HOW TO MAKE A BOUNDARY DETERMINATION THAT WILL WIN IN COURT

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Attorney at Law
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Comment or Suggestions? E-Mail: jeff@lucasandcompany.com



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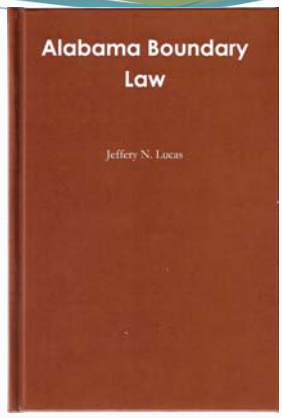

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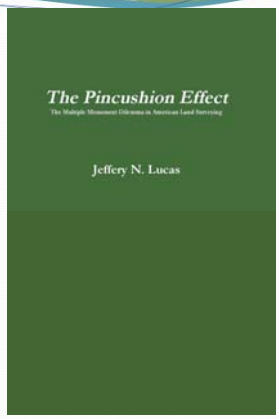

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ILLINOIS BOUNDARY LAW

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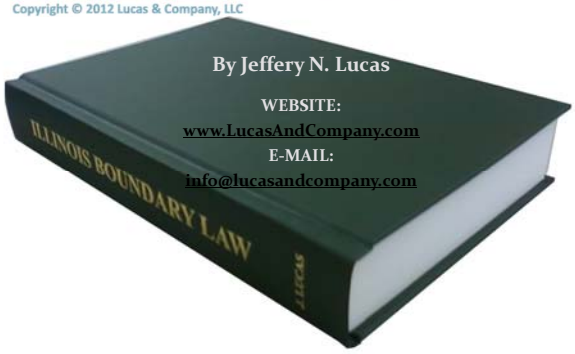

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DISCLAIMER

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. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

I. THE DETERMINATION OF ANY BOUNDARY IS A TWO-PART QUESTION; (1) WHAT IS THE PROPERTY; and (2) WHERE IS IT LOCATED?

What is the property is a legal question that must be asked and answered. *Where* the property is located on the ground is a factual question to be answered by the retracement surveyor.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Ignorance of the law is no excuse." The professional service provider is governed by the law in all areas of his or her practice.

9

JEFF'S 10 COMMANDMENTS for WINNING IN COURT

"More specifically, the ancient equity maxim is *ignoranti juris non excusat*. This is commonly translated as 'ignorance of the law is no excuse.' This is not a new proposition. … A fundamental premise of our legal system is that parties are presumed to know the law, and ignorance of the law is no excuse. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. This concept is also applied in the non-criminal, regulatory law context."

Wyoming Refining v. United States, 58 Fed.Cl. 409, 414, 416 (U.S. Claims 2003).

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Stop Sign Analogy

A Question of Law and Fact

"What are the boundaries of a particular tract of land is a matter of law, but where the boundaries of a tract are located is a matter of fact."

Ayers v. Huddleston, 66 N.E. 60, 63 (Ind.App. 1903).

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Stop Sign Analogy

A Question of Law and Fact

"While the construction of a deed of conveyance is a *legal problem*, the actual location of the plot conveyed is a *question of fact*. The lines of streets as actually opened, fence lines, and other mon-uments placed many years ago, before the controversy arose, whether they abut the premises in question, or are in the immediate vicinity, are persuasive factors from which may be derived the lines that are in dispute."

Beck v. Brown, 73 A.2d. 594 (N.J.Super 1950).

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Stop Sign Analogy

- Legal Question: What is it?



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Stop Sign Analogy

- Legal Argument: The What Has Changed!



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Stop Sign Analogy

- Factual Question: Where do you Stop?



16

Stop Sign Analogy

- Factual Question: Where do you Stop?



17

Stop Sign Analogy

- Factual Question: Where do you Stop?



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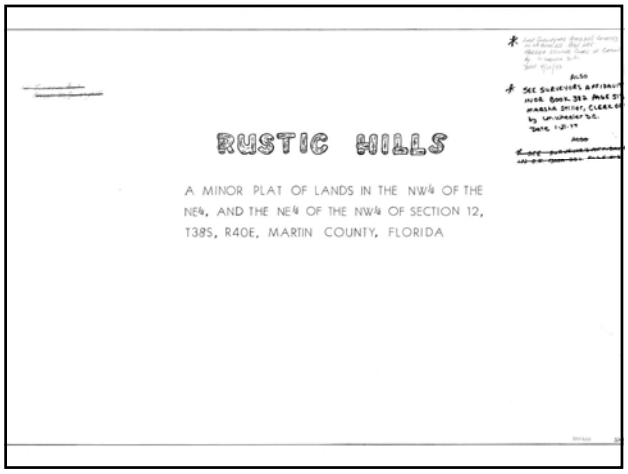
McGHEE v. YOUNG

Florida Court of Appeals
Fourth District
606 So.2d 1215
October 7, 1992

19



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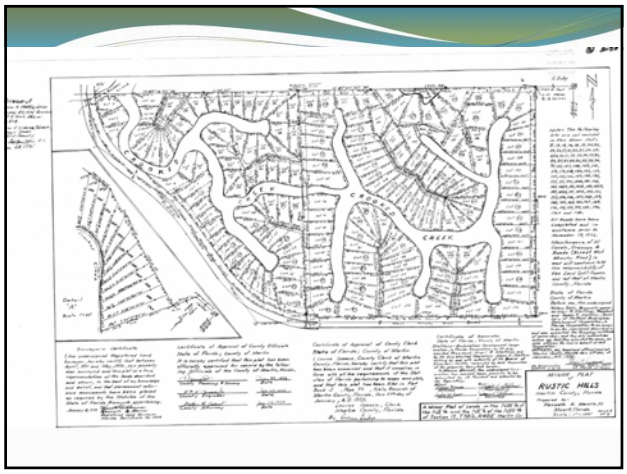

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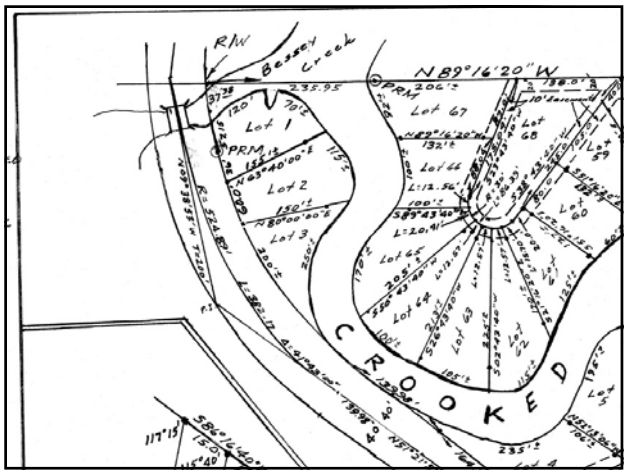

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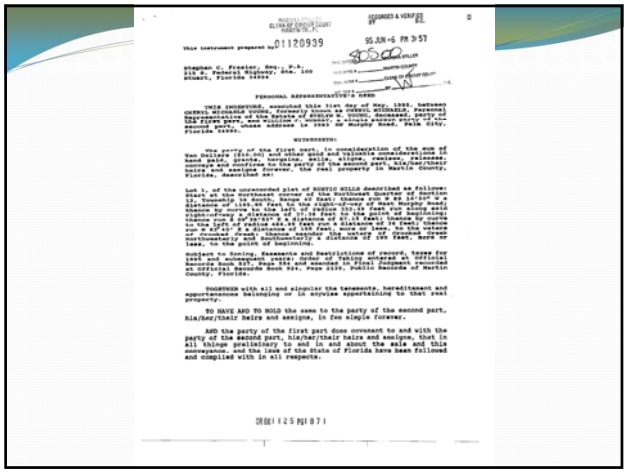

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Lot 1, of the unrecorded plat of RUSTIC HILLS described as follows: Start at the Northeast corner of the Northwest Quarter of Section 12, Township 38 South, Range 40 East; thence run N 89 16'20" W a distance of 1195.95 feet to the right-of-way of West Murphy Road; thence by curve to the left of radius 333.49 feet run along said right-of-way a distance of 37.38 feet to the point of beginning; thence run S 09°38'53" E a distance of 57.15 feet; thence by curve to the left of radius 484.89 feet run a distance of 36 feet; thence run N 63°40' E a distance of 155 feet, more or less, to the waters of Crooked Creek; thence meander the waters of Crooked Creek Northwesterly and Southwesterly a distance of 190 feet, more or less, to the point of beginning.

Subject to Zoning, Easements and Restrictions of record, taxes for 1995 and subsequent years; Order of Taking entered at Official Records Book 537, Page 554 and amended in Final Judgment recorded at Official Records Book 924, Page 2139, Public Records of Martin County, Florida.

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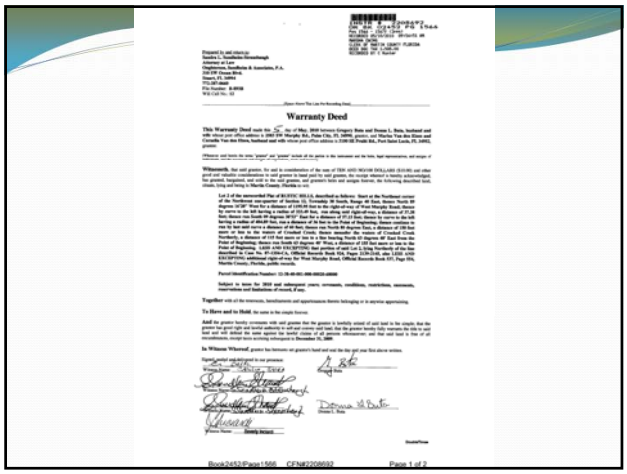

Warranty Deed

This Warranty Deed made this 5th day of May, 2010 between Gregory Bate and Donna L. Bate, husband and wife whose post office address is 2945 SW Murphy Rd, Palm City, FL 34990, grantor, and Marlon Van den Elzen and Cornelia Van den Elzen, husband and wife whose post office address is 5100 SE Pendo Rd., Port Saint Lucie, FL 34952, grantor

Witnesseth, that said grantor, for and in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other good and valuable considerations to said grantor in hand paid by said grantee, the receipt whereof is hereby acknowledged, has granted, bargained, sold and by these presents does grant, bargain, sell, alien, remise, release, convey and confirm unto the said grantee, and grantee's heirs and assigns forever, the following described land, situate, lying and being in Martin County, Florida, to-wit:

Lot 2 of the unrecorded Plat of RUSTIC HILLS, described as follows: Start at the Northeast corner of the Northwest one-quarter of Section 12, Township 38 South, Range 40 East, thence North 89 degrees 16'20" West for a distance of 1195.95 feet to the right-of-way of West Murphy Road; thence by curve to the left having a radius of 333.49 feet, run along said right-of-way, a distance of 37.38 feet; thence run South 09 degrees 38'53" East for a distance of 57.15 feet; thence by curve to the left having a radius of 484.89 feet, run a distance of 36 feet to the Point of Beginning; thence continue to run by last said curve a distance of 60 feet; thence run North 80 degrees East, a distance of 150 feet more or less to the waters of Crooked Creek; thence meander the waters of Crooked Creek Northerly, a distance of 115 feet more or less to a line bearing North 63 degrees 40' East from the Point of Beginning; thence run South 63 degrees 40' West, a distance of 155 feet more or less to the Point of Beginning. LESS AND EXCEPTING that portion of said Lot 2, lying Northerly of the line described in Case No. 87-1354-CA, Official Records Book 924, Pages 2139-2145, also LESS AND EXCEPTING additional right-of-way for West Murphy Road, Official Records Book 537, Page 554, Martin County, Florida, public records.

