

BOUNDARY DISPUTE RESOLUTION

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INTRODUCTION and DISCLAIMERS

I Am Not Your Attorney.

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

1. LAND SURVEYORS ARE MORE LIKELY TO START A
BOUNDARY DISPUTE AS TO RESOLVE ONE.



JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"This surveyor's mark was likely the spark that ignited this dispute. When the marker was placed near the Cothams' fence, the Cothams challenged the finding saying they had always owned at least to the ditch line and perhaps past the ditch line to the north."

Dowdell v. Cotham, 2007 Tenn.App. LEXIS 470

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

2. PINCUSHIONS ARE THE PHYSICAL
MANIFESTATION OF OUR COLLECTIVE CONFUSION
OVER BOUNDARIES.











JEFF'S 10 COMMANDMENTS ON BOUNDARY DISPUTES

- In a perfect world, the surveyor would be an uninterested third party as he/she surveys any particular boundary line. Owing as much of a duty to his/her client as to the client's neighbor.

JEFF'S 10 COMMANDMENTS ON BOUNDARY DISPUTES

"In the performance of his professional duties, a registrant shall make every reasonable effort to *protect the safety, health, property, and welfare* of the public. If the registrant's professional judgment is overruled under circumstances in which the safety, health, property, or welfare of the public is endangered, the registrant shall inform his employer or client of the possible consequences."

Maryland Code of Regulations. 9.13.01.02 (2010).

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"In the general *interest of the public*, these standards are promulgated to set forth the minimum acceptable level of performance to be exercised by all individuals practicing professional land surveying and property line surveying in Maryland."

Maryland Code of Regulations. 9.13.06.01 (2010).

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

**3. THE ONLY BOUNDARY LINE THAT MATTERS IS THE
"PROPERTY BOUNDARY" BETWEEN THE
COTERMINUS LANDOWNERS.**

The "Ultimate Issue" in any boundary dispute case is the "property" boundary between the disputing parties. No other line really matters.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"The purpose of the surveys in this boundary dispute is to locate accurately the *boundary between the plaintiff's and defendants' property*. To do this, the survey must begin with an accurate description of what land the parties own...."

Andrews v. Barton, 2008 Fla.App. LEXIS 1836 (Fla.App. 2008)

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

Federal Rules of Evidence

Rule 704.

“Opinion on Ultimate Issue. (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

Maryland Rules of Evidence

Rule 5-704 Opinion on ultimate issue.

“Except as provided in section (b) of this Rule, testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.”

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

“In all courts, evidence is the purview of the jury (or judge as ‘trier of the facts’ if there is no jury); the law is always in the purview of the court. A Georgia decision permitted the surveyor to testify as to his opinion on the ultimate issue of the case without invading the province of the jury, so long as the subject matter was an appropriate one for opinion evidence. This is quite unusual. North Carolina still retains the majority approach in that the expert land surveyor cannot give an opinion as to where a true boundary line is located, for that decision is the ultimate fact in issue to be determined by the jury from the evidence presented during the trial.”

Robillard, Walter G., Lane J. Bouman and Hon. Robert Shelton, *Clark on Surveying and Boundaries, Seventh Edition* at 49.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

"Rule 704, provides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact."

Green Hi-Win Farm, Inc. v. Neal, S.E.2d 614, 616, 617 (N.C.App. 1986).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

**4. THERE ARE ONLY TWO QUESTIONS
TO ANSWER TO RESOLVE A
BOUNDARY DISPUTE:**

- **WHAT IS THE BOUNDARY?**
- **WHERE IS THE BOUNDARY?**

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

"The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact."

Walleigh v. Emery, 163 A.2d 665, 668 (Pa.Super.Court. 1960)

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

“The Texas Supreme Court has explained that ‘as to what are boundaries, is a *question of law* for the determination of the court; as to where the boundaries are upon the ground, is a *question of fact* to be determined from the evidence.’”

TH Investments v. Kirby Marine, 218 S.W.3d 173 (Tex.App. 2007).

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

- How do boundary doctrines such as acquiescence, practical location, boundary by oral agreement, estoppel and repose pass muster under the Statute of Frauds?

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

- What about adverse possession?

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

**5. We Would do Well to Remember the Difference
Between Accuracy and Precision.**

A judge sitting on a bench can be 100% accurate on a boundary determination without ever making one measurement, while a land surveyor can very precisely measure the wrong property and be completely inaccurate on the same issue.

**HIGH ACCURACY
LOW PRECISION**



FIGURE 1

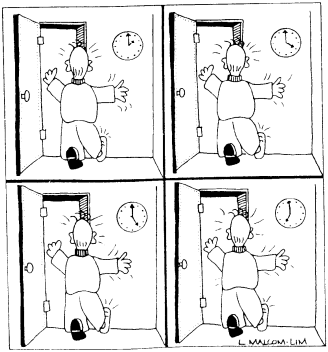
**HIGH PRECISION
LOW ACCURACY**



FIGURE 2

Publication Statement

Foresight! is a semiannual publication of the Surveying Engineering program at CSU, Fresno. Opinions and ideas expressed in this publication are solely those of the authors.



DESPITE MUCH PRACTICE, ERNEST COULD BE PRECISE, BUT NOT ACCURATE.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

- Just because a monument does not meet your precision expectations does not necessarily mean that it is not representative of the corner location.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

6. IN THE VAST MAJORITY OF CASES, THE SURVEYOR IS DEFACTO JUDGE AND JURY OVER THE LOCATION OF THE BOUNDARY LINE BETWEEN ADJOINING LANDOWNERS.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"I have been led to adopt in my own work the 'Principle of Cumulative Evidence.' It seems that, either rightly or wrongly, it is incumbent on the surveyor to collect all the evidence in each case and to carry his work along the lines of the preponderance of probability. In nearly all cases, while some of the data are either ambiguous or even conflicting, there is usually a large preponderance of evidence which point more or less clearly to one solution of the problem, and my own experience, containing some few examples, leads me to believe that this generally indicated solution is probably the right one."

Mulford, A.C., "Boundaries and Landmarks," D.Van Nostrand Co., New York, 1912, at Page 42 and 43.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"I have generally found that this line of reasoning appeals pretty strongly to all parties interested and that there is general willingness to abide by a decision so reached. The fact that you have been willing to collect all data possible and hear all side of the case begets confidence, and the rest is largely a matter of common sense."

Mulford, A.C., "Boundaries and Landmarks," D.Van Nostrand Co., New York, 1912, at Page 42 and 43.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"If, however, the evidence for and against re-locating an old line in a certain place is pretty evenly divided, it is my belief that a conference of all parties interested should be arranged with a view to establish a line by agreement, as a sure and safe way of preserving the peace and fixing the boundary for years to come."

Mulford, A.C., "Boundaries and Landmarks," D.Van Nostrand Co., New York, 1912, at Page 42 and 43.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

"In an old settled country, the principal work of the surveyor is to retrace old boundary lines, find old corners, and relocate them when lost. In performing this duty, he exercises, to a certain extent, judicial functions. He usually takes the place of both judge and jury, and acting as arbiter between adjoining proprietors, decides both the law and the facts in regard to their boundary lines. He does this not because of any right or authority he may possess, but because the interested parties voluntarily submit their differences to him as an expert in such matters, preferring to abide by his decisions rather than go to law about it."

Hodgman, F., M.S., C.E., "A Manual of Land Surveying," The F. Hodgman Co., Climax, Mich. 1913, at Page 289.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

"Every surveyor's authority is derived from his ability, his reputation, and the respect in which he is held. He has no judicial authority. Neither client nor adjoiner is bound by his survey, although both may accept it. A surveyor frequently helps settle boundary disputes by acting as a middleman between adjoiners. When a Court orders a survey, the Court decides where the line is to be."

Sipe, Henry F., "Compass Land Surveying," Henry Sipe, Elkins, West Virginia, 1965, at Page 37.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

"The surveyor analyzes the evidence, and decides, on the basis of laws of surveys and court decisions, what weight is to be given to each fact, and how this will guide the resurvey. These decisions are subject to revision as new evidence is discovered. Most disagreements between surveyors arise from failure to find all available evidence."

Sipe, Henry F., "Compass Land Surveying," Henry Sipe, Elkins, West Virginia, 1965, at Page 115.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"The surveyor is supposed to make his survey in such a manner that a court will uphold his judgments and actions. This means he must place the Boundary Line between abutting owners in exactly the same place whether he is paid by owner "A" or owner "B." In this sense a surveyor is actually a court. A court which doesn't know the law in its own field is an utter futility."

Tillotson, Ira M., "Legal Principles of Property Boundary Location on the Ground in the Public Land Survey States." Ira Tillotson, Missoula, Montana, 1973, at Page 1.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

- Even Brown recanted from his earlier position in his later years.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"In my early writings, I generally advocated that surveyors should locate land boundaries in accordance with a written deed; all conveyances based upon unwritten rights should be referred to attorneys for resolution. Within recent years, there have been cases, one in particular, wherein surveyors have been held liable for failure to react to a change in ownership created by prolonged possession...."

Brown, Curtis M., "Land Surveyor's Liability to Unwritten Rights," 1979. Reprinted in "State Manual, Surveying Society of Georgia," 2000.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"Can a surveyor monument the lines of ownership obtained by unwritten means? To my knowledge absolutely nothing in the law prevents him from doing so. Clearly from my conversations with attorneys, this is not the unauthorized practice of law. If the surveyor chooses to claim that a possessory right has ripened into a fee title, he is certainly privileged to do so. The real question is What should he do?" [Emphasis in original].

Brown, Curtis M., "Land Surveyor's Liability to Unwritten Rights," 1979. Reprinted in "State Manual, Surveying Society of Georgia," 2000.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

– What do the lawyers think we are doing?

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client's next door neighbor. The surveyor's opinion is founded on experience and applicable legal precedents. Unlike the attorney, the surveyor does not see himself primarily as an advocate for his client. ..."

Williams & Onsrud, "What Every Lawyer Should Know about Title Surveys," Reprinted in "Land Surveys, A Guide for Lawyers," Real Property and Trust Law Section American Bar Association, 1986.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"Merely locating the lines described in a deed on the ground is not adequate for establishing the physical limits of a property ownership. ..."

Williams & Onsrud, "What Every Lawyer Should Know about Title Surveys," Reprinted in "Land Surveys, A Guide for Lawyers," Real Property and Trust Law Section American Bar Association, 1986.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"A surveyor is guided by legal principles in his evaluation of the evidence for a boundary line location. One such principle is the presumed priority of conflicting title elements that determine boundary line location. ... The resolution of conflicts between written and unwritten rights is one of the most difficult problems for both surveyors and lawyers. ..."

