

It is merely idle for any State statute to direct a surveyor to locate or "establish" a corner, as the place of the original monument, according to some inflexible rule. 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, first, that neither his opinion nor his survey can be conclusive upon the parties concerned; and, second, 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 same rules that will govern theirs. On town plats if a surplus or deficiency appears in a block when the actual boundaries are compared with the original figures, and there is no evidence to fix the exact location of the stakes which marked the division into lots, the rule of common sense and the law is that the surplus or deficiency is to be apportioned between the lots on an assumption that the error extended alike to all parts of the block.

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 judgment, 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.

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 judgment. 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 the 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.

45. Seniority. It is common practice in West Virginia to mention the names of adjoiners in a description of a survey or in a deed description, regardless of who has the senior and junior titles. The reason is for identification rather than for trying to assign seniority. This author believes that actual legal seniority must be based on other records or evidence rather than a statement in a survey description. The surveyor of course must determine seniority if conflicting calls exist. But in most cases it is the intent that properties adjoin on a common line rather than overlap or leave a gap. When a new parcel is cut out of a larger

tract, the new parcel is of course senior to the parent tract. Then calls for the adjoiner to the new parcel could state: "thence with land reserved by (grantor) xxx". But even if the description says: "thence with land of (grantor), the adjoiner is not senior; the facts show he is junior to the new parcel.

46. When riparian rights are involved, they appear to go to the low water mark. 26 W. Va. 644, 53 Am. Rep. 116; 35 W. Va. 95, 13 S.E. 42, 29 Am. St. 793; 54 W. Va. 122, 46 S.E. 269, 102 Am. St. 927; Md. vs W. Va. 217 U. S. 577 (1910), 54 L. Ed. 888, 30 Sup. Ct. 630.

47. The western line of Maryland which joins West Virginia is to be run and located and marked "as far as practicable as it has been generally recognized and adopted by the people residing about or near the same xxx and not as conforming, except to a limited extent, to the western boundary of the Maryland Military Lots as said lots are now located and held", Maryland vs West Virginia 217 US 577 (1910).

Fences as Boundary Lines

One of the most common kinds of evidence that may show property ownership is a fence. In urban areas fences are made of wood, stone, concrete, metal or shrubbery. In rural areas fences are usually wire (barbed or woven) or rail. A ditch or ridge of earth (as from plowing along a fence) may have significance. The early zig-zag rail fences are being replaced by wire. In West Virginia, the law requires adjoining rural owners to cooperate in fence construction and maintenance where the fence serves certain agricultural uses of each owner. Fences assume considerable significance, depending on circumstances.

The good surveyor will tie his random line to nearby fences at about every station set-up. So when the random line is plotted, he can plot the fence and know how it fits between corners. Measurements are made to the wire or center of rail fences. The fence can sometimes serve as a guide to where the random line was, in the event random stakes are rotted off, lost or removed. When a fence is the legal boundary line, the wire itself rather than the center of the posts, is the proper line. Some courts have held that where the center of the posts have been placed on line, the fastening of wires on one side of the posts deprives the owner on that side, of use of a part of his land.

If fences are found to coincide with measurements in deeds for the properties concerned, they create no problem for the surveyor. However, when fences are found that diverge, the significance of the fence must be determined. A monument called for and found at a corner apparently undisturbed will usually take priority over a fence line or intersection. But where no monument is found, an old fence intersection in the area raises a presumption that the corner was at or near the intersection, especially if there is no evidence from adjoining

owners to the contrary. The older the fences, the greater the weight that is accorded them by the courts.

Fence intersections frequently provide a good guide to corner locations because more care is exercised by the builders and markers were often present. But this is not so true for fence lines *between* corners. When a fence is straight between recognized corners, no problem is raised by its presence. Many fences, however, diverge a great deal from a straight line, but if the corners at each end are agreed to be correct, the owners are likely to agree that the fence location is one of convenience only, and was placed there because it was cheaper to build off line, or because the line was unmarked and its location was not definite. If a resurvey is to be made, the owners will likely agree that the fence does not control and will be relocated to the true line where possible, at some future date.

A fence on the bank of a stream or road is usually there for convenience; the true line may be the center of the stream or road. Where a fence is called for in a deed, it controls if in its original location.

Disputes are most likely to arise when markers are missing, when measurements are inconclusive, and fences not straight. The surveyor must search carefully for evidence of fences that may have existed before the present fence. Chestnut rails are long-lasting and often their decayed remains can be found. A boundary line agreement may be found, either implied or formalized, in writing or verbal. If the fence has been acquiesced in for over 10 years (in West Virginia) and the land on each side has been used continuously by the respective owners or their tenants, a strong case exists for considering the fence to be the correct line. When such fences are "ancient" (thirty to fifty years old) and there is no good evidence to the contrary, courts are likely to hold that the fence is the line by possession or prescription. But in this connection, surveyors need to know about the legal action of "ejectment".

The original survey and grant presumed a straight line between two corners to be the true line. However, if the original surveyor's "footsteps" can be found elsewhere (by marked trees for example), the "footsteps" will control. When no such footsteps can be found (and very often they cannot), the modern surveyor should attempt to obtain agreement between the owners to accept a straight line between the corners as most equitable to their respective interests. If no agreement can be obtained, an off-line fence must be tied to and a lap shown on the plat; the ownership of the lap is a legal problem. There will be few times when a fence controls the line location, and surveyors must be alert to recognize them.

The surveyor may occasionally be asked where a fence should be built. Some owners prefer to build fences entirely on their own land in

the hope that it will save an argument with the neighbor. However, it is usually better in the long run if fences are built *on line* or as close thereto as practicable. If a fence is deliberately set back from the true line, and later one or both monuments are lost, the fence can cause disputes and require extra survey costs to unravel the problem. And the owner who had set the fence back might be hard pressed to prove his ownership to the true line.

Old Line Marks as Boundary Controls

Most land grants in West Virginia state "according to survey made on ---- by ----" and by authority of Land Warrant # ---- for ---- acres. Therefore, it must be presumed that most grants were preceded by a ground survey. But when a grant was to be issued for land adjoining property previously surveyed and granted, it was likely customary to survey only those lines of the new grant not previously surveyed, and to incorporate in the new grant the calls for the line of the previously surveyed grant or survey. This practice gave rise to significant errors of closure.

The lines of senior grants take priority over later grants. As most original grants in West Virginia were made 100 years ago or more, and the lands involved have been cutover one or more times or cleared of all trees since then, it is apparent that most trees if marked by the original surveyor have long since disappeared.

Original grants have been divided and subdivided by deed or otherwise right down to the present time. So any survey that subdivides land not heretofore subdivided is an "original" survey. (A resurvey of a former survey is not an original survey.)

The courts hold that original marks of a survey are monuments of the highest dignity because they show the "footsteps" of the original surveyor. Therefore, original marks control location of a line if:

1. The survey is senior to the adjoining survey.
2. The survey was made before or simultaneously with the execution of the deed or grant.
3. There is no expressed intention to the contrary.
4. The line is not a meander line (as on the bank of a stream or road).
5. The line is not a random line (which should never be marked).

A resurvey must follow the original survey if its footsteps can be found even though the original survey line was crooked or apparently on the wrong bearing and distance. Original marks can be hacks or blazes on trees, stakes set at instrument setups on the true line, paint marks, and topographical features such as stream and ridge crossings. The marks must be identifiable. The nearer they are to a corner, the