Parcel Identification Number: 12-38-40-001-000-00020-60000

Together with all the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

To Have and to Hold, the same in fee simple forever.

And the grantor hereby covenants with said grantee that the grantor is lawfully seized of said land in fee simple; that the grantor has good right and lawful authority to sell and convey said land; that the grantor hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whomsoever; and that said land is free of all encumbrances, except taxes accruing subsequent to December 31, 2009.

In Witness Whereof, grantor has hereunto set grantor's hand and seal the day and year first above written.

Signed, sealed and delivered in our presence:

Witness Name: Sandra L. Terwilliger Strosshagle

Witness Name: Elizabeth A. Bloodworth

Witness Name: Beverly Bryant

Gregory Bate

Donna L. Bate

Book2452/Page1566 CFN#2206932 Page 1 of 2

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Lot 2 of the unrecorded Plat of RUSTIC HILLS, described as follows: Start at the Northeast corner of the Northwest one-quarter of Section 12, Township 38 South, Range 40 East, thence North 89 degrees 16'20" West for a distance of 1195.95 feet to the right-of-way of West Murphy Road; thence by curve to the left having a radius of 333.49 feet, run along said right-of-way, a distance of 37.38 feet; thence run South 09 degrees 38'53" East for a distance of 57.15 feet; thence by curve to the left having a radius of 484.89 feet, run a distance of 36 feet to the Point of Beginning; thence continue to run by last said curve a distance of 60 feet; thence run North 80 degrees East, a distance of 150 feet more or less to the waters of Crooked Creek; thence meander the waters of Crooked Creek Northerly, a distance of 115 feet more or less to a line bearing North 63 degrees 40' East from the Point of Beginning; thence run South 63 degrees 40' West, a distance of 155 feet more or less to the Point of Beginning. LESS AND EXCEPTING that portion of said Lot 2, lying Northerly of the line described in Case No. 87-1354-CA, Official Records Book 924, Pages 2139-2145, also LESS AND EXCEPTING additional right-of-way for West Murphy Road, Official Records Book 537, Page 554, Martin County, Florida, public records.

Parcel Identification Number: 12-38-40-001-000-00020-60000

Subject to taxes for 2010 and subsequent years; covenants, conditions, restrictions, easements, reservations and limitations of record, if any.

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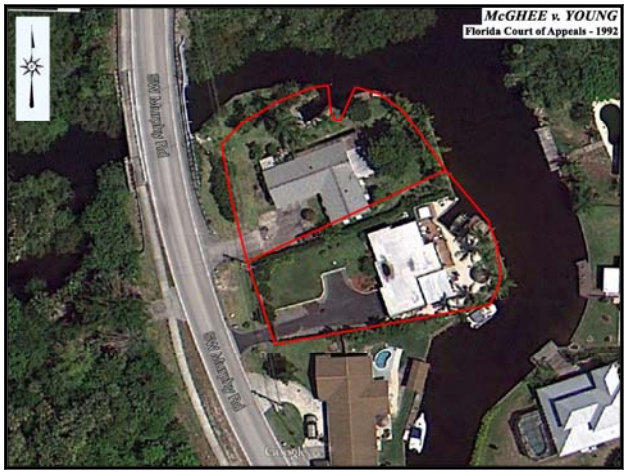

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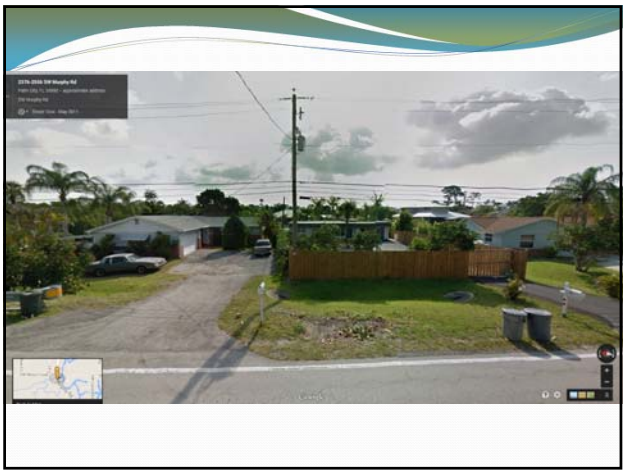

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

II. <u>INTENT IS KING WHEN IT COMES TO THE INTERPRETATION OF WRITTEN DOCUMENTS</u>

"The intent of the parties to a deed controls its interpretation."

Esteph v. Grumm, 887 N.E.2d 1248, 1252 (Ohio App. 2008).

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"It is a fundamental precept of property law that courts should construe instruments so as <u>*to give effect to the intent of the parties*</u>. … Fortunately, however, the burden placed on the courts in scrutinizing deeds is facilitated by a body of judicially and legislatively created <u>*guidelines for the construction of deeds conveying property*</u>."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977).

30

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Initially, the court should seek to ascertain the *intention of the parties* by looking to the entire instrument. The court should be careful to try to give meaning to every clause and provision of the instrument."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)

31

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Second, the court should look to the factual *situation and the circumstances* existing at the time the instrument was created."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)

32

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Finally, the court may look to the *subsequent acts* of the parties to determine the correct construction of the instrument."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)

33

JEFF'S 10 COMMANDMENTS of WINNING IN COURT

Intent is King, but Ambiguities are the Keys to the Kingdom.

1. Start with the Deed
2. Search the Four Corners
3. Deed is only Evidence of Title, not Proof of Title
4. Ambiguities: There will always be some level of Conflict between the Written Document and what we find on the Ground.

34

THERIAULT v. MURRAY

Maine Supreme Judicial Court
588 A.2d 720
March 28, 1991

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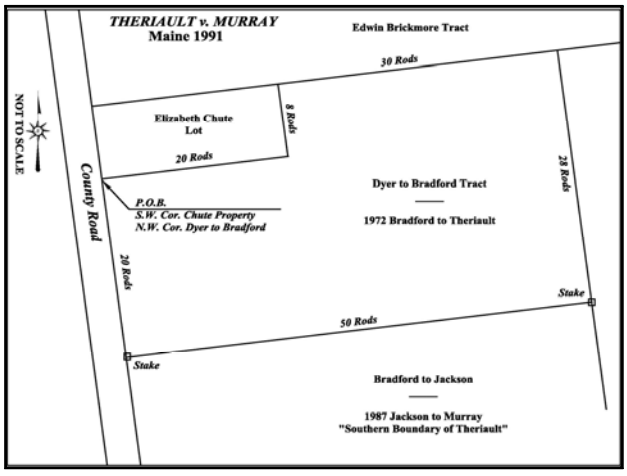

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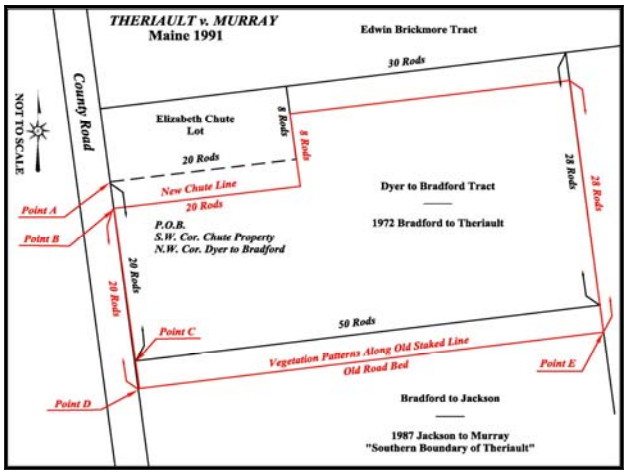

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Theriault v. Murray

"What boundaries a deed refers to is a question of law, *while the location of those boundaries on the face of the earth is a question of fact*. If facts extrinsic to the deed reveal a latent ambiguity, then a court determines the intent from contemporaneous circumstances and from standard rules of construction."

Theriault v. Murray, 588 A.2d 720 (Me.1991).

38

Theriault v. Murray

"A basic rule is that boundaries are controlled, in descending priority, by monuments, courses, distances, and quantity, unless this priority produces absurd results. *The physical disappearance of a monument does not end its use in defining a boundary if its former location can be ascertained*."

Theriault v. Murray, 588 A.2d 720 (Me.1991).

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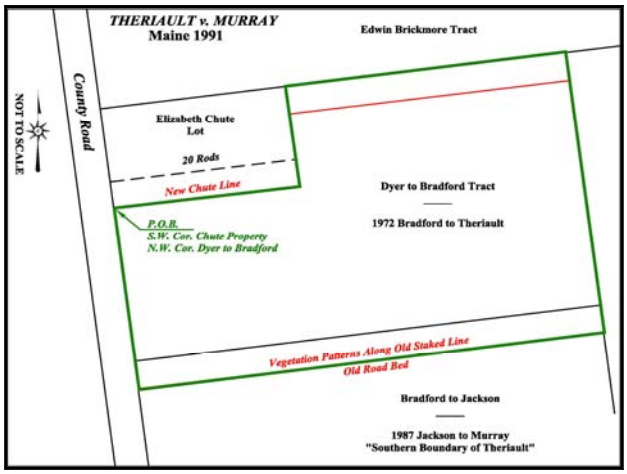

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

III. <u>CORRECT DEED CONSTRUCTION IS VITAL TO A CORRECT DETERMINATION OF BOUNDARY</u>

The Rules of Construction are court-made rules that have been developed over the centuries for the interpretation of legal documents. The courts use them when the interpretation of a document that is confusing, uncertain, ambiguous or in conflict.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

What Role Does the Deed Play?

We need to understand the role that the deed plays in the determination of the on-the-ground location of the property being retraced. The description in the deed is not sacrosanct.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"It is not the office of a [deed] description to identify the premises, but *to furnish the means by which they can be identified*."

Sengfeld v. Hill, 58 P. 250 (Wash.1899).

43

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"The issue here is not of a disputed boundary. It is what the deed means. *It is an application of the deed to the land, and not of the land to the deed*. While the object of the inquiry is to determine where the boundary is, the inquiry itself is what the requirements of the deed are rather than what the situation of the land is."

Smart v. Huckins, 134 A. 520 (N.H.1926).