Williams & Onsrud, "What Every Lawyer Should Know about Title Surveys," Reprinted in "Land Surveys, A Guide for Lawyers," Real Property and Trust Law Section American Bar Association, 1986.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

"If the surveyor's evaluation of the evidence...is eventually upheld in a court of law, it is because the surveyor has arrived at a comprehensive and well-reasoned answer rather than because he has arrived at the theoretically correct answer. Again, there are no 'true' answers waiting to be discovered; only well-reasoned answers."

Williams & Onsrud, "What Every Lawyer Should Know about Title Surveys," Reprinted in "Land Surveys, A Guide for Lawyers," Real Property and Trust Law Section American Bar Association, 1986.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

– What are we supposed to be doing?

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

“Sec. 1. Purpose - In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete, and accurate.”

2011 “Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys”, sec.1.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

“Sec. 3. D. Boundary Resolution - The boundary lines and corners of any property being surveyed as part of an ALTA/ACSM Land Title Survey shall be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and survey.”

2011 “Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys”, sec.3.D.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

“Sec. 3. E. Measurement Standards - A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e. *inaccurate*) if it was established or retraced using faulty or improper *application of boundary law principles*.”

2011 “Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys”, sec.3., subpara.E.iv.

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

**7. YOU ARE EITHER AN ORIGINAL SURVEYOR
SETTING OUT LINES FOR THE VERY FIRST TIME OR
YOU ARE A FOLLOWING (RETRACING) SURVEYOR
FINDING THE LINES THAT HAVE ALREADY BEEN
ESTABLISHED.**

JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES

“In surveying a tract of land according to a former plat or survey, the surveyor's only duty is to relocate, upon the best evidence obtainable, the courses and lines at the same place where *originally located by the first surveyor on the ground*.”

Adams v. Hoover, 493 N.W.2d 280 (Mich.App.1992).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“In making the resurvey, he has the right to furnish proof of the location of the lost lines or monuments, not to dispute the correctness of or to control the original survey. The original survey in all cases must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it.”

Adams v. Hoover, 493 N.W.2d 280 (Mich.App.1992).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“On a resurvey to establish lost boundaries, if the original corners can be found, the places where they were originally established are conclusive without regard to whether they were in fact correctly located, in this respect it has been stated that the rule is based on the premise that the stability of boundary lines is more important than minor inaccuracies or mistakes.”

Adams v. Hoover, 493 N.W.2d 280 (Mich.App.1992).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“Moreover, in relocating lost monuments the question is not how an entirely accurate survey would have located the lots, but how the original survey stakes located them. ... The rationale behind this proposition is primarily the public's need for finality and uniformity of boundaries and land titles.”

Adams v. Hoover, 493 N.W.2d 280 (Mich.App.1992).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“Bearings and course calls should not be used to establish the location of a survey line if there is other reliable evidence showing where it was actually run on the ground. Footsteps of original surveyor control over calls for course and distance; where actual lines run can be found, they constitute the true boundary and cannot be made to yield to course and distance calls.”

TH Investments v. Kirby Marine, 218 S.W.3d 173 (Tex.App. 2007).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“In resurveying a tract of land according to a former plat or survey, the surveyor's only function or right is to relocate, upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground. The object of a resurvey is to furnish proof of the location of the original survey's lost lines or monuments, not to dispute the correctness of it.”

Gilbert v. Geiger, 747 N.W.2d 188 (Wisc.App.2007).

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“Nothing is better understood than that few of our early plats will stand the test of a careful and accurate [precise] survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities.”

Diehl v. Zanger, 1878 Mich.LEXIS 375 (Mich.1878). Opinion by Cooley

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a *great public calamity.*”

Diehl v. Zanger, 1878 Mich.LEXIS 375 (Mich.1878). Opinion by Cooley

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

**9. BE AN EXPERT EVALUATOR OF EVIDENCE, NOT
SIMPLY AN EXPERT MEASURER.**

“While land surveying is often associated with engineering, the two professions are distinct. The evaluation of land surveying evidence is not a ‘science’ in the sense that there is one procedure to follow which will yield the ‘correct’ result.”

Williams & Onsrud, “What Every Lawyer Should Know about Title Surveys,” Reprinted in “Land Surveys, A Guide for Lawyers,” Real Property and Trust Law Section American Bar Association, 1986.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

“Surveyors occasionally disagree on the proper location of a boundary line; not necessarily because one surveyor measures better than the other but more commonly because each surveyor has weighed the evidence differently and has formed different opinions.”

Williams & Onsrud, “What Every Lawyer Should Know about Title Surveys,” Reprinted in “Land Surveys, A Guide for Lawyers,” Real Property and Trust Law Section American Bar Association, 1986.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

**10. NOT ALL EVIDENCE IS GOOD OR REVELANT
EVIDENCE.**

The Courts will only hear relevant evidence. During the course of a survey, you're likely to run across both good (relevant) and bad (irrelevant) evidence.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

Fed. Rules of Evidence
Rule 801. Definitions

The following definitions apply under this article:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.
- (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**JEFF'S 10 COMMANDMENTS
ON BOUNDARY DISPUTES**

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

JEFF'S 10 COMMANDMENTS ON BOUNDARY DISPUTES

Can "Sonny-Boy"
(in the year 2011)
testify as to where
George Washington set
the corner in 1748?



JEFF'S 10 COMMANDMENTS ON BOUNDARY DISPUTES

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(20) Reputation concerning boundaries or general history. Reputation in a community, *arising before the controversy*, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

EVIDENCE STANDARDS

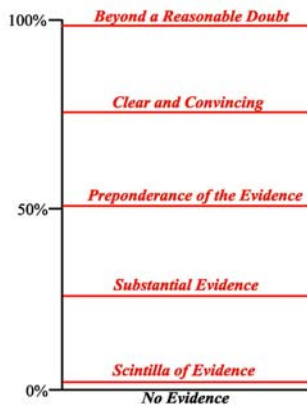
"PRINCIPLE 5. Evidence is not proof. Evidence leads to proof. A consideration of all evidence and conclusions to be drawn from evidence, in accordance with the law of evidence, may produce proof."

Robillard, Wilson, et al, Evidence and Procedures for Boundary Location, Fifth Edition, Page 19.

EVIDENCE STANDARDS

- **Beyond a Reasonable Doubt** (Almost Certain).
- **Clear and Convincing** (Highly Probable).
- **Preponderance of Evidence** (More than 50%, or the Greater Weight).
- **Substantial Evidence** (More than a Scintilla, Less than a Preponderance)
- **Scintilla of Evidence** (The Smallest Trace).

EVIDENCE STANDARDS



BEST AVAILABLE EVIDENCE

- WHAT IS BEST AVAILABLE EVIDENCE?

BEST AVAILABLE EVIDENCE

“After a surveyor has completed a comprehensive review of all available records, deeds and prior surveys, the surveyor begins the field survey. Once in the field, the surveyor has a duty to make a diligent search for all monuments referenced directly or indirectly in the deed or property description that either occur naturally or were put in place by prior surveyors or other persons.”

Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (U.S. Dist. 1995).

BEST AVAILABLE EVIDENCE

“Monuments have special significance because monuments indicate the location of property at issue on the ground. The search for monuments must continue until the monuments are located or until there is an explanation for their absence. If necessary, the surveyor should consult former surveyors, landowners, residents, or other knowledgeable parties to determine monument sites or obtain other information tending to show where a piece of property should be located.”

Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (U.S. Dist. 1995).

BEST AVAILABLE EVIDENCE

“Testimony of neighbors and informed residents concerning boundaries is an important source of information for resurveys. As stated in one treatise, ‘[a] diligent, thorough, and complete search for all evidence is the fundamental essence of land surveying.’ Through these investigative efforts, the surveyor attempts to reach his or her goal: the ‘location of land boundaries in accordance with the best available evidence’ even though the best evidence may be ‘mere hearsay or reputation.’”

Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (U.S. Dist. 1995).

BEST AVAILABLE EVIDENCE

“For a corner to be lost it ‘must be so completely lost that (it) cannot be replaced by reference to any existing data or other sources of information.’ The decision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position..”

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

BEST AVAILABLE EVIDENCE

“Even though the physical evidence of a corner may have entirely disappeared, a corner cannot be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.”

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

BEST AVAILABLE EVIDENCE

“There is no clearly defined rule for the acceptance or non-acceptance of the testimony of individuals. It may be based upon unaided memory...or upon definite notes and private marks. The witness may have come by his knowledge casually or...had a specific reason for remembering. Corroborative evidence becomes necessary in direct proportion to the uncertainty of the statements advanced.”

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

BEST AVAILABLE EVIDENCE

“5-7. Allowance for ordinary discrepancies should be made in considering the evidence of a monument and its accessories. No set rules can be laid down as to what is sufficient evidence. Much must be left to the skill, fidelity, and good judgment of the surveyor, bearing in mind the relation of one monument to another and the relation of all to the recorded natural objects and items of topography.”

Manual of Surveying Instructions, 1973. U.S. Dept. of Interior, Bureau of Land Management.

BEST AVAILABLE EVIDENCE

“5-8. No decision should be made in regard to the restoration of a corner until every means has been exercised that might aid in identifying its true original position. The retracements will indicate the probable position and will show what discrepancies are to be expected. Any supplemental survey record or testimony should then be considered in the light of the facts thus developed.”

Manual of Surveying Instructions, 1973. U.S. Dept. of Interior, Bureau of Land Management.

NORTHROP v. OPPERMAN

WISCONSIN SUPREME COURT
2011 Wisc. LEXIS 4
February 3, 2011



INTENT OF THE PARTIES

- Search the Four Corners
- Ambiguities
- Extrinsic Evidence
- Subsequent Acts of the Parties
- Testimony (Parol Evidence)
- Rules of Construction

INTENT OF THE PARTIES

- Intent Is King**
- The intent of the grantor and the grantee is king when it comes to the transfer of property, with a couple of exceptions.
 - First, grantor cannot grant more than he owns or has a right to grant;
 - Second, intent is defeated by unwritten rights (e.g. adverse possession) or by unwritten rights (prescriptive rights, agreement, acquiescence, estoppel, etc.), and;
 - Third, by senior conveyances.

