



Tecumseh Chapter of the Indiana Society of Professional Land Surveyors
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FROM THE NOVEMBER 8, 2006 CHAPTER MEETING:

- Pat Cunningham presented a Supreme Court of Indiana case (Herbst et al. v. Smith; 71 Ind. 44, November 1880), which discussed surveys conducted under the act of June 17th 1852. The court case sets precedents how surveys conducted under this act are treated as prima facie evidence concerning county surveyor's monuments (i.e. stones) at 1/16th corners versus theoretical location. A "sixteenth" corner was marked by a County Surveyor originally, as part of a legal survey under the act, a process that is similar to the legal survey process that exists today. Future surveys "reset" the corner at a different location because the original location was not at the theoretical location. The court decided that the original monument as set by the County Surveyor was the location of the "sixteenth" corner. Future court cases have referred to this case, in that as a part of the legal survey process, notification is required; however, the future cases have placed the burden of proof on the party that disputes that notification occurred (i.e. if a person wants to dispute that notification actually occurred, the burden is on them to show that it did not occur, otherwise it is assumed to have occurred). The issues involved in the case are legal surveys, original monuments and prima facie evidence. **This is a case that all surveyors should become familiar with and understand the ramifications that it could have on surveys that are being performed today, rather than being so quick to use a mathematical (theoretical) solution for "sixteenth" and other aliquot section corners.**

The above is a continuation of several presentations made by Pat Cunningham and Tim Beyer concerning the reestablishment of sixteenth and other aliquot section corners in a section when they have already been previously established in a prior survey. Such presentations were made at a chapter meeting on May 26, 2004, and seminars on January 21, 2005 and September 30, 2005. The presentation at this chapter meeting cites a specific Indiana Supreme Court case on the subject. Below is a summary of prior information and background on the subject.

GENERAL BACKGROUND: While a mathematical (theoretical) solution is a possible answer, case law (law established by prior Appellate and Supreme court decisions) establishes that it is a last resort and that, first, all other evidence and possible boundary solutions must be exhausted and determined to be unreasonable. **The evidence of a measurement is incompetent to prove an original monument, or its original location, to be in error.** Surveyors must also keep in mind the accuracy of the survey at the time it was performed. For example, the Surveyors-General Instructions to Deputy Surveyors, State of Arkansas, issued in 1843, set closing limits of 1:320 for surveys of sections, and were one of the first to set closing limits. Whether or not they pertain to Indiana, they give a general "flavor" of expected closing limits in the general time period.

Per IC 36-2-12-9, a survey by the County Surveyor constitutes prima facie evidence in favor of the corners and lines it establishes. Once a corner has been properly established by a private or public (County) surveyor, the surveyor's job is to reestablish that original location for the corner. The difference is that a public (County) surveyor's survey is presumed to have properly established the corner, while a private surveyor's is not; therefore, a private surveyor must show sufficient evidence on his survey that he has properly established an aliquot corner based on the BLM instructions, **when it has not been previously established.**

The law provides that the lines and corners as originally established during the process of an original survey or plat shall forever remain fixed in position. **The courts attach major importance to evidence relating to the original position of the lines and corners, such evidence being given far greater**

weight than the record courses and distances (mathematical/theoretical solution). When a surveyor uses a mathematical solution, he has determined that the original lines and corners are lost, meaning that their positions cannot be determined, ***beyond reasonable doubt***, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position. Therefore, a surveyor must be diligent, thorough, and persistent in his research before he claims corners are lost, since evidence may remain that can speak to a corner's original location and proportionate measure (mathematical solution) to create a new location for the corner may not be warranted. **Reasonable doubt can be obtained from the evidence, a conflict in the evidence, or the lack of evidence; therefore, in essence, the burden is on the surveyor who uses proportionate measure (mathematical solution) to show that there is insufficient evidence supporting another solution as described above. This type of matter has already been litigated in a court of law.**

The surveyor is presumed to know the law of boundaries and the law (weight) of evidence, and when he agrees to locate a written conveyance (deed) on the ground, he agrees to locate it in accordance with these laws. The location of the property is determined by conclusions drawn from the best available discovered evidence, all in accordance with the law of evidence. In a survey, the surveyor must satisfy himself only about the ***preponderance of evidence (not beyond a reasonable doubt)***, giving due weight to prior court precedent and the law of evidence, that his location is likely correct to the exclusion of other possible methods of locating the property (i.e. the weight of the evidence supporting his location outweighs the evidence, if any, supporting another location). **Said another way, in defending his location, a surveyor should be able to explain why the evidence does not support another location.** So, who would you rather be heading into a courtroom.....(a) the surveyor who quickly utilizes a mathematical solution because he does not look for other evidence or (b) the surveyor who gathers field evidence, County surveyor and other surveyor's records, plats, maps, photos, oral evidence, etc. and uses that evidence to reestablish the probable location of an original corner. **This type of evidence gathering applies beyond the original federal government survey section corners. This evidence gathering also applies to corners established from further subdivision of the section by the County Surveyor and others, the division of property by deed description, platting, etc., but it is often not done in those cases.**

