LAND SURVEYOR'S LIABILITY TO UNWRITTEN RIGHTS
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Within the United States, during recent years, vast changes have occurred in the laws regulating social relationships. Of these changes, those regulating liability and those diminishing the rights of private parties to the use of their land are of the greatest interest to land surveyors. Surprisingly, during this time, very few changes have taken place in the laws pertaining to land location procedures as based upon written documents. While new wrinkles have been added here and there, the basics are intact.

Liability for land surveyors has changed dramatically in the past decade. The increased number of lawyers and the inflation in the cost or land are cited as reasons for the problem. The move against professionals generally began in the 60's, when patients began to sue doctors for malpractice. This movement spread to lawyers, engineers, and now to land surveyors.

Today, if people in this country have a mania, it surely must be the desire to sue other people. Juries have been awarding such large claims that it is impossible to predict what the future will hold in cases against land surveyors. One such defense against litigation is to be without money or worldly goods; no lawyer in his right mind would consider taking a case against you. After listening to land surveyors around the country tell me how rough it is to make a living, that might be one of the reasons for the scarcity of suits against land surveyors. In T. S. Madson's new book entitled, "Understanding Your Professional Liability as a Land Surveyor," he lists 61 cases found after a comprehensive research. It is recommended reading for all surveyors.

Officially, I am retired; however, I am often asked to appear in court cases. Being retired does not mean that you quit work; it merely means that you select what you want to do and when you do it.

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 prolonged possession. The purpose of this paper is to re-examine what a surveyor should do in the event title has been altered by a legal transfer of title by prolonged possession.

Before delving into the question, it should be pointed out that there are two very different types of possession found by the surveyor. One is totally unrelated to the original survey lines; the other is possession which represents where the original survey monuments were set. Let us suppose that an original surveyor set an original monument to mark a corner; further, a fence was erected at the time the monument existed. Later the monument material disappeared. Now the fence is a monument to where the original monument was located. In this discussion only possession unrelated to original monumented lines and possession out of agreement with written deeds is being considered.

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Below is described a case wherein a surveyor located his client's land exactly in accordance with his client's deed, yet found himself in trouble because he failed to take into account the adjoiner's occupancy. The facts are as follows:

Surveyor "A" was asked to survey the following land: The East Half of the Southwest quarter of Section 6 T-S, R-E, certain Meridian, in accordance with the official government plat thereof. See the attached sketch. The official plat disclosed the said East half as having a full 80.00 acres, whereas the remainder of the SW1/4 was labeled as Lot 2 with 67 acres. Using the rules given in the booklet, Restoration of Lost or Obliterated Corners and Subdivision of Sections, Bureau of Land Management, the surveyor did correctly locate the said E1/2. There was a little excess which was properly divided among the parcels. Up to this point, the surveyor did everything exactly correct; he could not be faulted. What happened next did create a problem.

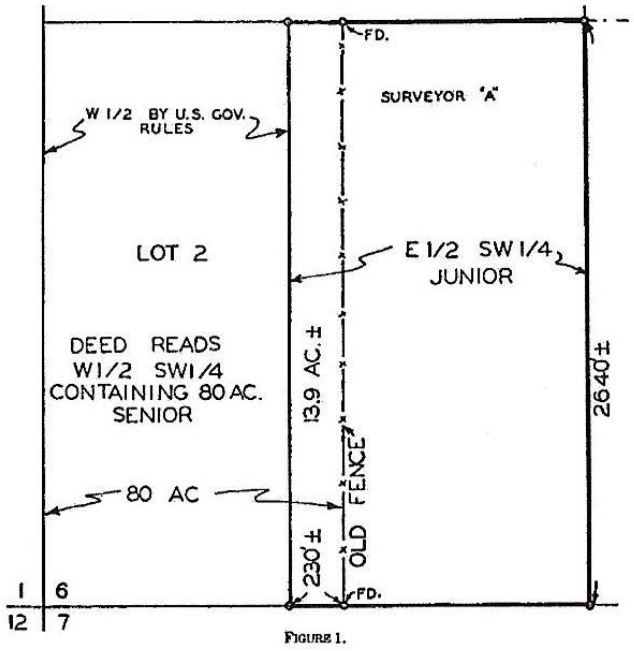

FIGURE 1.