MONUMENTS AND THEIR ROLE

“This litigation grows out of a new survey recently made by the city surveyor. This officer after searching for the original stakes and finding none, has proceeded to take measurements according to the original plat, and to drive stakes of his own. According to this survey the practical location of the whole plat is wrong, and all the lines should be moved between four and five feet to the east.”

Diehl v. Zanger, 1878 Mich.LEXIS 375 (Mich.1878). Opinion by Cooley.

MONUMENTS AND THEIR ROLE

“The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate [precise] survey would locate these lots, but how the original stakes located them.”

Diehl v. Zanger, 1878 Mich.LEXIS 375 (Mich.1878). Opinion by Cooley.

MONUMENTS AND THEIR ROLE

“No rule in real estate law is more inflexible than that monuments control course and distance—a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned.”

Diehl v. Zanger, 1878 Mich.LEXIS 375 (Mich.1878). Opinion by Cooley.

MONUMENTS AND THEIR ROLE

“The general rule that courses and distances must yield to natural or artificial monuments rests upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties.”

Myrick v Peet, 180 P. 574 (Mont. 1919)

MONUMENTS AND THEIR ROLE

“Monuments are facts; the field-notes and plats indicating courses, distances and quantities are but descriptions which serve to assist in ascertaining those facts. When there is a conflict between monuments and courses and distances, the latter must yield to the former.”

Myrick v Peet, 180 P. 574 (Mont. 1919)

MONUMENTS AND THEIR ROLE

“Marks on the ground constitute the survey; courses and distances are only evidence of the survey.”

Myrick v Peet, 180 P. 574 (Mont. 1919)

MONUMENTS AND THEIR ROLE

- One of the propositions that I have put forward and continue to put forward, is you are much better off trying to find reasons to hold a monument found in place, called for or uncalled for, than you are setting new monuments, especially when these new monuments conflict with existing occupation, long held possession, and monuments recognized by local landowners as property corners.

MONUMENTS AND THEIR ROLE

- Existing monuments that closely coincide with the deed (even if not called for in the deed), that coincide with possession and occupation, and that are recognized by locals are going to have the added weight of equity on their side.

MONUMENTS AND THEIR ROLE

- That said, even original monuments set by the original surveyor can and will be defeated under the right circumstances. It's not what the surveyor did or did not do, it's what the people do as a result of the survey. And time plays a role as well.

SENIOR/JUNIOR RIGHTS

- In order for there to be senior/junior rights issues, there has to be more than one conveyance coming from a common grantor.

SENIOR/JUNIOR RIGHTS

“There is only one survey in the record. There is no conflicting survey. There is an overlapping in the descriptions in the deeds in that the descriptions in the deeds of both parties include the disputed strip of land. We do not understand, however, that either party has proved ownership of the record title because neither traces title from the United States or other sovereign.”

Rollan v. Posey, 271 Ala. 640, 643, 644 (Ala. 1961).

SENIOR/JUNIOR RIGHTS

“We do not think the evidence will support a finding that respondents proved anywhere a conveyance from a grantor in possession. It is held in *Dunn v. Stratton*, supra, that the elder of two deeds from a common grantor will prevail, but in the instant case the two chains of conveyances do not emanate from a common grantor.”

Rollan v. Posey, 271 Ala. 640, 643, 644 (Ala. 1961).

SENIOR/JUNIOR RIGHTS

"We have not been cited to nor do we know of any case which holds that a claim of title is superior to another merely because the first claim rests on a deed at the end of a chain of conveyances which commences with a deed from a private person, bearing an earlier date than the deed from a different private person with which the second chain of conveyances commences."

Rollan v. Posey, 271 Ala. 640, 643, 644 (Ala. 1961).

SENIOR/JUNIOR RIGHTS

"Appellants' argument based on the fact that the first deed in their chain is dated 1900 while the first deed in appellees' chain is dated 1916 is without merit. Appellants have not shown a superior title to the disputed strip by their chain of conveyances commencing in 1900 as aforesaid."

Rollan v. Posey, 271 Ala. 640, 643, 644 (Ala. 1961).

SENIOR/JUNIOR RIGHTS

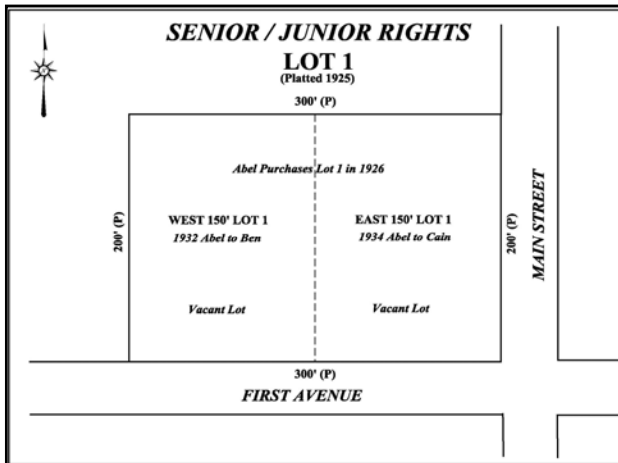
- As between senior and junior purchasers, conflicts are generally resolved in favor of the senior grantee and against the grantor.

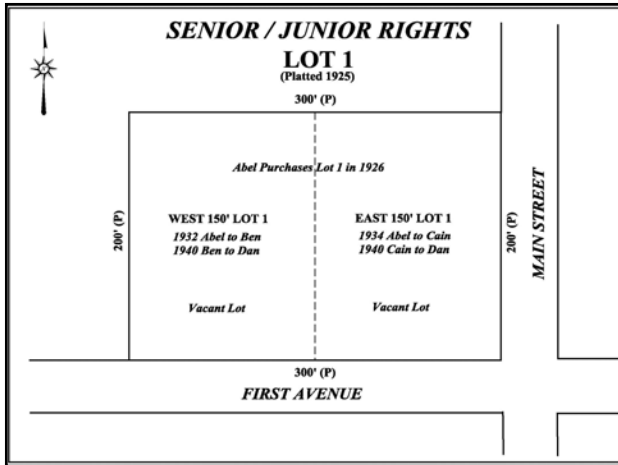
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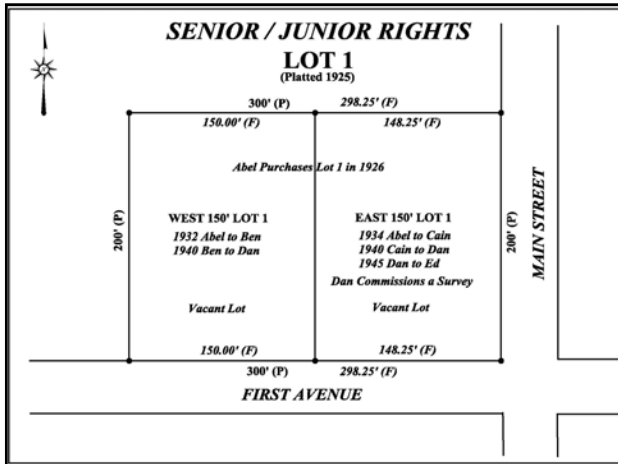
- When it appears that the common grantor attempted to divest himself of all remaining property, then the last (junior) conveyance gets the remainder. Again, a grant is generally construed against the grantor and in favor of the grantee.

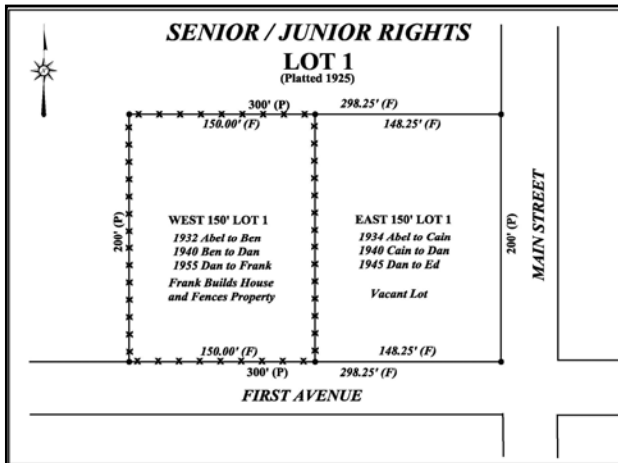
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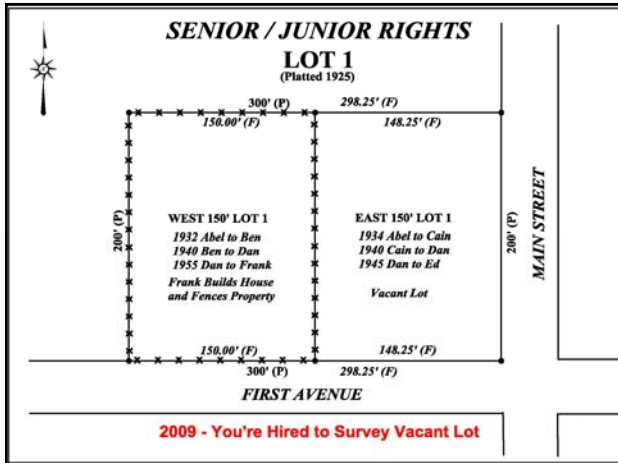
- A junior grant is always read in light of the senior grant.











SENIOR/JUNIOR RIGHTS

- What constitutes reasonable research?

UNWRITTEN RIGHTS

“The most important justification for the adverse possession doctrine is that it protects one who innocently and mistakenly possesses the land of another for such a long period that a justifiable reliance on the existing state of affairs can be presumed. A change in this state of affairs would give a windfall to the record owner...The Doctrine of adverse possession also promotes certainty in land titles, nullifies conveyance errors, and often settles boundary disputes.”

Edward H. Rabin, et al, Fundamentals of Modern Property Law, Fourth Edition, 790 (Foundation Press 2000).

UNWRITTEN RIGHTS

- **ADVERSE POSSESSION:**
- The statutory period for adverse possession to ripen varies from state to state.
- In many states it's 10 years with color of title and 20 years without.

UNWRITTEN RIGHTS

- **ADVERSE POSSESSION:**
- Adverse possession is a right and remedy that may be asserted by a plaintiff or claimed by a defendant to accomplish the transfer of title to property and the associated rights, but it is of little use to the practicing land surveyor.

UNWRITTEN RIGHTS

- **ESTABLISHMENT DOCTRINES:**
- Boundaries by agreement or acquiescence, in contrast, can be very beneficial in the ultimate determination of the true boundary line between two coterminous landowners.

