Adverse Possession, Acquiescence, & Boundary Line Agreements: Responsibilities of the Surveyor to Preserve Evidence
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Course Objectives
- What does a surveyor do?
- Elements of Adverse Possession
- Acquiescence Defined
- Boundary Line Agreements
- Examples, Application, & Discussion
- Conclusion: T.S. Madson's Compilation of Rules for Land Surveyors & tips for protection from legal liability

What does a surveyor do?
We know what we do, but do your clients? How about attorneys? Or real estate agents?

- BOUNDARY LAW HAS NOTHING TO DO WITH MEASUREMENTS-Bud Sayler
- Quasi-Judicial Function of Surveyors – Justice Cooley 1881
- When a monument is lost, occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is ascertainable; and the surveyor should consider what the occupation was, how long continued, and whether a claim of title has always accompanied it; and whether the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence.

- Some surveyors disregard all evidence of occupation and claim of title and plunge whose neighbors into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize. It is often the case that, where one or more corners are fixed by the survey, if points upon the line between the old and new corners are occupied, the land becomes tied into two sections, and the occupation is inadmissible as evidence in ordinary cases; but to bring these lines into discredit, when the people concerned do not question them, not only breeds trouble in the neighborhood, but it most often subjects the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common sense must declare that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared.

- A surveyor has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of parties as if it were at another.
Rules of Construction

- One of the most common - and erroneous - arguments contributing to the proliferation of purported corner markers representing a single corner is the idea that modern subdivision regulations and field procedures somehow supersede the more traditional legal principles relating to boundary retracement. Many have argued that the recent trend toward subdivisions that are designed first, then staked at a later date, favors dimensions and acreage calculations over monuments. Others assert that the surveyor’s intent to create lots of specific size controls over the customary rules of construction favoring monuments over measurements. Unmistakable Marks: Rules of Construction for Modern Surveys, Kristopher Kline, POB Magazine March 1, 2017

- Rules of construction are SUBORDINATE and always yield to the intention of the parties, particularly the intention of the grantor, where such intention can be ascertained. All rules of construction are but aids in arriving at the grantor’s intention.


Boundary Lines v. Title Lines

- Boundary Law deals with WHERE IS IT
- Title Law deals with WHO OWNS IT

- Two different areas of law that are interconnected: if the description does not adequately describe the property the title is affected

- The purpose of ALTA/NSPS Survey states members of the American Land Title Association have specific needs, unique to title insurance matters, when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by the public records

- The boundary lines and corners of any property being surveyed as part of an ALTA/NSPS Land Title Survey shall be established and/or retraced in accordance with appropriate BOUNDARY LAW PRINCIPLES governed by the set of facts and evidence found in the course of performing the research and fieldwork.

- When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor shall explain this information with notes on the face of the plat or map.
Ownership v. Possession

Most clients want to know what they own. There is a difference between ownership and written deed rights and most clients do not understand the difference between the two. The written deed is merely evidence of ownership, not proof of ownership. Written title alone is not the only consideration in determining who owns property; actual possession of the land can result in the passing of title. Land Surveyor’s Liability to Unwritten Rights, Curtis M. Brown (as presented at the NMASM Legal Seminar in Jan. 1979)

The Land Surveyor’s Liability to Unwritten Rights

Clients
Third Parties
As a matter of law, the surveyor is liable to third parties that have been damaged due to reliance of the surveyor’s work

Think of land transactions where the purchase price is based on calculated acreage

State Licensing Boards
Ethics
Standards of Practice

201 KAR 18:150

Section 3 Compliance
A professional land surveyor SHALL not represent that:
A boundary survey determines land ownership; or
A boundary survey depicts more than evidence or rights in land; or
Land ownership can be established by any survey.
Section 6 Field Work

A professional land surveyor **SHALL**

- Search for the physical monuments that represent each boundary corner;
- Search for other physical monuments set out in the description of the parcel or tract of land being surveyed;
- Gather, analyze, and document relevant parol evidence; **AND**
- Compare evidence discovered by field work, with that discovered by record research, to determine or reestablish the boundary of the tract or parcel of land being surveyed.