44

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"We reiterate: It is a familiar rule that it is not the office of a description to identify lands, but simply *to furnish the means of identification*."

Harlan v. Muncie, 835 N.E.2d 1018 (Ind.App.2005).

45

JEFF'S 10 COMMANDMENTS of WINNING IN COURT

"The estate thus created is to be determined, *not alone by the words used*, but by the situation and circumstances of the parties, the context of the instrument, and the fact that the instrument was or was not written by a person acquainted with "the use of legal technical words."

Smith v. Bachus, 70 So. 261, 264 (Ala.1915).

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DILLEHAY v. GIBBS

Tennessee Court of Appeals
No. M2010-0170-COA-R3-CV
June 16, 2011

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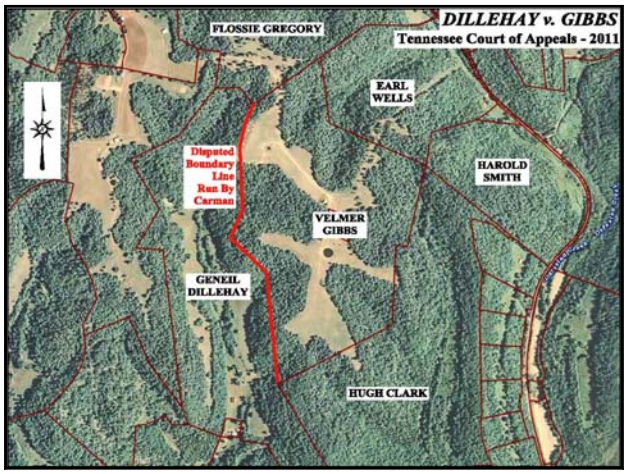

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Dillehay v. Gibbs

"Eventually, the parties discovered that they disagreed as to the correct boundary line. *Both parties hired licensed land surveyors to establish the boundary line*. Mrs. Dillehay hired Mike Holland and Richard Puckett; Ms. Gibbs hired Carroll Carman. All three testified at trial."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

49

Dillehay v. Gibbs

"Both Gibbs's and Dillehay's deeds are boundary deeds. As described at trial, a boundary deed essentially depicts a given property as being bounded on each side by its adjoining landowners. However, the deeds do not give calls and distances necessary to place the exact location of the boundary line between the two properties. *Consequently, the three surveyors resorted to other, varied means to locate the boundary line*."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

50

Dillehay v. Gibbs

"Holland testified that … he researched the land records at the courthouse, collected data in the field, and spoke with both parties. Holland described the inherent difficulties in establishing a boundary line from boundary deeds. He stated that he was able to establish the boundary lines for all of Dillehay's property, except the disputed boundary line …. Holland stated that he did not feel comfortable establishing the boundary line at that time. *Thus, he did not perform a mathematically closed survey of Dillehay's farm*."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

51

Dillehay v. Gibbs

"After Holland would not definitively establish a boundary line, Dillehay hired Puckett to survey the boundary line. *However, it does not appear from the record that Puckett established a line either*. He testified that he was hired to prepare a survey showing where previous owners and surveyors had placed the boundary line. Puckett stated that, essentially, he had prepared a court exhibit illustrating the various lines as drawn by Carman and Holland."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

52

Dillehay v. Gibbs

"The third land surveyor to testify was Carman. A licensed surveyor since 1977, Carman was hired by Gibbs, and his survey showed the furthest western extension of her boundary line. He testified that his survey accurately reflected the boundary line between Gibbs and Dillehay *to a reasonable degree of surveying certainty*. Carman discussed his methodology in great detail."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

53

Dillehay v. Gibbs

"Carman spoke with Gibbs's brothers and sisters, who told him that the boundary line was past that point '*down yonder*.' While conceding that this information was not particularly helpful, Carman *went searching for the boundary line so described*."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

54

Dillehay v. Gibbs

"Mr. Carman testified that eventually, after using a metal detector, he stumbled upon the remnants of a barbed-wire fence. According to Carman, the terrain on which the barbed-wire fence was located was 'very hilly'; 'very tough and rough'; 'heavily wooded'; and at a steep incline. *Carman said that, in his expert opinion*, a containment fence would not be placed in such difficult terrain and that the location of the fence 'indicated that a lot of effort at one day was put into placing the fence to mark between two farms."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

55

Dillehay v. Gibbs

"On cross-examination, Carman admitted that the deeds from which he established his line were boundary deeds without reference to monuments or calls and distances. He stated that he did not know who installed the fence upon which he shot his line or their purpose in installing the fence. While he attested to the barbed-wire fence as being the boundary line within a reasonable degree of surveying certainty, *Carman admitted that he could not confirm the line to an absolute certainty*."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

56

Dillehay v. Gibbs

"This case essentially boils down to which of two flawed surveys the trial court most credited—Holland's, cobbled together from ancient deeds with little apparent connection to the land and a disclaimer as to its veracity, or Carman's, shot from the ground on an old fence with slight support from the underlying deeds. *It appears from the record that Carman was the only surveyor to establish a boundary line within a reasonable degree of surveying certainty*."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

57

Dillehay v. Gibbs

"From our review of the record, *the trial court was intensely engaged in trying this matter*. It thoroughly questioned the surveyors' methods and conclusions. It ultimately concluded that Mr. Carman's survey was the most reliable and established the boundary line accordingly. *We will give great deference to a trial court's decision between competing surveys*."

Dillehay v. Gibbs, No. M2010-01750-COA-R3-CV (Tenn.App.2011).

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

What are the Rules of Construction for Deed Interpretation?

In a few states, the Rules of Construction have been codified.

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RULES OF CONSTRUCTION

OREGON REVISED STATUTES
TITLE 10. PROPERTY RIGHTS AND TRANSACTIONS
CHAPTER 93. CONVEYANCING AND RECORDING DESCRIPTIONS, INCLUDING THE OREGON COORDINATE SYSTEM

ORS § 93.310 (2006)
93.310. Rules for construing description of real property.

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it:

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RULES OF CONSTRUCTION

(1) Where there are certain definite and ascertained particulars in the description, the addition of others, which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by such particulars, if they constitute a sufficient description to ascertain its application.

(2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

(3) Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

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RULES OF CONSTRUCTION

(4) When a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title.

(5) When tidewater is the boundary, the rights of the grantor to low watermark are included in the conveyance, and also the right of this state between high and low watermark.

(6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them, if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

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FIRST NATIONAL BANK OF OREGON v. TOWNSEND

Oregon Court of Appeals
555 P.2d 477
October 25, 1976

63

WARRANTY TIMBER AND MINERAL DEED

This indenture made and entered into this the first day of February, 1955 between John Townsend, the party to the first part, and Claude J. Miller and [sic: name obliterated], Parties of the second part.

WITNESSETH

The said party to the first part, for and in consideration of Two Hundred and No/100 Dollars, to him in hand paid on all Trees and Minerals removed from his property.

Does hereby grant and convey unto the said parties of the second part, their heirs and assigns, the said tract of land in Jackson County, Oregon. Described as follows to wit:

The South West Quarter of the North East Quarter of Section 35 Township 40, Range 2, East the Willamette Meridian

The right to enter upon said land, cut and remove trees, mine and remove minerals, and make such alteration on said property as may be required in the removal of said trees of [sic: or] the mining of said ores or minerals. Said party of the first covenanting not to enter on said lands during said term in any manner which would prevent the re-logging removal of trees or ores and minerals of commercial value of the second parties.

All back taxes and taxes hereafter levied on said land will be paid by the parties of the second part, their heirs or assigns.

And the above described lands and property in quiet, peaceable, and exclusive possession of the said parties of the second part, their heirs or assigns against all persons law-fully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend.

In witness whereof I have hereunto set my hand and seal the day, and year first above written.

/s/ John Townsend

64

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

What are the Rules of Construction for Deed Interpretation?

In most other states the Rules of Construction are imbedded in the common law. Some examples follow:

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Whenever a *natural boundary is called for in a patent or deed*, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified. The course and distance may be incorrect, from any one of the numerous causes likely to generate error on such a subject; but a natural boundary is fixed and permanent, and its being called for in the deed or patent, marks, beyond controversy, the *intention of the party* to select that land from the unappropriated mass."

Cherry v. Slade, 7 N.C. 82 (N.C.1819)

66

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"When monuments are called for in a deed description inconsistent with the calls for courses and distances, it is a familiar rule that *courses or distances, or both, must yield to the monuments*."

Curtis v. Aaronson, 7 A. 886 (N.J.Super 1886)

67

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"To the extent that there is ambiguity in the language employed, the *deed should be construed most strongly against the grantor and in favor of the grantee*."

Carter v. Heitzman, 198 A.D.2d 649 (N.Y.App 1993)

68

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"The established hierarchy has been described as follows: Natural monuments (e.g., trees) prevail over artificial monuments (e.g., surveyor's stakes), which prevail over references to adjacent boundaries (e.g., "to Hunter's property line"), which prevail over directions (e.g., northwest), which prevail over distances (e.g., 30 feet), which prevail over area (e.g., 5 acres), which prevails over place names (e.g., "the Quinn farm")."

Stransky v. Monmouth Council of Girl Scouts, 925 A.2d 45 (N.J.Super.2007)

69

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

What are the Rules of Construction for Deed Interpretation?

In the Second Edition of *Clark on Surveying and Boundaries* (1939), Clark has more than a few of the Rules of Construction listed and discussed:

70

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 432. Scope. – *One of the most important duties the surveyor* is called upon to perform in connection with his work, and the attorney in advising his client, is as to *the construction or meaning to be given to the words* used by the grantor or maker of an instrument, containing a description of property to be surveyed or under consideration. …

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

71

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

… For this reason, the author has deemed it most advisable to *assemble the more important rules* of construction applicable to such instruments and cite authorities of the courts sustaining such principles.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

72

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 433. Valid and effective. – Instruments will be so construed as to render them *valid and effective, rather than void and ineffective*. It will be presumed a party signing a deed or other instrument intended to make a valid one.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

73

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 434. False and inconsistent descriptions. – Where one part of a description in a deed is false and impossible, but by rejecting that part, a perfect description remains, *such false and impossible part should be rejected* and the deed held good.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

74

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 436. Construed most strongly against grantor. – Where a deed admits of two constructions, it will be construed according to that construction which makes *most strongly against the grantor*. The reason is that the particular instrument is one in which the grantor has selected the words used.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

75

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 444. Long occupation of great weight. – Long occupation of the premises pursuant to the uncertainly expressed boundary, should have *much influence in the construction of the deed* containing the uncertain description. In other words the grantee in the deed having occupied a certain property, as described, has great weight to aid the court in construing the language used.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

76

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 452. Deed referring to plan. – Where lines are laid down on a plan, and are referred to in a conveyance of land, the courses and distances on such plan are as much to be regarded as the true description of the land, *as if they were expressly recited in the deed*. The fact that the conveyance refers to the lines in question make the boundaries of the tract certain.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

77

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

§ 471. Extrinsic evidence to explain calls. – Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter, and thus to give effect to the deed.

