Priority of Calls in the Law and Surveying

Presented By:
Walter G. Robillard and Kimberly A. Buchheit

NJSPLS SurvCon
February 2013
Atlantic City, NJ

Introduction

The “Priority of Calls” should be considered as the road map for the practicing surveyor when creating descriptions of land boundaries, when retracing descriptions of land parcels and when attempting to evaluate conflicting elements in land descriptions of parcels being surveyed.

This presentation will attempt to highlight both survey and legal approaches to understanding and applying the “Priority of Calls”.

What is the “Priority of Calls”?

The “Priority of Calls” is a standard set of guidelines, that when considered or applied can assist the surveyor in creating new parcels of land, in retracing previously created parcels of land and can assist the attorney in litigating disputes as to the title and boundaries of land.

The “Priority of Calls” can be applied in at least two instances:
1) When new legal descriptions are created to define new parcels of land.
2) When retracing parcels that were previously created in written descriptions

The Historical Significance of the “Priority of Calls”

Reference to the historical significance or a complete listing of the “Priority of Calls” (Dignity of Calls, as some courts have described them) could not be found in any early English Case Law decision until the Mid 1800’s.

On an individual basis, Courts have recognized elements of the listing either in their individual capacity or in conjunction with other elements of control.
Common Law

Based on “precedents” and principles of fairness. The system recognizes that similar facts should be considered similarly if raised again on another occasion.

- The common law became the basic law of most states due to the Commentaries on the Laws of England, completed by Sir William Blackstone in 1769, which became every American lawyer's bible. Today almost all common law has been enacted into statutes with modern variations by all the states except Louisiana which is still influenced by the Napoleonic Code. In some states the principles of common law are so basic they are applied without reference to statute.

Common Law Origins

Common Law is a system of law in place in England and its colonies. Common Law—law common to all England—was based on the principle that the rulings made by the King's courts were made according to the common custom of the realm, as opposed to decisions made in local and manorial courts which judged by provincial laws and customs. The crafting of English Common Law was begun in the reign of Henry II (approximately 1154), who had foreign legal learning and instituted legal reform in England.

The royal judges of Henry II, and of succeeding reigns, evolved the Common Law from the procedure of the King's central courts—the Court of King's Bench and the Court of Common Pleas.

Source note: http://www.luminarium.org/encyclopedia/commonlaw.htm
Common Law Definition

- The ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts. The general body of statutes and case law that governed England and the American colonies prior to the American Revolution.

- The principles and rules of action, embodied in case law rather than legislative enactments, applicable to the government and protection of persons and property that derive their authority from the community customs and traditions that evolved over the centuries as interpreted by judicial tribunals.

Source note: http://legal-dictionary.thefreedictionary.com/Common+law

Example: Florida Statutes 2012

Title 1, Chapter 2

- 2.01 Common law and certain statutes declared in force.— The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

- History.—s. 1, Nov. 6, 1829; RS 59; GS 59; RGS 71; CGL 87.
The Historical Significance of the “Priority of Calls”

The basic land description or survey systems recognized in American real property descriptions are identified as follows:
1) Public Land Survey Systems (PLSS)
2) State Sanctioned Survey Systems
3) Metes and Bounds Survey and System

The “Priority of Calls” application is partially or completely recognized and accepted in each of these three (3) systems.

Although not the oldest, the “Priority of Calls” applied to the Public Land Survey System was created under Statute Law by the United States Congress on February 11, 1805.

Only some of the States specifically mention the “Priority of Calls” or “Dignity of Calls”, but all of the States recognize a number of the elements.

The Historical Significance of the “Priority of Calls”

One of the earliest American Court Decisions that impliedly recognized the “Priority of Calls” was in 1799 in Kentucky, Cowan v. Harrod.

That was followed in 1809 with a similar decision in Bryan v. Beckley, 16 Ky. (Litt. Sel. Case) 91. This was an appeal that originated with an 1801 trial, Beckley v. Bryan and Ransdale, 1 Ky (Ky. Dec) 91.

Apparently these two (2) decisions were determined independent of any Federal Legislative influence. Over the years, the various Metes and Bounds States recognized this Priority.

One of the first decisions that recognized the Federal influence was Walters v. Commons in 1835, in Alabama. The Priority may not have been mentioned by name, but, it was accepted as an important factor to this definitive decision regarding the priority of original monuments over area in the conveyance of an aliquot part of a section.
The Historical Significance of the “Priority of Calls”

Researching the various decisions in which the Courts rendered guidelines as to the use of evidence has led to a compilation of a list that has been identified by numerous State and Federal Courts as those elements that comprise the “Priority of Calls”.

The Priority (Dignity) of Calls for Evidence
Compiled from State Courts, Statutes, Writings

1) Lines actually run in the field and proven from evidence
2) Monuments and/or Boundaries set and called for in the description
   A. Natural Monuments
   B. Artificial Monuments
3) Adjoiners (if Senior)
4) Courses
   A. Bearings then Distances (Metes and Bounds States)
   B. Distances then Bearings (GLO States)
5) Recitation of Area
   A. May be controlling
   B. May be evidentiary
6) Coordinates
Applying The Priority of Descriptive and Controlling Elements

RULES AND GUIDE FOR APPLICATION

- To be considered, the element must be referenced in a written conveyance, preferably in the chain of title.
- First Identify what elements are contained in the description that is to be surveyed.
- Consider NO element that is not referenced.
- Classify your elements in descending order.
- Look for the highest element. If it is there, accept it. If not, go to the next element.
- Any element that is not referenced is NO controlling factor.
- Report ALL evidence found, regardless.

By Administrative Code in Texas

Texas Administrative Code
TITLE 31 NATURAL RESOURCES AND CONSERVATION
PART 1 GENERAL LAND OFFICE
CHAPTER 7 SURVEYING

RULE §7.5 Dignity of Calls
The order of dignity of calls in a survey is as follows:
(1) Natural objects (rivers, etc.).
(2) Artificial objects (marked trees, stone mounds, adjoinder calls, etc.).
(3) Courses (bearings).
(4) Distances.
(5) Acreage.

Source Note: The provisions of this §7.5 adopted to be effective January 1, 1976.
Practice Standards (Texas)

MINIMUM STANDARDS OF PRACTICE
as approved by The Board of Texas Land Surveying
(1992; August 2011, current)

22 Texas Administrative Code §663.16. Boundary Construction

(a) When delineating a property or boundary line as an integral portion of a survey, the surveyor shall respect junior/senior property rights, footsteps of the original surveyor, the record, the intent as evidenced by the record, proper application of the rules of dignity or the priority of calls, and applicable statutory and case law of Texas.

(b) Appropriate deeds and/or other documents including those for adjacent parcels shall be relied upon for the location of the boundaries of the subject parcel(s).

Practice Standards (Texas)

(c) A land surveyor, assuming the responsibility of performing a land survey also assumes the responsibility for such research of adequate thoroughness to support the determination of the intended boundaries of the land parcel surveyed. The land surveyor may rely on record data related to the determination of boundaries furnished for the registrants’ use by a qualified provider, provided that the registrant reasonably believes such data to be sufficient and notes, references, or credits the documentation by which it is furnished.

(d) All boundaries shall be connected to identifiable physical monuments of record dignity. In the absence of such monumentation, the surveyor’s opinion of the boundary location shall be supported by other appropriate physical evidence, which shall be explained in the surveyor’s report.
Continuing Education

Further Reading/References:

- Superiority of Calls
- Rules of Construction

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Att. Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1799</td>
<td>Cowan v. Harrod (Kentucky)</td>
<td>1-4</td>
</tr>
<tr>
<td>1801</td>
<td>Beckley v. Bryan and Ransdale (Kentucky)</td>
<td>5-10</td>
</tr>
<tr>
<td>1805</td>
<td>Act of February 11, 1805, U.S. Congress</td>
<td>21-22</td>
</tr>
<tr>
<td>1805</td>
<td>Harris v. Powell’s Heirs (North Carolina)</td>
<td>52</td>
</tr>
<tr>
<td>1809</td>
<td>Bryan v. Beckley (Kentucky)</td>
<td>11-20</td>
</tr>
<tr>
<td>1815</td>
<td>M’Iver’s Lessee v. Walker (US Supreme)</td>
<td>53-56</td>
</tr>
<tr>
<td>1819</td>
<td>Cherry v. Slade’s Administrator (North Carolina)</td>
<td>23-33</td>
</tr>
<tr>
<td>1820</td>
<td>Smith v. Dodge (New Hampshire)</td>
<td>51</td>
</tr>
<tr>
<td>1821</td>
<td>Preston’s Heirs v. Bowmar (US Supreme)</td>
<td>50</td>
</tr>
<tr>
<td>1835</td>
<td>Walters v. Commons (Alabama)</td>
<td>34</td>
</tr>
<tr>
<td>1836</td>
<td>Wright v. Mabry (Tennessee)</td>
<td>48-49</td>
</tr>
<tr>
<td>1854</td>
<td>Riley v. Griffin (Georgia)</td>
<td>57-62</td>
</tr>
<tr>
<td>1867</td>
<td>Stafford v. King (Texas)</td>
<td>35-46</td>
</tr>
</tbody>
</table>

Fast Forward...

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Att. Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1942</td>
<td>Receiver’s Deed (New Mexico)</td>
<td>47</td>
</tr>
<tr>
<td>1946</td>
<td>Lyons v. Pullin (Texas)</td>
<td>64-70</td>
</tr>
<tr>
<td>1971</td>
<td>Sellman v. Schaaf (Ohio)</td>
<td>71-79</td>
</tr>
<tr>
<td>1981</td>
<td>Howell v. US (Georgia)</td>
<td>63</td>
</tr>
<tr>
<td>1989</td>
<td>Spainhour v. Huffmann (Virginia)</td>
<td>80-85</td>
</tr>
</tbody>
</table>
FALL TERM 1799.

Ford vs. Common' th.

renders for taxes & fines, when notice was given of a motion for the recovery of taxes only.

Costs recovered against the common wealth.

pellant was, that he would, on behalf of the common wealth, move for a judgment against him, for the balance of revenue tax only; and we find in the account, as stated by the auditor, a charge for militia fines, which not being comprehended in the notice, and there being a manifest distinction in the law, between taxes and fines, the court is of opinion that the judgment given by the general court shall be reversed with costs, so far as the amount of the said fines, and affirmed for the balance, which is £461 3s. 5 1/4d. together with 15 per cent. damages, and 5 per cent. interest on the whole amount, and costs of the motion.

Cause remanded to the court below, that execution may issue on the said judgment.

Cowan vs. Harrod.

From the Mercer County Court.

THIS, the Reporter believes, is the only case where an attempt has been made, in this state, to carry into effect the law of 1779 as to rectifying mistakes in original surveys. See 2 Dig. 719.

A transcript of the record will exhibit the case more fully and satisfactorily than any statement which he can make.

"At a county court held for Mercer county, at the court-house, on Tuesday the 27th day of March, 1798, John Cowan petitioned the court to rectify certain mistakes in the bounds of his land, wherein he then resided, and Ann Harrod, guardian of Margaret Harrod, heir of James Harrod, deceased, opposed the said petition; and the said Cowan, in its support, introduced James Thompson, Esq. as a witness; but the court refused to hear his testimony: Whereupon the said Cowan, by his attorney, exhibited his bill of exceptions in the words and figures following, to wit:

"Mercer County Court, March, 1798—This day John Cowan, who had filed a petition, and proved advertisement and notice to Ann Harrod, guardian of Margaret Harrod, heir of James Harrod, deceased, for the purpose of rectifying certain mistakes in the bounds of his land, wherein he lived, in Mercer county, to wit, that one part of the line, extending east and west, be-
FALL TERM 1799.

The case involved the priority of calls and the resolution of a dispute between John Cowan and John Harrod. The court heard testimony from James Thompson, Esq., a witness who surveyed the land. The surveyor had begun the survey in the middle of the division line and returned his survey as annexed hereto. The court ordered the surveyor to produce and examine James Thompson, Esq., as a witness. The surveyor, having by a former order of said court herein, returned his survey as annexed hereto, the said John Cowan offered to produce and examine James Thompson, Esq., as a witness, who first surveyed the land; offering to prove by him, that it was agreed between said Cowan and Harrod, that a line extending east and west, and to be fifty poles from said Cowan's then dwelling cabin, (marked by the name of his improvement, in the annexed plat,) should be the established line of division between them; and that he, the said Thompson, in presence of said Cowan and said James Harrod, did measure fifty poles from said Cowan's cabin to the place where the lowest tree now stands, and called for in the annexed plat, and from thence (agreeable to the contract between said Cowan and Harrod,) and in presence of both, did run west, and corner at the three sugar trees, where the patent purports the beginning to be; and having measured and marked the lines round to the letter B. in the annexed plat, called for the beginning without having measured the line from B. to A. or having measured or marked the line from B. to a. To which testimony the said Ann Harrod, guardian, &c. objected, for that the court ought not to admit parol proof in such a case, because, from the face of the title papers, it was apparent that the four corners of said Cowan had been made by the surveyor, and a straight line from those corners was not required by said Cowan; but a new line and corner was required by said Cowan. And the said John then and there insisted that the court should admit the proof and continue the line A. a. east to b. being the division line agreed on; but the court refused to admit the evidence, and repelled the petition of said Cowan; whereto he excepted, and prayed the court to set their seals thereto, and that the same be entered of record.

Samuel Ewing, [Seal.]
Garret Darland, [Seal.]
D. Kox, [Seal.]
John Rochester, [Seal.]
FALL TERM 1799.

"And prayed an appeal to the court of appeals; which was granted him upon his entering into bond with Samuel Taylor, George Caldwell or Joseph H. Daveiss, or either of them, his securities, as the law directs."

### EXPLANATION.

In the annexed plan A. B. C. D. represent John Cowan's survey, according to patent, the corners containing or having trees mentioned in the original grant. The line A. a. 247 poles, a marked line as far as not cleared ground, terminating at a black locust in John Cowan's lane, which locust is N. 2 W. 50 poles distant from his improvement, marked O. From B. three lines, (two of which are down,) N. 2 W. 14 poles, to a linn, buckeye and elm at b. a corner that ranges with the aforesaid line A. a. or is in the same course, but appears to be an open line, as no marked trees could be discovered; that is, the line from B. to b. 14 poles, is no where marked, that appears, nor the lines, buck-eye and elm before mentioned, are not marked; as also the open line aforesaid, that is, from the said lines, buckeye and elm to the black locust in John Cowan's lane, appears no where to have any marked trees. The line B. C. is 62 poles, E. corner to Col. Harrod, a fallen sugar tree, and the line c. d. his line running from John Cowan's survey, &c. Note—The line A. a. and b. is N. 38 E. and is at right angles to the line A. D. and B. C. March 24th, 1793.

A copy—Teste, John Thomas, S. M. C.
Cowan's patent was dated June 1st, 1782.

The following opinion of the court of appeals was delivered by Chief Justice Muter.

The court is of opinion that the county court of Mercer did, with propriety, refuse to admit the parol testimony, as stated in the bill of exceptions, and to permit the appellant to make a survey which would not have been conformable to his title papers, or some of them, or which would intrude upon the possessions of any other person.

Judgment affirmed with costs.

SPRING TERM 1800.

FROWMAN, &c. vs. SMITH AND WIFE.

From the Garrard Quarter Session Court.

Opinion of the Court, by Ch. J. Muter.

The presentment against Mary Smith having been found by the grand jury, and she having been discharged therefrom, for reasons which appeared to the court, and not acquitted of the charge contained therein, by a trial thereof on the merits, the court is of opinion that, on the trial of the action for a malicious prosecution, it was not incumbent on the defendants to show a probable cause, but that it was essential to the support of the plaintiffs' action, that they should have proved express malice in the defendants; which not having been done, judgment reversed with costs.

CHERRY AND STEELE vs. BOYD.

From the Lexington District Court.

Opinion of the Court, by Ch. J. Muter.

The only question arising in this cause is, whether General it was legal on the trial of the original suit to prove by rules of law a witness what the Surveyor who was dead told him in respecting evidence, 1775, as to the lines appearing on the land in dispute,
the proceedings in the suit at common law, in which there are the following errors, viz: 1st. There are no breaches assigned in the declaration, nor any filed prior to the execution of the writ of the inquiry. 2d. There is no copy of the bail bond returned to the clerk's office by the sheriff. For which errors, the court is of opinion, that the judgment aforesaid be reversed and set aside, that the cause be remanded to the court from whence it came for new proceedings to be had therein, to commence from the writ, and that the plaintiff recover of the defendant his costs in this behalf expended; which is ordered to be certified to the said court.

________________________

NOVEMBER 12, 1801.


Upon an appeal from a decree of the Lexington District Court.

1. As the law requires every official surveyor to see the survey plainly marked by trees or natural boundaries, the presumption is, that every survey has been thus marked, or bounded, when made, though the abutments may not now be found.

2. Should a surveyor omit to mark the abutments of a survey, such omission would not be allowed to prejudice the owner of the survey, whenever it could be supplied by any rational device.

3. The beginning corner in a plat and survey is of no higher dignity or greater importance than any other of the corners.

4. Where one or more of the corners of a survey are lost, they must be ascertained by running the courses and distances called for in the survey, from the remaining corners.

5. Where a departure from either course or distance becomes necessary, in order to close the survey, distances must yield, as being the more uncertain.

6. Where a portion of the lines and corners of a survey is lost, and the survey can not be closed by lengthening or shortening the distances, then, and not otherwise, there may be a deviation from the course.

The principal question arising in this cause is, in what manner ought the situations of the corners of a survey which have been
lost to be ascertained, when one or more of its other corners can be shown? This is indeed a question of great difficulty, and the decision of it will probably be of equal consequence to multitudes.

It is proper to premise, that there is but one species of cases in which any court of justice is authorized by our land law to divest the owner of a survey of the surplus included within its boundaries, namely: where the survey was made posterior to an entry made by another person on the same land; and to do more would be unequal and unjust, inasmuch as a survey which is too small can not be enlarged. But the present contest is not founded on a case of this kind.

It ought also to be premised, that from the year 1748 until the present day, the law has required every surveyor of land, at the time of making a survey, to see the same bounded plainly by marked trees or natural boundaries. Therefore, the legal presumption is, that all the lines and corners of every survey were thus marked or bounded when it was made, and that those of them which can not be found have by some means been removed or defaced. And if, in any instance, the presumption could be destroyed by undoubted testimony, yet, as the omission was the fault of an officer of the government, and not of the owner, it would be unjust that the claim should be injured thereby, when the omission can be supplied by any rational device. From this view of such cases, it appears that the object to be accomplished is to determine where such lost lines and corners had been marked, or would have been marked, had the surveys been closed.

And it is proper further to premise, that this court can not discover from the land law, or from the nature of the case, that the corner of a survey which is made the beginning in the plat and certificate of survey, is of any higher dignity, or of greater importance in any point of view than one of the other corners; nor in this respect that the surveyor was subjected to the direction of the owner; but it rather seems that the surveyor was, and ought to have been, left at discretion to fix on that corner of a survey for a beginning which might afterward be the most easily found, or which could be described with the greatest certainty, without consulting the owner, or giving a preference to the beginning called for in his entry, when survey was founded on an entry. And for similar reasons, it seems that it was also at the discretion of the surveyor, when he was inserting the other corners in the plat and certifi-
cate, to proceed either to the right hand or to the left from the corner he chose to name first.

It is equally necessary to premise, that the variation of the magnetic needle from the true meridian, which is different at different times, and at all times hard to be ascertained with accuracy—the inadvertent deviations of surveyors from the courses they meant to pursue—the carelessness and the involuntary mistakes of chain carriers, and the greater unevenness of the ground whereon one line of a survey is run than that of another, for which it is nearly impossible to make an accurate allowance, are the principal sources of the difficulties arising on this question, for the removal of which our land law contains no provision, only as to that arising from the variations of the magnetic needle, which, it is believed, has not generally been carried into effect with any reasonable degree of precision. Be this as it may, from this provision it is clear that the legislature considered the courses specified in a plat and certificate of survey as the principal guide to recover lost lines and corners. To confirm this position, it might be observed that for any other purpose the provision is wholly unnecessary. If the lines and corners of all survey could be shown, the true meridian and the variations of the magnetic needle from it would be of no importance in adjusting claims to land. Considerable aid may also be derived from the distances called for in plats and certificates of survey, yet, when a departure from either course or distance becomes necessary, reason as well as law seems to suggest that the distances, taken in our mode of mensuration, ought to yield, as being much the most uncertain of the two. Indeed, it never has been held, that in laying off vacant land purchased from government, that a line established by a surveyor can be altered on account of its being longer or shorter than the distance specified in the plat and certificate he has returned.

These considerations seem to dictate an answer to the question which has been stated, to-wit: From one of the adjacent corners which remain, the courses and distances of the lost lines ought to be run, as called for in the plat and certificate of survey, and if they close with the other adjacent corner which remains, the true situations of the lost corners, and consequently the true situations of the lost lines, will be satisfactorily ascertained. But if the courses and distances thus run do not close the survey, it must be accomplished by running the same courses, and either lengthening or shortening the distances, as each case may require, and in pro-
portion to the length of each line, as called for in the plat and certificate of each survey. And if the survey can not be made to close by this means, then, and not otherwise, a deviation from the courses called for must also aid in accomplishing the purpose. For examples, where all the corners of a survey are lost but one, lost corners ought to be ascertained by running conformably to both the courses and distances specified in the plat and certificate of survey. Where there is but one corner of a survey lost, the courses called for in the plat and certificate of survey ought only to be regarded; and nothing more is necessary than to extend those courses from the adjacent corners which remain, until they intersect each other, and the place of intersection will be the situation of the corner to be ascertained. But when two or more corners are missing, and running the courses and distances called for in the plat and certificate of survey will not close, then the length of each line can only be determined by calculation.

It may be supposed that where two corners of a survey are lost which has only four corners, and the distance between the remaining two corners is greater or less than the distance called for in the plat and certificate of survey, that the three lost lines should be extended on their respective courses so as to bear a just proportion to the remaining line, which would indeed be in conformity to the general rule just prescribed; at least, the same effect would be produced as if the rule had been literally applied. But it is conceived by the court that the remaining line, being either longer or shorter than is expressed in the plat and certificate of survey, ought to be presumed to have happened by a mistake, which could necessarily have affected only the length of the opposite line; therefore, the presumption can not be carried further in violation of the lengths of the other two lost lines than as specified in the plat and certificate of survey, and, therefore, that every such case must be an exception to the rule; that is to say, the two lost lines which are to be run from the remaining corners ought to be extended on the courses and to the distances called for in the plat and certificate of survey, making a proper allowance on each line for the unevenness of the ground over which it passes, and also to preserve the course of the other lost line, as called for in the same. The propriety of the exception will be further evinced by considering that the general rule arises principally from the necessity of the cases to which it is applied; but in the cases to which the exception is applied the necessity does not exist; and surely
nothing but necessity will justify a departure either from course or distance.

It will, however, be understood that in all cases where lost corners and lines are to be renewed, due allowances must be made for the variation of the magnetic needle from the true meridian. Where it shall be found that the direction of the land law, in this respect, was accurately complied with at making the survey, a legal standard is fixed. But where it was wholly omitted, or carelessly done, the defect may be rationally supplied by ascertaining from other lines of that or the neighboring surveys what was the difference of the variation, at or about the time the lost lines were made, from the variation at the time being.

On this question it need only be further observed, that the case on which this appeal was obtained falls under the exception which has been stated, and ought to be decided accordingly, and, consequently, that the decree of the district court, having been founded on principles repugnant to both general rules and the exception, is erroneous. It seems to this court that the decree is not only exceptionable, in directing the appellant’s survey to be closed by a line very different, both in course and distance, from what is specified in his plat and certificate of survey, but should the decree be affirmed, it would put in jeopardy every entry and survey made to adjoin lines which have been or hereafter may be lost.

It has been urged by the counsel for the appellees, that they have obtained the eldest grant for the land in contest, and, therefore, that they ought not to be compelled to convey it to the appellant, who, besides, holds a greater quantity of land by his survey than in equity he ought to enjoy. This objection is virtually answered in the preceding considerations; to which might be added, that equity can never prevail against law; nor can a grant extinguish a prior legal title. But if any doubt remained on the point, when taken in a general view, it is effectually removed from the present cause by a special act of assembly: it appearing that the appellant claims under one of those surveys which, at the May session, 1779, the legislature declared to be good and valid, and also that the claim of the appellees to any part of it originated since that time.

Wherefore, it is decreed and ordered, that the said decree of the district court held at the town of Lexington be reversed, and that the appellees pay unto the appellant his costs expended in the prosecution of this appeal. And it is further decreed and ordered,
that the cause be remanded to the said district court that it may cause to be ascertained the metes, bounds and quantity of so much of the said Bryan's settlement survey as shall be found to lie within the said Beckley's military survey when the situations of its lost corners are fixed, and its lost lines are run conformably to the exception contained in the foregoing opinion, and enter up a decree for the same in favor of Beckley, and that it make such further decrees and orders in the cause as law and equity may require. As to ascertaining Beckley's lost corners and lines, the meaning of the court is, from his north-westwardly corner an elm, buckeye and ash, extend a line south twenty degrees west four hundred and sixty poles. From his easterly corner, a white walnut and hoopwood, extend a line southwest with a line, styled in his grant William Preston's, five hundred poles. The extremities of those two extended lines will be the lost corners; and then connect those corners with a line running parallel to the line which connects the two first mentioned corners, and the survey will be closed; which opinion and decree aforesaid is ordered to be certified to the said district court.

NOVEMBER 13, 1801.

Charles Scott v. James Taylor and wife, Executors of David Leitch.

Upon a writ of error to reverse a judgment of the Franklin District Court.

In an action of debt on a sealed instrument, a variance between the writ and the declaration as to the amount of the bond, is fatal.

This is an action of debt on a note under seal, and the declaration and the note shown to the court are not for the same sum of money specified in the writ. The error being in the writ, the court is of opinion that it is not cured by the act of jeofails.
BRYAN v. BECKLEY.

[Kentucky,]

devour to be taken between this case and those where the debt or duty was to be paid or performed on a given day. On a careful examination of all the authorities within reach of the court, we have not been able to find a solitary case warranting such a distinction, or in which it has been held under any mode of expression, as to the time of payment or performance of a contract, that a tender after dark was good. In 1 Plow. 173, where the lease was upon condition, that if the rent be in arrear after either of the feasts on which it ought to be paid, by the space of ten days, that then the lessor shall enter, etc., it was adjudged that the time for payment, to save the lessee from a forfeiture of his lease, was the last convenient time, before sunset, of the tenth day. And in 1 Inst. 202, Coke lays down the same rule as to the time of tender, in his commentaries upon Littleton, where, in the text, the case is supposed of a feoffment, upon condition that the feoffor should enter, if the rent reserved should be behind a given number of days after the day of payment. In these cases the right of entry of the lessor or feoffor did not accrue until midnight of the tenth, or last day given for the payment; but the time allowed for the tender of payment, to save the condition, was a convenient time before sunset of the tenth or last day. In principle these cases do not differ from the one before the court; and the rule, and the reasons of the rule, as to the time of tender, established in them, apply with equal force to the present.

Judgment reversed.

See the note to Bates v. Bates, post, in regard to the time of day when the tender should be made.

BRYAN v. BECKLEY.

[Littell's Select Cases, 91.]

To Restore Lost Lines and Corners, no departure should be made from the course or distances except in cases of necessity, and where it is necessary to depart either from the course or the distances, the distances ought to yield.

Allowances for the Variation of the magnetic needle from the true meridian are to be made in all cases where lost lines and corners are to be renewed. Allowances are also to be made for the unevenness of the ground over which each line passes.

A Mistake in a Distance committed in the original survey on one line is presumed to have affected the opposite line only.
Nov. 1809.] BRYAN v. BECKLEY. 277

A MISTAKE IN ONE COURSE, evidenced by applying the patent to the ground, cannot be applied or be made by presumption to affect any other course named.

JUDICIAL NOTICE MUST BE TAKEN of the variation of the magnetic from the true meridian.

VISIBLE AND ACTUAL LANDMARKS are to be preferred in restoring lost lines and corners; if they cannot be ascertained resort must be then had to the courses and distances.

RELIEF IN EQUITY should not be granted further than the complainant's claim is reasonably certain.

WRIT OF ERROR. The opinion states the case.

By Court, BURR, C. J. The present cause comes before this court upon a writ of error to the decree of the Fayette circuit court, subsidiary to the former opinion of this court, and the consequent decree, whereby the circuit court was directed to ascertain and restore the lost lines and corners of Beckley's military survey. That opinion and decree need not be herein cited; it will be found under the title of Beckley v. Bryan and Ransdale, in the printed decisions, p. 107; Sneed, 91.