Section 10 Documentation of Boundary Surveys

A plat of survey **SHALL** required to be given to the client when the professional land surveyor does any of the following:

- Determines that the current physical description or plat does not accurately depict the actual conditions found during the course of performing the survey.

Why Should Surveyors Understand Unwritten Rights?

- In my early writings, I generally advocated that surveyors should locate land boundaries in accordance with a written deed; all conveyances based upon unwritten rights should be referred to attorneys for resolution. Within recent years there have been cases, and one in particular, wherein surveyors have been held liable for failure to react to a change in ownership created by adverse possession. Land Surveyor’s Liability to Unwritten Rights, Curtis W. Brown (as presented at the NMASM Legal Seminar in Jan. 1979)
Why Should Surveyors Understand Unwritten Rights?

“[Surveyors] need to be well-versed enough in each of the doctrines to recognize the possibility [of unwritten rights] – particularly when the respective owners have been peaceably occupying to the line of occupation.” The Surveyor’s Roles & Responsibilities: Ensuring the American Dream, Part 2, Gary Kent, The American Surveyor Magazine, June 2014

Adverse Possession-Title Doctrine

Goals of Adverse Possession

1. Not to reward those who “steal” land, but rather to dispossess those who fail to maintain and enforce their right of possession
2. A person that sleeps on their rights should not be allowed to demand with passion what they have for so long ignored with indifference. Acquiescence, Knud E. Hermansen
3. SIMPLY PUT – MAINTAIN THE BOUNDARY

Adverse Possession-Elements

1. Continuous - uninterrupted adverse use
2. Exclusive - continual exercise and enjoyment of the right
3. Hostile - against all others
4. Open & Notorious - control that is evident to others, presumption that the actual owner has notice of it
5. For the statutory period - period set by Legislature and codified into statutory law
Adverse Possession – KY Common Law

- To start the running of the statute of limitations (15 years KRS 413.010), the disseizor must have an actual possession; it must be an open, notorious, and visible possession; it must be a selfish or exclusive possession, that is the disseizer must hold possession for himself to the exclusion of the true owner, and all others; it must be a hostile possession, not only as against the true owner but as against the world; it must be a definite possession, that is its confines MUST be marked by an enclosure or other plainly visible indications; the disseizer must fly his flag, and indicate the lines of his dominion, the extent of his possession must be evident; it must be a possession under a claim by the disseizer of ownership in himself, so notorious as to amount to a constructive notice of its adverseness. When all these things coexist, the running of the statute starts.

To keep it running the disseizor must in this commonwealth maintain that status in full vigor in all its elements for every hour of every day for 15 years. Flinn v. Blakeman, 71 S.W.2d 961, 969 (1934)

Adverse Possession – KY Common Law

- In order to support a title by adverse holding, three facts must be established: First, the possession must have been continuous, actual, open, notorious and peaceable for at least fifteen years; second, the exterior boundary lines of the land so claimed MUST be well defined, i.e., either actually enclosed or so marked that the land is susceptible of being identified by its description; and third, the possession must have been of such a character and extent as to exclude the idea that the right to possession was in anyone else. Young v. Pace, 140 S.W. 555 (1911) line was not "blazed or fenced", inadequate description and claimant did not maintain his boundary.

Adverse Possession – KY Common Law

- Burden on claimant to prove them by clear and convincing evidence. Moore v. Stills, 307 S.W.3d 71 (2010) recreational use was not adequate to establish the adverse possession of another’s land under either the common law or KRS 411.190(8) and that Petitioners failed to prove the "well defined boundary" element of their claim.

