THE JUDICIAL FUNCTIONS OF SURVEYORS

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Reprinted from the printed proceedings of the Fourth Annual Meeting of the Michigan Association of Surveyors and Civil Engineers, held at Lansing, January 9-11, 1883.

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.

In the State of Michigan, all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan of subdivision was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth, unfortunately, is that the lines were very carelessly run, the monuments inaccurately placed; and, as the record witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed, it is impossible to determine by the record, by the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed, as indeed they should have been, for in general there can have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should become dear. The fact probably is that town surveys are quite as inaccurate as those made under authority of the general government.

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold and the work of improvement begun. A generation has passed away since they were converted into cultivated farms, and few if any of the original corner and quarter stakes now remain.

The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing was substituted in its place, the adjoining proprietors might in a few years be found disputing over their lines, and perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

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, even though the effect be to make one half-quarter section ninety acres and the one adjoining, seventy; for parties buy, or are supposed to buy, in reference to these monuments, and are entitled to what is within their lines, and no more, be it more or less. *McIver vs. Walker*, 4 Wheaton's Reports, 444; *Land Co. vs. Saunders*, 103 U.S. Reports, 316; *Cottingham vs. Parr*, 93 Ill. Reports, 233; *Bunton vs. Cardwell*, 53 Texas Reports, 408; *Watson vs. Jones*, 85 Penn Reports, 117.

While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men whose theoretical education is thought to make them experts, who think that when the monuments are gone the only thing to be done is to place new monuments where the old ones should have been, and would have been if place correctly. This is a serious mistake. The problem is now the same that it was before: To ascertain by the best lights of which the case admits, where the original lines were. The mistake above alluded to is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we shall refer is not what is commonly supposed.

An act passed in 1869 Compiled Laws, § 593, amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows:

"Second. Extinct interior section corners must be reestablished at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it.

"Third. Any extinct quarter-section corner, except on fractional lines, must be reestablished equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line."

The corners thus determined, the surveyors are required to perpetuate by noting bearing trees when timber is near.

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from government bought such land as was within the original boundaries, and unquestionably owned it up to the time when the monuments became extinct. If the monument was set for an interior section corner, but did not happen to be "at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it," it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains as a potential fact so long as he can present better evidence than any other person. And it may often happen that notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

There are two senses in which the word extinct may be used in this connection: One, the sense of physical disappearance; the other, the sense of loss of all reliable evidence. If the statute speaks of

extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that, if a man loses his deed, he shall lose his land altogether.

But if by extinct corner is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent:

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field notes indicated it to be.

2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.

3. No statute can confer upon a county surveyor the power to "establish" corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and Federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made govern, because the land was bought in reference to them; and any legislation, whether State or Federal, that should have the effect to change these, would be inoperative, because [of] disturbing vested rights.

4. In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence and give full opportunity for a hearing. No arbitrary rules of survey or of evidence can be laid down whereby it can be adjudged.

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. 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; and the surveyor should inquire when it originated, how, and why 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. 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. It is often the case that, where one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit, when the people concerned do not question them, not only breeds trouble in the neighborhood, but it must often subject 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. *Stewart vs. Carleton,* 31 Mich. Reports, 270; *Diehl vs. Zanger,* 39 Mich. Reports, 601; *Dupont vs. Starring*, 42 Mich. Reports, 492. And county surveyors, no more than any others, can conclude parties by their surveys.

The mischiefs of overlooking the facts of possession most often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees, and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from

these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting point in the original survey of the town plat; or a surveyor settling in the town may take some central point as the point of departure in his surveys and, assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

Suppose, for example, a particular village street has been located by acquiescence and user for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor, that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is error in the street line, and that all fences should be moved, say one foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the lot owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding someone disposed to do so. We shall then have a lawsuit; and with what result?

It is common error that lines do not become fixed by acquiescence in a less time than twenty years. In fact, by statute, road lines may become conclusively fixed in ten years; and there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, all concerned have cultivated and claimed up to it. *McNamara vs. Seaton*, 82 Ill. Reports, 498; *Bruce vs. Bidwell*, 43 Mich. Reports. 542. Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of any considerable time. The litigant, therefore, who is in such a case pins his faith on the surveyor, is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.

Of course, nothing in what has been said can require a surveyor to conceal his own judgment, 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 has fixed the rights of parties as if it were at another. But he would do mischief if he were to attempt to "establish" monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement. The peace of the community absolutely requires this rule. *Joyce vs. Williams*, 26 Mich. Reports, 332. It is not long since, that in one of the leading cities of the State, an attempt was made to move houses two or three rods into the street, on the ground that a survey under which the street had been located for many years had been found on a more recent survey to be erroneous.

