Know When to Hold'Em: Boundary Retracement.

BOUNDARY RETRACEMENT AND LEGAL ASPECTS OF LAND SURVEYING. Pennsylvania 2022

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Common Law & the Surveyor

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Indiana: Theory of Location (1)

Indiana Standards of Practice
865 IAC 1-12-2 Definitions; abbreviations

- (m) "Theory of location" means applying:
- (1) federal laws, including 43 U.S.C. 751 through 43 U.S.C. 775;
- (2) state and local laws; and
- (3) court precedent;
- …to establish the position of real property corners.

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Surveyors have a lot of work ahead…

Poch v. Urlaub; 357 Mich. 261; 98 N.W.2d 509; 1959

- "We agree with the judge below that this survey could not lawfully be regarded. A surveyor has no more right than anyone else to decide upon starting points and other elements of location.
- We have had frequent occasion to refer to the mischief done by the officious meddling of such persons under some notion that it is within their province to unsettle possessions and landmarks."

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Surveyors have a lot of work ahead…

Poch v. Urlaub; 357 Mich. 261; 98 N.W.2d 509; 1959

- In **Fisher v. Dowling**, again the Court said:
- "We have had frequent occasion to condemn the assumptions of surveyors in determining lines and landmarks according to their own notions.
- They have no such right, and their assumptions are not lawful. There are **few evils more annoying** to public or private peace than the **intermeddling with land boundaries,** and the disturbance of peaceable possessions."" [Cites omitted]

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Texas – Common Law and Reason (1)
Welder v. State: 196 S.W. 868 TX (1917)

- It is true that the common law as modified by our local conditions is in force in Texas.
- But the common law, as has been aptly said, is a system of principles, and not a collection of arbitrary rules.
- The common law claims to be the perfection of reason, and it is one of its maxims that where the reason ceases the law ceases…

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Blackstone: The Perfection of Reason (1)
Commentaries on the Laws of England Vol 1, (Oxford: Clarendon Press, 1765)

- And hence it is that our lawyers are with justice so copious in their ecomiums on the reason of the common law; that they tell us, …
- …**that the law is the perfection of reason**, that it always intends to conform thereto, …
- …and that what is not reason is not law.
- Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.

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Blackstone: Precedent Has a Reason (2)
Commentaries on the Laws of England Vol 1, (Oxford: Clarendon Press, 1765)

- The doctrine of the law then is this:
- …that **precedents and rules must be followed**, …
- …**unless flatly absurd or unjust**: …
- …for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.

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PENN: Perfection of Reason (1)
Appleton Estate: 81 Pa. D. & C. 85 (1951)

- It is enlightening and a guide to the general principle of law to project the course that would be pursued, were the prayer of petitioner granted, …
- …**because, the law being the perfection of reason**, …
- …that which turns out to be reasonable is likely to be the law …
- …and that which turns out to be unreasonable is likely not to be the law.

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Ohio – Common Law (1)
State v. Metzger: 21 Ohio Dec. 72; 1910

- Speaking generally of the existence and force of the common law in the state of Ohio, Judge Bartley …says:
- **"At an early period in this state, the common law of England and the statutes of that country** of a general nature, in aid of the common law, passed prior to the fourth year of King James I, **were adopted by legislative enactment.**
- But the act was repealed by the general assembly of this state on January 2, 1806; since which time, the common law of England has had no force in this state by legislative adoption.

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Ohio – Common Law (2)
State v. Metzger: 21 Ohio Dec. 72; 1910

- But, having been adopted in the original states of the Union and introduced into Ohio, at an early period, …
- …the common law has continued to be recognized as the rule of decision in our courts in the absence of legislative enactments, **so far as its rules and principles appeared to be based on sound reason, and applicable to our condition and circumstances.**

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Ohio – Common Law (3)
State v. Metzger: 21 Ohio Dec. 72; 1910

- The common law, therefore, has no force in Ohio, …
- …**except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts**, and this extends no further than it illustrates and explains the rules of right and justice as applicable to the circumstances and institutions of the people of the state."

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Ohio – Common Law (4)
Sloane v. Biemiller: 34 Ohio St. 492; 1878

- It has, however, been held in this state, as is the case in most of the states, that the owners of lands situate on the banks of fresh-water navigable streams are owners of the beds of the rivers to the middle of the stream, **as at common law.**
- And, although the dominion over and the right of property in the waters of the sea and its inland waters **were, at common law, in the crown, yet they were of common public right for every subject to navigate**…

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PENN: Perfection of Reason & Common Law (1)
Kilheffer v. Herr: 17 Serg. & Rawle 319 (1828)

- If the ground is to be taken, that because we doubt the reason, or propriety of an established rule, we are at liberty to reject it, and substitute another for it, …
- …then all principles are again thrown afloat on the ocean of uncertainty, without any compass but the discretion of the judge..

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PENN: Perfection of Reason & Common Law (2)
Kilheffer v. Herr: 17 Serg. & Rawle 319 (1828)

- The, foundation of the law is not laid on such a fluctuating basis.
- It has been pronounced, by the greatest jurists, to be the perfection of reason, not of every man's natural reason, but an artificial perfection of reason, gathered by long study, observation, and experience.

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Common Law & Common Sense

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Common Sense in Kentucky
Linebaugh v. Carroll, 2009-CA-000888-MR (KYCA)

- "In determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution. . . ." *Arthur v. Martin*, 705 S.W.2d 940, 942 (Ky.App. 1986). In attempting to ascertain intent, courts are admonished to **employ common sense – all too often a rare guest in the house of the law**:
- Fairness, justice and common understanding must enter into the interpretation of any instrument, and an apparent mistake in the use of words will not be permitted to impair what was the real intention of the parties or to defeat their obvious purpose.

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Kentucky – Mistaken Description (2)

Jackson v. Metcalf: 415 S.W.2d 363; 1967

- **Since there was a mistake in the 1918 deed** in that a **relevant call was obviously omitted ...**.
- …we believe the **grantor's intention** will be fulfilled by **assuming** that from the John D. Shell line the boundary follows the southeast boundary of the patent to the E. T. Creech line at the aforementioned double poplar. Crider v. Crum, 233 Ky. 414, 25 S.W.2d 1009; 3 American Law of Property, Section 12.105 at page 413.
- **To hold otherwise would require** us to presume that the grantor in the 1918 deed **intended to retain a small landlocked tract,** a presumption we are not willing to indulge under the circumstances presented.

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Florida : Common Sense (1)

Rapanos v. U.S.A.C.E.
547 U.S. 715; (2006)

- By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.
- We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months--…
- **Common sense and common usage distinguish between a wash and seasonal river.**

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Mass: Common Sense & Deeds (1)

Sumner v. Williams: 8 Mass. 162; 1811

- This reasoning is **the plain dictate of common sense and justice;** and it is not stronger than the case under consideration, which is an attempt to render the defendants liable upon a contract for the performance of obligations, which we know they never assumed.
- The case of *Browning vs. Wright*, which I before referred to, fully maintains the principles adopted by me, in construing this covenant. The case is not dissimilar.
- **It is so well reported, and the argument of Lord Eldon is such a triumph of common sense over technical niceties, that I would rather recommend the reading of the whole, than to weaken by attempting to epitomize it.**

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Mass: Common Sense & Deeds (2)

Sumner v. Williams: 8 Mass. 162; 1811

- The deed, then, certainly is the deed of the administrators, and the seals their seals in that capacity. Can the deed, then, be the deed of Thomas Williams and Joseph Williams, in their private capacities?
- This would be of one contract to make two contracts, of one deed two deeds, and to double the number of the seals.
- **I do hope that our law, which I have been proud to consider as the road to justice, under the directions of sound reason and common sense, will not conduct us into such a labyrinth of absurdity.**

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Why a Statute of Frauds??

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Penn: Statute of Frauds (1)

Kline: How To Fix a Boundary Line

- Before 1772, portions of the English statute were not considered to be in force in Pennsylvania. Several arguments – some politically motivated – were made for this position. One objector considered the English statute inappropriate due to the varying circumstances between England and the colonies.
- In 1772, a statute based on the English law was enacted, but did not include language from the original section four that referred to transfers of land by executors or agents.

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Penn: Statute of Frauds (2)
Kline: How To Fix a Boundary Line

- As of 1877, Pennsylvania courts held that: though the Act of 1772 forbade the transfer of estates in land except by a writing, a parol contract of sale was not void…

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PENN: Statute of Frauds (1)
Ebert v. Wood: 1 Binn. 216; 1807

- Ebert offered to **give evidence of a parol partition having been made by lines run and marked on the ground**, and of possession having been taken by each party respectively according to this partition, and the part allotted to each having been held in severalty from the time of the partition to the time of bringing the action.
- The first objection is founded on the act of **Assembly of 21st March 1772, by which a writing is made necessary for the passing of any estate or interest in lands.** This act of Assembly, so far as respects the point under consideration, is in substance the same as the English statute of frauds and perjuries

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PENN: Part Performance (2)
Ebert v. Wood: 1 Binn. 216; 1807

- **specific execution of a parol agreement shall be decreed in equity, where the agreement has been carried into effect in part only.**
- This determination was founded on two principles:
- 1st, that where the **parties have acted upon their agreement,** there is no danger of perjury in proving it; and
- 2d, because it is against equity that a man should refuse to perfect an agreement, from which he had derived benefit by an execution in part.

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PENN: Part Performance (3)
Ebert v. Wood: 1 Binn. 216; 1807

- Whether the courts of Chancery have gone further than they ought, in thus indirectly giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to inquire;
- because the principles I have mentioned have been adopted by this court, …
- …and long considered as the law of the land; and to question them now, would shake many titles acquired under their authority.

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PENN: Statute of Frauds (1)
Schettiger v. Hopple: 3 Grant 54; 1857

- …the **written instrument contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol.**
- And let it be remembered that the only **purposes for which deeds were invented, and by the statute of frauds** a writing signed was rendered necessary in regard to land, **were to secure evidence of contracts certain as to subject matter and interest.**
- They become, **when executed, the agreed evidence of the intent of the parties,** as to what is conveyed, for what estate, and under what conditions or covenants.

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Penn: Model Written Obligations Act (1)
Kline: How To Fix a Boundary Line

- Pennsylvania is also the only jurisdiction in the United States to include a **"Model Written Obligations Act"** in its legal system. The original model law was created in 1925, but only Pennsylvania and Utah adopted the model law, and Utah quickly repealed it. **33 Pa. Cons. Stat. Ann. § 6** reads in part:

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Penn: Model Written Obligations Act (1)
Kline: How To Fix a Boundary Line

- A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.
- This language is typical of the Pennsylvania court's cavalier attitude toward title transfers. While of limited significance even in Pennsylvania, this language provides another avenue by which the courts could enforce an informal written document.

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AZ: Common Law…includes…(1)
Hoyle v. Superior Court of Arizona:
161 Ariz. 224; 778 P.2d 259; 1989

- The term **"common law" may encompass more than the ancient, nonstatutory law of England** as applied and developed by the English courts. It may also include English statutes amending this law.
- In the context of this statute, the term "common law" includes certain English statutes. The Arizona Supreme Court has described these statutes as follows:
- [T]he acts of parliament of a general nature, and not local to Great Britain, which had been passed and were enforced at the time of our separation from the mother country so far, of course, as they are suitable to our wants, conditions, and circumstances.

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Wisconsin – effect of common law
City Milwaukee v. State:
193 Wis. 423; 214 N.W. 820; 1927

- All litigated cases must be decided according to law**, either statutory or the common law.**
- Where the **legislature has enacted statutes within the proper field of legislation** and not violative of the provisions of the federal and state constitutions, its edicts are supreme, and they cannot be interfered with by the courts;
- and where **legal principles have been laid down by the courts in the proper exercise of their judicial functions** and have **continued in force for such a period as to create vested rights,** such principles **are clothed with a force possessed by a statutory enactment,** and should be recognized and applied …

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Dutch Grants, Hudson & Mohawk: New York (16)
Smith v. Rochester: 92 N.Y. 463; 1883

- We think this and similar cases might properly have been decided for reasons peculiar to the Mohawk and Hudson rivers upon the grounds stated in the Commissioners v. Kempshall (supra), by Senator Verplanck and by the chancellor and Senator Beardsley in Canal Appraisers v. People (17 Wend. 571).
- The **titles granted to the original settlers in the Hudson and Mohawk valleys,** as **construed by the rules of the civil law prevailing in the Netherlands,** from whose government they were derived, did not convey to their riparian owners the banks or beds of navigable streams.

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Justice Cooley – "Knowing the Law"

- **QUASI-JUDICIAL CAPACITY OF SURVEYORS**
- I have thus indicated a few of the **questions with which surveyors may now and then have occasion to deal,** and to which they should bring good sense and sound judgment.
- **Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity** with the acquiescence of parties concerned; and **it is important for them to know by what rules they are to be guided** in the discharge of their judicial functions.
- What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value.

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Original Intent
&
Four Corners Rule

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PENN: Intent of the Parties (1)
Huss v. Stephens: 51 Pa. 282; 1866

- Still, however, it is true of deeds **that the intent of the grantor, when legal, is a governing principle in the construction** of his deed: ***Means v. The Presbyterian Church, 3 Watts & Serg. 303.***
- **As long ago as 1800 it was declared** … that **the great rule of interpretation, with respect to deeds and contracts,** is to put such a construction upon them as will **effectuate the intention of the parties**, if such intention be consistent with the principles of law.

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PENN: Intent of the Parties – Recent (1)
Midland v. Ohioville: 108 A.3d 132; 2015

- The **fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties.**
- The parties' intention must be ascertained from the document itself, if its terms are clear and unambiguous.
- The document is ambiguous if it is ***reasonably susceptible of different constructions and capable of being understood in more than one sense.***
- Parol evidence is admissible to explain, clarify or resolve the ambiguity.

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PENN: Intent of the Parties – Recent (2)
Midland v. Ohioville: 108 A.3d 132; 2015

- Although the **rules of construction aid the courts in ascertaining the intention of the parties**, …
- …they are ***not intended to be "a talismanic solution*** to the construction of ambiguous language."
- **Rules of construction** serve the legitimate purpose of ***aiding courts in their quest to ascertain and give effect to the intention of parties*** to an instrument.
- They are not meant to be applied as a substitute for that quest

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Penn: Intent of the Parties – Recent (3)
Midland v. Ohioville: 108 A.3d 132; 2015

- **Where a document is found to be ambiguous, inquiry should always be made into the circumstances surrounding the execution of the document** in an effort **to clarify the meaning that the parties sought to express** in the language which they chose ….
- It is **only when such an inquiry fails to clarify the ambiguity** …
- …that the rule of construction ... should be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document.

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Ohio – Intent of the Parties (1)
Hall v. Gangale: Case No. 86AP070055 (1986 App.)

- **The object of construing a deed**, as in the construction of other written instruments, …
- …is to **determine the intentions of the parties** thereto.

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Ohio – Intent at the Time (1)
Roebuck v. Columbia Gas:
57 Ohio App. 2d 217; 386 N.E.2d 1363; 1977

- In other words, evidence may be introduced to show the **situation and condition** of the easement and properties involved, …
- …the use made of it, …
- what obstructions, if any, **existed at the time of the grant**,
- …and all other facts bearing upon the situation and relation of the parties, in order to determine what was granted by one party and received by the other, the object being to apply the grant to the subject matter as the parties intended.

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Penn: Four Corners Rule (1)
Burleigh Estate:405 Pa. 373 (1961)

- The pertinent principles of law are well settled; their application is sometimes difficult.
- It is now hornbook law
- (1) that the testator's intent is the polestar and must prevail; and
- (2) that his intent must be gathered from a consideration of (a) **all the language contained in the four corners of his will** and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts;

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Penn: Four Corners Rule (1)
Commonwealth v. Fitzmartin: 376 Pa. 390 (1954)

- The reservation in a deed must be construed as a whole and the intent gathered from a consideration of the entire instrument:
- He that runs may read that the words of the present reservation, **considered from its four corners**, clearly and unequivocally refer to deep mining and not to strip mining.

