Skelton Boundaries and Adjacent Properties

PREFACE
There are many excellent texts dealing with the mathematical aspects of surveying, but few giving in concise form the basic legal principles underlying its application to the location of boundaries. The need of a book that will give to the lawyer who writes deeds and to the engineer who attempts to lay down the lines of a property, the mathematics and law involved is evident to all who are engaged in surveying.

It is therefore the purpose of this book to bring to the engineer an appreciation of the legal elements of boundary surveying and to the attorney a realization of the fact that the prevention of boundary disputes can only be attained by the application of modern methods of controlled surveying. As regards real property the service rendered a community by these professions may be measured by the infrequency of litigation, and cooperation is essential to reduce misunderstanding to a minimum.

The majority of cases discussed are the direct result of indifferent conveyancing, and the reader should study the text primarily so that he may prepare a deed in compliance with the common understanding of the parties to the transaction, and in a manner which will preclude its construction ever coming before the court for interpretation.

RAY HAMILTON SKELTON
University of Maryland,
June 10, 1930
Skelton Boundaries and Adjacent Properties

Associate Professor – University of Maryland 1926-1933

Prof. Roy H. Skelton Dies After Operation

Associate in Civil Engineering At U. Of Md. Succumbs In Capital Hospital

[Image of a group of men, one highlighted as Ray Hamilton Skelton 1888 - 1933]

Ray Hamilton Skelton

Skelton Boundaries and Adjacent Properties

[Image of the book cover]

[Image of the surveying equipment]
Skelton Boundaries and Adjacent Properties

PREFACE TO THE SECOND EDITION

In the sixty-seven years since Mr. Skelton wrote the preface to the first edition of this book, the law with respect to boundaries has not experienced the monumental shifts that have occurred in other fields of law. Still the order of importance of some matters had been rearranged because of our drawing closer together. Obviously, fences and party walls are not as important as they were more than half a century ago, but they do have relevance. Our goal was to update the first edition without doing damage to its original format and intent. We hope that we have done that.

Every attempt was made to update the citations in the first edition. If it appears that many of the cases are old, it is because the law probably has not changed significantly since the earlier edition. In some instances, the cases are so old that it has become impossible to economically find their dates.

We wish to acknowledge the help of Henry Shore who originally began this product, and Richie Mosley and Alan Wilson of Robert E. Wilson Land Surveyors, Inc. who provided invaluable help and advice in surveying matters.

John R. Barlow, II
Donald M. VonCannon
Greensboro, North Carolina
September 10, 1997
In thus attempting to cover a pretty wide field, the author has produced a book which inevitably is subject to criticism. A law book written by an engineer almost certainly is going to fall short of being a first-class law book. The same thing would almost certainly be true of a book on surveying if a lawyer were to write it. If, however, engineers are going to write law books, Professor Skelton has come about as close to doing a good piece of work as can reasonably be expected from one of his profession.

Inevitably this book is going to be compared with Clark on "Surveying and Boundaries," published nine years ago by the same publishers. The Clark book contains more useful information about surveying, although it does not purport to equip lawyers to act as surveyors. All in all, the reviewer finds the older book more serviceable. Professor Skelton's book, it would seem, is too much of a legal textbook for engineers; yet for lawyers it is, curiously, too much law and not enough engineering. The legal profession has available other books covering the law of the subject much better than the Skelton book.

RALPH W. AGLER
University of Michigan Law School

1st Edition – 1930
CHAPTER 1 – BOUNDARY CONTROL
§ 1-1. Scope and Purpose
The purpose of this chapter is to increase the knowledge of the Surveyor and, by the use of deed descriptions and examples of their application to surveying, to set the stage for the discussions that follow in the remainder of the text. The ultimate solution of the boundary problem is outlined in general terms, but since the necessary monuments have not been established in many localities, including some of the larger cities, a brief discussion of the writing of deed descriptions under conditions as generally found has been included.

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Skelton Boundaries and Adjacent Properties

Skelton on the Legal Elements of Boundaries and Adjacent Properties

I. Boundary Control (57 PAGES)
II. Relative Importance of Conflicting Elements (140 PAGES)
III. Excess and Deficiency (236 PAGES)
IV. Highways and Streets as Boundaries (57 PAGES)
V. Riparian Boundaries (40 PAGES)
VI. Establishment (24 PAGES)
VII. Adverse Possession (52 PAGES)
VIII. Dedication (52 PAGES)
IX. Adjoining Landowners (51 PAGES)
X. Table of Cases (Approximately 350 Cases)

Skelton Boundaries and Adjacent Properties
Chapter 1 – Boundary Control

CHAPTER 1
Boundary Control

I. Scope and Purpose
II. Deed Descriptions (18 PAGES)
III. Methods of Controlling Boundaries (22 PAGES)
IV. The Writing of Deed Descriptions (11 PAGES)
Skelton Boundaries and Adjacent Properties
Chapter 1 – Boundary Control

CHAPTER 1 – BOUNDARY CONTROL
§1-2. Deed Descriptions.

§1-2(a). [§2.] Requisites for a Valid Description.

The basic information for a boundary survey is obtained primarily from the as found in the deed or deeds conveying it and from deeds pertaining to the adjoining properties. The importance of the description has been recognized by the courts, who have established that a valid deed requires, among other particulars, a thing granted,[Fn1] which must be described with sufficient clarity to distinguish it from other things of the same kind.[Fn2] Furthermore, certain description clearly delineating the land to be conveyed but not locating it because of its uncertain starting point, has been held to be invalid.[Fn3] However Courts are reluctant to declare deeds void because of uncertainty of description. A description by which the property may be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient,[Fn4] since the purpose of a description is not to identify but to furnish a means of identification.[Fn5] and any description is sufficient if the identity of the premises can be established.[Fn6] Furthermore, if the parties lay out land and the grantee is put in possession, the deed will hold although the description is too vague to furnish means of identification.[Fn7] [Fn1] Barker v. Southern R. Co., 125 N.C. 596, 34 S.E. 701 (1899). [Fn2] Los Angeles County v. Hannon, 159 Cal. 37, 112 P. 878 (1910). [Fn3] Barker v. Southern R. Co., 125 N.C. 596, 34 S.E. 701 (1899). [Fn4] Sengfelder v. Hill, 21 Wash. 371, 58 P. 250 (1899) (citing Smiley v. Fries, 104 Ill. 416 (1882)). [Fn5] Sengfelder v. Hill, 21 Wash. 371, 58 P. 250 (1899), citing Rucker v. Steelman, 73 Ind. 396 (1881); Los Angeles County v. Hannon, 159 Cal. 37, 112 P. 878 (1910). See also note 3. [Fn6] McDougal v. Southern Pac. R. Co., 162 Cal. 1, 120 P. 766 (1912). [Fn7] Barker v. Southern R. Co., 125 N.C. 596, 34 S.E. 701 (1899).

The term "legal description" is defined as: A formal description of real property, including a description of any part subject to an easement or reservation, complete enough that a particular piece of land can be located and identified. The description can be made by reference to a government survey, metes and bounds, or lot numbers of a recorded plat. Black's Law Dictionary, 903 (7th ed.1999).

A. Legal Standard

The sufficiency of the description in a deed is a question of law for the court. See Pirkle v. Turner, 277 Ga. 308, 588 S.E.2d 733 (2003). If the description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function. Narsson v. Everett, 135 Colo. 55, 60, 308 P.2d 216, 219 (1957); see also Denham v. Hill, 57 Colo. 345, 142 P. 181 (1914)(a description is sufficient when from it the property can be identified).


