

Vermont Society of Land Surveyors 2017 Fall Conference September 21 & 22, 2017 Stowe Vermont

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**ADVERSE POSSESSION
ACQUIESCENCE
PRACTICAL LOCATION
THE LAND SURVEYOR'S ROLE**

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WHY IS IT IMPORTANT TO UNDERSTAND THE PRINCIPLES OF ADVERSE POSSESSION AND ACQUIESCENCE?

TO AVOID NEIGHBORHOOD DISPUTES



WHY IS IT IMPORTANT TO UNDERSTAND THE PRINCIPLES OF ADVERSE POSSESSION AND ACQUIESCENCE?

AVOID LITIGATION



VERMONT DEFINITION OF LAND SURVEYING

26 V.S.A. §2502 (4)

"Practice of land surveying" means providing, or offering to provide, professional services, including record research, reconnaissance, measurements, gathering parol evidence, analysis of evidence, mapping, planning, expert testimony, and consultation related to any of the following:

(A) locating, relocating, establishing, reestablishing, or retracing property lines or boundaries, or demarcating other legal rights or interests in any tract of land, road, right-of-way, or easement;

VERMONT DEFINITION OF LAND SURVEYING

26 V.S.A. §2502 (4)

(B) determining, by the use of principles of surveying, the position for any boundary monument or reference point, or replacing any monument or reference point;

(C) making any survey for the division, subdivision, or consolidation of any tract of land;

VERMONT DEFINITION OF LAND SURVEYING

26 V.S.A. §2502 (4)

(D) creating, preparing, or modifying graphic documents such as maps, plats, and plans, or electronic data used or referenced in instruments of conveyance of rights in real property, or which define rights in real property, or are used to define such rights;

(E) calculating dimensions and areas, which may be used to define rights in real property

NH DEFINITION OF LAND SURVEYING

NH RSA 310:54,IV

Practice of land surveying means any service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics,

the related physical and applied sciences and the relevant requirements of law for adequate evidence

to the act of measuring and locating lines, angles, elevations, natural and man-made features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water

NH DEFINITION OF LAND SURVEYING

NH RSA 310:54, IV

Practice of land surveying means ...

for the purpose of determining areas and volumes,

for the monumenting of property boundaries and

for the platting and layout of lands and subdivisions of
land,

including the topography alignment and grades of
streets and for the preparation and

perpetuation of maps, record plats, field note records
and property descriptions that represent these surveys.

Vermont Admin. Rules

5.4 Procedural Standards

Whenever a land surveyor conducts a survey of property, the surveyor shall, at a minimum, perform the following:

(a) Research and Field Investigation:

(1) Prepare a survey abstract.

(2) Examine, analyze and test consistency of the record evidence. Investigate and document inconsistencies and form preliminary conclusions as to the completeness of the record evidence.

(3) If necessary, obtain and document from knowledgeable and credible persons parol evidence which may control the location of the corners and the boundaries of the property under survey.

Vermont Admin. Rules

5.4 Procedural Standards

(4) Search for physical evidence which may control the location of the corners and the boundaries of the property under survey. Existing monumentation and physical evidence should not be removed or disturbed.

(5) Record and document in detail all physical evidence found or physical evidence of record not found. Descriptions shall include materials, size and shape, identifying marks or numbers, position and stability; cylindrical sizes shall be reported as inside or outside diameter. Position reported shall include the distance above or below ground.

(6) Make, record, and document measurements to ensure the location and perpetuation of pertinent physical evidence.