The case was this: Beckley was complainant in chancery, claiming under a survey made in 1774 by virtue of a warrant for military services; his survey was confirmed by the statute of Virginia of 1779; but Bryan and Ransdale had obtained letters patent, containing a grant for a part of that survey, founded on posterior rights, but elder in date than the letters patent granting the land to Beckley. The military survey purported to be of two thousand acres, but contained much surplus; the grant to Beckley described the land by reference to four courses and distances, and as connecting four corners designated by marked trees. Two lines could not be traced by any visible marks, and two of the corners could not be found. The two corners found were connected by the line between them, and another line from one of those corners was visible; but the distance on that line was not terminated by the existence of the corner trees called for; it was in fact, and so named in the grant to Beckley, the longer line of an adjoining survey. So that the proposition formerly before this court was, one line of the survey being ascertained and visible on the land by its terminating corner trees, and another line from one of those corners being ascertained as to the visible direction thereof, how shall the two remaining corners and lines be ascertained, restored and connected with those actually existing, so as to close the survey by the courses and distances specified in the grant? The court, in the former opinion and decree, after rea-
soning upon the case and giving the directions to be observed by the inferior court, drew this corollary: "From his northwesterly corner, an elm, buckeye, and ash, extend a line south, twenty degrees west, four hundred and sixty poles; from his easterly corner, a white walnut and hoopwood, extend a line southwest with a line styled in his grant Wm. Preston's five hundred poles; the extremities of those two extended lines will be the lost corners; and then connect those corners with a line running parallel to the line which connects the two first-mentioned corners, and the survey will be closed."

In attempting to carry that decree into execution, new difficulties have occurred in the court below by a disclosure and development of facts (by the report of survey) not before exhibited to this court. The most material facts newly discovered are these: That an actual mistake has happened in surveying the ground originally, by running the given line before mentioned variant in fact from the course intended and certified in the original plat and certificate of survey; lastly, a greater excess of the given line beyond the distance specified therefor in the grant than was represented formerly to this court. Before the former opinion of this court was given, the attention of the parties was attracted to objects of greater importance and of greater collision; upon going on the ground to prepare for executing that opinion, they were particularly directed to the points above stated. In adjudicating upon these subjects, it is distinctly to be understood that we feel ourselves bound to adhere to the principles of the former decision, as well because we are fully persuaded that they are correct in themselves as because, if they were not orthodox, we have no lawful power to change or oppugn their application to this controversy. So far as they apply we disclaim all and every authority to counteract them by any other. If the case in its new features can be adjusted according to the principles of the former decision, taken in their true spirit and effect, then assuredly it must be so decided; where those principles fall short, others apposite and co-adjutant may be applied.

For restoring and renewing lost lines and corners, the following principles are contained in the former opinion, viz.: 1. "That nothing but necessity will justify a departure, either from course or distance;" 2. "When a departure from either course or distance becomes necessary, that the distances ought to yield;" 3. That in all cases where lost lines and corners are to be renewed, due allowances must be made for the variation.
of the magnetic needle from the true meridian; 4. That proper allowances are to be made on each line for the unevenness of the ground over which it passes; 5. That a mistake in distance committed in the original survey, on one line, could have affected the opposite line only, "and the presumption in violation of the length of the other lost lines, cannot be carried further." From which may be deduced as a rational inference this sixth principle: That a mistake in one course evidenced by applying the patent to the ground, cannot be applied or be made by presumption to affect any other course named; because the courses were taken from the quartered compass by the magnetic needle, and therefore a mistake in one course does not necessarily or probably argue a mistake in running any other course. Having thus premised, we come to the decree of the circuit court now complained of, as being contrary to the former decree of this court, and to the facts established by the surveyor's report, upon which the said decree complained of was predicated. The surveyor's report confirmed and decreed by the circuit court has exhibited Beckly's grants as bounded and closed by the lines, courses, distances, and corners following, and represented in the annexed diagram:

A, white walnut and hoopwood, as expressed in the grant; E, elm, buckeye, and ash, extant, as likewise expressed. Line A to B; south forty-three degrees west, five hundred poles. Patent course and distance named for that line, south forty-five degrees west, five hundred poles; corner called for at B not extant. B to C north sixty-nine and one-half degrees west, seven hundred and ninety-three poles, being parallel to E A; course and distance expressed in the grant north seventy degrees west, six hundred poles; corner named at C not extant. E to C, south twenty and one-half degrees west, at right angles to E A, which line the surveyor reports extended four hundred and sixty poles only, falls seventeen poles short of intersecting the line B C. The patent course and distance of E C, south twenty degrees west, four hundred and sixty poles. E to A, south sixty-nine and one-half degrees east, nine hun-
dred and eighty-four poles; patent course and distance, south seventy degrees east, eight hundred poles.

The errors assigned in this decree are: 1. "The inferior court has erred in not pursuing the decree of the court of appeals, which they have not done either in its spirit or in its letter;" 2. "The inferior court erred in extending the line E C beyond the distance prescribed for that line by the court of appeals;" 3. "In not having allowed on the line, E C, two degrees east, variation of the magnetic needle from the true meridian, that being the variation, or not in allowing some other variation to the east." The variation of the magnetic meridian from the true meridian is recognized by the statutes and by the former opinion of this court. That such variation was eastwardly of the true meridian at the time of the original survey in 1774, that it had progressed eastwardly from that time until the time of making the survey preparatory to the decree now complained of, is one of those principles acknowledged by scientific men, which this court are bound to notice as relative to surveys, as much as they would be bound to notice the laws of gravitation, the descent of the waters, the diurnal revolution of the earth, or the change of seasons, in cases where they would apply. The particular degree of variation is difficult to be ascertained, and the method of ascertaining the variation to be allowed was directed in the former opinion. From the acknowledged eastwardly variation at the time of the original survey, compared with the survey upon which the decree complained of is predicated, it is evident that the courses of Beckley's military survey, as inserted in his grant reciting the survey, were ascertained by the magnetic needle without regard to the true meridian, and such we believe was the prevailing practice of the country at the time of that survey. Perhaps not a single instance of a contrary practice has occurred in original surveys, at least not an instance to the contrary has fallen under the notice of this court. Applying these observations to the case before us, it is apparent that a gross error was committed in running the existing line of Beckley's survey, for the line as now reported, is south sixty-nine and a half degrees east, which would make the variation of the magnet westwardly instead of eastwardly. This mistake is further proved by adverting to the course of the line A B as now reported, for it is only south forty-three degrees west, instead of forty-five degrees as called for in the grant, that is to say a variation of two degrees eastwardly had intervened since 1774, which it is believed, is about the average variation which
has been found by those who have traced a considerable number of the surveys of 1774, and compared the variations generally in those surveys with the variations of the magnet about the year 1802. But whatever might have been the variation in 1802, the time when the preparatory report was decreed upon by the court, whether two degrees eastwardly, or more or less, it is evident that the circuit court erred in communicating to the line B C, the mistake, and westwardly variation of the existing line E A, which is contrary to the first and sixth principles recited. For it is evident that the course of the line B C has been made to depart from the course called for in the grant, and without necessity. Neither is this departure owing to a due allowance for the magnetic variation, but an undue and improper westwardly variation has been given to it instead of an eastwardly. The circuit court have no doubt fallen into this error by attending to the direction that this line should be parallel to the given or existing line without examining that direction in conjunction with the principles of the decree, but nakedly and abstractedly, as well from those principles as from the additional light afforded by the report to which that direction has been applied.

According to the grant those lines appeared parallel; the court of appeals, not informed of the mistake committed in the existing line, directed the corresponding mistake line to be renewed by running a parallel. But it is evident from the first, second, third and fifth principles extracted from that decree, that if the court had been informed of the mistake existing in that line they could not have directed a parallel to it without doing violence upon the very principles which they meant to preserve unimpaired. The mind cannot for a moment assent to the proposition that by any rational construction of the former, the court have intended, by introducing the word “parallel” to produce a departure from the course of that line as expressed in the grant after due allowance was made for the variation of the magnet. If any intention of departing from the course, except from inevitable necessity, had been intended, the direction to connect the extremities of the two lines, the one of five hundred poles, and the other of four hundred and sixty poles would have been nugatory; for a line run from those extremities to connect them would have closed the survey. But so to connect those lines did not comport with the views and intention of the court. Such a connection might have, and in fact would have produced a departure from the patent course expressed for that line. For
it is a truth that the courses and distances named in the grant, without any variation, without mistake in any one distance, without any mistake in course, and tried upon a perfect plane, will not close the survey. To guard against such an event, and against mistakes; the court therefore added that these extremities were to be connected by a line "parallel to the line which connects the two first-mentioned corners," which provision was only tantamount to a direction to observe the patent course, for in the patent those lines were apparently parallel, each to the other. The opinion does not notice any mistake or departure in the given line. The very decretal order declares that Beckley was to have a decree for so much of Bryan's settlement survey, as should be found to be within Beckley's military survey, when its lost lines and corners are run and fixed conformably to the exception contained in the foregoing opinion; and that exception expressly declares that the two lost lines are to be run from the corners extant, and extended on the courses, and to the distances called for in the plat and certificate of survey, making a proper allowance on each line for the unevenness of the ground over which it passes, "and also to preserve the course of the other lost line as called for in the same." Hence it may be affirmed with confidence, that a departure from the course is repelled by every part of the former decision. The transferring a mistake in one course into another course expressed in the patent, and thereby producing a departure from that other course as is done by the decree complained of, was contrary to the manifest spirit and intention of the former decree of this court in the premises. For the same reasons the decree of the circuit court is erroneous in establishing the line of four hundred and sixty poles at right angles to the existing line, since thereby a similar departure will be produced from the corresponding course of that line named in the grant, and the mistake in the given line infused into the line of four hundred and sixty poles; which supports also the first, as well as the third members of the assignment of error.

Upon the second member of the assignment, it must be remarked, that although the surveyor has reported that the line of four hundred and sixty poles fell short by seventeen poles of intersecting the parallel line which he had run, yet by so reporting, he has thereby convicted his work of an error somewhere. That error may have been in some one or more of the courses, or in one or the other of the distances, or in the allowances made for unevenness of ground. Because if no such error
had been committed, taking the courses and distances as reported by himself throughout, the survey will close by accurate delineation on a plane surface, or according to calculation by latitude and departure. This is but another memento, that partial mistakes or inaccuracies should never be suffered to vitiate a claim to land, and induces a remark that reasonable accuracy can never be attained in completing this business, without good instrument, careful chain-carriers, and such allowance or other safeguard, for unevenness of surface as will be equivalent to horizontal admeasurement upon which the art and rules of surveying are founded. It further appears that the decree of the court of appeals heretofore made in the premises, has not been carried into execution by the decree complained of, in this, that due allowance has not been made for the variation of the magnetic meridian. The circuit court have, in fact, communicated to every line to be renewed, the mistake which had been committed in the given line, and thus have closed the survey upon a mistake, and have thereby contravened the decree of this court by departing from the courses of the grant in the lines to be renewed.

We would have it understood, that in alluding to courses of the grant as to the last lines, we mean they shall be run with proper allowances for the variation of the magnet since the date of the original survey, to be ascertained in the mode pointed out in the former decree, so as to close the survey, and fix the lost lines and corners where they were originally, according to the survey recited in the grant. The ancient lines and corners now lost, are the objects to be attained by the best evidence the nature of the case now affords, to wit, the description as certified by the surveyor and recited in the grant. It is further to be understood, as to those lines which are extant, or whose bearings are ascertained by existing corners, they are to govern, however variant from the courses called for. It is to the lost lines and corners that these rules are to be applied, where the ancient boundaries are visible and identified, resort to courses and to distances is unnecessary. Visible and actual boundaries as rules to govern the property of men, are far preferable to ideal lines and corners, but when these actual landmarks fail, we must resort to the next best evidence, courses and distances, as producing a reasonable degree of certainty, and a necessary security against the acts of the fraudulent and depraved, and against time and the elements.

It now appears that the courses and distances expressed in
the grant, when extended from the remaining corners of this survey, will not close as well, on account of some inaccuracy in the original certificate of survey, when tested by calculation, or on a plane, even according to the courses and distances in the grant expressed, as on account of the particular mistake before-mentioned as to the given line. The case is provided for in the last sentence of the sixth section of the former opinion. The length of one or the other of the lines of five hundred poles, or four hundred and sixty poles; that is to say, of A B or E C must be departed from, and then the length of the one which is made to yield must be determined by calculation. We say the one or the other, because there is no necessity for both to yield, and to make them both do so would be a departure from the spirit of the first and fifth principles, and to the second case put, in the section just alluded to, a departure from distances even ought not to be indulged further than necessary. A departure in the distances of both lines is not necessary; either lengthening the line of four hundred and sixty poles, or shortening that of five hundred poles will do, and the section directs a lengthening or shortening, but not to do both unless upon necessity. The former opinion excludes the idea of deciding the matter by going around from the beginning called for in the grant, in the progressive order of the courses and distances therein recited; because, by the fourth section of the opinion, it is clearly to be understood that the order of the courses in the certificate of survey is no evidence that the same order was observed in executing the survey. But there is a principle of equity which seems to be decisive on this subject; namely, that a complainant in equity ought not to have relief further than his claim is reasonably certain. Now it is evident that if from the extremity of the line of four hundred and sixty poles (from C), a line is extended the patent course to intersect the line of five hundred poles (A B shortened), and from the extremity (B) of the line of five hundred poles, a line be extended the patent course to intersect the line of four hundred poles (E C) extended, the claim to all the land between the two lines is in dubio; that land may have been included or excluded by the grant. And this argument would apply also to an extension and diminution of the distances on the lines E C and A B in equal proportions. But as to all the lands which would be included by retaining the line of four hundred and sixty poles in length, and reducing the line of five hundred poles, by calculation, to close the survey, the grant would be certain in every part, and for that only the claim should be established.
May, 1811.]  

Caldwell v. Sacra. 285

It is, therefore, decreed and ordered, that the said decree of the circuit court be reversed and set aside, and the cause remanded to have the former decree of this court carried into execution according to the principles thereof in the said opinion contained, and as now explained in a foregoing opinion, which is ordered to be certified.

And it is further decreed and ordered, that the defendant in error pay to the plaintiffs their costs in this behalf expended.

The case came before the court of appeals again, when the following opinion was pronounced, Boyle, C. J., Logan and Owsley, J.J., present:

We are of opinion that a correct exposition of the former opinion and decree of this court requires that Beckley's line, which is designated as running N. twenty degrees E. four hundred and sixty poles, should be run by making a due allowance for a variation of the magnetic, from the true meridian, from the time the survey was made until the present. This variation is reported by the surveyor to be three degrees and thirty minutes; and, consequently, the course of that line should have been N. sixteen and a half degrees E. according to the present magnetic meridian, instead of N. twenty degrees E. as the court below decreed it should be run.

For cases laying down similar principles, see Dale v. Smith, ante, 64, and note.

Caldwell v. Sacra.

[Litell's Select Cases, 118.]

If one agrees to a trespass which has been committed by another for his benefit, trespass will lie against him although the act was not done in obedience to his command or at his request.

Trespass. The opinion states the case.

By Court, Logan, J. In an action of trespass against Caldwell upon the allegation that he had, or caused to be, tied to the tail of a certain horse of the plaintiff large sticks of wood, and had so beaten and caused the said horse to run as thereby to occasion his death. Upon the plea of not guilty, the plaintiff proved the death of the horse occasioned by the sticks which had been tied to his tail, and the confession of Caldwell that his negro boy had tied sticks to the horse's tail, the horse having
EIGHTH CONGRESS. Sess. II. Ch. 14. 1805.

shall be allowed the same rate of compensation, as is provided by law for attending a meeting of the board of commissioners.

Sec. 6. And be it further enacted, That a sum not exceeding thirteen thousand five hundred and ninety-three dollars, and twenty-three cents, be paid out of any moneys in the treasury, not otherwise appropriated, for the further expenses incident to the valuation of houses and lands, and the enumeration of slaves within the United States.

Approved, January 30, 1805.

CHAP. XIV.—An Act concerning the mode of surveying the Public Lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the surveyor-general shall cause all those lands north of the river Ohio, which, by virtue of the act, intituled “An act providing for the sale of the lands of the United States, in the territory northwest of the river Ohio, and above the mouth of the Kentucky river,” were subdivided, by running through the townships, parallel lines each way, at the end of every two miles, and by marking a corner on each of the said lines, at the end of every mile; to be subdivided into sections, by running straight lines from the mile corners thus marked, to the opposite corresponding corners, and by marking on each of the said lines, intermediate corners as nearly as possible equidistant from the corners of the sections on the same. And the said surveyor-general shall also cause the boundaries of all the half sections, which had been purchased previous to the first day of July last, and on which the surveying fees had been paid, according to law, by the purchaser, to be surveyed and marked, by running straight lines from the half-mile corners, heretofore marked, to the opposite corresponding corners; and intermediate corners shall, at the same time, be marked on each of the said dividing lines, as nearly as possible equidistant from the corners of the half section on the same line: Provided, that the whole expense of surveying and marking the lines, shall not exceed three dollars for every mile which has not yet been surveyed, and which shall be actually run, surveyed, and marked by virtue of this section. And the expense of making the subdivisions, directed by this section, shall be defrayed out of the moneys appropriated, or which may be hereafter appropriated, for completing the surveys of the public lands of the United States.

Sec. 2. And be it further enacted, That the boundaries and contents of the several sections, half sections, and quarter sections of the public lands of the United States, shall be ascertained in conformity with the following principles, any act or acts to the contrary notwithstanding:

1st. All the corners marked in the surveys, returned by the surveyor-general, or by the surveyor of the land south of the state of Tennessee, respectively, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the said surveys, shall be placed as nearly as possible equidistant from those two corners which stand on the same line.

2d. The boundary lines, actually run and marked in the surveys returned by the surveyor-general, or by the surveyor of the land south of the state of Tennessee, respectively, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned by either of the surveyors aforesaid, shall be held and considered as the true length thereof.

APPRAISAL.

Statute II.

Feb. 11, 1803.

Act of May 18, 1796, ch. 29.

Mode of surveying public lands north of the Ohio.

Cornors to be marked.

Half sections purchased before July 1, 1804, to be surveyed and marked.

Whole expense of survey not to exceed three dollars per mile.

How the expense of making the surveys is to be paid.

Principles upon which the boundaries and contents of the public lands are to be ascertained.

Boundary lines run and marked by the surveyor south of the Tennessee river to be the proper boundaries of sections.

VOL. II.—49

(a) See notes to the act of May 18, 1796, chap. 29, vol. i. 465.
And the boundary lines, which shall not have been actually run, and
marked as aforesaid, shall be ascertained, by running straight lines from
the established corners to the opposite corresponding corners; but in
those portions of the fractional townships, where no such opposite cor-
responding corners have been or can be fixed, the said boundary lines
shall be ascertained, by running from the established corners, due north
and south, or east and west lines, as the case may be, to the water-course,
Indian boundary line, or other external boundary of such fractional
township.

3d. Each section, or subdivision of section, the contents whereof shall
have been, or by virtue of the first section of this act, shall be returned
by the surveyor-general, or by the surveyor of the public lands south of
the state of Tennessee, respectively, shall be held and considered as
containing the exact quantity, expressed in such return or returns: and
the half sections and quarter sections, the contents whereof shall not
have been thus returned, shall be held and considered as containing the
one half, or the one fourth part respectively, of the returned contents of
the section of which they make part.

SEC. 3. And be it further enacted, That so much of the act entitled
"An act making provision for the disposal of the lands in the Indiana
territory, and for other purposes," as provides the mode of ascertaining
the true contents of sections or subdivisions of sections, and prevents
the issue of final certificates, unless the said contents shall have been
ascertained, and a plot certified by the district surveyor, lodged with
the register, be, and the same is hereby repealed.

Approved, February 11, 1805.

STATUTE XX.

Feb. 14, 1805.

Cargoes of
Spanish vessels,
arriving in dis-
stress in the U.
States, may be
reshipped in
other vessels
without any
charges, &c.

Act of March
3, 1799, ch. 22.
sec. 66, vol. 1.
672.

CHAP. XV.—An act for carrying into more complete effect the tenth article of the
treaty of friendship, limits and navigation with Spain.

Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled, That whenever any Spanish
vessel shall arrive in distress, in any port of the United States, having
been damaged on the coasts, or within the limits of the United States,
and her cargo shall have been unladen, in conformity with the provisions
of the sixtieth section of the act, intituled "An act to regulate the col-
clection of duties on imports and tonnage," the said cargo, or any part
thereof, may, if the said ship or vessel should be condemned, as not sea
worthy, or be deemed incapable of performing her original voyage,
afterwards be re-laden on board any other vessel or vessels, under the
inspection of the officer who superintended the landing thereof, or other
proper person. And no duties, charges, or fees whatever, shall be paid
on such part of the cargo, as may be re-laden and carried away, either
in the vessel in which it was originally imported, or in any other what-
soever.

SEC. 2. And be it further enacted, That the collector of the district
of Norfolk, in Virginia, shall be, and he hereby is authorized and
required to refund to the owners or agents of the Spanish brigantine
Nancy, (which vessel arrived in distress at that port, in the year one
thousand eight hundred and four) the amount of the duties secured by
him on such part of her cargo as was re-exported: Provided, that the
debenture or debentures issued by the said collector for the drawback of
the duties on the exportation of the said cargo, shall be duly surren-
dered to him, and cancelled.

Approved, February 14, 1805.
The Court will award a venire facias de novo, where the jury, in a special verdict, find the evidence and not facts.

The rules which have been established by the decisions of the Courts, for settling questions relative to the boundary of lands, have grown out of the peculiar situation and circumstances of the country: and have been moulded to meet the exigencies of men, and the demands of justice. These rules are:

1. That whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for, it may be; or however short or beyond the distance specified.

2. Whenever it can be proved that there was a line actually run by the Surveyor, was marked and a corner made, the party claiming under the patent or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed.

3. When the lines or courses of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance: Provided those lines and courses be sufficiently established, and no other departure be permitted from the words of the patent, or deed, than such as necessity enforces, or a true construction renders necessary.

4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for; in all such cases, we are of necessity confined to the courses and distances described in the patent or deed: for however fallacious such guides may be, there are none other left for the location.

In this case the jury found a special verdict, so much of which as relates to the point which was sent up for the opinion of this Court, was as follows:

"Hislop's patent calls for Whitehurst's corner, described in the plat of survey as A, and thence along Ward's line 80 poles." Ward's line is from C to D. "Thence south on his line 320 poles to the back swamp." The line from C to D is south 30 degrees west; and is on the back swamp, and is the corner of
Ward's patent, which covers the land to the east of the line from C to D. If the poles from Whitehurst's corner at A be run east, the course and distance will lead to B: and the south course called for in the patent from the termination of this line, will lead to D. If the east course called for in the patent, from Whitehurst's corner at A be continued, it will lead to F and not touch Ward's line. If the Court be of opinion that the line from Whitehurst's corner at A, should be continued east 80 poles, and thence to Ward's line in the course nearest the description in the patent; or that it should run directly to Ward's line along the course nearest to that called for in the patent, the Jury find for the plaintiff, and assess his damages to $345. But if the Court be of opinion that the line from Whitehurst's corner at A, should run east 80 poles, and thence south, though not on or with Ward's line, the jury find for the Defendant. It does not appear that Ward had any lands, except those covered by the patent referred to in this case.

Taylor, Chief-Judge: The land claimed by the Plaintiff under Hislop's patent, is described by the letters A, B, C, D, and E. "Beginning at Whitehurst's corner at the letter A; thence east along Ward's line 80 poles, thence south to his line 320 poles to the back swamp." If the lines first called for, be extended according to the course and distance in the patent, they would run from A to B, and thence to D, and leave out the land claimed by the Plaintiff; but in so running, they would not be on or with Ward's line; they would depart from the boundaries called for in the patent, for the sake of preserving the course and distance. If the course of the first line, viz, east, be pursued, it will lead to F, and will not strike Ward's line, which is intersected by running a course south 50 degrees east, at the letter C: and the question is, whether after running the first line 80 poles, east, it shall diverge in the course nearest to that called for, for the purpose of meeting Ward's line, and "of running on it" 320 poles to the back swamp, although the course of Ward's line is south 30 degrees west, instead of south, as in the patent.

The decisions which have taken place in this State on questions of boundary, have grown out of the peculiar situation and circumstances of the country, and have, beyond the memory of any person now alive, been moulded to meet the exigencies of men and demands of justice, where the mode of appropriating an almost uninhabitable forest, had involved land titles in extreme confusion and uncertainty. In many cases, surveys were no otherwise made than upon paper; and in many others, when an actual survey was made, the purchasers from the Lords Proprietors were, in danger of losing their lands by an inaccurate description of them, the omission of whole lines, and the mistake of courses.

Land appropriated by a general description of courses and distances, without natural boundaries or marked lines, cannot be identified after the lapse of a considerable interval of time. If a beginning tree only were marked, the property continually revolves around it, and never can be ascertained for no person can pronounce what course must now be run in order to ascertain a line, said to be run in a certain direction an hundred years ago, from the uncertainty in the variation of the compass, and from carelessness or the want of skill in measurement. It is easy to conceive, therefore, how utterly impossible it would have been to render anything like justice to claimants under old patents, if the lands described in them were to be allotted only according to the courses and distances, to the neglect of natural boundaries, marked lines, and the well established lines and corners of adjoining tracts. Hence, certain rules have been laid down and repeatedly sanctioned by adjudications, which, in their application, have been found effectual for the
just determination of almost every case that has arisen, and which have been considered for so great in length of time as part of the law of the country, that they ought not to be abrogated by any power short of that of the Legislature. These rules are,

1. That whenever a natural boundary is called for in a patent or deed, the line is to determine at it, however wide of the course called for it may be, or however short or beyond the distance specified. The course and distance may be incorrect, from any one of the numerous causes likely to generate error on such a subject; but a natural boundary is fixed and permanent, and its being called for in the deed or patent, marks beyond controversy, the intention of the party to select that land from the unappropriated mass. In confirmation of this rule, many cases have been decided, only a few of which have been reported; but as some of them are fully up to the rule, and have been uniformly acquiesced in, it may be useful to bring forward the principal features of them.

In Sandifer v. Foster, 2 N. C. 237, Gee's patent began on the mouth of a dividing run, thence north, thence east, thence south to a white oak, thence along the river to the beginning. This white oak stood half a mile from the river, and if the line were run thence to the beginning, a large part of the land described in the Plaintiff's grant would be left out of Gee's patent. It was decided that the river must be considered the boundary of Gee's patent.

In Pollock v. Harris, 2 N. C. 252, a swamp, a pocosin and a marsh, are severally called for in the patent, as the termination of lines, which if run according to the courses and distances did not extend to them. The natural boundaries were held by the Court to be the proper terminations of the lines. To these cases may be added Witherspoon v. Blanks, Id. 496; Harramond v. McGlaughon. 1 N. C., 90, and Swaine v. Bell, 3 N. C., 179.

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

I understand the first decision of Bradford v. Hill. 2 N. C. 22, to be an authority for this rule; for although the Court directed the Jury to find according to the courses and distances called for in the deed, it was in the absence of proofs tending to establish the old marked line leading from Pollock's to Bryant's corner. The boundaries in the patent were, "beginning on Fishing Creek, thence east 320 poles to Pollock's corner, thence north the same number of poles to Bryant's, thence along Bryant's lines west 320 poles to the Creek." — Bryant's corner being four degrees to the east of north from Pollock's corner, the line from Pollock's corner intersected Bryant's line considerably to the west of Bryant's corner. It was proved that there was an old marked line leading from Pollock's to Bryant's corner, but that in running by the compass north 54 degrees cast, which was the general course of that line, it would be sometimes on the other side and sometimes on the other of that run by the compass, whence it was taken by the Jury to have been run by some person after the survey. The triangle formed by the said north line, part of Bryant's line and a line from Pollock's corner to Bryant's corner, included the land in dispute. It was decided by the Court that the courses and distances in the deed must be adhered to, because the line from Pollock's to Bryant's corner, was not proved to have been run by the surveyor; but that in cases of evident mistake by the surveyor, parol evidence was admissible, though it ought to be admitted with caution.
The same case under the name of Bustin v. Christie, 1 N. C. 160, came on for trial before Judge Moore, when the only additional fact proved was, that some ancient deeds were bounded by the old marked line from Pollock's to Bryant's corner. The Judge directed the Jury to establish that line, if they believed that to be the one intended.

In Eaton v. Person, 1 N. C. 23, the deed called for a course and distance, which carried the second line through the body of the land, leaving out a triangular piece, included in the second and third lines really run; but the second and third lines really run, as well as the corners, were marked and proved, by persons present at the survey for the patentee; upon which evidence the claimant under the patentee recovered.

In Person v. Roundtree, 2 N. C. 378, the latter entered a tract of land, lying in Granville county, upon Shocco Creek, which was run out, "beginning at a tree on the bank of Shocco Creek, running south a certain number of poles to a corner, thence north a certain number of poles to a corner on the creek, thence up the creek to the beginning." By a mistake, either in the surveyor or secretary who filled up the grant, the courses were reversed, placing the land on the opposite side of the creek to that on which it was really surveyed, so that the grant did not cover any of the land surveyed. Roundtree settled on the land surveyed, which was afterwards entered by a person, who obtained a deed from Lord Granville, and brought an ejectment against Roundtree, who proved the lines of the survey and a possession under his grant. The Court decided that Roundtree was entitled to the land intended to be granted, and which was surveyed: and that he should not be prejudiced by the mistake of the surveyor or secretary.

It was decided by Judge Haywood, in — v. Realty, 2 N. C. 370, that if a course and distance be called for, and there be a marked line and corner, variant from the course, which is proved to be the line made by the surveyor as a boundary, that marked line shall be preserved.