All of the foregoing is also incorporated into Rule 12 of Title 865 of IAC regarding the minimum standards for competent practice of land surveying in Indiana, as the rules require, among other things, that surveys be accomplished in accordance with prior court precedent. The rules also detail the type of evidence that is to be gathered and weighted accordingly. Without gathering this evidence, it is not possible for a surveyor to perform a survey in compliance with the law and ***he places his client at substantial risk for damages*** when such evidence is not gathered and properly weighted, as dictated by prior case law, in the course of his survey.

Evidence Relevant to most surveys:

- (a) Deeds (subject and adjoining properties).
- (b) Original and/or Retracement Plats or Surveys. These can be found in County Surveyor's Offices or other County/City offices (original federal government notes, stone records or surveys by the County Surveyor, surveys by private surveyors).
- (c) Surveys by Private Surveyors. Such surveys are typically available from the County Recorder, Auditor, and Surveyor's offices, and possibly at the City offices; therefore, all of these offices should be checked. Older surveys in the area may also be available at these offices. Since some surveyors do not routinely record surveys as required by law, those private surveyor's offices should also be contacted if surveys are not found in the public records
- (d) Road plans, right-of-way maps, and site construction plans. These maps and plans, if available, can provide history as to the location and age of streets, alleys, sidewalks, buildings, and other improvements and would be available at the City offices, Planning offices or other County offices, INDOT offices or online, or possibly at private surveyor's offices (as a last resort). Typically

important when abutting a county or state road or when surveying a property in an old platted area of a Town or City.

- (e) Railroad right-of-way and track maps, including valuation schedule (schedule showing how railroad acquired their property from landowners). These provide evidence of the railroad's location and history and may be the only practical way to obtain railroad deeds, since they are sometimes lost in County records. Often it is necessary to contact the railroad directly to obtain these maps and deeds (typically they can provide a recorded deed or the recording information for the deeds to their property or right-of-way).
- (f) Legal Drain Maps: Indicate county regulated drains to be shown on surveys as required by law.
- (g) Current and Historical Aerial Photos (back through 1930s). These photos can provide evidence and history as to the location and age of streets, sidewalks, buildings, possible fence locations, and other improvements. Such photos are typically available at the County Surveyor's Office, Planning Office, County GIS office, and possibly at City offices.
- (h) Field (physical) evidence (monuments, occupation, roads, etc.). Depending on the survey, the physical location of streets, alleys, sidewalks, buildings, fences, and existing monuments all provide evidence as to the original location of corners needed for the survey.

In old platted lots and blocks in a Town or City, old buildings may be prevalent and may provide the best evidence of original block and/or lot lines, since some are likely constructed up to the actual property lines with no building setback. Physical street, alley, and walk evidence should also be considered. Since the age and consistency of such improvements also varies, it is imperative that the gathering of this type of evidence extend into adjacent blocks within the same plat. As one example, buildings that are constructed up to the property line may not exist on both sides of the street within the same block, but by going into adjacent blocks, relevant buildings on both sides of the road may be able to be found. This is, also, especially true when infrastructure, such as streets or walks, appears to be older in adjacent blocks (if there is new construction within the subject block, for example). Monuments from surveys gathered in Items (b), (c), and (d), including those in adjacent blocks, should also be gathered and evaluated.

- (i) Oral evidence from property owners, surveyors, public officials. Building or property owners may be able to substantiate the age of buildings, roads, fences or other improvements. Surveyors can substantiate their thoughts concerning their own boundary solutions if it is not evident from the survey itself. This is an important piece of evidence gathering that is often ignored by surveyors.
- (j) Measurements and mathematical calculations. These need to be gathered as they pertain to many of the items above.

Another item to be considered is that prior court precedent (case law) dictates that when there is possession or improvements, especially for a long duration, doubt in property location evidence is usually resolved to leave the status quo.

3 Nov 2005

LS 401 – Legal Aspects of Surveying

HERBST et al, Appellant (Plaintiff)

v.

SMITH, Appellee (Defendant)

(Supreme Court of Indiana)

November 1880

Case:

The Herbsts appealed a decision that was in favor of the Smiths, stating that the Smiths had ownership of a strip of land between the two owners containing approximately 2 and 7/8 acres.

