no other method has been previously applied.

Boundaries created by a series of *sequential conveyances* fall under a different well recognized rule which requires that the conveyance document which created the boundary be construed against the grantor who retained ownership of the remaining portion of the parent parcel. Because the resulting parcels were subject to the ownership interest of the grantor at the time of each conveyance, a succession of priority is created, each parcel having seniority of right over the subsequent parcel

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described. When the surveyor is confronted by a conflict in the written title which gives the appearance of either an overlap or a gap with the adjoining parcel, the surveyor is obligated to research the record title to ascertain which of the parcels was created first or whether the parcels were created in simultaneous fashion. The conveyance of the senior parcel created the original boundary; any subsequent conveyance of the adjoining property will result in a junior parcel. The description of the boundary in the junior deed merely reflects the scrivener's interpretation of the location of the existing senior parcel boundary. If the senior boundary is improperly determined, the resulting junior parcel description will give the *appearance* of creating an overlap or a gap with the senior parcel. In reality, the discrepancy merely amounts to an incorrect dimension reported in the junior (remainder) parcel description.

Excesses and Deficiencies

A boundary, by definition, marks the confines or line of division of two contiguous properties. How, then, can any two adjoining properties overlap or gap? Our use of the words, "overlap" and "gap" to describe the apparent conflict caused by a shortage or excess from the record dimensions of a parcel has tainted the way we view the problem. Legally, it is impossible for two parcels divided by separate ownerships to "overlap" one another. Likewise, it is also legally impossible for a "gap" to occur. There can only be one boundary between two adjoining properties; therefore, there cannot be an overlap or gap in the "title." What is commonly viewed as a "title" problem, is in fact not a title problem at all. It is simply a conflict in evidence of two adjoining property descriptions.

The appearance of a gap or overlap represents the *discovery* of a conflict in evidence, not a boundary conflict. The resolution of the gap or overlap through the appropriate application of a legal principle presents the *resolution* of the conflicting evidence. The surveyor is expected to arrive at a conclusion to the boundary location and to monument their decision on the ground. The boundary location is determined by application of the surveyor's skill, knowledge and expertise at resolving conflicting title elements contained within the described boundaries according to legal principles. The principles are specifically designed to resolve the conflicting evidence by providing rules meant to prioritize the evidence in such a way as to give more credence to one piece of evidence over another.

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The boundary defining the farthest extent of the contiguous estates found by the surveyor may not reflect the dimensions found in the written title. The location of the boundary reflected by the title dimensions and the location as established by means of agreement or possession should be clearly indicated on the survey by making reference to the record and measured dimensions. The conflicting evidence identified by the survey may be resolved and the record title modified to reflect the differences if necessary. This process will involve the contiguous owners' input and agreement which, when reduced to writing and recorded, will resolve the discrepancies discovered. The survey may then be completed reflecting the agreement. The resolution would not be found in a correction of the title documents as the problem is not a title problem. It is merely an evidentiary conflict.

Differences between the dimensions reflected in the record title and the location of the boundary as measured upon the ground can originate from a variety of causes. The cause may be found in a dimension from an earlier survey or from an estimation of distance between fixed monuments. The cause may be found in a platted block subsequently divided into individual lots. Errors in the early surveys are often discovered by later surveys which employ more modern equipment and survey techniques. The nature of the differences in measurement and the process by which the property was divided often will determine the method used for reporting and distributing the measurement differences. Rules of law governing simultaneous and sequentially conveyed property were developed to provide specific direction to the surveyor to resolve such evidentiary conflicts.

Deficiencies (Shortages or Overlaps)

Overlaps in title are technical and legal impossibilities that are often misunderstood. What is "*described*" in a deed may appear to overlap with an adjoining property, however, what is "*conveyed*" by the deed is limited to only that portion the grantor has title to. The conveyance of title is limited by the senior right which created the boundary. Any shortage discovered in the amount of land available from the parent tract may result in the *appearance* of an overlap. The parcel with senior rights will prevail over the junior parcel provided the boundary has not been established by some other actions of the landowners. Title to the "overlapping" portion is vested in the senior parcel and cannot be encumbered by a subsequent sale of the remaining junior parcel.

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The junior parcel may have the appearance of title, however, an appearance cannot affect the prior ownership rights of the senior abutter. The only conflict is in the dimensions of the junior parcel. Surveyors frequently discover latent ambiguities when applying the dimensions contained in a property description to the ground. The survey process will recover the locations of the existing boundaries of the parent property which discloses a difference between the dimension of record and that measured by the surveyor using more modern techniques. The manner by which the surveyor documents and distributes this discrepancy in the measurement evidence might vary with each jurisdiction. Some jurisdictions require recordation of the survey in the title record making it subject to statutory constructive notice provisions. Other jurisdictions require filing of the survey in a public repository separate from the title records where the evidence of boundary locations is maintained separate from the constructive notice of the title record. A few jurisdictions fail to maintain any public repository for survey evidence, making the perpetuation of boundary locations over time an extremely difficult task.