UNWRITTEN RIGHTS

- **ESTABLISHMENT DOCTRINES:**
- Also, Statutes of Repose (or the Doctrine of Repose) that have run their course will settle the location of the boundary and secure title in the possessed land.

UNWRITTEN RIGHTS

“The object of the rule confirming occupation according to an agreed line *‘is to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable’*; and the rule not only binds the parties, but also their successors by subsequent conveyances....

Janes v. LeDeit, 228 Cal. App. 2d 474 (1964).

UNWRITTEN RIGHTS

“...It is also established by the authorities that the line so agreed upon becomes in legal effect the true line; that the agreement as to the line may be in parol; that *it does not operate to convey title to the land which may lie between the agreed line and the true line, but fixes the line* itself and the description carries title up to the agreed line regardless of its accuracy;...”

Janes v. LeDeit, 228 Cal. App. 2d 474 (1964).

UNWRITTEN RIGHTS

“...that the division line thus established attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed; and that if more is thus given to one than the calls of his deed actually require, he holds the excess by the same tenure that he holds the main body of his lands.”

Janes v. LeDeit, 228 Cal. App. 2d 474 (1964).

UNWRITTEN RIGHTS

“Notwithstanding plaintiff’s arguments, we conclude that the trial court properly directed a verdict for the defendants because plaintiff’s claim is barred, as a matter of law, by the 20-year rule of repose or prescription. The principle of prescription is a ‘strict rule of law in this State’ based on a strict application of the 20-year period. In *Boshell v. Keith*, this Court explained, at length, the 20-year rule of repose, and applied it: ‘Since *McArthur v Carrie’s Administrator*, this State has followed a rule of repose, or rule of prescription, of 20 years.’”

McDurmont v. Crenshaw, 489 So.2d 550 (Ala. 1986).

UNWRITTEN RIGHTS

“This principle of repose or prescription is similar to a statute of limitations, but not dependent upon one, and broader in scope. It is a doctrine that operates in addition to laches. Unlike laches, however, the only element of the rule of repose is time. It is not affected by the circumstances of the situation, by personal disabilities, or by whether prejudice has resulted or evidence obscured. It operates as an absolute bar to claims that are unasserted for 20 years.”

McDurmont v. Crenshaw, 489 So.2d 550 (Ala. 1986).

UNWRITTEN RIGHTS

“The rationale for this absolute bar to such actions was set forth in *Snodgrass v. Snodgrass*, as follows: ‘As a matter of public policy and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired.”

McDurmont v. Crenshaw, 489 So.2d 550 (Ala. 1986).

UNWRITTEN RIGHTS

“It is necessary for the peace and security of society that there should be an end of litigation, and it is inequitable to allow those who have slept upon their rights for a period of 20 years [to come forward with a claim....After 20-years] the memory of transactions has faded and parties and witnesses passed away.”

McDurmont v. Crenshaw, 489 So.2d 550 (Ala. 1986).

UNWRITTEN RIGHTS

“The consensus of opinion in the present day is that such presumption is conclusive, and the period of 20 years, without some distinct act in recognition of the trust, a complete bar; ... the presumption rests not only on the want of diligence in asserting rights, but on the higher ground that it is necessary to suppress frauds, to avoid long dormant claims, which it has been said have often more of cruelty than of justice in them, that it conduces to peace of society and the happiness of families, and relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible.”

McDurmont v. Crenshaw, 489 So.2d 550 (Ala. 1986).

UNWRITTEN RIGHTS

“The *Daley* Court held that long established occupational lines are not to be disturbed by recent surveys and that settled boundaries shall be allowed repose and shall not be disturbed. More importantly the *Daley* Court observed that if there is a lack of an agreement which would thus threaten an otherwise settled boundary then the court did not hesitate to ‘imply’ agreement from the conduct of the parties, or from surrounding circumstances.”

Adams v. Hoover, 493 N.W.2d 280 (Mich.App.1992).

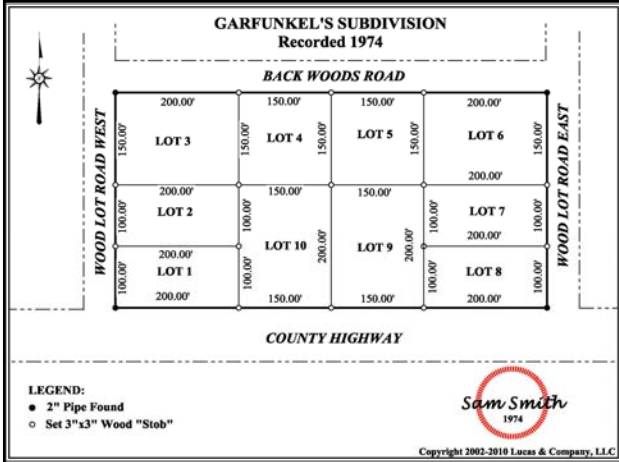
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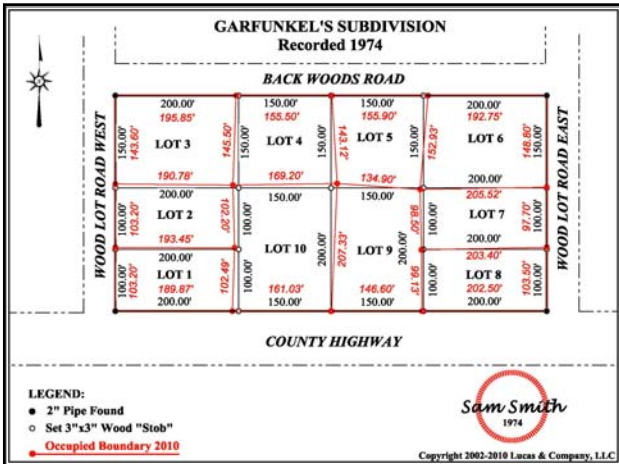
“The court concluded that the doctrine of repose has the same policy as that behind statutes of limitations.”

Adams v. Hoover, 493 N.W.2d 280 (Mich.App.1992).

GARFUNKEL’S SUBDIVISION

A Fictitious Case





UNWRITTEN RIGHTS

“An integral aspect of establishing record title to real property is proving its on-the-ground location. In the early case of *Neel v. Hughes*, the Court said: ‘Every conveyance must either on its face, or by words of reference, give to the subject intended to be conveyed, such a description as to identify it. If it be land it must be such as to afford the means of locating it.’”

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

UNWRITTEN RIGHTS

“It is a fundamental principle of boundary law that the court’s paramount objective in resolving boundary disputes is to fulfill the intention of the parties to the original instrument. ... The principles of boundary law are merely guides for ascertaining the intention of the parties to the original instrument.”

Porter v. Schaffer, 728 A.2d 755, 770 (Md.App.1999).

UNWRITTEN RIGHTS

“A grant calling for a survey incorporates all matters concerning that survey as if the same were explicitly contained in the grant.”

Porter v. Schaffer, 728 A.2d 755, 770 (Md.App.1999).

UNWRITTEN RIGHTS

“The rule that a line actually run by the surveyor, which was marked and a corner made, entitles the party claiming under the patent or deed to hold accordingly, notwithstanding a mistaken description of the land in the deed, *presupposes that the patent or deed is made in pursuance of the survey, and that the line which was marked and the corner which was made were adopted and acted upon in making the patent or deed, and therefore gives them controlling effect.*” [Emphasis provided.]

Porter v. Schaffer, 728 A.2d 755, 770 (Md.App.1999).

UNWRITTEN RIGHTS

“Thus, where a conveyance is about to be made, and the parties go upon the land and have the line marked and surveyed, the line so fixed and intended will prevail over any inconsistent description in a subsequent conveyance.”

Porter v. Schaffer, 728 A.2d 755, 770 (Md.App.1999).

UNWRITTEN RIGHTS

“We also note that, as a general canon of boundary law, it is well-settled that a call to an adjoining boundary takes precedence over a metes and bounds description in the same instrument. Therefore, as between a modern survey that is consistent with a call to an adjoining boundary and one consistent with the metes and bounds description but at odds with the adjoining boundary, the one faithful to the adjoining boundary ordinarily controls.”

Porter v. Schaffer, 728 A.2d 755, 770 (Md.App.1999).

UNWRITTEN RIGHTS

- **STATUTE OF FRAUDS:**
- Normally, interest in real property must be conveyed and evidenced through a written instrument, generally a deed or other instrument of conveyance.

UNWRITTEN RIGHTS

“Practically all existing statute of frauds provisions in the various jurisdictions are based upon Section 4 of the English statute of 1677, with very little change in the language of the statute. In the 300 years since that statute was adopted, such a heavy accretion of case law has developed that the matter of interpretation of the statute has become essentially a common law matter.”

Edward H. Rabin, et al, *Fundamentals of Modern Property Law, Fourth Edition*, 859 (Foundation Press 2000).

UNWRITTEN RIGHTS

- **STATUTE OF FRAUDS:**
- There are general exceptions that operate outside the statute and allow for the unwritten transfer of property in most, if not all states.

UNWRITTEN RIGHTS

“From the beginning the basis for removal of a case from the application of the statute of frauds has been the reliance by one of the parties to the oral contract to his detriment under circumstances where gross injustice would result unless the oral contract was enforced....[This notion] rests on the more fundamental principle that a contract to convey will be enforced even when not in writing if one party’s reasonable detrimental reliance on the contract would make it inequitable not to enforce it.”

Walker v. Ireton, 221 P.2d 340, (Kan.1977).

UNWRITTEN RIGHTS

"Of course, oral agreements for conveyance of land are normally unenforceable under the statute of frauds. An oral agreement may nevertheless be honored in cases presenting various exceptions to the statute of frauds. [In the present case]...the boundary line is enforceable under three exceptions to the statute of frauds: 1) the doctrine of practical location, 2) the doctrine of acquiescence, and 3) the doctrine of partial performance."

In Re Lot No.36, 62 Millwright Drive, 19868-NC (Del.Ch. 2004).

UNWRITTEN RIGHTS

"American common law authorities suggest that property interests resolved through agreements are binding on successors-in-title. For example, it is well-settled that disputed boundary lines, when resolved through application of practical location and acquiescence, run with the land. These doctrines are based on the sound public policy to avoid litigation over boundary lines."

In Re Lot No.36, 62 Millwright Drive, 19868-NC (Del.Ch. 2004).

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- Boundary by agreement, and by that I mean an unwritten, oral agreement between two coterminous property owners as to the location of the common boundary line, simply settles the "where" question, it doesn't change the "what" question.

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- As a general rule, the true location of the boundary must be uncertain or in dispute.
- This is not to say that the true location cannot be found.

