PDHonline Course L109 (6 PDH)

Land Boundary Surveys I

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Land Boundary I

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Module 1

These introductory ideas are first presented cursorily and will be developed more fully.

Real Property

Land is real property certainly, but what exactly is real property? Here are a few comparisons between real property (realty) and personal property (personalty) to bring the answer into some focus.

Personal property is moveable and real property isn't. Real property is land and things fixed to land, both physical and nonphysical. Real property or personal property can undergo a transformation that is each can be changed into the other. For example, land in place is immovable and real property, but if it is severed from the earth, like a truckload of gravel or topsoil, it becomes personal property. In its natural state, water is real property, but generally when it is put in containers, it becomes personal property. On the other hand, personal property can become part of the land when it is attached with the intention of making it permanent. State statutes usually include ground or soil as real property certainly, but also things that are attached it, whether by nature, i.e. trees and other vegetation, or by man, i.e. a house.

Real property might be attached to the land by roots, i.e. trees, vines, or shrubs. Trees, shrubs, vines, and crops that are a product of nature alone, termed "fructus naturales," and are regarded as part of the land in which their roots grow. They continue to be real property until severed. Grain, garden vegetables, and other crops that are the result of cultivation are classified as "fructus industriales," and are either real property or personal property, depending upon the circumstances.

Real property might simply rest on the land, i.e. walls, buildings and etc. For example, lumber at a lumber yard is personal property, but when it is used in the construction of a residence on a parcel of land, it becomes real property. And it need not be in actual contact with the soil itself. It may be attached to a building that is considered part of the land. A piece of plumbing, as an example, may be real property.

Different Laws

These contrasts in the two classes of property have resulted in different rules of law regulating their ownership. Real property is exclusively subject to the laws and jurisdiction of the state within which it is located. And transactions in real property are governed by the laws of that state, except where title is in the United States, or where it is specifically under the jurisdiction of the federal government. State law controls the form, execution, validity, and effect of instruments relating to land in that state, for example, state laws determine inheritability. Courts of one state do not have the power to render decrees that directly affect title to land in another state. Personal property, on the other hand, is usually regarded as

situated at the home of its owner, regardless of its actual location; it is governed by the law of the owner's home.

The distinction between real and personal property is also of importance as to method of transfer. A voluntary transfer of title to real property is usually made in an instrument in writing, whereas title to personal property generally passes by delivery of possession. A written instrument may be used in connection with the transfer of personal property, but is not necessary to its validity unless required by statute.

A Bundle of Rights

Land is composed of a bundle of rights. And for a particular parcel of land it is usual that those rights are divided among many. It is important to note that rights and title are not the same thing. Here are a few examples.

Included in real property are things incidental to the use of land, such as easements and rights of way. And real property includes not only the surface of the earth, but things under it and above it as well. For example, land includes ores, metals, coal and other minerals in or on the land, while in place they are real property. The rights to them can be divided and subdivided in various ways. For example, the owner of the title to a tract of land might convey the land and retain the rights to the minerals for himself. Or he could convey the rights to the minerals to another person and retain ownership of the land. But consider that if he did convey the rights to the minerals to another, he might automatically create an implied right of entry for their extraction

even though he still owned the land. But suppose he wished to avoid that. In that case, he might specifically exclude right of entry from the surface and convey just the rights to the minerals 500 feet or more below the ground so they would need to be removed from neighboring areas.

Here is another example, oil and gas are minerals, but are not fixed and stationary like solid minerals. They shift and move. In this case the owner of the title to the land might control of the right to drill for them and may in some cases retain all brought to the surface as his property. And this right may be conveyed to someone else linked to or separate from a grant conveying the ownership to the land on the surface.

Boundaries

Land and rights in land are divided by boundaries, and that, as they say, is where we come in.

To establish the location of a boundary land surveyors examine written deeds and other documents. We take testimony of adjoining owners and neighbors. We evaluate various bits of other information to find the best available evidence of the location. Usually the job requires tracing on the ground the written conveyance, the deed used to convey the property as supplied by the client. And due diligence usually demands that we examine the adjoiners, conveyances, maps, and surveys called for in that deed. Most often this includes recorded adjoining surveys, rights-of-way, utility easements, and dedications in the area as well as government field notes

and maps. In short, we must become familiar with the history of both the particular parcel and adjoining parcels.

And when ambiguities or other difficulties appear the land surveyor must be thoroughly prepared to present simply and clearly the strongest possible evidence to substantiate and justify his decisions. Because should a boundary dispute arise and court action result, the court's decisions will likely be based on an interpretation of boundary law and the evidence presented in the particular case, including the surveyor's work.

While one cannot depend that a particular court will act in accordance with what has generally been accepted by other courts, fortunately, there are guidelines that have stood the test of time. Therefore, when conflicts occur between written instruments, maps, and the actual measurements on the ground or when ambiguities are revealed in the instruments themselves there is some recourse to a generally accepted order of importance. But remember, this ordering can vary from state to state, or even within one jurisdiction.

1. Rights of possession and unwritten transfer of title. These can even alter or overcome a written conveyance. Unwritten rights can include:
    a. Agreements between adjoiners, expressed or implied;
    b. Adverse claims;
    c. Acts of nature;
    d. Statutory proceedings;
    e. Prescription, etc.

2. Senior Rights (when overlaps occur)
    a. Senior rights can come to bear in sequential conveyances. First come, first served, in other words, the first deed to be served from an existing tract is called the senior deed. Any later severances acquire seniority in the chronological order of execution.

    b. Senior rights generally do not come into play in simultaneous conveyances. Lot boundaries shown on a recorded subdivision plat, for example, are assumed to have all been created on the same day of recordation.

3. Written intentions of the parties, usually expressed in a deed.
    a. Call for a survey
    b. Call for monuments. The actual position of the called-for monument at the date of the conveyance.
        i. Natural Monuments: Trees, rocks, creek banks, etc., are some examples of natural monuments.
        ii. Artificial Monuments: Fence corners, the centerlines of roads, rock piles, as well as iron pipes, and concrete monuments, are all artificial monuments.
    c. Distance or Direction;
    d. Area;
    e. Coordinates and calculated or interpolated evidence.

Estates in Land

Several concepts were cursorily presented above, now begins the process of developing them into a more coherent whole. Words that may be unfamiliar will be defined.

Returning for a moment to the concept of real property, in most states, it is held to mean not only the physical land and appurtenances, structures that are affixed to it, but also interests, rights and benefits inherent in the ownership of the physical land. In other words, there is a bundle of rights with which the ownership of real estate is endowed. “It not only includes land and tenements but also all the legal rights tangible or intangible and corporeal or incorporeal” (Brown, Robillard and Wilson 1986).

In other words, real property isn't just the land itself it’s also the historical and legal baggage we call rights and interests in the land. "Legislatures and courts have allowed the transfer of nearly every conceivable benefit or right and combination of such benefits or rights that can exist in land," (Brown, Robillard and Wilson 1986). And the definition of an estate in land is the definition of the degree nature, or extent of interest that a person has in land. It is a right or interest in property that may be called a fee ownership interest, a lease interest for a period of years or some other category altogether.

Fee Simple Absolute

A fee is an estate of inheritance in real property. The word is derived from fief, and it means a freehold estate in land, freehold and fee are synonymous for all intents and purposes. The highest type of interest in land that a person can hold in the United States is fee simple absolute.

Fee simple absolute is a fee, an inheritable estate that is created by deed or will in most states. The word simple in the phrase means that it is without limitations to any particular class of heirs or restrictions. And the word absolute here means that there are no conditions or limitations in time. In theory, the estate could continue forever. A fee simple absolute is sometimes said to be indefeasible, meaning that there are no strings attached. Its continuance is not dependent on some future event.

