

**THE LAND SURVEYOR'S GUIDE
TO THE SUPREME COURT OF MONTANA**

**A REFERENCE TEXT SUPPORTING
THE CONTINUING EDUCATION
OF LAND SURVEYORS**

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2011**

**IMPORTANT, INFORMATIVE AND INTERESTING CASES
INVOLVING BOUNDARIES, DESCRIPTIONS,
SURVEYS AND RELATED PRINCIPLES
OF LAW AND EQUITY**

**THIS BOOK IS DEDICATED
TO THE MEMORY OF
TWO GREAT MONTANA LAND SURVEYORS**

**TINY TILLOTSON
MONTANA'S MOST OUTSTANDING
SURVEYOR, AUTHOR & PHILOSOPHER**

AND

**RICK GUSTINE
WHO DEDICATED THE LAST QUARTER OF HIS LIFE
TO BRINGING THE LAW TO MONTANA SURVEYORS**

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INTRODUCTION

Although the typical modern land surveyor, being highly skilled and versatile, wears many hats and performs a wide variety of functions serving many different purposes, the most basic role of the land surveyor in our society remains what it has always been, as the principal provider of a professional level of expertise on boundary location issues. The primary reason that the practice of land surveying is limited to those who have demonstrated that they are capable of functioning as professional decision makers, is to eliminate the negative consequences of incompetent boundary surveys, which can cause serious economic and social problems when improperly surveyed boundaries are relied upon in the use and development of land, by creating a group of qualified professionals that everyone can rely upon to deal objectively and diligently with boundary issues. Surveyors can be called upon either to create new boundaries or to retrace and restore existing boundaries, and as we will observe, these represent significantly different functions, with very different legal implications. In either case however, land owners expect the surveyor to provide a result that they can rely upon, because boundaries that they cannot rely upon are obviously of no value to them, and in fact can cause expensive problems, potentially resulting in liability for both the land owners and the surveyor. While the right of land owners to rely on new boundaries marked on the ground during an original survey is generally absolute, whenever existing boundaries are surveyed several important questions with significant legal implications appear, concerning the needs, expectations and responsibilities of the land owners relating to the survey and their boundaries, how well the land owners understand the legal effect of a retracement survey, to what extent the land owners are legally entitled to rely on the survey, and the possible presence of other legal factors or conditions that may have an impact on the boundary in question. Obviously, whenever a survey of an existing boundary is requested, it must be presumed that the land owner intends to rely on that boundary for some purpose, and therefore expects the surveyor to locate and mark the boundary in a manner that the land owner can make use of with complete confidence, so the essential question becomes whether or not the surveyed boundary is legally supportable, justifying the land owner's belief

that the corners and lines marked on the ground during the survey represent definite boundaries that the land owner can safely rely upon.

The typical modern surveyor is a master of measurement science, at least as it applies to land, and is well equipped with superb technological tools for that purpose, so if boundaries were controlled entirely by measurements the law would not be a factor, and the surveyor would have no particular motivation to learn about the law. Boundaries, and related land rights issues that surveyors often encounter however, are controlled by evidence, making it essential for the surveyor to recognize the potential value of all the conditions observed on the ground by the surveyor as evidence, to appreciate the importance of discovering all the evidence, and to understand which evidence controls the boundary location. Measurements themselves can be evidence, but as every surveyor should already know, measurements can become potentially controlling evidence only in the absence of any of the many higher and stronger forms of evidence, which are quite seldom truly absent, although their presence may well go unrecognized. Many surveyors however, choose to take the position that they are measurement experts only, with no need or reason to learn the law, and of course they are entitled to make that decision, and no one can require a professional to do anything that the professional feels unqualified to do. Some surveyors believe that the practice of land surveying is strictly limited to applying existing numerical values of record to the ground, therefore measurement and computer skills are all the surveyor really needs, and indeed it is possible to have a full career in certain branches of the surveying profession based entirely on technical knowledge, so in fact there is no absolute necessity for every surveyor to know every aspect of land rights law. The surveyor who intends to participate as a professional in projects involving land rights however, should realize that all professionals bear a fundamental burden to operate in good faith, in all respects, at all times, toward all parties, which means respecting and honoring all land rights, both public and private. In order to carry that professional burden, the surveyor is obligated to protect the land rights of all parties by retracing and resolving existing boundaries in a manner that is legally supportable, so that the surveyed boundary is of value, and the land can be safely developed without

unfortunate legal consequences, which means that the survey must be based upon the best available evidence, rather than on measurements alone, in disregard for superior evidence. Since land rights of all kinds are controlled by evidence, the basic premise set forth here is that the surveyor can clearly benefit from knowing what forms of evidence have historically been upheld as controlling, and also from learning to recognize what does or does not constitute a conveyance or potential transfer of land, which as we will see, is not always accurately reflected by the descriptions in the relevant deeds.

It should be understood that the goal for surveyors, in learning about the law, is not to come to independent conclusions about the legal principles that are involved in land rights controversies, or attempt to apply those principles independently, but simply to objectively observe those principles in action, and thereby come to realize the great importance that they can have on land rights in any given situation. By observing how land rights conflicts are judicially resolved, the surveyor can develop a better appreciation of how the work of the surveyor interacts with the law, and a better understanding of why surveys sometimes control land rights and sometimes do not. Engaging in education of this type is not intended to enable the surveyor to claim to be an expert on the law, it is intended only to familiarize the surveyor with situations that are similar to those that the surveyor may encounter, so the surveyor can see how such situations typically play out, and can recognize the possible presence of important legal factors that may determine the outcome, when the surveyor is confronted with comparable circumstances. Learning about the law can enable surveyors to point out potentially problematic situations, and thereby be of greater assistance to both land owners and attorneys, who are entitled to expect the surveyor on their project team to be able to demonstrate a professional level of knowledge, the ability to understand such matters, and the ability to contribute relevant information and communicate about land rights issues effectively. Only judges and attorneys need to know the procedural aspects of the law that are applicable in the courtroom, but surveyors should at least have a sound grasp of the basic principles that govern the creation and control of boundaries, in order to be able to understand how and why rights can be gained and lost through the operation

of law. The surveyor has no authority to adjudicate land rights, and should never set out to do so, but the surveyor does need to understand the rights of all parties, public and private, well enough to recognize those rights when they appear, and most critically, to avoid damaging them. It's essential for the surveyor to realize that the primary role of the retracement surveyor is that of a gatherer of evidence, and nothing the surveyor does independently, such as laying out or staking a boundary of record, can have any binding effect on any land owners, since no surveyor has any authority to alter existing or established boundaries in any way. Therefore, the prudent surveyor focuses first and foremost on fulfilling that responsibility to thoroughly and diligently acquire all the available evidence, rather than proceeding to treat the measured location of the boundary in question as representing an arbitrary demarcation of ownership. In summary, the surveyor is authorized only to honor and follow the law, and is charged with knowing it and respecting it, but the surveyor is not authorized to practice or question the wisdom of the law, and should strive to maintain a perspective on land rights issues that is completely professional and objective.

The purpose of this book is to review and discuss decisions of the Supreme Court of Montana that have guided and influenced the development of those aspects of the law that matter most to surveyors, in order to provide surveyors with insight regarding how the Court has dealt with situations in which land rights disputes occur, and to allow surveyors to see which factors the Court has found to be most important and decisive in such situations. It should be understood that statements made by the Court are not intended to constitute an instruction manual for surveyors, and even when specifically discussing surveys, the Court typically has no intention of laying down specific technical rules of practice. The prudent surveyor may well observe however, those practices and forms of behavior that find favor with the Court, and conversely, those ideas and assertions that the Court consistently rejects or disapproves, from which themes and patterns defining advisable professional behavior may be seen to emerge. Among the items that the surveyor can and should take notice of, are the instances in which surveys are upheld as controlling, and of at least equal importance, the conditions and circumstances under which surveys do not control. As we

will see, in some cases surveys were done that had no legal or controlling effect, while in many other cases surveys were not done when they clearly should have been, and the consequences of those failures to obtain surveys are quite noteworthy as well. While there are some cases in which the Court has been dismissive toward surveys or critical of surveyors, there are at least as many cases that are affirmative of the value of surveys, particularly those done taking all available evidence into account and treating all evidence with the highest level of respect. Many of the cases do not directly involve surveys or surveyors at all, but these cases can also be highly enlightening to surveyors, since they demonstrate that it is typically the acts of the parties themselves that control the legal status of their land rights. One elementary lesson of a general nature to be learned is that a simplistic understanding of the statutes, resulting from merely reading the statutes at face value is insufficient, because only the legal interpretation of the statutes performed by the Court itself fully captures the spirit of the law, which ultimately controls over the mere letter of the law. The law is not to be applied in unintended ways, and was obviously never intended to facilitate injustice, so the Court wisely follows the spirit of the law whenever necessary to achieve results that are in line with equity and justice. Another essential lesson to be gleaned is the value of good faith action following the spirit of the law, as only rarely is a party who endeavored to faithfully follow the spirit of the law punished or penalized, while many instances will be noted in which a party who relied upon a literal and rigid reading of the letter of the law meets with defeat. As we will discover, all of the powerful principles of law that can apply to land rights are of no avail to a party whose actions run counter to the spirit of the law, or reveal an absence of good faith, since nothing in the entire realm of land rights law can overcome these most fundamental tenets governing proper behavior in our society.

It should be understood that only reading objectively, with an open mind and with the intention of learning and appreciating the wisdom of the Court, rather than merely judging and criticizing the results of these cases based on personal preferences and inclinations, will result in a beneficial experience for the reader. Most surveyors are already aware that surveys do not always control boundary locations, and often do not control ownership

rights, but the primary goal of the surveyor in reading this book should be to develop an understanding of why that is so. The instincts and training of the typical surveyor tend to cause surveyors to feel that a party who obtained a survey should always prevail over a party who failed to do so, but one valuable lesson presented here is that the law treats surveys only as evidence, and not as absolute, therefore surveys can be negated and overcome, even when properly done. In addition, the reader should remain aware that the circumstances of each case are unique, and it cannot be presumed that situations which appear similar are in fact equivalent, since the presence or absence of even one important factor can change the outcome. We will bear witness herein to incredible, bizarre, ridiculous and comical mistakes, made by both land owners and surveyors, and observe how the Court handles the unenviable task of dealing with the legal consequences of ignorance, bungling and mistakes of every kind relating to boundaries. The astute reader will observe that relatively few of the cases presented herein were decided on the basis of statutory constraints, most were decided on the basis of time honored principles of common law, a number of which have been adopted by Montana and codified into statutory form, some as the result of the most historic decisions of the Court, and those principles relating to boundary and description resolution constitute the principal focus of this book. The efforts of the Court to do justice and uphold time honored principles of equity are richly displayed herein, for the potential benefit of all those who are interested, and each surveyor is free to decide how much of his or her time this learning exercise merits. It is truly amazing how much can be learned when reading with an open mind, so each reader is encouraged to read not for the purpose of scrutinizing, denying or rejecting the positions taken by the Court with respect to surveys and surveyors, but to understand and accept the wisdom of the Court. Those who find themselves consistently shaking their heads and lamenting that the Court was wrong, would be well advised to hit the reset button and start over, prepared to let go of personal notions that run contrary to the wisdom of the Court, approaching this material as an exercise in learning, rather than an exercise in criticism. Finally, it will be seen that the cases discussed all represent excellent examples of problem solving, so surveyors can and should learn from observing the organized and methodical thought process

employed by the Court, and strive to organize and develop their own problem solving skills along the same lines.

It is hoped that even those with little concern for the law itself may find this book interesting from both a historical perspective and a human interest perspective, so to make this learning experience palatable, the cases are presented here in a manner that is intended to provide both enjoyable reading and enlightenment. As opposed to a dry and tedious recital of statutes, each case presented herein is an interesting real life story, involving people from all walks of life, from the wealthy to the impoverished and desperate, which holds one or more valuable lessons regarding the consequences of sometimes foolish or outrageous human behavior. A small number of the most highly significant cases from the territorial period are first briefly reviewed, as a prelude to the statehood era, then 75 cases from the period of statehood up to the end of the twentieth century are featured, with a view toward touching and covering the most significant legal precedents, landmarks and milestones, that fall within the scope of topics indicated in the title of this book. Each of these featured cases begins with an introduction, followed by a timeline objectively presenting all the known facts relevant to the controversy at hand, and concludes with analysis of the critical aspects of the legal proceedings and the outcome. It's always important to read the timeline quite carefully, with an appreciation for the potential significance of each factual item mentioned, and it's also often critical to note the passage of time between successive items, which is quite extensive in a large number of the cases, emphasizing the potentially great value of seemingly minor points of evidence that often had their origin in the distant past. In addition to the wide variety of personalities that will be seen, the cases also cover the complete range of physical conditions, representing locations in every part of Montana, from urban scenarios to cases set in the most remote areas of the state, so those whose work takes place primarily in rural areas will discover stories about the kind of situations and controversies that they can relate to, just as will those who are more familiar with issues involving platted city lots. Since highly respected Montana attorney Greg Schultz has focused on documenting Montana case law for land surveyors in his wonderful series of articles in *The Treasure State*

Surveyor since 2000, it is left for this author to focus on the more distant past, thereby creating a background canvas, upon which others can build, by portraying future controversies. Legal citations are not presented in footnote form within the content portion of the book, citations for all of the Montana cases referenced in the text are instead provided at the end of the book, and are indexed both alphabetically and by topic, so the surveyor can access and read the full text of any given case, many of which are available for free through the Court's website. All interest in this book is genuinely appreciated, whether complimentary or critical, and all questions and other comments are most welcome. This effort merely opens a door upon the subject matter discussed herein, intended to introduce surveyors to the vast body of public information on the law, which may serve to broaden and fortify their existing professional knowledge, and any surveyors inclined to provide input that will expand upon the start represented here, by contributing additional information that may serve to enhance the legal knowledge base of our noble land surveying profession, now or in the future, are very heartily encouraged and invited to do so.

The following topics are the principal focus of this book:

ADVERSE POSSESSION	BOUNDARY RESOLUTION
DESCRIPTION REFORMATION	DESCRIPTION RESOLUTION
ENCROACHMENTS	ESTOPPEL
EXTRINSIC EVIDENCE	LACHES
MINING CLAIMS	MONUMENTATION
NOTICE	PLATS & SURVEY DRAWINGS
PRACTICAL LOCATION	RIPARIAN RIGHTS
ROADS, STEEETS & HIGHWAYS	STATUTE OF FRAUDS
SURVEYOR LIABILITY	TESTIMONIAL EVIDENCE

Although the following topics are involved to some extent in the cases that are included in this book, complete coverage of these and other related legal topics is beyond the scope of this book.

ABANDONMENT	CHAMPERTY	CEMETARIES
CONDEMNATION	COVENANTS	DEDICATION
DIVORCE	DOWER	EASEMENTS
EMINENT DOMAIN	ESCHEAT	ESCROW
FRAUD	FORGERY	HOMESTEADS
INHERITANCE	LICENSES	LEASES
LIS PENDENS	MARKETABILITY	MINERAL RIGHTS
MORTGAGES	PARTITIONING	PROBATE
TAXATION	TRUSTS	UTILITIES
VACATION	WATER RIGHTS	WILLS

THE TERRITORIAL PERIOD (1868 - 1889)

The Supreme Court of the Territory of Montana was created in 1864 and documentation of the decisions of the Court from at least as early as 1868, is publicly available in The Montana Reporter. Relatively few of the Court's decisions on land rights issues from this period remain especially relevant today, but they were certainly very important at the time, and they provide a good backdrop against which to view the decisions that have been handed down by the Court since the arrival of statehood. So before proceeding to engage in a more detailed examination of the more recent cases, we will begin with a brief review of some decisions that were among the most important and frequently cited during the early years, and some that established precedents in the field of land rights, which have continued to exert a strong influence over the many subsequent decades of jurisprudence in Montana. The early land rights decisions of the Court distinctly reflect the frontier status of Montana during this period, and particularly its wealth of natural resources, as a majority of the very early litigation involving boundary and description issues took place as a result of conflicts that developed between miners. There are significant legal differences of course, between the creation of mining claim boundaries and the creation of boundaries of other kinds that are more common and seem more typical to us today, but there are also many fundamental and equitable principles involved in these cases that apply to boundaries and land rights generally. So it may be worth taking note of some of the major decisions of the Court relating to mining claim descriptions and boundaries, in order to provide context and perspective as to how the Court views and treats boundary disputes and land rights conflicts in general.

In 1878, the Court was confronted with a conflict between miners, claiming rights to substantially the same area, in the case of *Belk v Meagher*. A valid mining claim was originally established in a certain location in 1864, and it was subsequently used and conveyed by various parties, without any disputes arising over the years, until 1876, when it went unused, and was therefore in danger of ceasing to exist at the close of that year, which would then leave the ground legally open to anyone, after that point in time. In December of 1876, Belk, apparently attempting to get the drop on anyone else who might be thinking of claiming the spot, performed the acts required by law to establish a claim of his own, known as a relocation, which included properly marking his claim on the ground and properly filing notice

of it, in accordance with the law. In February of 1877 however, Meagher came along and did the same thing, in essentially the same location, entirely ignoring any evidence or indication he may have had of the existence of Belk's claim. Belk simply rested his claim upon being first in time, while Meagher asserted that Belk's claim was invalid, because the ground was still a valid subsisting claim belonging to others, and was therefore not yet open to relocation, when Belk had arrived on the scene and initiated his claim. The Court agreed with Meagher, observing that the same acts that would have operated to secure a valid claim for Belk, if performed in January of 1877, were of no effect and had no value, since he had performed them in December of 1876, while the ground was still legally the property of others, even though it was in the process of being abandoned, and in fact the physical abandonment of it, by those holding any interest in it, was apparently complete by that time. In addition, the Court ruled that Belk had obtained no rights even at the end of December, when the original claim legally expired and terminated, since the legal effect of the termination was to return the ground to its status as public domain, open to all, on the first day of January 1877.

Belk was so convinced that he was right that he took the case to the Supreme Court of the United States, where the Montana ruling was upheld in 1881, with the memorable phrase "...location does not necessarily follow from possession, but possession from location...", emphasizing the importance of diligent adherence to the law, whenever the objective is to obtain rights to public land. It had already been well established by this time that a valid mining claim does represent property, in its fullest and highest sense, and the right acquired by a locator is in the nature of an easement, until such time as the location is either patented or forfeited. The lesson learned by Belk was that in the arena of land rights, being first in time does not always equate to being first in right, and this is one of the many principles that we will see play a decisive role in later controversies of other kinds as well. This case remained highly influential for decades, throughout the heyday of early mineral exploration in Montana. The same principles enumerated in this case were applied by the Court in 1908, in *Lozar v Neill*, to resolve a dispute involving overlapping boundaries of claim locations that had both been amended, in favor of the claim location that had been amended in 1905 over the one that had been amended in 1903, illustrating that which claim was first amended is not necessarily the controlling factor in a boundary dispute between conflicting mining claims. Then in 1910, in *Street v Delta Mining*, the Court again held that the termination of a mining

claim does not operate either to validate or benefit an overlapping claim, allowing the truncated claim to extend across the vacated ground to reach its full dimensions, but rather the entire terminated claim simply returns to the public domain, leaving the overlapped claim still either truncated or entirely invalid, as the case may be. With early decisions such as the one it produced in *Belk v Meagher*, the Court began to adopt positions and establish precedents that would shape its approach to boundary resolution in the future.

In 1882, the Court produced a decision clearly announcing its view on the fundamental subject of the value of monumentation in the marking of boundaries, in the case of *Hauswirth v Butcher*, which would go on to be frequently referenced as a seminal decision on the subject of monuments. Federal law stipulated that the maximum size of a mining claim should be 600 feet by 1500 feet, which dimensions were intended to allow a miner to have a reasonable opportunity to orient his claim to a discovered vein, and to pursue it for a reasonable distance, without monopolizing an excessive amount of the public domain in so doing. Some miners however, interpreted the law as allowing them to initially stake a larger area and only later narrow it down to the legal limits, at such time as this might become necessary, essentially allowing themselves the flexibility to shift their claim location in the future, in whatever manner might prove most beneficial to them. In this case, it was revealed that a certain claim had been adequately monumented, but that its actual length as monumented was approximately 2000 feet. The Court declared the oversized claim invalid, reversing a lower court decision, and again enforcing strict compliance with the law, just as it had in the *Belk* case, in order to create a valid mining claim location. The whole purpose of monumentation, the Court stated, is to provide certainty of location, and to thereby provide definite notice of location to all the world, and particularly to those who need to be able to rely upon the existing monuments, when claiming their own locations. Even boundaries that are well marked, the Court reasoned, amount to "no boundaries at all", if the monuments marking them lie beyond the legally allowable limits, because monuments that are unseen do not provide notice and therefore serve no purpose, since no party seeking to establish an adjoining claim could be expected or required by law to look for existing monuments beyond the maximum distances specified by law.

Less than one month after the *Hauswirth* case, the Court issued another significant decision on the same subject, that would prove to be highly influential during the territorial period, in the case of *Russell v*

Chumasero. Again clearly indicating its view of the importance of monuments in principle, and setting forth the concept that the presence of monuments comprises the most essential element of a description, the Court ruled that a description which calls for stakes marking boundaries, without specifying anything more about the stakes, such as their size or markings, is a legitimate description, and the boundaries so marked are valid under the law, the location having been duly marked, if in fact the stakes were actually in existence and not fictitious. The law, the Court held, simply required actual monumentation on the ground, and did not require any certain degree of specificity in describing that monumentation, so any evidence that a given location was physically marked on the ground, generally as described, was potentially sufficient to support a valid mining claim location. The following year, in *Leggatt v Stewart*, the Court reiterated the rule established in the *Hauswirth* case, finding that a claim which was reportedly 1763 feet in length had been properly treated in the lower court as being "void for uncertainty", and agreeing that regardless of exactly how its corners were marked, they were insufficient to support a valid claim. Two years later, in *Garfield Mining & Milling v Hammer*, the Court applied many of the same principles developed in these and other early cases, including the important principle that everything stated in a mining location description will be presumed to be correct, until the contrary is shown. In that case, the Court again approved a description that recited only generic stakes as corner monuments, and which was tied to another nearby mining claim only by a call for a highly approximate direction and distance, reading "about fifteen hundred feet south". The *Garfield* case eventually came before the Supreme Court of the United States, in 1889, and the *Montana* decision was upheld in all respects, demonstrating that although the legally mandated procedures required to create a valid mining location would be rigidly enforced, the requirement for adequate monumentation of a claim could be met by the inclusion in the description of highly simplistic language, merely indicating that the claim boundaries had been physically marked in some way, without any detail. As one might well expect, this rather lax attitude toward proof of legitimate monumentation would lead to future controversies, as we shall later see, but these cases represent the Court's initial efforts to develop and issue proper guidance upon the dominant principle of boundary law, which is the principle of monument control.

In 1883, a case came before the Court that would go on to become the classic early adverse possession decision in Montana, and even today it remains among the most frequently cited adverse possession cases in

Montana history. In the case of *Lamme v Dodson*, the ownership of an entire lot or parcel, of unspecified size, shape and location, presumably a fairly typical city lot, was at issue. During the 1860s, the property was owned by Tracy and it contained a house that was occupied by Warfield as a tenant. In 1871, Tracy sold the property to Lamme, and Warfield continued to occupy it as a tenant. In 1872, Lamme verbally agreed to sell the property to Warfield, in exchange for some construction work to be performed for Lamme by Warfield, on an adjoining lot that was apparently also owned by Lamme. Warfield then proceeded to tear down the existing house that he had been occupying and build a new one, evidently in anticipation of acquiring the lot in question himself, once his agreement with Lamme was carried out. However, for unknown reasons, Warfield never performed the work that Lamme had requested on Lamme's adjoining lot, so Lamme never sold the lot in question to Warfield. Warfield just continued living on the property as a tenant, in the house that he had built, until he died in 1881. Dodson, who was the executor of the estate of Warfield claimed that the lot in question was part of Warfield's estate, based on adverse possession. Since an oral agreement was involved, this potentially could have been argued as a statute of frauds case, but because Dodson never claimed that Warfield had performed his part of the agreement, the outcome of the controversy depended entirely upon the success or failure of Dodson's adverse possession claim. Dodson prevailed on this basis in a lower court, so the focus of the Court was upon the fundamental question of whether or not the possession by Warfield was properly characterized as adverse.

To resolve the matter, the Court properly placed the burden of proving that Warfield's acts had been adverse to Lamme upon Dodson, following the basic principle that ownership rights are presumed to be correctly documented in the record, and any party asserting the contrary must present evidence sufficient to overcome that presumption, in order to prevail. Warfield had always acknowledged Lamme's ownership of the property, and had continued to act in subservience to Lamme over the years, as a mere tenant of the property, never denying the validity of the title held by Lamme, either by his words or actions. In view of this, the Court concluded that the critical element of intent, on the part of Warfield, to assert ownership of the property, was absent, despite the fact that he had built a house on the property and lived in it for several years. The existence of the oral agreement between Warfield and Lamme actually operated to Lamme's benefit, since it provided a logical explanation for Warfield's decision to build a house on land that he was aware he did not own. The evidence of the agreement, and

the landlord & tenant arrangement, both indicated that the relationship between Lamme and Warfield was never adversarial, either at its inception or in fact at any time, so the statute of limitations had actually never even begun to run against Lamme. Holding that "adverse possession is a matter of intent", meaning the intent of the possessor to exercise complete dominion and control over the land in question, the Court reversed the ruling of the lower court. With this decision, the Court had upheld the principle that any adverse claimant must present evidence of actions that are hostile to the title of the property owner of record, in order to successfully complete adverse possession, and one whose actions openly acknowledge the title of the record owner, cannot successfully do so. Ironically, at the same time that this landmark case was being decided, an earlier Montana adverse possession case, *Sullivan v Dunphy*, was on its way to the Supreme Court of the United States, where adverse possession cases are rarely ruled upon. In that case, the decision of the Montana Supreme Court, in favor of an adverse possessor, in which the Court had treated the passage of the time period specified by the statute of limitations as an absolute bar, was ultimately fully upheld in 1886. Importantly to surveyors, both of these early high profile cases demonstrate that the concept of adverse possession was never intended to be applied as a method of boundary resolution, it was originally adopted simply as a means of resolving competing titles, through which one title was adjudged to be superior and the other inferior, not merely in part, but in their entirety. This would change significantly over the ensuing decades however, and adverse possession would eventually enter the realm of location issues, becoming a potentially serious factor in boundary disputes, as we shall observe.

Also in 1883, in the case of *Foster v Willson*, the Court was required to examine a specific description, in order to determine the legitimacy of a certain lower court judgment. Foster and Willson evidently made competing claims to the same tract of land, the details of their claims are not discussed in the case however, since they were not relevant to the matter at hand, which was simply the legal sufficiency of the property description. The description in question read, in pertinent part, "That certain house and lot ... about one-eighth of a mile westerly from the hotel and boarding-house of Rolla Butcher, called the Rainbow Hotel, and about 400 yards southerly from the Alice Gold & Silver Mining Company's mill, said house being known as the Clark Hall House ...". A lower court had found this description to be legitimate, and based upon it, that court had rendered a judgment on the ownership of the lot at issue, which the lower court described as being 60

feet by 100 feet in size, despite the fact that no lot dimensions appeared anywhere in the existing description. In addition to adding lot dimensions to the description, the lower court had also replaced the word "westerly" in the description with the word "easterly". Both the original description and the description created by the lower court were attacked on three counts, the first being the general lack of detail, the second being the change to the directional language, and the third being the addition of the lot dimensions, so these were the specific issues which the Court would need to address. The Court agreed with the lower court that the original description, although clearly lacking precise measurements, was legally sufficient and was not so indefinite as to be invalid, based upon the principle that extrinsic evidence can be presented to clarify a genuinely ambiguous description, pertaining in this instance to the various buildings recited in the description, whenever the true meaning of the description is the issue to be decided. In so ruling, the Court implicitly applied the basic rule that has often been expressed as "that will be recognized as certain, which can be made certain" to the subject of description analysis, and in so doing also demonstrated that courts generally strive to declare documents to be valid, rather than invalid, whenever the document in question appears to have been created in good faith, despite defects and deficiencies of a technical nature. This portion of the Court's ruling represents the most important aspect of this case, as it marks the adoption by the Court of the essential concept that extrinsic evidence of the true intent of the original parties to a conveyance always represents valuable evidence, which is acceptable under the well known legal maxim that "intent is paramount". The power of evidence of intent, which very often proves to be decisive in land rights cases, will frequently appear, as we proceed through the decades.

However, the Court was not as charitable in its view of the description created by the lower court as it had been in assessing the validity of the original description. The Court declined to uphold either the change of direction or the addition of the missing lot dimensions. The directional change, the Court stated, rather than eliminating uncertainty, actually introduced uncertainty, as to the correctness of the original description. Without clear evidence as to whether the directional change was intended as a correction, or was simply a typographical error on the part of the lower court, the description created by the lower court was deemed to be legally unsupportable. This alone would have been enough to defeat the description, but in addition, the Court observed, the addition of the missing lot dimensions "expanded" the original description, since no evidence had been

presented to verify what the actual dimensions of the intended property might be. For these reasons, the Court reversed the decision of the lower court, and remanded the matter for further clarification or correction of the description that had been created by the lower court. The same principles applied in this case were applied in *State v Board of Commissioners of Chouteau County* in 1911, in which a description that failed to refer to the Montana Principal Meridian was upheld as valid. In that case, the Court examined and discussed general description requirements, and cited with approval an Indiana decision stating that "... a court will only declare a deed void for uncertainty when, after resorting to oral proof, it still remains a mere matter of conjecture what was intended by the instrument.". The Court therein also quoted the often reiterated phrase that any description will be held valid, if a surveyor could "... take the deed and ascertain from an inspection of it where the land was located.". In 1950, in *Henningsen v Stromberg*, the Court, again typically focused on ascertaining the intent of the original parties to a deed, noted that "The tendency of modern decisions is to disregard technicalities and to treat all uncertainties in a conveyance as ambiguities to be cleared up ...", as opposed to discarding the description as patently ambiguous and void. As we progress through this chronology, we will note some cases in which the Court has taken a seemingly contrary position, with respect to the technical content of a description, but the proposition established in the Foster case, regarding the acceptability of extrinsic evidence properly presented, has remained vital throughout the decades.

Another 1883 case, *Story v Black*, holds the honor of being the very first case ever published in the Pacific Reporter, which today includes well over one million cases from all across the west, and it proved to be quite worthy of that historic position, as it has gone on to become one of Montana's most frequently cited land rights cases. Black owned two lots in Bozeman, which he and his wife had acquired from his father by means of an unrecorded deed, that he had given to them as a wedding gift, and his father owned two other nearby lots. Black's father then found a buyer who wanted to buy the same lots that he had gifted to the newlyweds, so he proposed to exchange the two lots he still owned for the gifted lots, and the Blacks accepted this proposal, but no deed was executed to document this exchange of properties. After the Blacks had developed and improved their new lots, and taken up residence thereon, Black's father experienced financial difficulties and his assets were sold off by the sheriff. Since the lots occupied by the Blacks still stood in the name of the father, they were

among the assets sold by the sheriff, and Story obtained a sheriff's deed to the lots. Story was informed by the sheriff that the Blacks were living on the lots, at the time Story acquired the lots, yet he elected to go ahead with the purchase and then file an action against the Blacks, seeking to eject them from the property by means of the statute of frauds, based on the fact that no documentation of their ownership of the property existed. A lower court ruled that the Blacks had acquired an equitable title to the land, and the statute of frauds was inapplicable. The Court agreed that the rights of the Blacks were worthy of protection and Story had acquired nothing. The Court found that sufficient evidence of a conveyance agreement made in good faith existed to uphold the exchange, as a legitimate exception, that was not within the intended scope of operation of the statute, although this transfer of land stood in clear contravention of the statute. The powerful principle of notice was clearly a major factor in this decision, as Story's knowledge of the situation at the time he acquired his deed, the Court indicated, effectively supplanted the notice that publicly recorded documentation would have provided to him. In so holding, the Court had exercised the often reiterated mantra that the statute of frauds will not be allowed to be used as a tool of fraud against innocent parties, wisely incorporating that broad equitable limitation, which would prove to be highly useful in the resolution of many future conveyance disputes, into Montana law.

Although the statute of frauds mandates written evidence of all land rights transfers, it was intended only to eliminate opportunities for deception and to support organized record keeping, by encouraging the use of written land records. It was never intended to be used for perverse or devious purposes, to destroy valid agreements between innocent parties who had acted in good faith. For that reason, while the statute does serve to render agreements that are both undocumented and unperformed voidable, it does not have the power to undo unwritten agreements that have been carried out by actual performance of the parties, so it would be an error of oversimplification to suggest that it renders every unwritten agreement void. In 1905, in *Finlen v Heinze*, the Court applied the same principles that controlled the outcome of the Story case, in resolving a controversy over a mining claim, and clarified that a written document is merely evidence of an agreement, the agreement itself comes into existence at the moment it is made, and can become binding as soon as acts clearly attributable to it are performed in reliance upon it. In 1908, in *Stevens v Trafton*, the Court again based a decision regarding the validity of a conveyance of a portion of a city lot upon these same principles of equity, deciding that clear evidence of an

intention to convey land cannot be defeated by a mere failure to reduce the intended conveyance to writing, where the subsequent conduct of the parties bears out the evidence of their true intentions at least as well as any written document could, poignantly stating that anything less would amount to "a denial of justice". Equity honors productive acts that create value, performed in innocent reliance, and steps forward to protect them when necessary, by requiring those attempting to acquire land or land rights to take notice of existing physical improvements and visible possession or occupation of land that they propose to acquire. Justice allows no man, when dealing with others, to simply ignore that which he would prefer to deny, or to simply close his eyes, for his own benefit, to that which he would prefer not to see, and as we will see, Story would certainly not be the last one to learn this important lesson at the hands of the Court. The obvious message for surveyors, in cases such as these and the several others of the same tenor that we will see, is that it pays to be diligent in the gathering of all available evidence, and conversely, it never pays to ignore potentially valid physical evidence of possession, occupation or use of land.

In the 1885 case of *Silver Bow Mining & Milling v Clarke*, the Court was confronted with a conflict between two patents, one for a townsite and one for a mining claim, a conflict typical of those encountered when civilization attempts to gain a foothold in a frontier territory. Silver Bow located its mining claim in 1875, and performed all the necessary acts, including boundary monumentation, and filed all the necessary documents, to create a legitimate claim location. In 1877, the Butte townsite was patented, and that patent evidently included at least part, if not all, of Silver Bow's mining claim within its boundaries. In 1880, Silver Bow obtained its patent for its claim location, and as the townsite began to develop, the boundary overlap became apparent. Neither patent expressly acknowledged the existence of the other, each one had apparently been granted in genuine ignorance of the fact that an overlap existed. As townsite occupants, such as Clarke, began to move into portions of the area that had been patented to Silver Bow, the company filed an action to defend its patented boundaries, and it prevailed in a lower court. The Court agreed that the Silver Bow patent was superior to the Butte townsite patent, even though the townsite patent was the first one issued, for the reason that federal patents date back to the date of authorized entry, and in that regard a patent merely serves as legal confirmation of the completion of the effort to acquire the land that began at the time of a lawful original entry. In so ruling, the Court engaged in a very thorough examination of the law, relating to the nature of the land

rights that are acquired through the process of filing a mining claim and obtaining a federal patent to protect the location. After reviewing the federal acts and laws providing for the patenting of mining claims, and relevant decisions of the Supreme Court of the United States construing the meaning, intent and consequences of those acts and laws, the Court concluded that the patent issued to Silver Bow was in fact an absolute grant of the land within its patent boundaries, in fee, not merely an easement or a right of some lesser form. The Silver Bow location, as surveyed and described in its patent, the Court noted, stood as an unrecited exception to the area described in the Butte patent, so in reality, there was never any overlap. Even government officials, the Court held, are not entitled to sell the same land twice, so by the time the Butte patent was issued, the Silver Bow location was no longer part of the public domain, and therefore was not available to be included in the Butte patent, regardless of how or where the Butte townsite boundary was described in the federal patent creating the site. Situations such as this one, involving both physical boundary issues and the validity of conflicting descriptions, clearly illustrate the need for land surveyors to understand the operation and interaction of the legal principles that are applicable to boundaries, descriptions and conveyances.

In the following year, 1886, a very similar case came before the Court, once again pitting the patented Butte townsite against the interests of certain miners. In *Talbott v King*, the townsite occupants presented evidence that although the townsite had not been patented until 1877, they had actually been occupying or using the ground in controversy since 1866, and they argued that on that basis their rights to the land should be measured from that point in time, which was well before any mining claims had been made in that vicinity. Furthermore, as the townsite occupants pointed out, the patent for the 1875 mining claim location that was at issue in this case, which had been issued in 1881, contained language stating that "all town property rights upon the surface" were excepted and excluded from the mining claim patent. Yet although the townsite occupants appeared to have a stronger position than they had in the Silver Bow case, the Court once again ruled against them. While the rights associated with a mining claim stem from the date of the claim location, the Court observed, the townsite occupants had established no land rights whatsoever by virtue of their unauthorized occupation and use of the land prior to the date of the townsite patent, because the land was still part of the public domain at that time, so their presence upon the land from 1866 to 1877 was of no value or legal benefit to them. The Court also held the exception language in the mineral

patent to be invalid and without effect, because the granting of the mineral patent in 1881 had amounted to a de facto adjudication by the federal government that the land was in fact mineral land, making it impossible under the law for any of the same land to be included in any townsite. The townsite occupants had failed to protest the issuance of the 1881 patent, and once that patent was issued, the Court stated, it served as conclusive proof that the land was truly mineral in character, so just as in the Silver Bow case, it represented a valid exception, altering the townsite boundary described in the Butte patent, even though it was unreferenced in that patent, to whatever extent it penetrated the patented townsite boundaries. The issuance of the mineral patent had validated the boundaries of the original mining claim location, as surveyed and described, and the Court found that the townsite occupants were estopped from denying that result, so the mineral patent had effectively taken another bite out of the supposed townsite boundary. In 1887, in *Hartman v Smith*, the Court held that a mill site, not located on mineral land, but used in connection with a valid mining claim, also represents a valid exception to a townsite, and cannot be successfully claimed as being part of the townsite, despite being within the described boundaries of the townsite. Decisions such as these served to open the eyes of incoming settlers, and the public in general, to the importance of mining claim location boundaries, and as we will see, it would not be long before the description and monumentation of those boundaries would become the subject of both further legislation and additional controversies.

In 1888, *United States v Godwin*, a case involving railroad land, the rights of a settler who had occupied it, and the importance of original surveys, arrived for consideration by the Court. Several years earlier, the United States had granted an extensive amount of land to the Northern Pacific Railroad, blanket fashion, by means of an act of congress, described as consisting of all the odd numbered sections lying within a certain distance of a railroad line. The land was substantially, if not entirely, unsurveyed at that time, yet in legal theory at least, the grant took effect immediately, so it had the effect of removing all the described lands from the public domain, subject of course to subsequent determination of the exact location of each section by means of survey, at such time as the GLO was able to complete the original surveys of the subject area. So as the situation stood at that earlier time, the railroad owned the land that had been granted, but no one yet knew exactly how much land had been granted, or where the boundaries of most of it were located. Amidst this scenario, obviously quite fruitful of controversy, the railroad began granting land to settlers, at least some of

which was located in townships that had not yet been subdivided into sections. Godwin was one such settler, who thus acquired a certain quarter section, the location of which is not specified in the text of the case, and by some unknown means he ascertained its location himself and fenced it. The United States, not surprisingly, took exception to this, and acting upon the basis of a statute outlawing the fencing of public land for private use, filed an action seeking the removal of Godwin's fences. A lower court allowed the fences to stand, and the Court agreed that the United States had no right to compel Godwin to remove his fences, upon the mere assumption that he had improperly located them. Godwin had legally acquired a legitimately described tract of land, and the burden was on the United States to survey the land and thereby definitely determine whether or not his fences were properly located. Only upon showing, by means of survey, that his fences were not properly located, could the United States compel their removal, if such was the desire of the United States. The Court was unwilling to find Godwin guilty of having illegally enclosed public land, unless it could be conclusively shown that he had done so, and that could not be done until the section in which his land was located existed on the ground. As can readily be seen, in so ruling, the Court effectively placed the burden upon the GLO to complete the subdivision of the township in question, before accusing Godwin of enclosing public land, and thereby required the government to properly deal with the consequences of its decision to grant extensive amounts of land, without having made adequate provision for the boundaries of that land to be marked on the ground in a timely manner. This decision provides considerable insight into the high degree of pressure that was placed upon GLO surveyors during the nineteenth century, to get the original surveys done as rapidly as possible, and the consequences of that urgency and haste are only too evident and well known to all land surveyors today.

Later in the same year, the United States filed another action against a Montana settler, based upon the same statute banning enclosure of public lands, in *United States v Bisel*, under seemingly similar circumstances, but with a very different outcome, due to the presence of certain key factors. Bisel had selected a certain quarter section and fenced it, just as Godwin had, but in this case, the land was not railroad land, it was school land, located in a certain Section 36, and Bisel had simply occupied it, with no title of any kind to it. As in the Godwin case, the basic question was whether or not the land enclosed could be properly characterized as public land, for if it was not, the United States had no legitimate basis upon which to attack

Bisel's enclosure or use of it. Bisel attempted to fight this attack on his possession of the land by asserting that it was no longer public, and therefore it was no longer under the jurisdiction or control of the United States. The Court ruled to the contrary however, indicating that the land was in fact still public land, which was simply being held in trust by the United States, as a caretaker in effect, in anticipation of the creation of the new state, which would ultimately take full responsibility for it, and full control over it, at the moment of statehood. Recognizing the inherent ambiguity in the phrase "public land", the Court clarified that while school sections might not be termed public, in the sense that they were not open to settlement as part of the public domain, as were other typical sections, yet the school sections were truly public, in the sense that they were reserved for a legitimate public purpose, and were therefore under public jurisdiction at all times. Bisel was guilty of trespassing, his fences were ordered removed, and his claim to the land was vanquished. By 1905, the view of the Court, regarding the relationship between surveying and the use or settlement of lands granted by acts of congress, had coalesced, and in *Clemmons v Gillette*, the Court held that state school land located in townships that had not yet been subdivided into sections could not be sold or leased by Montana, nor could it be legitimately enclosed by anyone, even a party holding a grant from the state, prior to being surveyed. The view taken by the Court in the *Clemmons* case, implicitly holding that sections do not come into existence at all until the moment of official approval of the original survey by the GLO, is generally in line with most modern decisions stipulating the necessity of an original survey, to adequately define the boundaries of land being conveyed out of the public domain by means of a typical PLSS description. Subsequently, numerous United States Supreme Court decisions have expressly upheld the now well known concept that the original survey on the ground, once properly documented and approved, represents the legal creation of a section, and title can neither exist nor be conveyed, without valid existing boundaries.

Also in 1888, a case which had been before the Court once previously returned to the Court upon a second appeal. The case of *Upton v Larkin* had first come to the Court in 1885, presenting a contest between overlapping mining claims. Upton had filed a mining claim location in 1879, and Larkin, who had filed one subsequently that overlapped it, had challenged the validity of Upton's claim. A lower court had upheld Upton's claim, but the Court in 1885 found the evidence to be so weak and unclear, that it was compelled to remand the case back to the lower court for a new trial. In the

new trial, Upton prevailed once again, and again Larkin chose to appeal the decision, still apparently convinced that Upton's claim was fatally flawed. Upon reviewing the case for the second time, the Court still found the evidence to be of relatively poor quality, particularly lamenting the absence of certain important items, such as maps, but in spite of this the Court elected to dispose of the case on this second time around. Larkin's main argument appears to have been that the vein discovered by Upton was actually located within another mining claim and was not within the boundaries of the claim filed by Upton. Due to the absence of any specific survey evidence, it was impossible to tell exactly how a specific determination was made on this issue, but it was somehow determined that the apex of the vein in question was in fact located inside Upton's claim, just 19 inches inside its boundary with an adjoining claim. Apparently frustrated by this result, as an alternative, Larkin attempted to assail the validity of the boundary of Upton's claim by attacking the manner in which it had been described. Upton's claim location notice contained a description by metes and bounds, which called for stakes at two of its four corners, and trees at the other two corners, and it also made reference to an adjoining claim, as bounding Upton's claim on one of its four sides. However, evidence was produced indicating that in fact all four of Upton's corners were marked by stakes, and none of them were marked by any trees, whereupon Larkin asserted that this inconsistency in the description should be treated as being significant enough to render Upton's description invalid.

The Court wholly disagreed with Larkin, stating that all the law required to support a valid mining claim location was that the boundaries must be actually marked on the ground, by some form of permanent monumentation, which could be either natural or artificial, and that the description need only provide basic verification that the boundaries are monumented in some way, by making reference to a monument or monuments of some form. No specific or particular description of any kind whatsoever, whether by metes and bounds or otherwise, was required by law, so any flaws in Upton's description, the Court decided, were entirely immaterial and irrelevant. Such boundaries, the Court observed, in the contemplation of the law, are controlled entirely by the actual corners and lines marked on the ground, and the description serves merely as a pointer, to guide a party who has never been in the area previously, to the locality at which he will find the mining claim location in question, adequately marked out on the ground. On that basis, the Court upheld the validity of Upton's location and its monumented boundaries, but Larkin remained unsatisfied

and took the case to the Supreme Court of the United States, where he was finally silenced, when the Montana ruling was fully affirmed in 1892. The Court's decision in this case indicates that by this time the principle of monument control was already well entrenched and was judicially recognized as dominant, being paramount to any descriptive language tending to the contrary. In 1889, another case of the same variety, *Flick v Gold Hill & Lee Mountain Mining*, came to the Court, and again the Court held that evidence in the form of a metes and bounds description of a claim location was not required by law, and therefore could not be treated as controlling evidence in a boundary dispute involving mining claim locations. The validity or invalidity of a claim location must be determined, the Court held, based only upon such evidence as comes within the requirements of law for the legal creation of such tracts, reversing and remanding the case, due to treatment of a location description by a lower court that tended to indicate the contrary. The Court's interpretation and application of the law pertaining to claim location descriptions in the *Upton* and *Flick* cases pointed toward a need for greater clarity or specificity as to exactly what does, and what does not, represent a legitimate and appropriate form of description, in the context of a mining claim, and this would continue to be a source of uncertainty and controversy, as the group of cases next reviewed very well demonstrates.

Another 1888 case, *Flavin v Mattingly*, focusing squarely on the fundamental relationship between monumentation and descriptions, provides great insight into the early Court's perception of the significance of monuments, and shows what the Court understood to be the reason that mining claim location statutes required descriptions to make reference to monuments. *Flavin* and *Mattingly* had filed competing mining claims, no details of the exact source of the conflict between them are given in the text of the case, but when *Mattingly* applied for a patent *Flavin* objected, on the basis that *Mattingly's* claim somehow interfered with his own, which required *Mattingly* to attempt to prove that *Flavin's* claim was invalid, in order to obtain a patent for his claim. These claim locations were apparently among a cluster of similar claims located in or around Park Canyon in Silver Bow County. *Flavin's* location was evidently described in rather loose terms, as quoted by the Court it read simply "... on the northerly side about 1/4 mile from Park canon.", and it then proceeded to recite a simplistic generic statement, as required by law, indicating that the claim had been marked on the ground "... by substantial posts or monuments of stone at each corner ...", without specifying anything further about what kind of monuments had

actually been used. Mattingly, quite understandably from a surveyor's perspective, chose to attack this description as being too vague and indefinite to be accepted as valid. The Court interpreted Flavin's description to mean that his location was along the north edge or wall of the canyon and approximately a quarter mile from the entrance or mouth of the canyon. The fact that no real detail was provided by the description was irrelevant and of no consequence, in the view taken by the Court, the description was perfectly sufficient and in full compliance with the law, because it directed one to the general locus, where the actual monumentation would be found, presuming Flavin had actually set some kind of monuments, which he was not required to prove, since his claim location itself already amounted to a sworn statement that he had fully complied with the law in that regard. Therefore, the Court upheld the lower court ruling that Flavin's location was entirely valid and was superior to that of Mattingly. The fact that the Court was willing to accept an enormous natural feature the size of a canyon as being a satisfactory natural monument, sufficient to identify a certain location, may seem amazingly unrealistic, when viewed with a surveyor's sense of precision, but the Court felt that the law was not intended to mandate precision. The law regarding claim location descriptions, in the eyes of the Court, was written using only general terms in respect to monumentation because the description was intended to provide only general guidance to the vicinity of the location, where the actual boundaries were to be found on the ground. For that reason, one such as Mattingly, attacking the description of another, had the burden of proving that no monuments were ever set by Flavin, or that they had been set so poorly or inaccurately as to be worthless, and such an attack could not succeed based merely upon the presence of even a fairly high degree of indefiniteness or uncertainty in an opponent's description.

In 1889, in *Gamer v Glenn*, a very similar case featuring competing claims, in which one of the parties inevitably attempts to overcome the other by launching an assault on the credibility of the opponent's location description, the court reiterated the position it had taken in the Flavin case and some of the other earlier cases that we have reviewed. This time, the description in question made reference to "a large boulder" as being the sole natural monument offered to support or anchor the description, and cited certain other existing claims as forming some of the adjoining boundaries of the location in question, and there was also testimony that posts of lumber had been erected at all of the corners of the location at issue. Consistent with its ruling in the Flavin case, the Court found the reference to the "boulder"

to be potentially useful, and therefore entirely legitimate and acceptable, and put the burden on the party attacking it to prove either that it did not exist, or that such objects were so common in the area that the particular object referenced should be considered useless by virtue of being indistinguishable, which the assailant in this case was evidently unable or unprepared to do. By this point in time, it had become clear that the Court was inclined to take a rather liberal or generous view of what may represent a monument, and to accept virtually any natural object offered for that purpose, including even objects of tremendous extent and objects lacking in uniqueness, as meeting the requirements of the law, as it then stood. In *O'Donnell v Glenn*, another case which came before the Court twice, in 1888 and 1890, the sufficiency of a claim location description was again at issue. In the description therein scrutinized, no natural objects were mentioned at all, and the description appeared to indicate that only the point of beginning had actually been marked on the ground, by a stake, but other existing claim locations were called out as adjoining boundaries. The Court approved the description, holding that even a single stake can be a permanent monument, if it is deemed to be "of such size and so firmly planted" as to satisfy the spirit of the law calling for permanent monumentation, once again leaving the details of monument validity as an open question, to be resolved on a case by case basis. Thus the matter stood at the close of the territorial era, controlled by laws enumerating the location requirements for mining claims in only the most general of terms. Within just a few years however, presumably as a result of frequent controversies such as those outlined above, efforts to establish standards requiring better monumentation and documentation, through legislation, would finally begin.

Still another 1888 case, *Tucker v Jones*, was destined to become one of the most significant and often referenced land rights cases in Montana history, and is therefore worthy of being the last case dating from the territorial era that we will take notice of. This case does not involve any boundary issues, but it does involve and illustrate two highly important principles of land rights, which being essentially timeless and based in equity, have stood unchanged over the succeeding decades. In 1866, the predecessors of Tucker and Jones dug an irrigation ditch, at an unspecified location, that crossed the lands of both and served the lands of both. Eventually, those lands came into the ownership of Tucker and Jones, respectively, and they both used the ditch just as their predecessors had, although none of the deeds previously conveying the lands that had come down to them had ever mentioned the ditch at all. Tucker was frequently

away however, sometimes for over a year, and in 1887, Jones informed Tucker that he was the sole owner of the ditch and Tucker had no right to use it. Jones based his claim not only on the fact that the right to use the ditch had never been expressly deeded to Tucker, since he was cognizant that the right to use it had never been deeded to him either, but also on the basis that through Tucker's extended absences from the land, Tucker had effectively abandoned whatever right he may have originally had to use the ditch. As can readily be seen, this controversy was fundamentally about rights associated with land ownership that are in the nature of an easement, so the principles here set forth are equally applicable to easement rights of other types, and are certainly not limited to ditches. The Court took the ideal opportunity presented by this case to spell out and clarify two essential aspects of land rights ownership.

First, noting that the ditch was appurtenant to both properties, the Court stated that the right to use it had in fact been positively conveyed to each of the parties, despite the fact that the ditch location was never described, or even mentioned at all, in any existing document, based on the principle that "... where a party grants a thing, he by implication grants whatever is incident to it, and necessary to its beneficial enjoyment.". Under the powerful principle of appurtenance, crucial land rights can be, and quite frequently are, conveyed utterly without description, and the failure of both land owners and surveyors to realize this, has resulted in serious damage and numerous conflicts, some of which we will watch the Court resolve. Second, the Court indicated that a mere absence of use is by no means equivalent to abandonment. Abandonment stems not from a mere cessation of use, but only from a cessation of use with the intention, on the part of the holder of the right, to permanently forsake and relinquish the right in question. Thus the Court ruled that the ditch stood equally as an implicit burden, and an implicit benefit, to the lands of both Tucker and Jones, and the rights of both to use it, as holders of valid appurtenant land rights, were legally equal, therefore the ditch had to be respected mutually as a legitimate, although undescribed, permanent easement or right-of-way for its intended purpose. As we proceed through our review of cases from the statehood period, we will encounter a great many more instances in which the Court has dealt with unwritten rights of various kinds, and we will observe the degree of respect that it has for such rights, which can be essential to the productive use of land in support of our economy and our society in general.

METCALF v PRESCOTT (1891)

Entering the era of statehood, the land rights arena in Montana continued to be dominated by cases involving mining claims. The first decision from the statehood era that we will review illustrates the operation of two fundamental principles that are highly relevant to land surveyors, one relating to description content and analysis, and the other relating to testimony regarding monumentation, in the context of mining claims. Here we see that in analyzing descriptions, to determine their validity, the approach taken by the Court is typically based on common sense, rather than on technical factors, since the concern of the Court is simply to see that justice is done, through the protection of all legitimate rights, regardless of whether or not technical excellence or perfection is achieved in so doing. The de facto judicial editing or rectification of error plagued or otherwise inadequate descriptions, to allow them to accomplish what was truly intended, such as we have already observed in reviewing the 1883 Foster case, is a factor in description resolution that should be understood by all parties acting in reliance on existing descriptions, as well as those such as surveyors, who often engage in the preparation of new descriptions. Interestingly, in the 1895 case of McGowan v McLay, yet another case concerning the legality of a mining claim location, the Court defined its view of a description used for conveyance purposes as a mere "delineation" or "enumeration" of an estate or title, the validity of which is always subject to the Court's scrutiny, and the meaning of which is ultimately governed by the best evidence of the intent that it expresses. Here we also see another instance, consistent with those we have seen in the territorial cases, in which the Court indicates its willingness to accept extrinsic evidence, such as testimony, to support and validate monuments that were referenced only in a general manner, without specificity in a description, reinforcing the Court's inclination to uphold the controlling value of monuments to the greatest possible extent. In this case, the position on monument validity taken by the Court actually worked to the benefit of both litigants, since as we will see, each of them found it necessary to defend their respective descriptions against allegations made the opposing party, albeit on a different basis.

January 1885 - Prescott and his fellow defendants made certain mineral discoveries, in an area that was apparently very close to the boundary between Jefferson County and Lewis and Clarke County. They then established two mining claim locations, which they called the Crucible and the New Brunswick, monumenting their corners with posts, evidently in the belief that they were in Lewis and Clarke County, and naturally they described those locations accordingly. However, they subsequently discovered that a nearby claim location, lying about one mile to the north of theirs, had been described as being in Jefferson County. Upon realizing that they had been mistaken about which county their claims were actually located in, Prescott decided to travel to Jefferson County to properly record the documents relating to these claims there.

February 1885 - Prescott recorded the appropriate information relating to the Crucible and the New Brunswick in Jefferson County, but apparently either forgot, or simply neglected to change, the county name from Lewis and Clarke to Jefferson on his documents.

1885 to 1890 - At some unspecified time during this period, Metcalf and his fellow plaintiffs made certain mineral discoveries in the same area as those filed by Prescott. They evidently either recognized, or subsequently discovered, the error made by Prescott, involving the county names, and decided to attempt to turn that error to their advantage. Metcalf established two claim locations, which were called the Ida May and the Corbett, apparently in substantially the same place as Prescott's claims, evidently in the belief that Prescott's error had the legal effect of rendering both of his locations invalid. Metcalf did not mention any specific physical monuments in the descriptions of these claim locations, but his descriptions did make reference, by means of approximate direction and distance, to certain existing nearby claim locations that had been made by others. After filing the Ida May and Corbett location documentation in Jefferson County, Metcalf and his partners filed an action in Jefferson County against Prescott and his partners, seeking to have the locations filed by Prescott deemed void.

Metcalf simply argued that due to the description error made by Prescott, regarding the county name, the location documents filed by Prescott had not been legally recorded, and were therefore inferior to his own properly described and recorded locations. Prescott freely conceded his description error, but argued that it should not be treated as fatal to his locations, since he had fulfilled his basic responsibility to provide public notice of the existence of his claims, by recording his documents in the correct county. In addition, Prescott argued that Metcalf's locations were invalid, because Metcalf had failed to make proper reference to any specific monuments in his description. The trial court ruled that both of Prescott's locations were invalid, in the case of the New Brunswick, because its documentation did not indicate that it had been properly notarized, and in the case of the Crucible, because Prescott could not be legally allowed to present any extrinsic evidence to prove that it was actually located in Jefferson County, since such evidence would stand in contradiction to the plain language of his description, stating that it was in a different county.

The Court first addressed the issue presented by Prescott's description error, focusing on whether or not it had the effect of preventing him from legally proving that his claims had actually been monumented in Jefferson County. In the absence of any evidence that a party, such as Prescott in this case, had not been acting in good faith when attempting to create a claim location description meeting the minimum requirements of law, the Court generally does not expect, and seldom if ever requires, perfection from such a party. In addition, the Court is typically disinclined to take issue with an error that does no genuine harm, on mere technical grounds, and of course the Court recognizes the important concept that not every error is indicative of an action taken in bad faith. After noting that the evidence clearly showed that the area in question really was in Jefferson County, and also stating that under the rulings pertaining to monumentation in the territorial era cases that we have already reviewed, the posts used and described by Prescott constituted adequate corner monuments, the Court was fully satisfied that Prescott had established his locations in a legally sufficient manner. Although the Court had taken issue with description errors of certain kinds in the past, as we have seen, and would do so again in the future under different circumstances, it deemed the error made by Prescott in this case to be immaterial and insufficient to destroy the validity of his two locations, since inclusion of the county name was not a legally mandated description requirement. Citing cases from Massachusetts and California, which had dealt with comparable description discrepancies and deficiencies, the Court

adopted the rule that excess information in a description, when not genuinely misleading, is not fatal and can simply be excised and ignored, taking the position that:

“... false description is surplusage. So much of the description as is false is rejected, and the instrument will take effect, if a sufficient description remains ... if defendants be successful in proving what they allege to be the fact as to a permanent monument, the description is sufficient, and the error in stating the county ... is harmless.”

Having disposed of the description issue, the Court next turned to Prescott's failure to have the documentation pertaining to the New Brunswick properly sworn and notarized, and agreed with the trial court that this was fatal to the New Brunswick location. Apparently the Crucible was not afflicted with this problem however, so it remained a potentially valid location, provided that Prescott had in fact properly monumented it in Jefferson County, as the evidence indicated, so the trial court had erred, the Court determined, in denying Prescott the opportunity to present testimony that aside from the incorrect county name, his description of the Crucible was otherwise valid and legitimately monumented. Upon so deciding, the Court reversed the ruling of the lower court against Prescott on the description error issue and remanded the case back to the trial court for further proceedings, to give Prescott the opportunity to present his extrinsic evidence in defense of the actual location of the Crucible. In conclusion, since the Court was clearly aware that the issue raised by Prescott, concerning the validity of Metcalf's locations, would arise when the lower court took up the controversy once again upon remand, the Court saw fit to provide additional guidance on how this assertion made by Prescott should be handled. The Court effectively took the question raised by Prescott, concerning the legitimacy of Metcalf's monument references out of play on remand, by reminding both the litigants and the lower court of the Court's earlier decisions, in which it had repeatedly held that nearby mining claim locations, previously established by others, could be legitimately referenced as existing monuments by subsequent locators. If referenced as such in a subsequent description, the monuments previously placed, and boundaries previously established by others, were sufficient to satisfy the basic legal requirement for reference monumentation, the Court held, as the law stood at the time. Therefore, along with the proposition that certain erroneous

description language can be treated as surplusage, and may neither control nor diminish the effectiveness of an otherwise acceptable description, this decision also supports the concept that extrinsic evidence can be presented in support of monument references made in a description, when the validity of such monuments is called into question. The ultimate outcome of this controversy is unknown, since the matter never returned to the Court, but the Court's ruling set the stage for a result on remand in which each miner would retain one claim and lose one claim, and had Prescott not bungled the notarization of the New Brunswick, he could have successfully defended both of his locations, despite his description error.

DILLON v BAYLISS (1891)

With this case, which also features both boundary and description issues relating to mining claim locations, we encounter the distinction between patent and latent ambiguities, and watch as the court contrasts the two and differentiates between them. Every description that meets all legal description requirements on its face, by virtue of the completeness of its content and the absence of any self-contradictory or otherwise nonsensical language, is legally presumed to be a valid description, effectively defining the location and extent of the intended area. That presumption is important, because it enables the description to control, in the absence of evidence to the contrary, but this presumption is not conclusive, so the contrary may always be shown. The fact that a given description is free of obvious error allows it only to pass the first test of its validity, due to the absence of patent ambiguity, which typically renders a description void if present. A description that is unambiguous in terms of content, when treated in isolation and taken at face value, can however contain latent ambiguity, for a virtually infinite variety of reasons, most of which are subject to discovery by a surveyor. Here we observe a scenario in which a conflict develops, as the apparent result of the creation of a number of carelessly or sloppily prepared descriptions in the same general area, leading to overlapping boundaries requiring resolution by the Court, and raising the question of whether or not evidence can be presented that has a potentially damaging effect on ostensibly valid descriptions. The Court is thus required here to distinguish latent ambiguity from patent ambiguity, and establish how latent

ambiguity, and the extrinsic evidence relating to it, is to be dealt with judicially. Once again, the specific focus is on the validity of references to monuments in descriptions, and the determination of their legitimacy, pointing yet again to the need for improved documentation of claim location monumentation. Interestingly, this case also happens to contain what appears to be the first use of the phrase "professional surveyor" ever made by the Court.

1882 - Dillon filed his mining claim location, which he called the Kilby, describing it as being 200 feet by 600 feet in size, stating that it was bounded on three sides by certain existing locations which he identified as having been previously established by others, and including the typical generic statement indicating that all of its corners had been monumented.

1883 - Bayliss filed his mining claim location, which he called the Maskelyne, evidently in substantially the same place as the Kilby. Whether or not Bayliss was aware, at this time, of any conflict or overlap between these two locations is unknown, and the extent of the conflict or overlap is unspecified, but no suggestion was ever made that Bayliss had created this situation knowingly or deliberately.

1884 to 1890 - At some unspecified time during this period, Bayliss applied for a patent for his location, but when Dillon learned of this, he objected and filed an action seeking to prevent Bayliss from patenting the Maskelyne.

Dillon argued that his location was senior, and he had done everything legally necessary to create and perpetuate it, including adequately describing and monumenting it, so the claim location of Bayliss should be deemed invalid, at least to whatever extent it was in conflict with Dillon's claim location. Bayliss argued that the description created by Dillon was so indefinite and uncertain that it was impossible to determine where its boundaries really were, and he attempted to present witnesses, who were identified as civil engineers, to testify in support of his position, but the trial judge upheld Dillon's objection to the witnesses, so they were not allowed to testify. The trial court then went on to rule in favor of Dillon, on the basis that Dillon's description contained no fatal flaws, when viewed in isolation,

and no evidence beyond that could be allowed to operate to impeach a valid description.

In previous cases, we have seen that attacks on mining claim location descriptions were typically unsuccessful, but this time the assailant came better prepared, with information evidently derived when Bayliss had his claim location surveyed for purposes of patenting. and he was also apparently more astute than most miners. Bayliss had challenged the validity of Dillon's description, and the testimony that was provided by various witnesses for both sides had illustrated that there was at least some degree of uncertainty or confusion relating to Dillon's claim location, since the testimony of those familiar with the area in question was clearly contradictory in some key respects. Specifically, the positions of the adjoining claim locations previously described by others, which Dillon had cited in his description as bounding objects, in relation to the location of Dillon's claim, were inconsistently described by different witnesses, indicating an obvious lack of clarity or certainty, if not the presence of outright boundary chaos in the vicinity at issue. Despite this apparent inconsistency, the trial judge had allowed Dillon's description to stand as valid, and had disallowed or discounted the testimony that had tended to discredit Dillon's description. The Court agreed that Dillon's description had been properly treated as legitimate evidence, since it was apparently valid on its face, and gave no obvious indication that it contained any error or insufficiency, so it was entitled to the same presumption of correctness as any other description. Mindful of the fact that miners are not surveyors, and quoting from a Colorado decision, the Court observed:

“That degree of certainty with which the final survey for a patent fixes the locus and boundaries of the subject-matter of the grant is not required in the original location ... nor would it be practicable, without the aid of a professional surveyor ... there was no error in admitting (Dillon's) location notice in evidence. Its fate, however, when it got into court, and met the attacks of its adversary, is another matter ...”

Having adopted the position that Dillon's description was worthy of the presumption of sufficiency, the Court acknowledged that Bayliss was correct that the description in question was by no means conclusive or unassailable. Although the fact that some of the witnesses for Bayliss were engineers was immaterial, the Court indicated, since the objective was not to

ascertain the technical precision of Dillon's description, but only to determine its validity, their testimony should have been allowed and given due credibility by the trial court, since it may very well have proven that Dillon's description was genuinely useless and invalid. While the use of adjoining claims as monuments in a description was perfectly legitimate, the Court noted, they held no value as monuments, if the result was a description that did not form a closed figure of any kind or enclose any definite tract. Since it was distinctly possible, judging from the testimonial evidence, that in reality Dillon's description amounted to nothing more than nonsense, when applied to the ground, the Court reversed the lower court's decision and remanded the case for a new trial, in order to provide Bayliss with the opportunity to demonstrate that Dillon's monument references were in fact bogus and useless, which the lower court had denied to Bayliss. This case stands as a classic example of the ever present potential for latent ambiguity in a description to emerge in a variety of ways, with very serious consequences, and it upholds the viability of such extrinsic evidence. As the Court wisely pointed out, even a description that appears to be completely acceptable and fully valid on its face, can be proven to be faulty, or even worthless, if it can be shown that the boundaries of adjoining tracts that are referenced in it as monuments do not relate to each other in any cogent manner, or that they do not exist at all, or that the description contains manifest errors of other kinds, once an attempt is made to apply it to the ground. While description errors that are clerical in origin can often be explained and effectively corrected, as demonstrated in the Metcalf case just reviewed, here we see that errors of a more fundamental nature, such as reliance on flawed data or mistaken descriptions previously created by others, although amounting only to a latent defect, can have a very damaging effect, and surveyors should be aware that such evidence is always relevant and subject to presentation. Similarly, in the 1899 case of *Bramlett v Flick*, the Court held that evidence pertaining to blazed trees along claim location boundaries was valid extrinsic evidence, which is highly relevant and fully admissible, in the determination of boundaries. The final outcome here is unknown, but the ruling of the Court had opened the door for Bayliss to introduce extrinsic evidence, potentially disqualifying Dillon's location, and thereby enabling Bayliss to obtain the patent he was seeking.

HOFFMAN v BEECHER (1892)

Here, in yet another claim location conflict, which is very similar in terms of conditions to the previous two cases that we have just reviewed, we see a result that stands in contrast to those previous cases, and provides additional insight into the attitude of the Court toward the true value of surveys. In this instance, description ambiguity again results in an overlap, which is virtually total and deliberate in this case, but instead of functioning to damage or destroy the prior location, by calling it's validity into question, the extrinsic evidence provided by the survey of the subsequent claim actually operates, in the eyes of the Court, to confirm the legitimacy of the previously established location. The Court here draws the critical distinction between description flaws that are of a genuinely fundamental nature, which are potentially fatal to the rights described, and errors that are inconsequential, which are subject to correction upon discovery, such as measurement errors in boundaries that are subject to the principle of monument control. Discrepancies of both of these types can amount to latent ambiguities, and their presence is typically revealed only when a survey is done, where none had previously been done, but the essential question addressed here by the Court is whether the evidence disclosed by the survey of the subsequent location has the effect of negating or supporting the original unsurveyed claim location. Here also for the first time we witness the impact of surveyor testimony, clarifying that unlike the survey done for Bayliss in the Dillon case, which uncovered serious issues with Dillon's location description, the survey evidence here has the contrary effect, since it reveals only measurement error, and the surveyor's testimony indicates that the earlier location was legitimately established and described, with reference to valid adjoining locations and existing monumentation as boundaries. Of course, like all principles, monument control is not without exceptions, as in the 1909 case of Tiggeman v Mrzlak, wherein the Court decided that distances can control, but only in the absence of superior evidence, such as where the original monumentation is genuinely lost. In

1913, in *Leveridge v Hennessy*, the Court similarly determined that the monuments in question there had been set so far from the described location that they were undiscoverable, and it therefore disqualified them on the basis that they were without value for purposes of notice for that reason. In the case we are about to review however, we learn that survey evidence is not necessarily useful only to the party who ordered the survey, it can also operate to the benefit of the opposing party.