The simple remedy for reporting a shortage or excess discovered between two contiguous parcels, where the survey is placed in a public repository, is to represent the record and measured dimensions on the face of the survey and to document the surveyor's methodology for distributing the excess or deficiency in accordance with the appropriate legal precedent. Where the surveys are not deposited for public record, little remedy exists except to attempt a modification of the title record. This may be accomplished, under certain circumstances, by execution of a correction deed or landowner affidavits to remedy the record.

A commonly seen, and typically improper, remedy is attempted by executing a Quit Claim Deed which describes the senior parcel or the parcel to which an apparent claim of ownership is to be released. The description contained in the Quit Claim Deed should encompass the existing record description of the adjoining (typically senior) parcel. Release of any interest in the overlapping portion by the title holder of the junior parcel will remove the apparent cloud upon the title. This method has advantages over other methods where the overlapping "strip" of land is described and conveyed from one party to the other. "Strip" descriptions are frowned upon as they often result in

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violation of subdivision regulations, when no parcel (strip) actually exists. The more appropriate resolution should be maintained in the survey record and not incorporated into the title record.

Excesses (Overages or Gaps)

Gaps in title with an adjoiner are similarly a technical impossibility. To “*adjoin*” means to be connected or contiguous, which by logic makes a gap impossible. The more proper term “*adjacent*” means lying near to but not necessarily touching. Every boundary marks the division of two contiguous estates. Therefore, having a gap between two contiguous estates is not possible. When two parcels do not join or are not contiguous, a third parcel owned by a third party separates them. The parcel may not be shown on a map or recognized by the assessor for taxation purposes, but if the property exists, it exists. No agreement between the adjacent properties will affect the intervening third party interest. Likewise, if the property does not exist, the two properties are adjoining and there is no gap between them. An overage or excess found in the dimensions of a parent parcel, from which the current properties share a common root of title, may result in the *appearance* of a “gap” between the parcels.

The descriptions of properties frequently contain inaccuracies that, if taken literally, result in the appearance of slight gaps or strips of property along the exterior lines of the original tract. The Supreme Court of West Virginia has addressed this common problem on numerous occasions. They have repeatedly stated:

“It has been held frequently by this court that there is a presumption of law against a grantor retaining a long, narrow strip of land next to one of his outside lines, when the description of the land granted approximates the description under which he holds. “Generally, in the absence of facts or circumstances explanatory, it will not be presumed that a party granting land intends to retain a long, narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor — especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held — it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract ...”

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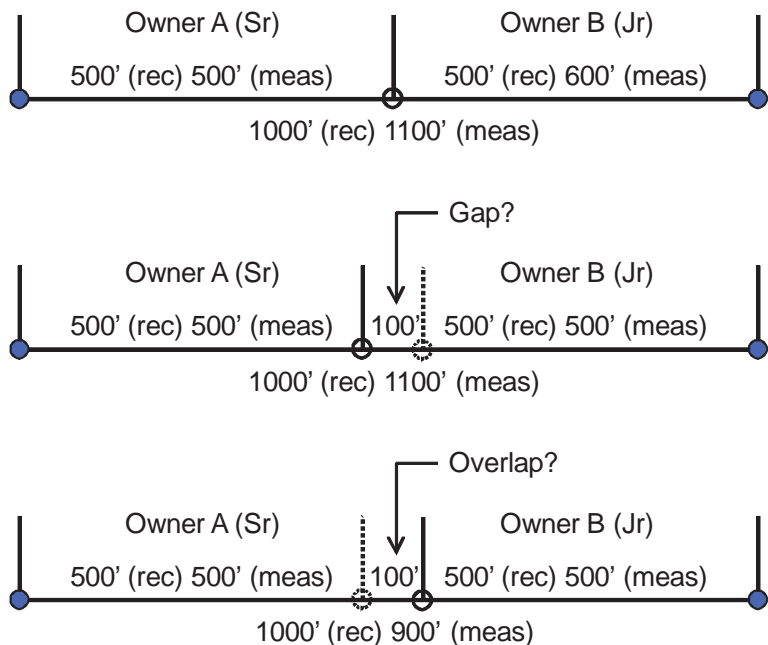
United Fuel Gas Co. v. Townsend, Supreme Court of Appeals of W. Virginia, 1927, 139 S.E. 856, quoting *Western Co. v. Peytona Co.*, 8 W. Va. 406,418

The long, narrow strip referred to in *United Fuel* was approximately 50 feet wide on one end and 132 feet wide on the other and contained approximately 4 ½ acres of land. This principle is also found expressed by the Kansas courts:

“In general, the intention of the parties as duly ascertained will determine the question as to the quantity of land conveyed by a deed. So, where an intent to convey the entire interest of the grantor is clear from the whole deed, the instrument should be so construed as to effectuate such intent. Again in such cases the rules apply that, where the description is of doubtful character, the instrument shall be construed against the grantor and in favor of the grantee. There is a presumption that a grantor intends to convey his entire interest, and a deed will be taken to convey the entire property and interest of the grantor in the premises unless something appears to limit it to a lesser interest.” *Brewer v. Schammerhorn*, 183 Kan. 739, 332 P.2d 526 (Kan. 12/06/1958)

Consider an example of a landowner who holds title to a parcel of land (the parent tract) described as containing 1000 feet of frontage.

The landowner is approached by an individual desiring to purchase the west 500 feet of the parcel. They decide to forgo the expense of a survey. The landowner subsequently is approached by a second individual desiring to purchase the remainder of the original parcel. The landowner is clearly aware that he originally purchased 1000 feet, sold the west 500 feet and, therefore must have 500 feet remaining. The deed is drawn up



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describing the remaining east 500 foot parcel and the sale is consummated. A surveyor is requested to perform a division of the east parcel and proceeds to retrace the boundaries of the parent tract. Of course he will find that the dimension of the original parent tract to be either long or short of the original 1000 feet presumed by the original landowner. The result is one of two possible scenarios.

It is readily apparent that the landowners intended to create a boundary with the first senior conveyance. The *senior* deed will describe for the first time the location of the boundary agreed upon by the original conveyance. The subsequent conveyance of the adjacent (*junior*) parcel can have but only two possible intents. The first intent would be to follow the existing line of record created by the senior deed; the second would be to create a new boundary and retain ownership of a third parcel of land separating the first and second parcels.

The intentional creation of a third parcel should be reflected in the deed records by the subsequent sale of the third parcel, or by delineation of the strip in the assessor's records as a separate parcel. Lacking evidence that either condition is found in the record, it must be presumed that the intent of the second conveyance was to follow the existing line of record. Such an interpretation is consistent with the presumptions stated in the above cited rulings.

Contracting for Conflict Resolution

The surveyor cannot merely assume the client knows or understands the potential problems or liabilities associated with his actions. The client has contracted the surveyor to provide a service, the scope of which is often unknown. Most clients don't have a clue as to what the surveyor needs to perform his duty or what his duty even involves. It is up to the professional to ascertain the needs of the client and to provide what is essential to meet those needs.



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Proper steps are necessary to ensure that the client’s needs will be met when undertaking any project. The surveyor must fully evaluate the request for services before committing to perform the work. The first and most often overlooked step in this process is defining the scope of work. Without first establishing a clear objective or purpose for the survey, neither the client nor the surveyor will have similar understandings of the work necessary to achieve the goal. The surveyor must interview the client to establish the purpose and intended use for the survey being requested. Once the client’s needs have been established, the surveyor has the responsibility to determine if he or she is properly qualified in accordance with the state licensing statute. The Professional Land Surveyor’s licensing act limits the conduct of the land surveyor to disciplines which the licensee is competent or qualified by examination, education, or experience. The licensing act sets forth the minimum qualifications for licensure as a land surveyor. These minimum qualifications are not sufficient to automatically qualify a surveyor to competently provide services in all survey disciplines. The surveyor must judge his or her own competency before accepting any project.



After appraising the scope of work and the ability to provide the service, the surveyor should be able to provide an estimate of the cost and the expected time of completion of the project. The client should be informed of the estimated date of commencement and the estimated length of time to complete the work. The surveyor should prepare a written agreement establishing the scope of work, estimated time of completion, estimated cost, and the delivery product.

A *caveat* is normally included in the agreement addressing the discovery of unknown factors during the course of the survey. Items such as missing monumentation, defects in title or weather conditions can seriously effect the final cost or completion schedule.

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The caveat should enable the surveyor, upon discovery of any ambiguity, uncertainty, or dispute regarding the boundary location, to notify the client, discuss the nature of the discovery, and, if necessary, to issue a *suspension* of work on the contract. If a suspension is issued, the order should be accompanied with an explanation of the discovery, its need for resolution, and an invoice for the portion of the contract completed to date. Once issued, the surveyor and the client can negotiate the additional unforeseen work that may be necessary to resolve the ambiguity, uncertainty, or dispute.



