

“BOUNDARY BY PRACTICAL LOCATION”
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I. INTRODUCTION.

These materials are intended to provide an overview of the common law doctrine of boundary by practical location (“BPL”), sometimes also called practical location of boundaries. As the name implies, BPL is a legal means to establish a boundary line via a lawsuit. The effect of a successful BPL claim is that the claimant is awarded ownership of the land up to the boundary line established by lawsuit.

II. THREE WAYS TO ESTABLISH A BOUNDARY BY PRACTICAL LOCATION.

There are three separate and distinct ways to establish a boundary by practical location:

Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line.

Romanchuk v. Plotkin, 9 N.W.2d 421, 427 (Minn. 1943).

These three methods are commonly referred to as (1) acquiescence, (2) agreement, and (3) estoppel, respectively.

A. BPL by Acquiescence.

Acquiescence requires that the defendant stands by silently while the claimant acts as though the boundary line is the actual line for period of the statute of limitations, which is 15 years pursuant to Minn. Stat. § 541.02.

The acquiescence required is not merely passing consent but conduct from which assent may be reasonably inferred. *Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867 (Minn. Ct. App. 2011). In *Pratt Investment Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001), the court held that consent can be affirmative or tacit; in other words, consent can be inferred through inaction where action would be expected. *Pratt Investment Co.* further held that:

While case law does not say that “possession” is an element of establishing a boundary by practical location, “[a]cquiescence entails affirmative or tacit consent

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to an action by the alleged disseizor, such as construction of a physical boundary or other use * * *.” *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn.App.1987).

Id.

A classic example of acquiesce is when adjoining landowners mutually construct a fence with the intention that the fence represents an adequate reflection of the property line. *See Fishman v. Nielsen*, 53 N.W.2d 553, 555-556 (Minn. 1952) (finding practical location by acquiescence when parties and their predecessors in title made a conscientious effort to build dividing fence as close as possible to actual boundary and remained satisfied with fence’s location for the statutory period).

B. BPL by Agreement.

To establish a boundary by express agreement, the claimant must prove that an express agreement between the landowners set an “exact, precise line” between their properties and that the agreement had been acquiesced to “for a considerable time.” *Beardsley v. Crane*, 54 N.W. 740, 742 (Minn. 1893). In other words, at some point the owners on both sides of the boundary line expressly agreed to the location of the line and then treated it as such. The express agreement theory requires clear proof of an agreement: “We hold that an ‘express agreement’ requires more than unilaterally assumed, unspoken and unwritten ‘mutual agreements’ corroborated by neither word nor act.” *Slindee v. Fritch Investments, LLC*, 760 N.W.2d 903, 909 (Minn. Ct. App. 2009).

C. BPL by Estoppel.

To establish a boundary by estoppel, the defendant must have silently looked on with knowledge of the true boundary line while the claimant encroached on defendant’s property or subjected himself to expense he would not have incurred had the boundary line been in dispute. Estoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other. *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). For example, claimant spends money building a fence in a certain location that he otherwise would not have built, while defendant knowingly looks on but stays silent.

III. SURVEY VERSUS PRACTICAL LOCATION.

Boundaries established by practical location of boundary will supersede the outcome of an indisputably correct survey. *Phillips v. Blowers*, 161 N.W.2d 524, 529 (Minn. 1968); *Wojahn v. Johnson*, 297 N.W.2d 298, 304 (Minn. 1980).

IV. BPL VERSUS PUBLIC BODY.

Contrary to the similar doctrine of adverse possession, in the case of practical location it is possible to estop a city, township, parkboard, etc. from claiming ownership of property, though the standard is high:

The trial court found, as to Parcel B, that this case presents “a classic example of estoppel.” We agree and do not reach the issue of adverse possession. A municipality, like a private owner, may be estopped. *Bice v. Town of Walcott*, 64 Minn. 459, 67 N.W. 360 (1896). Each case stands on its own sets of facts, *id.*, which must be proved by a fair preponderance of the evidence. The facts themselves must be clear, positive and unequivocal in their implications. *Eliason v. Production Credit Association of Aitkin*, 259 Minn. 134, 106 N.W.2d 210 (1960).

We recognize that municipal corporations are afforded an added degree of protection as regards their property:

The doctrine of estoppel is not applicable to municipal corporations as freely and to the same extent that it is to individuals. When it is applied, the basis of application is usually not because of the nonaction of the officers of the municipality, but because they have taken some affirmative action influencing another, which renders it inequitable for the corporate body to assert a different set of facts.

Halverson v. Village of Deerwood, 322 N.W.2d 761, 767 (Minn. 1982).

V. BPL IS DISTINCT FROM ADVERSE POSSESSION

Though BPL (especially by acquiescence) looks similar to adverse possession (for instance, it generally carries the same statute of limitation period), the two theories are distinct and not interchangeable. More than one decision indicates that lawyers had better plead and present proof under both legal doctrines if they wish to maintain both theories. Some cases will better fit adverse possession; and though they’re similar, other cases will better meet the practical location rules. *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000) (“Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements”); *see also Engquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955) (stating practical location is “independent of adverse possession”).