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- The states vary in their treatment of a boundary by oral agreement if the “true” boundary can be ascertained without ambiguity.

UNWRITTEN RIGHTS

“It is undisputed that the parties were ignorant of the true boundary until the survey in 1995. The Newport’s contend that boundary by agreement does not apply because there was no dispute over the location of the boundary. We disagree. There is no requirement that there be a dispute over the boundary. Rather, there must be either uncertainty or a dispute as to the location of the true boundary.”

Johnson v. Newport, 960 P.2d 742, (Idaho 1998).

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- Under Idaho law, there are only two elements that must be fulfilled to have a boundary by agreement:
 - (1) an uncertainty (or ambiguous) boundary, and
 - (2) a subsequent express or implied agreement to fix the boundary (monuments and fences recognized by the affected landowners as the true boundaries).

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- What's good for Idaho may not be good the entire country, therefore, there are three more generally accepted elements of the boundary by agreement that need to be considered.

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- The third element is that there must be agreement as to the location of the boundary.
- The fourth element is that there must be a mutual acquiescence to the agreed upon line.

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- The agreement can be express or it can be implied.
- Coterminous landowners settling in to a common fence line is a very good example of an implied agreement with the requisite mutual acquiescence.

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- The fifth and final element of a boundary by agreement is that sufficient time must pass for the unwritten rights to ripen into possessory rights.
- This time requirement is usually based on some statute of limitations, but not always.

UNWRITTEN RIGHTS

- **BOUNDARY BY AGREEMENT:**
- **Final Cautionary Note:** Some states will not recognize a boundary by oral agreement without sufficient ambiguity as to location. To do so would mean that a conveyance of land had taken place in violation of the Statute of Frauds.

UNWRITTEN RIGHTS

“We have held that where the owners of adjoining tracts of land know where the true boundary line is, and with such knowledge agree that it shall be at another place, and in accordance with such agreement erect a fence on the agreed boundary line and there after acquiesce in such fence as marking the boundary line for a long period of time, no boundary line by acquiescence [agreement] is thus established because without a dispute or uncertainty as to the location of the true boundary line, the establishment of such a boundary line would have the effect of transferring real property by parol agreement contrary to our statute.”

Jensen v. Bartlett, 286 P.2d 804 (Utah 1955).

UNWRITTEN RIGHTS

“Here the court found that there is no official or original plat or survey by which the boundary line can be located, and the evidence shows that the different surveyors do not agree on the location of the boundary line. *This clearly creates sufficient uncertainty on which to base a finding of a boundary line by acquiescence [agreement].*”

Jensen v. Bartlett, 286 P.2d 804 (Utah 1955).

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- One of the best explanations of the doctrine of boundary by acquiescence is in an Arkansas case, *Lammey v. Eckel*, 970 S.W.2d 307, (Ark.App. 1998):

UNWRITTEN RIGHTS

“By contrast, a boundary by acquiescence arises not by a parol agreement but from the actions of the parties. It is more in the nature of an implied agreement presumed to exist by the long acquiescence of adjoining landowners who apparently consent to a dividing line between their properties. The concept is based upon the landowners' tacit acceptance of a fence line or other monument as the visible evidence of their dividing line.”

Lammey v. Eckel, 970 S.W.2d 307, (Ark.App. 1998)

UNWRITTEN RIGHTS

“The acquiescence need not occur over a specific length of time, although it must be for ‘many years’ or a ‘long period of time.’ [The] acquiescence must exist for a period of seven years [but] most boundary by acquiescence cases involve time periods of at least twenty years.”

Lammey v. Eckel, 970 S.W.2d 307, (Ark.App. 1998)

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- In other words, the basic difference between boundary by agreement and boundary by acquiescence is that it is not necessary that the parties get together and agree to a line as their common boundary (either verbally or by formal agreement), their acquiescence to a well defined boundary constitutes the agreed boundary.

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- In Arizona, although boundary by acquiescence has been acknowledged by the courts, the elements had never been clearly defined until *Mealey v. Arndt*, 76 P.3d 892, (Ariz.App. 2003).
- In this case we see the Arizona court reach out to other state jurisdictions in order to apply the elements that they needed to resolve their case.

UNWRITTEN RIGHTS

“Although Arizona has acknowledged the doctrine of boundary by acquiescence, it has not clearly defined the elements. We therefore look to other jurisdictions. Generally, to establish the doctrine of boundary by acquiescence, the party asserting the doctrine must prove (1) occupation or possession of property up to a clearly defined line, (2) mutual acquiescence by the adjoining landowners in that line as the dividing line between their properties, and (3) continued acquiescence for a long period of time. In Arizona, the required period of time for acquiescence is ten years, the same as that for adverse possession.”

Mealey v. Arndt, 76 P.3d 892, (Ariz.App. 2003)

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- The Arizona court did some of our work for us.
- Their elements of boundary by acquiescence are a recitation of the general elements found in case law from other jurisdictions, making them representative of many states, not just Arizona.

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- Additionally, we learn from reading this case that the acquiesced line must generally be clearly defined, not an obscure or hidden line, or a line defined by boundary markers no one knew anything about.

UNWRITTEN RIGHTS

“In order to establish a boundary by acquiescence, a party must prove: (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice to the adjoining landowner of the possession; (3) conduct by the adjoining landowner from which recognition and acquiescence not induced by fraud or mistake may be fairly inferred; [and] (4) acquiescence for a long period of years such that the policy behind the doctrine of acquiescence is well served by recognizing the boundary.”

Anchorage Realty Trust v. Donovan, 2004 ME 137 (Me.2004).

UNWRITTEN RIGHTS

“Contrary to the contention of the Donovans, a boundary by acquiescence may be proven even where the deed description is clear and the legal boundary is known. Moreover, the distinguishing feature of acquiescence is that proof of an agreement to locate and fix a boundary on a certain line is not required, as the Donovans assert.”

Anchorage Realty Trust v. Donovan, 2004 ME 137 (Me.2004).

UNWRITTEN RIGHTS

"The establishment of a boundary line by acquiescence for the statutory period of twenty-one years has long been recognized in Pennsylvania. Two elements are prerequisites: 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of twenty-one years. As recognized by the Superior Court and the common pleas court, the doctrine functions as a rule of repose to quiet title and discourage vexatious litigation."

Zeglin v. Gahagan, 571 Pa. 321, 325, 326 (Pa. 2002).

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- The courts do not see litigation as a good thing, especially when it involves boundary disputes between neighbors.
- This kind of litigation has a destructive effect on the fabric of society in that it pits neighbor against neighbor and involves a valuable resource that, in many instances, is the only treasure owned by the litigants.

UNWRITTEN RIGHTS

"As President Judge Coffroth aptly observed...a prospective purchaser will see the fence or similar marking; given its obvious presence as apparent boundary, he is therefore put on notice to inquire about its origin, history, and function. After 21 years, the chips will be allowed to fall where they may, for reasons of equity and peace."

Zeglin v. Gahagan, 571 Pa. 321, 325, 326 (Pa. 2002).

UNWRITTEN RIGHTS

- **BOUNDARY BY ACQUIESCENCE:**
- The subject of occupied boundaries should be of grave concern to every practicing land surveyors.
- It is simply the trump card in any hand dealing with the determination of the true boundary between coterminous property owners.

UNWRITTEN RIGHTS

“A claimant must prove the following elements to establish a boundary line through mutual recognition and acquiescence: (1) the presence of a certain and well defined boundary line; (2) the parties' good faith manifestation of a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the parties' continuous mutual acquiescence in the line for 10 years.”

Enders v. Sherman, 2000 Wash.App. Lexis 824 (Wash.App. 2000)

UNWRITTEN RIGHTS

“The elements of the doctrine of parol agreement are as follows: (1) There must be either a bona fide dispute between two coterminous property owners as to where their common boundary lies upon the ground or else both parties must be uncertain as to the true location of such boundary; (2) the owners must arrive at an express meeting of the minds to permanently resolve the dispute or uncertainty by recognizing a definite and specific line as the true and unconditional location of the boundary; (3) they must in some fashion physically designate that permanent boundary determination on the ground; and (4) they must take possession of their property by such occupancy or improvements as would reasonably give constructive notice of the location of such boundary to their successors in interest.”

Kromm v. Literal, 2002 Wash.App. Lexis 95 (Wash.App. 2002)

THE THREE BROAD SCENARIOS

- The surveyor faces three broad scenarios when attempting to make boundary determinations.
- Before we look at the three broad scenarios, we need to first consider title.

THE THREE BROAD SCENARIOS

- **REAL PROPERTY TITLE:**
- “The formal right of ownership of property. Title is the means whereby the owner of lands has the just possession of his property.”
Blacks

THE THREE BROAD SCENARIOS

- **REAL PROPERTY TITLE:**
- As we know, title to land can come about either by written means (deeds or “record title”) or by possessory means (occupancy or unwritten means).
- Title can be encumbered or unencumbered.

THE THREE BROAD SCENARIOS

- **MARKETABLE TITLE:**
- “A title which is free from encumbrances and any reasonable doubt as to its validity, and such as a reasonably intelligent person, who is well informed as to facts and their legal bearings, and ready and willing to perform his contract, would be willing to accept in exercise of ordinary business prudence.”
Blacks

THE THREE BROAD SCENARIOS

- **MARKETABLE TITLE:**
- Technically, any encumbrance may render title unmarketable.
- However, if a buyer is willing to buy with, even with an encumbrance, the title is technically “marketable.”

THE THREE BROAD SCENARIOS

- **INSURABLE TITLE:**
- In contrast to Marketable Title, “Insurable Title” is title that an insurance company is willing to insure.

THE THREE BROAD SCENARIOS

- **INSURABLE TITLE:**
- Put another way, “Insurable Title” is title a reasonably prudent title company would be willing to insure, free from exceptions (other than those normally excluded by the policy form) and at normal title insurance rates.

THE THREE BROAD SCENARIOS

- **REAL PROPERTY TITLE:**
- Title (either “record” or “unwritten”), Marketable Title, and Insurable Title are not necessarily the same.
- Title to real property may not be “marketable” or “insurable.”
- A title with a defect may still be “marketable” yet “uninsurable.”

THE THREE BROAD SCENARIOS

- **REAL PROPERTY TITLE:**
- The reality is that most title will be marketable if it is insurable.
- This means that the real inquiry with regard to title, is whether or not it’s insurable.