From the foregoing, it will appear that the duty of the surveyor where boundaries are in dispute must be varied by the circumstances. 1. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant. By

monuments, in the case of government surveys, we mean of course, the corner and quarter stakes. Blazed lines or marked trees on the lines are not monuments; they are merely guides or finger posts, if we may use the expression, to inform us with more or less accuracy where the monuments may be found. 2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. 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 parties concerned; *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 the same rules that will govern theirs. On town plats is 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 mark the division into lots, the rule of common sense and of 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. *O'Brien vs. McGrane*, 29 Wis. Reports, 446; *Quinnin vs. Reixers*, 46 Mich. Reports, 605.

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.

Meander Lines. The subject of meander lines is taken up with some reluctance because it is believed the general rules are familiar. Nevertheless, it is often found that surveyors misapprehend them, or err in their application, and as other interesting topics are somewhat connected with this, a little time devoted to it will probably not be altogether lost. These are lines traced along the shores of lakes, ponds, and considerable rivers, as the measures of quantity when sections are made fractional by such waters. These have determined the price to be paid when government lands were bought, and perhaps the impression still lingers in some minds that the meander lines are boundary lines, and that all in front of them remains unsold. Of course this is erroneous. There was never any doubt that, except on the large navigable rivers, the boundary of the owners of the banks is the middle line of the river; and while some courts have held that this was the rule on all fresh-water streams, large and small, others have held to the doctrine that the title to the bed of the stream below low-water mark is in the State, while conceding to the owners of the banks all riparian rights. The practical difference is not very important. In this State, the rule that the centerline is the boundary line is applied to all our great rivers, including the Detroit, varied somewhat by the circumstance of there being a distinct channel for navigation, in some cases, with the stream in the main shallow, and also sometime by the existence of islands.

The troublesome questions for surveyors present themselves when the boundary line between two contiguous estates is to be continued from the meander line to the centerline of the river. Of course, the original survey supposes that each purchaser of land on the stream has a water front of the length shown by the field notes; and it is presumable that he bought this particular land because of that fact. In many cases it now happens that the meander line is left some distance from the shore by the gradual change of course of the stream, or diminution of the flow of water. Now the

dividing line between two government subdivisions might strike the meander line at right angles, or obliquely; and, in some cases, if it were continued in the same direction to the centerline of the river, might cut off from the water one of the subdivisions entirely, or at least cut it off from any privilege of navigation or other valuable use of the water, while the other might have a water line crossing it at right angles to its side lines. The effect might be that, of two government subdivisions of equal size and cost, one would be of great value as water-front property, and the other comparatively valueless. A rule which would produce this result would not be just, and it has not been recognized in law.

Nevertheless it is not easy to determine what ought to be the correct rule for every case. If the river has a straight course, or one nearly so, every man's equities will be preserved by this rule: Extend the line of division between the two parcels from the meander line to the centerline of the river, as nearly as possible at right angles to the general course of the river at that point. This will preserve to each man the water front which the field notes indicated, except as changes in the water may have affected it, and the only inconvenience will be that the division line between different subdivisions is likely to be more or less deflected where it strikes the meander line.

This is the legal rule, and is not limited to government surveys, but applies as well to water lots which appear as such on town plats. *Bay City Gas Light Co. v. The Industrial Works*, 28 Mich. Reports, 182. It often happens, therefore, that the lines of city lots bounded on navigable streams are deflected as they strike the bank, or the line where the bank was when the town was first laid out.

When the stream is very crooked, and especially if there are short bends, so that the foregoing rule is incapable of strict application, it is sometimes very difficult to determine what shall be done; and in many cases the surveyor may be under the necessity of working out a rule for himself. Of course his action cannot be conclusive; but if he adopts one that follows, as nearly as the circumstances will admit, the general rule above indicated, so as to divide as near as may be the bed of the stream among the adjoining owners in proportion to their lines upon the shore, his division, being that of an expert, made upon the ground, and with all available lights, is likely to be adopted as law for the case. Judicial decisions, into which the surveyor would find it prudent to look under such circumstances, will throw light upon his duties and may constitute a sufficient guide when peculiar cases arise. Each riparian lot owner ought to have a line on the legal boundary, namely, the centerline of the stream, proportioned to the length of his line on the shore, and the problem in each case is how this is to be given him. Alluvion, when a river imperceptibly changes its course, will be apportioned by the same rules.

The existence of islands in a stream when the middle line constitutes a boundary, will not affect the apportionment unless the islands were surveyed out as government subdivisions in the original measurement. Wherever that was the case, the purchaser of the island divides the bed of the stream on each side with the owner of the bank, and his rights also extend above and below the solid ground, and are limited by the peculiarities of the bed and the channel. If an island was not surveyed as a government subdivision previous to the sale of the bank, it is, of course, impossible to do this for the purposes of government sale afterward, for the reason that the rights of the bank owners are fixed by their purchase; when making that, they have a right to understand that all land between the meander lines, not separately surveyed and sold, will pass with the shore in the government sale and, having this right, anything which their purchase would include under it cannot afterward be taken from them. It is believed, however, that the Federal courts would not recognize the applicability of this rule to large navigable rivers, such as those uniting the Great Lakes.