During the course of the survey, Surveyor "A" observed a fence encroaching on his client's deed lines by a little more than 13 acres. At each end of the fence, a surveyor's stake was found (in California a surveyor must put his number on every property stake that he sets), and he was contacted. The adjoiner's deed read as follows: The West half of the SW1/4 containing 80 acres. Further facts were; the dividing fence was old (more than the statute of limitations of 10 years), the adjoiner was occupying 80 acres, and at one time one party owned all of the SW1/4 and sold off the W1/2 containing 80 acres first.

On the theory that acreage was subordinate and the client had a written deed to the E1/2, surveyor "A" monumented the deed as written, disclosed the fence line, and wrote in the gross area, including the approximate 13 acres fenced by the adjoiner. A buyer purchased the land as based upon the acreage figure (per acre purchase price) and a title company insured title on the bases of the survey. When the buyer tried to occupy the land, the adjoiner objected and a law suit followed. The court judgment was up to the fence and the title company had to pay damages. Following this the title company sued the surveyor and won more than $100,000 damages in the lower court. To date the appeal of this case has not been ruled on by the higher court; regardless of how the appeal comes out, Surveyor "A" has lost considerable time and money for legal fees, court costs, travel, expert testimony, etc.

A point to bring out is that the title company was acting as a third party; they did not pay the surveyor's original fee for the work. As a matter of law, the surveyor is liable to third parties that have been damaged.

This is a case where the land surveyor correctly located the client's deed lines in accordance with the writings of his client, yet was held liable for failure to recognize the ownership rights of the adjoiner. The implications suggested by this case deserve further analysis.

I appeared as an expert witness and testified that the surveyor had located the E1/2 exactly correct in accordance with the government requirements. Also it was my opinion: (1) The title company had all the facts, including the location of the fence, the adjoiners deed, etc., and (2) they elected to insure the title and collected the fee, not the surveyor; therefore, they should pay the damages. The judge obviously thought otherwise.

With the benefit of 20-20 hindsight, let us look at the case and see what the surveyor could have done, if anything, to have avoided liability or at least have reduced his liability to some degree.

The first question to explore is: What did the client have in mind when he asked the surveyor to locate his boundaries? Was he asking the surveyor to locate his ownership? Or just the deed lines? As all surveyors should know, there is a vast difference between ownership and written deed rights. The written deed is merely evidence of ownership, not proof of ownership; title to land can be transferred by unwritten rights. From my experience with clients, very few know that there is a difference between the two; most clients want to know what they own.

One thing is certain: The client is not asking the surveyor to locate his lines of possession; they can see where they exist. As a minimum, he wants to know if his lines of possession agree with his written title. If the surveyor has no intention of locating the lines of ownership, that is, he intends only to locate the written deed lines and show possession in relation to the written deed, and if he fails to make the client aware of such fact, the courts will probably find that the surveyor contracted to locate the lines of ownership and hold that the client is entitled to rely on that standard of duty by the surveyor. Seemingly, that is what happened in the above case. While Surveyor "A," in the above case, correctly marked the deed lines, did he inform his client completely about the difference between ownership and deed lines? Did he put on his map, "area claimed by others," or did he put a heavy solid line around the area of confusion, or did he exclude the acreage within the area of confusion from the gross acreage of ownership? By looking at the map, did the client have a right to think he owned the area fenced by others? It is my opinion that if he had done the things suggested by these questions, he probably would have avoided liability.