Fee simple absolute is subject to four limitations. They are eminent domain, escheat, police power and taxation. Eminent Domain is the right by which a sovereign government or some persons acting in its name and under its authority may acquire private property for public or quasi-public use without consent of the owner. Escheat is the reversion of property to the state when there is no one competent or available to inherit. Concerning police power:

> "Police power is the right exercised for the purpose of regulating use of property; it is not for the purpose of taking property. Property taken by eminent domain must be

> compensated for, but property regulated by the police power requires no compensation. The right to enact legislation to protect the safety, welfare, peace and, lives of people comes under police power; and although this does interfere with private rights and does seem to take away private rights, no compensation is necessary.
>
> In general, building or zoning regulations, set-back ordinances, restrictions on signs, and like ordinances are enforced under the police power without compensation to the property owners." (Brown, Robillard and Wilson 1981:428)

In other words, despite some limitations, the holder of a fee simple absolute is the owner of all possible rights in land the political philosophy of the time permits. As mentioned earlier, both the materials and the rights that are included in the term real property can be said to be determined by jurisdiction, and can change with the various states laws. However, as a general rule, today a deed conveys a fee simple absolute unless there is language specifically showing that something else was intended. For example

From the 12th century when the king began to make grants to a vassal "et sui haeredes", and his heirs, such grants descended on the owner's death to his legal heirs rather than reverting to the king. Today it isn't necessary for a conveyance to contain the words, "and his heirs and assigns", if a deed conveys a fee simple absolute estate inheritability is assured. But for centuries unless the words "and his heirs" were added a grantee, or devisee, in the case of a will, took only a life estate.

Life Estate

A life estate is an estate in property the duration of which is confined to the life of one or more persons. In other words, a life estate is exactly what you would expect: the right of possession, use, rents and issue of property for a lifetime, though not always the life of the owner of the estate.

There are of two types- the legal life estate and the life estate created by a deed or a will. Concerning the legal life estate there are two further subdivisions; courtesy which is a husband's right to possess a wife's real estate after her death and until he dies and dower which is the similar right for a surviving wife.

Fee simple determinable

A fee simple determinable is a fee simple but the ownership continues only as long as a particular situation continues. In other words, there are strings attached. It is defeasible.

The words "as long as" or "until" are often used in conveying a fee simple determinable. The original grantor holds reversionary rights, the property may come back to him automatically if an event occurs or fails to occur as he stipulated. It is interesting to note that this reversion may happen even after several subsequent changes in title.

Reversion

Reversionary refers to the right of the grantor to repossess the property and resume the full and sole use and proprietorship from which he was temporarily separated. Another way of describing a reversion is the residue of an estate left in the grantor, his successors, or in the successors of a testator. A testator is a man who leaves a will or testament when he dies. While a deed can be said to grant or convey property, a will is said to devise property.

For example, suppose A owns an estate in fee and devises a life estate or a fee simple determinable to B on his death which leaves a residue in A's heirs. That residue is called a reversion, so called because possession of the property reverts to A's successors when B's lesser estate ends.

Fee upon condition subsequent

A fee upon condition subsequent makes the title held by the grantee somewhat precarious. The grantor can stipulate that if something particular comes to pass, the original grantor, or devisor may re-enter, which means re-take, the title. It might include language such as, "to A, but if A dies childless, then to revert."

In other words, in a fee upon condition subsequent the grantor retains a right of re-entry, a power of termination. However, note the difference from a fee simple determinable; a fee upon

condition subsequent doesn't end automatically but only if some condition happens and the grantor re-takes the property. In fact, if he does not act within a certain period of time he may actually be prevented from re-taking it.

Remainder

A remainder is an estate that is created at the same time as another estate, both by a single grant. The remainder consists of rights and interest that continue after the ending of others. An example of the wording of a remainder would be if a grantor were to specify, “to B for life and upon his death to C ".

Briefly: lease, easement, right-of-way and license

A fee simple absolute is the highest fee around, but it still may be subject to a right-of-way, easement, license or lease.

A lease can be granted by a written document by which the possession of land is given by the owner to another person for a specified period and for rent specified. The right of possession and use of land for a limited period may be at the sufferance of the owner meaning that if the tenant holds the property after his term has expired the landlord may evict him.

An easement is a non-possessory right to make specific use of a definite portion of land owned by another. The owner of the underlying ground has the right to also make use of it to the extent that his use does not interfere with the exercise of the easement he granted. For his part, the holder of the easement cannot use it for purposes other than intended by the easement.

Some states recognize a right-of-way as a superior type of easement where the holder of the right-of-way may let others use the property for other purposes. In some jurisdictions, a right-of-way given to the public, either a state or a public utility may convey an interest in the land itself that enables the holder to permit others to use the right-of-way for other purposes. For example, a railroad might permit a power company to erect lines. In some cases, the grant may even permit removal of the underlying ground or minerals. But more often a right-of-way is considered a peculiar type of easement being limited to use for passage only.

A license is a revocable non-possessory interest in land which grants the right to enter the land without being subject to an action in trespass. A license is a privilege, not a right, given by the licensor to the licensee to use land for a limited purpose. It is revocable at will.

We have taken a very brief look at some of the rights in real property. A voluntary transfer of those rights is accomplished by a written instrument, a deed. Why must it be a written instrument?

Livery in Seisin

One of the earliest methods of transferring land was known as, “livery of seisin”. The buyer was known to be, "seized of the land". Under this theory, a written instrument was not sufficient to transfer a land title without actual delivery. Since it was physically impossible to take the land to the buyer, the buyer was taken on the land, and there in the presence of friends and neighbors as witnesses, the delivery was made.

This was quite a ceremony with the chief characters repeating, a required form. The seller giving the buyer a twig from a tree symbolized the delivery, a handful of soil, or the doorknob. Transfers affected in this manner were livery in deed, but if the ceremony were performed in sight of the land and not on it was constructive delivery and sufficient in law.

Deeds

Today a deed can be broadly defined as a written instrument under seal. A more complete definition is an instrument in writing which when executed and delivered conveys an estate in real property or interest therein. The person from whom the property is transferred is the grantor. The person to whom it is transferred is the grantee. And it is usual that only the grantor’s signature is required. Requirements for a valid deed may include: competent parties, a proper subject matter, a valid consideration, a written or printed form, sufficient and legal wording, execution, signing, sealing, delivery and acceptance. Each of these elements but the written or

printed form has a foundation in the "livery of seisin" of history. The stipulation that a deed be in writing is also traceable to historical precedent.

"The Statute of Frauds enacted by the English parliament in the reign of Charles II, 1672 made void any oral transfers of land, this statute has been re-enacted in one form or another in all the states of the Union. As so re-enacted in most states any oral agreement by the party conveying land changing fixed boundaries is at best voidable. And in most states an oral agreement as to where the true boundary is, is not binding upon the party, at least unless they have so acted on the agreement that an injustice would arise if one of the parties was permitted to deny the validity of the agreement." (Grimes 1976:6)

More about deeds in the next module.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3rd edn, New York: John Wiley and Sons.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1981) *Evidence and Procedures for Boundary Location*, 2nd edn, New York: John Wiley and Sons.

Grimes, J.S. (1976) *Clark on Surveying and Boundaries*, 4th edn, New York: Bobbs-Merrill.

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Module 2

Conflicting Title Elements

Following in the Footsteps

The cardinal principle guiding the surveyor who is running lines of a deed previously surveyed is to follow in the footsteps of the previous surveyor. But in a resurvey the surveyor is frequently confronted with the problem of resolving conflicts discovered when applying the deed to the ground. In performing his duties to trace on the ground the calls given in an instrument not infrequently, he encounters latent ambiguities. These are ambiguities that are not apparent from reading the deed itself. In other words, the description may be good on its face but when it is applied to the ground inconsistencies are revealed. For example, the instrument may call for courses and distances to points that it will not reach, the calls may actually over shoot the points found, or the area called for may differ dramatically from that found in measurement. Many other problems develop as well, but first a return for a moment to the order of importance of conflicting title elements. First in order is the right of possession, or unwritten rights.

Right of Possession - Unwritten Rights

It was mentioned previously that unwritten rights or possession that ripens into a fee right could extinguish written rights. The next category in the order of importance is the stipulation that a senior right is superior to a junior right.

Senior Right

When a portion of a tract of land is sold and two parcels are created a new parcel and the remainder of the parent parcel, the remainder will likely become, when it is conveyed, junior. Such are often called sequential conveyances and are based on deeds that came into being with a lapse of time between them.