1882 - Hoffman's predecessor filed a mining claim location at this time, known as the Lake Superior, which was then conveyed to Hoffman at an unspecified time, evidently within the next few years. The location notice created by Hoffman's predecessor defined his location as being the standard size, reciting the typical legally prescribed dimensions of 600 feet by 1500 feet, and it made the legally obligatory reference to certain existing adjoining locations previously established by others.

1887 - Beecher applied for a patent for his mining claim location, known as the Silver Queen, which he had evidently established at an unspecified time within the previous few years, subsequent to the Lake Superior. With the Silver Queen, Beecher had intentionally covered nearly the entire area embraced by the Lake Superior, in the apparent belief that he could prove that Hoffman's location description was legally inadequate, if it should prove to be necessary to do so. When he became aware of what Beecher had done, Hoffman naturally objected to it, and he filed an action to block Beecher's attempt to obtain a patent.

Hoffman argued that his location was senior to Beecher's, and that the documentation supporting it was legally sufficient in all respects, so it should be upheld as valid. His evidence included a diagram of his location, which had not been prepared by a surveyor, because the site was more than 11,000 feet above sea level and was inaccessible for most of each year due to snow, for which reason he claimed that he had been unable to obtain the assistance of a surveyor. Beecher, who had obtained a survey of his location, argued that Hoffman's measurements of the boundaries of his location were in error, to such an extent as to render his claim invalid. The trial court agreed with Beecher that Hoffman's location was invalid, due to having been

improperly measured and described, and that Beecher's location was therefore entirely legitimate, so Hoffman could not legally stop Beecher from obtaining a patent for the Silver Queen.

Since the assault made by Beecher on the validity of Hoffman's location was based entirely upon Beecher's allegation that Hoffman's location was so mistakenly described as to destroy its legitimacy, the sole focus of the Court was upon the specific details of the alleged deficiencies in Hoffman's description. Rather than allowing technical details such as measurement discrepancies to control the resolution and outcome of the controversy however, the Court indicated that it was cognizant and mindful of the fact that there was a larger purpose to be served by the examination of the details of such a conflict. The law provided for the opportunity to adjudicate and resolve conflicts over mining claim locations, the Court observed, because it was necessary to protect the rights of parties who had acted in good faith, prior to the point in time when their rights stood be permanently foreclosed and lost, by the issuance of a federal patent to another party or parties. Although Hoffman had not obtained a survey, and had simply adopted his predecessor's measurements and drawing of his location, nothing that he or his predecessor had done was contrary to the law, since there was no legal requirement for a location to be surveyed, at least until such time as the miner chose to seek a patent. The Court recognized Hoffman as a claimant who had acted in good faith, because despite whatever measurement errors had been made, he had shown his intention to comply with the basic requirements of law, and in fact his predecessor had properly applied the principle of monument control, to lock his location into place with respect to his adjoiners, presumably aware of his own inability to measure effectively. In view of what had been done to legally document Hoffman's claim location, speaking with reference to the protection of Hoffman's rights, and quoting in part from a comparable Nevada case, which had gone on to be upheld in the Supreme Court of the United States, the Court noted that:

“... the primary object ... is to obtain an adjudication in a competent tribunal of the controversy of bona fide claimants ... the law intended, in every instance ... to give the opportunity to have the conflict decided by a judicial tribunal ... The main proposition which controlled the court below is the alleged fatal variance in the descriptions ... There is no variance in the respective descriptions of which the law would take serious

notice ... and the mistake is harmless.”

Having thus acknowledged the presumption that Hoffman had acted in good faith, which is always the applicable presumption, in the absence of any accusations or evidence of fraud, and having reminded the litigants that the dispositive equitable factor under consideration by the Court is always the bona fide intent of the original claimant, and not the degree of precision manifested by his efforts, the Court proceeded to review the specific issues presented by Hoffman's description. Beecher had pointed out two problems with Hoffman's description, one being the fact that the call on the closing line ran southwest, instead of southeast as it should have to close properly, and the other being the fact that the true dimensions, as discovered by the survey done for Beecher, were all at variance with those in Hoffman's description, some by up to 300 feet. The Lake Superior was also bounded by two existing mining claim locations of others however, serving as monuments, which were both consistent with Hoffman's description and were confirmed by Beecher's surveyor, who also testified that he had found original stakes that Hoffman had set for the Lake Superior. Characterizing both of the measurement issues relied upon by Beecher as slight and inconsequential, the Court refused to lend them any credence or allow them to control the rights in controversy. Declaring Hoffman's description to be materially in harmony with the conditions on the ground, the Court determined that it appeared to be legally sufficient and valid, in spite of its clear lack of precision, and accordingly reversed the decision of the lower court and remanded the case for a new trial, effectively ending Beecher's effort to capitalize on the deficiency of Hoffman's measurements. The most obvious factor of significance in this case was the strong reiteration of the basic principle of monument control, as the Court simply swept aside all of the measurement issues, without any serious consideration of their magnitude, even though that was substantial, on the fundamental basis that measurements are controlled by monuments, including established adjoining boundaries. But equally important, in equitable terms, was the Court's support for the efforts of Hoffman's predecessor, who had met and satisfied the requirements of law, by monumenting his boundaries in good faith, even though he had failed to describe them in precise terms. This appreciation for such efforts, made by people lacking in the kind of technical skills possessed by a surveyor, leaves the Court highly disinclined to approve the punishment of one such as Hoffman, who has neglected to order a survey, and instead simply relied upon the conditions that he could actually see for himself on the ground. This particular aspect of land rights justice may leave some

surveyors disgruntled, at seeing a party who decided to forego a survey prevail over one who obtained a survey, but we will see this scenario play out in this same manner in the future, making it clear that it pays to be mindful of the perspective of the Court, with regard to the proper role of surveys and surveyors.

GOODRICH LUMBER v DAVIE (1893)

Here we arrive at the first case of the statehood era involving platted city lots that we will take notice of. This case focuses solely on the subject of description validity, since it resulted from a single mistake made in reference to a certain city lot. While no surveyors are directly involved in this controversy, a residential subdivision plat, such as the one in play here, is obviously a product with which surveyors routinely work, and which some are called upon to create, making issues relating to platted lots relevant to the typical land surveyor, and a fundamental part of a surveyor's professional knowledge. Determining the number of an existing platted lot would not be a difficult task for a land surveyor, and one would probably suppose that most other people could properly do so as well, but this case illustrates that even such a seemingly simple item as this can become a source of serious controversy. Although the source of an error or mistake is often of paramount significance in land rights litigation, this case is an example of a situation in which the origin of the problem is of no importance whatsoever, in the eyes of the Court, which takes the position that it is not subject to correction, in the absence of proof that it was anything other than the result of plain bungling. The Court certainly has the authority to correct genuine mistakes, and we have already watched it do so, the critical distinction made here by the Court however, is between mistakes that clearly deviate from an agreed and well understood intention, and those that cannot be shown to represent anything other than carelessness on the part of one party. The Court is well aware of its responsibility to come to the rescue of any party or parties whose description efforts have missed their target, despite being performed with reasonable diligence and in good faith, but the Court has no such responsibility to the negligent, and we see the Court allow the axe of justice to fall here upon plaintiffs who failed to carry their burden

of proof well enough to show that they were not either primarily or entirely responsible for their own predicament. In another early ruling pertaining to platted lots, in the 1890 case of *Ming v Foote*, the Court allowed a patent for several platted townsite lots to be controlled by a revised plat, which did not yet exist at the time of the patent, although the patent had been issued with reference to an earlier version of the townsite plat, viewing the revision of the plat as a mere technicality, insufficient to nullify the conveyance, on the basis that doing so protected the sanctity of the patent. Here by contrast, the Court takes a more rigid position, choosing to employ language indicating that it was inclined to see plats as absolutely controlling the rights described in all documents in which plats are referenced.

1891 - Gelsthorpe had acquired Lot 13 in Block 200 of Great Falls at an unspecified point in time, and he decided to have a building erected on it at this time, so he hired Davie, who was a builder, to handle the job for him. The details of any contract that may have existed between Gelsthorpe and Davie are unknown, but are not relevant to the subject matter. Davie proceeded to obtain the lumber for the project from Goodrich and constructed the building for Gelsthorpe on Lot 13. Evidently some uncertainty or confusion, of unknown origin, existed over which lot Gelsthorpe actually owned, or else a simple mistake or blunder of some kind was made, because for some reason, the lien that was created to cover the value of the lumber indicated that the building was on Lot 14, and the lien was therefore written so as to apply against that lot, which was in fact vacant, and was owned by others. When Goodrich attempted to foreclose, he discovered that the lumber had actually been used on Lot 13, and not on Lot 14, so the lien describing Lot 14 was of no use or benefit to him, and he responded to this situation by filing an action seeking to have the description error corrected. Who prepared the erroneous lien description is unknown.

Goodrich did not suggest that any kind of fraud had taken place, he simply maintained that the wrong lot number had been used through innocent inadvertence, so the mistaken description should be considered subject to correction. The lumber itself was the true subject matter of the

lien, he argued, rather than the land, so the fact that the lumber was not used on the lot that was described in the lien should be treated as insignificant, and the lot number should be changed, so that the lien would apply to the lot upon which the lumber had actually been used. Davie did not participate in the trial, but his fellow defendant Gelsthorpe argued simply that the description was clear and definite, and contained no uncertainty, so it was not subject to correction or reformation of any kind. The trial court agreed with Gelsthorpe, denying Goodrich the opportunity to change the mistaken lot number.

Since there was no accusation that Gelsthorpe, Davie, or anyone else had perpetrated any form of deception, regarding which lot Gelsthorpe actually owned, or which lot the building was going to be constructed on, either at the time Davie obtained the lumber from Goodrich or when the lien was created, the Court treated the source of the description error as a pure mistake on the part of Goodrich, and Goodrich apparently conceded his responsibility for the mistake, as he made no attempt to blame the error on any other party. The Court began by reiterating that although any ambiguity in the language used in a description is always subject to clarification, by evidence of any form that serves to assist in defining its true meaning, the idea of changing the actual content of a description is an entirely different matter. Interpretation of existing words used in a description is always appropriate, to determine the true intent of the parties who selected that language, but replacing one word or number with a different word or number, is not mere interpretation, it amounts to outright reformation of the description, and reformation of a description requires legitimate justification. After citing cases from Illinois and Texas, in which certain distinctive buildings had been held to adequately identify a tract of land, which was occupied by the building in each of those situations, effectively taking the place of a more typical form of description, the Court observed that the circumstances of this case were quite different, because here a fully valid legal description had been employed, which was completely independent of the building and made no reference to it, as had been done in the cited cases. Emphasizing the significance of the reference to a recorded subdivision plat that had been made in the description in question here, and quoting from a Minnesota case involving such a plat, the Court confirmed that:

“In this state, the important means of identifying real estate is, in the case of urban property, the description according to the plat ... the system is well nigh universal to describe land by lot

and block of the plat of an official survey ...”

With that very basic statement, the Court acknowledged the great significance of plats, and indicated that it clearly recognized the high degree of control that they exert when referenced in a description, which affords all of the parties involved in the transaction the right to rely upon the plat as a legally controlling document. Unfortunately for Goodrich, since the description that he used to identify the property to which the lien would apply was absolutely clear and complete, the Court was unwilling to approve the change to it that he sought to make. The actual source or exact cause of the erroneous lot number was of no consequence, in the eyes of the Court, which determined that the consequences of the error fell solely on Goodrich, who obviously should have exercised greater care in verifying the correctness of the description that he had chosen to use, at the outset. Having so decided, the Court upheld the lower court ruling, but modified it by leaving the door open for Goodrich to continue to seek a remedy against Davie, since Davie had not been involved in the ruling that had been made in the lower court, and the possibility existed that he could in fact be proven to have been the party actually responsible for the use of the erroneous lot number. In reviewing future cases, we will learn that the Court is perfectly open to the idea of reforming a description, when the evidence indicates that such action is merited and can be justified, but in this instance, Goodrich presented no evidence that the description error had been created as the result of anything other than his own lack of care in ascertaining the true lot number, and that alone, being a unilateral error, was an insufficient basis, the Court concluded, upon which to alter the document in question. Despite its general disinclination to allow technicalities, such as a single mistaken number or word to control, the Court has taken this same rigid approach under other circumstances. In the 1895 case of *Haggin v Lorenz*, Lorenz was occupying a tract that was also claimed by Haggin, which was located in a certain Section 25. Haggin obtained a judgment in his favor and had the sheriff physically remove Lorenz from the tract in Section 25, but the description that had been used by Haggin for that purpose erroneously described the tract as if it were in Section 26, due to a typographical error, which resulted in the controlling quarter corner being called out as the corner between Sections 25 & 26, when the quarter corner between Sections 25 & 36 was actually intended. Though the fact the error was very obviously and purely clerical in nature, the Court ruled that Lorenz had been unjustifiably removed and ordered him to be put back into possession of the tract in Section 25, applying the well known maxim that "the particular

controls the general". Haggin, just like Goodrich, had learned the hard way that the Court can be quite unforgiving, when the evidence points to carelessness in the preparation of a description.

MATHES v NISSLER (1895)

Although boundaries are typically created through legal means, they can also be created through equitable means, and this case represents an excellent example of the creation of such equitable rights to land, and shows us that such rights can be binding upon the parties who were involved in their creation, and upon their successors. The distinction between legal and equitable land rights lies in the process through which the rights come into existence, so since these two terms are used only with reference to the differences in the process of creating such rights, the fact that equitable rights are distinguished from legal rights does not mean that equitable rights are illegal, it simply means they were derived in a manner different from similar rights that were created through the legal channel. An equitable right, in contrast to a legal right, is founded in natural justice, and upheld by the generally accepted principles of common law, which support and encourage proper conduct and behavior, while a legal right generally has its origin in a specific item found in the body of law that has been legislated and codified in the form of statutes. The Montana Subdivision and Platting Act is an ideal example of statutory law that has been legally adopted, with respect to the creation of boundaries, and upon which land rights can therefore be legally founded. By contrast, laches, estoppel, notice and practical location are some prime examples of equitable principles that can and do often have a significant impact on land rights, including the creation and location of boundaries, as we see here, and as will be noted and developed in other cases yet to come. In *Neill v Jordan*, an 1894 case also dealing with the topic of boundary creation, Jordan owned certain land that was described in the typical aliquot fashion, and the aliquot line that marked his east boundary also represented the west boundary of the Helena townsite. When the townsite was originally staked, the townsite surveyor evidently staked that aliquot line east of the line that Jordan had been treating as his boundary, so Jordan of course began using the additional land and claimed ownership of

all the land extending to the new line, which had evidently been staked by the townsite surveyor in error, short of the true aliquot line location. Jordan asserted that the work of the townsite surveyor was legally conclusive, regardless of error, so all the land west of the line in question was not part of the townsite, and he was free to claim it as being part of his own adjoining land. The Court disagreed however, rejecting the suggestion that the work of the townsite surveyor was equivalent, in terms of conclusiveness, to the work of a GLO surveyor establishing corners and lines of the PLSS, so the townsite patent controlled, the erroneous line was deemed subject to correction, and Jordan was forced to relinquish the portion of the townsite that he had been using.

1871 - A group of four settlers, comprised of Mathes, Nissler, Stolte and Otten, settled in an unspecified location on a portion of the public domain. The area they chose was presumably unsurveyed at this time, so they had no true boundaries, and the size of the area which they occupied is also unspecified. Over the ensuing years, each of them constructed buildings, made their homes on the land, and developed businesses there, as typical settlers, and no one challenged their right to be there. Over time, they gradually established de facto boundaries between their separate portions of the area, through their use of the land. These boundaries were never documented in any manner, but they were distinctly observable on the ground, and they were mutually respected by each of the parties, just as any typical neighbor respects the property of an adjoining land owner.

1886 - By this time, the land had evidently been surveyed by the GLO, so the group became aware of the fact that the boundaries of the PLSS had been established around them. Apparently concerned about the fact that more settlers might soon be entering the area, and aware that they had never filed any legal claim to the land that they had been using, the group decided it was time to attempt to secure their rights to the land. To accomplish that, as a group, they filed a placer mining claim that covered the entire area they had been using. The extent of their claim is not specified, since it was not a factor in the case, but presumably it was a typical quarter section or a typical quarter quarter.

1889 - The claim filed jointly by this group was approved, and a patent was issued to them as a group, granting a share of the rights to the whole area to each of them equally, without any regard for the manner in which they had physically divided the land among themselves by means of their occupation and use of it over the years.

1893 - Otten evidently decided to leave the area, while Mathes wanted to increase the size of the area that he owned, so Mathes bought Otten out, and the others had no problem with this. Therefore, at this point in time, Mathes owned a one half interest in the land, while Nissler and Stolte each held a one quarter interest in it. Mathes apparently wanted to expand his use of the land, but Nissler and Stolte maintained that they had the right to continue to exclusively control the well defined areas that each of them had been occupying over the years. Mathes believed that his one half interest covered the entire area, so he decided to file an action, seeking to have the land legally partitioned, without regard to the manner in which the land had been historically used, so that he could make exclusive use of his half of it.

Mathes argued that the land had never been legally partitioned, so he was entitled to one half of it, to be measured off without respect to the manner in which it had been previously used by the various parties, and he relied on the statute of frauds to render the existing physical divisions void and enable him to legally sweep them aside. The exact manner in which he wanted the area in question to be legally divided is unknown, but presumably he wanted it divided in the typical aliquot fashion, so that the land owned by him would be in the typical compact rectangular shape, which would be most useful and convenient to him in subdividing it, and his plan evidently conflicted to some extent with the areas that had been used by the others. Nissler and Stolte argued that a verbal agreement had been made between all of the members of the group, at the time they decided to file their claim to the land, by which each party agreed to respect the areas occupied by the others, and that they had all agreed that each of the others would always have the right to claim ownership of the area that each one had respectively occupied and developed for their own use and benefit, and that their oral agreement to that effect should be treated as binding upon all of them. The decision of the trial court honored the rights of each party to

their existing areas of occupation and denied Mathes the right to claim the arbitrarily measured half that he wanted.

This case represents a classic contest between legal rights and equitable rights, the claim of Mathes being based upon statute law, while the claim set forth by Nissler and Stolte had its basis in equity. Without question, Mathes was entirely correct that the subject property had never been legally divided in any manner, but clearly it had been physically divided among the parties in a manner that was both natural and logical, in keeping with the way people typically respect the property and possessions of their fellow citizens, amounting to a genuinely practical division, which was fully apparent on the ground. Each party had presumably occupied and used an area of approximately equal value, such as had been most appropriate under the conditions to support his specific personal preferences and needs, and each of the others had implicitly respected those divisions, the Court found, as fellow members of any civilized society typically do, creating equitable rights which had become vested in each of them. Although land rights had been created in equity, by the mutual actions of the parties, since no documentation of the original agreement between the partners existed, their rights as they stood were technically deprived of legal status, and it was this factor that Mathes sought to employ against his partners, to his own personal advantage. After observing that the long standing development and improvement of the land, performed by each party in the immediate presence and view of each of the others, had created a mutual estoppel between them, the Court proceeded to cite a number of comparable decisions upholding the legal validity of such rights from all across the country, and quoting in part from a Pennsylvania decision, declared that:

“... partition is not an acquisition or purchase of land, nor is it in any proper sense a transfer of the title ... A parol partition, when fair and equal, and followed by due execution, has been held to bind ... the result of such a partition does not confer a merely equitable right, but a right recognized, and which will be enforced, at law ... Retaining possession and making the improvements are sufficient to render the partition valid ... a parol partition, carried out and followed by actual possession in severalty, of the several parcels, is valid, and will be enforced, notwithstanding the statute of frauds, on the theory that it has

been removed from it's operation by part performance.”

Since the statute of frauds was fundamentally intended to prevent unscrupulous parties from taking advantage of naive and genuinely innocent parties in the course of completing land transactions, it had no application, the Court decided, to a situation such as this, in which no transfer of any interest in the land at issue had taken place. All of the members of the group had acquired rights to the entire area that was patented to them, against all outsiders including all the world, but as between themselves, the Court held, none of them had ever acquired any rights to any area that had already been put to exclusive productive use by any one of the others. Noting that the decision of the trial court, protecting the rights of Nissler and Stolte to their respective holdings, was fully in accordance with settled law, the Court upheld the decision of the lower court, confirming that binding boundaries can be created through an oral agreement that is subsequently put into effect and mutually honored as such. What Mathes failed to understand and appreciate is the fact that equitable rights are just as subject to protection under the law as legal rights, and he also failed to realize that under the principles of the common law, in dealing as he had with his partners, he had bound himself to honor the commitment that they had mutually made, with respect to the use and control that each of them had with regard to the land in question. Estoppel, of the kind that was in operation here, simply represents the imposition upon the parties, by the Court, of the basic requirement for honesty and fair dealing between members of a society. While various specific laws have been created through legislation, and those laws serve numerous beneficial purposes, the Court recognizes, none of them can be construed as having been intended to facilitate unjust behavior, and one important role of the Court is to apply it's wisdom to insure that statute law is not manipulated by artful parties in support of their own fundamentally unjust conduct. The Court had again made it clear to all, just as it had 12 years earlier in the Story case, that laws such as the statute of frauds are not weapons to be wielded to the detriment of innocent parties who have acted in good faith. This case demonstrates not only that oral boundary agreements can have real validity, but also that they can sometimes even operate to create entirely new original boundaries, which had never previously existed as a matter of record. Interestingly, the Court gave no indication of any need or requirement for the undescribed boundaries that it approved in this case to be surveyed, but it is likely of course that a survey would be required to define such boundaries for the record, were a similar situation to arise today.

TRACY v HARMON (1896)

Here we have another case focused upon description validity, which in this instance well illustrates the potentially severe consequences of a description containing patent ambiguity. This case was intended, by the plaintiff when he decided to take legal action, to be an adverse possession case, as the plaintiff was evidently attempting to secure his rights to various lots and parcels that he had acquired for some unknown purpose, presumably involving development of the area, and the defendant represented an obstacle to his plans, since he was using or occupying part of the area that had been acquired by the plaintiff. But as we will see, the matter of adverse possession was destined not to be decided, because the description of the land in controversy, upon which the plaintiff's claim of ownership was founded, proved to be insufficient to support his claim, calling the validity of his own acquisition into question. Thus the description error seen here goes beyond causing a mere boundary dispute, in the view of the situation taken by the Court, it actually prevents the owner of record from successfully asserting any claim to the land in question at all. The Court did decide some adverse possession cases during this period however, including the 1891 case of *Peter v Stephens*, in which the Court took the rigid position that color of title was absolutely necessary to support adverse possession, a position from which it would subsequently retreat, but which was effectively replaced by the requirement for the adverse claimant to show payment of taxes on the land claimed. In *Casey v Anderson*, in 1895, taking an approach more favorable to adverse claimants, the Court ruled that an otherwise successful adverse possession is not disrupted or broken by a judgment temporarily divesting the record owner of his title, because all that matters in the determination of adverse possession are the facts of physical possession and the acts or omissions of the parties themselves. In that same case the Court also correctly noted that adverse possession has its origin in the common law doctrine of laches, and modern laws relating to adverse possession actually represent merely a statutory codification of the spirit or essence of that ancient equitable doctrine. Then in 1896, in *M & M Land & Improvement v Brasier*, the Court again harkened back to the seminal

Lamme case of 1883, reviewed earlier herein, upholding an adverse possession claim, that had been made on the basis of a claim of title, in the absence of any color of title, consistent with the widely held modern view that a valid claim of title can be made by an adverse claimant lacking any documentation representing color of title. This gradual erosion of the color of title requirement for adverse possession, which took place nationwide during the nineteenth century, would eventually lead to judicial conflict and the increasingly frequent intrusion of adverse possession into the realm of boundary law, which played out in the western states primarily during the early decades of the twentieth century.

1896 - No timeline of events is provided by the Court in the text of this case, because the Court found any such details unnecessary to consider in reaching its decision here, but the situation was evidently of the kind typically seen in adverse possession cases. Tracy was the owner of record, of an unspecified number of city lots and parcels, who had presumably acquired title to the land by legitimate means, and the fact that he was the legal owner of a substantial amount of land was unquestioned. Harmon was an adverse claimant, who had evidently been using or occupying at least one of the lots or parcels that were owned by Tracy, for some unspecified length of time, in some manner that was adverse to the ownership rights of Tracy. Since Harmon evidently refused to vacate or stop using the land in question, Tracy found himself compelled to file an action against Harmon, seeking to have Harmon ordered to cease and desist, in order to recover effective possession of the property that he had acquired, and put it to whatever use he planned to make of it.

Tracy simply set forth the facts showing that he was the owner of record of the property that was being used or occupied by Harmon, and argued that the possession of Harmon was in conflict with Tracy's ownership rights, so Harmon should be ejected from the land. Harmon apparently made no claim to legal ownership of the land in question and instead argued that his possession was genuinely adverse, and that it had lasted for the period of time required by the applicable statute of limitations, so his right to the land was superior to that of Tracy. Although the relative strengths and weaknesses of their respective arguments are unknown, so the basis for the

result reached at the trial cannot be analyzed, the ruling of the trial court was favorable to Harmon.

Tracy was unsatisfied with the result reached by the trial court, so the case came to the Court in the form of a challenge to the validity of that result. The exact grounds upon which Tracy intended to challenge the trial court ruling are not spelled out in the text of the case, because the assault upon the trial court ruling launched by Tracy was effectively cut off and blocked by Harmon. Harmon was able to prevent Tracy from successfully presenting his case, because Harmon had discovered a fatal flaw in the record information relating to Tracy's claim to the specific tract of land that was involved in this controversy. That flaw was in the description that Tracy was relying upon to support his ownership of the property in question. As quoted by the Court, the description of the parcel that Tracy put in issue reads, in pertinent part, as follows:

“Commencing at a point 200 feet south of the north line of what is known as the block eight in Springbrook addition to the city of Bozeman, as shown by the recorded plat of said addition ... and on the west line of the SE1/4 of the NE1/4 ... thence running west to the west line of the said block, about 35 feet; thence south, along the east line of said block, 50 feet; thence west about 36 feet, and to a point on the west line of the SE1/4 of the NE1/4 ... thence north to the point of commencement.”

In addition to Tracy's description itself, the plat referenced in the description was also among the evidence, and it fully showed the block in question, which was 250 feet long from east to west, and it also showed the aliquot line that was recited in the description. The Court stated that it was clear, after looking at the plat, that the west line of the SE1/4 of the NE1/4, which is correctly referenced twice in the description, was located approximately 35 feet west of the east end of the block in question, and approximately 215 feet east of the west end of that block. It was quite obvious, despite the bungled directional calls, that the description was intended to define a rectangular tract of land, roughly 35 feet by 50 feet in size, located at the east end of the block in question. Nevertheless, the Court took the position that a party who is attempting to recover land, by having another party who is making use of it thrown off the land, bears the burden of providing an absolutely definitive description of the land that they claim to own. For that reason, the Court ruled that the description error was

uncorrectable and was in fact fatal to the claim made by Tracy, it had cost him any opportunity he may have had to recover the tract at issue. The description as it stood, the Court declared, was of no value whatsoever to Tracy, since it failed to adequately enclose any specific tract of land, so it was impossible for him to prove that he actually owned the area being occupied by Harmon, and on that basis, the Court upheld the lower court decision against Tracy. In essence, it made no difference how strong Tracy's claim to the land may have been, or how weak Harmon's claim may have been, the Court declined to even look into any of those issues, because the bogus description made it impossible for the Court to rule in Tracy's favor, even if his claim had proven to be superior in terms of merit. This case represents a classic example of a patently ambiguous description, and while latent ambiguity in a description can be clarified by extrinsic evidence, as we have already seen, extrinsic evidence is of no benefit to a description stricken with patent ambiguity. Tracy's description was patently ambiguous, because as the Court noted, it is impossible to enclose a rectangular figure with a description that contains two westerly calls and no corresponding easterly calls, so the fact that the real location of the tract could be ascertained by the use of extrinsic evidence was of no assistance to Tracy. In order to make Tracy's description sufficient, it would have been necessary to either reverse or eliminate certain directional calls, which would require outright reformation of the description. Consistent with its rulings in the Goodrich and Haggin cases, the Court had again placed the full burden of correctness, and the consequences of a description failure, on the party seeking to benefit from the use of an erroneous description. Comparing the outcome of cases such as these to that of the Mathes case, it can be seen that quite ironically, under certain circumstances, a party with no legal description at all can actually occupy a stronger position, and be more likely to prevail, than a party holding a flawed description, affirming the wisdom of the old adage that "the only thing worse than no information is bad information".

HORSKY v MORAN (1898)

This case, though lacking the level of detailed clarity that a surveyor might typically desire, presents the most complex factual situation that we have reviewed thus far, and in so doing it provides us with considerable insight into the nature of the many early land rights controversies that took

place in Montana between miners and the occupants of townsites. As we have already seen well demonstrated in several earlier cases, mining claim locations were legion in Montana and they were replete with boundary issues and conflicts, which sometimes involved townsites as well, since many townsites were naturally situated in mineral rich areas. As can readily be imagined, many of the early townsite surveys were evidently hastily done, perhaps by unqualified personnel, and therefore may well have contained some blunders and problems that were just as serious as those that so often afflicted claim locations, so its not surprising that numerous major boundary and title disputes erupted, where mining claims and townsites sprang up in close proximity. A critical factor in the competing claims made in this case was the fact that both parties, the miner and the town lot owner, held rights that were ultimately derived from the United States, as the original grantor of all land rights upon the vast public domain. The land rights of the miner resulted from laws that had been put in place to support the discovery and use of natural resources, which was obviously a matter of high importance that was quite beneficial to society, but the land rights of the lot owner were also the product of the powerful federal drive to settle and populate the west, in the interest of the development of the nation as a whole. The crucial element in this case proved to be the fact that the rights of the lot owner were granted by means of patent, and therefore represented an outright and absolute grant of ownership, upon which the lot owner had the right to place great reliance, while the rights of the miner were contingent in nature, upon his ongoing use of the land for a productive purpose, until such time as he might obtain a patent, which in this case the miner had never done, putting him at a distinct disadvantage. Here we also see another instance in which the same dispute was dealt with by the Court on multiple occasions, due to multiple appeals, and in this particular case due to the fact the evidence was obscure and inconsistent, which the Court openly lamented in striving to see that justice was done with respect to the rights of both parties. As we will see, the Court ultimately resolves the issues based upon the importance of protecting the land rights of legitimate patentees, through the application of time honored equitable principles.

1869 - The townsite of Helena was created, and it's boundaries were

based on a townsite plat, which was based on a survey that was done in 1868. Moran was a miner who had established a placer mining claim and had been living and working on it for an unspecified length of time. The description of Moran's placer claim location is unknown, but the townsite plat evidently overlapped the area that Moran had been occupying or using to some extent, and included some unspecified amount of land that he believed was within the boundaries of his claim location. There was no evidence regarding the details of how Moran had established his claim location, or any information concerning its size, shape or monumentation, and there is no indication that it was ever surveyed.

1874 - Horsky acquired a group of lots in the townsite, which had been patented in 1872. Horsky went into possession of the lots that he had acquired, fenced the land, erected buildings and made his home there. How he determined where the boundaries of his group of lots actually were is unknown, there is no evidence that he ever had the lots surveyed, and no indication of whether or not any lot corners had ever been set on the ground.

1885 - Another survey of the townsite was performed and another plat of the townsite was prepared, apparently due to concerns about unspecified errors or mistakes in the 1868 survey, or the 1869 plat, or both. This second plat of the townsite evidently altered some of the streets and lots that had been depicted on the 1869 plat, and it also added some new lots to the townsite. The exact differences between the earlier and later surveys and plats are unknown, but it appears that the 1885 plat was intended to correct and officially supersede the 1869 plat. This resulted in some degree of uncertainty, if not outright confusion, over the location, or even the validity, of at least some of the lots that had already been acquired, with reference to the 1869 plat, such as those held by Horsky.

1888 - Moran obtained a deed to one of the new lots created by the 1885 plat. Just a few days after that deed was issued to Moran, Horsky obtained an additional deed, for the purpose of resolving the ambiguity that existed in relation to the exact location and dimensions

of the lots that he had previously acquired, which had arisen in part from the fact that his lots had all been described previously using distances that were stated as being only "more or less". After obtaining this additional deed, Horsky believed that his tract was now fully and properly described, and was not in conflict with the 1885 plat. A controversy subsequently arose however, over whether or not the lot acquired by Moran was actually in conflict with the land held by Horsky, and Horsky came to the conclusion that a conflict did exist, so Horsky filed an action against Moran, seeking to have Moran's deed declared void.

1893 - Horsky was initially successful in this first action against Moran, but his trial court victory was reversed by the Court, on the grounds that he had failed to present evidence that was sufficiently clear and convincing that Moran's lot was actually in conflict with his own lots, so Horsky was unable to clear his title or eliminate the problems posed by Moran at this time. Moran's mining claim was not expressly involved in the dispute that was adjudicated at this time, which was focused instead on the deed to the single platted lot that Moran had acquired in 1888, but the larger issue presented by Moran's mining claim also remained unresolved. Moran had apparently made little or no use of the mining claim for several years, but he had never formally forsaken it either. Horsky was forced to go back to the drawing board, and attempt to develop a new strategy with which to try to put these issues involving Moran into repose. Horsky decided to launch another effort to finally silence the claims of Moran, and this time his attack on Moran was focused on the validity of Moran's placer mining claim.

Horsky argued, in this second trial, that Moran's mining claim was invalid, and that even if it had been valid originally, Moran had abandoned it, so in fact Moran had no valid claim of any kind to any portion of the townsite. Horsky also once again argued that the statute of limitations had run against Moran, so Moran should be barred from asserting any claim that infringed upon Horsky's lots. Moran did not assert merely that he owned the one platted lot which had been deeded to him in 1888, as he had done during the first trial, instead this time he argued that his entire placer mining claim

was still valid, and any portion of the townsite that overlapped his claim location was invalid, which evidently included all of the lots that had been deeded to Horsky, and possibly an even larger area, with a potential impact on other townsite occupants. Moran further argued that it was impossible for Horsky or anyone to have adversely possessed any of the land that they had enclosed, because since the land was within the boundaries of his claim location, it was still part of the public domain, and it had never legally become part of the townsite. The trial court again decided the issues in favor of Horsky, this time ordering Moran's claim location to be voided, along with his 1888 deed, and since Moran was again completely unsatisfied with the result, the Court was required to revisit this convoluted controversy.

The Court acknowledged that the trial judge had performed an impressive review of a number of cases dealing with the issues that were in play, including cases that had reached the United States Supreme Court, such as *Belk v Meagher*, discussed earlier herein, which had come from Montana. The trial judge had quite extensively and thoroughly examined the law regarding federal patents, noting the conditions under which a patent can be held to be either void or voidable, but also affirming the great significance of such a grant, and the Court agreed with his analysis. Ultimately, in view of the fact that the federal government had issued a patent covering the entire townsite, and numerous lots had been conveyed and occupied for several years in reliance on that townsite patent, some of them having been improved and occupied for over 20 years, such as those held by Horsky, the Court declared that the townsite patent was fully valid, to its complete extent as platted. Since Moran had not been diligent in performing the tasks required of him by law, in relation to sustaining his mining claim as a viable ongoing operation, and he had never obtained a patent for it, the Court was unimpressed with his attempt to assert rights to the land, which the Court indicated he should have asserted in a more timely manner. The Court cited the venerable doctrine of laches, which is among the oldest and most powerful active principles of equity, and which amounts to an estoppel imposed by silence in conjunction with the passage of time, as the basis for its ruling in this case, quoting with approval from a federal decision declaring that:

“No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of

his property ... It gives to the actual and long possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds ... It works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years ...”

The granting of the townsite patent, the Court determined, without any explicit protest from Moran, had effectively foreclosed any rights he might have once had, or might have been able to successfully maintain, with respect to his claim location, had he brought them forth at the appropriate time. On the contrary, since he had allowed the development of the townsite to take place, and watched improvements being made by innocent parties such as Horsky, on land that he intended to one day claim once again as being his own, he had in fact acted in a manner that was indicative of an intention to abandon his claim to the land. Having so decided, the Court upheld the lower court's nullification of all the claims made by Moran, leaving him with nothing, and quieting title to the land in dispute in Horsky. The Court had employed the powerful equitable forces of laches and estoppel against Moran, due to his own delays and omissions, which the Court saw as tantamount to a de facto abandonment of whatever rights he may have originally had in the area that had been developed as part of the townsite, stating that his rights to his claim location were "in the nature of an easement only", leaving them subject to abandonment. Decisions such as this one by the Court, effectively negating otherwise valid land rights such as those of Moran, serve as a stern warning to those who may suppose that they have the option to choose to stand by in silence and watch others make productive improvements, before voicing a claim to the same land, once it's value has been thus enhanced. But Horsky's battle was not yet at it's end, Moran took the case on to the Supreme Court of the United States, where the Montana decision was upheld in 1900, on the basis that a decision based on laches, being of an inherently equitable nature, is not within the scope of matters that are subject to review in the United States Supreme Court. This case marks another milestone on the early path toward civilization, and the closing of the old frontier in Montana, as it shows an increasing inclination on the part of the Court to honor and protect the rights of settlers who had supported the conversion of the once rugged and desolate territory into a productive participant on the national stage, by occupying and improving unused land, and thereby helping to form the nucleus of a modern society. In another well known and frequently cited example of the Court's application

of these same equitable doctrines to land rights, in *Riley v Blacker* in 1915, the Court held that a grantor, who had conveyed land to a grantee who had subsequently died, was guilty of laches, for delaying until after the grantee had died, before asserting that his deed had been intended only as security, and did not represent an actual conveyance. In that case, the Court again ruled that an estoppel was applicable, to prevent the grantor from denying the efficacy of his own deed as a legitimate conveyance, once the grantee was no longer present to contest the grantor's claim to that effect. In so ruling, The Court very astutely observed that laches is the product of negligence, acting in combination with the passage time, and it can take place independently of any statute of limitations, concluding with the solemn mantra that "Equity aids only the vigilant."

PURDUM v LADDIN (1899)

Here we reach the point in time when the Court placed its stamp of approval upon the first efforts to improve the quality and usefulness of monumentation and descriptions in Montana, by upholding the validity of an 1895 law that had put additional requirements relating to mining claim locations in place. Prior to 1895, as we have seen, the monumentation of claim location boundaries was poorly controlled, and the description of those boundaries was likewise substantially inadequate, resulting in many conflicts, if not outright chaos in some areas, yet some resisted the idea of adopting higher claim location standards, and believed Montana had no authority to modify or tamper in any way with the existing federal guidelines. The fact that it was very often quite difficult, if not impossible, to tell where the boundaries of existing claim locations were, due to poorly marked corners and lines, and uninformative descriptions of those corners and lines, resulted in many overlapping claims, involving not just miners but other innocent parties as well, and this problem was compounded when new locations were described with reference to earlier poorly described locations, so the need to improve upon this situation going forward was clear. In 1895, laws were enacted in Montana that placed additional requirements upon those wishing to establish a mining claim location, going beyond the very minimal federally mandated requirements, including the establishment of

minimum requirements for monumentation, and the requirement that each monument be individually described. The objective of course was to make it possible to easily find and recognize existing boundaries, so newcomers to an area, whether they were miners or others, could no longer claim that they had established new boundaries that in were in conflict with existing boundaries, out of genuine ignorance of the presence of an existing claim location. In *Riste v Morton*, in 1897, it was alleged that a certain claim location was invalid, due to inadequate monumentation, because it was described only with reference to adjoining claim locations as monuments, and there was no definite evidence that those adjoining locations were properly monumented. Although the 1895 standards had gone into effect, the Court rejected that allegation, because the claim location in question had been established prior to 1895, so it met the applicable description standards that were in effect at the time it was created, since legitimate monuments were presumed to exist on all location boundaries, despite being undescribed, under the old standards. The Court thus took the position that the 1895 description and monumentation standards were applicable only to claim locations that had been established after the standards were changed, which required the Court to wait for a case involving an inadequately established location of more recent vintage to come along, to provide the Court with an opportunity to uphold and impose the new standards, and in the final month of the passing century, that opportunity finally arrived.

1895 - The legislature finally addressed the issue of mining claim monumentation, presumably with the objective of eliminating many of the disputes, both legal and physical, of the kind that we have seen play out in several previous cases, resulting from poorly marked or poorly described claim locations, by mandating both better monumentation and more detailed descriptions. The new law was not retroactive, so all existing claim locations remained legally sufficient as they stood, provided that they met the prior requirements, but all subsequently established locations had to comply with the elevated 1895 monumentation and description requirements. Purdum happened to be among the first miners to attempt to establish a new claim location after the new law went into effect, so he may or may not have

been aware that the requirements of the law had changed, at the time he marked and described his location. Laddin evidently came to the same area at some time thereafter and arrived at the conclusion, since he was apparently aware of the change to the law, that Purdum's location was insufficiently monumented and described to be valid under the new law, so he filed a location of his own, covering essentially the very same area. When Purdum discovered what Laddin had done, he filed an action seeking to have his own location declared valid and Laddin's location declared void.

Purdum argued that his location was adequately monumented and described, and that it was in fact better monumented and described than several comparable locations that had previously been legally scrutinized and held to be valid, which was true. He also argued that the legislature did not have the authority to burden miners by adding legal requirements of the kind at issue, because the legal requirements for a valid mining claim location had long been established by federal statutes and those statutes were intended to fully control the subject of mining claim locations. Laddin argued that Purdum's location description was not in compliance with the new and more detailed requirements of the law, and that the changes to the law, just made by the legislature, were fully valid and should be enforced. At the trial, Purdum was allowed to present his description, despite the objection of Laddin that it was unacceptable, and the resulting verdict was in favor of Purdum. The district court however, applying the 1895 standards to the situation, struck down the result in Purdum's favor, and ordered a new trial, which obviously spelled doom for Purdum, so he was left with no choice but to appeal to the Court that the verdict in his favor should be reinstated.

It had already been confirmed by the Court in previous cases that the Montana legislature had the authority to establish legal requirements relating to mining claims, which had the effect of expanding or enhancing the existing federal laws on the subject, as long as none of the statutes created by the Montana legislature had the effect of negating or contradicting any federal law. Generally, a state can essentially refine or tailor certain aspects of the law to suit the specific needs of the state, while working within the parameters set by federal law, making laws that were composed using general language at the federal level more specific, relevant and applicable, to the conditions found in each particular state, and more suitable to the preferences of the citizens of each state, provided of course that no such

supplemental laws violate the spirit or purpose of any federal laws, standards or guidelines. Upon deciding that higher standards for the monumentation and description of mining claim locations would be beneficial to the citizens of Montana in 1895, the Montana legislature had effectively adapted the existing federal law to better suit the conditions in Montana, by supplementing the existing legal requirements with standards that were intended to lead to a reduction in the occurrence of both violence and litigation resulting from land rights disputes. The legislature had not rejected or denied the validity of the existing federal laws on the subject, it had simply put in place more detailed requirements, that were built upon the foundation provided by the very basic and minimal requirements of federal law. In assessing the validity of the 1895 legislation, the Court approvingly stated that it simply required:

“... a declaratory statement, which must contain, among other things. The location and description of each corner, with the markings thereon. The statute is mandatory, and substantial compliance with its provisions is necessary to perfect a valid location ... doing whatever else is required for that purpose by the acts of congress and the local laws and regulations ... the provisions ... are mandatory, reasonable, and not in conflict with any act of congress ...”

The Court found the new standards to be perfectly acceptable and valid, and although it did not expressly say so, the Court very likely hoped and believed that once put into practice, they would have the intended effect, and would thereby reduce the number of conflicts over claim locations that the Court would be required to deal with in the future. The law had always required that all mining claims must be monumented, but now the law expressly required that each corner of a given claim must be well marked, and the type of monument actually used, and the markings that it bears, must be specifically called out in the claim location description, for each corner of the given claim. The federal law, being very general in its requirement for monumentation, was very easy to abuse, since it could be satisfied with a mere general statement indicating that monuments of some kind had been set, without any specific information at all, to inform a reader of a location description what to expect to find. The new law hoped to end, or at least diminish, the prevalence of poor or absent monumentation, by placing greater emphasis on the importance of proper monumentation, mandating

descriptions that were more specific, which would make them clearer and easier to follow, thereby minimizing the occurrence of conflicts caused by uncertainty over claim location boundaries. Although Purdum's claim location was reasonably well described, and would have been adequate under the old law, it did not expressly call out and describe specific properly marked monuments at every corner, so it clearly did not satisfy the requirements of the new law. Therefore Purdum's claim was doomed, and the Court upheld the decision against him, paving the way for Laddin's location to prevail over his, assuming no such fatal flaws could be found in Laddin's description. Purdum simply had the misfortune of becoming the first victim of the new law, and the one whose name would thereafter be linked with the elevated requirements, mandating higher monumentation and description standards. The Court was not inclined to impose the new standards rigidly however, cognizant as it always is, that there is seldom any wisdom or virtue in being inflexible. In 1903, in *Walker v Pennington*, the Court allowed a description that failed to indicate that the posts that had been used as corner monuments met the legal length requirement to stand, on the basis that an expectation of precision or perfection in either monumentation or description is unrealistic, noting that "technical strictness" should not be allowed to overshadow the purpose of the law, and observing that good faith efforts to comply with the law are to be honored as such. Later that same year however, in *Hahn v James*, the Court struck down a claim location description that failed to state either the size or type of posts that were used, and failed to specify how the posts had been marked, or even that they had been marked at all, confirming that the Court fully intended to enforce the new standards, and showing that it would not tolerate outright disregard for the law, choosing rather to strike a wise balance between material and immaterial deviations from the law.

COBBAN v HECKLEN (1902)

Although every description that is to be used in any conveyance should ideally be prepared thoughtfully and carefully and be well written, such is not the case in the real world, and the Court, rather than pretending that perfection can be achieved, realizes that it's role is to deal with the consequences of carelessness and poor decisions, in a manner that serves the interests of justice. The statute of frauds, as a broad concept, is intended to make it difficult, if not impossible, to successfully perpetrate fraud through

abuse of contracts and agreements in general, and to accomplish this in the realm of land conveyances, it mandates that agreements involving any transfer of land rights must be written, and more specifically that descriptions included in such contracts or agreements must be reasonably clear and complete, in order to be legally binding. The Court however, is frequently confronted with situations in which that mandate has not been carried out, yet the parties have performed acts that create mutual responsibilities and obligations to one another, under the unwritten code of implicit natural justice. Therefore, the Court is often required to consider and rule upon the validity of descriptions of land that clearly fall woefully short of any ideal standards, in terms of both completeness and documentation, but which can nevertheless be shown to have real meaning to the parties, who acted in innocent reliance upon an agreement. In this case, the Court had to determine whether or not a description comprised of just two words, "one acre", which were never even written down, could become legally binding, despite the presence of the statute of frauds, and whether or not that phrase could be a legally sufficient description of a fee conveyance of land. While those who engage in the business of preparing outstandingly detailed legal descriptions may feel that the decision of the Court here shows disdain for the law, or reveals that the Court is overly sympathetic to ignorant parties who failed to comply with the law, that is actually not the case. It must be kept in mind that the larger perspective and the specific focus of the Court is targeted at the accomplishment of justice, rather than rigid and inflexible adherence to technical standards. Here we see a classic example of the fact that the statute of frauds does not represent an absolute bar, instead it is seen and treated by the Court as a legal tool, which the Court can apply or retract, as necessary to serve the larger interests of justice and equity. The 1908 case of *State v Quantic* provides a similar example of the fact that the Court tends to be highly forgiving of description errors or inadequacies in general, as in that case the Court chose to ignore an erroneous date, that would have destroyed a prescriptive water right, if left uncorrected, and upheld the validity of the rights in question, treating the mistaken date as merely a harmless typographical error, controlling nothing.

1894 - A certain placer mining claim, consisting of 120 acres, was

owned by four parties, identified as Cobban, his nephew, and two unspecified others. Cobban's nephew was the party who was in physical possession of the land, tending to it on behalf of the others, who had verbally authorized him to act as their agent and representative in all matters involving the land. Hecklen, who was looking to acquire a parcel of land upon which to build a home, met Cobban's nephew, who was interested in selling some of the land within the mining claim as homesites. The claim location was regular and fully legitimate in all respects, but it had not yet been patented, nor had any of it been platted or legally subdivided in any way. Nevertheless, Cobban's nephew, who was a professional real estate agent, and was evidently anxious to start selling off the land, verbally agreed to sell a one acre parcel to Hecklen. Hecklen and Cobban's nephew not only agreed upon the exact price and terms of the sale, they visited the site together and marked off the boundaries of the one acre parcel, and Hecklen then built a fence upon the boundaries so marked, with the approval of Cobban's nephew. Hecklen then also built a home on the parcel over the ensuing months and he and his family began living there, also with the full knowledge and approval of Cobban's nephew.

1895 - A patent was issued, making Cobban, his nephew, and the two others, the legal owners of the land at issue. Shortly thereafter, Cobban and his nephew visited the Hecklen family at their new home and verbally reaffirmed the original oral conveyance agreement, assuring them that a deed, conveying the one acre parcel to them, would soon be forthcoming.

1897 - The land was finally partitioned between the four legal owners, and the Hecklen parcel wound up being within the portion owned by Cobban. Cobban believed that the land held great value, due to its mineral content, and decided that he wanted to devote all of his portion to mineral exploration, so he revoked the long standing promise to provide Hecklen with a deed for the occupied acre and ordered the family off the land. They naturally refused to vacate the premises, so Cobban filed an action accusing them of wrongful entry

and seeking to have them ejected.

Cobban argued that since there had never been any written conveyance agreement, the statute of frauds supported his proposition that the land occupied by Hecklen now belonged to Cobban alone, and Hecklen had acquired no rights to it whatsoever. Cobban denied that he had ever personally agreed to sell any of the land to anyone, and he also denied that Hecklen had any right to rely on anything that Cobban's nephew or anyone else may have said concerning the land in question. Cobban further charged that all of the improvements made to the land by Hecklen had been made in violation of Cobban's ownership rights, and entirely without his consent, so they should be deemed to be subject to removal upon demand by Cobban. Hecklen argued that his agreement with Cobban's nephew, although entirely oral and unwritten, was made in good faith, and had been fully executed and openly put into effect, and should therefore be treated as binding upon all parties who had actual knowledge of it, including Cobban. The trial court agreed with Hecklen, and ordered Cobban to deed the fenced acre to Hecklen.

This case obviously gave the Court another fine opportunity to expound upon the true nature and validity of conveyance agreements in general, and specifically the effect of physical improvements upon the operation of the statute of frauds. The Court reviewed the testimony concerning the alleged terms and details of the conveyance agreement, and agreed with the trial court's conclusion that there was a definite and complete agreement between Hecklen and Cobban's nephew, rather than a tentative, preliminary or partial proposal, and that Cobban's nephew had the right to speak and act on behalf of his fellow property owners at the time the agreement was made. Furthermore, the Court stated, the improvements made by Hecklen, having clearly been made in good faith, in reliance upon an agreement which both parties were entitled to enter and carry to fruition, stood as sufficient evidence of both the existence of the agreement and their mutual intention that it was to be permanent and binding upon all parties. In the presence of such clear evidence of an agreement, that had not only been made, but had also been put into practice to the fullest extent possible at the time, the Court held that the statute of frauds had no application to the events at issue. Cobban also attempted to turn the absence of a written description of the Hecklen parcel to his advantage, suggesting that the agreement could not properly be considered to be definite or certain, since the land involved was never described at all, and even if it had been written down, he maintained that the phrase "one acre" alone was an incomplete, uncertain

and therefore invalid description. The Court very effectively disposed of Cobban's contention, by pointing out that the parties to the agreement had not only contemplated the exact amount of land to be conveyed to Hecklen, they had physically drawn the boundaries of it upon the ground, making it truly certain, in the most absolute terms possible, quoting with favor the following wisdom from a now very distant time period:

“If a man grants twenty acres, parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the grantee.”

The spirit of this passage, when translated into such language as would more commonly be used today, equates to "that which can be made certain, will be treated as being certain", and in the eyes of the Court, the acts of the parties on the ground had provided all the certainty that could be desired, as to the actual location of the land at issue. Of course, every surveyor can immediately recognize that although an acre is indeed certain with regard to quantity, it is by no means certain or absolute in terms of either location or configuration, and therefore makes for a poor, if not completely useless, description. It should be kept in mind however, that the Court is typically open to accepting such a description as a potentially valid one, if extrinsic evidence sufficient to support it can be presented, as illustrated here. In addition, this case demonstrates how highly focused the Court is upon lending validity to all conveyances made in good faith, and conversely, how reluctant the Court is to strike down a conveyance, even when it is quite poorly documented, or even when in fact it is not documented in writing at all. In this scenario, the fence turned out to be not merely valid boundary evidence, but in fact the sole and controlling boundary evidence, marking the location of a boundary that had been legitimately created on the ground through purely practical means, rather than by means of a written description. Finding that estoppel was applicable against Cobban, and operated to bar his claim to the Hecklen parcel, the Court ruled that the lower court had correctly decided the issues on the merits, and agreed that Cobban had been properly ordered to complete the conveyance of the parcel to Hecklen, as originally intended, because even if Cobban's nephew had not been properly authorized to sell any of the land, Cobban himself had put his personal blessing upon what had been done, thereby fully ratifying the transaction. However, the Court was compelled to reverse the lower court's decision and remand the case, due to the fact that

certain evidence, indicating that Hecklen may have participated in a scheme to prevent the land in question from being patented, had been incorrectly excluded during the trial. Once again, just as in the Mathes case 7 years earlier, the Court had given it's approval to a new original boundary created entirely by physical acts, with no documentation of any kind, proving that although properly documented boundaries are clearly best, undocumented boundaries can legitimately exist, where justice demands their recognition, as a consequence of the acts or intentions of innocent parties. Given an instance in which a description exists, but is subject to attack under the statute of frauds as insufficient, the Court typically likewise endeavors to protect it and give it effect, rather than rejecting it outright, in the Court's strong drive to uphold, rather than negate, intentions and agreements in general. In *Howe v Messimer*, in 1929, the Court rectified a mistaken description, by effectively deleting an erroneous reference therein to public school land, again adhering to the position that a deed can only be deemed void if it's intent still cannot be ascertained, even after accepting extrinsic evidence for the purpose of clarifying it's intent.

HOAR v HENNESSY (1903)

Here we examine the case that represents the Court's most forceful and authoritative statement ever on the subject of oral boundary agreements. This decision may seem unremarkable and even predictable, being quite consistent in spirit and effect with the Court's decision in the Cobban case, that we have just reviewed, but in fact the Court has never again taken such a strongly affirmative position on agreed boundaries as that seen here, and it has never taken the additional step of expressly adopting the doctrine of practical location, which generates the presumption of agreed boundaries through implication. Therefore, this case shows the extent of the actual evidence of the existence of a specific agreement that is required by the Court, before it will uphold a physical line of division as a boundary, on the basis that it represents the embodiment of an agreement, and the Court has ever since refrained from accepting the concept that a binding boundary can be created by means of evidence that provides only grounds for implication of the existence of an agreed boundary. The construction of valuable improvements, in direct reliance upon the supposed validity of a certain boundary line, was undoubtedly a major factor in this case, providing sound

justification for the Court's decision here, but in the absence of such highly persuasive circumstances in subsequent cases, the Court has gravitated increasingly toward the acceptance of survey evidence as controlling boundaries, while nonetheless maintaining that no survey can operate to overturn a settled or established boundary. Nevertheless, although the attitude of the Court toward surveys has evolved considerably over the last century, as we shall observe going forward, and the Court has never again encountered such compelling evidence of a legitimate oral boundary agreement, this case stands out as a particularly exemplary one, on the subject of boundary determination by means of equitable principles, showing the potential power of equitable factors to negate the controlling value of surveys. In this case the Court also lays to rest the notion that the statute of frauds can prevent oral boundary agreements, by taking the view that boundary agreements put into effect on the ground constitute an equitable exception to such statutory constraints, representing simply a practical and mutually beneficial resolution of existing boundary uncertainty, as opposed to a deliberate or intentional transfer of land rights between two parties, which would invoke the statute. In the 1926 case of *Gravelin v Porier*, an adoption and custody case, the Court intensively examined the history of the statute of frauds, wisely concluding that it has always been acknowledged and judicially treated as being subordinate to equitable considerations, and noting that it serves only "to prevent mistakes, frauds and perjuries, by substituting written for oral evidence" with respect to contracts, so it has no power to overcome evidence of physically performed agreements, such as those relating to boundaries.

1890 - Hoar and Hennessy acquired adjoining lots fronting on Montana Street in Butte. Whether or not the lots had been surveyed or platted is unknown, and there is no indication of how the lots were described in their deeds, nor is there any indication of the frontage or width of the lots, or whether or not the lot boundaries had ever been physically marked at all. Nevertheless, both of them proceeded to build houses on their lots, and once the two houses were built, they stood only about 4 feet apart.

1891 - Hennessy decided to build a fence on the lot line dividing the

properties, so he hired a surveyor to mark the line, and the surveyor did so, although how the surveyor arrived at the line location is unstated, and there is no indication that any lot corner monuments existed. Hennessy then asked Hoar to look at the line, and Hoar agreed that the line appeared to be reasonably accurate, and that it was acceptable to him, remarking that it was about 3 inches from the location where he had previously believed the line to be, and indicating that he considered those 3 inches to be negligible and unimportant. Hennessy then built a rail fence on the surveyed line, and both parties agreed that it satisfactorily marked their lot line.

1896 - Hennessy replaced the rail fence with a board fence in the same location, without any objection from Hoar.

1899 - Hoar added fill material to his lot, pressure from which caused the board fence to gradually tilt toward Hennessy's lot, which was lower in elevation, so fearing that the pressure was about to destroy the fence, Hennessy decided to replace it with a stone wall, which would serve as a retaining wall, and then erect another board fence on top of the wall. Hoar objected to this idea, on the grounds that a wall, being wider than a fence, would take up too much of the space between the houses, and might not leave him enough room to walk around the side of his house, but Hennessy built the wall and fence anyway. Hoar apparently had another survey of the lot line done by another surveyor, which evidently showed that the wall extended 1 foot onto Hoar's lot, so Hoar filed an action seeking the removal of the wall, on the basis that it was encroaching on his lot.

Hoar argued that the location of the lot line had not been properly established in 1891, when the original fence was built, so he was entitled to rely on the lot location surveyed for him in 1899, and he had the right to demand that the wall be moved off his property. He further argued that even if a verbal agreement regarding the lot line location had been reached in 1891, it could not be binding upon him, since the fact that it was unwritten, made it a violation of the statute of frauds. Hennessy argued that a valid boundary agreement had been made, and that it had been put into practice and given full effect by both parties, so it should be treated as legitimate and binding, despite the fact that it was unwritten. He further argued that

although the wall did straddle the lot line, it rested equally on each lot, since it was centered on the agreed line, and the fence was centered on the wall, and was therefore also directly upon the agreed line, so both the wall and the fence had been legally located and appropriately placed, and neither of them should be subjected to removal. The trial court held that the agreed location of the lot line was valid and binding, and the wall and fence were not subject to removal.

On the question of whether or not one property owner can legally build a wall or fence directly on a boundary line, thus placing one half of it on the land of the adjoining property owner, without the consent of that adjoining property owner, as Hennessy had done, the Court found nothing inappropriate in doing so. Citing decisions from Massachusetts, Missouri and New York, which had approved walls and fences built in such a manner, the Court held that a wall or fence built for purposes of the division of properties is in fact a benefit to both property owners, which can and ideally should rest directly on the true dividing line, and once built, the parties are bound to mutually respect and maintain it. In view of the Court's position, Hoar was actually fortunate that Hennessy had built the wall and fence with his own labor and at his own expense, and had not asked Hoar to contribute any money or labor toward the construction of it, so the fact that part of the wall and fence was in fact located on Hoar's lot did not constitute a valid basis for any complaint by him, the Court decided, unless he could prove that it was not centered on the lot line and that it was actually located mostly or completely on his lot. This position taken by the Court made the question of the true location of the lot line central to the outcome of the case, and since the lot line had been placed in different locations by different surveyors, the Court determined that the true lot line location was uncertain, which made it subject to being conclusively established by an agreement between the adjoining owners, such as that which had taken place in 1891, amounting to a practical boundary location, based on a surveyed line in this instance. In so concluding, the Court followed the long standing and very elementary principle that stability, rather than precision, is the most virtuous quality of any property boundary, so wherever genuine uncertainty over a boundary location exists, for any reason, any actions taken by the property owners to stabilize the location of the boundary, and make it certain, are to be honored, and those actions will be treated under the law as being binding upon the parties and their successors. In response to Hoar's argument that the statute of frauds had the effect of preventing or destroying any unwritten

boundary agreements made by property owners, the Court, quoting highly renowned decisions from Tennessee and California, stated that:

“... where there is doubt or ignorance as to the true locality of the line, a parol agreement fixing the line between adjoining owners is not within the statute, and, where satisfactorily established, will be enforced by the courts ... It is well settled that where the owners of contiguous lots by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for any period of time, such agreement is not within the statute of frauds, and it cannot afterwards be controverted by the parties or their successors in interest.”

Since there was no dispute that Hoar and Hennessy had lived in harmony for 8 years, from 1891 to 1899, both of them respecting the agreed line as the true lot line throughout that period of time, the Court determined that their mutual actions were sufficient to ratify the agreed line, as the true and permanent boundary between their lots. Accordingly, the Court fully upheld the decision of the lower court, ruling that the wall and fence represented the true dividing line and were not encroachments subject to removal. The 1891 agreement was beneficial to both parties, in that it provided certainty where there had previously been uncertainty, and their subsequent conduct had served to validate that line, by showing their mutual acceptance of it, in the eyes of the Court, just as convincingly as if they had reduced the agreement to writing. Hoar's suggestion that the agreement should be considered invalid because it was never written down was useless to him, since he had been a participant in the agreement himself, and having conceded that the agreement was made, even if he was correct that the agreement should have been put in writing, he was just as responsible as Hennessy for the failure to document the agreement, so he could not be allowed to benefit from a failure in which he himself had played a part. An important aspect of this case, in which the Court found it unnecessary to even consider the validity of the surveys that were involved, is the fact that it provides insight into how the Court views and treats such subsequent surveys. While the reverence of the Court for the sanctity of original surveys has already been noted, and will be even more strongly expressed in cases yet to be seen, the Court has no obligation to respect subsequent surveys, so the line adopted by the Court in this case did not control because it

represented a correctly surveyed line, quite the contrary, it controlled simply because it was accepted, recognized and treated as the boundary by the parties themselves. Where land rights, including boundaries, have been legitimately established by the conduct of land owners, such as those seen in this case, acting to clarify a boundary location that appeared uncertain to them, the Court allows subsequent surveys, showing a different location for the same line, no power to undo or destroy the line established by the land owners. The fundamental basis for this judicial attitude toward subsequent surveys is the fact that retracement surveys are not intended to be corrective in nature, they are intended to be affirmative and confirmatory of the original line only, and therefore are not seen as beneficial, when they serve only to introduce ambiguity to the situation, by providing evidence that is contradictory and militates against certainty and permanence of location, as seen in this case. In situations such as this, in which conflicting surveys appear, the Court may very well become disinclined to allow any of the subsequent surveys to control the boundary location, as we will later see again, instead resolving the matter by upholding the boundary location that best accords with the existing conditions, on the basis that none of the subsequent surveys has conclusively shown that the existing physical boundary is not in accord with the original survey or the true originally intended boundary location.

WILSON v FREEMAN (1904)

This case provides us with a clear view of the operation of a few of the most crucial principles of law and equity, which can have a major impact on the resolution of conflicts and disputes involving descriptions and boundaries. Here we again see the relevant principles applied in a controversy involving overlapping mining claim locations, but these same principles are ones that we will see extended to other properties in later cases, so observing their presence and use at this early date provides a valuable historical backdrop, validating their application in more modern cases. In addition, this case serves as an important follow up to the 1899 Purdum case, since it upholds additional legislative action concerning claim location descriptions, that was taken just after the turn of the century, in a further effort to clarify existing claim location boundaries, in order to minimize the occurrence of boundary controversies. So here again we look

on, as the Court interprets the intent and meaning of the law, and provides essential guidance relating to the applicability and the legal effect of certain relevant statutes, concerning which the opposing parties obviously hold very different opinions, resulting in the discord that eventually brings them before the Court. The 1899 case of *Sanders v Noble* also provides considerable insight into how the Court views the fundamental relationship between monuments and descriptions, and particularly its highly flexible attitude toward descriptions, when they are at odds with monuments. Sanders made a discovery and properly posted notice of it, but did not immediately mark the boundaries of his location. Noble then came along, just a matter of days later, and created a location very close to that of Sanders. Sanders then returned, within the legally allowable time period, and marked his boundaries, disregarding the boundaries created by Noble and overlapping them, since Sanders knew that Noble had been on notice of the existence of the discovery made by Sanders. Noble refused to honor the location of Sanders, so Sanders filed an action seeking validation of his own boundaries, but the trial court held that Sanders had improperly placed his boundaries, and was guilty of unjustifiable delay, and thus ruled that the boundaries created by Sanders were invalid. The Court however, reversed this decision, striking down Noble's location and upholding that of Sanders, on the basis that Noble had notice that Sanders had reserved the right to mark his boundaries later, and Sanders had the right to orient or "swing" the axis of his location in such a direction as was most suitable to him, pivoting it around his point of discovery. In so ruling, the Court strongly reiterated the principle of monument control, stating with reference to the description created by Sanders that "Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located." The Court disposed of the controversy in favor of Sanders, since he had properly set legitimate monuments, concluding that "Such stakes and monuments would control the courses specified in the notice."

1891 - A predecessor of Freeman established a mining claim location, which he called the Dixon. He performed the tasks required by law at the time, and filed the required documentation, to establish a valid

claim location, and this location was subsequently conveyed to Freeman at an unspecified date.

1895 - The statutes applicable to the establishment of mining claims were revised by the Montana legislature, effectively intensifying the requirements for the creation of a legally valid mining claim location, as previously outlined in the 1899 case of *Purdum v Laddin*.

1898 - Wilson, apparently aware of the 1895 revisions to the law, attempted to establish a mining claim location in accordance with the law as it stood at this time, which he called the Snowstorm, and which represented a relocation of an earlier claim that had evidently been abandoned by others. He apparently believed that he had properly located the Snowstorm, so that it was not in conflict with any other valid existing claim locations of others, according to the recorded descriptions of other nearby claim locations, as they stood at this time.

1899 - Freeman discovered that the description of the Dixon contained an error, so he filed an amendment to it, for the purpose of correcting the description error.

1901 - The Montana Legislature enacted a law declaring that mining claim locations could be legally amended, and also legalizing any locations that had been properly amended prior to the enactment of the law.

1902 to 1903 - At an unspecified time during this period, Freeman decided to seek a patent for his location, but Wilson believed that Freeman's amended location was in conflict with his location, so he filed an action seeking to prevent Freeman's claim from being patented.

Wilson argued that his location was legally sufficient and valid in all respects, and that it was superior to Freeman's claim. He further argued that the Dixon was invalid under the law as it had stood since 1895, and that Freeman's amendment of the Dixon was illegitimate, and that Freeman had notice of the existence of the Snowstorm at the time Freeman amended the Dixon, so the Dixon could not overlap the Snowstorm or interfere with it in any way. Freeman argued that the Dixon had been legitimately created and amended, and that Wilson had notice of the actual location of the Dixon at

the time Wilson attempted to establish the Snowstorm, so the Dixon, as amended, was superior, and he was entitled to a patent covering it's full extent.

As can readily be seen, two of the three issues in play in this case, by means of which Wilson hoped to derail Freeman's attempt to obtain a patent, were controlled strictly by the intent, the interpretation, and the true meaning of the two statutes in question, dating respectively from 1895 and 1901. Consistent with it's ruling in the Purdum case, the Court unhesitatingly upheld the original validity of the Dixon, which had come into existence in 1891, regardless of whether or not it's description met the requirements of law established in 1895, on the basis that the 1895 legal revisions were not intended to be retroactive. The 1895 statutes, the Court indicated, were applicable only to locations created after those revisions to the description and monumentation standards were made, and were not intended to destroy or eliminate any valid locations already in existence at that point in time, so Wilson had been obligated to take notice of the existence of Freeman's location, when Wilson created the Snowstorm in 1898. On the contrary however, the Court noted, the 1901 statute pertaining to the amendment of existing claim locations was expressly intended to be retroactive, or curative in nature, so the fact that Freeman had executed his amendment prior to the enactment of the law approving such description amendments was of no significance, his amended description and all others that had been properly made prior to 1901 were embraced within the law, just as fully as any amendments that had been made since 1901. While the 1895 legislation had been focused on improving the quality of monumentation and descriptions going forward, it had left the many poorly documented existing claim locations already in existence unaddressed, and the 1901 legislation, in the eyes of the Court, was intended to function in effect as a supplement to the 1895 standards, allowing and encouraging the rectification of the many erroneously described locations that had been created prior to 1895. So Wilson was left with only one way of attempting to negate the validity of Freeman's amendment of the Dixon, and that was the fact that Freeman had not amended his location until after Wilson had created the Snowstorm, which was evidently very near or adjacent to the Dixon, and was therefore adversely impacted by Freeman's amendment. In theory, Wilson could have had a valid point and prevailed on this matter, had the nature of Freeman's amendment been different, but the Court provided the following explanation of the key factor in the case, which serves to clarify the primary reason for

it's conclusion that Freeman's amendment of the description of the Dixon was legitimate and must be allowed to stand:

“Respondent (Freeman) claims that there was a mistake in the recorded certificate of location (of the Dixon) as to the direction of the vein located and of the claim, and a discrepancy between such certificate and the staking of the claim on the ground; that while in the notice the claim was described as running easterly and westerly, in truth and in fact, by the staking of the claim on the ground, it ran in a northerly and southerly direction ... Respondent did not change the location on the ground ... but simply conformed the description ... as recorded, with the actual staking on the ground as made at the time the original location was made. Respondent had a perfect right to do this ...”