Clark on Surveying and Boundaries, Second Edition (1939), The Meaning of Words Used in Descriptions

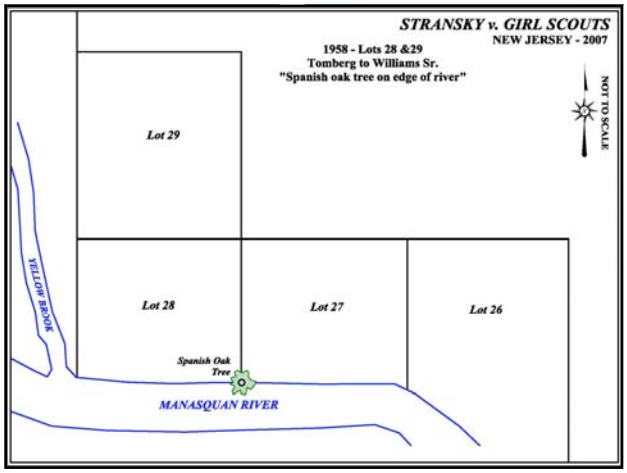
78

STRANSKY v. GIRL SCOUTS

NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION
925 A.2d 45
June 15, 2007

79

79



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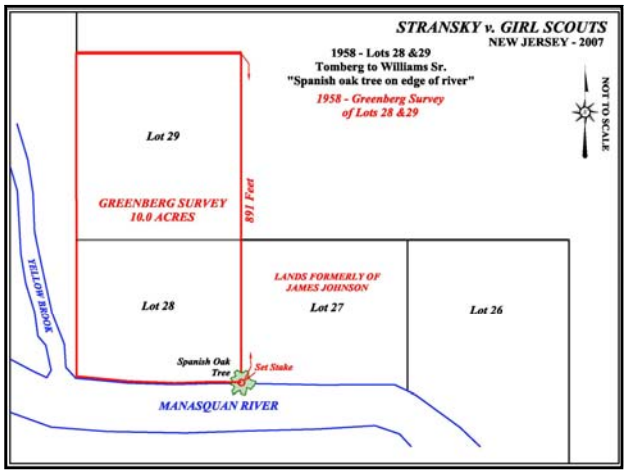

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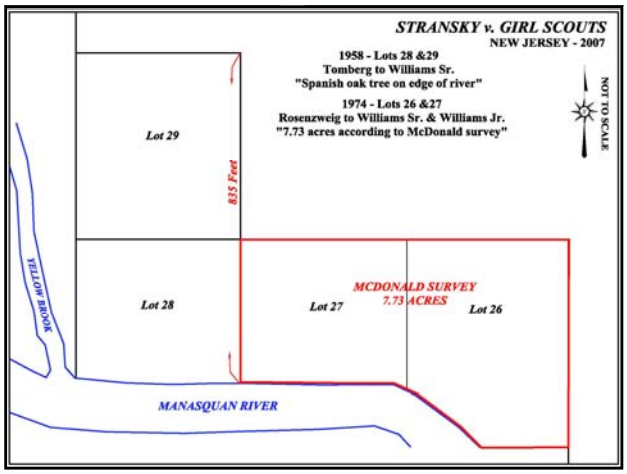
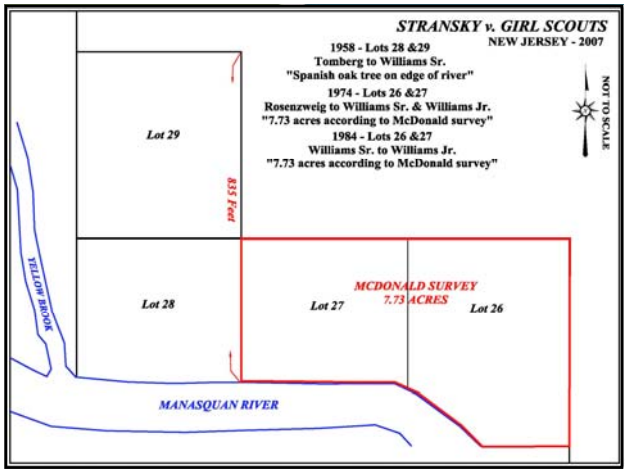
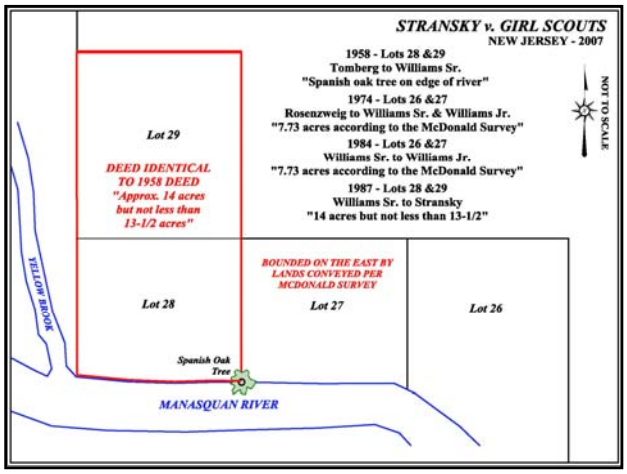

STRANSKY v. GIRL SCOUTS
NEW JERSEY - 2007
1958 - Lots 28 &29
Tomberg to Williams Sr.
"Spanish oak tree on edge of river"
1974 - Lots 26 &27
Rosenzweig to Williams Sr. & Williams Jr.
"7.73 acres according to McDonald survey"
NOT TO SCALE
Lot 29
835 Feet
YELLOW BROOK
Lot 28
MCDONALD SURVEY
7.73 ACRES
Lot 27
Lot 26
MANASQUAN RIVER

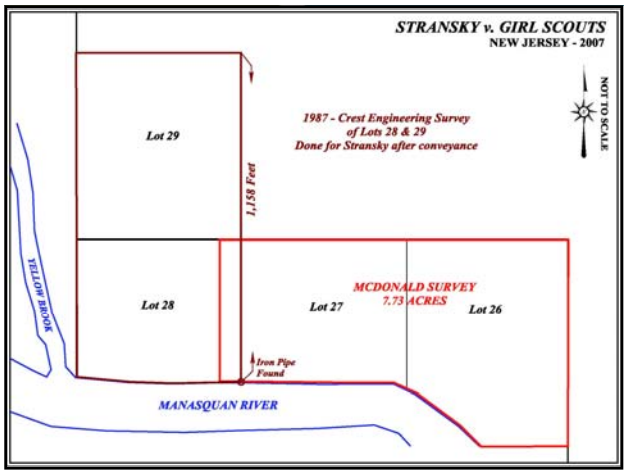
82


STRANSKY v. GIRL SCOUTS
NEW JERSEY - 2007
1958 - Lots 28 &29
Tomberg to Williams Sr.
"Spanish oak tree on edge of river"
1974 - Lots 26 &27
Rosenzweig to Williams Sr. & Williams Jr.
"7.73 acres according to McDonald survey"
1984 - Lots 26 &27
Williams Sr. to Williams Jr.
"7.73 acres according to McDonald survey"
NOT TO SCALE
Lot 29
835 Feet
YELLOW BROOK
Lot 28
MCDONALD SURVEY
7.73 ACRES
Lot 27
Lot 26
MANASQUAN RIVER

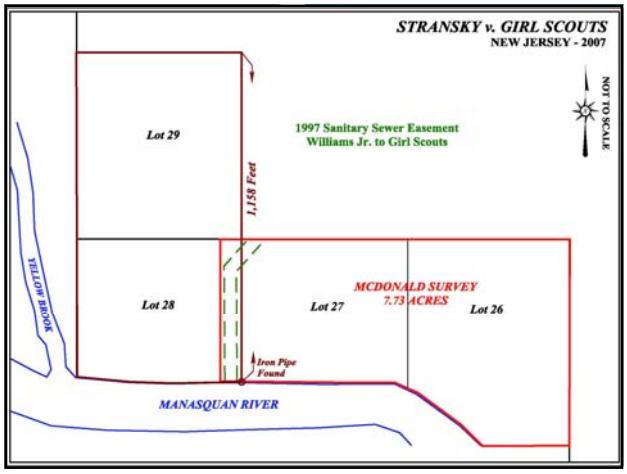
83


STRANSKY v. GIRL SCOUTS
NEW JERSEY - 2007
1958 - Lots 28 &29
Tomberg to Williams Sr.
"Spanish oak tree on edge of river"
1974 - Lots 26 &27
Rosenzweig to Williams Sr. & Williams Jr.
"7.73 acres according to the McDonald Survey"
1984 - Lots 26 &27
Williams Sr. to Williams Jr.
"7.73 acres according to the McDonald Survey"
1987 - Lots 28 &29
Williams Sr. to Stransky
"14 acres but not less than 13-1/2"
NOT TO SCALE
Lot 29
DEED IDENTICAL
TO 1958 DEED
"Approx. 14 acres
but not less than
13-1/2 acres"
YELLOW BROOK
BOUNDED ON THE EAST BY
LANDS CONVEYED PER
MCDONALD SURVEY
Lot 28
Lot 27
Lot 26
Spanish Oak
Tree
MANASQUAN RIVER

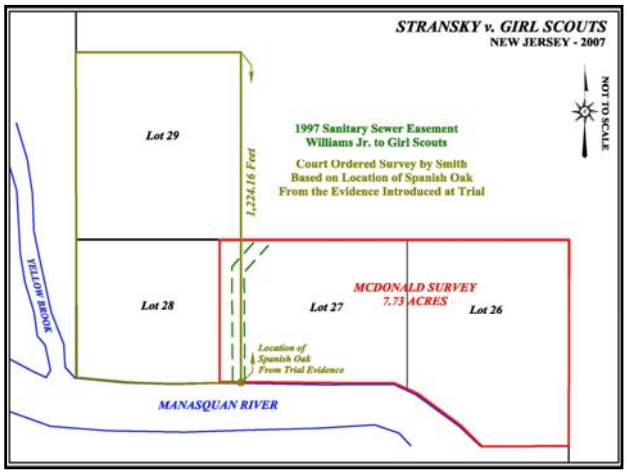
84


STRANSKY v. GIRL SCOUTS
NEW JERSEY - 2007
NOT TO SCALE
1987 - Crest Engineering Survey
of Lots 28 & 29
Done for Stransky after conveyance
Lot 29
1,158 Feet
YELLOW BROOK
Lot 28
MCDONALD SURVEY
7.73 ACRES
Lot 27
Lot 26
Iron Pipe
Found
MANASQUAN RIVER

85


STRANSKY v. GIRL SCOUTS
NEW JERSEY - 2007
NOT TO SCALE
1997 Sanitary Sewer Easement
Williams Jr. to Girl Scouts
Lot 29
1,158 Feet
YELLOW BROOK
Lot 28
MCDONALD SURVEY
7.73 ACRES
Lot 27
Lot 26
Iron Pipe
Found
MANASQUAN RIVER

86


STRANSKY v. GIRL SCOUTS
NEW JERSEY - 2007
NOT TO SCALE
1997 Sanitary Sewer Easement
Williams Jr. to Girl Scouts
Court Ordered Survey by Smith
Based on Location of Spanish Oak
From the Evidence Introduced at Trial
Lot 29
1,224.16 Feet
YELLOW BROOK
Lot 28
MCDONALD SURVEY
7.73 ACRES
Lot 27
Lot 26
Location of
Spanish Oak
From Trial Evidence
MANASQUAN RIVER

87

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

IV. THE BOUNDARY LOCATION DOCTRINES ANSWER THE FACTUAL QUESTION OF LOCATION

In the face of ambiguities, uncertainties and conflict over the location of a boundary, the location doctrines are the surveyor's "tool-kit" for resolving the factual question of location.