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Alabama : Crystal Clear? (1)
African Methodist Episcopal v. St. Paul Methodist
362 So. 2d 868; 1978

- Of course, **were the language contained in these deeds crystal clear** in their references to the grantees, **there would be nothing to construe;** the only option open to the court would have been to give force to those plain terms.
- It is axiomatic, as the plaintiff maintains, **that a deed is to be construed by considering the entire instrument** in order to give effect to the grantor's intent, …
- …and arbitrary rules of construction will not be resorted to when that intent can be gleaned from the entire instrument.

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Grammar Isn't Everything

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Florida : Intent is "Pole star" (1)
Ansley v. Graham
73 Fla. 388; 74 So. 505; 1917

- The **modern rule**, which prevails in his State, is much simpler, and much more calculated to carry out the wishes of the grantor.
- **The intention of the grantor, as gathered from the four corners of the instrument, is now the pole star of construction.**
- That intention may be expressed anywhere in the instrument, and in ***any words, the simpler and plainer the better,*** that will impart it; and the court will enforce it no matter in what part of the instrument it is found."

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Florida : Grammar, Illiteracy (2)
Ansley v. Graham
73 Fla. 388; 74 So. 505; 1917

- To hold that by the use in a subsequent part of the deed of technical words found in the statute, …
- …of which he may not, and **probably did not, know the meaning** and effect, he defeated his own intention, …
- …which is expressed in words so clear and simple that a child could understand them, **would do violence to all rules of construction.**

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Florida : Grammar isn't controlling (3)

Ansley v. Graham
73 Fla. 388; 74 So. 505; 1917

- *Mala grammatic a non vitiat chartam*, …
- …**neither false Latin, nor false English, will make a deed void when the intent of the parties doth plainly appear.**"
- "The manifest intention of the grantor will prevail over the doubts which might be raised by strict grammatical construction."
- So far as the instrument under consideration is concerned, any interpretation placed upon it will do violence to grammatical construction.

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Penn : Intent and Grammar (1)

Steele v. Statesman Ins.: 530 Pa. 190 (1992)

- It is basic that no interpretation of contractual language is necessary or permissible unless there is ambiguity which must be resolved.
- Words and phrases shall be construed according to rules of grammar and according to their common and approved usage. "It is often stated in judicial opinions that where the language used in a statute is clear and unambiguous there is no need for interpretation or construction. The same rule applies to the construction of contracts."

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Penn : Intent and Grammar (1)

Commonwealth v. McDermott:
236 Pa. Superior Ct. 541 (1975)

- The setting in which the words are uttered, more strongly than any delicate shading in grammar, reveals the intention of the parties.
- On this principle rather than by a pedantic examination of the meaning of the words of a lay witness, the decision in Murdock's Estate is justified

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SCOTUS: Grants from the State (1)

Shively v. Bowlby: 152 U.S. 1 (1894)

- The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants.
- The familiar rule and its chief foundation were felicitously expressed by Sir William Scott:
- **"All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants;**

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SCOTUS: Grants from the State (2)

Shively v. Bowlby: 152 U.S. 1 (1894)

- …and upon this just ground, …
- …that the prerogatives and rights and emoluments of the Crown **being conferred upon it for great purposes, and for the public use**, …
- …it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, …
- …**beyond what such grant by necessary and unavoidable construction shall take away.**"

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Identification by the Senses And the Meeting of Minds

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Ohio – Meeting of Minds (1)
Tewarson v. Simon: 141 Ohio App.3d 103 (2001)

- "As a general rule, a contract, **being founded upon the meeting of minds between contracting parties**, contains only such terms as are agreed upon, and no others."

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Penn: Meeting of Minds (1)
Martin v. Penn. Turnpike Comm: 381 Pa. 67 (1955)

- In granting the rule against Martin the court below said that "a rescission of a contract must be based on a sufficient consideration."
- But this is a superstructure built on a phantom foundation.
- There never was a contract here to rescind.
- "Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other.

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Penn: Meeting of Minds (2)
Martin v. Penn. Turnpike Comm: 381 Pa. 67 (1955)

- So long as any condition is not acceded to by both parties to the contract, the dealings are mere negotiations and may be terminated at any time by either party while they are pending.
- There must be a meeting of minds in order to constitute a contract.
- This doctrine is very familiar and has been recognized many times in our Courts."

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Identification by the Senses – Mass. (1)
Harrison v. Dolan: 172 Mass. 395; 52 N.E. 513 (1899)

- The tenant manifested her **intent** to maintain possession of **the locus**, even if she did it under a **mistaken description.**
- ***Proesentia corporis tollit errorem nominis***, **identification by the senses overrides description, as in many other cases in the law.** …
- We interpret the finding and ruling as meaning that the tenant in actual fact occupied the premises adversely during the whole twenty years,

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Ohio – Meeting of Minds – Explained (1)
Convenient Food Mart v. Countywide Petroleum: Case no. 84722: 2005-Ohio-1994

- The term **"meeting of the minds,"**…
- … while seeming subjective on its face, is far more objective in application than it might appear:
- "In early nineteenth-century America, courts and text writers developed the notion that **the basis of contract law was the actual 'will' or 'meeting of minds**' of the parties, which certainly suggests a more subjective approach to contract interpretation.

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Ohio – Meeting of Minds – Explained (2)
Convenient Food Mart v. Countywide Petroleum: Case no. 84722: 2005-Ohio-1994

- Interestingly, however, the interpretation of contracts during that period continued the common-law tradition of ascertaining **the intentions — now the 'minds' — of the parties** by examining the common examining the common meaning of the words used in the agreement.

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Ohio – Meeting of Minds – Explained (3)

Convenient Food Mart v. Countywide Petroleum:
Case no. 84722: 2005-Ohio-1994

- For example, American courts continued to adhere to the **common-law parol evidence rule,** …
- …by which evidence of the parties' subjective ***intentions unexpressed in the written terms of an integrated agreement was regarded as irrelevant*** to the interpretation of the agreement.
- Indeed, more than one observer has noted the irony that the ascendancy of the 'will' theory of contract in the early nineteenth century was accompanied by an increasingly 'objective' approach to interpretation."

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Identification by the Senses S.C.O.T.U.S. (1)

Minneapolis & St. Louis v. Columbia Rolling:
119 U.S. 149; 7 S. Ct. 168; 30 L. Ed. 376; 1886

- As **no contract is complete without the mutual assent of the parties**, an offer to sell imposes no obligation until it is accepted according to its terms.
- So long as the **offer has been neither accepted nor rejected, the negotiation remains open**, and imposes no obligation upon either party; …
- …the one may decline to accept, …
- …or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made.

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Counteroffer not Acceptance S.C.O.T.U.S. (2)

Minneapolis & St. Louis v. Columbia Rolling:
119 U.S. 149; 7 S. Ct. 168; 30 L. Ed. 376; 1886

- A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer,…
- … and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.

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Meeting of Minds: U.S. Supreme Court (1)

Brawley v. U.S.A.: 96 U.S. 168; 24 L. Ed. 622; 1877

- The written contract merged all previous negotiations, and is presumed, in law, **to express the final understanding of the parties.**
- **If the contract did not express the true agreement, it was the claimant's folly to have signed it.** The court cannot be governed by any such outside considerations.
- Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

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Dictionary as a Fortress??

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Judge Learned Hand: Dictionary as Fortress

Cabell v. Markham: 148 F.2d 737; 1945

- Of course it is true that the **words used, even in their literal sense, are the primary, and ordinarily the most reliable,** source of interpreting the meaning of any writing: be it a statute, a contract, or anything else.
- But it is one of the surest **indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary**; but to remember that statutes always have some purpose or object to accomplish, whose **sympathetic and imaginative discovery** is the surest guide to their meaning.

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Judge Learned Hand: "Twenty Bishops"

Ashwood Capital v. OTG Management:
948 N.Y.S.2d 292 (2012)

- This case serves as a reminder that in order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it. **As Judge Learned Hand stated:**
- "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.
- A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.

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Judge Learned Hand: "Twenty Bishops"

Ashwood Capital v. OTG Management:
948 N.Y.S.2d 292 (2012)

- **If, however, it were proved by twenty bishops** that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, …
- …he would still be held, unless there were some mutual mistake, or something else of the sort.
- Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent"

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Penn: Dictionary as a Fortress (1)

Commonwealth v. Smith: 221 A.3d 631 (2019)
(Concurring Opinion)

- As used in Section 6110.2,[1] the term "alter" is ambiguous.
- As the Majority notes, some dictionaries propose narrow definitions of the word, while others propose broad ones.
- **The resulting muddle brings to mind Judge Learned Hand's wisdom that…**

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Penn: Dictionary as a Fortress (2)

Commonwealth v. Smith: 221 A.3d 631 (2019)
(Concurring Opinion)

- …"it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."
- Consistent with Hand's interpretive spirit, the Majority astutely investigates the skullduggery that Section 6110.2 is seeking to remedy.

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Ohio – Dictionary as a Fortress (3)

In Re: Ohio Edison Co.: 131 N.E.3d 906 (2019)

- Here, PUCO **appears to be playing the old dictionary definition matching game.**
- According to the rules of that game, **one chooses a single definition** or part of a definition.
- Then one **squints at the chosen words in isolation** until one's sense of the colloquial use of language is **sufficiently dulled,** and one concludes that the matter at hand could (just maybe) be covered by that definition.
- From this, a player of the game leaps to the conclusion that this is what the statute means.

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Ohio – Dictionary as a Fortress (4)

In Re: Ohio Edison Co.: 131 N.E.3d 906 (2019)

- Instead of playing this game, one should stop and take stock of how the word or words are actually used by ordinary speakers of the English language.
- And it should be plain that an incentive cannot be anything that might stimulate an outcome.

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Harmonize All Parts

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Virginia: Harmonize all Deed calls (1)
Conner v. Hendrix: 194 Va. 17; 72 S.E.2d 259; 1952

- In the construction of deeds it is to be remembered "That it is the **duty of the court to give the proper meaning to every word** used in the instrument if possible."
- "**Effect and meaning should be given to every part of the deed,** if it can be done consistently with the rules of law."
- Words descriptive of the land conveyed should be given their established, definite, usual and ordinary meaning, unless a contrary intent appears.

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Virginia: Harmonize all Deed calls (2)
Conner v. Hendrix: 194 Va. 17; 72 S.E.2d 259; 1952

- "To justify the suppression of a part of a description it must not **only be out of harmony with other parts** of the description; ...
- ...but it must be **undeniably so in some important respect**, after putting a reasonable construction upon the rest of the description."

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Virginia: Harmonize all Deed calls (3)
Conner v. Hendrix: 194 Va. 17; 72 S.E.2d 259; 1952

- "It is a well-settled rule of construction that inasmuch as the **parties must have intended all the provisions and terms of a deed to have some meaning** and be given some import, from the fact that the terms and provisions were actually inserted in the deed, a deed will be so interpreted as to make it operative and effective in all its provisions, if its terms are susceptible of such interpretation.
- **Every word, if possible, is to have effect,** for, it has been said, the deed, as the witness to the contract between the parties, should speak the truth, the whole truth, and nothing but the truth."

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Penn: Harmonize all Calls (2)
Hardy v. PennDER: 515 A.2d 356 (1986)

- Petitioners' interpretation renders the statutory term "initiates", as found in "initiates an adversary adjudication," 71 P.S. 2033(a), mere surplusage.
- **We must construe a statute to give effect to every word, if possible,**

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Penn: Harmonize all Calls (2)
Commonwealth v. Driscoll: 485 Pa. 99 (1979)

- Our purpose in this case, as it is in any case requiring interpretation of a statute, is to give effect to the intent of the legislature. To determine that intent we look both to the statutory scheme, and to the specific language of the Act. We must assume that the legislature intends every word of the statute to have effect.

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What are the "Surrounding Circumstances?"

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Intent in Light of Surrounding Circumstances Includes…

- **Common Law principles** current at the time of the creation of the description (not at the later time of transcribing the original description!)
- **Current Land Use** as of the time of writing
- Current **technology** (example, mining and drilling techniques)
- Current Municipal Ordinances at time of writing
- Customs at time of writing
- Idioms and local usage

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Alabama: Surrounding Circumstances (3)

Barker v. Mobile Electric
173 Ala. 28; 55 So. 364; 1911

- Although "it is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, …
- …yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, * * * in order to give a definite meaning to the language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description."

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PENN: Surrounding Circumstances (1)

Yuscavage v. Hamlin: 391 Pa. 13; 137 A.2d 242; 1958

- As we recently pointed out …certain rules are applicable in the construction of deeds. Among such rules are those providing:
- (1) that the **nature and quantity of the interest conveyed must be ascertained from the instrument itself**
- …and **cannot be orally shown in the absence of fraud, accident or mistake**
- …and **we seek to ascertain not what the parties may have intended by the language but what is the meaning of the words;**

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PENN: Surrounding Circumstances (2)

Yuscavage v. Hamlin: 391 Pa. 13; 137 A.2d 242; 1958

- (2) **effect must be given to all the language of the instrument and no part shall be rejected if it can be given a meaning;**
- (3) the language of the deed **shall be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.**

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PENN: No part of Deed rejected (3)

Yuscavage v. Hamlin: 391 Pa. 13; 137 A.2d 242; 1958

- And while it is true that a recital not a necessary part of the deed can neither diminish nor qualify the grant if that operative part of the deed is certain and definite yet, where the terms are uncertain or contradictory, reference may be made to the recital to determine the intention of the parties.
- On this aspect of the matter we must also keep before us one of the **cardinal principles in the construction of deeds, i.e., that no part shall be rejected if it can be given a meaning.**

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Kentucky – Lord Blackstone & Intent (1)

Atkins v. Baker: 112 Ky. 877; 66 S.W. 1023; 1902

- "The **proper end of all rules of construction** is **to effect the intention of the parties to the instrument;**
- …and the **intention of the grantor in a deed is to govern**, where it can be ascertained, equally as in the case of other instruments.
- In arriving at it **the entire paper must be considered.**
- **Blackstone** says that the **construction must be made upon the entire deed**, and **not merely upon disjointed parts of it.'**

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Ohio – Identical Names (1)

Alston v. Alston: 4 Ohio App. 2d 270 (1964)

- In *17 Ohio Jurisprudence 2d 144, Deeds, Section 43, "Extrinsic Evidence to Identify Grantee,"* it is said in part as follows:
- " * * * Likewise, a latent ambiguity in a deed as the person intended may be explained by extrinsic evidence. Thus, where there is a conveyance of land to a person by name, and there are two persons of the same name, evidence is admissible to show which one was intended."

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Significance of Parol Statements

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PENN: Significance of Parol Agreement (1)

Pierro v. Pierro: 438 Pa. 119; 264 A.2d 692; 1970

- "Where it is necessary to prove any essential feature of an agreement for the sale of land by oral testimony, the agreement is not in writing within the meaning of the statute of frauds
- **"'[P]arol evidence to describe the land intended to be sold is one thing, (and hence is inadmissible) and parol evidence to apply a written description to land is another and very different thing, and for that purpose is admissible.'"**

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PENN: Significance of Parol Agreement (2)

Pierro v. Pierro: 438 Pa. 119; 264 A.2d 692; 1970

- "'If the subject-matter, the land, be described, **we admit evidence in order to apply the description to the land;** but we cannot admit parol evidence, first, to describe the land sold, and then, to apply the description.'"
- **"[P]arol evidence may be used to explain and define the description contained in the writing, but not to create the description itself."**
- Because the agreements contain no descriptions, any parol evidence would be creating the description rather than explaining, defining, or applying the description already given.