If Freeman had attempted to alter the actual location of the Dixon, as it had been originally established, in any way, the Court would have taken a very different view of his action, and he could have been denied his right to a patent on that basis. Since he had merely corrected a legally correctable description error however, his location remained fully valid and the Court ruled that he was entitled to the patent that he was seeking. The Court clearly viewed Freeman's correction of the original description error as a positive and beneficial act, performed in the spirit of the 1901 statute, effectively bringing the record into agreement with the physical reality on the ground, and not as an act to be criticized or condemned, as Wilson had obviously chosen view it. Ironically, after scrutinizing Wilson's documentation, to which the stricter 1895 standards applied, the Court determined that the Snowstorm was invalid, so in reality Wilson had no legal basis upon which to challenge the validity of Freeman's location anyway, and Wilson was therefore left with nothing. Even if Wilson's location had been legitimately created and been completely valid in terms of it's documentation however, Wilson would still not have been able to prevail under these circumstances, because the critical element of notice was in play, and it operated against him. While it was true that Wilson had recorded his documentation of the Snowstorm before Freeman amended the Dixon, Freeman could not have been charged with notice of the existence of the Snowstorm, even if it's documentation had been correct, complete and properly recorded, because the change that Freeman made to the Dixon did not change it's actual location, and therefore his action was not the source of the conflict. The

conflict existed because Wilson had failed to take notice, when he located the Snowstorm, of the actual stakes on the ground, marking the boundaries of the Dixon, so in fact Wilson, rather than Freeman, was the only party in the case who could be successfully charged with the important legal burden of notice. Wilson either believed that he was entitled to rely on the described location of the Dixon, and that he bore no burden to even look for its actual corners or lines on the ground, or if he actually saw the stakes that marked the Dixon, then he believed that he was entitled to ignore them, because they were not in agreement with the recorded description of that location. In either case however, the Court had made it quite clear that he was entirely mistaken, once again upholding the core principle of monument control, as well as the validity of the concept of description reformation, when used to bring an erroneous description into accord with an existing physical boundary, as it was originally monumented on the ground. The principle of physical notice, the concept of description reformation, and the false notion that information of record can be fully and solely relied upon, even when physical objects provide notice of the existence of a possible error in the record information, are all critically important legal factors, which we will see play out again in several future cases.

COLLINS v MCKAY (1907)

Continuing our review of boundary and description issues arising from the establishment of mining claim locations, here we examine a case involving claim locations that originally overlapped harmlessly, since they were established by the same party, and observe how the overlap goes on to become a problem requiring resolution by the Court. Overlapping claim locations have very often been created, with no issues or conflicts typically resulting from that situation, because a great many claims are eventually found to be unfruitful and are therefore abandoned, leaving only a relatively small number of locations that are finally patented. Since the patenting process requires a proper survey of the location to be approved, problems such as overlaps are typically noticed and eliminated by various means before a patent is issued, but of course like every other such process, this one is imperfect and mistakes can always be made. In this case we see issues develop as a result of several common factors, such as the subsequent conveyance of one claim location, followed by additional conveyances

further splitting the interests in the land, and also the influence and effect of the presence of the party who originally established the claim locations in question, followed by the consequences of the intervention of another party, when the original grantor dies, taking his first hand knowledge regarding what has transpired on the land with him. In addition, this controversy also introduces the important equitable concept of after-acquired title, that basically serves as a means by which to keep grantors honest, but can also operate as a limitation upon their successors, and demonstrates the strong drive of the Court to validate conveyances, rather than invalidate them, regardless of specific description details that would introduce ambiguity, or even defeat the intended conveyance, if allowed to control it. Finally, here we again see an example of beneficial surveyor testimony, in this instance supporting the testimony of land owners concerning certain monuments, upholding the highly important principle that monument testimony is strong evidence, with the potential to control boundaries. Also on the subject of surveys done for the purpose of patenting a claim location, in the 1899 case of *Basin Mining & Concentrating v White*, the Court ruled that it is possible to correct errors made by an original surveyor, in that case a United States Deputy Mineral Surveyor, provided that such errors are discovered and corrected by means of an official resurvey, before any reliance is made upon the erroneous original survey. Cases such as these clearly point to the true significance of the principle of monument control, in the eyes of the Court, which is the fact that monuments form a concrete basis for boundary certainty and justifiable reliance, thereby supporting the essential concept of overall boundary stability, which the Court sees as a major benefit to society, making it a cornerstone of justice.

1881 - Colbert established a placer mining claim, which he called the Emery. The description and related details pertaining to the full size and shape of the Emery are unknown, but the validity and correctness of its description and its boundaries were never disputed.

1888 - Colbert and Burton, who had evidently become Colbert's mining partner by this time, together filed another mining claim location in the same area, which they called the Protection, and each of them held an equal ownership interest in the land embraced within

the Protection at this time. The complete description of the Protection is also unknown, but it evidently overlapped approximately 3 acres of the Emery, presumably in the form of a strip, and the ownership of this overlap area would become the focus of the controversy.

1889 - Colbert conveyed all of his interest in the east 660 feet of the Protection to Burton, which evidently included the area in which the Emery and the Protection overlapped, but Colbert described the land only with reference to the Protection in the deed to Burton, and made no reference to the fact that it was also partly inside the boundaries of the Emery. Burton then conveyed several smaller parcels of unspecified size to a number of other parties, including McKay, and each of those parcels included a portion of the overlap area, so all of the parcels at issue were located either wholly or partially within the boundaries of the Emery. Colbert was present when the grantees of Burton first visited the land, and he personally took part in showing each of them exactly where the corners and boundaries of the Emery and the Protection were. Burton, McKay and each of the other parties involved promptly occupied their respective parcels and began developing them, and Colbert never made any objection to their presence on the land.

1899 to 1903 - During this period, surveys of the Emery were completed and patents were issued to Colbert, covering the entirety of that original placer mining claim. The Protection, on the other hand, was apparently never surveyed or patented.

1904 to 1907 - At an unspecified time during this period Colbert died and Collins became the administrator of his estate. Collins decided to assert that all of the land lying within the boundaries of the Emery, as it had been surveyed and patented, was part of the estate of Colbert, and was therefore under his complete control, and none of the defendants had any rightful claim to any portion of the Emery. They evidently resisted his demands that they either purchase the land from him or vacate the premises, so he filed an action seeking to quiet the title of the estate of Colbert to the entirety of the Emery, and to have the claims to the land being made by McKay and his neighbors ruled

invalid.

Collins argued that the Emery was fully valid, based upon the patents that had been issued to Colbert for it, but that the Protection was inferior to the Emery and was invalid to the extent of the overlap, therefore he asserted, all of the deeds that had been executed with reference to the Protection were also invalid, and could not intrude upon or invade the patented boundaries of the Emery. McKay and his fellow defendants argued that all of the deeds held by them should be deemed fully valid, because Colbert had knowledge of all of them, and never objected to any of them, and they therefore asserted that their deeds actually represented the best evidence of Colbert's true intent, which had been perfectly clear while he lived, and had only become unclear upon his death. They further argued that the fact that the land had been described with reference to the Protection, and not the Emery, even though it was actually located within both of those tracts, should not be considered fatal to the validity of their deeds, and the subsequent patenting of the Emery by Colbert should not be allowed to destroy the rights within it's boundaries that they had previously acquired in good faith. The trial court agreed with the defendants, and ordered Collins to convey all of the lands in question to each of the respective defendants, in confirmation of their ownership of their respective parcels.

In view of some of the previous rulings of the Court, which we have reviewed, regarding overlapping mining claim locations, in which the Court had consistently held that an undisputedly valid location, such as the Emery, was essentially impregnable, and could not be penetrated to any extent by any subsequent overlapping claim location, it may appear that Collins had a very strong case. In addition, the Court had frequently strongly upheld the legal significance and sanctity of federal patents, such as that issued to Colbert for the Emery, so viewed in the context of several earlier decisions of the Court on these subjects, the argument made by Collins might seem to have been very solid indeed, when viewed from a technical perspective. To resolve the matter however, the Court narrowed the dispositive issue down to whether or not the deeds in question, held by McKay and the other defendants, could be treated as valid, and the Court decided that the best measure of their validity was whether or not the property intended to be conveyed by each of those deeds could be distinctly identified. The Court began it's analysis of the situation by noting that the deed from Colbert to Burton, which had covered the entire overlap area, and which had formed the basis for Burton's conveyances to McKay and all of the others, clearly stated that Colbert had thereby "granted, bargained, sold, remised, released,

conveyed and quitclaimed" the land described to Burton. This language, the Court concluded, undeniably expressed the intent of Colbert to permanently part with all of his rights and all of his control over all of the land in question, regardless of which mining claim location he may have believed or considered the land in dispute to be part of. Colbert, the Court realized, had the full right to make a binding conveyance to Burton, and since Burton, McKay and the other subsequent grantees had all relied upon Colbert's conveyance to Burton, with the full knowledge of Colbert, the Court was disinclined to allow any details of the description language selected by Colbert to be used to negate Colbert's clear intention for the area at issue to be conveyed, first to Burton and later to each of Burton's grantees. Quoting from an Oregon case, in which the true purpose of a description of land for use in a deed was spelled out, the Court stated that it made no difference whether Colbert had chosen to refer to the land in question as being part of the Protection or as being part of the Emery, either way he had positively conveyed away all of his rights to it, adopting the position that:

“The object and purpose of a description of real property is to mark out and designate the boundaries of a portion of the earth's surface, and, if this can be done by one name as well as another, that object has been fully accomplished.”

Viewing the integrity and credibility of the deeds in the light of all the evidence regarding the circumstances present when they were executed, the Court found that they adequately identified the land, and manifested the true intent of the parties with reference to it, so they were completely valid at that time. In response to the position taken by Collins, who insisted that the Emery was superior to the Protection, and that Colbert still owned the entirety of the Emery at the time he died, based on the patents covering all of it that had been issued to Colbert, subsequent to the execution and delivery of the deeds in question, the Court indicated that the doctrine of after-acquired title was applicable to the situation, and that it effectively silenced the argument made by Collins. Under that doctrine, which is founded upon the principle of equitable protection of rights acquired in good faith, a grantor cannot deny the validity or effectiveness of his own prior deeds, so he can never again assert title to any land that he has previously conveyed, if doing so would operate to deprive a grantee of rights to that land, by invalidating, either in whole or in part, a previous conveyance made by the grantor. Collins, of course stood in the shoes of Colbert, as the party in control of the Colbert estate, so Collins could make no assertions of

ownership that Colbert himself could not have successfully made as Burton's grantor, had Colbert still been alive. Having thus very adroitly disposed of the issues raised by Collins, the Court fully upheld the lower court ruling, acknowledging the ownership of each of the respective parcels by each of the respective defendants, and effectively truncating the Emery, controlled by Collins. Once again, the Court had most admirably found a way to support a group of conveyances made in good faith, even though they had been severely bungled, in terms of description, and thereby placed in potential legal jeopardy. Although it was not absolutely crucial or indispensable to the result, this case is also noteworthy to surveyors because it includes surveyor testimony. Specifically, the surveyor who had worked for Colbert and Burton testified concerning the nature and validity of certain monuments that he had seen and used, employing a drawing that he had evidently prepared for that purpose, which appears to have been at least somewhat helpful, and was therefore favorably mentioned by the Court. His testimony was challenged by Collins, but the Court determined that it had been properly allowed to stand, and it did serve to corroborate the testimony provided by the several defendants, which the Court recognized as important and convincing evidence, outlining and supporting their means of identification and description of their respective parcels. In the concluding portion of its decision, citing cases from Illinois, Indiana, Kansas, Massachusetts and Minnesota, the Court reiterated the important concept that extrinsic evidence, including the testimony of surveyors and land owners alike, regarding the location or validity of ambiguous or uncertain monuments, is always genuinely relevant evidence, which can ultimately control true original corner and boundary locations.

HAMILTON v MONIDAH TRUST (1909)

In this case, involving platted city lots, we will see the well known principle that original monuments control reaffirmed, but we will also learn that some potentially very serious caveats exist, which can effectively blunt the power of that principle. Absolute proof, meeting the "beyond any reasonable doubt" standard is typically not required, in order to prevail in the realm of boundary law, being generally reserved for the most grave matters, such as those where lives hang in the balance, nevertheless the burden of proof is always a serious issue, which can have a major impact on judicial outcomes. The typical standard to be met by survey evidence is the basic

preponderance standard, meaning simply that the evidence presented must tend to show that the issue or item in question is more likely to be true or correct, than is any opposing or contrary view of the same issue or item. Conclusively meeting the burden of proof however, to the satisfaction of the Court, under even this relatively minimal standard can certainly be problematic, for both land owners and surveyors, as we will see very clearly illustrated here. The result here will likely prove to be very difficult for some surveyors to accept, since the Court appears to lack respect for both the efforts and the testimony of a worthy surveyor in this situation, but in fact the Court is simply adhering to a strict or elevated burden of proof, because the fate of a building is at stake, and the Court is naturally quite reluctant to allow a destructive act to take place without very definite proof that such destruction is justified. Here we also again see the Court's inclination to protect valuable improvements using limitations on actions, as the Court reminds both the parties and the lower courts that the intent with which an encroaching improvement of a permanent character, such as building, is constructed is inconsequential, because such an encroachment necessarily represents an open assertion of ownership, regardless of the basis for its existence. So the fact that a building was built under a mistaken idea regarding a lot line location does not prevent it from operating as a true ouster of the owner of record of the lot encroached upon, for purposes of adverse possession. In a 1907 case, *Howie v California Brewery*, similarly involving survey evidence, a party wall collapsed when the brewery adjoining Howie's building was demolished, destroying one side of his building, and Howie claimed that wall had been located at least partially on his property, but two surveys that had been done, which he presented as evidence, both failed to adequately show the location of the wall in question with respect to the property line in question. The Court reversed the decision of the lower court, which had been in Howie's favor, on the basis that although his surveys correctly showed the property line in question, he had failed to meet his burden of proof that any part of the wall in question had in fact been located fully, or even partially, on his side of the property line.

1876 - The original survey of the Butte townsite was performed, during which wooden stakes were set to mark the corners of the new

lots that were being created.

1883 - By this time, most, if not all, of the original lot corner stakes were no longer visible on the surface of the ground, many of them having been knocked out, but many of them also having been buried under fill material.

1892 - Additional survey work was done, apparently covering a substantial area, and many old stakes were found, some of them by means of excavation. In many places, new stakes, which were evidently of the same type as the stakes that had been used previously, were set.

1897 - Hamilton and Murray owned adjoining lots in the platted townsite. The details of their ownership, such as how or when they acquired their lots, are unknown. Murray constructed a building at this time, evidently intending to place it up against, or very near, the line between his lot and Hamilton's lot. How Murray determined where the lot line was is unknown, there is no indication of whether or not he found or used any existing stakes or made any measurements, and there is no indication that he had his lot surveyed.

1898 to 1902 - At some unspecified time during this period, Hamilton came to believe that Murray's building was encroaching on his lot by up to half a foot. How Hamilton arrived at his opinion regarding the location of the lot line in question is unknown, but he had apparently seen some stakes at some earlier time and believed that he knew the true lot line location. Whether or not any visible lot corner stakes still existed in the area at this time is unknown. Hamilton filed an action seeking to have the building removed from his lot, and he was victorious in this first trial concerning the issue of the building location.

1903 - Murray challenged the trial court judgment against him, so the matter came before the Court for the first time, and Murray's appeal was successful, as the Court reversed the decision, on the grounds that the evidence that had been presented was insufficient to prove that an encroachment existed. As a result, the building remained in the same

location.

1904 to 1908 - At an unspecified time during this period, Murray evidently conveyed his lot to Monidah. Hamilton, apparently still convinced that the building was encroaching on his lot, decided to try once again to have the building removed, so he filed an action against Monidah, making the same accusation regarding encroachment that he had made against Murray.

Hamilton argued that during the survey performed in 1892, the original lot corner stakes had been recovered, by means of excavation, and new stakes had been set on the surface, as it existed at that time, thereby perpetuating the original location of the lot corners in question. According to the line defined by the stakes that were set at that time, he asserted, the building in question was encroaching upon his lot. Monidah argued that the lot line was not where Hamilton maintained that it was, and that any stakes that Hamilton may have seen could not be proven to be either original or correct and therefore could not be trusted, so the building could not be proven to be encroaching on Hamilton's lot. Just as in the first trial, the jury produced a verdict in Hamilton's favor, but this time the trial judge set aside the verdict and ordered a new trial, causing Hamilton to appeal, and returning the matter to the Court for a second time.

When this case first came to the Court in 1903, the Court quite rightfully took the position that it is impossible to successfully prove that an encroachment exists, without first proving where the boundary in question is located, and in so holding, the Court emphasized the great significance of finding the original lot corner stakes, stating that they would represent "the very best evidence". Since the arguments and the evidence failed to properly address and resolve the boundary location issue during the first trial, the Court had negated the result of that trial, which was in favor of Hamilton, and stipulated that another trial would be necessary, in order to deal properly with the boundary issue. For unknown reasons, it took 6 years for the controversy to find its way back to the Court, during which time Hamilton presumably attempted to gather additional evidence relating to the location of the lot line in question, in an effort to make a stronger case than he had made the first time around, in order to meet the basic burden of proof that he bore as the complaining party. At the conclusion of its 1903 decision however, the Court also discussed the nature and potential consequences of the situation, in the event that it should subsequently be determined that the building actually did represent an encroachment. In such event, the Court

clarified, the reason for the existence of the encroachment would make no difference whatsoever, the presence of the building would represent an absolute ouster of Hamilton from whatever portion of his lot it rested upon, regardless of whether it had been built over the lot line deliberately or mistakenly. This position taken by the Court, that "mistake or inadvertence" does not prevent adverse possession from accruing and developing, would prove to be quite important in future cases concerning adverse rights, as we will later see. By so indicating, the Court had suggested to the astute observer that it was inclined to view the existing building favorably, and that it would be disinclined to approve of the removal of the building, even if it was encroaching, given the passage of a substantial period of time since the construction of the building. In fact, this hint offered by the Court in 1903, revealing that it was prepared to protect and uphold the building location, accurately foreshadowed its final decision in 1909, but Hamilton either missed or ignored this caution flag raised by the Court, and continued to wage a battle which would ultimately prove to be futile. On this second time around before the Court, Hamilton appeared to have improved his chances of prevailing, by enlisting the testimony of the surveyor who had been on the ground in 1892, who had personally searched for the original lot corners, and who very earnestly believed that he had successfully recovered many of them. The testimony of the surveyor was unusually extensive and exactly on target, so much so that even today, any experienced boundary surveyor can genuinely appreciate his words, as he described what he had done and found many years earlier:

“... I recognize them as being the original stakes, in comparison with other stakes that I found in the district ... They were stakes set there by ... McFarlane, who originally surveyed the townsite. I was familiar with them ... set there at the time the Butte townsite was surveyed ... I know by comparison with other stakes that are found all over the Butte townsite. They were covered up to some depth. When we got down to the original ground I found the stakes ... I base my conclusion by comparison with other stakes ... many stakes that were set over the different blocks ... the stakes that I compared them with were original townsite stakes ... I do not think it was an assumption on my part that those stakes were the same as the original stakes ... they were covered up and were in the original

loam. They were just at the bottom of the fill ... we had to dig five or six feet at the back, and about eight feet at the south end, before we got to those stakes ... You could see the shape of the hole, and the decayed wood was in the hole ... I was satisfied and ... never went any further in my investigation ... they were the original stakes.”

The old surveyor knew that it was his job to discover the original stakes, wherever they might be, and he had clearly done a masterful job of diligently digging them up and carefully analyzing them. In addition, in his testimony he had very directly addressed the essential issue of whether or not the stakes he had discovered were truly original, clearly stating that he was very confident that they were in fact genuine original stakes. No surveyor could be asked to do anything more than he had done, yet all of his outstanding efforts years before, and his wonderfully sincere and forthright testimony, would prove to be of no assistance to Hamilton. Despite this powerful and convincing testimony, indicating that the surveyor had done everything possible under the circumstances to properly recover and perpetuate the original lot corners, the Court concluded that the evidence regarding the true original location of the lot line in question was still insufficient, and therefore ruled that the lower court had correctly rejected the verdict that had been rendered by the jury in favor of Hamilton. The Court observed that because the stakes that had been set during subsequent surveys were indistinguishable in size, shape and composition from those set during the original townsite survey, it was impossible to be certain which of the stakes that had been found were truly original and which were not. Even the fact that the surveyor had verified that the stakes that he had found had been placed in the original ground, before the fill material had been added, and that they were still upright in the original loam when he dug them up, was unavailing. Under the unusually strict rule applied here by the Court, it's very likely that there was nothing the old surveyor could have said that would have persuaded the Court to accept his conclusions about the origin of the stakes he had found. In addition, a civil engineer and a street commissioner both testified that they had never seen any original stakes, which was merely stating the obvious, since the original stakes were all known to have been long buried, but this testimony left the surveyor outnumbered, in the eyes of the Court, so his testimony was doomed to come up short. The Court was unwilling to accept anything short of absolutely conclusive proof that the building was encroaching before condemning it,

and even if it had been conclusively shown to be encroaching, its quite possible that the Court might have decided that it should be allowed to remain in place, on the basis of equity, given that so much time had passed since it was built. The easiest way to protect the building however, was to simply deny the validity of the stakes, and since the nature of the evidence left that route available, the Court opted to decide the matter on that basis, but as we will later see, the Court does not always take such a stern attitude toward surveyor testimony. Although it may represent a bitter pill for land surveyors to swallow, this case does stand as a warning that unmarked monuments can be called into question, and by the same token, it very well illustrates the great value of properly marked and distinctly identifiable monuments.

AMERICAN MINING v BASIN & BAY STATE MINING (1909)

Returning to our review of description issues, and the Court's treatment of them, we here find the Court laying out the basic requirements for deed reformation, and observe a situation in which those requirements were met, by proof that a description was clearly prepared in error, and that the error represented a mistake that contravened the agreed intentions of both of the parties to the transaction. While this case happens to involve two mining companies, that fact is merely incidental, and the principles in operation here are equally applicable to virtually all conveyances of land or land rights, regardless of the specific character or use of the land conveyed. Here we will also see the Court point out the potentially great significance of the discovery rule, which controls the relevance of the passage of time, when errors are made, and rectification or damages are sought, as a consequence of past mistakes. Although the element of time does not prove to be decisive in this case, we have already seen, and will frequently see again, that time can and does have a major impact on land rights. Since a delay on the part of one party can result in damage to the rights of another party, the passage of time is very often highly relevant to the status of land rights, including ownership, and this concept is manifested in the doctrine of laches. The Court very poignantly applied the principle of laches in the 1894 case of *Wolf v Great Falls Water-Power & Town-Site*, ruling that Wolf, who had contracted to acquire a certain city lot in Great Falls, but had delayed for

over 3 years in completing the acquisition, had forfeited his contractual rights to the lot in question, as a consequence of his delay, since the Court found his delay to be unjustifiable. Wolf's right to the lot was foreclosed by the Court, because he had allowed Great Falls to improve the lot, before asserting his claim, after the value of the lot had been substantially increased by the improvements, demonstrating that laches, and the estoppel invoked against a party guilty of laches, is fundamentally related to reliance by an innocent party on the acts or omissions of the party who created the controversy by means of an unjustifiable delay. On the other key element present in the case we are about to review, the issue of the reformation of documents, the Court would go on to provide clarification of what constitutes a valid basis for such reformation in the case of *Parchen v Chessman*, a financial case that became one of the most frequently cited early Montana cases, and which came to the Court twice, in 1914 and 1917. In allowing the reformation of the contract in question in that case, the Court declared that any scrivener error, which has the effect of violating the intentions of the parties to the contract, or preventing their true agreed intentions from going into effect, is subject to reformation as a genuine mutual mistake, in the absence of negligence or fraud, and in so ruling, the Court cited the case we are about to review as support for that position.

1897 - *American and Basin*, which were two independently owned and operated mining companies, together were both owners of a tract of land of unspecified size. When or how they had acquired their respective interests in the tract is unknown, but each company held an undivided one half interest in all of the land at issue. Both companies desired and intended to make use of all of the land, for mining purposes, so neither of them desired or intended to partition the land, and both of them were fully satisfied with the existing equal land ownership arrangement. Prior to this time, only American had been using the land, for an unknown length of time, and American had erected substantial improvements on it. At this time, the companies negotiated a deal, in which American would convey a one half interest in the ownership of all the improvements located on the tract to Basin, so both companies would have equal rights to use all of the existing

buildings and equipment, as well as equal rights to use all the land. Deeds were drawn up for this purpose, and were executed by the parties, and subsequently recorded.

1905 - At this time, American discovered that certain errors had been made in composing the language that was used in the deeds, and as a result, the deeds indicated that American had conveyed not only the one half interest in the improvements to Basin, which it had intended to convey, American had also conveyed its one half interest in the land itself to Basin, so according to the deeds, American no longer held any ownership interest in the land. Upon making this discovery, American filed an action seeking to have the deeds reformed, to eliminate the language that had mistakenly conveyed away its rights to the land.

American argued that the deed language failed to accurately capture and correctly express the true intentions of the parties at the time the deeds were created and executed, so the mistaken language should be treated as being subject to correction, regardless of the amount of time that had passed since the date of the conveyance in question. Basin did not assert that no mistake had been made, but simply argued that since the mistake had gone undiscovered for several years, it was no longer subject to correction. The trial court agreed with Basin, and dismissed the action filed by American, holding that it was too late to alter the language of the deeds, regardless of the cause or source of any error that might have been made in composing them.

At the trial, Kleinschmidt, who represented American, and Glass, who represented Basin, both testified extensively regarding all of the relevant circumstances and events surrounding the creation of the deeds, and numerous events that had taken place subsequently. The actual content of the deeds themselves was not included in the text of the case, nor were any details explaining how the mistaken conveyance language came to be included in the deeds, but since it was undisputed that the language in question had been erroneously included in the deeds, and no suggestion was made that any kind of fraud was involved, the source or cause of the mistake was rendered unimportant. The testimony of both of the company executives made it clear that the land conveyed had been innocently and mistakenly included in the deeds, so the issue was not whether an error had been made, but whether it was correctable through the process of description

reformation. The first question therefore, was whether or not any applicable statute of limitations might make it impossible to legally reform the deeds, by barring American from raising the error as a viable issue at all.

Answering that question in the negative, the Court indicated that the discovery rule could be applied to the situation, so even if any statute of limitations was applicable, the statutory time period could not commence to run, until such time as the fact that a mistake had been made was discovered by, or became otherwise known to, the party damaged by the error.

Therefore, the Court observed, it made no difference when the mistake had been made, and the fact that 8 years had passed before the error was noticed was inconsequential, the clock had in effect, not begun to tick until the moment of the discovery in 1905. It does not appear that the discovery rule has ever been expressly applied by the Court to any liability claims involving survey work in Montana, but surveyors should be aware of its existence, since it can prevent statutes of limitation from having their intended beneficial effect, by extending the lifetime of long undiscovered errors of various kinds, including survey errors, thereby keeping open the opportunity for professional liability claims to be successfully made, potentially against surveyors among others. Having concluded that no valid basis existed, either in law or in equity, upon which to prevent American from pursuing correction of the erroneous deeds, the only matter left to assess was the question of whether or not the elements required by law to make reformation possible were present. Following a Wyoming decision on the same subject, which had outlined the basic legal requirements for contract reformation, the Court found that:

“... the evidence in this case is clear, satisfactory, and convincing, that the deeds as written did not contain the agreement actually entered into by the parties; that there was a mistake as to a material fact; that the mistake was mutual; and that it did not occur by, or result from, the negligence of the plaintiff (American). These are the prerequisite requirements ... and we think they are fully met ...”

It may well be asked why, after denying others the opportunity to correct errors that they had made in deeds or descriptions, although they were simplistic mistakes of a seemingly very similar nature to the one seen here, such as the errors that we have already noted as being fatal in the Goodrich case and in the Tracy case, the Court was willing to let American

escape the consequences of this mistake. The answer to that question will not be found by any analysis of the exact type or kind of error that was made, instead the answer lies in the actual effect that the mistake has on the parties, specifically upon their knowledge and intentions. Remembering that the intent of the parties is always the paramount consideration in resolving conflicts and disputes over issues of this nature, and that putting the true intentions of the parties into effect is always the goal, is key to understanding such decisions of the Court. Most errors in deeds and descriptions, such as those that doomed Goodrich, Tracy and others, are not mutual mistakes, they represent unilateral errors made by one party, with no participation or opportunity for input from the other party. The Court will not impose reformation where doing so will result in an injustice, so the Court will not allow reformation to correct an error made entirely by one party, to the detriment of another party, who is innocent of any blame for the existence of the error. Therefore, the key element that the Court looks for, in determining when reformation is appropriate, is the element of mutuality. A mutual mistake is one that prevents the intentions of both of the parties, not just the intentions of one of the parties, from being accomplished. Whenever it is evident that both parties were laboring under a genuinely mistaken impression, concerning the true contents of a description, a deed, or in fact any comparable written contract, the document can be reformed, to enable it to have it's intended effect. One goal of the Court in matters involving land rights, as we have already observed, is to find a way to lend validity to agreements legitimately formed in good faith, if any way to do that can be found, because doing so allows their real intentions to be carried out, and to reach fruition. Having determined that no obstacles to deed reformation were present in this case, the Court ordered the lower court to reverse it's ruling in favor of Basin, and to quiet title in American, by means of description reformation, to the land that American owned prior to the execution of the erroneous deeds. Although American was the grantor in this situation, and the Court typically places the fundamental burden of proper description on the grantor, the fact that Basin had not been damaged or harmed in any way, through any form of reliance on the mistaken language, and in fact had not even been aware of the error until American had discovered it and forthrightly pointed it out, clearly convinced the Court that in this instance, the parties stood as equals, with respect to responsibility for the mistake in question. Due to the absence of any showing of detrimental reliance by Basin on American's mistake, American could not be found guilty of laches, or estopped from successfully seeking correction of the description error.

POST v LIBERTY (1912)

Here we come to a case that can be very useful to surveyors, when discussing the merits of a survey with reluctant clients, who are unconvinced that a survey really holds any serious value or benefit. While this case, like many others reviewed herein, contains no references to any mistaken boundary surveys or any errors made by surveyors, it presents a potentially valuable lesson concerning surveys for land owners, and purchasers of land as well. In fact, the whole controversy that plays out in this case centers upon the absence of a survey, prior to a conveyance, which clearly would have prevented this litigation, and it thereby reveals the potential consequences for parties who neglect to order a survey at the most appropriate point in time, which is obviously when the terms of the conveyance are being determined. Of course people love to save money, and many people tend to feel that a survey should be unnecessary, when an existing tract is being conveyed, since all parties are bound to be honest in their dealings with one another, so there is little or no danger that anything could go wrong. The problem with that logic, as surveyors well know, is that dishonesty is not required to create problems, in fact the vast majority of boundary issues arise from simple carelessness or innocent ignorance, rather than any deliberate or intentional fraud, and here we see how easily such a misunderstanding can be perpetuated and become the source of a major conflict. From this situation we learn that if a grantor wants to inform a grantee about his land, or make any statements about the size or extent of it, that grantor would be well advised to have a survey in hand when doing so, in order to show his grantee that any such remarks the grantor makes have a legitimate and reliable basis. Although the case we are about to review involved a mistaken idea regarding the location of a property boundary with respect to a road, the Court has applied the same principle against a grantor who made a similar misrepresentation regarding a fence, in recognition of the fact that a typical innocent grantee is very likely to accept his grantor's suggestion that a fence marks a boundary, without questioning that suggestion, if no reason to question it is apparent. While such erroneous statements by a grantor do not constitute a full estoppel, since nothing

prevents the true boundary from remaining in the location of record, they do have the same effect as an estoppel upon the grantor, with respect to liability for damages. In *Fontaine v Lyng*, in 1921, the grantor pointed out a certain fence to his grantee, stating that it marked the boundary of the property to be conveyed, but it turned out that the fence was actually located about 100 feet beyond the true boundary location. The Court took the position, citing the case we are about to review, that the reason why the fence was believed to represent the boundary was irrelevant, if a statement was made by the grantor, or a party legitimately representing the grantor, which communicated to the grantee the false impression that the fence represented the boundary, then the grantor is guilty of misrepresentation, for perpetuating a mistaken boundary location without verifying it before doing so.

1910 - Liberty was the owner of an extensive amount of land, located in an unspecified rural township, and he was using most of it for agricultural purposes. How he acquired the land and how long he owned it are unknown, but he apparently had only a vague idea about where some of the boundaries of his land were located. No details about the boundaries in question are known, and there is no indication of whether or not any survey monuments, original or otherwise, existed anywhere on the property in question. Post came to the area looking for some good cropland to buy and met Liberty, who offered to sell his land to Post, and attempted to show Post the boundaries of the property. The complete legal description of the land is unknown, but it amounted to 780 acres, which was presumably described as various aliquot parts of multiple sections. The eastern boundary of the land stretched from the northeastern part of Section 14 all the way down to the southeastern part of Section 27. A road ran through the eastern portion of the land, and the road was apparently on or near the boundary in the east half of Section 14, but it curved westerly as it ran south, so that it was actually a substantial distance west of the boundary in the east half of Section 27. Liberty was apparently unaware of this, he may have been misinformed about where the boundaries were by a previous owner, and he evidently never had his

land surveyed. All of the property west of the road was good cropland, but in Section 27 there was a creek, evidently paralleling the road, which was just east of the road, and there was a steep bluff just east of the creek, making all of Liberty's land east of the road useless for agriculture. Liberty apparently believed that the road formed most of the eastern boundary of his land, so he pointed the road out to Post as being his easterly boundary, and told Post that only about 20 of the 780 acres were east of the road, in the area where Liberty believed the creek was the boundary. Post bought the land, relying on Liberty's statements, but soon began to have doubts about its true size and the true location of its boundaries, so he had it surveyed. The survey revealed that about 200 of the 780 acres were actually located east of the road, and none of those 200 acres were useful as cropland. Post then told Liberty that he wanted to rescind their transaction, but Liberty refused, so Post filed an action against him, seeking to have the conveyance rescinded.

Post argued that he was entitled to rely on the correctness of the boundaries that Liberty had shown him, and that he had no legal burden to order a survey of the land prior to purchasing it, and Liberty was guilty of misrepresentation for pointing out the boundaries incorrectly, regardless of whether Liberty ever knew where the boundaries of the land really were or not, so Post had the right to demand that their contract should be rescinded. Liberty argued that if he had in fact shown Post the wrong boundaries, it had been just an honest mistake on his part, and Post had the responsibility to verify the property boundaries prior to making a commitment to buy the land, so Post had no right to demand that the contract be rescinded. The trial court ruled in favor of Liberty, deciding that Post should bear the burden of his failure to properly ascertain exactly what he was buying.

In reviewing our previous case, we saw that certain errors or mistakes in deeds or descriptions can be resolved simply by correcting the erroneous document, through the process known as reformation, but of course not every mistake can be corrected in that manner, and since the mistake made here was of a different kind, and was not a description error at all, reformation was not an alternative in this situation. Post was not willing to settle for the number of usable acres that Liberty could convey, and of course Liberty could not convey any additional land that he did not own, so this controversy could not be remedied merely by changing the description

of Liberty's property, yet there was one important respect in which this case mirrored the American case, just previously discussed herein. There was no dispute, the Court observed, that the parties had entered a clear and definite agreement, and they had fully and properly documented their intentions as well, the problem resulted from the fact that they were both operating under a misunderstanding at the time they made the agreement, so just as in the American case, their agreement failed to embody their true intentions. Since the description of the land itself was not mistaken, and was therefore not subject to change, one of the parties would have to bear the consequences of their mutual misunderstanding regarding the boundary location, so the Court had to determine which party was really most responsible for creating and perpetuating that misunderstanding. Liberty obviously could not state that he had deliberately lied about the boundary location, and in fact no assertion that he had lied was even made, so he had no alternative but to plead that he had been genuinely ignorant and mistaken regarding the true boundary location, and this was very likely the truth. Its quite possible that Liberty was really a victim himself, who had been misinformed about the property boundaries by his grantor when he had acquired the land and had simply never discovered the truth, this put him in a very difficult position however, on equitable grounds, because it was clear that what he had told Post was both wrong and seriously misleading. The Court performed an unusually extensive analysis of the law on this subject, in arriving at it's decision, during which it reviewed the outcomes of comparable cases from several other states, including Minnesota, South Dakota, Washington and Wisconsin, and the following principles were among those cited with favor and adopted by the Court:

“... the owner of real estate is presumed to know the location of his land; and if in attempting to sell it, he undertakes to point out its location or its boundaries he is bound to do so correctly. In other words, his representations amount, in effect, to warranties ... Where the vendor undertakes to point out to the purchaser the boundaries of his land, he is under obligation to point them out correctly, and has no right to make a mistake ... the purchaser had a right to rely on the representation made by the vendor ... it is immaterial whether the representations as to area be as to acreage or dimensions ... and it is not material whether the vendor knew to be false what was stated. If the

representation as to a material point was relied on, and was stated as a fact ... the vendor cannot plead ignorance ... and even if the party innocently misrepresents a material fact by mistake, it is equally conclusive.”

While there is no law stating that a grantor must point out to his grantee exactly where the boundaries of the land being conveyed are physically located, there is also no law requiring the grantee to order a survey, the law simply expects each party to exercise reasonable prudence and diligence, in conducting their transaction. If a grantor tells his grantee nothing misleading about the land being conveyed, then the burden rests upon the grantee, to determine whether or not sufficient uncertainty exists concerning the land to merit ordering a survey, and if the grantee has good reason to suspect that anything about the property may be amiss, then the grantee bears the burden of inquiry, which can include the responsibility for ordering a survey. But if a grantor makes the critical mistake of guessing about either the acreage, the dimensions, or a boundary location, as Liberty did, then in the eyes of the Court, the grantor has voluntarily lifted that burden from the grantee and taken it upon himself, and the grantor cannot successfully assert that he is not to blame for misleading the grantee, or that the grantee was foolish to believe what the grantor told him. From these concepts expressed by the Court, it becomes evident that the party who actually stands as the one most likely to benefit from a survey, for purposes of conveyance, may often be the grantor, rather than the grantee, since it is the grantor who stands to bear the liability for any mistaken notions that may exist regarding the land, and a survey operates to relieve the grantor of that liability. Having decided that Liberty must bear the consequences of his misleading representations to Post, the Court reversed the lower court decision against Post, and also granted Post damages, plus interest and litigation costs, as well as upholding Post's right to rescind the transaction, leaving Liberty stuck with all of the property, including the 200 useless acres. Had Liberty simply been completely honest, and informed Post that he was unsure of the exact boundary location, Liberty would have incurred no liability, since Post could not have successfully accused him of providing misleading information. Liberty's mistake resulted from his desire to sell his land, which made him unable to resist the temptation to make favorable statements about the land, that operated to induce Post to buy it, creating the liability which the Court required Liberty to bear. Here we observe the presence of a factor that can potentially be very important in a land rights controversy such as this, between a grantor and his grantee, but is often

overlooked, and that is the fact that the Court typically places a higher and heavier burden of knowledge on grantors than grantees. This is the case primarily because grantors are presumed to be familiar with their property and grantees are presumed to be unfamiliar, and therefore innocent, with respect to the grantor's property, and this is a general judicial theme that has remained consistent throughout the decades. We will further compare and contrast the relative responsibilities of grantors and grantees with respect to boundaries, in subsequent cases dealing with similar conflicts, as we proceed through the decades.

WRIGHT v BROOKS (1913)

In this case we again observe the consequences of productive possession and improvement of land, combined with neglect for the importance of proper documentation of the true intent of the parties, with respect to the ownership status of the land, planting the seeds of future controversy by leaving rights to the land in limbo for a period of several years. As is typical of most conflicts such as this over land rights between a grantor and a grantee, both parties here were at least partially at fault here, for allowing the problematic circumstances to develop, forcing the Court to determine which party was primarily responsible and must therefore be required to bear the loss. This case also provides a good example of the fact that serious land rights issues can lay dormant or unknown, only to flare up when a subsequent grantee enters the scenario, often resulting in a dispute between the subsequent grantee and a prior grantee, for which the blame really rests with the grantor who made the conveyances to both of the grantees. Courts generally strive to place the blame where it truly belongs in such cases, as we see here, in their drive to protect all innocent grantees, but very often the grantor is gone, leaving the unfortunate grantees to litigate the matter against each other. Grantees can be equally devious however, as in the 1904 case of *Goodell v Sanford*, wherein Sanford acquired land from Goodell, openly maintained ownership of the land, and conveyed portions of it to others, prior to paying Goodell in full. When Goodell took action to collect the unpaid payments on the land from Sanford, Sanford took the position that he had never actually acquired the land in question, due to certain technical defects in Goodell's conveyance to him, so he owed

Goodell nothing, and a trial court ruled in his favor. The Court reversed that decision, stating that a grantee who has acknowledged the validity of a conveyance, through actions and conduct with reference to the land, is estopped from subsequently denying the validity of the conveyance on the basis of technicalities, denying Sanford the shelter of the statute of frauds, in a classic application of the principle that "actions speak louder than words" to the subject of land ownership. In *Shaw v McNamara & Marlow* in 1929, another case in which the validity of a conveyance was attacked, in part on the basis that the description was insufficient under the statute of frauds, the Court declared that the description, which read only "Burke's homestead at Big Sandy", was an adequate legal description, reiterating that certain properties can be legally identified simply by name. The Court then concluded, citing the case we are about to review as support for its decision, that the physical possession and improvement of the property there at issue, by a grantee, in conjunction with such a description by property name alone, was fully sufficient to remove the conveyance of the tract there in controversy from the statute of frauds.

1898 - Henry Brooks and his two brothers, Anthony and John, were business partners. This partnership was known as H. P. Brooks & Brothers, and the partnership was the record owner of various tracts of land, including two adjoining city lots in Lewistown, which were apparently vacant. There is no indication of how the lots had been acquired or how long they had been owned by the partnership, nor any details relating to the size or location of the lots, but the ownership of the lots by Brooks at this time was undisputed. Henry, who was the controlling partner responsible for making land deals on behalf of the partnership, verbally agreed to sell the two lots to Wright, and told Wright that he could begin using the land immediately, even though no money changed hands at this time and no deed was executed or even prepared. Wright immediately took possession of the lots, fencing them and erecting a building, which was described as a chicken house, and he continued to use the land in that same manner over the ensuing years, with no objection from any of the three brothers, although the Brooks partnership continued to pay the taxes

on the lots.

1909 - Henry died, without ever having conveyed the lots to Wright. Wright had requested a deed from Henry and offered to pay the agreed price, but for unknown reasons, the transaction had never been completed.

1911 - John, who had evidently taken over the real estate business upon Henry's death, and who was the legatee of Henry's will, upon discovering or recalling that the lots still stood in the name of the Brooks partnership, decided to sell them to Kattleson. Kattleson immediately tore down the improvements that had been made by Wright and began grading the lots in preparation for the construction of a new building that he was planning to erect there. When Wright found out what had happened, he filed an action against John and Kattleson, seeking to have John's conveyance to Kattleson voided, and to require John to convey the lots to Wright. Anthony apparently claimed no interest in the land and was not involved in this controversy.

Wright argued that he and Henry had made a complete and definite agreement that the lots were to be conveyed to him, and that he was not responsible for the fact that the agreement had never been reduced to writing and carried to completion, which he believed was due solely to plain procrastination on the part of Henry, so Wright had in fact become the equitable owner of the lots. For that reason, he asserted, he was entitled to a conveyance from John, so John should be required to accept his payment of the originally agreed purchase price and deed the lots to him, rather than to Kattleson. Brooks did not deny that his late brother had agreed to sell the lots to Wright, but he and Kattleson argued that since Wright had never paid for the lots, and had allowed over 10 years to pass without effectively validating his claim to the lots by obtaining a deed, Wright had allowed his agreement with Henry to lapse, and forsaken any claim to the lots that he may once have had, so Brooks was free to convey the lots to another party, as he had done. Brooks and Kattleson also asserted that the agreement between Henry and Wright could have no legally binding effect, because Henry was not the sole owner of the land in question at the time he made the agreement, so Henry had no right or authority, acting alone as he had, to make any conclusive commitment to sell the lots to anyone. The trial court

found the arguments made by Brooks and Kettleson unconvincing, and held that Wright was the true owner of the lots in question, nullifying the conveyance from Brooks to Kettleson, and mandating legal conveyance of the lots in controversy to Wright.

Its important to note at the outset that Brooks never expressly argued that the statute of frauds was applicable to this situation, presumably because his legal team was astute enough to take notice of the prior decisions of the Court on that subject, including some that we have reviewed, and therefore realized that Wright had sufficiently performed his part of his oral conveyance agreement with Henry, by improving and exclusively occupying the land, thereby making the statute of frauds inapplicable. Nevertheless, despite the absence of this specific argument, the Court recognized that the issues in play were fundamentally linked to the existence of an unwritten conveyance agreement and the subsequent performance and conduct of that oral agreement by the parties, so the Court analyzed the events and treated the resolution of the conflict just as it would have done, had the statute of frauds been expressly brought into play. It was impossible for Wright to successfully make any case based on adverse possession, the Court noted, despite his long standing and exclusive physical possession of the lots, since he had freely testified that he had acknowledged the title of Brooks to the land in question, and in fact his argument relied upon the validity of the legal title and ownership of the lots by Brooks, since Wright claimed that he owned the land not merely by virtue of his possession of it, but by means of an oral conveyance agreement. Instead of attacking the existence of the alleged conveyance agreement, Brooks had elected to attempt to turn the passage of time to his favor, by arguing that Wright had unjustifiably delayed in obtaining a deed to the lots, and was therefore guilty of laches. The Court however, was quite cognizant of the highly ironic nature of this argument on the part of Brooks, since he and his late brother obviously stood equally exposed to accusations of unjustifiable delay, having never taken any positive action in response to Wright's requests for the completion of the promised conveyance, so the Court was just as unreceptive toward the issue of delay put forth by Brooks and Kettleson as the lower court had been. Citing comparable cases that had taken place in California and Oregon, involving the occupation and use of land by a grantee in anticipation of, or pursuant to, a promise of conveyance, the Court explained that:

“It is the recognized rule, followed by this court, that specific performance of an oral contract for the sale of real estate may

be decreed where possession ... is followed by improvement ... the statute of limitations does not commence to run (against the vendee) until the vendor has in some manner disavowed his trust ... the weight of authority is that the vendee in possession cannot be barred from specific performance by mere delay, however long, because his possession is a continued assertion of his claim. He may rest in security until his title or right of possession is attacked.”

The ongoing open occupation and use of the land by Wright over the years, the Court determined, amounted to a real assertion of his rights to it, effectively reiterated and renewed every day that he held the land, making it impossible for Brooks to successfully accuse Wright of having inordinately delayed in asserting his rights. Wright, the Court indicated, had the right to trust that the Brooks brothers would eventually make good on Henry's conveyance agreement, right up until the moment when his rights to the land at issue were finally openly denied, by John's conveyance of the lots to Kettleson, so the Court was unwilling to charge Wright with laches. In fact, the Court found, if any of the parties engaged could be charged with laches, it was the Brooks brothers themselves, since they had long delayed in dealing with Wright, to such an extent that their delay gave rise to an estoppel, preventing any of them from renouncing the original conveyance agreement and ejecting Wright from the land, based on their knowledge that Wright held the good faith belief that the land would not be conveyed to anyone other than him. In addition, the Court dismissed the suggestion that Henry had not owned the lots he had granted to Wright, and therefore had no right to sell them, without the participation of his brothers, stating that the evidence fully showed that Henry was the true motivating party, in complete charge of all the land transactions involving the partnership, and he therefore clearly had the authority to convey the lots to Wright on behalf of the partnership. Upon Henry's death, the Court decided, his brothers were not freed of Henry's commitment to sell the lots in question, on the contrary, they were obligated to carry out his intentions, so in fact they held only the legal title, in trust for Wright, who had long since become the equitable owner of the land. The great importance of possession and improvement of land, arising from any agreement made in good faith, and representing any kind of productive use of the land in question, even when not properly documented, is clearly illustrated by this case, as the Court fully upheld the lower court decision in favor of Wright. Although the improvements that

had been built on the lots in question by Wright were very humble and meager, they represented legitimately productive use of the land, and they provided constant and ongoing physical notice to all the world of Wright's control over the lots, leaving Kettleson no opportunity to successfully claim that he was an innocent grantee without notice. Even the fact that Wright had never paid anyone any money for the land, and the fact that the Brooks brothers had gone on paying the taxes on the lots, were insufficient to convince the Court that evicting Wright from the land had been justifiable in any sense. Once again, the Court had provided support to an innocent grantee, who it evidently saw as having been mistreated by his grantor, despite the absence of any form of documentation between the parties, since the grantor was clearly a person occupying a position of superior power, based on his higher intelligence and education, allowing the behavior and conduct of the parties over time to determine the manner in which justice could best be served.

RUDE v MARSHALL (1917)

Here we examine an adverse possession case that stands out as a true milestone in the history of land rights litigation in Montana. The conditions on the ground leading up to this legal battle are quite mundane, and are very typical of those that frequently result in adverse possession claims, but at this early date the Court had yet to clearly define its position on some of the fundamental principles that determine the manner in which it would approach and resolve conflicts involving boundaries, so this case gave the Court an ideal opportunity to clarify its disposition toward such disputes. The Court has always been aware of course, that errors, mistakes and misunderstandings concerning boundaries have many different sources and causes, and ideally each of them should be resolved accordingly, but the Court also recognizes that identifying the origin of such problems can be very difficult. With the passage of time, mistakes, ignorance and misconceptions on the part of land owners regarding their boundaries gradually become indistinguishable from survey errors, made either in the creation or retracement of those boundaries, and the evidence brought before the Court often leaves the true origin or nature of the controversy unclear. Courts in general therefore seek to adopt or craft legal and equitable tools

that can be employed to resolve errors and mistakes involving boundaries, even in the absence of complete and detailed evidence, and it was through this process that adverse possession gradually developed from a means of resolving title conflicts only, into a means of fixing or defining boundaries as well. Here we see the Court effectively broadening the scope and applicability of adverse possession, extending it into the realm of boundary law, by exercising it even where no title conflict was shown to exist, to create a boundary that accords with the existing physical conditions, judicially instituting a state of repose between the parties, based on the acts and conduct of the parties and their predecessors. In so doing, the Court here allows adverse possession to usurp the role of boundary resolution, by giving it preference over the doctrine of practical location, adopting the position that adverse possession can operate to resolve boundary errors, mistakes and ignorance of all kinds, and allowing tacking of possession through privity between predecessors and successors to support adversely created boundaries as well. In 1912 in *McDonnell v Huffine*, one of Montana's most prominent and often cited early easement cases, the Court ruled that a void verbal grant can mark the inception of adverse or prescriptive rights, and that such rights are not damaged or diminished by anything short of physical interruption resulting in actual cessation of use, then in 1919 in *Shinors v Joslin* the Court again staunchly upheld adverse rights acquired as the result of an encroachment, in a case quite similar to the one we are about to review. The pendulum of Montana justice reached its maximum inclination toward adverse rights with these cases however, and the ensuing decades would see a gradual return to a position of balance, as subsequent cases will demonstrate.

1897 - Bohler was the owner of a typical platted lot, located within the Butte townsite, which was platted as 100 feet in length, north to south, and 42 feet in width, and which was apparently vacant at this time. Bohler sold the south half of the lot to Parry, describing the portion conveyed as being 42 feet by 50 feet. Bohler also erected a fence across the center of the lot at this time, presumably intending to place it on the dividing line that he had just created by means of conveyance. How Bohler determined exactly where to put the fence is

unknown, there is no indication that any lot corner monuments existed, or that any measurements were made, or that any surveys were done. Bohler only retained the north half of the lot for a short time after this, and there is no indication of whether or not he ever built anything else on his half of the lot, or ever lived on the lot.

1898 - The north half of the lot, formerly owned by Bohler, was acquired by Walsh. There is no evidence regarding how Walsh used his half of the lot, or how Parry used his half of the lot either, but neither of them had any apparent concerns about the location of the fence, so it remained in the location where Bohler had built it. The height of the original fence is unknown, but Walsh had the height of the fence increased to 10 feet at this time. Parry allowed this to be done and both parties continued to treat the fence, with respect to whatever actual use they may have been making of the land, as if it represented the boundary between their properties.

1905 - Marshall acquired the north half of the lot, and proceeded to erect a substantial building made of stone on it. Marshall removed the fence and constructed the south wall of his building right where the fence had been, evidently in the belief that the fence represented his southerly boundary, and with the apparent intention of using every bit of his property. There is no indication that anyone ever told Marshall that the fence marked the south boundary line of the property, or that he had the property surveyed or made any measurements to attempt to verify the fence location, he was apparently acting upon his own presumption that his property extended to the fence. Parry, who still owned the south half of the lot, allowed this fence removal and building construction to take place, without ever raising any objection.

1909 - Rude acquired the south half of the lot. There is no indication that Rude made any inquiry about the location of the north boundary of the south half of the lot, or about the location of Marshall's building. Rude apparently did not have the property surveyed and did not question or challenge the location of Marshall's building at this time.

1914 - Rude filed an action, charging that Marshall's building was up to 2 feet over the north line of the south half of the lot, and that it was therefore an encroachment subject to removal. There is no indication of how Rude came to this conclusion, it may have been the result of an unknown or unspecified survey, or it may have been based simply upon measurements made by Rude or others, without the assistance of any surveyor. There is no evidence that anyone ever looked for any lot corner monuments or ever made any attempt to verify whether or not the lot was actually 100 feet in length on the ground, as it had been platted.

Rude argued that the building should be removed because it obviously represented an encroachment, regardless of how or why it had been built in its present location, since it was clear that it must have been placed upon a portion of the south half of the lot as a result of a mistake of some kind. Marshall made no attempt to prove that his building was not located over the true boundary line of record, and no attempt to maintain that the location of the boundary line of record was anywhere other than where Rude claimed it was. He evidently accepted and conceded the fact that his building was over the line of record, and in fact it's possible that he may have known all along that it was over that line, so he argued that he had acquired title to the portion of the south half of the lot occupied by his building by means of adverse possession. The trial court agreed that Marshall had satisfied the requirements of adverse possession and ruled in his favor, holding that the building was not an encroachment because Marshall had acquired title to the 2 foot strip in question by that means.

This case squarely confronted the Court with an issue that had become highly controversial in the arena of land rights during the late 1800s and early 1900s, and that was the issue of what should be the legal consequences of an honest or innocent mistake concerning a boundary made by a property owner, when presented in the context of the use or occupation of land. While noting that the matter at hand could be decided on the basis of estoppel, since all of the various owners of the two properties in question had acted in a manner that effectively condoned and approved the original fence, and subsequently the south wall of the building as well, as a physically established boundary between the properties for many years, the Court elected instead to resolve the conflict purely on the basis of adverse possession, thereby clarifying Montana's position on this issue. In comparable cases that had taken place in some other states in recent years, it

had been ruled that the presence of a mistake, made by a land owner in attempting to determine his own boundary location, had the effect of preventing adverse possession from operating, because the presence of such a mistake was indicative of the absence of any intent, on the part of the mistaken party, to claim any land beyond their boundary of record. This concept, holding that any mistaken idea regarding a boundary location was fatal to an adverse possession claim, had the effect of restraining the operation of adverse possession, limiting it to situations in which entire properties were at issue, and preventing it from being applied to controversies involving boundaries, to support a claim of ownership of a mere fragment of the adjoining property, since boundary disputes always involve a mistaken notion regarding the location of the boundary in question, on the part of at least one of the parties, if not both. Although this legitimate and rational legal concept, attempting to limit the application of adverse possession to conflicts over title to entire properties, and prevent it from being injected into boundary and encroachment conflicts, had merit when viewed from a strict legal perspective, the desire and need to use adverse possession as a judicial tool in support of the equitable rectification of mistakes of various kinds relating to boundaries proved to be overwhelming. Therefore, this concept known as the "mistake doctrine", which was particularly unpopular in the western states, was never widely adopted, and was destined to gradually fade into obscurity over the ensuing decades, lingering in only a handful of widely scattered states, such as California in the west, and Maine where it first rose to prominence in 1897. By adopting the position that it took in this landmark case, the Court effectively declared what the Montana position on this very fundamental and crucial land rights issue would be:

“Every possession is adverse which is not in subservience to the title of another ... Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another believing it to be his own, up to a mistaken line, claims title to it and so holds, the holding is adverse ... and the fact that ... the owner of the record title was ignorant of the location of the true boundary ... or the fact that both owners were mistaken as to the true boundary line, does not affect the operation of the rule ... a mistake as to boundary lines is immaterial. In other words, the mistake cannot be pleaded in avoidance of the legal effect of the

possession ... a mistake as to the true boundary line ... is adverse, and, if continued for the requisite period, will give title by adverse possession.”

The Court had made it clear, in so stating, that adverse possession was not limited only to situations involving conflicts over which of the competing parties held the superior title to an entire property, as it had been in the previous adverse possession cases decided by the Court, it could also be used to successfully claim a chunk or a sliver of an adjoining tract or parcel, that had been mistakenly occupied, effectively creating a new boundary, in a location where none had previously existed. While the wisdom of this decision, expanding the application of adverse possession, may well be questioned, and it may well be argued that other legal principles, such as those related to the practical location of boundaries, are more appropriately applicable to controversies focused on boundaries than is the concept of adverse possession, there can be no doubt that this decision of the Court was based on its commitment to seeing that justice is done, by implementing such tools as are available to accomplish that objective. Pointing out that it was beyond question that "actions speak louder than words", the Court concluded that any physical possession of any amount of land, if not held in a manner that is clearly subservient to the record owner of the land, like the use of land by a renter who is obviously subservient to his landlord, is fundamentally adverse in nature to the title held by the owner of record, adopting the principle that physical acts represent the highest and strongest manifestation of intent. In upholding the lower court ruling in favor of Marshall, which had the effect of shifting the boundary in question from the location of record to the location established by the physical conditions on the ground, the Court had joined the growing majority of states that had decided to allow adverse possession to be used to resolve conflicts stemming from encroachments, and those centered upon boundary errors and mistakes of numerous kinds, making it a serious and potentially important factor in boundary disputes. Also noteworthy is the fact that in so deciding, the Court upheld the concept of tacking together the possession of consecutive adverse possessors, so that the current occupant can derive the benefit of the use and occupation of the area in question that had been made by his predecessors, in order to fulfill any time period required by the statutes of limitation, which was another aspect of adverse possession that had once been the subject of legal controversy, over the question of how to determine the existence of privity between grantors and grantees. In allowing Marshall to rely upon the treatment and acceptance of the fence by

all of the prior owners of both adjoining properties as their boundary, the Court confirmed that it recognized and acknowledged the existence and applicability of the important principle of privity between grantors and grantees, whenever land under possession is conveyed, in effect uniting the possession of the grantor and the grantee, for purposes of satisfying whatever statutory time period may be required.

The power and legal implications of this decision did not go unnoticed, and it was instrumental in motivating legislation that was intended to stem the potential flood of adverse possession cases over similar small strips of land, located along poorly tended boundaries everywhere, by instituting the requirement that adverse claimants must show evidence that they have paid taxes on the land being claimed, which as we shall observe in later cases, was intended to again limit adverse possession to use in the resolution of title conflicts. Surveyors typically tend to question whether possession of land beyond a boundary line, as seen in cases such as this one, can ever really be properly characterized as being truly innocent or not, correctly pointing out that in cases such as this, any one of the several parties that were involved could have prevented the problem from coming into existence in the first place, or at least prevented it from developing into a serious problem, simply by ordering a survey of the line in question. In that regard however, it should be recognized that the Court always presumes that all of the parties acted innocently and in good faith, the burden to show the contrary always rests upon the opposing party, and the mere failure to order a survey is not typically seen by the Court as sufficient to show that any particular person was not acting in good faith. By embracing situations involving boundary errors made by land owners, in the absence of a survey, along with situations in which the adverse claimant holds legitimate color of title to the area being claimed, within the doctrine of adverse possession, the Court had simply elected to extend the same presumption of good faith to those who held mistaken notions regarding their property boundaries, that it had always extended to those with color of title. In effect, the Court had simply chosen to view the decision of Marshall, to erect his building without first obtaining a survey to verify his property boundaries, as an innocent and understandable mistake, that was not indicative of bad faith on his part, and for which he should not be punished, since in so doing he had merely been relying upon the existing conditions, which presented the appearance of a well established physical boundary, that all of the prior owners of both of the adjoining properties had always accepted. Nevertheless, its essential of course, for surveyors to understand that adverse possession does not

eradicate or relocate any existing boundaries of record, when present however, it does render the record location incapable of controlling the actual boundary location, and it does result in rights extending to the boundary location that has been established by physical occupation and use, so the prudent surveyor should be aware of it's potential presence and cognizant of it's potential legal significance.

COX v HALL (1917)

Returning to the subject of description errors and their rectification, here we find the Court again ascertaining the true intent of a conveyance agreement, and enabling that agreement to have it's intended effect, in this instance preserving the agreement despite the carelessness of an apparently absent minded attorney. The importance of professional responsibility is well demonstrated by this scenario, as the Court, consistent with it's general inclination to hold professionals to a higher burden of care, elevated above that typically applied to innocently ignorant parties, here declines an invitation to shift that burden of responsibility to a party who trusted the work of a recognized professional, and thus stood as an innocent victim himself in the eyes of the Court. In this case we also watch as the Court accepts extrinsic evidence in the form of testimony to control a description that contains latent ambiguity, and rules upon the value and significance of a statement of approximate acreage, and ultimately confirms that the statute of frauds does not operate to bar the Court from reforming a description to conform to the actual intentions of the parties, when the written documentation of their agreement fails to properly express their original oral agreement. While the Court finds the description at issue here to be correctable, and orders it to be reformed accordingly, the Court is not always so charitable in assessing the value and meaning of legal descriptions, many description errors are not subject to correction, for a variety of reasons, and prove to be fatal to the validity of the conveyance in question. In 1911 in *Washoe Copper v Junila*, a mineral rights case, the Court held that an undescribed exception stated in a deed renders the deed invalid as evidence, since the presence of an exception of indeterminate extent, following a description, makes the extent of the description itself indeterminate and

patently ambiguous. Also in 1911 in *Billings Realty v Big Ditch*, a water rights case, the Court similarly concluded that a description exception defined only in terms of acreage is fatally flawed, in the absence of any indication of where the excepted acreage is located within, or in relation to, the subject property, leaving the entire description "legally insufficient". These decisions obviously point to the fact that exception tracts should be described as diligently as any other areas requiring description. Then in 1916 in *Horsky v McKennan*, the Court was confronted with a challenge to the validity of a description contained in a tax deed reading "One half of part of Lot 14 Thompson Placer, being 214 feet east side of Main Street, and 216 feet west side of Main Street, and 224 feet east side of Gulch Street, and 224 feet west side of Gulch Street.". In that case, the Court ruled that this description was so indefinite and useless that the conveyance could not be upheld at all, and was in fact a complete nullity, although the land rights involved may have been assigned or conveyed an unspecified number of times, using the same patently ambiguous description.

1909 - The Pace-Woods Improvement Company owned approximately 480 acres, consisting of one entire section, less the west half of the west half, and Cox was occupying all of the land, as the holder of a contract for deed from Pace-Woods. A Northern Pacific railroad track ran through the section in a generally northeasterly direction, crossing through the southwest, southeast and northeast quarters of the section. There was also an irrigation ditch meandering across the entire north half of the southeast quarter of the section, running more or less parallel with the railroad track, and this ditch was located several hundred feet south of the railroad track. Hall wanted to purchase a certain portion of the section, so he visited Cox, and Cox agreed to this idea, so Cox and Hall together went to the office of Pace, and informed Pace of the change that they proposed to make to the contract for deed held by Cox. The portion of the section that Hall wanted, and which Cox agreed to let him buy from Pace, consisted of approximately 40 acres, and was that portion lying north of the ditch, and south of the railroad track, in the east half of the east half of the section. When Pace reduced their agreement to writing

however, as an amendment to Cox's existing contract for deed, he neglected to mention that the portion to be conveyed to Hall was located in the east half of the east half of the section. The description of the area to be conveyed to Hall, after being written down by Pace, included the entire area between the ditch and the track, which extended much farther west than Cox and Hall had intended, because Pace had failed to include any language limiting it to the east half of the east half, so the area described in writing by Pace actually embraced well over 60 acres, although the description concluded with the phrase "40 acres more or less". Hall evidently paid Pace for the land, so Pace-Woods proceeded to issue a deed to Hall, employing the erroneous description.

1910 - Cox completed his obligations under his contract for deed and Pace-Woods issued a deed to him, excepting out the land that had been previously conveyed to Hall. Upon reading his deed for the first time, Cox noticed the description error that Pace had made, and he contacted both Pace and Hall in an attempt to have the error promptly corrected, but Hall refused to participate in the correction process proposed by Cox, and instead Hall began using all of the land lying within the boundaries described in his deed.

1912 - Upon finally becoming convinced that Hall was going to remain unwilling to cooperate with him in correcting the mistake that had been made, Cox filed an action against Hall, seeking reformation of the description error.

Cox argued that the original intentions of the parties were entirely clear and complete, and they had been properly communicated to Pace, but Pace had failed to fully state the language of the agreement between Cox and Hall, and as a result, the deed to Hall failed to capture and express that agreement correctly, so the language of the deed should be corrected to accurately indicate, and carry out, the true intent of the parties. Hall argued that even if it was true that the description contained an error, the error was the result of the negligence of Cox, so Cox should therefore be required to bear the consequences of it. In addition, Hall argued that because the description contained the phrase "more or less", following the acreage figure, the acreage could not be considered to be the controlling aspect of the

description, so the stated boundaries must control, despite the fact that this happened to result in an additional 20 acres having been conveyed to him. The trial court found that the evidence was sufficient to support the true nature of the agreement between Cox and Hall, as the actual content of that agreement had been outlined by Cox, and therefore agreed with Cox that the documents in question were subject to reformation, and so ruled in his favor.

As we have already seen repeatedly demonstrated, the Court is typically quite disinclined to lend it's support to arguments based primarily on technicalities, and prefers instead to focus on assisting and supporting parties who acted in good faith to reach the legitimate objectives that they set out to achieve, despite whatever legal or technical obstacles such innocent parties may encounter. The situation in play here presented a particularly clear and strong example of the type of controversy that the Court generally finds to be lacking in merit, and which the Court would therefore really prefer not to be required to deal with, since doing so detracts from the time that the Court has to deal with more serious and complicated matters of law and justice. Given that Hall had seen fit to bring this matter before the Court however, the Court took advantage of this instance to once again administer the law in an equitable manner, which as is often the case, means slicing through the Gordian Knot of legal technicalities that are presented, and sweeping the detritus aside. The Court had very little patience with Hall's suggestion that the proximate cause of the whole problem rested with Cox, and that the bulk of the blame for it should therefore be placed upon the shoulders of Cox. In the eyes of the Court, Cox had in fact done exactly what he was obligated to do, which was to obtain professional assistance with the preparation of the description that had to be created to document his agreement with Hall, so Hall's allegation of negligence on the part of Cox was baseless and unsupportable, and Cox certainly had the right to fully rely on the correctness of the description prepared by Pace. The motivation and basis of the assertion made by Hall was clearly self interest, rather than principle of any kind, and it was obvious that he had simply decided to attempt to turn Cox's trust in the description created by Pace to his own advantage, so the Court was entirely unsympathetic to Hall's negligence allegation. Even though it was true that Cox had been negligent to some extent, in failing to check the language used by Pace, at the time Pace composed the description in question, the Court observed, Cox's negligence, if it could be properly characterized as such at all, was entirely excusable, because Pace was an attorney and Cox was a farmer, so Cox could not be condemned for failing to have the audacity to question the

language used by a man so much more well educated than himself. Had Cox taken it upon himself to attempt to describe the land at issue, and failed to properly do so, the situation would have been quite different, but that was not the case, Cox had justifiably relied, the Court indicated, upon the work of Pace. Burdens, under the law, are not in fact to be placed equally upon all parties, the knowledge, education, and professional status of the parties involved in any controversy can all be highly relevant, and can even be decisive, as the Court noted with respect to this particular point:

“Pace is an attorney at law ... Cox reposed confidence in his ability to understand the agreement, to reduce the same to writing, and to properly describe the land ... plaintiff Cox is a man of meager education, and not familiar with land surveys or descriptions, and is unable to properly describe land, technically or legally, or detect errors in such descriptions.”