In Standen v. Bains, 2 N. C. 238, the Plaintiff claimed under Askill, who patented a tract of land in 1740, extending, as he alleged, to a line distinguished in the plat by the name of the dotted line. The courses and distances expressed in the patent, extended not so far, but only to a line distinguished in the plat as the black line. The Defendant entered this intermediate tract in the year 1781, and took possession; whereupon the Plaintiff brought suit. The Court permitted evidence to be given, that the dotted line, which was a marked one, had, for a long time, since the year 1740, been reputed the line of Askill's tract. The patent called for a gum standing in Roberts' line; this gum was found at the termination of the dotted line. It next called for two lines of Roberts' tract; the dotted line was upon these two lines. It called for Hoskins' corner; the dotted line went to that corner; and there was nothing in favor of the black line, but course and distance. But there was no witness who could prove positively that the dotted line was the line of Askill's tract.

In Blount v. Benbury, 3 N. C. 353, Judge Hall says there have been many decisions in this country which warrant a departure from the line described in the deed or patent, to follow a marked line, which the Jury have good reason to believe was the true one.

The circumstances of that case, of which I have a fuller note than any published, afford a striking confirmation of the rule. The question arose on
the title of a piece of land, which lay between two parallel lines, A, B and C, D. The latter line was contended for by the Defendant as the line of J. Blount's patent; in which case, the Defendant was not in the possession of the Plaintiff's land; but if the line A B was the line of J. Blount's patent, the Defendant was in possession. The patent under which the Defendant claimed, called for Beasley's line and Blount's line at E, south 85 degrees east, as one of the boundaries. The person under whom the Defendant claimed, in his deed dated in 1785, called for Blount's line, and at the same time, marked as such, the line, from C to D. The principal question was, whether the line thus marked should be the boundary of the deed, or whether Blount's, wherever that should be ascertained to be, should be so considered. It is to be remembered, that the line from A to B was an old marked line. It was decided by the Court that Blount's line, wherever it was, should be the boundary; that although the patent calls for Beasley's line and Blount's line south 85 degrees east for one boundary; still the jury might consider Beasley's line the boundary as far as it went, and then the line A B which was 51 poles to the north of it; and that line was consequently established.

In Johnson v. House, 3 N. C. 301, Person surveyed the land for the patentee, under whom House claimed, and extended the line in question 160 poles, and marked and cornered it, as also the next line; but upon calculation, he found he had included 712 acres, instead of 640, and he cut off the land in question by drawing from 80 poles instead of 160. But he returned a plat to the Secretary's office, mentioning the corner red oak, marked at the end of 160 poles, and the corner white oak, marked at the end of the next line drawn from thence. The plat having been returned with those corners, although mentioned to stand at the distance of 80 poles instead of 160, they were taken, notwithstanding the distance mentioned in the plat, to the true corners. The corner marked at the end of 80 poles, was a white oak instead of a red oak, called for in the patent.

These cases, and many others which have occurred since, sufficiently prove the existence of the rule, which, if it had not been adhered to, would, in every case cited, have deprived the true owner of part, or the whole of his land.

3. Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance, provided those lines and corners be sufficiently established, and that, no other departure be permitted from the words of the patent or deed, than such as necessity enforces, or a true construction renders necessary.

This rule is founded upon the same reasons with the preceding ones, the design of all being to ascertain the location originally made; and calling for a well known line of another tract, denotes the intention of the party, with equal strength, to calling for a natural boundary, so long as that line can be proved.

In Miller v. White, 3 N. C. 160, the Plaintiff claimed under a patent to Nathan Bryan, beginning at a corner tree, thence south 80 degrees east 40 poles, to Walter Lane's line. There was no actual survey; the 40 poles were completed before arriving at Lane's line. The second line was with Lane's line to his corner, a certain course and distance; but that distance would not reach the corner. Supposing the line to be drawn from the point of intersection of the first line with Lane's line, if the first line extended to Lane's line, and if the second line went with Lane's to his corner, then the land claimed by the Plaintiff was within Bryant's grant. If the first
line stopped at the end of 40 poles, the land in question was not included. Judge Johnson was of opinion that the line should extend to Lane's line.

In Smith v. Murphy, 1 N. C. 223, the Defendant produced in evidence two deeds:
the third course of the latter deed called for 42 poles to a corner standing on the other tract. Forty-two poles were completed before arriving at the first tract. If the last line of the second tract should be drawn from the point where the 42 poles were completed, the land which the Plaintiff had obtained a grant for, was not within any of the Defendant's deeds: but if the line be extended beyond the 42 poles to an intersection with the lines of the other tract, then the land claimed by the Plaintiff was covered by the Defendant's second deed. It was held by the Court that the line should be extended to that of the other tract.

4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood can be ascertained and identified by evidence, or where no lines or corners of an adjacent tract are called for, in all such cases, we are, of necessity, confined to the courses and distances described in the patent or deed: for, however fallacious such guides may be, there are none others left for the location.

A case recently decided, Bradberry v. Hooks, 4 N. C. 443, may seem, upon a hasty glance, to limit the application of the third rule, and in some degree to shake its authority; but an accurate attention to the circumstances of that case, will show that the decision and rule accord with each other. The words of the Plaintiff's patent were, "Beginning at a pine in or near his own line, and runs south 240 poles to a stake in William Hooks' line, thence with or near his line, north 73 degrees east 400 poles to a stake, thence north 305 poles to a pine, thence to the beginning." Hooks had three lines in the direction of the first line of the Plaintiff's patent, the two first of which formed an acute angle, and the corner of a patent which was ten years older than the Plaintiff's: the third line of Hooks' formed one side of a patent which was seven years younger than the plaintiff's. The question in the case was, whether Hooks's line which first presented itself as one side of the angle, that which formed the other side of the angle, or the still more distant line of the new patent, should form the terminus ad quem of the Plaintiff's patent. The claim of the last line was rejected without hesitation, because, being made several years after the Plaintiff's location, it could not have been called for in the survey, although there was evidence of Plaintiff's declaration that the patent was not surveyed 'till after the grant issued. The court decided in favor of the first line, as the establishment of that formed the least departure from the words of the patent, and as the course from that line was north 73 degrees east, as called for in the Plaintiff's patent; and would also run with or near Hooks' line, which would not be the case, if the first line of the Plaintiff's patent were extended to Hooks' second or third line. Upon this case it is to be observed, that; it is an express authority to shew that where the line of another tract is called for, the line calling for it shall be extended thither, and in the terms of the rule, with no greater departure from the words of the patent than is necessary to satisfy them. The words of the plaintiff's patent were satisfied by stopping at the first line, and would have been departed from, if the line had been extended to the second. It was also a part of the case, that no actual survey of the Plaintiff's land had been made till after the patent issued.

It may also be thought that the second rule and the cases which support it,
are broken in upon by the late decisions in Herring v. Wiggs, 4 N. C. 474; but such an inference is not authorized by the very peculiar circumstances of that case. Michael Herring was the owner of a patent covering the whole land in dispute; and in 1778, conveyed to Keetley, under whom the Defendant claimed, "beginning at a pine tree of Jacob Herrings and George Graham's land and running with George Graham's line, and the same course continued to a corner, including 100 acres of land, running a north course to the patent line." Twenty-seven years afterwards, Michael Herring conveyed to his son the Plaintiff, by deed, which after describing several lines, called for "Richard Keetley's corner, a pine, thence with Rutley's line south 98 poles to a pine, standing by the side of Graddy Herring's fence." The Plaintiff proposed to prove by parol evidence that a marked line from L to K was the true line of the Keetley deed; and he did prove that at thelime of the conveyance to him (the Plaintiff) Michael Herring and himself actually ran to K, and thence to L, where there had stood the pine by Graddy Herring's fence; and that Keetley had sent his son to shew this line. The Court were of the opinion, that no parol evidence was admissible to show a line in contradistinction to the deed, which would give less than 100 acres; that as Keetley's corner was admitted to be at U, a line running thence could not alter the location, which was fixed by a prior deed from Michael Herring, to which, permanency was affixed by registration; that as to the line in question, the deed did not purport to be bounded by a tree or stake, but was to be run in such a way as to include quantity. It was, therefore, a boundary, which could not be mistaken, altered, or changed by memory or reputation, but would always speak in the same tone of decisive notoriety. With respect to the circumstances of the land's being run off before Michael Herring executed the deed to the plaintiff, of the conduct of Keetley in recognizing the line K L as the true one, they were held not to affect Keetley's right, or to change that which was originally made the dividing line by the deed from Herring to Keetley.

This case does not affect the general rule; because the question in it was not where Keetley's line was originally fixed, but whether, when the survey was made and the lines established so as to include 100 acres, the posterior circumstances should have the effect, of changing the line, so as to include a less quantity.

The right of the case before us depends upon the application of the third rule. The patent calls for Whitehurst's corner, which is ascertained to be at the letter A, and this is sufficient authority for running the course and distance of the next line from it, notwithstanding the unaccountable insertion of the words "along Ward's line." After running out the 80 poles, the words are "thence south on Ward's line 320 poles to the Back Swamp." Here we are presented with a choice of difficulties. If we run according to the course, we reach the Back Swamp, but we do not run on Ward's line. On the other hand, if we continue the first line in an eastern course beyond the 80 poles, Ward's line will never be touched. It is, therefore, less a question of constitution respecting the patent than of fact to be ascertained upon evidence to the jury, whether the line described as Ward's was the line originally called for, and according to which the land was located; and if Ward's line be established by proof, whether the second line in Hislop's patent was run from B to C, or from B to D. I am of opinion these facts ought to be enquired into by the Jury; for which purpose there must be a new trial.

Henderson, Judge: I think a venire facias de novo should be awarded, because the Jury, instead of finding the facts have only found the evidence. That the line C D is Ward's line or a line of a tract of land belonging to Ward, is
matter of evidence. That it is the line of Ward called for in Hislop's patent, is a question of fact, for the Jury to find from the evidence: and this fact may depend upon a variety of circumstances, all proper for the consideration of a Jury. This error has become too common from confounding the evidence with the facts. A line, when once established to be the one called for, no matter by what evidence (if it be legal evidence,) whether it be artificial or natural, will certainly control course and distance, as the more certain description. A natural boundary, such as water course, is designated from other water courses by its name, or by its situation, or by some other mark.

One of those means of identifying the water course cannot control all the rest, if those other means are more strong and certain. A name, for instance, is the most common means of designating it; and this in general is sufficiently certain: but it cannot control every other description; and when there are two descriptions incompatible with each other, that which is the most certain must prevail. Cases might be put, where it must he evident that the parties were mistaken in the name, and therefore the name must yield to some other description more consistent with the apparent intent of the parties. It is true, that in cases of water courses or other natural boundaries, and in some cases of artificial boundaries, which are of much notoriety, and have therefore obtained well known names, the other descriptions, must be very strong: but if they be sufficiently so, the name must give way, and be accounted for from the misapprehension or mistake of the parties. This doctrine was fully illustrated in the famous suit relative to the Cattail branch, between Bullock's heirs and Littlejohn, which was more than once in this Court, and finally decided on the Circuit, to the entire satisfaction of the bench and the bar. Hislop's patent begins "at A. Whitehurst's corner, thence along Ward's line east 80 poles, thence south on his line 320 poles, to the Back swamp." Ward's line mentioned in the case, is almost 240 poles from Whitehurst's corner, running in a southwestern direction, and would not be intersected by an east line from the beginning; and is the boundary of a tract of land of Ward's lying entirely east of that line. Of course, it cannot be the line of Ward called for from A to B, or the first course in the patent. It is therefore almost certain, that it is not "the Ward's line" called for in the record course of the patent, and therefore would not control the course and distance, which is from A to B, and from B to D, leaving out the triangle B, C, D. But this a question of fact, and the evidence should have been submitted to the Jury.

I presume the Chief Justice has correctly examined all the cases stated in his opinion; but I have not had an opportunity of looking into them; nor do I deem it necessary to do so, in order to illustrate my views of the points arising in this case — I am of opinion that there should be a new trial.

Hall, Judge: In this case I concur in the opinion delivered by Judge Henderson. I have not had time during the sitting of the Court to examine all the cases referred to in the opinion delivered by the Chief Justice, but I have no doubt, they are truly and ably set forth and commented upon. But I think it is unnecessary to take any further view of the case than that taken by Judge Henderson - I concur in the opinion that there should be a new trial.

New trial granted.


File at: http://files.usgwarchives.net/nc/martin/court/sladesad786wl.txt

This file has been created by a form at http://www.poppet.org/ncfiles/

File size: 30.1 Kb
Taxton, Chief Justice: The land claimed by the
Plaintiff under Hislop’s patent, is described by the let-
ers A, B, C, D, and E. “Beginning at Whitehurst’s
corner at the letter A, thence east along Ward’s line 80
poles, thence south on his line 320 poles to the back
swamp.” If the lines first called for were extended
according to the course and distance in the patent, they
would run from A to B, and thence south to D, and
leave out the land claimed by the Plaintiff; but in so
depart from the boundaries called for in the patent, for the sale
of preserving the course and distance. If the course of the first
line, viz., east, be pursued, it will lead to F, and will not strike

X. C.]
MAY TERM, 1819.

Cherry v. Slade.

I don’t understand the diagram...
IN THE SUPREME COURT.

CHERRY P. SLADE.

DIAGRAMS REFERRED TO IN THE FOREGOING OPINION.

1. [Diagram 1: Fishing Creek indicated.]

2. [Diagram 2: Diagram with labeled points and lines.]

3. [Diagram 3: Diagram with labeled points and lines.]

4. [Diagram 4: Diagram with labeled points and lines.]

5. [Diagram 5: Diagram with labeled points and lines.]

Attachment: Priority of Calls/Feb. 2013
Page 33
pend on its own circumstances.—Bishop's Lessee v. McMullen, 5 Ohio St. 19.

[c] (Wis. 1891) Under Act Cong. June 2, 1860, the line described will take the loca

tion, on satisfactory proof, shall issue to the claimant. Representation of the

mount of the right of the real owner, his decision is ex parte, and is not


[511x, 512] 72.

[a] (Ala. 1825) The United States, in providing for the survey of the public domain, established the rule that sections of land that should be held to contain the exact quantity returned by the surveyor general, so that the corner bound

E. 303, 32 L. Ed. 666.

[b] (III. 1877) Where a fractional section has been subdivided under the act of Congress or April 5, 1832, and the rules and regulations prescribed in conformity therewith by the sec-

[c] (Ala. 1857) Where a fractional section has been subdivided under the act of Congress or April 5, 1832, and the rules and regulations prescribed in conformity therewith by the sec-

[d] (Miss. 1841) Lands sold under the United States surveys pass according to the descriptions of the legal subdivisions whether those subdivisions contain the legal quantity or not.

[e] (Mo. 1892) The United States sold the north half of a government section to plaintiff's predecessors, and set off to the state the south half for schools, by reference to the survey and the surveyor general. Held, in an action against the state's grantees, that the location of the dividing line between the north and south half must be determined from such plat and the acts of Congress relating to the survey of the public

[f] [Mo. 1893] In ejectment to recover the northeast fractional quarter of a certain sec-

[511x, 512] 72.

[a] (U. S. 1888) A patent issued "according to the official plat" is limited by calls for bayous noted on the official plat certified to the state by the land office of the survey department, as Rev. St. §§ 2295, 2396 [U. S. Comp. St. 1901, pp. 1471, 1473], make it the duty of the surveyor general, in his course over which the line he runs may pass, and also the quality of the land, and provide that the boundary lines actually run and mark

[b] (U. S. 1888) A patent issued "according to the official plat" is limited by calls for bayous noted on the official plat certified to the state by the land office of the survey department, as Rev. St. §§ 2295, 2396 [U. S. Comp. St. 1901, pp. 1471, 1473], make it the duty of the surveyor general, in his course over which the line he runs may pass, and also the quality of the land, and provide that the boundary lines actually run and mark

[c] (Ind. 1889) Where an inland navigable

land covers a portion of a section of land, and the government survey designates the dry land in each subdivision as a fractional subdivision, the purchaser from the government of such lots acquires title to all that portion of the bed of the lake included in the whole subdivision. Rice v. Helwig, 121 Ind. 61, 22 N. E. 968, 6 L. R. A. 387.

[36] — Meander lines.

[a] (U. S. 1808) Meander lines are run in surveying fractional portions of the public lands bordering on navigable rivers, not as bounda-

[b] (U. S. 1809) Meander lines, as shown by government surveys of land bounded by a lake or river, are merely for the purpose of ascen-
KEY POINTS: It is the duty of a surveyor of the public land to run round the land located, and to see that such objects are designated as will clearly identify the locality, and to call for these objects, natural and artificial, in his field-notes of the survey; and when the field-notes assert that the survey has been made, the calls will be presumed to be true until the contrary is proved; and as to lost calls, the presumption will be indulged that they have been destroyed or defaced; and even if it be established that the land was not, in fact, surveyed, the patent will not be held void, if the boundaries can be identified by any reasonable evidence.

If there be a defined beginning-point, the boundaries may be established by course and distance alone. (16 Tex. 440.)

Natural objects are mountains, lakes, rivers, creeks, rocks, and the like; artificial objects are marked trees, stakes, mounds, etc., constructed by others or the surveyor, and called for in the field-notes, and they should be inserted in the patent. (Paschal's Dig. Art. 5294, note 1144)

In all future controversies these calls are to be searched for, and, if found, there can be little room for controversy about the boundaries; if not found, or found out of their places, then the rules of law must control.

The general rules as to controlling calls are: 1, natural objects; 2, artificial objects; 3, course and distance. (Pas. Dig. Art. 5294, note 1144.)

The true and correct location of the land is ascertained by the application of all or any of these rules to the particular case. And when they lead to contradictory results or confusion, that rule must be adopted which is most consistent with the intention apparent upon the face of the patent, read in the light of the surrounding circumstances.

The most material and certain calls shall control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control course and distance. (Pas. Dig. Art. 5294, note 1144)

Course and distance are the most unreliable calls; distance is less reliable than course, because of the mistakes of the officers, over which the locator has no control; but of natural and artificial objects the locator can take note on the ground; hence the general rule, that course and distance yield to natural objects; while, under certain circumstances, course and distance may control, yet generally they are but guides to the other calls.

The actual identification of the survey, the footsteps of the surveyor upon the ground, should always be followed, by whatever rule they may be traced. Calls are also divided into descriptive or directory and special locative calls. The former, although consisting of lakes and creeks, must yield to special locative calls, that is, to particular objects upon the corners or lines of the land.

Where a survey called to commence in the immediate neighborhood of a well-known corner, and to run east three thousand one hundred and sixty varas, to the corner of another survey, and by following the distance not one of the natural or artificial objects called for could be found at the places named, whereas if the first line stopped at the distance of seven hundred and fifty varas every crossing of the creek, spring, and artificial object called for were found,
the long distance called for was disregarded, and, in the light of the surrounding circumstances, the survey was made to stop at seven hundred and fifty varas.

The fact that the survey thus established had been patented to another party does not disprove the identity.

Where the charge of the court, as to the law governing the case, was erroneous, the judgment will be reversed.

Where it is objected that a witness, whose depositions are offered, is not shown to be out of the county at the time of trial, the objection should be sustained, unless oath be made as required by the statute. (Pas. Dig. Art. 3726, note 845)

Where the commissioner of the general land office testifies as to records in his office, it is a good objection that the records are not produced. They are higher evidence than the commissioner's conclusions as to their contents. (Pas. Dig. Art. 3715, note 839)

The object of the verdict of a jury is to respond to the issues made in the pleadings and supported by the evidence. The judgment must be a conclusion of law from the facts found, and all must be so certain that the ministerial officers may execute the judgment without further directions. (20 Tex. 442, 471; 22 Tex. 173; 25 Tex. 173.)

Where the issue was as to the conflict of surveys, the verdict should find what the actual conflict is; and the judgment should rest upon the verdict, and not upon a survey made upon a former trial.

If a defendant proves three years' continuous possession before the institution of the suit, claiming under a location and survey under a valid certificate (with a title derived from the grantor), he is entitled to the benefit of the 15th section (three years) of the statute of limitation. (Pas. Dig. Art. 4622, note 1031.)

[**1] Appeal from Cherokee. The case was tried before Hon. Reuben A. Reeves, one of the district judges.

This action of trespass to try title was instituted by appellee the 11th of September, 1858, alleging the appellee to be the owner of a tract of six hundred and forty acres of land, which is alleged to commence three thousand one hundred and sixty varas east of the southeast corner of the John R. Taylor survey of a half league; thence north four hundred and eleven varas to corner; thence east one thousand nine hundred and eight-tenths varas; thence south one thousand nine hundred and eight-tenths varas; thence west one thousand nine hundred and eight-tenths varas; thence north one thousand four hundred and eighty-nine and eight-tenths varas to the place of beginning, which is alleged to include the residence and improved land of appellant.

Plaintiff set out his title, and averred that in 1838 a certificate {260} for six hundred and forty acres of land was issued to Mobly Rhone, which was approved as genuine, etc. That this certificate was filed on the land described in the petition, and that a patent duly issued to the land on the 31st day of July 1845. He also alleged that, in 1852, [**2] he sued appellant for the same land, which suit was decided against him; and that this was the second suit allowed under the statute. (Pas. Dig. Art. 5298). No survey of the land was averred, nor was there any proof that a file was ever made on the land.
In an amended petition, it was averred that, in 1839, the John H. Irby or John R. Taylor surveys were well known; and that from that time the land claimed by appellee had been well known as the Mobly Rhone survey, and was known to the appellant and those under whom she claimed at the time of the accrual of their rights; that it was precisely similar in size and shape to a survey made for Reason Franklin, lying adjacent to it; that the beginning-point of the Rhone and Franklin surveys is the same for calls; that the surveys are identical in the calls for course and distance, except that the Franklin survey calls to begin nearer to the John R. Taylor survey; and it was averred that the land granted to Rhone lies entirely east of the Franklin survey; that there the marks, natural and artificial, as described in the patent to Rhone, cannot be found on the ground where it was alleged the land lies. It was averred that the mistake was caused by the accident, carelessness, or inattention, or conjecture of the surveyor, and the field-notes of a survey made by A. J. Coupland, under order of the court during the pendency of the former suit between these parties, were made a part of the petition, and it was averred that they correctly described the land patented to said Rhone.

Appellant answered, excepted to appellee's petition, because the land was not described with sufficient certainty, etc., and because appellee derived his title from the government, but did not aver that any survey of the land was made, and no sufficient description of the land was given.

For answer, appellee plead not guilty, etc., and limitation of three and five years; alleged that no survey in fact was ever made, covering or embracing the land in controversy; and averring that the land described in the patent to Mobly Rhone was entirely away from and off the land in controversy, which was occupied by appellant. Appellant also plead occupation and improvement made in good faith, etc.

On the trial, the plaintiff below read in evidence the patent to Mobly Rhone, which was objected to because it was variant from the land and patent described in the petition; there was a deed from Rhone to himself; an agreed statement signed by the attorneys, admitting as genuine the certificate to Mobly Rhone, also that the certificate to John H. Power, under which appellant claimed, was genuine, and that said certificate was transferred by Power to Tubb in 1847, and by Tubb to Pearson in 1848, and by Pearson to Gray and wife in 1849, and by Gray and wife to appellant in 1851, that said transfers had been regularly recorded, etc.

E. G. Armstrong, a witness for appellee, said that in October, 1857, by order of the district court of Cherokee county, he made a survey of the land in controversy, which was given in the record; that in making the survey he went to the southeast corner of the John H. Irby or John R. Taylor survey, and ran a line from thence east three thousand one hundred and sixty varas; he set a stake for the beginning-point, and from thence ran the courses and distances as called for by the patent; that the survey so made did include the residence and improved land claimed by appellant; that he made diligent search at the place fixed upon for the beginning for marked lines, etc., and made search at all the corners, and along the lines of the survey made by him, for corners and marked lines, but could find no old lines; that from his examination he was satisfied that no corner-trees or lines had ever been marked there; that to commence at the southeast corner of the John H. Irby or John R. Taylor survey, and run east three thousand one hundred and sixty varas for a beginning-point, and then running the courses and distances called for in the patent, would include the land claimed and occupied by the defendant.

That on the 3d day of November, 1855, he made a survey, commencing at the southeast corner of the John R. Taylor survey, and running east seven hundred and fifty varas he found marked lines; and running north four hundred and eleven varas found a marked tree and
corner, as called for in the patent to Rhone; and from thence, running the course and distance called for in the patent, he found marked line trees and corners, Camp and Mud creeks, as called for in the patent. Witness said that the survey as made by him on the ground agrees with the calls of the patent as well as any survey he has ever made.

The file made by P. H. Tubb, on the 14th of April, 1848, under which appellant [**6] claimed the land, the survey made for Mrs. Gray, which covered the file, or nearly so, were also in the record. Armstrong said the house occupied by Mrs. Stafford, the appellant, was a few varas west of the survey made for Mrs. Gray under and by virtue of the Power certificate. That to commence at the southeast corner of the John R. Taylor survey, and run east three thousand one hundred and sixty varas for a beginning-point, and then running the course and distances called for in the patent to Mobly Rhone, would include the premises and land claimed by appellant. That a survey so made would agree with the patent in the calls for course and distance; but all the other calls of the patent would be in conflict with a survey so made. That in running the east line of said survey, made by him under the order of the court, he crossed a {263} lake thirty varas wide. That it was such an object as would likely be stated in the field-notes of a survey as a matter of description.

It was admitted by the plaintiff that no survey in fact was ever made by virtue of the certificate to Mobly Rhone, upon which the patent issued, covering or embracing the land in controversy, and which was occupied by [**7] the defendant. But it was contended by plaintiff, that the patent operated to convey the land to the grantee, without an actual survey being made. When the deposition of James M. Trimble was offered, the defendant objected to reading the deposition in evidence, unless oath were made that Trimble was not in the county. The objection was overruled, and the deposition was read. S. Crosby said that he was a clerk in the land office from 1845 to 1852, and commissioner of that office from 1852 to 1858; that he had been familiar with the maps and surveys in the general land office since 1845; that the Mobly Rhone and Reason Franklin surveys were in the office; that, as represented on the map, the Rhone survey lies east of the Franklin survey. When the survey made for M. D. Vaughan came up for examination, it was said to be in conflict with the Rhone survey; and in June, 1851, a transcript of the field-notes of the Rhone and Franklin surveys was filed in the office by Carter, the assignee of the M. D. Vaughan certificate; that the Rhone and Franklin surveys both called for the same land; and on this and the testimony of Trimble and Coupland, that there was no evidence of a survey to be found [**8] commencing three thousand one hundred and sixty varas east of the John R. Taylor survey, the Rhone survey was considered to be removed, so as not to conflict with the Vaughan and Gray surveys, and the patent was issued to Carter as assignee of Vaughan, etc.

Irby, a witness for appellee, testified that he was present at the time the line was run from the John R. Taylor to {264} the Reason Franklin survey; that the line was run in the evening, and the next day the party were surveying about the same place. He proved the declarations of a party claiming to be M. Rhone, and also proved the declarations of persons in the vicinity of the land as to where it was said to be located. Witness knew Camp creek since the date of the survey, in 1839; it had been well known since that time; it runs through or across the Franklin survey. It would not touch at any point a survey of six hundred and forty acres commencing three thousand one hundred and sixty varas east of the John R. Taylor survey above mentioned, and from thence running as called for in the patent to Rhone; nor would a survey so made be nearer than one-half mile of Camp creek.

Armstrong and Coupland, who had been on the land and [**9] made surveys under order of the court, agreed with Irby that a survey commencing and running the course and distance as called for in the patent to Rhone would not come nearer than a half mile of Camp creek. Irby
further stated, that Tubb, under whom appellant claimed the land, settled upon it in 1847, and that it had been occupied continually since that time by persons who claim under and through Tubb. A regular chain of title and occupation was shown from Tubb to appellant.

Myers proved that the patents to Rhone and Franklin were precisely the same, except that it was seven hundred and fifty varas from the John R. Taylor survey to the beginning of the Reason Franklin survey, and three thousand one hundred and sixty varas from the Taylor to the beginning of the Rhone survey—the place assumed as the beginning, no survey having been made.

The appellant read in evidence the certificate to John H. Power and the field-notes of the survey made by virtue of the Power certificate. It was in proof that the patent to Carter, assignee of the M. D. Vaughan certificate, conflicted {265} about eighty acres with the land claimed by appellee, and the house and a small portion of land claimed [**10] and occupied by appellant was on the grant to Carter. All the other improvements were on the Power survey, or the land surveyed by virtue of the Power certificate.

Vansickle said there might be a mistake as to the beginning of the survey of Mobly Rhone. If this were admitted or established, the difficulty in regard to the survey would be removed. As the survey is, and the field-notes as in the patent appear, there is no conflict with the survey as found on the ground, marked lines, corners, and creeks; except in the distance from the southeast corner of the John R. Taylor survey to the point designated as the beginning of the Rhone survey, there is no discrepancy. All the other calls in the patent to Rhone were found on the ground as described in the patent to Rhone; but it removed the survey entirely off the land occupied and claimed by the appellant; he made the survey; the lines of the survey and corner trees were plainly marked.

The deposition of A. A. Nelson proved that he was surveyor of the Nacogdoches land district from the year 1840 to 1856; that Cherokee was taken from the Nacogdoches land district in 1848; that the survey of Rhone was not designated on the map which [**11] was made in 1846.

The judge charged the jury, that when a survey calls to begin so many varas from a certain corner of an older survey, which is established, the beginning-point may be ascertained by running according to the calls in the patent. If there is no actual survey, there must be such a description on the face of the patent as would lead to and identify the place designated, and such as would enable subsequent locators to appropriate the adjacent lands; that if Irby or John R. Taylor's corner had been identified, and Rhone's beginning-corner was shown to be three thousand one hundred and sixty varas from the Taylor survey, the remaining calls (266) of the patent for the natural objects, if found on the ground, would control, if there were no marked lines, or if they were inconsistent with the natural objects on the ground as called for in the patent; then the calls for course and distance, as given, must fix the boundaries of the Rhone patent.

There were motions for new trial and in arrest of judgment.

A new trial was asked, on the ground that the court erred in the various rulings upon the admission of the testimony and in the charge to the jury, and in refusing to give [**12] the charges asked by appellant, and because the verdict was against law and evidence, and because the verdict was not responsive to the issues, and did not find for the plaintiff the land sued for.
Motion in arrest of judgment, because the verdict did not ascertain and find on the matter in issue between the parties, and did not find for the plaintiff the land described in the petition; and did find for the plaintiff the land in the patent, when no patent was averred by the plaintiff, and three patents were referred to in the evidence.

The verdict was, "We the jury find for the plaintiff all the land embraced within the bounds as claimed by the patent."

It was assigned for error that the court erred in overruling the defendant's exception to the petition and the other rulings of the court.

DISPOSITION:
Reversed and remanded.

COUNSEL:
Donley & Anderson, for appellant, argued against the form of the petition.

The question arises whether a patent is sufficient to appropriate the land, when there has been no survey of the land.

We concede that a patent to land is, prima facie, evidence that all the preliminary steps have been taken to justify its issuance, and raises the presumption that all the legal requisites to the issuing of the patent have been complied with.

It has, however, been held by this court, that the issuing of a patent is a ministerial act, and must be performed according to law. If issued against law it is void, and those claiming under it acquire no right. (State v. Delesdenier, 7 Tex. 76).

The principle announced in this case has been sustained in numerous cases adjudicated by other courts. (Hunderkoffer v. Burns, 1 Wash. C. C. 109; Stoddard v. Chambers, 2 How. 284).

[They reviewed the Texas legislation, showing the steps by which lands are located, surveyed, and patented.]

No authority has been cited that a patent, without a previous survey, has been issued, unless it was represented that a survey in fact had been made.


The facts in relation to the calls and lines were reviewed. Anderson v. Stamps, 19 Tex. 464; Urquhart v. Burleson, 6 Tex. 502; Hubert v. Bartlett, 9 Tex. [*14] 97; George v. Thomas, 16 Tex. 74; Boulton v. Lann, 16 Tex. 96; Henry v. Henry, 5 Barr, 249; Kelly v. Graham, 9 Watts, 116.]

It is assigned for error, that "the court erred in rendering judgment on the verdict of the jury in this cause, and in refusing to arrest the judgment herein," etc.

The jury "find for the plaintiff all the land embraced within the bounds, as claimed by the patent," etc.
As there are conflicting calls in this patent, the verdict in fact determines nothing.

If the patent to Mobly Rhone is referred to, what are the bounds of the land ascertained by the patent, the courses and distance, or the marked lines and natural boundaries? We shall not go again into this matter. We refer to the authorities hereinbefore cited on this question. We believe that they are conclusive of the question, that the marked lines and natural boundaries shall govern. We cannot add to those authorities by argument. On the question of the sufficiency of the verdict, it is said, in Young v. Wickliffe, 7 Dana, 447, "this is not responsive to the issue, and did not authorize the judgment."

In Russell v. Cornwell, 2 Root, 68; 2 U. S. Dig. @ 463, it is said, "a judgment will be arrested where the issue put is not answered directly by the verdict and judgment."

In Kurle & Walker v. Shrive, 11 Gill & J. 405, it is held, that "a verdict which omits to find a material issue joined in the cause may be made the subject of a motion in arrest."

In Crommitten v. Minter et al. 9 Ala. 595, the verdict was, "We the jury do find in favor of the said plaintiffs, and we find the right and title to said land in the plaintiffs' declaration mentioned, to wit, fifty acres of the southeast fractional quarter of fractional section twenty-four, in township eighteen, in range eighteen, in the district of lands subject to sale in Cahaba, Alabama, to be in said plaintiffs," etc. It is said that this verdict would have been sufficient, if it had not affirmed that the plaintiffs had title to so much of the land, leaving it to be inferred that the title to the residue was in some one else. (Jenkins v. Noel, 3 Stew. 60; Brown v. Hilligas, 2 Hill, 447; Patterson v. The United States, 2 Wheat. 221).

J. F. Wood, for appellee. I. Can the plaintiff recover, under his patent, by establishing the beginning-point without an actual survey upon the ground?

II. Are the rights of the plaintiff below (defendant here) affected by prescription or the statute of limitation; and to what extent, if affected?

As to the second point, the statute of limitation, there can be but little difficulty. Mrs. Stafford lives on the Vaughan survey, about eighty acres of which conflicts with the Rhone survey. And although it is shown that, by the proof, she, and those under whom she claims, had lived there since about 1847, yet the deed or patent to the Vaughan survey is 5th June 1851, less than a year prior to the commencement of the action, which was on 13th April 1852. The statute could not begin to run until some claim by boundaries was set up, so that, as to the survey, the statute does not run.

And as to the Power's survey, under which appellant also claims about eighty acres, the proof shows the file in that case to have been made 14th April, 1848, and the survey in November, 1850; and a very material question here arises, as to the time at which the statute should begin to run, whether at the date of the file or at the date of the survey.

M. Priest also filed a long and able argument for appellee.

JUDGE:
Smith, J. It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent, and see that such objects are designated on it as will
clearly point out and identify the locality and boundaries of the tract, and to extend a correct
description of these objects (natural and artificial, with courses and distances) into the field-
notes of the survey, in order that they may be inserted in the patent, which will afford the
owner, as well as other persons, the means of identifying the land that was in fact located and
surveyed for the owner (21 Tex. 20); and until the reverse is proved, it will be presumed that
the land was thus surveyed and boundaries plainly marked and defined. And if any object of a
perishable [*270] nature, called for in the patent, be not found, the presumption will be
indulged that it is destroyed or defaced; but if it be established, by undoubted evidence, that
the land was not in fact surveyed, yet, as the omission was the fault of the government officer
and not the owner, it would seem extremely unjust to deprive him of the land, by holding the
patent to be void, if the land can, by any reasonable evidence, be identified. [**18] And if
course and distance alone, from a defined beginning-point, will, with reasonable certainty,
locate and identify the land, that will be held sufficient. (Newsom v. Pryor’s Lessee, 20 U.S. 7,
7 Wheat. 7; 16 Tex. 440; 5 Mon. 159.) Then we must conclude that the position of the
appellant, that a patent, without a survey having been made of the land, should be held void,
cannot be sustained.

The main point in this case appears to be, whether the Mobly Rhone patent for six hundred
and forty acres of land in fact covers any of the land claimed by the defendant below.

As has been intimated, it is the purpose of the government and the locator to select a
particular tract of land and designate it from the mass of the public domain. (21 Tex. 21; 9
Tex. 103). And hence the directions given by law to run round the land--in fact, point out and
define upon it such natural objects, or plain artificial marks, with courses and distances, by
which the land can at all times be easily found and identified. Natural objects are mountains,
lakes, rivers, creeks, rocks, and the like. Artificial objects are marked lines, trees, stakes, etc. A
description [**19] of these objects and marks of identity should be faithfully transferred into
the field notes, and thence into the patent, to serve the purpose aforesaid; and in all future
controversies in respect to the locus or boundaries of the tract, recourse must be had to these
calls, and when they are all found and established in conformity with those set forth in the
patent, the conclusion is almost irresistible that the [*271] tract of land covered by the patent
is identified, and there can be little or no room for controversy about the boundaries of the
land; but when all the calls of the patent cannot be found, or if found to be inconsistent with
others, in whole or part, and leading to a different result or confusion, then it becomes
important to look to the rules of law that must govern the action of the court and jury, in
respect to the character and weight of the evidence to be considered by them in fixing upon
and establishing the true boundaries of the survey.

It has been often said by this court that the general rules are, that the location should be
governed, first, by natural objects or boundaries, such as rivers, lakes, creeks, etc.; second,
artificial marks, such as marked [**20] trees, lines, stakes, etc.; and, third, course and
distance.

The true and correct location of the land is ascertained by the application of all or any of
these rules to the particular case. And when they lead to contrary results or confusion, that rule
must be adopted which is most consistent with the intention apparent upon the face of the
patent, read in the light of the surrounding facts and circumstances.

The rule stated by Chief Justice Marshall, in Newsom v. Pryor, 7 Wheat. 7, is, "that the most
material and most certain calls shall control those which are less material and less certain. A call
for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control
both course and distance." (6 Tex. 502; 16 Tex. 110; 9 Tex. 103; 22 Tex. 594).
Of all these *indicia* of the locality of the true line, as run by the surveyor, course and distance are regarded as the most unreliable, and generally distance more than course, for the reason that chain-carriers may miscount and report distances inaccurately, by mistake or design. At any rate, they are more liable to err than the compass. The surveyor [*21] may fall into an error in making out the field-notes, both [*272] as to course and distance (the former no more than the latter), and the commissioner of the general land office may fall into a like error by omitting lines and calls, and mistaking and inserting south for north, east for west. And this is the work of the officers themselves, over whom the locator has no control. But when the surveyor points out to the owner rivers, lakes, creeks, marked trees, and lines on the land, for the lines and corners of his land, he has the right to rely upon them as the best evidence of his true boundaries, for they are not liable to change and the fluctuations of time, to accident or mistake, like calls for course and distance; and hence the rule, that when course and distance, or either of them, conflict with natural or artificial objects called for, they must yield to such objects, as being more certain and reliable.

There is an intrinsic justice and propriety in this rule, for the reason, that the applicant for land, however unlearned he may be, needs no scientific education to identify and settle upon his land, when the surveyor, who is the agent of the government, authoritatively announces to him that certain well-known rivers, lakes, creeks, springs, marked corners, and lines on the land, constitute the boundaries of his land. But it would require some scientific knowledge and skill to know that the courses and distances called for are true and correct, and with the aid of the best scientific skill mistakes and errors are often committed in respect to the calls for course and distance in the patent. The unskilled are unable to detect them, and the learned surveyor often much confused.

Although course and distance, under certain circumstances, may become more important than even natural objects— as when, from the face of the patent, the natural calls are inserted by mistake or may be referred to by conjecture and without regard to precision, as in the case of descriptive calls— still they are looked upon and generally regarded as mere pointers or guides, that will lead to the true lines and corners of the tract, as, in fact, surveyed at first.

The identification of the actual survey, as made by the surveyor, is the *desideratum* of all these rules. The footsteps of the surveyor must be followed, and the above rules are found to afford the best and most unerring guides to enable one to do so.

There is another rule to be observed in estimating these natural and artificial calls. They are divided into tow classes; descriptive or directory, and special locative calls. The former, though consisting of rivers, lakes, and creeks, must yield to the special locative calls, for the reason that the latter, consisting of the particular objects upon the lines or corners of the land, are intended to indicate the precise boundary of the land, about which the locator and surveyor should be, and are presumed to be, very particular; while the former are called for without any care for exactness, and merely intended to point out or lead a person into the region or neighborhood of the tract surveyed, (9 Yer., 55,) and hence not considered as entitled to much credit in locating the particular boundaries of the land when they come in conflict with special locative calls, and must give way to them.

In this case the southeast corner of the John R. Taylor survey appears to have been notorious in the neighborhood and well established. The line calling to run east three thousand one hundred and sixty varas, to the beginning corner of the Mobly Rhone survey of six hundred and forty acres, when extended that distance, is unsupported by any natural or artificial call mentioned in the patent or proved to have been made by the surveyor. When that line was run
out by Armstrong, the distance and course called for, thence around the tract, the courses and
distances called for in the patent, for the four corners and lines of the tract, not one single
natural or artificial object called for in the patent could be found upon the ground at {274} all
corresponding with it, as described in the patent. But it is contended by the appellee that no
survey was in fact made by the surveyor, and that the tract was surveyed by protraction,
beginning at the Taylor southeast corner. To support the truth of this supposition, it must be
admitted that the surveyor did not perform his duty; that the locative calls of the patent were
never in fact made or found, and were falsely placed in the patent by the surveyor, or that they
have, since the designation of them, been destroyed or defaced, and cannot now be found;
while it must be admitted that Mud creek and Camp creek, called for in the patent, are not
liable to destruction, if it be admitted that all the marked trees may have been destroyed or
defaced by accident or design.

There is no evidence adduced, except the admission of the plaintiff himself, that the survey
was not in fact made, or that it was made by protraction; while, on the contrary, it has been
most satisfactorily proved, that if the line east from Taylor’s corner be stopped at seven
hundred and fifty varas from that point, thence following the courses and distances called for,
we find every call of the patent on the ground, natural and artificial. Mud and Camp creeks are
crossed, each twice, and a spring reached at the very points called for in the patent, the corner
and bearing –trees also corresponding with the patent, fortified by course and distance. It is
ture, no witness has testified that these were the lines actually run by the surveyor for the
Mobly Rhone survey. Some evidence tended to show it was surveyed for Reason Franklin. It
may have been surveyed at the time for Franklin, but, like the Irby survey, which was
transferred to Taylor, this may have been applied to the Mobly Rhone claim. The wonderful
coincidence of the locative calls of the patent with the objects found here on the ground would
appear to leave but little doubt that they were the true locative calls of the Mobly Rhone survey,
and that there was a mistake in the length of the descriptive call of three thousand {275} one
hundred and sixty varas, and that its true length is seven hundred and fifty varas. The distance
of this line is the least important or material of all the calls in the patent. It is directory or
descriptive in its character, and forms no part of the boundary of the survey, and evidently was
intended only to point and direct a person to the neighborhood in which the special locative
calls could be found, and about its accuracy the parties may not have been very particular. And
in this view we are of opinion this call should yield to the more specific calls found on the
ground. It will be observed that if we hold that this line is correctly stated to be three thousand
one hundred and sixty varas, we do not find one solitary other call of the patent on the ground;
and we are asked to presume that the report of the calls in the patent were false, and that no
survey was in fact ever made on the land; while, on the other hand, if we hold that this
descriptive call of three thousand one hundred and sixty varas was a mistake in distance, and
that its true length is only seven hundred and fifty, then we find every corner, bearing tree, line,
and the two creeks called for, all corresponding with the calls in the patent, in respect to
identity and course and distance; and from the rules laid down it seems that we must hold the
true length of that line to be seven hundred and fifty varas, and force it to yield to the more
material and locative calls of the patent found upon the ground.

It is said that this same tract was surveyed for and patented to Franklin. This, we conceive
can be of but little importance in fixing upon the boundaries of the Rhone survey. If it amounts
to anything, it only proves that two patents have been issued for the same tract of land, which
by the by, has been very often done, but not often, perhaps, with lines corresponding so
literally. But we do not think that at all affects the question of boundary involved in this case.
Because Mobly Rhone has secured a patent upon, Franklin’s land, we cannot see how that can
furnish any {276} reason why he should take that of any other person in its stead.
The line from Taylor’s southwest corner we regard as a descriptive or directory call; and, if found to be in conflict with any of the locative calls found and identified upon the ground, then it must yield to them, as being more material and important.

We believe the charge of the court gave too much importance to the descriptive call of three thousand one hundred and sixty varas over those of a locative character; and that it did not present to the jury properly the rules that should govern them in establishing the boundaries of the Rhone survey; and that it erred in refusing the charge asked by the defendant in that respect, and should have granted the defendant a new trial on her motion.

The objection to reading the deposition of Trimble, for want of an affidavit that he was out of the limits of the county, was improperly overruled. O. & W. Dig. Art 464; 9 Tex. 339; 12 Tex. 11.

The exceptions to the deposition of Crosby, in respect to the contents of records and papers in his office, should have been sustained. Copies were better evidence of these facts. 22 Tex 293.

The object of a verdict is to respond to and decide the issues between the parties upon the evidence adduced, and to declare the respective rights of the parties as involved in the issue with certainty, so that the judgment can be entered with like certainty, and the ministerial officers can carry it into execution, without determining additional facts. 20 Tex 442; 22 Tex. 173.

The issue here was not whether the plaintiff owned the land claimed in the petition. The defendant did not deny such claim, but contended that the patent of the plaintiff did not embrace the land they claimed, and that it was located elsewhere; and the issue was, whether the land claimed under the Rhone patent conflicted with that (277) claimed by the defendant. To this issue it seems the jury did not respond with that certainty required by law. The verdict responded to the evidence adduced, (the patent,) but not to the issue, which the patent was introduced to support.

The judgment is equally liable to objection. Instead of declaring the legal sequence of the verdict and the issues, it establishes the judgment; established and ratified the correctness of a survey made by A. J. Coupland in 1852, by order of the district court in a former suit, which survey constituted no part of the pleadings or verdict. It would seem that the verdict of the jury left the issues and the rights of the parties where they were before the trial, and that the ministerial officers of the court cannot carry the judgment out without determining the fact whether the plaintiffs’ land really conflicts with that of the defendant, and to what extent.

If the defendant had proved continuous and adverse possession of the premises by herself and those she claimed under for three years before the institution of the suit, under the location and survey of the Power certificate, it is not seen why the defense of three years’ limitation failed her. But it is not clear to us that it was shown that the improvements made on the land in 1847 and 1848 were upon land common to both the location and the survey. As this case will go back for a new trial, and these doubts may be removed, therefore we will not now further discuss it.

There being error in the proceeding, therefore the judgment below is reversed, and the cause remanded for a new trial in conformity with this opinion.

REVERSED AND REMANDED.
RECEIVER'S DEED

N. LESLIE WILLIAMS, RECEIVER
TO
RALPH W. DINES, ETUX

Incorporated, party of the first part, and Ralph W. Dines and Viola B. Dines, his wife, and the survivor of

IN WITNESS WHEREOF:
The undersigned, party of the first part as such receiver is vested with the legal title to the heretofore
described real estate, and

IN WITNESS WHEREOF, party of the first part as such receiver has been authorized and directed by the District Court of
Socorro County, New Mexico, in said cause No. 2566 to convey the heretofore described real estate to

Beginning at Corner No. 1, the northeast corner of the tract herein described, which point is the section
R. W. M. and running

thence No. 87 deg. 07' 53" E., along the north line of said Section 4, a distance of 1219.35 feet to Corner No. 2;

thence S. 22 deg. 10' 03" E., a distance of 585.8 feet to Corner No. 3; thence S. 21 deg. 55' 51" E., a distance of

W., a distance of 1236.7 feet to Corner No. 4; thence S. 32 deg. 10' 03" E., a distance of 274.6 feet to Corner No. 5;

thence E. 29 deg. 07' 19" N., a distance of 1236.1 feet to Corner No. 6; thence S. 33 deg. 21' 55" E., a distance of

222.9 feet to Corner No. 7; thence S. 49 deg. 07' 53" E., along the west bank of the Pecos River, a distance of 21 feet to corner

thence S. 12 deg. 56' W., along the west bank of the Pecos River, a distance of 781.2 feet to Corner No. 11;

thence W. 12 deg. 56' S., along the west bank of the Pecos River, a distance of 21 feet to Corner No. 12; thence S. 13 deg. 20'

thence N., along the west bank of the Pecos River, a distance of 703 feet to Corner No. 13; thence S. 13 deg. 20'

thence W. 12 deg. 56' S., along the west bank of the Pecos River, a distance of 21 feet to Corner No. 14; thence S. 1 deg. E. along

the west bank of the Pecos River, a distance of 377 feet to Corner No. 15; thence S. 7 deg. W., along the west

bank of the Pecos River, a distance of 767 feet to Corner No. 16; thence S. 3 deg. E., along the west bank of the

Pecos River, a distance of 115 feet to Corner No. 17; thence W. a distance of approximately 103 feet to a point on

the line dividing the West One-Half [56] of said Section 4, for Corner No. 18; thence N. a distance of 1222.2 feet to Corner No. 19; thence W. 12 deg. 22' S., a distance of 403.94 feet along the west line of said Section 4

and the point of beginning; and containing 159.88 acres, more or less.

Together with and singular hereafterments and appurtenances thereto belonging or in anywise appertaining,
and the reversion and reversionary, remainder and remainders, rents, issues and profits thereof; and all the estate,
right, title, interest, claim and demand whatsoever of the party of the first part in and to the above described and
bargained premises, with the hereafterments and appurtenances, with the place of binding, and containing 159.88 acres, more or less.

TO HAVE AND TO HOLD all and singular the said premises above bargain and described, together with the
appurtenances, unto the said parties of the second part, survivor of them, their assigns, and the heirs and assigns of such survivor, forever.

IN WITNESS WHEREOF, the said party of the first part as receiver of L. B. Putney, Incorporated, has hereto
set his hand and seal the day and year first above written,

H. Leslie Williams
Receiver of L. B. Putney, Incorporated.

STATE OF NEW MEXICO
COUNTY OF SANTIAHO, . . . . . . . . . . . . . .

On this 17th day of June, 1942, before me personally appeared H. Leslie Williams, Receiver of L. B. Putney,
Incorporated, to be known as the person described in and who executed the foregoing instrument and acknowledged
that he executed the same as his free act and deed.

IN WITNESS WHEREOF I have hereto set my hand and affixed my notarial seal the day and year last above written.

Seal
by commission Expires: June 1, 1942.

Virginia Chavez
Notary Public.

APPROVED:
Bryan G. Johnson

EXHIBIT 1

Attachment: Priority of Calls/Feb. 2013
Page 47
WRIGHT, lessee vs. MABRY.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF TENNESSEE, NASHVILLE

17 Tenn. 55; 1836 Tenn.

March, 1836, Decided

PRIOR HISTORY: The facts necessary to be stated in order to understand this case are correctly set forth in the opinion of the court, delivered by Judge Green. The cause was argued by.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sought review of a judgment from a trial court (Tennessee), which found that plaintiff was not entitled to recover a tract of land as against the claim of defendant in plaintiff's action of ejectment.

OVERVIEW: Plaintiff claimed that a tract of land had been granted to him by the State of Tennessee in 1832. Defendant claimed his title to the tract of land based upon a 1793 grant by the State of North Carolina to a predecessor in title to defendant. The 1793 grant was for a large tract of land on both sides of a creek with a specific description. If the 1793 grant actually crossed the creek, then it would not include plaintiff's tract, but if the 1793 grant was surveyed according to the corners and distances called for, then plaintiff's tract was encompassed by the tract claimed by defendant. The court affirmed the judgment for defendant, holding that the specific calls for the course and distance in the 1793 grant took precedence over the general call that the tract was on both sides of the creek. The call for the creek was only a general or directory call, indicating the neighborhood of the grant but not the precise location of the grant. Calls for natural objects were directory calls which did not make pretensions to precise accuracy of tracts of land. Although the charge of the trial court was not entirely correct, the judgment for defendant was correct.

OUTCOME: The court affirmed the judgment.

LexisNexis(R) Headnotes

Real Property Law > Deeds > Property Descriptions

[HN1] A call for the natural objects in a grant of land yields to a call for course and distance, because the latter is a special call, intended to designate boundary, about which the contracting parties, are presumed to be particular, and the former is merely a directory call, intended to lead to the neighborhood of the place, but making no pretensions to precise accuracy.

HEADNOTES

When a grant calls to be upon both sides of a creek, but the calls for course and distance, when run out, throw it altogether on one side: It was held, that the directory case to be on both sides of the creek, must be disregarded; and that the lines cannot be extended so as to cross the creek.

General or directory calls in a grant, must yield to special or locative calls.

COUNSEL: W. K. Turner, for the plaintiff in error

Thompson, for defendant in error.

JUDGES: GREEN, J., delivered opinion of the court.
OPINION BY: GREEN

OPINION

GREEN J. delivered opinion of the court.

The plaintiff prosecutes this action of ejectment to recover a tract of land granted to him by the State of Tennessee, by grant bearing date the 5th day of December, 1832. The defendant resists the plaintiff’s right to recover, and insists that he has a better title in himself by virtue of a grant from the State of North Carolina to Nicholas Rochester, dated the 17th of April, 1793, and mesne conveyances for the land therein described to himself. The grant to Rochester is for one thousand acres, and calls to lie “on Duck river, and on both sides of Beaver Dam creek, a fork of said river, beginning at a post oak, on the last line run for the officers and soldiers, twenty chains west of where said line crosses Duck river, as run the last time; then west one hundred and twenty-five chains to a stake; then north eighty chains to a stake; thence east one hundred and twenty-five chains; then south eighty chains to the beginning.” If this grant be run so that the first line will cross Beaver Dam creek, then north eighty chains to a stake; then east one hundred and twenty-five chains, and then a straight line to the beginning, the land included in the plaintiff’s grant would not be included in the grant to Rochester; because the first line of the Rochester grant, in that case, would be much longer than the one hundred and twenty-five chains called for, and from the termination of the distance called for in the third line to the beginning corner, would be a diagonal line. But if the Rochester grant be surveyed according to the corners and distances called for, the land claimed by the lessor of the plaintiff would be included in it. It becomes necessary, therefore, to put a construction upon the calls of this grant, and to determine how it ought to be surveyed.

It is supposed in the argument, that as a matter of course the land included in the grant is to lay on both sides of Beaver Dam creek. We do not think so. True, the grant calls for land lying on both sides of Beaver Dam creek; but it also calls for a beginning at a post oak, “and running west one hundred and twenty-five chains to a stake; thence north eighty chains to a stake,” &c. Now all these calls cannot be complied with; because it will require the first line to be much more than one hundred and twenty-five chains long, in order to reach Beaver Dam creek. It is supposed, that the call for Beaver Dam creek, a natural object, is to have priority of the calls for course and distance, and therefore, that the latter must yield. That doctrine is not applicable to this case. The call for lying “on both sides of Beaver Dam creek” is a general and directory call; whereas, the calls for running west one hundred and twenty-five chains to a stake; then north eighty chains, is special and locative. "Here" to use the language of Judge Crabb, in Robert vs. Cunningham, 1 Mart. and Yer. [HN1] "the call for the natural objects yields to the call for course and distance, because the latter is a special call, intended to designate boundary," about which the contracting parties, are presumed to be particular, "the former is merely a directory call, intended to lead to the neighborhood of the place, but making no pretensions to precise accuracy." In that case the grant called for lying on the south side of Cumberland river, but the calls of course and distance would cross the river.

The court held that the grant included land on both sides of the river. So here; we think the directory call for lying on both sides of Beaver Dam creek, is to be disregarded, and that the first line should stop at the distance called for. According to this construction, the Rochester grant would cover the land claimed by the plaintiff in this action; therefore, although the charge of the court to the jury may not be entirely correct, yet as the result would have been the same, had a correct charge been given, we affirm the judgment.

Judgment affirmed
LEGAL HISTORY: ERROR to the Circuit Court of Kentucky.

This was an ejectment brought in the Court below, in which the lessor of the plaintiff claimed title under a patent, describing the survey as "beginning at an ash in the middle of a line of Glenn's land, and with it 20 degrees, east 800 poles, crossing three branches to a hoop wood and sugar tree corner to Moffat's land, and with a line thereof north 70 degrees, west 100 poles, crossing the creek to a sugar tree south 33 degrees, west 820 poles, crossing three forks of the creek to two sugar trees, south 70 degrees, east 300 poles, to the beginning." The question arising upon the construction of this patent, is stated in the opinion of the Court.

LAW

It is a universal rule, that course and distance yield to natural and ascertained objects.

But where these objects are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one to the other.

Cases may exist in which the one or the other may be preferred according to the circumstances.

In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decisions of the State tribunals.

COUNSEL: This cause was argued by Mr. B. Hardin, for the plaintiff, and by Mr. Talbot, for the defendant.

OPINION BY: STORY

OPINION

Mr. Justice Story delivered the opinion of the Court.

Whatever might be our opinion (and we wish to be understood as expressing none) if the question in this case were entirely new, it cannot be affirmed, that there has been such a clear mistake of construction, as that justice and law require us to depart from the decision of the local tribunals. The question here is, whether the third and fourth lines of this patent (following the order of the lines as they are given in the patent) are to be continued upon the courses called for by the patent until they intersect, or whether the fourth line is to be extended from the beginning to the distance called for by the patent, and then the closing line is to be drawn, so as to strike the termination of the second and fourth lines at the patent distances. In the former case, the fourth line will be longer than the distance called for by the patent; in the latter, the third line will vary from the course called for by the patent. The counsel have stated, that the question resolves itself into this, whether the course shall yield to distance, or distance to the course. It may be laid down as an 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. In the present case, whichever construction is adopted, the plaintiffs will hold a larger portion of land than their patent calls for. We must consider that the construction of the patent is somewhat doubtful. That it is susceptible of two constructions, each of which has some reasons to support it. If it be doubtful, it would seem reasonable not to press the broadest construction against a party who is now in actual possession under a perfectly good legal title. That possession ought not to be ousted without a clear title in the other party, especially where it has been upheld by the State tribunals. This very case, between the same parties, has been already adjudicated in the Court of Appeals of Kentucky; and that Court, upon full deliberation, decided in favour of the defendant. It would be a great mischief for the same title to be in perpetual litigation from the conflict of opinion between the Courts of the State and the federal Courts; and we, therefore, acquiesce in the opinion of the Court of Appeals, upon the ground that the point is one of local law, has been fully considered in that Court, and is a construction which cannot be pronounced unreasonable, or founded in clear mistake.


Judgment affirmed.
DECISION: Judgment on the verdict.

HEADNOTES

In a conveyance of land, when the deed refers to monuments actually erected by the parties as the boundaries thereof, the land will pass according to the monuments, however the distance between them may be mistaken in the deed.

This was an action of covenant broken. The plaintiff alleged in his declaration, that the defendant by deed, dated November 1, 1817, conveyed to him a tract of land in Concord, in this county, bounded as follows—"Beginning at a "dry white pine tree, the northwest corner of the lot, thence "south 26 degrees west 133 rods to a stake and stones, "hence south 64 degrees east 179 rods to a small birch tree "spotted, thence north 26 degrees east 133 rods to a stake "and stones, thence north 64 degrees west 179 rods to the bounds first mentioned;" and in and by said deed covenanted with the plaintiff that he was seized of the said tract in his own right in fee simple; when in fact, as the plaintiff alleged, he was not so seized. The defendant pleaded that he was seized, upon which issue was joined.

The cause was tried here at May term, 1820, when it appeared in evidence, that previous to the making of the deed mentioned in the declaration, the defendant had conveyed to one B. Bailey a part of the original lot, lying on the south side, and to one W. Dodge another tract, part of the same lot, and adjoicing the part conveyed to Bailey. These tracts conveyed to W. Dodge and Bailey contained 100 acres. Before the said deed was made the plaintiff contracted with the defendant to purchase the residue of the original lot, and directed a surveyor to measure off the 100 acres conveyed as aforesaid to W. Dodge and Bailey, and then measure the residue of the lot, and make out a draft of a deed of it. The surveyor accordingly measured off the 100 acres, and then measured the residue, and found it amounted to ninety-six acres.

The following plan is a representation of the several parcels of the original lot. The parties, before the deed was made, erected and agreed upon monuments at C and D; but when the surveyor drew the deed, he, by mistake, took the distances between A and E, and B and F, instead of the distances between A and C, and B and D, and the distances thus taken by the surveyor were inserted in the said deed, so that if the length of chain between the monuments is to prevail, the deed includes the tract sold to W. Dodge.

The court directed the jury, that if they believed that the parties erected monuments at the corners of the 96 acres, as the boundaries of the lot to be conveyed, those monuments must prevail, and be considered as the boundaries of the land conveyed; and as it was not disputed that the defendant was seized of the 96 acres, they must, if they believed the monuments to have been so erected, return a verdict for the defendant.

The jury returned a verdict for the defendant, and the plaintiff moved the court to grant a new trial, on the ground that the jury had been misdirected.

COUNSEL: J. C. Chamberlain, for the plaintiff.

DECISION

By the court. Whenever in a conveyance of land the deed refers to monuments actually erected as the boundaries of the land, it is well settled that those monuments must prevail, whatever mistakes the deed may contain as to the distances between the monuments. In this case we entertain no doubt that the direction to the jury was correct, and that there must be

Judgment on the verdict.
HEADNOTES

General reputation or hearsay is admissible as evidence in questions of boundary.

OPINION

The plaintiff's patent called for a white oak—then the second line—then the third to the creek—then down the creek to the beginning. He proved a marked white oak, on a branch emptying into the creek, and running from thence so as to form an acute angle between it and the creek. He proved also a red oak at the third corner, and a red oak was called for in the patent—and that where the red oak stood, the second line would terminate, if drawn from the end of the first line, beginning at the white oak. This white oak standing on the branch, was at the distance of two or three hundred yards from the creek.

Under the charge of the court, however, the jury found a verdict establishing it as the beginning, and the verdict remained undisturbed.

This verdict was found on the hearsay of a witness now dead, who heard a former proprietor now also dead, say that the white oak was the beginning tree; and on the hearsay of another witness, who said he ran out the land for the said proprietor when he purchased it, and began at the said white oak, in the year 1766. The original survey was made in 1753, or earlier.

[SEE DIAGRAM IN ORIGINAL]

If the beginning [**2] was at A, then C. D. was the true line of the patent. If at B, then E. F was the true line. The plaintiff claimed to C D, and prevailed, as the white oak at A was established instead of the beginning at B on the creek.
13 U.S. 173; 3 L. Ed. 694; 1815 U.S. LEXIS 380; 9 Cranch 173

M'IVER'S LESSEE v. WALKER AND ANOTHER.

SUPREME COURT OF THE UNITED STATES

13 U.S. 173; 3 L. Ed. 694; 1815 U.S.
March 1, 1815, Decided

HISTORY: ERROR to the Circuit Court for the district of East Tennessee, in an action of ejectment brought by the Plaintiff in error against the Defendants.

The case is thus stated by the chief justice in delivering the opinion of the Court.

"On the trial the Plaintiff produced two patents for 5000 acres each, from the state of North Carolina, granting to Stockley Donalson, from whom the Plaintiff derived his title, two several tracts of land lying on Crow Creek, the one, No. 12, beginning at a box elder standing on a ridge corner to No. 11, &c. "as by the plat hereunto annexed will appear." The plat and certificate of survey were annexed to the grant.

The Plaintiff proved that there were eleven other grants of the same date for 5000 acres each, issued from the state of North Carolina, designated as a chain of surveys joining each other from No. 1 to No. 11, inclusive, each calling for land on Crow Creek, as a general call, and the courses and distances of which, as described in the grants, are the same with the grants produced to the jury. It was also proved that the beginning of the first grant was marked and intended as the beginning corner of No. 1, but no other tree was marked, nor was any survey ever made, but the plat was made out at Raleigh, and does not express on its face that the lines were run by the true meridian. It was also proved that the beginning corner of No. 1, stood on the north west side of Crow Creek, and the line, running thence down the creek, and called for in the plat and patent, is south 40 degrees west. It further appeared that Crow Creek runs through a valley of good land, which is on an average about three miles wide, between mountains unfit for cultivation, and which extends from the beginning of the survey No. 1, in the said chain of surveys, until it reaches below survey No. 13, in nearly a straight line, the course of which is nearly south thirty-five degrees west by the needle, and south forty degrees west by the true meridian. That in the face of the plats annexed to the grants, the creek is represented as running through and across each grant. The lines in the certificate of survey do not expressly call for crossing the creek; but each certificate and grant calls generally for land lying on Crow Creek. If the lines of the tracts herein before mentioned No. 12 and 13, in the said chain of surveys, be run according to the course of the needle and the distances called for, they will not include Crow Creek or any part of it, and will not include the land in possession of the Defendants. If they be run according to the true meridian, or so as to include Crow Creek, they will include the lands in possession of the Defendants. Whereupon the counsel for the Plaintiff moved the Court to instruct the jury.

1. That the lines of the said lands ought to be run according to the true meridian and not according to the needle.

2. That the lines ought to be run so as to include Crow Creek and the lands in possession of the Defendants.

The Court overruled both these motions and instructed the jury that the said grant must be run according to the course of the needle and the distances called for in the said grants, and that the same could not be legally run so as to include Crow Creek, and that the said grants did not include the lands in possession of the Defendants. To this opinion an exception was taken by the Plaintiff's counsel. A verdict and judgment were rendered for the Defendants, and that judgment is now before this Court on a writ of error."

The chief justice in stating the case, omitted the fact that testimony [***4] was offered by the Plaintiff at the trial to prove "that the surveyor who made the plats and certificates of survey annexed to the grants, had regard to the true meridian, and not to the course of the needle, in making the said certificates of survey, and intended the courses of the surveys so to be run;" which testimony was rejected, by the Court below, as inadmissible -- but the Court admitted evidence "that the general practice of making surveys by surveyors has been to run to the courses of the needle."

Absent Livingston, J., Story, J., and Todd, J.

If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian.

Course and distance must yield to a call for natural objects.

All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey.
If a patent refer to a plat annexed, and if in that plat a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey nor the patent calls for that water-course. Quaere. Whether parol evidence can be given that the surveyor intended to express the courses according to the true, and not according to the magnetic meridian.

LAW NOTES

If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian. Course and distance must yield to a call for natural objects. All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey. If a patent refer to a plat annexed, and if in that plat, a water course be laid down as running through the land, the tract must be so surveyed as to include the water course, and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses & distances mentioned in the patent, and although neither the certificate of survey, nor the patent, calls for that water-course. Quaere? Whether parol evidence can be given that the surveyor intended to express the courses according to the true, and not according to the magnetic meridian.

COUNSEL: SWANN, for the Plaintiff in error.

The Court below ought not to have rejected the testimony to prove the intention of the surveyor to run the lines of these grants by the true meridian. It corroborates the plat annexed to the grant. The rule of construction as to grants from the state, especially in Virginia, N. Carolina and Tennessee, differs from the rule as to other deeds. Course and distance may be controled by parol evidence of the actual manner in which the survey was made, and of the actual marks and bounds made upon the land at the time of the survey. The Courts have not stopped at a natural object called for, it parol evidence be given that according to the actual survey the line extended beyond that object. The marks control the course and distance of the patent. 1 Hen. and Mun. 77, Baker v. Glasscock. "Taylor's N. Carolina Rep. 116, Hayward's Rep. 238, 378 " MS. Rep. Blount's lessee v. Masters. 3 Call. 239, Herbert v. Wise.

If the witness had testified that a survey had been actually made and that it included the creek, it would have been admissible testimony. But the plat was intended to be a substitute for an actual survey. It was a part of the patent, annexed to it and referred to by it. It was as much a part of the patent as if it had been inserted in it. It shows that the land ought to be laid off so as to include the creek, as plainly as if the patent had expressed it in words. The course, south 40 degrees west, is ambiguous -- it may mean a magnetic or a meridional course. The question is what was the intention of the surveyor? How shall it be ascertained? The most direct mode of ascertaining it is to prove his declarations at the time. It is true that by proving what was the general practice of surveyors you may infer his intention -- but that is a secondary mode of proof, and less certain than proof of his declarations at the time he made the particular survey in question. This is not bringing parol evidence to contradict or to control the plat, but to corroborate and confirm it.

If a grant is capable of two constructions, the Court must adopt that which is most beneficial to the grantee, 1 Taylor's Rep. 163.

JONES, contra.

The general practice of the country is to survey by the compass, and all the courses expressed in surveys refer to the magnetic meridian. A certificate of survey therefore is always supposed to express magnetic courses unless the contrary is expressed on its face. No parol proof can be admitted to contradict what is so strongly implied. It would be a dangerous practice -- it would be a difficult thing for a common surveyor to ascertain the true meridian, and there is no law of North Carolina which compels him to do it. The testimony offered was not to prove any act of the surveyor, but his intentions.

There is no natural boundary called for in the patent. The general expression that the land is on Crow Creek, cannot control the course and distance. The expression in the patent "as by the plat hereunto annexed will appear," refers only to the courses and distances, and not to the actual location of the land. The figure of a creek delineated on the plat, without any reference to it in the certificate of survey, cannot control the boundaries actually described. Not a word is said about the lines including or crossing Crow Creek; and in order to include the creek you must deviate from the straight line called for.

C. LEE, in reply.

The intent of a grant must be effectuated, if by any means, consistent with the rules of law, it can be done. The intent of this grant cannot be effectuated by the
mode of survey directed by the Court below. The plat, annexed to the grant, shows the intent to be to make the survey conform to the nature of the ground so as to include the creek and the valley, and exclude the mountains. The law of North Carolina requires the plat to be annexed to the deed, which is thereby, and by the reference to it in the body of the deed, made a part thereof; and contains a plain declaration that the grantee shall have the valley through which the creek runs.

On what ground could the testimony of the intention of the surveyor, have been rejected by the Court, when they admitted testimony to show the general practice to be to survey by the magnetic meridian? That general practice was only a fact from which the jury might infer, in the absence of positive testimony, what the intent of the surveyor was. It was a grade of evidence inferior to positive testimony of the intention. It was only prima facie, not conclusive evidence of his meaning. There was no law of North Carolina which required the surveyor to go by the magnetic, and not by the true meridian. He was at full liberty to adopt the true meridian if he pleased. We say he did so, and the plat itself is evidence of the fact; for it could not otherwise be consistent with itself. You must run the lines according to the true meridian to include the creek.

MARSHALL, Ch. J.

Does not a difficulty arise in consequence of the grant having been made without actual survey?

C. LEE. That is a matter between the state and the grantee. After a grant, no stranger can take advantage of such a defect. The state may waive the objection if it chooses to do so.

SWANN. It has been settled, I believe in North Carolina that when a grant has actually been made, no enquiry shall be made by the state as to the survey, &c.

In Hayward's Rep. 358 the judge says, "when a grant has issued we can look no further back; all previous proceedings must be considered as regular."

WRITTEN BY: MARSHALL

DECISION

MARSHALL, Ch. J. after stating the facts of the case, delivered the opinion of the Court as follows:

"It is undoubtedly the practice of surveyors, and the practice was proved in this case, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be [*178] bounded by the courses and distances of the patent, according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.

The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances, are more probable and more frequent, than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described. Had the survey in this case been actually made, and the lines had called to cross Crow Creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner or other marked trees and yet the land must have been so surveyed as to include Crow Creek. The call, in the lines of the patent, to cross Crow Creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause.

That the lands should not be described as lying on both sides of Crow Creek, nor the lines call for crossing that creek, are such extraordinary omissions as to create considerable doubt with the Court in deciding whether there is any other description given, in the patent, of sufficient strength to control the call for course and distance.

The majority of the Court is of opinion that there is such a description. The patent closes its description of the land granted by a reference to the plat which is annexed.

The laws of the state require this annexation. In this plat, thus annexed to the patent and thus referred to as describing the land granted, Crow Creek is laid down as passing through the tract. Every person, having knowledge of the grant, would also have knowledge the lands lay on both sides of the creek; There would be nothing to lead to a different conclusion, but a difference of about five degrees in the course, should he run out the whole chain of surveys in order to find the beginning of No. 12; and he would know that such an error in the course would be corrected by such a great natural object as a creek laid down by the surveyor in the middle of his plat. This would prove, notwithstanding the error in the course, that the lands on both sides of Crow Creek were
intended to be included in the survey, and intended to be
granted by the patent.

It is the opinion of the majority of this Court, that
thee is error in the opinion of the Circuit Court for the
district of East Tennessee in this, that the said Court in-
structed the jury that the grant, under which the Plaintiff
claimed, could not be legally run so as to include Crow
Creek, instead of directing the jury that the said grant
must be so run as to include Crow Creek, and to conform
as near as may be to the plat annexed to the said grant;
wherefore it is considered by this Court that the said
judgment be reversed and annulled and the cause be re-
manded to the said Circuit Court that a new trial may be
had according to law.

The chief justice, added, that he did not think the
question about the true meridian had much to do with the
case. The Court decided it upon the plat. If it had not
been for the plat, they should have said that the land
ought to be surveyed by the magnetic meridian.

DUVALL, J.

My opinion is that there is no safe rule but to follow
the needle.
MARGARET RILEY, adm'x of William Riley, deceased, plaintiff in error, vs.
LEWIS L. GRIFFIN, GEO. W. ADAMS and others, defendants.

SUPREME COURT OF GEORGIA

16 Ga. 141; 1854 Ga.
August, 1854, Decided

HISTORY: Ejectment, in Bibb Superior Court. Tried before Judge POWERS, May Term, 1854.

This action was brought by the defendants in error, against the plaintiff in error, to recover a lot of land in the County of Bibb.

The plaintiffs in the action, introduced a grant from the State to Lewis L. Griffin, one of the lessors of the plaintiff, dated in 1836, to fractional Lot No. 3, in said county, and introduced testimony, showing that the grant covered the premises in dispute, and that defendant was in possession, at the time of bringing the writ.

Defendant introduced a deed from Willis Wilder to O. H. Prince, dated in 1835, and a deed from Prince to Wm. Riley, her intestate, dated in 1845, for part of fractional Lot No. 2, Macon Reserve. Defendant introduced testimony, going to show that this deed covered the premises in dispute, (the lots adjoining) and also to show possession and claim of ownership, since 1836.

Defendant also introduced Warren B. Riley, the son of intestate, whose testimony was as follows:

"I have known the premises in dispute, since 1835 or 1836. My father was in possession of the premises, since 1835 or 1836, first as the agent of Maj. O. H. Prince, and after the death of Prince, he bought the land at Prince's sale, and remained in possession until his death; and his widow and administratrix has been in possession ever since, and is now.

During the lifetime of Prince, father always held possession as his property, using it as such; and after he bought it, used it as his own ever since, cultivating it and exercising acts of ownership over it, as his own.

I know the lines well; I know the line is the old original line; have frequently seen the old blazes on the trees, which had all the appearance of the original Surveyor's mark. The owners of the adjoining lands set it up as the original line, and were governed by it, and no dispute about it until Adams bought the adjoining land.

If this land is not covered by the deeds from Wilder to Prince, and from Prince's administrator, (W. Poe) to Wm. Riley, then there is no land, whatever, that can be claimed under the deeds.

All the parties acquiesced in agreeing to the line, as fixed and known, until Adams bought, and then Brantly, (Adams' father-in-law,) made a fuss about the lines, in a Justice's Court. Riley was in possession of the premises in dispute occupying it and using it as his own, when Adams bought fractional Lot No. three, which they claim to cover the place sued for".

After argument, the Court charged the Jury as follows:

This is a question of boundary. If you believe, from the evidence, that the premises in dispute are covered by the grant from the State to Lewis L. Griffin, then you will find for the plaintiff.

And if you believe, from the evidence, that defendant went into possession of the premises in dispute, under a mistaken apprehension, as to the real boundary, when, in fact, the premises were not covered by his deed, possession and user of it, as his own, under such misapprehension, for seven years, does not confer title, as against the true owner; and so, if you believe that plaintiff's grant covers the premises in dispute, you will find for plaintiff; otherwise, you will find for defendant.

Defendant's Counsel requested the Court to charge the Jury, that if Riley, and those under whom he claims, had been in the actual possession of the premises in dispute, for more than 7 years before suit brought, claiming it as his own, by himself and those under whom he claimed, and cultivating it and exercising acts of ownership over it--

That such possession under the case made by the evidence, (if the Jury believed the testimony,) conferred a good title in defendant, and the Jury would find for defendant, if they believed the evidence, as to the possession. The Court refused so to charge, but did charge, that a purchase of Lot No. 2, and going into possession of Lot. No. 3, conferred no
title to No. 3; and 7 years' open, adverse possession of No. 3, did not convey title to No. 3, against the true owner, because not bona fide, under claim of right, and adverse to the true owner. The party making such a mistake, does so at his peril— if such mistake, in your opinion, from the testimony, was made.

The Jury found, for the plaintiff, the premises in dispute.

Which said charge, and refusals to charge, defendant, by her Counsel, then and there excepted, and now assign the same for error.

RESULTING LAW: Judgment reversed.

A possession which is the result of ignorance, inadvertence, misapprehension or mistake, will not work a disseizin.

Marked trees, as actually run, must control the line, which courses and distances would indicate.

If nothing exists to control the call for courses and distances, the land must be bounded by the courses and distances of the grant, according to the Magnetic Meridian: but courses and distances must yield to natural objects.

All lands are supposed to be actually surveyed: and the intention of the grant is, to convey the land according to that actual survey.

If marked trees and marked corners are found, distances must be lengthened or shortened, and courses varied so as to conform to those objects.

Where the calls of a deed or other instrument, are for natural, as well as known artificial objects, both courses and distances, when inconsistent, must be disregarded. And this rule is supposed to prevail, in most of the States of this Union.

Whenever a natural boundary is called for in a grant or deed, the line is to determine at it: however wide of the course called for, it may be, or however short, or beyond the distance specified.

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

When the lines or courses of an adjoining tract are called for in a deed or grant, the lines shall be extended to them, without regard to distances, provided these lines and courses be sufficiently established.

When there are no natural boundaries called for, no marked trees or courses to be found, nor the places where they once stood, ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for, in all such cases, Courts are of necessity confined to the courses and distances described in the grant or deed.

Courses and distances occupy the lowest, instead of the highest grade, in the scale of evidence, as to the identification of land.

Any natural object, and the more prominent and permanent the object, the more controlling as a locator, when distinctly called for and satisfactorily proved, becomes a land-mark not to be rejected, because the certainty which it affords, excludes the probability of mistake.

Courses and distances, depending for their correctness on a great variety of circumstances, are constantly liable to be incorrect; difference in the instrument used, and in the care of surveyors and their assistants, lead to different results.

In ascertaining boundaries, the locations of the original surveyor, so far as they can be found, are to be resorted to; and where they vary from the proprietor's plan, the locations actually made, will control the plan.

Whenever, in a conveyance, the deed refers to monuments, actually erected as the boundaries of the land, it is well settled that these monuments must prevail, whatever mistakes the deed may contain, as to courses and distances.

Courses and distances are pointers and guides, rather to ascertain the natural objects of boundaries.

Where a given line is exceeded in a grant, according to the courses and distances, evidence may be given of long occupation under it, to prove the boundaries.

Boundaries and courses may be proved by hearsay, from the actual necessity of the case.
Where a line has been run and agreed on by the co-terminous proprietors, and acquiesced in and possession held to it, for eighteen or twenty years, the parties and those claiming under them, are bound by it, no matter when, nor by whom, the line was run.

COUNSEL: STUBBS & HILL; WHITTLE, for plaintiffs in error.

RUTHERFORD; POE; NISBET & POE, for defendants.

JUDGES: Lumpkin, J., delivering the opinion.

WRITTEN BY: LUMPKIN

OPINION

By the Court.--LUMPKIN, J., delivering the opinion.

We recognize the doctrine, that a possession which is the result of ignorance, inadvertence, misapprehension, or, in other words, mistake, will not work a disseizin— as, for instance, A has a grant to Lot No. 2; he is a stranger in the country, and calls upon some one residing in the vicinity of his land, who points out No. 3 instead of No. 2. A, acting upon this mistake, and not intending to occupy any other land than that which his grants covers, enters upon No. 3 and lives on it as his own for more than seven years. An occupancy, under such circumstances, would not, we apprehend constitute adverse possession. Brown vs. Gray, (3 Greenleaf's R. 126.)

It is the intention to claim title which makes the possession of the holder adverse; and this is the doctrine upon which the decision in every case proceeds. If it be clear, therefore, that there is no such intention, there can be no pretense of an adverse possession. (Angell on Limit. 402, 412.) If one be the owner of a tract of land, and at the same time the agent of the owner of an adjoining tract, he cannot avail himself of the Statute, to support his title to a part of the land of his principal, of which he had taken possession upon a misapprehension of the boundary. Comegys vs. Corley, (3 Watts 280.)

Whether there be any evidence to justify the charge, that the defendant's occupancy, in this case, may have been the result of mistake, is somewhat questionable.

But there is another portion of the charge, which requires more consideration. The Court instructed the Jury, that if Griffin's grant covered the premises in dispute, then the verdict must be for the plaintiff.

Is this proposition necessarily correct? We think not.

Let us refer, for a moment, to the testimony of young Riley and Jonathan Wilder. Warren B. Riley swears, that he has known the premises in dispute since 1835 or 1836. His father has been in possession since that time, first, as the agent of Major O. H. Prince, and afterwards, in his own right—he having become the purchaser of the property, when sold as the estate of Major Prince, by Col. Poe, the administrator. That either as agent of Prince, or in his own right he had always held the land, exercising acts of ownership over it, by cultivating it, &c. This witness testifies, that he knows the lines well, and that the line to which his father claimed, was the old original line. He has frequently seen the old blazes and trees which had all the appearance of the original Surveyor's marks. That the owners of the adjoining lands set it up, as the original line, and were governed by it, and there was no dispute about it until Adams bought the adjoining land. He further stated, that all the parties, that is, those residing on the contiguous tracts, acquiesced in the line as fixed, until Adams bought, and then Brantley, Adams' father-in-law, made a fuss about the line in a Justice's Court.

Jonathan Wilder swore that he acted as the agent of his uncle, Willis Wilder, who owned the land before Major Prince bought it. That at the time it was sold, the blazes made by the Surveyor who run the land, were plain on the trees; and that he followed the original marks. That Riley's fence is nearly on the line as run round by witness. That it is a little over at the corner, as well as he can recollect, judging from his eye and from memory; subsequent examination has confirmed him in this opinion. He knows he is not mistaken as to the lines, because he followed the original Surveyor's marks, then fresh and plain on the trees, which were then standing, very few, if any, having been cut down. Prince and Riley, together have been in possession of the land, for the last eighteen or twenty years, claiming it as their own, under Willis Wilder. There never was any dispute about the boundary, while witness controlled it, as the agent of his uncle.
Witness has known the place, over since the original survey was made, and before that time; has often seen the original Surveyor's marks, and could trace the original lines by them, and did so.

Now, it would seem, according to the proof, that when Lot No. 2 was originally surveyed, the lines may not have been run straight, according to courses and distances. But still, if the Surveyor marked these as the true lines, it is quite clear that the owner of No. 2 will hold to these boundaries. Marked trees, or the line, as actually run, must control the line which courses and distances would indicate.

If nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the grant, according to the Magnetic Meridian; for it is the practice, undoubtedly, of Surveyors, to express, in their plots and certificates of survey, the courses which are designated by the name. But it is a general principle, that the course and distance must yield to natural objects called for in the grant.

All lands are supposed to be actually surveyed; and the intention of the grant is, to convey the land, according to that actual survey.

Consequently, if marked trees and marked corners be found, distances must be lengthened or shortened, and courses varied, so as to conform to these objects. McIver's Lessee vs. Walker, (9 Cranch 173.)

Where the calls of a deed or other instrument, are for natural, as well as known artificial objections, both courses and distances, when inconsistent, must be disregarded. And this rule, says Mr. Justice Washington, is supposed to prevail in most of the States. McPherson vs. Foster, (4 Wash. C. C. 45.)

Whenever a natural boundary is called for in a grant [*148] or deed, the line is to determine at it, however wide of the course called for it may be, or however short, or beyond the distance specified.

And whenever it can be proved that there was a line actually run by the surveyor, was marked and [*13] a corner made, the party claiming under the grant or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the grant or deed.

When the lines or courses of an adjoining tract, are called for in a deed or grant, the lines shall be extended to them, without regard to distance, provided these lines and courses be sufficiently established.

Where there are no natural boundaries called for--no marked trees or corners to be found, nor the places where they once stood, ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for--in all such cases, Courts are, of necessity, confined to the courses and distances prescribed in the grant or deed; for however fallacious such guides may be, there are none other left for the location. Cherry vs. Slade's Adm'r, (3 Muir. 82.)

The foregoing rules, Chief Justice Taylor remarked, had grown out of the peculiar exigencies of the country, and were moulded by experience, to meet the demands of Justice.

And thus, it will be seen that courses and distances occupy the lowest grade, instead of the highest, in the scale of evidence, as to the identity of land.

And it is reasonable that this should be so; for any natural object, when called for distinctly, and satisfactorily proved and the more prominent and permanent the object, the more controlling as a locator--becomes a landmark not to be rejected, because the certainly which it affords, excludes the probability of mistake:

While course and distance, depending, for their correctness, on a great variety of circumstances, are constantly liable to be incorrect. Difference in the instrument used, and in the care of Surveyors and their assistants, lead to different results. (Lessee of McCay vs. Gallway, 3 Ham. 282. Thornberry vs. Churchill and Wife, 4 Monroe's Ken. R. 32. McNeill vs. Massey, 3 Hawk. 91. Beard's Lessee vs. Tulloth, 1 Cook 142. Preston's Heirs vs. Bowmar, 6 Wheat. 580.)

This doctrine is found scattered, broadcast, throughout the authorities; and I had supposed to be too well understood and established to require to be discussed at this day.

In Brewer vs. Gay, (3 Greenleaf's R. 126,) it was held, that in ascertaining the boundaries of lots of land, where a township has been laid out, the locations of the original Surveyor, so far [*15] as they can be found, are to be resorted to; and where they vary from the proprietor's plan, the locations actually made will control the plan.

So, in Dodge vs. Smith, (2 N.H. 303,) the Supreme Court say, "whenever, in a conveyance, the deed refers to monuments actually erected, as the boundaries of the land, it is well settled that those monuments must prevail, whatever
mistakes the deed may contain, as to the courses and distances. The same principle was decided in Brand vs. Dawny. (20 Marten's Lom. Rep. 159.)

In Doe vs. Paine & Sawyer, (4 Hawk's N. Rep. 64.) the Court refer to courses and distances, as pointers or guides merely, to ascertain the natural objects of boundary.

So, also, it has been held, that where a given line is exceeded in a grant, according to the courses and distances, evidence may be received, of long occupation under it, to prove the boundaries. (Makapeace vs. Bancroft, 12 Mass 469. Sargent vs. Towne, 10 Mass. 303. Baker vs. Sanderson, 3 Pick. 354. Livingston vs. Ten Broeck, 16 Johns. 23.) Vide Davies' Abrd. of Am. L. vol. 3, p. 307, where some of the early cases decided in Massachusetts, upon this subject, are collected.

And, as landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made; and are often destroyed, as in the case before the Court, by the improvement of the country and other causes, the boundary and corners may be proved by hearsay, from the necessity of the case. (Nicholls vs. Parker, 14 East. 331. 12 East. 62. 1 M. & S. 679. 1 T. R. 466. 5 T. R. 262. 2 Ves. 512. 6 Peters 341. 4 Day's Conn. R. 265. 1 Harris & McHenry, 84, 368, 531. 2 Hayw. 349. 1 Yates 28. 6 Binney 59.)

So then, notwithstanding Mr. Wood run out Lot No. 3, according to the courses and distances designated in the plot accompanying the grant, and conceding that the lines, thus run, would cover the premises in dispute; still, if the testimony of Wilder and Riley be true, as to the original lines of Lot No. 2, actually run and marked by the Surveyor, as a question of law, the plaintiff was not entitled to recover, nor were the Jury bound so to find.

Again: Suppose the line sworn to, is not that which was marked by the original Surveyor; still, if it were agreed on by the coterminal proprietors, and acquiesced in, and possession to it held for eighteen or twenty years, the parties, and those claiming under them, would be bound by it, no matter when nor by whom the line was run and chopped. Brown vs. McKinney, 9 Wharton's R. 567. Burrell vs. Burrell, 11 Mass. 294.)

There is a small piece of ground which stands in this predicament; it is included in Riley's fence, but outside of the old boundary line. That being so, the title to this parcel of ground will not depend on the actual line run, as proven by the witnesses, because it is not included in it; still, it is inclosed by Riley's fence. Here, then, is possessio pedis. If this fence has been built seven years, then this strip of land will be covered by actual occupancy; otherwise, the plaintiff's right to that will not have been lost or taken away.

Judgment reversed.
Where a line has been run and agreed on by the co-terminous proprietors, and acquiesced in and possession held to it, for eighteen or twenty years, the parties and those claiming under them, are bound by it, no matter when, nor by whom, the line was run.

COUNSEL: STUBBS & HILL; WHITTLE, for plaintiffs in error

RUTHERFORD; POE; NISBET & POE, for defendants.

JUDGES: Lumpkin, J., delivering the opinion.

WRITTEN BY: LUMPKIN

OPINION

By the Court —LUMPKIN, J., delivering the opinion.

We recognize the doctrine, that a possession which is the result of ignorance, inadvertence, misapprehension, or, in other words, mistake, will not work a disseizin—as, for instance, A has a grant to Lot No. 2; he is a stranger in the country, and calls upon some one residing in the vicinity of his land, who points out No. 3 instead of No. 2. A, acting upon this mistake, and not intending to occupy any other land than that which his grants covers, enters upon No. 3 and lives on it as his own for more than seven years. An occupancy, under such circumstances, would not, we apprehend constitute adverse possession. Brown vs. Gray, (3 Greenleaf's R 126.)

It is the intention to claim title which makes the possession of the holder adverse; and this is the doctrine upon which the decision in every case proceeds. If it be clear, therefore, that there is no such intention, there can be no pretence of an adverse possession. (Angell on Limit. 402, 412.) If one be the owner of a tract of land, and at the same time the agent of the owner of an adjoining tract, he cannot avail himself of the Statute, to support his title to a part of the land of his principal, of which he had taken possession upon a misapprehension of the boundary. Comeys vs Carley. (3 Watts 280.)

Whether there be any evidence to justify the charge, that the defendant's occupancy, in this case, may have been the result of mistake, is somewhat questionable.

But there is another portion of the charge, which requires more consideration. The Court instructed the Jury, that if Griffin's grant covered the premises in dispute, then the verdict must be for the plaintiff.

Is this proposition necessarily correct? We think not.

Let us refer, for a moment, to the testimony of young Riley and Jonathan Wilder. Warren B. Riley swears, that he has known the premises in dispute since 1835 or 1836. His father has been in possession since that time, first, as the agent of Major O. H. Prince, and afterwards, in his own right—he having become the purchaser of the property, when sold as the estate of Major Prince, by Col. Poe, the administrator. That either as agent of Prince, or in his own right he had always held the land, exercising acts of ownership over it, by cultivating it, &c. This witness testifies, that he knows the lines well, and that the line to which his father claimed, was the old original line. He has frequently seen the old blazes and trees which had all the appearance of the original Surveyor's marks. That the owners of the adjoining lands set it up, as the original line, and were governed by it, and there was no dispute about it until Adams bought the adjoining land. He further stated, that all the parties, that is, those residing on the contiguous tracts, acquiesced in the line as fixed, until Adams bought; and then Brantley, Adams' father-in-law, made a fuss about the line in a Justice's Court.

Jonathan Wilder swore that he acted as the agent of his uncle, Willis Wilder, who owned the land before Major Prince bought it. That at the time it was sold, the blazes made by the Surveyor who run the land, were plain on the trees; and that he followed the original marks. That Riley's fence is nearly on the line as run round by witness. That it is a little over at the corner, as well as he can recollect, judging from his eye and from memory; subsequent examination has confirmed him in this opinion. He knows he is not mistaken as to the lines, because he followed the original Surveyor's marks, then fresh and plain on the trees, which were then standing, very few, if any, having been cut down. Prince and Riley, together have been in possession of the land, for the last eighteen or twenty years, claiming it as their own, under Willis Wilder. There never was any dispute about the boundary, while witness controlled it, as the agent of his uncle.
HOWELL v. U.S.

519 F. SUPP 298 U.S.N.D.GA. (GA. 1981)

HOWELL v. UNITED STATES

Cite as 519 F.Supp. 298 (1981)

APPENDIX "A"
LYONS v. PULLIN

Court of Civil Appeals of Texas, El Paso

197 S.W.2d 494; 1946 Tex. App.

May 2, 1946

SUBSEQUENT HISTORY: Rehearing Denied
June 6, 1946.

CASE SUMMARY:

PROBLEM: Defendant adjoining neighbor sought review of the decision of the District Court of Karnes County (Texas), which entered a jury verdict in favor of plaintiff real property owner in an action of boundary.

FACTS: The neighbor acquired his property as a gift from his grandmother in 1932. The neighbor built a fence along a line, now claimed by him, shortly before the owner’s grantors acquired property from the grandmother in 1939. In 1944, the owner filed a boundary action against the neighbor, disputing the location of a corner and claiming title to a certain strip of land. A jury returned a verdict in favor of the owner. The court held that there was nothing in the call indicative of the intention of the original surveyor to locate the disputed corner in a creek bed and thereby making it locative, and such a call did not take precedence over a course and distance call. Further, the neighbor’s requested instruction was not necessary to enable the jury to determine the point of the disputed corner. Moreover, defendant could not claim under the 10-year statute of limitation because it would be less than incredible that he could make an adverse claim against his grandmother who had been so generous. Finally, Tex. Rev. Civ. Stat. Ann. art. 5421c(8), § 6 did not protect the neighbor against the admission of a patent issued to him for acreage having its beginning at the disputed corner.

FINAL: The court affirmed the trial court’s decision.

HN1 Claim of title or claim of right is in all cases necessary. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so. The naked possession unaccompanied with any claim of right will never constitute a bar. Where a party enters upon land and takes possession without a claim of right, his occupation is subservient to the paramount title, not adverse to it. It is nothing more than a trespass, and, no matter how long continued can never ripen into a title.

HN2 Tex. Rev. Civ. Stat. Ann. art. 5421c(8), § 6 requires, where there is no prior filing, that the application of a good faith claimant shall be accompanied by a report of a State of Texas licensed surveyor; field notes describing the lands, lines and corners, together with a plat and proof of his good faith claim.

[HN3] Tex. Rev. Civ. Stat. Ann. art. 5421c(8), § 6 provides that an application by a good faith claimant shall not be used or considered, in any way, as an admission on his part that a vacancy exists.

COUNSEL: H. W. Wallace, of Cuero, and Tom Smiley, of Karnes City, for appellant.

J. W. Ragsdale, of Victoria, and J. O. Faith, of Karnes City, for appellee.

FINAL OPINION BY: SUTTON

DECISION

This is an appeal from the District Court of Karnes County. The suit is one of boundary. The trial on the facts was to a jury, and on a verdict favorable to the plaintiff judgment was entered in his favor, from which the defendant has appealed.

The disputed strip contains 82.8 acres of land and is approximately 1500 varas long (substantially east and west) and of a mean width of some 315 varas. It is described by plaintiff by metes and bounds, and claimed by him to be out of the A. J. Burris and the Henry Clarke original surveys. The defendant admits the description generally as correct, except he does not admit the corners are properly called for nor that it is out of the named original grants.

It is conceded the controlling issue is the correct location of the Southwest corner of the A. J. Burris. The original field notes for the Burris are as follows:

‘Beginning at the West corner of a survey made for Peter Gass, a stake from which a mesquite mk. I bears S. 73 deg. W. 40 varas, a hackberry, mkd. V bears No. 56 degrees E. 70 varas.

‘Thence S. 20 deg W. with the line of D. Nicholson’s survey, five hundred and ninety varas to a stake in the bed of West Ojo, from which a mesquite mkd. V. bears S. 74 1/2 deg. W. 42 varas, another mkd. N. bears S. 38 1/2 deg. W. 71 varas.

26
Attachment: Priority of Calls/Feb. 2013
Page 64
'Thence S. 70 deg. E. at 166 varas crosses East Ojo, five hundred varas to a stake, the W. corner of H. Clark's labor, from which a mesquite mkd. V. bears N. 74 deg. E. 19 varas, another, marked B, bears N. 2 1/2 deg. W. 23 varas.

'Thence N. 20 deg. E. at 400 varas crosses East branch five hundred and ninety varas to the South corner of said Gass' Survey, on the West boundary of Clark's labor, a stake from which a mesquite marked A, bears S. 52 deg. E. 128 varas, another, marked W, bears S. 31 1/2 deg. E. 93 varas.

'Thence N. 70 deg. W, with the Gass' S. line, five hundred varas to the Beginning.' (S.F. pp. 483, 484)

The patent to Burris is dated August 5, 1851.

The plaintiff claims the involved strip as a part of the lands he purchased and described as follows:

'Beginning at the N. W. corner of the Peter Goss 124 acres which is also the S.W. corner of the Wm. Guthrie 1/3 league a stake from whence a mesquite brs. N. 75 deg. W. 41 yrs;

'Thence S. 20 deg. W. at 1424 1/2 hrs. pass said Peter Goss S. W. corner, in all 2039 1/2 hrs to the S.W. corner of the S.W. corner of the A. J. Burriss survey in the east edge of the Ojo de Agua creek from whence a mld. S. 38 1/2 deg. W. 71 yrs and an old mesquite bears S. 74 1/2 deg. W. 42 varas;

'Thence S. 70 deg. E. at 172 hrs. Yates Creek 506 hrs. pass S.W. corner of Henry Clark labor in all 1506 hrs. to the said Henry Clark’s S. E. corner a mesquite 4 in. in dia. marked X bears N. 84 deg. E. 29 3/4 yrs;

'Thence N. 20 deg. E. 281 varas a stake;

'Thence N. 16 3/4 W. 406 hrs a stake from whence a mesquite 6 in. in dia. marked X bears N. 33 deg. E. 14.9 hrs and a mes. 6 in. in dia. marked X bears S. 41 deg. W. 16-1/10 hrs;

'Thence N. 53 2/3 deg. W. 552 varas to the S.W. corner of a track of 220 1/8 acres belonging to P. B. Lyons;

'Thence N. 74 deg. W. 387 varas to a post at the S.W. corner of 241 1/8 acres belonging to A. B. Lyons;

'Thence following the west boundary of said 241 1/8 acres N. 18 deg. E. 363 hrs N. 22 3/4 deg. E. 780 hrs to a post for corner;

'Thence N. 70 deg. W. 109 3/10 hrs to the west corner of said A. B. Lyons 241 1/8 acres from whence a mes. 8 in. in dia. marked X bears N. 74 deg. E. 7 1/4 hrs and a mesquite mkd. X bears N. 4 deg. W. 23 1/4 hrs;

'Thence N. 20 deg. E. 160.8 varas to a stake in the north boundary line of said Peter Goss survey from whence a L.O. mkd. X bears S. 39 deg. E. 46 1 varas;

'Thence N. 70 Deg. W. 263.4 varas to the place of beginning.' (S.F. pp. 461-462)

The field notes for the disputed strip are as follows:

'Beginning at a stake in the edge of Ojo de Agua Creek, set for the southwest corner of the A. J. Burriss Survey, from which an old mesquite tree bears S. 38 1/2 deg. W. 71 varas and another old mesquite tree bears S. 74 1/2 deg. W. 43 7 varas;

'Thence S. 71 deg. E. at 120 to 180 varas Yates Creek at 818 varas pass the northwest corner of the A. D. Wilm. tract of land, in all fifteen hundred eight (1508) varas to a corner post at the southeast corner of the Henry Clark Survey and a corner of the H. K. Hardy Survey;

'Thence N. 20 deg. E. 277 varas to a post and stake at the turn of the old Runge and Charco Road;

'Thence N. 16 3/4 deg. W. 22 varas to a corner post;

'Thence N. 69 3/4 deg. W. with a fence and north line of this tract of land, at 1075 varas Yates Creek, in all 1493 varas to a stake in the west line of the A. J. Burriss Survey and east line of the Jas. G. White Survey;

'Thence S. 20 deg. W. cross and re-cross Ojo de Agua Creek 328 varas to the place of BEGINNING, containing 82.8 acres of land, of which about 25.6 acres are out of [*497] A. J. Burriss Survey and about 57.2 acres out of the Henry Clark Survey.' (Tr. p. 3)

The defendant's concession to the correctness of these field notes so far as the area involved is concerned has been noted heretofore. The following plat will illustrate the situation involved in the suit:

[SEE ILLUSTRATION IN ORIGINAL] The defendant has twelve points but has grouped them for the purpose of briefing them. As we understand them they involve the propositions that the Southwest corner of the Burriss is located as a matter of law at the point where the call of the west line first enters the Ojo Creek, marked I on the above plat; that plaintiff's evidence is insufficient to locate the Southwest corner of the Burriss at the point marked K on the plat 328 varas South from the point I, and where the west line touches the creek at the third intersection; that the court erred in failing to instruct the jury in connection with the first issues submitted to them, and in admitting in evidence certain testimony with respect to a vacancy acquired by the defendant.

Defendant's position that the Southwest corner of the Burriss is fixed as a matter of law at the point I is based on the first call in the Burriss field notes where it calls to run

27

Attachment: Priority of Calls/Feb. 2013
Page 65
'S. 20 deg. W. with the line of the D. Nicholson's survey, five hundred and ninety varas to a stake in the bed of West Ojo **. It is asserted this is a locative call and must be construed to locate the corner at the point where the line first intersects the creek. We find most of the cases cited in support of this contention by the defendant to be cases wherein the course and distance calls either fail to reach the stream or other natural object called for, or extend beyond. They are cases in which the line, if prolonged would cross the creek or stream, or do cross the same, and not lines that run with the course of the stream, as is the case here and might cross it a number of times. The record here is the 'Ojo' is a very crooked creek with short bends and curves in it. This is illustrated by the fact the west line of the Burriss, as run by plaintiff's surveyors, intersected it three times in a distance of 328 varas. There is nothing contained in the call indicative of the intention of the original surveyor to locate the Southwest corner of the Burriss in the bed of the Ojo where the line first intersects it and, therefore, make it locative. It merely calls for a point in the bed of the Ojo, 590 varas S. 20 deg. W. of the Gass corner. The call between the beginning corner here and the creek, unless specially designated in such manner as to show the intention to make it locative, cannot be said to be such, and will not take precedence over course and distance. Jones v. Andrews, 72 Tex. 5, 9 S.W. 170, at page 174.

Of course, the point in the Ojo called for, when found, is locative of the corner, but we think it does not mean the point of the first intersection. Armstrong testified on cross-examination it is not uncommon for surveyors to cross even large streams and make no call for them.

This has been from the inception of this controversy the position of the defendant and his surveyor. The defendant acquired his property as a gift from his Grandmother in April, 1932. Plaintiff's grantees acquired the property owned by him, of which the disputed strip is asserted to be a part, from the same common owner, defendant's Grandmother, in November, 1939. The grantor was an aged woman, 93 years of age when she died in May 1944. She was represented by her son, father of the defendant, in the sale of the lands owned by plaintiff. He had the survey made to determine the south line before the sale was consummated, and represented it to be all right. We take it he was familiar with the field notes by which the land was sold and conveyed. It is a little significant that it did not develop how those field notes were made up for the purpose of the conveyance.

The west lines of the Gass and Burriss is a straight line. D. E. Lyons, father of the defendant, and agent of his mother, the grantor, testifying for the defendant, testified he knew where the west line of the Gass and Burriss is on the ground and that there has never been any dispute that he ever heard of (and he was born and raised on this farm) about the location of that line. He put his surveyor on the line; the surveyor checked it for course and ran down to where it intersected the Ojo first and checked for the bearings called for; found an old mesquite stump hanging in the bank of the Ojo, he was willing to accept as one of the bearings trees, and then laid out the south line according [*499] to the calls in the Burriss patent, which line is now claimed by the defendant, based upon this survey.

The evidence of the location of the Southwest corner of the Burriss as claimed by the plaintiffs is not as full and complete and satisfactory as it might be, and as we think it might have easily been made, but we regard it as sufficient to support the finding of the jury. As heretofore indicated, the defendant proved by his father the location on the ground of the west line of the Gass and Burriss is known and that there has never been any dispute about its location on the ground. This is an old settlement. The surveys in the area are from ninety to one hundred and more years old. There is a road along the northern and of the Gass tract. That extremity, we take it, as a part of the line is known on the ground. Surveyor Conrads, for the plaintiff, took the field notes of plaintiff's deeds and ran around plaintiff's lands, and as contended by defendant within itself proved nothing, but he unquestionably reached the northern terminus of the Gass west line, as called for in the field notes he was using. He took his course and ran the distances called for in the Gass and Burriss field notes and ultimately found the point claimed by plaintiff and found by the jury to be the Southwest corner of the Burriss. An iron pin driven there by another surveying crew was called to his attention. He checked and found two old mesquite trees that, according to his testimony, almost exactly fit the calls for the original bearings in the Burriss field notes. As he put it, 'When you find two trees to tally, that is good.' He accepted the corner as identified and ran the south line as now claimed by plaintiff.

Another surveyor, witness for plaintiff, Armstrong, testified he surveyed the whole area for his employer, an oil company that had the oil leases on the lands thereabouts, and he found the corner now claimed by plaintiff. It was he and his crew who drove the iron pin later found and accepted by Conrads. Armstrong testified his crew had field notes to all the adjoining surveys in the area, including the Hardy, the Henry Clark, the D. C. Lyons, Jr. (13 acres of the 155 acres of which were conveyed to the defendant by this Grandmother), for the purpose of locating all the lines in general and the west Burriss in particular. He was especially interested in the location of the Burriss west line and Southwest corner, he said, because from the field notes he was suspicious of the existence of a vacancy below the Burriss. More will be said
about the vacancy hereafter. He further testified the trees
he found and accepted as the original bearings were two
large mesquites 14 and 22 inches in diameter respectively.
The 14 inch tree found was described in the field notes as
a 4 inch tree, if he be correct in his belief they are the
same. He could not find the V called for as the mark on
the tree, but it had been marked. According to his testi-
mony, course and distance took them into the vicinity of
the point accepted. They found the trees and felt they
had enough but desired to be sure of themselves and did
other work. Of course, it is immaterial what led to the
point if it can be identified as the corner. We think the
evidence and circumstances in the record sufficient to
support the verdict and finding of the jury. The record
reflects further, we believe, if the point I be accepted
plaintiff is short approximately 70 acres from the acreage
of 254 called for in his deeds, and if point K be accepted
the defendant has all the acreage attempted to be con-
veyed to him.

Special Issue No. 1 is as follows:

'4. Do you find from a preponderance of the evidence
that the original southwest corner of the A. J. Burris
Survey in Karnes County, Texas, is located at an iron peg
situated in the bank of the Ojo de Agua Creek at the point
identified by the witness Conrads?'

To this issue the defendant objected and excepted as
follows:

'4. He objects to said Special Issue No. 1, because
nowhere therein or in connection therewith, does the court
instruct the jury that Southwest corner of the said Burris
Survey mentioned in said Special Issue No. 1 is the
original southwest corner thereof as originally located
on the ground by the original Surveyor who located and
surveyed said A. J. Burris Grant.

'S. He objects to said Special Issue No. 1 because
nowhere therein or in connection therewith are the jury
given any instructions as to the law which controls the
construction of said grant, nor in locating same natural
objects called for in the original grant control over course
and distance, and in this connection defendant here now
tenders to the court his request for such instructions.' (Tr.
p. 17)

These objections and exceptions were overruled,
about which he complains.

Defendant complains also of the failure of the court
to give his requested special charge in connection with
Special Issue No. 1, to wit:

'You are instructed in connection with Special Issue
No. 1 that you are to search for and follow as far as
possible the footsteps of the surveyor who originally
located the A. J. Burris Survey on the ground, and in this
search you will be guided first, by natural objects such as
streams and timber; second, by artificial objects such as
fixed and established line of an adjoining survey, about
which there is no dispute, and then by course and distance.
It is a matter of no consequence which corner or line of
the survey was first made and you will consider all of
the evidence and follow the actual survey of the A. J. Burris
grant as it was originally made on the ground by the
original surveyor, and construct lines no further nor
beyond where he left his footprints, and follow those lines
and go to those corners which the evidence points to as
being identified and established as they are called for in
the original survey.' (Tr. p. 18)

As heretofore stated, and as asserted by the parties to
this suit, the issue in the case is the correct location of a
point, to wit, the Southwest corner of the Burris Grant.
The jury were called upon to locate that point, and are not
called upon to locate a line or lines, nor to construct the
Burris Grant. Issue No. 1 is not subject, we think, to the
first objection copied above, because it is not involved
nor ambiguous. It requires the jury to locate 'the original
corner of the A. J. Burris Survey' and it was unnecessary
for the court to instruct them in the manner pointed out by
the defendant, in said objection. The omission pointed
out in the objection last copied is not error, nor was it error
to refuse the instruction requested in connection therewith
for the reason the same is not necessary to enable the jury
to properly pass upon and make an answer to the issue,
which is the requirement of Rule 277, Texas R.C.P.
The purpose of the testimony in the case and the duty of
the jury under the testimony was to locate and identify the
Southwest corner of the Burris, from which the South line
of the disputed strip, and claimed by plaintiff to be his
South line, may be run in accordance with the calls in
plaintiff's deed. Of course, the South line of the Burris is a
segment of that line. In a proper case it might even be
necessary to include in the charge the dignity of calls, and
if we are correct in holding the first intersection is not a
locative call then there are no locative calls involved here
other than for the bearing trees for the corner, which
renders the instruction unnecessary. Runkle v. Smith, 63

This brings us to a consideration of the questions
presented under the claim of title made by the defendant
under the ten years statute of limitation. An old road
testified to in the record divides the disputed strip into two
parts. One part lies generally east and the other west of
the old road as we understand it. The court submitted no
issue as to that portion lying east of the old road. The
other portion was divided into two parts, one contained
in the north field and the other lying outside the field along
the two creeks, the Yates and the Ojo, and submitted the
issues in Special Issues 2 and 3. The pleadings of the
defendant embraced the disputed strip as a whole as de-
scribed. The answers to each of these issues was adverse to the defendant. He complains the court erred in refusing to grant him a new trial on the grounds the answers are contrary to the evidence. The suit was filed June 20, 1944. A fence was built in the summer or early fall of 1939, along the line claimed by the defendant. The defendant testified on cross examination that he at no time prior to the erection of the fence in 1939 claimed any lands other than that conveyed to him in his gift deed. It would be little less than incredible that he could claim against his grandmother who had been generous with him.

[HN1] Claim of title or claim of right is in all cases necessary. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by the intent on the part of the occupant to make it so. The naked possession unaccompanied with any claim of right will never constitute a bar. Where a party enters upon land and takes possession without a claim of right, his occupation is subservient to the paramount title, not adverse to it. It is nothing more than a trespass, and, no matter how long continued can never ripen into a title. Houston Oil Co. v. Stepney et al., Tex.Civ.App., 187 S.W. 1078, at page 1084, points (7-10), error refused.

Under the defendant's testimony there is ample support for the answers of the jury to issues 2 and 3, because they only had to believe his testimony when he testified he did not claim any lands involved in the suit prior to 1939 other than what his grandmother gave him. It is determined that the disputed strip is not a part of the original D. C. Lyons grant. Had it been there could have been no need to claim under the ten year statute but under his deed.

The defendant and other witnesses testified he cultivated a field of some 60 to 65 acres and that some 20 acres of it was out of the disputed strip and that he otherwise used and possessed the other portion of it. On the other hand, it is admitted that portion submitted in issue number 3 was in a common enclosure of the defendant and his grandmother until the fence was built in 1939. She continued in possession of her other lands, including that acquired by the plaintiff. It is true defendant ran livestock in the common enclosure, but that was not hostile to her possession and was insufficient to give title by limitation. Under the evidence and the state of the pleadings in the case an instructed verdict, it is thought, would have been proper on the issue of limitation. Musgrove v. Foster Lumber Co., Tex.Civ.App., 89 S.W.2d 287, error dismissed, and cases cited; Marion County v. Sparks, Tex.Civ.App., 112 S.W.2d 798.

In a very similar case on the facts so far as the lands submitted are concerned it was held the evidence was sufficient to support the findings of the jury. Mosley v. Gulf Production Co., Tex.Civ.App., 111 S.W.2d 726, error dismissed.

The defendant further complains the court erred in admitting in evidence a patent issued to the defendant January 12, 1944, for 6.65 acres of land described by metes and bounds and having for its beginning the corner the Southwest of the Burrus as claimed by the plaintiff. The objections urged against the offer and admission of the patent, as well as the examination of the defendant by the plaintiff with respect thereto, were based on a provision of the statute, Art. 5421c, subsection (f) of Section 6, Vernon's Civil Statutes, and that the purchase was a compromise with the State. The defendant testified a representative of an oil concern operating in that area suggested the vacancy was there; that he had a 90 day preference right to purchase it, but if he didn't Bascomes Giles, the Commissioner of the General Land Office, knew it was there and someone else might buy it. He further testified he submitted the matter to his attorney for examination and consideration and then signed and made the application to purchase, which contained the field notes of the patent. [HN2] The statute requires, where there is no prior filing, that the application of the good faith claimant shall be accompanied by a report of a State licensed surveyor; field notes describing the lands, lines and corners, together with a plat and proof of his good faith claim. Defendant's application was accepted and the area sold and patented to him.

The provision of the law under which the objection was urged is as follows:

[HN3] 'The application by a good faith claimant shall not be used or considered, in any way, as an admission on his part that a vacancy exists.'

Under prior provisions of this statute the State had taken the position one who had made even an unsuccessful application to purchase or lease could not as between himself and the State subsequently assert the vacancy did not exist, and this contention was subsequently upheld. Stanolind Oil & Gas Co. et al. v. State, et al., 136 Tex. 5, 133 S.W.2d 767, at page 776. This decision by the Supreme Court reversed the Court of Civil Appeals decision, 114 S.W.2d 699. It may be the provision of the statute above was inserted because of such claims. The Court of Civil Appeals took the view the transaction was in the nature of a compromise and that an unsuccessful application would not cut him off from saying thereafter the vacancy did not exist, but said had the applicant been successful a different situation might be presented. When this testimony was offered it was offered as an admission and declaration against interest and not by way of estoppel. The plaintiff seems to suggest the defendant is estopped under the case of Smith v. Chipley, 118 Tex. 415, 16 S.W.2d 269. A similar holding is had in State v. Ohio Oil Co. et al., Tex.Civ.App., 173 S.W.2d 470 (Dismissed). We are not here called on to decide whether or not there is an estoppel in this case, and we do not so
decide. We are of the opinion the facts in this case do not show a compromise was entered into by the defendant, but to the contrary he voluntarily proposed to buy as vacant the land purchased by him and at a time when there was no controversy in existence, and after the line he now contends for had been run. He cannot be permitted to sign and make the written application he did and then say he did not understand it, under the facts here. We are also of the opinion the provision of the statute does not protect him against the evidence offered and received against him. The provision is to protect him and relieve him against a claim he is bound by his application if the existence of the vacancy he subsequently brought into question. A good faith claimant is authorized to make the application if a vacancy is claimed to exist, and is required to make it within 90 days after the Commissioner declares one to exist to protect his preference right. The provision merely saves him from being cut off from taking a contrary position in a controversy as to whether it does exist or not. We conclude the court did not err in admitting the evidence.

Finding no reversible error the judgment of the trial court is affirmed.
LYONS v. PULLIN

197 S.W.2D 494 (TX.1946)

FACTS & MAIN POINTS.
SELLMAN ET AL., APPELLANTS, v. SCHAFF ET AL., APPELLEES

Court of Appeals of Ohio, Third Appellate District, Logan County

26 Ohio App. 2d 35; 269 N.E.2d 60; 1971 Ohio App.
April 7, 1971, Decided

FINAL: Judgment accordingly.

THE CASE: Appellant landowners sought review of a decision by the trial court (Ohio) that denied the landowners' prayer for injunction in a boundary dispute, granted appellee property owners' prayer for a mandatory injunction requiring the landowners to remove their boat slip, and granted the property owners damages for wrongful use of part of their land.

FACTS: The parties, who owned neighboring properties, developed a dispute regarding the boundary between their two lots. Both parties sought injunctive relief. The trial court denied the landowners' petition for injunction and determined that the boundary was consistent with the property owners' claims, and required the landowners to remove the boat slip that they had installed. On appeal, the court concluded that the landowners established by a preponderance of the evidence the location of the original traverse point as marked by a stake set by the original surveyor. The court further ruled that the original survey made on the land in 1944 established the monuments and lines by which the boundaries of the two lots involved were delineated. The court noted that only one monument, a stake, was in question and determinative of the line. The court determined that even though the stake was gone, because its actual location was established sufficiently to define the line, it was not necessary to resort to the plat, and the property owners were obligated to move their fence.

FINALE: The court denied the property owners' prayer for injunctive relief and damages, granted the landowners' prayer for relief, entered judgment accordingly, and remanded.