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Ohio – Effect of Parol Statements (1)

U.S. Construction v. Harbor Bay: 172 Ohio App.3d 609 (2007)

- We concur with the trial court.
- The parol evidence rule states that
- *"absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements."*

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Ohio – Effect of Parol Statements (2)
Galmish v. Cicchini: 90 Ohio St. 3d 22 (2000)

- "The parol evidence rule, as is now universally recognized, is **not a rule of evidence but is one of substantive law.**
- The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.

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PENN: Parol Evidence Rule: (1)
Ledonne v. Kesler: 256 Pa. Super. 280 (1978)

- Succinctly stated, the purpose of the parol evidence rule is ". . .to preserve the integrity of written agreements by refusing to permit the contracting parties to attempt to alter the import of their contract through the use of contemporaneous [or prior] oral declarations."
- "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement."

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Alabama : Parol Statements vs. Deed (1)
Litchfield v. Falconer:
2 Ala. 280; 1841

- It is a **settled principle**, both in the English and American courts, that **parol evidence is not admissible to contradict, vary, or materially affect,** by way of explanation, a contract in writing.
- This rule rests upon the ground that **written evidence is of a higher grade** than the mere verbal declarations of witnesses; and consequently, where parties have agreed upon the terms of a contract, which is afterwards reduced to writing, the verbal agreement is merged in the written contract.

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Alabama : Parol Statements vs. Deed (1)
Lamar v. Minter:
13 Ala. 31; 1848

- The **deed must be held to speak its own meaning**, and **cannot be limited, enlarged or explained by parol evidence**, so as to make it operative otherwise than its terms indicate.
- …while in some cases it is allowable to prove by parol, matters which are extrinsic of, and not concluded by the deed, **it is not admissible thus to contradict the description of the land it purports to convey;** so as to give to the deed an operation different from what its terms import.

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Public Intent vs. "What he intended"

- "Intentions" as applied to the construction of a deed is a term of Art and signifies a "meaning of the writing" (Donald A. Wilson)
- Thus the proper question is not what he meant to do, but what he did according to the words recorded in a description.
- Each word has a specific meaning, whether it be a technical term or a layman's phrasing, but the grantor is assumed to understand the meaning of every word in a description that he signed.
- A deed is the written embodiment of the intent…

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Intent and Government Surveys

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Washington: Where it actually was… (1)
Strunz v. Hood:
44 Wash. 99; 87 P. 45; 1906

- …**a court or a court commissioner cannot correct the United States government surveys,** …
- …or establish government corners at points other than those fixed by the government surveyors; that in any attempt to reestablish an original survey …
- …the purpose should be to **follow the footsteps** of the government surveyor as nearly as possible, and that when there is any variance between field notes and monuments as set up by the United States government surveyors, the monuments must prevail

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Washington: "Where it should have been"?? (2)
Strunz v. Hood:
44 Wash. 99; 87 P. 45; 1906

- It was undoubtedly the duty of the commissioner to ascertain if possible where the original government monuments had been actually located and established,…
- … rather than where he might think they ought to be located or established.

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Follow the Original Footsteps

Kentucky – Original Footsteps (1)
Lainhart v. Shepherd: 246 S.W.2d 460; 1952

- His decision is upheld by this statement of the law from *8 Am.Jur., Boundaries, Sec. 10, p. 751*: 'Boundary lines may be indicated by courses and distances as well as by monuments, or by both monuments and courses and distances. **In the event of an inconsistency** between the **monuments and the courses and distances** described,
- …the **general rule** is that resort is to be had to the **monuments whether natural or artificial, and then to courses and distances**, although **this rule of relative importance is not an inflexible one.'**

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Heard this Phrase Before? Kentucky (2)
Lainhart v. Shepherd: 246 S.W.2d 460; 1952

- ***Morris v. Jody, 216 Ky. 593, 288 S.W. 332, 333,*** relied upon by appellant, is clearly in accord with our view on the issue at stake when it states:
- …'All of the rules of law that have been adopted for guidance in locating disputed boundary lines have been to the end that, in so doing, **the steps of the surveyor who originally projected the lines on the ground** may be retraced as nearly as possible.
- No rule that has been adopted to accomplish that end is more firmly established than that courses and distances are controlled by marked corners and fixed monuments.'

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PENN: Original Survey (1)
Healy v. Moul, 5 Serg. & Rawle 181 (1819)

- After a survey made and returned, the lines cannot be altered by the deputy surveyor to the injury of a third person, on the ground of mistake in such survey: …
- …and evidence of a diagram afterwards made by authority of the deputy surveyor and approved by him and returned to the surveyor general's office, who directed a resurvey which was suspended by suit, is not admissible after a lapse of time to shew mistake in the original survey in excluding some lands and including others.

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PENN: Original Survey (2)
Healy v. Moul, 5 Serg. & Rawle 181 (1819)

- The first presumption is, that every survey is made with the consent of the owner, if it is returned.
- That presumption is corroborated, if it is patented.
- It would require evidence of fraud and imposition by the surveyor, or by the adverse claimant, to let the owner take lands that had been appropriated to others.
- It would be opening a wide door, if at the end of 30 years, evidence were to be received, that all this was done in mistake, and land opened to a new survey, where it had been appropriated by grant and patent, for all that time.

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PENN: Original Survey (3)
Healy v. Moul, 5 Serg. & Rawle 181 (1819)

- What miserable confusion would ensue, if every deputy, after his survey returned, was at liberty to change the position of an actual survey, actually returned, and disturb intermediate grants.

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Tenn: Original Footsteps, Not Later Ones (5)
Open Lake v. Lauderdale Haywood:
No. W2009-02269-COA-R3-CV (2011)

- …the duty of a retracement surveyor is to **locate on the ground the boundary lines and corners established by the original survey.**
- …in order to determine the location of disputed boundary lines on the ground, a **retracement surveyor must restore the original surveyor's lines in the same position as they were marked initially** at the time of the original land grant.
- …the purpose of the resurvey is to determine **where the footsteps of the original surveyor were located, not the footsteps of the most recent surveyor.**

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Florida : Original Footsteps (1)
Beckham v. Bennett:
118 So. 3d 896; 2013

- A surveyor cannot set up new points and establish boundary lines unless he is surveying unplatted land or subdividing a new tract.
- **Subsequent surveyors may only locate the points and retrace the lines of the original survey; they cannot establish new lines or corners.**

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Florida : Original Footsteps (2)
Beckham v. Bennett:
118 So. 3d 896; 2013

- Likewise, **boundaries originally located and set (right, wrong, good or bad) are primary and controlling** when inconsistent with plats purporting to portray the survey…
- … and **later notions as to what the original subdivider or surveyor intended** to be doing or as to where later surveyors, working, perhaps, under better conditions and more accurately with better equipment, would locate the boundary solely by using the plat as a guide or plan.

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Florida : Original Footsteps (3)
Beckham v. Bennett:
118 So. 3d 896; 2013

- **Written plats are not construction plans** to be followed to correctly reestablish monuments and boundaries.
- **They are "as built" drawings of what has already occurred** on the ground and are properly used only to the extent they are helpful in finding and retracing the original survey which they are intended to describe

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PENN: Original Footsteps (1)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- But **with an original mark for a starting point,** the lines may be run in accordance with the legal presumption and will hold the tract against all younger surveys.
- **The work found on the ground is the basis.**
- It **fixes the footsteps of the surveyor**, so far as it exists, and from it the legal presumption projects the lines along the courses and distances as returned, and incloses the tract.

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PENN: Original Footsteps (2)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- The following important facts should be borne in mind in examining this question:
- 1st. The location of the block, as such, is not involved, nor are its lines before us.
- 2d. The location, that is, the existence on the ground, of no member of the block is challenged in any manner.
- 3d. The question is simply one of boundary between two interior surveys in a block conceded to be on the ground.
- **What have we to guide us in fixing this boundary?**

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PENN: Original Footsteps (3)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- Unless there is some monument of the survey or some call to control it, the line must be run from the white oak, on its official course, to the intersection with the line southwest from the pine.
- Is there monument or call to deflect this line from its course as returned?
- It is conceded that there is nothing on the southwest of Steiner and northeast of Scott, for the line was not run on the ground.

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PENN: Original Footsteps (4)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- There is no marked tree or fixed monument called for at the southwest corner.
- There is no call for an adjoiner that can control the direction of this line;
- for, while the connected draft represents these four tracts as having a common post corner, and the Frey as adjoining the Steiner along the whole extent of its northwest side,
- **the work on the ground, which overrides the calls, shows the return to be mistaken.**

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PENN: Original Footsteps (5)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- But the **learned judge regarded the sugar**, the common corner of the Frey and the Slough, **as a monument of the Steiner. Why?**
- It is not on the lines of the Steiner.
- It is **not adopted, referred to, or noted in any manner by the deputy surveyor,** as a monument of the Steiner, in his official return of that survey.
- It **belongs to other surveys, which, while members of the same block, are in all other respects independent of each other** and well located by original lines on the ground.

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PENN: Original Footsteps (6)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- It was a mistake, therefore, to apply a rule intended to protect a member of a block which was without lines on the ground from the encroachments of a junior survey by calling to its aid all the marks on the lines of the block to fix its location, to a question of boundary between interior members of the same block; especially when as here the lines of the block were not before the court.
- The legal presumption that the survey was made as it was returned must prevail, until it is overcome by work on the ground, or by calls that require an abandonment of it.
- This rule is **applicable to a single survey and to a block of surveys with equal force.**

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PENN: Original Footsteps (7)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- But **with an original mark for a starting point, the lines may be run in accordance with the legal presumption and will hold the tract against all younger surveys.**
- **The work found on the ground is the basis.**
- It fixes the footsteps of the surveyor, so far as it exists, and from it the legal presumption projects the lines along the courses and distances as returned, and incloses the tract.

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Tenn: More Certain Controls (1)

Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- It is well settled in Tennessee that "'[i]n determining disputed boundaries resort is to be had **first to natural objects or landmarks,** because of their very permanent character; next, to artificial monuments or marks, then to the boundary lines of adjacent landowners, and then to courses and distances.'"
- The governing rules are near universal and are recited by the Court of Appeals in Ohio in ***Sellman v. Schaaf, 26 Ohio App.2d 35, 269 N.E.2d 60, 66 (1971).***

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Tenn: Original Footsteps – Recent Case (2)

Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- **all the rules of law adopted for guidance in locating boundary lines have been to the end that the steps of the surveyor who originally projected the lines on the ground may be retraced as nearly as possible**; …
- …further, that in determining the location of a survey, the fundamental principle is that it is to be located where the surveyor ran it.

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Tenn: Original Footsteps – Recent Case (3)

Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- **Any call, it has been said, may be disregarded, in order to ascertain the footsteps of the surveyor** in establishing the boundary of the tract attempted to be marked on the land; …
- …and the conditions and circumstances surrounding the location should be taken into consideration to determine the surveyor's intent."

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Tenn: Original Footsteps – Recent Case (4)

Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- ***In Clark, Surveying and Boundaries …***
- "The original survey must govern if it can be retraced. It must not be disregarded.
- So, too, the places **where the corners were located, right or wrong**, govern, if they can be found. In that case a hedge planted on the line established by original survey stakes was better evidence of the true line than that shown by a recent survey.
- In making a resurvey it is the **surveyor's duty to relocate the original lines and corners at the places actually established and not to run independent new lines, even though the original lines were full of errors."**

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Tenn: Original Footsteps – Recent Case (5)

Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- **"The line actually run is the true boundary,** provided the essential survey can be found and identified as the one called for, and prevails over maps, plats, and field notes. * * * **The lines marked on the ground constitute the actual survey** and where those lines are located is a matter to be determined by the jury from all the evidence. If the stakes and monuments set at the corners of the parcel in making the survey have disappeared, it is competent to show their location by parol evidence."

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PENN: Original Surveyor – Mistake (1)

Sugarloaf Township Appeal
209 Pa. Super. 52 (1966)

- By utilizing the bearings as actually drafted on the incorporation plot the description closed without difficulty.
- Utilizing the bearings as written thereon a distortion arose which resulted in an outline of an area that did not close, the terminal of the final bearing being far removed from the beginning point.
- It appeared to the Commission that the original surveyor by inadvertence had made an error in transposing two letters in the bearings, not an uncommon error, and that their transpositions were the cause of the dispute.

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PENN: Original Surveyor – Mistake (2)

Sugarloaf Township Appeal
209 Pa. Super. 52 (1966)

- After hearing, view of the boundaries on the ground, and examination of records, the Commission, one mem- ber of which was a registered surveyor and the other two members of the Luzerne County Bar, made its report in which it …
- …recommended corrections in the description of the
- …northerly line from N. 54° W. to S.54° W., and of the …
- …southerly line from S. 80° E. as written, to N. 80° E., as plotted.

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Rules of Construction

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Old Surveys were often Inaccurate?: Va.

Herbert v. Wise: 7 Va. 239; 1802

- To pursue the proper descriptions of our land boundaries, would render men's titles very precarious, not only from the variations of the compass, …
- …but that **old surveys were often inaccurate**; and mistakes often made, in **copying** their descriptions into the patents; **leaving out lines**, and **putting north for south**, and east for west; and in **copying those descriptions into subsequent conveyances**:

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The Rules of Construction – Generic (Priorities, or Order of Importance)

1. Natural Monuments – creeks, streams, ridgelines, etc.
2. Artificial Monuments – marked survey lines, concrete monuments, rebar.
3. Adjacent tracts or boundaries (call for adjoiners)
4. Courses and / or bearings (may be combined with 5)
5. Distances – States are not consistent when considering the hierarchy between course and distance. Most consider them of nearly equal stature.
6. Area or Quantity

Note that the Rules of Construction are guidelines, not a straightjacket!!

PENN: Rules of Construction (1)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- Initially, we note that the **primary function** of the trial court resolving a boundary dispute is to ascertain the **intent of the grantor** at the time of the original subdivision.
- **To achieve this result, our courts have employed certain rules of construction that are commonly thought to provide the best indication of that intent.**

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PENN: Guidelines Only (2)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- **As a general rule, where there is a conflict** between courses and distances or quantity of land and natural or artificial monuments, the **monuments prevail**. Moreover, natural monuments normally take preference over artificial marks or monuments.
- **These rules, however, are not imperative but are aids in construction that must yield to a contrary showing.**

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PENN: Rules of Monuments (3)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- **Monuments are visible markers or indications left on natural or other objects indicating the line of a survey.**
- "[N]atural objects, such as the bank of a stream, the shore of a lake, a precipice or ledge or rocks, a fountain or spring of water, may be adopted . . . as . . . monuments fixing the location of lines and corners."

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PENN: Rules of Monuments (4)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- We fully recognized **the general rule that monuments on the ground are of the highest value** on questions of boundary, …
- …but that **rule cannot prevail where the monument claimed is so manifestly wrong as to lead to an absurd result** …
- …as here, **embracing the land of a third party. An alleged monument, which is a palpable mistake, will be disregarded.**

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PENN: Rules of Monuments (5)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- In Appeals of ***Borough of Dallas, supra***, this court stated:
- Though some of the terms of description . . . are entitled usually to more probative value than others, …
- …yet, in the end, the true construction is ascertainable **by the totality of their combined effect and not wholly and exclusively by any one term when it is irreconcilable with the other terms** of description.
- **To lay down the hard and fast rule that only monuments . . . are determinative elements of a description . . . is to make the rule contended for more important than the underlying intent of the contracting parties** . . . .

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PENN: Called-For Monument (6)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- With the exception of the deed of April 27, 1978, **none of the deeds in either chain of title makes reference to any monuments**, …
- …nor was any evidence presented at trial showing that any monuments were erected by either of the parties or their predecessors with intent to conform to the deed.
- The defendants' [appellants] claim to a tract containing 40.29 acres would seem to be the type of 'absurd result' which the Post court wished to avoid."