Having disposed of the negligence charge against Cox, by forgiving his omission to verify that his words had been properly set down on paper by the scrivener of the description in question, all that remained was to address the question of the validity or significance of the acreage stated in the description. Since Hall wanted the description to stand, just as it had been written without alteration, he set forth the well known principle that whenever acreage is recited as "more or less", it has no controlling value, and must be treated as meaningless extra information, or surplusage, that was inserted only to be informative in a most general sense. The Court recognized however, that the description in question was ambiguous in nature, because the acreage was materially inconsistent with the stated boundaries, therefore the description was subject to analysis in the light of extrinsic evidence, to clarify what was truly intended. The Court thus here applied the important concept of latent ambiguity, which provides that ambiguity exists in a description whenever conflicts appear as a result of the application of that description to the ground, and the presence of ambiguity is the key factor that makes the introduction of extrinsic evidence allowable, such as the testimony of Cox in this case, to clarify the true nature of the agreement and intent of the description. Indicating that the description principle relied upon by Hall was undoubtedly true, but was also completely irrelevant to the situation, the Court explained that the controlling principle was the very basic requirement that the description must be interpreted in the manner that gives effect to the true intentions of the parties. The presence of

the acreage in the description, although not controlling, was valid evidence supporting Cox's claim that the boundaries had been erroneously described, so even though the acreage alone was insufficient to dictate the outcome, it was nevertheless valuable evidence that contributed to Hall's downfall, by rendering his position implausible in the eyes of the Court. Being fully satisfied that Cox and Hall had in fact formed a complete and definite agreement, embodying their meeting of the minds, with respect to their mutual intent for the use and ownership of the land in question, and that only a mutual mistake had accidentally derailed their original plan, the Court fully upheld the decision of the lower court that the description was in error and merited reformation, to reflect the true original intentions of Cox and Hall for the land. Some may wonder why Hall never argued that the statute of frauds supported his case, since the ultimate result amounted to the triumph of an oral agreement over a written agreement. Had Hall brought the statute of frauds into play however, it would have been to no avail, since the existence of the original oral agreement was undisputed, the mistake that had been made in reducing it to writing ran contrary to that agreement, and the statute of frauds does not operate to bar the reformation of a description that fails to capture the essence of an actual agreement, even if that agreement was originally made only verbally. Thus here again we can clearly see that the Court does not treat the statute of frauds in an absolute or literal fashion, or apply it to destroy agreements concerning land rights that can be shown to have been legitimately made in good faith, the statute of frauds merely allows alleged agreements, that are neither supported by sufficient evidence nor put into effect, to be deemed void.

BORGESON v TUBB (1918)

In this case, the Court was required to sort out a variety of issues that are highly relevant to surveyors, which emerged from poor platting procedures and ambiguous conveyances, that served to plant the seeds of future controversy. As every surveyor knows today, early subdivision plats often left a lot to be desired, in terms of both information and monumentation, but here we see a situation involving an apparently deliberate or intentional overlap of an earlier plat by a subsequent plat, leading the Court to conclude that the subsequent plat was intended to supersede the previous plat, to the extent of the overlap, although that intention was apparently not expressly stated on the subsequent plat. The

Court arrives at this conclusion, as we shall see, based upon the subsequent conduct of a number of parties, who used and conveyed the land lying in the disputed area, presenting an excellent example of the fact that the conduct of land owners after a conveyance can be the strongest evidence of the true original intent of the parties who divided the land. In the eyes of the Court, land use typically shows the meaning that such ambiguous documents held in the minds of the original parties, who had first hand knowledge of the original conditions on the ground, potentially including knowledge of original monument locations, having been the first people to make use of the land. In addition to the evidence of the intended location of the boundaries of the platted lots, which is provided by the long standing physical conditions on the ground, survey evidence also proves to be key to the Court's decision here, although the Court makes only one very brief reference to the survey upon which it ultimately places great reliance. The fact that the Court was comfortable relying on the testimony of a subsequent surveyor, who had no apparent personal connection to the original surveys or platting, for purposes of boundary resolution, introduces an important factor concerning the view taken by the Court toward survey evidence. Courts generally allow all professional results, including surveys, to carry the presumption of correctness, which places the burden of proof on any party maintaining that a particular survey is incorrect in some respect. Among subsequent surveys, aside from the Court's deference to original surveys, the most recent survey is typically presumed to be correct, and to serve as a correction of any prior surveys, to the extent of any disparity between the surveys. The Court does not take this position because the most recent survey is necessarily the most correct or accurate survey of course, the most recent survey simply carries the presumption of correctness because it stands uncontradicted, until such time as a challenge to it is raised, which can come in the form of another survey, or in the form of testimony or other evidence calling the survey into question. Here however, we see an uncontested survey control, even in the utter absence of any evidence supporting its correctness, for no other reason than the fact that it stands undisputed.

1882 - The southwest quarter of the northeast quarter of a certain

regular section was platted as the original townsite of Lewistown, and the plat was recorded. This plat showed Main Street, running in a northeasterly direction through the townsite, up to the sixteenth line at the northerly boundary of the townsite. Near that sixteenth line, which represented the north edge of the townsite, Block U 15 was shown, lying on the south side of Main Street, but this block had not yet been divided into lots.

1884 - An amendment to the 1882 plat was filed, evidently for the primary purpose of adding the endorsements of certain local authorities, but some other changes were also made. Block U 15 appeared on this plat in the same location as it had on the 1882 plat, but this time it was divided into lots, and the last lot on the northeasterly end of that block was Lot 7. Lot 7, as it was shown on this plat, was a typical lot, rectangular in shape, with 50 feet of frontage on Main Street.

1885 - An addition to the original townsite, located directly to the north of the original townsite, in the northwest quarter of the northeast quarter, was platted. On this plat however, the sixteenth line between the southwest and northwest quarters of the northeast quarter was shown as being approximately 20 feet further south, compared with how it was shown on the two existing plats of the townsite itself. For that reason, the northernmost corner of Lot 7 projected well into the addition, creating a triangular parcel, that had been previously platted as part of Lot 7, but which was now shown as being part of the addition, rather than part of the original townsite. This parcel was identified on the plat of the addition as Lot 1 in Block 12, and this small triangle would become a focal point of controversy. There was no evidence that any monuments were ever set at any of the lot corners depicted on any of these plats.

1886 - Jutras acquired both Lot 8 in Block U 15 of the original townsite plat and Lot 1 in Block 12 of the addition plat. Lot 8 however, was southwest of Lot 7 and did not touch Lot 1 at all, and Jutras was in possession of Lot 7 and never occupied or used Lot 8 at all, so the number 8 in the deed issued to Jutras was obviously a

typographical error that needed to be corrected.

1890 - A correction deed was issued to Jutras, which corrected the mistaken lot number from 8 to 7, but while correcting one error, this deed introduced a different error, since it failed to mention Lot 1 at all. Evidently Jutras did not realize that this second error had been made, or he did not understand the significance of it, so he believed that he now owned the entire rectangle that had comprised the original Lot 7, including the triangular Lot 1, rather than the truncated Lot 7, which did not include Lot 1, so Jutras continued to occupy both Lot 7 and Lot 1, and no one ever challenged his use of Lot 1.

1893 - Jutras mortgaged Lot 7 to Landt, but he did not mortgage Lot 1. The mortgage was foreclosed and Landt acquired Lot 7. As a result of this development, interpreting the foreclosure to apply only to that portion of Lot 7 lying south of Lot 1, Landt took possession of the truncated Lot 7, but Jutras continued to occupy the triangular Lot 1. Jutras and Landt maintained a fence between these two lots, so it was clear that Landt recognized that he did not own Lot 1, and in fact Landt offered to buy Lot 1 from Jutras, but Jutras refused to sell it to him.

1896 - Jutras built a sidewalk running along the portion of Main Street adjacent to both Lot 7 and Lot 1, and he and Landt shared in the expense of building it, and they also subsequently shared in the upkeep and improvement of it, until Landt eventually conveyed Lot 7 to Borgeson, at an unspecified date.

1903 - Jutras conveyed Lot 1 to Walton.

1904 - Walton conveyed Lot 1 to Tubb. Borgeson apparently became aware of the platting discrepancy that had resulted in the creation of Lot 1, and he decided to challenge the existence and validity of Lot 1, so at an unspecified date Borgeson filed an action in which he claimed to be the owner of not just the truncated Lot 7, but the entirety of Lot 7, as originally platted, which included Tubb's Lot 1.

Borgeson argued that the original plat controlled, and that it was impossible for any overlap to exist between the townsite plat and the

addition plat, therefore Lot 1, since it was lying within the supposed overlap area, had never existed, so when he acquired Lot 7 he had acquired the full rectangular area shown as Lot 7 on the 1884 townsite plat, and not just the truncated Lot 7 shown on the 1885 addition plat. Tubb argued that the 1885 addition plat had the effect of superseding both the 1884 amended townsite plat and the 1882 original townsite plat, and the sixteenth line shown on the addition plat operated as a correction of the erroneous location of that same sixteenth line, as it had been shown on the townsite plats. Therefore, Tubb asserted, Lot 1 had been legitimately created, and Lot 7 had never actually been a complete rectangle, despite being shown as such on the 1884 plat, so Borgeson had only acquired the truncated Lot 7 shown on the 1885 plat, and had no legitimate claim to Lot 1. The trial court agreed with Borgeson, that the original plat controlled and Lot 1 had never existed, quieting title in him to the entire rectangle comprising the original Lot 7, including the triangular Lot 1 occupied by Tubb.

This case presents an almost comical series of errors, blunders and poor decisions, creating great uncertainty and confusion, but there was nothing funny about the situation to Tubb, who was called upon to defend the existence of his lot, in order to avoid being forced to relinquish it. The origin of the problem was in the fact that two different surveyors had performed the original surveys of the townsite and the adjoining addition, and they evidently did not agree on the location of the sixteenth line that was intended to form the boundary between the two subdivisions, so the second survey had deliberately overlapped the first one. No details relating to either of the original surveys in question were in evidence, and neither one of the original surveyors were apparently available to testify, so the reason for the disparity between the two original surveys is unknown, but the Court would be required to deal with the consequences of the conflict that these two surveys had created, and the opinion of a third surveyor would prove to be key to the outcome. The decision had clearly been made, in 1885 when the addition was platted, to treat the overlap area as being part of the addition, rather than part of the original townsite, but this resulted in a patent conflict between the two plats, which showed the same area lotted differently, and from this conflict arose the obvious question of which plat the land owners were entitled to rely upon. Under the law, an original plat typically controls, because once lots are sold in reliance upon it, the rights of the people who bought those lots cannot be questioned or disturbed, so an original plat cannot be altered or modified in any material way once rights have been acquired with reference to it, because reducing the size of the lots at that

point in time would have the effect of injuring those innocent buyers of the original lots. In this case however, no lots had evidently yet been sold in the overlap area at the time when the addition was platted, so the opportunity still existed to treat the addition plat as a correction to the original townsite plat, and that was evidently how the addition plat had actually been used. The evidence of this, the Court observed, was in the fact that the 1886 deed to Jutras made explicit reference to the addition plat, by conveying Lot 1 in Block 12 of the addition to him, making it clear that the intent of the parties at that time was to honor the addition plat as being superior to the original townsite plat, which they had the right to do. As can be readily seen, in focusing upon this particular factor, the Court recognized that the subsequent conduct of the parties provided the best evidence of the true intent of the language they had used in the relevant deeds, therefore the references to Lot 7 in all of the various deeds, the Court decided, must be interpreted as references to only the truncated portion of Lot 7 shown on the addition plat, and not the full original Lot 7 shown on the townsite plat. On the equally essential question of where the sixteenth line forming the boundary between the townsite and the addition was really located, the testimony of a surveyor, who had evidently performed some survey work in the area at an unspecified time, was introduced, and was very tacitly acknowledged by the Court as follows:

“The witness Tilzey testified that he made a survey and located the line correctly, and according to his testimony the boundary is represented by the line CD. His testimony, though not conclusive, is uncontradicted.”

The line CD, pointed out as the actual location of the sixteenth line in question by the testifying surveyor, was the line shown as the south boundary of the addition on the 1885 plat, and this proved to be the testimony that clinched the victory for Tubb, because it served to verify that the location of the sixteenth line, as it was shown on the original townsite plat and the amended townsite plat, was incorrect, and this gave credence to the proposition that the addition plat was intended to supersede and correct the townsite plats. There was no evidence presented at all regarding any details of how Tilzey had performed his survey, so his testimony was not adopted by the Court based on any proof of its correctness, it was accepted as controlling by the Court simply because it was uncontested. This stands as a classic example of the fact that the Court employs the presumption that the most recently performed survey is correct, even in the absence of any

evidence that it was done properly, and the most recent survey will control, if the validity of that survey is never challenged. The objective of all subsequent surveys of course, is to retrace the original survey, yet whether or not this was accomplished by the most recent survey never becomes an issue at all, until such time as that survey is called into question in some manner. Had a competing survey been done, supporting the sixteenth line location that was shown on the original plat, the outcome could have been different, but since that was never done, the Court placed it's full reliance upon the one survey that had been presented, without ever questioning the correctness of that survey, making it the basis for the Court's decision to reverse the lower court ruling and deny Borgeson victory. Ironically, although Borgeson's claim to Tubb's lot had been vanquished and silenced by the Court, Tubb also emerged from this affair as a potential loser, because the evidence had revealed that his claim might actually have no more validity than that of Borgeson. The evidence, as analyzed by the Court, had shown that although Lot 1 had been legitimately created, Jutras never had title to it, because it had been omitted from the correction deed that was issued to him in 1890, so Walton and Tubb, as the successors of Jutras, had acquired no title to it either, unless title to it had been obtained through adverse possession, which the Court did not discuss, since the only issue before the Court was the validity or invalidity of Borgeson's claim. Interestingly, the Court concluded by indicating that since the true location of the sixteenth line had been uncertain and ambiguous for several years, Landt and Jutras had the right to establish their boundary themselves, by means of agreement, so the fence line that they had mutually maintained represented the permanent and binding boundary between their particular lots, regardless of where any subsequent surveys might show the sixteenth line to be. The Court evidently felt that it might be necessary or beneficial to clarify this, since under the Court's ruling, this fence line formed the northerly boundary of Borgeson's lot. If the validity of Tubb's claim to Lot 1 had been in play, the Court evidently would have held that it's southerly boundary had been established through practical location, but since this issue was not officially in play, these statements by the Court sadly hold no controlling or precedential value, and the equitable doctrine of practical location, having never been officially adopted by the Court, has never again come as close to realization in Montana as it did at this time.

MYRICK v PEET (1919)

Here we again find the Court dealing with boundary issues, and passing judgment on the impact, significance and consequences of a mistake concerning a boundary location, this time in the context of the PLSS. In distinct contrast to our last case, in which a sequence of errors, which played out over many years, resulted in the controversy dealt with there, in this instance a single mistake was the source of the conflict, and that mistake had stood for only a few years, with essentially no serious impact on the litigants or anyone else, which as we will see, leads the Court to view such a mistake as correctable. Quite appropriately, in this first major case decided by the Court focusing on PLSS principles, we will observe the Court take a stance that strongly supports original PLSS monumentation, sending the clear message that original corners cannot be taken lightly and must be found and respected as controlling, wherever they physically exist, since they represent the most fundamental building blocks for all boundaries in the west, and the ultimate basis for reliance by all parties in the development and use of land. In its drive to uphold the integrity of land rights acquired with reference to the PLSS, here we see the Court limit the extent to which land owners can settle or resolve their own boundaries in any permanent or binding manner, by disapproving the neglect of existing PLSS monuments that took place in this situation, making it clear that disregard for original PLSS monuments will not be viewed favorably by the Court. The PLSS was devised expressly to prevent and eliminate any possibility for gaps or overlaps to exist, since these omnipresent problems had plagued the colonial states, so the Court recognizes that the PLSS is intended to provide a basis for descriptions that are not subject to such title conflicts, as are frequently erroneous metes and bounds descriptions. Under such circumstances, as indicated by the decision of the Court in this case, when controlling monuments exist, and no title conflict exists between the adjoining properties at issue, the land owners are obligated to abide by the existing PLSS monumentation, and cannot conclusively establish their boundary in another location. In addition, the Court here also emphasizes, consistent with fundamental PLSS principles, the purely secondary nature of measurements, in relation to monumentation,

denying the validity of the suggestion that measurements should control, although original monuments still exist. This case stands as an especially strong assertion of the principle of monument control, setting forth the proposition that wherever original monuments exist, no boundary uncertainty exists, therefore no agreement made in ignorance of such monuments can be upheld as binding, which clearly points out to land owners the importance of obtaining the assistance of a land surveyor, and points out to the surveyor the importance of diligence in the discovery of all evidence of original monumentation.

1913 - Myrick and Peet were the owners of adjoining quarter sections of rural land, located in a township that had been originally surveyed by the GLO in 1883. Several sections in the township had been granted by the United States to Montana, which had then issued patents to Myrick and Peet, for their respective quarters, at a land sale that had been held at an unspecified date, so how long they had owned their lands is unknown. For an unspecified length of time, they had been unconcerned with boundaries and had shared all of their land with each other, both of them allowing their livestock to graze upon the entire area owned by both parties, and there is no evidence that any buildings ever existed anywhere in this area. Myrick owned the northwest quarter, and Peet owned the northeast quarter of the same section, and neither of them had any accurate or specific personal knowledge regarding the actual location of the platted line between their quarters. They both wanted to begin cultivating their lands at this time, so they decided to attempt to locate the north quarter corner of the section in question, but were unable to find any physical evidence of it. They then decided to try to establish its location themselves, by making measurements, from certain points that they had found, which had evidently been set on or near the north line of the section by some surveyors who had recently been working in the area. The adjoining owners then proceeded to mark a point somewhere along or near the north edge of the section, which they believed was on or near the platted quarter line, and they also marked a line running southerly from that point, for an unspecified distance, which they believed to be

the quarter section line. Peet then built a fence, of unspecified length, at a convenient location within about 12 feet of the line that they had marked, and they each proceeded to cultivate their respective quarters with reference to the fence.

1916 - Peet apparently discovered, by unknown means, presumably as the result of a survey or a conversation with a surveyor, that both the fence and the line that they had marked 3 years earlier were off by more than 1000 feet to the east. Evidently the points that he and Myrick had measured from in 1913 were not actually located at the section corners, as they had apparently believed, and may have been merely random traverse points located somewhere along or near the north line of the section. Upon making this discovery, Peet moved the fence over 1000 feet to the west, to the true quarter section line location, which had evidently been pointed out to him by a surveyor who had previously located the original north quarter corner monument and knew of its real location. When he found out what Peet had done, Myrick filed an action, seeking to have Peet ordered to move the fence back to its original location, and to have the original fence location declared to be the true boundary between their lands.

Myrick argued that he and Peet had been legally entitled to make their own measurements, for the purpose of determining the location of their dividing line, and that they had made the measurements properly, and the line that they had established therefore represented the true quarter line for their purposes, regardless of whether or not the original quarter corner still existed elsewhere. He also argued that the line established in 1913 had been intended to be absolute and permanent, regardless of whether it was accurately located or not, so Peet had no right to relocate the fence, as he had done, and he should be required to return it to its agreed location. Peet argued that original monuments control absolutely, and no measured line that stands in contradiction to an original monument can have any validity or value. He also argued that since the line marked in 1913 represented an effort to discover and mark the true original quarter line, as it had been originally monumented and platted, and did not represent an attempt to establish an independent boundary line, it should not be treated as permanent, and should be considered subject to correction, so his fence should be allowed to remain where he had relocated it, on the original

quarter line, as that line had been subsequently discovered. The trial court saw no merit in the arguments made by Myrick, and issued a directed verdict in favor of Peet.

The claim made by Myrick in this case, much like that made by Hall in the Cox case just 2 years before, was so obviously strained and so unabashedly self serving that the Court had little difficulty in disposing of it. While the Court is open to the correction of technical errors in documentation, through the process of description reformation, as we have already seen, only rarely does the Court elect to validate the correction of past physical mistakes concerning boundaries or land rights in general, since the Court typically prefers to support all well established existing conditions and land use, in it's drive to emphasize the importance of the physical stability of boundaries. In this case however, the circumstances proved to be sufficient to motivate the Court to be unusually receptive to the idea of correcting the serious measurement error made by the parties, which required the Court to reject the assertion that the line erroneously marked by the parties represented a legitimate and binding boundary agreement. Three surveyors who had performed field survey work in the area in question testified in this case, and all of them confirmed that they had personally surveyed portions of the section in question in recent years, and that they had found all of the original monuments involved, and that the original monuments were all properly marked and identified as original GLO corners, so it was quite clear that all of the relevant original monuments were there all the time, and the litigants had simply failed to properly locate and identify them. Myrick did himself no favors with his own testimony, as he openly conceded that he had been uncertain about what the points that he and Peet had found on the ground actually represented, and he admitted that the points they had found were not marked in any way that identified them as original GLO corners, so the fact that they had made their measurements from the wrong points was undisputed, therefore their measurements were of no value, regardless of how careful Myrick and Peet had been in making them. Although it was really unnecessary, in view of the circumstances, as established by the very strong and thorough testimony of the three surveyors, regarding the presence of the relevant original monuments, the Court decided to take the opportunity presented by this scenario to very forcefully drive home the conclusive power of the principle of monument control, in an effort to banish the false notion, apparently held by Myrick, that original monuments are subject to correction by means of subsequent measurements. Citing and quoting in part from decisions issued by

California, Missouri, Wisconsin and Washington, as well as the United States Supreme Court, the Court expounded as follows upon the reverence with which original monuments are universally treated:

“Before courses and distances can determine the boundary, all means for ascertaining the location of the lost monuments must first be exhausted ... a fixed visible monument can never be rejected as false or mistaken in favor of mere course and distance ... upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties ... Monuments are facts; the field notes and plats indicating courses, distances and quantities are but descriptions which serve to assist in ascertaining those facts ... Marks on the ground constitute the survey; courses and distances are only evidence of the survey ... With ocular and tangible proof of authentic boundaries at hand, it would be illogical to resort to courses and distances ... there are no lost monuments, they import absolute verity and must prevail ... The question is not whether the monuments were correctly placed, but whether they were placed by authority.”

Rarely has the towering significance of the core principle of monument control, which is so essential to the very stability of society, been so forcefully asserted and affirmed. Monuments control because, as the Court indicated, they comprise the ultimate source of reliance for property owners. Mistaken words or numbers are quite common, but they are all swept away by means of the physical certainty of location provided by actual monumentation on the ground. Even an utterly illiterate individual can be certain of where his boundaries are located, and thus be able to live in harmony with his neighbors in our society, given the existence of physical monumentation that he can see for himself on the ground. This respect for the rights of all citizens in our society, including even the poorest and least educated among us, has been gradually eroded and diminished over the decades, with decreasing illiteracy and improved education, but it should be recognized that our nation was settled primarily by illiterate pioneers, and the PLSS was created to enable them to securely occupy the land, based upon the principle of monument control, which remains as valid and vital today, to their descendants, as ever it was. The original monuments that were

in evidence in this case, the Court noted, were clearly established by the authority of the federal government, which is the fee owner of the entirety of the public domain, which included the lands at issue, at the time when the township and sections were surveyed, platted and created, and therefore the controlling nature of the original monuments, once they were located, was beyond question. In view of the fact that the litigants had obviously been delinquent in failing to properly locate the original monuments marking their boundaries, which they had the responsibility to do, the Court was entirely unwilling to lend any support to the dividing line that they had so negligently attempted to establish, by acknowledging it as a legitimate boundary. For that reason, the Court was disinclined to favor the assertion made by Myrick that the line marked in 1913 should be treated as binding because the parties had agreed at the time that it would be permanent, since accepting that proposition would have meant approving the foolish behavior of both parties, and most importantly, would have allowed Myrick to benefit dramatically from his own negligent behavior. The Court stopped short of stating that the parties had been foolish not to enlist the aid of a surveyor in 1913, but under these circumstances, the Court would not condone the actions they had taken in 1913, in derogation of their responsibility to respect and conform to the lines of the original survey. Holding that the lower court had been correct in concluding that the line marked by the litigants in 1913 held no value, and could not be upheld as a valid boundary under any legal or equitable theory, the Court determined that the monumented quarter line was the true boundary, so Peet had been justified in relocating the fence in question, and it need not be restored to its former location. In so deciding, the Court cited the statute of frauds, indicating that it effectively barred the doctrine of practical location, clarifying why the Court has never adopted practical location as a valid boundary resolution method, yet as we will see going forward, the Court would continue to honor genuine boundary agreements, and would continue to treat legitimate agreements that are supported by physical reliance as valid exceptions to the statute of frauds.

BOX ELDER LIVESTOCK v GLYNN (1920)

This case, at first blush, may well appear to be entirely at odds with the decision made by the Court just the previous year in our last case, and some may be inclined to feel that this apparent dichotomy represents an example of the Court contradicting itself, or that it represents a

demonstration of vacillation on the part of the Court, showing the decisions of the Court to be inconsistent and unreliable. That is not at all the case however, and in fact a comparison of the differences in the details of the two cases answers that charge and provides great clarity for surveyors, who may wish to understand the reasoning applied by the Court in resolving boundary issues, particularly when surveys are involved. In the case we are about to review, the factual conditions on the ground present a situation in which uncertainty of location is inherent, so the likelihood of boundary controversy is high, and the Court naturally takes this into account in applying the typical legal expectations to the acts of the parties, and in evaluating the decisions made by the parties and their predecessors. As we will see here, whenever a state of genuine boundary uncertainty exists, and parties act in a reasonable manner to put an end to the uncertainty that is plaguing them, by hampering their efforts to use, develop or convey their land, the Court is much more inclined to be receptive to their actions, and to lend credibility and permanence to those actions, than is the Court when the acts of the parties demonstrate plain negligence or flagrant disregard for existing monuments, as was seen in the Myrick case. To find support from the Court, the parties need not perform to a model of perfection, but they must have acted in good faith, and as the case we are about to review clearly shows, obtaining an objective survey and agreeing to accept it as controlling, impresses the Court quite favorably, these being steps taken in good faith by parties intending to live in harmony with one another. In addition, beyond the survey related aspect of the matter, two other very important factors that were absent in the Myrick case appear here, making this case a more typical land rights controversy. One of those factors is the presence of third parties, grantees whose actions as successive owners serve to confirm and perpetuate the existence of the original state of agreement that was forged by a predecessor who has departed from the land. The other important factor is the powerful principle of inquiry notice, which arises only when land or land rights are conveyed, making it incumbent upon the grantee to meet the burden of observation of the physical conditions on the land acquired prior to the acquisition, rather than leaving issues to be raised at some later date. Neither of these two factors was present in the Myrick case, which was essentially a battle fought in isolation, involving only the land rights of two specific

parties, since the properties at issue there were never conveyed. For these reasons, although a fence is rejected as boundary evidence in one case, while another fence is accepted as controlling a boundary in the next case, it can be seen that both of these decisions by the Court were perfectly understandable and fully justified, on their own unique merits.

1898 - Van Bergen made an entry under the Desert Land Act, upon the south half of the southwest quarter of a certain section, located in a township that had been originally surveyed by the GLO in 1882. The north half of the southwest quarter and the west half of the southeast quarter of the same section were evidently already owned and occupied by Glynn, although how or when Glynn had acquired his land is unknown, so he may or may not have been an original entryman himself. How either Glynn or Van Bergen knew where the boundaries of their respective aliquot parts of the section were located is also unknown, since there was no evidence that any monuments were in existence in the area at this time, but there was no indication that Van Bergen and Glynn ever engaged in any contention over the location of their mutual boundaries.

1900 - Van Bergen quitclaimed his rights to his entry to Reese, who occupied the land that she had acquired, but soon became engaged in a boundary dispute with Glynn, the details of which are unknown. In order to resolve the dispute, Reese and Glynn agreed to order a survey of the aliquot lines forming their boundaries. No details are known regarding how the survey was performed, and there is no indication that any monuments were found during this survey, but it was done by an individual who was described as a "competent surveyor", and this surveyor set monuments marking the boundaries of both of the properties involved. After the completion of the survey, Reese and Glynn agreed to adopt the corners and lines that had been marked during the survey as their true and permanent boundaries, they did not document this agreement in writing however. Reese then built a fence around her property, following the lines of the survey, and both parties subsequently honored the fence as their boundary.

1902 - Reese quitclaimed her rights to the Van Bergen entry to Hanley.

1903 - Hanley conveyed the entry back to Reese, by warranty deed, and Reese then conveyed it to Nathan, also by warranty deed.

1910 - A patent covering the Van Bergen entry was issued by the United States. The patent was issued to Hanley, but it automatically passed to Nathan, by virtue of the conveyances made in 1903.

1914 - Nathan conveyed all of his patented land to Box Elder by warranty deed. Although all of the subsequent land owners had continued to treat the fences built by Reese as their boundaries over the years, Box Elder was not convinced that the fences had been correctly located, so Box Elder evidently ordered another survey, which was performed by a different surveyor. No details regarding this survey are known, but based upon its results, Box Elder filed an action against Glynn, claiming that the fence along the east side of their land was located too far west, and the fence along the north side of their land was located too far south, so Box Elder sought the right to move the fences unspecified distances east and north respectively, to the aliquot lines in question, as those lines were depicted on the survey relied upon by Box Elder.

Box Elder argued that the aliquot lines in question, which formed the boundaries of the Van Bergen patent, had been incorrectly located by the surveyor who had been employed by Reese and Glynn in 1900, since the survey prepared subsequently for Box Elder showed the true location of those aliquot boundaries to be farther north and east, so Box Elder owned some of the land that had been occupied by Glynn. Box Elder also argued that Reese and Glynn had no authority to enter into any binding boundary agreement, and that since they had failed to document their agreement it was void under the statute of frauds, so the fences should be relocated to the true location of the aliquot boundaries in question. Glynn argued that there was no definite evidence that the earlier survey was incorrect, or that the subsequent survey was correct, and that the existing fences represented an agreed boundary, which had been established in good faith, and which should therefore be deemed sufficient and binding, despite the fact that the agreement had been undocumented, and the Van Bergen entry was not yet

patented when the agreement was made. The trial court, presumably attempting to follow the Court's apparent rejection of boundary agreements in the Myrick case, was unwilling to accept the testimonial evidence of the boundary agreement presented here, and so proceeded to render judgment in favor of Box Elder.

The Court began by taking notice of the important fact that the evidence indicated that the section in question in this case, although originally intended to be regular, was not in fact a typical regular section, since it revealed that the section in question actually contained a substantial excess of land, and even more importantly, it was evidently located in an area of extensive obliteration of original monuments, which explained why no original monuments had ever been found anywhere in the section. In view of this situation, the Court was well aware of the likelihood for disputes to arise, and therefore approached the case from a perspective of appreciation for the difficulties experienced by the entrymen under such conditions, which made the Court highly inclined to embrace the idea of a boundary agreement, since the absence of monumentation left the normal rules relating to respect for original GLO monuments without relevance. The original parties, the Court recognized, had done whatever they could do themselves to properly locate their lands, under the circumstances, and when a dispute arose, they had done exactly what the law expected them to do when no monuments could be found, and that was to obtain the services of a qualified local surveyor, to attempt to retrace and recover their original boundaries and corner locations. This was what Reese and Glynn had done in 1900, and they had further acted to secure their holdings by agreeing to accept the results of the survey, rather than contesting it, so that they could live in peace with each other as good neighbors, therefore the Court found nothing but good faith manifested in all of their actions. The decision by Reese and Glynn, to order a survey and adopt its results as a conclusive resolution of their disagreement, was a wise one, which stands in stark contrast to the foolish decision of Myrick and Peet to forego a survey, in the case just previously reviewed, which had clearly caused the Court to call the wisdom and legitimacy of their agreement into question. The testimony of Reese, the Court indicated, was both relevant and essential to the issues under consideration, since she had explained the events that had taken place many years before, including the fact that the fence was built along the lines of the survey done in 1900, so the fence represented valid evidence of the corners and lines run and marked during that survey, and the Court found that her testimony should have been treated as credible and valuable

boundary evidence. Since the testimony of Reese clearly corroborated Glynn's assertion that the boundary agreement between them had been made in complete good faith, being based upon a presumably competent survey, and it had been put into practice by the construction of a physical boundary, which effectively perpetuated the results of the survey, it was evident that the statute of frauds was inapplicable to this scenario. Quoting in part from a decision of the United States Supreme Court relating to a comparable state of affairs, the Court declared that:

“Where there is a real controversy as to the boundaries, an agreement between the contesting claimants settling the same is not within the statute of frauds ... It is not a contract for the sale or conveyance of lands ... the courts do not consider it as a conveyance of title from one person to another. It was merely a submission of a matter of fact, to ascertain where the line would run on actual survey ...”

The boundary agreement between Reese and Glynn, the Court determined, bore the hallmarks of legitimacy and should not be overturned based merely upon an absence of documentation, since it was never intended to operate as a conveyance or transfer of any land, it had simply served the wholesome and productive purpose of making certain, that which had formerly been uncertain, thus eliminating the state of contention that had previously existed between the participants in the agreement. In addition, the Court observed, all of the occupants of the Van Bergen entry or patent, subsequent to Reese and prior to Box Elder, had freely acknowledged and respected the legitimacy of the agreed boundary, as indeed they were bound to do, based upon the principle of inquiry notice. Each one of them had seen the condition of the property, including the existing boundary fence of course, and were therefore charged with notice of both its presence and its potential legal significance, and each one of them had accepted it unchallenged, so Box Elder was bound to do the same, having been on notice of the fence location prior to acquiring the land, just as all of the prior owners had been. The Court also held that the fact that the land was still unpatented at the time when Reese and Glynn had made their agreement was of no consequence, and was of no benefit to Box Elder in its effort to negate the validity of the agreement, since the agreement had remained in effect well beyond the time when the patent was eventually issued, and had been thereby effectively ratified by all of the parties, long prior to the arrival of

Box Elder on the scene. This treatment of the events that had taken place by the Court was fully consistent with the long established policy that the rights of an entryman commence and begin to accrue upon his actual entry, and the subsequent issuance of a patent serves merely as a form of legal confirmation of the rights that he has already established, by virtue of his legitimate entry as a bona fide settler upon the land. Finally, regarding the relative merits of the two surveys that were in evidence, and the question of which, if either of them, was truly correct, the Court elected to apply the usual presumption that the most recent survey was correct, in the absence of any distinct evidence to the contrary, but this decision was obviously of no value or benefit to Box Elder, since the validity of the boundary agreement had been established, and the Court acknowledged that no subsequent survey has any authority to undo or overturn a valid boundary agreement. Although the survey done in 1900 was thus treated as being factually incorrect by the Court, in view of the existence of a more recent survey contradicting it, the 1900 survey nevertheless represented a good faith effort made by the land owners to resolve their boundary issues, and therefore served as a legitimate basis for a valid boundary agreement, so the agreed boundary controlled, despite the presence of a more accurate or correct subsequent survey. Having thus addressed all of the issues that had been raised by Box Elder, the Court reversed the decision of the lower court, and confirmed that the fences that had been maintained by Glynn and his adjoiners had become the permanent and binding boundary between their lands, regardless of where any of the aliquot lines within the section in question might be subsequently shown to run.

BODE v ROLLWITZ (1921)

The scenario that plays out here, in our first riparian rights case, is one that has been repeated numerous times, all over the west, along the shores of the many great and wandering rivers that traverse the western states. The surveyors who performed the original GLO surveys, creating sections by subdividing townships, often encountered bodies of water and had to decide how to treat them. Many or most of those GLO surveyors had little or no experience or training that would qualify them to properly decide how to classify the waters that they discovered or came across in the course of their survey work, so there was naturally great variation in the way that the different surveyors chose to deal with lakes and rivers. Some surveyors

treated virtually all wet areas as lakes, even areas that were really only seasonal puddles, and also treated any low or wet areas along rivers as being part of the river, so these surveyors ran many meander lines, and ran their meander lines far from the actual edges of the water along rivers. Other surveyors took the opposite approach, running only a minimal amount of meander lines, leaving questionable wet areas unmeandered, and running as close as possible to the water's edge along rivers, making the results of the meandering done by the GLO quite inconsistent. In addition, each surveyor had to judge whether or not any islands that were spotted during the survey were permanent enough, or potentially valuable enough, to be worth surveying, and of course there was great variation in the judgment of the various surveyors on this matter as well. Naturally, while some surveyors were very diligent, and meandered every island that they saw, even very tiny ones, most surveyors probably tended to disregard most of the islands that they saw, particularly the ones located in the larger rivers, since they were generally aware that most such islands were typically worthless for settlement purposes, because they were subject to frequent flooding, and very often were destined to be swept away by the river in a short time anyway, so surveying them would be an exercise in futility. In this case, we will see the impact of the Court's knowledge of this inconsistency in the early surveys, as the Court takes the position that the decisions of the early surveyors, concerning waters in general, and islands in particular, cannot be treated as being legally conclusive, and thus adopts the omitted federal land concept, so despised by riparian land owners. In 1895, in *Gibson v Kelly*, a case involving the Missouri River, after reviewing the decisions of numerous other states on the issue of navigability, the Court had chosen to adopt the low water mark, as opposed to the high water mark, as the boundary of all lands bordering navigable waters in Montana, in the course of determining that the Missouri River is navigable. In future cases, we will watch as the Court applies and develops the concept of navigability and other riparian principles, but in the case we are about to review, we will see the Court focused on the basic principle of accretion, and the treatment of islands, in the context of a non-navigable river.

1878 - Townships lying along the north side of the Yellowstone River

were subdivided into sections by the GLO. No survey work was done south of the river, because the river marked the northerly boundary of the Crow Reservation at this time. The north bank of the river was meandered and typical riparian government lots were platted in all of the sections invaded by the river.

1880 - Bode and her husband were homesteaders, who settled on two of the riparian lots lying along the north side of the river. The original township plat showed no islands in the river anywhere in the township, but the field notes mentioned that there were in fact some islands in existence in the area at this time.

1885 - An ice gorge developed in the river near the Bode homestead, which resulted in a closure of what had been the main river channel, and the formation of a new main channel approximately a quarter mile to the south. Some water continued to flow in the former main channel, but Bode and her husband began using the expanded area between their homestead and the new main channel, since their livestock could easily wade across the shallow old channel and graze all the way down to the north bank of the new channel.

1890 - Bode and her husband obtained their patent for the two adjoining government lots on the north side of the river that they had occupied, which had been platted as containing a total of about 35 acres.

1904 - Since the northerly boundary of the Crow Reservation had been moved to the south at an unspecified time, the portion of the township lying south of the river was subdivided into sections by the GLO. The township plat created at this time showed a large bulge in the river directly south of the lots owned by Bode, indicating that the former main river channel was still part of the river, but that the river had been dramatically widened, as a consequence of the ice gorge. Like the 1878 plat, this plat also gave no indication that any islands existed anywhere in the township.

1912 - Bode and her husband were divorced and she became the sole occupant of the homestead. By this time, the north channel had

become so filled with sediment that it was dry at times of low water and flowed only during times of high water. Bode continued to use the land between the north and south channels as pasture for her livestock.

1914 - More settlers moved into the area at this time, including Rollwitz and Jones. Rollwitz and his daughter settled upon the area between the two river channels, directly south of the lots owned by Bode, and built a house and barn there, and Jones settled on the land directly east of Rollwitz and also erected buildings. The homesteads of Rollwitz and Jones were directly north of the new main river channel, which had been formed in 1885, and were separated from the Bode homestead only by the remnant of the former main channel, which had gradually been reduced to a shallow and narrow slough in times of normal water conditions. The area occupied by Rollwitz and Jones did not appear as land on either of the existing plats of the area, it was inside the area that had been shown on the plats as being part of the river, so Rollwitz and Jones applied to the GLO, requesting a survey of the islands they had occupied, which would enable them to obtain patents for the land they were using.

1916 - The GLO performed a survey of the islands located within the bulge of the river shown on the 1904 plat, as requested by Rollwitz and Jones, and platted the islands, treating them as land that had never previously been surveyed or patented to anyone, thus lending credibility to the occupation of the land by Rollwitz and Jones. This GLO plat expressly identified the lands occupied by Rollwitz and Jones as islands, and showed that the former main channel, running along the north side of the islands, was still an active part of the river, indicating that two river channels actually still existed. The area occupied by Rollwitz, which would become the principal focus of the controversy, was platted as containing about 50 acres. The area occupied by Jones was even larger, but it was the claim of Rollwitz that was the main source of concern to Bode, since a patent issued to Rollwitz would have the effect of cutting off her direct access to the main river channel, so Bode elected to file an action against both Rollwitz and Jones, to prevent them from obtaining the patents they

were seeking.

Bode argued that since she was an owner of riparian lots, she was entitled to any accretion attaching to those lots, and the land between the two river channels had attached to her land by means of accretion as the north channel had gradually dried up over the years, so the land in question could not be properly classified as an island or islands, and was actually part of her lots. Rollwitz and Jones argued that the land they had occupied had always been an island, or group of islands, and had never been attached to either the north or south bank, therefore it was unsurveyed land, which had been omitted from any GLO surveys that had been conducted for the purpose of subdividing the township prior to their arrival, so they were entitled to occupy and claim it, based on the original survey of 1916, which had properly identified the land as islands. The trial court adopted the position maintained by Rollwitz and Jones, agreeing that the land was in fact a group of islands, and was omitted land that Bode could not claim was part of her land, so Rollwitz and Jones had been correct in recognizing that they were free to enter and acquire it, and there was nothing Bode could legally do to stop them from obtaining patents.

Although the outcome of this case really depended solely upon the determination of one specific issue, since the Court had never previously expounded upon many of the most basic principles relating to riparian rights, the Court chose to take the opportunity that this controversy presented, to address some of those principles. With respect to the principle of accretion, the Court agreed that Bode was correct in her understanding of the basic operation of the process of accretion upon land that has been patented into private ownership in the public land states. Accretion and its counterpart, reliction, both result in the expansion of existing tracts of land bordering upon both navigable and non-navigable bodies of water, when satisfactorily shown to have taken place. In addition, the Court noted, islands that form and develop as a result of either accretion or reliction, in any non-navigable body of water, also legally attach to the adjoining riparian land, and such islands can grow by those same means, to such an extent that they eventually physically attach to one bank and become united with the riparian estate in question both physically and legally. However, not all such land that develops or appears, and becomes physically attached to a bank, can be properly characterized as accretion, and although Bode correctly understood the concept of accretion, she had not proven that accretion was what had actually taken place in the location at issue. The Court acknowledged that the Yellowstone River was a non-navigable river in the area under scrutiny,

so no issues related to navigable waters were involved, and Montana had no stake or interest in the matter. The court was unaware of the existence of the 1904 GLO survey, but it knew that the river represented the southerly boundary of the 1878 GLO survey, so the manner in which the GLO had viewed and treated the islands already in existence at that time was relevant, and it was subject to question and determination by means of analysis of all the evidence. The 1878 plat showed that no islands existed anywhere in the river, but there was clear evidence that a number of islands actually did exist in the vicinity at that time, which the Court saw as an indication that the original GLO surveyor had deliberately excluded the islands, leaving them to be dealt with in the future, in whatever way might be deemed most appropriate. Since it was clear that the 1878 plat could not be relied upon as accurate evidence of either the existence, or non-existence, of the islands in question at that time, the Court was unwilling to presume that the islands had not been in existence throughout the time period in question. The evidence, the Court found, tended to show that it was more likely that there had always been two river channels, so it could not be conclusively shown that the land in question had taken the form of an island as the result of accretion since 1878. With reference to the significance of both the intent and the decisions of the GLO, as indicated by the neglect shown toward the islands during the 1878 survey, which was revealed by their absence from the 1878 plat, the Court quoted the following statement made by the Supreme Court of the United States:

“... the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon ... surveying officers ... are not clothed with authority to especially examine as to these matters ... or determine them, nor does their report have any binding force.”

While the Court very clearly did not approve or condone the failure of the GLO to include the islands in question in the 1878 survey, or even to depict their existence at all on the 1878 plat, the Court held that this failure could not be construed as having divested the United States of its ownership of any of the land in question. In the view taken by the Court, the existing islands had simply remained unsurveyed land, and part of the public domain,

regardless of whether the decision of the GLO to ignore the islands and leave them unplatted in 1878 had been an appropriate course of action or not. Having concluded that the lands at issue had not formed from the bed of the river by means of accretion, the Court then reached the truly dispositive question, which was whether or not they had attached to the lands of Bode by means of accretion, and the answer to this most central question, would lie in how the Court viewed the key event that had taken place in 1885, the ice gorge. If the change to the river that took place as a consequence of the ice gorge was seen by the Court as resulting from a distinct single event, rather than a process gradually depositing land, then Bode could not prevail, because the principle of accretion would not apply. The Court decided that an ice gorge was fundamentally an immediate event, rather than a gradual one, which in this case simply had the effect of shifting the main force of the current from the north channel to the south channel. Over time, the north channel had gradually become mostly filled with sediment, which may have given Bode the impression that a gradual change was taking place, but in reality, the Court concluded, the actual source of the change was one distinct event, the ice gorge, rather than a long ongoing process, so the principle of accretion was inapplicable. In addition, since the public domain, the Court observed, is not subject to any claims based solely upon usage, regardless of the duration of the use, the fact that Bode had been using the area in controversy exclusively and continuously for nearly 30 years, by the time the United States at last undertook to survey it in 1916, was of no assistance to her, and did nothing to support her claim. Therefore, the Court upheld the ruling of the lower court, validating the 1916 GLO survey, to the benefit of Rollwitz and Jones, and limiting the southerly boundary of the lots owned by Bode to the location defined by the remnant of the north channel, effectively terminating the riparian status of her lots and completely cutting her off from the river at times of low water. Ironically, although she had derived the benefit of the use of some additional land for many years, as a result of the ice gorge, that same event which may once have seemed to be fortuitous to her, had turned out to be a source of misfortune for her in the end, because it was avulsive in nature, rather than accretive, leaving her lots isolated and detached from the water, with the dry and useless north channel as her south boundary. The classification of riparian areas as unsurveyed or omitted land, remaining open to settlement, in situations equivalent or comparable to this one, would continue to be a major source of controversy between the federal government and riparian land owners, spawning much litigation such as that seen here, throughout the west for many decades to come.

THOMPSON v BARTON GULCH MINING (1922)

Returning to the subject of mining claim location boundaries, here we review a case that touches upon a number of issues that are of considerable significance to land surveyors. Although the principle of monument control is among the most powerful and revered legal principles in the realm of boundary law, like all such principles, it is not truly absolute. In theory, the controlling force of original monuments is absolute, and quite justifiably so, because nothing, not even the most well written legal description, can convey the significance of a particular or specific location on the ground to all the world with the level of clarity and certainty that is provided by a physical monument. Proper monumentation provides the essential factor of absolute notice to everyone, even the ignorant and illiterate, of the truly intended boundary location, and this is the ultimate basis for the principle of monument control. Monuments can only provide notice and control however, if people are aware of their existence, and there can be instances, such as the situation presented here, in which otherwise perfectly valid monuments can either go accidentally unused, or be deliberately mislocated or ignored, in a way that misleads innocent parties to believe that they do not exist. Since our courts function as the guardians of justice and equity, as we see here, they will not allow any legal principle, including the principle of monument control, to be used to fool, cheat or harm an innocent party who has acquired land or land rights in good faith. Those seeking an answer to the age old question of how far out of place a monument has to be, before it can be ignored or rejected, will note that the answer provided here by the Court, is simply far enough out of place that it cannot be found by a party looking for it, which is perfectly logical, although not the kind of highly specific answer that most surveyors would prefer to have. In this case, we also again see the Court choose to honor a boundary that was clearly established by means of a direct agreement between adjoining parties, who after agreeing on their mutual intent, collaborate in physically marking their mutual boundary on the ground, supplying the strongest possible evidence that they were mutually satisfied with the boundary thus established. In addition, this case features an unusually substantial amount of surveyor

testimony, unfortunately illustrating in this instance the fact that even a very intelligent and experienced surveyor with solid technical knowledge can be manipulated and cornered by a skillful attorney, forcing the surveyor to admit that he made a key mistake. Importantly, although the surveyor here is vanquished, and in the end his survey does not control, his testimony clearly shows that he was a very honest and forthright professional, who was a victim of deception to some extent himself, and whose work could certainly not be successfully attacked as negligent, although his decision making was faulty in certain respects, and the Court therefore treats his role in the controversy that plays out here accordingly.

1903 - Ferguson, Hill and Jordan established a mining claim location, which they called the Marietta. Corners intended to define the boundaries of the location were physically marked on the ground by the partners, and the group then filed all the documentation required to create a legitimate claim location. Shortly thereafter, Ferguson conveyed his interest in the location to Davies.

1909 - Hill conveyed his interest in the location to Davies, and Jordan had disappeared, apparently never to return, so Davies took over the claim, acting as it's sole owner, and began living on it. Davies knew where all of the original corner monuments of the Marietta were located, since they had been shown to him by the original owners, but he evidently made actual use of only a limited portion of the land, which was apparently located near the north end of the location, and he had no desire to use or to claim ownership of the southerly portion of the Marietta.

1915 - Thompson arrived in the area, wanting to establish a mining claim location of his own, and he met Davies, who agreed to assist Thompson in creating a location lying directly south of the Marietta, which Thompson called the Metalic. In order to establish the boundaries of the Metalic on the ground, Thompson and Davies together measured off it's intended dimensions and physically marked it's corners. Although Davies knew where the monuments marking the southerly corners of the Marietta were located, he never showed them

to Thompson, or said anything about them to Thompson. Instead, ignoring the existence of his own southerly boundary monuments, Davies knowingly helped Thompson set monuments marking the northerly boundary of the Metalic a substantial distance north of the original monuments that had been set to mark the south end of the Marietta 12 years before. Unaware that any boundary conflict had been created, Thompson then prepared and properly filed his documentation for the Metalic, and his description expressly called for the existing boundary of the Marietta as the adjoining boundary of the Metalic on the north.

1918 - Davies conveyed the Marietta to Barton, and Barton had it surveyed, with the intention of obtaining a patent for the location. Davies met the mineral surveyor who came to do the survey for Barton on the site, and Davies showed Barton's surveyor the original corners set in 1903, and the surveyor completed the survey, relying on the original corners pointed out by Davies, which resulted in an amended certificate of location being created and filed for the Marietta.

1919 - Barton applied for a patent, based on the 1918 survey of the amended location of the Marietta, but Thompson, upon learning only at this point in time that the Marietta and the Metalic actually overlapped, filed an action to prevent the Marietta from being patented as surveyed, in order to prevent the Metalic from being truncated by the Marietta.

Thompson argued that he had acted as an innocent party, in trusting Davies to help him properly establish his location, so the Metalic should be considered valid, and allowed to stand as whole to its full extent, as he and Davies had monumented it, including the overlap area, despite the fact that it was the junior location of the two, and despite the fact that the Metalic's description called for the south line of the senior location as his northerly boundary. Barton argued that the Marietta was the senior location and the description of the Metalic clearly acknowledged that the south boundary of the Marietta was in fact the Metalic's northerly boundary. Barton also argued that the original monuments marking the boundaries of the Marietta had always existed, and original monuments always control, so the Marietta

should be treated as the superior location and should include the overlap area, as indicated by the 1918 survey. The trial court found the points made by Barton to be both correct and convincing, and ruled in his favor, stating that Thompson had been remiss in failing to properly ascertain the true location of the senior boundary that he had referenced in the process of describing his own boundary.

Barton certainly appeared to have a very strong case, with some very powerful principles working in his favor, including senior rights, monument control and physical notice, and in addition, it was undoubtedly true that Thompson could have discovered the monuments erected in 1903 to mark the southern end of the Marietta, if he had been more careful and diligent, and he should have realized the importance of doing so. However, there were also some important factors in play that worked in favor of Thompson, and his legal team made very good use of them, to negate the impact of the principles which formed the foundation of Barton's position. On the subject of monumentation, although it was true that the original monuments for the Marietta had been dutifully set in 1903, and were still well marked and fully visible in 1918, Thompson pointed out that the survey had revealed that they had not been set at the distances called out in the description of the Marietta. The southerly boundary monuments were well over 100 feet too far south, and were therefore in excess of the maximum size limit for a legal claim location. The surveyor working for Barton knew this, but he chose to make use of the monuments anyway, when performing the survey for Barton, presumably because he had some knowledge of the principle of monument control, and he had been informed by Davies that the monuments were genuine and original, which was true, and because adopting the monuments was beneficial to Barton. On the witness stand, the surveyor provided extensive testimony about everything he had done, and he was apparently confident that both his decisions and his survey were reasonably well made and would prove to be acceptable, but he was evidently not aware of what had taken place between Thompson and Davies, or if he was aware of it, he did not realize the importance that the Court would place upon their actions. After analyzing the situation in detail, the Court decided that the monuments were so far out of position, in relation to the description of the Marietta, that they could not be allowed to control its boundaries, so the surveyor had erred in accepting and using them. Making reference to several of the cases that he have previously discussed in our review of the territorial period, concerning monumentation of mining claim locations, the Court reiterated the principle that monuments which are improperly positioned cannot

control and can be rejected, because by virtue of not being in the described place, they may go unseen, and in such event they cannot fulfill the most basic purpose of all monuments, which is to provide notice of an actual boundary location to all the world. Quoting with favor from an Idaho decision on the same subject, the Court adopted the position that monuments which are materially mislocated, beyond the described limits of a claim location, represent an exception to the principle of monument control, and must yield to dimensions or distances, because:

“... where a claim is excessive in area the location is not void unless the excess is so great as to impress the locator with a fraudulent intent. The intent of the law is to require the locator to make his location so definite and certain that from the location notice and the stakes and monuments on the ground the limits and boundaries of the claim may be readily ascertained ...”

Monuments, the Court well understood and recognized, must be apparent in some meaningful way, in order to serve their intended purpose, of alerting innocent parties who come in search of land, that the land marked off by the monuments they see is under the dominion and control of another party. When monuments exist and are visible to the parties involved in a given land transaction of any kind, they control as intended, but when a conveyance is made without notice of the existence of any monuments, the Court reasoned, the principle of monument control cannot be justifiably applied. The error manifested in the monuments in question however, was not the only reason, and was not in fact even the main reason, why Thompson should prevail, the Court concluded. Although Thompson's failure to discover the monuments could be forgiven on the basis that they were not in the places where they were described to be, his alleged failure was in fact not a failure at all, because he had done exactly what an innocent party seeking to acquire land is supposed to do under the law, and that is to inquire with the adjoining land owner about the actual conditions on the ground. Thompson had gone to Davies and sought his assistance in good faith, with no intention or desire to encroach upon the Marietta at all, quite the contrary, Thompson believed that ascertaining the location of the Marietta's existing boundary could best be accomplished by inquiring with Davies, and he quite justifiably believed that doing so would insure that no boundary conflict would occur. Davies, on the other hand, the Court

observed, had neglected to inform Thompson about the existence of the boundary monuments in question, even when he had a perfect opportunity to point them out, and he had then compounded the difficulty even further by providing information and assistance to Thompson that was actually misleading and unhelpful, which was proven out by the fact that the whole controversy had developed, resulting in costly litigation. Recognizing that Davies was the true culprit who had been the cause of the dispute, and noting that Barton, as the grantee of Davies, could occupy no better position than did Davies himself, the Court reversed the decision of the lower court, and ruled in favor of Thompson. In the eyes of the Court, due to the presence of evidence showing that Thompson had been essentially victimized by Davies, neither the principle of monument control, nor the principle of physical notice could operate in Barton's favor, so although Barton's location was senior, it was inferior to the subsequent location made in good faith by Thompson, to the extent that it had been thus compromised and abandoned by Davies. The Court realized that Thompson and Davies had agreed upon the location of their mutual boundary, by personally and jointly establishing it on the ground themselves, so Davies and his successor Barton were thereby estopped from subsequently asserting any other boundary location, to the detriment of Thompson. Once again, the Court had protected the land rights of an innocent party, whose trust had been abused and betrayed by a party who he had attempted to deal squarely with, and Barton was stuck with the consequences of the foolish behavior and negligent conduct that had been exhibited by his grantor.

PROSPER v SMITH (1923)

This case takes us back to an urban setting, where we observe the Court addressing the importance of physical evidence of occupation and use of land, and producing a decision that defines a set of circumstances under which physical possession of land can control over information that has been placed upon the public record. In reviewing the decisions of the Court from any time period, it becomes readily apparent that the Court has a deep and abiding respect for all affirmative or productive use of land, so when conflicts involving land rights arise, and the battle is between a party with evidence of ownership of the land in question that accords with the public legal records, and another party who is making some open use of all or part

of the same land, as is quite often the case, the owner of record cannot count on prevailing. Recordation is ultimately nothing more than one means of providing notice, and it is not necessarily the strongest or controlling form of notice, so those who choose to rely exclusively on recorded information, when physical evidence to the contrary is present, do so at their own peril, and as we shall later see, the principle of physical notice applies to boundary issues as well as ownership issues pertaining to entire properties, as in the case we are about to review. Just as our last case demonstrated that even the mighty principle of monument control is not absolute in its application, here we see a classic illustration of the fact that the same rule applies to recording statutes, as the Court once again finds it more appropriate to see that justice done, than to allow the recording statutes to be invoked in a manner that would reward a clever attempt to exploit the law for personal gain, at the expense of valid rights held by an innocent party. From cases such as this one, we learn that while recordation is certainly beneficial to society, and the recording laws are of great value, possession and improvement of land is seen by the Court as an equally effective means of providing notice of existing land rights, so unrecorded land rights that are witnessed by obvious occupation and use are not subject to destruction or termination solely on the basis that no evidence supporting or justifying those rights can be found in the public records. Also relevant to the vital principle of physical notice, in the 1920 case of *Heilman v Loughrin*, the Court held that monuments marking a mining claim location cannot be disregarded simply because they were not called out in the location description, if the party who disregarded the monuments had personal knowledge of their existence and their location, applying the concept that a party who chooses to ignore their own actual knowledge, and rely instead on the content of public records alone, is guilty of acting in bad faith. Similarly in 1959, in *Harvey v Havener*, the Court silenced an allegation that a mining claim location should be considered void, due to various defects in the recorded documentation of that location, such as erroneous or absent dimensions, again ruling that technical defects in recorded documents become irrelevant in the face of evidence that the party who is pointing out the defect had actual knowledge of the truth of the matter, or of the true state of affairs. Decisions such as these clearly show that where the evidence indicates to the satisfaction of the Court that land

rights have been acquired in good faith, in its efforts to protect such rights the Court will invariably look beyond the details found in recorded documents, or as in the case we are about to review, even beyond an absence of recorded documents, for the presence of the key elements of notice supplied by physical sources, which can serve the same purpose as recordation, and can do so just as forcefully.

1918 - Demars owned a tract of land of unspecified size and shape, located in Havre, and there was a house on the land, which had been occupied by Williams, as a tenant of Demars, for an unspecified length of time. Demars executed a contract for deed to Williams, and Williams began making the appointed payments, but this contract was not recorded. Smith and her son then moved into the house, along with Williams, and with the help of her son, she began building a second house, located on the same tract. The construction of the new house was completed, and Smith and her son moved out of the old house and began living in the new house.

1919 - Williams assigned the unrecorded contract for deed to Smith, so no evidence of this assignment appeared in the public records. Williams then sold the old house, and it was moved off the property, and Williams moved away, leaving Smith and her son as the only occupants of the subject property. Smith and her son then also erected a fence around an unspecified portion of the property. About a month after Williams had left the tract however, Papillo filed an action against Williams, to recover money that was owed to him by Williams, and since he knew about the existence of the contract for deed between Demars and Williams, he included it in his action against Williams. The action filed by Papillo was successful, and judgment was entered against Williams, so in order to pay Papillo, the contract that had been acquired by Williams was sold off by the sheriff, and Prosper was the buyer.

1920 - Having paid the price, Prosper obtained a sheriff's deed to the property in question, and he also subsequently obtained a quitclaim deed covering the property from Demars, which he then recorded.

Prosper then filed an action against Smith, claiming that Smith was illegally occupying the land and seeking to have her removed from it.

Prosper argued that he had legally acquired the property in question, and since Williams and Smith had both failed to record either the contract for deed, originally obtained and held by Williams alone, or the assignment of the contract to Smith, they had both lost any rights to the land that they may have once had, so he had the authority, as the new owner of the property, to order Smith off the land and take possession of it himself. Smith argued that Williams had never held any personal interest in the land himself, he had acquired the contract for deed on behalf of Smith, acting as her agent, with the intent of conveying the contract to her, as he had done, so it had been a mistake to allow the contract to be sold in order to pay off the debt owed by Williams to Papillo, and therefore Prosper had not actually legally acquired the land in question. Smith further argued that her constant presence on the land, under the contract for deed, had provided adequate notice of her rights to the land, so her failure to record the assignment of the contract to her should not have the effect of terminating her rights as the assignee of the contract. The trial court ruled in favor of Prosper, on the grounds that the involvement of Smith in the original contract for deed, having been undisclosed and covert, did not provide any notice of her interest in the land, and her failure to record any evidence of the land rights claimed by either Williams or herself was fatal to her rights.

The thrust of the controversy in this case, which is one that is quite emblematic of many others of the same variety that have taken place in the many states that have enacted recording statutes, was the fundamental assertion made by Prosper that he was an innocent or bona fide purchaser of the land in question. A bona fide purchaser, with respect to land, generally holds a very strong position in any litigation resulting from the conveyance of the property in question, as we have already observed in previous cases, so such status is highly coveted and sought for its value and benefit under the law. A party who has acquired land or land rights innocently, while acting in good faith, naturally attracts the sympathy of the Court, and is very often deemed to be worthy of the equitable protection which the Court has the power and authority to bestow. However, the Court strictly scrutinizes the claims of those who set out to paint their own actions with shades of innocence, and the Court is seldom unable to determine, when the relevant evidence is present, whether or not the claimant is truly worthy of such status, and whether or not the claimant's participation in the conveyance in question really bears the stamp of genuine innocence. There was no question

as to the legality of the agreement and contract for deed made by Demars and Williams, and likewise, the legality of the assignment of the rights created by the contract to Smith was also unquestioned. If Smith had recorded the relevant documentation, assuming that she continued to properly make the appointed payments to Demars, as stipulated by the contract, her rights would have been preserved and the property would have eventually become legally hers, but she had not done that, so the basic question for the Court was whether or not her failure to provide constructive notice of the meaning and significance of her presence on the property, was such a severe failure that it should cost her the property. Papillo and Prosper both had actual knowledge that Williams had acquired rights to the tract in question, but Prosper claimed that, due to Smith's failure to record any indication that she had acquired any legal interest in the tract, no one had any way of knowing about her interest, and there was no reason to suspect that she had acquired any rights to the subject property, so he had innocently believed that the only party holding any rights or interest in the subject property was Williams. After dismissing the suggestion made by Prosper that Smith had been an undisclosed participant in the affair, and that Williams therefore could not have legally acted as her agent, the Court turned to the decisive issue, which was the presence or absence of adequate notice, in any form that would operate to alert parties such as Papillo or Prosper, that Smith held a legal interest in the contract for deed, and quoting from earlier Montana cases also involving the principle of notice, explained that:

“The possession of real property which will amount to notice of an unrecorded grant thereof, must be under such grant, must be unequivocal, inconsistent with the title of the apparent owner of record, and of such a character that an intending purchaser could, by following up the inquiry, learn of the unrecorded grant.”

The Court thus confirmed the principle of inquiry notice stemming from physical evidence, which places the burden upon a grantee to question the meaning of anything on the land being acquired that serves to indicate that rights of others may be present, before acquiring the land that the grantee proposes or intends to acquire. Prosper had imagined that because there was no indication to be found among the relevant public records that Smith had any rights to the tract in question, that he could safely proceed to

acquire it, without ever addressing her, and then legally force her off the land, by simply pointing out that she had been delinquent in recording any evidence of her rights. Recording laws however, were never intended to be used as weapons against the innocent, by those with the cleverness or diligence to discover failures of recordation and exploit them to their own advantage, and the Court is quite fully cognizant of this. On the contrary, recording laws were intended to enhance the security of land rights, so the Court is naturally quite reluctant to allow them to become tools with which to destroy the security of parties who actually hold valid land rights, but have been remiss in recording their documents. Noting that Prosper had ample opportunity to observe that Smith had taken possession of the tract, and had made very substantial improvements to it, clearly bearing the mark of permanence, the Court declined to favor Prosper's claim that he had been an innocent purchaser of the tract, and so reversed the decision of the lower court, dismissing Prosper's case and nullifying his acquisition, while upholding the right of Smith to complete her acquisition of the land by paying off her contract for deed. The efforts of Prosper to acquire the land in question, the Court concluded, had been for naught, because he stood in no better position to attack the rights of Smith than did Demars or anyone else with knowledge of her presence on the tract at issue, and Smith's failure to record any documentation of her rights created no basis upon which to justify stripping her of those rights, since Prosper could easily have discovered her intentions, had he bothered to inquire with her about the true nature of her occupancy. The Court has consistently applied the fundamental principle of physical notice, triggering the obligation of a grantee to make such reasonable inquiry as may be expected of a person acting in good faith, based on notice gathered from the visible physical presence of either objects or persons on the land in question, to the resolution of disputes resulting from conflicting conveyances of land. In so doing, the Court has made it clear that a party who is aware of any physical indications that other parties may hold rights to land that is the subject of a proposed conveyance, or who has good reason or opportunity to learn the true significance of physical items existing on such land, and fails to do so prior to acquisition, does not qualify for protection under the recording statutes as a bona fide purchaser. A party who has reason or opportunity, in the eyes of the Court, to take notice of facts that would lead a prudent person to make inquiry, cannot simply neglect to inquire about the rights of others to the land, because in matters involving equity, no man can be allowed to close his eyes to reality, and subsequently benefit from having done so, for which reason the Court

enforces equitable limitations upon the applicability of the recording statutes.

NORTHERN PACIFIC v CASH (1923)

Returning to the subject of adverse possession, here we review a sequence of events that certainly has the appearance of being a very typical adverse possession scenario on the surface, but turns out to the contrary, due to the presence of two key factors, neither of which is visible on the ground, showing how important intangible factors can be in determining the fate of land rights. The two critical factors seen here relate to the timing of the acquisition of the land in question by the owner of record, and the presence of evidence that the acts of the predecessor of the adverse claimant were not truly adverse in nature. Adverse possession has both a physical component and a psychological component, and while the facts relating to physical possession on the ground are generally readily apparent, and can be reasonably well understood from observation of the conditions and circumstances involved in successful adverse possession cases, the most complex task facing the Court in adverse possession cases is typically the assessment of the state of mind of the adverse claimant. Since properly ascertaining intent is just as key to the determination of adverse possession as it is to boundary resolution or description analysis, the Court invariably sifts and scours the evidence in adverse possession cases, looking for clear evidence of the true motivation behind the acts of the adverse claimant, making any testimony that throws light upon the true attitude of the adverse claimant or his predecessors toward the land in dispute potentially decisive, as we will see here. In the 1921 case of *Blackfoot Land Development v Burks*, a portion of one section was farmed by the owner of an adjoining section for a period of time that was well in excess of the required statutory time period, and it was undisputed that Blackfoot, the owner of the adjoining section, had never used any of the area in controversy, nor had Blackfoot ever prevented the predecessor of Burks, the adverse claimant, from making full use of that area. Though all the physical requirements of adverse possession were clearly present however, the Court ruled that adverse possession had not taken place, because it had been revealed that the

predecessor of Burks had attempted to purchase the portion of the section owned by Blackfoot that he had been using, proving that his use of the area at issue was never based upon a claim of ownership on his part. Later in 1921, in *Northern Pacific v Smith*, a trial court ruled that Smith had acquired title to land that had been conveyed to Northern Pacific by means of a congressional grant that was made in 1864, by virtue of Smith's long possession of the land at issue, which was uncontested. The Court reversed that decision however, since it was pointed out that the GLO plat creating the section in question had not been approved until 1912, so prior to that time, although the land itself had obviously existed, no sections had yet existed, and Smith's possession of unsurveyed public domain could not be treated as adverse to Northern Pacific. Conversely however, its also quite possible for the testimony of a land owner to contribute to the destruction of his own rights, and this was demonstrated in *Miner v Cook* in 1930. Miner sought to prove that a certain road departed from a section line that formed one boundary of his land, and that he therefore actually owned some land lying on the opposite side of the road. The Court however, concluded that it made no difference where the road was located in relation to the section line, because Miner had conceded in his own testimony that he had never made any actual use of any land on the opposite side of the road, so even if in fact he had once been the record owner of that land, he had lost it to adverse possession.

1889 - Swigert settled upon the northwest quarter of a certain regular section. A road ran diagonally through the northeast quarter of the northwest quarter, physically separating the northeasterly half of that quarter quarter from the rest of the northwest quarter. Swigert fenced the portion of the northwest quarter that he was using and claiming, which was the entire quarter, with the exception of the road and the 20 acre triangular area northeast of the road. Swigert eventually obtained a patent for the land that he had settled on, but the patent covered only the southeast, southwest and northwest quarters of the northwest quarter, so the entire northeast quarter of the northwest quarter remained unpatented public land.

1904 - Northern Pacific selected the northeast quarter of the northwest

quarter, by virtue of it's right to select certain available portions of the public domain as lieu land, to replace other lands which Northern Pacific had been entitled to, under the long standing federal grant of lands to railroads, which had been made to foster rapid settlement and development of the west, by offering extensive amounts of land in return for the construction of railroads. No one other than Swigert had ever occupied any portion of the northeast quarter of the northwest quarter, and although that quarter was patented to Northern Pacific at this time, Northern Pacific showed no interest in making any use of it either.

1907 - Swigert conveyed all of his property to Edwards, who continued to use the entire fenced area, including the southwesterly half of the northeast quarter of the northwest quarter, just as Swigert had.

1911 - Edwards evidently recognized the fact that the southwesterly half of the northeast quarter of the northwest quarter had been fenced and used by Swigert, and that the legal description of his property did not include any part of the northeast quarter of the northwest quarter, so he contacted Northern Pacific and proposed to lease the portion of it that he was using. Northern Pacific simply ignored his request, but took no action to prevent him from using the land either, so he just went right on using it.