> "Sequential conveyances are those written deeds in which junior and senior rights exist between adjoining parcels. . . In Texas, Virginia (including the Virginia Reserve in Ohio, Kentucky and several southern states), warrants were issued for an area of land. The person with a warrant went upon the land, selected the area he desired and had it surveyed, described, and platted as required by law. The description usually included calls for monuments, trees, topographic features, measurements and area. The person then applied for a patent, and if all legal requirements were met, the patent could be granted. Since each parcel was created in sequence usually as indicated by the date of the patent, these were sequential conveyances." (Brown, Robillard and Wilson 1981: 71-72).

As you would expect, the system resulted in numerous gaps and overlaps.

Contrast the above with what is known as simultaneous conveyances, when several parcels of land are created at the same moment. These might include lots in a subdivision, Sections in a Township and multiple parcels created in a will. For example, sections in a township were all created at the moment the plat was filed and accepted by the GLO (BLM).

The fundamental difference between these conveyances and the surveys that follow them is the treatment of excess or deficiency when it is discovered. In sequential conveyances, proportionate measurements rarely apply, but in retracement of simultaneously created parcels, proportionate measurement is usually the rule

The surveyor is daily expected to determine his best opinion to resolve questions that arise with reference to the excess and deficiency of lines shown by his recent measurement as compared with the original measurement. One court wrote in its opinion regarding a case in Nebraska:

> "On a line of the same survey, and between remote corners, the whole length of which is found to be variant from the length called for, it is not presumed that the variance was caused by a defective survey of any part but it must be presumed, in the absence of circumstances showing the contrary that it arose from an imperfect measurement of the whole line, and such variance must be distributed between the several subdivisions of the line in proportion to their respective length." [Brooks v. Stanley, 66 Neb. 826, 92 N.W. 1013 (1902)]

This is the general rule, but there are many variations, applied to different conditions. It must also be remembered that to invoke this rule in establishing the boundaries between the several subdivisions of the variant line, such boundary lines and the monuments originally established must be lost. Of course, wherever original corners are to be found, they prevail, even if the measured distances do not appear to be regular.

Where there is an excess or deficiency in the actual land platted into lots and blocks, with intervening streets, and the original monuments have disappeared, each block should, if possible, be treated as distinct. " In the absence of monuments streets are given the width called for on the plat regardless of excess or deficiency that may exist within a subdivision" (Brown, Robillard and Wilson 1981: 137) and the shortage or surplusage apportioned among the lot owners.

> “Block six consists of lots 4, 5, and 6, and upon the official plat these lots occupy the entire space between the north line of the addition and the street next south therefrom. These lots each are marked upon the plat as being 50 feet wide and there is nothing upon the face of the official plat indicating that any deficiency or excess should be taken from or added to any particular lot. So even if there were an excess of four and one-half feet in the length of this block, no part of the excess would fall outside of any particular lot, therefore any such excess should be apportioned among them." [Booth v. Clark, 59 Wash. 229, 109 P. 805 (1910)]

However, as previously mentioned where an original tract of land is subdivided by distinct and separate surveys, the second survey is subservient to the first and must bear any subsequently discovered deficiency and, in such cases, the doctrine of apportionment cannot be invoked.

Likewise, where there are separate conveyances at different periods from unplatted lands by metes and bounds the rule does not apply. The first conveyances would be entitled to the full amount purchased; the second, next in order; (junior) and the last would be entitled to all of the surplusages, if any, and must stand any deficiency, if there is any.

> "In metes and bounds states surveyors, as well as the people think of their lane, as being fixed by definite calls, not as a proportionate part of a whole. . .If one item characterized the difference between metes and bounds states and other states, it is the subject of proportionate measurement." (Distribution of excess and deficiency) (Brown, Robillard, Wilson 1986)

The next category in the often-quoted order of importance is the written intentions of the parties to a deed.

Deeds

A deed is an instrument in writing that when executed and delivered conveys an estate in real property. It is the instrument by which the title to real property is transferred from one person, called the grantor, to another person, called the grantee. And there are various categories of deeds.

For example, there are deeds that are sometimes created in connection with court proceedings; a sheriff's deed, a marshal's deed, a commissioner's deed, an executor's deed,

a guardian's deed, a tax deed, and a trust deed. A trust deed establishes a trust, meaning, it is an instrument, which conveys legal title to the property to a trustee and states his authority and the condition binding upon him in dealing with that property. A trust deed is frequently used to secure lenders against loss. Trust deeds are not primarily for the purpose of conveying title from one person to another. They are usually used to create a lien on real property. When the debt secured by the trust deed has been paid a reconveyance deed is sometimes used to convey the title from the trustee to the trustor.

An unrecorded deed that is not recorded in the registry of deeds or other repository of public record is usually only binding upon the grantor, his heirs and devisees and anyone who has actual notice of it. It is not valid against anybody else.

Quitclaim Deeds

A quitclaim deed conveys whatever interest the grantor possesses in the property described in the deed is conveyed to the grantee without warranty of title. If the grantor indeed has a valid title, a quitclaim deed is just as complete as a general warranty deed. Under these conditions, a quitclaim deed is sufficient to pass title. However, if the grantor in fact has no right, title or interest in the property, a quitclaim deed has no validity.

Grant Deeds

A grant deed conveys the fee title of the land described and owned by the grantee. If at a later date the grantor acquires a better title to the land conveyed the grantee immediately acquires the better title without formal documents. A grant deed also contains implied covenants or

warranties. The statutes of most states stipulate that the use of the word grant in a conveyance by which a fee estate is passed implies these covenants on the part of the grantor and his heirs, unless specifically stated otherwise:

1. The grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.
2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

In a special warranty deed, the grantor warrants the title only against defects arising during the period of his ownership of the property and not against defects existing before that time. It usually uses language such as, "by, through or under the grantor but not otherwise."

In a general warranty deed the grantor warrants the title against defects arising at any time, either before or after the grantor became connected with the land. It is a deed where the grantor warrants he holds clear title to the property even if it is examined all the way back to the property's origins. And further that there are no hidden liens or encumbrances on the property.

Why is a discussion of deeds important? The concept of a deed is simplicity itself and embodied in these definitions. However, precisely what an instrument conveys and what it doesn't convey is expressed by the construction and language of the instrument. It is therefore important that a surveyor be well-versed in reading and understanding the sufficient and legal words which are required to be incorporated into a valid deed. Said another way, the words do not need to be

legal jargon but they must communicate the intentions of the parties to the deed clearly. The words of the deed must contain a description of the land and describe the particular parcel. The words must also define and limit the estate being conveyed. These are critical issues to a surveyor engaged in understanding the property conveyed. In most states, a valid deed includes some or all of the following.

Typical Deed Requirements

Competent Parties and Proper Subject Matter

The proper subject matter for a deed is real property and the parties to a deed in real property must be made reasonably certain in the instrument for it to be valid. A deed must include a named grantor, a person conveying the property, and grantee, a person receiving the property. That is the grantee must be named or otherwise designated in such a way as to be ascertainable. The person may be natural or artificial, but capable of taking the title. For example, it has been held that a deed to a dead person is void. However, infants, insane or incompetent persons may be grantees. If the grantee's name is inserted in a deed executed by the grantor without proper authorization, it is void. A deed to a fictitious person is also void, but a deed to a person using an assumed name is not. In short, a deed must have a competent grantor and a grantee capable of holding title. They must have the legal capacity to convey and receive.

A Valid Consideration

A sum of some amount may need to be mentioned in some jurisdictions to validate a deed, but it need not reflect the actual value of the property. In early common law, a consideration was said to be necessary to a valid conveyance, but is no longer required in many states.

A Written or Printed Form

The Statute of Frauds requires that a conveyance of any interest in land must be in writing. The writing must be reasonably explicit at least regarding the essential terms of the conveyance, if not a formal contract.

Sufficient and Legal Wording

A deed must include operative words of conveyance and a valid description. A deed must contain a description sufficient to identify the land conveyed. A sufficient description of the property means a description that is capable of location by a competent surveyor. There is no specification that indicates bearings and distances are included. It suggests that the surveyor is also a gatherer of testimony and evidence in addition to measurements.