Within the United States, in most areas, the first right to land must be acquired via a writing, however defective. After a written title is obtained, except in Torrens Title areas, imperfections in the writings can be corrected by long possession or the land area can be enlarged or diminished by the acts of adjoining owners. Written title alone is not the only consideration in determining who owns property; actual physical possession of the land can result n the passing of title. In the order of importance of elements determining who has ownership of land, a legally consummated unwritten right ranks higher than a written title (Note: Not so in Torrens Titles).

The second question to explore is: Can a surveyor monument the lines of ownership obtained by unwritten means? To my knowledge. absolutely nothing in the law prevents him from doing so. Clearly from my conversations with attorneys, this is not an unauthorized practice of law. If the surveyor chooses to claim that a possessory right has ripened into a fee title, he is certainly privileged to do so. The real question is, What should he do?

The third question to explore is then: whenever a surveyor finds possession out of agreement with written title, and he determines that title has or probably has passed due to an unwritten conveyance, what are his obligations and what should he do?

Since the client wants to know if his lines of possession are in agreement with his written title, the surveyor is certainly obligated to report on that. But since most clients thin the surveyor is locating ownership lines, the surveyor must fully disclose the fact that land can be gained or lost by possession, and if he thinks land has been lost to an adjoiner by some unwritten act, he is obligated to inform his client of such fact. In addition, since the surveyor is liable to all third parties that have a right to rely on the results of the surveyor's findings, the information must be presented in such a manner that no third party can be misinformed. Merely telling the client orally is not sufficient; every document presented must clearly indicate the facts so that no third party can be misled.

In the above case the surveyor was held liable to a third party, the title company. If the surveyor had put a heavy border around the disputed area, and if he had clearly marked on his map, "AREA OF DISPUTED TITLE" or "AREA CLAIMED BY OTHERS" he could have saved himself a court trial In addition, he should not have included the disputed area in the gross acreage of the client; acreage should be sorted into two columns, the first showing what the client owns for certain. and the second showing doubtful areas.

My own policy in handling encroachments has been as follows: First, all adjoiner deeds are read to eliminate the possibility of senior rights. Second, the adjoiners are questioned as to how possession came into being and how long it had been there. If no senior right existed and if the fence were there for a period of time less than the statute of limitations, then the possession would be treated as an encroachment, and stakes would be set in accordance with the written deed. If for any possible reason title could pass because of unwritten considerations, then the area encroached upon would be given a doubtful status. A written report would then be given to the client explaining why ownership is in doubt ant a map would be delivered showing the area in question. Admittedly, this solution is not satisfactory to the client; he wants to know what he owns. On the other hand, I was never one willing to assume unnecessary liability. Some time ago I made up my mind that, regardless of how much I knew, there would always be some situation in which it was impossible to find an answer as to who owned what, especially when you take into account what the client is willing to pay. If I were uncertain, I would monument the area the client had for certain, explain the situation, and then let the client decide whether he wanted to go after the doubtful area.

In my own practice, I have at times set monuments in a position that was determined because of long occupancy, and as I reflect on it, in each case the client had color of title, that is, he had a written title that was defective. On its face the writings appeared to be good. yet in fact they were somehow deficient when you looked up record facts, such as senior rights or the original position of monuments. Two examples that follow illustrate the situation:

A subdivision was made some 50 years ago, and the surveyor measured out 1320 ft. and set a pipe at a corner fence post and wrote "fence corner of long standing." Upon properly breaking down the section. it was discovered that the section was somewhat skewed in the last half mile going into the township line. The subdivision encroached upon the adjoiner's land by about 100 feet as shown in Figure 2. I was asked to monument the lot in the Northwest corner. Even knowing that the subdivision encroached upon the adjoiner, I monumented the lot in accordance with the filed map. It was my opinion that title had passed for the simple reason that the lot owners had

paid taxes for more than 50 years with a fence in place; all of the requirements of the law for a possession to change to a fee title had been met. Technically, I was working from a written title, but in fact it was a defective title that depended upon occupancy to ripen into a fee right.