(c) Cornerstone Land Consulting, Inc. 6
The purpose of a description of the land, which is the subject matter of a deed of conveyance, is to identify such subject matter; and it may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property conveyed can be located. * * * So, if a surveyor with the deed before him can, with the aid of extrinsic evidence if necessary, locate the land and establish its boundaries, the description therein is sufficient.' 16 Am.Jur. (Deeds) Sec. 262.

The foregoing rules have met with approval of our own courts. Quintana v. Montoya, 64 N.M. 464, 300 P.2d 549, 71 A.L.R.2d 397; Adams v. Cox, 52 N.M. 56, 191 P.2d 352, 68 A.L.R. 77; Armijo v. New Mexico Town Co., 3 N.M., John, 427, 5 P. 709. And the rules are applicable to tax deeds. State v. Board of Trustees of Las Vegas, 32 N.M. 182, 253 P. 22.

"This action was commenced by appellants in the usual statutory form to quiet title to certain real estate situated within the City of Santa Fe designated as "Tract 87, Zimmerman's Map, 1904..."

"The trial court's findings read [in part]:

3. That the description in plaintiffs' chain of title by reference to the 'Survey Map' retained in the County Assessors Office is an insufficient description for purposes of making a conveyance.

4. That said survey map (being Zimmerman's map 1904) was not filed for record in the office of the County Clerk and Recorder, Santa Fe County, New Mexico.

5. That said survey map, being Zimmerman's map, 1904, contains no metes and bounds descriptions and is completely incapable and insufficient of describing tracts of land referred to by reference to tract numbers as set out in said map; further, said map contains no identifiable beginning or reference point.


§1-2(f). Reference to Plats.


To make a map a part of a deed, the reference to the map must be definite and certain, and the numbering of lots without reference to a particular map will not suffice.[36] A map, plan, or survey referred to in a deed becomes a part of the deed and is to be construed with it,[37] and courses and distances or other particulars appearing on such maps, plans or surveys are to be considered a true description, since, by referring to a map, the grantor adopts it.[38] The map referred to need not be recorded.[39]
Since the appeal turns on the adequacy of the Zimmerman map to furnish means of identification of the tract in question, we proceed to a discussion of it at some length. The evidence reflects that the map was authorized by Chapter 50, Laws 1901, being an Act authorizing county commissioners to have certain lands surveyed for the better returns of taxable property, etc. Pursuant to this statute, the Board of County Commissioners of Santa Fe County employed John L. Zimmerman to make a comprehensive survey of all lands within Santa Fe County, including the City of Santa Fe, and to establish boundaries of each tract. This survey was finished by him in 1904, but for some reason it was never certified by him nor was it ever made a matter of record; however, it bears upon its face the following endorsement, 'Filed this 31st day of December, A. D. 1904, at 5 o'clock P.M. Celso Lopez Recorder by Deputy.' While the map bears neither metes nor bounds, or the surveyor’s acknowledgment, it shows various land marks, roads, boundaries, and tract numbers within the city. And there is evidence that no reception records were kept by the county clerk for such documents prior to 1930.

There is further evidence that the Zimmerman map, since 1904, has been used continuously by the assessors of Santa Fe County as a means of identifying county and city property for taxation; and, that it is generally recognized as the basic plat of the county by abstractors in the preparation of abstracts, and others engaged in the buying and selling of real estate. In this respect, the witness Scanlon, a registered engineer and a surveyor, testified as to the origin of the map and as to its accuracy. He testified that directions can be determined therefrom, and from which, aided by arroyos, natural boundaries, road crossings, and curves in arroyos shown on the map, the boundaries of the various tracts of the city can be determined. He testified emphatically that it was possible by referring to the map to locate upon the ground the boundaries of a particular tract with reasonable certainty. His testimony was corroborated by other competent evidence. There being no evidence to the contrary, the findings of the court have no support in the evidence.

§ 2-1. Control of Intention.


When the surveyor pictures himself or herself in the seat of the scrivener, the surveyor should keep in mind that

(1) the object of the construction of a deed is to discover and effectuate the intention of the parties;[Fn5]

(2) the intention is to be gathered from the words of the conveyance read in the light of surrounding circumstances;[Fn6]

(3) the conveyance is presumed to be made with reference to the conditions and state of the premises at the time, and no subsequent change will invalidate it;[Fn7]

(4) a construction which is consistent with all the terms of the description should be given, rather than one consistent with some of the terms;[Fn8] and

(5) the intention of the parties definitely expressed in the instrument is controlling.[Fn9]
Wells v. Lagorio, 112 Va. 522, 71 S.E. 713 (1911).

Wells owned 60 acres more or less, which he understood was bounded by HFEB. (See Figure 9.) He sold the western half, 30 acres more or less (HGDB), to Lord, who afterwards conveyed to Lagorio. The description defined the 30-acre tract by establishing D midway between B and E, and G midway between H and F. Later Wells sold the eastern half, 30 acres more or less, to Beckett and bounded definitely by GFED. Wells honestly believed that he had disposed of the entire property until Denby, who acquired the adjoining property JIA several years later, had a survey made and advised Wells that the area AIHB was his. Lagorio and Beckett immediately claimed the area in question as theirs, and the matter reached the courts. Evidence showed that the parties had taken possession literally described and that the intention of the parties had been given effect without consideration of the area AIHB in dispute. The court ruled that the tract therefore belonged to Wells regardless of the deficiency in areas of the lots of Lagorio and Beckett.

The facts are as follows: Wells was the owner of a certain tract of land in the county of Norfolk, and by deed dated November 1, 1883, he sold to Claude Lord a portion of it—"the same being the westerly half of a tract of woodland, said to contain 60 acres, lying on the north side of Sewell's Point road, and bounded on the west by the lands occupied by Jackson Denby, on the north by Talbot's land, and on the east by Phillips' land, the said lands being a part of lands deeded by Mrs. Martha Upshur and others, dated October 18, 1882, to A. B. Wells and John C. Lord; the said land to be divided by a line starting at the center of the tract on the Sewell's Point road, thence running in a northerly direction to the center of the north line dividing the tract in halves, said westerly half, sold to said Claude Lord, said to contain 30 acres more or less."...
By deed dated September 25, 1886, Wells sold to Abram Beckett "all that tract of land lying and being in Tanner's Creek district and county of Norfolk, state of Virginia, and bounded and described as follows, to wit: On the west by lands owned by Claud Lord, and on the north by one Talbot, and on the east by lands of Phillips, and on the south by Sewell Point road, containing 30 acres more or less, being a part of the same that was conveyed to A. B. Wells and John C. Lord by deed bearing date on October 18, 1882, and duly of record in the clerk's office of Norfolk county court; the said John C. Lord having subsequently conveyed his interest to the said A. B. Wells."

The controversy in this case arises with respect to the location of the western line of the original tract owned by Wells; his deed to Claude Lord calling on the west for "lands occupied by Jackson Denby." That line is shown on the plat which accompanies this opinion as B, H.

Lagorio was put in possession of the western half of the tract owned by Wells, which was supposed to contain 30 acres, but which upon survey was ascertained to contain only 17 1/4 acres. Some years thereafter the Denbys conveyed to a man by the name of Edwards, who, upon investigating his title and having a survey of the premises made, found that his line upon the east was I, A, and not H, B, as had been theretofore supposed. He disclaimed all interest in that quadrilateral containing 14.2 acres, and so informed Wells, who thereupon made claim to it. The land is in a wild state, grown up in scrubby woods and bushes—practically in a state of nature.