It is interesting to note that parol, or oral, evidence can be used in establishing the sufficiency of a legal description in a deed. In other words, testimony may be used to explain latent ambiguities in the deed, uncertainties that are not immediately apparent when looking at the words themselves, but are revealed when looking at outside evidence, such as retracing the boundary on the ground. But it may not be used to overcome patent ambiguities. Patent ambiguities are those that are revealed by looking at the words themselves on the face of the instrument. The idea is derived from the Statute of Frauds. In many conveyances of real property, the buyer, seller, title lawyer, title insurer or mortgage company request a current survey. The purpose of the survey is generally to insure that the property described in the deed is as it was when last described and to monument the location on the ground.

Execution, Signing, Sealing

A deed must be properly executed by the grantor. It must be signed by him or by an attorney-in-fact acting pursuant to a written authorization. Usually, a grantor writes his name in ink in longhand but signatures by mark are valid. Another person at the grantor's request and in his presence may write the grantor's name for him. The grantor's signature need not be at the bottom of the instrument, it just has to appear on it somewhere.

At early common law, it was not necessary that the deed be signed, but every deed of land had to be under seal. Later it was decided that the grantor's name had to appear somewhere in the instrument in order to identify him. However, The Statute of Frauds does require an actual signature to appear on a conveyance of any interest in land. Since the grantor's signature is now

required, it would seem unnecessary that his name also appears in the conveyance, but most courts have retained that requirement. Only the grantor's signature is required; the grantee is deemed bound by the terms and conditions of the grant when he accepts it and his signature to the conveyance is not necessary to bind him thereto.

Although a seal was essential to a valid conveyance at early common law, it is no longer necessary in most states today.

Unlike a will, there are no set formalities to the execution of a conveyance. Neither attestation by witnesses nor acknowledgments by the grantor of his signature are ordinarily necessary. The grantor must usually acknowledge his signature before a notary public as a pre-requisite to recording the conveyance, but the recordation of a deed is not required for it to be valid.

Delivery

A deed is not effective as a transfer of real property until it has been delivered and accepted by the grantee. The determination of whether the instrument has been delivered by the grantor to the grantee is usually the biggest problem in regard to assuring the validity of a conveyance. Delivery is the act, however, by which the deed takes effect and passes title. It is not merely a transfer of the physical possession of the deed, such as the act of handing a deed to the grantee. In fact, the physical transfer itself does not establish delivery, though it sure raises the presumption of it. It is the grantor's intent that is the essence of delivery and it is satisfied if he has shown by word or action his intention that the deed is in force, that title has

passed irrevocably even though actual possession of the property may be postponed. Anything that clearly manifests the intention of the grantor that his deed shall presently become operative and effectual, that he divests control over it, and that the grantee has become the owner, constitutes sufficient delivery.

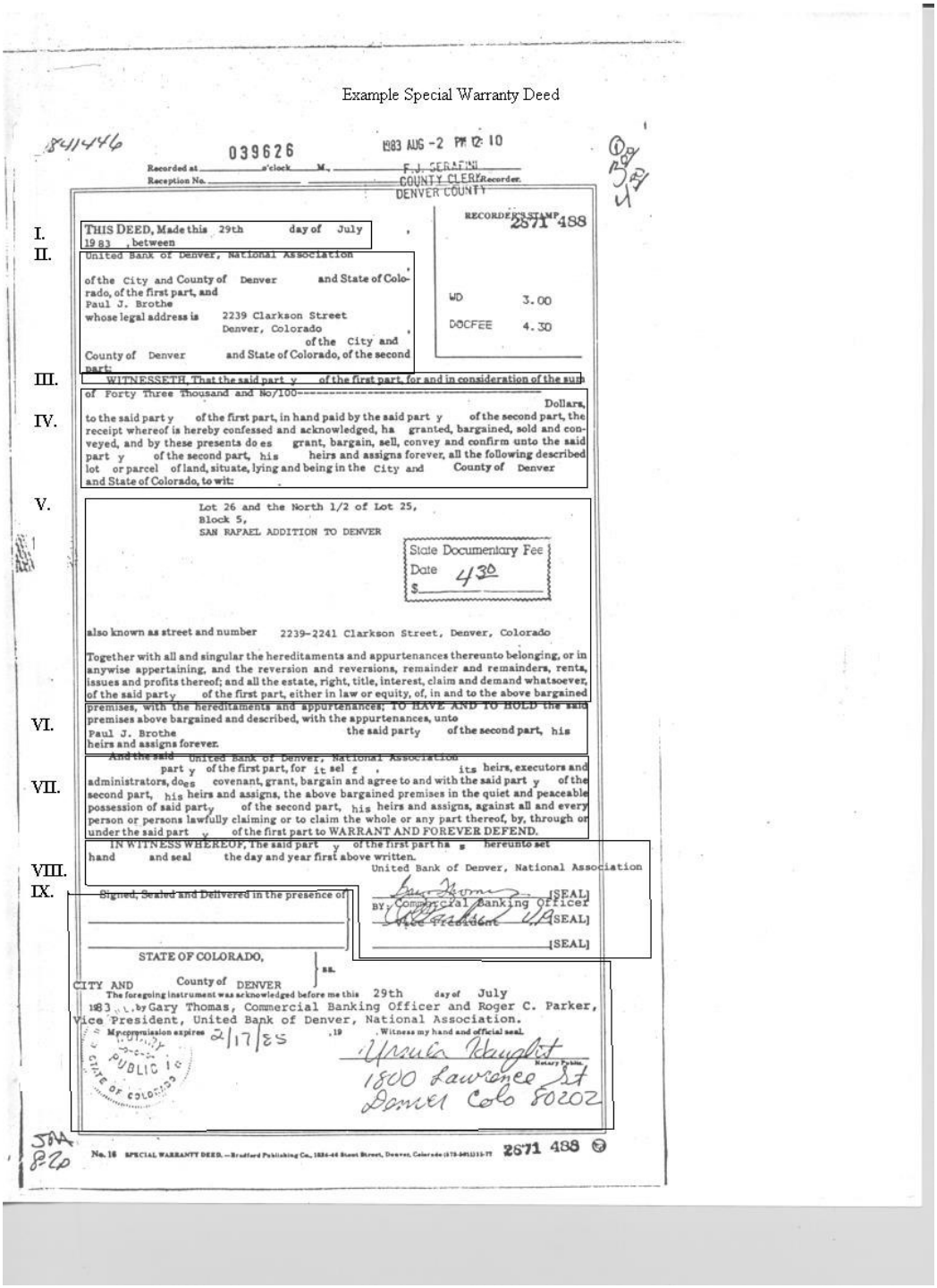
Even though the deed may not have actually been handed to the grantee, it is deemed to be constructively delivered to him where, by agreement of the parties, it is understood to be delivered. The same is presumed when the grantor delivers it to a third party for the benefit of the grantee with the latter's assent.

Acceptance

A conveyance is completed by the grantee's acceptance. The weight of authority supposes acceptance if the conveyance is beneficial to the grantee, even if he is not aware of it - but acceptance of a deed may also be shown by acts, words, or conduct of the grantee. He can indicate an intention to accept, such as execution of an encumbrance on the property, or by other acts of ownership. Acceptance is almost always presumed if the grantee is an infant.

Some Typical Parts of a Deed Document

A conveyance usually consists of specific parts.



Example Special Warranty Deed

841446

039626

1983 AUG -2 PM 12:10

Recorded at ___ o'clock ___ M., Reception No. ___

F.J. SERAFINI COUNTY CLERK and Recorder, DENVER COUNTY

RECORDER'S STAMP 2671 488

WD 3.00

DOCFEE 4.30

I. THIS DEED, Made this 29th day of July 1983, between

II. United Bank of Denver, National Association of the City and County of Denver and State of Colorado, of the first part, and Paul J. Brothe whose legal address is 2239 Clarkson Street Denver, Colorado of the City and County of Denver and State of Colorado, of the second part;

III. WITNESSETH, That the said party of the first part, for and in consideration of the sum of Forty Three Thousand and No/100---------- Dollars,

IV. to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land, situate, lying and being in the City and County of Denver and State of Colorado, to wit:

V. Lot 26 and the North 1/2 of Lot 25,
Block 5,
SAN RAFAEL ADDITION TO DENVER

State Documentary Fee
Date 4.30
$ ___

also known as street and number 2239-2241 Clarkson Street, Denver, Colorado

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances; TO HAVE AND TO HOLD the said

VI. premises above bargained and described, with the appurtenances, unto Paul J. Brothe the said party of the second part, his heirs and assigns forever.