ACQUIESCENCE IN VERMONT

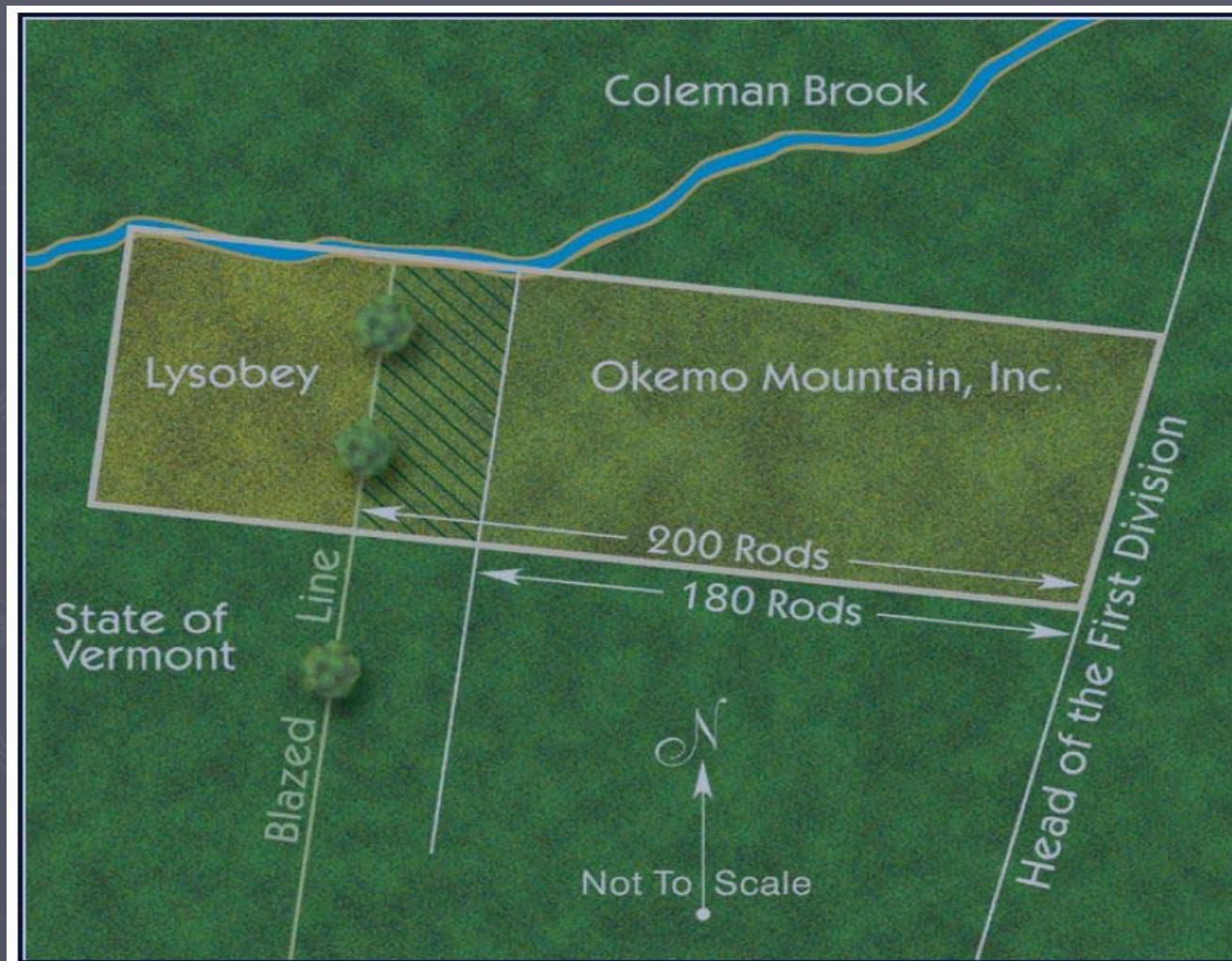
Okemo Mtn., Inc. v. Lysobey, 178 VT 608 (2005)

Facts:

- ▶ Okemo claimed line 200 rods west of the Head of the Ludlow First Division
- ▶ Lysobey claimed line at 180 rods

ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608 (2005)



ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608
(2005)

FACTS

- ▶ Conflicting plans and deeds from the early 1800's.
- ▶ Evidence supported that the 200 rod line was blazed on the ground for at least 1970.
 - Forester testimony at trial
- ▶ No other physical evidence.

ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608
(2005)

FACTS

- ▶ Blazed line since 1970.
- ▶ Lysobey purchased in 1986 – blazes existed
- ▶ Lysobey first took action to challenge the line in 1997.
- ▶ 27 years passed between purchase and challenge

ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608 (2005)

Rules of Acquiescence

- ▶ A boundary is established by acquiescence when there is mutual recognition of a given line by adjoining landowners, and continuous possession by one to the line for a fifteen-year period, which is the same as the period required to establish ownership by adverse possession.

ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608 (2005)

Rules of Acquiescence

- ▶ A line established by acquiescence for the statutory period of fifteen years prevails over the line established by a later survey.
- ▶ In other words: once title is established by acquiescence, a later survey does not overturn the acquiesced line.

ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608 (2005)

citing:

N.A.S. Holdings, Inc. v. Pafundi, 169 VT 437
(1999)

Rules of Acquiescence

- ▶ Continued satisfaction and compliance with a boundary marked on the ground is persuasive evidence which supports its selection as the correct division.

ACQUIESCENCE IN VERMONT

Okemo Mtn., Inc. v. Lysobey, 178 VT 608 (2005)

citing:

N.A.S. Holdings, Inc. v. Pafundi, 169 VT 437
(1999)

- ▶ The trial court noted that the lack of ancient monuments on the ground is not fatal to Okemo's claim because the blaze line, located as it is in a remote area without any other boundary markings, was the equivalent of the claimant "unfurling its flag."

ACQUIESCENCE IN NEW HAMPSHIRE

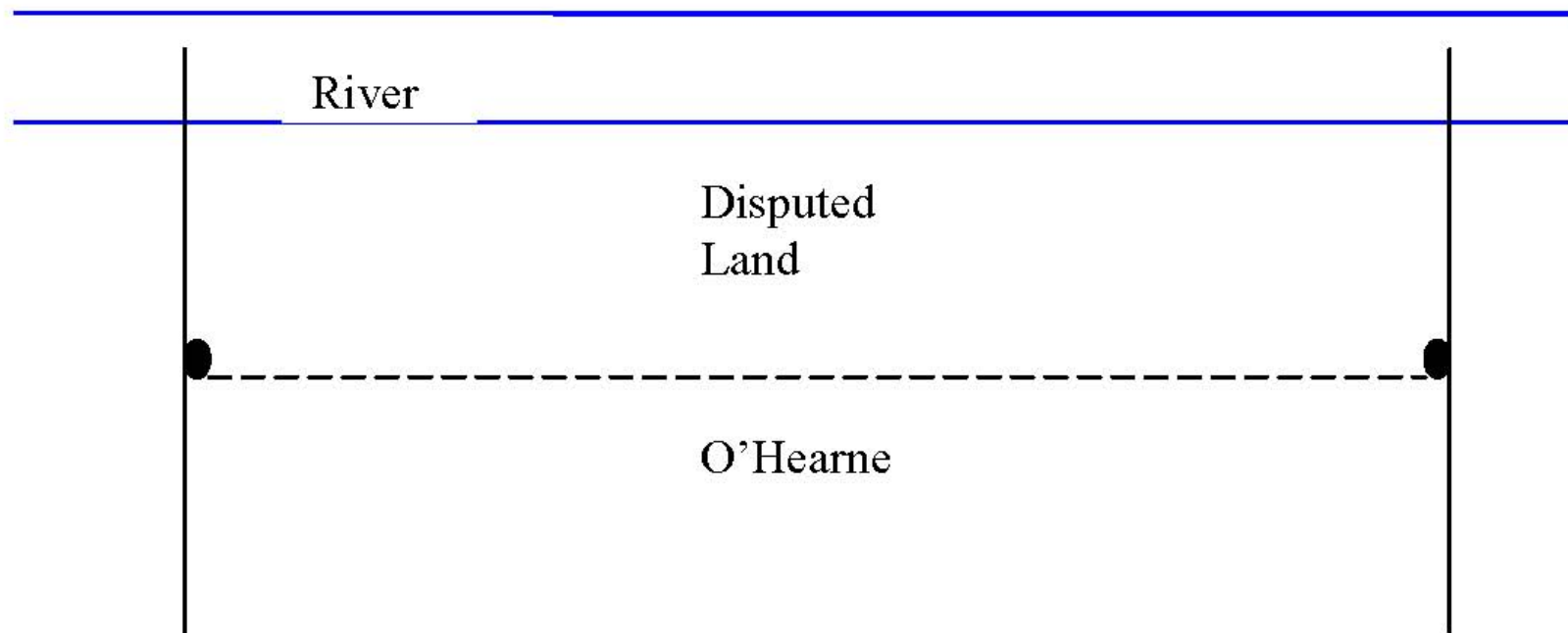
O'Hearne v. McClammer, 163 N.H. 430, 2012

- ▶ Facts: Early deeds called for CL of river. Later deeds called for witness monuments.
- ▶ Parties and their predecessors used the witness monuments as the line for over twenty years
- ▶ Which line controls?