1918 - Edwards conveyed all of his land to Cash. Edwards informed Cash that some of the land within the original fence, which was evidently still in place at this time, was railroad land, but Cash apparently believed that he saw an opportunity to acquire all of the land, on the basis that it had been fenced and used by Swigert and Edwards for decades, and Northern Pacific had never used any of it, so he proceeded to complete his purchase from Edwards. After buying the land, Cash continued using the southwesterly half of the northeast quarter of the northwest quarter as cropland for an unspecified length of time, just as his predecessors had, but there is no indication that any buildings were ever erected anywhere on the northeast quarter of the northwest quarter. At some subsequent point in time, Northern Pacific

evidently decided to either use or convey the land in question, but Cash refused to relinquish the portion of it that was in his possession, so Northern Pacific filed an action against him, to compel him to remove his fence from the northeast quarter of the northwest quarter and cease his use of that quarter quarter.

Northern Pacific argued that it had legitimately acquired the entire quarter quarter in question, and that no use of it prior to the time when Northern Pacific had acquired it was relevant at all, and that none of the use of the land in question had ever been adverse in nature, so Cash had established no valid claim or rights to any portion of the quarter quarter in question. Cash argued that the possession and use of the area in question, by both his predecessors and himself, had been adverse to Northern Pacific, and that the adverse use had continued for approximately 30 years, far beyond the length of time required to secure title, so title to the entire area within the fence should be quieted in him, based upon adverse possession. The trial court saw no merit in the claim made by Cash and ruled in favor of Northern Pacific.

The first mistake made by Cash was his notion that the land at issue had been held adversely by Swigert from the time Swigert erected the fence in 1889. The quarter quarter in question had remained in the public domain, having been formally claimed by no one, until 1904 when Northern Pacific had acquired it, so whatever use or occupation took place prior to 1904 was of no benefit to Cash or anyone else, since the public domain is not subject to adverse possession. Cash made no claim that Swigert had built his fence in a good faith effort to follow any aliquot boundaries, and in fact it would have been absurd to make such a claim, since the fence ran diagonally across the quarter quarter, so the Court could not be expected to swallow the nonsensical idea that Swigert's fence represented any aliquot line. Cash however, suggested that because the acquisition of the quarter quarter by Northern Pacific was made under the authority of a grant which had its origin in federal law that had been enacted decades earlier, the ownership of the quarter quarter by Northern Pacific should be measured as if it had begun at the time of the original federal railroad grant, so the land should be treated as if had no longer been part of the public domain at the time Swigert arrived in 1889. This was a fairly clever effort by Cash, but it would go unrewarded by the Court, which indicated that treating the effect of the federal railroad grant in the manner suggested by Cash would have absurd results, and moreover, it would defeat the operation of the most fundamental principle of

adverse possession, which is the vital concept of notice. Northern Pacific could not possibly be charged with notice of any use of the quarter quarter that had taken place prior to the time Northern Pacific first became interested in the land, and furthermore, Northern Pacific had the right to rely on the rule that the public domain cannot be adversely possessed, so there was no need or reason for Northern Pacific to even take notice of any use actually being made of the land in 1904, as would have been the case if Northern Pacific had acquired the land from a private party. So the matter in controversy and the discussion of adverse possession, the Court decided, would be limited to what had taken place since 1904. The Court reiterated some important and relevant elements of adverse possession that it had previously set forth, and which have been previously noted herein, including the fact that the real intentions of the adverse claimant are key, mistaken opinions regarding boundaries are irrelevant, actions speak louder than words, and the fact that a fence can become a boundary if treated as such without any regard for whether or not it actually represents or stands upon any boundary line of record. None of these frequently dispositive factors alone however, were destined to control the outcome of the present conflict. The Court pointed toward and highlighted the most crucial and decisive aspect of the evidence presented as follows:

“... the question of adverse possession is one of intention: hence it follows that where the occupation is by mistake and with no intention on the part of the occupant to claim as his own land which does not belong to him ... the holding is not adverse ... it is not the presence or absence of the mistake which enters into the determination of the question, but the presence or absence of the requisite intention to claim title ...”

How best to ascertain the intent of an individual, particularly an individual who lived many years before, and acted out his role in setting the stage for future disputes at a distant time, under unclear circumstances, is very often a source of consternation in land rights conflicts, but in this instance, there was no such difficulty, and the answer was quite clear. By 1911, Swigert and Edwards combined had, to all appearances, been using the land at issue adversely to the title of Northern Pacific for 7 years, but at that time Edwards made the critical mistake which destroyed the value of all the events that had gone before, when he attempted to lease the area at issue from Northern Pacific. One of the essential elements of adverse possession

is notoriety, which means that the adverse claimant cannot hide his claim of ownership, he must openly assert it, when he is presented with any explicit opportunity to do so. By acknowledging the ownership of the quarter quarter in question by Northern Pacific, with his lease offer, Edwards had made it perfectly clear that he was not holding the land in question in the manner of a true land owner, he was simply using it as an intruder, and he thereby terminated, by his own action, the accrual of any time that could otherwise have counted, either on his own behalf or to the benefit of his successors, toward adverse possession. Northern Pacific made no response whatsoever to the lease offer from Edwards, but the damage was done all the same, because no response was necessary, it was not the denial of the lease offer that was essential, it was the acknowledgement by Edwards of the ownership of the quarter quarter by Northern Pacific, and particularly his open recognition that all of his use of the land was subservient in nature to the title of another party, which negated any possibility that his use has been adverse in character. Since Cash had to rely upon the adverse nature of the possession of Edwards, as a supplement to his own period of possession, in order to be able to fill the required time period, the elimination of the possession of Edwards from the equation was utterly fatal to the claim made by Cash. Although Cash had very clearly held the area in question adversely himself, for a few years, the Court observed that he was evidently the first party ever to hold the land in question with an intention that was truly defiant, and therefore adverse, to the title of Northern Pacific, and so the Court upheld the decision of the lower court to quiet the title of Northern Pacific to the entire quarter quarter. Had it not been revealed that Edwards had contacted Northern Pacific, and openly conceded that he was not the owner of the area at issue, the combined possession of Edwards and Cash would have easily exceeded the required 10 year period, and all other things being the same, Cash could very well have prevailed, since Northern Pacific had in fact neglected the land long enough to bring the statute of limitations into play. Since the actual occupation and physical use of the area was sufficient to satisfy the legal requirements of adverse possession in all other respects, and the time period during which the use had occurred was prior to the formulation of the tax payment requirement for adverse possession, the Court would very likely have decided the matter upon the basis of the physical evidence, and awarded the entire fenced portion of the quarter quarter in question to Cash.

HOGAN v THRASHER (1925)

Here we come to a case that illustrates the strong inclination of the Court to support and uphold land rights agreements as well as any decision the Court has ever handed down, and which has often been cited for the important principles it embodies. The Court always has the option to nullify or negate agreements that are flawed to such an extent as to be impossible to equitably enforce or successfully complete, but aside from those agreements that are either hopelessly ambiguous or manifestly unjust, the Court typically arrives at an appropriate means of giving legal effect to all land rights agreements that have been made and performed in good faith. Although land surveyors are naturally concerned primarily with agreements involving boundaries, the Court is far more frequently called upon to adjudicate issues relating to conveyances of land or land rights than issues involving boundaries, so observing the way that the Court treats and handles conveyance agreements is an outstanding way of becoming familiar with the overall perspective and general approach that the Court brings to the resolution of land rights agreement controversies of all kinds. Here we see the Court approve the validity of an agreement that was not only entirely undocumented, it was contingent upon events that were still in the future at the time it was made, yet the Court views it as a legitimate agreement, which the parties made a firm and definite mutual commitment to carry out, so the Court enforces it as binding upon them. In so doing, the Court clearly intends to give notice to all that such agreements must be taken seriously, and when one party acts in reliance upon such an agreement, the option to back out of it can be legally denied to the opposing party. In *Besse v McHenry* in 1931, a case concerning the validity of a certain lease, the Court emphasized that the statute of frauds "can have no application to oral contracts which have been fully executed", and went on to explain that reliance upon an oral agreement by one party is binding upon any other party to the agreement who is aware that such reliance has taken place, creating equitable rights in favor of the party who innocently honored the agreement. Just as we have already learned from decisions of the Court such as the one reviewed in the *Prosper* case, that the statutes mandating recordation of

documents are intended only to provide affirmative evidence, and cannot be used to block or damage any existing rights, cases such as these likewise demonstrate that the statute of frauds is intended only to operate in an affirmative manner, and the Court prefers not to allow it to function in a way that prevents any legitimate agreements from having their intended effect. The 1944 case of *Price v Western Life Insurance* however, shows that conversely to verbal conveyance agreements, an agreement can also serve to prevent the passage or alteration of land rights. In that case, Price and his neighbor owned adjoining lands through which a stream apparently sinuously wound, so they verbally agreed to allow each other to use certain areas which the other owned on the opposite sides, expressly making the water a boundary for land use purposes only, while clearly reserving their ownership rights. Price later asserted adverse possession of all the land on his side of the stream, and a trial court ruled in his favor. The Court reversed that decision however, on the grounds that Price's possession was never adverse, because it was based upon a valid oral agreement, which controlled the ownership rights in dispute, nullifying the effect of his use of the ground in controversy.

1900 - Hogan was a settler who was farming separate tracts of land in two adjoining townships. He was using an area near the center of Section 36, which was state school land, and he was also using another tract about a mile to the east, near the center of Section 31, that extended west and included a portion of Government Lots 2 & 3 in Section 31, amounting to about 20 acres within those two lots, which were unpatented public lands. Evidently these lands were used by Hogan only as cropland and he resided elsewhere.

1902 - Thrasher was another farmer, who also began using land in the east half of Section 36 at this time, under a lease from the state. After establishing his farming operation in that section, he expanded it and also began using some of the land in Government Lots 2 & 3 in the adjoining Section 31, amounting to about 40 acres, west of the part of those two lots that was already in use by Hogan. There was no controversy between the two farmers at this time, and neither one of them had any objection to the use that was being made of these lands

by the other.

1904 - Lots 2 & 3 were patented to Northern Pacific. Apparently Northern Pacific had no interest in making any actual use of the land however, and paid no attention at all to the existing use that was being made of these lots, so both farmers just went right on using their respective portions of these lots, as they had previously been doing.

1908 - Thrasher obtained a contract for deed from Montana, which covered all the land he had been using in Section 36 and also included the land in that section that Hogan had been using. Hogan then learned that Thrasher also wanted to acquire Lots 2 & 3, but Hogan wanted to buy those two lots himself, so he approached Thrasher and proposed a deal. Hogan told Thrasher that if Thrasher would not object to Hogan acquiring Lots 2 & 3 from Northern Pacific, Hogan would allow Thrasher to continue using the land that he had been using in those lots, as long as Thrasher would let Hogan go on using the land that he had been using in Section 36, which was within Thrasher's boundaries, and Thrasher indicated that this deal was acceptable to him. The two farmers then further agreed that whenever Thrasher completed his acquisition of land in Section 36, he would convey to Hogan the portion of that section that Hogan had been using, and in return, Hogan would convey Lots 2 & 3 to Thrasher. Based upon this agreement, Hogan acquired Lots 2 & 3 from Northern Pacific, without any objection from Thrasher, and the existing land use pattern continued, completely unchanged. Of course, this agreement made by the two farmers was entirely oral and unwritten.

1915 - Hogan and Thrasher both participated in a trial that was conducted to resolve a controversy that had arisen over water rights, which were associated with the lands that both of them were using. Hogan and Thrasher were on the same side in this instance, as both of the farmers, along with a number of other settlers who were also claiming water rights in the vicinity, were defendants in this case. The ownership rights of the defendants to their respective lands was never in question however, because that was not a matter that was subject to adjudication during this trial.

1919 - Thrasher finally completed his payments for the portions of Section 36 that he had been using, and obtained patents from Montana covering those various portions, including the area that Hogan had been farming, which was described as an irregular triangular tract, containing about 37 acres, located near the center of the south half of Section 36.

1922 - Thrasher proposed to carry out the 1908 agreement at this time, and for that purpose he had deeds prepared, conveying the irregular tract to Hogan, and he deposited them for delivery to Hogan, upon compliance by Hogan with his part of their deal. However, Hogan evidently decided that he no longer wanted to complete the land swap, instead he now wanted to retain ownership of Lots 2 & 3 and make use of all of those lots himself, so he directed Thrasher to stop using Lots 2 & 3, but Thrasher declined to comply and insisted that Hogan was obligated to fulfill the agreement by deeding the two lots to him. Hogan responded by filing an action against Thrasher, seeking to force Thrasher to cease his use of Lots 2 & 3.

Hogan argued that no legitimate agreement had ever been made, and that even if a conveyance agreement had been made, it would be legally null and void, because it involved a transfer of land ownership and none of it had ever been reduced to writing, so it was controlled by the statute of frauds. Thrasher argued that the oral agreement was valid, and that it had been executed by the continuation of the physical use of the lands in controversy that had been made by both parties, for several years subsequent to the agreement, therefore it should be considered binding upon the parties, despite being obviously in violation of the statute of frauds. The trial court agreed with Thrasher and ruled that both parties were legally bound to make the two conveyances they had mutually pledged to make to each other in 1908.

As we have already seen in reviewing earlier cases, the Court typically seeks to give effect to all agreements that were made by people acting in good faith, and particularly those involving land rights which can be seen to have had results that were positive, beneficial or productive, facilitating actual use of the lands in question. This general attitude or position taken by the Court is not based merely upon any charitable sentiments, but upon the Court's understanding of the fact that innocent

parties frequently act without giving extensive thought to possible future developments, and they therefore fail to appreciate the benefits of reducing their agreements to writing, due to their failure to foresee that changing circumstances can have the effect of negating plans and intentions once discussed and agreed upon with apparent clarity and certainty. For the benefit of society in general, the Court has always recognized, all citizens should honor their agreements, and where sufficient evidence is present to indicate that an agreement was actually made, and exists in reality, the Court is therefore most reluctant to strike it out or support a denial of its existence, upon the basis of technical failures, such as a failure to document, or to record, evidence of the agreement's existence. The statute of frauds, in the view of the Court, merely makes certain agreements voidable, it does not function arbitrarily, as a hammer to crush every agreement that has not been properly documented, even when sufficient evidence of other kinds exists to validate the existence and content of the agreement at issue. From previous cases, such as the Box Elder case, we have observed that the Court can elect to treat agreements that could be construed as constituting a transfer of land rights, and thus be within the statute of frauds, in a manner that has the effect of eliminating that factor from consideration, leaving the subject matter outside the scope or limits of statutory operation. Only in extreme cases, such as the Myrick case, in which boundaries vary by vast and dramatic amounts, and where the presence of good faith actions cannot be shown, does the Court find the idea of declining to enforce boundary agreements palatable, and invoke the statute of frauds for the purpose of controlling boundaries. In viewing the scenario presented by this case, one might well expect the Court to have taken the same approach that it took in the Myrick case, and approve the application of the statute of frauds to the deal made by Hogan and Thrasher, since an equally substantial amount of land was at stake here. From the Court's treatment of this dispute however, we can clearly see that the amount of land at issue is not the primary element controlling the Court's decisions, the element truly driving such decisions is the Court's intense focus upon supporting and protecting the original intentions of the parties, by mandating that once those intentions have been ascertained, they must be carried out. The best evidence of original intent, the Court realizes, is quite often the actual conduct of the parties who made the agreement in question, since their conduct typically represents valid evidence reflecting their understanding of the agreement's true meaning, and with that in mind, the Court adopted the position that:

“Where one party to an oral contract has, in reliance thereon, so

far performed his part of the agreement that it would be perpetrating a fraud upon him to allow the other party to repudiate the contract and to set up the statute of frauds in justification thereof, equity will regard the case as being removed from the operation of the statute and will enforce the contract by decreeing specific performance ...”

Here we see very well illustrated the importance of innocent reliance, in the eyes of the Court. Since open reliance upon an agreement by one party can be freely seen by the other party, who is clearly aware of the source of that reliance, the subsequent conduct of each one of the participants, in allowing the other party to rely upon the agreement in question, serves to bind both of them to their mutual contractual commitments and responsibilities, making it inequitable for either of them to later deny that any agreement existed between them. Open reliance, along with conduct effectively approving that reliance, by failing to object to it in any material way, supports the existence of a binding contract, and in the face of such evidence of conduct supporting reliance, the existence of the contract in question can be so satisfactorily shown, that no written evidence is necessary to witness its existence. Although very substantial tracts of land changed hands in this situation, devoid of any written evidence, the Court was satisfied that the original intent of the parties was adequately evidenced by their own acts of long standing possession and cultivation of the lands involved. It was suggested by Hogan that Thrasher should not be allowed to make any claim to Lots 2 & 3 at this time, because he had not asserted any claim to them during the water rights litigation that took place in 1915. This failure on the part of Thrasher, Hogan maintained, proved that Thrasher had acknowledged that Hogan was the true owner of the two lots at that time, and that all of Thrasher's use of the lots was made merely by virtue of a permissive verbal license from Hogan, as the owner of record, which was revocable at the pleasure of Hogan, so Thrasher should be estopped from asserting any claim to those lots ever after. Such factors, the Court agreed with Hogan, would be devastating to Thrasher's claim, if his claim were based upon adverse possession or any other form of prescriptive rights, provided that such allegations made by Hogan were true. However, the Court observed, Thrasher's claim was entirely unrelated to adverse possession, and his case was not based upon any prescriptive principles, just the contrary, it was based upon an oral conveyance agreement, so the fact that Thrasher recognized that Hogan was the record owner of the two lots in

question, was in no way detrimental to Thrasher's case, and neither estoppel nor laches could operate to bar his claim. While Thrasher was not subject to estoppel as a result of his participation and role in the 1915 trial, and was not guilty of laches for waiting 14 years to request that Hogan comply with the 1908 agreement, the Court found, an estoppel against Hogan was appropriate, denying him the right to unilaterally terminate his conveyance commitment to Thrasher, since Hogan had obtained substantial benefits from their verbal agreement during those intervening years. Having determined that both the physical and testimonial evidence clearly indicated that the agreement alleged by Thrasher had in fact been made, and put into practice, and that Hogan had pointed out the existence of no valid obstacles to the completion of the original oral agreement between the parties, the Court upheld the ruling of the lower court in Thrasher's favor, concluding that equity and justice were best served by setting aside the statute of frauds, and compelling Hogan to join Thrasher in fulfilling the terms of their 1908 agreement.

WADDELL v SCHOOL DISTRICT NO. 2 OF YELLOWSTONE COUNTY (1925)

In this case we will see the Court establish an important Montana precedent within the field of land rights, regarding the nature of licenses and the consequences of land use under a license. A license to use land for a particular purpose is merely a state of permission, always subject to termination by the licensor, which unlike an easement, a dedication, or a fee conveyance, does not create or transfer any land rights, so unlike a grantee, a licensee holds no land rights, and the use of the land by the licensee remains perpetually at the discretion of the licensor. The licensee is presumed to understand this state of affairs, and to realize that a license does not justify or support permanent development or improvement of the land in question, but very often misunderstandings occur, and licensees build unauthorized permanent structures of various kinds on land they do not own. In such cases, the question typically becomes whether or not the licensor, as the record owner of the land, is subject to estoppel, due to having allowed the licensee to invest in improvements that stand on the licensor's land, which operates to convert the license into a permanent land right, by depriving the

licensor of the right to revoke it. In the case we are about to review, we will look on as the Court takes the position that a license cannot become irrevocable in Montana, even when a building that is clearly permanent in character is built on the land of the licensor, with the full knowledge of all the parties, by the licensee or at the direction of the licensee. The Court handed down a decision in 1911, in the case of *Lewis v Patton*, which foreshadowed the decision we are about to review, in the context of an easement case. In that case, Lewis asked Patton if he could build a road across Patton's land, and Patton agreed that Lewis could build the road, but Patton never agreed to grant Lewis an access easement for the road, and several years later Patton closed off the road that Lewis had built and was still regularly using. The Court decided that in the absence of any evidence of a conveyance agreement between the parties, Patton had given Lewis only a license to build on his land, not an access easement across his land, so Patton was free to close the road as he had done, and the Court refused to bring estoppel to bear to prevent Patton from doing so, despite the fact that he had watched Lewis build the road, since Patton had never even verbally agreed to grant Lewis any permanent rights related to the road. The Court has however, found estoppel to be applicable in similar cases involving the construction of more substantial improvements, particularly buildings, and the 1910 case of *Von Tobel v City of Lewistown* and the 1981 case of *Town of Boulder v Bullock* are excellent examples of the creation of land rights by means of estoppel, showing that the Court stands ready to support and protect valuable physical improvements that were clearly built in good faith, even when they encroach upon an existing public right-of-way. Subsequent to the case we are about to review, the Court has adopted a 6 point test, which it has employed to measure the applicability of estoppel in many instances involving property rights of numerous kinds, such as *Smith v Krutar*, a 1969 water rights case, and *Kelly v Wallace*, a 1998 easement case, as well as the aforementioned *Boulder* case of 1981.

1899 - Newman, who was a member of the board of trustees of School District No. 3 in Yellowstone County, owned a certain 10 acre tract of land in an unspecified location. A site for a new schoolhouse was needed, and Newman agreed to allow it to be built on his land. No

details regarding this agreement are known, so whether or not Newman voluntarily offered to devote a portion of his land to this purpose is unknown. Whether or not Newman lived on this 10 acre tract or was making any use of it is unknown, but the school building was built on his tract the following year, and a fence was built around it, enclosing an area of unspecified dimensions, amounting to less than one acre. Who performed this construction work is unknown, there is no indication that Newman personally participated in it, although he presumably observed the construction, and he certainly knew that it was taking place. The school was put into normal use, but no documentation regarding the status of the land that was put to this purpose was ever recorded, and no written conveyance of any land rights was ever made.

1911 - The original schoolhouse was replaced with a new one, apparently in or very near the same location, and this new school building was built on a concrete foundation. Newman was still a trustee at this time, and he evidently either approved this building replacement or made no objection to it.

1917 - School District No. 3 became part of School District No. 2, so District No. 3 ceased to exist at this time. District No. 2 continued to use the site as a school, but since Newman was not a trustee of District No. 2, this use of the site was no longer under his direct control and jurisdiction as a trustee. Nevertheless, as the owner of the land, he allowed the use of the site to continue unchanged. There is no indication that Newman ever got any compensation, or any other form of direct personal benefit, in return for this use of his property.

1921 - District No. 2 decided that the site was no longer needed as a school, and all of the school equipment was removed from the building and taken away for use elsewhere. The vacant building was still used by District No. 2, but only on an infrequent basis as a dance hall for students. Newman made no objection to this change in the use of the site and allowed the building and fence to remain in place.

1922 - Newman agreed to convey his land to Waddell, and Waddell

obtained a contract for deed from Newman, which described the tract being conveyed as containing 10 acres. The contract also made reference to the existence of the school site on the land, stating that the contract was subject to "such rights, if any, as School District No. 3 of Yellowstone County may have". Waddell then built a house on the tract, just a short distance from the school building, and began living in the new house. The noise from the dances annoyed Waddell, so in an apparent effort to discourage such use of the building, and to make it clear that he considered the area to be part of his land, he tore down the fence and the two outhouses that were associated with the building, but he did not disturb the building or make any use of it himself. The dances continued however, so Waddell then wrote a letter to District No. 2, stating his position regarding the land being used, and requesting that the building be removed, but he evidently got no response at all.

1924 - Having ignored Waddell's request and chosen not to remove the school building, at this time District No. 2 decided to assert its right to resume use of the building as a school, and began holding classes there once again. Waddell therefore decided to challenge the right of the District to use the site, and filed an action seeking to prevent any further use of the site by the District.

Waddell argued that the District had never acquired any permanent rights to the land in question, because the use of the land for school purposes had been both originally and continually permitted and approved by Newman as the owner of the land, and the absence of any written conveyance of land rights indicated that Newman always intended to maintain complete control over the land, including the right to terminate the use of it, for school purposes or any other purposes, at any time. Waddell further argued that as Newman's grantee, he had acquired the right to put an end to any use of the land in question by the District or others. District No. 2 argued that the fact that Newman had allowed a permanent structure to be constructed on his land indicated that he intended the portion of his land in question to be devoted to use as a school site on a permanent basis, so neither he nor Waddell had any right to now demand that the building be removed, or that it not be used as a school. The District further argued that it had acquired the fenced area by means of adverse possession, and that

because Newman had knowingly allowed valuable improvements to be made to the land in question, at the expense of the District, he and any successors such as Waddell were estopped from revoking the right of the District to make ongoing use of the land, for school purposes and legitimate related purposes, as the District had done. The trial court found that adverse possession had taken place, so Waddell did not own the area in question, and had no right to control the use of it, or prevent the use of it by the District, because he had never acquired it, and so ruled in favor of the District.

The decision of the trial court in this case was not surprising, given the fact that the defendant was a School District, apparently operating in good faith, and using the land in dispute for a purpose that was beneficial to the community and to the public in general, since such uses are typically viewed with favor when they become involved in litigation. The Court began however, by correctly rejecting the idea that adverse possession was applicable to this situation, since the rights involved were clearly permissive in origin rather than prescriptive, and it then proceeded to subject the other claim made by the District, on the basis of estoppel, to a distinctly higher level of scrutiny than had the trial court. Looking quite closely at the evidence presented, the Court determined that there were legitimate grounds upon which to debate or question what the true intentions of Newman had been, both originally and as reflected by the relevant events that had unfolded over the years. The intent of Newman, as the alleged grantor of the school site, was the foremost concern, and the Court's decision regarding his intent would control the outcome, however there were some subtle but highly relevant factors that bore upon the matter and merited consideration. Given the absence of any evidence indicating what had actually taken place in 1899, at the time of the original decision to employ a portion of Newman's land as a school site, the Court was unwilling to embrace the presumption that Newman had intended to permanently dedicate the land, since it was equally possible that he had been persuaded or coerced into allowing the site to be located on his land, and the absence of any written conveyance supported the possibility that he had deliberately declined to grant any permanent rights to the District. Newman himself was evidently unavailable and never testified during the trial, so the Court was required to draw the key conclusion regarding his true intent from the evidence at hand. Within the evidence presented, the Court found nothing to indicate that Newman had induced the District to act as it had done, either by any acts or omissions on his part, and he had never said or done anything clearly disclosing any intention to abandon or relinquish any of his land. Newman's

behavior and conduct over the years, allowing the school to function, and even to be rebuilt, did not reveal any bad faith on his part, the Court observed, but the failure of the District to secure any definite rights to the land in controversy was a possible indication of an absence of good faith on the part of the District. The District was unable to produce any evidence that Newman had ever agreed to permanently convey or dedicate any land to the District, so in the absence of any evidence that any conveyance of land rights had ever taken place, or had even been intended to take place, the Court concluded that Newman had made no grant of any land rights to the District, written or otherwise, and the District had held and used the site only by virtue of a license from Newman, which the Court defined as follows:

“A license is defined as a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts ... a license gives no interest in the land ... if by a license an interest in the land could be created within the meaning of the statute of frauds, under that statute it could not be created by parol ... a license is only an authority to do an act or series of acts on the land of another, and passes no estate or interest therein ... incapable of being assigned or transferred ... a license cannot operate as an estoppel ... nor is the grantee of a licensor estopped to perform acts constituting a revocation of a mere license ...”

While many states have adopted the concept that a license, although entirely permissive and revocable at its inception, can become binding and irrevocable, as a result of estoppel raised by the subsequent conduct and behavior of the parties, Montana hereby declined to do so, and the Court has faithfully adhered to that position throughout the subsequent decades. Since Newman had evidently never said or done anything to mislead the District into believing that he had permanently dedicated the site for school purposes, or that he intended to give up all of his own rights to the portion of his land in controversy, the Court found no basis upon which to charge either Newman with estoppel, or his grantee Waddell with notice. Despite the fact that Newman had allowed a structure with a concrete foundation to be built upon his land, an act normally considered to be indicative of permanence, and the fact that Waddell had clear notice of its presence on the land prior to his acquisition of Newman's tract, the Court held that Newman had retained control over all of his tract, and Waddell was an

innocent purchaser who had correctly assessed the legal implications of the circumstances. Two key factors were highly persuasive to the Court, the first being the fact that District No. 3, the organization which Newman had allowed to build both of the school buildings, had ceased to exist in 1917, and under the rules applicable to licenses adopted by the Court, District No. 2 had acquired no rights to Newman's land at that time, so any use of the site after that time was an adverse use of the land, not being based upon any agreement. That adverse use however, not being of either sufficient duration or sufficient continuity, was of no value to District No. 2, the Court indicated. The second crucial factor was the language that Newman had wisely chosen to use in the contract for deed with Waddell, which demonstrated that Newman understood that only District No. 3 could potentially claim any rights to the site, and which did not reference or acknowledge any possible rights of District No. 2. This proved to be the decisive factor, since it was proof, in the eyes of the Court, that Newman had never intended to convey any land rights that would last beyond the duration of District No. 3. For these reasons, the Court reversed the decision of the lower court, and ruled that Waddell was entitled to the entire 10 acre tract, free and clear of any burdens, and he was therefore entitled to demand removal of the building at any time. Its important to note that had Waddell attempted to keep the building for himself, or had he intentionally damaged it, or made any use of it himself, the outcome could have been different, because the ownership of the building was another matter, and only the land rights were in play in this legal battle, so the fact that Waddell respected the building, and was willing to let the District move it to another location, operated in his favor, by showing good faith on his part. The court, on this occasion, had declined to approve the creation of a new original parcel by means of either an oral grant or estoppel, but only because the creation of the particular parcel at issue was not warranted by the evidence that had been presented, and not because the Court considered it impossible to create new boundaries by unwritten means.

FITSCHEN BROTHERS v NOYES (1926)

Returning to the subject of adverse possession, here we will watch as an intriguing set of events unfolds over a span of several decades, during which most of the original participants pass away, ultimately presenting the Court with an opportunity to take another step in it's development and

application of the concept of adverse possession. Controversies such as this, involving evidence that carries potentially varying implications, can be resolved by diverse means, based upon various legal and equitable theories and principles, but adverse possession is often seen by the Court as the most appropriate vehicle by which to accomplish justice in such situations, since it has the effect of rendering other potential points of legal contention moot, by applying a bar that prevents issues which might otherwise have been relevant from being introduced. In this case, the Court finds adverse possession to be a suitable means of supporting and accomplishing the actual intentions of the original deceased parties, who bungled their conveyances decades earlier, but subsequently made their true intentions known through their conduct, including as we will see, the manner in which a subsequently created right-of-way across the land at issue was acquired. In addition to clarifying the rights of cotenants with regard to adverse possession, this case also well illustrates the importance of determining the origin of land rights, as the variance in the sources of the legal title held by the competing parties here, proves to be highly instrumental to the outcome, in the view taken by the Court. The Court also here reiterated the emphasis that it places upon the difference in meaning between the phrases "color of title" and "claim of title", which the Court had first contrasted and clearly defined in the 1915 adverse possession case of *Morrison v Linn*. In that case, the Court lamented the misleading terminology that had been used in both statutes and prior case law, and explained that while the phrase "color of title" merely indicates the presence of some form of documentation, which tends to support the claim of an adverse possessor, although it is legally ineffective as a conveyance for any of a variety of reasons, the phrase "claim of title" represents the truly indispensable factor required for a successful adverse possession. While color of title amounts only to an option, providing the element of good faith to the possessor, the Court there decided, the vital claim of title is present whenever a possessor without legal right, occupies and uses land in the manner of a typical land owner, showing subservience to no one, in the occupation and use of the land, thereby demonstrating the intention to maintain full dominion and control over the land to all the world, and of course most importantly to the owner of record of the land in question. In the 1925 case of *Bearmouth v Passerell* however, the Court had acknowledged

the validity of the legislation creating the tax payment requirement for adverse possession, which made any such claims arising after 1917 subject to that requirement, in order to prevent "clandestine encroachments" from ripening into fee title, while stating that this modification of the law had no impact on the Court's view toward the mistake doctrine, previously discussed in our review of the Rude case. In the end, the fence involved here controls, not simply because it stood as a barrier for over 40 years however, but because it represented the best evidence of a location defined by a valid boundary agreement, which had been honored by all of the original parties, to the end of their lives.

1875 - A mining claim location identified as the Prospector was established, and later in the same year another mining claim location identified as the Minnie Jane was also established very nearby. Both of these claim locations were presumably legitimately established and valid in all respects, except for the fact that their boundaries and descriptions were in conflict, but this was apparently unknown to anyone at this time.

1879 - Benjamin Phillips and George Fitschen, who was the elder of the two Fitschen brothers involved in this matter, acquired the Prospector and took physical possession of all the land within its boundaries.

1880 - Roach and Wampler acquired the Minnie Jane, whether or not they made any physical use of it is unknown.

1881 - Roach and Wampler wanted to patent the Minnie Jane, so they had it surveyed, and the fact that it overlapped the Prospector was discovered. The Prospector was directly north of the Minnie Jane, and the two locations were not materially in conflict at their west end, but the south line of the Prospector ran South 84 East, while the north line of the Minnie Jane ran North 79 East, resulting in a triangular overlap that was over 300 feet wide at its east end and was 4.6 acres in size. When Phillips and the elder Fitschen learned of the overlap, they warned Roach and Wampler that they would protest the patenting of the Minnie Jane, as a violation of their rights to the Prospector. An

agreement was then reached however, under which Roach and Wampler were to proceed to patent the Minnie Jane, but then deed half of the overlap area to Phillips and the elder Fitschen, along with a portion of the Minnie Jane lying beyond the overlap area at the east end, which adjoined the east end of the Prospector, since the Minnie Jane extended somewhat farther east than the Prospector. This agreement was documented, but the documentation was unrecorded and was subsequently lost.

1882 - As a result of the 1881 agreement, the Minnie Jane was patented to Roach and Wampler, to its full original extent as surveyed, without any objection from the owners of the Prospector.

1883 - The reduced Prospector, having been truncated by the Minnie Jane, was patented to Phillips and the elder Fitschen.

1884 - Roach deeded his interest in the Minnie Jane to Noyes, who was his brother-in-law, intending the deed to serve only as security for a loan that had been given by Noyes to Roach. The description that was used in this deed evidently covered the entirety of the Minnie Jane, and the deed was properly delivered and promptly recorded, resulting in a legitimate conveyance, which gave Noyes a legal interest in half of the entire area covered by the Minnie Jane. In anticipation of the completion of the boundary agreement made in 1881, and unaware that this transaction had taken place between Roach and Noyes, Phillips and the elder Fitschen built a fence running along the boundary line that had been agreed upon, which ran down the center of the overlap area.

1885 - Roach and Wampler deeded the area that had been previously agreed upon in 1881 to Phillips and the elder Fitschen, just as they had agreed to do, and this deed was promptly recorded. The parties to this deed evidently all believed that their mutual conveyance agreement had thereby been successfully carried out and was complete at this time. Since Roach held no legal interest in the Minnie Jane at this time however, and Noyes was not a party to this transaction, the original objective of the agreement had not been legally accomplished. Phillips

and the elder Fitschen, apparently unaware that a legal problem had been created by the transaction between Roach and Noyes, continued to occupy and use all of the land north of the fence that they had built to mark the agreed boundary in 1884.

1888 - Roach paid off the loan given to him in 1884 by Noyes, so Noyes deeded the Minnie Jane back to Roach, employing the same description used by Roach in 1884, but since Noyes knew of the existence of the 1885 deed and believed that the area described in it had thereby been effectively cut out of the Minnie Jane, he cited the area described in that deed as an exception to the description in the deed he gave to Roach. As the result of this description error, Noyes continued to hold a legal interest in a portion of the overlap area, and although he was completely unaware of it, he thus remained an owner of record and a legal cotenant of that land, along with Phillips and the elder Fitschen. This development would eventually become the source of the subsequent controversy.

1892 - A railroad was built, running across both of these claim locations, and the railroad operator subsequently acquired portions of the railroad right-of-way from each of the parties, which by means of description adopted and acknowledged the boundary between the parties as it was defined in the 1885 deed. No railroad right-of-way was acquired from Noyes, nor did he ever suggest that he had any interest in the land crossed by the right-of-way, or that he was due any compensation, although he was fully aware of the construction of the railroad, and of the location of the right-of-way.

1895 - Roach died.

1896 to 1901 - At an unknown time during this period, Wampler died. The fate of any remaining ownership interest or other rights that either Roach or Wampler may have had in the Minnie Jane is unknown, but this was not a point of controversy.

1902 - Noyes died, having never attempted to make any use whatsoever of any portion of the Minnie Jane, or to convey his interest in it to anyone, being apparently unaware that he had retained

any legal interest in it.

1905 - George Fitschen died, and his interest in the two locations passed to his brother Gus.

1912 - The heirs of Noyes deeded their late predecessor's remaining legal interest in the Minnie Jane to his estate, and the estate asserted ownership of that entire claim location by paying the taxes on the entirety of it, although Roach and Wampler were still listed as its record owners.

1921 - Fitschen and Phillips, having discovered that their title was clouded by the events that had taken place during the 1880s, decided to file an action seeking to quiet their title by silencing the ownership claim being made by the estate of Noyes. Phillips and Fitschen still remained in physical possession of the whole area north of the agreed boundary, their ownership having never been challenged by any physical intrusion by anyone, and the fence which had served to mark the agreed boundary since 1884 was still in place.

Fitschen, on behalf of Phillips as well as himself, argued that the claim made by the estate of Noyes, if it was ever a valid one, had been extinguished decades earlier by the long standing and undisputed sole possession of all of the land in question by Phillips and himself. The estate of Noyes argued that because Phillips, the elder Fitschen and Noyes had all been legal cotenants of the land in question, adverse possession was inapplicable to destroy or bar the ownership interest that had been legally acquired by Noyes and never conveyed by Noyes, regardless of the passage of any amount of time. The trial court found the case made by the estate of Noyes unconvincing, and quieted the title of Fitschen and Phillips to all of the land north of the fence marking the agreed boundary that had been created in 1885.

Due to the overwhelming length of time that Fitschen and Phillips occupied and used the land in question here, and the fact that no one aside from them claimed to have used any of it in any way for over 40 years, by the time this case reached the Court, it might be expected that this case would be a quick and easy one for the Court to resolve. But this was not a simplistic or routine adverse possession case, because it involved a controversy between parties who were legal cotenants of the land in

question, even though all of them were evidently unaware of the existence of their cotenancy for decades. Therefore, although Noyes was never in actual possession of any of the land at issue, for even a moment, and he died without ever personally asserting any rights to it himself, his estate had a potentially valid basis for a legitimate claim to a partial interest in the land, as a consequence of events that had taken place so far in the past that few were yet alive to recall them. The principle that was operating in support of the existence of the Noyes interest is a powerful one, which has destroyed numerous otherwise legitimate adverse possession claims, and that is the concept that whenever ownership of land is shared by multiple parties, they are presumed to be acting in unison and in harmony, rather than acting antagonistically or with adverse intentions toward each other. Therefore, under the basic principle of cotenancy, it is not necessary for every one of the many owners holding some interest in a given tract of land to make any use of it, because the acts of any one of them are presumed to represent all of the others, in a beneficial manner, so any such act or use perpetuates the rights of every one of them. For that reason, one cotenant cannot normally act in a manner that effectively eliminates the interests of other cotenants, because everything done by the cotenant who is in actual possession of the land serves not just to express his own personal dominion over the land, but also to manifest the ongoing dominion of all of his cotenants over it as well, even though they may be far away and may never even visit or see the land in which they hold a legal interest. After examining the historical evidence at length and in great detail, as indicated by the unusually extensive timeline of events enumerated above, and noting that while adverse possession between cotenants was rarely successful it was certainly not impossible, the Court explained the circumstances under which adverse possession can and does take place even between cotenants:

“... the doctrine has been long since held, and the authorities sustain it, that one tenant in common may so enter and hold as to render the entry and possession adverse and amount to the ouster of a cotenant ... where the party occupying the premises holds not in recognition of, but in hostility to, the rights of his cotenants, his possession ceases to amount to constructive possession by them, becomes adverse, and ... will vest in the possessor a sole title by adverse possession ... actual ouster of the cotenants must appear, this does not necessarily imply an actual physical ouster, but it is sufficient if the grantee claims

exclusive ownership and by his conduct denies the right of others to any interest in the property ... conveyance of the entire property by one cotenant to a stranger constitutes an ouster of the other cotenants ..."

As can be readily seen, the key factor distinguishing the present case from most other cases involving adverse possession claims made by a cotenant or cotenants, against a fellow cotenant or cotenants, was the fact that the title to the land in question that was acquired by Fitschen and Phillips came from a different source than the title acquired by Noyes. Typically, contesting cotenants are members of a family, who acquired title together, and the rule of beneficial cotenancy generally therefore applies to the rights held by all of them, but in this instance, the cotenants were truly competing parties, who were in a genuinely adversarial relationship, with respect to the land in controversy, so no basis existed upon which to presume that the acts of any one of them were made for the benefit of all. The possession of Fitschen and Phillips, the Court concluded, in no way stood for or represented possession by Noyes, and it was therefore entirely sufficient to meet the requirements of adverse possession. Fitschen and Phillips had always held the land at issue in a completely independent manner, and they had never acknowledged or recognized the ownership interest of Noyes in any way, so rather than serving to sustain or otherwise benefit the legal interest of Noyes in the land, their possession had operated as an ouster of any legal interest he may have had in it. Furthermore, the Court stated, Fitschen and Phillips had held the area in question by virtue of both a valid claim of title and valid color of title, both of which the Court described in a detailed discussion of the meaning and effect of those two elements of adverse possession. For those reasons, the Court upheld the ruling of the lower court, silencing the long dormant and exceedingly stale claim that had been put forth by the estate of Noyes, and confirming the validity of the rights of Fitschen and Phillips to all of the land north of the agreed boundary, as fenced and documented in the 1885 deed. Its interesting to note that this case could have been decided on other grounds with at least equal justification. The 1884 deed from Roach to Noyes was clearly intended to operate only as a mortgage, and had been obviously treated only as such by all of the parties, so it could have been ruled that Noyes had never acquired any interest from Roach in the first place, on that basis. In addition, the exception made by Noyes in his 1888 deed to Roach was clearly not intended by Noyes to reserve any ownership rights to the area described in the exception, his subsequent conduct, completely ignoring the land in

question, amply demonstrated that he had intended the exception to serve only as his recognition of the fact that the excepted area was already owned by Phillips and the elder Fitschen, and that he was therefore not conveying it to Roach. Ironically, the exception made by Noyes turned out to be the cause of the whole controversy, despite the fact that Noyes had intended it to represent a clarification, and he would have never thought to assert a claim to the exception area himself while he lived, but of course his personal knowledge was lost upon his death, when his legal rights passed into the hands of others. Moreover, had Noyes never made any deed exception at all in 1888, this problem would have never developed, because by reconveying the entire Minnie Jane to Roach, rather than causing a conflict with the title of Phillips and the elder Fitschen, as Noyes apparently feared, his 1888 deed would in fact have enabled Roach's part of the 1885 conveyance to become whole and fully effective, through the doctrine of after-acquired title, securing full title to the grantees of Roach and Wampler, as intended by all.

KURTH v LEJEUNE (1928)

As we have already repeatedly seen, the Court generally prefers to resolve boundary disputes by upholding and enforcing the concept of justifiable reliance upon monumentation, embracing monumentation that can be shown to be unquestionably original in character, or items which can be shown to be legitimate physical evidence of an original survey location, with particular zeal. The right of reliance upon corners or lines marked on the ground during an original survey has always been well understood, by both settlers and judges alike, since it has a logical basis in the process of boundary creation on the ground, which forms the basis of the PLSS, serving all rational and practical purposes related to the development and use of land. Although reliance upon documentary evidence can be very useful and important, it is well understood to be subject to all of the errors, mistakes, inconsistencies and ambiguities that so frequently find their way into documents of all kinds, including deeds and plats of course, and is therefore quite justifiably treated at law as a distinctly secondary form of reliance. While physical monuments set on the ground can and certainly do embody manifest discrepancies as well, once they are placed and employed for their intended purpose, which is ultimately the productive use of the land, the

right of reliance upon those monuments becomes primary in the determination of boundary locations, effectively eliminating all the vagaries and conflicts that inevitably plague attempts to reconcile descriptions originating from various sources, in the eyes of the Court. This case provides a classic example of the Court's inclination to honor a monument that has been used by land owners for productive purposes as controlling, even in the face of serious evidence tending to call the monument into doubt. Here we see the Court place the critical burden of proof squarely upon the party attacking the validity of an allegedly original monument, which typically operates to make it virtually certain that the monument will prevail in the end, because there is nearly always conflicting evidence regarding the validity of any monument that was set several decades before the outbreak of a boundary dispute. Here we also see very clearly illustrated the great reluctance of the Court to take the position, or accept the suggestion, that an original monument location has been utterly lost, while some physical evidence of it remains in existence, since the Court is quite aware, as are all surveyors, that measurements will virtually never serve to accurately restore an original monument location, making evidence of physical use of the land in reliance on the original monument in question, the most satisfactory means of boundary resolution. The preference of the Court seen here, for a survey in which a monument supporting the reliance of a number of settlers is adopted, over a survey rejecting the same monument in preference for a measurement based boundary in a dramatically different location, demonstrates that the Court clearly favors acceptance of monuments, over rejection and correction of boundary errors, as a general policy. As is well evidenced by decisions such as this one, while its true that proportional measurements have their basis in equity, the Court will not approve their use, when physical boundary evidence is present, supporting and protecting existing land rights established in good faith, by pointing to the boundary location that is truly most equitable.

1911 - Jaraczski and Churlien were settlers who established homesteads in the same section at this time. They both selected land in a certain Section 24, which had originally been surveyed by the GLO in 1873, Jaraczski taking the northwest quarter and Churlien

taking the entire east half of the section. There were already other homesteaders living in the sections lying directly to the north and the east, who had located certain original GLO monuments marking their boundaries, and they showed the monuments that they had found to Jaraczski and Churlien, to help the newcomers understand where their boundaries were. Both Jaraczski and Churlien obtained patents for their respective quarters at unspecified times during the ensuing years, and their ownership of their respective parts of the section was never questioned.

1912 - Jaraczski's son built a fence running southward from a stone that had been identified by the homesteaders as the north quarter corner of Section 24, intending the fence to represent the east boundary of his family's land. How far south the fence ran, and how the direction of the fence was determined, are unknown.

1913 - Jaraczski and Churlien petitioned Chouteau County to build a road for them, so they could reach the nearest public highway, which was one mile to the east of the northeast corner of Section 24. The county built the road as requested, running westward from the existing public road to the northeast corner of Section 24, and then continuing along the north and west lines of the northeast quarter of Section 24, terminating the road at the center of that section. Churlien then built a fence along the east side of the road.

1916 - Jaraczski conveyed her quarter to her son, who was the owner of record for only one month, before conveying it to the father of the Kurth brothers and Kensey. Kurth and Kensey had a survey of the northwest quarter done at this time, and during the survey they and their surveyor were shown the monuments marking the corners of the quarter by Jaraczski's son, and their surveyor adopted the existing stone monuments as valid originals.

1917 - Churlien conveyed the east half of the section to Le Jeune.

1919 - Jaraczski's son died.

1921 - The father of the Kurth brothers conveyed his interest in the northwest quarter to Ryffel, who after just 6 months conveyed it to

Kurth's sons. At this time, Le Jeune learned, by unknown means, that the stone which had always been accepted and treated by all of the homesteaders, and also by the county when constructing the road, as the north quarter corner of Section 24, was over 600 feet east of the midpoint between the northerly corners of Section 24. She felt that this situation unfairly deprived her of land that was actually part of her half of the section, so she wrote to the surveyor general, asking for the quarter corner location to be corrected. The surveyor general quite naturally declined to comply with her request, so she turned to the county surveyor, who at her request verified, by means of measurement from the north section corners, that the stone in question was too far east, and set another stone on the section line, over 600 feet to the west of it, at the midpoint of the section line. There is no indication of whether or not the county surveyor made any effort to confirm the validity of the location of the existing stone by using the GLO field notes, or by any other means. From the midpoint of the section line, also in response to Le Jeune's request, he then ran a line half a mile southward, and Le Jeune then built a fence on the line thus marked by the county surveyor.

1926 - The Kurths and Kensey had initially made no objection to the relocation of the north quarter corner, and had allowed Le Jeune to occupy and use all the land east of her new fence, but at this time they decided to challenge the county surveyor's new north quarter corner, so they filed an action against Le Jeune, seeking to have her fence removed, and to have the quarter corner monument that had been accepted and relied upon by the original settlers declared to be the true quarter corner location.

The Kurths and Kensey argued that the stone located over 600 feet east of the midpoint of the section line in question was the true original quarter corner monument set in 1873 by the GLO, and that it had been undisturbed and was still in its original location, so it should be honored as the true quarter corner, despite the fact that it had evidently been set too far east. Le Jeune did not argue that the original stone had been incorrectly set during the original survey, instead she argued that Jaraczski's son had found the stone in its original location and moved it over 600 feet to the east, just

prior to fencing his mother's land in 1912, in an effort to steal some of Churlien's land, and therefore the current location of the original stone could not control, so the line marked by the county surveyor actually represented the true quarter line and the west boundary of her land. The trial court allowed certain evidence submitted by Le Jeune, supporting her assertion that Jaraczski's son had moved the monument in question, to be introduced, and finding that evidence convincing, the jury produced a verdict in favor of Le Jeune.

Since the outcome of this controversy clearly hinged entirely upon the identification and location of the original GLO monument marking the north quarter corner of the section in question, the Court wisely began its analysis of the situation by recognizing that the expectation that all quarter corners had actually been located halfway between the adjoining section corners is an unrealistic fallacy. When she first discovered the distance discrepancy in the north line of the section in 1921, presumably having been informed about it by someone who had seen the survey that was done for Kurth and Kensey in 1916, Le Jeune had initially reacted by charging that the stone in question must have been incorrectly set during the original survey in 1873. When her request to have this apparent original survey error corrected was rejected by the GLO, she had learned that measurement and monumentation errors made during original GLO surveys are not correctable, so she had dropped her effort to get the stone moved on that basis, and commenced to attempt to get it moved on the alternative basis that it was no longer where it had been originally set. As the Court noted, a surveyor had testified that the stone that had been relied upon by the homesteaders bore the markings of a typical GLO quarter corner, so Le Jeune evidently realized that the only way she could successfully impeach the stone was on the basis that it had been moved, and the death of Jaraczski's son appeared to provide her with an ideal opportunity to accomplish that, since he was no longer available to testify as to what he had done. For that purpose, Le Jeune had obtained affidavits and testimony of several parties, including Jaraczski's daughter, who stated that they believed that Jaraczski's son had moved the stone in question. Jaraczski's daughter testified that her brother had told her in 1914 that he had moved the stone before building the fence in 1912, and others stated that they had been present when Jaraczski's son had died in 1919, and that in a deathbed confession he had admitted moving the stone. The Court however, being much more experienced than either the jury or the trial judge with such devious attempts at deception related to obscure technical matters such as surveys, was not about to allow this flagrant violation of the

rule of monument control to stand. There was also extensive testimony that had been provided by several nearby homesteaders, who had seen the stone in question years before the Jaraczski and Churlien families had arrived on the scene, and all of them had verified that the stone had never moved, and that there was no reason to suspect that it was not still located where the GLO surveyors had placed it in 1873. The Court decided that the evidence provided by the testimony of the surrounding land owners was more reliable than that provided in support of Le Jeune's position, which amounted to hearsay that was highly suspect, due to the fact that it was all completely dependent upon statements attributed to a party who was deceased, and therefore no longer available to speak for himself. Quoting from its decision in the Myrick case 9 years earlier, the Court reiterated that:

“... the parties must be governed by the monuments on the ground ... Before courses and distances can determine the boundary, all means for ascertaining the location of the lost monuments must first be exhausted ... When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.”

Once again, the Court had emphasized the primacy of the principle of monument control, as the fundamental basis of the PLSS, and the ultimate source of reliance for all of the people served by it. The homesteaders, the Court held, had the right to rely completely upon the original monuments on the ground, just where they had found them, and allowing such locations to become the subject of subsequent corrections based upon measurement discrepancies would amount to a clear injustice that would be severely and unreasonably disruptive to communities everywhere. Physical monuments, once relied upon and put to productive and beneficial use, the Court indicated, must be presumed to have been legitimately established, discovered and used, therefore proof that they have been tampered with in some way must be conclusive, in order to justify overturning or striking down the reliance that has been placed upon them. Since the accusations against Jaraczski's late son that were launched by Le Jeune fell far short of anything resembling certainty, the Court ruled that the affidavits and testimony supporting Le Jeune's case had been improperly introduced and considered, and had prejudiced the members of the jury against the existing stone, presumably adversely influencing their decision regarding its validity.

Fully convinced that the stone in question was still in its original location, and that it therefore controlled the quarter line location, the Court reversed the ruling of the lower court, ordered Le Jeune's husband to restore the land in question to the Kurths and Kensey, and ordered a new trial to be held to determine the amount of the damages to be paid by Le Jeune to the Kurths and Kensey for Le Jeune's illegitimate use of the land at issue. In so ruling, the Court had again made it clear that measurements do not represent a valid basis upon which to establish boundaries, in any case where any evidence of an original monument location still exists, and it had effectively struck down the quarter line that resulted from the survey performed by the county surveyor, who was operating on the theory that the original stone was invalid and could not control, simply by virtue of having been set using improper measurements. Although the survey performed by the county surveyor was clearly based on an erroneous concept, there was no suggestion that he was guilty of any negligence or subject to any liability, even though his quarter corner had proven to be without merit or value, and was therefore found to be unworthy of judicial support, since the veracity of his work was not an issue that had been specifically put into play in this case. Nevertheless, just as in the Myrick case, the Court had strongly demonstrated that it is not inclined to view any behavior that is disrespectful toward original monuments with approval, and this solemn warning to those who consider measurement evidence superior to physical evidence of an original survey, or who consider the correction of original errors to be an appropriate objective, is one that we will see repeated numerous times over the ensuing decades.

NEMITZ v RECKARDS (1934)

The next boundary case taken up by the Court proved to be quite similar in principle to the Kurth case, although it plays out under a very different set of circumstances, once again focusing on proper treatment and respect for original GLO monumentation. Again here we find the Court confronted with evidence of substantial error manifested in the work of the original GLO surveyors, naturally causing great consternation on the part of those settlers, such as Le Jeune in the Kurth case and Nemitz in this case, who found themselves with quite a bit less land than they thought they were getting, presenting an equitable challenge to the principle of monument control, and forcing the Court to decide just how stringently that principle

would be applied. From this case we also learn the potential significance of unrecorded surveys, and we again note the impact of the testimony of land surveyors, as both of these factors prove to be highly relevant to the outcome here. Although the great importance of surveys and surveyor testimony as evidence is clear and undeniable, it must also be realized that the intent of a surveyor is not controlling, the only controlling aspect of the work of any surveyor is what the surveyor actually did on the ground, making the monuments that were set by the surveyor the sole controlling factor derived from an original survey, regardless of whether or not those original monuments were set where the original surveyor intended to set them. The case we are about to review, like the Kurth case, provides the opportunity to contrast the varying approaches of two retracement surveyors, and observe which surveyor's work finds favor in the eyes of the Court, as it evaluates and rules upon the credibility of their work, in relation to an original survey. In the Kurth case, the mistake made by the surveyor on the losing side was his decision to deliberately ignore an existing original GLO monument, based on the fact that he had found it to be out of position, which made him feel justified in attempting to establish a new quarter corner at the theoretically ideal position. In the case we are about to review, the mistake made by the retracing surveyor on the losing side is not deliberate, instead he simply fails to find the original monument at all, because he restricts his search for it to a limited area where he expects it to be, and he also fails to do sufficient research to find a recent survey that would have been of assistance to him, yet these mistakes lead to the same result as that seen in the Kurth case. The same theme is revealed in the mistakes made by these two surveyors, as they both over estimated the importance of measurements and under estimated the importance of respecting existing physical evidence. In addition, as these decisions of the Court show, both surveyors were fundamentally mistaken in their view of the role of a retracement surveyor, since both of them saw their own role as a corrective one, rather than recognizing that the objective of the retracement surveyor is simply to respect and document all existing physical evidence that serves to protect existing land rights. Consistent with it's position in the Kurth case, here again we watch as the Court disapproves and discards the efforts of a retracement surveyor to establish a different corner location, which the

surveyor erroneously sees as being the correct location based upon measurements, again teaching the lesson that the task of the retracement surveyor is not to use his measurement skills to relocate the corner to where it was intended to have been placed, but rather through diligence to discover and document the location at which it was in fact originally placed. The Court thus makes it very clear that the surveyor's most valuable tool is not the ability to measure well, it is the surveyor's professional knowledge and diligence in finding original evidence.

1910 - Reckards acquired the east half of Section 17 in a certain township, by means of a contract for deed from the State Board of Land Commissioners. He decided to build a fence along the western boundary of his land, so he went looking for the north and south quarter corners of the section. While looking for the south quarter corner, he saw an old fence that ran south for about two miles, through Sections 20 & 29, and he found the original GLO monument marking the south quarter corner of Section 17 at the north end of that fence, so he built his fence running northward, to the north quarter corner which he had also found, from that point. Subsequently, he also obtained a contract for deed from the Board for the northwest quarter of Section 20.

1911 - It came to the attention of the Board that the 1882 GLO survey of the township, in which the Board had extensive land holdings, was substantially defective, so the Board authorized a resurvey of the township to be performed under the direction of the state engineer, for the purpose of determining the true acreage of the many aliquot parts that the Board had contracted to convey to various settlers, such as Reckards.

1912 - The resurvey ordered by the Board was performed and a plat showing the existing original GLO monuments found during the resurvey, along with revised acreage figures, was produced and approved by the Board. This resurvey plat bore the names of the state engineer and the deputy surveyor who had performed the field work, but it bore no official stamp and no statement of certification of any

kind.

1913 - The resurvey plat was officially filed in the records of the state land office, and in accordance with the results of the resurvey, the contract for deed held by Reckards for the northwest quarter of Section 20 was revised, to indicate that it contained 175 acres, rather than 160 acres as originally platted by the GLO. There is no indication that this plat was ever filed in any county records.

1915 - The northeast quarter of Section 20 was patented by the United States to Nemitz, and his patent described the land in the typical manner, with reference to the original GLO plat of the township.

1916 to 1933 - At an unspecified time during this period, Nemitz had a survey of Section 20 performed by a civil engineer named Chapman. Based on his own measurements, and relying solely on the original GLO plat and field notes, Chapman disregarded the point between Sections 17 & 20, which had been found and used by Reckards as the quarter corner when building his fence in 1910, and set another quarter corner at the midpoint of the section line in question, which was about 450 feet west of the monument that had been adopted by Reckards. At an unspecified time subsequent to the Chapman survey, another survey of Section 20 was performed by another civil engineer named Wells. Who ordered the Wells survey is unknown, it may have been ordered by Reckards in reaction to the Chapman survey, nonetheless Wells evidently performed a more diligent search for the original quarter corner monuments than Chapman had, and he found them. Wells found the monuments along the same old fence line that was seen by Reckards in 1910, Chapman had missed them because the old fence was located only about 1900 feet west of the east line of Section 20, so Chapman had ignored it and had only searched for the quarter corners several hundred feet further west, at a distance of a full half mile from the east line of Section 20. Whether either Chapman or Wells were aware of the existence of the 1912 resurvey is unknown, but the work of Wells was in harmony with the resurvey, while that of Chapman was not. Nemitz obviously supported the Chapman survey, but Reckards insisted that the existing fence,

running between the original quarter corners, was the west boundary of the quarter acquired by Nemitz, so Nemitz filed an action against Reckards, seeking to have the Chapman survey declared to be correct.

Nemitz argued that since his patent was based upon the original GLO plat, and not the resurvey done by the State Board, Chapman had correctly ignored the resurvey and monumented the boundaries of the quarter sections in question in accordance with the original GLO plat and field notes. He further argued that the Chapman survey should control the location and boundaries of his land, because both the resurvey plat and the drawing of the Wells survey were unofficial documents, which amounted to unacceptable extrinsic evidence, so they should not be considered valid evidence or allowed to control the boundaries of the land that he had acquired. Reckards argued that the relevant original GLO monuments had all been found during the resurvey, and they had not been relocated or altered in any way during the resurvey, and they had been confirmed by the Wells survey, so the original monuments should control the boundaries of all parts of all the sections in the township, even though the original quarter corners had not been properly set at the midpoints of the section lines as intended. The trial court visited the site and agreed with Reckards that the original monuments must control, regardless of the fact that the quarter corners were several hundred feet out of their intended positions, and so ruled in his favor, leaving Nemitz with a quarter section that was only about 1900 feet wide east to west.

Several surveyors evidently testified in this case and the Court took their testimony quite seriously and considered it with great appreciation for their efforts, since technical issues that come within the realm of expertise held by land surveyors made up the core of this controversy. It had become clear, the Court observed, from the pattern formed by the original GLO monuments that had been found during the 1912 resurvey conducted at the request of the State Board, that the 1882 GLO survey subdividing the township in question had contained substantial systematic measurement error. There were evidently measurement shortages discovered throughout the township, which were fairly uniform in nature, indicating the persistent presence of a consistent error, which resulted in numerous quarter sections displaying similar shortages in their dimensions. This pattern of evidence, which a survey of only one section could not have revealed, was important and impressive to the Court, because it strongly supported the authenticity of the monuments that had been found far out of their expected positions. Had such an extensive resurvey not been done, this distinctive measurement

pattern would not have been evident, and an assertion that some monuments must have been moved could have easily gained traction and seemed quite credible, potentially leading to rejection of some or all of the monuments in question, on the basis of disturbance. The evidence provided by the resurvey, the Court indicated, was highly valuable, since it dismissed the notion that monuments might have been moved, unless it could be imagined that someone had moved several monuments, that were spread out over a distance of several miles, all roughly the same direction and distance, so the resurvey plat was a key piece of evidence that had been properly introduced and employed as such. No suggestion was made that the conditions indicated fraud or gross error in the original survey, the evidence simply revealed that the original GLO surveyor had not done a particularly good job of measurement, which was quite understandable, so there was no valid basis upon which to ignore or disregard the existing original monuments. Other surveyors, aside from Wells, corroborated the validity of the original monument locations depicted on the resurvey plat, and one witness, who had built the portion of the old fence between the quarter corners in Section 29, testified that he had seen the original monuments as early as 1894, all of which the Court found to be highly persuasive evidence, favoring the validity of the disputed monument adopted by Reckards. No monuments had evidently been set during the 1912 resurvey, it had amounted only to an exercise in recovery and documentation of existing monuments, conducted to discover the extent and magnitude of the measurement errors in the original GLO survey, yet it was pivotal evidence pointing toward the application of the principle of monument control. The Court summarized its decision to treat the monuments in question, including the ones in Section 20 specifically disputed by Nemitz, as conclusive, by stating that:

“... the boundaries or monuments here are somewhat inconsistent with the measurement as shown by the government survey. Notably the field notes of the government survey show the width of the section from east to west to be at least 600 feet more than it actually measured on the ground. This fact is borne out by all the several surveyors ... the quarter corners of Section 20 were established by the United States government at the points indicated ... This was a question for the trial court, and it was answered in the affirmative.”

Chapman, it appears was the only one of the several surveyors

involved who had not gotten the message clearly sent by the decisions of the Court in the Myrick and Kurth cases, discussed previously herein, that the principle of monument control is mandatory and binding upon land surveyors, to the same extent that it is binding upon land owners. The position maintained by Nemitz was based upon his notion that the resurvey, having been conducted only under the authority of the State Board, rather than by the GLO, could have no impact on his rights. He was correct in that general premise, but he failed to realize that the resurvey did not represent any change or revision to the GLO survey at all, it simply showed the real locations of the GLO monuments, which controlled with equal force, under either the GLO plat or the resurvey plat. Chapman made two common fundamental mistakes, in failing to do sufficient research to discover the existence of the resurvey plat, and failing to discover all the evidence on the ground, specifically the existing original monuments. Presumably, if he had the benefit of having the resurvey plat in hand, he would have been able to locate the original quarter corners, despite their dramatic mislocation, and he would have accepted them as all the other surveyors who had seen them had done. What Nemitz, and perhaps Chapman as well, failed to understand, was that the plat and field notes cannot control in the presence of any existing physical evidence of an original survey, regardless of the presence of measurement blunders made by the original surveyor, because the intent of the original surveyor is irrelevant, all that matters is the existing physical evidence of his actual footsteps on the ground. The role of the surveyor, as the Court has repeatedly held, is not to correct past mistakes, but rather to recover, document and perpetuate all existing physical evidence of the original survey. Since Chapman had completely failed in that regard, his work was without value, and the case of Nemitz was lost, so the Court upheld the lower court decision declaring the existing fence to represent the west boundary of the quarter acquired by Nemitz. Despite his errors, there was no suggestion that Chapman was negligent or bore any potential liability, his ill informed opinion regarding the boundary location in question was simply overwhelmed by those of his more astute colleagues. Testimony illuminating the meaning and significance of physical evidence, and supporting its validity, had once again proven to be key to the resolution of this conflict, as was the commendable integrity of Reckards. Although Reckards stood to gain land in Section 20, as a result of winning his battle with Nemitz, by respecting the original monuments that he had found, he actually lost more land in Section 17, by that same token, than he gained in Section 20. Reckards had been aware since 1910 that he had gotten shorted on his purchase of the east half of Section 17, to the same extent that Nemitz

was shorted by the mislocated original monuments, yet Reckards had accepted the monuments as they stood, and even argued in favor of their validity, so it appears that the least that can be said of him is that he must have been an admirably honest man.

GROSFIELD v JOHNSON (1935)

Shortly after disposing of the boundary controversy reviewed just previously in the Nemitz case, the Court took on another case presenting yet another variation of the same fundamental issues, involving PLSS boundaries and the principle of monument control. While the Court had already made its support for original monumentation in general quite clear in previous cases by this time, it had thus far dealt with issues specific to quarter corners only in the context of distance, clarifying that in the absence of evidence of a truly fraudulent survey, no amount of distance error alone is sufficient to justify rejecting an original monument, whether it might be a section corner, a quarter corner or otherwise. The case we are about to review however, provided the Court with the opportunity to express and apply the same principles in the context of alignment, since it presented a boundary conflict between owners of land in different sections, rather than owners of land in the same section, as in the Kurth and Nemitz cases. In this case, we will see what may very well be the strongest example of superior diligence in survey work that has ever been brought before the Court, coming about as close to being utterly conclusive as survey evidence can ever come, and we will note how appreciative the Court is of the highly valuable evidence provided by the prevailing surveyor. By contrast, there is also a surveyor on the losing side in this case, and although his treatment of the circumstances that he found, upon arriving to survey the section line in dispute here, can be characterized as typical of those surveyors who are inclined to rely upon measurements as the basis for their work, rather than seeking out all possible evidence, his work appears very weak and amateurish, when compared to the truly professional efforts of the surveyor who comes along next and applies his superior skills to properly resolve the situation at hand. As will also be noted, this scenario represents a good example of the discovery of original survey work that was performed using a

rogue method, yet in accord with the position on the conclusiveness of original monumentation that it had consistently taken in previous cases, the Court adheres to the principle of monument control, and disregards the absence of superior quality in the work of the original GLO surveyor. The position thus maintained by the Court also accords perfectly with the decisions of the United States Supreme Court on the subject of reliance upon all duly authorized work of the federal government. Every citizen has the right to rely fully on official federal products that have been created expressly for purposes of public reliance, which of course includes documents such as GLO plats and federal land patents, so the approval of a township plat, combined with the subsequent issuance of a patent making direct reference to that township plat, creates a firm right of reliance upon all the monuments set during the original survey of the township thus created, by all those who subsequently acquire land in that township. Therefore, PLSS entrymen and their successors have the unqualified right to rely on original survey monuments wherever they find them, and they are under no obligation to order another survey, either to test the precision or correctness of the original survey, or to correct any errors contained in it, before proceeding to develop their land in reliance on those monuments, and this is the basic right that the Court endeavors to rigorously protect here.

1915 to 1925 - On unspecified dates during this period Grosfield and Johnson acquired land located in adjoining sections, in a township that had originally been surveyed by the GLO in 1892. Grosfield acquired all of Section 5 and Johnson acquired part of the east half of Section 6. Who owned these lands prior to the arrival of these parties is unknown, but they were evidently not original patentees, because prior to the arrival of either of them, a fence had been built on or near the section line, presumably by a previous owner or owners of these sections. The fence ran northward on a straight line, from the southwest corner of Section 5, for about three quarters of a mile to the base of a hill, at which point it angled to the northeast for an unspecified distance ascending the hill, then upon reaching the top of the hill, it angled to the northwest, and from that point it ran in a straight line to the northwest corner of Section 5, so it was comprised

of three straight portions with two distinct angle points.

1926 - Grosfield and Johnson discussed whether or not any portion of the fence was really located on the section line, but no definite conclusion or agreement was reached and nothing was done. The section corner locations at the north and south ends of the fence were known to both parties and were undisputed, but the location of the quarter corner lying somewhere along the fence was apparently unknown to either of them.