VII. And the said United Bank of Denver, National Association party of the first part, for itself, its heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, the above bargained premises in the quiet and peaceable possession of said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, by, through or under the said party of the first part to WARRANT AND FOREVER DEFEND.

VIII. IN WITNESS WHEREOF, The said party of the first part has hereunto set hand and seal the day and year first above written.

IX. Signed, Sealed and Delivered in the presence of

United Bank of Denver, National Association

BY: Gary Thomas [SEAL]
Commercial Banking Officer

Vice President [SEAL]

[SEAL]

STATE OF COLORADO, } ss.
CITY AND County of DENVER

The foregoing instrument was acknowledged before me this 29th day of July 1983, by Gary Thomas, Commercial Banking Officer and Roger C. Parker, Vice President, United Bank of Denver, National Association.

My commission expires 2/17/85. Witness my hand and official seal.

Notary Public
1800 Lawrence St
Denver Colo 80202

No. 18 SPECIAL WARRANTY DEED. — Bradford Publishing Co., 1826-44 Stout Street, Denver, Colorado (303-893-1313-7) 2671 488

I. Date

II. Names of the parties to the deed

III. Recitals

A. Statements of fact explaining the transactions: they sometimes begin with “Whereas" or " Witnesseth" or " Know all men by these presents".

B. For example: “Witnesseth, that said party of the first part, for, and in consideration of the sum of . . .”

IV. The operative words of conveyance, consideration and receipt – for example, “ . . . to said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold and conveyed . . .” etc.

V. The description of the land conveyed, exceptions or reservations

A. Reservation - A clause in a deed by which the grantor creates and reserves some interest to himself which had no previous existence, but is first called into being by the instrument i.e. rent, or an easement. It is a taking back of an interest conveyed.

B. Exception - Act of not including something from a description, expressly something which would otherwise pass or be included. An exception excludes from the operation of a conveyance some actually existing part of the thing described (i.e. an apple orchard, or a house on the land). It may

cover not only a particular piece of land but fixtures on it, or timber growing on it, or the minerals underneath it.

C. A reservation on the other hand is a clause by which the grantor secures to himself a new thing. Both exceptions and reservations operate exclusively in favor of the grantor.

VI. The habendum

A. The above, I through V, taken together constitute the premises or granting clause. It is followed by the habendum.

B. The habendum clause usually begins with the words, "To have and to hold."

C. It defines the extent of the ownership. The office of the habendum is properly to determine what estate is granted by the deed. However, the granting clause prevails over the habendum. In other words, the habendum may lessen, explain, or qualify but not contradict the estate granted in the premises.

VII. Conditions and Covenants – agreements, conventions or promises of two or more parties by deed in writing, signed, sealed and delivered by which either of the parties pledges himself to the other that something either is done, shall be done, or shall not be done.

VIII. Execution, signatures and seals

IX. Acknowledgement

Elements Not Required of a Valid Deed

Generally speaking, a consideration is not necessary for the validity of a deed. A date is not essential, attestation by witnesses nor an acknowledgment of signatures by a notary. The lack of acknowledgment of a deed by a notary public or similar official does not prevent the conveyance of title. Such an acknowledgment is sometimes required for the recordation of a conveyance, but recordation itself is not required for the deed to be valid. Of course, it is a common practice to record deeds and it can be important for title insurance purposes, but even an unrecorded deed is valid between the grantor and grantee and third parties that have notice of it.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3rd edn, New York: John Wiley and Sons.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1981) *Evidence and Procedures for Boundary Location*, 2nd edn, New York: John Wiley and Sons.

Clark, F.E., Grimes, J.S., Robillard, W.G. and Bouman, L.J. (1987) *A Treatise on the Law of Surveying and Boundaries*, 5th edn, Charlottesville, Virginia: The Michie Company.

Land Boundary I

Jan Van Sickle, PLS

Module 3

Written Intentions in Deeds

Resolving ambiguities and discrepancies between deeds and facts found in surveying involves not only reading the deed itself, but interpreting it. That interpretation can only be sensible in light of the intention of the parties at the time it was executed. And it is frequently the surveyor who is called upon to unravel this mystery.

> 'Excepting senior rights of others and a valid unwritten right of possession, the intentions of the parties to a deed, as expressed by the writings, are the paramount consideration in determining the order of importance of conflicting title elements.' (Brown, Robillard, Wilson 1986: 80)

> 'In the determination of boundary lines as set in a deed, rules yield to the manifest intention of the parties to the extent that this can be ascertained from the language used, which is the controlling considerations.' (Clark, Grimes, Robillard and Bouman 1987:518)

Here is a case in point.

"Rose PIERCE. Plaintiff (Pierce), Cross-defendant and Respondent,

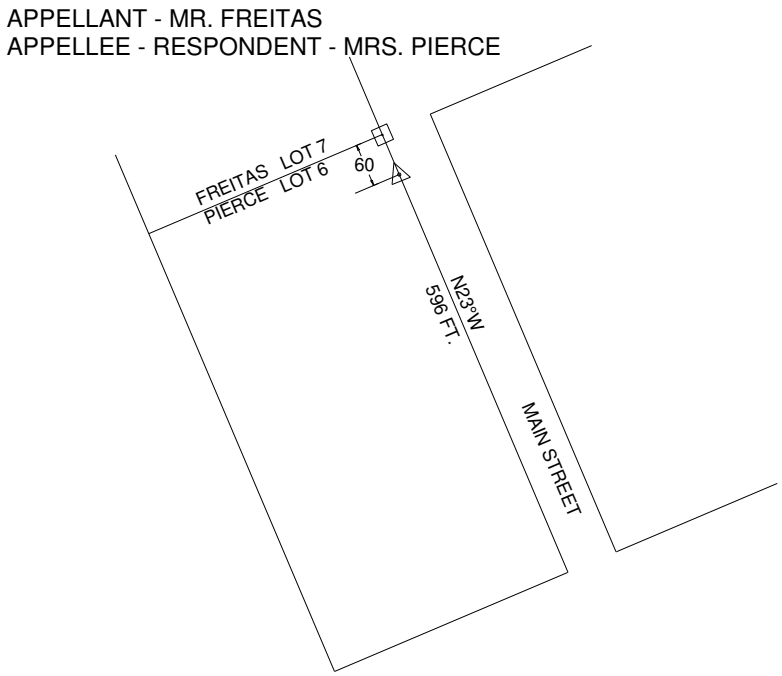
v.

FREITAS. Defendant (Freitas), Cross-complainant and Appellant

Civ. 16180.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955"



Comment 1

This was a disagreement about a strip of land across a lot right on Main Street in Santa Clara, California. Mrs. Rose Pierce received the strip in 1948 from her son Manuel. He had purchased

it from Mr. Freitas, Mrs. Pierce's neighbor, the year before. As it happened this 60-foot strip of land was right along the line between their two lots. Mrs. Pierce said it was a 60-foot strip, but Mr. Freitas said it was a 55-foot strip. So they went to the Superior Court of Santa Clara County, and the court agreed with Mrs. Pierce. Mr. Freitas still thought it was a 55-foot strip of land and brought it to the District Court of Appeals. Here is how the Pacific Reporter tells the story.

"Respondent Rose Vierra Pierce in 1952 instituted a quiet title action with respect to a rectangular parcel of real property with a frontage of 60 feet on the southwest side of Main Street in Santa Clara. The parcel had been acquired from appellant Freitas. The deposit receipt in respondent (Pierce)'s name dated August 21, 1946, described the parcel as 2052 Main Street only. The deed dated January 4, 1947 was taken in the name of the respondent (Pierce)'s son Manuel Vierra. It conveyed also another lot not here involved. It described the front of the rectangular lot in question as follows:

'Beginning at a harrow tooth on the southwesterly line of Main Street, distant thereon North 23° 00' West 596.00 feet from the point of intersection of the said southwesterly line of Main Street with the northwesterly line of Reed Street, . . . ; running thence North 23° 00' West along said southwesterly line of Main Street 60.00 feet to a stake set at the common corner of Lots 6 and 7 . . .' By a grant deed of July 13, 1948 Manuel Vierra and his wife conveyed the parcel to respondent (Pierce), the deed containing exactly the same description as the deed from appellant (Freitas) to Manuel Vierra.