Certainly, if all the facts had been known at the date of the deed from Wells to Lagorio, and he had sold one-half of the quadrilateral A, I, F, E, the dividing line G, D, on the plat, would have fallen further to the west, and would have left in the half which Beckett afterwards bought 7.1 acres now embraced in the quadrilateral B, H, G, D.
Wells v. Lagorio, 112 Va. 522, 71 S.E. 713 (1911).

It appears from the evidence that the line B, H, was shown to Lagorio and accepted by him as his western boundary at the date of his deed, and so the line C, D, was the western boundary of Beckett. Lagorio and Beckett were both placed in possession of what they bought, or what they believed at the time of the transaction they were buying, and they and their assigns are still in the enjoyment of it. As the facts have since developed, it appears that the western line of Wells’ original tract is further west than either he or his vendees at the time supposed. They were under the impression that his western line was H, B. It turns out now, in the light of subsequent developments, that his western line was I, A, and at the time of making the deeds to Lagorio and Beckett he was the actual owner, though ignorant of the fact.

As was said by the commissioner to whom the cause was referred: “It is true that Wells thought he was selling all of the land that he owned; but his possessions were greater than he knew, and it cannot be reasoned that he intended to sell that which he did not know that he owned. It is true that Wells thought he was selling 30 acres to each of the parties, Lord and Beckett, and they thought they were getting approximately that amount, and it is further true that they did not get approximately 30 acres apiece; but they did get a tract of land, the exact boundaries of which they knew and had been pointed out to them. They got the identical piece of land that they purchased, bounded by the very lines which they had contemplated and which had been pointed out to them—the exact lands they had proposed to purchase, although their lands contained less acreage than was supposed.”...

The lines and corners actually located upon the ground by the parties to a transaction prevail, if known prior to the transaction, over all calls, including those for monuments. [Fn33] Since monuments, especially those classed as natural, are given great weight in the determination of boundaries, it is apparent that this rule depends for its strength upon the fact that the lines actually marked and evidenced are the most certain evidence of the intention of the parties, and that there is a greater possibility of error in the call for the monument when it is lacking in an essential quality, especially visibility.


That the above is true is illustrated in Stefanick v. Fortuna,[Fn34] where an iron pipe set to mark a corner prevailed over an unmarked street line. (See Figure 10.) Cohen, from whom Stefanick purchased, owned a lot 66 x 198 on the northeastern corner of Mill and Hoosac Streets. The lot was bounded on the north and east by land of P. Connors. The deed of that portion purchased by Stefanick read as follows:

Beginning at a point in line between lands of grantor and those of P. Connors, distant ninety-one (91) feet from a stone monument standing in northerly line of Hoosac street, thence in east line of grantor's land one hundred and seven (107) feet to the lands of P. Connors; thence turning at right angle left and running in southerly line of said Connors' land sixty-six (66) feet to an iron pin driven in the approximate east line of Mill street; thence turning at an angle of 90° and running one hundred and seven (107) feet in approximate east line of Mill street to iron pin driven; thence turning left at an angle of 90° and running sixty-six (66) feet to place of beginning. Meaning to convey the northerly part of the Busby lot 107 x 66.

Skelton Boundaries and Adjacent Properties
Chapter 2 – Relative Importance of Conflicting Elements

The parties agreed that the circumstances under which this deed was drawn were as follows:

"Prior to said conveyance Mr. Charles Sayles, a surveyor, was called upon to prepare a boundary line for the new lot to be sold to the plaintiff and was told about the portion that Mr. Cohen had decided to sell. He went to the premises and located a point which consisted of a stone in the ground at the southeast corner of said Cohen's lot, said marker standing in the incorrect street line, approximately eighteen (18) inches north of the true street line. He assumed that this marker stood in the true street line and, taking it for a point of beginning (this is the point of beginning set forth in the Stefanick deed) he measured northerly along the east line of the premises a distance of ninety-one (91) feet and there placed a pin in the ground, intending it for the point of beginning for the plaintiff's lot. He then turned at a right angle, as he supposed (he used no instrument other than his eye), and placed another pin in the east line of Mill street. This was all he did. He made no measurement of the distances from these points to the northerly line of the 'Busby lot,' but from these points to the northerly line of the 'Busby lot' the actual distance was one hundred five and five-tenths (105.5) feet. It was from a description of the premises furnished by Mr. Sayles that the deed to Stefanick was drawn."


There are two discrepancies between the monuments described in the deed and the explanation as to monuments agreed upon by the parties. By the explanation agreed upon the surveyor put a pin in the ground to mark the southeast corner of the land conveyed, 91 feet north from the 'stone in the ground at the southeast corner of said Cohen's lot' which was erroneously assumed to be in the northerly line of Hoosac street. That pin is not referred to in the deed. On the other hand the deed refers to an iron pin at the intersection of Connors' line with 'the approximate east line of Mill street,' while the explanation agreed upon does not state that pin was placed in the ground at that point.


§ 2-2. Control of Lines Marked and Surveyed.
§ 2-2(d). Over Course and Distance.
§ 2-2(d)(1). The Rule.

Where the original corners and lines are established, they must control over course and distance, [Fn52] for where the "footsteps" of the surveyor in making the survey are found and identified, all classes of calls contained in the deed must yield to the survey thus established. [Fn53]

[Fn52] Nelson v. Hall, 17 F. Cas. (No. 10,107);


§ 2-2(d)(2). Application.

This rule is most effective in giving control to intention, and that it establishes finality in boundaries is well shown in the case of Bolden v. Sherman,[Fn54] (See Figure 11.) In August, 1847, Sherman bought from Augustus Garrett a piece of land on State Street, Chicago, and the deed was recorded in November of the same year. In 1849 Garrett, in attempting to fence his remaining land, established his south fence six feet over on Sherman's land. There was no evidence to indicate the location of the fences along his other lines, and in 1856 when his wife's executors platted the estate north of Sherman, the surveyor took the fence on Sherman's land, the only remaining one, as good, and laid off eleven lots, one next to the fence 27 feet wide and the ten to the north each 24 feet on State Street. This naturally left an unplatted space of some 6 feet between Lot One and the property of Ann Seaman, the abutter on the north of the Garrett estate.

[Fn54] Bolden v. Sherman, 110 Ill. 418 , 1884 WL 9898 (Ill. 1884).
In October, 1861, Stevens took possession of the 26 feet next south of the Howard property, and built a house upon it, and by himself and his tenants has been in the actual possession of the same ever since. This action was brought October 26, 1880.

In ruling on the point in question, the court held, “Where a lot is sold as platted, the fences and surveyor’s marks upon the ground, as stakes, are facts indicating its boundaries and will prevail over an attempt to describe lots by distances.

It is true the deed says the north-west corner is 216 feet south of the north-west corner of the Garrett tract, when the north-west corner of this 51 feet was, in fact, 222 feet south of the Garrett tract, by the description in the deeds to the property lying next north, but whether more than 216 feet south of the enclosure, does not appear. It is not a question of accuracy of measurement. The question is, what land did this deed purport or profess to convey.

_Bolden v. Sherman_, 110 Ill. 418, 1884 WL 9898 (Ill. 1884)

The lots were sold in March, 1856, at a public sale, and Charles Ferren bought lots 10 and 11, at $5100, and received a contract from the executors, by which they contracted to sell the same to him. The description in the contract was: “Commencing at a point on State street 216 feet south of the north-west corner of the land belonging to the estate of said Eliza Garrett, deceased,-- which adjoins the land formerly belonging to Mrs. Ann Seaman, of New York,— running south 51 feet, thence east 170 feet, thence north 51 feet, thence west 170 feet to the place of beginning, known in a certain plat or subdivision of said property, now in possession of said parties of the first part, as lots 10 and 11, in block 1.”...