Resolution of the discovery may lead to an infinite number of potential solutions, time delays, and costs. There may be a need for additional research beyond the normal measure conducted during a typical survey. There may be a need for additional field work, monument recovery, and investigation. There may be a need to contact adjoining or prior landowners to explain the historical circumstances about which the boundary was formed. When a dispute arises, there may be need for mediation or possibly litigation to resolve the dispute before the surveyor can complete the survey. All of these conditions are typically *unforeseen* by the surveyor or the client and can rarely be accounted for in the initial contract. If difficult conditions are expected, they should be included in

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the initial scope of work. The unforeseen circumstances and conditions will typically result in an amendment to the scope of work and outlining the estimated time and costs associated.

Once the ambiguity, uncertainty, or dispute has been resolved and documented, the surveyor can issue a notice to resume the initial contract. If the resolution is not possible, the surveyor or the client can *terminate* the initial agreement. During the resolution process the surveyor can provide expertise assisting the client during mediation, arbitration and, when necessary, litigation processes. The role of the surveyor during the resolution can be quite varied dependant upon the measure of repair necessary. The surveyor may be called upon to assist in preparing exhibits, descriptions, or affidavits to document the factual evidence and the results from negotiations. The surveyor may also be called upon to assist in the mediation or litigation process as a consultant or an expert witness. As such, the role of the surveyor can dynamically change throughout their engagement.

Resolution Through Mediation

Mediation is a conflict resolution process in which a neutral person facilitates communication, the development of understanding, and the generation of options for creative dispute resolution. Unlike a judge or jury, the mediator does not decide the outcome of a dispute. A mediator's role is to help participants surface issues, to create a safe space to discuss issues, and to foster agreement as participants seek options that could move them forward toward workable solutions. Mediation is a useful process when the goal of preserving the neighbor-to-neighbor relationship is as important as resolving the substantive problems. Unlike litigation or arbitration, mediation allows the participants in the dispute to remain in control of the process and to contribute to the outcome.

Surveyors have been encouraged throughout the centuries to involve themselves in the resolution process. They received encouragement from Thomas M. Cooley, Justice of the Michigan Supreme court during a presentation to the Michigan Society of Surveyors and Engineers at their annual conference in January, 1881. Justice Cooley summarized the role of the surveyor by saying:

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“It is always possible, when corners are extinct, that the surveyor may usefully act as a mediator between parties and assist in preventing legal controversies by settling doubtful lines. Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow his judgement, cannot, on the basis of mere consent, be compelled to do so; but if he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them. Of course, it is desirable that all such agreements be reduced to writing, but this is not absolutely indispensable if they are carried into effect without.”

Further advice was given by author, Ray Hamilton Skelton in his book entitled, *The Legal Elements of Boundaries and Adjacent Properties*, § 305 (1st ed.), published in 1930.

"When it is definitely proved that the fence or wall marking the given line is not in harmony with the lines of other improvements which check with their own deed calls, and that at most it merely represents a line established at some time by adjoining owners, the matter is primarily one of law, hinging upon the question of establishment. The [surveyor] should then make a situation survey to show that the lines of the original survey contradict the line in question, and, where possible, explain the discrepancy. In all cases the extent of the conflict should be indicated, but no recommendation as to which line is the boundary should be made, and comments should be confined to the statement of facts. To prepare such a plat intelligently the [surveyor] must have a knowledge of the legal principles of establishment.

Furthermore, the [surveyor] is often the first to find the conflict between an established line and its corresponding deed line. Where boundaries are unsettled such discoveries are likely to start a dispute, for the first impulse of the party encroached upon is to defend the land laid down by his deed calls. It is much easier to prevent a fight than to stop one, and for a party to defer action than to back down from an untenable position. Therefore, if the [surveyor] can explain the principles of establishment and illustrate them by an abstract application, the militant party may be persuaded to seek legal advice rather than to depend upon rough tactics. When this is accomplished the matter may often be adjusted peacefully, and when they elect to abide by the established line, the position of the new line may be made a matter of record so that the conflict with the deed line is explained and thus overcome.”

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When conflicts arise between the record locations and the occupation lines, the surveyor's role will change from that of evidence recovery and boundary determination to that of a mediator providing assistance to the landowners for documenting their establishment of the boundary. Through facilitated dialogue, the participants are able to identify what is important to them and what they need to reach a solution. Mediation is voluntary and relies on the good faith participation of the people involved in the process. One of the fundamental tenets of mediation is confidentiality. In order to encourage honest and open communication among participants, all conversations associated with the mediation process remain confidential. As a process, mediation of boundary conflict resolution requires the use of a skilled, knowledgeable mediator, a task for which the land surveyor is well suited. With sufficient training and practice, anyone can serve as a mediator provided they have no stake in the outcome of the dispute.