- Actual Possession most important element; it has long been held that the surveying and marking of a boundary, the payment of taxes, and occasional entries for the purpose of cutting timber are not sufficient to constitute adverse possession. Id. at 78
Adverse Possession – KY Common Law

- Insufficient to prove actual possession
  - Removal of timber
  - Masting of hogs
  - Ranging of cattle
  - Conducting a sugar camp
  - Operation of a water mill
  - Occasional sowing of grass
  - Intermittent holding of church services
  - Digging a pond
  - Maintenance of hiking & motorcycle trails or any other recreational use
  - Seasonal hunting
  - The posting of signs forbidding trespass
  - Driving away hunters from time to time

- Sufficient to prove actual possession
  - Evidence of substantial activity on the land that alters the condition of the property.
  - The clearing of timber in addition to cultivating the land for seasonal crops
  - Construction of a fence and substantial use of the land up to the fence to include improvements or livestock—one strand of barbed wire not enough
  - The use must be so substantial as to put the owner on notice that his or her dominion over the land is being usurped.

Acquiescence – Equitable Doctrine

- It is generally agreed upon that possession along a line for a period equivalent to the statute of limitations brings about an implied agreement between adjoining owners; that is, in the absence of proof of agreement and in the absence of contrary proof (nonagreement), mere possession for the duration of the statute of limitations is sufficient proof (an implied proof) of agreement.
- Courts have said that lines acquiesced in for a long period of time may be better evidence of the original survey than are measurements from distant points. Robillard, Wilson, & Brown, Evidence and Procedures for Boundary Location, Fourth Edition
- A long period of acquiescence may raise a rebuttable presumption that a fence is on the true and correct line and often only by contrary evidence can the presumption be overcome. A fence built for mere convenience and admitted by both parties to be not necessarily on the true line can NEVER become a true line by acquiescence.
Acquiescence - Elements

1. Record boundary must be vague or unknown
   - Purpose of the element is to keep adjoining from bypassing the legal requirement of a writing requirement or demonstrating planning, zoning, or building requirements.
2. One party act by fixing the boundary in location by definite geometric notation or occupation that appears and is accepted as marking the boundary
   - The boundary so fixed by the one party must be accepted by the other party, and the object must reasonably believe the object is placed on the line or fixed by the appropriate party.
   - Acquiescence for a long period of time must be with respect to recognized boundaries, eg., fence, hedge, tree line, not merely mowed space.
3. The non-acting party recognize the barriers or monuments as marking the boundary through active (PRACTICAL LOCATION) or passive (ESTOPPEL) acceptance, and
4. The conditions exist for the statutory period of time.

Acquiescence

Where parties for fifteen years or more have recognized a certain line as the true, common boundary of their property, the record line becomes unimportant, and the courts will recognize that as the true location. Combs v. Combs, 240 S.W.2d 558 (Ky. 1951)

It is reasonable for a surveyor to adopt an occupation line as the boundary where the record boundary location is vague, difficult to fix, or a reasonable location of the record boundary is on or near the occupation line. Acquiescence, Knud E. Hermansen

Acquiescence

Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is ascertainable, and the surveyor should inquire when it has been attempted to fix it by instruments. Combs v. Combs, 240 S.W.2d 558 (Ky. 1951)

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Acquiescence - Examples

- Acquiescence by Estoppel - only one person acts to mark the boundary and the adjoiner accepts and occupies as if it is the true boundary for the statutory time
- Bill and Jane live next to each other in an old subdivision. Bill does his best to locate the common boundary he shares with Jane in order to build a rock wall. He makes measurements and sets stakes, eventually building the rock wall along a line between the stakes. Jane watches Bill make the measurements to locate the boundary and observes Bill construct the wall. For many years thereafter, Jane and Bill respect the wall as marking the common boundary. Fifteen years later, Jane needs a survey of her property in order to build a garage. In performing the survey for Jane, the surveyor gathers considerable site and record information. Most of the original monuments have disappeared. The surveyor prorates the distances between found monuments that are located several hundred feet away with the following results shown in the diagram:

Acquiescence - Examples

- Acquiescence by Practical Location - two parties act together to mark the boundary and then occupy up to the boundary for the statutory time
- John and Jim are adjoining lot owners. One summer day while both are doing yard work they begin discussing where their common boundary is located. Neither is sure. After drinking a couple of beers, they decide that the best and least expensive way to determine their common boundary is to split the frontage (after all, they believe, they have the same size lots). John goes to get his plastic tape and Jim gets some old metal posts he has. Together they split the front and back distance and place the metal posts in the ground to mark their corners. For the next fifteen years they each respect the metal posts they set. Jim builds a new garage based on the metal posts marking his boundary. John passes away and his daughter obtains the property upon John’s death. She has the property surveyed and discovers the metal posts are three feet on her (deceased father’s) property. She demands Jim respect the surveyor’s monuments rather than the metal posts, Jim’s garage would be in violation of the setback distance required by municipal zoning regulations. Jim argues that the metal posts are the correct line based on his acquiescence in the distance for the statutory time period. The court rules in favor of Jim’s opinion of the correct location of the common boundary.

Boundary Line Agreements

- A party can establish a boundary by practical location in three ways:
  - By acquiescing in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations;
  - By expressly agreeing with the other party on the boundary and then by acquiescing to that agreement; or
  - By estoppel
    - Slindee, 760 N.W.2d 903, 907 (Minn. App. 2009)
Boundary Line Agreements

- **Use when:**
  - The boundary line cannot be located with reasonable certainty (Record v. Possession), that is to say:
    - The record boundary location is vague or unknown
    - The location of the record boundary cannot be reliably located with reasonable certainty by a competent surveyor based on the information found in the field. Imagine a bounds description with no metes or calls to monuments.
    - No contemplation of transfer of land, not subject to Statute of Frauds, just a clarification of an existing boundary preserved into perpetuity. Simple agreement suffices.
  - The record boundary can be reasonably located
    - The location of the record boundary can be determined by a competent surveyor with reasonable certainty using the information in the operative records; yet, the parties in interest would like to place the boundary in a different location, not as long as an existing fence line that has been in existence for the statutory period of time. Think acquiescence, estoppel & practical location.
  - Contemplation of a transfer of land, subject to Statute of Frauds. The law does not ordinarily condone the transfer of title by the simple language often employed in boundary line agreements; instead, a legal description such as adverse possession. Deeds of transfer should be drafted rather than a boundary line agreement. Surveyor to play a pivotal role.

Boundary Line Agreements

- Boundary line agreements can be useful tools to fix vague or uncertain boundaries. The boundary line agreement should not be used to simply save surveying costs unless the surveyor is sure the record boundary cannot be located with reasonable certainty. Surveyors should tell parties in interest to seek legal counsel when using an agreement that attempts to fix a boundary location that differs from the location that was or could be reasonably established by the operative deeds. Boundary Line Agreements Beware the Known Boundary, Knud E. Hermansen

Boundary Line Agreements

- **How to memorialize the agreement - Is it easily discovered in the title record?**
  - Statement on plat of survey, signed by both parties, and witnessed by unconcerned parties that is filed in the title record.
  - Quit-claim Deed or Warranty Deed existing in Miscellaneous Records get overlooked, but one could certainly record the agreement there, as well.
  - Planning and Zoning Codes must be taken into consideration.
  - Recording Statutes – good idea or just a convenience that opens surveyors up to further liability? You be the judge.

  - Indiana 865 IAC 1-12-12(a)(2)
    - Record the plat of survey… in the county recorder’s office in the county where the property is located when:
      - If, in the registered land surveyor’s opinion, the:
        - Monuments;
        - Monument witnesses;
        - Evidence of possession; or
        - Description; are not consistent with the last recorded survey of the parcel
RULE ONE
To avoid liability the surveyor should err on the side of safety, always try to do a little more than an ordinarily prudent surveyor would do under the circumstances.