_Stevens_, in 1859, sold to Kate Howard lot 10, and one foot off the north side of lot 11, and she, in 1859, built a brick house upon the property, 25 feet front, on State Street. This left 26 feet between the south line of her house and the line of the fence on the south line of the six feet in controversy. ...

In October, 1861, Stevens took possession of the 26 feet next south of the Howard property, and built a house upon it, and by himself and his tenants has been in the actual possession of the same ever since. This action was brought October 26, 1880.

_Bolden v. Sherman_, 110 Ill. 418, 1884 WL 9898 (Ill. 1884)
§ 2-4. Control of Artificial Monuments.

§ 2-4(a). General.

Strictly speaking, natural monuments are confined to the works of nature; and artificial monuments are the works of person. In practice, certain monuments, such as highways and building walls, are generally recognized as possessing the properties of natural monuments - that is, permanence, identity, and visibility. Other monuments placed by persons may possess certain of the essential properties to a greater degree than many natural monuments and yet may lack one feature to such an extent that they cannot be regarded with great confidence. It is therefore hard to draw any distinct dividing line between the two classes of monuments or to decide whether a certain object is distinctive and permanent enough to be regarded as a monument. In many of the cases previously considered, the monuments referred to were on the border line and might be regarded for purposes of control as either natural or artificial, according to the judgment of those making the decision.

§ 2-4(b). Stakes As Artificial Monuments.

§ 2-4(b)(1). General.

By definition, a monument is some tangible landmark established to indicate a boundary. It is questionable whether wooden stakes meet all the requirements usually associated with a landmark, permanency especially. In Bast v. Mason it was held that wooden stakes about 1 inch square, driven at corners of lots did not constitute permanent monuments. This case was cited in Cox v. Freedley supporting this contention. On the other hand in Thatcher v. Matthews it was held that where a stake is placed to locate the corner of a survey, the stake fixes the corner as conclusively as if the corner were marked by a permanent object. These citations establish that it is impossible to give a hard and fast rule that will determine the regard to be given a stake based on the considerations of its physical properties such as size, and material; and further investigation of these cases reveals that when the problem is viewed as one regarding the control of intention, much of the apparent conflict is removed. Thus in Bast v. Mason the rejected stakes had been set up by an auctioneer just prior to a sale and yielded to a fence long recognized as a boundary. Under these circumstances the decision is not in the least arbitrary and illustrates how the surrounding circumstances as well as the physical properties of the stakes enter into a decision.


[Fn147] 101 Tex. 122, 105 S.W. 317 (1907).

Skelton Boundaries and Adjacent Properties

Chapter 2 – Relative Importance of Conflicting Elements

§ 2-4(b). Stakes As Artificial Monuments.
§ 2-4(b)(3). [§132.] Identity Aided by Evidence.

The courts recognize that great latitude must be allowed in the proof of ancient boundaries. [Fn152] Extrinsic evidence locating the position of a monument no longer existing is sometimes available in fixing its location. In Williamson v. Gooch [Fn153] the court held extrinsic evidence permissible to show where a fence marking a point had previously been located so that a measurement could be taken from the fence to a stake. In fact, the stake had actually been replaced by a tree, but its location was unquestioned. Likewise, evidence establishing the fact that a fence was located four feet from the house was sufficient to establish its location at the time of the transaction. [Fn154] These decisions suggest the great value of referencing stakes and other artificial monuments and of placing the referenced dimensions on the plat so as to indicate that they were actually made for the purpose of locating the monument with respect to more lasting structures. Furthermore, course and distance should not be disregarded in determining the identity of a monument. In general, if the call for the monument is made in the deed, the location and identity may be proved by testimony not found in the grant but consistent with it. [Fn155]

[Fn152] Busbee v. Thomas, 175 Ala. 423, 57 So. 587 (1912).
[Fn153] 103 Me, 402. 69 A. 691 (1908).
[Fn155] See § 2-1(a)(3) - (5), supra. [§§ 68, 69, 70]

§ 2-4(c). [§133.] Stakes As Lines Marked and Surveyed.

Stakes are generally classed as artificial monuments, but under certain circumstances they may be regarded as lines marked on the ground at the time of the survey. As such stakes may constitute the best evidence of the intention of the parties and are controlling above all other calls. [Fn156] So no general rule can be stated to determine the regard to be given a stake in such a situation, for the decision depends upon the character of the monument, the surrounding circumstances, and the actions of the parties at the time of the transaction. The simultaneous consideration of these facts would lead to ridiculous hair splitting and is rendered unnecessary by the underlying fundamental principle that it is the intention of the parties effectually expressed and not merely surmised that control. Calls are only guides pointing to this intention, and in any given case the ones that are more positive prevail, regardless of an arbitrary arrangement of precedence.

[Fn156] See § 2-2(a)(1). [§77]


Considering that an object to be regarded as an artificial monument must possess visibility, permanence and stability, and that in general these properties are not as strong as are found usually in a natural object, it is apparent that after natural monuments, artificial objects control all classes of calls. [Fn157] It is essential that they be mentioned in the deed. [Fn158] To control, the artificial monument must be fixed, stationary, and well defined. [Fn159] Artificial monuments should be sufficiently known and certain to indicate the supposed intent and must exist at the time of the deed or be erected to conform to the intention shortly after its execution. [Fn161]

[Fn159] Smith v. Hutchinson, 104 Tenn. 394, 58 S.W. 226 (1900).
[Fn160] Church v. Steele, 42 Conn. 69 (1875).
§ 2-8. Control of Course and Distance.
§ 2-8(a). [§183.] General.

The marks on the ground constitute a part of the survey. Courses and distances are only evidence and record of the survey.[Fn303] When there are no natural boundaries and the stakes of the original survey are gone, the lines of ancient fences and long continued occupation of adjacent lots on the same block have greater probative force than mere measurements of courses and distances.[Fn304] The limited control of the courses and distances is clearly established.

In grading the dignity of the different classes of calls usually found in deed descriptions of land, the courts intended only to establish a rule for arriving at the location of boundaries as actually established at the time the original survey was made. The rule that monuments and natural objects are superior to courses and distances does not impeach the sufficiency of course and distance to locate a boundary, but course and distance must yield to the superior class of calls.[Fn305]

[Fn303] Hall v. Tanner, 4 Pa. 244 (1846).
Skelton Boundaries and Adjacent Properties
Chapter 2 – Relative Importance of Conflicting Elements

§ 2-8(b). [§184.] The Rule

It is generally recognized that the control of course and distance is primarily negative. It follows that courses and distances control only when

1. there are no calls for natural or artificial monuments, lines marked and surveyed, or adjoiners; [Fn306]
2. the monuments or lines called for cannot be located [Fn307] or identified; [Fn308]
3. the monuments or lines called for were referred to erroneously [Fn309] or upon conjecture, [Fn310] or are impossible calls, [Fn311] and thus compliance with them would defeat the evident intention expressed in the deed. [Fn312]

In the application of the above rule to cases involving lost monuments, it should be borne in mind that “if monuments called for have been lost or removed, the places where they were originally located may be shown by parol or other competent evidence, and if proved to the satisfaction of the jury by fair preponderance of evidence, these original locations will prevail over courses and distances.” [Fn313]

[Fn308] Bell County Land & Coal Co. v. Hendrickson, 24 Ky. L. Rptr. 371, 68 S.W. 42 (1902).
[Fn309] Johnson v. Archibald, 78 Tex. 96, 14 S.W. 266 (1890).
[Fn313] Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668 (1904).