THE THREE BROAD SCENARIOS

- **REAL PROPERTY TITLE:**
- However, what a title company, title attorney, tax assessor, or clerk at the county GIS department thinks about your survey of property may be totally irrelevant to your determination of where the true property lines are located on the ground.

THE THREE BROAD SCENARIOS

- **FIRST CASE – THE SITUATION:**
- The writing matches, with very little trouble, the situation on the ground.
- There is very little to interpret.
- No real ambiguities.
- Lot and Block situation is common.

THE THREE BROAD SCENARIOS

- **FIRST CASE – THE SOLUTION:**
- Assuming a valid deed, the owner has Record Title, Marketable Title, and Insurable Title.
- Survey the property as described and work out the conflicts. In all likelihood, you are accepting boundaries that have already been established.
- Don't create problems that don't exist.

THE THREE BROAD SCENARIOS

- **FIRST CASE – THE SOLUTION:**
- Remember the “*de minimis*” rule.
- *De minimus non curat lex*—the law does not concern itself with trivialities.
- Land surveyors are ate-up with trivialities.

THE THREE BROAD SCENARIOS



THE THREE BROAD SCENARIOS



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THE THREE BROAD SCENARIOS



THE THREE BROAD SCENARIOS



THE THREE BROAD SCENARIOS

- **SECOND CASE – THE SITUATION:**
- We have a deed that is clear and unambiguous on its face, evidence on the ground is also unambiguous as to location, yet there are some major occupational discrepancies.
- Lot and Block
- Metes and Bounds
- Aliquot Parts

THE THREE BROAD SCENARIOS

- **SECOND CASE – THE SITUATION:**
- The deed is clear and the boundary evidence leaves little doubt as to location.
- All reasonably prudent surveyors under like or similar circumstances would locate the boundary where you would.
- Again, since your job is retracement, the boundaries are mostly likely already established.

THE THREE BROAD SCENARIOS

- **SECOND CASE – THE SITUATION:**
- The conflicts could be encroaching fences or other occupation.
- The conflict could be your client insisting that another line is his boundary.
- Whatever the conflict, they are always red flags that require the surveyor to double check the evidence.

THE THREE BROAD SCENARIOS

- **SECOND CASE – THE SOLUTION:**
- Assuming a valid deed, the owner has Record Title but may have an adverse claim or cloud that could affect Marketable Title and Insurable Title.
- If there is no ambiguity in the interpretation of the deed. **DO NOT LEAVE THE DEED.** The courts will not.

THE THREE BROAD SCENARIOS

- **SECOND CASE – THE SOLUTION:**
- This doesn't mean, however, that you cannot consider extrinsic evidence in the course of your survey. Extrinsic evidence is always in play for the land surveyor.
- Sometimes a fence is just a fence and sometimes an encroachment is just an encroachment.

THE THREE BROAD SCENARIOS

- **SECOND CASE – THE SOLUTION:**
- Complete the survey and detail the encroachments.
- Remember the *de minimus* rule.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE SITUATION:**
- Ambiguities abound—patent or latent (or both). More than one possible interpretation of the deed or more than one possible location on the ground.
- Any context: Lot & Block, Metes and Bounds, Aliquot Parts
- Conflict could be large or could be small.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE SITUATION:**
- Conflicts could be due to differences in the gathering and evaluation of evidence obtained by surveyors, past or present.
- Conflicts could be gaps and overlaps pointing to possible *junior/senior rights* issues.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE SITUATION:**
- Conflicts could be *positional*. More than one possible location for the property.
- Conflicts could be in *configuration*. Configuration does not match deed description?

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE SOLUTION:**
- At this point, the red flags are flying. The surveyor must get up from his chair and go to the field to evaluate the situation firsthand. Do not leave the resolution of this issue to your subordinates.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE SOLUTION:**
- More research may be necessary.
- More field work may be necessary.
- Discussions with the landowners may be absolutely necessary for a proper resolution of the issue.
- Testimony of others with knowledge of the boundaries may be warranted.

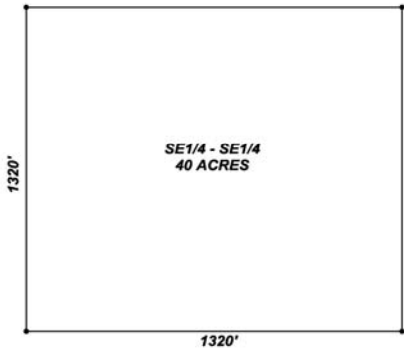
THE THREE BROAD SCENARIOS

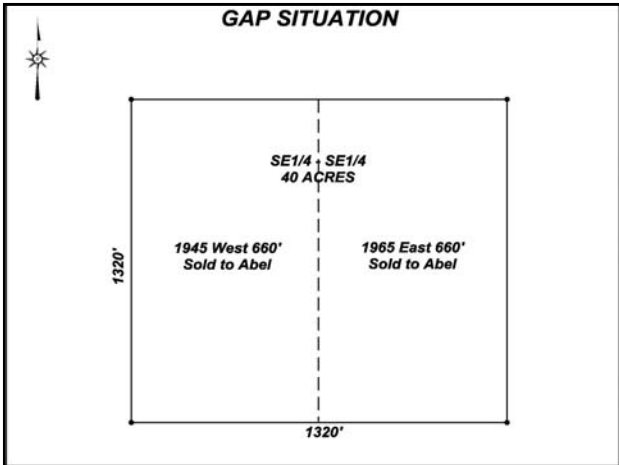
- **THIRD CASE – THE SOLUTION:**
- *This is a stop-look-and-listen moment, not a rush to drive irons.*
- Resolutions to real problems need to be a top priority, not completing a survey that may send all of the parties to court.
- The land surveyor must give these problems undivided attention.

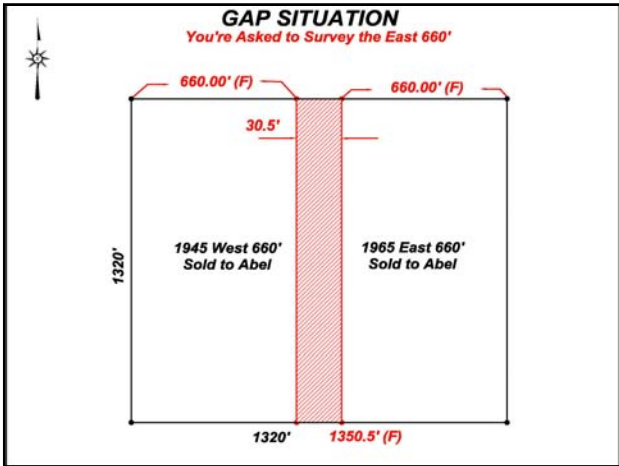
THE THREE BROAD SCENARIOS

- **THIRD CASE – THE GAP SOLUTION:**
- Assuming a gap and a valid deed, owner has Record Title, Marketable Title, and Insurable Title to described area.
- May also have Title to gap area, but may not have Marketable or Insurable Title to gap area.

GAP SITUATION







THE THREE BROAD SCENARIOS

- **THIRD CASE – THE GAP SOLUTION:**
- Grants are generally construed against the Grantor.
- Senior gets what senior was conveyed and junior get's what was left, especially when it appears Grantor was attempting to convey all that he owned.
- A junior deed is always read in light of the senior deed.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE GAP SOLUTION:**
- Courts generally abhor unconveyed strips of land.
- Equity abhors a forfeiture.
- General case is remainder parcel goes to last grantee.
- As with a senior conveyance, occupational rights can trump the general rule.

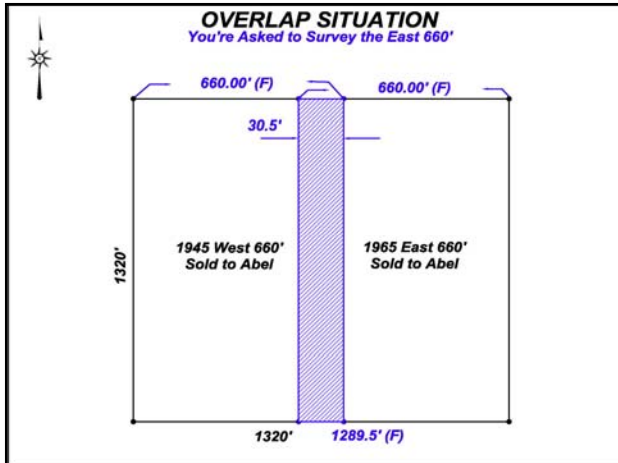
THE THREE BROAD SCENARIOS

"It has been held frequently by this court that there is a presumption of law against a grantor retaining a long, narrow strip of land next to one of his outside lines, when the description of the land granted approximates the description under which he holds. Generally, in the absence of facts or circumstances explanatory, it will not be presumed that the party granting land intends to retain a long narrow strip next to one of his lines; but if the course and distances approximate closely to a line or corner of the tract owned by the grantor—especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held—it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract..."

United Fuel v. Townsend, 139 S.E. 856 (W.Vir.App. 1927)

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE OVERLAP SOLUTION:**
- Assuming an overlap and a valid deed, owner has Record Title to the overlap area but probably not Marketable Title or Insurable Title
- But someone owns the overlap area, either your client or the adjoiner.



THE THREE BROAD SCENARIOS

- **THIRD CASE – THE OVERLAP SOLUTION:**
- As with the gap problem, this situation requires the undivided attention of the land surveyor. More investigation may be required.
- This is a stop-look-and-listen moment. Not a rush to drive irons.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE OVERLAP SOLUTION:**
- The record could end the discussion if it is shown that a senior conveyance has taken place.
- In essence, the overlap does not now, and never has existed.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE OVERLAP SOLUTION:**
- As with gaps, Grants are generally construed against the Grantor.
- Senior gets what senior was conveyed and junior get's what was left, especially when it appears Grantor was attempting to convey all that he owned.

THE THREE BROAD SCENARIOS

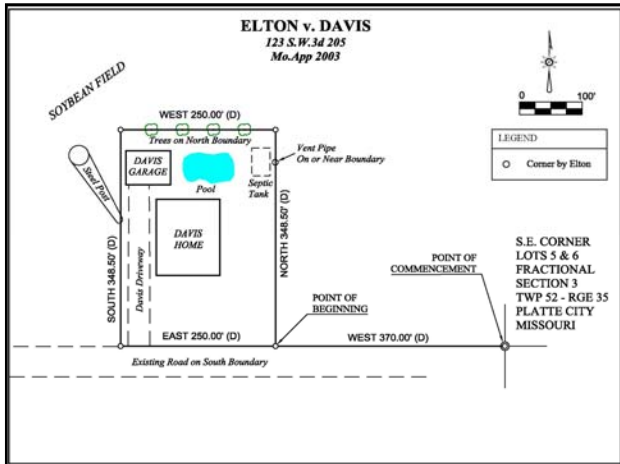
- **THIRD CASE – THE OVERLAP SOLUTION:**
- A junior deed is always read in light of the senior deed.
- General case is remainder parcel goes to last grantee.
- Again, occupational rights can trump the general case.