88

THE BOUNDARY LOCATION DOCTRINES

There are two types of Uncertainty:

1. Subjective Uncertainty, and
2. Objective Uncertainty.

89

Presumption v. Inference

Presumption:

"A presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts. In a sense, therefore, *a presumption is an inference which is mandatory unless rebutted*. Although there are many reasons that can support the creation of a presumption, including the difficulty of proving the presumed fact, the most important consideration is probability."

State of Iowa v. Burlington Basket Co., 651 N.W.2d 29 (Iowa 2002).

90

Presumption v. Inference

Inference:

"Whether … an inference aids a litigant, depends upon whether the common knowledge and experience of men, as applied to facts shown, lead to the belief that ordinarily and usually further facts or consequences follow. *Thus, an inference is simply a reasoning process*."

State of Iowa v. Burlington Basket Co., 651 N.W.2d 29 (Iowa 2002).

91

THE BOUNDARY LOCATION DOCTRINES

- Adverse Possession – Title and Location Doctrine
- Common Grantor Doctrine – Location
- Doctrine of Monuments - Location
- Original Surveyor/Following Surveyor – Location
- Lines Actually Run on the Ground – Location
- Acquiescence – Location & Evidence
- Oral Agreement – Location
- Practical Location – Location
- Repose – Location
- Estoppel – Location
- Junior/Senior Conveyances – Primarily Location

92

THE BOUNDARY LOCATION DOCTRINES

"The mere matter of the locating the boundary of lands, however, does not involve the title. It relates only to *the limit to which the land covered by the title extends*. The statute of frauds is inapplicable to an award made under a parol submission which had nothing in view beyond the settling of a dispute as to the boundary of land, and not the title of it. No right or title passes in virtue of the award. *It merely fixes the boundary, and the title which existed previously becomes precisely located and limited by it*."

Shaw v. State, 28 So. 390 (Ala.1899).

93

THE BOUNDARY LOCATION DOCTRINES

"And whenever it can be proved that there was a *line actually run by the surveyor*, was marked and a corner made, the party claiming under the grant or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the grant or deed."

Riley v. Griffin, 16 Ga. 141 (Ga.1854).

94

THE BOUNDARY LOCATION DOCTRINES

"The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that *monuments control* course and distance."

Diehl v. Zanger, 39 Mich. 601 (Mich.1878).

95

THE BOUNDARY LOCATION DOCTRINES

"In cases of disputed boundary, *all evidence, whether documentary or parol*, which bears upon the point in issue and which is not inadmissible on general principles, may be received in evidence, including records of original proprietors, their plans and maps and the location of lands by ancient settlers"

Pounders v. Nix, 130 So. 537 (Ala.1930).

96

THE BOUNDARY LOCATION DOCTRINES

"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 into*."

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

97

THE BOUNDARY LOCATION DOCTRINES

"The location of a boundary line by a *common grantor* is binding upon the grantees and their successors in interest, who take with reference thereto."

Rinehold v. Renne,492 P.3d 154 (Wash.2021).

98

THE BOUNDARY LOCATION DOCTRINES

"Where the exact location of a boundary line is not definitely known, a dispute involving the boundary line must be determined by looking to the conduct of the parties with reference thereto. Thus, *long acquiescence by the owners of adjoining lands* in the location of the dividing line between their lands may, in effect, *establish such line*."

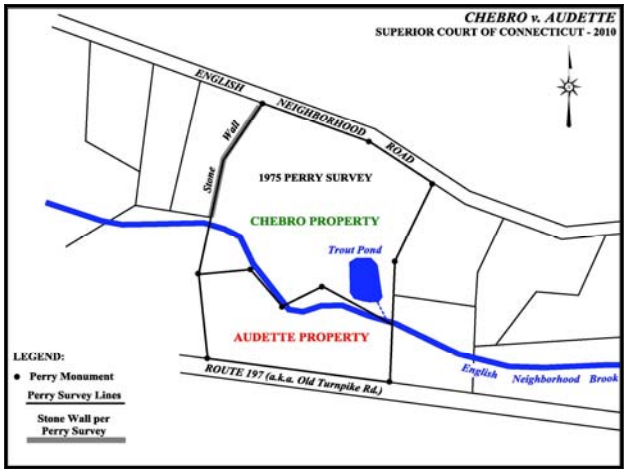
Northrop v. Opperman, 2011 WI 5 (Wisc.2011).

99

CHEBRO v. AUDETTE

Superior Court of Connecticut
Judicial District of Windham at Putnam
2010 Conn.Super. LEXIS 2449
September 23, 2010

100



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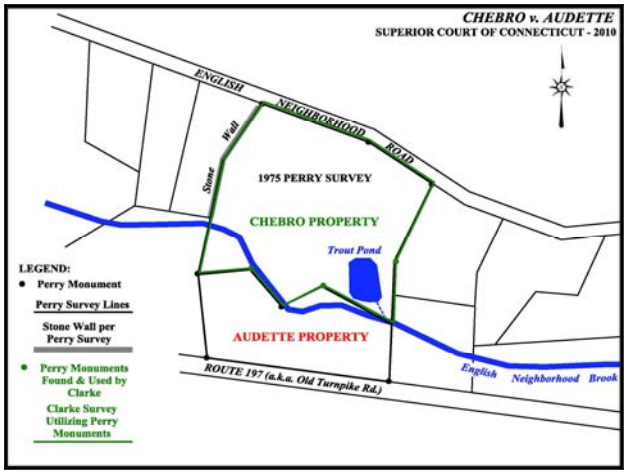

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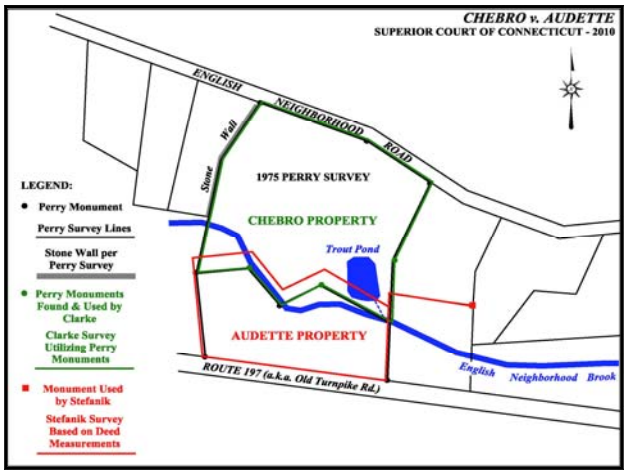


103

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

V. <u>PAROL EVIDENCE IS ADMISSIBLE EVIDENCE AND IS OFTEN DETERMINATIVE ON THE QUESTION OF LOCATION</u>

"In determining the correct boundaries of land, courses and distances must give way to monuments on the ground, and <u>*parol evidence is admissible*</u> to establish the existence of such monuments.

Will v. Piper, 134 A.2d 41 (Penn.Super.1957).

104

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Before a deed will be declared void … <u>*all sources of inquiry*</u> which the description itself and the circumstances surrounding the parties and the conditions existing at the time of its execution naturally suggest must be exhausted in a vain effort to locate the property."

Hall v. Staley, 2003 N.C.App. LEXIS 1390 (NC App. 2003)

105

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Parties making a conveyance are presumed to make it with reference to *the state or condition of the premises at the time*, and, if the description be sufficient when made, no subsequent changes in conditions can make it invalid."

Hall v. Staley, 2003 N.C.App. LEXIS 1390 (NC App. 2003)

106

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"*Parol evidence* is, and must of necessity be, *always admissible* to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply."

Hall v. Staley, 2003 N.C.App. LEXIS 1390 (NC App. 2003)

107

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"When the terms used in the deed leave it uncertain what property is intended to be embraced in it, *parol evidence is admissible to fit the description to the land*. ... The general descriptions contained in the boundary line "fit" two possible alternate interpretations on the ground. Therefore, it was proper and necessary for the court to receive *parol evidence* from both parties indicating where the boundary line was commonly understood to lie."

Hall v. Staley, 2003 N.C.App. LEXIS 1390 (NC App. 2003)

108

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"It is well established that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, *parol evidence may be received* to complete the description and identify the property."

Harlan v. Muncie, 835 N.E.2d 1018 (Ind.App.2005).

109

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"Parol evidence is therefore *often necessary* to make descriptions intelligible."

Harlan v. Muncie, 835 N.E.2d 1018 (Ind.App.2005).

110

THIEL v. DAMRAU

Wisconsin Supreme Court
66 N.W.2d 747
November 9, 1954

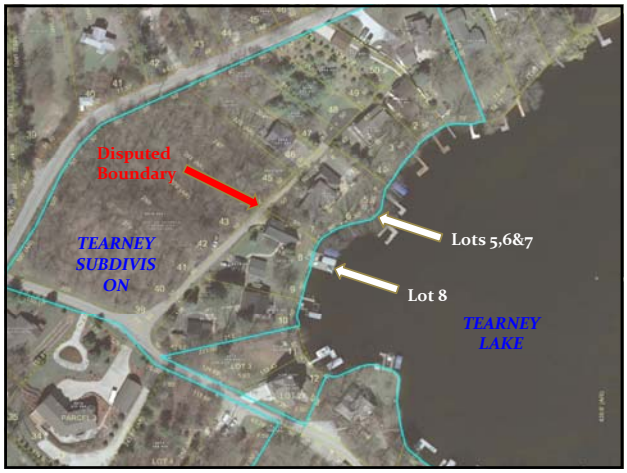
111

Thiel v. Damrau

"This appeal involves *an unfortunate controversy between neighbors* as to the true location of a boundary line separating their premises. Plaintiffs are the record owners of lots 5, 6 and 7 in Tearney's Subdivision in the community of Okauchee, in the town of Oconomowoc, Waukesha county, while the defendant is the record owner of lot 8 in said subdivision. The west boundary line of lot 7 forms the east boundary line of lot 8, and it is the location of this line that is the crux of the controversy.

Theil v. Damrau, 66 N.W.2d 747 (Wisc.1954).