There are many barriers that can affect the resolution of disputes. These barriers include: time constraints, inadequate access to information, poor communication structures, conflicting desires of the landowners, high value of property at stake, emotionally charged situations, and fatigue. For many land surveyors, there is little training or skill development in negotiation, listening, communication, or conflict resolution. With limited training and a little priority placed on the importance of developing mediation skills, the surveyor can fulfil an important role. Few mentors or role models exist for modeling effective skills and techniques. Many surveyors have a tendency to avoid addressing conflict directly. It is little wonder that boundary conflict resolution has been avoided by many in the land surveying profession. The goal for successful mediation requires that the land surveyor overcome these barriers and engage themselves in resolving the issues.

Many of these limitations, however, can be overcome by adequate training. Each state has established a program of mediation training through private organizations or through the courts or the state attorney's bar association. Mediation has fast become a preferred form of settlement of conflicts between neighbors over the litigation process. The state legislators have enacted laws which encourage, and often require, that attempts to resolve conflicts through the mediation process be attempted before any civil suit can be brought before the court magistrate. The surveyor can

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provide an vitally essential role in the mediation of conflicts by bringing their experience, knowledge and expertise to the mediation table. The parties, with the guidance of the surveyor, are more likely to enter into an informed decision which is more likely to fulfill their current and future needs.

Resolution Through Arbitration

When all efforts of the landowners to arrive at a mutual agreement regarding the location of their common boundary have been exhausted, the landowners may reach an impasse. Only three choices remain. Either walk away and leave the problem unresolved, arbitrate a resolution, or litigate a resolution. Prior to the choice to litigate, the parties have the mutual authority to resolve their boundary. They share a common problem. Their failure to resolve the problem amicably is not doomed to eternity. One or the other parties may choose to arbitrate.

Abraham Lincoln was a skilled trial lawyer who viewed litigation as a “last resort.” He is quoted as writing:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time.” *Abraham Lincoln’s Notes for a Law Lecture*, July 1, 1850.

The step to arbitrate is one which essentially passes the mantel of authority from the landowner to an arbitrator or a panel of arbitrators. The arbitrator may be chosen by the landowners either from an informal or formal setting. When we commonly think of litigation, we equate it with the court system involving attorneys appointed to represent the owners, a judge appointed as the arbitrator, lack of control over the outcome, and lots of time and money expended in the process. This is not necessarily the landowners’ only recourse. They may choose to informally arbitrate the boundary.

The landowners may choose a solution as simple as appointing the surveyor as the arbitrator. They agree to share the cost of a survey and, “what ever the surveyor decides, that will be our line.” In this type of action, the surveyor is appointed as the sole arbitrator. He will perform the survey as typical, he will gather all physical evidence, the written evidence, and the oral testimony of the

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landowners (they need their day in court), and make a professional determination regarding the boundary location in accordance with the rules of law just as he is expected to do in any other survey. The difference being that (and this really isn't any difference) the landowners may choose to appeal his decision even though they've initially agreed to be bound by the arbitrator's decision.

Some states provide a method for resolution of boundary disputes through a panel of arbitrators. Rather than rely upon the decision of a single surveyor, the parties may choose to each select a surveyor, then have the two surveyors jointly select a third surveyor. The three surveyors can form an arbitration panel, each bringing to the table the evidence gathered. The panel will review the evidence, perform an analysis and will determine the facts at hand. They will then discuss the principles involved which determine the boundary and will derive their opinion. As chosen arbitrators, their opinion is agreed in advance to be upheld by the owners. If either owner disagrees with the panel opinion, they will have a right of appeal, however the panel opinion will carry a presumption of correctness which must be overcome on the appeal.

Illinois, as well as several other states, provides by statute an opportunity for disputing parties to arrange, through the civil court, the commission of a panel of surveyors to jointly conduct a survey with the intent to resolve the location of a boundary line. The purpose of such a statute is not to grant overriding authority to the surveyors to adjudicate the location of the boundary, but is to provide a consortium of surveyors who, working together to gather and review the evidence, is more likely to derive a proper conclusion regarding the boundary location.

Upon completion of the survey, a report of findings is given to the court for final adjudication. The process is similar to those which provide for the selection of a *special master* when topics of technical issues are being tried by the court. Because the judge and jury don't have the benefit of the expert's knowledge, training, or skills in a certain subject, they must rely upon the expertise of trained professionals such as the surveyor. The duty of the expert is to *assist* the trier of fact (i.e. the judge and/or jury) to understand the evidence, its proper analysis, and the facts determined from the evidence. In the case of boundary locations, the surveyors are then required to apply the

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appropriate rule of law which aligns with the fact situation as the case presents and to determine the location of the boundary line.

The parties affected by the boundary line determined by the expert, special master, or commission are given opportunity to review, challenge, or accept the findings as reported to the court prior to its final adjudication. For this reason, the findings report is not considered as having any *binding* or authoritative standing. The report expresses the opinions of the surveyors regarding the evidence, factual determinations and resulting boundary location. Those opinions are subject to review and challenge by the parties and the court. The court will take the report under advisement along with any issues brought up under challenge and will make its determination regarding the ultimate issue before the court.