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Ohio: Court Sets Rules of Retracement: (5)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- "**Generally, in determining boundaries**, …
- …**natural and permanent** monuments are the most satisfactory evidence and control all other means of description, in the absence of which the following calls are resorted to, and generally in the order stated:

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Ohio: Court Sets Rules of Retracement: (6)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- First, **natural** boundaries;
- second, **artificial** marks;
- third, **adjacent** boundaries;
- fourth, **course and distance**,
- *course controlling distance, or distance course, according to circumstances.*
- **Area is the weakest of all means of description."**

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Ohio: Guidelines, Not Straightjacket: (7)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- Appellant argues that the trial court erred by using area over distance and by looking at the intent at the time of the partition.
- However, the record establishes that the trial court did not use area as the controlling factor and did not apply a different standard.
- **First, we note that the standard in Broadsword is not a rigid rule that must be followed blindly in every situation.**

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Ohio: More Certain Controls: (8)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- The ground of the rule is that **mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent.**
- The reason assigned for this rule is that **monuments are considered more reliable** evidence than courses and distances.
- A description by **course and distance is regarded as the most uncertain kind of description,** because mistakes are liable to occur in the making of the survey, in entering the minutes of it, and in copying the same from the fieldbook."

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NC: Original Footsteps – Reject the False (2)

Ritter Lumber v. Montvale Lumber:
169 N.C. 80; 85 S.E. 438; 1915

- …and, besides, **there are other calls in the survey of equal importance** with the one for Defeat Ridge, **which would have to be disregarded** if that is adopted as the end of the first line.
- If the line is run from A to D, we are following the footsteps of the surveyor, **and rejecting a false description** for that which is not only certain, but which the referee and judge say was the one actually adopted by the parties at the time of making the surveys.

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Alabama: Reject the False (2)

Crampton v. Prince
83 Ala. 246; 3 So. 519; 1887

- The reason of the rule is that where there is a discrepancy between two descriptions, **the one will be adopted as to which there is least liability of mistake**,--
- **Rejecting the description which is most apt to be erroneous,** the law regards it as a mere misdescription, and not as a warranty of the quantity of land intended to be conveyed.

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PENN: Call for Adjoiner (5)

Stark v. Equitable Gas: 116 A.3d 760; 2015

- '[w]here monuments are doubtful, resort will be had to the courses, distances, and quantity.'")
- ("When the **line of another tract** is **called for in the description of a deed as one of the boundaries** of the land conveyed, the line ordinarily runs to such boundary line.
- **When such line is certain and notorious**, it is to **be treated as the monument or boundary** rather than the ambiguous location of the center of a paper street which need not be taken as a monument or permanent landmark for the purpose of fixing the boundary line in this case.")

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Course vs. Distance

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SCOTUS: P.O.B., Course v. Distance (1)

Preston's Heirs v. Bowmar: 19 U.S. 580 (1821)

- "It may be laid down as a universal rule, that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances."

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PENN: P.O.B., Course v. Distance (1)

Baker v. Roslyn Swim Club:
206 Pa. Super. 192; 213 A.2d 145; 1965

- ""Where the calls for the location of boundaries to land are inconsistent, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances."

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PENN: P.O.B., Course v. Distance (2)

Baker v. Roslyn Swim Club:
206 Pa. Super. 192; 213 A.2d 145; 1965

- However, the same paragraph continues with the following language: "Where, however, it is apparent that a mistake exists with respect to the calls, an inferior means of location may control a higher one. In the last analysis the call adopted as the controlling one should be that most consistent with the apparent intent of the grantor."
- "Generally, among the inferior calls, course will control distance if they are inconsistent, and course and distance will control quantity."

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PENN: P.O.B., Course v. Distance (3)

Baker v. Roslyn Swim Club:
206 Pa. Super. 192; 213 A.2d 145; 1965

- Likewise, the same general rule and the same exceptions are cited in 11 C.J.S. Boundaries § 51, as follows: "The rule that artificial monuments control courses and distances in case of conflict is not an imperative and exclusive one, but is a rule of construction to ascertain, or to aid in determining, the intention of the parties; and it is not followed where strict adherence to the call for a monument would lead to a construction plainly inconsistent with such intention.""

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Alabama: Variation of the Compass (1)

Taylor v. Fomby
116 Ala. 621; 22 So. 910; 1897

- **In the absence of calls for monuments**, therefore, or if the monuments called for can not be found, **the courses and distances control quantity, and all other less definite terms of description."**
- In establishing an original line of survey, **according to the field notes used in such survey,** attention is given, therefore, first to calls for natural or artificial monuments, and if these are not to be found, to courses and distances, with the variation of the needle from the true meridian as indicated for the original survey on the field notes.

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Alabama: Variation of the Compass (2)

Taylor v. Fomby
116 Ala. 621; 22 So. 910; 1897

- In these surveys, **north and south lines are to be run, according to the true meridian,** *(U. S. Stat. 2395)*; and it has been held, that *where the lines are obvious, they must be followed, though made on an assumed or wrong magnetic variation.--Bonney v. McLeod, 38 Miss. 393.*
- And, it is only when lost lines and corners are to be renewed, due allowance must be made for the variation of the magnetic needle from the true meridian.

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PENN: Declination (1)

Hagey v. Detweiler: 35 Pa. 409; 1860

- A line which depends on allowances for **the variation of the needle**, and the position of a post set so long ago as 1784, **cannot be considered free from doubt, however traceable by its appropriate course it may be**, if the position of the post be assumed.
- **The doubt has reference of course** to the starting-point, not to the bearing of the line; **but that doubt infects the line from beginning to end.**

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Area

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PENN: Area ...(1)

Glen v. Glen, 4 Serg. & Rawle 488 (1818)

- It may be, however, that the original intent was, to convey 200 acres, and through a mistake arising from miscalculation, such boundaries have been fixed, as contain 213 acres;
- How would the law stand, on that supposition ?
- The boundaries being recognised by both parties, must betaken for those intended by the deed;
- ...

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PENN: Area ...(2)

Glen v. Glen, 4 Serg. & Rawle 488 (1818)

- ...and thus we have the case of a deed, containing 13 acres more than was supposed by either party ; possession held for 13 years, and then, both grantor, and grantee being dead, an attempt to open the conveyance, for no other reason, than that it contained a surplus of 13 acres.
- Why were the words more or less used, but to shew, the understanding of the parties, that the boundaries should not be affected by a deficiency or surplus of quantity ? Would a court of chancery interfere in a case of this kind ?
- I think not.

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PENN: Area ...(7)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- "Evidence of the acreage of land, especially where the number of acres is followed by the words **'more or less', has little weight as against specific boundaries** and is in its nature **an uncertain method of description and often a mere estimate.**
- **Where, however, a doubt exists** as to the actual location of the boundary and the writing contains **no words to definitely fix the line by either metes and bounds or monuments** on the ground, **evidence of the acreage becomes a material factor** in the determination of the intention of the parties

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Kentucky – Does Area Control ? (2)

Metropolitan Life v. Hoskins:
273 Ky. 563; 117 S.W.2d 180; 1937

- …**it is argued** that the deeds, beginning with the commissioner's deeds, as well as the mortgage to appellant's assignor, **show an intention that the acreage was to control**, since each tract was described as containing a specific number of acres, and in the sales to Stevens and Hoskins the ***land was to be paid for by the acre.***
- **We think, however**, that the deeds more clearly evidence an ***intention to pass title to the land surveyed and platted by the surveyor*** employed in the A. B. Hampton settlement suit and described by metes and bounds.

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Oregon: Area & Government Surveys…(1)

Kanne v. Otty:
25 Ore. 531; 36 P. 537; 1894

- The **plaintiffs contend that it was the intention** of the government of the United States to grant, and of William S. Buckley **to acquire, one hundred and sixty acres** of land under the provisions of section 5 of the act of congress, approved September twenty-seventh, eighteen hundred and fifty, (9 U.S. Stat. 406,) …
- …and that this intention of the parties will control courses, distances, boundary lines, monuments, and quantity, while the …
- …defendants contend that the intention of the parties is to be ascertained by the boundaries established by the original survey.

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Oregon: Ambiguity in the deed (2)

Kanne v. Otty:
25 Ore. 531; 36 P. 537; 1894

- Where there is ambiguity in the descriptive words of a grant respecting the quantity, character, or duration of the estate conveyed, evidence of the intention of the parties at the time the instrument was executed is admissible in interpreting it:
- In a controversy respecting a deed containing a description which referred to a boundary line, ***"as surveyed by Israel Johnson and Isaac Boynton,"*** it was contended that the premises had never been surveyed by them. The court, in construing the reference contained in the instrument, said: "If Johnson and Boynton never made any survey, there was a latent ambiguity in the deed"

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Oregon: Measurements are guides only…(3)

Kanne v. Otty:
25 Ore. 531; 36 P. 537; 1894

- In *Vandusen* v. *Shively*, 22 Ore. 64, 29 P. 76, which was a suit to establish the boundary lines of a donation land claim, BEAN, J., said:
- "The location of this line is a question of fact to be ascertained from the evidence.
- The courses and distances as given in the field notes are but descriptions which serve to assist in determining where the line was actually run.

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Oregon: Original Government Line Controls (4)

Kanne v. Otty:
25 Ore. 531; 36 P. 537; 1894

- Section 2396, U.S. Revised Statutes, provides that **"All the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners** of the sections or subdivisions of sections which they are intended to designate."
- In ***Goodman v. Myrick, 5 Ore. 65***, it was held that all claims surveyed under the act of congress, approved September twenty-seventh, eighteen hundred and fifty, were recognized as legal subdivisions, and that **the true line was the one actually run upon the ground in the original survey of donation land claims.**

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Ohio: Area: (6)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- **Area is the weakest of all means of description."**

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Are Modern Surveys Different?? (Define 'Modern')

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POB March, 2017 – Why the rules still apply to Modern Subdivisons

1) One of the most telling points against the abandonment of the rules of construction is their continued and consistent application in modern decisions.
2) While the four corners rule is applied commonly to deeds, wills, and contracts, it is equally applicable to recorded and unrecorded plats.
3) **Wheeler v. Hoffman: No. 40-2-07 Oecv; Vermont Super (2009)** points out the fallacy of depending on local regulations while ignoring the rules of construction.
4) The stability of property boundaries and titles is of paramount concern to the courts.
5) Surveying and Engineering are different disciplines

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Washington: Interpreting a Plat (1)

Staff v. Bilder:
68 Wn.2d 800; 415 P.2d 650; 1966

- Meadowdale Beach plat, **laid out by compass and chain in 1904** in the **accepted method of the day**, **has many inaccuracies and discrepancies,** all particularly revealed in surveys from time to time through the more modern transit method of surveying.
- Mathematically, moreover, the 1904 plat does not close. Although some of the tracts within the plat close mathematically, others do not.
- Because of these inaccuracies, professional surveyors have come to accept the line of 76th Avenue West, running along the western boundary of tracts 121 and 122, as a fairly reliable base line,

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Washington: Interpreting a Plat (2)

Staff v. Bilder:
68 Wn.2d 800; 415 P.2d 650; 1966

- Where a plat contains substantial mathematical errors and discrepancies and with the passing of time questions arise concerning the true boundaries among its component parcels, **the question to be answered is not where new and modern survey methods will place the boundaries, but where did the original plat locate them.**
- The main purpose of a resurvey is to **rediscover the boundaries according to the plat** upon the best evidence obtainable and to retrace the boundary lines laid down in the plat.

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Maryland – 1793 is 'Modern Times' (1)

Martindale's Lessee v. Troop: 3 H. & McH. 244; 1793

- This is confirmed by a **very modern author**. (2 Woodd. Lect. 170.) "There may exist a right of possession to lands in one who is not the actual possessor of them; and such is properly called a right of entry.
- Upon what ground of political or legal propriety is it that **in modern times** estates tail, reprobated by our laws, condemned by every country in the world which commerce has enlightened,

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Michigan: – Modern Survey in 1878 (1)

Diehl v. Zanger: 39 Mich. 601; 1878

- And in some of them the impropriety of disregarding the various landmarks which time and actual occupancy and improvements and the behests of usage and general acquiescence have produced, in deference to the **disordering achievements of some modern survey**, has been distinctly adverted to and explained.

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Mich. Cooley: – New Survey in 1878 (2)

Diehl v. Zanger: 39 Mich. 601; 1878

- **Nothing is better understood than that few of our early plats will stand the test of a careful and accurate 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.
- 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.**

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Vermont – Intent vs. Subdivision Regs. (1)

Wheeler v. Hoffman: #40-2-07 VT. Super: Oecv (2009)

- The master rule in construing a deed is that "the intent of the parties governs."
- The deed description creating Plaintiffs' property is geometrically impossible, as it does not describe a parcel of land with a perimeter that closes.
- If ambiguity in a deed description exists, "interpretation of the parties' intent becomes a question of fact to be determined based on all of the evidence-not only the language of the written instrument, but also evidence concerning its subject matter, its purpose at the time it was executed, and the situation of the parties."

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Vermont – General vs. Specific Intent (2)

Wheeler v. Hoffman: #40-2-07 VT. Super: Oecv (2009)

- The deed language and contemporaneous property transfer tax return show that Catherine Crouse intended to create a parcel that was large enough (10+ acres) to be exempt from state subdivision regulations.
- **Such a general intent does not, however, establish boundaries of a parcel that can be surveyed or laid out on the ground.**
- **The relevant intent is her intent with respect to location of specifically described boundaries.**

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Vermont – General Intent is 'Area' (3)

Wheeler v. Hoffman: #40-2-07 VT. Super: Oecv (2009)

- The long-standing principle that specific descriptions prevail over general descriptions applies in determining the grantor's intent with respect to parcel boundaries.
- **Her general intent to create a parcel with a certain acreage cannot operate to enlarge a parcel whose boundaries and size can be determined from the property description.**
- Statements of acreage are given the least weight in determining the intent of the grantor.

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Monuments

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Creek as a Monument: Maryland (1)

Keech's Lessee v. Dansby: 1 H. & McH. 20; 1704

- The second line of the defendant's land is expressed in the patent to run west up the creek;
- whereas the plots returned make it appear that the course west does not run up but across the creek, and thereby runs into the plaintiff's land, which is the cause of the difference, and notwithstanding the act of Assembly a and common reason direct,
- **that the greater certainty is always to be preferred to the less, and that the natural course of the creek is more certain than the artificial course of the compass**;…

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Creek as a Monument: Maryland (2)

Keech's Lessee v. Dansby: 1 H. & McH. 20; 1704

- …besides the several testimonies that the taker up and the son of Ascham always intended and understood their land to be bounded by the creek,
- and not by the artificial line; yet the Jury rejecting law, reason, and the evidence, found for the defendant; that is, that the natural bound should be rejected, and the artificial adopted, …
- …so that the defendant is permitted by the verdict to run over the creek and take the plaintiff's land, **which is error**.

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Ohio – What is a Monument? (6)

Owens v. Haunert:
137 Ohio App. 3d 507; 739 N.E.2d 5; 2000

- A "monument" is a tangible landmark, and monuments, as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary, even though this means either shortening or lengthening of distance. ***

Alabama: What is a Monument? (1)

Cornelious v. State
22 Ala. App. 150; 113 So. 475; 1927

- Section 3446 of the Code of 1923 applies alone to monuments, posts, or trees as the same refers to the boundaries of land.
- As used in this section, "monument," "post," and "tree" are used synonymously.
- When relating to land a "monument" is some **tangible landmark established to indicate a boundary**.

When is a monument…not a corner?? (1)

August 1990 ACSM Bulletin "Law and Ethics"
"Uncalled-For Monuments" by David R. Knowles.

- " The most widely accepted legal principle in land surveying is probably that of a monument controlling direction, distance, and area.
- It is in fact the most quoted principle in court decisions:
- **However, the term "monument: lacks an important adjective – "called for".**
- **In other words, called for monuments control dimensions.**

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When is a monument…not a corner?? (2)

August 1990 ACSM Bulletin "Law and Ethics"
"Uncalled-For Monuments" by David R. Knowles.