Facts:

John Herbst left his land to his widow and two children. The land was described as the north-east quarter of the south-west quarter of section 16, township one (1) south, range six (6) east, in Clark county, Indiana. The defendant is the owner of the quarter quarter section directly south of the plaintiff. The court decided that the true nature of the problem was establishing the boundary between the two quarter-quarter sections. In 1853 the land had been surveyed by Daniel H. McDaniel, who was the county surveyor of Clark county. The survey was completed and the line was established and no appeal had ever been taken with that survey. Sidney S. Lyon, a later county surveyor of Clark county, made another survey of the line and found the boundary line to fall north of the McDaniel line. This new survey showed the strip of land in dispute to belong to the defendants. Another later survey, done by William W. Farris, found that a fence that had been erected between the two parcels stood half on the plaintiff's side and half on the defendant's side of the Lyon survey line.

Issue:

The issue at hand was a judgment to determine whether the McDaniel line was to be taken to be true. This could also be interpreted to mean whether the original survey done by the county surveyor was to be held as the true line and be prima facie evidence.

Decision:

The Supreme Court of Indiana reversed the decision of the circuit court, stating that the McDaniel survey line was indeed to be held as prima facie evidence of the boundary between the two parcels and no further survey was to govern the boundary.

Reasoning:

The reasoning for the decision was that the act of June 17, 1852 (1 R. S. 1876, p. 864) stated that, when properly executed, the original survey of a county surveyor shall be prima facie evidence in favor of the corners established and lines run during the survey, and shall become conclusive when no appeal is filed within a certain time.

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Herbst et al. v. Smith.

No. 7281.

SUPREME COURT OF INDIANA

71 Ind. 44; 1880 Ind. LEXIS 278

November Term, 1880, Decided

PRIOR HISTORY: [**1] From the Clark Circuit Court.

DISPOSITION: The judgment is reversed, with costs, and the cause remanded for a new trial.

HEADNOTES: Survey and Surveyor -- *Boundary Lines*. -- *Evidence of*. -- *Statute Construed*. -- A survey made in accordance with the act of June 17th, 1852, 1 R. S. 1876, p. 864, is conclusive evidence in favor of the corners and lines established thereby, unless appealed from as provided therein, and *prima facie* evidence thereof during the time within which an appeal may be taken therefrom.

Estoppel -- *Insufficiency of Evidence to Create*. -- See evidence set out in the opinion.

COUNSEL: J. H. Stotsenburg, for appellants.

JUDGES: Worden, J.

OPINIONBY: Worden

OPINION: [*44] Worden, J.--This was an action by Lucy Herbst, Charles Herbst and John Herbst, against the appellee, to recover a piece of land described as a strip of land six poles in width off the south side of the north-east quarter of the south-west quarter of section 16, township one (1) south, of range six (6) east, in Clark county, Indiana, containing two and 7/8 acres.

Trial by the court; finding and judgment for the defendant. New trial refused.

John Herbst, the elder, died seized of the **quarter quarter** section above described, leaving his widow, Lucy Herbst, and John Herbst and Charles Herbst, his children, and two other children, who have since conveyed their interest in the land to Charles Herbst.

The defendant is the owner of the south-east quarter of the south-west quarter of the same section, which, as will be seen, lies immediately south of, and adjoining, that owned by the plaintiffs; and the controversy is as to the **boundary** line between the two tracts, the plaintiffs claiming that the true [**2] **boundary** gives them the strip of land in dispute, and the defendant that the true **boundary** gives it to him.

It was proved on the trial, that, in the year 1853, one [*45] Daniel H. McDaniel, the then surveyor of

Clark county, at the request of one of the owners of the land in that section, and after having given ten days' notice to the owners of the adjoining lands, and for the purpose of establishing and perpetuating the south-east and the south-west corners of the section, proceeded upon such notice to make the required survey and location; and that the line, as he established it, called the McDaniel line, would give the plaintiffs the land described in their complaint. He made all the proper entries and record of the survey, and no appeal was taken from it. There was some evidence given by the plaintiffs, tending to show that the McDaniel line was the true one, but this we regard as unimportant, for reasons to be hereinafter stated. Afterward, Sidney S. Lyon, then **county surveyor**, made another survey of the line, and by his survey the land in dispute would fall on the defendant's side of the line. Still later one William W. Farris surveyed the line. In reference to this last ^{1/4 1/4} **[**3]** survey, Charles Herbst, one of the plaintiffs, having testified to some matters in chief, said, on cross-examination, that the defendant enclosed the land five or six years ago. W. W. Farris, a surveyor, surveyed the land at that time; the fence was built one-half on each side of the line when Farris ran the line. The witness was then seven or eight years old; that he did not know which was the right line when Farris ran the line; that they did not give any notice to him of that survey; he was present at the survey. In response to a question by the plaintiffs, he said: "Three years ago, I told the defendant to move the fence he had put up, back to the line between the sections, called the McDaniel line, and he would not."

The defendant gave the following testimony in respect to the survey of Farris, and the building of the fence, etc.