VI. DOES PRACTICAL LOCATION REQUIRE SOMETHING AFFIRMATIVE?

It does get muddy, our Court has, on occasion, said that practical location requires some act like possession, building a fence or something:

While case law does not say that "possession" is an element of establishing a boundary by practical location, "[a]cquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of a physical boundary or other use * * *." > *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn.App.1987). Implicit in the case law is the notion that the disseizor has claimed, by way of some action, that a boundary has existed for the statutory period, and the disseized has acquiesced to that boundary.

Pratt Investment Company v. Kennedy, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001).

However, acquiescence by definition is inaction. Webster's defines acquiesce as to "grow quiet, to consent without protest". *Pratt Investment Co.* talks of affirmative or tacit consent. In other words, consent can be inferred through inaction where action would be expected. The *Pratt Investment* court points to the "non-action" by the party losing title to the property. Sheep rearing may not be enough, *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App.1987). Where the land is vacant and heavily wooded, there is then no possession sufficient to establish a boundary by practical location, *Pratt Investment*. Some use is required, see the following:

In addition, if appellant or his predecessor never substantially used or possessed the disputed territory, appellant can hardly claim that he has "relied" upon any supposed boundary for purposes of the practical location doctrine.

Fishman v. Nielsen, 237 Minn. 1, 6, 53 N.W.2d 553, 556 (1952) cited in *Pratt Investment*.

One of the more concrete, easy to understand examples is found in *Fishman*:

Acquiescence exists when adjoining landowners, for example, mutually construct a fence with the intention that the fence represents an adequate reflection of the property line. *Fishman*, 237 Minn. at 7-8, 53 N.W.2d at 555-56 (finding practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for statutory period);

as quoted in *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 850 (Minn. Ct. App. 2001).

And in a case with the same factual scenario as above, the court held "although the aid of a survey may often be useful in determining the location of a boundary, one is not required here" because of the existence of the fence which established the boundary. *Bickhardt v. Gerwerth*, 2002 WL 31109381, 2 (Minn. Ct. App. 2002).

When adjoining landowners occupy their respective premises up to a certain line that they both recognize and acquiesce in for 15 years, generally they are precluded from contesting that boundary line. *Amato v. Haraden*, 280 Minn. 399, 403, 159 N.W.2d 907, 910 (1968); see Minn.Stat. § 541.02 (2004). Acquiescence requires actual or implied consent to some action by the disseisor, such as construction of a boundary or other use of the disputed property and acknowledgement of that boundary for an extended period of time. *Engquist*, 243 Minn. at 507-08, 68 N.W.2d at 417; *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn.App.1987); see also *Fishman v. Nielsen*, 237 Minn. 1, 7-8, 53 N.W.2d 553, 556-57 (1952) (finding practical boundary by acquiescence when two predecessors in title agreed on a line, built a fence on the line, and acquiesced in the line for at least 18 years); *In re Zahradka*, 472 N.W.2d 153, 156 (Minn.App.1991) (finding that boundary by practical location by acquiescence when disseisor built parking lot on disseized land and disseized made no claim to ownership of land for more than 15 years), *review denied* (Minn. Aug. 29, 1991).

Blanchard v. Rasmussen 2005 WL 2495991, 3 (Minn. C. App. 2005).

VII. RESOLUTION OF AN OVERLAP VIA BPL.

BPL may resolve an overlap problem. In *In re Zahradka*, 472 N.W.2d 153, 154 (Minn. Ct. App. 1991), certificates of title issued to adjoining landowners included legal descriptions which overlapped, and the claiming owner had constructed a parking lot which then remained without objection.

VIII. BPL VERSUS TORRENS PROPERTY.

Though Torrens property is protected from adverse possession and prescriptive easement claims, BPL claims may apply to Torrens property:

No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, *but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceeding subsequent to establish a boundary by practical location for registered land.*

Minn. Stat. § 508.02 (emphasis added). The statute is retroactive—it applies to actions filed before codification in 2008. *Ruikkie v. Nall*, 798 N.W.2d 806 (Minn. App. 2011); *see also Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008).

See also Minn. Stat. § 508.25 specifying a certificate holder's rights against adverse claims.

IX. JUDICIAL DETERMINATION OF TORRENS BOUNDARIES.

The Torrens Act provides for the judicial determination of boundaries either at the time of the initial registration (in Minn. Stat. § 508.06), or subsequent to the initial registration (Minn. Stat. § 508.671).

However, a Court may not rule in such a way as to alter the boundaries set out in a Torrens certificate:

Moreover, a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the torrens certificate.

Petition of Geis, 576 N.W.2d 747, 750 (Minn. Ct. App. 1998).

The doctrine of practical location of boundaries does not apply to registered property absent an ambiguous certificate of title or a dispute as to the location of boundaries at the time the property was registered.