- "There seems to be a **growing practice** in the profession of indiscriminately **yielding to uncalled-for monuments that happen to be in the general vicinity of the presumed corner location.**
- In some cases, the deed calls for, either directly or indirectly, original monuments of a different type.
- In other cases the **deed calls for no monuments whatsoever** – the description is pure metes with only dimensions given.
- **Yielding to an uncalled-for monument without predetermined justification may lead to embarrassment in court."**

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When is a monument…not a corner?? (3)

August 1990 ACSM Bulletin "Law and Ethics"
"Uncalled-For Monuments" by David R. Knowles.

- " **When accepting uncalled for monuments** or any other evidence the **surveyor should be prepared** to persuade the court that this is the **best evidence available of the corner location,** and not accept a monument merely because it was there."

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NM: Is the Monument Original? (1)

Canavan v. Dugan:
10 N.M. 316; 1900-NMSC-022; 62 P. 971; 1900

- Various witnesses, by means of the official field notes, located the various monuments of adjoining corners, and found them on the ground in place and demonstrate that the proper place for the corner in question, if it is to harmonize with the rest of the township, is where defendant claims it is.
- Defendant further shows that the **monuments now found by intervenor** and claimed by him to mark the true corner, **bear evidence of having been recently placed in their present position**, in that they are not set in the ground and **grass is found underneath them.**

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PENN: Measurement can prove identity (1)

Chisholm v. Thompson: 233 Pa. 181; 82 A. 67; 1911

- "The identity of a monument existing on the face of the earth with one referred to in a deed is always a question of fact" and …
- …"**While monuments capable of being identified must always control courses and distances, the measurements of the lines whose courses and distances are given should not be disregarded in determining the identity** of the monuments claimed to be found with those referred to in the deed:"

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Tenn: Pipe was Moved?? (1)

Gilbert v. Birdwell:
No. M2009-01743-COA-R3-CV (2010)

- The Williford deposition gave as its justification the presence of what he described as an old iron pipe on the northern margin of Partin Road. The position of the court gave heavy reliance on the existence of the so-called iron pipe.
- The testimony of Mr. Johnson relied on the fact that **he considered that pipe to have been moved after its initial placement.**
- The issue as to whether or not the pipe had been removed could not be established upon the proof that was presented at the hearing, and this fact remains a matter of conjecture.

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Tenn: Pipe was Moved?? (2)

Gilbert v. Birdwell:
No. M2009-01743-COA-R3-CV (2010)

- It is clear from the evidence presented that the Birdwells should have known the case could turn on the existence and location of the iron pin, and the possibility that the pin had been moved.
- All of the previous surveys and descriptions were available to the parties prior to the hearing, and Mr. Johnson performed his survey well in advance of that date.
- From the record as a whole, we can only conclude that any proof concerning the beginning point of the disputed property line was available from the outset of this case.

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NM: Best Evidence of Original Monument (1)

Murray Hotel Co. v. Golding:
54 N.M. 149; 1950-NMSC-014; 216 P.2d 364; 1950

- **Happily for property owners**, where destruction or obliteration of original monuments of a survey has occurred, they are not denied the privilege of establishing original lines by other proof, if it is available.
- **In the absence of known monuments, the best evidence obtainable may be resorted to** for the purpose of establishing original lines.
- **Ordinarily**, **physical evidence on the ground** such as occupancy, street lines, old buildings, measurements, quantity of land called for by the deeds and other like evidence may tend to disclose what is the true line.

PENN: Litmus Test for Monument …(8)

Pencil v. Buchart: 3551 A.2d 302; 1988

- **Before a physical monument is accepted as a boundary line, there must be evidence other than its mere existence** that the monument was intended for that purpose …
- …and **at no point were the stones used by Van Why to mark the southeast boundary ever mentioned in any deed in other chains of title.**
- Nor is there any evidence that any past parties erected it as a monument to mark the boundary.

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PENN: What is a Monument? (1)
Stark v. Equitable Gas: 116 A.3d 760; 2015

- It has been said that "a stone wall is strong evidence of a boundary line."
- One court has said that a monument, when used in describing land, is **"any physical object on the ground which helps to establish the location of the line called for,"** whether it be natural or artificial.
- That court noted that, just as in contracts or wills, the intention of the parties governs the interpretation of deeds and…***[KK note: continued next slide]***

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PENN: Identification by the Senses (2)
Stark v. Equitable Gas: 116 A.3d 760; 2015

- …that it is for that reason "that **monuments named in deeds** are given precedence over courses and distances, **because the parties can see the tree, stone, stake, pipe or whatever it may be, which is referred to in the deed,** but would require equipment and expert assistance to find a course and distance." "
- [T]he physical disappearance of a monument does not terminate its status as a boundary marker, provided that its former location can be ascertained through extrinsic evidence."

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PENN: Identification by the Senses (3)
Stark v. Equitable Gas: 116 A.3d 760; 2015

- "**The rule that artificial monuments control** courses and distances in case of conflict is **not an imperative and exclusive** one, …
- …but is a rule of construction **to ascertain, or to aid in determining, the intention of the parties**;
- …and it is not followed where strict adherence to the call for a monument would lead to a construction plainly inconsistent with such intention.

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PENN: Identification by the Senses (4)
Stark v. Equitable Gas: 116 A.3d 760; 2015

- "Accordingly, **courses and distances will prevail over monuments where absurd consequences might ensue** by giving controlling influence to a call for the latter, or where, in any given case, a consideration of all the facts and circumstances **shows a call for distance to be the more reliable or certain**, or **where the call for the monument was inserted by mistake or inadvertence."**

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PENN: Link Between Deed & Monument (2)
Stark v. Equitable Gas: 116 A.3d 760; 2015

- …that it is for that reason "that **monuments named in deeds** are given precedence over courses and distances, **because the parties can see the tree, stone, stake, pipe or whatever it may be, which is referred to in the deed,** but would require equipment and expert assistance to find a course and distance." "
- [T]he physical disappearance of a monument does not terminate its status as a boundary marker, provided that its former location can be ascertained through extrinsic evidence."

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Kentucky – Monuments Identifiable (1)
Sackett v. Ky. Coal: 160 Ky. 793; 1914

- It is the **ordinary rule, of course**, that **natural monuments and not distances control.** To apply this rule, however, the **natural monuments must be located with reasonable certainty.**
- There is **not only uncertainty as to the particular ridge,** but **uncertainty as to the precise point on the particular ridge.**
- We therefore conclude **that in a case like this**, where there is such doubt, confusion and uncertainty as to the proper location of the natural monument called for**, the distance called for by the patent, and not the natural monument, should control.**

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PENN: Uncalled For Monument (1)

Yoho v. Stack: 373 Pa. Super. 77; 540 A.2d 307; 1988

- The **tree-fence line** upon which appellant's surveyor relied is ***not identified as a monument in the deed descriptions.***
- Therefore, it is **not entitled to the controlling effect** which appellant's surveyor gave to it.
- The trial court did not err when it accepted appellees' survey in preference to appellant's survey.

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PENN: Which Branch of the River?? (1)

Post v. Wilkes-Barre Connecting R.R.
286 Pa. 273; 133 A. 377; 1926

- **Where a river has two branches a call thereto without more is presumed to be to the first branch, especially where that accords with the courses, distances and quantity.**
- "Courses and distances may be used as guides by which to find natural objects, or to determine, in case of doubt, which of two or more natural objects is the one intended":
- "Though **known and fixed monuments control where they conflict with the courses and distances**, yet where there are **two conflicting monuments one of which corresponds with the courses and distances,** that one should be taken, and the other rejected as surplusage"

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Other Types of Monuments

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Fence as a Monument?

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Tenn: Fence as a Monument?? (1)

Overton v. Davis:
No. E2006-01879-COA-R3-CV (2007)

- The general rule provides that **a fence may serve as a monument when called for in the deed,** …
- …but a fence that is neither called for as a monument in the deed, nor erected to conform to a surveyed line, will not be treated as a monument. See 12 Am. Jur. 2d Boundaries 69 at 472 (1997).
- **The fence line Mr. YYYYYYY reconstructed in his survey is not called for in either the Harrington deed or the Yarnell deed.**

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Tenn: Fence as a Monument?? (2)

Overton v. Davis:
No. E2006-01879-COA-R3-CV (2007)

- Whether a fence will constitute a boundary will depend on the intention of the parties and the significance they attach to the fence rather than its location or condition.
- The parties must intend the fence to establish the boundary and not serve as a mere barrier.
- A fence may be maintained between adjoining proprietors for the sake of convenience merely, and without intention of thereby fixing boundaries…

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PENN: Surveyor Testimony re: fence (1)
Bossert v. McGhee: 2014 Pa. Super. Unpub.

- **The reference to woven wire is just the same as any other monumentation. Survey is an attempt to retrace the original surveyor's footsteps.** Any reference by a stream, an iron pin, a stone, fence, those are all monuments.
- The **original deed** from . . . Annie Fearon, to the railroad in 1896 **referenced a fence which would be installed** by and maintained by the railroad.
- We have found that **fence was installed at the described location to the west of Maple Avenue**, but it was not installed at the--to every piece of information we found, it was not installed at the described location to the east of Maple Avenue in the disputed area.

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PENN: Surveyor Testimony re: fence (2)
Bossert v. McGhee: 2014 Pa. Super. Unpub.

- This document was prepared in June of 1917…
- the area in question is delineated by the railroad as according to historical documentations. **When I look down very close to the south line of the original 66 foot right-of-way, I see it labels fence there. It says STD for standard wire fence.** . . .
- So it appears to me the railroad constructed their fence line in the current location of the property line

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PENN: Sometimes the Fence is critical (3)
Bossert v. McGhee: 2014 Pa. Super. Unpub.

- …standard wire fence, depicted in a 1917 railroad map, which is no longer standing…
- Instantly, the trial court found the boundary between the parties' properties was established by Appellees' expert AAAAA's survey. Decree, 6/4/13.
- The trial court agreed with AAAAA that the standard wire fence was a monument and it prevailed in the instant land dispute. Prelim. Decree at 2.
- The court concluded the "fence [was] the most significant factor in this dispute . . . and based [its] Decree on the location of that fence in conjunction with the AAAAA survey."

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Stake as a Monument

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Artificial Monuments – "Stake"

- What is the significance of a call to a stake?
- Is a call for a stake an artificial monument or is it in fact merely on par with a call for a point?

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Tenn: Stake as a Monument: Recent Case (6)
Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- "Marked corners are conclusive and will control over courses and distances.
- Although **stakes are monuments liable to be displaced or removed,** …
- …they **control so long as it is certain that they mark the corners of the original survey."**

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PENN: Call for a Stake (1)

Allison v. Olihger: 141 Pa. Super. 201; 14 A.2d 569; 1940

- The appellants also make reference to the fact that the original description in defendants' deed called for a post but no such post has been identified as existing at the present time.
- The reference to a stake or post in the ground long since gone is not such a monument as is controlling: ***Detwiler v. Coldren, 101 Pa. Super. 189, 195.***

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PENN: Call for a Stake (2)

Allison v. Olihger: 141 Pa. Super. 201; 14 A.2d 569; 1940

- "But what sort of a monument is a stake?
- **It is so unsubstantial, that in country surveys, it usually indicates a corner which the surveyor never visited,** and which exists only on paper.
- **Artificial boundaries which are meant to be fixed monuments,** are made with **more care than merely sticking a stake, which the next wind may blow over,** which one of **a thousand accidents may destroy,** and which **must rapidly decay, if not otherwise obliterated.**
- **So frail a witness is scarcely worthy to be called a monument,** or to control the construction of a deed in so important a particular as that under consideration":

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Call for a Stake: Ohio sums it up…

Mooren v. Cleveland: 15 Ohio Dec. 456; 1904

- ***Where a deed conveys certain blocks according to a certain plat*** not entitled to record and such blocks are described on the plat as containing a certain area, and the lots therein as having certain dimensions,…
- … ***but the original stakes at the corners of the blocks are still standing or can be established,***
- **the positions of such stakes must govern in ascertaining the true boundaries of the lands conveyed.**
- It is not error to exclude oral evidence that to obtain the area and dimensions named, the lines of such blocks must be run so as to include in each one-half of a strip marked as a street.

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Roads as Monuments

- Roads are not waterways – it is the surveyors job to re-locate the original road as it was at the time of the original survey which created the boundary in question.
- The principles of accretion and avulsion do not apply to roads or to artificial canals.
- Later survey work may (and frequently does) define a new highway easement in a location that is different from that of the original boundary.

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Alabama: Road as a Monument (1)

Hanks v. Spann:
990 So. 2d 399; 2008

- Alabama follows the **majority rule that a grant of land abutting a public highway is presumed to carry fee title to the centerline** of the highway.
- Moreover, the testimony that the **logging road** was the boundary between the Hankses' and Clement's properties was undisputed.
- In fact, it was undisputed that the Hankses' and Clement's predecessors in interest had agreed that the logging road was the boundary line of the properties as well.

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PENN: Roads as Monuments (1)

Patterson v. Watkins: 27 Pa. D. & C.3d 671 (1983)

- Ordinarily, **a road is a monument which will govern over courses and distances.**
- In the case at bar, it is clear from the deed and the testimony that the **intention of the parties to the 1958 conveyance was that the private lane constitutes the northern border.**
- The defendants in 1958 inspected the property and were present at the time that the boundaries were designated and measured for the deed.
- …**the rule that the monument prevails is especially applicable where the "purchaser inspects the property and has an opportunity to see the physical boundaries."**

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AZ: Call for a Road (1)

Cottonwood/Verde C.O.C. v. Cottonwood Professional:
183 Ariz. 121; 901 P.2d 1151; 1994

- **Arizona follows an almost universal rule** governing transfers of lands abutting roadways.
- If land abutting on a public way is conveyed by a description covering only the lot itself, nevertheless, the ***grantee takes title to the center line*** of the public way if the grantor owned the underlying fee, unless the contrary intention sufficiently appears from the granting instrument itself, or the circumstances surrounding the conveyance.

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Arkansas: Call for Street (2)

Halbert Pipe v. DF Enterprises: 1992 Ark. App. CA91-193

- In this case where the description **contains not only distances and angles**, but ***also refers to markers and monuments, such as streets,*** it has been held that degrees and measurements must yield to courses and monuments in many instances.
- In these circumstances, the **mistake in course and distance must yield** to the expressed intention to return to the point of beginning.

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Trees as Monuments

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Call for a Tree: Indiana (1)
Wingler v. Simpson: 93 Ind. 201; 1884

- Parol evidence is admissible to prove the former existence, …
- …identity and location …
- …of ***ancient monuments since removed, such as marked trees*** and stones, indicative of the location of lines and corners; and we see no reason why the acts of the interested parties, contemporaneous with the alleged existence of the monuments, as tending to prove their existence, should not be also admissible in evidence.

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Ohio: Trees as Monuments

Broadsword v. Kauer:
161 Ohio St. 524; 120 N.E.2d 111; 1954

- Consequently, if ***marked trees and marked corners*** be found conformably to the calls of the patent, …
- …or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects.
- When it comes to courses and distances, the latter yield to the former.

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PENN: Tree the Wrong Type (1)

Wray v. Miller, 14 Pa. 289 (1850)

- Our law has ever held that where two corners are established, the course is to be disregarded: ***Hall v. Powell, 4 Ser. B. 462.***
- If the chesnut oak was really the corner of the plaintiff's survey, a diagonal line to the white oak would prevail.
- The return drafts did not call for the chesnut oak corner.
- They called for a chesnut eighty-one or eighty-two perches distant, and so returned to the land-office three quarters of a century ago.

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PENN: Tree the Wrong Type (1)

Wray v. Miller, 14 Pa. 289 (1850)

- The reasoning upon the facts in evidence was strong.
- The chesnut oak was eighty-one perches from where it ought to have been, if called for.
- It was not mentioned or returned on either of the surveys.
- The returned drafts called for a chesnut, and the parol evidence tends strongly to prove that anciently it existed.
- If it existed, it was the true corner of these surveys.