O'Hearne v. McClammer, 163 N.H. 430, 2012

Acquiescence & Adverse Possession

McClammer



O'Hearne v. McClammer, 163 N.H. 430, 2012

Acquiescence & Adverse Possession

- ▶ Evidence of Acquiescence
- ▶ the owners walking the line together,
- ▶ letters to DOT supporting the monument line, and
- ▶ no trespassing signs along the monumented line.

O'Hearne v. McClammer, 163 N.H. 430, 2012

Acquiescence & Adverse Possession

- Procedural History: Lower Ct. found for D based on 20 year acquiesces
- Issues: The Court discussed difference between elements of Adverse Possession and Acquiesces
- Holdings: Court found that both parties acquiesced to the monumented line for over 20 years.

O'Hearne v. McClammer, 163 N.H. 430, 2012

Elements of Acquiescence

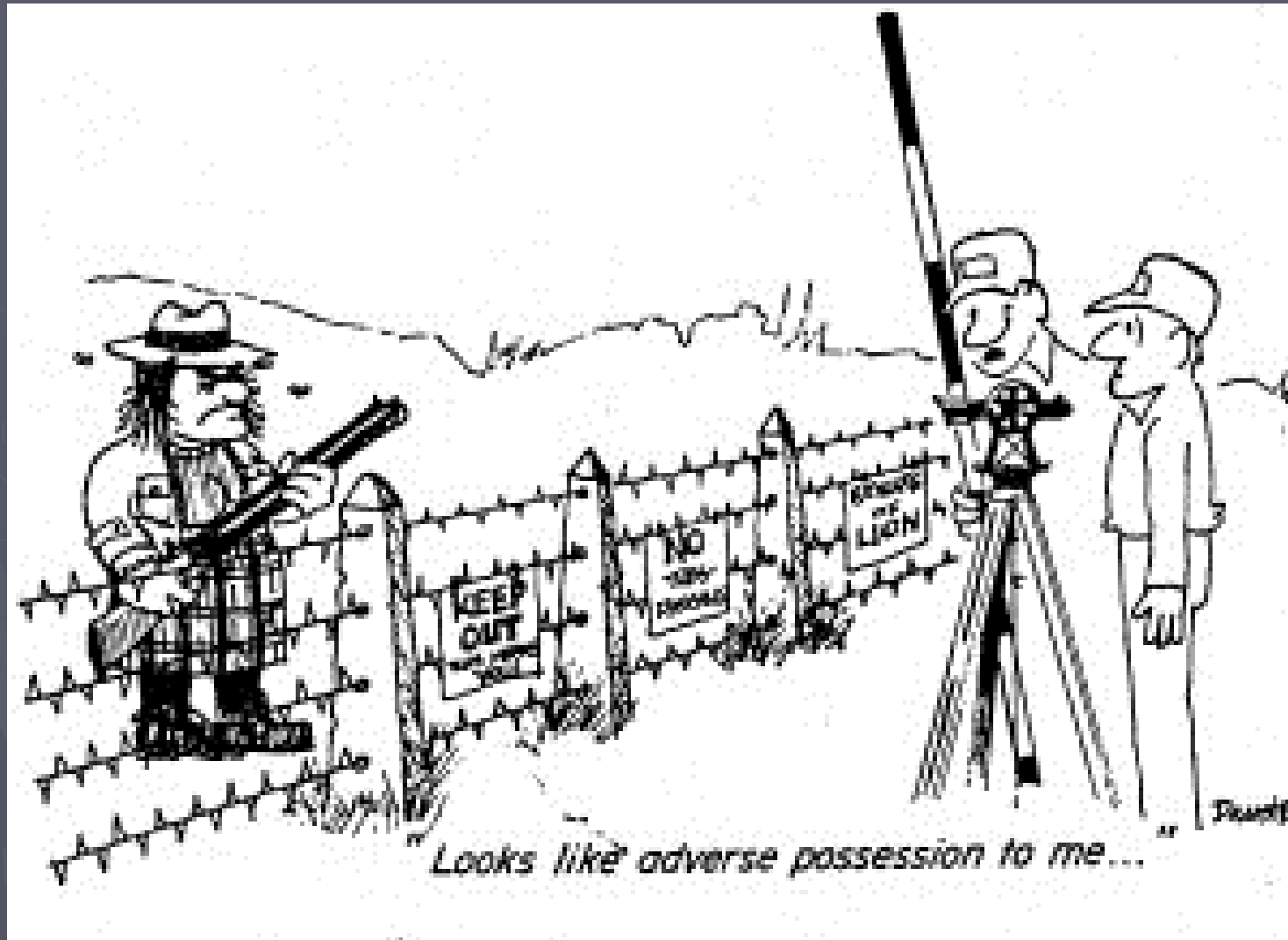
- To establish a boundary by acquiescence, a party generally must prove that:
- (1) the parties are adjoining landowners;
- (2) who have occupied their respective lots up to a certain boundary;
- (3) which they have recognized as the true boundary separating the lots; and
- (4) have done so for at least twenty years [or the statutory period for bringing real property claims].