Where there is a dispute of boundaries in two conveyances from the same grantor, the calls of the senior grant must control, and no language contained in the junior grant can in case of conflict extend or change the lines of the elder grant. [Fn393] It has been ruled that where the first sale by the grantee calls for a specified area, the quantity so set forth must be satisfied by preference and priority over all junior grants. [Fn394]

§ 2-11(b). Exceptions.

However, a grant of land identified by specific boundaries having such descriptive features as to render its identification a matter of absolute certainty gives a better right to the premises than a floating grant, although the floating grant is surveyed and patented first. [Fn395] The rule is subject to limitations arising from the control of other established principles recognized by the courts as superior evidence of the intention.

Where the grants are made by a grantor separately but simultaneously, that one is first surveyed and given practical location will prevail. [Fn397]


§ 2-12. Relative Importance of Conflicting Surveys.

If the lines of an older survey can be established by its lines and corners, and the lines and corners conflict with an adjoining survey, the lines of the adjoining survey must give way to the lines of the older survey. [Fn398] Thus where the field notes of a survey were filed and recorded prior to a subsequent survey, they were not contingent on any future work, and appropriated definite lands, and the lines of those lands could not be affected or changed by subsequent surveys. [Fn399] This rule is general [Fn400] and applies with great force where the lines of the prior survey are established and recognized, and the prior lines are called for in the description of a junior grant. [Fn401] Where the surveyed line of the older survey is well marked, established, and recognized, and a call for it as a bound is made in a junior grant, such line as established, marked, and recognized at the time of the junior survey will prevail over the line of the senior survey in its correct position. The distance calls of the junior grant will not be extended to conform with the correct unmarked and unrecognized line of the senior survey. [Fn402]

[Fn400] Snodgrass v. Snodgrass, 2 12 Ala. 74, 101 So. 837 (1924).
Skelton Boundaries and Adjacent Properties
Chapter 3 – Excess and Deficiency

CHAPTER 3
EXCESS AND DEFICIENCY

I. THE RULE
II. THE REASON FOR THE RULE
III. CONDITIONS FOR THE RULE TO APPLY
IV. LIMITATIONS
V. EFFECT OF STREETS
VI. EFFECT OF IMPROVEMENTS
VII. EFFECT OF IRREGULARITY OF THE PLAN
VIII. EFFECT OF LOCATION OF DISCREPANCY BEING ESTABLISHED
IX. EFFECT OF REFERENCE TO A PLAT IN DESCRIPTION BY METES AND bounds
X. RULE TO BE APPLIED AS LAST RESORT

§ 3-1. [§215.] The Rule

Where a tract of land is subdivided and platted, any excess or deficiency is to be apportioned among the several parcels, since it cannot be presumed that the variance arose from the defective survey of any particular part. It must be concluded, in the absence of evidence to the contrary, that it arose from imperfect measurement of the whole line. [Fn1] The excess or deficiency, determined by actual measurement between recognized monuments instead of the plat dimensions, unless there are markings on the ground of the division lines between the lots, must be apportioned between the subdivisions of the whole line in proportion to their respective lengths, [Fn2] and if there is an excess, the title does not remain in the original owner of the tract. [Fn3]

[Fn3] Cappin v. Manson, 144 Ky. 634, 139 S.W. 860 (1911); Booth v. Clark, 59 Wash. 29, 109 P. 805 (1910).
§ 3-2. [§216.] Reasons for the Rule

Where the excess or deficiency is due to the original chain or tapes being too long or too short, rigid mathematics dictates that the error should be distributed proportionally among the subdivisions of the line, and where a small discrepancy is due to careless surveying, and there are no circumstances suggesting that there is a gross mistake in any part of the survey, the law of probability supports the rule. But where it can be proved that the error is caused by an erroneous assumption in regard to one terminal of the line or side of an area, then the rule has no rational basis, since an error that is located and explained should not, from a mathematical standpoint, be distributed.

Maxims of Jurisprudence
When the reason for a rule ceases, the rule ceases.

Skelton Boundaries and Adjacent Properties
Chapter 3 – Excess and Deficiency

§ 3-2. [§216.] Reasons for the Rule

Certain circumstances may justify an apportionment of the excess or deficiency, even where the conditions do not substantiate the mathematical basis for the rule. Therefore, where a line is supposedly of a certain length but is in reality a small fraction longer than the supposed length, and a plat shows it divided into a given number of equal parts, the logical conclusion is that the mapper intended a given number of lots of equal frontage; if he had known the correct length of the line, he would have merely made each lot frontage a trifle larger. When the rule is applied in such a case, it prevents the mapper's intention from being overcome by an error or mistake that he did not recognize. The plat as a pictorial representation shows clearly the number of lots into which the area was to be divided, and its dimensions indicate the relative sizes that can be attained only by apportioning the excess or deficiency. Furthermore, where an excess or deficiency exists and is not distributed, a lot may have two positions, according to the starting point of the survey. Therefore, it is essential that the discrepancy be apportioned to stabilize the location of the starting point.

§ 3-3. [§217.] Conditions for Rule to Apply.

The rule of apportionment of excess or deficiency applies to the following situations:

1. where the tract is divided into lots by a plan, and conveyance is made solely by lot number with reference to a plat; [Fn6]
2. when the tract is divided in a partition proceeding [Fn7]
3. where the tract is divided into two or more parts of designated area; [Fn8]
4. where the whole tract is intended to be conveyed by two or more deeds executed at the same time, and no lines are marked on the ground, but it is the intention of the parties that the tracts adjoin each other; [Fn9]
5. where the tract consists of a number of surveys lying between lines fixed by the adjoining tracts; [Fn10]
6. where the tract consists of two or more surveys made into one inclusive survey or made at or about the same time by the same surveyor; [Fn11] or
7. where the lots conveyed are intended to adjoin, but it appears, when marked as described in the conveyances, there is a space between them; [Fn12]

[Fn12] Lincoln v. Edgecomb, 28 Me. 275 (1848).

§ 3-4. [§218.] Limitations.

Though certain circumstances raise a presumption that an excess or deficiency is to be apportioned, if the facts in any particular case establish that the intention is otherwise, the presumption is overcome. For example, the rule does not apply to the following situations:

1. Where the plat shows dimensions for all lots but one, [Fn13] and is the clear intent of the grantor that this lot be regarded as a remnant to take care of the excess or deficiency, [Fn14] the omission of the dimensions of the remnant lot gives the dimensions of the plat certainty.
2. Where a street or other recognized and acknowledged monument shown on the plat and found on the ground limits the distribution of the excess or deficiency, [Fn15] the rule does not apply since the best evidence of the location of a line is the very stakes or monuments set by the surveyor; [Fn16]
3. Where the land is platted into blocks with intervening streets, each block should, if possible, be treated as distinct, and the shortage or excess in the block be distributed among the lot owners unless possession has fixed the limits; [Fn17]

§ 3-4. [§218.] Limitations.

(4) Where improvements have been made on the original lines, [Fn18] and where the grantee has been put into possession to certain definite lines whose identity and position can be unquestionably established, the superior rule in regard to lines marked and surveyed prevails. [Fn19]

(5) Where (a) the procedure of the surveyor in marking the plat can be definitely followed, (b) the location of the excess or deficiency can be established, [Fn20] and (c) where the lines as originally run can be fully retraced, the excess and deficiency are not to be apportioned. [Fn21]

(6) Where there is no connection between the deeds of the various grantees in both time and circumstances [Fn22] and each grant is distinct and separate, the deeds take precedence in order of seniority, and the junior deed must bear the deficiency or take the excess. [Fn23]

(7) Where the tracts of land are conveyed separately and simultaneously by a common grantor, but one deed is based on a prior survey, [Fn24] this deed is in effect the senior grant, and the general rule would not apply.

(8) Where an attempt to apportion the excess or deficiency would cut the land into such sized lots as to cause the boundary lines to pass through houses and improvements where actual possession has fixed the size of the lots, the general rule may be rendered impossible to apply. [Fn25]


§ 3-5. [§219.] Effect of Streets

Chapter 3 – Excess and Deficiency

Streets that have been opened in supposed conformity to a plat and have been in use for a long period of time should be accepted as fixed monuments in locating lots or blocks contiguous or fronting the streets. [Fn25] ...

Streets limit the apportionment of excess and deficiency because it is essential that their location be undisturbed, but where they themselves are not fixed, the reason for their control ceases, and cases may arise where apportionment should be extended over more than one block. In Coop v. George A. Lowe Co., [Fn27] a plat showed Block Twenty-Four consisting of seventeen lots, one triangular in shape fronting 197 feet on 37th Street and the other sixteen lots fronting on Grant Avenue and separated from Lot One by a 20-foot alley. (See Figure 37.) The lots on Grant Avenue were not dimensioned, but Block Forty-Three to the south of the alley was shown as 142.5 feet west of Grant Avenue and parallel to it. This made the plat distance from the southwest corner of Lot One to the southeast corner of Lot Two, 197+20+142.5=359.5 feet, whereas on the ground there was only 315.7 feet. The county road to the west was intended to be 4 rods wide but was actually 8. However, as the plat was laid from the line of the 8-rod road, this was of no consequence. [Fn27]


§ 3-5. [§219.] Effect of Streets

The alley had long been in dispute. The abutting property owners did not recognize an existing fence as fixing its lines, and it had not become established by adverse possession. Under these circumstances the court prorated the deficiency, giving 173 feet to Lot One, 17.6 feet to the alley, and 125.1 feet to the lots between the alley and Grant Avenue. There was nothing in the record to show that the line of the alley in blocks to the south was fixed, and thus this apportionment was essentially correct. Had fences or other structures in adjoining blocks located the alley, then its position in Block Twenty-four would have been determined as in line with the alley as fixed by improvements, and the apportionment would not have applied.[Fn28]

It is questionable whether the shortage should be prorated in a street. Street widths are usually first determined before the actual platting is begun, and several widths are accepted as representing the requirements for the various classes of streets. The general tendency is to keep the street area down to a minimum, and it is usually a reasonable presumption to assume that the mapper gave careful thought to his street dimensions and intended them as shown. Had he known of a deficiency, he would have taken a little off the lots on either side of the street or rearranged the street plan to give a more satisfactory layout.

[Fn28] See Chapter 4, § 4-2(d)(3).

§ 3-6. **[§220.] Effect of Improvements.**

"In resurveying a tract of land according to a former plat or survey the surveyor's only function or right is to relocate, upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground." [Fn29] Therefore where it is established that existing improvements were erected soon after the lot had been marked and in conformity with the original lines and stakes, these structures preclude the apportionment of a shortage or surplus since these are controlling evidence of the mapper's intention." But "practical location or use and occupation, in order to be evidentiary of original locations, must be at least open to the inference that it commenced with some reference to the original survey lines or markings." [Fn31] and the significance of structures depends upon whether they were built according to lot lines and upon the probability that their builders at the time of construction had better means of knowing the lines than are now available. [Fn32]


[Fn32] Id.

§ 3-6. **[§220.] Effect of Improvements.**

[Nilson Bros.][Fn36] acquired title to the north one-half of Lot Five and the south one-half of Lot Six, as shown on a plat dated 1868. The plat showed eleven 50-foot lots and one 49-foot lot on Halstead Street to the north of Belmont Avenue (66 feet wide.) (See Figure 39.) There was no description by metes and bounds. Nilson Bros. erected a building 50 feet wide with its north wall 308 feet from the centerline of Belmont Avenue and making no allowance for the shortage of 2.68 feet which, if apportioned made his north line 306.77 feet north of the centerline of Belmont Avenue and his building 1.23 feet over his line. Kahn in improving his property to the north rested his beams in Nilson Brothers' wall; they brought suit to restrain him, claiming that, as their building had stood for twelve years, they had acquired the land upon which it stood by adverse possession. In this they relied upon a statute that fixed the necessary period of possession under color of title as ten years. But as stated above, their deed, necessitating reference to the plat for its practical location, confined their title and their claims to lines 256.99 and 306.77 feet from the centerline of Belmont Avenue. Therefore, the statute was of no avail. It is a general rule that improvements of a permanent character made on real estate and attached to it without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee. [Fn40] Therefore, Kahn had the right to project his beams approximately 14 inches into the wall, and Nilson Brothers' improvements did not restrain the apportionment of the deficiency amounting to approximately 0.22 feet per lot.

§ 3-10. [§226.] Rule to be Applied as Last Resort.

Though it is true in every careful survey that measurements are made between established monuments of known distances apart for the purpose of prorating measurements, this process is not strictly an application of the rule of apportionment. Its purpose is rather to compare the tape being used with that of the original survey, or to allow for the effect of temperature. The true application of the rule involves the distribution of a discrepancy.

When this is realized, it is evident that the rule of apportionment is merely one of construction and that the control of intention as effectively expressed seldom if ever aids in its application. When dimensions are given to all the lots of a block, it is certain that the mapper was unaware of any discrepancy, and when all but one are given. intention is apparent, and the rule has no application.

When this is realized, it is evident that the rule of apportionment is merely one of construction and that the control of intention as effectively expressed seldom if ever aids in its application. When dimensions are given to all the lots of a block, it is certain that the mapper was unaware of any discrepancy, and when all but one are given. intention is apparent, and the rule has no application.


§ 3-10. [§226.] Rule to be Applied as Last Resort.

When the rule of apportionment is viewed in this light, existing lines assume a great importance. Where it is proved that they represent the limits within which the grantor has placed the grantee in actual possession, they should stand, regardless of whether or not they have existed for a period of time to establish the line by adverse possession. Under these circumstances they are actual evidence of the understanding of the parties at the time of the transaction. Furthermore, this conception of the problem breaks down the logic of the court’s ruling in Nilson v. Kahn where it was held that a conveyance by lot number and reference to a plat conveyed title not to the frontage and depth shown on the plat but rather to dimensions after an existing excess or deficiency had been prorated. Fifty-feet should mean 50 feet no matter whether the representation of a frontage is in words or by figures on a plat. It is not logical to seal the merchant’s scales to protect the buyer’s expenditures and then to permit a developer to evade responsibility for representations as based upon his own measurements.

Skelton Boundaries and Adjacent Properties
Chapter 3 – Excess and Deficiency

§ 3-10. [§226.] Rule to be Applied as Last Resort.

These considerations clearly establish the regard to be given to the rule. The construction of deeds and the legal effect thereof is a question of law [Fn68] for the courts to decide, [Fn69] and it is not for the surveyor in a given case to attempt to force his or her theories. Rather, it is the surveyor’s duty to search diligently for evidence of the existence lines of occupation and such facts as will locate the position of the error in order that the court may have more tenable grounds for its decision and be relieved of the necessity of applying the rule. The courts do not hold the rule of apportionment in high regard, as is established by the relatively few cases in which it is resorted to, and even then, the courts apply it only in the absence of any marking on the ground of the division lines between the lots.