RULE TWO
It is the land surveyor’s duty to correctly locate and mark property lines as described in a deed furnished him and to relate lines of possession to title lines. The surveyor cannot and does not assume the responsibility of proving that a given deed is correct and legal; that is a function of an attorney or court of law.

RULE THREE
Search and search well; if it is there, find it. If it isn’t, be able to say with certainty that it isn’t there.

RULE FOUR
Liability results when the surveyor fails to do correctly the thing that he purports to do.

RULE FIVE
The surveyor is a fact finder. He goes upon the land armed with all the documentary evidence that is available and searches for markers, monuments and other facts. After all the evidence, facts, measurements and observations are assembled, the surveyor must come to a conclusion from the facts.

RULE SIX
Never set a corner in disagreement with improvements without first satisfying yourself that you are not only right, but that your “right” will prevail in court if necessary.
RULE SEVEN
Discovery of a another surveyor’s monument does not relieve the surveyor of the
obligation to look further. That monument is only proof in the event that superior
evidence cannot be discovered. Therefore, the surveyor must seek all other
evidence and use the official monuments as though they were the last resort.

RULE EIGHT
The conclusions that flow from the evidence may produce proof. Evidence in
itself is not proof of a fact; a conclusion or inference that may be drawn from
evidence is the proof. In coming to conclusions from evidence, the most
important need of the surveyor is the ability to recognize and know what is the
best evidence that is available.

RULE NINE
The best evidence of a monument’s original position is a continuous chain of
history by acceptable records, usually written and dating back to the time of the
original monumentation. A found monument without a background history is of
little value as evidence; and, a set monument is worthless if unidentifiable in the
future.

RULE TEN
In civil cases having to do with land surveying and real property, it is only
necessary to prove a “preponderance of evidence”; it is not necessary to prove
“beyond a reasonable doubt” as in criminal cases.

RULE ELEVEN
It is of the utmost importance that a surveyor seek and find all of the evidence at
the time of the initial survey, and this must be done irrespective of costs. The
major cause of disagreement between surveyors relates to the lack of discovery
of all available evidence. If every surveyor uncovered all of the evidence,
differences would be reduced to a minimum and their surveys would have a
finality of location!

RULE TWELVE
A surveyor may be able to compute, make drawings, use Instruments and stake
engineering projects, but, until he understands Boundary Law and the law of
evidence, he is not qualified to make property locations.
Tips on how a Land Surveyor can Protect Himself from Legal Liability – T.S. Madson

- Attend legal seminars and identify the standard of care and skill to which he is required to subscribe.
- Raise his prices enough to allow him to reach the required standard of care.
- Refuse to compete on a price basis with other surveyors – there is a high correlation between prices and professionalism, and
- Learn to recognize potential problems before they occur and decide at that moment whether he wants to continue work on that project and advise the client accordingly.

Interesting Reads

- A Statute of Limitations on Boundaries, Jeffrey Lucas, Point of Beginning Magazine, June 2014
  - “I certainly can’t predict the future, but one thing I am fairly confident of is that our current practice model, which is let the chips fall where they may, will eventually bring an end to traditional surveying as we currently know it (that part of surveying that requires licensure). If that’s all we have to offer there will be faster and easier ways to do this. Spurred on by the courts’ demands, a new generation of surveyors will no longer be needed after all—there will be an app for that.”

  - “In order to begin a conversation on resolving boundary and title problems, we have to acknowledge there are only two persons who can truly resolve disputed boundary or title problems. Those persons do not include attorneys, title companies, or surveyors. And, in a sense, they do not even include judges and juries – or at least not of their own volition. No, the only persons who can resolve such conflicts are the two owners involved. And they can do it one of two ways: the painless, low-cost way – by agreement (or acquiescence) – or the expensive, painful litigation path.”

- “Surveyors need to be well-versed enough in each of the doctrines to recognize the possibility of unwritten rights, particularly when the respective owners have been peaceably occupying to the line of acquisition.”