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Tenn: Trees as Monuments (1)

Dallum's Lessee v. Breckenridge: 3 Tenn. 152; 1812

- I feel no sort of difficulty upon the questions arising out of the evidence in this cause. The defendant's entry can be of no avail; not only because it wants notoriety, but because **the objects called for want identity.**
- To make an entry good, both these things must concur and exist.
- **In general, a call for a tree is not good; and indeed it never can be a good call, unless there is something else in the entry leading the subsequent locator so near to the place where the tree is, that it will not be imposing an unreasonable degree of trouble on him to make search for it.**

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Tenn: Monuments Control (Usually) (4)

Dallum's Lessee v. Breckenridge: 3 Tenn. 152; 1812

- It is undoubtedly true, as has been argued by the counsel for the defendant, that **in general, when an object is called for in a grant, the line must terminate at that object, whether it be a tree, marked line, or natural boundary,** unless there be something else in the grant, evidencing that the object is not called for as a termination of the line.
- In this case, the use of the expression in all, shows that the grantee did not intend to stop at the corner of Gilbert. Where then must he stop?

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PENN: Were all lines run?? (1)

Mills v. Buchanan: 14 Pa. 59; 1850

- Nothing is more common in ascertaining old lines than to **start from a marked line or corner** on the other end of the tract than that where the difficulty exists. **It is sometimes the surest, and sometimes the only way in which a dispute can be accurately settled.**
- There are **many surveys in this commonwealth where only one line was run**, and very many where a number of surveys have been protracted upon one.
- In such cases, **the only way of ascertaining the locality of these chamber surveys, as they are called,** is to **commence where the marks of the hand of the surveyor are fixed and certain, and run off the courses and distances.**

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PENN: Marked Trees (2)

Mills v. Buchanan: 14 Pa. 59; 1850

- "If the jury believe that the white oak is the corner of Braddock's Field survey, and that the two blocked trees, as stated by Patterson, are the lines of the Braddock's Field survey, …
- …then the line is from the white oak by those line trees; and if they are satisfied that the corner on the river is where the defendant claims, then the line is to be ascertained by running the course, with the proper variation and the distance from the river corner, thence by the next course, with the proper variation,
- …until the course intersects the line from the white oak by the marked trees."

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PENN: Lines Marked are original survey (3)

Mills v. Buchanan: 14 Pa. 59; 1850

- the **marked or artificial lines made by the surveyor constitute the true survey and must be followed.** There would be no sense or reason in the rule, if the marks must be on the line returned.
- They must prevail over it. Taking a course between these trees diagonally, it seems there would be little variation and but a short distance from the line thus indicated.
- **The courses and distances run on the ground are the true survey**

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Reversing Calls, Point of Beginning

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SCOTUS: Running a Deed backwards
Ayers v. Watson:
137 U.S. 584; 11 S. Ct. 201; 34 L. Ed. 803; 1891

- If this was so, (and it was for the jury to determine whether it was or not,) **the judge was entirely right** in charging **that the footsteps of the original surveyor might be traced backward as well as forward**;
- and that **any ascertained monument in the survey might be adopted as a starting point** for its recovery.
- This is always true where the whole survey has been actually run and measured, and ascertained monuments are referred to in it.

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PENN: Reversing Direction of Survey (3)
Merlino v. Eanotti: 177 Pa. Super. 307 1955

- The trial Judge, in accepting appellees' surveys concluded that a counter-clockwise survey was the correct method of determining the proper lines.
- We do not consider such a conclusion warranted by the actual monuments on the ground.
- **Where the calls are readily ascertainable, all corners are of equal dignity and a survey may be started at any one of them.**
- However, **where the beginning corner is the only one marked on the ground**, it is necessarily of controlling force

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PENN: Summary: Direction of Survey (4)
Merlino v. Eanotti: 177 Pa. Super. 307 1955

- **Reversing the lines of a survey should be resorted to only when the terminus of a line cannot be ascertained by running forward.**
- When the beginning corner is known, the calls ought not to be reversed except in order to make the survey close

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Water as the Monument Strip & Gore Doctrine* (The Centerline Presumption)

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Ohio – Strip & Gore Doctrine (1)
Gavit v. Chambers: 3 Ohio 495 (1828)

- In Ohio, **owners of lands situate on the banks of navigable streams** running through the state, …
- …are **also owners of the beds of the rivers to the middle** of the stream, as **at common law.**

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Ohio – Strip & Gore Doctrine (2)
Gavit v. Chambers: 3 Ohio 495 (1828)

- It is, we conceive, **vitally essential to the public peace and to individual security,** …
- …**that there should be distinct and acknowledged legal owners for both the land and water of the country.**
- This seems to have been the principle upon which the common law doctrine was originally settled, that where a stream was not subject to the ebb and flow of the tide it should be deemed the property of the owners of the soil ^bounding upon its banks.

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Penn: non-navigable stream boundary (1)
Alburger v. Philadelphia Electric: 535 A.2d 729 (1988)

- We begin by recognizing that we are concerned here with a **nonnavigable water course**.
- While the Commonwealth holds title to all lands underlying navigable waters in trust for the public, …
- …**title to the lands underlying nonnavigable waters is held by the owners of lands bordering such waters.** Thus, Appellants here are the owners of the creek bed of the East Branch as it flows across their properties.

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Penn: non-navigable stream boundary (1)
Shaffer v. Baylor's Lake: 392 Pa. 493 (1958)

- Ordinarily, title to land bordering on a **navigable stream extends to low water mark subject to the rights of the public to navigation** and fishery between high and low water, …
- …**and in the case of land abutting on creeks and non-navigable rivers to the middle of the stream,**

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Penn: Streets – Strip & Gore Doctrine (1)
Cox v. Freedley, 33 Pa. 124 (1859)

- "Now applying the ruling in *Paul v. Carver* to this description, **is it not perfectly manifest that we must say Cox took to the middle of Egypt and Race streets?**
- And why should not the doctrine of that case be applied?...
- But it was with a knowledge of such authorities, Judge Lewis remarked, in *Paul v. Carver,* that the circumstance of being bounded by the side of a street, instead of the street itself, was entirely too insignificant to produce a result so inconvenient, and so contrary to the practice of the people."

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Penn: Streets – Strip & Gore Doctrine (2)
Cox v. Freedley, 33 Pa. 124 (1859)

- *beginning at a stake on the north-east corner of Egypt and Race streets, and thence along the north-east side of said Egypt street, south forty-eight degrees five minutes east, ninety-one feet eight-tenths, to a stake in the middle of a ten feet wide alley …*
- *… to a stake on the south-west side of Penn street; and along said side of said street, north sixty degrees forty-five minutes west, fifty-four feet and two-tenths, to a stake on the south corner of Penn street and Race street afore- said ; and along the south-east side of said Race street,*

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Penn: Streets – Strip & Gore Doctrine (1)
Fitzell v. Philadelphia: 211 Pa. 1 (1905)

- "The leading case in this state enforcing this general principle is *Paul v. Carver, 24 Pa. 207*, decided in 1855; it is followed down to *Higgins v. Sharon Borough, 5 Pa. Superior Ct. 92, decided in 1897,* probably in number twenty cases, all of them adhering strictly to the same principle.
- The large number of cases since are to be ascribed to two causes, first, Paul v. Carver, was apparently inconsistent with two earlier cases,…

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Penn: Streets – Strip & Gore Doctrine (2)
Fitzell v. Philadelphia: 211 Pa. 1 (1905)

- Many attempts to so limit it by evidence dehors the deed in subsequent cases were made, …
- …but the rule has finally settled down to this, that to so limit there must be an express reservation, or the **lines must be stopped short of the middle of the street or highway by a permanent natural or artificial monument.** This brings us to the question involved in this issue."

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Penn: Streets – Strip & Gore Doctrine (1)
Scholl v. Emerich, 36 Pa. Super. 404 (1908

- So, where a street is called for as a boundary, the title passes to the center of the street. … If no other reason could be assigned in support of this rule of construction, the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights ought to have great weight." He then referred to the inconvenience which in cities would result from the adoption of any other rule when a street was called for as a boundary, and concludes thus:

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Penn: Streets – Strip & Gore Doctrine (2)
Scholl v. Emerich, 36 Pa. Super. 404 (1908

- "Influenced by these considerations the law has carried out the real intention of the parties by holding that the title passed to the center of the street subject to the right of passage.
- Where a street is called for as a boundary it is regarded as a single line.
- The thread of the road is the monument or abuttal," …
- …and cites Newhall v. Ireson, 62 Mass. 595.
- In the case thus cited, Chief Justice Shaw said: "The road is a monument, the thread of the road, in legal contemplation, is that monument or abuttal…"

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Penn: Streets – Strip & Gore Doctrine (1)
Rahn v. Hess: 378 Pa. 264; 106 A.2d 461 (1954)

- Where land is laid out in town lots, with streets and alleys, the owner receives a full consideration for the streets and alleys in the increased value of the lots…
- If the streets were to be vacated, of what value would they be to the original grantors, unless for the purposes of annoyance to the lot owners?

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Penn: Streets – Strip & Gore Doctrine (2)
Rahn v. Hess: 378 Pa. 264; 106 A.2d 461 (1954)

- A long strip of ground fifty or one hundred feet wide and perhaps several miles in length, without any access to it except at each end, is a description of property which it is not likely either party ever contemplated as remaining in the grantor of the lots on each side of it.
- Influenced by these considerations, the law has carried out the real intention of the parties by holding that the title passed to the centre of the street subject to the right of passage.
- Where a street is called for as a boundary it is regarded as a single line. The thread of the road is the monument or abuttal …

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U.S. Supreme Court on Illinois Lakes: (4)
Hardin v. Jordan:
140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- It **has been the practice of the government from its origin,** in disposing of the public lands, **to measure the price to be paid for them by the quantity of upland** granted, no charge being made for the lands under the bed of the stream, or other body of water.
- The **meander lines** run along or near the margin of such waters are run for the **purpose of ascertaining the exact quantity of the upland** to be charged for, …
- …and **not for the purpose of limiting the title of the grantee to such meander lines.**

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Alabama : Strip & Gore—Highways (1)

Standard Oil v. Milner:
152 So.2d 431 (1962)

- It is a **general rule** that …
- …a **private conveyance of land bounded by or abutting on a highway or a railroad** right-of-way, the fee to which belongs to the abutting owner, **is presumed to pass the fee to the right-of-way to the center** line thereof, and under certain circumstances to the opposite side.
- This rule is based on a presumption that the grantor intended to convey such fee along with and as a part of the conveyance of the abutting land, **generally on the theory that he did not intend to retain a narrow strip of land which could hardly be of use or value** except to the owner of the adjoining land.

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NC: Strip & Gore Doctrine (2)

Patrick v. Jefferson Standard:
176 N.C. 660; 97 S.E. 657; 1918

- "There is **no rule of the common law better settled and more universally adopted in this country** than that which prescribes that …
- …a grant of land bounded in general by a creek or river not navigable carries the land to the grantee usque ad filum aqua--to the middle, or thread, of the stream."

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Corners on Riparian Features

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NM: Riparian Corners are Different (1)

Casa Colorado v. Pooler
38 N.M. 87; 1933-NMSC-098; 28 P.2d 519; 1933

- The Casa Colorado grant was confirmed by Act of Congress of December 22, 1858 (11 Stat. 374). It was surveyed in 1877. Patent issued in 1909, describing the land as follows:

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NM: Source Description (2)

Casa Colorado v. Pooler
38 N.M. 87; 1933-NMSC-098; 28 P.2d 519; 1933

- *"* * * The Lots thirty-eight in Township two north of Ranges one, two, three and four east, the Lot thirty seven in township two north of Range five east, the Lots thirty eight in Township three north of Ranges one, two, three and four east, the Lot thirty-seven in Township three north of Range five east, the Lots thirty-nine in Township four north of Ranges two, three and four east, and the Lot thirty-seven in Township four north of Range five east of the New Mexico Meridian New Mexico, more particularly described as follows; to-wit:*

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NM: Calls for Rio Grande River (3)

Casa Colorado v. Pooler
38 N.M. 87; 1933-NMSC-098; 28 P.2d 519; 1933

- ***Beginning at the northwest corner, a point on the left bank of the Rio Grande River*** *sixty chains fifty-four links west of the southwest corner of the Survey of the Town of Tome, grant number two;*
- *thence* ***meandering along the left bank of the river to the southwest corner; thence east nineteen miles to the southeast corner;*** *thence north eleven miles, seven chains, sixty-eight links to the northeast corner, thence* ***west seventeen miles, twenty-three chains, fifty-six links*** *to the northwest corner, the place of beginning, containing one hundred thirty-one thousand seven hundred seventy-nine and thirty-seven hundreths acres."*

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NM: Rivers shift over time (4)

Casa Colorado v. Pooler
38 N.M. 87; 1933-NMSC-098; 28 P.2d 519; 1933

- **It is the theory** of finding VIII, and here urged, that the river bank, as it existed in 1909, is to be taken as the western boundary of the grant, and **that it will be presumed not to have changed**; there being no evidence to the contrary.
- It is well known that rivers do change their banks; particularly such streams as the Rio Grande.

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NM: Riparian Corners are Different (5)

Casa Colorado v. Pooler
38 N.M. 87; 1933-NMSC-098; 28 P.2d 519; 1933

- A presumption against change would be contrary to common knowledge.
- If indulged in this case, as matter of law, it would result, as matter of fact, in making the eastern boundary a variable.
- Any erosion would upset the description.
- Except for the remote possibility of equal wash at the two western corners, the eastern boundary would soon cease to be a north and south line.

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NM: Riparian Corners are Different (6)

Casa Colorado v. Pooler
38 N.M. 87; 1933-NMSC-098; 28 P.2d 519; 1933

- In a sense the river may be a permanent boundary.
- But not in the sense that a point on the eastern boundary may be located by measuring from it.
- In fact, a description tied merely to a bank of the Rio Grande is necessarily ambiguous.

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Alabama: Call for Mouth of Branch (6)

Doe Ex Dem Miller v. Cullum
4 Ala. 576; 1843

- The charge prayed assumed as a legal conclusion that the **letter A. as marked on the map**, was intended to designate the mouth of the branch, from the fact that they seemed to be placed at the same point.
- None of the papers made by the Spanish authorities for the purpose of conferring a title on the grantees, make any reference in terms to the branch; they speak of the Bay of Mobile being the eastern boundary of the tract, refer to the map, and **A. as the point where the survey begins.**

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Alabama: Did Branch Move?? (7)

Doe Ex Dem Miller v. Cullum
4 Ala. 576; 1843

- *Now it seems to us that it would be a most unwarrantable assumption, to hold that the place intended by A. is identical with the mouth of the branch, merely because of their apparent proximity upon paper.*
- **But suppose** the Spanish concession in totidem verbis **had recognized the mouth of the branch, as the north-east corner** of the tract at the time it was surveyed would it not be admissible to show, that owing to alluvial deposits and other causes. the locality had been changed, so as by an adherence to it, greatly to increase or diminish the quantity which passed by the grant, or to change the form of the plot?

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Alabama: Does Branch Control?? (8)

Doe Ex Dem Miller v. Cullum
4 Ala. 576; 1843

- Would that point still control the survey, as the place of beginning?
- We should incline to the opinion, that it would under such circumstances be allowable to show, the precise point on the bay intended as the corner, though the natural object designated had been gradually removed by natural causes.
- The branch is doubtless an inconsiderable body of water to which no riparian privileges are attached, and by the mere shifting of its bed or mouth cannot be allowed to subtract from, or add to, the soil of contiguous proprietors.

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Translated 1632 Calls.: Deakins Line (9)

West Va. v. Maryland
217 U.S. 1; 30 S. Ct. 268; 54 L. Ed. 645; 1910

- *Going from the said estuary called Delaware Bay in a right line in the degree aforesaid to the true meridian of* ***the first fountain of the river Potomac****, then …*
- *…tending downward towards the south to the farther bank of the said river and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack situate near the mouth of the same river where it discharges itself in the aforenamed bay of Chesapeake and thence by the shortest line as far as the aforesaid promontory or place called Watkin's Point.*

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Is a Contour a Monument?