O'Hearne v. McClammer, 163 N.H. 430, 2012

Elements of Adverse Possession

- 20 Years (RSA 508:2, I = statute of limitations)
- Adverse (no permission)
- Continuous (seasonal is OK)
- Exclusive
- Use of the land claimed
- So as to give notice to the owner that an adverse claim is being made
- (Do not need color of title)

ADVERSE POSSESSION



Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

- ▶ "The adverse possessor must show that he or she has
 1. used or possessed disputed property
 2. in an open,
 3. notorious,
 4. hostile, and
 5. continuous manner
 6. throughout the limitations period of fifteen years."

Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

1. Used or possessed disputed property

- ▶ “possession” is the key word – user must actually occupy and control the land.
- ▶ Are paying taxes enough? - probably not if there is no physical possession.

Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

2. In an open, notorious,

The adverse possession must not be hiding under the rock!

Notorious = “famous or well-known for some bad quality or deed”

Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

2. In an open, notorious,

- ▶ "The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest."

- ▶ *Barrell v. Renehan*, 114 Vt. 23, (1944)

Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

3. Hostile

Hostile = unfriendly, adverse, antagonistic

- ▶ If the owner gives permission for the use, there is no hostility.
- ▶ Tolling the clock with revocable license.

Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

4. Continuous manner

- ▶ The possession cannot be broken by the record owner during the 15 years.
- ▶ Possession does not have to be 24/7.
 - Seasonal use OK in NH.
 - Regular logging

Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

4. Continuous manner

- ▶ To toll the clock the record owner must physically reclaim the land or bring a quiet title action in court. *Mahoney v Tara* 2014 VT 90.
- ▶ Record owner survey and recording plan does not toll the clock – not possession.

Reclaiming the Land Stops Adverse Possession



Elements of Adverse Possession

Mahoney v. Tara, LLC, 2014 VT 90

► “The adverse possessor must show that he or she has

5. Statute of limitations period of fifteen years.

Vermont = 15 years. 12 V.S.A. § 501.

New Hampshire – 20 years. RSA 508:2.

Elements of Adverse Possession

► Possession and Use Exclusive

- Shared use does not create fee title
- Shared use may create a prescriptive easement
- Examples:
 - Driveways
 - Beach rights

No Adverse Possession Statutory Exclusions:

- ▶ **RSA 539:6** **State Lands**
12 V.S.A. § 462 **State, Pious or**
Charitable use
- ▶ **RSA 236:30** **Public Highways**
19 V.S.A. § 1102
- ▶ **RSA 367:45** **Rail Roads**
5 V.S.A. § 3425

Acquiescence and Adverse Possession Perfecting the Claim

- ▶ By Agreement of the Parties
 - Boundary line agreements
 - NH RSA 472:4
- ▶ Judicial Decree
 - *Gordon v. Town of Rye*, 163 N.H. 144 (2010).
 - Jurisdiction to settle disputes in real property rests with the Superior Court

