

**44. ESTABLISHING DISPUTED BOUNDARIES [Details]**

**Cross Reference Note:**

For relief under special circumstances where improvements are on lands of another, see *Johnson v. Dunkel*, 132 Colo. 383, 288 P.2d 343 (1955), and *Golden Press, Inc. v. Rylands*, 124 Colo. 122 , 235 P.2d 592, 28 A.L.R. 2d 672 (1951); for jurisdictional and procedural matters in boundary cases, see *Gibson v. Neikirk*, 98 Colo. 389 , 56 P.2d 487 (1936).

### § 38-44-101. When action may be brought

When one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, disputed, or destroyed corners or boundaries or parts thereof are situated against the owners of the other tracts which would be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. If any public road is likely to be affected thereby, the proper county shall be made a party defendant.

#### History:

L. 07: p. 286, § 1. Code 08: § 297. Code 21: § 298. Code 35: § 298. CRS 53: § 118-11-1. C.R.S. 1963: § 118-11-1.

#### Case Note:

#### ANNOTATION

#### I. GENERAL CONSIDERATION.

**Law reviews.** For article, "One Year Review of Property", see 35 Dicta 48 (1958).

**Whether fence is boundary is question of fact.** The question of what function a fence has performed over a period of years and whether it has been acquiesced in as a boundary is peculiarly a question of fact. *Kelly v. Mullin*, 159 Colo. 573, 413 P.2d 186 (1966).

**Who suffers loss due to boundary line readjustments.** Where one of two innocent parties must suffer a loss of land due to boundary line readjustments called for by later official surveys, it must fall upon the party later in time who has never been in actual possession of the land in question. *Marr v. Shrader*, 142 Colo. 106, 349 P.2d 706 (1960).

**When refusal to appoint commission not error.** In an action to establish an alleged disputed boundary to land, where such boundaries can be determined with accuracy, it is not error to refuse the appointment of a commission. *Archuleta v. Rose*, 136 Colo. 211, 315 P.2d 201 (1957).

**Equitable relief granted where improvements mistakenly built upon land.** Where the powers of the court were invoked to settle a boundary dispute and the rights of the parties with respect to improvements mistakenly built upon the land, there being no bad faith on the part of any of

the parties, it was the duty of the court to grant such equitable relief as the situation required. *Pull v. Barnes*, 142 Colo. 272, 350 P.2d 828 (1960).

Where an adjoining owner had in good faith erected improvements on adjoining land, believing it to be his own, he should be granted the right to remove the same if feasible, and if not, then given an equitable lien on the property for the value thereof. *Pull v. Barnes*, 142 Colo. 272, 350 P.2d 828 (1960).

**A boundary dispute may be resolved under appropriate statutory or common law proceedings.** *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**An unexplained use of an easement for the statutory period** is presumed to be under a claim of right and is, therefore, adverse. *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**Applied** in *Fisher v. Peterson*, 152 Colo. 221, 381 P.2d 29 (1963); *Hartley v. Ruybal*, 160 Colo. 80, 414 P.2d 114 (1966).

## II. PRIORITY OF EVIDENCE IN BOUNDARY DISPUTES.

**Intention of parties controls.** In construing a deed, the object is to discover and effectuate the intention of the parties to it, but while that intention is to be gathered from the language and words of the deed, it should be read in the light of the surrounding circumstances at least when it is ambiguous. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

Where there are two repugnant descriptions in a deed, the court will look into the surrounding facts and will adopt the description which is most definite and certain, and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

**Monuments control courses and distances.** In a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land is fixed by ascertainable monuments and by courses and distances, the well-settled general rule is that the monuments will control the courses and distances if they are inconsistent with the monument calls. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

**Courses and distances least reliable of calls.** A general rule of construction invoked in the case of repugnant calls in a deed is that courses and distances are the least reliable of all calls, and that a call which designates a point capable of precise and exact location takes precedence

over a call for a course and distance if there is a repugnancy between the two. *Wallace v. Hirsch*, 142 Colo. 264, 350 P.2d 560 (1960).

**Successor to party to boundary agreement estopped.** A successor in title to one who has entered into an executed agreement as to location of the boundary line fence is not in a position to attack that agreement collaterally or to invoke the provisions of this section, merely by creating a dispute. *Schleining v. White*, 163 Colo. 481, 431 P.2d 458 (1967).

**Cross Reference Note:**

For alternative solution of boundary or corner dispute, see §38-44-112 .

**§ 38-44-102. Notice**

Notice of such action shall be given as in other cases and if the defendants or any of them are nonresidents of the state, or unknown, they may be served by publication as provided by law.

**History:**

L. 07: p. 287, § 2. Code 08: § 298. Code 21: § 299. Code 35: § 299. CRS 53: § 118-11-2. C.R.S. 1963: § 118-11-2.

**§ 38-44-103. Pleadings - trial of issues**

The action shall be a civil action, and the only necessary pleadings therein shall be the petition of plaintiff describing the land involved and, insofar as may be, the interest of the respective party and asking that certain corners and boundaries therein described, as accurately as may be, be established. Either the plaintiff or the defendant, by proper plea, may put in issue the fact that certain alleged boundaries or corners are true ones or that such have been recognized and acquiesced in by the parties or their grantors for a period of twenty consecutive years, which issue may be tried before a commission appointed in the discretion of the court.