Fig. 39.

Skelton Boundaries and Adjacent Properties
Chapter 4 – Highways and Streets as Boundaries

CHAPTER 4
HIGHWAYS AND STREETS AS BOUNDARIES

I. Fee Carried to Center
II. Location of Streets
III. Relation Between Streets and Private Boundaries
IV. Reversion
§4-1. Fee Carried to Center. 
§ 4-1(a). [§230.] The Rule.

Chief Justice Chase said, "It is a familiar principle of that law, [referring to the statute law of Illinois regarding dedication] that a grant of land bordering on a road or river, carries title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. [Fn1] The title of the land in the roadway is, of course, subject to the public easement. This rule is applied to land described as "bounded on," "running along the highway," and the like, even though the expressed dimensions exclude the highway. [Fn2] The rule does not conflict with the principle that a call for a monument takes to an exterior point or line of the same, as explained by Justice Gray in the following:

§4-1. Fee Carried to Center.
§ 4-1(b). ([§231.]) Reason for the Rule.

The basic reasons for this rule are (1) the absence of practical use to the grantor of relatively small, odd-shaped parcels of land that would remain in his possession; ([Fn4]) (2) the greater value to the grantee who has acquired adjacent land, and who has an immediate interest in the properties adjoining; ([Fn4]) (3) the public convenience, which is best served by having control of highways and streets in the owners of adjacent properties, rather than in distant owners who have no incentive to keep them up; (4) the concern of the state and political units as to who shall determine and pay for improvements; ([Fn7]) (5) prevention of disputes regarding precise boundaries; ([Fn8]) and (6) the embarrassment and confusion that would prevail if a different rule existed. ([Fn9])


§4-1(c). Effect of Manner of Establishment.
§ 4-1(c)(3). ([§234.]) By Dedication.

A common-law dedication confers only an easement and leaves the legal title in the street in the adjoining owner ([Fn21]) and in some states dedications pursuant to the statutes do not pass fee simple but only such an estate as the purpose of the trust requires, and the fee simple title subject to the public easement remains in the dedicator and his grantees. ([Fn22])


In other jurisdictions, the surveying and platting of land and acknowledging and placing a plat on record has the effect of conveying a fee to the city of such portions of the premises platted as donated to the public. ([Fn22]) Plats were unknown to the common law, and thus, it is important that they be in substantial compliance with the statutes.

[Fn22] Sears v. Chicago, 247 Ill. 204, 93 N.E. 158 (1910).
§4-1(c). Effect of Manner of Establishment.

§ 4-1(c)(4). [§235.] By Prescription.

Since an easement will confer upon the public all the rights essential for the use of right-of-way as a street, an easement rather than a vesting of fee is acquired by prescription, and the title in the roadway remains in the owner of the adjoining land.[Fn30]


§4-4. Reversion.

§ 4-4(a). [§272.] The Rule.

Where land is bounded upon a highway or street without reservation and thereafter the highway or street is abandoned, the land in the bed of the street reverts to the grantees holding the abutting lots. [Fn169] If the street runs along the margin of grantor’s land and the grantor owned the fee in the entire width of the street, the entire width inures to the grantees who own the adjoining lots. [Fn170] However, where the conveyance limits the grant to the side lines of the street, no fee in the right-of-way is passed to the grantees holding the abutting lots, and they acquire no interest in the street when the street is abandoned and when the land therein is relieved of the public easement.[Fn171] Where the original grantor restricts the conveyance by words so as to reserve title to the land within the street in himself, the fee upon abandonment reverts to him free from the burden of easement. [Fn172]

Skelton Boundaries and Adjacent Properties
Chapter 5 – Riparian Boundaries

CHAPTER 5
RIPARIAN BOUNDARIES

I. GENERAL
II. LAW OF STATE CONTROLLING GOVERN
III. DEFINITIONS
IV. EFFECT OF PARTICULAR CALLS
V. RIPARIAN RIGHTS
VI. POWER OF STATE TO DISPOSE OF PUBLIC RIGHTS
Skelton Boundaries and Adjacent Properties
Chapter 6 – Establishment

CHAPTER 6
ESTABLISHMENT

I. GENERAL
II. ESTABLISHED LINES DISTINGUISHED FROM MARKED LINES OF ORIGINAL SURVEY
III. BY AGREEMENT
IV. BY ESTOPPEL
V. BY PRACTICAL LOCATION
VI. RECOGNITION AND ACQUIESCENCE
VII. BY SUBMISSION TO ARBITRATORS
VIII. BY PRIVATE SURVEY
IX. BY STATUTORY PROCEEDINGS
X. IMPORTANCE OF FORMAL AGREEMENT

§ 6-1. [§305.] General.
Establishment is fixing a boundary on the ground by using the actual location of its monuments rather than strictly adhering to where the calls in the deeds describing the tract locate those monuments. [Fn1] Establishment is important because it maintains the status quo, supplies the deficiencies of poor descriptions, and aborts disputes in regard to old recognized lines, whether they are in conflict with the deeds or not. The application of establishment to a given case is difficult, since it may depend upon such factors as the implication of an agreement, the consequences of a party's action, and the presumption of an acquiescence, and may involve the party's knowledge or ignorance of the facts, their intentions and motives, and their responsibilities to one another.

[Fn1.] 11 C.J.S. BOUNDARIES §64
§ 6-1. [§305.] General.
When it is definitely proved that the fence or wall marking the given line is not in harmony with the lines of other improvements that check with their own deed calls, and that at the most it merely represents a line established at some time by the adjoining owners, the matter is primarily one of law, hinging upon the question of establishment. A situation survey should then be made to show that the lines of the original survey contradict the line in question, and, where possible, explain the discrepancy. In all cases the extent of the conflict should be indicated, but no recommendation as to which line is the boundary should be made, and comments should be confined to the statement of facts. To prepare such a plat intelligently the [surveyor] must have a knowledge of the legal principles of establishment.

[text in italics, appearing in the 1st Edition, is omitted from the 2nd Edition]

Lines fixed by establishment are to be differentiated from those that are proved to be marked lines of an original survey. The former are local in their effect and are not to be used as a basis of a survey in direct conflict with the deed calls, while the latter are the very best foundation for the reconstruction of the original plat.

This point is well illustrated in the following survey of Lot Three (See Figure 57.) The deed merely called for adjoiners, and an attempt was made to lay down the line DC from the senior deed out of the entire tract of some 6 acres. This grant clearly called for the line as beginning 100 feet from the corner and parallel to First Street, but when it was laid down, it ran into flower beds. Upon investigation it was not parallel to the fence AB', which was, according to the deeds of both Lots One and Two, on a line parallel to First Street, but in fact departed from parallelism 5 ½ feet in 200 feet. The fence had long been established, but the deed description was clear and certain. The street was monumented, and there could be no error of consequence in laying down its side line. The line DC being unmarked raised the question as to the weight to be given DC' established with regard to the fence.

Was the proper location of the senior grant the one laid down by the deed from the monumented street, and had the senior grantee by long acquiescence in an erroneous fence line lost the triangle ABB', or should the clear call of his deed for the unmarked line DC as parallel to First Street be ignored and the distances of the senior deed be given control over this call for course and the line laid down as DC? If the fence was merely on a line established by the acts of the owners of Lots One and Two, the first procedure was proper, but if it was a marked line of the original survey, the second line of action was to be followed.