It was the appellant (Freitas)'s contention that the above description in the deed signed by him was the result of a mutual mistake as he had agreed to sell a rectangular lot with a frontage of 55 feet only, the description of which should have read: 'Beginning at a harrow tooth on the

southwesterly line of Main street, distant thereon North 23° 00' West *601 feet* from the point of intersection of the said southwesterly line of Main Street with the northwesterly line of Reed Street . . . ; running thence North 23° 00' West along said southwesterly line of Main Street *55.00 feet* to a stake set at the common corner for Lots 6 and 7 . . . ' In a cross-complaint appellant (Freitas) sought reformation of the deed accordingly.

In support of his contention appellant (Freitas) relied on the escrow instructions signed by him and Manuel Vierra on January 4, 1947, in which the description of the frontage read:"

Comment 2

Note that escrow means a deed, money or something of value delivered to a disinterested person to be delivered to the grantee upon the fulfillment or performance of some act of condition.

"'Beginning at a harrow tooth on the southwesterly line of Main Street distant thereon North 23° 00' West *596.00 feet* from the point of intersection of the said southwesterly line of Main Street with the northwesterly line of Reed Street, . . . ; running thence North 23° 00' West along said southwesterly line of Main Street *55.00 feet* to a stake set at the common corner for Lots 6 and 7 . . . 'It is conceded by appellant (Freitas) that said description is inconsistent because the actual distance of the monuments, the harrow tooth and the stake as therein described, would be 60 feet. He contends, however, that the escrow holder bank without consulting the parties erroneously resolved the discrepancy in favor of the monuments and that the appellant (Freitas), because he could not read, was not aware of either the discrepancy in the escrow instructions or the alleged mistake in the deed.

The evidence further showed that respondent (Pierce) lived in the house on the parcel in question and that if the boundary appellant (Freitas) contended for were accepted the house would be too near the property line to leave the sideline set back required by local law and the parts of the building would even protrude over the property line. Appellant (Freitas) conceded this but testified that respondent (Pierce) had agreed to move the house at her expense. He did not wish to sell 60 feet because that would include part of the garage driveway of his own adjacent home and he did not wish to replace his existing driveway, which curved to the house sold, by a straight one which would require the taking out of one or two trees on his property. Respondent (Pierce) as a witness testified that the moving of the house to conform to a local ordinance had never been mentioned as she had bought 60 feet and there had never been any conversation about buying 55 feet only. She had in 1948 tried to put up a fence on the boundary in accordance with the 60 feet width but appellant (Freitas) had thrown it down and she had abstained from rebuilding because of death threats by appellant (Freitas). She had always paid taxes in accordance with the deed and appellant (Freitas) conceded that he never tried to pay taxes on the five-foot strip in dispute or to have the assessment corrected."

Comment 3

Well, there you have it. Mrs. Pierce contended that the words in the deed description she had were clear and unambiguous. They said 60 feet. And the distances in the description also agreed with the monuments on the ground. Mr. Freitas did not deny that, but he insisted he, the grantor, did not intend to sell a 60-foot strip of land. He said he intended to sell only 55 feet and that was what it had said in the escrow agreement, before the banker changed it. And after all aren't, "the intentions of the parties to a deed, as expressed by the writings" . . . the paramount consideration, (Brown, Robillard, Wilson 1986: 80)? But he also had to agree that the

monuments called for in the deed were 60 feet apart. “Monuments called for in a deed, either directly or by survey, or by reference to a plat which the parties relied on, are subordinate to senior rights, clearly stated contrary intentions, and original line actually marked and surveyed, but are presumed superior to direction, distance or area.” (Brown, Robillard, Wilson 1986: 87).

Comment 4

Here is the court’s decision.

“The court held that respondent (Pierce) was owner in fee of the real property as described in the deeds and refused the reformation sought in the cross-complaint, finding in substance that the allegations on which the action for reformation was based were untrue. . .

On its face, the deed signed by appellant (Freitas) conveys the property as claimed by the respondent (Pierce) without any ambiguity or discrepancy. ‘The presumption is that a written instrument deliberately executed expresses the intention of the parties . . .’ ‘It is for the trial court to determine if this presumption has been overcome.’
(Kayser v. German, 3 Cal2d 478, 486, 44 P 2d 1041, 1044)

Moreover, the escrow instructions on which appellant (Freitas) relies tend to support respondent (Pierce)'s position. In the conflict between the stated monuments which favor respondent (Pierce) and the stated measurement on which appellant (Freitas) relies, the monuments if ascertained are paramount, (§ 2077, subd. 2, Code of Civil Procedure). The escrow holder bank in drawing up the deed evidently followed this rule. It is true that the rule only applies ‘when the construction is doubtful and there are no other sufficient circumstances to determine it’, (§ 2077, Code of Civil

Procedure), and that in the construction of boundaries the intention of the parties is the controlling consideration.

(Machado v. Title Guarantee & Trust Co. 15 Cal.2d 180, 186, 99 P.2d 245.)

But as to their intention and prior oral negotiation the testimony of the parties is in hopeless conflict, appellant (Freitas) testifying that it was agreed to that respondent (Pierce) would take 55 feet and move the house, respondent (Pierce) that she bought 60 feet and did not speak about moving the house. Under said circumstances, the decision of the trial court is binding on this court and does not require citation of authority.

Judgment affirmed

NOURSE, Presiding Justice.
DOOLING and KAUFMAN, JJ., concur."
[Pierce v. Freitas, 131 Cal. App. 2d. 65, 280 P.2d 67 (1955)]

Comment 5

In this case, the court did uphold the principle that the intentions of parties to a deed, *as expressed by the writings*, are the paramount consideration. So even though Mr. Freitas testified that he intended to sell only 55 feet, in fact, he sold 60 feet because the words on the deed said 60 feet, not 55 feet. Further, the description in the deed was not the least bit ambiguous and matched the position of the monuments for which it was called. The harrow tooth and the stake were 60 feet apart, not 55 feet. "For a monument itself to be controlling it must be (1) called for, (2) identifiable and (3) undisturbed." (Brown, Robillard, Wilson 1986: 88).

And it appears that the monuments in this case satisfied all three conditions. Further, the description specifically mentions, "60.00 feet *to* a stake," and there is some significance in that word, "to". "'To a stone,' 'to a stake,' 'to the corner of Lot 16,' 'to the point of beginning,' are

all examples of the usage of the word 'to' where distance, area, or course given yields by presumption to the object or point called for." (Brown, Robillard, Wilson 1986: 94). In other words, even if the distances in the deed description proved to be too short or too long, the courses would still have to terminate on the harrow tooth and the stake because the description stipulates they will run "to" those monuments where they stand. Those calls are locative.

Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3rd edn, New York: John Wiley and Sons.

Clark, F.E., Grimes, J.S., Robillard, W.G. and Bouman, L.J. (1987) *A Treatise on the Law of Surveying and Boundaries*, 5th edn, Charlottesville, Virginia: The Michie Company.

Land Boundary I

Jan Van Sickle, PLS

Module 4

Written Intentions in Deeds

> "A deed merely furnishes a means of locating a boundary. Where the boundary actually exists is a subject of independent inquiry." (Clark, Grimes, Robillard and Bouman 1987:518)

PARKMAN et. al. v. LUDLUM.