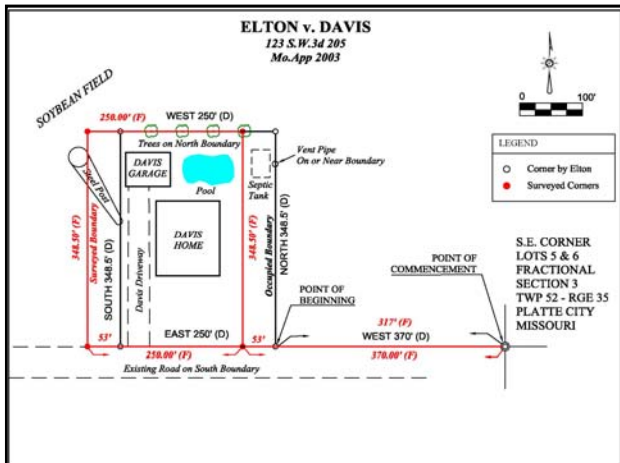
THE THREE BROAD SCENARIOS

- **THIRD CASE – THE POSITIONAL SOLUTION:**
- Assuming more than one possible location and a valid deed, owner has Record Title to what' described in the deed.
- Once the ambiguity as to location is discovered, owner may or may not have Marketable Title or Insurable Title to described area.

ELTON v. DAVIS

Court Of Appeal Of Missouri,
Western District
123 S.W.3d 205
October 14, 2003





THE THREE BROAD SCENARIOS

- **THIRD CASE – THE POSITIONAL SOLUTION:**
- As with the gap and overlap problem, this situation requires the undivided attention of the land surveyor. More investigation may be required.
- This is a stop-look-and-listen moment. Not a rush to drive irons.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE POSITIONAL SOLUTION:**
- The deed no longer contains the true intent of the parties to the transaction.
- Ambiguities as to location mean intent resides in the extrinsic evidence.
- The deed is still a guide to help locate true intent.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE POSITIONAL SOLUTION:**
- True intent is found in the factual situation existing at the time of the conveyance and in the subsequent acts of the parties.
- Testimony evidence is crucial in these situations—before the battle lines are drawn.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE POSITIONAL SOLUTION:**
- All of the boundary establishment doctrines are in play.
- The *best available evidence* is utilized to render a well-reasoned opinion on the property boundaries involved.

THE THREE BROAD SCENARIOS

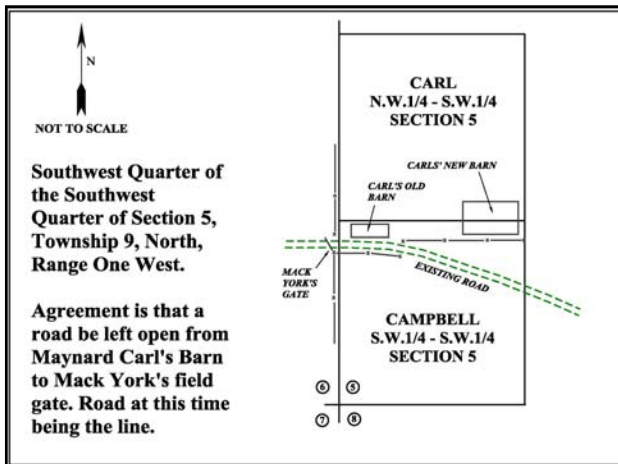
- **THIRD CASE – THE POSITIONAL SOLUTION:**
- The standard of care is what a reasonably prudent surveyor would do under like or similar circumstances.

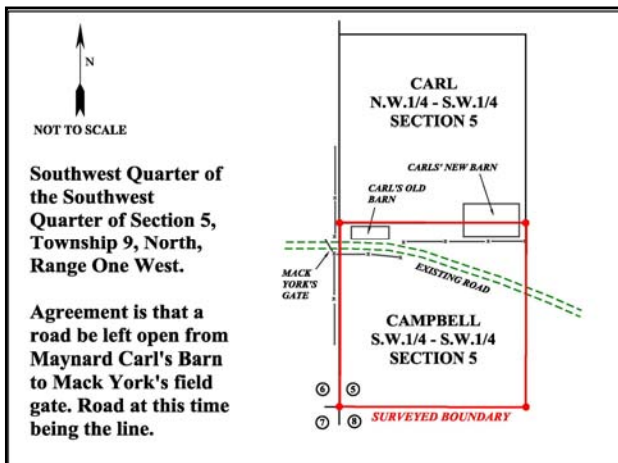
THE THREE BROAD SCENARIOS

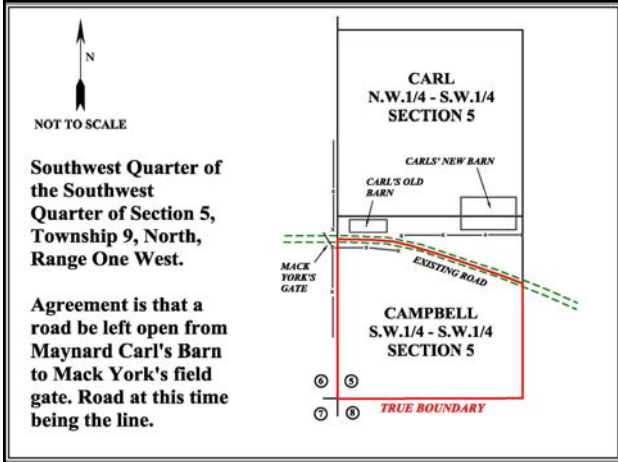
- **THIRD CASE – THE CONFIGURATION SOLUTION:**
- Assuming more than one possible configuration and a valid deed, owner has Record Title to what's described in the deed.
- Once the ambiguity as to configuration is discovered, owner may or may not have Marketable Title or Insurable Title to described area.

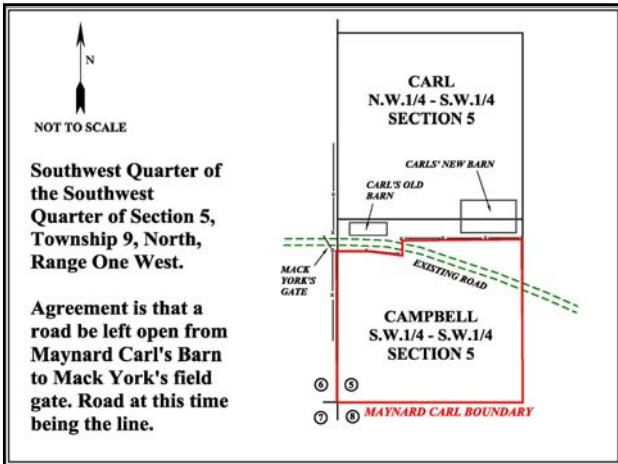
CAMPBELL v. CARL

Alabama Supreme Court
395 So.2d 480
February 27, 1981









THE THREE BROAD SCENARIOS

- **THIRD CASE – THE CONFIGURATION SOLUTION:**
- Again, this situation requires the undivided attention of the land surveyor. More investigation may be required. This is a stop-look-and-listen moment. Not a rush to drive irons.

THE THREE BROAD SCENARIOS

- **THIRD CASE – THE CONFIGURATION SOLUTION:**
- The deed no longer contains the true intent of the parties to the transaction.
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THE THREE BROAD SCENARIOS

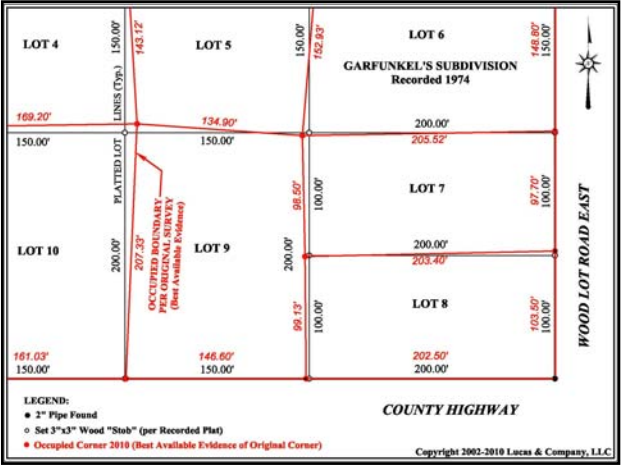
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- True intent is found in the factual situation existing at the time of the conveyance and in the subsequent acts of the parties.
- Testimony evidence is crucial in these situations—*before the battle lines are drawn*.

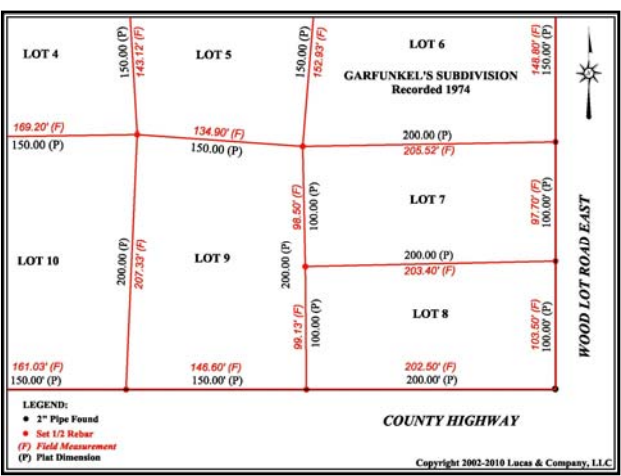
THE THREE BROAD SCENARIOS

- **THIRD CASE – THE CONFIGURATION SOLUTION:**
- All of the boundary establishment doctrines are in play.
- The *best available evidence* is utilized to render a well-reasoned opinion on the property boundaries involved.

GARFUNKEL'S SUBDIVISION

A Fictitious Case





THE THREE BROAD SCENARIOS

- **THIRD CASE – THE CONFIGURATION SOLUTION:**
- The standard of care is what a reasonably prudent surveyor would do under like or similar circumstances.

REMEDIES

- There are all types of remedies available. Many depend upon jurisdictional issues, such as platting laws, zoning and other regulatory issues.