"Whenever one or more proprietors of lands in this state, the corners and boundaries of whose lands are lost, destroyed, or are in dispute, or who are desirous of having said corners and boundaries permanently re-established, and who will not enter into an agreement as provided by section one of this act, it shall be lawful for said proprietor or proprietors that they shall cause a notice, . . . that, . . . he, she or they will make application to the circuit court of the county in which said lands are situated, for the appointment of a commission of surveyors to make survey of and to permanently establish said corners and boundaries, . . ." (Ill. Rev. Stat. 1987, ch. 133, par. 12.)" *Kelch v. Izard*; 590 N.E.2d 1050, 227 Ill. App. 3d 180, 169 Ill. Dec. 131, 1992.IL.0000590, (04/20/1992)

The statute is designed such that, when disputing parties cannot agree to have their boundary jointly surveyed, they may petition the court to assign a commission of surveyors to locate the line in question. Once the survey is completed and the final adjudication by the court is made, the parties will be bound by the adjudicated line. The charge given the surveyors is no different than their normally assigned task which is to locate the line in accordance with the rules of law using the best evidence which can be recovered. The surveyors cannot be used under the statute to establish new corners or boundaries (*Burns v. Kimber* (1912),176 Ill. App. 515). They are charged only with locating existing boundaries as have been created and established by prior action. As such, the surveyors are responsible for retracing existing boundaries as formerly established.

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“**765 ILCS 215/3** – Upon the filing of proper petition and proof of due notice as aforesaid, the said court shall appoint a commission of three surveyors, entirely disinterested, to make said survey, who shall proceed to make said survey and report their proceedings to the said court, as soon as may be accompanied by a plat and notes of said survey; said commission of surveyors shall be authorized to administer an oath, and take the evidence of, and incorporate the same with their survey, of any person who may be able to identify any original government or other legally established corner or witness thereto, or government line, tree or other noted object, and all stone corners or other monuments that have been in existence over twenty years, and recognized as original government corners by the adjoining proprietors. (Source: Laws 1933, p. 1105.)”

The statutes require that notification be provided to all owners affected by the permanent survey as their boundaries will ultimately be established by judicial action thereby binding the parties to the boundaries as determined by the survey. The parties are typically given an appeal period during which they may file any objections to the locations of their boundaries.

The judicial process surveys have a unique quality among surveys as the adjudication directly following the survey process lends permanency to the adjudicated boundaries. The boundary locations become fixed in position while the costs of the adjudication are borne by the parties who initiated the action. Judicial surveys provide an opportunity for repair of multiple boundaries which may comprise entire neighborhoods or subdivisions whose boundaries are in turmoil from the lack of monumentation or the over-prevalence of conflicting evidence. The effect of the judicial process is to establish the positions of the existing boundaries, not to adjudicate matters of title.

Resolution Through Litigation

The landowners may also choose to go the formal route by hiring the attorneys and yielding their authority to the judge. They will proceed through a formal process governed strictly by the law (the same law which governs the actions of the surveyor). Once a judgment is obtained, the owners again have the right to appeal the decision of the court. If they choose to appeal the judges decision,

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they can afford the opportunity to receive the opinion of three to five judges whether their case is heard by an appellate court or the supreme court of their state.

The role of the surveyor during the litigation process can change dramatically during the litigation process, often requiring the surveyor to play multiple roles. Prior to filing of the complaint, the surveyor can function as the surveyor or as a consultant to the parties during any mediation process. Once the complaint is filed, however, the rules of the game change considerably. The nature of the dispute is brought before the judiciary and the judicial rules of evidence and procedure now control. The better the surveyor understands the judicial process, the more opportunity they will have to assist the landowners achieve proper resolution.

The most important rule for the surveyor to be aware of which is contrary to their standard of practice is the communication process. The surveyor's typical approach to conflict resolution requires open communication with any other surveyor performing work on the same boundary. During the litigation process, however, the direct line of communication is severed and all communications must be channeled through the attorneys. If the surveyor wishes to discuss their findings with the opposing party's surveyor, he must initiate the contact through the client's attorney who seeks permission from the opposing party's attorney who seeks permission of the opposing party. Meeting times, dates and places are established along with a list of parties who will be present (should they decide to be present) and the surveyors will meet under controlled conditions. This process may seem contradictory to the surveyors' standard practice, but they must remember they're not playing by surveyor rules, they are under court rules. Exparte' communication is frowned upon.