4 Div. 763.

Supreme Court of Alabama

Dec. 17, 1953

Comment 1

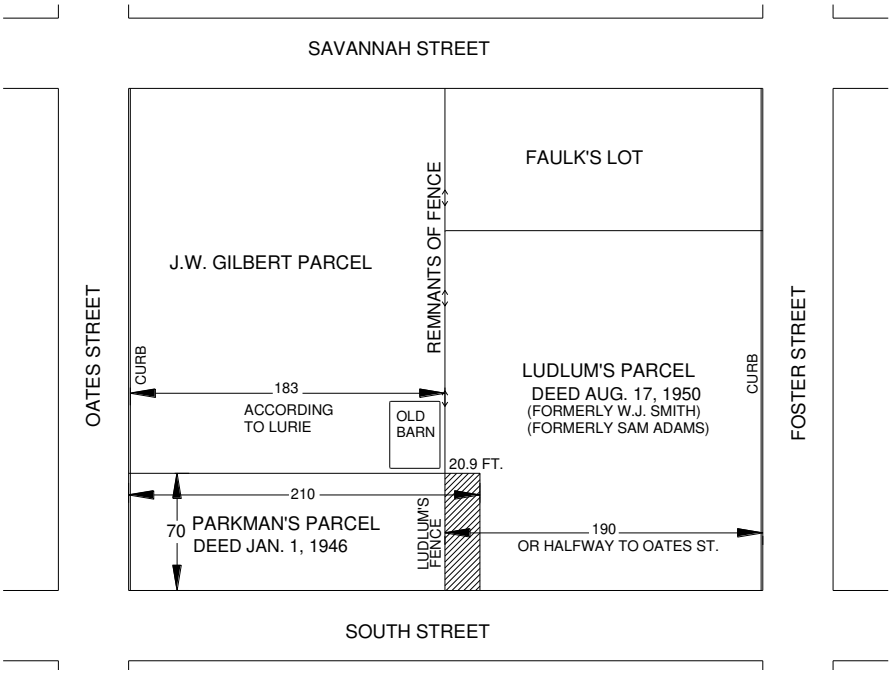
The Parkmans were not happy with the situation in Dothan, Alabama. The lot they bought from Reba Taylor was 70 feet wide and 210 feet long. It clearly said so in their deed. So how could Mr. Ludlum, their neighbor, build a fence some 20 feet into their property? Mr. Ludlum said that the line on which he built the fence was, 'well-defined and long-established.' The Parkmans disagreed and filed a suit to ask the judge at the Circuit Court of Houston County Alabama to establish the disputed boundary once and for all. Unfortunately, Judge Halstead agreed with Mr. Ludlum. Still not persuaded the Parkmans carried their case to the Alabama Supreme court. The story is continued in the 69 Southern Reporter, 2d Series.

"Appellant and complainants (Parkmans) below, have appealed from a decree establishing a boundary line. Appellant (Parkmans) and appellee (Ludlum) have conveyances to lands to the City of Dothan that are contiguous and they derived title from a common source, Sam. H. Adams. Adams conveyed directly to appellee, Ludlum, but appellant, Parkmans trace their title back to Adams through three mesne conveyances. The question of adverse possession is not here involved."

Comment 2

A Mesne conveyance just means that there were intermediate or intervening owners in the chain of title. Sam Adams had sold the property to James Taylor. James Taylor sold it to Reba Taylor. And Reba Taylor sold it to the Parkmans in 1946. Whereas in 1950 Mr. Ludlum bought his lot, called the W.J. Smith lot', right next door to the Parkmans directly from Sam Adams.

The appellant is the party who takes an appeal from one court or jurisdiction to another. The appellee is the party in a cause against whom an appeal is taken; that is, the party who has an interest adverse to setting aside or reversing the judgment. An appellee is sometimes called a respondent. It should be noted that a party's status as appellant or appellee does not necessarily bear any relation to his status as plaintiff or defendant in the lower court.



"The properties comprise the south side of a block fronting South Street between Oates Street on the west and Foster Street on the east. The total footage from the intersection of South and Oates Streets to the intersection of South and Foster Streets along the north side of South Street, measuring from the back of the curbs at each intersection is 379.1 ft. Appellant (Parkmans)' deed calls for 210 feet along South Street; appellee (Ludlum)'s deed calls for 190 feet along South Street, a total of 400 feet, necessarily making an overlap of 20.9 feet.

It is the east boundary of the Parkmans (appellant) lot and the west boundary of the Ludlum (appellee) lot, or the North and South line between the lots, which is disputed. Complainants (Parkmans) set out their title in their bill, alleged that appellee (Ludlum) had built a fence on their property and prayed that the court establishes the boundary line between the properties at a

point on South Street, define and locate the line and establish judicial markers on the line so defined.

Appellee (Ludlum) answered, setting up his title and claiming the true line to be west of where complainants (Parkmans) asserted it to be; that the west line of his property, the W. J. Smith lot, is a well-defined and long-established line and that he has been in possession of all the lands up to said well defined and established boundary line since the property was conveyed to him.

The deed to appellant (Parkmans), dated January 1, 1946, described the property as follows: 'One house and lot in the City of Dothan, Alabama, located on the east side of South Oates Street at the north side of South St., and further described as follows: Beginning at the southwest corner of the lot formerly owned by C. E. Harman, now the property of J. W. Gilbert, thence running along the east side of Oates St., Seventy (70) ft. to South St.; *thence east along the north side of Smith St. Two Hundred Ten (210) ft.; thence north along the west boundary line of lot formerly owned by W.J. Smith, now owned by Sam H. Adams, Seventy (70) ft*.; thence west Two Hundred Ten (210) ft, parallel with South St., to the starting point. Said lot containing one third acre and being the same property described in deed from Sam H. Adams, and wife Ruth Adams to James C. Taylor dated Aug. 5th, 1942, and recorded in Book 71 at page 342 of the Houston County Probate Office, and known as the former residence and lot of Annie H. and J. P. Adams. (Italics supplied.)

Appellee (Ludlum)'s deed dated August 17, 1950, described his property as follows:

'One vacant lot situated on the west side of South Foster Street in the City of Dothan, Houston County, Alabama, and more particularly described as follows: Commencing at the crossing of Foster and South Street and *running west half way to Oates Street; thence North 70 yards to lot formerly known as the McKeachern lot, but now known as Faulk lot*; thence cast to Foster Street; thence South back to starting point, containing one acre, more or less. Said lot more particularly described as follows: Commencing at the northwest corner of Foster and South Streets, and running thence northward along the west boundary line of Foster Street 215 feet to Faulks lot; thence westward along the line of Faulk's lot and parallel with South Street 190 feet; *thence Southward parallel with Foster Street 215 Feet to the north boundary line of said South Street; thence Eastward along the north boundary line of South Street 190 feet to the starting point.'* (Italics supplied.)

The cause was submitted on bill and answer and testimony taken orally before the court. The decree was in effect a finding in favor of the appellee (Ludlum).

Appellant (Parkmans) urges that the court erred in using a fictitious landmark or monument in fixing the boundary rather than metes and distances as fixed on the deeds. This assignment is directed to the following paragraph of the decree:

'It is ordered. adjudged and decreed by the Court that the true boundary line between the Parkmans Lot and the Ludlum Lot, the lots owned by the plaintiffs and defendant in this case and involved in this suit, be and the same is hereby established as a straight line beginning at the northern extremity of the old brick foundation of a barn once located thereon at the southeast

corner of the J. W. Gilbert lot and extending South along said brick foundation, the old rusted wire fence and rotten or decayed fence posts, above and below the surface of the ground to South Street in the City of Dothan, Alabama.'

The J. W. Gilbert mentioned in appellant (Parkmans)' deed, called as a witness for appellee (Ludlum), testified that he purchased the lot lying north of the Parkmans in 1917 and lived on it for several years; that he built a cypress picket fence from his southeast corner north to Savannah Street (which is the north boundary of the block in which the property lies and presumably is parallel to South Street); that he had a paved stall in the southeast corner of his lot and the pavement was still there; that a corner of a barn joined his southeast corner; that the barn was built on a brick foundation. the east side of which extended south about 30 feet and from the barn, there was a fence extending south to the north side of South Street; that this line was straight all the way through the block from South Street to Savannah Street. He further testified that the barn had been moved and he did not know whether the fences were up or not, except that he did identify from a picture the cypress picket fence which had been the boundary on his property. He also stated that the W. J. Smith lot, which was east of his lot and the Parkmans lot was enclosed by fences, one of which was the fence extending from the barn to South Street.

Mr. J. N. Massey, a witness for appellee (Ludlum) testified that he had known the land since 1917; he knew about the barn and the fence which extended both north and south from the corners of the barn and he cultivated the land up to the fence for several years.

The appellee (Ludlum) testified that he erected his fence from the southeast corner of the Gilbert lot, along the brick foundation south to South Street following old fence posts, which had rotted, to the ground. He had been familiar with the property since 1945 and an old fence had extended from the Gilbert corner south to South Street when he first knew the property. He had moved opposite the property in 1945 and still lived on the south side of South Street.