On all the little lakes of the State which are mere expansions near their mouths of the rivers passing through them—such as the Muskegon, Pere Marquette, and Manistee—the same rule of bed ownership has been judicially applied that is applied to the rivers themselves; and the division lines are extended under the water in the same way. *Rice v. Ruddiman,* 10 Mich., 125. If such a lake were circular, the lines would converge to the center; if oblong or irregular, there might be a line in the middle on which they would terminate whose course would bear some relation to that of the shore. But it can seldom be important to follow the division line very far under the water, since all private rights are subject to the public rights of navigation and other use, and any private use of the lands inconsistent with these would be a nuisance, and punishable as such. It is sometimes important, however, to run the lines out for considerable distance in order to determine where one may lawfully moor vessels or rafts for the winter or cut ice. The ice crop that forms over a man's land of course belongs to him. *Lorman v. Benson,* 8 Mich., 18; *People's Ice Co. v. Steamer Excelsior,* recently decided.

What is said above will show how unfounded is the notion, which is sometimes advanced, that a riparian proprietor on a meandered river may lawfully raise the water in a stream without liability to the proprietors above, provided he does not raise it so that it overflows the meander line. The real fact is that the meander line has nothing to do with such a case, and an action will lie whenever he sets back the water upon the proprietor above, whether the overflow be below the meander lines or above them.

As regards the lakes and ponds of the State, one may easily raise questions that it would be impossible for him to settle. Let us suggest a few questions, some of which are easily answered, and some not:

1. To whom belongs the land under these bodies of water, where they are not mere expansions of a stream flowing through them?

2. What public rights exist in them?

3. If there are islands in them which were not surveyed out and sold by the United States, can this be done now?

Others will be suggested by the answers given to these.

It seems obvious that the rules of private ownership which are applied to rivers cannot be applied to the great lakes. Perhaps it should be held that the boundary is at low water mark, but improvements beyond this would only become unlawful when they became nuisances. Islands in the great lakes would belong to the United States until sold, and might be surveyed and measured for sale at any time. The right to take fish in the lakes, or to cut ice, is public like the right of navigation, but is to be exercised in such manner as not to interfere with the rights of shore owners. But so far as these public rights can be the subject of ownership, they belong to the State, not to the United States, and so, it is believed, does the bed of a lake also. *Pollord v. Hagan,* 3 Howard's U.S. Reports. But such rights are generally considered proper subjects of sale, but like the right to make use of the public highways, they are held by the State in trust for all the people.

What is said of the large lakes may perhaps be said also of the interior lakes of the State, such, for example, as Houghton, Higgins, Cheboygan, Burt's Mullet, Whitmore, and many others. But there are many little lakes or ponds which are gradually disappearing, and the shore proprietorship advances *pari passu* as the waters recede. If these are of any considerable size—say, even a mile across—there may be questions of conflicting rights which no adjudication hitherto made could settle. Let any surveyor, for example, take the case of a pond of irregular form, occupying a square mile or

more of territory, and undertake to determine the rights of the shore proprietors to its bed when it shall totally disappear, and he will find he is in the midst of problems such as probably he has never grappled with or reflected upon before. But the general rules for the extension of shore lines, which have already been laid down, should govern such cases, or at least should serve as guides in their settlement. *Note*.—Since this address was delivered [in 1881] some of these questions have received the attention of the Supreme Court of Michigan in the cases of *Richardson v. Prentiss*, 48 Mich. Reports, 88, and *Backus v. Detroit*, Albany Law Journal, vol. 26, p. 428.

Where a pond is so small as to be included within the lines of a private purchase from the government, it is not believed the public have any rights in it whatever. Where it is not so included, it is believed they have rights of fishery, rights to take ice and water, and rights of navigation for business and pleasure. This is the common belief, and probably the just one. Shore rights must not be so exercised as to disturb these, and the States may pass all proper laws for their protection. It would be easy with suitable legislation to preserve these little bodies of water as permanent places of resort for the pleasure and recreation of the people, and there ought to be such legislation.

If the State should be recognized as owner of the beds of these small lakes and ponds, it would not be owner for the purpose of selling. It would be owner only as trustee for the public use; and a sale would be inconsistent with the right of the bank owners to make use of the water in its natural condition in connection with their estates. Some of them might be made salable lands by draining; but the State could not drain, even for this purpose, against the will of the shore owners, unless their rights were appropriated and paid for.

Upon many questions that might arise between the State as owner of the bed of a little lake and the shore owners, it would be presumptuous to express an opinion now, and fortunately the occasion does not require it.

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 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.