112



113

Thiel v. Damrau

"Where adjoining owners take conveyances from a *common grantor* which describe the premises conveyed by lot numbers, but such grantees have purchased with reference to a boundary line then marked on the ground, such location of the boundary line so established by the common grantor is binding upon the original grantees and all persons claiming under them, irrespective of the length of time which has elapsed thereafter."

Theil v. Damrau, 66 N.W.2d 747 (Wisc.1954).

114

Thiel v. Damrau

"A boundary location made upon the ground by a common grantor at the time of conveyance, and the acquiescence following, *are conclusive upon the defendants, and this boundary must remain as then located*, even if it was located erroneously, as might subsequently be determined."

Theil v. Damrau, 66 N.W.2d 747 (Wisc.1954).

115

Thiel v. Damrau

"*The testimony given* by the Damraus in the instant case with respect to the presence and location of the stakes marking the boundary line between lots 7 and 8 at the time said lots were purchased by the plaintiffs and the Baumgartners *stands undisputed* by the plaintiffs or by any witness called by them."

Thiel v. Damrau, 66 N.W.2d 747 (Wisc.1954).

116

Thiel v. Damrau

"*This is very significant* in view of the fact that the plaintiffs' complaint alleged that there were stakes marking the boundary lines of lot 7 at the time plaintiffs purchased it from Mrs. Connor, which stakes have since disappeared, thus clearly establishing that plaintiffs knew of the existence of the two stakes testified to by the Damraus. Not only is the Damraus' testimony undisputed but *there is nothing in the record to discredit such testimony or render it improbable*."

Thiel v. Damrau, 66 N.W.2d 747 (Wisc.1954).

117

Thiel v. Damrau

"*Positive uncontradicted testimony* as to the existence of some fact, or the happening of some event, cannot be disregarded by a court or jury in the absence of something in the case which discredits the same or renders it against the reasonable probabilities."

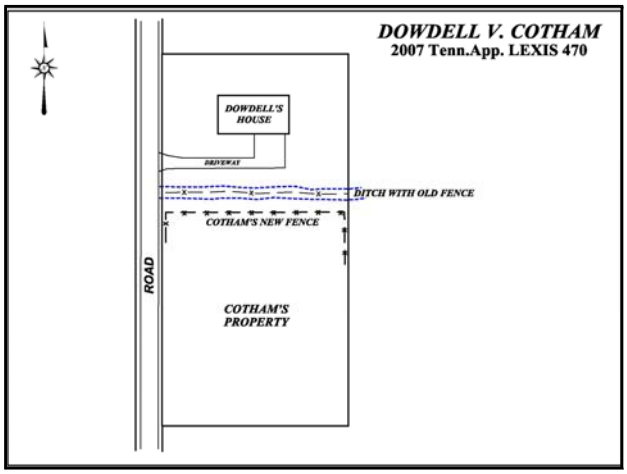
Thiel v. Damrau, 66 N.W.2d 747 (Wisc.1954).

118

DOWDELL v. COTHAM

Court of Appeals of Tennessee
2007 Tenn. App. LEXIS 470
July 25, 2007

119



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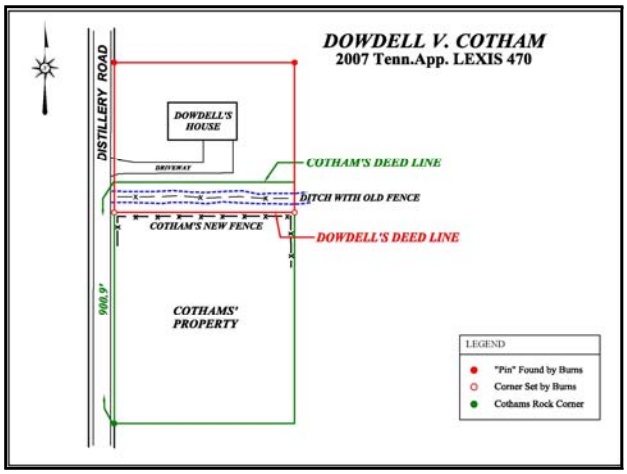
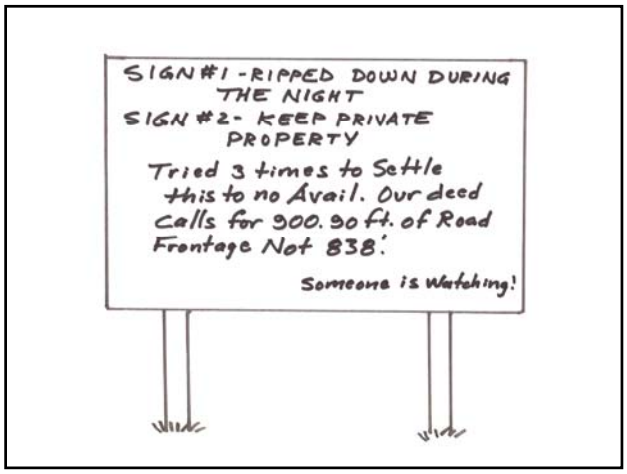

DOWDELL V. COTHAM
2007 Tenn.App. LEXIS 470
DISTILLERY ROAD
DOWDELL'S HOUSE
DRIVEWAY
COTHAM'S DEED LINE
DITCH WITH OLD FENCE
COTHAM'S NEW FENCE
DOWDELL'S DEED LINE
900.9'
COTHAMS' PROPERTY
LEGEND
"Pin" Found by Burns
Corner Set by Burns
Cothams Rock Corner

121


NO SALE
PROPERTY LINE DISPUTE
We only want what is ours!
This is not the correct Property Line.

122


SIGN #1 - RIPPED DOWN DURING THE NIGHT
SIGN #2 - KEEP PRIVATE PROPERTY
Tried 3 times to Settle this to no Avail. Our deed Calls for 900.90 ft. of Road Frontage Not 838'.
Someone is Watching!

123

Dowdell v. Cotham

"Mr. Dowdell hired registered land surveyor, Mike Burns, to conduct a survey of his property in an attempt to resolve the dispute. Burns testified as an expert at the bench trial but explained that *the actual field work had been completed by his associates*."

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

124

Dowdell v. Cotham

"On cross-examination, Burns stated that he had been retained by Dowdell to conduct a *survey of the property* because Dowdell wanted to know the location of his property line. Dowdell told Burns that the Cothams believed their property line went *all the way to Dowdell's driveway*."

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

125

Dowdell v. Cotham

"Betty Cotham testified that she is the owner of the real property located at 2926 Distillery Road.... Mrs. Cotham saw Burns' survey crew on the property and engaged in conversation with one or more of them. She asked the crew why they were digging next to her fence. *It was when the survey stake marked the boundary line determined by Burns that the Cothams erected the signs* at the corner of the property."

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

126

Dowdell v. Cotham

"On cross-examination, Mrs. Cotham affirmed that even though she did not know the exact location of the boundary line, she always believed it to be north of the ditch line due to her deed references. She said someone from Burns' team measured the road frontage *and told her there was an overlap of fifty feet*."

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

127

Dowdell v. Cotham

"*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 (Tenn.App.2007).

128

Dowdell v. Cotham

"We find no cause for concern that *the trial court found the testimony of the surveyor troublesome*. The surveyor testified as to his results but noted that he had not conducted the actual survey."

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

129

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

VI. THE CIVIL STANDARD IS A PREPONDERANCE OF THE EVIDENCE

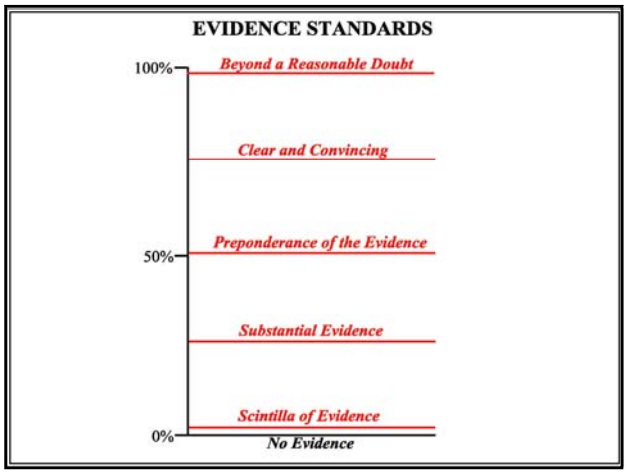
In civil court, a preponderance of the evidence that leads to the proof of the matter is all that is required.

130

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

- **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).

131



132

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

VII. NOT ALL EVIDENCE IS GOOD OR RELEVANT EVIDENCE

"Evidence, to be admissible, must be relevant to the issues, competent under established rules of law, and material in the sense of having some reasonable tendency to prove or disprove points in issue."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, at 32

133

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

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.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

Fed. Rules of Evidence
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.

135

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

Can "Old-Timer" (in the present day) testify as to where George Washington set the corner in 1748?



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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

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:

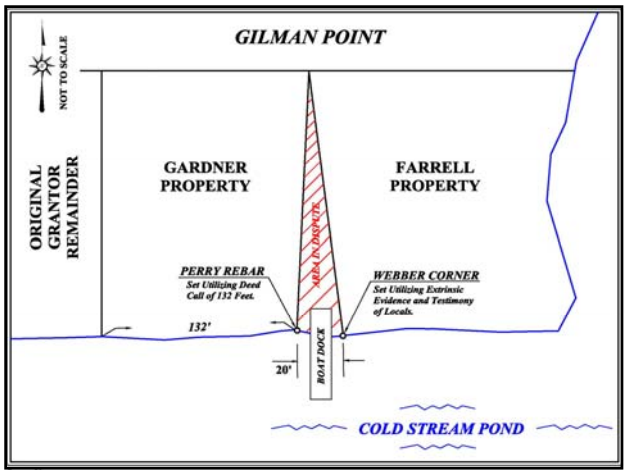
(20) Reputation concerning boundaries or general history. Reputation in a community, ***arising before the controversy***, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

137

FARRELL v. GARDNER

Maine Superior Court
2003 Me.Super. LEXIS 250
December 5, 2003

138



139

Farrell v. Gardner

"The location of a boundary on the face of the earth *is a question of fact*. To determine that location from a deed description, the court must determine the intent of the parties to that deed. If the facts extrinsic to the deed description are affected by a *latent ambiguity*, then a parcel's boundaries are located by reference to monuments, courses, distances and quantity, in that priority."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

140

Farrell v. Gardner

"'Monuments' are visible marks or indications left on natural or other objects indicating the lines and boundaries of a survey. In this sense the term includes not only posts, pillars, stone markers, cairns, and the like, but also fixed natural objects, blazed trees, and even a watercourse. *The physical disappearance of a monument terminates its status as a boundary marker unless its former location can be ascertained through extrinsic evidence*."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

141

Farrell v. Gardner

"Perry has relied heavily on the apparent locations of the more recently created lots in order to determine the location of the senior lot. *This approach is flawed* because the location of the junior lots is dependent on the location of the senior lot—the deeds to the junior lots can only convey what is left over from prior conveyances—note the converse."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

142

Farrell v. Gardner

"Perry's approach is also problematic because after finding the point that he believed to be the defendant's southwest corner, *he simply measured 8 rods back* toward the plaintiff's lot to find the common southerly corner of the parties' parcels. ... It places too much emphasis on the accuracy of the distance call associated with the southern boundary of the defendant's land."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

143

Farrell v. Gardner

"As Harris testified, many of the lots in that area were laid out with a rope that, on other days, was used to tie up cows, and uncertainty is both prevalent and justified. This is further shown by Webber's findings that there were discrepancies between the distance calls for the northern boundaries of those westerly lots and the apparent actual locations of those lines. *Thus, Perry's dispositive reliance on a distance call in the defendant's deed weakens his resulting opinion*."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

144

Farrell v. Gardner

"The flaw in Perry's methodology *is the strength of Webber's*. When Perry's opinion rests primarily (if not exclusively) on information derived from the deeds, Webber's analytical base is more thorough. He considered the record descriptions, as did Webber."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

145

Farrell v. Gardner

"However, *Webber also took into account historical information* of the type set out above and properly used it as *extrinsic evidence* to generate other important information, such as the location of a pin that, because it is a monument, is entitled to great weight. ... *The court is also troubled by the evolution of Perry's opinion*."