The Surveyor's Role in Acquiescence and Adverse Possession

- ▶ NH Lan 503.02, Definitions. ...
- ▶ (k) “Line of possession” means a line defined by physical evidence of occupation.
- ▶ Lan 503.03, Survey Requirements. ...
- ▶ (f) Standard property surveys shall include the location of lines of occupation and any possible encroachments.
- ▶ Lan 503.09(b) As appropriate to the purpose of the survey, a survey plat shall contain but not be limited to containing the following: ...
 - (13) Lines of possession where they affect the surveyed boundaries;

The Surveyor's Role in Acquiescence and Adverse Possession

- ▶ Parol Evidence
- ▶ Talk to your client
- ▶ Talk to the abutter
- ▶ Show the encroachment on the plan
- ▶ Educate the client
- ▶ Educate the lawyer

The Surveyor's Role in Acquiescence and Adverse Possession

The Judicial Functions of Surveyors

Justice Thomas Cooley

Chief Justice, Supreme Court of Michigan

1864-1885



The Surveyor's Role in Acquiescence and Adverse Possession

The Judicial Functions of Surveyors

- ▶ The Facts of Possession
- ▶ The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it.

The Surveyor's Role in Acquiescence and Adverse Possession

The Judicial Functions of Surveyors

- ▶ The Facts of Possession
- ▶ Even then he should hesitate long before doing anything to the disturbance of settled possessions.
- ▶ Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable

The Surveyor's Role in Acquiescence and Adverse Possession

The Judicial Functions of Surveyors

- ▶ The Facts of Possession
- ▶ Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State statute, disregard all evidences of occupation and claim of title and plunge whole neighborhoods into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize.

The Surveyor's Role in Acquiescence and Adverse Possession

The Judicial Functions of Surveyors

- ▶ The mathematically calculated boundary line problem.
- ▶ Monuments and possession trump metes and bounds.
- ▶ There is NOT a rule of boundary reconstruction that says the computer trumps all other evidence.

Common Law Rules of Deed Interpretation

▶ **HIERARCHY OF DEED CALLS**

- ▶ Natural Monuments
- ▶ Artificial, (manmade), Monuments
- ▶ Calls for Abutters
- ▶ Direction
- ▶ Distance
- ▶ Area

The Surveyor's Role in Acquiescence and Adverse Possession

The Judicial Functions of Surveyors

- ▶ The Facts of Possession
- ▶ ... 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.

The Surveyor's Role in Acquiescence and Adverse Possession

► The Duty of the Surveyor

1. Search for original monuments
2. If no monuments, look at all evidence including the acts and possession of the parties.
3. Clearly communicate with the client
4. Offer to act as a mediator to settle doubtful lines. The surveyor cannot force mediation and settlement.
5. Avoid being the creator of controversy and litigation

Equity Powers of Court

- ▶ What is “Fair” and “Equitable” given the facts of the case
- ▶ Court has broad powers in Equity to decide what is fair
- ▶ Based upon “Natural Law”
- ▶ The Moral Law of how society should work

Equity Powers of Court

- ▶ Equity cases are based on the facts and circumstances of the each case.
- ▶ A Quiet Title action to perfect adverse possession or acquiescence is an equity proceeding.
- ▶ Estoppel
 - I am estopped by my prior acts – my actions showed that I acquiesced to the line.
- ▶ Laches
 - I sat on my rights too long watching you occupy the land.

Equity Powers of Court

Equity is based upon the facts and circumstances of the each case.

- ▶ Unjust Enrichment

- I watched you build the barn on my land

- ▶ Nuisance

- Your act interferes with my rights

Equity Powers of Court

- ▶ The statute of limitations in each state sets the time period:
- ▶ Adverse Possession
 - 15 years VT, adverse, exclusive
 - 20 years NH
- ▶ Acquiescence
 - 15 years VT, parties acquiesce to line
 - 20 years NH
- ▶ Florida: 7 yrs. and Color of Title; or 7 yrs. and Payment of Taxes.

The Surveyor's Role

- ▶ Identify the evidence
 - Record evidence
 - Existing monuments
 - Lines of occupation
 - Parol evidence
- ▶ Reconcile the evidence if possible
- ▶ Communicate with the client and abutters
- ▶ Avoid being the creator of disputes and litigation
- ▶ Act as mediator/facilitator of settlement if possible

The Surveyor's Role Is not:

