How to Fix a Boundary Line
Acquiescence & Adverse Possession
Agreement & Practical Location

This subject opens a wide field, and the cases having a bearing upon it are exceedingly numerous. From an examination of many of them we cannot fail to see, that the principle of dispensing with strict and exact proof, in the prescribed form, of every estate, interest, authority, easement, &c., is one of universal application in every branch of the law, municipal, or national. Any system of jurisprudence, which should discard it, would be intolerable. It is diversified and modified in a thousand ways, but can be traced everywhere. Under the name of prescription, limitations, presumption, estoppel, reputation, acquiescence, it is, in essence, the same thing. The only difficulty exists in making a proper application of it. No doubt it would be going too far, to say, that any power of discrimination, or amount of industry, could deduce from the chaos of decisions a clear, rational and intelligible system, accommodated to the varied position of parties, the nature of the estate, right, or authority, to be affected. Neither a Bacon nor a Coke nor a Mansfield could accomplish so herculean a task.

Downer v. Dana: 19 Vt. 338 (1847)

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Contents

This book is dedicated to my wife, Robyn, who has been my best friend and advocate as I've worked to expand my vocation, from surveyor to educator.

Also, continuing thanks go to my sisters Deb and Pam for the amazing patience it takes to edit these books; to my mom, who continues to believe in me; and to all of the enthusiastic professionals who make it worthwhile to continue.

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Introduction

Boundary retracement has never been simple. The litigious nature of our society makes it more critical than ever that surveyors, attorneys and other professionals who deal with boundary-related issues be aware of the many mechanisms applied by our judicial system when attempting to determine limits of title and the boundaries of various property interests.

It is no accident that the meaning of the word "Fix" in the title of this book is rather ambivalent. In a general sense, this term may refer to the repair of a broken component. In the legal realm, the word describes the concept in which something uncertain is made certain. This process is often applied to boundary lines where the location of the line is in dispute.

Courts often must define limits of ownership using poor descriptions drawn from documents of dubious origin. In some situations, the judge will need to apply various legal principles where no writing exists. These situations are often so convoluted and confusing that the courts are placed in the role of "legal mechanics," where they may apply a patchwork of retracement principles in an attempt to achieve an equitable outcome.

Regardless of the specific methods favored in a given jurisdiction, all state courts maintain a "toolkit" for the repair of "broken" boundaries. The ways that the various available principles may conflict with one another can create additional complications.

One of the main reasons I wrote this book is that a state-by-state approach is necessary to correctly apply many of the principles discussed. All too often, attempts to create a "one-size-fits-all" definition for a single term will fail because of the unique constructions generated by the various state courts.

While adverse possession doctrine includes several basic concepts that are similar regardless of jurisdiction, some of the other concepts included in this book may have radically different definitions under varying circumstances, even within the same state. In particular, the terms "acquiescence" and "practical location" take many distinct forms, depending on the state and situation in which they are applied.

Each section of this book begins with a general review of the relevant principles. Sections also include consideration of a group of individual states where the variations of the doctrine in question are particularly significant. For certain concepts, some states quickly disqualify themselves from detailed consideration. For example, Virginia and North Carolina do not recognize acquiescence as an independent title doctrine.

I have attempted to organize this material starting with more basic and widely accepted concepts and working toward some of the more esoteric doctrines. However, the fact remains that none of these principles are simple to comprehend or to apply correctly.

Three additional "bookkeeping" notes regarding quotations should be mentioned. To improve readability and as a result of space constraints, internal citations are generally omitted within quotations. Only where they serve to demonstrate the diversity of source material or in some way act as an aid to understanding are they included. Long quotations are highlighted in red to distinguish them from general commentary, while shorter phrases drawn from court opinions are enclosed in quotation marks.

This book does not use the standard footnote format found in most reference works. Instead, each citation is included at the beginning of the discussion of the opinion currently under consideration. This is a planned departure from custom, since the citations and sources are perhaps the most indispensable portions of this book.

All primary citations are highlighted with a bold red font, and the corresponding quotes are represented by red text. Secondary sources and primary source names repeated for clarity may be recognized by their bold blue font. Legal descriptions or agreements included as examples from court rulings will be highlighted in blue text.

Section One: Perception of the Land

The early colonists of this country brought hither with them the various modes of conveying real estate, at that time in use in England. This is apparent from the language of numerous ancient statutes; some of which distinctly recognized feoffment at common law as a valid conveyance, while others have mentioned bargain and sale as a method resorted to for transferring property. **American Law Register, January 1858.**

The preceding quotation highlights a fundamental problem that plays an important part in many title disputes. Despite the development of our legal system over a period of several centuries, many landowners still tend to ignore the specifics of a deed in favor of what they see. This perception is more real and significant in the minds of most landowners than the abstract technicalities found in the deed.

While land use professionals are accustomed to considering titles based on the technicalities of written descriptions and surveys, typical property owners look at land in a different way. Even in present day, the layman's perspective is similar to the concept embodied in the ancient concept of "livery of seisin" and tends to ignore specific details included as part of a deed or survey.

Among legal professionals, it is easy to presume that the enactment of the statute of frauds in 1677 and the subsequent development of the rules of construction eliminated the significance of livery of seisin. However, this ancient principle still influences many legal concepts related to title transfer, including adverse possession, part performance, and estoppel.

The statute of frauds was enacted concurrently with the colonization of the eastern seaboard colonies. As a result, a smorgasbord of title transfer mechanisms may be observed in early records from colonial-era British colonies.

Before the Statute of Frauds: Livery of Seisin

Despite the significance of the statute of frauds today, it is important to remember that for many centuries before its enactment no document was required to transfer title in England. Prior to 1677, "livery of seisin" (or seizin) was the accepted method for conveying land titles. In **Green v. Liter: 12 U.S. 229 (1814)** the U.S. Supreme

Court describes this process: It is well known that, in ancient times, no deed or charter was necessary to convey a fee simple. The title, the full and perfect dominion, was conveyed by a mere livery of seizin in the presence of the vicinage. It was the notoriety of this ceremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of a later age; and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of seizin was absolutely necessary to produce a perfect title…

Many records from this period of history describe this formal ritual that includes a symbolic "handing over" of a twig or a clod of dirt to the new owner. An excellent example of this concept is illustrated by a statue of William Penn, found on New Castle Common in Delaware. This statue represents his acceptance of a tract of land and clearly shows a key, twigs and a container of water in the subjects' hands.

It would be easy to dismiss this bit of history as irrelevant in light of the current legal principles governing title transfers. However, the emphasis on possession as evidence of ownership is still a critical consideration in current discussions of part performance, adverse possession, acquiescence, and practical location.

Regardless of the system applied, it is the meeting of minds between the parties – whether formalized by actions (livery of seisin) or by writings (deeds) – that actually operate to convey land. The typical layman's lack of any specialized knowledge of legal or surveying principles makes this idea even more critical when considering actions of the parties and the effect of those actions on land titles.

It seems likely that the preference by colonial-era courts for monuments over measurements was based in part on the ancient principle of livery of seisin. Less than 30 years after the enactment of the statute of frauds in England, the court of the Province of Maryland affirmed the concept of "identification by the senses." **Keech's Lessee v. Dansey: 1 H. & McH. 20 (1704)** highlights the legal preference for natural monuments over measurements. The dispute arose from a deed description that included the phrase "west up the creek" but also contained a bearing that conflicted with the course of the creek. The court recognized that both an "Act of Assembly" and "common reason" mandated the presumption that the intent of the parties was most clearly proved by visible monuments. For additional discussion of this concept, see **Identification by the Senses** later in this section.

Background: The Statute of Frauds

A discussion of the statute of frauds may seem surprising in a book that deals predominantly with unwritten title transfers, but this statute remains a significant impediment when considering claims of boundary by parol agreement, part performance or acquiescence. Any mechanism that transfers title based purely on statements or informal writings must circumvent this principle or be considered an exception operating outside the statute. Ironically, portions of the statute have been rescinded in its country of origin – England – but many elements of the statute remain in force in the United States, as well as in various former English protectorates or colonies such as Canada and Australia.

Property titles and associated boundaries may be legitimately affected by many types of documents other than warranty deeds. Depending on jurisdiction, writings that could affect property ownership include (but are not limited to) written boundary line agreements, plats, wills, landowner affidavits, and highway plans.

More common – and insidious – are the multitude of documents that purport (but ultimately fail) to create, transfer or extinguish fee title or other rights to real property. Easements are common targets of property owners, who often treat them as if they were children's toys that can be detached, moved, and snapped into new positions based purely on the convenience of the moment. Our legal system frowns on such a cavalier attitude toward any transfer of real property rights. States routinely apply both statutory and common law principles to define the standards for legitimate transfers of title. The most widespread and consistent rules of this type are embodied in the statute of frauds.

English Origins of the Statute of Frauds

29 Car. II. c. 3 (1677) originated in England and embodies recognition of the dangers of reliance on human memory as a repository for long-term agreements. While this statute originally affected numerous types of contracts or agreements, the portions most relevant to property boundary disputes are included in section three of the original English version: And moreover that no leases estates or interests either of freehold or terms of years or any uncertain interest not being copyhold or customary interest of in to or out of any messuages manors lands tenements or hereditaments shall at any time after the said four and twentieth day of June be assigned granted or surrendered unless it be by deed or note in writing signed by the party so assigning granting or surrendering the

same or their agents there unto lawfully authorized by writing or by act and operation of Law. **The Statute of Frauds: Institute of Law Research and Reform; University of Alberta Edmonton, Alberta; Background Paper No. 12; 1979.** This statute was an attempt to target certain types of transactions that were problematic because they were critical to the smooth functioning of society. It would matter little whether the problems were due to mistaken memory or to deliberate manipulation of circumstances for personal gain.

University of Pennsylvania Law Review and American Law Register, Vol. 78, No. 1 (Nov., 1929) provides additional insight on the early development of the statute. Given the level of education typical of the English citizens circa 1677, this statute represented a sea change in the way title was transferred. An entire population, long accustomed to seeing land transfers based on parol agreement followed by livery of seisin, suddenly was required to draft and deliver a document in order to convey land. This sudden shift on the part of the courts quickly necessitated the development of the concept of part performance.

In a more general sense, the current focus on maintenance of written or electronic records reflects a continuing concern with a very old problem. What system provides a reasonable mechanism for retaining convincing and acceptable evidence of events that occurred in the past? Several of the basic principles embodied in the original law have been described as common sense, or ordinary prudence.

While it would seem that the date of the enactment of the original statute would be easy to determine, some confusion appears among various sources even on this basic issue. An article in the Indiana Law Journal notes: There has been a difference of opinion among law writers as to the date and authorship of the Statute of Frauds;' but it now seems to be settled that the correct date for this celebrated Statute is April 16, 1677. **Vol. III March, 1928 No. 6, pg. 427.**

Early arguments over the origins of the statute are considered in **A Treatise on the Statute of Frauds 3rd Ed. Causten Browne Esq. Published by: Little, Brown & Co. 1870.** According to the author, Lord Hale, Sir Lionel Jenkins and Lord Nottingham are considered to be the most likely authors of **29 Charles II, C.3, 8 Stat at Large 405** and certainly contributed to the final form of the law. However, the law was not passed until after the demise of Lord Hale and may well have been enacted while still in draft form.

Mr. Browne points out that the statute of frauds probably would have been unnecessary if the original methods of property transfer by livery of seisin had been applied consistently. For many years,

due solemnity and a strict form of the ceremony for property transfer generally was confirmed by witnesses. However, as property transfers between middle class citizens became more common, the strict form for observation of the conveyance fell more often to attorneys appointed to the task. While some form of written record usually was kept before the advent of the statute of frauds, the writing already was becoming the only dependable source of information. Ultimately, one formal ceremony was substituted for another formal ceremony.

A masterly analysis of the statute was documented in 1913 when Crawford D. Hening traveled to England to study the original documents housed in the Victoria Tower. Mr. Hening notes that the statute endured four years of formative efforts before reaching its final form in 1677. Numerous drafts and re-writes attest to the lengthy analysis and negotiation that led to the eventual approval of this statute. **The Original Drafts of the Statute of Frauds (29 Car. II c. 3) and Their Authors: Crawford D. Hening: Vol. 61, No. 5 March 1913: University of Pennsylvania Law Review**

Statute of Frauds in the United States

In the United States, the legal systems of 49 of the 50 states include some variation of the English statute of frauds for real property transfers. Louisiana alone has not expressly incorporated some form of the English statute, due in large part to the early influence of the French civil law system that preceded it. Additional discussion of Louisiana is found later in this section.

This statute has remained remarkably durable despite attempts by several authors to cast doubt on the current utility of the law. **Opdyke v. Norris: 413 Mich. 354; 320 N.W.2d 836 (1982)** notes: The Statute of Frauds has enjoyed a position of prominence in Anglo-American jurisprudence for three centuries and has proven durably resistant to continuing scholarly criticism. The statute remains firmly entrenched in our law despite its repeal in England, the jurisdiction of its birth, in 1956...Even the modern Uniform Commercial Code includes a modified statute of frauds.

Michigan Law Review, Vol. 66, No. 1 (Nov., 1967) justifies the continued existence of the statute as follows: "The retention of the requirement of a writing has been justified on three grounds: (1) the Statute serves an "evidentiary" function, lessening the danger that courts or juries will be misled by perjured testimony as to the existence or purport of a contract; (2) it has a "cautionary" effect, tending to impress upon the contracting parties the significance of their agreement; and (3) it acts as a "channeling" device, providing a