Once litigation is ensued, the discovery of evidence is made through the proper channels and in accordance with negotiated schedules. The parties will agree to a process for exchanging documents through formal interrogatories or requests for production. The surveyor, as a consultant, may be able to provide assistance in formulating the requests for specific documentation the surveyor will need, as an expert, to properly review the case. There will typically be an opportunity for obtaining specific testimony of lay witnesses by deposition or by affidavit to preserve their testimony or to

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make advanced discovery of the nature of the testimony. Deposition testimony may provide critical insight to the surveyor, as an expert witness, to consider in the formulation of their opinions. The surveyor may again act as a consultant, providing assistance to the attorneys formulating the questions and understanding the importance of the responses received during the deposition. The surveyor can bring a level of expertise regarding proper interview of landowners regarding matters of their boundaries. Their training and experience in gathering and analyzing evidence can provide an invaluable service to the attorney.

Once the discovery period has run its course, a separate period is generally recognized wherein the surveyors, as expert witnesses, are given opportunity to formulate their opinions upon the evidence gathered during the initial discovery. The expert's opinions, according to the rules adopted in most jurisdictions, are required to be made in writing and in the form of a report which contains the surveyor's opinions and all evidence relied upon as a basis for that opinion. These expert reports are quite extensive and must meet the strict requirements of the judicial code.

During the trial process, the surveyor can again provide expertise in several roles. The surveyor, as consultant, may provide assistance directly to the attorney by helping them to prepare for the witness interrogations. Making certain that the correct questions are asked is the only way to ensure that the proper evidence is brought before the court. Evidence not presented is evidence that will not be considered. The surveyor may also assist the attorney in understanding the responses given by the owners and understanding the purpose behind a line of questions made by the opposing side. Remember, the attorneys are not surveyors. Their expertise lies in understanding the trial process, not understanding how boundaries are determined. That's the job of the surveyor.

The surveyor will also be relied upon in the courtroom to provide testimony, in the form of opinions, as an expert witness. Boundary cases will often succeed or fail on the testimony of the expert. The better the surveyor can explain the process relied upon by the surveyor to determine a boundary location, the more easily the judge or jury (if there is a jury) can understand the process they are being asked to employ. The rules, laws and procedures for determining a boundary are the same for

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the judge, jury, and surveyor. The more easily the surveyor's testimony is understood, the more easily the testimony will be relied upon.

Once the trial has concluded and the judgment passed, the role of the surveyor is not done. The final judgment requires documentation. The surveyor may be called upon to provide descriptions, sketches, or surveys which will accompany the judgment and provide the final documentation of the boundary on paper and upon the ground. The principle goal in any boundary dispute should be to result in a boundary which is known by the landowners, is physically marked on the ground with certainty, and documented in the survey records, the title records, and the court records. Each record should provide cross-reference to the other to ensure easy discovery by future landowners. The surveyor's assistance in providing these records is critical to a stable outcome.

At some point in the litigation process, the landowners will reach a point of mutual exhaustion, either in desire, time or dollars, and will turn away from the process, return to their homes, and either live with the results of the decision handed to them or choose to amicably adjust their boundary line to a location which is mutually agreed upon by both owners. The authority to mutually decide the location of their common boundary remains intact. They have the power to decide the fate of their boundary before they choose to litigate and they have that same power after the litigation is complete. Their power lies in their ability to arrive at a mutual agreement.

If one or the other parties refuses or is unable to reach a mutual agreement, having exhausted their remedy through the judicial process, their only choice is to live with the judgment. If one of them refuses to acknowledge the judgment of the court, that's where the strong arm of the law can enter. The police powers are associated with the judgment. The sheriff, policeman, or constable can be called upon to enforce the judgment. The police power of enforcement is not available to enforce a civil agreement or arbitrated settlement. The *dunamis* represented by the officer's side-arm is typically sufficient to enforce the judgment.

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Documenting the Final Resolution

The variety of solutions derived from the mediation, settlement, agreement or judicial processes yield an equally varied possibility of documentary solutions. The final form of the settlement is controlled not only by the settlement itself but by state and local statutory processes. These processes vary greatly by state, region, or locality and must be intimately understood by the land surveyor. The land surveyor will serve a major role by providing the necessary documentation for the review, acceptance, and approval of the landowner settlement agreement by the local reviewing agency. Certain documents may be necessary for the local agency and others may be required for the public records repository.

Most agreements will result in some form of correction or amending document being filed in the public records. There will be some, however, that will require no alteration as the parties have agreed to relocate the occupational improvements to harmonize with the existing record boundary. All of the agreements should, at a minimum, include a land survey map graphically depicting the location of the boundaries relative to existing lines of occupation. Monuments should be set along the agreed-upon boundaries with the full expectation of the parties to the agreement. The survey map should also document all monuments found which were relied upon during the course of the survey and a narrative or survey report should be provided to document the deed records, owner testimony and survey history relied upon to achieve the surveyor's ultimate opinion regarding the boundary location as resolved by the parties.