**History:**

L. 07: p. 287, § 3. Code 08: § 299. Code 21: § 300. Code 35: § 300. CRS 53: § 118-11-3. C.R.S. 1963: § 118-11-3.

**Case Note:**

**ANNOTATION**

**Applied** in Kelly v. Mullin, 159 Colo. 573, 413 P.2d 186 (1966).

**§ 38-44-104. Commissioners - county surveyor**

The court in which said action is brought may appoint the county surveyor or, if there is no county surveyor or if the court deems it in the best interest of the parties, shall appoint a commission of one or more disinterested surveyors who, at a date and place fixed by the court in the order of appointment, shall proceed to locate the lost, destroyed, or disputed corners and boundaries.

**History:**

L. 07: p. 287, § 4. Code 08: § 300. Code 21: § 301. Code 35: § 301. CRS 53: § 118-11-4. C.R.S. 1963: § 118-11-4. L. 79: Entire section amended, p. 479, § 5, effective July 1.

**Case Note:**

**ANNOTATION**

**Applied** in Davis v. Dilley, 147 Colo. 395, 363 P.2d 658 (1961).

**§ 38-44-105. Oath or affirmation - assistants**

The commissioners so appointed shall take an oath or affirmation in accordance with section 24-12-101 and shall have power to appoint all necessary assistants.

**History:**

Amended by 2018 Ch. 88, §48, eff. 8/8/2018. L. 07: p. 287, § 5. Code 08: § 301. Code 21: § 302. Code 35: § 302. CRS 53: § 118-11-5. C.R.S. 1963: § 118-11-5. L. 2018: Entire section amended, (HB 18-1138), ch. 88, p. 704, § 48, effective August 8.

**Cross Reference Note:**

For the legislative declaration in HB 18-1138, see section 1 of chapter 88, Session Laws of Colorado 2018.



### § 38-44-106. Hearing

At the time and in the manner specified in the order of court, the commission shall proceed to locate said boundaries and corners and for that purpose may take the testimony of witnesses as to where the true boundaries and corners are located; and, when so ascertained, the commission shall mark the same by erecting or putting down permanent and fixed monuments at all corners so located. In its report to the court, the commission shall file a map or plat showing all monuments, lines, and any other evidences or witness marks that will more nearly identify the corners and, if that issue is presented, shall also take testimony as to whether the boundaries or corners alleged to have been recognized and acquiesced in for twenty years or more have in fact been recognized and acquiesced in. If it finds affirmatively on such issue, it shall incorporate the same into the report to the court.

#### History:

L. 07: p. 287, § 6. Code 08: § 302. Code 21: § 303. Code 35: § 303. CRS 53: § 118-11-6. C.R.S. 1963: § 118-11-6.

#### Case Note:

#### ANNOTATION

**Monuments of original survey control**, and it is a general rule that the original corners as established by the government surveyors, if they can be found, or the places where they were originally established, if that can be definitely determined, are conclusive on all persons owning or claiming to hold with reference to such survey and the monuments placed by the original surveyor without regard to whether they were correctly located or not. *Brackett v. Cleveland*, 147 Colo. 328, 363 P.2d 1050 (1961).

**Relocation of obliterated corners is first step in settling boundary dispute.** Where section corners have been obliterated, and there is a dispute as to boundaries, the correct rule in determining these boundaries is first to relocate the corners. *Brackett v. Cleveland*, 147 Colo. 328, 363 P.2d 1050 (1961).

**Applied** in *Smith v. Dorsey*, 29 Colo. App. 369, 483 P.2d 1359 (1971).

#### Cross Reference Note:

For methods of erecting monuments at corners, see §38-51-104 .

**§ 38-44-107. Adjournments and report**

The proceedings may be adjourned by the commission from time to time as may be necessary, but the survey and location of the corners and boundaries must be complete and the report thereof filed with the clerk of the court at least ten days before the first day of the term next following that of its appointment, unless the court appointing it makes an order for an earlier report.

**History:**

L. 07: p. 288, § 7. Code 08: § 303. Code 21: § 304. Code 35: § 304. CRS 53: § 118-11-7. C.R.S. 1963: § 118-11-7.

### § 38-44-108. Exceptions - hearing

At the term of court after such report is filed, any party interested may file exceptions thereto within ten days from the date the report is filed with the clerk, but if in term time, then within three days after the same is filed, and the court shall hear and determine them, hearing evidence in addition to that reported by the commission if necessary, and may approve or modify such report or again refer the matter to the same or another commission for further report.