Petition of Building D, Inc., 502 N.W.2d 406 (Minn. Ct. App. 1993).

Why should torrens title property be treated differently? The Court of Appeals has answered the questions squarely:

The purpose of the Torrens law is to establish an indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that the property can become encumbered only with registered rights and claims.

Petition of McGinnis, 536 N.W.2d 33, 35 (Minn. Ct. App. 1995).

EXPERT AND LAY WITNESS TESTIMONY

In boundary line litigation, there is often testimony from both experts and non-expert lay witnesses. The Rules of Evidence specify when opinion testimony may be used as opposed to direct observation of facts (e.g. I saw the car hit the boy; the fence started running east from the old sugar maple):

If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MSA REV Rule 701, OPINION TESTIMONY BY LAY WITNESS

The rule for admission of expert witness testimony is:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

MSA REV Rule 702, TESTIMONY BY EXPERTS

Rule 703 states what surveyors, engineers, etc. may base their opinions on.

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in

this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

MSA REV Rule 703, BASES OF OPINION TESTIMONY BY EXPERTS

Sometimes persons other than surveyors may be permitted to testify to expert opinions concerning boundary line issues. An expert is basically anyone who by education, training or experience is qualified to render opinion evidence which may be helpful to the finder of fact. A mine engineer technician was allowed to testify although not a surveyor:

James Rossi, an Eveleth Taconite Company employee for 20 years, was a mine engineering technician whose job included making maps and doing volumetric surveys. The maps are made daily. He testified that in drawing up the maps of Eveleth's property, he had to become familiar with the general boundaries of its property. Over objection, Rossi testified that a map he prepared was from an aerial photograph of the dock and general area where the bushings were stolen. He also testified that the "Spolarich Farm" was owned by Eveleth.

Appellant contends that Rossi was not qualified to testify about whether the farm was on Eveleth's property because Rossi was neither an attorney nor a qualified land surveyor. The trial court ruled that he was a qualified witness based on his job responsibilities and lengthy experience in the mine engineering department. This ruling was proper.

State v. Larson, 393 N.W.2d 238, 242 (Minn. Ct. App. 1986).

It is important to note that ultimately a judge (who presumably is not a surveyor) will rule on the correctness of disputed, competing surveys. Judges (and juries) often resolve hotly contested claims of a variety of experts when they have no previous background in the science or other field of study. This is simply a fact of life in our judicial system for parties to deal with.

There are some limitations on a surveyor's qualifications to testify. The following example relates more to the failure to establish a proper foundation for an opinion. A surveyor was called to testify in an accident case and did successfully identify a highway survey reflecting the contour of the highway and the elevation in 100 foot increments down the road. He showed the road rose by 4 ½ feet. Then the attorney tried to establish "sight distance":

Objection was again sustained for lack of foundation. The question as asked clearly lacked foundation. Sight distance is meaningless unless the circumstances are explained showing at what height the sight is taken, from and to what point. The question as asked not only lacked foundation, but it is difficult to see how it could be answered at all.

Jallen v. Agre, 119 N.W.2d 739, 744 (Minn. 1963).

Foundation simply looks at whether a witness has a reasonable basis to be qualified to state the opinion he is about to relate.

As stated earlier, a survey line may be overridden by proof of adverse possession or practical location of boundary. Nevertheless, survey testimony is often involved, to show the proper location, and to show where the line should be moved for two examples.

A good discussion of competing survey testimony is found in *Wojahn v. Johnson* involving attempts to relocate lost government corner lot markers, and claims of adverse possession and practical location. The county surveyor was held to have used proper survey techniques in first determining that he could not relocate the old monuments. The court stated:

The plaintiffs attack the methodology of the Johnson survey on essentially three grounds, contending that the survey illegally deviated from the original government survey in angles and distances between corners, that the county surveyor did not adequately investigate before determining that certain corners were "lost," and that the surveyor inappropriately used proportionate measurement techniques.

The county surveyor located three of eight government corners but could not find the other five, though he did not speak to neighbors. The Plaintiff's surveyor criticized this failure. He did, however, follow the old field notes and drawings and relied on other old records of the government survey in establishing his opinion of the correct location of the missing corners. The surveyor admitted the boundary line established by the located corners did not jibe with certain existing and older fence lines.

Because the trial court accepted the county surveyor's testimony of his methodology, the Supreme Court deferred to its findings of fact. They also commented:

When a resurvey is made of sections, quarter-sections, etc., originally established by United States Government Survey, the aim of the resurvey must be to retrace and relocate the lines and corners of the original survey. Even when an original section corner is erroneously placed by an original government surveyor, it cannot be corrected by the courts or a subsequent surveyor.

Wojahn v. Johnson, 297 N.W.2d 298, 303 (Minn. 1980).

CONCLUSION

If you have questions regarding the specifics of this presentation, please feel free to contact the presenters. Thank you very much.



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