Farrell v. Gardner, 2003 Mer.Super. LEXIS 205 (Me.Super.2003).

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

VIII. THE STANDARD OF CARE IS WHAT THE REASONABLY PRUDENT PRACTITIONER WOULD DO UNDER LIKE OF SIMILAR CIRCUMSTANCE

The Standards of Care for all professional service providers has become universal. It is the reasonably prudent practitioner standard.

147

JEFF'S 10 COMMANDMENTS OF WINNING IN COURT

"It is the duty of a land surveyor in his (her) profession to use that degree of knowledge, skill, and care ordinarily possessed and used by members of that profession, and to perform any service undertaken as a land surveyor, in a manner that a reasonably prudent land surveyor would use under the same or similar circumstance."

Alabama Pattern Jury Instructions, Sec. 25.20, Malpractice, Non-Medical Professionals.

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JEFF'S 10 COMMANDMENTS OF WINNING IN COURT

"The *standard of care* by which the professional acts of surveyors are measured *is a national standard*, not a local or regional one. ... Whether a proffered witness is qualified to testify as an expert is a matter to be *decided by the trial court* in the exercise of its sound discretion."

Bell v. Jones, 523 A.2d 982 (D.C.App.1986).

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JEFF'S 10 COMMANDMENTS OF WINNING IN COURT

"*Surveyors are not insurers of the correctness* of their findings but may be held liable for damages caused by breach of their duty to perform a survey with the care, skill, knowledge and diligence expected of a professional surveyor."

Highland Lakes v. Nicastro, 966 A.2d 1102 (N.J.Super.A.D. 2009).

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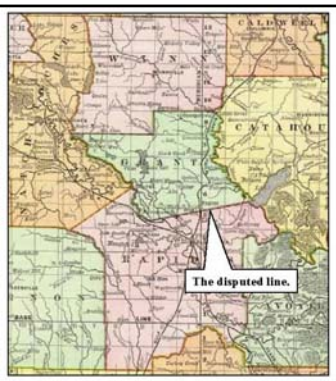
RAPIDES PARISH
v.
GRANT PARISH

Court Of Appeal Of Louisiana,
Third Circuit
924 So.2d 357
February 22, 2006

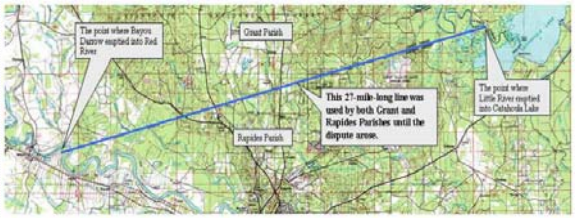
All pictures and diagrams courtesy of Frank Willis and used with permission.

151



Rand Map of 1893 showing Grant Parish. The disputed line is the long line between Grant and Rapides parishes and is defined as a straight line running from the point where Bayou Darrow emptied into Red River, easterly to the point where Little River emptied into Catahoula Lake.

152

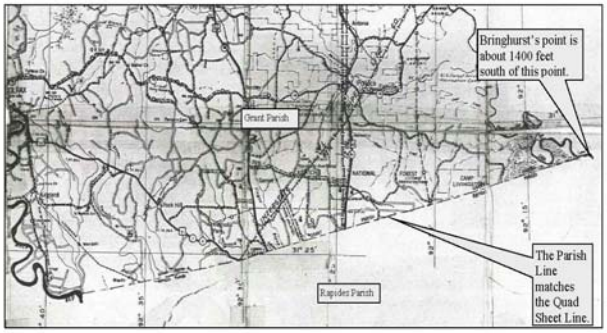


Legal Description of Grant Parish

Commencing at a point on Red river where the Daro empties into said river, and thence running east to the point where Little river empties into Catahoula Lake; thence up Little river to the junction of the Castor and Duddemonia, thence west on the southern boundary of the parish of Winn to the range line between ranges numbers two and three west, thence south on said range line to the township line between townships numbers eight and nine north, thence west on said township line to where said line crosses the Bogolet de Bon Dieu; thence down said Bogolet de Bon Dieu to the mouth of Cane River, thence down Red river to the point of starting, the mouth of the Daro.

153

Both Parishes Agreed on the Quad Sheet Line in the 1940's



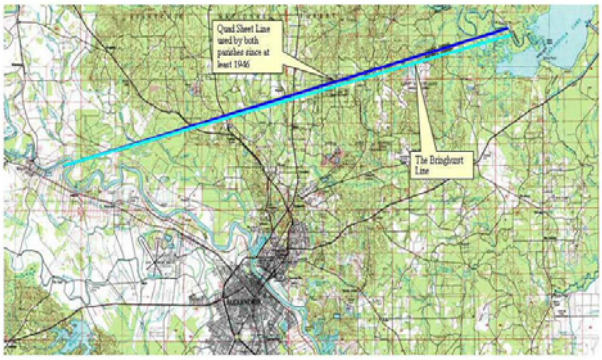
The Grant Parish Planning Board prepared this map of Grant Parish in 1947. The line matches the Quad Sheet Line. We checked the minutes of Grant and Rapides Police Juries, starting in 1870, and much to our surprise we found resolutions adopted in 1946 by both parish governing bodies accepting and certifying the accuracy of the Quad Sheet Line.

The line matched Bringhurst on the west end, but on the east end the line was about 1400 feet north of the Bringhurst point. The bend in the line does not indicate the line turned and is due to the piecing together of the map which is falling apart.

44

154

The Bringhurst Line and the Quad Sheet Line Did Not Match

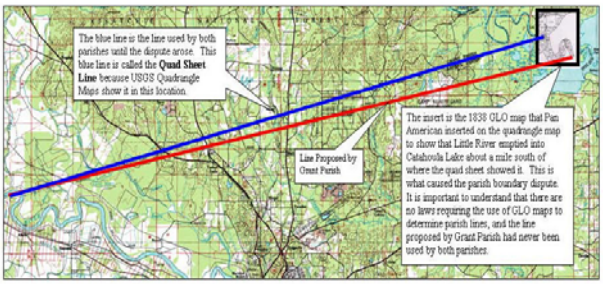


On the west end the Bringhurst Line matched the Quad Sheet Line used by both parishes. However, at the east end the Bringhurst line fell about 1400 feet south of the Quad Sheet Line.

In surveyor's terms, the Quad Sheet Line represents the ***line of possession,*** so I surveyed both 27-mile-long lines in the field. I tried to determine the reason for the shift at the east end.

155

The Grant Parish Proposal to Move the Line South into Rapides Parish using an 1838 Map as Their Basis



Pan American Engineers had found a map produced by the General Land Office in 1838. The map showed Little River emptying into Catahoula Lake about 2.5 miles downstream from the point that had been previously recognized by both parishes. Pan American superimposed the General Land Office map on the quadrangle map and used it as the basis for proposing the new location of the parish line. Their proposal would shift the east end of the parish line south by about a mile and would remove about 12,000 acres of land from Rapides Parish and place it in Grant Parish.

If Pan American were correct, Rapides would lose about $1,000,000 in tax revenue annually, and Grant would gain $1,000,000. Neither I nor Pan American found any evidence indicating the Legislature had used the 1838 General Land Office map to write the description. No laws required the use of General Land Office survey for delineating governmental boundaries. However, Pan American assumed that the Legislature had used it, and they based their entire survey upon this assumption. This assumption was the line drawn in the sand that caused the boundary dispute.

4

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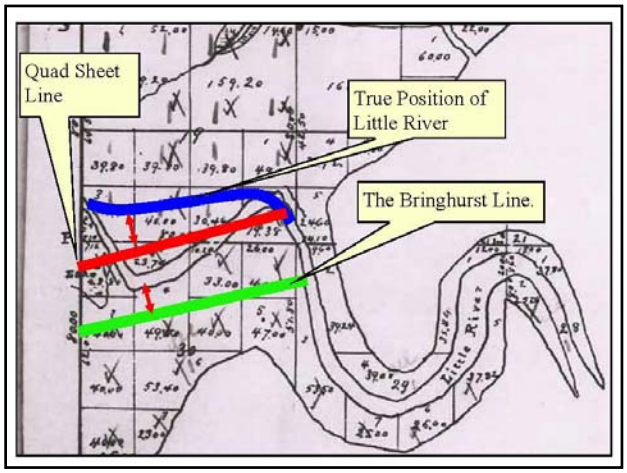
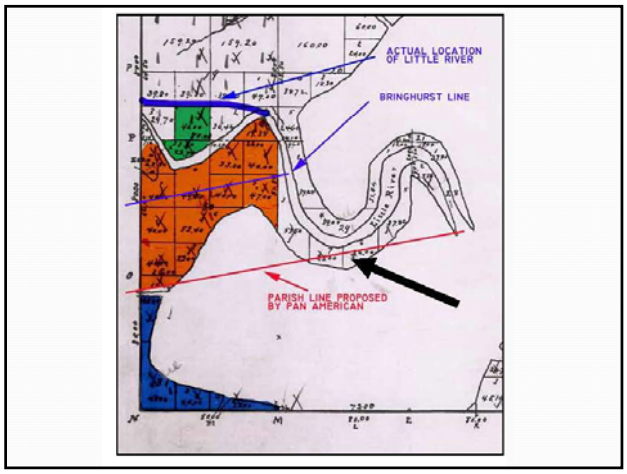
1838 GLO Map at Catahoula Lake