1931 - Johnson had a survey of the section line done by a civil engineer named Busse. Busse found a round stone marked as the quarter corner at a point along the fence line. He declined to accept this monument however, for three reasons, because it was not the size or shape called for in the field notes, because the bearing trees that were called for in the field notes were not present, and because his measurements indicated that it was 107 feet west of a straight line between the section corners. Having rejected the round stone as a possible existing quarter corner monument, Busse set a new one to the east of it, on the line between the section corners.

1932 - Johnson undertook to move the old fence eastward, to the line surveyed by Busse, but Grosfield objected and employed another surveyor named Wolvard to survey the section line in question. Wolvard apparently surveyed not only the section line in question, but also the other section lines between Sections 1 through 5 in the township, in order to closely examine the work of the original GLO surveyor. He determined by this means that the comparable quarter corners lying to the east in the township deflected similarly to the west of a true line between their corresponding section corners, revealing a repetitive pattern in the original survey work. He concluded from this pattern that the GLO surveyor had stopped running the section lines at each of the quarter corners in question, and had never continued northward to the township line to close out and verify the position of the quarter corners that he had set. Then returning to the quarter corner at issue, Wolvard excavated at the locations indicated in the field notes for the missing bearing trees and found old roots matching

the type of tree called out in the notes, so for these reasons he accepted the stone under the fence line as being the true original quarter corner monument, despite the fact that it was smaller than the dimensions called out for it in the notes. Johnson proceeded to complete the relocation of the fence in spite of this, so armed with the information provided by Wolvard, Grosfield filed an action against Johnson, seeking to have the existing stone declared to be the quarter corner, and to have Johnson compelled to restore the fence to its original location.

Grosfield argued that the work of Wolvard had clearly proven that the existing stone was the true original quarter corner, and that the original fence had correctly marked the southerly half of the boundary between the two sections in question, and that Johnson had wrongly relocated the fence onto Grosfield's land and should be required to remove it and replace it in its former location. Johnson argued that the work of Busse had shown that the existing stone was not the original quarter corner monument, or that if it was the original monument it had been moved, so it should not be treated as a valid or controlling original monument, and the line established by Busse should be declared to be the true section line. The trial court visited the site and viewed the conditions on the ground and ruled in favor of Grosfield, holding Johnson responsible for returning the fence to its prior location, except for the small portion that had been inside Section 6 which Grosfield was to move to the true line, and adopting the existing stone and the angled section line as the true boundary between the sections in question.

From the unusually detailed evidence presented in this case, the manner in which this boundary controversy had developed between the litigants was very clear to the Court. The quarter corner in question had been set by a GLO surveyor employing a method that amounted to an unauthorized shortcut, but the essential fact was that he had completed the primary aspect of his assignment, which was to actually set the required monument for the original settlers to rely upon, and the original patentees had done so, rendering the method that the original surveyor had used, and the lack of care or precision manifested in his work, both irrelevant. The original entrymen had evidently properly located the original monuments marking both the section corner at the south end of Sections 5 & 6 and the quarter corner of 5 & 6, and they had properly run their fence directly northward from the section corner to the quarter corner with no difficulty, since the land was relatively flat in that area. Since they could not see the

section corner to the north however, due to the presence of the intervening hill, they had naturally presumed that the section line extended straight to the north, and therefore they had continued building their fence past the quarter corner monument on the same line, until reaching the base of the hill, at which point they had deviated to their right, to follow the path of least resistance up the hill, as dictated by the topography, and then upon finally seeing the north section corner from the top of the hill, they had corrected their direction and built the fence running straight for the remaining distance toward their destination point. As a result of this simplistic fence construction procedure, although the southerly half of the fence properly followed the true boundary between the sections, the part of the original fence just north of the quarter corner had been built to the west of the section line, diverging into Section 6, and the northerly portion of it, running up the south side of the hill and down the north side of the hill, had been built in Section 5. The previous owners of the land were presumably aware of this situation, but they had apparently considered the relatively minor deviation of the fence from the section line to be too insignificant to merit rebuilding the fence, and had chosen to let the fence stand, just as it had been built, knowing that the northerly half of it did not represent their mutual boundary. This scenario could have been envisioned, and the matter at issue could have been resolved with the same result through testimony, even without the information provided by the Wolvard survey, but the Court was very impressed with the depth and breadth of the investigation performed by Wolvard, and his outstanding work in gathering all of the available evidence, served to clinch this victory for Grosfield. The Court summarized the important items that it considered very relevant and quite helpful in making its decision, which were neglected or overlooked by Busse, but which were properly addressed by Wolvard, emphasizing the value of the diligence that Wolvard had brought to his work as follows:

“... he retraced several of the section lines in that vicinity ... he found a considerable variation ... with respect to several similar lines in adjoining sections ... his conclusion was corroborated by McLeod who was at one time a government surveyor himself ... he did find some tree roots ... such trees as were described in the field notes were short lived, and they had probably died since the survey was made ... he did not attach any particular importance to the variation in the size or contour of the stone ... he explained the location of the stone in relation

to Swamp Creek ... and accounted for the difference in the distance ... by the fact that the channel of the stream had been changed by erosion ... so that it had thrown the field notes out of proportion ..."

Wolvard had thought of everything, he had even verified the passing calls found in the field notes, and rationally explained the inconsistencies in them, he had done a truly superb job of covering every possible issue bearing upon the location and integrity of the existing quarter corner monument, by accounting for all of the physical evidence that was available to be gathered and analyzed by a land surveyor, and making wise use of all of it. He had dealt with everything mentioned in the field notes, including the bearing trees, the alleged dimensions of the original monument, and the topographic calls along the section line, and most impressively, he had gone well beyond the call of duty and surveyed several miles of other section lines, in order to be able to confidently and definitively support his opinion that the stone in question was in fact the original monument, despite its mislocation in terms of alignment. Busse had made the fundamental mistakes of failing to discover all of the available evidence, and failing to understand that the presence of measurement discrepancies does not constitute a valid basis for the rejection of an existing monument. The difference in the work of the two men was stark and dramatic, indicating two distinctly different professional philosophies, Wolvard had set out to prove the validity of the existing monument, while Busse had made no such commitment and was content to dismiss it without any trouble or care. Both surveyors had used the original field notes, but in very different ways, Busse had used the measurements and dimensions in the notes to justify ignoring the existing monument, but Wolvard had correctly taken a broader view, and rather than focusing only on the numbers, he had used the totality of the information provided in the notes to prove the validity of the existing monument, demonstrating the superior skills of a truly prudent surveyor. The diligence of Wolvard was quite justifiably applauded and rewarded by the Court, which cited his work as the basis for its decision to uphold the lower court ruling in favor of Grosfield, verifying that the boundary between the sections ran through the stone monument in question marking the original quarter corner, despite the resulting deflection of the line, and not along the straight line staked by Busse and used by Johnson. In so deciding, while not condoning the use of a shortcut in the original surveys, the Court concluded that the presence of such poor methodology did nothing to diminish the right of the settlers to rely fully upon the GLO monuments that

they had found on the ground, because the settlers had no responsibility to verify the work of the original surveyors before making use of it to establish their boundaries and develop their land. The PLSS was designed, the Court recognized, to allow rapid and efficient settlement of the land, while at the same time creating stability through the permanence and certainty of location provided by physical monumentation, and section lines were never intended to be subject to change based on the subsequent discovery of past errors. The example set herein by Wolvard is a truly sterling one, that offers a most admirable model for all subsequent surveyors, and the failures of Busse warn of the consequences of failing to find all the evidence, and failing to make proper use of all available information. Despite the obviously incomplete job done by Busse, and his mistaken conclusion regarding the quarter corner at issue, the Court made no suggestion that he might bear any liability, his erroneous corner and line were simply nullified by the decision of the Court.

JEFFREY v TROUSE (1935)

While the last few cases that we have reviewed all featured conflicting surveys, this case provides insight into the kind of problems that can arise in the absence of any survey. In a contest involving boundary or encroachment issues between adjoining land owners, if one of them obtains a survey and the other does not, the party who ordered a survey undoubtedly has a distinct advantage, not only because of the facts shown by the survey, but also because obtaining a survey and respecting the boundaries depicted on the survey shows good faith on the part of the land owner who ordered the survey. Since every survey performed by a professional land surveyor is presumed to have been done with complete objectivity, and without favoritism toward the interests of any land owner, regardless of who paid for the survey, a land owner who provides a survey as evidence supporting his claim is seen by the Court as having acted in good faith in so doing. When the contest is between a grantor and a grantee however, as in the case we are about to review, the additional question of which party should be held responsible for ordering a survey of the land being conveyed enters the picture. While neither party bears any absolute obligation to order a survey, each of them bears some degree of risk if no survey is obtained, and if

problems that would have been revealed by a survey subsequently arise, the failure to have a survey done is likely to become a major source of regret. While the grantee always bears the legal burden to inquire with the grantor, or other appropriate parties, about the true legal character and status of everything that is visible or apparent on or near the subject property, the grantee has no obligation to order a survey, unless some apparent issue remains unresolved by such inquiry. If the grantor expressly declines to verify or validate the existing conditions on the property in question, with respect to such items as boundary locations or possible encroachments, or simply says nothing to the grantee about such issues at all, then the burden on the grantee is elevated, making it highly prudent for the grantee to order a survey, because the grantee has been put on notice that problems involving the property may exist. If the grantor voluntarily provides any information to the grantee however, the burden on the grantee is alleviated, and the grantor takes on potential liability, for anything incorrect or misleading in the information provided to the grantee. A grantor is always presumed to be fully familiar with his land, which of course includes knowing where his boundaries are located, so any incorrect information relating to boundaries provided by a grantor is typically seen by the Court as an act taken in bad faith, and the fact that the grantor was mistaken about his own boundaries due to his own failure to obtain a survey, does not absolve him of liability for providing misleading information to his grantee. In *Krutzfeld v Stevenson*, a 1930 mineral rights case, the Court had again upheld the concept that the fundamental burden to provide a conveyance that is clear, complete, correct and free of deception of any kind, falls squarely upon the grantor, whenever the grantor is the party responsible for the preparation of the documentation and related information supporting the conveyance, as is typically the case. Although misleading information provided by a grantor cannot alter existing boundaries of adjoining property of course, the risk taken by a grantor who makes any statements concerning boundaries, which are not supported by a survey, as we shall see here, is potentially very severe.

1929 - The Trouses, a husband and wife, owned and operated a campground known as Cabin City. Jeffrey came to the area looking

for an opportunity to acquire such an operation, and he was introduced to the Trousers by Bates, who was a real estate agent. The parties met at the site and the Trousers showed the property to Jeffrey and Bates, and in the process of showing them the cabins and other improvements, the Trousers also pointed out the approximate location of the boundaries of their property, leading Jeffrey to believe that all of the improvements shown to him were located on the subject property. The Trousers had acquired the property in 1912 and had occupied it ever since, but there is no indication that they had ever had it surveyed, or that they had any definite knowledge of where its boundaries were located. The Trousers also provided Jeffrey with an abstract of title, which contained an unofficial map or sketch of unknown origin, showing that all of the improvements were on the land owned by the Trousers. The Trousers agreed to convey their business, and the land that it was situated upon, to Jeffrey, so a contract for deed was executed, and Jeffrey occupied the land and began making payments on it, and he took over the operation of the business. The site was located in the east half of a certain Section 34 and was described as being 160 acres in size, so it was understood by all parties that the east line of Section 34 was the eastern boundary of the property. The terrain was apparently very rugged and wooded however, and there was evidently no visible indication of exactly where the east line of Section 34 was actually located on the ground.

1930 - By unknown means, Jeffrey either discovered or was informed that a substantial portion of the campground was actually encroaching into Section 35. Who owned the land in Section 35, that was allegedly encroached upon by the campground, is unknown, and there is no indication that any retracement surveys of the section line in question were ever performed, but it was evidently found that the section line was actually located approximately 160 feet west of the east boundary that had been pointed out to Jeffrey and Bates by the Trousers. A creek ran through the middle of the campground, with several buildings on each side of it, and Jeffrey had learned that the creek and several buildings on the east side of it were actually located completely in

Section 35. Jeffrey accused the Trousers of having misinformed him regarding the section line location, in order to induce him to buy the subject property from them, but the Trousers denied having said or done anything to mislead him about the location of the boundary in question, taking the position that the boundary location was entirely Jeffrey's problem.

1933 - Jeffrey filed an action against the Trousers, seeking compensation for his loss resulting from their erroneous statements to him concerning the location of the section line. There is no indication of the nature of the damages that Jeffrey actually suffered as a result of the discovery of the encroachment, its possible that the encroaching buildings were bulldozed by the owner of the land in Section 35, or Jeffrey may have been forced to move the buildings into Section 34, or he may have been required by the adjoining land owner to purchase additional land in order to keep the buildings where they were.

Jeffrey argued that as an innocent purchaser, he had the right to rely fully on the statements that had been made to him by the Trousers concerning their property boundaries, which they had made freely and voluntarily, and not as the result of any coercion on his part, and he was not responsible for their lack of knowledge or their failure to properly point out their own boundaries, so he was entitled to damages from them for his loss. The Trousers argued that they had never made any definite references to any specific boundary locations, and they could not possibly have done so, because they had never known exactly where their boundaries were themselves, so Jeffrey bore the burden of verifying the boundary location in question prior to agreeing to buy the land, and he was not entitled to any compensation from them for the consequences of his failure to do so. A jury returned a verdict in favor of the Trousers, and judgment was entered against all of the claims made by Jeffrey.

This case forms an interesting contrast when compared with several of the other cases we have reviewed involving boundary issues, such as the last previous case. In that case, Grosfield prevailed primarily because he had come to the legal battlefield very well prepared, with an outstanding survey in hand, which fully supported his position. In this case however, we see exactly the opposite situation, one in which neither party is well prepared, in part because neither party felt that it was necessary to obtain a survey.

Without any survey evidence, it is impossible to tell if any monuments existed, and if not, how the location of the section line in question was known with certainty, leaving open the serious possibility that the Trousers were actually correct about the boundary location, and therefore they never made any false statements at all. In this situation, due to the lack of any truly definite or decisive evidence regarding the boundary location in question, the Court is effectively forced to render a decision upon the basis of the meager evidence introduced, which the Court is never comfortable doing, very often leading to an extension of the controversy, as we will see here, which would have been unnecessary had a survey been done to resolve the boundary location with certainty. From the evidence presented in this dispute, it is not even possible to tell whether or not an encroachment problem truly exists, much less what the exact extent of any encroachment might be, so the Court was required to deal with the matter at face value, and produce a ruling based upon the presumption that an encroachment did exist. Since this presumption effectively reduces the conflict to a pure contest between the testimony of the grantor and the testimony of the grantee, it puts the grantor at a distinct disadvantage, because the grantor always bears the fundamental burden of preparing a conveyance that is clear and certain, and free of ambiguity, so the very existence of a conflict serves as proof that clarity and certainty were obviously not achieved when the conveyance was made. Therefore, as we will see from the outcome of this dispute, the party with the most to gain from a survey prior to conveyance, in terms of self protection, is typically the grantor, rather than the grantee. In this instance, although he had not proven that any boundary problem definitely existed at all, and he had not shown what, if any, actual damages he had suffered as a result of the mistaken boundary location, Jeffrey nevertheless found favor and sympathy in the eyes of the Court, because he was clearly a bona fide purchaser, having innocently trusted in the apparent good faith of his grantor. Operating on the presumption that a problem had in fact resulted from the statements made to Jeffrey and Bates by the Trousers, the Court imposed the same heavy burden upon the party functioning as the grantor that it had imposed in the Post case 23 years earlier, reiterating that:

“... the owner of real estate is presumed to know the location of his land; and if in attempting to sell it, he undertakes to point out its location or its boundaries he is bound to do so correctly. In other words, his representations amount, in effect, to warranties ...”

Forced to proceed as if a genuine encroachment conflict existed, due to the failure of the Trousers to ever obtain a survey of their land showing the true location of their buildings and other improvements in relation to the section line in question, the Court thus saw them as the parties responsible for the creation of the controversy at hand. The testimony given by the Trousers was at odds with that of both Jeffrey and Bates, who as an objective bystander, testified only that he recalled something being said in a general way about boundaries, but that was enough to raise a legitimate concern, in the eyes of the Court, and to lend some degree of validity to the charges being made by Jeffrey. The Court observed that even if the Trousers had actually made no specific representations about the exact location of the boundary in question, they could still be liable to Jeffrey for his subsequent problems, because they had said nothing to indicate to him that any of the improvements that they had shown to him were not located on the subject property, and they were fully aware that he believed that everything that had been shown to him was in fact on the subject property. So even if the Trousers had said nothing at all concerning their boundaries, the fact that they had allowed Jeffrey to leave the property with a mistaken impression about the status of the buildings and other improvements that he was proposing to buy from them, along with the fact that they had provided him with the misleading drawing included in the abstract, could be sufficient to result in liability on their part. The Trousers, the Court noted, had agreed to provide Jeffrey with a warranty deed, in the full knowledge that he had accepted their representation that all of the improvements he had seen were located within the boundaries of the land that they were proposing to sell to him, so regardless of where any of the boundaries of the subject property might prove to be, the Trousers could be held liable for misrepresentation, if any of the improvements were not actually on the land conveyed. On that basis, the Court reversed the decision of the lower court, and ordered that Jeffrey be granted a new trial, to provide him with the opportunity to show the extent to which he had been damaged by the discovery of the actual boundary location, creating an encroachment problem for him, subsequent to his transaction with the Trousers. The outcome of the new trial is unknown, and it is quite possible that it was never even held, if the parties were able to resolve the conflict themselves by reaching a settlement agreement at some point, as is often the case in such situations. Although it is not possible to say with certainty of course, the evidence that was mentioned in this case would appear to introduce the serious possibility that the Trousers may have been able to successfully claim ownership of any encroaching portion of the campground area by means of adverse possession. Depending upon when

the use of the area as a campground actually began, and upon other relevant factors, even if part of the campground was in fact located in Section 35, the original encroachment may well have ripened into ownership, which had vested in the Trousers, and which they could therefore convey to Jeffrey, thereby resolving the matter in his favor and rendering his damage claim against them moot.

SMITH v WHITNEY (1937)

In our second case on the subject of the rights of riparian land owners, we find the Court again focused primarily upon the elementary issue of accretion, and addressing the role and meaning of meander lines as well, while also making a significant decision pertaining to the relationship between the natural boundaries of riparian properties and the artificial linear boundaries of the PLSS. This case is among the most frequently cited Montana cases on riparian land rights, because it contains definitive statements by the Court relating to basic riparian principles, such as the appurtenant nature of accreted land and the proper treatment of meander lines, which follow and embody the intentions of the PLSS with respect to water boundaries. Wherever a body of water of any kind forms a boundary, the intent is typically for the boundary to remain governed by the water, and it is fully understood that many bodies of water have the capacity and tendency to change in location through natural processes that are beyond human control, so accretion, reliction and erosion have long been recognized as actions that control boundaries, with avulsion, which we will see the Court address in later cases, being the exception to that rule. The most important element of riparian rights, and indeed the defining element of such rights, is a connection to a body of water, and for this reason it has generally been judicially acknowledged that water boundaries must be treated as flexible in location, to maintain the connection between all originally riparian land and the water itself, to the extent that this essential connection can be justifiably perpetuated. The case we are about to review provides an excellent example of the desire of the Court to legally maintain this very valuable and vital connection, despite changing physical conditions, and despite understandable omissions of any reference to additional land formed

by accretion in documents of conveyance. By virtue of it's typically subtle formation, the existence of accretion can very often be literally imperceptible, so to treat it as legally separate from the land to which it has become physically attached would quite obviously be highly problematic, and it is this realization that leads the Court to treat it instead as being appurtenant to such land. This treatment has the legal effect of placing the burden on a grantor of land containing accretion, or subject to it, to clearly sever the accretion from the land conveyed, if indeed it is his true intention not to convey the accretion along with the described land. Once accretion has been determined to exist however, new issues are introduced, such as the proper means of dividing it between adjoining riparian land owners, and such scenarios can present some of the most complex situations and boundary controversies ever adjudicated. In the 1987 case of *Stidham v City of Whitefish*, the Court adopted the position that in the interest of equity, accretion and reliction must be divided proportionally, and cannot be divided in an arbitrary manner, by simply extending any existing lines of the PLSS beyond the meander lines upon which those lines were terminated during an original survey. In that case, the Court expressly approved both radial division of land along circular lakes, and base line division of land along oblong or narrow lakes, while striking down a lower court ruling that had accepted a division based on the extension of government lot lines as inequitable, in order to protect the riparian land ownership of all parties.

1879 - A township lying almost entirely north of the Yellowstone River was subdivided into sections and platted. The river, which formed the northerly boundary of the Crow Reservation at this time, intruded upon the southern edge of the township, causing the southernmost portions of Sections 32 through 35 to be platted as riparian government lots. Over the ensuing years, a substantial amount of land evidently built up along the north bank of the river in this area, as the river migrated southward.

1920 - Blackburn settled upon an island, which was evidently located a fairly short distance south of the point where the northerly corner of Sections 3 & 4 of the township lying directly to the south would have been, had the river not been there. The township in which this island

was situated had also been subdivided and platted by this time, since the Crow Reservation boundary had been relocated several miles to the south, but Blackburn's island had never been platted. Blackburn evidently noticed that the land lying along the river to the north of the island appeared to be vacant and unused, so he fenced in a substantial portion of that land, stretching out along the river for an unknown distance to the east and to the west, and he built a cabin south of the fence, near the north bank of the river. He then used the area that he had fenced, along with his island, without protest or objection from anyone for the next several years.

1933 - The taxes on the riparian lots lying along the southern edge of the north township had gone unpaid for an unspecified number of years, so those lots became subject to tax sale, and Smith acquired tax deeds to the lots lying along the southern edge of Sections 32, 33 & 34. When the lots in question had originally been patented into private ownership is unknown, but the title of Smith was quieted against the previous owner of these lots, by means of a quiet title action in which Blackburn was not involved. Whether or not Smith had ever seen the area in question, or ever attempted to make any actual use of any of the land in the area, is unknown, but Smith was apparently either unaware of the presence of Blackburn, or else she considered his presence insignificant.

1934 - Blackburn conveyed his island to Whitney, who then built a new fence, evidently somewhat farther north than Blackburn's fence had been, following the northerly meander line along the river, as that line had been established in 1879, enclosing over 180 acres lying along the north bank of the river, and Whitney maintained sole use of the entire area south of this fence, although he had no legal title to any land lying north of the river. When Smith discovered this situation, she filed another quiet title action, this time targeted against the possession based claim to this portion of her lots that was being made by Whitney.

Smith argued that all of the land held by Whitney north of the river had been created through a process of accretion, which had taken place over

the half century that had passed since the time of the original GLO survey of the area, and all of that accretion had become both physically and legally attached to the several lots that she had acquired, thereby effectively expanding and extending them to the south. She further argued that when she acquired the lots, by means of her tax deeds, she had acquired a new and complete title to all of the land in question, free of any burden such as that represented by the occupation and use of the land that had been made by Blackburn and Whitney, despite the fact that in expanding to the south the lots had extended beyond the southerly line of the township in which they had been originally created, so title to all of the land north of the river should be quieted in her. Whitney also maintained that all of the land he had fenced had been created by accretion, but he argued that it had not become part of the lots in question, because the meander line created along the north side of the river during the 1879 GLO survey was intended to represent the southerly boundary of the township lying to the north of that line, so no land south of that meander line could be considered to be part of the township in which Smith's lots were located. Whitney further argued that the occupation and use of the area in question by Blackburn and himself represented adverse possession of that area, and the tax deeds issued to Smith did not have the effect of disturbing or ending his possession of the land either physically or legally, so title to the entire area that he had fenced should be quieted in him. The trial court found the case made by Whitney unpersuasive and ruled in favor of Smith on all points, quieting title in her.

The great similarity of this case to the Bode case of 1921 will be immediately noticed by those who have already read the account of that case presented previously herein, as in each case a party occupying an island in the Yellowstone posed a challenge to the rights of a party holding an interest in land lying directly to the north of the island along the bank of the river. These two cases are in fact quite different however, and they turned out very differently as we shall see, for two fundamental reasons. First, in the Bode case, the legitimacy of the island itself was attacked by Bode, making the determination of the character of the island pivotal to the outcome, while in this case it was not the island itself that was at the center of the controversy, so the location of the island, and the manner in which it had formed, were not active issues in this case at all. Second, although both Bode and Smith attempted to use the principle of accretion to their advantage, the land at issue in this case had formed in a very different way than the land that was claimed by Bode, so Smith was in a much stronger position to begin with than Bode had been in making her accretion claim. The Court began it's

analysis of the circumstances present in this case by disposing of the claim of adverse possession made by Whitney, which was doomed for a variety of reasons. The actual use made of the area in question by both Blackburn and Whitney had been marginal and relatively insubstantial, the boundary of the area used by Blackburn had been shifted or expanded by Whitney, a tax deed creates an independent virgin title emanating from the sovereign free of burdens, and neither possessor had ever paid any taxes, so the Court had no difficulty whatsoever in deciding that Whitney could show no valid claim to the area in question on the basis of adverse possession. Any opportunity for Whitney to prevail, or to be awarded any of the land that he had occupied beyond the island itself, effectively ended at this point, it was clear that he had no legitimate claim to any of the land north of the river, but since Smith was seeking to quiet her title to the area in question, she not only had to dispatch the nuisance presented by Whitney's possession, in order to fully achieve her objective, she also had to satisfy the Court that her own claim had a legitimate basis. Since there was no indication anywhere in the evidence that any single event, such as the ice gorge that had been the undoing of Bode's claim, was present here, the Court agreed that the material which had accumulated along the north bank of the river over the past half century was indeed genuine accretion, just as both of the litigants here suggested, having physically attached itself to the land subsequently acquired by Smith. With respect to the obstacle posed by Whitney's assertion that the meander line traversed by the GLO in 1879 along the north side of the river represented a boundary, constituting a distinct limitation upon the land embraced in the tax deeds held by Smith, the Court stated that:

“... meander lines ... are not run as boundaries ... but for the purpose of defining the sinuosities of the banks of the lake or river, in order to ascertain the exact quantity of the upland ... the title of the grantee is not limited to such meander lines; the waters themselves and not the meander lines constitute the real boundary ... Unless excepted or reserved, accretions or the right thereto pass to a purchaser or a patentee although not described in the deed ... Accreted lands are included in the assessment of lands described in accordance with the government survey, even though the assessment is limited by its terms to the number of acres specified in the government survey, and the tax deed purchaser acquires the same title, whether they are

described or not, as he does to the upland ..."

In so holding, the Court had adopted the basic widely recognized principles relating to accretion and meander lines, and also the concept of appurtenance, as that principle applies to riparian lands. Accretion attaches to existing upland physically, and becomes one with it, in a manner that typically makes the accretion indistinguishable from the upland to the untrained eye with the passage of time, and therefore the law is highly inclined to allow it to attach itself to the upland in a legal sense as well. Likewise, meander lines represent a purely technical means of partitioning land, devised and incorporated into the PLSS only for the purpose of segregating lands that are of a genuinely productive character from those that are diminished in utility by the presence of an amount of water that renders them unsuitable for typical agricultural purposes. Having made all of the decisions necessary to declare the area in question to be a part of the government lots acquired by Smith, the Court faced just one more potentially very troublesome hurdle, that it would need to clear before confirming the validity of her title to all the land in question. As noted above, due to the fact that the riparian lots created in Sections 33 & 34 were very close to the southern edge of the township to begin with, the accretion, if it was to be acknowledged to be part of the lots that had their origin in those sections lying to the north, would cause the lots in question to extend southerly beyond the latitudinal line representing the south boundary of the township. The Court appears to have hesitated at this point, having never been confronted previously with this specific scenario, and been somewhat reluctant to violate the sanctity of the township line in question, since such lines obviously represent major elements of the framework of the PLSS. The Court was presumably cognizant of the fact that several other states had produced rulings in comparable cases holding that section lines are permanent and absolute boundaries, which can effectively block or stop the progress of advancing riparian rights, yet the Court found a way to support its decision to allow the ownership of Smith to extend beyond the apparent limits of the township in which her title was located. Citing cases from Arizona and California, which had held that township and range lines may not legally exist at all under such circumstances, in which the PLSS line in question could not be carried all the way through the relevant area on the ground during the original survey due to physical conditions, the Court adopted the position that accretion can carry a tract of land beyond a section, township or range line, into another section or township. In so deciding, the Court had established an important precedent for Montana, by allowing

riparian ownership to cross artificially created boundaries, so a tract of land described as being in a given section could in fact extend into one or more other sections, despite not being described as any part of the section or sections thus invaded. Though doing so had required the Court to reach farther than it was fully comfortable reaching into its storehouse of PLSS knowledge, the Court upheld the ruling of the lower court in favor of Smith, wisely adhering to the larger principle that natural boundaries triumph over artificial boundaries. Since the principle of accretion applies to both navigable and non-navigable waters, the Court had not needed to take any position on the navigability of the Yellowstone in this location, leaving that matter undiscussed, and this would prove to be an issue of high importance in a case that we will later encounter.

KELLY v GRAINEY (1942)

Here we reach a rather complex but fascinating case, replete with many essential details, which very well illustrates a highly important but often overlooked factor in the determination of adverse possession, and also provides insight regarding the Court's treatment of the meaning of conveyances, in accordance with the circumstances under which they were made, which would not be apparent to a surveyor or anyone else, upon simply reading the content of such deeds, or taking them at face value. In 1918, in *Collins v Thode*, one sister attempted to claim adverse possession of a portion of a lot owned by another sister, on the basis that she had openly occupied the area in contention for the requisite number of years, which was undisputed. The Court ruled however, that because the litigants were sisters, there was never any reason for the sister who was the record owner of the lot to suspect that the possessing sister intended to assert a claim of ownership against her, therefore despite the very obvious actual occupation and use of the lot, the record owner had no notice that an adversarial situation existed, demonstrating that the existence of a familial relationship can operate to prevent adverse possession. In *Lehman v Sutter*, a 1921 case involving the abandonment and relocation of multiple mining claim locations, Sutter attempted to establish claim relocations on land that he believed had been fully abandoned, but the rights to which had actually been held by multiple parties as cotenants. Lehman then made relocations of the same ground the

following year, and charged that the relocations made by Sutter were void. Since the last of the cotenants holding rights to the original claim locations had not abandoned her rights until after Sutter had made his relocations, the Court agreed with Lehman that Sutter's relocations were void, on the basis that the land rights of one cotenant cannot be damaged by any acts of fellow cotenants, therefore the abandonment of the area by some of the cotenants was worthless to Sutter, because valid rights of one cotenant had still existed when he made his relocations, legally invalidating his efforts. These important factors were united in the 1933 case of *Le Vasseur v Roullman*, leading the Court to rule that Le Vasseur had not completed an otherwise successful adverse possession, because the defendants were his own brothers and sisters, who were also his legal cotenants, all of the parties having derived their rights to the land in dispute as heirs of their late mother, so they all had the right to presume that Le Vasseur's sole possession of their late mother's property was not adverse to their rights. The same conditions, again involving family members in the role of legal cotenants, produced the same result in the 1994 case of *YA Bar Livestock v Harkness*, in which the Court also reiterated the important principle that a deed which would otherwise represent valid color of title, supporting the claim of an adverse possessor, is of no benefit to the possessor, if the possessor knows that it is invalid, on the basis that no document can operate as color of title in the absence of good faith.

1917 - Kelly, who was evidently a widower with one daughter, purchased a house, which was apparently situated on a typical city lot in Butte, and they moved into the house, which they shared with Kelly's elderly parents and with Kelly's sister. Kelly was the county assessor and his sister worked in his office as a deputy assessor.

1918 - Kelly decided to marry again and he planned to move into another home with his new wife. For that reason, Kelly conveyed the house and lot that he had acquired the previous year to his parents and the deed was promptly recorded. However, his parents immediately deeded the property back to Kelly, so that he could once again assert his ownership of it upon their passing from this life. Kelly accepted the deed from his parents, but chose to hold onto it rather than record

it. Kelly's sister was fully aware of what had taken place, in fact she had typed up both of these deeds herself.

1919 - Kelly moved away, leaving his parents as the record owners of the lot, in the care of his sister, and Kelly's daughter continued to live there with them. Kelly sent money to his sister on a regular basis, to cover his daughter's living expenses.

1921 - Kelly's daughter moved out of the house, so Kelly stopped sending payments for her care to his sister, and he was out of touch with his former family from this time forward, so he was unaware of the subsequent events.

1922 - Kelly's sister decided to buy another lot adjoining the lot on which she and her parents were then living, so her parents gave her a deed to the lot that they were all living on, which she then gave to the bank as security for the loan that was necessary for her to be able to buy the adjoining lot. They all then moved into the house on the adjoining lot and the house that they had been living in was rented out by Kelly's sister.

1923 - Kelly's sister obtained a deed from the bank for her lot, which she recorded.

1925 - Kelly's sister paid off the loan and the bank released to her the 1922 deed from her parents that had been used as collateral. Instead of destroying it however, as her parents had presumably intended for her to do at this time, Kelly's sister recorded it, so she became the owner of record of both lots at this time, and she paid all the taxes on both lots from this time forward.

1930 - Kelly's father died, but Kelly's sister and mother continued to live together on the lot that had been purchased by Kelly's sister in 1922, and Kelly's sister continued to exercise full control, on a day to day basis, over the rented lot, which had stood in her name on the public records since 1925.

1937 - Kelly's sister became terminally ill, and just before dying she deeded both of the adjoining lots to Grainey, who was her sister, in

exchange for a promise from Grainey that she would assume the responsibility of taking care of their mother, and Grainey promptly recorded the deeds. Kelly's sister died without ever telling Grainey about the existence of the unrecorded deed that their parents had given to Kelly in 1918, so Grainey believed that she was the true owner of both lots. Grainey, who lived with her husband in Helena, had Kelly's mother placed in a retirement home and apparently then began making plans to sell off the two lots.

1939 - Kelly learned what had happened, so he recorded the deed that had been given to him by his parents 21 years before, but Grainey declined to honor that deed and informed Kelly that she was now the owner of both of the lots, so Kelly filed an action against her, seeking to quiet his own title to the lot that he and his family had formerly occupied together.

Kelly argued that he had remained the sole owner of the lot in question at all times, because the two deeds that he exchanged with his parents in 1918 amounted to one simultaneous conveyance, which only had the effect of insuring that his parents had an interest in the property for the duration of their lives, and that exchange had been intended to insure his ongoing ownership of the property, rather than to deprive him of ownership. He further argued that nothing that had happened could be properly characterized as adverse to him, because all of the parties involved had adequate knowledge or notice of the circumstances, by virtue of the fact that they were all members of the same family, so none of their acts had been adverse to his ownership of the property in question. Grainey argued that their sister had adversely possessed the lot in question under color of title, by virtue of the deed issued by their parents to her in 1922, and that she had fulfilled the tax payment requirement throughout the subsequent time period, during which she had maintained complete control over the property in question as well. Grainey further argued that she had acquired the lots from her sister without any knowledge or notice that their brother claimed or held any interest in either of them, so she was a bona fide purchaser, and therefore his long unrecorded deed could have no effect upon her ownership of the lot at issue. The trial court found that Kelly's sister had successfully completed adverse possession of the lot in question, and Grainey was an innocent purchaser of both lots, and so ruled in her favor.

On the surface, this case presents what might appear to be a perfectly typical adverse possession scenario, in which a property owner leaves the area where his land is situated, and pays no further attention to it at all for many years, while another party steps in and begins making normal use of the land, unknown to the owner of record, as a result of the owner's negligent attitude toward the land, and the trial court evidently saw this dispute in that way. The tendency or preference of courts in general to allow the status quo to remain intact or persist, has been frequently noted as a legitimate equitable concept has some real validity, since the existing conditions typically represent a state of affairs that came to pass for some justifiable reason, and this may well be an even more reasonable perception where those conditions have been cemented in place with the passage of time. Therefore, adverse possession may sometimes be seen or treated as a mechanism that operates as a "catch all", standing as an absolute bar to those who have been delinquent, with respect to their land rights, for any one of a myriad of reasons, and that perception presumably produced the result in favor of Grainey seen here. While there was no evidence that Grainey acted in bad faith, one deeply respected principle stood as a serious obstacle in her path to victory here, and that was the fact that all of the parties were members of the same family. The sanctity of the family unit is considered highly precious in our society, and of course the Court is very much aware of that, so the bar for an adverse possessor launching a claim against a fellow family member or members is set quite high by the Court, in recognition of the basic principle that family members should ideally be able to trust and rely upon one another to guard their mutual interests, rather than attack them. Quite conscious of the applicability of that principle to the present case, the Court found that although the possession of Kelly's sister, for 15 years under color of title, may very well have met all of the other requirements of adverse possession, one critical element was absent, the possession was not truly adverse. Since Kelly had implicitly trusted his sister, the Court concluded, by leaving both his property and his parents in her custody and care, it was clear that her use of the lot had begun in a permissive fashion, and nothing had ever happened that was sufficient to cause Kelly to believe that his sister's use of the land in question had ever changed in character in any way. The fact that Kelly's sister had moved to the adjoining lot and rented out the lot in controversy was irrelevant, the Court decided, because even while renting it out, she was still merely using it in a manner that had been anticipated by Kelly, to obtain funds to support their parents. When an adverse claim arises from a use that is known to have had its origin in a permissive act or relationship, the burden upon the

adverse claimant to prove that the record owner of the land in question had an opportunity to understand the true character of the possession at issue is an elevated one, which the Court described in the following terms:

“While a permissive possession may subsequently become hostile, to make it so there must be a repudiation of the permissive possession, and of the recognition of ownership implicit therein, and the repudiation must be brought home to the owner by actual notice, or at least by acts of hostility so manifest and notorious that the actual notice must be presumed.”

Kelly's sister had never told anyone of her true intentions to assert a claim of ownership of the lot in question, independent of that of her brother, but even more importantly, she had also never openly acted in a manner that could be viewed by anyone as defiant or hostile to his rights to the land. To all the world, it had always appeared that she was merely playing the role of a caretaker acting on her brother's behalf, so the Court was unwilling to agree that her possession had ever been adverse to the title of her brother. But this position taken by the Court was not enough to clinch the victory for Kelly, there was also the matter of the deeds to resolve. Grainey had set forth the proposition that Kelly had deeded the lot in question to their parents, and then their parents had deeded it to Kelly's sister, and then she had deeded it to Grainey. This was a correct statement of what the public records revealed, the public records however, as the Court observed, do not constitute all the available evidence, nor do they necessarily represent the controlling evidence. To determine whether or not the conveyances appearing in the public records, pointed out by Grainey, had any controlling value, or indeed any validity at all, it was necessary for the Court to examine the specific evidence relating to each of them, because no deed can have any meaning other than what it was truly intended to mean, since as we have already seen, the true intentions of the parties when ascertained, reign paramount. Grainey asserted that she was an innocent purchaser without notice of her brother's rights to the land in question, in part due to his failure to record the deed from his parents, which he had admittedly been holding for many years by the time of their sister's passing. While this might well be true, the Court indicated, it could make no difference, if their sister had never become the owner of the lot in question, since one cannot convey what one has never owned, and it had been established that Kelly's sister had not

become the owner of the lot by means of adverse possession, so it was necessary to resolve the true intent of the parties to the earlier deeds. The 1922 deed from their parents to Kelly's sister had been intended for use as security only, so it may not have actually amounted to a genuine conveyance, but that transaction was also rendered unimportant by the Court's position regarding the exchange of deeds that took place in 1918. The 1918 deed from Kelly to his parents was also not a legitimate conveyance, since neither Kelly nor his parents had intended their exchange of deeds to result in any change of ownership the Court held, that deed had been intended only to secure unto the parents the right to occupy the land for the remainder of their lives. So regardless of whether Grainey had been acting in good faith or not, as the intended grantee of her dying sister, she had acquired nothing by virtue of her deeds, because the ownership rights to the lot in question had remained vested solely in their brother at all times. Kelly had very narrowly escaped, based only upon the Court's recognition of the validity of his deed from his parents, despite the fact that it was unrecorded, because the presence of that deed rendered Kelly's deed to his parents ineffective as a conveyance, in the eyes of the Court. Having found the decision of the lower court to be in error, the Court reversed it, and ordered judgment to be entered in favor of Kelly, quieting his title to the lot in controversy.

VAUGHT v MCCLYMOND (1945)

Returning to the subject of boundary issues, in the context of the PLSS, we find the Court dealing with yet another dispute centered upon a conflict over a particular quarter corner location, but in this instance the complexity of the matter is magnified by the absence of any nearby original section corner monuments to assist in fixing the quarter corner location in question. In response to this situation, we will watch the Court take the unusual step of putting in place guidelines for the performance of PLSS retracement surveys, representing the Court's attempt to rectify the chronic abuse of the PLSS by misguided surveyors of this era, who continually made the fundamental mistake of relying primarily upon measurements in restoring PLSS corners, where no original monuments were found, or none were ever set, as opposed to properly gathering and relying upon valid corner evidence. Many early surveyors, particularly those who had

participated in the original GLO surveys, in roles of significance, had a truly magnificent understanding of how those surveys were done, and they did a marvelous job of retracing original survey work, as we have seen in the 1935 Grosfield case for example. However, a great many other surveyors, and engineers practicing surveying as well, were ignorant of the manner in which the original surveys were conducted, and therefore indulged the false assumption that every quarter section was 1320 feet in size, and was perfectly square, and contained exactly 160 acres. Such surveyors and engineers set countless monuments, without proper regard for physical evidence, some of them were actually unable to even recognize valid physical evidence, and others deliberately rejected legitimate original evidence when it did not agree with their measurements, obviously causing serious boundary problems and completely unnecessary disputes involving untold numbers of innocent victims. It was this prevalence of habitually erroneous retracement survey work, which is unfortunately quite well demonstrated by the surveyor who we see severely chastened by the Court here, that motivated the Court to clarify exactly what it expected from PLSS retracement surveyors, in no uncertain terms, in the case we are about to review. Among the essential issues squarely addressed here by the Court, is the fact that the principle of monument control applies even inside sections, so all existing quarter corners must be used where they are found when subdividing sections, and simply laying out squares by measuring 1320 feet, or correcting quarter corners that are found to not be precisely centered between section corners, will not be condoned. In addition, the Court acknowledges that only original surveys actually create boundaries, and reiterates that all other surveys must endeavor merely to perpetuate the original surveys, without alteration, so any subsequent survey that cannot be affirmatively shown to have been based on original monuments holds no controlling value. Most importantly, the Court makes it very clear, by means of the forceful language used in this case, that PLSS rules, established by the federal government, relating to evidence and procedures to be employed in retracing original PLSS surveys, must be observed, and retracement surveys done in willful disregard for original survey evidence will be struck down, should they reach the Court.

1915 - The west half of Section 26, located in a township that had been originally surveyed by the GLO in 1890 and platted in 1891, was patented to the mother of Vaught. The Vaught family apparently also owned an unspecified but substantial amount of adjoining land, extending beyond Section 26, which they used for agricultural purposes. There is no indication that any structures or other improvements were ever built anywhere in this area, this land was apparently used only as cropland.

1940 - Vaught's mother conveyed the northwest quarter of Section 26 to McClymond, who was already the owner of the north half of Section 27. How or when McClymond had acquired his land in Section 27 is unknown. The description used in this deed conveying the northwest quarter of Section 26 to McClymond was evidently identical to the language of the original patent, indicating only that the northwest quarter was a regular quarter section, nominally containing the usual 160 acres. There is no indication of whether or not any of the other parts of Section 26 were owned by Vaught, or by McClymond, or by any other parties.

1941 - There was a fence of unknown origin running east and west across Section 27, which McClymond evidently believed was located on the quarter section line, so he ordered a survey of the northwest quarter of Section 26 to be done by Burke, who was the county surveyor, naturally expecting that the survey would indicate that the south boundary of the northwest quarter of Section 26 was coincident with an easterly extension of the fence running through Section 27, and that was in fact the result of the survey. Upon completion of the survey, McClymond informed Vaught's husband, who was apparently in charge of the Vaught family farming operation, that he intended to fence the quarter he had just acquired, following the lines that had been staked as the boundaries of that quarter by Burke. After viewing the results of the survey however, Vaught's husband objected to the location of the south line of the northwest quarter, as Burke had staked it, maintaining that based on the Vaughts idea of where the west quarter corner of Section 26 was located, Burke had placed the

quarter section line too far south. McClymond asked Burke to check his work, and after conducting additional field work, Burke relocated the line in question over 300 feet to the north, stating that he had erred the first time around. McClymond decided to ignore Burke's new quarter line however, and he proceeded to build a fence on the line originally staked by Burke, to which Vaught responded by filing an action against McClymond, seeking to have him ordered to move the fence north to the alternate quarter line location.

Vaught argued that the first Burke survey was erroneous and the second Burke survey was correct, so McClymond had no right to any land south of the second quarter section line staked by Burke. McClymond argued just the contrary, that the first Burke quarter line was correct and the second line was not, so he was entitled to fence and occupy the entire area north of the first Burke quarter line. No claims based on physical possession of the land in Section 26 could be made, since the fence was still new when it became the focal point of this dispute, and neither party presented any conclusive evidence supporting either of the alternative quarter line locations, each party simply maintained that the line accepted by the other was wrong, and each party claimed to be entitled to damages from the other. The trial court was evidently more comfortable with the southerly alternative for the line in question, presumably because that location lined up with the long standing division fence that ran west across Section 27, and so ruled in favor of McClymond.

Since the resolution of this dispute was obviously centered entirely upon the proper determination of the actual location of original PLSS boundaries, the Court immediately focused solely upon defining the parameters for proper PLSS boundary resolution. After emphasizing the importance of properly retracing the footsteps of the original surveyor, the Court pointed out the shortcomings of Burke's work, and dismissed all of it as worthless. Burke, the Court found, had never located any original GLO monuments anywhere in Section 26, instead he had begun his initial work from points which he had simply assumed to represent legitimate corners of the section in question, without sufficient evidence to support his opinion regarding their validity. Burke testified that he had found several stones, which he stated were marked in some unspecified manner, all of which he had accepted as representing various section corners, quarter corners and sixteenth corners, based on his opinion that they had been properly established by a previous county surveyor, but the Court was unimpressed

with his testimony, and observed that he had not properly verified the validity of any of the existing monuments that he had initially used. Burke also testified that he had initially set the center sixteenth based entirely upon the monuments that he had found on the west and north sides of the northwest quarter, without making any effort to locate any corners on the east or south sides of the section, simply laying out a figure containing 160 acres, instead of making an effort to properly locate the true location of the center lines of the section. When called upon to return and verify his work, for unknown reasons Burke had taken a completely different and even more irrational approach, attempting to establish the same center sixteenth by traversing all the way from a point which he had accepted as being the northeast corner of Section 36, over a mile and a half southeast of McClymond's quarter. Burke's attempt to arrive at the center of Section 26 from opposing directions, quite predictably, resulted in a material conflict with his own previous work, creating the 300 foot discrepancy that had immediately become a point of contention between Vaught and McClymond, and neither of Burke's methods found any favor at all with the Court either. The Court declared that Burke had failed to properly identify or utilize any original monuments, and since he had failed to base his work on any genuine original GLO monumentation, and failed to make proper use of either the original plat or field notes, the Court was disinclined to approve his work or to base any definite decision upon it. Original monuments were evidently very scarce in the area where Burke was working, but the Court clearly did not see the existing conditions as sufficient justification for his decision to accept and rely upon monuments that had been set by others, even those set by earlier county surveyors, without any effort on his part to verify their validity. In fact, the Court was so disgusted with the work that had been done by Burke, and with the poor judgment he had exhibited, that it discounted all of his testimony, and indicated that he should not even have been allowed to testify, since the prior survey work that Burke's work was based on was utterly devoid of validity. As guidance for future surveyors, who might be tempted to take similar shortcuts, or engage in the use of bogus methods comparable to those Burke had employed, quoting decisions from Idaho, Minnesota and Nebraska, the Court concluded with a stern reminder that:

“...government surveys are, as a matter of law, the best evidence; and, if the boundaries of land are clearly established thereby, other evidence is superfluous and may be excluded; the best evidence is the corners actually fixed upon the ground by

the government surveyor, in default of which the field notes and plats come next, unless satisfactory evidence is produced that the corner was actually located upon the ground in a place different from that stated in the field notes. Any section corner or quarter corner that is identified as having been established by an official survey of the United States government must stand as being correctly located, however plain it may appear that the location is wrong; because the government surveys cannot be changed ..."

Burke, as any experienced boundary surveyor will recognize, was basically functioning in a manner typical of county surveyors of his era, in performing the McClymond survey as he initially did, particularly in adopting monuments set by his predecessor without question, and in subdividing sections using overly simplistic methods that clearly amounted to shortcuts, so the question arises as to why he was so vigorously pilloried by the Court for doing so. In Burke's defense, it may well be that like many other county surveyors of his time, he over estimated the legal authority vested in a county surveyor, causing him to accept the work of his predecessors without question. It can further be plainly observed, by the forthright character of his testimony, that he was an honest man, not driven by any corrupt motivation, who innocently believed that the work of both his predecessors and himself, as county surveyors, was binding in effect, upon the citizens they served. He was correct in that belief, to the extent that both the public and private parties certainly do have the right to rely on the work of their county surveyors, but he apparently failed to comprehend that their reliance itself is the only element that can legally bind those citizens, and they are not bound to accept any subsequent survey without question, on the contrary, they are perfectly free to challenge any such survey, until such time as it may become binding upon them as a consequence of their own acts in reliance on it. It may be impossible to defend Burke's failure to properly subdivide Section 26, yet it is quite possible that his acceptance of the monuments he found on the north and west boundaries of the section was not without a valid basis, if in fact those monuments represented legitimate perpetuations of original monuments. Because he failed to make any effort to show any evidence of the origin of those monuments however, and instead merely adopted them without explanation, he was unable to give any reason why they should be honored as legitimate, so it was his own failure to envision the possibility that his decision making might be challenged, and he

might need to be prepared to defend it, that doomed his work in the eyes of the Court. While Burke's initial work on the McClymond survey may not really have been especially poor, he then made the fatal mistake of contradicting his own work, which essentially invited the court to make an example out of him, and the Court evidently felt the time had come to do that. In most conflicts of the type presented in this case, there are two or more competing surveyors, but here the competing claims made by the litigants were both based on the work of the same surveyor, putting Burke in an extremely vulnerable position. Although he had done nothing so extraordinarily flagrant as to justify the wrath of the Court, he had made enemies out of both parties and lost their trust, putting himself in a no win situation, and he had bungled the survey work, setting the wheels of his own disgrace in motion, by giving both parties good reason to call his work into question. The Court's ridicule of Burke's procedures was clearly intended as a warning to all surveyors to cease their abuse of the PLSS, and what the Court saw as misguided or bogus survey practices, by serving land surveyors with notice of the importance of following PLSS guidelines in their work. Since no definite conclusion regarding the location of any of the boundaries in question could be reached from the evidence at hand, the Court had no alternative but to reverse the decision of the lower court and remand the case, with instructions that another survey, or multiple surveys if necessary, must be performed, by a qualified party or parties, either agreed upon by the litigants or selected by the Court, in order to properly resolve the dispute. The ultimate outcome is unknown, but in the absence of any original monumentation, the burden would fall upon McClymond to show that the fence in Section 27 was built using the original location of the west quarter corner of Section 26, and that it was therefore positive evidence of that original GLO monument location, if he was to retain his victory. Even though it had very harshly rebuked the work of Burke, the Court gave no indication that he should incur any liability for his mistakes, thereby tacitly acknowledging that in fact his work was not untypical of that of many of his peers.

LAAS v ALL PERSONS (1948)

In our last adverse possession case, the Kelly case of 1942, we saw the reaction of the Court to a claim of adverse possession that was made under a set of circumstances that operated as mitigating factors, including most notably the interaction between several members of the same family, causing

the Court to view adverse possession as inapplicable. In the case we are about to review, which is representative of the most typical form of adverse possession, just the contrary is true, as the conflict has a single clearly defined source, which is a specific mistake, made as a result of the ignorance or carelessness of an unknown party, who never even knew any of the parties that would later become embroiled in controversy, as a result of the mistake. When property taxes go unpaid, and land is scheduled to be sold due to that delinquency, the law provides very strong safeguards, to prevent injustice from being done to the owner of record, including rules mandating that the record owner or owners must be provided with an ample opportunity to take notice of what is being done, and the land must be described well enough to insure that the identity of the land subject to conveyance is clear and certain. The strict legal guidelines intended to insure the validity of all tax deeds are often not met however, setting the stage for a subsequent dispute, between the party whose rights were damaged by the shortcomings or failures in the tax proceedings and the grantee of the tax deed, although both parties with claims to the land at issue are typically innocent of any bad faith actions. It is in such a scenario as the one that plays out here, that adverse possession serves to make the element of time decisive, tipping the balance of justice in favor of the party whose rights have been put into physical effect, against the party whose rights could be preserved or revived only at the expense of an equally innocent party. In the 1935 case of *Anderson v Mace*, the Court explained its perspective on the proper role and justification of adverse possession, stating that it operates as a "demerit of the person who, having a remedy, fails to exercise it", upholding the principle that every land owner carries the implicit burden of knowing the status and limits of his land rights, and the burden of monitoring any activities that may eventually damage or reduce those rights if allowed to persist. In addition, the position taken by the Court in that case also demonstrates that the Court views and applies the statutory bar of adverse possession as an expression of the basic equitable principle of laches, which places the responsibility for the often unfortunate consequences of unjustifiable delays at the feet of the party who is guilty of the delay in asserting their rights. Subsequent to the case we are about to review, in the 1949 case of *Barcus v Galbreath*, the Court produced a decision that very

well illustrates the conditions required to overcome the limitation upon adverse possession among cotenants, while reiterating the position on the element of timeliness, with respect to the tax payment requirement for adverse possession, that we will see the Court take here. In that case, Barcus, Galbreath and a cattle company each held an interest in all or part of the land at issue, making them all legal cotenants, but only Barcus lived on the land and held sole possession of all of it, and for over 20 years Barcus openly and repeatedly denied and rejected the assertions of ownership made by the others. In view of the evidence of the open claim of complete and absolute ownership of all of the land in dispute that had been consistently made by Barcus, the Court decided that Barcus had clearly put the others on notice that their rights were being positively and utterly denied, therefore the fact that Barcus was a cotenant did not operate to prevent her from successfully completing adverse possession against her fellow cotenants.

1918 - Robowoitra was a settler, a single and childless woman, who had established a homestead on a certain 80 acre tract. She applied for a patent for the land at this time, but she died shortly thereafter, so the patent was issued to her only known relatives, her niece and two nephews. The three heirs of Robowoitra were all just children, where they were living, and whose care they were in, are unknown, but no attempt was made by anyone to assert any rights or make any claim to their late aunt's homestead on their behalf, so the 80 acre tract went unused and unattended during the following years.

1922 - Since the taxes on the Robowoitra homestead had gone unpaid, it was sold for delinquent taxes by Liberty County to the husband of Laas, who obtained a tax deed for it, and the Laas family began living on it. He fenced and cultivated the land in the usual manner, and made numerous substantial improvements to the property over the following years, turning it into a productive farm. He also executed a mortgage and granted mineral leases relating to the property, all of which were recorded, and he paid the taxes on the property as they came due. The three heirs of Robowoitra were all still under the age of 16 at this time. There is no indication that anyone knew that they had any rights to the property in question, and no evidence that anyone ever made

any effort to find them or contact them, to inform them of their rights, before conveying their late aunt's property to another family.

1926 to 1931 - During this time period, all three of the Robowoitra heirs became adults.

1932 - The subject property was conveyed to the son of Laas, who recorded his deed and took over the farming operations from his father and continued to use the land just as his parents had. He was evidently not as prudent or careful as his father however, and he allowed the property taxes to go unpaid.

1940 - The subject property was conveyed to Laas by her son, her deed was recorded, and she took charge of the ongoing use of the land. She granted another mineral lease, that was also recorded, but she also neglected to pay any taxes on the property.

1943 - The taxes on the subject property had gone unpaid since 1933, but they were finally paid by Laas and her son at this time. Also at this time, the Robowoitra heirs finally somehow discovered the existence of the patent that had been issued in 1918. The heirs were in the livestock business and they had known the Laas family and done business with them for several years by this time, yet the heirs evidently decided to use the patent as a basis upon which to assert a claim to the 80 acres occupied by the Laas family, forcing Laas to file an action against them, and any other unknown parties, to quiet title to the land that had been deeded to her husband more than 20 years before.

Laas argued that she and her family had complete and open control over the subject property for over 20 years prior to the time that the Robowoitra heirs made their claim to the land, and the occupation and use of the land in question by her family met all the requirements of adverse possession, so the 1918 patent was no longer of any significance or value, and title should be quieted in her against the heirs and any other unknown parties who might emerge making similar or comparable claims. The Robowoitra heirs argued that their patent should still be considered valid, because they were only children at the time when the events which had operated to deprive them of their rightful ownership of the land had taken

place, so they could not have been expected to properly react and respond to those events, as adults acting in defense of their rights would act, therefore neither the tax proceedings and tax deed nor adverse possession had destroyed or terminated their rights to their late aunt's homestead. They further argued that since the Laas family had neglected to pay their taxes on the land in question for a period of several years, Laas had lost the right to claim any protection from the statute of limitations, so the adverse possession claim made by Laas should be invalidated on that basis. The trial court agreed with Laas that adverse possession had taken place, negating the Robowoitra patent, and effectively silencing any other potential claims to the land in question as well.

It is often said that adverse possession is not designed or intended to either reward anyone, or penalize anyone, it simply functions as a means of supporting and encouraging the proper treatment of land rights by the holders of those legal rights, and the productive use of the land itself, all to the benefit of society in general. That is certainly true, to the extent that the protection of stable and beneficial land use within any community is essential to society, but it is equally true that the specific elements of adverse possession are necessarily variable, and therefore must be adjudicated on a case by case basis. Each set of circumstances forms a unique situation, that involves the consequences of decisions made by the parties themselves over time, and the varying evidence regarding the character and the intentions of the people involved, is well within the realm of factors that are given serious consideration by the Court in each case. Consequently, adverse possession ultimately does function in effect as a reward for certain behavior, and a penalty for other behavior, quite importantly including omissions, as well as acts. In this case, the good faith of Laas and her family was self evident, nothing they had done could be properly characterized as deliberately negative in any respect, either toward the heirs of Robowoitra or toward the community in general. The Laas family had simply done what society offered them the opportunity to do, which was to acquire neglected land and put it to good use, so their good faith was obvious, and it would be absurd to accuse them of attempting to steal any land belonging to any other parties, so they entered this legal contest in a very strong position, for that reason. Large numbers of innocent buyers of tax delinquent properties have become adverse possessors, in every state, completely unknowingly and unintentionally, as a result of errors made by ignorant or careless county employees, who failed to properly execute the tax proceedings in some way, which served to keep the rights of the tax delinquent record owner alive, or

potentially alive, and such was the position in which the Laas family found themselves, fighting the heirs, who were the holders of long dormant land rights. As is often the case in conflicts of this kind, both the Laas family and the heirs of Robowoitra could be accurately depicted as innocent victims, but one group had to lose, and the Court had to determine who that should be. Although the heirs had been only children when their aunt died, and through no fault of theirs her property had not been effectively delivered unto them, as a result of bungling on the part of some unknown parties, which had clearly amounted to a miscarriage of justice, the Court was typically disinclined to turn back the hands of time to right that wrong, to the detriment of the innocent Laas family. Because the possession of the subject property by the Laas family had persisted well into the adulthood of the heirs, the Court decided that the fact that the Laas possession had begun while the heirs were minors was inconsequential, and was of no benefit to the heirs. If the legal guardian of the heirs, whoever that may have been in 1922, had failed to protect their rights to their late aunt's land, by never asserting those rights, the heirs were simply stuck with the consequences of that failure on the part of their guardian. Passing on then, to the issue presented by the lack of timeliness exhibited by the late tax payments made by Laas in 1943, the Court observed that:

“The question seems to be one of first impression in Montana ... The courts of other states having statutes similar to ours are not in harmony on this question ... Some courts, even though the statute does not expressly so provide, require the claimant to pay the taxes of each year of the period before they become delinquent ... Other courts refuse to apply such a construction to the statute and hold that the payment of the accrued taxes for the consecutive years constituting the statutory period at any time when such taxes are payable during the period is a sufficient compliance ... The legislature has therefore said no more than this, namely, an adverse claimant must show that he has claimed the land for a period of 10 years continuously and that he has paid all the taxes ...”

The Court deemed it most appropriate to allow all taxes paid by an adverse possessor to operate to the credit of the possessor, regardless of whether or not the payments had been made in a timely fashion, which of

course had the effect of forgiving the delinquency of Laas, and sealed the fate of the Robowoitra heirs. The irony in the application of this rule to this particular case is rather remarkable, in view of the fact that, although the Laas family did eventually pay their delinquent taxes in full, their period of tax delinquency actually lasted several years longer than the period of tax delinquency that had cost the heirs of Robowoitra the ownership of their land to begin with in 1922, yet Laas escaped the more lengthy period of delinquency entirely unharmed. Of course, the decision of the Court to uphold the lower court's ruling, quieting the tax title of Laas and effectively extinguishing the rights of the heirs, was nevertheless fully justified, since the damage to the innocent Laas family resulting from a decision to the contrary would have been enormous, putting all their years of earnest effort in developing their farm in jeopardy. All of the members of the Laas family, the Court realized, had faithfully recorded the many conveyances of rights relating to the tract in controversy, that had been made during their time on the land, including their grants of rights to others, as well as their conveyances to each other, so they had quite forthrightly and admirably fulfilled their duty to provide constructive notice of their acts and intentions regarding the land. The Laas family had well earned the right to benefit from the absolute statutory bar manifested by adverse possession, the Court recognized, while the Robowoitra heirs on the other hand, although certainly unfortunate and presumably just as innocent as the Laas family, were left holding a worthless patent. Despite the sanctity with which the Court definitely views all absolute grants such as patents, time waits for no one, and attempting to turn back time to undo one injustice, the Court understood, most often results only in even greater injustice to others, so the Court was forced to reluctantly conclude that as the patent had languished for a quarter of a century, its value had completely dissolved. The fundamental basis for the tax payment requirement, which had been incorporated into the statutes relating to adverse possession over 30 years earlier, lies in the concept that one who has paid taxes on the land in question has already consistently provided evidence of the fact that their claim to the land is being made in complete good faith, since a thief generally does not pay for that which he takes. Furthermore, as has been previously noted herein, the tax payment requirement has the effect of limiting the usefulness of adverse possession to claim portions, fragments or slivers of adjoining properties, thus restricting it to its originally intended purpose, which is to clear away stale titles, exactly as it did in this case, rather than to intrude upon the realm of boundary law. This case represents an excellent example of the fact that adverse possession, when based on good faith actions, is highly beneficial to good

and innocent people, and of the fact that the Court, being quite cognizant of the usefulness of adverse possession in the protection of innocent parties, is prepared to make use of it in those instances when the evidence indicates that it's application is merited.

CITY OF MISSOULA v BAKKE (1948)

Our third riparian rights case, in stark contrast to the 1921 Bode case and the 1937 Smith case that we have previously reviewed, takes place in an urban setting, and accordingly, the changes to the land at issue here are the result of human activity, rather than any natural process. This case forms an interesting counterpoint with those earlier cases, in which we have seen claims of accretion both successfully and unsuccessfully set forth, as here we learn that the principle of accretion can have relevance even when no natural accretion is present. Human activity that results in deliberate or intentional changes to the flow or extent of any body of water, or changes to the configuration of riparian lands, generally does not alter existing boundaries. For example, a land owner cannot gain land simply by building a structure that diverts the flow of a stream, causing it to erode away or cut through the adjoining land, in order to enlarge his own property. Evidence of such circumstances would inevitably result in a decision that the boundary in question remained where it was located, prior to the efforts that were directed at reducing the size of the adjoining tract. However, many western rivers have obviously changed quite significantly in character over the many decades since the settlement of the west began, in terms of both magnitude and location, as the result of various human activities related to the use of the water and the adjoining land, and where such changes are incidental, rather than intentional, they can and do impact riparian boundaries in a manner that is equivalent to changes which are purely natural in their origin. Here we will see the Court choose to treat changes to a river resulting from human activity as being equivalent to natural changes, as the Court focuses on legally maintaining the essential originally intended physical connection between riparian land and the water that was clearly intended to serve as the boundary of platted land, in the absence of any revision or vacation of an original plat, which could serve to indicate a contrary intent. The important

principle that a grantor will not be presumed to have intended to except or reserve any portions of his land from a conveyance, unless such portions are clearly identified as exceptions or reservations in a manner that is manifestly apparent to his grantee, is also pivotal to the outcome of this case, just as it so frequently is in cases fought to resolve who holds fee ownership of the land underneath a right-of-way that was described as an exception or reservation in a conveyance. On the subject of adverse possession, while this case shows that a government entity, such as a city, can complete adverse possession, the acts and statements of city personnel can also bar the city from making a successful case, just as an individual adverse claimant can eliminate the legal functionality of their own possession. In addition, here we will see the Court sort out a clash of public and private land rights, resulting from the creation of a public alley that crosses several platted but unsold city lots, in a deliberate attempt to terminate the riparian status of the lots, which becomes a major issue when those lots are subsequently sold with reference to the plat, which shows them to be riparian. Finally, it may be worth noting that in 1950 one of Montana's most interesting and influential easement cases, *City of Missoula v Mix*, also took place in this same vicinity, just one block away from the site of the case we are about to review.

1882 - McCormick owned a substantial amount of land lying along the northeast side of the Missoula River and adjoining the Missoula townsite, which he decided to subdivide, and so the McCormick Addition was platted. Front Street was platted as running basically parallel to the mean course of the river, and it was about 100 feet northeast of the northeasterly bank of the river. The strip of land lying between Front Street and the river was identified on the plat as Block 56 and it contained about 30 lots, each having 30 feet of frontage on Front Street and running at right angles down to the river. None of these lots were sold however, and this strip remained vacant land under the ownership of McCormick.

1887 - McCormick conveyed some of his land holdings to his wife, including Block 56.

1888 to 1929 - At some unknown time during this period, Missoula began using Block 56 as a city dump. Waste material was dumped along the rear of the lots, gradually reducing the width of the river and lengthening the distance from Front Street to the edge of the water. McCormick's wife evidently never objected to the use of her land as a dump, and after she died in 1927 the use went on without any objection from her estate. After decades of such dumping, the northeast bank of the river was about 250 feet southwest of Front Street.

1930 - Missoula acquired a strip of land running through Block 56, to serve as an alley, which was 25 feet wide and parallel with Front Street, as it was described in a quitclaim deed executed by the McCormick estate. The northeast side of this strip was 130 feet southwest of Front Street, and was situated just a short distance southwest of where the northeasterly edge of the river had been in 1882. The alley was evidently put into use by city dump trucks and the area southwest of the alley continued to be used as a dump. There is no indication that the dumping altered the location of the actual channel of the river, or had any adverse impact on the land located on the opposite bank of the river, which was evidently very wide in this area.

1936 - Lots 9 through 14 in Block 56 were deeded to Follman by the McCormick estate. Follman could not tell where any of the lot lines were, so he asked the city engineer to help him lay out the boundaries of his lots, and together they taped off the lot lines and set stakes, placing the rear stakes at the northeasterly edge of the alley. Follman then built a carpentry shop and a lumber warehouse on these lots, and he also used part of the area lying just southwest of the alley as a lumber yard. At an unspecified point in time, the city engineer questioned Follman's use of the area southwest of the alley and asked Follman if he would be willing to deed that area to the city, but Follman refused.

1938 - The estate of McCormick quitclaimed the area lying southwest of the northeast edge of the alley and northeast of the current

northeasterly bank of the river to Missoula, which covered all of the land that had been reclaimed from the river as a result of the dumping activity. This strip of land extended for several hundred feet along the river and was up to 150 feet in width.

1943 - The dumping had apparently ceased by this time and the former dumping ground was put to use as a training area for city firefighters. Missoula also began grading and graveling portions of the area for use as a parking lot, and city officials completed plans to build a Civic Center on the site.

1944 - Follman conveyed his lots in Block 56 to Bakke. Bakke was aware that Missoula claimed to own all of the land southwest of the alley, but he was evidently convinced that the lots in Block 56 legally extended all the way to the river. Bakke opened a used car lot and he used the area southwest of the alley to store cars, trucks and other equipment. The Missoula fire chief instructed him to remove his vehicles and other property from the area southwest of the alley, but Bakke refused to do so, and went right on using the area just as he had been using it. Missoula needed to clear the area in question, in order to commence construction activities for the Civic Center project, so the city filed an action against Bakke, seeking to quiet it's title to the alley and all of the land lying southwest of the alley, down to the river.

Missoula argued that the land in question had been created by purely artificial means, through acts of dumping that had all been carried out at the expense of the city, which could not be considered accretion, and therefore the artificially created land should be treated as an independent tract, entirely separate and distinct from the land that was in existence when the lots were platted in 1882, so all that Bakke had acquired was a group of lots lying between Front Street and the alley. Missoula further argued that the location selected for the creation of the alley had been intended to mark the southwesterly boundary of the lots, as they had been originally platted, so the alley formed an absolute boundary, and none of the lots in Block 56 could ever legally extend across or beyond the alley. Bakke argued that because the 1882 plat clearly showed that all of the lots in Block 56 extended to the river, the lots that he had acquired were riparian lots by

definition, which were entitled to retain their connection to the river as it gradually moved in a southwesterly direction, regardless of whether the cause of that gradual migration had been natural or artificial, so the boundaries of all of his lots extended all the way to the centerline of the river, which was non-navigable, wherever the river might be at any given time. Bakke further argued that the alley could not form a boundary of his lots, because it did not exist when the lots were platted, and the grantor of the alley had no authority to cut the platted lots off from the river, by making the alley the new southwesterly boundary of Block 56, more than half a century after the plat had been recorded and relied upon as valid. The trial court held that the principle of accretion did apply to the artificially created land, and that all of the conveyances that had been made were fully valid and effective, with the exception of the 1938 quitclaim deed, which had conveyed nothing, and so ruled that all of the land between Front Street and the river was part of the lots that had been platted in Block 56, with the exception of the 25 foot strip comprising the alley itself, which the trial court decided had been acquired in fee by Missoula.