Additional documentation beyond the survey map may also be required. If the title to the land is affected, the title record may require reparation. Existing title documents may need to be reformed, exchanges of title may be required, or the filing of the final judgement, owners' affidavits, or similar documentation may be required to perpetuate the evidence of the resolution. Too often, the resolution is filed by the attorney with the clerk of court and no evidence of the dispute or its ultimate resolution is found in the title record. This can present a serious problem when subsequent purchasers come on the scene relying upon the existing title records to pass title, being unaware of the court record. The problem which was resolved at great effort and expense may be reopened and

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another dispute started over the same problem previously resolved. Only after additional expenses are again incurred will the prior resolution hopefully come to light.

The choice of various methods of documentation will be governed by local ordinances, state statutes and other factors such as the ability of the surveyor to file their survey in a public repository. State filing laws for surveys provide a crucial step forward toward perpetuating evidence as to the location of boundaries and the auxiliary evidence which may disclose the result of an owner agreement or a final judgement resolving the boundary location. Survey records can be a vital addition to the title record by providing graphic depictions and written descriptions of the evidence which is used to define the location of the boundary on the ground.

A surveyor's narrative included on the map can provide an excellent medium for documenting the oral, physical, and written evidence utilized by the surveyor in reaching a determination of the boundaries. The narrative also provides an opportunity to reference any settlement agreements or judgments affecting the boundary locations shown on the face of the survey.

Although the survey can provide a means of documenting the evidence, the survey records commonly do not provide the constructive notice that recording a document in the title records affords. It is the *constructive notice* of the title record that binds subsequent purchasers to the resolution. Once made a matter of public record, all bona fide purchasers of the land are expected to make the purchase with full knowledge of the contents of the title record. For this reason, resolutions are best documented when found in the title record. While there is no law requiring that the boundary established by an agreement between adjoining owners be recorded (oral agreements are acceptable), they should be encouraged to enter their agreement in writing and record it as a matter of the title record. Their agreement may be in the form of a written agreement or may be in the form of an owners' affidavit, whichever is allowed by rules governing document recording.

If the owners so choose, the second best alternative may be to document the evidence of their agreement on the face of the survey either by landowner signature or, even less binding, by the surveyor's notation within the narrative. Of course, the landowners may, even when given the opportunity, choose to make no effort to document their agreement. Their failure to document it will

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not invalidate their agreement and it may be up to the surveyor to document the evidence of their agreement in the narrative. The bottom line is that any effort toward documentation is better than no effort at all.

Conclusion

Over a century has now passed since Chief Justice Cooley penned his treatise on the Judicial Function of the Land Surveyor. Technology has since overtaken the surveying industry and the pace of development has quickened the destruction of evidence of past boundaries. Yet, his words still ring true to today's land surveyor:

“A generation has passed away since [the lands] were converted into cultivated farms, and few if any of the original corner and quarter stakes now remain ... If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern.”

As the evidence continues to fade, it rests on the surveyor to recover its remains, to bolster it with new evidence, and to perpetuate the boundaries for future generations to recover. While the technology increases the speed and precision by which the surveyor can secure the position of the boundary, the recovery of the evidence necessary to prove the boundary's position becomes more time consuming and difficult.

The difficulty of evidence recovery and analysis has led many surveyors to give up, resort to staking the “deed line,” and passing the resulting problems on to the client. The client is handed a map, an invoice, and the advice, “better call an attorney.” The map is overridden with disclaimer statements in an attempt to shield the surveyor from the fallout of damages caused by the inadequate survey. Surveyors have attempted to re-define the profession by reducing it to a technical process of mathematics and measurement. They have replaced accuracy with precision and enter a warfare where the closest pin to the true measurement wins. The result is a property corner resembling a pincushion of possible corner positions with no decisive action made to console the landowner.

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Somewhere along the passing century, the land surveyor has been allured by the shimmer of technology and has forgotten their true quest. The certainty of the mathematics and the speed at which a measurement can be obtained tends to reduce boundary surveying to a technical process. The professional expertise of the surveyor has been mournfully sacrificed.

It is time for the surveyor to re-discover the root of his profession. To seek after the evidence that seems so illusive, to study the laws which govern his actions, and to perform his duty regarding the recovery of the true boundary. The surveyor must take time to gather all of the evidence available and recognize the importance of the actions of the landowners and their attempts at resolving their boundaries. The surveyor must assist the landowners in mediating land disputes which arise. There is only one profession in these great United States which is empowered with the skills, knowledge, and expertise to identify and locate land boundaries. There is no other profession upon which the duty falls.

Finally, as Chief Justice Cooley also said:

“I have thus indicated a few of the questions with which surveyors may now and then have occasion to deal, and to which they should bring good sense and sound judgement. Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions. What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value.”

I can only trust that the discussions prompted by this presentation may also be of equal value and will foster the advancement of our profession.

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