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Louisiana: Contour as a Boundary Line (1)

Stamper v. Bienville Parish,153 So. 2d 503 (1963)

- It is apparent that in the instant case the quantity of land in Lot 4 lying between the Traverse Line or Meander Line and the Contour or water line is not so great that we would be justified in saying it was not included in the patent from the United States, but was omitted through error or fraud.
- As previously pointed out, the land affected is 2.53 acres.
- Unquestionably, in our opinion, Stamper's property extends to the water line or 148.6 foot Contour Line and does not merely stop at the Traverse Line.

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Louisiana: Contour as a Boundary Line (2)

Stamper v. Bienville Parish,153 So. 2d 503 (1963)

- We find the water line as accepted by the United States and the State of Louisiana should conform to an elevation of 148.6 feet above mean sea level, and has been properly shown on plats by engineers Williamson, Bowman and Dutton, and presently constitutes the west or north line of certain lots of the Shady Point Park Subdivision.
- **It is our conclusion, therefore, that the State of Louisiana has never had title to the property east or south of the 148.6 foot Contour Line.**

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Texas: Contour as a Boundary Line (1)

Ulbricht v. Friedsam,
159 Tex. 607, 325 S.W.2d 669 (1959)

- On August 14, 1930, Cassie A. Freidsam, et vir, by deed, granted to Emory, Peck and Rockwood Development Company a perpetual easement and right to overflow, inundate and make use of for all purposes
- … her land **lying below the 1020 foot contour line in connection with the operation of a dam** to an elevation of 1020 feet above mean sea level.

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Texas: Contour as a Boundary Line (2)

Ulbricht v. Friedsam,
159 Tex. 607, 325 S.W.2d 669 (1959)

- *"Thence up and down the meanders of Cedar Springs Creek with meanders of the 1020 elevation contour line which is a partitioned fence line between Dorbandt and this tract;*
- *"Thence, Southwesterly with the meanders of the elevation 1020 feet contour line to its intersection with the West line of the F. C. Rector Survey No. 403, which is the West line of the Dorbandt tract;*

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Texas: Contour is not a Meander Line (3)
Ulbricht v. Friedsam,
159 Tex. 607, 325 S.W.2d 669 (1959)

- "The general rule, subject to various qualifications, is that the meander lines of a government survey are not run as boundaries of the tract surveyed, …
- …but for the purpose of defining the sinuosities of the banks of the stream or other body of water, and ascertaining the quantity of land embraced in the survey; and the stream, or other body of water, and not the meander line, is the boundary."

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Texas: Contour – Called for – Controls (4)
Ulbricht v. Friedsam,
159 Tex. 607, 325 S.W.2d 669 (1959)

- It is undisputed that the 1020 foot contour line was selected by Cassie A. Friedsam to limit the extent of the L.C.R.A. easement.
- In the partition of the ranch among the heirs of Cassie A. Friedsam, the 1020 contour line was again set out as the dividing line between the lake and the upland.

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Texas: Contour is not a Meander Line (5)
Ulbricht v. Friedsam,
159 Tex. 607, 325 S.W.2d 669 (1959)

- In defendant's deed to Heckman and Ulbricht, she sets out the 1020 foot contour line as the boundary of the land she conveyed.
- Plaintiffs accepted the deed with this description.
- **We hold that the 1020 foot contour line is not a meander line but is a boundary line for the 386 acres conveyed.**

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Penn: Low Water Mark a Boundary Line (1)
Cobb v. Keen Lake Camping: Unpublished 2015

- It is clear that the low-water mark of Keen's Lake is the line which becomes the shoreline when the volume of water in the lake sinks to its low point. It is not, as Cobb proposes, the point where the lakebed dips down closest to the center of the earth.
- As KLCCR's expert explained, the reason deeds for properties along a body of water were made to the low-water mark was to guarantee access to the water: "back in the day when you needed cattle to be able to get to the water to drink, they would make it to the low[-]water mark so they weren't standing four f[ee]t back" when the water was at its low point

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Penn: Low Water Mark a Boundary Line (2)
Cobb v. Keen Lake Camping: Unpublished 2015

- Unless the volume of water in Keen's Pond is at its lowest, Cobb owns land that is under water. At all other times, his boundary line is not the shoreline, and he in fact owns land that is under the water. Thus, there is no merit to his argument that he could not have been a plaintiff to the 1972 action unless the low-water mark is the zero-foot contour line.

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Penn: Low Water Mark a Boundary Line (3)
Cobb v. Keen Lake Camping: Unpublished 2015

- The trial court's determinations that the low-water mark and the zero-foot contour line are not the same, and that Cobb's land below the waters of Keen's Lake extends only to the low-water mark, are a result of the correct application of the law to factual findings that are supported by the record.
- Hence, Cobb's first issue warrants no relief.

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Penn: Artificial Lake is Different (1)

Miller v. Lutheran Conference & Camp Ass'n,
331 Pa. 241 (1938)

- …but in the case of a non-navigable lake or pond where the land under the water is owned by others, no riparian rights attach to the property bordering on the water, and an attempt to exercise any such rights by invading the water is as much a trespass as if an unauthorized entry were made upon the dry land of another:

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Penn: Artificial Lake is Different (1)

Intili v. Salak
403 Pa. Super. 578, 589 A.2d 761 (1991)

- In 1938, Austin Jayne and Jane Reap, appellees' predecessors-in-title, instituted an action in equity in an effort to bar Michael, Thomas, and Margaret Brown, appellants' predecessors-in-title, from using an artificial lake formed from Elk Creek (known originally as Little Keen Pond and then as Canoe Lake) for boating, fishing, or swimming.

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Penn: Artificial Lake is Different (2)

Intili v. Salak
403 Pa. Super. 578, 589 A.2d 761 (1991)

- The lake is non-navigable water and is situated entirely on land belonging to appellees.
- The southwestern high water line of the shore of the lake is the boundary line between these adjoining landowners.
- On December 23, 1938, the trial court issued an injunction barring the Browns from using the lake for any purpose.

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Penn: Artificial Lake is Different (3)

Intili v. Salak
403 Pa. Super. 578, 589 A.2d 761 (1991)

- In 1958, appellants purchased land abutting the lake from the Browns.
- In 1968, appellees purchased the land under the lake from Austin Jayne and Jane Reap. In 1969, as successor owners to Austin Jayne and Jane Reap, appellees sought enforcement of the 1938 decree against appellants as successors to the property owned by the Browns.
- Appellees alleged that despite their repeated demands, appellants continued to fish from the shore and to permit their cattle to drink from the lake.

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Penn: Artificial Lake is Different (4)

Intili v. Salak
403 Pa. Super. 578, 589 A.2d 761 (1991)

- However, we note that the July 12, 1990 order merely embodies the long-held legal principle that where a non-navigable lake is entirely on property belonging to one party, that party has sole rights to it as the owner, and other owners whose property forms the shoreline do not obtain the right to use the lake by virtue of their ownership of adjoining land forming the shore.

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TVA, Contour Lines, AND 2 Surveys

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Tenn: TVA Lake, Power Easement (1)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- all owned lots within the Lindsay Mill Subdivision recorded in Map Book 2, Page 26…
- None of these deeds contain a metes and bounds description, but instead refer only to the recorded plat.
- The deed to the Linns describes the property as being a part of **TVA tract XNR-41** on the right bank of the Cove Creek embayment of Norris Lake and begins *"on an iron pin on 1020 contour line of Norris Lake, being 560 feet more or less northeast of TVA concrete monument number 517.6."*

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Tenn: TVA Lake, Conflicting Surveys (2)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- Mr. BBBBBB's plat shows the Linn lot does not reach contour 1020, but, rather, the southeast corner is approximately at contour 1029, which point is some 29 to 30 linear feet northwest of the 1020 contour line.
- Mr. BBBBBB does, however, insist his survey of the property lines of lots 18 and 21 and his plat of lots 19 and 20 are accurate because of several iron pins and angle irons he found in the approximate location of some of the corners he established.

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Tenn: TVA Lake, Conflicting Surveys (3)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- He does concede, however, that the pins were not uniform, some being angle irons and others rebar pins.
- He also conceded that he did not know the origin of the pins, although Mr BBBBBB **assumed** they were placed there by the person who originally surveyed the subdivision:

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Tenn: TVA Lake, Conflicting Surveys (4)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- The fallacy of Mr. BBBBBB's survey is that neither lot 18 nor 19 reach contour line 1020 as called for in the Linn deed and shown on the recorded plat.
- Moreover, a **portion of lots 18 and 21 would encroach upon the Tennessee Valley Authority transmission line easement** (see appendix),…
- … although the **recorded plat clearly shows that this easement is a boundary of the subdivision.**

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Tenn: TVA Lake, Original Footsteps (5)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- On the other hand, Mr. AAAAAA first established the beginning corner of the Linn lot by surveying the line from TVA concrete monument number 517-6, the exact location of which is undisputed northeast to contour line 1020.
- This point is mentioned in the tract conveyed to the subdivider of the subdivision by the United States of America, acting as agent of the Tennessee Valley Authority.

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Tenn: TVA Lake, Original Footsteps (6)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- **Although Surveyor AAAAAA found no stakes, pins or other markings at the corners he established, his survey did conform to the Linn deed and the recorded plat which showed lots 18 and 19 adjoining the 1020 contour line.**

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Tenn: What is a Contour Line?? (7)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- The **general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks**, because of their very permanent character, next, to artificial monuments or marks, then to boundary lines of adjacent owners, and then to courses and distances. **But this general rule,** as to the relative importance of these guides to the ascertainment of a boundary of land, **is not an inflexible or absolute one.**
- Applying the foregoing to the facts of the case at bar, **we find that contour line 1020 is somewhere between a natural object or landmark and an artificial monument.**

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Tenn: Lower Court Bollixed the Case (8)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- *(It is, therefore, my opinion that the BBBBBB survey should establish and recognize the long recognized lot lines and let adverse possession control the eight feet left by the mistake of a surveyor of long ago.)*
- **In all deference to the Chancellor, we find no evidence in the record to support any adverse use by any party to the suit.**

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Tenn: Lower Court Bollixed the Case (9)
Linn v. Elrod: 03A01-9903-CH-00080 TN App. 1999

- …we are aware that the Chancellor made reference to "long-recognized lot lines."
- However, also in all deference to the Chancellor, our review of the record does not disclose any such proof.
- Indeed, it is undisputed that Ms. Elrod, who had earlier employed Mr. BBBBBB to perform a survey for her, disputed his finding as to the boundary line between lots 18 and 19.

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Justice Thomas Cooley
Duty of the Surveyor

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Quote from Justice Cooley
"The Judicial Function of Surveyors"

- When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor.
- **It is by no means uncommon that we find men whose theoretical education is thought to make them experts, who think that when the monuments are gone the only thing to be done is to place new monuments where the old ones should have been,** and would have been if place correctly.
- **This is a serious mistake.** The problem is now the same that it was before: to ascertain by the best lights of which the case admits, where the original lines were.

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Quote from Justice Cooley
"The Judicial Function of Surveyors"

- If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, **the place of the ...**
- **...original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern,** even though the effect be…
- … to make **one half-quarter section 90 acres and the one adjoining, 70;** for parties buy, or are supposed to buy, in reference to these monuments, and are entitled to what is within their lines, and no more, be it more or less.
- While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes.

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Cooley – The Duty of the Surveyor

- 1. He is to search for original monuments, or for the places where they were originally located,…
- … and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant.
- By monuments, in the case of government surveys, we mean of course, the corner and quarter stakes.

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Interaction between Multiple Descriptions

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Simultaneous vs. Sequential Conveyance

- Simultaneous conveyance occurs when a plat is recorded showing multiple lots in a subdivision; each lot has equal rights regardless of which is sold first
- Sequential conveyance occurs when properties are sold individually, each by it's own survey and deed.

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PENN: Junior-Senior title (1)

Manhattan Coal v. Green: 73 Pa. 310; 1873

- **An older survey cannot be changed or contradicted by the lines of a junior survey.**
- **The calls of the latter, whether mistaken or true, do not limit the lines of the former**
- In affirming the defendants' 11th point the court correctly informed the jury, **that the proper way to locate the block of thirteen** was **first to run out the older blocks for which it called,** and if there was not a sufficient vacancy left to contain the whole thirteen, those of the thirteen first surveyed would be entitled to the vacant land, but **in no event could any of the younger block exclude any of the older block.**

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PENN: Junior-Senior Title (5)

Merlino v. Eanotti: 177 Pa. Super. 307; 110 A.2d 783; 1955

- Where there is a **clash of boundaries in two conveyances from the same grantor**, …
- …**the title of the grantee in the conveyance first executed is, to the extent of the conflict, superior;** and this is so even though the conveyances were made with reference to a map or plot:

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PENN: Simultaneous Conveyance (1)

Morrison v. Seaman: 183 Pa. 74; 38 A. 710; 1897

- In popular use the phrase **"a block of surveys"** means any **considerable body of contiguous tracts surveyed in the same warrantee's name, without regard to the manner in which they were originally located.**
- In legal use the same phrase is employed to describe a body of contiguous tracts located by exterior lines, but not separated from each other by interior lines.
- But the interior lines of the Robert Morris warrant are not left to be ascertained in this manner.
- Two tiers of tracts directly west of the district line, containing six tracts each, had all their corners marked upon the ground by the surveyor, which fixed absolutely the position of all their lines.

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PENN: Simultaneous Conveyance (2)
Morrison v. Seaman: 183 Pa. 74; 38 A. 710; 1897

- **In the absence of monuments of the original surveys, calls for adjoiners, courses and distances** and the legal presumption that the surveys were made as they were returned into the land office are to be resorted to in order to locate the line of any given survey
- **In the case of interior members** of a block the rule is that **marks made by the surveyor** for any tract in the block are evidence for the purpose of fixing the lines of any other tract in the same block
- But **where lines are run and marks made by the surveyor for a particular tract sufficient to fix its place** on the ground, the **general rule is that its place must be found by tracing the footsteps of the surveyor.**

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PENN: Simultaneous Conveyance (1)
Mathers v. Hegarty: 37 Pa. 64; 1860

- True, **the surveys were made on different days not distant from each other**, but this **does not militate against their having been located as one body.**
- It rather tends to show the honesty of the surveyor.
- **It is vain to deny that surveys thus made by one surveyor upon warrants thus calling for each other returned to the land office on the same day,** and belonging to the same owner, are to be regarded as one block, and located together.

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PENN: Simultaneous Conveyance (2)
Mathers v. Hegarty: 37 Pa. 64; 1860

- where the question is what is the true location of a survey more than sixty years old, of which there are no visible monuments, and which must be located by its calls for other surveys, …
- …it is not error for the court to say to the jury that it cannot be severed from the body of which it was returned as a part, and for which it calls, when, by…
- … **adhering to such body, it answers the greater number of its calls, preserves its figure and its distances, and also its quantity, even though the consequence be that another call must be disregarded.**

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PENN: Simultaneous Conveyance (3)
Mathers v. Hegarty: 37 Pa. 64; 1860

- We understand the court below as having said no more.
- **The fact that such a location caused an interference with a junior survey, is of no consequence whatever.**
- **The true question is, what was the location before the junior survey had any existence?**
- **What it was then it must always continue to be.**

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Arkansas: Senior Title (1)
Albion Fire v. Douglas: 1998 Ark. App. CA97-1477

- When **descriptions in conveyances from a common grantor** overlap, the **deed first executed and recorded is controlling.**
- …In ***Hughes v. Yates***, the court stated that, in construing the descriptions in overlapping conveyances from a common grantor,…
- … the **deed first executed and recorded** must be given the construction that it would have received in a controversy between the grantor and the grantee; its **legal effect cannot be altered by the extraneous fact that the grantor later executed an independent deed** containing an overlapping description.