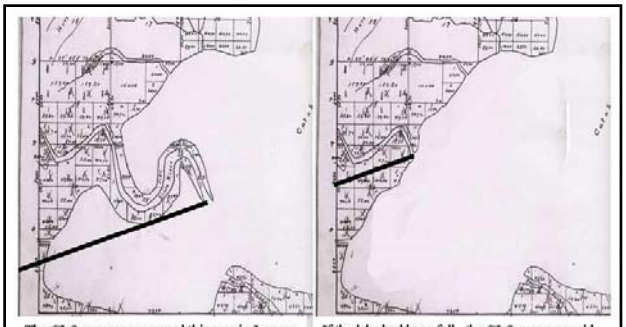
157


Quad Sheet Line
True Position of Little River
The Bringhurst Line.
Little River

158


ACTUAL LOCATION OF LITTLE RIVER
BRINGHURST LINE
PARISH LINE PROPOSED BY PAN AMERICAN

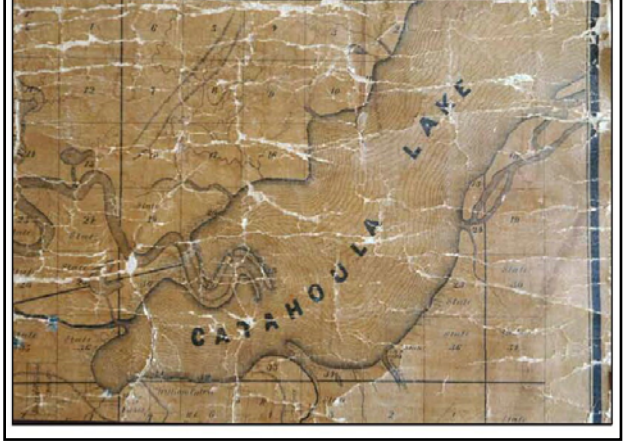
159



The GLO surveyor surveyed this area in January of 1838. Historical records show that the water level in Catahoula Lake was frequently low during January. If the lake had been higher during the time of the GLO survey, the chicken neck would have been under water, and the GLO surveyor would not have surveyed it.

If the lake had been full , the GLO survey would have looked like this. If this GLO map had been used to delineate the parish line, the line would have been north of the point shown on the map to the left. A one-foot change in the water level at Catahoula Lake can expose or inundate about one mile of the chicken neck.

160



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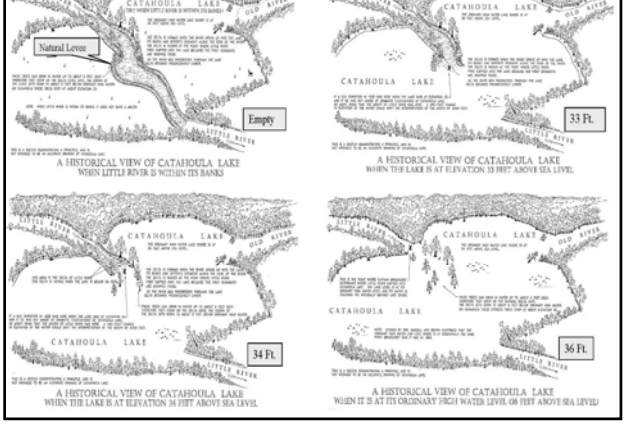

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

IX. THE BEST AVAILABLE EVIDENCE IS THE SURVEYOR'S CRITERION

There is always *some* evidence of a corner's location, by definition, whatever that evidence is will be the *best available evidence*.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"The surveyor must find the *best available evidence* that determines the location of boundaries and elements for the parcel of land described in the deed on the ground. In those areas in which there is widespread obliteration and loss of evidence, it may become necessary to accept evidence of an inferior type, such as hearsay and reputation, but whatever is accepted, *it must be the best of that found* after an extensive and complete search of the record, the ground, and adjoiners is complete."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location,* Sixth Edition, at 45.

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"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).

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"*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).

166

JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"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).

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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

"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*.' (Citation omitted). 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).

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JEFF'S 10 COMMANDMENTS OF WINNING IN COURT

"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*, 1974, McClain Printing Company, Parsons, West Virginia, at 115.

169

NORTHROP v. OPPERMAN

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

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171

Northrop v. Opperman

"In the survey/fence cases, a circuit court first determines whether the boundary line can be determined from the deed and original monuments or markers. If the boundary line cannot be so determined, *the circuit court looks to the best evidence of the boundary line*. The circuit court's determination of the best evidence locating the boundary line in the survey/fence cases *is essentially a finding of fact*. An appellate court does not set aside findings of fact unless they are clearly erroneous."

Northrop, et. al. v. Opperman, et. al., 2011 WI 5 (Wisc.2011).

172

Northrop v. Opperman

"The evidence of undisputed occupation and fencing in accordance with the originally surveyed line for about 30 years, not only of the piece of land in controversy, but of other parcels of land in that immediate neighborhood, *raises a presumption* that the line so recognized is the true line. *So strong a presumption* is thus raised in the present case that we do not regard it as overcome *or seriously weakened* by the simple fact that upon a resurvey, based upon no original monument, another line several rods distant is established."

Northrop, et. al. v. Opperman, et. al., 2011 WI 5 (Wisc.2011).

173

Northrop v. Opperman

"The original location of monuments must always prevail, but that when those monuments have disappeared *they must be established by the best evidence* the nature of the situation is susceptible of. Extrinsic evidence, such as an old fence, may have so much greater probative force than more recent surveying measurements as to prevail over the latter as a matter of law."

Northrop, et. al. v. Opperman, et. al., 2011 WI 5 (Wisc.2011).

174

Northrop v. Opperman

"The answer to the pertinent question—*where is the boundary line*?—must be established by the *best evidence available*. Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are no such monuments, then stakes set by the surveyor or soon thereafter are the next best evidence. Buildings, fences, and other substantial improvements built according to the stakes laid out while they were present are the next best evidence of the line."

Northrop, et. al. v. Opperman, et. al., 2011 WI 5 (Wisc.2011).

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WEBER v. KROEGER

Tennessee Court of Appeals
No. M2019-00406-COA-R3-CV
October 10, 2019

176



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JEFF'S 10 COMMANDMENTS on WINNING IN COURT

X. <u>The Only Boundary Line that Matters is the "Property Boundary" Between the two Coterminous Landowners</u>

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

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The Ultimate Issue Rule

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.

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The Ultimate Issue Rule

New Jersey Rules of Evidence

Rule 704. Opinion on Ultimate Issue

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.

180

The Ultimate Issue Rule

"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.

181

The Ultimate Issue Rule

"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, 349 S.E.2d 614, 616, 617 (N.C.App. 1986).

182

The Ultimate Issue Rule

"*No witness can give opinions on the ultimate fact that is being tried*. Permitting an expert to tell the members of the jury what they must decide is usurping their exclusive rights. … The surveyor is more or less limited in the responses to the questions asked."

Robillard, Walter G. and Donald A. Wilson. *Evidence and Procedures for Boundary Location*, Sixth Edition at 549-550.

183

The Ultimate Issue Rules

"A Mississippi court ruled on the question of whether the surveyor could be asked, 'Where is the true line?' The court replied: '*This is not a matter about which they could give their opinion*.'"

Robillard, Walter G. and Donald A. Wilson. *Evidence and Procedures for Boundary Location*, Sixth Edition at 550. According to the endnotes, quoting from the case of *Gichner v. Antonio Title Co.*, 410 F.2d 238 (Miss.1969).

184

The Ultimate Issue Rules

Mississippi Rules of Evidence

Rule 704. Opinion on ultimate issue.

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.

185

The Ultimate Issue Rule

Mississippi Rules of Evidence

Commentary to Rule 704.

Rule 704 abolishes the "*ultimate issue rule*" which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it 'invades the province of the jury.'

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The Ultimate Issue Rule

Mississippi Rules of Evidence
Commentary to Rule 704.

The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions *must be helpful* to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which *wastes time*.

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The Ultimate Issue Rule

Nebraska Rules of Evidence
Case Notes on Rule 704.

Under this section, the test is not whether the expert's opinion or inference invades the province of the jury, but whether the opinion or inference is otherwise admissible and will *assist the trier of fact* to understand the evidence or determine a fact in issue ....

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The Ultimate Issue Rule

The Lone Detractor

"In keeping with recent legal decisions, we have somewhat modified some of the terminology. For instance, seldom is the term property line or property boundary used. It is our belief that property rights, including property boundaries, are legal questions and as such are not addressed by land surveyors. Surveyors locate boundaries, or land boundaries or deed lines. They do not and cannot locate property rights."

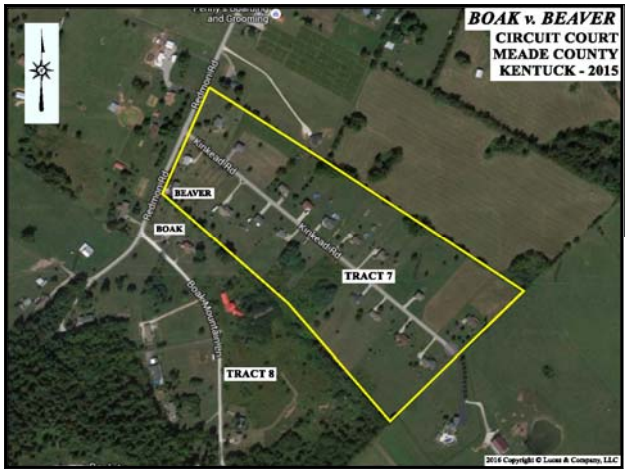
Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location,* Sixth Edition, at 2.

189

BOAK v. BEAVER

MEADE COUNTY CIRCUIT COURT
46TH JUDICIAL CIRCUIT
Civil Action 10-CI-00269
September 10, 2015

190



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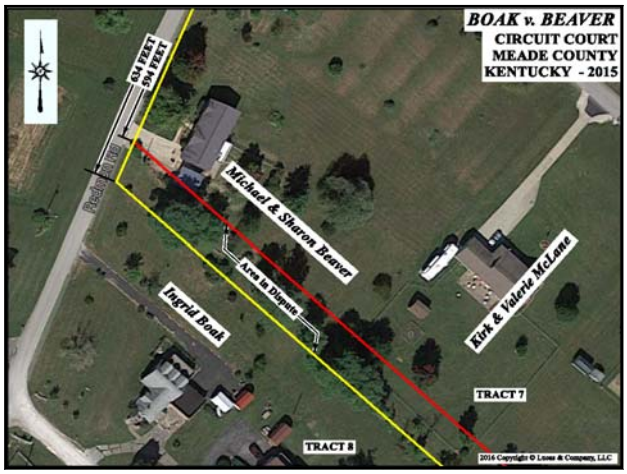

192

BOAK v. BEAVER

"Mr. Smith testified that when a surveyor is required to re-trace a survey, he is required to ***first find the line and then measure it***. A retracement of the survey does not mean that one measures to create the line, because ***the line is already there***. Retracement surveys require the surveyor to find the line and then measure it."

Boak v. Beaver, Civil Action 10-CI-00269 at 7 (Ky.46thCir.Ct.2015).

193