#### History:

L. 07: p. 288, § 8. Code 08: § 304. Code 21: § 305. Code 35: § 305. CRS 53: § 118-11-8. C.R.S. 1963: § 118-11-8.

#### Case Note:

#### ANNOTATION

**Even though use of "master" pursuant to C.R.C.P. 53 conflicts with this section for resolving a disputed boundary**, because the parties stipulated for the entry of judgment upon final approval of the surveyor's report by the trial court, the parties waived their rights to object to the trial court's determination of the disputed boundary. *Durbin v. Bonanza Corp.*, 716 P.2d 1124 (Colo. App. 1986).

**Applied** in *Hildebrand v. Olinger*, 689 P.2d 695 (Colo. App. 1984).

### § 38-44-109. Corners and boundaries established

The corners and boundaries finally established by the court in proceedings under this article, or an appeal therefrom, shall be binding upon all the parties, their heirs and assigns, as the corners and boundaries that have been lost, destroyed, or in dispute; but if it is found that the boundaries and corners alleged to have been recognized and acquiesced in for twenty years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established. The court order or decree shall be recorded in the grantor-grantee index of the real property records of the county or counties in which the land lies.

#### History:

L. 07: p. 288, § 9. Code 08: § 305. Code 21: § 306. Code 35: § 306. CRS 53: § 118-11-9. C.R.S. 1963: § 118-11-9. L. 2010: Entire section amended, (HB 10 - 10 85), ch. 95, p. 326, §8, effective August 11.

#### Case Note:

#### ANNOTATION

**Boundary established by court becomes true boundary.** The boundary established by the court in these proceedings becomes the true boundary line of the property. *Smith v. Dorsey*, 29 Colo. App. 369, 483 P.2d 1359 (1971).

**Common ownership of two tracts of land extinguishes any acquiescence in boundary lines attributable to the prior landowners** of the tracts unless the deed adopts the boundary lines as previously acquiesced upon. *Salazar v. Terry*, 911 P.2d 1086 (Colo. 1996).

**Applied** in *Forristall v. Ansley*, 170 Colo. 391, 462 P.2d 116 (1969).

**§ 38-44-110. Appeal**

There shall be no appeal in such proceedings, except from final judgment of the court taken in the manner that other appeals are taken, and no appeal shall be taken after three months from the final order of the court.

**History:**

L. 07: p. 288, § 10. Code 08: § 306. Code 21: § 307. Code 35: § 307. CRS 53:  
§ 118-11-10. C.R.S. 1963: § 118-11-10.

### § 38-44-111. Costs

The costs in the proceedings shall be taxed as the court thinks just and shall be a lien on the land or interest therein owned by the party or parties against whom they are taxed insofar as such lands are involved in the proceedings.

#### History:

L. 07: p. 288, § 11. Code 08: § 307. Code 21: § 308. Code 35: § 308. CRS 53: § 118-11-11. C.R.S. 1963: § 118-11-11.

#### Case Note:

#### ANNOTATION

**Assessment of costs and expenses to losing party.** In an action involving boundary dispute, judgment assessing costs of survey and expenses of commissioners to losing party is in accord with this section. *Kelly v. Mullin*, 159 Colo. 573, 413 P.2d 186 (1966).

**Assessment of all costs not abuse of discretion.** But the trial court's assessment of all costs of the action against the defendants was not an abuse of discretion. *Brackett v. Cleveland*, 147 Colo. 328, 363 P.2d 1050 (1961).

**Costs allocated only between original plaintiff and defendant** since the issue of allocating costs to the third-party defendants was not raised in plaintiff's motion for a new trial and thus the court of appeals had no jurisdiction to decide the issue. *Brewster v. Nandrea*, 705 P.2d 1 (Colo. 1985).

**§ 38-44-112. Agreements**

Any uncertain line, uncertain corner, or uncertain boundary of an existing parcel of land that is recorded in the real estate records in the office of the clerk and recorder for the county where the land is located and that is in dispute may be determined and permanently established by written agreement of all parties thereby affected, signed and acknowledged by each as required for conveyances of real estate, clearly designating the same, and accompanied by a map or plat thereof that shall be recorded as an instrument affecting real estate, and shall be binding upon their heirs, successors, and assigns. If the map or plat is prepared by a licensed professional land surveyor, monuments shall be set for any line, corner, or boundary included in the agreement.

**History:**

L. 07: p. 288, § 12. Code 08: § 308. Code 21: § 309. Code 35: § 309. CRS 53: § 118-11-12. C.R.S. 1963: § 118-11-12. L. 2007: Entire section amended, p. 294, § 5, effective August 3.

**Case Note:**

**ANNOTATION**

**Law reviews.** For article, "CRS § 38-44-112 Boundary Line Agreements", see 46 Colo. Law. 61 (Mar. 2017).

**§ 38-44-113. Establishment of boundary corner**

The establishment of a boundary corner through acquiescence confirmed by a court of competent jurisdiction, or by written agreement pursuant to section 38-44-112, shall not alter the location or validity of any existing or properly restored public land survey monument in the vicinity. Such existing or properly restored public land survey monument may be used to control future land surveys in the region when such surveys are not related to the boundary corner established by acquiescence or agreement.

**History:**

L. 97: Entire section added, p. 1629, § 5, effective July 1.