Skelton Boundaries and Adjacent Properties
Chapter 6 – Establishment


The surveyor's duty is to lay down the lines in their original location, and no further step was possible until the character of the line AB' established by the fence was determined. The ordinance defining First Street was looked up, and it was found to be dated subsequent to the deeds to Lots One and Two, but prior to all other conveyances of the tract. The heirs of the original grantor were then interviewed, and a map of the entire tract was found among some old papers. The line MN extending indefinitely in to the block and the lines AB' and DC' parallel to it were shown in block. The line MN with the angles at M and N and the length in conformity with the city map was drawn in red. All the other lot lines in the block were in black and those related to First Street were clearly laid off with reference to MN. From this it was concluded that the fence was built upon a line parallel to the nonexistent street as of the date of the deed, and that the calls for AB and CD as parallel to this paper street were to be laid down from the fence, which was not along a line erroneously established but along a line of the original survey. As such, it controlled the location of DC, but as merely an established line it placed the fight between the property owners whom it separated.
§ 6-3. By Agreement.
§ 6-3(a). [§307.] Necessary Foundation.
To establish a line by agreement, it is essential that the line be in dispute or that its true location be unknown, and the agreement must simply fix and determine the situation and location of the properties the parties already own.[Fn3] It is not necessary that the line be incapable of ascertainment. The mere fact that there has been a dispute and that the parties have agreed upon and settled a line between them is sufficient to bind them, even though it is afterwards learned that the true line could have been found.[Fn4] It is not at all necessary that there be an actual interference as shown by the title papers,[Fn5] and while in some jurisdictions the agreement must be based on an actual dispute,[Fn6] in others this is not necessary. The element of uncertainty is sufficient in the latter case.[Fn7] The courts have observed that these settlements are common, approved and encouraged by the courts, and should not be disturbed, though it may afterwards be shown that they were erroneously settled, and that convenience, policy, necessity and justice all united in favor of supporting such an amicable adjustment.[Fn8]


§ 6-3(b). [§308.] Limitation.
Such an agreement is not within the statutes of frauds because the effect of an oral agreement establishing boundary lines is not to pass title to land by parol, but to fix the location of an unascertained or disputed boundary,[Fn9] but if the true line is known, then the transfer of any portion of the land on one side of the line from one owner to the other must be in writing to be valid.[Fn10] Furthermore, where the true location is unknown, and the contiguous owners agree on a line that is known not to be the true line, the agreement is void.[Fn11] since it involves a transfer of real estate.[Fn12]


§ 6-4. By Estoppel.
§ 6-4(a). [§313.] Foundation.

"Estoppel in pais may be defined as a right arising from the acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." [Fn54] An estoppel may arise when a party by his declarations or actions either active or passive permits another to be injured to his benefit. Since establishing a boundary line is not considered to affect the title to land, it may be settled by estoppel,[Fn55] which may arise as a matter of deed or record as where both parties claim under the same plat. Neither law nor good policy permits either of them to dispute the lines of the survey as actually located on the land, since their deeds effectually estop them from doing so.[Fn56] Estoppel can also arise through the acts or declarations of a party. For example, where a grantee pointed out a road as the boundary he is estopped from later denying that the road is the boundary.[Fn57]


§ 6-4(b)(2). [§315.] Necessary Essentials.

The elements necessary for the operation of establishment by estoppel are (1) that the person claiming the benefit shall have been misled to his injury,[Fn65] (2) that his actions were induced by the declarations or actions of the party against whom the estoppel is claimed,[Fn66] (3) that the party whose rights are to be barred shall with knowledge have looked on while the other party subjected himself to expense that he would not otherwise have incurred had he known the line to be in dispute,[Fn67] (4) that the division line is not well ascertained and cannot be located by the plain and unambiguous calls of the deed.[Fn68] The reason for this latter element is that generally the party claiming the estoppel must not only be without knowledge of the state of facts but also of a convenient and available means of acquiring such knowledge.[Fn69]

[Fn66] Harris v. Lewis, 156 Iowa 413, 136 N.W. 674 (1912).
[Fn67] Benz v. St. Paul, 89 Minn. 31, 93 N.W. 1038 (1903); see also Cottrell v. Pickering, 32 Utah 62, 88 P. 696 (1907).
Chapter 6 – Establishment

§ 6-5. By Practical Location.
§ 6-4(a). [§320.] Essentials.

Practical location is only an actual designation by the parties on the ground of the monuments and bounds called for by their deeds [Fn90] and one adjoiner cannot make a practical location without the other [Fn91]. Cooperation and agreement between the adjoiners is essential to practical location, and the mere fact that an adjoiner knew of a survey and saw the actual setting of stakes is insufficient to establish a practical location in absence of proof that he agreed to the line or that improvements were made according to the survey [Fn92].

[Fn91] Crook County v. Sheridan County, 17 Wyo, 424, 100 P. 659 (1909); Kincaid v. Peterson, 135 Or. 619, 297 P. 833 (1931).

§ 6-6. Recognition and Acquiescence.
§ 6-6(a). [§323.] Foundation.

In general, acquiescence depends on the words, declarations, or silence of the parties or on inferences and presumptions of their conduct [Fn103] and exists where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his right. Acquiescence does not presume an agreement, either expressed or implied. To the contrary, an agreement can be inferred by acquiescence [Fn104]. Recognition and acquiescence not induced by fraud or mistake and continued for a long period of time afford strong if not conclusive evidence that the line recognized is in fact the true line, and boundaries may be so established on this basis, although neither of the parties intended to claim more than his deed gave him [Fn105].

[Fn105] Lane v. Jacobs, 166 A.D. 182, 152 N.Y.S. 605 (1915).
CHAPTER 7
Adverse Possession

I. GENERAL
II. NECESSARY ELEMENTS
III. INTERRUPTION
IV. COLOR OF TITLE
V. AGAINST WHOM ADVERSE POSSESSION DOES NOT RUN
VI. WHO MAY ACQUIRE PROPERTY BY ADVERSE POSSESSION
VII. EXTENT OF ADVERSE POSSESSION
VIII. RIGHT OR TITLE ACQUIRED

CHAPTER 8
Dedication

I. GENERAL
II. CAPACITY OF THE DEDICATOR
III. COMMON-LAW DEDICATION
IV. STATUTORY DEDICATION
V. ACCEPTANCE
VI. LIMITATIONS
VII. PRESUMPTIONS
VIII. REVOCATION
IX. ABANDONMENT
Skelton Boundaries and Adjacent Properties
Chapter 9 – Adjoining Landowners

CHAPTER 9
Adjoining Landowners

I. RIGHTS AND DUTIES
II. ENCROACHMENTS
III. RIGHT TO LATERAL SUPPORT
IV. RIGHT TO EXCAVATE
V. LIABILITY FOR DANGEROUS CONDITIONS
VI. RIGHT TO LIGHT AND AIR
VII. TREES
VIII. FENCES
IX. PARTY WALLS

§ 6-7. By Submission to Arbitrators.

In general, acquiescence depends on the words, declarations, or silence of the parties or on inferences and presumptions of their conduct [Fn103] and exists where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his right. Acquiescence does not presume an agreement, either expressed or implied. To the contrary, an agreement can be inferred by acquiescence. [Fn104] Recognition and acquiescence not induced by fraud or mistake and continued for a long period of time afford strong if not conclusive evidence that the line recognized is in fact the true line, and boundaries may be so established on this basis, although neither of the parties intended to claim more than his deed gave him. [Fn105]


[Fn105] Lane v. Jacobs, 166 A.D. 182, 152 N.Y.S. 605 (1915).
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