Bakke was in a rather unenviable position going into this controversy, since private parties attempting to block high profile public projects are often viewed as obstructionists, motivated only by a general desire to rebel against authority, who are merely looking for opportunities to stick a thumb in the eye of the government, and the judiciary is generally quite disinclined to reward such motivation, whenever it's presence is detected. Bakke however was evidently not the typical obstructionist, and he must have either had strong personal knowledge of the applicable land rights principles or been very well advised, because he was apparently astute enough to recognize that the rights of Missoula to the land in dispute were highly questionable, and the city's claim of ownership of the land was therefore very vulnerable. Missoula had not only used all of the land in controversy, the city had actually created the land, using public funds at the expense of it's citizens, by operating a city dump on the site, and using it without objection from anyone for decades as the landfill area steadily grew in size. On that basis, Missoula was apparently fully confident that no legal challenges to the city's ownership of the landfill area could be successfully maintained by anyone. The claim of adverse possession asserted by the city was readily swept aside by the Court however, on the basis that city employees working in the landfill area had openly and repeatedly acknowledged the rights of others, such as Follman and Bakke, to the area in question, by acquiescing to the uses that they had made of that area, and

even offering to purchase land from them, so Missoula was compelled to prove its ownership of the land in question by means of the existing written conveyances. It was undisputed that all of the land had been platted in 1882, and there was no indication on the plat that McCormick, the original developer and grantor, had intended to retain or reserve any land or land rights whatsoever in the area, on the contrary, the plat made it perfectly clear that his intent was to create lots that were bounded by the river. The Court agreed with Missoula that the fill material could not be properly classified as accretion, but neither could it be legitimately identified as an independent tract of land. The Court concluded that since it was absurd to imagine that McCormick had intended to retain only the portion of his land forming the bed of the river, all of the land created in the process of operating the dump had in fact been deposited upon Block 56. The dumping of the material legally did nothing more than raise the elevation of the underwater portion of the platted lots to which it had become attached, and although the land thereby created could not be technically described as accretion, the principle of accretion was fully applicable to the situation. Since no land existed between the river and the platted lots when the dumping began, the Court stated, the added land had simply increased the portion of the lots that was above the level of the water, and decreased the portion lying below that elevation, while narrowing the width of the river, which still formed the true permanent boundary of the riparian lots, just as it always had, explaining that:

“... there is no land intervening between said lots and the river ... the owner of land which borders upon any other water than a navigable lake or stream, takes to the middle of the stream ... where a line is described as running in a certain direction and thence up or down with the river, these words imply that the line is to follow the river according to its meanderings and turnings and in water courses not navigable, must be to the center of the stream.”

Since the platted lots ran to a non-navigable body of water, the Court observed, they all extended not merely to the bank of the river, but to its centerline, despite the fact that the lot lines drawn on the plat stopped at the edge of the river, so all of the dumping activity had actually taken place upon the platted lots, and that activity had merely served to alter the lots vertically, by reclaiming land, to the benefit of the future lot owners, while

leaving the original lot boundaries entirely unchanged. In so holding, the Court was following the fundamental judicial principle that a grantor will not be presumed to have intended to reserve any parts of his land, he will be presumed to have intended to convey all of his land, unless he clearly and openly expresses to his grantee or grantees that some specific portion of it is not being conveyed. Having been vanquished on its contention that the land in controversy should not be treated as accretion, or as being part of the original lots platted in Block 56, Missoula was forced to rely upon the creation of the alley running through Block 56, to support its claim that it owned all the land between the alley and the river. The Court agreed with the lower court that the alley had been legitimately created, and that it had been legally conveyed in fee to Missoula in 1930, and Bakke made no effort to dispute the legal status of the alley or claim ownership of it, so there was no conflict over either the existence or the ownership of that 25 foot strip itself, but there was a conflict between the litigants over what the legal effect of the creation of the alley had been. It was obvious that Missoula had acquired the alley for the purpose of insuring that the city would continue to have access to the dump site, at the time when it had become clear that buildings would soon be popping up on the lots along Front Street, potentially blocking access to the dump. The Court was unwilling to agree with Missoula however, that the intentions of the parties to the deed creating the alley in 1930 could control the legal status of the land comprising the dump site. The estate of McCormick, the Court found, had no authority or control in 1930 over the legal status of the lots that had been platted decades earlier, so even if it was true that the intent of the 1930 conveyance was to cut the lots off from the water, which did appear from the subsequent acts of the parties to be the case, that intent could be given no legal effect, since the intent of McCormick, for the lots to extend to the water, had already been clearly communicated by the original plat, and the original plat must control, having never been vacated or amended. Therefore, the 1930 deed controlled only the alley itself, and had no impact at all upon any of the land lying outside that 25 foot strip, so the Court upheld the decision of the trial court in all respects, confirming that Bakke's lots did in fact extend all the way across the site of the proposed Civic Center. If Missoula needed some portion of Bakke's lots to construct its planned project, the city would have to deal with Bakke directly, by making him an offer for his land that was fully satisfactory to him and acquiring it from him by that means, or by proceeding to commence a condemnation action against him, under the authority mandated by the principle of eminent domain. In so deciding, the Court had once again upheld the principle that natural boundaries control

over artificial boundaries, consistent with its last major riparian decision, 11 years before in the Smith case.

WHORLEY v KOSS (1949)

Here we review a case that focuses exclusively on the relationship between grantor and grantee, and quite clearly shows how intent the Court is upon doing equity in making its decisions, particularly in assessing the circumstances under which a land rights transaction was made, and distributing the legal responsibility, and the resulting liability, when something goes wrong. The basic controlling principle in the case we are about to review is the well known idea that any description must embody the true intentions of the parties, or else it can be deemed to be subject to reformation, but in this case the evidence pertaining to the circumstances under which the transaction was made, leads the Court to deviate from the general rule that the grantor is the party primarily responsible for the content of the deed. The grantor here may in fact have been negligent in certain respects, if negligence is to be measured strictly, yet the Court declines to place the typical burden of responsibility upon him, due to a compelling combination of factors, including the superior mental faculties of the grantee, and most significantly, the decision of the grantee to relieve the aged grantor of the task of creating a description for their transaction. The elementary maxim that one cannot sell what one does not own is dispositive of the actual ownership of the land in dispute here, nevertheless the description error creates complicated questions relating to liability, leading the Court to approve description reformation, in combination with mandatory performance of the contract at issue, in favor of the grantor rather than the grantee, as the proper remedy. This case also illustrates that the existing physical conditions play an important role in every conveyance, since in the eyes of the Court, a grantee, being necessarily on inquiry notice regarding all visible improvements to the property that he proposes to acquire, has no valid basis upon which to complain, if after reformation of his description he still gets the land that he actually bargained for, being deprived by the correction only of additional property that would have amounted to an unjust windfall. While the value of a survey to a grantor has

been previously noted and will later be noted again, this case provides a particularly good example of an instance in which the potential value of a survey to a grantee is very poignantly demonstrated. In *Thamling v Duffey*, an 1894 financial case, the Court had made it very clear that grantees, as well as grantors, carry serious legal and equitable burdens, which must be met if the grantee is to prevail, holding that "gross carelessness" on the part of a grantee constitutes evidence of bad faith, depriving a grantee of his precious status as a bona fide purchaser, and leaving the Court disinclined to protect his interests. In *Norwegian Lutheran Church v Armstrong* in 1941, the Court ruled that a contract for deed cannot have the effect of a deed or a comparable document of conveyance, even if it contains the language "hereby sells, grants and conveys", which of course is language that universally denotes a fee conveyance, because no individual word, phrase or clause in a document can be allowed to have the effect of circumventing the purpose of the document, as that purpose is defined by the true intentions of the parties.

1946 - Whorley was a farmer, 70 years of age, with a wife who had become an invalid, and they owned approximately 2400 acres of rural land, stretching out over an unspecified number of sections, some of which they lived on and had farmed, but some of which they had seldom if ever used at all, since parts of their land were of little value for agricultural purposes. How or when they had acquired the land is unknown, but there was no dispute concerning their ownership of it, and all of the boundaries were apparently marked at least well enough to be visible, by such things as fences and crop lines if nothing else. Whorley realized that it was time to retire from farming and move to a place where he could spend all of his time caring for his wife, so he decided to sell all of their land at this time. He apparently saw no reason to have his land surveyed, presumably because he knew that it was already adequately described in the existing public records, and he knew that there were no boundary conflicts to be resolved. Koss came and met Whorley on the property, Koss personally viewed most if not all of the land to be conveyed, and the two men then agreed to complete the transaction. Whorley told Koss to obtain the legal

descriptions of his land from his deeds recorded at the courthouse and then take them to an attorney and have the attorney draw up a contract for deed, listing all of the aliquot part descriptions that had been used in the various deeds by which Whorley had acquired the land. Koss agreed to have this done and he hired a title abstractor to complete the task, but the abstractor evidently did a poor job and produced a composite drawing of what he believed were the aliquot parts owned by Whorley, but which in fact was incorrect. Koss took the incorrect drawing to the attorney, who used it to produce the required legal description, which was then used in the contract for deed that was signed by the parties. Because the abstractor had accidentally included some land that was actually owned by Whorley's son, who evidently owned and operated a separate farm adjoining the land owned by his father, the description mistakenly indicated that 2720 acres were being conveyed, far more than Whorley actually owned. When Whorley subsequently learned from his son that Koss was claiming to have acquired the land that was owned by Whorley's son, including the house in which Whorley's son was living, Whorley insisted that the description error needed to be corrected, but Koss refused to cooperate, so Whorley filed an action against Koss, seeking to have the description reformed to properly delineate only the land that he actually owned and had intended to convey.

Whorley argued that the description that had been created did not reflect his true intentions, regarding the land which he had intended to convey, through no fault of his own, and the mistake that had been made by the abstractor and perpetuated by the attorney who wrote the description, had been unknown to all parties, so it qualified as a genuine mutual mistake, which Whorley was entitled to have corrected through description reformation. Whorley further argued that Koss was bound to complete the transaction that they had agreed upon, by acquiring all of Whorley's land from him, once the description was corrected, and Koss could not legally back out of their agreement on the mere basis that the contract contained a description error, because Koss was the party primarily responsible for the existence of the error. Koss did not argue that no mistake had been made, he argued that he was not personally responsible for the mistake, so the presence of the mistake gave him the option of choosing not to buy any of

Whorley's land at all, because he had been misinformed about what land was actually owned by Whorley, as a result of the presence of the mistake. Koss apparently believed that Whorley should be held primarily responsible for the existence of the mistake, because Whorley was the grantor, and a grantor typically has the responsibility to verify that the description being used is correct before signing a contract for deed, which Whorley had failed to do. The trial court found the argument made by Koss unconvincing and ordered him to perform his part of his contract with Whorley, by purchasing all of the land that Whorley actually owned, after reforming the description to correctly define Whorley's land.

Surveyors know how easily legal descriptions can be bungled, especially by those who have little or no experience dealing with descriptions of land, so surveyors are very likely to have little sympathy for either of the parties involved in this case, since both of them evidently failed to even consider enlisting the assistance of a land surveyor, to insure that their transaction was properly documented. The Court however, being confronted with the results of the actions of the parties, needed to determine which of them would have to bear the consequences of their mutual failure, so the decisive question was simply which party should be charged with the responsibility for making sure that the land intended to be conveyed was properly described. As we have seen in previous cases, and we will see again in future cases, Koss was correct that the grantor typically bears the primary legal burden of insuring that his deed clearly informs his grantee and effectively communicates to his grantee exactly what is, and what is not, being conveyed, and this obviously includes providing a description of the property being conveyed that is free of errors or ambiguity of any kind. There is no law or rule however, stating that the grantor must be the one to prepare the documentation, the parties are free to conduct the transaction in whatever manner they choose, and this can include placing the responsibility for the preparation of the documentation on the grantee. When the grantee accepts the responsibility for filling the role of the preparer of the documents, the burden to do so correctly then falls upon the grantee. The rule that the grantor bears the description burden merely states the initial condition of the relationship between a grantor and his grantee, acknowledging the fact that the grantor initially has the right to maintain control over the description used, so the rule amounts to a presumption that the grantor did in fact exercise his right to provide the description, and in so doing took the responsibility for it's correctness. Being a presumption however, that rule applies only in the absence of evidence to the contrary, so

evidence that the grantee actually took the responsibility for producing the description to be used shifts the burden to the grantee, as the preparer, to insure the description's correctness. This is what Koss evidently failed to understand, and his incorrect belief that the burden to check the description, which had been prepared by agents working for Koss, still rested upon Whorley, would lead to his defeat. Since the evidence here, as indicated by the Court, clearly showed that Koss had voluntarily taken on the burden of creating the required description, Whorley was freed of that responsibility, and he was entitled, the Court held, to trust that Koss and the various parties assisting him had properly created and checked the description before inserting it into the contract for deed. Since none of the parties made any charges that the presence of the erroneous language had resulted from any attempts at fraud or deception, the Court found that it was a pure mistake, which all of the parties were genuinely unaware of, when they signed the contract for deed, concluding that:

“... mistakes were unwittingly made in the description of the land intended to be sold and conveyed by plaintiffs and intended to be purchased by defendant ... the mistakes were mutual and the written instrument executed by the parties failed to express the real agreement intended to be made by them ...”

The fact that the errors in the description language were unknown to any of the participants made the mistake a mutual one, which would serve to distort the true intentions of both parties, and prevent their actual agreement from being properly documented, if allowed to stand, so the Court agreed that the description was subject to reformation, and it had been properly corrected. The conclusion that the bogus description could not control was elementary, since it was axiomatic that Whorley could not convey any land he did not own, but the matter of the legal effect and consequences of the error remained to be dealt with. Whorley simply wanted to complete the transaction by selling all of his land to Koss, which had always been his clearly stated intention, but Koss insisted that he had the right to terminate the contract, because he did not want to complete the transaction, since it did not include the valuable area which had turned out to be owned by Whorley's son. The evidence indicated however, that Koss had visited the Whorley property, and that he had the opportunity to view all of it, so regardless of whether he had actually taken the time to look at every bit of the subject property or not, he could be charged with notice, concerning everything that was visible on or near the land. Koss had obviously seen the

buildings owned by Whorley's son, and thought they were located on the land that was going to be conveyed to him, but as the grantee, he had the fundamental burden of inquiry, so his failure to inquire about those buildings was fatal to his claim. A grantee is not entitled to speculate or guess about the significance of anything that he sees on or near the land he is proposing to buy, he bears an equitable burden to act in a prudent manner, by raising any issues about what he sees, and obtaining clarification regarding all visible objects that may or may not be located on the subject property, prior to agreeing to complete the conveyance. Koss had failed to verify whether or not the buildings in question, or the lands they were situated on, were intended to be included in his deal with Whorley, so he had lost his opportunity to refuse to complete the transaction without those lands and buildings, therefore the Court upheld the decision of the lower court requiring Koss to complete the purchase of Whorley's land. So in the end, Whorley escaped undamaged because he had effectively passed his description burden on to Koss, and Koss took the fall, because he had failed to have the description prepared accurately, and he had relied on an incompetent description, and he had misunderstood what land was actually being conveyed to him, all because he had failed to consult a land surveyor, proving that a survey can be of great value, even when no boundary or encroachment issues exist. Ironically, the mishandling of the description preparation here could have been easily avoided, if the true desire of the parties was to do only what was minimally necessary, since a description reading simply "All of my land" would have legally accomplished the objective of successfully conveying all of the intended land and nothing more. The real source of the controversy was the fact that due to their failure to order a survey, the location and extent of the land involved was left unclear, once again illustrating that using a description which has not been verified by means of a survey is a recipe for disaster. Since surveyors are already aware of that however, the main lesson for surveyors here is that the party taking the responsibility for the preparation of a description always bears the consequences of any errors subsequently found within it, whether they prove to be correctable errors or not, potentially resulting in serious liability.

KENNEY v BRIDGES (1949)

Returning to our review of the Court's historical treatment of adverse possession, here we find a case which at first glance may seem to stretch

adverse possession beyond its normal limits, but which upon deeper examination can be seen to clearly follow the most essential principles controlling the adjudication of land rights, demonstrating that adverse possession can be completed even in the absence of the typical obvious physical evidence of occupation and use, where other equally important factors are present. Once again, in the case we about to review, carelessness in the preparation of a legal description is the ultimate source of the controversy placed before the Court for resolution, but in this instance none of the contending parties themselves, nor any of their predecessors, are responsible for the description error, all the parties are victims of bungling on the part of county employees. In addition, here we will see the Court take an interesting position on a matter that may be of particular interest to surveyors, regarding the value of the marking of lot corners by land owners themselves as evidence, which sheds light on the Court's attitude toward the right, and indeed the responsibility, of land owners to openly identify their boundaries, confirming that the Court respects and supports their efforts to do so. In 1937, in the case of *Sullivan v Neel*, the Court had indicated that even very minimal acts performed by a party who is functioning as an adverse possessor, either knowingly or unknowingly, can set the clock that ticks off the statutory time period required to bar recovery in motion. In the highly typical scenario presented by that case, the patriarch of the Neel family died in 1882, and his full land holdings were unknown to his family, so a certain tract that he had owned was overlooked and effectively left abandoned. In 1918 the long forgotten tract was sold by the county for unpaid taxes to Sullivan, who used it only as a pasture, never fencing it, building on it, or physically occupying it in person. When the descendants of Neel discovered what had happened, Sullivan was forced to file an action against them, in an attempt to quiet his tax title. Although the tax deed was void, through no fault of Sullivan, the Court decided that even his very rudimentary use of the tract constituted a valid adverse possession, since he had valid color of title, and he had made tax payments, both of which supported the bona fide character of his claim. In 1955, in *Hentzy v Mandan Loan & Investment*, the Court again found merely grazing sheep under comparable circumstances to be sufficient to complete adverse possession, and also held that the possession of land by a county, once the county takes

control over the land in question for delinquent taxes, by obtaining a deed naming the county as grantee, is adverse if the deed subsequently proves to be invalid, so the county's use of the land accrues, and can count to the benefit of any subsequent adverse possessor. In *Long v Pawlowski* in 1957, the Court's decision in favor of adverse possession was the same, even though the use of the unenclosed rural land in question in that case was limited to grazing and lambing that was conducted only during the summer season, and the only change or improvement to the land that had been made by the adverse claimant was a series of dams, presumably of the earthen variety.

1924 - Wicks acquired a group of presumably typical adjoining city lots in Livingston. Where Wicks actually lived is unknown, there is no indication that he ever even saw his lots, so he may very well have lived elsewhere. The number of lots Wicks owned is also unknown, as is the size, shape and location of the lots. These lots were evidently still in their original condition, completely undeveloped and vacant, and whether any of the surrounding land was developed or vacant at this time is unknown as well.

1931 - The husband of Bridges filed an action against Shinn, and prevailed, resulting in a sheriff's deed being issued, conveying a number of properties owned by Shinn to the Bridges. For unknown reasons however, the sheriff's deed mistakenly included the group of lots owned by Wicks. There was no evidence that Wicks had ever conveyed the lots in question to Shinn, or to anyone else, so this mistake was apparently the result of a typographical error involving either the lot numbers or the block number listed in the sheriff's deed. No one noticed this mistake, so the Bridges naturally believed that they had become the owners of these lots, although the lots actually still belonged to Wicks. The lots in question were then leased by Bridges to a party who proposed to build a miniature golf course on the land, but this idea evidently proved to be unfruitful and ended the following year.

1932 to 1945 - During this period neither Bridges nor her husband

ever made any personal use of the lots, which continued to lie vacant, but they did pay the taxes on them promptly every year. In addition, they visited the lots from time to time to tidy up the ground, and they sometimes placed fresh unmarked wooden stakes at the lot corners, evidently hoping this would serve as a signal to others that the lots were being attended and had not been abandoned. Bridges evidently paid the taxes in person each year, so her name, rather than that of her husband, appeared as the owner of the lots in the county tax records. The area surrounding the lots in question was apparently also vacant during this time, because the lots became part of a baseball field where American Legion baseball games were played for a few years, under a lease issued by Bridges, along with the owners of adjoining properties, for that purpose. Livingston also offered to lease the lots from Bridges for the purpose of erecting a skating rink, but Bridges apparently did not like that idea and declined the city's offer, and she also declined a lease offer made by an oil company. Wicks remained the true owner of the lots throughout this period, but he apparently never paid any taxes on them, never made any use of them, never openly asserted any claim to them, and never disputed the claim of ownership made by Bridges.

1946 - Wicks quitclaimed the group of lots to Young. Just a few days later, Young quitclaimed the lots to West, and on the same day that West acquired them he quitclaimed them to Kenney. At this time, the lots were being used as part of a lumber yard, under another lease that had been executed by Bridges.

1947 - Kenney paid the 1946 taxes on the group of lots that had been deeded to him. He was told by the tax office personnel that the lots stood in the name of Bridges in their records, so any payment that he made would operate to her credit, but he paid the taxes anyway. Two weeks later, when Bridges went to the tax office to pay the taxes on the lots as usual, she discovered that they had already been paid by Kenney, so she evidently then contacted Kenney and learned that the ownership status of the lots was in dispute. Kenney then filed an action against Bridges, seeking to quiet his title to all of the lots in

question.

Kenney argued that neither Bridges nor her husband had ever made any significant physical use of any of the land in controversy, so they could make no valid claim of adverse possession, having never taken actual possession of the lots, or fenced them, or improved them, or lived on them, and title to the lots at issue had always remained in the name of Wicks, so as a successor of Wicks, Kenney was the true legal owner of the lots in question. Bridges argued that she and her husband had maintained complete control over all use of the property in question for a length of time in excess of the requisite statutory period, under color of title, with payment of taxes, so title had become vested in her by means of adverse possession. The trial court felt that Bridges had satisfied all the requirements of adverse possession, and so quieted title to all of the lots in her on that basis.

Most adverse possession claims involve land that has been developed or improved in some way, and in those adverse possession cases that involve vacant or unimproved land the success rate of the adverse claimants is much lower, potentially giving the impression to the casual observer that construction of some kind is among the required elements of adverse possession, and that appears to have been the mistake made by Kenney. In a great many adverse possession cases, minor or insignificant uses of the land in question have been found to be insufficient to support a successful possession based claim, and indeed any use of land that is so trivial and temporary as to quickly pass away, leaving no trace, can be discounted and rejected, because use of that kind does not exist or survive long enough to serve any meaningful purpose or provide notice of use. So Kenney was right, that since nothing permanent or lasting had ever been built anywhere on the lots in question, not even a fence, the validity of the ownership claim made by Bridges would have been highly questionable, had it been required to stand upon physical possession evidence alone. Bridges however, had several other important factors operating in her favor. First, she held a deed which was valid in all respects, although it contained a description error, so the initial basis for her claim to the lots in question was firmly anchored in good faith, because she had no physical or openly apparent reason to suspect that the land described in her deed was not the land that the deed had actually been intended to convey. Second, she had reinforced the good faith nature of her claim by faithfully paying all the taxes due on the land, showing that she had no intention of hiding the fact that she was claiming to be the owner of the lots from anyone. Thirdly, she had consistently and repeatedly acted as the owner of any vacant lot would be expected to act,

when called upon by numerous parties interested in putting the land to some kind of use. She had leased the land out for various purposes a number of times, and also refused to lease it out to others, both of which amounted to functions that an owner of a vacant lot would naturally perform, in accordance with the owner's personal preferences and discretion at any given time. So in fact she had an exceedingly strong claim to the lots in question, based upon her conduct, despite the fact that she and her husband had never built anything on the land, and they had done little more than pick up trash left on the land by others. The measure of a successful adverse possession, the Court indicated, lies in the evidence revealing the true intentions of the party or parties making the adverse claim, and it was completely clear that Bridges not only believed that she was the owner of the lots, she had demonstrated to all the world that she was the functional owner of the land, and she had nothing to suggest that she harbored any doubts about the status of the land, so there was no basis for any assertion that her claim was not founded in good faith. Quoting from an Iowa decision, expressly addressing the issues that arise when a claim involving adverse possession of vacant land is made, the Court agreed that:

“... to set in operation the statute of limitations does not necessarily require the claimant to live upon the land, or to inclose it with fences, or to stand guard at all times upon its borders ... It is enough if the person pleading the statute takes and maintains such possession, and exercises such open dominion, as ordinarily marks the conduct of owners in general ... It is manifest that the acts of ownership and dominion necessary to indicate adverse possession of a vacant lot need not and cannot be the same which a court or jury might think essential with respect to a lot covered with valuable improvements ... If one asserting ownership of a vacant lot goes upon it at reasonable intervals, marks its limits or corners with visible monuments, clears it of brush, grass and weeds to the limits so indicated, and points it out as his property to his neighbors and friends, it constitutes adverse possession.”

The position adopted by the Court in this case clearly illustrates that the Court is far less concerned with details, when land rights are at stake, than it is with the larger principles of law and equity that actually represent

and control the ownership and transfer of those land rights. In assessing the attitude, posture and intentions of an adverse claimant, with respect to the land in question, however great or small the area involved may be, and in the process of determining the value that those elements hold in support of the claim being made, the Court looks primarily to the physical acts of the claimant, to observe whether or not those acts reveal a party effectively functioning as the owner of the land in question. While physical acts are typically the primary factor in most adverse possession decisions, actions taken by the claimant in relation to the land can be equally important, and in some cases such as this one, they can carry the claim to success. Bridges and her husband had maintained control over all of the physical uses being made of the land at issue, so although they were seldom physically present on the land, and even then they were only momentarily present, it was known and understood by the community that they were in fact the parties in full control of the land. Ultimately, the single most important element of adverse possession is notice, all of the specific requirements for a successful adverse possession are expressly targeted at insuring that no owner or owners of record can ever be deprived of their ownership rights without having had clear notice of what was taking place, or without being allowed several years to step forward and forthrightly address whatever developments may occur involving their land. Wicks, as the owner of record, had utterly failed this test, instead choosing to quitclaim away any right or interest that he might still have had in this group of lots, tacitly recognizing that they were no longer of any real value to him, leading the Court to conclude that he had apparently abandoned the lots. Since the claim made by Kenney could be no stronger than that of Wicks, the Court ruled that Kenney had acquired nothing by means of the string of quitclaim conveyances that had ended with him, because Wicks had already lost the lots by the time he purported to convey them in 1946, and therefore the Court upheld the lower court decision to quiet title to all of the lots in dispute in Bridges. Kenney, due to his mistaken impression regarding what constitutes adverse possession, had gotten stuck with the hot potato, that had been wisely jettisoned in rapid succession by Wicks, Young and West, who were evidently smart enough to recognize that the lots had already been lost to Bridges. Wicks was undoubtedly a true victim of the original error that had initially put his lots in jeopardy, but under the law he had ample opportunity to correct that error, and he finally lost his rights to the land not because of the error itself, but because of his own failure to seek correction of it, despite the fact that the many items noted above all provided him with distinct notice that his rights were in danger and required his attention, if they were to be preserved. This

case shows especially well how the Court employs the doctrine of adverse possession to finally bury past mistakes of every variety relating to land rights, including description errors, allowing the passage of time to render all such errors irrelevant, and eliminating the need to delve into the murky depths of the past in a futile effort to figure out who actually made such mistakes and should have been held accountable for them.

STRACK v FEDERAL LAND BANK OF SPOKANE (1950)

Although we have already seen cases illustrating numerous mistakes made in the preparation of legal descriptions, ranging from the inevitable typographical errors to major blunders and omissions, here we encounter a scenario that points to yet another potential source of serious error in description composition, which is the inability of some people to properly comprehend and understand what is being shown on a map or plat. Even though map reading is obviously a most elementary skill to a land surveyor, it must be remembered that many people have never had any need or reason to use maps, and to them even some of the most simplistic items that appear on a plat can seem confusing or be entirely meaningless. While a land surveyor can typically understand and properly explain any such items, clearing up any misunderstanding of the meaning of a map or plat, the surveyor can obviously do so only if the surveyor has the opportunity to participate in the formulation of the proposed conveyance of land. In this case we will see the consequences of a series of misunderstandings and failures, resulting from the absence of any advisory input from a surveyor, and observe the equitable resolution of the situation by the Court, again exhibiting the power of the concept of notice, over all parties engaged in transactions involving land rights. The concept of description reformation, which is exercised by the Court in the case we are about to review, is not targeted simply at eliminating errors and is therefore not applicable to all description errors, instead it exists to serve the far larger purpose of protecting valid land rights, essentially intervening to rectify instances in which genuine mistakes would otherwise result in the unjust victimization of innocent parties. In *Sullivan v Marsh*, a case concerning the validity of a liquor license, which was also decided in 1950, the Court clearly spelled out

the limitations on the correction of any of the components of a written contract, such as a legal description, stating that reformation is appropriate only when it is evident that the mistake in question was mutual in nature, and that the mistake "occurs in reducing to writing the agreement which the parties intended" with the result that "the executed written instrument does not reflect the actual and true understanding of the parties". In *Voyta v Clonts*, a 1958 mineral royalty case, which has been subsequently referenced by the Court many times, as defining the principle and parameters of document reformation with respect to land rights, the Court reiterated its view that the role of reformation is to provide an equitable remedy for the protection of all agreements made in good faith. In recognition of the fact that the process of converting thoughts, ideas and decisions into written language can often be problematic and result in errors of various kinds, the Court in that case maintained the position that it is the intended agreement itself, rather than the document which represents merely an effort to capture the agreement, that truly controls the actual rights of the parties. So if it can be shown that the documents of record do not adequately express the true nature of an agreement that was clear to all the parties prior to the preparation of the documents relating to the agreement at issue, then reformation of the documents in question, to bring them into alignment with the true intentions of all the parties, is appropriate, and the use of erroneous descriptive language that contradicts the real intentions of the parties in some way, as all surveyors are well aware, is among the most common of all such discrepancies.

1883 - A township through which the Yellowstone River ran was surveyed and subdivided by the GLO. Since the river ran through only the northerly portion of Section 11, just three government lots were platted in that section. The northwest quarter of the northeast quarter became Lot 1, the north half of the northwest quarter became Lot 2, and the southwest quarter of the northwest quarter became Lot 3. Aside from those three lots, the remainder of the section was regular and it contained a total of 580 acres. However, Lot 4 in Section 10 happened to lie directly to the west of Lot 3 in Section 11, and this unfortunate coincidence would lead to confusion and controversy.

1936 - The Bank owned all of Section 11, along with a large amount of other surrounding land, and at this time the Bank contracted to sell 3282 acres of land, including all of Section 11 to Swigart. The land in Section 11 was described in the contract for deed as consisting of four government lots plus all of the regular aliquot parts in the section, so it was clear that all of Section 11 was to be conveyed. However, whoever had prepared the description had apparently looked at the GLO plat and noticed Lot 4 next to Lot 3, but failed to realize that Lot 4 was actually in Section 10, rather than in Section 11.

March 1940 - Strack entered into a contract for deed with Swigart, to acquire the south half of the north half of Section 11, which was comprised of three of the regular aliquot parts of the section plus Lot 3, totaling 156 acres, since Lot 3 contained about 36 acres. There was no indication that the position of the river had ever shifted materially, so it apparently still cut only a few acres off the northwest corner of Lot 3 and the presence or location of the river was not a source of controversy. Strack however, did not record his contract for deed.

November 1940 - Swigart died leaving 3 heirs, named Sterling, Jean and June, so each of them acquired an equal interest in all of the land that had been included in Swigart's 1936 contract for deed with the Bank. Apparently unaware that Swigart had made an agreement with Strack, since Strack had failed to record his contract, the 3 heirs cancelled Swigart's contract with the Bank, and each of them made new individual contracts of their own with the Bank, dividing all of Swigart's land among themselves, as they saw fit. Under these new contracts, Lots 1, 2 & 3 in Section 11 were conveyed to Jean, while the remainder of the south half of the north half was conveyed to June. So the heirs had unknowingly split up the land that had been described in Strack's contract, and the contracts that they created at this time were recorded.

1941 to 1946 - At an unspecified date during this period, Strack informed the heirs of the existence of his contract with Swigart, and upon realizing that Strack's rights had been accidentally overlooked and a problem had been created by their division of Section 11, the

heirs acknowledged Strack's rights and attempted to take steps to provide rectification of the situation. Sterling and Jean quitclaimed their interest in the land that was described in Strack's contract to June, so June effectively stepped into the shoes of Swigart, with respect to the contract held by Strack covering the south half of the north half of Section 11. However, rather than describing the land covered by these quitclaim deeds using the lot numbers, they described it only as the south half of the north half, so Jean remained the owner of record of Lot 3. Trusting that the problem had been properly corrected, Strack took possession of the entire area covered by his contract for deed and fenced it and began occupying and using it, but his contract remained unrecorded.

1947 - The Bank issued a deed to June, pursuant to it's contract with her, but in listing the parts of Section 11 being conveyed, the deed mistakenly stated that it included Lot 4, and it omitted Lot 3, which needed to be included in order to fully cover the south half of the north half of Section 11. Unaware of this error, June then repeated it, by issuing a deed employing the same description to Strack, in order to document the completion of his contract with Swigart. Strack was also unaware that this description error had been made, so he mortgaged his property, again repeating the erroneous description himself. So even after all of these transactions had been completed, and all of the parties knew where their lands and boundaries were located on the ground, no one realized that a description problem still existed, and the public records still incorrectly indicated that Jean, rather than Strack, was the owner of Lot 3.

1948 - Jean, also unaware that a description error had been made, or that Lot 3 was in fact part of the area that had already been conveyed to Strack, entered a contract for deed conveying Lot 3 to Storholm. When Strack discovered what had happened, and realized that another contract which was in conflict with his own contract had been created, he filed an action against the Bank, the Swigart heirs and Storholm, seeking to have all of the erroneous descriptions reformed.

Strack conceded that he had failed to record his documents of conveyance, but he argued that his open occupation of the land was equivalent to recordation for purposes of notice, so Storholm had no valid claim to Lot 3, and all of the erroneous descriptions should be reformed to clarify that Lot 3 was actually part of the south half of the north half of Section 11, which Strack had acquired. The Swigart heirs evidently understood exactly what had taken place, once the details were revealed and explained to them, so they did not dispute the claims made by Strack, and they withdrew from the action. The Bank also did not dispute anything that had happened, and also made no argument against Strack, agreeing with him that the deeds should be reformed to meet the true intentions of the parties, if the deeds were in fact erroneous in some way. Only Storholm stood against Strack, and he argued that he was an innocent purchaser who had legally acquired Lot 3 from Jean, who was the undisputed legal owner of that lot. He maintained that he was entitled to rely entirely upon the public records as the basis for his acquisition of the lot in question and the descriptions could not be reformed, because doing so would damage his rights. He also asserted that if the mistaken descriptions were to be corrected he would be entitled to compensation for his loss of the lot in question. The trial court decided that description reformation was the appropriate legal and equitable remedy, and ordered all of the descriptions involved to be corrected, as requested by Strack.

If ever a case has presented a classic example of the value that a land surveyor brings to a land transaction, this would be that case, since the mere presence of any competent land surveyor, as a consultant or even just as a friendly adviser, even if no survey field work was needed or desired, would have prevented any of the problems that are documented in this case from taking place. Surveyors certainly can and do make mistakes of course, but all that was required to prevent the incredibly simple mistakes made by these parties was someone capable of understanding a GLO plat, so virtually any surveyor could have easily saved these unwise parties from themselves, but in their ignorance, they never obtained the assistance of a surveyor and instead chose to trust the Bank personnel to properly create their descriptions, setting the stage for this conflict. The fact that a number of mistakes had been made, and had been repeated, was quite obvious to the Court, and in fact multiple errors had been made, all stemming and cascading from the original mistake concerning the lot numbers, and all due to a fundamental misconception regarding the details of GLO platting. The GLO both intended and attempted to make its products clear and useful,

knowing that many of the people who would rely upon them would be very ignorant, or even illiterate, yet not every GLO plat achieves the goal of complete clarity, so basic misunderstandings such as this one proved to be inevitable. Since no surveyor was ever consulted, Strack and the Swigart heirs evidently operated in complete ignorance, with regard to the real location of certain portions of the land embraced within their descriptions for several years, although no gaps or overlaps were involved, and in their minds each of them correctly understood where their true boundaries were physically located. No problems arose initially, even when errors were discovered, because Strack and the Swigart heirs were earnestly concerned with correcting any mistakes that had been made in an honest and open manner, since their primary goal was just to live in harmony with each other, and none of them had any intention of trying to take any unfair advantage of any mistakes that had been made. Jean owned all of the land lying directly to the north of Strack's land, and both Jean and Strack acknowledged and accepted their mutual boundary on the ground, since it had been fenced, so they naturally imagined that there was no real possibility that anyone might come along and challenge their land holdings. In fact, the steps that the parties had taken to correct their descriptions were legally sufficient to bind all of the parties who were actually present on the land prior to 1948, especially when viewed in combination with their respective use of the land, so neither Strack nor any of the Swigart heirs could have made any successful claim against the other, even if they had desired to do so. They had however, left open an opportunity for another party to attempt to rock their world, by failing to record their documents, and Storholm proved to be that party. The Court however, being well prepared to deflect his assault, and come to the rescue of the description bunglers, explained why in the view of the Court Storholm could not be allowed to prevail, as follows:

“... Storholm was well acquainted with the land purchased by him and knew of the fence ... Storholm alleged that he was a purchaser in good faith for value and without notice ... this contention cannot be sustained ... Storholm had notice of the interest of plaintiffs at the time he purchased or at least sufficient notice to put him upon inquiry which if properly pursued would have disclosed that interest.”

In so deciding, the Court once again adhered to it's consistent equitable position, with respect to the fundamental principle of notice,

holding that all transactions involving land rights are subject to notice, and that the most elementary and effective form of notice is that provided by physical evidence. Land rights, like everything else that is part of the physical world, do not exist in a vacuum, and this case yet again demonstrates why the Court has consistently maintained that physical notice is the most reliable form of notice, which can be ignored only at the peril of those who choose to close their eyes to the reality that they can see on the ground. Just as the Court demands clarity and completeness from a typical grantor, it likewise expects prudence and diligence to be displayed by the typical grantee, and a grantee having the expectation that he will be favored or protected by the Court, despite the absence of those virtues on his part, is very likely to meet with disappointment, as Storholm learned. If Storholm had actually failed to comprehend that Lot 3 was a part of the land that had been acquired and openly occupied by Strack for several years, by the time Storholm entered the scene in 1948, then he was just as ignorant or careless as the others had been, and he was therefore deemed by the Court to be no more worthy of protection than any of the others. Even if Storholm really was as innocent as he proclaimed himself to be of the truth about the lot that he had contracted to purchase, he had nonetheless failed to take any steps to discover or clarify where the land that he had agreed to buy was actually located, which clearly represented a fundamental failure on his part, as a grantee. By the same token, Storholm could not state that he knew that the lot in question was located in the south half of the north half of Section 11, because his grantor had previously quitclaimed the entire south half of the north half, and as a subsequent grantee, Storholm stood in no better position than did his grantor herself, with regard to the land rights held by Strack. Suggesting that if Storholm had any valid legal claim at all, that claim would need to be made against his grantor, and not against Strack, the Court upheld the ruling of the lower court, reforming the descriptions in the documents of conveyance required to clarify that Strack was in fact the owner of Lot 3. The lower court had gone beyond the resolution that had been requested by Strack however, and had also ordered the description in the contract for deed issued by Jean to Storholm in 1948 to be corrected as well, and this decision the Court concluded, had to be reversed, because the conflict that had been litigated did not involve the resolution of any rights that might be in dispute between Jean and Storholm. For that reason, the Court left open the opportunity for Storholm, should he choose to assert that he had been defrauded as a grantee, to seek a legal remedy for his loss from Jean, as the grantor who had contracted to sell him land that she did not own, provided that he felt confident that he could prove that she had done so knowingly. As

far as the result of the present case was concerned however, Storholm's misplaced reliance upon the recorded descriptions had left him with nothing. Like many before him, and many who would come after him, he had found the Court unwilling to reward cleverness, at the expense of innocence.

HELLAND v CUSTER COUNTY (1953)

Here we find the Court confronted with a case that combines legal principles relating to the true ownership boundaries of platted lots with riparian legal principles, since it takes place at the junction between platted urban land and an abandoned portion of a river channel. Yet as we will see, the most important factor in the Court's resolution of the relationship between the rights of the competing parties, is neither the clearly drawn boundaries of the platted land nor the character of the land lying in the abandoned river channel, which is defined only by occupation, instead it is the existence of an otherwise insignificant strip of vacant land lying between the areas held by the parties, which proves to be most critical to the outcome. Nevertheless, in the course of reaching its decision in the case we are about to review, the Court enumerates its position on the location of boundaries of ownership that implicitly develop when land is platted, dedications are made, and the land is conveyed with reference to the plat, which has long been a source of legal controversy and disagreement between the courts of various states, and which has evolved over time even within a number of states, including Montana. In 1892 in *Hershfield v Rocky Mountain Bell Telephone*, the Court had very staunchly and definitively taken the position that a grantee of a typical platted city lot, abutting a typical dedicated city street, owns only the area lying within the platted dimensions of the lot, and holds no ownership interest in any area lying within any adjoining dedicated streets or alleys. In that case, the Court ruled that the telephone company had the right to place poles in a dedicated public right-of-way, under the authority granted to the company to do so by Helena, without providing any compensation to any lot owners who were inconvenienced by the pole locations near their lots, because the dedication of the public streets had reserved the fee ownership of the streets in 1869 when Helena was platted on public land, so the lot owners had never

acquired any ownership interest in any of those streets. The Court then ruled to the same effect in *Loeber v Butte General Electric* in 1895, again indicating that lot owners in Butte had no basis for either objection or compensation, when the city authorized the installation of utilities such as light poles in a public alley, since their lots did not include any portion of any such dedicated areas. In a more modern context however, in *Bailey v Ravalli County* in 1982, the Court held on a statutory basis that lot ownership typically does extend to the centerline of any adjoining public right-of-way, which amounts only to an easement, so upon vacation or abandonment of the dedication, the public right-of-way simply vanishes, and the ownership of the abutting land owners merely continues unaltered, therefore the land beneath a public right-of-way passes in a typical conveyance, although unmentioned, being in fact a part of the described land being conveyed in fee. Then in 1992, in *Herreid v Hauck*, the Court decided that centerline reversion applies, even if a dedication actually was a fee conveyance, so an owner of property adjoining a vacated public fee right-of-way can make a legitimate claim of ownership extending to the centerline, even if the dedicated roadway was not comprised of land that had once formed a part of the tract held by the land owner, completing the judicial acceptance of statutory centerline reversion as a controlling legal concept.

1878 - The GLO performed the original subdivision of the township in which the Tongue River met the Yellowstone River, just south of Miles City. At this time, the Tongue River entered the southwest quarter of Section 34 from the southeast, flowing in a northwesterly direction, before passing into the southeast quarter of Section 33, so the south half of the southwest quarter of Section 34 was platted as Lots 1 & 2. This portion of the river was part of an oxbow, that bulged to the northeast from the central thread of the river valley, which was about half a mile distant, to the southwest.

1882 - The west half of the west half of Section 34 was patented to Miles, who then conveyed the west half of the southwest quarter, which included Lot 2, to Dickinson.

1884 - Dickinson conveyed the west half of the southwest quarter to

Snyder, who platted a portion of that area as the Snyder Addition to Miles City. The area platted by Snyder was entirely north of the river, and the street that ran east and west at the south end of his subdivision was just a short distance north of the meander line that ran along the north side of the river. To what extent Snyder's Addition was developed or used over the ensuing years is unknown.

1913 - The river was deliberately diverted from the oxbow area, leaving the entire oxbow channel exposed, so the river thereafter flowed along a straighter course, but about a half a mile farther southwest, and it no longer entered Section 34 at all. There is no indication of whether or not any development had yet taken place in this immediate area at this time, and no indication of whether or not the land lying on the inside of the former oxbow was being occupied or used at all, but little or no use was evidently made of the abandoned channel itself by anyone over the ensuing years, and no one asserted any claim of ownership relating to it. Presumably the former river channel remained a swamp or marsh for several years, only gradually drying out enough to become useful land.

1914 to 1927 - A number of resurveys that included the former oxbow area were performed by the GLO during this period, and several supplemental plats showing the area were produced, but there is no evidence that the abandoned river channel itself was ever surveyed or treated as a separate and distinct tract. Portions of the former channel were incorporated into various tracts that also covered parts of the area formerly located inside the oxbow, the subsequent ownership and use of which is unknown.

1936 - Kuni, who was a dairy farmer, began using a portion of the abandoned river channel lying directly south of the Snyder Addition as a pasture, allowing his herd to graze on it, and no objection to this was raised by anyone. There is no indication that Kuni owned any other land anywhere in the vicinity, but over the ensuing years he fenced a portion of the abandoned channel, an area about 250 feet by 400 feet in size, and he occupied that area on a continuous basis without any objection or interference from anyone. Whether or not the

area occupied by Kuni extended over the full width of the abandoned river channel is unknown, but his north fence was evidently just a short distance south of the south end of the 1884 subdivision. Kuni never paid any property taxes on any of the land he was using, because no property taxes were ever assessed.

1943 - Hartman acquired several lots in the 1884 subdivision, including Lots 10 & 11 in Block 24, which were the lots that were located at the south end of a block lying at the south end of the subdivision, and she lived in a house on those lots, overlooking the portion of the abandoned river channel that was being occupied by Kuni. Directly south of her lots was the platted street marking the southerly limit of the subdivision, with only the former river channel lying on the opposite side of that street. Whether or not the platted street running along the south side of Hartman's lots was ever actually constructed or used as a street is unknown, but it had never been formally vacated. There is no indication that Hartman and Kuni ever met or communicated at all during the several years that they lived in such close proximity, and no indication that Hartman ever made any use of any of the land lying between the street in question and Kuni's fence.

1949 - Kuni conveyed the portion of the abandoned channel that he had occupied to Helland. How the land was described in this conveyance is unknown, but Helland was evidently not completely confident about his ownership rights, because he subsequently insisted on paying several years worth of taxes on the land, even though he was told by county officials that no taxes were owed or due on that land, in an apparent effort to support the validity of his claim to the fenced area. How either Kuni or Helland accessed the fenced tract is unknown, its quite possible that they may have accessed it by driving down one of the platted streets running through the 1884 subdivision near Hartman's house, potentially disturbing and upsetting her.

1950 - Helland decided to file an action against Custer County and Miles City, seeking to quiet his title to the area that had been fenced by Kuni. Hartman either became upset with Helland, or else she

simply thought that she saw an opportunity to obtain all or part of the fenced area for herself, because she decided to inject herself into the action as an intervener, in an attempt to prevent Helland from successfully quieting his title.

Helland argued that Kuni had acquired title to the fenced area by virtue of adverse possession, and had then conveyed it to him, so his claim was superior to, and effectively barred and silenced, any and all other potential claims to the area in question. Custer County and Miles City had no problem with Helland's claim of ownership and elected not to contest it at all, but Hartman chose to step forward at this juncture and challenge Helland, by setting forth a competing claim of her own. Hartman argued that when she acquired her lots in the 1884 subdivision, she had also acquired ownership of the land extending from those lots to the centerlines of each of the three adjoining streets around her block. She further argued that since the platted street bounding her block on the south was the last street on the south end of the subdivision, and there was no lot owner or other legitimate occupant of the land located on the opposite side of that street, to claim the other half of it as their own, she had actually acquired not just half of that street, but its full platted width. She then asserted that since she actually owned all of the land up to the north edge of the original river channel, her lots were actually riparian lots, and her ownership rights therefore extended all the way to the center of the abandoned channel, because the river had been deemed to be non-navigable. The trial court was unconvinced by Hartman's clever presentation however, and so proceeded to quiet Helland's title on the basis of adverse possession, as he had requested.

The key event, setting the stage for this controversy, was of course the artificially created avulsive shift in the location of a substantial portion of the Tongue River in 1913, described in the timeline above. Since the river was non-navigable, Montana never held any interest in the abandoned bed of the river, portions of the bed were owned by the adjoining riparian patentees or their successors, and some portions of it may have remained part of the public domain, if any of the land lying along the course of the oxbow had never been patented. Furthermore, because the shift was a true abandonment of the river channel existing prior to 1913, rather than a gradual migration of the channel, accretion, reliction and erosion were all uninvolved, and no boundaries were changed as a result of the shift. Certain property owners, situated either on the inside or on the outside of the oxbow, whose lands had originally been riparian in character, may have been left high and dry, and if

that happened to any land owners they were entitled to compensation for that loss of rights, nonetheless, the 1913 relocation of the river clearly could not have the legal effect of changing any existing boundaries under any riparian legal theories or principles. The boundary between the properties lying along the inside of the oxbow, and those lying outside of it, simply remained right where it had been ever since it had come into existence in 1878, by means of the original GLO survey, which had created government lots bounded by the river, along the centerline of the channel, despite the fact that the channel had gone dry. Both Hartman and Helland evidently understood all of this correctly, but they took very different approaches toward acquiring land rights in the abandoned bed of the river. Helland recognized that Kuni had effectively occupied a portion of the land that had been conveyed to Snyder in 1884, which extended south to the centerline of the oxbow that formed the southerly boundary of Lot 2 in Section 34. Helland also believed that the land lying in the channel that had been exposed in 1913 had never been included in the plat of Snyder's Addition, and that Kuni's occupation of his fenced tract, lying within that area left unplatted by Snyder, had met all of the requirements of adverse possession. No argument could be made that Kuni had failed to pay taxes on the area in question, the Court maintained, because there were never any taxes to pay, so that element of adverse possession was not in play in this scenario at all. In addition, the fact that Kuni apparently never had any color of title was no handicap to Helland either, since Kuni's possession had endured long enough to render color of title irrelevant, so the details relating to the origin of Kuni's use of his enclosed area were of no consequence. Kuni's use of the land at issue was unquestionably open and apparent enough to be considered adverse to all the world, so it made no difference, the Court determined, whether Kuni or anyone else had any idea of who the true legal owner or owners of the former river channel might be. The Court therefore agreed that the occupation of Kuni represented a genuine instance of adverse possession, and upheld Helland's right of ownership accordingly, but rather than simply confirming the successful adverse possession that had been executed by Kuni, the Court also elected to address the claim made by Hartman, and the Court was quite unsympathetic toward the old woman, openly ridiculing her in it's characterization of her position, declaring that:

“... The intervener may not indulge in a game of leap frog, or hop, skip and jump, with her title which covers only ... Block 24 ... she may not leap ... across the narrow strip of land ... between said street and the land so adversely claimed by Kuni

and plaintiff and then effect a three point landing in Kuni's cow corral located in the abandoned river channel."

The Court chose to employ this comical language, portraying the old woman as an acrobat attempting to perform a feat of athletic prowess, in order to illustrate and emphasize the strain that her argument placed upon the legal principles that she was hoping to parlay to her advantage, and to ostracize her position by deliberately depicting it in a nonsensical fashion. In truth, each of the three prongs of her attack, standing alone, had some degree of potential legal validity, but when combined together they produced a ludicrous result, clearly contrary to the intent of Snyder, who had created the 1884 subdivision. Her first suggestion, that she held land rights extending to the centerline of the streets adjoining her lots, the Court found to be perfectly acceptable, being in harmony with the ancient and well established principle that a conveyance bounded by any reference object, such as a street, makes the object a monument, and every conveyance is presumed to be intended to run to, and along, the center of any such monument. Her second assertion however, ran afoul of the Court, which held that she had no valid claim to the entire width of the platted street south of her lots, even if the street were to be formally abandoned or legally vacated. Other states have held that where a street is platted against a subdivision boundary, with no lots in that subdivision on one side of it, and that street is eventually vacated, the entire street reverts and attaches to the adjoining lots lying within the plat by which the street was created, but the Court declined to adopt that principle, and instead decided that Hartman's ownership rights could extend no further than the centerline of the street. Hartman's third claim, being clearly the most problematic of the three, was probably the one that seriously irked the Court, provoking its derogatory treatment of her. In the Bakke case, decided just 5 years earlier, as we have seen, the Court had acknowledged and upheld the principle that riparian ownership extends to the centerline of a non-navigable stream, and Hartman was proposing that this principle should apply to her lots, just as it did to those of Bakke, but in fact a clear and essential difference in circumstances existed. Bakke's lots were undisputedly riparian in nature to begin with, Hartman's lots on the other hand, revealed no intention on the part of the subdivision designer that they should be considered riparian in nature. Snyder, the Court concluded, had not intended to subdivide all of his land, and in fact he had not done so, because he had left a strip of land unsubdivided, south of the most southerly street, between the street and the meander line of the oxbow, and neither that unplatted strip nor any land south of it had ever been conveyed to anyone.

Even if Hartman had prevailed in her claim to the full width of the street itself, under the Court's ruling, her ownership rights would still have been effectively blocked from legally crossing that strip on the opposite side of the street, however great or small its width might be, and so her claim to the abandoned channel went for naught, although other states have ruled to the contrary, under comparable conditions, on this issue as well. Hartman's artfully contrived assertion that her typical rectangular city lots were actually intended to be riparian lots, had proven to be more than the Court could choke down, and so all of her efforts to block Helland proved to be futile, as the Court fully upheld the lower court decision quieting title in Helland to the fenced tract, without ever addressing his rights of access to that tract, since that issue was never specifically raised. The Miles City Country Club now occupies the area that once comprised the oxbow.

REEL v WALTER (1957)

Returning to our review of the Court's treatment of PLSS boundary issues, here we reach a case that clearly outlines and identifies the Court's perspective on boundary surveys, in which we also watch as the Court again declines to adopt the concept of practical location, dismissing an invitation to treat a fence of unknown origin as evidence of an agreement regarding the location of an aliquot boundary line. In terms of survey evidence and boundary analysis, this case presents an interesting contrast, when compared to the Vaught case of 1945, previously reviewed herein. In that case, the Court flatly rejected all of the boundary evidence presented by the surveyor, which consisted of a number of monuments that the surveyor failed to prove to be faithful perpetuations of original corner locations, yet in the case we are about to review, the Court readily embraces all of the boundary evidence that was accepted by the surveyor, without questioning how well it relates to the original survey of the section in question. This difference results from two crucial factors, the first being the degree of completeness manifested in the survey work, and the second being the manner in which the survey evidence is presented. While the surveyor in the Vaught case attempted to do the minimum and failed to survey the entire section, the surveyor here did survey the entire section, evidently analyzing and adopting the best evidence of each corner, showing a distinctly higher level of thoroughness and

diligence, which greatly impresses the Court. In addition, while the surveyor in the Vaught case offered no drawing and produced results that were actually self-contradictory, the surveyor here presents a drawing showing the whole section, which provides a complete and consistent picture of the situation for review by the Court, thus convincing the Court that his work is entitled to the presumption of correctness, which has the critical effect of throwing the burden to present evidence sufficient to overcome his work upon the opposing party. The response of the opposing party here is a particularly weak one, as no opposing survey is even presented, making the outcome quite predictable and unremarkable, but the defense gives the Court an opportunity to reiterate its position that practical location is not a valid boundary resolution method, again requiring explicit evidence of a deliberate boundary agreement, in order to support an allegedly agreed boundary location. In the 1925 case of Schmuck v Beck, the predecessors of the litigants owned adjoining sections, and Beck's predecessor had built a winding fence running more or less along the section line, following a path of least resistance dictated by the topography. After Schmuck and Beck had acquired the adjoining sections, it was discovered that the fence was completely on Schmuck's side of the section line, by up to 150 feet, so he relocated it to the actual section line. Since there was never any controversy as to the true original section line location, the Court approved Schmuck's action, dismissing Beck's claim that the fence represented an agreed boundary for two obvious reasons, first because there was no evidence that the fence was erected for boundary purposes, and second because no fence that contains numerous curves, angles or jogs can be considered a legitimate attempt to mark a boundary that is known to be a straight line.

Prior to 1944 - At an unspecified time, patents were issued, to different unknown parties, for the northeast and southeast quarters of a certain Section 28, which had been surveyed and platted by the GLO as a regular section in 1870. Both of these quarters had apparently been conveyed a number of times, and in every transfer they were described only as typical aliquot parts. Fences of unknown origin existed around all four quarters of the section, which had presumably been built by the original patentees decades earlier. At an unspecified

time, Reel acquired the northeast quarter and the parents of Walter acquired the southeast quarter. There was no indication that any conflicts or disputes concerning boundaries or fence locations had ever arisen between any of the parties who had previously owned any of the various parts of the section, and there was no indication that any boundary issues were ever discussed by any members of the Reel or Walter families. All of the parties occupying these quarters had simply always used all of the land enclosed within the existing fences without question, and without challenging one another, on the apparent presumption that the fences had all been built on or near the true boundaries of the various aliquot parts of the section.

1944 - The parents of Walter conveyed the southeast quarter to him.

1945 to 1956 - At an unspecified time during this period, Reel and Walter became concerned about the true location of the boundary between their quarters. Both parties had surveys performed, but which survey was done first is unknown. The survey that was done for Reel covered the entire section, and it showed that the fence between the northeast and southeast quarters was an unspecified distance north of the quarter section line, and it indicated that Reel owned about 8 acres lying south of that fence, upon which there were some old farm buildings of unknown origin that had long been used by the Walter family. The survey done for Walter was apparently in disagreement with the survey done for Reel, but no drawing of the Walter survey was ever made, so no details, such as who conducted it, how it was performed, or what it was based upon, are known. Based on the results of the survey done for him, Reel filed an action against Walter, seeking to have title to the northeast quarter quieted in himself, as that quarter was depicted on his survey, and to resolve the boundary location, for the apparent purpose of relocating the fence to the surveyed line and taking possession of the 8 acres lying on the other side of the existing fence.

Reel argued that the survey that had been done for him had been properly performed and was entirely true and correct, and that the quarter line shown on the survey was the original boundary between the quarters in

controversy, and that no other boundary of any kind had ever existed, therefore he was entitled to all of the land north of the surveyed quarter line, regardless of the existence of the fence or any other improvements located on the 8 acre strip in dispute. He further argued that no agreement had ever been made adopting the fence in question as the boundary, and that there was no evidence that it had ever been intended to represent a boundary of any kind, and that it had only served as an approximate line of division between the quarters, which was subject to correction if it was not on the quarter line, so he should be allowed to relocate it to the surveyed line. Walter did not argue that adverse possession had taken place, instead he argued that the survey done for Reel had not been properly performed, and that the fence, having always been accepted and treated as the dividing line between the respective properties, marked the agreed location of the aliquot line in question, and represented a practical location of the boundary between the adjoining properties. The trial court held that the survey done for Reel was correct in all respects, and that the evidence to the contrary presented by Walter was unconvincing and insufficient, and so ruled that Reel was entitled to the 8 acres in question, since it was part of the northeast quarter.

Although this case was initiated as a quiet title action, there was in fact no title conflict whatsoever, since neither party denied that the other party owned a full quarter section, so the only matter at issue was the actual boundary location, and for that reason the case proceeded to resolution as a boundary dispute. Why Walter chose not to raise the issue of adverse possession is unclear, since it had long been established that the Court was open to the concept of adverse possession, as a legitimate means of defense for a party who had occupied a portion of an adjoining tract for a great length of time, either mistakenly or intentionally, as the Walter family and those before them had evidently done here. Presumably, Walter supposed, either rightly or wrongly, that the tax payment requirement for adverse possession would prevent him from achieving success, if he were to depend upon adverse possession, and so he bypassed it, but in the end he would have good reason to regret that decision, because the doctrine of practical location, which he chose to invoke in his defense, was one that the Court had never formally approved. The Court found it necessary to examine the evidence relating to the survey that had been conducted for Reel in unusual detail, since it had been attacked as deficient by Walter, but here again Walter had made what would prove to be a very poor decision. Since he entered this battle unarmed with any documentation of the survey that he

claimed had been done for him, which he alleged was superior to the Reel survey, the Court was disinclined to take his objections to the Reel survey seriously. The Reel survey, the Court noted, was well documented, and evidently it was at least reasonably professional in its appearance as well, therefore the Court applied the highly beneficial presumption of correctness to Reel's survey, and indicated that Walter, regardless of his personal knowledge, was unqualified to contradict it. The Court quite clearly viewed Walter's failure to obtain the support of a professional land surveyor for his argument as a significant deficiency on his part, which placed Reel in a highly advantageous position. Walter attempted to protest the judgment of Reel's surveyor, with regard to his determination of whether the corners of the section in question were truly lost corners, or merely obliterated corners, which as every surveyor knows is a crucial factor in any such survey, but the Court trivialized and dismissed this effort on Walter's part, because the survey done for Reel stood uncontradicted by any other survey, so it carried the presumption that all such decisions had been professionally and properly made by Reel's surveyor. Being fully satisfied that the methods and procedures employed by Reel's surveyor were entirely consistent with all of the applicable standards for such surveys, including the BLM Manual, and that Walter's personal opinion of the survey was inconsequential, the Court was fully prepared to allow the survey to control the boundary location in question. The only way Walter could prevent Reel's survey from controlling the outcome, having chosen to base his defense solely on the concept of practical location, was to convince the Court that a binding agreement relating to the boundary at issue had been made, adopting the existing fence as the boundary, regardless of its actual location relative to the true quarter line. Quoting from the Myrick case of 1919, the Court reiterated that:

“... where two adjoining proprietors are divided by a fence which they suppose to be the true line, they are not bound by the supposed line, but must conform to the true line when ascertained ... The burden of proof is always on the party attempting to show the existence of an agreement fixing the location of a boundary line ...”

Nearly 40 years after the Myrick decision, the Court was still unwilling to approve the doctrine of practical location, for the purpose of creating a binding boundary by means of implication, based solely upon existing physical conditions. In the absence of specific evidence that the

adjoining property owners had made an actual agreement, the Court remained unwilling to accept the creation of any binding boundary, contrary to the boundary location of record, through mere silence. The Court opted instead to maintain the position that the existing physical conditions represented only a transitory state of affairs, subject to subsequent correction, and binding upon no one, in preference to adopting the concept that silent recognition of a physical barrier as a boundary prevents the line of record from subsequently controlling the boundary location. The Court's decision to reject Walter's fence as a boundary was actually a very easy one however, since as the Court observed, the fence in question skewed significantly off a cardinal east and west alignment, and even more importantly, it contained what the Court characterized as "two pronounced jogs" of unspecified magnitude. In the eyes of the Court, it was very clear that the fence in question was never intended to follow the quarter section line, nor could it even have been intended to follow or represent any straight line at all, so it had no validity as an aliquot line and Walter's proposition had been doomed to failure from the outset. Just as the claim of riparian rights made by Hartman in our previous case was ridiculed as frivolous by the Court, the claim made by Walter in this case, that the fence actually represented valid boundary evidence, was a foolish one, obviously lacking in credibility, which therefore quite naturally did not serve him well. In conclusion, the Court pointed out that the circumstances of this case were very similar to those of the Myrick case, in which the boundaries of the section at issue were well delineated, as opposed to those present in the Box Elder case, which took place in an area of extensive obliteration, emphasizing that for the principle of practical location to find favor with the Court, conditions must be such that the parties were virtually forced to adopt a practical boundary location, by a lack of available monumentation in their particular area. Reel's surveyor evidently did testify in this case, but the Court found it unnecessary to quote any of his testimony, applauding his work, which as the Court approvingly stated, had included accepting the existing fence lines around the exterior of the section as valid boundary evidence, and adopting several old fence corners as section and quarter corners, in the course of his work. It was quite evident that the surveyor had made a real effort to recover and perpetuate the original corner locations, and that he had rejected the fence that Walter contended for, only because it was materially at variance with all of the other evidence, and bore no indication that it was ever intended to represent the quarter section line in question. Finding no error in the survey work that had been done for Reel, and holding that Walter had presented no legitimate evidence to justify

rejecting the Reel survey, the Court fully upheld the decision of the lower court in Reel's favor, so the survey done for Reel had successfully controlled the boundary in dispute, because no superior evidence contradicting it had been presented.

TILLINGER v FRISBIE (1957)

In addition to the Reel case, just previously reviewed, the Court issued another major decision on PLSS boundaries in the landmark year of 1957, which amounted to an equally important statement on the subject of boundary control, and which not surprisingly complements the Reel decision very well, since the opinions of the Court in both cases were composed by the same Justice. The position of the Court here on the issue of practical location mirrors and dovetails with the position previously maintained by the Court, that the burden of proof upon a party proposing that a binding boundary has been created by means of practical location, and that an otherwise valid subsequent survey therefore cannot control the boundary location in question, is a heavy one, this time in the context of a controversy over a section line. In the case we are about to review, yet again it appears evident that the concept of practical location was rather poorly understood by land owners and attorneys alike, since the practical location argument made here once again misses the mark, and was destined to fail even in the absence of survey evidence. The common law doctrine of practical location does nothing more than provide courts with the opportunity to accept a physically apparent boundary as binding, on the basis that it is implicitly the product of an agreement, as opposed to a boundary location of record, when it appears appropriate or necessary to exercise the doctrine, it obviously cannot apply whenever definitive evidence negating the value of the physical evidence exists. Since practical location simply gives controlling evidentiary weight to existing physical evidence, when the origin of the existing conditions is unclear or unknown, it can never be applied as a means of boundary resolution, if the origin and true purpose of the physical objects is known to have been unrelated to any boundary issues or concerns, and this proves to be the decisive factor here. Just as the testimony of the builders of the fence at issue in this case determines the fate of the fence, we

also see the Court confirm its acceptance of the principle that the testimony of land owners and others can control boundaries, as the Court approves both the work and the decision making of a surveyor who restored a section corner on the basis of parol evidence. This verification that testimonial evidence can be the best evidence of an original PLSS monument location, indicates the Court's recognition of the concept that a corner which is subject to restoration by means of testimony is merely obliterated and is not to be treated as lost, fully consistent with the position of the BLM on the restoration of lost or obliterated corners. Finally, the Court also expressly clarifies in this case that boundary agreements, when legitimately executed and performed to resolve doubt or ignorance, are not within the purview or scope of the statute of frauds, and can therefore become binding upon all parties and their successors, even in the complete absence of written documentation, acknowledging that verbal agreements can control boundaries. In view of this second important boundary decision of 1957, in which the Court again upholds a well performed survey as controlling, that year can be seen as the dawn of the modern era of judicial survey analysis in Montana, making it clear that retracement surveys, if conducted and documented in a truly professional manner, have the respect and appreciation of the Court.

1927 - Wilson was a farmer or rancher, who acquired the southwest quarter of Section 3 in a township that had been created by the GLO in 1869, whether or not he was the original patentee of this quarter is unknown. There is no indication of whether or not any monuments or fences were in existence on the section lines at this time, and no indication of whether or not any of the adjoining land was already occupied.

1936 - Tillinger was also a farmer or rancher, who acquired the southeast quarter of Section 4, whether or not he was the original patentee of his land is unknown as well.

1938 - Wilson and Tillinger agreed to jointly construct a fence along the section line between their quarters. Each of them built a quarter mile of it, but who built the north half and who built the south half is

unknown. Unaware of where any section corners or quarter corners might be, and choosing not to enlist the assistance of a surveyor, each of them began from the ends of existing fences of unknown origin that ran for substantial distances to the north and to the south. They could apparently see a fairly long distance down the existing fence lines, and the fences evidently appeared to be reasonably straight, so they attempted to project the lines formed by the existing fences, in the apparent belief that the existing fences were located on the section lines. Both parties subsequently treated the fence that they had thus built as their mutual boundary, but neither of them ever erected or placed any improvements anywhere in close proximity to the fence, the land on both sides was apparently used only by grazing livestock.

1943 - Frisbie acquired the southwest quarter of Section 3 from Wilson, and he continued to use it just as Wilson had done, without ever questioning the fence location. There was no evidence that Frisbie was ever told anything about the fence by anyone, or that he ever made any effort to determine either the origin of the fence, or what the real purpose or significance of it really was.

1950 - Frisbie performed some repairs on an old dike that existed somewhere near the fence in question, in the apparent belief that the dike was located on his land, since it was on his side of the fence. Tillinger warned Frisbie at this time that he suspected that the fence was not located on the section line, therefore the dike might not be located on Frisbie's land, but Frisbie completed the work anyway.

1952 - Tillinger ordered a survey, the results of which showed the fence to be west of the section line in question, by about 15 feet at one end and about 80 feet at the other end. Tillinger, apparently aware that this strip on the opposite side of the fence had been in the possession of Frisbie for nearly 10 years by this time, and suspecting that Frisbie might attempt to claim ownership of that strip, decided to file an action against Frisbie, seeking to have the section line that was indicated on the survey declared to be the true boundary between the properties in question.

Tillinger argued that the survey done at his request was correct in all respects, and that the fence had never been intended to supplant the section line as the boundary, it had been erected purely for utilitarian purposes as a cattle barrier, so the section line had always remained the true boundary, and the survey done for him had accurately marked its true location. Frisbie argued that the fence had been intended to serve as a boundary, and the fence builders had agreed that it would become their permanent boundary, so the surveyed location of the section line was of no significance, and it could not control the property boundary location. The trial court ruled that Wilson and Tillinger had implicitly agreed that the fence would form their permanent boundary, and so ruled in favor of Frisbie.