Mr. J. W. Parkmans, testifying for complainants (Parkmans), stated that they went into possession of the 210 ft. called for by their deed; that no one pointed out the boundary lines to them when they bought; that he did not know anything about the W. J. Smith lot except that he saw it mentioned in the deed; that he saw the old fence on the Gilbert lot but no fence extended to South Street, when he purchased the lot.

The surveyor, Mr. Milton Lurie, called by complainants (Parkmans), found no evidence of fences or old landmarks on the line claimed by appellant (Parkmans), but did find evidence of a boundary line 183 feet east of the back of the curb on Oates Street, which was a projection of the line running south from Savannah Street, along the paling fence on the Gilbert property. He further testified that he could find no information as to the width of either Oates or Foster Streets in the years 1918-21 (about the time title to all the property came into the Adams family). Also, there was no evidence of when curbs were installed on Foster and Oates Street.

T. E. Buntin, Dothan, for appellant (Parkmans)s (Parkmans).

W. Perry Calhoun, Dothan, and Halstead & Whiddon, Headland, for appellee (Ludlum).

MERRILL, Justice."

Comment 3

So there is the case. Mr. Ludlum testified that he built a fence following the remains of a fence that had been there since at least 1917. Mr Gilbert spoke of a barn on a brick foundation at the southeast corner of his property. It was at the foundation of that barn that Mr. Ludlum began his fence. Mr. J.N. Massey's testimony corroborated Mr. Gilbert, he said he knew of the original fence and barn. A surveyor Mr. Lurie also spoke of evidence of a fence on the Gilbert property in his testimony. There seems to be a good deal of evidence about the fence and the barn foundation.

But this fence is in direct contradiction with the Parkmans's deed. Mr. J. W. Parkmans, said he knew about the old fence across Mr. J. W. Gilberts lot, but there was no fence across his property that he could see. So the Parkmans simply went into possession of the 210 feet called for by their deed. Imagine their surprise when Mr. Ludlum came more than 20 feet onto what they considered their property and started building a fence.

Here is the court's decision

"Suit to establish disputed boundary line. The Circuit Court, Houston County, D. C. Halstead, J., entered decree favoring defendant (Ludlum), and complainants (Parkmans) appealed.

The Supreme Court, Merrill, J., held that where witnesses and photographs testified to existence of brick foundation and rotted fence posts, these markings were not fictitious landmarks, and decree establishing boundary lines was not improper because it was based on these landmarks.

It is clear that the court was not using a fictitious landmark when the decree mentioned the brick foundation of the barn at the Gilbert corner and the old line of fence posts to South Street as monuments in determining the true boundary. In addition to the evidence of the witnesses, two pictures showing the fences are before us and one of them shows the brick foundation of the barn.

Appellants (Parkmans)' other assignment of error is that the court erred in finding for appellee (Ludlum) in the face of an antedated and prior recorded deed in conflict with the appellee (Ludlum)'s deed, and it is insisted that where there is a common source of title, the older deed prevails in disputed boundary cases. Dunn v. Stratton, 160 Miss. 1, 133 So. 140; Dupont v, Percy, La.App., 28 Sold 359.

We do not think this principle is applicable to the instant case. It is true that title to all the property was in Sam H. Adams prior to 1942, but the parcels were separate lots vested in Adams at separate times and as far back as 1906. W. J. Smith had conveyed appellee (Ludlum)'s lot describing it as follows: ‘One town lot in Dothan Alabama commencing at the crossing of Foster and South St, and running west half way to Oates St, thence North 70 yards to McEachern lot; Thence east to Foster St. thence South back to the starting point.’ This deed and subsequent

deeds were recorded.

Appellee (Ludlum)'s answer also carried exhibits of recorded deeds in appellants (Parkmans)' chain of title from 1905 to the present. Two deeds dated 1905 and 1908 described the west boundary as ‘thence North along W. J. Smith's lot 70 feet’; the next one dated 1918 said, ‘thence North along the West boundary of lot formerly owned by W. J. Smith, but now the property of C. S. Roby 70 feet’ and all the other deeds described it as appears in appellants (Parkmans)' deed.

The issue is one of fact and the court made the following finding of fact:
‘It is clear and evident from the deed of Sam H. Adams to James C. Taylor that he, Sam H. Adams, did not intend to convey, and did not convey to James C. Taylor, any part or portion of the 'Ludlum Lot' which he owned, for his deed to James C. Taylor in the description of the property conveyed therein, contains the following:

‘Beginning at the southwest corner of lot formerly owned by C. E. Harman, now the property of J. W. Gilbert and running along the East side of South Oates Street seventy (70) feet to South Street; Thence East along the North Side of South Street two hundred and ten (210) feet; *thence North along the West Boundary of lot formerly owned by W. J. Smith now the property of Sam H. Adams seventy (70)* feet’

This same description is contained in the decd from James C. Taylor to Reba Taylor and Reba Taylor to Plaintiffs.

While the deeds furnished the means of locating the boundaries, their actual locations were an independent inquiry. Middlebrooks v. Sanders, 180 Al.. 407, 61 So. 898.

Affirmed.

LIVINGSTON C. J., and LAWSON and STAKELY, JJ. concur.

Decree affirmed.

1. Boundaries

Brick foundation and line of rotted fence posts, the existence of which was testified to by witnesses and by photographs, were not fictitious landmarks, and decree which established the boundary line was not improper because based on these landmarks.

2. Boundaries

In a suit to establish a boundary, where descriptions in the deed overlapped, evidence was sufficient to support the finding that the boundary followed the line of rotted fence posts extending to the corner of brick foundation.

3. Boundaries

Where title to the complainant (Parkmans)'s and defendant (Ludlum)'s lots vested in parties' predecessor in the title at different times, and where prior deeds to complainants (Parkmans)' lot described it as bounded by that lot which subsequently became defendant (Ludlum)'s antedated and prior recorded deed which was in conflict with defendant (Ludlum)'s deed, did not control the establishment of a boundary.

4. Boundaries

While deeds furnish the means of locating boundaries, the actual location is an independent inquiry."

Comment 4

To a large degree, it seems this case was decided on the "ancient fence" doctrine.

"Ancient fences, built and maintained on what were supposed to be the boundaries of a parcel of land for a long period of time prior to the dispute, may be held to locate the property rights and boundaries as against recent surveys with which they may conflict. This is a restatement of the 'ancient fence' doctrine that is supported by case law.

In order to utilize a fence as the true and correct dividing line, the fence itself must be supported by testimony or parol evidence indicating the fence was built on the correct original line." (Clark, Grimes, Robillard and Bouman 1987: 371)

Well, the location of the remains of the old fence in this case certainly was supported by testimony, from people who acted as if they thought it was on the correct original line. But what about the fact that the deed to the Parkmans was dated January 1, 1946, and the deed to Mr. Ludlum was dated August 17, 1950? And they both have their deeds from a common

source, Sam H. Adams. Adams conveyed directly to Mr. Ludlum. The Parkmans trace their title back to Adams through three mesne conveyances.

It seems that the Parkmans have the senior deed. Senior rights are usually superior in standing to the written intentions of the parties to a deed. "Where two adjoining landowners claim title from a common source, the last deed must absorb any shortage in acreage" (Clark, Grimes, Robillard and Bouman 1987: 294). Yes, these principles are important, but there appears to be a critical difference here, the court said, " We do not think this principle is applicable to the instant case."

Part of the reason may be that the Ludlum parcel and the Parkmans parcel were vested in Sam Adams at different times. Part of the reason may be that the Parkmans deed description said that their eastern boundary was the western boundary of the W.J. Smith parcel, which is now Mr. Ludlum's parcel. And Mr. Ludlum offered evidence that this call had shown up in previous conveyances of what is now the Parkmans property. And finally, it is important to remember that a court may not always follow guidelines such as the principle that senior rights are superior to the written intentions of the parties to a deed, if the court feels the evidence of the particular case shows that the principle does not apply.

Clark, F.E., Grimes, J.S., Robillard, W.G. and Bouman, L.J. (1987) *A Treatise on the Law of Surveying and Boundaries*, 5th edn, Charlottesville, Virginia: The Michie Company.