[HN1] Ohio Rev. Code § 5303.01 provides that an action may be brought by a person in possession of real property against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest.
[HN2] Ohio Rev. Code § 711.01 provides that any person may lay out a village or subdivision or addition to a municipal corporation by causing the territory to be surveyed and by having a plat of it made by a competent surveyor.
[HN3] A reference in a deed to a plat incorporates the plat and constitutes an adoption of the survey as a part of the description. A conveyance by lot number assigned by a plat incorporates the plat as part of the description. The survey as actually made controls the representation of it on the plat.
[HN4] When an original survey has been made, it is not the plat or the metes and bounds description that is primary. The primary function of the second surveyor is to find first where the boundaries were established by the first surveyor. Only where this becomes impossible of accomplishment does the second survey turn to the courses, distances, and still-exist monuments to determine the boundaries. The essential rule governing the resurvey is to follow the steps of the first surveyor. Conveyances are presumed to be made according to a prior actual survey.
[HN5] A survey is the locating and marking on the ground of the land described in a grant. Once a tract has been located by survey, and its boundaries have been marked, those boundaries cannot be altered by a subsequent survey. In making a resurvey, the duty of the surveyor is merely to locate the monuments placed by the original surveyor, or, where such monuments no longer exist, the places where they originally stood.
[HN6] All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to the actual survey. The real purpose of a boundary inquiry is to follow the steps of the surveyor on the ground, and all calls will be construed with this in mind.
[HN7] 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. 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.
[HN8] 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 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.

[HN9] 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.

[HN10] 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.

[HN11] In locating a deed upon land, the rule is first, to find the original lines as actually run; second, to run lines from acknowledged corners or calls, and third, lines run according to the courses and distances called for in the deed.

[HN12] The essential procedures established by statute for the survey and establishments of corners by the county engineer, Ohio Rev. Code § 315.28 et seq., are predicated upon the principle of establishing, if at all possible, from parol and other evidence the situs of corners as originally situate.

[HN13] The testimony of surveyors as expert witnesses may properly be received by the court.

[HN14] A stake when once placed fixes the corner as conclusively as if it were marked by a natural object or a more permanent monument. Owing to the fact that it may be removed or obliterated, its location is frequently more difficult of proof, but if proved, it fixes the corner with the same certainty as where the mark is a permanent object. Although monuments set at the time of an original survey on the ground and named or referred to in the plat are the best evidence of the true line, if there are none such, then stakes actually set by the surveyor to indicate corners of lots or blocks or the lines of streets, at the time or soon thereafter, are the next best evidence.

[HN15] The general rules as to the weight and sufficiency of evidence are applicable in determining the sufficiency of the evidence in proceedings to quiet title or remove clouds thereon, and, in order for plaintiff to recover, it is incumbent on him to make out his case by the preponderance of the evidence.

Subsequently drawn between "obliterated" corners and "lost" corners, the importance being that in the case of an obliterated corner the investigation is directed toward the determination of its original location while in the case of a lost corner the question is one of relocating the corner by a new survey. For the purpose of this distinction an obliterated corner may be defined as one of which no visible evidence remains of the work of the original surveyor in establishing it but of which the location may be shown by competent evidence. A lost corner is one which cannot be replaced by reference to any existing date or sources of information.

THE LAWS

1. Where a survey of a parcel of land has been made by a surveyor, monuments placed or ascertained, and boundary lines established by such monuments and a plat is made thereafter and recorded which subdivides the land so surveyed into lots, the boundary lines of such lots as so established on the ground itself are primary. The plat is derivative and secondary.

2. Where the original monuments as located by such surveyor are still ascertainable, the boundary lines determined by such monuments will determine the boundaries of the respective lots irrespective of deviation from the course or distance as set forth in the plat.

3. Wooden stakes placed by a surveyor on the land to mark corners of lots or the intersection of boundaries and measuring lines constitute monuments.

4. The primary duty of one making a resurvey of a parcel so surveyed to ascertain the boundaries of a lot is to discover the boundaries and corners as established by the original surveyor on the land itself irrespective of deviation from the course and distance indicated on the plat.

5. Where an original monument as set by the first surveyor is obliterated but its location may be ascertained by parol or other evidence, the monument so located is the equivalent of the original monument.

COUNSEL: Messrs. McCulloch, Felger, Fite & Gutmann, and Messrs. Smith & Smith, for appellants. Messrs. Schlofman & Elliott, Mr. James R. Goslee, and Mr. John B. Kelly, for appellees.
JUDGES: COLE, J. YOUNGER, P. J., and GUERNSEY, J., concur.

OPINION WRITTEN BY: COLE

OPINION

Sometime prior to November 28, 1944, in October and November, Walter R. Toy, a surveyor, surveyed a portion of Seminole Island and thereafter on that date certified to a plat predicated upon this survey indicating "all lots have been staked; monuments and new galvanized iron pipes are being placed on the ground at the points indicated on the plats." The subdivision was entitled Seminole Shores Subdivision No. 2. In fact, difficulties arose and not all monuments and pipes were placed. Nevertheless on November 30, 1944, Harry E. Johnson and John P. Schooley, the then owners of the land so surveyed, dedicated the streets, drives and parks to public use and on the 11th of December, 1944, the plat was approved and accepted by the Logan County Commission. It was filed for record with the Recorder of Logan County on December 20, 1944.

Subsequently, Harry E. Johnson, the then sole owner, sold and transferred to Charles M. and Winifred Grafelman Lot 85 in Seminole Shores Subdivision No. 2 as shown on the recorded plat thereof, recorded in Book C, page 34, Plat Records of Logan County, Ohio. The deed was dated August 26, 1950, but was not transferred and recorded until July 26, 1951.

By a similar transaction, Harry E. Johnson sold and transferred to Ralph D. and Maude M. Leatherman Lot 86 in the same subdivision. This deed was also dated August 26, 1950. It was, however, recorded September 12, 1950.

There is no question as to the foregoing facts nor as to the fact that the Grafelmans proceeded within the following year to build a boat slip (sometimes called a dock in the testimony but being an enclosed indentation in the shore line) and began the construction of a house on Lot 85. The boat slip was located on the south side of Lot 85 and was placed near the south line of that lot which is the disputed boundary here involved. However, on September 1, 1951, the title was transferred by Mr. Grafelman to Grace Sellman, Reuben Sellman, George Sellman, Marjorie Sellman and Marilyn Snyder (hereafter referred to as "Sellman" for simplicity). (These people acquired Mrs. Grafelman's interest by a separate deed.) The deed from Mr. Grafelman was for some reason marked "Transfer not necessary Mch. 13, 1952" by the auditor of Logan County but was not recorded until October 17, 1960. The Sellmans completed the house and utilized the premises over the following years.

On May 10, 1956, the Leathermans sold and transferred Lot 86 to Charles L. and Dorothy E. Schaaf. The deed was recorded May 10, 1956.

Although the record title is therefore somewhat confused at times by the delays in recording, it is apparent from the testimony that possession was actually transferred in each case at the date on the deed or shortly thereafter.

At some point in the ownership of the Sellmans and the Schaafs, a fence was erected by Schaaf essentially continuing the south line of the boat slip, a line then assumed to be the dividing boundary between the two lots.

Subsequently, and apparently due to a survey involving property to the south, Schaaf had the boundary line between Lots 85 and 86 surveyed and the surveyor indicated a new line which ran down the middle of the boat slip. Schaaf moved his fence and placed a post on the new line in the interior of the boat slip. This led to the present law suit.

Sellman, on October 19, 1960, filed a petition against the Schaafs, praying for a temporary and permanent injunction enjoining Schaaf from interfering with their possession. To this, the defendant Schaafs filed an answer and cross-petition setting forth four causes of action:

1. In ejection for recovery of real estate.
2. For damages for wrongful use of real estate.
3. For prospective damage for continued use.
4. To quiet title, and also for a mandatory injunction to require plaintiffs to remove the boat slip from their premises.

Thereafter, the plaintiffs filed an amended petition joining as defendants their predecessors in title, the Grafelmans and the original dedicators, John P. Schooley and Harry E. Johnson; also joined were Mrs. Leatherman (Mr. Leather-
man being deceased), and a Mr. Cary owning Lots 87 and 88 to the south of Lot 86. They then prayed for a temporary and permanent injunction against Schaafs from interfering with the plaintiff Sellmans' use of the boat dock, a mandatory injunction to remove the steel fence erected by defendant Schaafs, for a determination of the true boundary line of the premises (presumably a declaratory judgment or a prayer to quiet title), an injunction against Cary, Schoooley or Johnson asserting title to the premises and, in the alternative, if the court found in favor of Schaafs' claims as to the boundary, damages against Grafelman and Johnson. Subsequently, Cary and Schoooley were dismissed as defendants by the trial court and the issues were joined. Trial was had and the ultimate judgment of the court in effect denied plaintiffs' petition for injunction, determined the boundary to be as Schaafs claimed, granted Schaafs' prayer for a mandatory injunction requiring Sellmans to remove the boat slip, granted to Schaafs damages of $450 from the Sellmans for wrongful use of part of Schaafs' land and further awarded Sellman a judgment of $450 against Grafelman, one of his predecessors in title. No relief was awarded against Mrs. Leatherman, and Mr. Grafelman is concerned only with certain alternative relief.

Appeal on law and fact is taken to this court from that judgment. (Note: appeal was previously taken herein but the case was returned to the trial court for lack of a final order. See Sellman v. Schaaf, 17 Ohio App. 2d 69.)

The initial relief here requested on both sides is a mandatory injunction; on the plaintiffs' side to remove the fence and steel post; and on the defendants' side to remove the alleged encroachment of the boat slip or dock. However, it would appear that the primary, paramount and basic relief requested, expressly or implied, by both parties is the quieting of title to real estate, and to do this it is necessary to determine where the common boundary line between Lot 85 and Lot 86 is located. The other relief is ancillary, supplementary, or alternative to this basic issue.

In [HN1] R. C. 5303.01, it is provided that "an action may be brought by a person in possession of real property * * against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest."

The facts here involved show that each party claims and to some degree is in possession of the disputed area. Here also, there are mutual adverse claims of title, and each, as to the other, makes such claims. An action at law for trespass (predicated upon possession) or ejectment (predicated on being out of possession) would be of doubtful value and in any event could result in continuing repeated actions and in a multiplicity of suits; it would therefore appear that the remedy at law would be inadequate and that the exercise of equity powers to quiet title would be proper.


Proceeding then upon the conclusion this is basically an action to quiet title by the determination of a boundary, we turn to a more detailed factual analysis. The facts indicate that both the lots are located on the shore of the island and are essentially wedge shaped, although Lot 86 approaches in form a parallelogram. Lot 85, wedge shaped, has its shortest dimension along the lake front to the east. The west boundary, which is larger, extends along Seminole Shore Drive. On the south it has a common border with Lot 86, the boundary line in issue. Lot 86 also on the east fronts on the lake shore and on the west on a circular drive which comes off from Seminole Shore Drive.

The narrow question presented concerns the ownership of a triangular sliver of land between the two lots, the boat slip on Lot 85 being partly in this area. There is no question as to the southwest corner of Lot 85 and the northwest corner of Lot 86 which are identical. However, the plaintiffs and defendants claim differing location for the southeast corner of Lot 85 which should be identical with the northeast corner of Lot 86. The plaintiff contends this corner lies to the south a short distance from the boat dock. The defendants, Schaafs, place the corner some distance north in the middle of the boat dock. To determine the ownership of this pie shaped wedge it is necessary to analyze the law pertaining to descriptions, boundaries and surveys to place in proper perspective the evidence here presented.

Each party received a deed which refers to a recorded plat or survey and there is no question but that the measurements, courses, and monuments shown on the recorded plat are incorporated in each deed by reference. The descriptions therefore embody, just as would a metes and bounds description, the monuments, courses and distances set forth in the plat to describe the actual land owned by each party. However, this description and this plat is a symbolic representation of something which has been physically marked out on the surface of the earth. The actual physical markings and location by monument or otherwise is the primary thing. It locates the land. The map or plat is secondary to this purporting to symbolically represent that which has been physically located.

A reference to [HN2] R. C. 711.01 makes this clear. It states in part that:
"Any person may lay out a village, or subdivision or addition to a municipal corporation, by causing the territory to be surveyed, and by having a plat of it made by a competent surveyor."

Thus, the subdivision is first done by the survey of the premises, establishing monuments, corner posts, etc., so that a physical or semi-physical dividing of the land with the attendant markings takes place. Then a "plat is made." The symbolic representation of what was done on the premises becomes the recorded documentation of the action taken and provision is made for the dedication and acceptance of public streets and ways. Today there are more regulations than existed at the time the plat here involved was made, but the essential sequence of events remains the same.

This being the case, the further question then arises: what is the situation where the actual location of a corner by a surveyor in setting up a subdivision differs from the description or plat?

Referring to the recorded plat in the instant case, we find that the eastern end of the dividing boundary line between Lots 85 and 86 was located by a stake placed in a measurement line in the original survey. It is explicitly stated "all lots have been staked." The location of the stake is shown by a black dot which is coded to indicate an iron pipe. Whether the pipe was so placed is doubtful according to the testimony but the conclusion is inherent in the plat and from the evidence that a stake was placed at this location, and a stake may be a monument. It necessarily becomes one here and constitutes the method for locating the boundary line.

2 McDermott, Ohio Real Property 128, states in part:

[HN3] "A reference in a deed to a plat incorporates the plat and constitutes an adoption of the survey as a part of the description. A conveyance by lot number assigned by a plat incorporates the plat as part of the description. The survey as actually made controls the representation of it on the plat."

In the question here stated, if the original stake were still in its original situs and this were established by competent evidence, then there would perhaps be a conflict between the courses and distances noted on the plat and the stake, an artificial monument set up by the original surveyor. In such event which should determine the boundary?

Although much discussion is set forth in the briefs dealing with the priority of calls and whether monuments govern courses and distances, it would appear the actual question is not initially this order of precedence but what was actually done by the original surveyor. As set forth by McDermott and as is inherent in the relationship between the survey on the land and the plat, the survey as actually made on the land must govern. It is Lot 85 as originally surveyed which we are trying to find, and by this we mean its original location on the ground. If this can in fact be found, it is that land that was sold, not the symbolic plat, and it is the land as marked out by the original surveyor that constitutes Lot 85; and likewise with Lot 86.

This line of reasoning is buttressed by the concept governing all resurveys. [HN4] When an original survey has been made, it is not the plat or the metes and bounds description that is primary. The primary function of the second surveyor is to find first where the boundaries were established by the first surveyor. Only where this becomes impossible of accomplishment does the second survey turn to the courses, distances, and still-existent monuments to determine the boundaries. The essential rule governing the resurvey is to follow the steps of the first surveyor.

McDermott, supra, at 139, paragraph 3-26A states:

"Conveyances are presumed to be made according to a prior actual survey. It is said that the primary purpose of construction is to follow the footsteps of the surveyor on the ground."

Proof of Facts 651, Boundaries, states:

[HN5] "A survey is the locating and marking on the ground of the land described in a grant. Once a tract has been located by survey, and its boundaries have been marked, those boundaries cannot be altered by a subsequent survey. In making a resurvey, the duty of the surveyor is merely to locate the monuments placed by the original surveyor, or, where such monuments no longer exist, the places where they originally stood."

12 American Jurisprudence 2d 594, Boundaries, Section 55, reads as follows.

[HN6] "All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to the actual survey. It is therefore said that the real purpose of a boundary inquiry is to follow the steps of the surveyor on the ground, and all calls will be construed with this in mind."

In 11 Corpus Juris Secundum 540, Boundaries, Section 3, it is said:
"It has been declared that [HN7] 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. 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."

In Clark, Surveying and Boundaries (2d Ed. 1939), it is said at page 727, Section 665:

[HN8] "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."

In 6 Thompson, Real Property, 594, Description and Boundaries, Section 3047 (1962 replacement), the following is stated.

[HN9] "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."

At page 599, Section 3049, it is further said that:

[HN10] "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."

In Ohio, in an 1834 case, the Supreme Court in essence announced the basic principle here involved.

In Avery's Lessee v. Baum's Heirs, Wright, 576, paragraph 3 of the syllabus reads as follows:

[HN11] "In locating a deed upon land, the rule is -- first, to find the original lines as actually run; -- second, to run lines from acknowledged corners or calls; -- third, lines run according to the courses and distances called for in the deed."

Also, we may note that [HN12] the essential procedures established by statute for the survey and establishments of corners by the county engineer (see R. C. 315.28 et seq.) are predicated upon the principle of establishing, if at all possible, from parol and other evidence the situs of corners as originally situate.

We therefore conclude that the original survey by Toy in 1944 made on the land established the monuments and lines by which the boundaries of the two lots here involved were delineated. If the original monuments can be established by parol or other evidence, they may be relocated upon the land irrespective of any deviation in courses and distances from other monuments as shown on the plat. The monuments the original surveyor established on the land govern and establish the line. Here, only one monument is in question and is determinative of the line. It is the stake placed by Toy at the time of the original survey and constituted the intersection of a north-south line (a measurement or traverse line) near the lake front with the east-west line between Lots 85 and 86. The plat designates that such a monument, artificial in character but nevertheless a monument, was placed by Toy, the original surveyor. This court is in essence doing that which a second surveyor would do. It is attempting to follow Toy's footsteps and establish what he actually did on the land itself. If this can be established, it takes priority; if not, then we must turn to the use of the plat and courses and distances from other monuments actually located.

Essentially, the evidence in this case is predicated upon each of the two routes to the establishment of a boundary line. The plaintiffs, Sellmans, contend that, although the stake is gone, its actual location may, by evidence, be established sufficiently to define the line. The defendants, Schaafs, contend this monument is utterly lost and resort must be had to the plat, to courses and distances and other monuments from which their surveyor relocates the point and hence the line. As we have seen, the establishment of the position of the original stake as placed in November, 1944, by Toy, the surveyor, takes precedence. If the evidence can establish this location, then the steps of the original surveyor having been followed, the case is ended. The original position so established governs.
It will be noted the evidence itself, as presented by the two sides, basically does not contradict, but travels or points in these different directions. The defendants, Schaafs, did not testify as to the position or identity of any original stake but predicated their claim on a new or resurvey from certain surviving monuments. Mrs. Leatherman, called by Schaafs, testified first that she and her husband were shown corners of the lot and stakes on the ground when they bought and that a Mr. Miller built the boat dock according to the stake, and that this stake was on "his side" of the boat dock. Later she states that she really can't remember, thus ending up on both sides of the issue. The basic witness for the Schaafs is Lewis, the surveyor, who in 1959 surveyed the line for Schaafs. (In passing we should note that in spite of R. C. 315.20, it has long been held that [HN13] the testimony of surveyors as expert witnesses may properly be received by the court. Zupf v. Dalgarn, 114 Ohio St. 291; Glass v. Dryden, 18 Ohio St. 2d 149; Kramp v. Toledo Edison, 114 Ohio App. 9.) He says only that he found no stake or monument and proceeded to establish the line by reference to other discovered stakes in somewhat distant lots.

On the other hand, the testimony of the Sellmans does not in effect dispute the accuracy of this survey. These witnesses all testify as to the location of what they contend was the original monument placed by the original surveyor, Toy, and dispute the necessity for establishing the line by reference to any other monuments. In passing, we should note that a stake is an artificial monument, and we here so treat it. In 12 American Jurisprudence 2d 608, Boundaries, Section 71, it is said:

[HN14] "A stake when once placed, however, fixes the corner as conclusively as if it were marked by a natural object or a more permanent monument. Owing to the fact that it may be removed or obliterated, its location is frequently more difficult of proof, but if proved, it fixes the corner with the same certainty as where the mark is a permanent object.

"Although monuments set at the time of an original survey on the ground and named or referred to in the plat are the best evidence of the true line, if there are none such, then stakes actually set by the surveyor to indicate corners of lots or blocks or the lines of streets, at the time or soon thereafter, are the next best evidence."

In other words, the two theories of the case never collide. If the proof establishes the position of the corner (actually a stake placed to mark the intersection of a traverse line and the line between Lots 86 and 85) with reasonable accuracy and this is, in fact, the position of the stake as placed by Toy, then under the law as we have analyzed it, this must govern even if Toy was in error in the original placement. On the other hand, if this location is not established, then the original monument is lost completely. Then, the resurvey as made by Lewis based upon courses and distances shown on the plat as run from found and established monuments must govern and there is no expert testimony contradicting him. The issue then boils down to the evidence of the location of the stake. If this is established by the appropriate degree of proof, then the line must be so established. If it is not established by the appropriate degree of proof, the survey by Lewis replacing the lines by the next best method must govern. In a word: the issue depends upon the case made by the plaintiffs, Sellmans, for if their proof fails, the Lewis survey must prevail.

The degree of proof in a quiet title action is not concisely stated in Ohio cases. However, in 74 Corpus Juris Secundum 124, Quieting Title, Section 80, the following appears.

[HN15] "The general rules as to the weight and sufficiency of evidence are applicable in determining the sufficiency of the evidence in proceedings to quiet title or remove clouds thereon, and, in order for plaintiff to recover, it is incumbent on him to make out his case by the preponderance of the evidence."

As indicated in prior paragraphs, we consider the basic issue here to be a mutual action to quiet title and the balance of the relief requested by both parties is ancillary and subsidiary to this question, and this basic issue must therefore be governed by the preponderance of the evidence.

Do the Sellmans and their witness establish the location of the original traverse point as marked by a stake set by the original surveyor, Toy, and do they establish this by a preponderance of the evidence?

Without analyzing in detail the testimony of the various plaintiffs who are the owners in common of Lot 85, and of the others called by them we arrive at certain basic conclusions of fact.

1. The original surveyor, Toy, did mark the various corners of the lots including the intersection of the traverse line and the common boundary of Lots 85 and 86 by wooden stakes in 1944.

2. When the Sellmans purchased Lot 85 in 1951, there was a wooden stake about a foot or foot and one-half south of the southeast corner of the boat slip. The position of this stake may be located within practical limits necessary to
establish a common boundary between Lots 85 and 86, since there is no issue as to the location of the west terminus of the line.

3. There is now no stake at this position at the corner of the boat slip.

In the survey of federal lands, many special rules appear to govern, but one distinction made in these rules appears to be reasonable and applicable to the present situation. This is the distinction made between an "obliterated" corner and a "lost" corner.

In 11 Corpus Juris Secundum 554, Boundaries, Section 13, it is said:

"In the discussion of the relocation or reestablishment of government corners, [HN16] a distinction is frequently drawn between 'obliterated' corners and 'lost' corners, the importance being that in the case of an obliterated corner the investigation is directed toward the determination of its original location while in the case of a lost corner the question is one of relocating the corner by a new survey. For the purpose of this distinction an obliterated corner may be defined as one of which no visible evidence remains of the work of the original surveyor in establishing it but of which the location may be shown by competent evidence. A lost corner is one which cannot be replaced by reference to any existing date or sources of information."*

Thus, the stake of 1951 is not lost. Its position can be shown by competent testimony which is undisputed and which is reasonably the same from a substantial number of witnesses. Even Mrs. Leatherman, called by defendants, Schaafs, in her first recollection, so located this stake, although in cross-examination her answers are vague and less definite. However, the question narrows to the problem of the identity of the stake of 1951 and the stake of 1944. If the stakes are identical, then the monument placed by the original surveyor, Toy, is not lost, simply obliterated, and its position is established. If the proof fails as to identity, the monument is lost and the point, and thus the line, must be considered lost and relocated by the Lewis survey.

It is our conclusion that the identity is established by a preponderance of the evidence and that the stake of 1951 is the same stake placed by the original surveyor, Toy.

1. Although there is a period of six years between the sale of the lot to Grafelman by Johnson in 1950 and the placing of the stake by Toy in 1944, there is no evidence the original stake was moved or replaced during that period. There was some testimony by Lewis that dredging operations had occurred near other lots but at no time was it indicated nor was it testified to that Lots 85 or 86 were specifically effected. Johnson, the then owner, establishes the identity of these stakes of 1944 and 1950.

2. The identity of the 1951 stake with the stake pointed out by Johnson to Grafelman in 1950 is established by Grafelman.

3. The actions of Toy, the surveyor, in 1951, at the Labor Day Conference on the site are consistent only with the conclusion that he recognized the stake as his and as located by him. Toy, it is testified, explicitly identified the stakes then on the premises as his.

4. The testimony indicates [***26] that measurements made in 1951 were exactly as shown on the plat as to the distance between the two stakes on the traverse line -- a highly unlikely result if either of the stakes were different.

Although this testimony is made by interested parties, they are parties in a position to observe; their testimony is uncontradicted and there is substantial mutual corroboration.

Concluding, then, that the stake of 1944 is the stake of 1950, and that the stake of 1950 is the stake of 1951, we find that the stake marking the intersection of the traverse line with the common boundary of Lots 85 and 86 as placed by Toy, the original surveyor, is not lost, but, being merely an obliterated monument, its position for all practical purposes is established and must govern the location of the boundary.

The witnesses differ slightly as to their distance from the boat dock wall, varying from "just south of the boat slip" to one and one-half feet south. The plat made by Lewis and marked Exhibit D locates this line by reference to the fence that had been in place for many years. Extending this fence line establishes the boundary line at .54 feet from the edge of the boat slip roof and for practical purposes represents the boundary as originally surveyed by Toy.

This, then, we determine to be the line between Lots 85 and 86 and title to the disputed land north of the line as so located is quieted in the plaintiffs, Sellmans, et al. Title to the disputed land south of the line as so located is quieted in the defendants, Schaafs.
Turning to the prayer of the petition and cross-petition supplemental and ancillary relief prayed for:

1. The defendants Schaafs' prayer for recovery of the triangular parcel as established by the survey of Lewis is denied.

2. The defendants Schaafs' prayer for damages is denied.

3. The defendants Schaafs' title is quieted as above set forth.

4. The defendants Schaafs' prayer for a mandatory injunction is denied.

5. The plaintiffs Sellmans' prayer for an injunction is granted to the extent that defendants Schaafs are enjoined from interfering with the use by Sellmans of the land north of the boundary so established and are directed to remove the steel fence from the Sellman premises as herein determined and are further directed to remove the steel pipe placed by them or caused to be placed by them in the boat slip area of Lot 85.

6. The plaintiffs' prayer that the true boundary line be determined is granted as aforesaid.

7. The plaintiffs' prayer for alternative relief against their predecessors in title is denied.

Costs are assessed against defendants Schaafs, and the cause is remanded to the Court of Common Pleas for execution and enforcement of the judgment.

*Judgment accordingly.*
HISTORY:
Appeal from a judgment of the Circuit Court of Albemarle County. Hon. Robert L. Powell, judge designate presiding.

HOLDING:
Reversed and remanded.

CASE SUMMARY:
Defendant landowner challenged the decision from the Circuit Court of Albemarle County (Virginia), which, in a jury trial, entered judgment for plaintiff surveyor in the surveyor's suit to recover for the unpaid balance for a boundary survey. The landowner had the action removed from the district court, denied liability, and counterclaimed for damages arising from the surveyor's alleged negligence.

FACTS: The landowner hired the surveyor to survey a tract of land. The controversy arose over the survey of a half-acre parcel that had been carved out of larger tract containing 111.1 acres. A 1907 recorded deed in the chain of title to the 11.1-acre parent tract contained a metes-and-bounds description. A pipe was stuck in a chestnut tree stump to signify a corner in the deed. The surveyor relied on a fence line extension rather than a recorded distance in the deed. The landowner refused to pay for all of the survey because he thought the survey erred in disregarding a recorded distance in the deed, relying on an unrecorded fence line, and depending on an acreage computation. The landowner unsuccessfully filed a motion for summary judgment. The court reversed, holding that the extension of the fence line on which the surveyor relied, being neither marked nor surveyed, and being unrelated to any monument described of record, failed to meet the criteria of standards that governed land surveyors. The extension of the fence line failed to meet the criteria of artificial monument and established lines, marked or surveyed. The court held the recorded distance should have prevailed.

OUTCOME: The court reversed the decision after concluding the surveyor was negligent as a matter of law, and the circuit court erred in denying the landowner's summary judgment motion on the issue of liability. The court entered final judgment for the landowner on the surveyor's claim, entered judgment on the issue of liability in the landowner's favor as to the landowner's counterclaim, and remanded for trial on the issue of damages on the counterclaim.

TEACHINGS
[HN1] Professionals charged with negligence are ordinarily entitled to be judged by the standard of care prevailing in their profession at the appropriate time and place. This necessitates the expert testimony of fellow professionals, familiar with the standard, to explain it to the fact-finder. The question whether the professional departed from the standard is ordinarily an issue of fact, to be resolved on the basis of conflicting expert testimony, but exceptions exist which have become rules of law. Such exceptions fix binding standards which are not left to the exercise of professional judgment. Being rules of law, they are not subject to expert opinions expounding local practices.

[HN2] Land surveyors, like other professionals, are governed by certain standards which have ripened into rules of law. In the absence of evidence of contrary intent, a distinct order of preference governs inconsistencies in the description of land: 1. natural monuments or landmarks; 2. artificial monuments and established lines, marked or surveyed; 3. adjacent boundaries or lines of adjoining tracts; 4. calls for courses and distances; 5. designation of quantity. The foregoing rule is not inflexible, and will not be applied if to do so will frustrate the intent of the parties to the deed. Where the conflict is between courses and distances, courses should prevail because they were presumably set by the more experienced surveyor using a compass, while the distances were measured by the less experienced chain carriers.