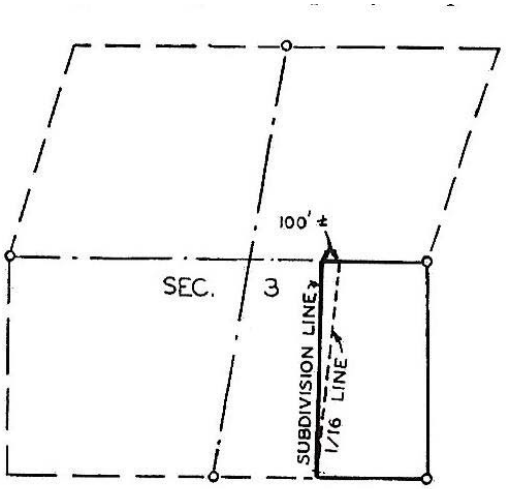

FIGURE 2.

It was my policy that if a subdivision had been made prior to the statute of limitations, and the owner had a fence up for the length of time of the statute of limitations, I would not investigate the correctness of the exterior boundary on the theory that if it were wrong, it did not matter; title had passed by occupancy rights.

The second situation is shown in Figure 3. The street was the boundary of the City of San Diego and was determined from monuments miles apart. In improving the street and putting in curbs and sidewalks, the city ran the true line; it encroached on the subdivision to the west by about 5 ft. The blocks to the east were 5 ft. too long, and those to the west 5 ft too short. I was asked to monument one of the lots adjacent to the street, and I did so by placing all of the shortage in the last lot. They had lost 5 ft. to the street and I recognized it as such.

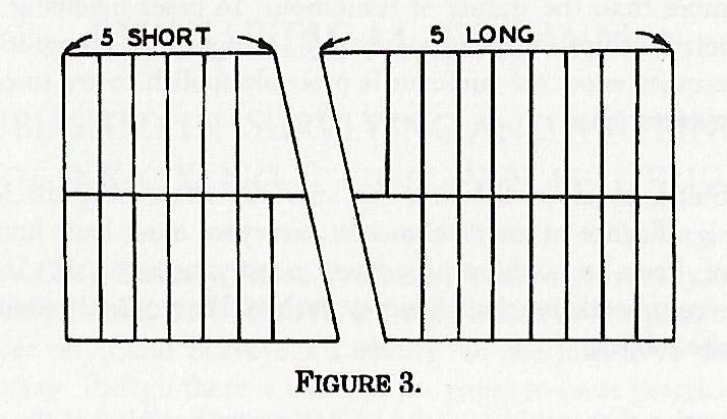

FIGURE 3.

Here are two cases in which I reacted to change in title due to possession. In the first one, the party had a written document giving title to land that the adjoiner owned; the second, the lot owner lost land because of continued use by the public. As a summary of the discussion presented, the following is offered:

(1) The surveyor in finding an encroachment on his client's land must fully inform the client of its significance; further, the information must be presented in such a manner that third parties also understand the significance of any encroachment.

(2) Nothing in the law prevents the surveyor from deciding who has ownership to encroachments, and he may monument ownership lines rather than written title lines.

(3) In some circumstances the surveyor may be justified in monumenting the line that he believes to represent true ownership line. In my experience, this occurs when (1) the client has color of title, (2) the client has paid taxes on the land described with color of title, (3) and the client has had possession by an enclosure for a time more than the statute of limitations. In cases involving adverse relationships (adverse possession), estoppel, or recognition and acquiescence, the surveyor is probably foolish to try to establish ownership.

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

A practice that would save the land surveyor harmless is the practice of drafting "Property Line Agreements." This is supported by the policy of the American Congress on Surveying and Mapping that all written deeds should be brought into conformance with the possession of the land. This is accomplished by causing the client and all adjoiners to sign a map stating that they agree that the lines shown thereon are their common property lines. This is a good way to resolve the problem under discussion and all land surveyors should attempt to settle their boundary disputes in this way.

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