REMEDIES

When dealing with remedies the land surveyor needs to keep a few things in mind:

- Do not become an advocate for changing the “what” question. That is the practice of law.
- Just because the “what” does not meet your precision expectations does not mean that it is a new “what.”

REMEDIES

When dealing with remedies the land surveyor needs to keep a few things in mind:

- In the vast majority of cases, there is no need to reform the deed simply because the math does not match what's on the ground.
- In every case we have looked at, reformation was necessary because surveyors don't understand boundary law.

REMEDIES

When dealing with remedies the land surveyor needs to keep a few things in mind:

- Remember the "*de minimus*" rule. *De minimu non curat lex*—the law does not concern itself with trivialities.
- Don't create problems that do not exist.

REMEDIES

When dealing with remedies the land surveyor needs to keep a few things in mind:

- In most (if not all) jurisdictions, the preparation deeds is the practice of law.
- Just because a title company does not like the results of your survey of property does not change the fact as to location of the property lines. Ditto for attorneys and bureaucrats down at the county.

REMEDIES

When dealing with remedies the land surveyor needs to keep a few things in mind:

- A survey is an opinion on boundaries. As such it should be subject to re-evaluation, especially in light of better evidence than you were dealing with.
- The evidence standard in play is the best available evidence.

REMEDIES

When dealing with remedies the land surveyor needs to keep a few things in mind:

- Extrinsic evidence is always in play for the land surveyor.
- The standard of care is what a reasonably prudent surveyor would do under like or similar circumstances.

REMEDIES

REMEDIES GENERALLY AVAILABLE TO LAND SURVEYORS:

- Issue your opinion on the property boundaries and let the parties deal with these problems. This is the status quo which has not served either the profession or landowners very well.

REMEDIES

REMEDIES GENERALLY AVAILABLE TO LAND SURVEYORS:

- **BEFORE** drawing the proverbial battle-lines, attempt to mediate a settlement between the landowners as to the correct location of the property line.
- In order to do this you need to be able to explain boundary law and evidence to them. Deeds and measurements are only evidence of the location of boundaries, not proof.

REMEDIES

REMEDIES GENERALLY AVAILABLE TO LAND SURVEYORS:

- Thinking in terms of *Elton v. Davis*, a corrective deed is in order. This is not advocating that the “what” has changed. This is the correction of an error in the deed. An attorney will generally be necessary for the preparation of a corrective deed. However, the parties themselves can prepare their own deeds.

REMEDIES

REMEDIES GENERALLY AVAILABLE TO LAND SURVEYORS:

- Thinking in terms of *Garfunkel's Subdivision*, a corrective plat could be in order. Again, this is not advocating that the “what” has changed. This is correcting the math on a plat to keep the next surveyor from blundering. Attorneys aren't necessary but cooperation of all of the lot owners is.

REMEDIES

REMEDIES GENERALLY AVAILABLE TO LAND SURVEYORS:

- Thinking in terms of *Lawson v. Winemiller*, and *Dowdell v. Cotham*, several remedies are available:
- A minor subdivision plat;
- Boundary line agreements; or
- Corrective deeds.

REMEDIES

REMEDIES GENERALLY AVAILABLE TO LAND SURVEYORS:

- In some jurisdictions, survey maps are required to be recorded. If the recording of survey maps is considered “constructive notice” in those jurisdictions, remedies worked out on the map of survey will correct the record and help to prevent future boundary disputes.

BOUNDARY LINE AGREEMENTS

About Boundary Line Agreements:

- They are NOT a conveyance of land.
- It is an agreement to settle “where” the common boundary is located on the face of the earth.
- “What” the boundary is, remains as described in their respective deeds.

BOUNDARY LINE AGREEMENTS

About Boundary Line Agreements:

- If the “what” is being changed to match the “where” it is a conveyance of land and not a true boundary line agreement.
- A boundary line agreement clarifies the ambiguities as to location.

BOUNDARY LINE AGREEMENTS

About Boundary Line Agreements:

- A boundary line agreement is a contract. It is definitely within the grey area between practicing the law and practicing land surveying. *Err on the side of caution.*
- There is nothing preventing two land owners from forming their own contract to agree to a boundary line location.

BOUNDARY LINE AGREEMENTS

Elements of a Boundary Line Agreement:

- Names of parties; “A” and “B.”
- Date of Agreement.
- Description of “A’s” property.
- Description of “B’s” property.
- Nature of dispute as to the location of the common boundary line.

BOUNDARY LINE AGREEMENTS

Elements of a Boundary Line Agreement:

- Recital of desire to compromise or settle dispute as to location.
- Declaration and establishment of true location of boundary. (Attach Map of Survey with Descriptions)
- Release by each party of the other. Included.

BOUNDARY LINE AGREEMENTS

Elements of a Boundary Line Agreement:

- If it is not a conveyance, generally, mortgage holders need no be included. Agreement to bind and inure to successors.
- Execution and acknowledgment.

BOUNDARY LINE AGREEMENTS

Elements of a Boundary Line Agreement:

- The agreement is a contract and all contract requirements apply.
- Record the agreement and the attached survey map.

FINAL CONSIDERATIONS

ADDITIONAL PROBLEMS:

- Approaching the parties about these issues can lead to all of the problems that you are trying to avoid.

FINAL CONSIDERATIONS

ADDITIONAL PROBLEMS:

- Many of these issues will require the involvement of other professionals, such as attorneys, especially when it comes to the preparation of deeds for conveyances.

FINAL CONSIDERATIONS

ADDITIONAL PROBLEMS:

- Third parties, such as mortgage companies and titles companies may need to be involved as well.

FINAL CONSIDERATIONS

ADDITIONAL PROBLEMS:

- Surveyors are generally reluctant and ill equipped to deal with these problems because the negotiation and mediation techniques involved fall outside of their comfort zone.

FINAL CONSIDERATIONS

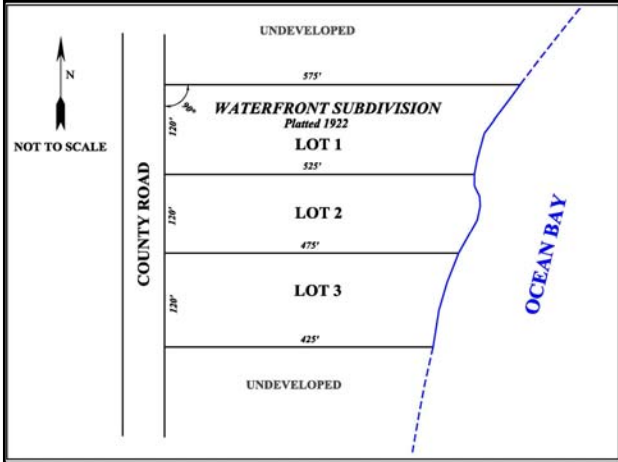
RE-WRITING DESCRIPTIONS:

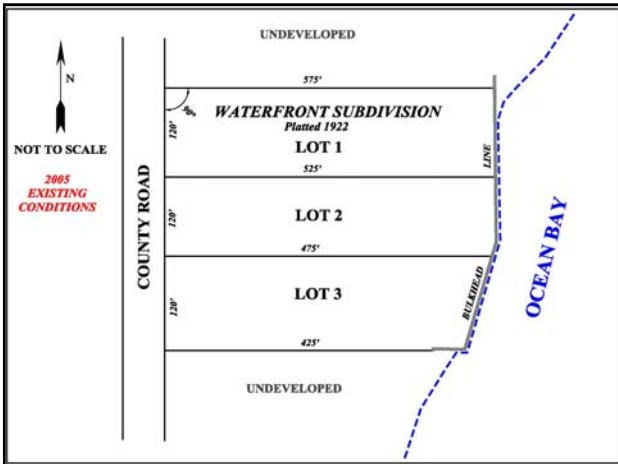
- In some case, especially when the discrepancies are small, re-writing the description of the property can be solution.

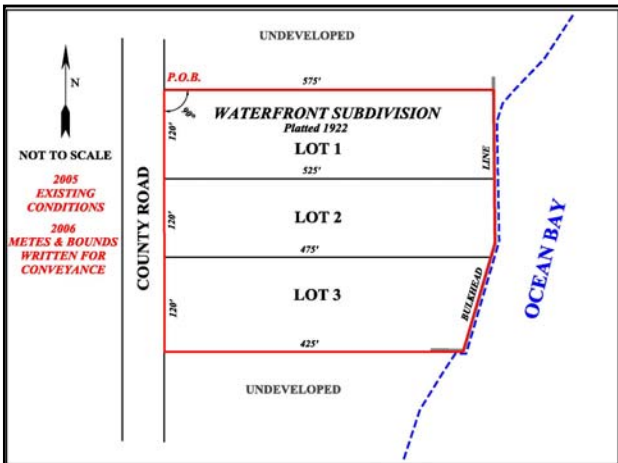
FINAL CONSIDERATIONS

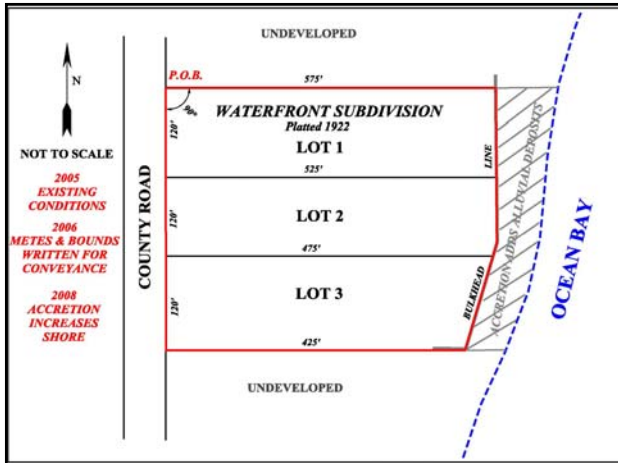
RE-WRITING DESCRIPTIONS:

- Caution should be the approach to re-writing descriptions.
- Re-writing legal descriptions, if not done properly, can cause more problems than they solve.









FINAL CONSIDERATIONS

RE-WRITING DESCRIPTIONS:

- If the re-written description causes the title company to not insure the property, your have just rendered the property “uninsurable” and, more than likely “unmarketable.”
- Either of these situations is not good.

FINAL CONSIDERATIONS

RE-WRITING DESCRIPTIONS:

- A discussion with the title company could go a long way towards avoiding rendering the property uninsurable.
- You may also find that no one at the title company knows what you are talking about.