A landowner engaged a firm engaged in land surveying to make a boundary survey. The certified land surveyor explained to the landowner that a reliable result could not be achieved by establishing a single point and running the line from it, but that it would be necessary to survey the entire property to establish the boundary to an acceptable degree of accuracy. The survey was made and a plat was furnished to the landowner along with a bill for services. The landowner was dissatisfied with the plat and paid less than half of the bill. He later engaged another land surveyor to survey a part of the tract which fell on the other side of a highway, and came up with a
different line than that found by the first surveyor, who had disregarded a distance call in favor of extending a fence line he observed in the field. The shorter line gave an acreage for the tract that was closer to the recorded acreage. The surveyor sued to recover the unpaid fee and the landowner counterclaimed for damages. The case was tried as an action for professional malpractice. At the conclusion of the evidence, the landowner moved the court to strike the first surveyor’s evidence and to enter summary judgment against him. The trial court denied the motions and submitted the case to the jury with an instruction that the surveyor’s duty was to possess and exercise such reasonable and ordinary skill, care and diligence as are ordinarily exercised by the average of the members of his profession in the area. The surveyor prevailed, receiving a verdict for the balance of his fee and a finding in his favor on the landowner’s counterclaim. The landowner appeals.
1. The question whether a professional departed from the standard of care prevailing in his profession is ordinarily an issue of fact, to be resolved on the basis of conflicting expert testimony, but exceptions exist which have become rules of law.
2. Such exceptions fix binding standards which are not left to the exercise of professional judgment. Being rules of law, they are not subject to expert opinions concerning local practice.
3. In the absence of evidence of contrary intent, a distinct order of preference governs inconsistencies in the description of land: (1) natural monuments; (2) artificial monuments and lines; marked or surveyed; (3) adjacent boundaries; (4) calls for courses and distances; (5) designation of quantity.
4. This order of preference is not inflexible and will not be applied if to do so will frustrate the intent of parties to a deed, but here there was no evidence of the intent of the parties in the relevant deed, and accordingly the order of preference governs the case.
5. Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances. Here the recorded distance should have prevailed.
6. The original surveyor was negligent as a matter of law and the court erred in denying the landowner’s motions to strike and to grant summary judgment on the issue of liability.

THE LAW:

Since a surveyor was negligent as a matter of law, the trial court erred in denying motions to strike and to grant summary judgment on the issue of liability. Judgment is reversed and the case is remanded for trial on the issue of damages.

COUNSEL:

Dabney Overton, Jr. for appellant.

Larry J. McElwain (Paxson, Smith, Gilliam & Scott, on brief), for appellee.

JUDGES:

Russell, J., delivered the opinion of the Court.

WRITTEN BY: RUSSELL.

FINAL OPINION:

This is a dispute between a landowner and a surveyor employed to make a boundary survey. Contending that the survey was negligently performed, the landowner refused to pay the surveyor’s fee in full. When the surveyor sued in general district court for the unpaid balance, the landowner removed the case to the circuit court, denied liability, and counterclaimed for damages arising from the surveyor’s alleged negligence. At a jury trial, the surveyor prevailed, receiving a verdict for the balance of his fee and a finding in his favor on the landowner’s counterclaim. We awarded the landowner an appeal from a judgment entered on the verdict. On appeal, the controlling issue is whether the surveyor was negligent as a matter of law.

The essential facts are undisputed. In 1982, Harold R. Spinhour owned a tract of land in southwestern Albemarle County containing approximately 32.5 acres. This tract had been assembled from several sources. One of its constituent parts was a small parcel containing approximately 0.5 acre lying north of State Route 693. This half-acre parcel, the subject of the present controversy, had been carved out of a larger tract containing approximately 11.1 acres, which had formerly belonged to George Craig. West of the half-acre parcel lay a tract formerly belonging to the trustees of a Mormon church. The church building no longer exists, and the former church lot now belongs to Davy L. Thacker. Thacker erected a house on the lot which Spinhour thought was very close to, or encroaching upon, the line dividing Thacker’s "church lot" from Spinhour’s half-acre parcel.

A 1907 recorded deed in the chain of title to the 11.1-acre parent tract contained a metes-and-bounds description which began as follows: "Beginning at a stone on a ridge near Mormon Church thence N. 54 E. 8 8/10 poles to a chestnut a corner to S. E. Pugh and S. R. Kirby, thence ...." By 1982, the "stone on a ridge near Mormon Church" could not be found. The physical evidence suggested that the ridge had been graded down in connection with the construction of the Thacker house, probably resulting in removal of the stone.
It was conceded by all parties, however, that the other end of the beginning course described in the 1907 deed was monumented. The evidence disclosed that the area had been widely grown with chestnut trees in the early part of the present century, but that all had been killed by the chestnut blight in the 1920s and 1930s. Many of their stumps remain, however, and, being particularly durable, are still visible. Several adjoining landowners had, for many years, considered a very large chestnut stump to be the remains of the "chestnut a corner to S. E. Pugh and S. R. Kirby" described as the end of the beginning course recited in the 1907 deed. One of the adjacent owners had, years earlier, accepted the stump as his boundary to his detriment, because it fell some 15 feet within his property lines as measured from other monuments. There were no other chestnut stumps in the vicinity. For those reasons, a succession of surveyors working on adjacent tracts over the years accepted the chestnut stump as monumentation of the corner described in the 1907 deed. One of the earlier surveyors had driven an iron pipe into the stump to fix the exact corner point.

Spainhour believed that by beginning at the chestnut stump and running the distance, 8 8/10 poles (145.2 feet), n1 along the reciprocal of the course (N. 54° E.) called for in the 1907 deed, a surveyor could establish the original location of the "stone on the ridge near Mormon church" which had marked the beginning point of the 1907 description. That point would mark the corner common to the half-acre parcel and Thacker's lot. By running a line from that corner to other monuments, Spainhour hoped to fix his boundary with Thacker.

n1 A pole, as a surveyor's unit of measurement, is one-fourth of a surveyor's, or Gunter's, chain. Gunter's chain, named for Edmund Gunter (d. 1626), is 66 feet long and consists of 100 links, each 7.92 inches in length. A pole is therefore 16.5 feet in length. 8.8' x 16.5' = 145.2'.

In 1982, Spainhour engaged B. Aubrey Huffman & Associates, Ltd. (Huffman), a firm engaged in civil engineering and land surveying in the Charlottesville-Albemarle area to make a boundary survey. Huffman's principal officer and sole stockholder was Arthur F. Edwards, a certified land surveyor. Edwards explained to Spainhour that a reliable result could not be achieved by establishing a single point and running the line from it. Edwards' opinion was that it would be necessary to survey the entire Spainhour property in order to establish the boundary to an acceptable degree of accuracy. Spainhour agreed and authorized the survey.

Edwards checked the land records, sent out a survey party under another certified land surveyor to do the field work, examined the field notes, and prepared a plat which was furnished to Spainhour along with Huffman's bill for services in the amount of $2,341.25.

Spainhour was dissatisfied with the Huffman plat. Although Huffman accepted the pipe in the chestnut stump as a monument, the plat ran the line from that pipe toward Thacker 132.40 feet rather than 145.2 feet as called for by the 1907 deed. The resulting Spainhour-Thacker boundary fell 13 feet farther from Thacker's house than Spainhour thought it should. Spainhour paid $1,100 on Huffman's bill but refused to pay the balance.

In 1984, Spainhour engaged J. W. Clark, a certified land surveyor in Augusta County, to survey the half-acre parcel which adjoined Thacker. Clark did not find it necessary to resurvey all of Spainhour's 32.5 acre tract, but did survey the boundaries of the original 11.1-acre parent tract out of which the half-acre parcel had been carved.

Clark found monuments along the boundaries of the 11.1-acre tract which he related to more recent recorded surveys of adjoining lands. The courses and distances he obtained confirmed, with a reasonable degree of accuracy, that the pipe in the chestnut stump was indeed the corner described in the 1907 description. He applied the reciprocal of the 1907 course which had ended at that corner, ran the distance of 145.2 feet called for in the 1907 deed, and established the beginning point of the 1907 deed which formed one end of the disputed boundary. This resulted in a line which barely missed Thacker's house, but passed through a concrete pad at the foot of Thacker's rear steps.

In the process of his field work, Clark found the iron spikes set by Huffman and left them in place. Clark placed his own spikes at the points he thought correct, and prepared a plat of the half-acre parcel and its parent tract which showed, in addition to his own lines, the lines established by Huffman with which he disagreed. A part of Clark's plat, showing both versions of the disputed boundaries of the half-acre parcel, is appended to this opinion.

At trial, the cause of the disagreement between surveyors became apparent. Edwards, Huffman's surveyor, had disregarded the 145.2 foot distance called for by the 1907 deed for two reasons. First, measuring that distance from the pipe in the chestnut stump brought him to a point which established a boundary line which did not agree with the alignment of an old fence he found across Route 693. Although the fence was not mentioned in any description of record, and had a "bow" in it, it showed signs of such antiquity that Edwards concluded that it had been accepted as a boundary between the parent 11.1-acre tract and the former Mormon church lot. By extending the line of the fence across the road to the point of its intersection with the reciprocal of the course
to the pipe in the chestnut stump as called for the 1907 deed, he arrived at his conclusion concerning the 1907 beginning point.

Edwards' second reason for disregarding the 145.2-foot distance call related to acreage. When the 145.2-foot distance was entered into Edwards' computer along with the other courses and distances established for the boundaries of the parent 11.1-acre tract, the computer reported that the parent tract had actually contained only 10.73 acres. He testified, "[a]lthough the acreage number on there is wrong or some or one or all of the courses and distances called for on that description have something wrong with it." Accordingly, he testified, he relied on the extension of the fence line he observed in the field rather than the recorded distance call. The result gave him a distance of 132.40 feet rather than the 145.2 feet called for by the deed. Entered into the computer, the shorter line yielded an acreage for the parent tract that was closer to the 11.1 acres of record.

Clark testified, as did other certified land surveyors who appeared as witnesses, that modern surveyor's techniques have resulted in greatly improved accuracy in recent years. When surveyors formerly employed the magnetic compass to establish courses, the result varied from year to year due to changes in magnetic variation, resulting from the constantly changing deflection of the lines of magnetic force around the earth. While this variation could be computed from published tables, local deviation caused by the magnetic attraction of ferrous metals in the earth and rocks was entirely unpredictable. The evidence was that boulders in western Albemarle County were particular sources of such magnetic disturbances. Further, surveyors presently compute their courses and distances in a theoretical horizontal plane. Older measurements were made by survey parties hauling their chains up hill and down dale. The net result is that recent surveys frequently disagree with older surveys of the same property; courses may differ substantially, modern distances may be shorter if the terrain is rough, and computed acreage will frequently be less in a modern description than in an older one.

Notwithstanding these improvements in technology, all the surveyors who testified, including Clark and Edwards, agreed that the hierarchy of reliability among the surveyor's measurements remains the same. When measurements conflict, monuments are the most reliable guides; they prevail over distances, courses, and acreage. Courses, formerly dependent upon the vagaries of the magnetic compass, and distances, formerly measured by the use of Gunter's chain, come next. Acreage, based upon mathematic computation from courses and distances, and subject to the sum of all the errors in them, is the least reliable measurement.

The case was tried as an action for professional malpractice. Clark's opinion was that Huffman had erred in disregarding a recorded distance, relying on an unrecorded fence line observed in the field, and depending on an acreage computation. Expert witnesses called by Huffman opined that Huffman's methods met the locally prevailing standards of skill, care, and diligence. At the conclusion of Huffman's evidence, and again at the conclusion of all the evidence, Spanhour unsuccessfully moved the court to strike Huffman's evidence and to enter summary judgment on the issue of liability in Spanhour's favor on his counterclaim, on the theory that Huffman had been negligent as a matter of law. Denying these motions, the court submitted the case to the jury with an instruction that Huffman's duty was "to possess and exercise such reasonable and ordinary skill, care and diligence as are ordinarily exercised by the average of the members of his profession in good standing, in the Charlottesville/ Albemarle County area." Spanhour objected to the instruction.

[1-2] In our view, the court erred in denying Spanhour's motions and submitting the case to the jury. [HN1] Professionals charged with negligence are ordinarily entitled to be judged by the standard of care prevailing in their profession at the appropriate time and place. This necessitates the expert testimony of fellow professionals, familiar with the standard, to explain it to the fact-finder. The question whether the professional departed from the standard is ordinarily an issue of fact, to be resolved on the basis of conflicting expert testimony, but exceptions exist which have become rules of law. See, e.g., State Farm Mutual Auto Ins. v. Floyd, 235 Va. 136, 144, 366 S.E.2d 93, 97 (1988) (attorney has legal duty to convey settlement offer to client); Va Real Estate Comm. v. Bias, 226 Va. 264, 269-70, 308 S.E.2d 123, 126 (1983) (broker has absolute duty to convey offer promptly to seller). Such exceptions fix binding standards which are not left to the exercise of professional judgment. Being rules of law, they are not subject to expert opinions expounding local practices.

[3-4] [HN2] Land surveyors, like other professionals, are governed by certain standards which have ripened into rules of law. In the absence of evidence of contrary intent, a distinct order of preference governs inconsistencies in the description of land:

1. natural monuments or landmarks;
2. artificial monuments and established lines, marked or surveyed;
3. adjacent boundaries or lines of adjoining tracts;
4. calls for courses and distances; n2

5. designation of quantity.

Providence v. United Va./Seaboard Nat., 219 Va. 735, 745, 251 S.E.2d 474, 479 (1979). The foregoing rule is not inflexible, and will not be applied if to do so will frustrate the intent of the parties to the deed, id., 251 S.E.2d at 480, but in the present case there was no evidence of the intent of the parties to the crucial 1907 deed other than its language. Accordingly, the foregoing order of preference governs the case.

n2 Minor suggests that where the conflict is between courses and distances, courses should prevail because they were presumably set by the more experienced surveyor using a compass, while the distances were measured by the less experienced chain carriers. F. Ribble, 2 Minor on Real Property, § 1076 (2d ed. 1928).

The chestnut stump in which a pipe had been set was accepted by all concerned as a natural monument, meeting the criteria of the first category above. The course running to or from it was not in controversy. The sole question for the surveyor was whether the distance recorded in the 1907 deed should prevail over the inconsistent measurement of acreage. On that point, the rule is clear. "Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances." Reid v. Rhodes, 106 Va. 701, 707, 56 S.E. 722, 724 (1907) (quoting Hunter v. Hume, 88 Va. 24, 29, 13 S.E. 305, 307 (1891)). The extension of the fence line on which Huffman relied, being neither marked nor surveyed, and being unrelated to any monument described of record, fails to meet the criteria of "artificial monuments and established lines, marked or surveyed," the second category above. The recorded distance should have prevailed.

[6] We conclude that Huffman was negligent as a matter of law, and that the court erred in denying Spahnhour's motions to strike and to grant summary judgment 7 on the issue of liability. Accordingly, we will reverse the judgment, enter final judgment in Spahnhour's favor with respect to Huffman's claim, enter judgment on the issue of liability in Spahnhour's favor with respect to Spahnhour's counterclaim, and remand the case for trial of the issue of damages on the counterclaim.

Reversed and remanded.

[SEE ILLUSTRATION IN ORIGINAL]
Editor’s Note: Justice Cooley's essay on the Judicial Functions of Surveyors has been reprinted in many publications over the years. Should a surveyor be guided only by the deed in retracing boundaries, or should consideration be given to lines of possession? This subject has been long debated. Although some of the ideas presented in this essay may benefit today's surveyors, this reprint is being provided only as a historical note of interest and its publication in this manual does not constitute an endorsement by ASPLS.

The Judicial Functions of Surveyors

By Thomas M. Cooley

Chief Justice, Supreme Court of Michigan, 1864-1885

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

In the State of Michigan, all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan of subdivision was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing.

The truth, unfortunately, is that the lines were very carelessly run, the monuments inaccurately placed; and, as the record witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed, it is impossible to determine by the record, by the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed, as indeed they should have been, for in general there can have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should become dear. The fact probably is that town surveys are quite as inaccurate as those made under authority of the general government.

RECOVERING LOST CORNERS

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold and the work of improvement begun. A generation has passed away since they were converted into cultivated farms, and few if any of the original corner and quarter stakes now remain.
The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing was substituted in its place, the adjoining proprietors might in a few years be found disputing over their lines, and perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

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.

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 placed 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. The mistake above alluded to is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we shall refer is not what is commonly supposed.

An act passed in 1869 (Compiled Laws, 593) amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows:

Second. Extinct interior section corners must be reestablished at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it.

Third. Any extinct quarter-section corner, except on fractional lines, must be reestablished equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line.

The corners thus determined, the surveyors are required to perpetuate by noting bearing trees when timber is near.

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from government bought such land as was within the original boundaries, and unquestionably owned it up to the time when the monuments became extinct. If the monument was set for an interior section corner, but did not happen to be "at the intersection of two right lines joining the nearest known points on the original section lines east and west and
north and south of it," it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

EXTINCT CORNERS

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains as a potential fact so long as he can present better evidence than any other person. And it may often happen that notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

There are two senses in which the word extinct may be used in this connection: One, the sense of physical disappearance; the other, the sense of loss of all reliable evidence. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that, if a man loses his deed, he shall lose his land altogether.

But if by extinct corner is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent:

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field notes indicated it to be.

2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.

3. No statute can confer upon a county surveyor the power to "establish" corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and Federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made govern, because the land was bought in reference to them; and any legislation, whether State or Federal, that should have the effect to change these, would be inoperative, because of the disturbance to vested rights.

4. In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence and give full opportunity for a hearing. No arbitrary rules of survey or of evidence can be laid down whereby it can be adjudged.

THE FACTS OF POSSESSION

The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to
trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence.

Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State statute, disregard all evidences of occupation and claim of title and plunge whole neighborhoods into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize. It is often the case that, where one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit, when the people concerned do not question them, not only breeds trouble in the neighborhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common sense must declare that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared. (Stewart v. Carleton, 31 Mich. Reports, 270; Diehl v. Zanger, 39 Mich. Reports, 601.) And county surveyors, no more than any others, can conclude parties by their surveys.

The mischiefs of overlooking the facts of possession most often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees, and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting point in the original survey of the town plat; or if a surveyor settling in the town may take some central point as the point of departure in his surveys and, assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

Suppose, for example, a particular village street has been located by acquiescence and used for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor, that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is error in the street line, and that all fences should be moved, say 1 foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the lot owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding some one disposed to do so. We shall then have a lawsuit; and with what result?
FIXING LINES BY ACQUIESCENCE

It is common error that lines do not become fixed by acquiescence in a less time than 20 years. In fact, by statute, road lines may become conclusively fixed in 10 years; and there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, all concerned have cultivated and claimed up to it. Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of any considerable time. The litigant, therefore, who is in such a case pins his faith on the surveyor is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.

Of course, nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of parties as if it were at another. But he would do mischief if he were to attempt to "establish" monuments" which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement. The peace of the community absolutely requires this rule. It is not long since, that in one of the leading cities of the State, an attempt was made to move houses 2 or 3 rods into the street, on the ground that a survey under which the street had been located for many years had been found on a more recent survey to be erroneous.

THE DUTY OF THE SURVEYOR

From the foregoing, it will appear that the duty of the surveyor where boundaries are in dispute must be varied by the circumstances.

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. Blazed lines or marked trees on the lines are not monuments; they are merely guides or finger posts, if we may use the expression, to inform us with more or less accuracy where the monuments may be found.

2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. It is merely idle for any State statute to direct a surveyor to locate or "establish" a corner, as the place of the original monument, according to some inflexible rule. The surveyor, on the other hand, must inquire into all the facts, giving due prominence to the acts of parties concerned, and always keeping in mind, first, that neither his opinion nor his survey can be conclusive upon parties

---

ASPLS Standards of Practice Manual

"The Judicial Function of Surveyors" - Justice Thomas M. Cooley

Ch3 Guidelines - rev. 1/13/94

Attachment: Priority of Calls/Feb. 2013
Page 90
concerned, and, second, that courts and juries may be required to follow after the
surveyor over the same ground, and that it is exceedingly desirable that he govern his
action by the same lights and the same rules that will govern theirs.

It is always possible, when corners are extinct, that the surveyor may usefully act as a
mediator between parties and assist in preventing legal controversies by settling doubtful lines.
Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even
if they consent to follow his judgment, cannot, on the basis of mere consent, be compelled to do
so; but if he brings about an agreement, and they carry it into effect by actually conforming their
occupation to his lines, the action will conclude them. Of course, it is desirable that all such
agreements be reduced to writing, but this is not absolutely indispensable if they are carried into
effect without.

MEANDER LINES

The subject of meander lines is taken up with some reluctance because it is believed the
general rules are familiar. Nevertheless, it is often found that surveyors misapprehend them, or
err in their application; and as other interesting topics are somewhat connected with this, a little
time devoted to it will probably not be altogether lost. These are lines traced along the shores of
lakes, ponds, and considerable rivers, as the measures of quantity when sections are made
fractional by such waters. These have determined the price to be paid when government lands
were bought, and perhaps the impression still lingers in some minds that the meander lines are
boundary lines, and that all in front of them remains unsold. Of course this is erroneous. There
was never any doubt that, except on the large navigable rivers, the boundary of the owners of the
banks is the middle line of the river; and while some courts have held that this was the rule on all
fresh-water streams, large and small, others have held to the doctrine that the title to the bed of
the stream below low-water mark is in the State, while conceding to the owners of the banks all
riparian rights. The practical difference is not very important. In this State, the rule that the
centerline is the boundary line is applied to all our great rivers, including the Detroit, varied
somewhat by the circumstance of there being a distinct channel for navigation, in some cases,
with the stream in the main shallow, and also sometime by the existence of islands.

The troublesome questions for surveyors present themselves when the boundary line
between two contiguous estates is to be continued from the meander line to the centerline of the
river. Of course, the original survey supposes that each purchaser of land on the stream has a
water front of the length shown by the field notes; and it is presumable that he bought this
particular land because of that fact. In many cases it now happens that the meander line is left
some distance from the shore by the gradual change of course of the stream, or diminution of the
flow of water. Now the dividing line between two government subdivisions might strike the
meander line at right angles, or obliquely; and, in some cases, if it were continued in the same
direction to the centerline of the river, might cut off from the water one of the subdivisions
entirely, or at least cut it off from any privilege of navigation or other valuable use of the water,
while the other might have a water line crossing it at right angles to its side lines. The effect
might be that, of two government subdivisions of equal size and cost, one would be of great
value as water-front property, and the other comparatively valueless. A rule which would
produce this result would not be just, and it has not been recognized in law.

"The Judicial Function of Surveyors" - Justice Thomas M. Cooley

53
Attachment: Priority of Calls/Feb. 2013
Page 91
Nevertheless it is not easy to determine what ought to be the correct rule for every case. If the river has a straight course, or one nearly so, every man’s equities will be preserved by this rule: Extend the line of division between the two parcels from the meander line to the centerline of the river, as nearly as possible at right angles to the general course of the river at that point. This will preserve to each man the water front which the field notes indicated, except as changes in the water may have affected it, and the only inconvenience will be that the division line between different subdivisions is likely to be more or less deflected where it strikes the meander line.

This is the legal rule, and is not limited to government surveys, but applies as well to water lots which appear as such on town plats (Bay City Gas Light Co. v. The Industrial Works, 28 Mich. Reports, 182.) It often happens, therefore, that the lines of city lots bounded on navigable streams are deflected as they strike the bank, or the line where the bank was when the town was first laid out.

IRREGULAR WATERCOURSES

When the stream is very crooked, and especially if there are short bends, so that the foregoing rule is incapable of strict application, it is sometimes very difficult to determine what shall be done; and in many cases the surveyor may be under the necessity of working out a rule for himself. Of course his action cannot be conclusive; but if he adopts one that follows, as nearly as the circumstances will admit, the general rule above indicated, so as to divide as near as may be the bed of the stream among the adjoining owners in proportion to their lines upon the shore, his division, being that of an expert, made upon the ground, and with all available lights, is likely to be adopted as law for the case. Judicial decisions, into which the surveyor would find it prudent to look under such circumstances, will throw light upon his duties and may constitute a sufficient guide when peculiar cases arise. Each riparian lot owner ought to have a line on the legal boundary, namely, the centerline of the stream, proportioned to the length of his line on the shore, and the problem in each case is how this is to be given him. Alluvion—when a river imperceptibly changes its course—will be apportioned by the same rules.

The existence of islands in a stream when the middle line constitutes a boundary, will not affect the apportionment unless the islands were surveyed out as government subdivisions in the original measurement. Wherever that was the case, the purchaser of the island divides the bed of the stream on each side with the owner of the bank, and his rights also extend above and below the solid ground, and are limited by the peculiarities of the bed and the channel. If an island was not surveyed as a government subdivision previous to the sale of the bank, it is, of course, impossible to do this for the purposes of government sale afterward, for the reason that the rights of the bank owners are fixed by their purchase; when making that, they have a right to understand that all land between the meander lines, not separately surveyed and sold, will pass with the shore in the government sale and, having this right, anything which their purchase would include under it cannot afterward be taken from them. It is believed, however, that the Federal courts would not recognize the applicability of this rule to large navigable rivers, such as those uniting the Great Lakes.

On all the little lakes of the State which are mere expansions near their mouths of the rivers passing through them—such as the Muskegon, Pere Marquette, and Manistee—the same rule of bed ownership has been judicially applied that is applied to the rivers themselves; and the division lines are extended under the water in the same way. (Rice v. Ruddiman, 10 Mich., 125.)
If such a lake were circular, the lines would converge to the center; if oblong or irregular, there might be a line in the middle on which they would terminate whose course would bear some relation to that of the shore. But it can seldom be important to follow the division line very far under the water, since all private rights are subject to the public rights of navigation and other use, and any private use of the lands inconsistent with these would be a nuisance, and punishable as such. It is sometimes important, however, to run the lines out for considerable distance in order to determine where one may lawfully moor vessels or rafts for the winter or cut ice. The ice crop that forms over a man's land of course belongs to him. (Lorman v. Benson, 8 Mich., 18; People's Ice Co. v. Steamer Excelsior, recently decided)

MEANDER LINES AND RIPARIAN RIGHTS

What is said above will show how unfounded is the notion, which is sometimes advanced, that a riparian proprietor on a meandered river may lawfully raise the water in a stream without liability to the proprietors above, provided he does not raise it so that it overflows the meander line. The real fact is that the meander line has nothing to do with such a case, and an action will lie whenever he sets back the water upon the proprietor above, whether the overflow be below the meander lines or above them.

As regards the lakes and ponds of the State, one may easily raise questions, some of which are easily answered, and some not:

1. To whom belongs the land under these bodies of water, where they are not mere expansions of a stream flowing through them?

2. What public rights exist in them?

3. If there are islands in them which were not surveyed out and sold by the United States, can this be done now?

Others will be suggested by the answers given to these.

It seems obvious that the rules of private ownership which are applied to rivers cannot be applied to the great lakes. Perhaps it should be held that the boundary is at low water mark, but improvements beyond this would only become unlawful when they became nuisances. Islands in the great lakes would belong to the United States until sold, and might be surveyed and measured for sale at any time. The right to take fish in the lakes, or to cut ice, is public like the right of navigation, but is to be exercised in such manner as not to interfere with the rights of shore owners. But so far as these public rights can be the subject of ownership, they belong to the State, not to the United States, and so, it is believed, does the bed of a lake also. (Pollard v. Hagan, 3 Howard's U.S. Reports.) But such rights are generally considered proper subjects of sale, but like the right to make use of the public highways, they are held by the State in trust for all the people.

What is said of the large lakes may perhaps be said also of the interior lakes of the State, such, for example, as Houghton, Higgins, Cheboygan, Burt's Mullet, Whitmore, and many others. But there are many little lakes or ponds which are gradually disappearing, and the shore proprietorship advances pari passu as the waters recede. If these are of any considerable size--


"The Judicial Function of Surveyors" - Justice Thomas M. Cooley
say, even a mile across--there may be questions of conflicting rights which no adjudication hitherto made could settle. Let any surveyor, for example, take the case of a pond of irregular form, occupying a square mile or more of territory, and undertake to determine the rights of the shore proprietors to its bed when it shall totally disappear, and he will find he is in the midst of problems such as probably he has never grappled with or reflected upon before. But the general rules for the extension of shore lines, which have already been laid down, should govern such cases, or at least should serve as guides in their settlement.

Where a pond is so small as to be included within the lines of a private purchase from the government, it is not believed the public have any rights in it whatever. Where it is not so included, it is believed they have rights of fishery, rights to take ice and water, and rights of navigation for business and pleasure. This is the common belief, and probably the just one. Shore rights must not be so exercised as to disturb these, and the States may pass all proper laws for their protection. It would be easy with suitable legislation to preserve these little bodies of water as permanent places of resort for the pleasure and recreation of the people, and there ought to be such legislation.

If the State should be recognized as owner of the beds of these small lakes and ponds, it would not be owner for the purpose of selling. It would be owner only as trustee for the public use; and a sale would be inconsistent with the right of the bank owners to make use of the water in its natural condition in connection with their estates. Some of them might be made salable lands by draining; but the State could not drain, even for this purpose, against the will of the shore owners, unless their rights were appropriated and paid for.

Upon many questions that might arise between the State as owner of the bed of a little lake and the shore owners, it would be presumptuous to express an opinion now, and fortunately the occasion does not require it.

**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.

* * * * * * *