

Thomas McIntyre Cooley and The Judicial Functions Of Surveyors

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Judge Thomas M. Cooley was a member of the Michigan Supreme Court, and twice spoke at annual meetings of the Michigan Association of Surveyors and Engineers about judicial functions of surveyors. Two different versions of his paper, "The Judicial Functions Of Surveyors," were published in *The Michigan Engineer* (1881, pp. 18-25, and 1883, pp. 112-122). The 1883 version is cited most often.

The paper was widely acclaimed on publication. By 1886, it had been reprinted, without editorial changes, in *The Theory And Practice Of Surveying* by John Butler Johnson (Appendix A, 1886: John Wiley & Sons) and in *A Manual Of Land Surveying* by Charles Fitzroy R. Bellows and Francis Hodgman (pp. 349 - 364, 1886: Register Printing and Publishing House). It was reproduced, also, in *Surveying and Mapping* (vol. XIV, no. 2, pp. 161 - 168; 1954) and in Brown, Robillard, and Wilson's *Evidence And Procedures For Boundary Location*, (3rd ed., 1994, pp. 491-501; John Wiley & Sons).

Little has been written concerning Justice Cooley and the origins of his paper. The last General Land Office (GLO) contracts in Michigan were issued in 1852 (Upper Peninsula). Between the 1830s and 1870s, Michigan was the scene of extensive lumbering operations, which destroyed significant portions of the supporting evidence (bearing and witness trees, etc.). After the American Civil War, considerable settlement of the logged lands took place, and land surveying problems began to arise.

From the late 1840s, land surveyors in Michigan and elsewhere encountered problems in retracing the original GLO surveys. The National Archives has considerable correspondence between surveyors and GLO officials on file concerning retracements. In the general instructions for executing GLO contract

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surveys in Michigan, the Surveyor General recommended that Abel Flint's *Treatise On Surveying* be read by the deputy surveyors. However, this work contains nothing concerning the legal aspects of land/boundary surveying. The treatise discusses only the mathematical elements of surveying.

After the American Civil War, there was only one land surveying book in print - *A Treatise On Land Surveying* by William Mitchell Gillespie. Gillespie's *Treatise* did not consider any legal aspects of land surveying. Besides surveying and mathematical topics, 19 pages address the surveying methodology employed in the contract surveys. Reference is made to the Oregon Instructions (1851).

In 1868, J.H. Hawes, former Principal Clerk of the General Land Office, wrote the *Manual Of United States Surveying*. This excellent work, however, only addresses federal legal aspects of GLO surveys. William A. Burt's *A Key To The Solar Compass And Surveyor's Compass* adds no further insight. The only other major work published prior to Cooley's appeared in 1873: Shobal V. Clevenger's *A Treatise On The Method Of Government Surveying*. Again, this work treats the federal surveying process, and omits any discussion of common law and state and local law, regulations, and rules.

Bellows wrote (1886; p. iii):

"In making subdivisions of Government Surveys, or in resurveying old boundary lines, every surveyor has felt the need of definite

instructions relating to a multitude of questions found to arise in the work. The function of a surveyor in most of these cases is a judicial one, and the answers to those questions are to be found only in the decisions of courts which are practically inaccessible to him."

In 1881, the Michigan Association of Surveyors and Engineers formed a committee to write a manual of instruction on the duties and responsibilities of surveyors and the legal documents governing land surveying practice. "Bellows and Hodgman," and later "Hodgman," were the products of the materials gathered. One hundred and thirty four pages of "Bellows and Hodgman" addresses land surveying practice (in Michigan). It was Justice Cooley's thoughts, presented in 1881 and expanded in 1883, that set the stage for the textbooks on land surveying that are available today.

JUSTICE COOLEY'S REMARKS

The opening paragraph of "Cooley" is the most important pronouncement. In these opening sentences, Cooley states the philosophy and conduct that a land surveyor should follow in practicing the profession:

"When a man has had 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."

From this opening statement, Cooley proceeds to develop the ideas and to indicate their application to the (then) existing practice of land surveying. The

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first surveys in Michigan were Aaron Greeley's surveys of the French land claims in Detroit (commenced 30 January 1808). Actual surveys of the sectionalized portion commenced with a contract issued by Edward Tiffin to Alexander Holmes dated 18 April 1815. A second contract, dated 12 October of that year, was entered into with Benjamin Hough. The surveys would continue until the last contract was issued in April 1852. After that, lesser contract surveys were executed to address minor omissions found in the earlier work.

Cooley's writing is clear, concise and factual. Although not a surveyor, Cooley clearly understood the Michigan land surveying problems. He recognized the deficient quality of many of the original contract surveys and some real property subdivisions. He did not castigate the earlier surveyors, but outlined the general problems occurring throughout the state. Cooley commenced with the fundamental legal tenet that the original lines and

monuments must hold - no matter the amount of "error" or deviation from the theoretically prescribed location. The description of reestablishing section corners is based upon Michigan statute (1869), and not on Restoration of Lost and Obliterated Corners (1883).

Cooley's four precepts about "extinct corners" are not pragmatic legal verbiage, but articulate rhetoric. The lay person (nonattorney) can comprehend the precepts and the technical/legal issues. The Michigan land surveyor must understand these principles because they override the GLO/BLM philosophy on "lost and obliterated" corners for all lands that have been patented. Land surveyors in other states could be governed by the "extinct corner principle" if court decisions elsewhere have been written and sustained through the appellate process.

Cooley continued his dissertation with a number of general but practical illustrations of *faux pas*. He did not clutter the document with bureaucratic legalese.

For a document of such brevity, it contains much useful information for members of the profession. There is a wealth of information incorporated in a broad spectrum statement of the duties and responsibilities of land surveyors. (Remember, land surveyor registration was more than two decades in the future.)

Little analysis of Cooley's paper has been written. Numerous writers have referenced the paper, but have not delved into the document. Recently, an in-depth

discussion has been published. In the sixth edition of *Clark On Surveying And Boundaries*, Walter G. Robillard and Land J. Bouman provide an excellent commentary and analysis (e4.18; pp. 109-115). The authors comment on earlier interpretations, and present a candid discussion of the arguments and counter arguments for various points of Cooley's. This analysis is for both attorneys and land surveyors: although land surveyors have accepted "Clark" as a principal reference for more than seven decades, the work is an invaluable reference to the legal profession.

Cooley is not light reading, but it is a well-organized and well thought-out treatise, and a foundation for land surveying practice. Cooley should be mandatory reading for all professionals. It is interesting to note that the philosophy set out in Cooley applies equally to the other design professions (engineering, architecture and landscape architecture).

Thomas Cooley's paper is not a time-dated document stating era specific principles and doctrines. The document is a philosophical statement of the land surveyor's role in boundary determination and boundary retracement. Justice Cooley's thoughts from 11 decades past are not solely for his era, but a comprehensive treatise on the responsibilities and duties of land surveyors.

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