William W. Farris testified: "I saw the stone at the **[*46]** corner of section 16, spoken of by Kiefer, but I did not think that the true corner. That stone was planted there by McDaniel when he made his survey."

Peter Smith testified: "I was present at the building of the fence between Charles Herbst and my father, the defendant. The fence was **[**4]** put where Farris ran the line. The plaintiff Charles Herbst was present when the line was run. Charles Herbst said: 'Put the fence on the line.' Charles helped to pay for that survey. The defendant has been in possession ever since."

Nicholas Robbins testified: "The plaintiff Charles Herbst, defendant Smith, and I agreed to have Dr. Farris make a survey. Charles Herbst was present at the survey. The fence was put on the Farris line. * * * I hold now to the Lyon's line. The Farris survey was made on the Lyon's line. Charles Herbst helped to pay the expense of running that line."

Mathias Engle testified: "I was present at the Farris survey. Charles Herbst was there. There was a dispute about the McDaniel and Lyon's line, and we all agreed to have Farris run a line we could stand to. I think Farris ran his line on the Lyon's line. All were satisfied then with the Farris survey."

Charles Herbst testified, in rebuttal, that "No corner was established by William W. Farris when he made the survey spoken of by the defendant's witnesses."

It is claimed by counsel for the appellants, that, on these facts, the line called the McDaniel line must be regarded as the true line, and that there **[**5]** is nothing in the record to estop or otherwise preclude them from claiming up to that line; and, consequently, that they were entitled to a new trial.

We have no brief for the appellee.

The first, and what seems to us to be the main, question in the case, viz., whether the McDaniel line must be **[*47]** taken to be the true line, must depend, for its solution, upon the construction to be given to the act approved June 17th, 1852, on the subject of **county surveyors**. 1 R. S. 1876, p. 864.

The 3d section of the act provides, that, "Whenever the owner of any land within this State, after having given ten days' notice to the owners of adjoining lands, if such owners reside in the county, and if not, by publication three weeks successively in a newspaper nearest to such land, shall desire to establish, relocate or perpetuate, any corner thereof, or in the same section or line thereof, such **county surveyor** shall proceed to make the required surveys and location, and if a corner is to be perpetuated, shall deposit in the proper place a stone or other durable material with the letters and figures answering to such corner, and shall, also, enter in his field-notes, one or more bearing trees, **[**6]** if there be such, the species and size, course and distance thereof, (and if there be no trees, then he shall deposit one or more stones as witnesses to said corner), all of which proceedings shall be entered by him in a book to be kept for that purpose," etc.

"Sec. 8. The survey of such surveyor shall be *prima facie* evidence in favor of the corners so established, and the lines so run, but an appeal may be taken to the circuit court within three years, and such court may reverse such survey; and upon such appeal being prayed for by any person, such surveyor shall forthwith transmit the papers in his hands touching the same, and copies of the field-notes in the case complained of, without requiring an appeal bond, and such court, in the trial of such appeal, may receive evidence of other surveys of the same premises, made by the same or other persons, either before or since the one complained of, and if such court shall decide against such surveyor, it shall enter an order for a resurvey, and such new survey may be made by any **[*48]** other competent person whom the court may designate, from whose decision an appeal may be in like manner had."

It is clear to our minds, that **[**7]** the Legislature intended that, when a survey should be made in accordance with that statute, it should be conclusive unless appealed from as therein provided for.

There would not only be little necessity or use of an appeal, but there would be little certainty as to corners, lines and **boundaries**, if the question could be reopened as often as a new surveyor might come in, or as often as any of the landholders affected by the survey might desire to have the question reopened. The statute says, "The survey of such surveyor shall be *prima facie* evidence in favor of the corners so established, and the lines so run, but an appeal may be taken," etc. The object of the statute was, as we think, to make such survey *prima facie* evidence, etc., during the time in which an appeal could be taken, and perhaps pending an appeal when taken; but, where no appeal is taken, the survey becomes, after the time limited therefor, conclusive. Otherwise, such survey settles nothing that may not, upon a new survey and without any appeal, be unsettled. A new survey may doubtless be had, not for the purpose of establishing the corners, lines or **boundaries**, as an original survey; but for the purpose of **[**8]** re-locating or perpetuating the corners, lines or **boundaries** established by such original survey, where they have become obscured or lost.

In this case, there is no trouble as to the survey made by McDaniel, and we think it clear that the plaintiffs' rights as to **boundary** are to be governed by that survey, without reference to any subsequently made. There is nothing in the evidence that estops the plaintiffs to claim up to the line established by the survey made by **[*49]** McDaniel. Bigelow Estoppel, 468-470; *Ball v. Cox*, 7 Ind. 453; *Meyers v. Johnson*, 15 Ind. 261.

The judgment below is reversed, with costs, and the cause remanded for a new trial.