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Ohio: In Agrement…
Kennedy v. Rose: 2008 Ohio 3929

- Therefore, based upon the evidence presented it was reasonable for the trial court to give deference to the **Harkness survey which used the original deed description of the parent property and the deed description for the conveyance in 1949 to first establish the boundary lines of the property for the most senior conveyance** from the parent parcel, **rather than to much later surveys which did not take the parent property boundaries into consideration** and the language of the original 1949 conveyance into consideration.

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How Much Research is sufficient

- In order to determine the correct solution in a sequential conveyance scenario, the surveyor must search the chain of title for each lot that affects his solution.
- Is there any possibility that a description, copied in several iterations from an original survey, may include one or more transcription errors??
- Additional research may be necessary to determine the appropriate age of trees called for as monuments.

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Sufficient Research: Ohio (1)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- *The Dispute:* This case involves a dispute over the ownership of the 14-foot right of way reserved in the Sims deed. Over the years, all parties and their predecessors in interest have used the right of way at issue for ingress and egress to the adjoining properties.
- There have been multiple surveys performed in this case. Each of the surveys performed used a line within inches of the others to mark the western boundary of the property to the immediate east of that property owned by the plaintiffs and the defendants. In other words, these surveys use a similar line to mark the western boundary of the Old Schoolhouse Lot.

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Sufficient Research: Ohio (2)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- The court finds that the surveys conducted by XXXXXXXX, XXXXXXXXXX, and XXXXXXXX **do not reflect the intent of the grantor, as evidenced by the chains of title. In the original deed from Sims to Brown, dated April 30, 1860,** the grantor states that the property is conveyed "Reserving the right of way along Smith's line to the Williamsburg road." From this, the court finds that Sims intended to convey the property with a reservation of a right of way along Smith's line, which became the Old Schoolhouse Lot.

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Sufficient Research: Ohio (3)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- **Although the language in the deed may have changed, the intent of the original grantor**, Sims, to convey the property subject to a reserved **right of way** across the plaintiff's property and connecting the defendant's property to the main road **is clearly reflected in the language so chosen.**
- The court finds, however, that the **intent of the grantor was lost within the defendants' chain of title**; and this is, perhaps, **the reason that the surveys concluding that the defendants own the land do not echo the intent of the original grantor, Sims.**

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Sufficient Research: Ohio (4)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- From this, the court finds that the **intent of Sims in the Bess deed was to convey the Bess property with an assignment of the use of the right of way** across the Brown property. This specific language is also used in the deed from Bess to Beck, recorded on February 5, 1869.
- The confusion in the defendants' chain of title appears to have arisen on March 13, 1906, when Beck conveyed a "tract or strip of land for a Right-of-Way" to C.W. Jordan (the "first" deed). **That deed appears to indicate, at first glance, that Beck owned the property outright.**

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Sufficient Research: Ohio (5)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- Upon reviewing the first deed for the "tract or strip of land for a Right-of-Way," the court finds that **Beck did not intend to convey fee simple title in the strip of land** but instead made a conveyance of the use of a right of way across the adjoining property. This is evidenced by the language used, i.e., "for a Right-of-Way"
- However, many of the deeds subsequent to the March 1906 deed **dropped the "right-of-way" language, and they appear to convey fee simple title to the 14-foot tract of land.** This "third tract of land" appears in the conveyance from Jordan to Hughes, recorded February 26, 1914…

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How many Standards for sufficiency of research

1. Current deed descriptions of subject parcel and any adjoiners
2. Research subject parcel back to source of present description.
3. Research Back to creation of each boundary line
4. Research Back to State Grants.
5. Complete Title Search.
6. Definition used by the courts: If missed evidence, you didn't do enough research!
7. To know the answer

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Three questions that we should ask

Is there any information or evidence that you do not understand on your project?

Can you make a clear statement defending why you hold/set/don't agree with every corner?

Have you paid adequate attention to rights of way and easements providing access to or crossing your project?

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The Constellation of Evidence.

- The Surveyor needs to consider all available evidence – Deeds, conversations with neighbors, Sketches on grocery bags, as well as all physical evidence on the ground. Balk lines, old creek beds, fences, age of trees, creek fords, old road beds are all helpful.
- A program presently available on the NGS website to calculate approximate magnetic variance is very useful.
- The idea is to build a "high degree of professional surety" by developing a strong preponderance of evidence.

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Apportioning: That Average, Everyday Street

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Apportioning Excess-Deficiency

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When Considering Apportioning…

1. Single Plat as the Source…or not…
2. Existing Original Corner Markers…or not…
3. Detailed Deeds vs. Calls for Plat Lot Number.
4. Is there an Unmistakable Mathematical Blunder.
5. Status of Adjoining public ways, interior alleys.
6. Apparent 'original intent' regarding 'Remnant Lots.'
7. Permanence and age of existing structures on Lots.
8. Time-span between recorded plat and present dispute.
9. Reliance of lot purchasers on subsequent surveys.
10. Federal rules associated with Government Boundaries.

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Florida: Apportioning (1)

Pompano Beach v. Beatty:
177 So. 2d 261; 1965

- It is a well established rule that an excess or deficiency by reason of an error of the surveyor who made the original plat or by inaccuracies therein, such deficiency or excess must be apportioned among all lots and blocks according to their apparent size as shown on the plat. *Clark on Surveying and Boundaries, 2d Ed., ß 189.*
- This rule, like most well settled rules, **has its exception in a situation where its application is impractical or there are facts and circumstances that are otherwise controlling.**

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Arkansas: Apportioning (1)

Hughes v. Yates: 311 S.W.2d 179 (1958)

- In arriving at the result just stated I have applied the rule given by the text writer in ***8 Am.Jur. 796, "Boundaries", § 71***, which is as follows:

"If, after a tract of land has been subdivided into parts or lots and title thereto has become vested in different persons, it is discovered that the original tract contained either more or less than the area assigned to it in a plan or prior deed, the excess should be divided among, or the deficiency borne by, all of the smaller tracts or lots in proportion to their areas. * * * The sequence of lot numbers on the plat of lots is immaterial in the application of the rule. The sequence of sale of the lots is likewise immaterial

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AZ: Rationale for Apportioning (7)

Galbraith v. Parker: 17 Ariz. 369; 153 P. 283; 1915

- "If lines of a survey are found to be either shorter or longer than stated in the original plat or field-notes, the causes contributing to such mistake will be presumed to have operated equally in all parts of the original plat or survey, and every lot or parcel must bear the burden or receive the benefit of a corrected resurvey, in the proportion which its frontage, as stated in the original plat or field-notes, bears to the whole frontage as there set forth.
- This rule applies to government surveys.

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AZ: Apportioning – Sometimes… (8)

Galbraith v. Parker: 17 Ariz. 369; 153 P. 283; 1915

- In such cases the rule is that no grantee is entitled to any preference over the others, and the excess should be divided among, or the deficiency borne by, all of the smaller tracts or lots in proportion to their areas.
- The causes contributing to the error or mistake are presumed to have operated equally on all parts of the original plat or survey, and for this reason every lot or parcel must bear its proportionate part of the burden or receive its share of the benefit of a corrected resurvey.

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NM: Don't Apportion past corner. (3)

Canavan v. Dugan:
10 N.M. 316; 1900-NMSC-022; 62 P. 971; 1900

- If this were a contest between the owner of the south half and the owner of the north half of section 15, it might be that the line would have to be extended north so as to include the natural objects called for in the field notes, and thus make the south half of the section much larger than the north half.
- But we know of no reason or rule of law requiring an error to be protracted beyond the point which will include the natural or artificial monuments called for in the field notes.

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Ohio: Apportioning Excess-Deficiency

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Ohio – Apportionment in Subdivision (1)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- The rule is that the boundaries fixed by a recorded plat of a subdivision govern where they are true and correct, but not as to valid claims of adverse possession. See *Brewster v. Bulaw, 296 S. W., 372.*
- Where a surveyor makes a plat of certain land, and the dimensions or length of the lines that are laid down upon the plat conflict with proved or admitted facts they must give way to them.

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Ohio – Apportionment in Subdivision (2)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- **Subject to qualifications**, …
- …the general rule is…
- … that where a tract of land is subdivided and is **found to contain either more or less than the aggregate amount called for** in the survey of tracts within it, …
- …the proper course is to apportion the excess or deficiency among the several tracts.

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Ohio – Apportionment in Subdivision (3)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- In *8 Amer. Jur., Page 796, Section 71*, it is stated that…
- … ***"if after a tract of land has been subdivided into parts or lots, and title thereto has become vested in different persons, …***
- ***…it is discovered that the original tract contained either more or less than the area assignd to it in a plan or prior deed, …***
- ***…the excess should be divided among, or the deficiency borne by all of the smaller tracts or lots in proportion to their areas."*** See also *March v. Stephenson, 7 Ohio St., 264.*

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Ohio – Apportionment in Subdivision (4)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- In *Wilson Bros., Inc. v. Kalm et, 314 Ill., 275, 145N. E., 340, …*
- …it is stated in the second proposition of the syllabus that …
- **…"in absence of any agreement or question of title by adverse possession, where a block has been platted into lots, and lots sold, shortage in block will be pro rated among the several lots. "**

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Ohio – Apportionment in Subdivision (5)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- **Although it is the general rule** that where land is subdivided by a plat, the shortage shall be apportioned among all of the lots, **such apportionment will only be made in the absence of facts showing that equity does not require the application of a different rule.**
- It would be impractical, if not impossible to take all of the land included in said Davis Fourth Addition to said Village of Mineral City, Ohio, and pro-rate this alleged deficiency among all of the lots contained therein.
- To do so would affect the location of all existing streets and alleys in the said addition.

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Ohio – Apportionment vs. Dedicated Alley (6)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- The recorded plat of said Davis' Fourth Addition to said Village of Mineral City, Ohio, shows that an alley 16-1/2 feet wide, between lots 230, 231, 232 and 233, and lots 242, 243, 244 and 245 was donated to the village by the acceptance of said Plat.
- The alley not having been vacated, and having been donated to the village for public use by the proprietor before any lots were sold, the court must fix its width as 16-% feet. Any short- age must be apportioned as nearly as possible and practical pro rata among the lots in question.

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Indiana – Apportionment Dispute (1)
Geiger v. Uhl, 204 Ind. 135 (1932)

- The appellees bought a lot on the west side of North Meridian Street, south of Twenty-second Street, in the city of Indianapolis and erected thereon a brick business building.
- The appellant, who owns the north forty feet of the lot which adjoins appellee's lot on the south, claims that the building erected by appellees extends over upon his lot a distance of 4 3/8 inches…

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Indiana – Background of the Case (2)
Geiger v. Uhl, 204 Ind. 135 (1932)

- The gasoline station (and the brick building west of it) occupy the full width of lot 32, viz: 50 feet south of Twenty-second Street and the foundation of appellees' store building is 49.64 feet wide extending south from lot 32 (lot 31 being 50 feet wide).
- There is a hedge between appellees' and appellant's lots extending east from the alley in the rear (on the same line an old fence formerly stood), which hedge is 100 feet south of Twenty-second Street.

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Indiana – Background of the Case (3)
Geiger v. Uhl, 204 Ind. 135 (1932)

- There is a hedge in the front and a board fence in the rear on the appellant's south boundary line—extending all the way from Meridian Street to the alley—and such hedge and fence are each 140 feet south of Twenty-second Street.
- These are actual distances measured on the ground, and are also the exact distances as shown on the plat,

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Indiana – Apportionment – The Rule (4)
Geiger v. Uhl, 204 Ind. 135 (1932)

- This rule is: where a tract of land is subdivided and is subsequently found to contain either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts, 9 C. J. 295, except so far as possession has fixed the limits,
- *Anderson v. Wirth (1902), 131 Mich. 183, 91 N. W. 157.*
- The rule is supported by numerous decided cases…

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Indiana – Apportionment is Guesswork (5)
Geiger v. Uhl, 204 Ind. 135 (1932)

- …although as stated in *Barry v. Desrosiers (1908), 14 B. C. 126, 128*, …
- …it is **mere guess work** to say arbitrarily that the error extended uniformly along the whole frontage, and it is a rule that is more properly prescribed by legislation
- (as in *Maysville v. Truex (1911), 235 Mo. 619, 139 S. W. 390)* than by judicial construction.
- Its application when only one or two property owners are litigants, out of the many among whom a deficiency is distributed, must be careful in order to avoid adjudicating the rights of those not before the court.

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Indiana – Qualification for Apportionment (6)
Geiger v. Uhl, 204 Ind. 135 (1932)

- A qualification of the apportionment rule is that when dimensions are given to each subdivision (lot) except one (or two) **which is an irregular space, without dimensions designated**, …
- …such **remnant portion will bear the shortage or receive the overplus.**

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Indiana – Apportionment not Applicable (7)
Geiger v. Uhl, 204 Ind. 135 (1932)

- From our examination of the evidence we are not convinced that a determination of the legal question with reference to the "apportionment" and "remnant" rules is necessary to a decision of this appeal or that the trial court in determining this action in appellees' favor was bound to decide or did decide such question.
- On the contrary we believe the trial court was obliged to find in favor of the appellees for the reason that the **facts proven do not make out a case for the application of the rule** contended for by appellant, even if that rule be correct, which we neither concede, nor decide.

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Indiana – Apportion the Entire Block (8)
Geiger v. Uhl, 204 Ind. 135 (1932)

- If there is a shortage that should be apportioned among all of the lot frontages on the west side of Meridian Street between Twenty-second Street and McLean Place (or between Twenty-second Street and the alley south of McLean Place) and no adjustment or apportionment has ever been made, then all of such frontagers should have been made parties to this action.

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Indiana – Can't Cherry-Pick 2 lots (9)
Geiger v. Uhl, 204 Ind. 135 (1932)

- It has been held that **two lot owners in the center of a block,** which block contains a surplus, are bound by the descriptions in their deed, and **are not entitled in an action between them alone to have their corners shifted so as to apportion their share of the surplus,** 9 C. J. 296-7, citing *Elam v. Hickman (1915), 166 Ky. 135, 179 S. W. 17.*

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PENN: Apportioning Rejected (1)
Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- Defendants suggest, "The boundary for Noah Mellott must be constructed by considering his total acreage after apportioning the boundary between Noah Mellott and William Valiance based on their joint title of 125 [acres,] more or less."
- Because neither Noah nor Valiance had superior title, Defendant's argue apportionment is required.
- To that end, Defendants propose the following calculation:

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PENN: Apportioning Rejected (2)
Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- *Based on the acreage that Noah Mellott and William Valiance purported to divide, Noah Mellott acquired 68.86 percent of the title contained in the Divelbiss Deed (110.25 acres divided by 160.11875 acres total) and William Valiance acquired 31.14 percent of the title (49.86875 acres divided by 160.11875 acres total). Applying these percentages to the title conveyed by the Divelbiss Deed, Noah Mellott only acquired 86.075 acres or 86 acres and 12 perches.*

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PENN: Apportioning Rejected (3)
Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- Practically speaking, what the Mellotts propose could upend nearly 150 years of property ownership by MFLP and their predecessors in title.
- Indeed, Noah and Valiance entered into an agreement in 1870 to divide the land they obtained from Divelbiss in 1865. The agreement included a drawing or survey with a specific metes-and-bounds description of each parcel as well as noted the adjoiners. After a series of conveyances, Noah's parcel was obtained by George and Sally Harris.
- The First and Second Harris Deeds, with specific, although erroneous metes-andbounds descriptions, were executed in 1917 and recorded in 1944 and 1932, respectively.

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PENN: Apportioning Rejected (4)

Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- The act of recording provided all concerned — including future purchasers — the opportunity to learn of error and inconsistency.
- Inexplicably, the first discovery of the errors in the metes-and-bounds descriptions in the First and Second Harris Deeds was in the instant timbering dispute in 2010, some 140 years after Noah and Vallance entered their agreement and 90 years after the Harris Deeds were executed.
- Now, in 2019, this Court is asked to turn back time and correct the errors.

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