As anyone who has already read the last previous case reviewed herein will immediately recognize, this controversy was highly similar to the one documented in the Reel case, which had just been decided by the Court earlier the same year, the most obvious difference being that this case was focused upon a section line, while the Reel case was focused on an aliquot line and was thus limited to one section. That was not really the most important difference between these two cases however, as far as the outcome was concerned, as we shall see, but both cases were true boundary location disputes, in which the survey evidence presented would of course prove to be quite valuable. Once again in this case, two surveyors were involved, but just as in the Reel case, the Court had the opportunity to review the work of only one of them in detail, and that critical factor would here again give the better prepared party a distinct advantage. While the survey done for Tillinger was evidently well performed and professional in appearance, and therefore convincing to the Court, Frisbie had made the same mistake that Walter had made in the Reel case, which was the mistake of coming into the battle without any survey of his own. Frisbie attempted to show that Tillinger's survey was wrong in various ways, primarily by pointing out that it was different in some ways from other surveys that had been done in the same area in the past, by others and for other purposes, but the Court understood very well that surveyors and their measurements can differ, and was therefore unimpressed with Frisbie's effort to attack Tillinger's survey. Since Frisbie had obtained no survey specifically focused on the section line in question, the Court found it very easy to dismiss the evidence of nearby surveys that he presented, as being either inferior to Tillinger's survey or completely irrelevant. A surveyor did testify on behalf of Frisbie, but since that surveyor's testimony was based only on his memory of work that he had done in the distant past, and not on any recent survey work done by him for

the purpose at issue, the Court discounted it and paid his testimony no heed. Such testimony could potentially have been highly influential, had it been more effectively presented, or had Tillinger been unprepared, but the presence of Tillinger's survey effectively pushed all evidence of earlier nearby surveys into the background, in the eyes of the Court. In assessing the validity of the survey done for Tillinger, the Court noted with particular approval two specific things that Tillinger's surveyor had done, in the process of attempting to properly locate the section line in question. The Court pointed out that Tillinger's surveyor had made use of his own field notes, from a previous survey that he had personally conducted, in which he had found one of the section corners controlling the line at issue, to restore one missing section corner, and then he had interviewed a land owner and accepted the land owner's parol testimony as the best means of establishing the true original location of the other missing section corner. The Court found both of these practices employed by Tillinger's surveyor, along with the checking that he had done, extending beyond the specific section line in question, to be exemplary, despite the fact that he had apparently ignored the quarter corner on the line in question, observing with favor that he had:

“... made a survey in the area in 1929, and had used as a starting point the section corner common to Sections 3, 4, 9 and 10 ... the corner was not in place (in 1952) but using his original notes which were admitted in evidence, he was able to reestablish the location of the corner ... The Section corner common to Sections 3, 4, 33 and 34 ... he reestablished ... by making inquiry of a former resident on the property, who had known of its location.”

The validity of the section line shown on Tillinger's survey being established to the satisfaction of the Court, the attendant issue of course was whether or not it could control the boundary in question. Importantly, the Court clarified that the statute of frauds could have no relevance or application to a boundary dispute such as this one, were it to be shown that the parties or their predecessors had entered into an actual agreement, identifying a permanent boundary between their lands, even if the agreement was entirely unwritten, provided that it was affirmatively made for the purpose of resolving their mutual uncertainty over the boundary location in question. As we have seen in previous cases, and will see again, the Court only most reluctantly discards agreements of any kind, it greatly prefers to

find a valid basis upon which to enforce all bona fide agreements, in the interest of equity and justice. So the relevant parties to the construction of the fence, Tillinger and Wilson, could have adopted it as their boundary, but once again, consistent with the position it had taken in the Reel case, the Court refused to presume that they had done so, or to accept the implication that they had done so, and in fact in this case there was no need or reason to apply any presumption at all, because both of those parties were present, and they were fully able to testify for themselves, regarding what their true intentions with respect to the fence had been. The testimony of Wilson was the clinching factor, the Court found, since it revealed that the fence was never intended to replace the section line as the boundary, and the fence had been built only as a rough approximation of the section line, sufficient as a barrier to retain livestock. Since the fence builders had intended to follow the section line, the Court stated, the fence could represent a binding boundary, independent of the section line, only if they had expressly agreed to adopt it as their permanent boundary regardless of where the section line might subsequently prove to be. The claim made by Frisbie, that the fence builders had intended it to operate as a binding boundary, had been thoroughly discredited by Wilson's testimony, which had made it clear that neither he nor Tillinger had ever intended the fence to be relied upon for boundary purposes. The fence in question had been constructed, the Court concluded, as nothing more than a convenient way of closing the half mile gap between the existing fence lines, and neither of the adjoining land owners had ever treated the fence as a boundary by improving the land up to it, nor had they ever told Frisbie or anyone else that it represented their boundary. Frisbie, the Court determined, had drawn his own conclusions regarding the meaning of the fence, and since he had not been falsely informed about it by anyone, his attitude with respect to the fence could not prevent Tillinger from claiming the land on his side of the section line, as it was depicted on the survey done for him, therefore the Court decided that the survey controlled the section line, so it reversed the ruling of the lower court to the contrary. Under the Court's ruling, the strongest evidence of the true intent of the parties had again controlled the outcome, and the fact that both of the fence builders were still alive, and had provided definitive testimony regarding the true origin of the fence, was the decisive factor. The testimony of the fence builders had eliminated the need to reach any decision on the character or purpose of the fence based merely upon inference or implication, and had thereby rendered both practical location and adverse possession inapplicable to the scenario.

THIBAUT v FLYNN (1958)

While the last two cases that we have reviewed both provide outstanding examples of the potentially controlling value of a retracement survey, this case serves as a reminder that there are definite limitations upon what a retracement survey can accomplish, even when correctly performed in all respects. Even though there is no indication that the survey done here is any less accurate or complete than the surveys that prevailed in the Reel and Walter cases, and indeed the survey in play here is not even challenged or contested at all, it counts for naught in the end, because the existing conditions on the ground, in combination with the passage of time, have placed the rights of the parties into repose, rendering the relevant lines of the PLSS powerless to control the boundaries in controversy. Although some land surveyors may believe that surveyors are vested with the authority to control boundaries, in fact no such right exists, surveys control boundaries only to the extent that the actions of the surveyor, and the products of the surveyor's work, can be shown to stand as the best evidence of the intent of the relevant parties. It should always be remembered that a license is merely a privilege, rather than a right, so any surveyor working under a license, in Montana or any other state, holds only the privilege of performing surveys that can be presented as legitimate evidence, rather the right to actually establish or conclusively determine any boundary locations. It should also be understood that this does not apply only to retracement surveyors, even original surveyors can establish no boundaries contrary to the intentions of the party or parties who have employed and directed the surveyor as to their intentions, and even the work of the original PLSS surveyors controls only because it is the will of the people, as the owners of the public domain, that original survey evidence on the ground shall be legally conclusive. This paradigm is well displayed in the case we are about to review, along with the controlling nature of existing physical conditions that have long endured, as the strongest manifestation of the intent with which the land at issue has been actually held. Adverse possession that occurs in the presence of the legal elements that have been deemed to be indicative of good faith on the part of the possessor, such as color of title and payment of taxes, necessarily

involves a mistake or mistakes, and here we look on as the Court forcefully clarifies that the mere presence of mistakes does not obviate or preclude adverse possession. Under the doctrine of subjective intent, which is honored in a small number of states, an adverse claim can be destroyed by any evidence that the adverse claimant did not actually intend to deliberately take the land in dispute from the owner of record, effectively eliminating the possibility of adverse possession completed in good faith. The Court properly rejects this senseless legal distortion of the controlling value of intent here, wisely adhering to the objective position that mistaken possession in good faith is just as worthy of protection as possession held in deliberate derogation of the rights of the owner of record. While the Court has frequently reiterated that adverse possession in Montana has always been a question of intent, this case well illustrates that the controlling intent, in the eyes of the Court, is that which is expressed and communicated physically, through acts of use and occupation.

1870 to 1875 - During this period, the father of Flynn settled on land located in a township that had not yet been subdivided into sections, intending to establish a homestead. When the township was subsequently subdivided by the GLO, it became clear that the Flynn homestead was located in the northeast quarter of the northeast quarter of Section 13. Flynn's father had already fenced the area he was claiming, prior to the original survey of Section 13, so quite naturally his fences did not precisely coincide with the lines that were established during the survey, but he had evidently attempted to fence the area that he knew would become that 40 acre tract in the northeast corner of Section 13, so his fences were close to the surveyed lines, and he therefore decided not to bother adjusting their location after the survey was done. He lived on the land and farmed all the land inside his fenced area, so he eventually obtained a patent for his quarter quarter in Section 13, at some unspecified point in time, and he subsequently expanded his farm by acquiring Lot 1 in Section 18 lying directly to the east, which had already been fenced.

1887 - Mitchell acquired a large tract of land lying directly to the south of the lands owned by the father of Flynn in Sections 13 & 18,

whether or not Mitchell was the original patentee of his land is unknown. A public road ran east to west through the northerly part of Mitchell's land, an unspecified distance south of the fences running along the southerly edge of the Flynn property. Mitchell lived south of the road and he made little or no use of the narrow strip of land that he owned lying north of the road, so the location of those existing fences was evidently unimportant to him. Mitchell saw that the fence running along the southerly boundary of Lot 1 in Section 18 ran approximately due west, for its full quarter mile length, all the way to the range line, but at that point he noticed that it angled distinctly, and ran in a more southwesterly direction for a quarter mile, to the west end of the Flynn homestead in Section 13. Mitchell believed that the fence west of the range line was not located on the true northerly boundary of the tract that he had acquired, and that it was encroaching on the northerly part of his land, yet he chose to do nothing about it, since he had no intention of ever using the small portion of his land lying north of the road, so Mitchell never discussed the fence issue with Flynn's father.

1888 to 1945 - Over these several decades, Flynn's father continued to use all of the land north of the fence, and he raised his family, and when he died his land passed to Flynn and her sister, who had continued their late father's occupation of all of the land north of the original fences for an unspecified number of years, by the end of this time period.

1946 - Mitchell conveyed the portion of his land lying north of the road to Bakker, who shortly thereafter conveyed it to Thibault. Before conveying his land lying north of the road, Mitchell had it surveyed, and the survey evidently confirmed Mitchell's suspicion that the west quarter mile of Flynn's south fence had been built too far south by her father. There is no indication that Thibault actually viewed the property being conveyed to him prior to purchasing it, or that Mitchell or Bakker ever said anything to him about Flynn's fence, but Thibault had seen the survey, so he was aware that the fence was within the described boundaries of the land that he was acquiring. The language used to describe the land in these conveyances is unknown, but the

strip was described as consisting of approximately 10 acres, and it did not call out Flynn's fence as the northerly boundary of the land being conveyed. No details regarding how the survey was conducted are known, but it evidently showed that about two acres of the southeast quarter of the northeast quarter were north of Flynn's fence, in the form of a triangle, due to the fact that the fence ran at a bearing that was somewhat south of due west, as it ran westerly from the range line. After acquiring the strip of land lying north of the road, that had formerly belonged to Mitchell, Thibault wanted to relocate the fence to the northerly boundary of the southeast quarter of the northeast quarter, as that line was shown on the survey, directly in line with the fence to the east, along the south boundary of Lot 1 in Section 18. Flynn refused to allow Thibault to do this however, so Thibault filed an action against Flynn, seeking to have the boundary of the property that he had acquired declared to be the aliquot line that was depicted on the survey, north of Flynn's fence.

Thibault argued that he was entitled to the entire portion of the southeast quarter of the northeast quarter of Section 13 lying north of the road, as it had been surveyed for Mitchell and described in the subsequent deeds including his own, and Flynn had no valid claim to any portion of it, regardless of the prior occupation and use of it by her family, so Thibault should be declared to be the owner of the two acre triangular area in dispute and be allowed to relocate the fence to the aliquot line surveyed in 1946. Flynn argued that the entire fenced area represented the homestead that had been established by her father, and that the Flynn family had maintained constant possession of the entire fenced area for over 70 years by the time the fence location issue arose in 1946, so they had acquired title to the entire fenced area by means of adverse possession, regardless of where any subsequent survey, such as the one done for Mitchell in 1946, might show the aliquot boundaries of the homestead to be located. The trial court agreed that adverse possession had been successfully completed many years prior to the 1946 survey and the arrival of Thibault in the area, and therefore awarded the two acre area to Flynn on that basis.

In this case, the Court was again confronted with a true boundary dispute, not involving any gaps, overlaps, erroneous descriptions or any other title conflicts, but unlike the seemingly comparable Reel and Tillinger cases, decided just the previous year by the Court, the defendant in this

instance chose to rely upon adverse possession to justify her prior and ongoing use of the land in controversy, and to support her claim of ownership. This case had been initiated long before the results of the Reel and Tillinger cases were known however, so the decision of Flynn to argue adverse possession instead of practical location was not based upon the refusal of the Court to gratify or uphold the claims made by Walter and Frisbie, the defeated defendants in those 1957 cases, her decision was based on the circumstances specific to her case, and it would prove to have been a wise one. By the time this case reached the Court however, the results of the Reel and Walter cases, in both of which the Court had upheld the boundary line of record, as opposed to the line of possession, were known, so Thibault may very well have felt quite confident that he would be able to obtain a reversal of the decision against him. Thibault also had the comfort of knowing that the tax payment requirement for adverse possession had been consistently applied by the Court, and he presumably believed that it would operate to negate the claim being made by Flynn, since she had never paid any taxes on any portion of the quarter quarter that had been conveyed to him, so he may well have been convinced that she had made a foolish choice to argue adverse possession, and for that reason anticipated victory. In addition to those factors, Thibault had still another apparent reason to be very confident, because like Reel and Tillinger, he had the support of a recently performed survey, clearly showing Flynn's fence encroaching over the aliquot line in question into his quarter quarter, and Flynn had obtained no survey whatsoever, leaving her in a position seemingly equivalent to that of the losers in the Reel and Tillinger cases. The Court however, elected not to focus upon the survey in this case, since the validity of the boundary of record was not put into doubt by the argument set forth by Flynn. Rather than contesting the correctness of the survey presented by her opponent, as Walter and Frisbie had tried but failed to successfully do, Flynn chose instead to argue simply that the survey was irrelevant, even if it was perfectly correct in all respects. In effect, by employing the defense of adverse possession rather than practical location, Flynn conceded that the aliquot line of record had always been located where the 1946 survey showed it to be, but maintained that she had acquired the triangle at issue by virtue of her family's long standing possession of it, despite the fact that it was located in an adjoining quarter quarter, rendering the true location of the aliquot boundary no longer of any meaning or significance. In accepting this argument on her part, the Court once again confirmed that it is willing to apply adverse possession to resolve boundary disputes, when appropriate or necessary, as well as title disputes, thereby depriving any survey, regardless

of it's correctness, of the power to control boundaries, where those boundaries have been effectively established by physical means. With respect to the core issue presented by all conflicts between boundaries of record and physical boundaries resulting from mistaken possession of virtually every kind, the Court reaffirmed it's long held position that:

“... one in possession ... is deemed to hold adversely, although his claim of title may have originated in a mistaken belief ... Hostility of possession in such cases may be shown by claimant's failure to admit the possibility of mistake ... under such circumstances possession for the requisite period will ripen into adverse title, although it is shown that on taking possession claimant had no intention of taking what did not belong to him ... or had no intention of claiming beyond the true line, or that he had no desire to take any land belonging to the adjoining owner, or that he would have surrendered possession if he had known that the disputed land was not within the calls of his deed ... it is immaterial what he might or might not have claimed had he known that he was mistaken.”

The Court clearly recognized from the evidence that the possession of Flynn and her sister, and their father and fellow family members before them, was all based on the fact that Flynn's father had gone upon the land prematurely, prior to the original survey, and mistakenly estimated the location of the boundaries of the northeastern quarter quarter in the then unsurveyed Section 13 himself, so the Family's occupation of the land was the obvious result of an ancient boundary determination error. Therefore the survey evidence was set aside by the Court, since the survey could not control the property boundary location unless the errors made by Flynn's father remained legally correctable, and the only question to be answered, the Court determined, was whether or not Flynn's fence represented a valid boundary, created entirely by physical means and solidified through adverse possession. Whether or not the land south of the quarter quarter comprising the Flynn homestead was patented prior to 1887, when Mitchell arrived in the area and occupied it, was unknown, so it was possible that the Flynn's father had actually successfully completed adverse possession of his entire fenced tract before Mitchell even arrived in the area, if all of the land encroached upon by the fence in question was no longer part of the public

domain at that time. Mitchell's testimony that he had observed the situation, upon first arriving on the land, and had chosen not to raise any issue with Flynn's father about the fence location, despite his belief that the fence had been built in error, was a strong indication that Mitchell himself had recognized that the land north of the fence had already been lost to adverse possession by 1887. Even if Mitchell was the original patentee however, his behavior set the stage for adverse possession, which had begun with his arrival, and developed over the subsequent years, so in either event, it was fully evident that the Flynn family had acquired the area in controversy, by virtue of their occupation and use of it, long before the tax payment requirement for adverse possession legislated in 1917 had gone into effect, possibly even decades before that time, leading the Court to find that requirement inapplicable. Furthermore, the Court indicated, the negligent conduct of Mitchell toward this situation involving his possible land rights, if he had ever intended to assert any such rights, was binding upon his successors, because the ongoing presence of the Flynn fence, which constituted a highly visible invasion of the southeast quarter of the northeast quarter, had given both Mitchell and his successors full notice of the existence of a potential land rights conflict. Having ignored the obvious conflict, and chosen not to raise any issue about it prior to acquiring the land lying directly south of the fence, Thibault was in no position to take issue with the fence, or question its validity as a boundary, having voluntarily bypassed his opportunity to inquire about its significance, without having been misinformed about it by anyone. Concluding that the manner in which the properties in controversy had been created and described, in accordance with the GLO survey and plat, had no relevance or bearing upon the operation of adverse possession, the Court upheld the ruling of the lower court in favor of Flynn. Cases such as this one powerfully illustrate the concept, first widely explained to land surveyors by the late Curtis Brown of California in his works on the interaction between boundary law and land surveys, that unwritten rights can always triumph over recorded boundaries, descriptions and surveys, making reliance upon boundaries of record a very dangerous proposition, as Thibault had learned the hard way.

MCCAFFERTY v YOUNG (1964)

Our next riparian rights case introduces us to the impact of the principle of avulsion on boundary determination, while also providing an insightful example of how the Court deals with conflicting evidence of the

real intent of a series of problematic conveyances. Survey evidence also figures quite prominently in the case we are about to review, which motivated Tiny Tillotson to write about the survey work that formed a major portion of the evidence analyzed by the Court here, making this an appropriate point at which to pay tribute to the wisdom of a man who clearly brought both great knowledge, and great passion for his work, to the land surveying profession. Focusing upon the role of the surveyor as a professional gatherer of evidence relating to boundary locations, Tillotson expressed many important ideas that offer timeless guidance to all those who engage in the practice of land surveying. With regard to survey evidence, Tillotson very strongly believed that in order to meet the fundamental burden of professionalism, a land surveyor conducting boundary surveys of any kind has the obligation to discover, evaluate, perpetuate and document all available boundary evidence, of every variety. He recognized that in the context of PLSS surveys, testimonial evidence can be of great value in the restoration of obliterated corners, and should be sought before identifying any corner as lost, since a decision that a given corner is truly lost is equivalent to a declaration that no satisfactory evidence of the original monument location exists, which leaves the surveyor who has made that decision very vulnerable to being proven wrong, by a more diligent surveyor subsequently arriving on the scene. Tillotson also wisely observed that finding original monuments, and successfully recovering obliterated monument locations, the boundary surveyor's most unique and crucial task, requires mental skills and personal qualities, such as determination and perseverance, to a far greater extent than it requires any physical or technical skills. Correctly noting that boundaries are established by the combined forces of law and equity, and not by measurements, he postulated that every surveyor should know the law, at least well enough to avoid harming any existing land rights by disregarding them through ignorance. In order to be able to function as a true professional, he theorized, it is incumbent upon the land surveyor to become well enough acquainted with the law, including the operation of the basic principles of equity, to avoid creating conflicts or liability, and he went so far as to suggest that the failure to do so is unethical. Roy Bandy, a surveyor who Tillotson greatly admired and held up as an example of outstanding diligence and professionalism, knew that

surveyors very often function as a de facto judge and jury, particularly in remote areas, although the surveyor has absolutely no legal authority to make any conclusive boundary determinations, because many land owners simply trust and rely upon surveyors, and therefore act with reference to the lines and corners marked during a survey, with potentially serious consequences. In discussing this case, Tillotson quite rightly applauded the survey work done here by Bandy, who not only recovered the required original monuments, but even more critically in this instance, obtained the evidence required to prove that an avulsive event had in fact taken place, which turned out to be the decisive issue.

1871 - Lewis and Clark County was created, with the Sun River as one of its boundaries, and a township through which that non-navigable stream ran was surveyed and platted by the GLO. The course of the river, as it was platted, ran through Sections 7, 8 & 17, flowing in a generally southeasterly direction, but only a small portion of it crossed the southwest quarter of Section 8, as a bend in the river looped just to the northeast of the southwest corner of that section, which stood near the southwest bank of the river. The river just narrowly missed entering the east side of Section 18 at this time.

1893 - Teton County was created and the portion of the Sun River already forming the northeasterly boundary of Lewis and Clark County also became the southwesterly boundary of Teton County.

1918 - A flood took place, during which the river broke through the oxbow that had carried it into Section 8 and began flowing in a new channel that was located about a quarter mile southwest of the oxbow channel, in the northeast quarter of Section 18, leaving the portion of its former channel lying in Section 8 abandoned. The land in this area had been patented, but who owned the land at this time is unknown. Apparently there was no concern expressed by anyone regarding the shift in the river, and it's quite possible that the owner or owners of this remote area were not even aware that this short portion of the river, only about half a mile in length, had changed its location.

1942 - Peterson owned a large ranch of unknown extent, which

evidently included Sections 7, 8, 17 & 18 in the township in question. How or when Peterson had acquired his ranch is unknown, and there is no indication that any improvements were ever built in any of the sections located along the river, aside from fences, but it was undisputed that he was the sole owner of the entire area, including a substantial amount of land lying in each county. Evidently unaware that a portion of the river was no longer in its original location, Peterson conveyed the western portion of his ranch to Woessner, intending the existing river to be the easterly boundary of the conveyance. The specific manner in which the area conveyed was described in this document is unknown.

1944 - Peterson conveyed the eastern portion of his ranch to Young, using a description which included only part of Section 8 and did not include any part of Section 18, based upon the originally platted river channel, which had run through Section 8, indicating that Peterson was unaware that the river had moved. This document expressly stated that the lands being conveyed were located in Teton County, but this was stated only by way of general reference, in the caption rather than in the particular portion of the description, which did not specifically call out either the river or the county line as the boundary of the land conveyed.

1945 to 1959 - At an unspecified time during this period, Woessner conveyed all of his land to Knudson, but the specific manner in which that area was described in this document is also unknown. Knudson subsequently conveyed all of his land to McCafferty, using a description which included only part of Section 18 and did not include any part of Section 8, giving the impression that it was written with reference to the river channel that was currently active at this time, which ran through Section 18. The conveyance to McCafferty expressly stated that the lands being conveyed were located in Lewis and Clark County, but just as in the description held by Young, this was again stated only by way of general reference, so none of the documents relating to any of the sections involved had ever specifically identified either the river or the county line as the

boundary in an explicit manner, because the descriptions were not written using the metes and bounds description form, and therefore none of them contained any boundary calls running to, or along, any particular line or series of lines. Also at an unspecified time during this period, Young acquired portions of Sections 8 & 17 lying west of the original river channel, presumably by means of quitclaim deeds from the other parties involved, but even after having done so, Young was still not the owner of record of any portion of Section 18, so he still could not access the portion of the river that had shifted to the west. At the end of this time period, a fence which was generally treated as the boundary by both McCafferty and Young, although not without some degree of protest by both of them, enclosed the lands of Young in Sections 8 & 17, but then followed the abandoned river channel, as it ran west to the northerly junction of the old and new channels. Whether Young ever attempted to acquire the remaining land that he did not own on his side of the active river channel from McCafferty is unknown, but relations between the two ranchers had turned bitter by the end of this period, so no such deal would have been likely to reach completion, even if proposed by either party at this point in time. In addition, it was unclear whether or not McCafferty had good title to all of Section 18 to convey, even if he wanted to convey it, due to the manner in which Peterson had described his conveyances.

1960 - In an apparent effort to help resolve the matter, or to at least quantify the extent of the area in conflict, a survey was performed at the request of Lewis and Clark County, to determine the location of the relevant portion of the current river channel, relative to its originally platted and long abandoned location. The survey revealed the location of the new channel, which according to the research done in connection with the survey had been created by the 1918 flood, and it accurately depicted the abandoned channel as well.

1961 - Young was evidently convinced that he owned all of the land lying east of the new channel, including the part of Section 18 that had once been southwest of the river but had been northeast of the

currently active river channel since 1918. McCafferty however, upon seeing the results of the survey, believed that he owned all of Section 18, including the part lying on Young's side of the river, so McCafferty filed an action against Young, seeking to quiet title in himself to all of Section 18.

McCafferty argued that the intent of all the relevant conveyances was clearly expressed in the documents, and that the documents in question all indicated that the original county line, following the original river channel, was intended to be the boundary between the easterly and westerly ranches conveyed by Peterson. He further argued that the river had abandoned its original channel through an act of avulsion, and therefore the county boundary had not shifted to the active channel, it had remained in the abandoned channel, so he was entitled to all of Section 18, since it was located entirely west of the original channel. Young argued that the language used in the various conveyances was unclear, leaving the ownership of portions of the land lying between the two channels uncertain, therefore the ownership of the area should be determined through the testimony of the previous owners of the land in controversy, regarding the intent of their conveyances. He further argued that the change in the river had not been proven to be avulsive in nature and should therefore be presumed to be the result of accretion, meaning that the county boundary had moved along with the river and was now located in the currently active channel, rather than the original channel, so he should be recognized as the owner of all the land on his side of the current channel. The trial court decided that the language used in the various relevant documents of conveyance adequately expressed an intention for the county line, and not the river itself, to control the boundary between the two ranches that had been created when Peterson had split his original ranch, and the county boundary had never moved, it was still located in the original river channel, resulting in a ruling in favor of McCafferty, quieting his title against Young, as McCafferty had requested.

This case involved both a conflict over the proper interpretation of the meaning and legal effect of several documents, and also a controversy over the actual conditions and circumstances under which the events, including several conveyances of land, had played out. Before the Court could properly address the legal implications and ramifications of the conveyance language that had been used, it was necessary to clarify and delineate the factual events that had taken place, which required the Court to make a determination regarding the status of the river, since the river had been the

basis of the boundaries that had been created in the area at issue. Long before the ranches in controversy ever existed, the Court noted, the river had been adopted by the two relevant counties as their mutual boundary, and neither county had ever done anything indicating any desire or intent to relocate that original boundary. Neither county had been aware, until the survey was done in 1960, that the river was not still in its originally platted location, so the original county boundary location had clearly never been deliberately or intentionally changed, it could only have changed if the river had migrated from its original location through a process of erosion and accretion. The 1960 survey had been very well conducted, the Court found, many original section corners had been recovered, and both the old and new river channels had been clearly defined, making the facts of what had transpired during the flood, over 40 years earlier, fully evident for all to see for the first time. The thoroughness of the research done by the surveyor was particularly outstanding and impressive, and the Court agreed with the surveyor that the evidence of the original oxbow channel, still physically intact and in its platted location, along with the presence of trees, which were shown to be 70 to 80 years old, growing on the land between the channels, adequately supported the conclusion that the river had abandoned its original channel, rather than gradually migrating to its present location. Since it had been affirmatively shown that the current location of the river was the result of a single avulsive event, and not a gradual process of erosion of one bank along with accretion to the other, there was no legitimate basis for any suggestion that the county boundary had ever changed, because boundaries defined by watercourses follow the water only when the lateral movement of the water is the result of an ongoing process, not when it results from an instantaneous abandonment of one location in favor of an entirely new one. The Court saw fit to define the principle of avulsion using the term "perceptible" in this case, which was an unfortunate overstatement that would result in confusion in the future, but this error would finally be corrected by a future decision, nearly 30 years later, and was harmless here. Nevertheless, on the basis of the evidence provided by the 1960 survey, the Court concluded that the county boundary was still located in the abandoned oxbow channel, which would prove to be crucial to the outcome, as we shall see. The true location of the county line having been established, the issue remaining to be resolved centered upon the question of what should control the interpretation of the intentions expressed in the various conveyances that had resulted from Peterson's decision to split up his ranch, and in answering that question the Court elected to take the opportunity presented by this case to send a message to all grantors and grantees, regarding the potential

consequences of carelessness in document preparation, declaring that:

“The testimony in this case which is intended to establish the river as presently located as the boundary clearly shows that several years ago the people related to these ranches carelessly waved their hands off toward the river as the boundary between the two ranches. Yet the deed and contract stated something of very different consequence.”

The Court was undoubtedly frustrated by the fact that the parties had not even bothered to introduce all of the relevant deeds into evidence, which had caused the trial court to presume that nothing was stated in the missing deeds that either contradicted or added to what was stated in the deeds that were in evidence, and the Court approved of this approach. The result of this absence of information was the application of the presumption that the deed from Knudson to McCafferty perpetuated the true original intentions of Peterson, which was critical because Peterson was the sole source of the titles held by all of the subsequent parties, making his intent vital, and there was no suggestion that Peterson had not intended to convey every bit of his land. Young's case was premised upon showing that the documents in question actually failed to express Peterson's true intentions with complete clarity, and were therefore ambiguous in nature, so testimony should be allowed to serve to clarify Peterson's true intent. All of the relevant parties testified, and from their testimony it became quite clear that all of them were unaware that any distinct or material shift in the river's location had taken place, and they had all presumed that the currently active river channel was in fact the only channel, until the contrary was shown by the survey in 1960. It was obvious, the Court acknowledged, that Peterson had intended the active river channel to separate the east and west ranches, and he had just carelessly assumed that the river was still in its original location, and he had also wrongly assumed that if the river had moved, it had moved only an insignificant amount and it had carried the county boundary with it. If Young had sought to have the descriptions in the relevant documents reformed, this evidence of the actual original intent could have been of some value, but Young made no such argument, so the only question before the Court was whether or not the documents in question were ambiguous. If the documents were ambiguous, testimony could have an impact upon, or even control, the interpretation of the language used in the documents, but if the documents were unambiguous, the language of the documents would make

all of the testimony irrelevant. The Court decided that the one and only consistent element contained in the descriptions at issue was the references to the counties in which the land conveyed existed, so since the descriptions were unambiguous in at least that one respect, the county line location controlled the boundaries created by the conveyances. Because the documents all failed to call out the current river channel as the intended boundary, the river could not be treated as a controlling physical monument, as it would have been if called out as such, the county boundary of record was the controlling monument, in the view taken by the Court, and no testimony to the contrary could serve to expressly contradict or negate the unqualified and unconditional language of the relevant documents to that effect. Having so decided, the Court fully upheld the ruling of the lower court in favor of McCafferty, effectively forcing Young to attempt to acquire the land in dispute from McCafferty, if Young wanted complete access to the river. As we have seen in numerous previous cases, the Court typically holds all evidence of intent paramount, but here the Court demonstrated that although extrinsic evidence can, and typically is, of great significance, and can frequently control ambiguous deed language, it can never operate to directly contradict clearly stated written language, or operate to eliminate such language from a written description, so when a written description is complete and legally sufficient, the parties can find themselves bound by the unintended legal consequences of words that they, or their predecessors, negligently chose to use.

MONTGOMERY v GEHRING (1965)

Here we review a case in which problems related to fencing a boundary represent the central issue in the minds of the litigants themselves, but which is really focused upon the principles applicable to the analysis and interpretation of descriptive language, and which also sheds light on the way the Court views surveys that are executed subsequent to a conveyance. While a survey done after a conveyance is completed can control the boundary of the land conveyed, if such an arrangement has been agreed upon by the parties, such a subsequent survey typically cannot control the location of the described boundary, in the manner of an original survey performed prior to conveyance, because only a survey performed beforehand can serve as a basis of reference when preparing the description to be used in

the conveyance. Original monuments, set prior to a conveyance, control for three primary reasons, first because they provide physical notice of the intended boundary location, which all of the parties saw or had the opportunity to see when striking their bargain, secondly because the description provides constructive notice of their significance, if they are recited in the description, and thirdly because original monuments create and typically carry a right of reliance, regardless of the level of precision manifested in them. Monuments not set until after a transfer of land has taken place, obviously lack the first two factors in this equation, which represent the critical elements of notice, therefore with respect to subsequent monuments, the third element, being the element of reliance, is not judicially seen or treated as being as unquestionable as reliance upon original monuments. In the case we are about to review, the existence of the monument at issue is undisputed, since it is a natural monument, rather than one set by the hand of man, the controversy resides entirely in the second aspect of notice mentioned above, as the grantee asserts that the grantor failed to carry his burden of clarity, because the grantor made only a very subtle and indefinite reference to the intended monument, when composing the description language that lies at the heart of the conflict. As we will see, the grantor manages to escape the consequences of his negligence in description preparation to some extent, as he is awarded title to the full area that he intended to retain, yet he is left with an unworkable situation, which effectively prevents him from reaping the benefits that he evidently anticipated, when designing the conveyance in question. While the boundary location and title claim put forth by the grantee are shot down by the Court, the grantee is left with the satisfaction of seeing the principal objective of the grantor meet with frustration. Tiny Tillotson, who performed the second survey mentioned below and later went on to write about this case, correctly described this scenario as a classic example of one in which all of the parties really emerged as losers, having invested extensive funds in a futile effort to rectify a problem that had resulted from their own mutual negligence, in dividing land and completing their transaction without engaging the assistance of a land surveyor at the appropriate time.

1948 - Montgomery was the owner of a large amount of land, the

extent of which is unspecified, and how or when he had acquired it is unknown. Poorman Creek, a non-navigable stream, ran through the land owned by Montgomery, in a generally northwesterly direction, and a public road ran along the creek, crossing it near the middle of the portion of the road lying within the boundaries of Montgomery's land. Montgomery decided to convey about 260 acres to Gehring, which constituted the portion of his property lying northeast of both the creek and the public road. In the language of this conveyance, which listed all of the various aliquot parts and government lots that were being conveyed, Montgomery indicated that he intended to retain that portion of his property that fell within the listed areas, but was southwest of the creek and the road, which he described as approximately 60 acres, clearly stating that this area was an exception to the conveyance and was not being conveyed to Gehring. The tract being conveyed was intended by Montgomery to include only the land lying northeast of both the road and the creek, he intended both the bed of the creek, and the land lying between the creek and the road, to be excepted from this conveyance. The description used by Montgomery however, which he had written himself, evidently without any professional assistance or guidance, defined the boundary between the tract conveyed and the tract retained only by means of a reference in the exception language to "the other side of Poorman", meaning that the boundary was to be on Gehring's side of the creek. To what extent the parties used their respective tracts following this conveyance is unknown, but Montgomery had a cottage on his tract that he apparently used only on an infrequent basis, as a pastoral retreat, while Gehring was evidently a farmer or rancher who kept livestock on his tract.

1957 - A controversy evidently developed between Montgomery and Gehring over the exact location of the boundary created by the 1948 conveyance, stemming from their divergent uses of the lands on either side of that boundary, so Montgomery ordered a survey of his tract, with the apparent intention that it would serve to physically define the described boundary by marking it on the ground. This survey showed

a traverse line running along Gehring's side of the creek, at an unspecified distance from the creek, creating a strip on Gehring's side of the creek that was not of uniform width. A portion of the traverse, in the area where the creek formed the boundary, followed a fence that Gehring had built along a portion of the creek, but most of the area along the boundary between the two tracts remained unfenced. This survey purported to depict the "Montgomery Property", and iron pins were set along the traverse line, but the location of the traverse line bore no specifically defined relationship to the boundary described in the 1948 conveyance, so it was at best a loose or convenient approximation of the described boundary, adopting a line that was decidedly advantageous to Montgomery, since it included a long strip of land on Gehring's side of the creek.

1963 - Gehring ordered a survey which retraced the 1957 survey, but did not accept or identify the traverse line as a boundary, and in addition this survey clarified that 1.3 acres existed between the traverse line and the centerline of the creek, which Gehring believed constituted the actual boundary between the tracts, rather than the edge of the creek. This survey also revealed that some of the land conveyed to Gehring, and some of the land retained by Montgomery as well, was actually located within a patented mining claim owned by others. Upon learning that Gehring claimed that his tract extended to the centerline of the creek, Montgomery filed an action against Gehring and all other potential claimants, seeking to obtain a ruling defining the boundary to be as he had intended it in 1948, on Gehring's side of the creek, and also seeking to clarify the rights of the parties to the use of the land lying along their mutual boundary.

Montgomery argued that the description he had written and used in the conveyance at issue clearly identified the intended location of the boundary between the respective tracts, and that he had the right to build a fence on Gehring's side of the creek, and that he was not legally required to place the fence entirely on his own property, regardless of whether Gehring objected to the presence of a fence along the boundary or not. Gehring argued that the boundary had not been clearly defined in the description created by Montgomery, so the centerline of the creek should be declared to be the true

boundary, in order to provide his livestock with access to the creek, and Montgomery had no right to build a fence anywhere on Gehring's side of the creek, because doing so would deprive Gehring of his right of access to the creek. The trial court found that the boundary was in the location intended and described by Montgomery, on Gehring's side of the creek, ruling that Montgomery was therefore entitled to place his fence on Gehring's side of the creek, and awarding Montgomery 10 feet on Gehring's side of the creek, upon which to build a fence.

Although the controversy between the adjoining land owners in this case was centered upon the construction of a proposed fence, the primary issue for the Court was the validity of the description written by Montgomery, which required the Court to assess whether or not he had met the basic requirement that rests upon any grantor, when conveying a portion of his land, and that is the fundamental need to clearly identify what is being conveyed, by adequately defining the boundaries of the conveyance. While remarking that Montgomery had certainly not done an ideal job of describing his conveyance to Gehring, the Court determined that he had described the intended location of the boundary between the two tracts with sufficient clarity to create a definite and binding boundary, located at the edge of the creek, and on the opposite side of it, with reference to the area that he had described as an exception. The contention of Gehring, that any conveyance made with reference to a creek such as the one at issue should or must necessarily adopt the centerline of the creek as the boundary, was mistaken, the Court indicated, because the centerline control principle is a tool of law and equity, not an absolute rule to be applied arbitrarily to every situation. The principle that a conveyance extends to the centerline of any object that is identified as a bounding object had been applied, or recognized as legitimate, a number of times by the Court, as we have seen in the Helland case 12 years earlier for example, and it had also been codified into statute law, along with many other such elementary and widely approved principles of common law, but like many such concepts, it operates only as a presumption, rather than an absolute or universally controlling principle. Presumptions at law are highly important and are often decisive, when applicable, but no presumption will be applied in defiance of clear evidence to the contrary, presumptions are reserved to control only those matters which remain unresolved after all the relevant evidence has been evaluated. In this case, the Court effectively discounted and disregarded the surveys presented by both of the litigants, since neither of them could be shown to correspond in any direct way to the description in question, so obviously

neither of them was capable of controlling the boundary location in dispute, nor were they even intended to do so, they were both merely exhibits revealing the existing conditions on the ground, and thus served only as helpful illustrations of the details in contention. The described boundary was entirely valid, the Court decided, even without having been defined by any survey, and was located wherever the edge of the creek on Gehring's side might be, because Montgomery had expressly called out the edge of the creek as the boundary in the description, effectively making it a controlling physical monument, regardless of whether or not that had been a particularly smart decision on his part, and Gehring had accepted Montgomery's description without objection. Montgomery had written the description in an awkward fashion, attaching the language defining the boundary between the two tracts only to the description of the exception area, and his reasoning in so doing was certainly questionable, since the consequences of his description would prove to be problematic, but none of that, the Court explained, was enough to obfuscate or invalidate the boundary location, because:

“... Montgomery had a reason to want the boundary along the northeast side of the creek ... to keep the cattle from straying and milling around the cottage ... where the language indicates that the edge, not the center, be the boundary, and where the circumstances show some probative explanation for this, then the statutory presumption that the boundary is along the center may be deemed rebutted.”

Having resolved the boundary location aspect of the conflict, the matter of the proposed fence itself yet remained to be dealt with. The Court first clarified that Gehring was entirely free of responsibility, with respect to the fence being proposed by Montgomery, Gehring had no duty to either help build the fence or contribute any funds toward its construction, regardless of where Montgomery might choose to build it. Furthermore, the Court held, while the proposed fence remained unbuilt, however long that might be, Gehring was free to allow his livestock to roam the land at liberty, so Montgomery had no right to complain of any damage that Gehring's animals might have done to Montgomery's land, or any damage they might do in the future, provided that Gehring did not intentionally cause any such damage by directing his animals onto Montgomery's land. On the other hand however, the Court ruled that Montgomery was free to place his fence

directly on the boundary between the tracts that he had created, in such a manner that one side of the fence was on Gehring's tract and one side of it was on Montgomery's tract, if Montgomery were able to accomplish this without placing any portion of the fence completely on Gehring's land. Since Montgomery had established the tract boundary at the exact edge of the creek, the Court observed, this could prove to be quite difficult to accomplish, but the Court naturally had little sympathy for his plight, because he had been the grantor in charge of selecting the language used in the conveyance, and he had very neatly painted himself into this corner, so the Court was perfectly content to allow him to experience the consequences of his poorly chosen words, as a lesson to future grantors considering writing their own legal descriptions. While the Court upheld Montgomery's right to build a fence directly on the boundary in question, it was unwilling to allow him any additional space whatsoever on Gehring's side of the creek, striking down the 10 feet awarded to Montgomery by the lower court's ruling, and characterizing it as an unacceptable attempt to perform a private condemnation. Gehring naturally protested that a fence along the edge of the creek would function to deprive him of the use of the creek that he had expected to have, and which he had intended to use, because water rights had been included in the conveyance of the land to him, and were appurtenant to his tract. The Court however, while agreeing with Gehring that he did have water rights, did not agree that the proposed fence would have the effect of preventing his livestock from obtaining water from the creek, apparently anticipating that if any fence were to be built by Montgomery it would be only a barbed wire fence, which Gehring's animals could reach over or through to drink from the creek. The Court never addressed the ancillary issues, such as the road boundary or the overlapping mining claim, since those issues were not specifically placed before the Court for adjudication. Although the existing boundary was not in a particularly convenient location for either of the parties, or even a sensible location, the Court concluded, the parties had both accepted the description used in the conveyance, and it was legally sufficient, so they were both stuck with the existing boundary, unless they could mutually agree to modify or adjust it. The boundary in question was located exactly at the edge of the water, having been defined by that physical monument, and no survey could have the effect of shifting it one way or the other, merely by staking some other line or series of lines that might be preferable or more convenient and depicting any such alternate location with bearings and distances.

TOWNSEND v KOUKOL (1966)

Once again in this case, a fence is at the center of the controversy, and the main concern of the parties is whether or not the long standing fence is subject to relocation, which forces them to deal with the issue of their mutual boundary location, although this represents an issue that they are both clearly reluctant to confront, as demonstrated by the neglect and procrastination exhibited by both of them toward ascertaining their record boundary location for many years. Ironically, the defendant in this case, as we will see, makes two arguments that are mutually contradictory, yet fails to make a third argument that could well have proven to be more productive than either of the two arguments made. Arguing multiple legal theories, in an effort to cover all possible interpretations of the evidence during the adjudication process, is typical of those who are clueless concerning the differences between the various principles, concepts and doctrines that control land rights, including boundary and ownership issues, and also of those who realize that the validity of the rights they are claiming is marginal or suspect, so it is often an indication that an unsound claim is being made in desperation, and the Court is cognizant of this. In this instance, in addition to observing the failure of two mutually contradictory claims set forth by the same party, we will look on as that party suffers the fate that typically befalls those who fail to obtain a survey, in order to combat the effects of a survey that has been placed in evidence by the opposing side. Here again the Court declines to come to the rescue of a fence that is incapable, due to its physical configuration, of being successfully asserted as a boundary, a theme to which the Court has remained consistently faithful, sweeping aside the arguments conjured up in support of the fence, and poignantly clarifying the Court's view that the principle of acquiescence is inapplicable to boundary resolution in Montana. In the 1976 case of *Johnson v Jarrett*, which involved a conflict over the intended location of a boundary that had been defined as following a certain old road, it was argued that a particular existing road had been recognized and treated as the boundary in question by all of the parties for decades, therefore that road had become a binding boundary by virtue of their mutual acquiescence. Consistent with its decision in the case we are about to review, the Court rejected that argument, again maintaining that

acquiescence is inapplicable to boundary disputes, and also going on to take the position that acquiescence must be based on knowledge rather than ignorance, a position contrary to that of most other states, where acquiescence can control boundaries, but only when ignorance, doubt or uncertainty is present, enabling a boundary established through practical location to be deemed beneficial and valid. Scenarios such as the one in evidence here, serve to well illustrate the reason for the existence of the legal presumption, quite frequently applied by the Court, that an uncontradicted survey is correct and controls, unless either it's correctness is called into question, or the presence of some factor that prevents the survey from governing the boundary at issue is shown.

1921 - Randall acquired Lot 4 in Section 4, in a township through which the Gallatin River runs. The river runs in a generally northerly direction through the east half of Section 5, and the ground to the east of it is considerably higher than the river bottom land, but only a relatively small amount of high ground that is useful for agriculture exists along the eastern edge of the northeast quarter of Section 5. Whether or not Randall was the original patentee of his lot is unknown, but there is no indication that anyone had ever occupied it prior to his arrival.

1925 - Randall built a fence between his land and the river, approximately parallel with the river, and the fence happened to run fairly close to the line between Sections 4 & 5, but it was actually located almost entirely on Lot 1 in Section 5. Whether or not Randall had any idea where the section line constituting the west boundary of his lot was actually located is unknown, but there is no indication that he made any effort to locate or follow that line when building the fence, and even if he did know where the section line was, he may well have deliberately intended to enclose and use the small portion of the adjoining Lot 1 in Section 5 that was suitable for cultivation. Since he had built it more or less parallel with the river, the fence was also not straight, it formed a substantial bow, bulging about 140 feet to the west near the middle of it's quarter mile length. The land lying east of the river in Section 5 was apparently unoccupied, and it may have

been unpatented, so no one expressed any concern about the location of Randall's fence. Over the ensuing years, Randall farmed all of the land east of his fence and pastured his livestock on the land between the fence and river.

1936 - Townsend acquired Lot 4 from Randall, and she maintained the fence and continued to use the same area that he had been using, in the same manner that he had used it. Townsend also owned additional land in both sections, lying directly to the south of these two lots, but Lot 1 apparently remained vacant.

1954 - Koukol acquired Lot 1 and built a house on the high ground just east of the river, an unspecified distance west of the fence. Koukol was apparently unaware of the location of the section line, and was unconcerned with the location of the fence, so no issue was raised regarding the fence at this time, and Townsend continued to use all of the land to the east of it.

1964 - Koukol had the line between Sections 4 & 5 surveyed, and the survey indicated that the line ran through Townsend's field. There is no indication of how the section line location was determined and no indication as to whether or not any monuments were found during the survey. Koukol wanted to replace the existing fence with a new one located on the section line, but Townsend would not agree to that, since she believed that she had acquired all of the land lying east of the fence, so she filed an action seeking to validate her ownership of all the land that she had long been cultivating.

Townsend argued that she had acquired the portion of Section 5 lying east of the fence by virtue of either acquiescence or adverse possession, therefore she had the right to permanently maintain the fence in its existing location, and the section line was no longer relevant because it was no longer the boundary between the lots in question. Koukol argued that neither acquiescence nor adverse possession had taken place, and the section line had always remained the boundary, and the section line location indicated by the survey was correct, so he was entitled to remove the existing fence and build his own fence on the surveyed line. The trial court decided that adverse possession had been completed, so Townsend had become the owner of all the land east of the fence, and Koukol had no right to disturb it.

While the basis for the claims made by Townsend may appear to have been solid, being founded upon 40 years of uninterrupted use of the portion of Section 5 in dispute, when her own possession is combined with that of her predecessor Randall, both of her claims actually contained serious flaws, which would lead to her downfall. Turning first to Townsend's claim that the long standing acquiescence in the existing fence location, by all parties, was valid evidence that the fence represented the result of a boundary agreement made in the past, the Court looked to California for guidance, since the concept of acquiescence as a form of evidence supporting the practical location of boundaries had never before been squarely raised as an issue and addressed as such in Montana. As has been noted in previous cases, the Court has never formally adopted the principle of practical location as a distinct and independent means of boundary resolution, and has always required explicit evidence that a boundary was settled upon, as being in a certain clearly defined location, regardless of the boundary location of record, through an agreement between adjoining land owners, in order to support any claim of a binding agreed boundary, rather than accepting such a boundary as binding on the basis of implication alone. Acquiescence, when that term is used with reference to potential or alleged boundary agreements, is simply a form of evidence, supporting the implication that a state of agreement existed between adjoining land owners regarding their mutual boundary, in those instances where there is no direct or definite evidence that any explicit boundary agreement ever took place. Acquiescence, when applied in this context, merely indicates that a state of mutual acceptance existed, between parties occupying adjoining properties, which by its presence suggests that those parties were satisfied that the existing physically marked boundary between their lands was intended to be permanent and binding, upon them and their successors, regardless of whether or not it might subsequently be discovered to be contrary to the boundary location of record. Since acquiescence, even when shown to have existed, serves only to support the implication that an agreed boundary was created by adjoining property owners, in an effort to establish their boundary at a practical location, which would be useful to both of them, and which would conclusively resolve their mutual uncertainty over the true boundary location, it was inevitable that Townsend's attempt to rely upon that theory would be condemned as an unacceptable method of boundary resolution by the Court. Having already established in prior decisions that practical location was insufficient to prove the existence of an agreed boundary, because evidence merely implying the existence of an agreement, without demonstrating that an actual or conscious agreement was deliberately

entered into by the relevant parties, cannot alter or overcome the boundary location of record, the Court took the opportunity presented by Townsend's argument to likewise banish acquiescence from the realm of boundary resolution in Montana. Choosing to follow California, rather than those states in which the practical location of boundaries, supported by acquiescence, has been adopted as a legitimate boundary resolution doctrine, the Court effectively rang the death knell of acquiescence, and by extension practical location of any kind in Montana, by postulating that:

“... in the absence of an agreement to the effect that a fence between adjoining properties be taken as a true boundary line, mere acquiescence in its existence is not sufficient to establish a claim of title ... it is necessary that the acquiescence consist in recognition of the fence as a boundary line and not a mere barrier ... acquiescence ... without an agreement ... does not constitute an estoppel which will prevent the real owner from subsequently claiming his property ... the burden of proof is always upon the party attempting to show the existence of an agreement fixing the location of a boundary line ... to establish an agreed boundary line, the evidence must show more than mere acquiescence ... it must go further and show that ... there was an actual designation of the line upon the ground ...”

Townsend's claim that a permanent and binding boundary location, at odds with the section line representing the boundary location of record, had been established through acquiescence, had not only met with utter failure, it had prompted the Court to finally announce its rejection of the concept of acquiescence with respect to land rights, sending a message that no claims relating to agreed boundaries, based upon mere implications of the existence of an agreement, would find any favor with the Court. This position is one that the Court has steadfastly adhered to ever since, often citing its decision in this case in so doing, with the result that no successful arguments relying upon the principles of acquiescence, or practical location in any other form, have been made in Montana subsequent to this decision. Acquiescence and adverse possession are fundamentally different legal concepts, being based upon directly opposing doctrines, the former representing the existence of a state of agreement between adjoining land owners, and the latter representing precisely the contrary, the absence of any kind of agreement

whatsoever, and the existence of a genuinely adversarial relationship instead, so Townsend was not sunk just yet, although in very short order she would be. Turning then to Townsend's claim of adverse possession, upon which she had initially prevailed, the Court elected to dispose of her argument solely upon the basis of her failure to comply with the tax payment requirement, without any consideration of any other possible merits or demerits related to her claim. Townsend had very likely been encouraged, upon viewing the success experienced by Flynn, who had vanquished her attacker by means of adverse possession in the 1958 Thibault case, as we have previously seen, under conditions that must have appeared to Townsend to be highly comparable to her own. If Townsend was thus hopeful of victory however, such optimism on her part was entirely misguided, because during all of the 40 years through which the fence upon which she relied had stood, the tax payment requirement had been in effect, so any merit that her adverse possession claim might otherwise have had, was not even worthy of consideration, in the eyes of the Court. Even if the tax payment requirement had not been in place to defeat Townsend, given the view taken by the Court of the fences in the Schmuck and Reel cases, she could potentially have been vanquished simply by the fact that the fence at issue was visibly curved, making it impossible for Koukol or anyone else to be charged with notice of it as a division fence, that might be controlling for boundary purposes, given the context of a boundary defined by a PLSS line, known by all to be necessarily straight. Having concluded that the lower court had clearly erred in awarding the portion of Lot 1 in controversy to Townsend, the Court reversed the lower court's ruling and quieted title to all of Lot 1, as it had been surveyed in 1964, to Koukol, confirming his right to remove the existing fence, which amounted to nothing more than an encroachment, even after four decades, and build a new one on the surveyed section line. For surveyors, it may well be worthy of note that once again here, the Court accepted the findings of a survey without any examination of the methods or procedures employed in performing the survey, for the simple reason that no one ever raised any issues with the veracity of the survey, or questioned it in any way. Of course the real reason that Townsend made no attempt to challenge the section line location surveyed for Koukol, which was depicted running through her field on that survey, may well have been actual knowledge on her part that Randall had built the fence without any regard for the section line, intending only to enclose as much useful land as he could, in which event she had known all along that the fence extended beyond the section line and bore no relation to her boundary at all.

BUCKLEY v LAIRD (1972)

At this juncture, we reach what may be the most fact intensive case involving boundary surveys that has ever taken place in Montana, and review a decision that provides great insight into the way the Court views survey evidence, thereby supplying several highly valuable lessons for the guidance of land surveyors who are in the business of gathering and analyzing boundary evidence. As the scenario that forms the foundation of this case superbly shows, the presumption that land is physically visited and actually viewed when it is conveyed forms the basis for the principle of monument control. People executing land transactions historically have acted with primary reference to objects that they can see and touch, rather than words or intangible technical items such as numerical values, which they cannot actually see or even accurately comprehend. Conveyances made with reference to visible objects create rights, such as the fundamental right of reliance between a grantor and his grantee, given that both are operating and dealing with one another in good faith, and the Court is highly aware of its role in protecting such rights. As cases such as the one we are about to review clearly show, these important considerations, which form serious legal and equitable factors, can have a major impact on how the Court views and determines the relative validity of competing surveys. It should be well understood and always kept in mind that all numbers represent nothing but descriptive tools used to symbolize spatial relationships between existing physical objects or designated points on the ground, that are seen as mere indicators by the Court, pointing to the true controlling elements, which are all of those physical objects that stand as legitimate boundary evidence. The powerful concept that stability controls over precision is also prominently on display here, leading to the inevitable conclusion that measurements, even when carefully made, do not represent proof of location in the face of physical evidence to the contrary, since measurements in the wrong location simply have no controlling value. In addition, this case also illustrates that buildings are not presumed to represent encroachments, and they can hold value with respect to boundary determination, because they typically provide clear notice of existing rights, such as historically established boundaries.

We also watch as the Court applies the PLSS rule that a GLO plat which controls one section does not control an adjoining section, over an earlier plat which created that adjoining section, simply by virtue of being the last plat to show the area, each of the adjoining sections platted at different times are controlled by the appropriate original plat. In stark contrast with the case just previously reviewed, the fence here turns out to be absolutely pivotal survey evidence, while the fence in the Townsend case did not represent boundary evidence at all, the difference being the presence of crucial testimony, that lends credibility to the object in question, showing that all physical manifestations relating to any boundary being surveyed require serious consideration and analysis, to ascertain their value as evidence. The great lesson for land surveyors, so elegantly taught by the outcome of this case, is never to dismiss or disregard physical evidence or testimony as meaningless without ample consideration, because respect for all legitimate boundary evidence is mandatory, and not optional, in the eyes of the Court.

1904 - The Laird family occupied a substantial portion of the north half of a certain Section 21, which had been surveyed and platted by the GLO just two years before. The area they were using was not owned by the family, they apparently worked the land as tenant farmers. Section 21 had been platted along with the sections lying north and east of it, but the portion of the township lying to the south and to the west of this section remained unplatted.

1917 - A fence was built dividing the north and south halves of the section, presumably by the owner of the land that was occupied by the Laird family, or at his direction, the south half of the section apparently being still unoccupied at this time. The Laird family evidently presumed, or were told, that the fence represented the quarter section line, so they treated it as such for all purposes henceforward.

1926 - The father of Laird acquired the east half of the northwest quarter and the west half of the northeast quarter of Section 21 from his former landlord, and the Laird family went on using the land as they always had.

1930 - The GLO completed the subdivision of the township, surveying Sections 20 & 28 adjoining Section 21, along with all the other previously unplatted sections in the southwestern portion of the township. The east quarter corner of Section 20 established during this survey was not coincident with the west quarter corner of Section 21, so from this time forward, two distinct platted quarter corners existed. In addition, these two quarter corners both had to be referenced by means of a witness monument, rather than being directly established, due to the presence of a road. The original west quarter corner of Section 21 was not recovered during this survey, apparently having been unknowingly destroyed by the road construction crew and never restored.

1937 to 1942 - The southerly portion of the Laird property was evidently comprised primarily of unused timber land, but during this period Laird's father built a cabin near the southerly boundary of his land, with an outhouse just south of the cabin, and the family began using the area on an occasional basis for recreational purposes. Laird was told by his father that the fence represented the southern boundary of their land.

1944 to 1948 - Buckley acquired the south half of Section 21, with the intention of creating a residential subdivision. Buckley was not the original patentee of his land, but the south half was apparently still vacant land at this time. Buckley indicated to the surveyor who he hired to plat his subdivision that he believed the fence formed the north boundary of his land. The surveyor agreed with Buckley's conclusion regarding the fence, and an unspecified portion of the south half, lying along the fence line, was subsequently subdivided and platted, into an unspecified number of residential lots of unspecified size, and the plat was recorded. For unknown reasons however, none of these lots were sold at this time or for several years thereafter.

1951 - The father of Laird died, his land passed to his wife, and the family continued to live on their land and use it just as they always had. Laird, who by this time was an adult, and had become a licensed

engineer and surveyor, surveyed a portion or portions of his mother's property, apparently in anticipation of conveying certain portions of it to various family members. In so doing, Laird adopted the quarter section line that was shown as the north boundary of the south half of the section on Buckley's subdivision plat, acknowledging that the fence marked that line.

1953 - Laird's mother deeded a 13 acre tract lying in an unspecified location along the southern edge of her property to Laird, and the survey of this tract, that had been done by Laird two years earlier, was recorded along with this deed.

1960 to 1963 - During this period, Helppie acquired an unspecified number of Buckley's lots, lying along the north side of the subdivision. There is no indication that any of the lots were ever sold to anyone else, Helppie owned most, if not all, of Buckley's lots by the end of this period.

1965 - Helppie evidently decided to abandon a substantial portion of Buckley's subdivision, if not all of it, and make some different use of the land, or create a new subdivision of his own, so he ordered the south half of the section to be surveyed again. Helppie's surveyor concluded that the fence line was not on the quarter section line, and his survey showed the quarter line being about 40 feet north of the fence, running between the cabin and the outhouse built by Laird's father. Helppie proceeded to build a log fence on the quarter line that had been surveyed for him, but he subsequently found that it had been moved to the location of the original fence, by an unknown party. Buckley and Helppie decided to assert ownership of the strip lying north of the fence, so together they filed an action against Laird and all other relevant parties, seeking to have the quarter section line depicted on the survey done for Helppie declared to be the true northerly boundary of the south half of the section.

Buckley argued that the survey done for Helppie was the only one of the private surveys in evidence that had been properly performed, and that the earlier surveys performed in Section 21 had all been incorrect and therefore could not control the location of the quarter line in question. Laird

argued that the survey relied upon by Buckley and Helppie had not been properly conducted, and that there was no evidence that the earlier survey work, including that which he had done himself, was incorrect, and that the strip in question was part of the north half of the section. The trial court found that the survey done for Helppie was accurate, and controlled the location of the quarter line in question, and Laird also had no valid claim to the strip on the basis of possession, and so ruled in favor of Buckley and Helppie.

As we have seen in several earlier cases, the Court typically welcomes survey evidence, and applying the presumption that such evidence was professionally prepared and correctly perpetuates the original corners and lines in controversy, adopts the survey as a factual representation of all matters depicted upon it, provided that no specific allegations to the contrary are launched against it. This case however, in which the surveys were mutually contradictory, and each of them was used as a basis upon which to attack the validity of the others, eliminated the role of any legal presumptions, and brought the competing surveys into direct conflict. In addition, the Court realized from the outset that the possession by the Laird family of the land in dispute fell far short of being adequate evidence of adverse possession, and also that any possible claim based on acquiescence as an independent boundary resolution doctrine had been eliminated by the Townsend decision announced 6 years before, so the only way that Laird could possibly prevail would be by proving that the survey done for Helppie was illegitimate in some respect. Therefore, the primary focus of the Court was on Helppie's survey, and for that reason the fact that Laird was a surveyor, who knew how to effectively attack a flawed survey, would prove to be the decisive factor. The evidence that was introduced with respect to the several surveys that had been done in the area, including the GLO surveys, was far more extensive and detailed than that which is presented in a typical boundary dispute, and this served as an invitation to the Court to scrutinize the survey evidence in great detail. The author of the opinion of the Court in this case was the same Justice who had written for the Court in the Reel and Tillinger cases 15 years earlier, and he had made it very clear in those decisions that he was not at all inclined to favor fences over survey lines, without some good reason for doing so, sending the parties who attempted to rely on fences against surveys down to defeat in both of those instances. The key difference in this case however, was the fact that the fence contended for by Laird had a genuine pedigree, it did not merely stand alone against a survey, it represented potentially valid evidence of an

original survey itself, and the fact that Laird was a surveyor worked strongly to his advantage in this regard as well, enabling him to recognize that the fence itself represented significant survey evidence, which could be very persuasive to the Court if effectively presented as such. Knowing that the Court would seek out evidence of the true original quarter line location, given the opportunity and motivation to do so, Laird very astutely provided the Court with plenty of ammunition, in the form of both documentary evidence and critical testimonial evidence, and then just sat back and watched as the Court dismantled the work of Helppie's surveyor. Mindful of the fact that no survey, including those done by the GLO or BLM, can ever be allowed to have a damaging impact on any rights legitimately acquired and held by entrymen or their successors, the Court outlined the fundamental problem with the survey that had been done for Helppie. The surveyor, the Court observed, had done a marvelous job of precise measurement, and he had thoroughly documented his work, yet his results all counted for naught, because:

“... he disregarded the other marks and evidences of property lines ... he did not discuss the problem with other land owners nor did he seek out any other information concerning the east-west centerline or any other monuments, natural or artificial ... the surveyor's only duty is to relocate, upon the best evidence obtainable, the courses and lines at the same place where originally located ... the original survey in all cases must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it ... the stability of boundary lines is more important than minor inaccuracies or mistakes ... upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties ... Monuments are facts ... courses, distances and quantities are but descriptions which serve to assist in ascertaining those facts.”

Helppie's surveyor had relied upon the witness corner, set by the GLO in 1930 and clearly shown on the official plat which resulted from that township completion survey, in attempting to restore the quarter line in question, the problem, as the Court noted, was that the 1930 survey was never intended to control any existing land rights in Section 21, or in any of

the other sections that had been created nearly 30 years earlier. The rights acquired by all of the land owners who were already present in 1930 were locked into, and were dependent upon, the 1902 GLO plat, which was the one and only controlling original plat for the land in all of the sections that had been created at that time, so the 1930 plat could in no way operate to contradict or supersede the 1902 plat, it served only to create and control the land rights that later came to exist in the newer sections lying in the southwestern portion of the township. Once the original quarter corner monument was taken out by the road construction, the surviving portion of the fence had served to perpetuate the corner's original location, so the fence thus became a physical pointer to that original monument location, making the fence the best evidence of the original location of the missing quarter corner, to be ignored by subsequent surveyors at their peril. Since the fence was straight, and had been built at a time when the original monuments were presumably still physically present and visible, unlike some of the fences relied upon in prior cases, the Court had no difficulty accepting this fence as legitimate boundary evidence, deciding that it was in fact the best remaining evidence of the original quarter section line. Having acknowledged the fence as a genuine monument, the Court severely criticized Helppie's surveyor for failing to contact Laird, not just because Laird was a surveyor, but even more importantly because Laird was a long time land owner, with valuable knowledge about the history and significance of the fence, as a valid perpetuation of the original location of the boundary in question. In addition, the Court found that Buckley was in no position to adopt or support the survey that had been done for Helppie, since it stood in flat contradiction to the survey that had been done nearly 20 years earlier, to subdivide and plat the same land when Buckley owned it. Moreover, the Court indicated, Helppie himself had no valid basis for attempting to overturn the surveys done by Buckley's surveyor and by Laird during the 40s and 50s, because Helppie acquired his land from Buckley with full knowledge that the fence was on the quarter line, having been so informed by the existing surveys and by Buckley himself, and having been on inquiry notice, due to the physical presence of the fence, the cabin and the outhouse, so Helppie could make no claim that he was an innocent purchaser without notice. Since the fence clearly constituted superior physical evidence of the original survey, and it had been consistently relied upon as the boundary by both surveyors and land owners in conducting all of their conveyances of the lands at issue, until Helppie's arrival, the Court reversed the decision of the lower court and declared the fence to represent the original quarter line location, and therefore the true boundary between the parties. Despite it's stern rebuke of

his failure to respect the physical boundary evidence that had been available to him, the Court as usual made no suggestion that Helppie's surveyor might bear any liability for the consequences of his work, even though the Court had struck his survey down, effectively rendering it null and void, because none of the litigants had expressly charged that his erroneous quarter section line was attributable to negligence.

ROE v NEWMAN (1973)

Our next riparian rights case again demonstrates the great importance of obtaining and respecting all possible evidence when dealing with boundaries of the kind that are subject to movement or change, and ultimately shows the unfortunate consequences of failure to do so. Whenever conditions or circumstances appear to indicate that a body of water representing a boundary may have moved or changed in some way over time, research and investigation of the historic location and action of that body of water is required, in order to support any determination of the current boundary location. Although a legal presumption that accretion is the cause or source of any such changes in location does exist, proceeding on the mere assumption that accretion has taken place, and is responsible for any materially different conditions that may be observed, is a dangerous practice. Accretion is presumed to account for all apparent stream movement simply because accretion is known to be constantly ongoing, to some degree in all locations where streams that are susceptible to movement exist, but as soon as any evidence of avulsion appears, the presumption in favor of accretion can be set aside, at which point the matter becomes subject to determination based upon the strongest evidence. Many things, both natural and artificial, can represent significant evidence of an undocumented avulsive event, the strongest indicator being the presence of a distinct abandoned channel, as in the McCafferty case of 1964, but a vacated channel is not absolutely necessary to prove avulsion. In both the Bode case of 1921 and in the case we are about to review, no empty channel existed, but collateral evidence of avulsion was present, in the form of aged trees, that would have been washed out by any gradual migratory river movement, and in this case by an artificial object, known to have been built on dry land,

on one side of the river, which is later discovered on an island, revealing that the island must have been cut from the dry bank during an avulsive action. Importantly, in this case the Court also once again warns, as it did in the Bode case, that whenever the location of a body of water is found to differ dramatically from the location of a meander line which was intended to represent the limits of that aquatic area, the possibility that omitted land may exist, remaining part of the public domain and therefore being under federal control, must be considered. It is navigability however, which proves to be the most crucial element in this case, introducing the rights of Montana to all or part of the land in dispute between the private land owners here, and in the end making it impossible for either of the private parties to prevail. The Court's decision regarding the navigability status of the river also has the effect of rendering both of the competing surveys dubious, eliminating any chance for either of them to control the boundary in question, because both surveyors proceeded on a false premise, one of them assuming that accretion had occurred, rather than avulsion, and the other assuming that the section of the river that was involved was non-navigable. The principal lesson to be garnered here, is obviously that incomplete treatment of evidence can render an otherwise acceptable survey ineffective, and prevent it from holding any controlling value.

1879 - The northerly portion of a township through which the Yellowstone River flows was subdivided and platted by the GLO. The river flowed in a generally easterly direction through the approximate center of Section 15 and four riparian government lots were created on the north side of the river in that section, with Lot 4 being in the northwest corner of the section. A meander line was run along the northerly side of the river, and one island about a mile upstream was also included in this survey, but no other islands were shown on this GLO plat, and all of the land south of the river remained unplatted, since the river formed the northerly boundary of the Crow Reservation.

1880 to 1905 - The four riparian government lots created in Section 15 in 1879 were presumably patented into private ownership during this period.

1906 - The GLO surveyed and platted the southerly portion of the township, since the Crow Reservation boundary had been relocated farther to the south. This plat also showed that only one island existed in the river, the same one that existed in 1879, about one mile upstream from Section 15, and this plat showed that the river's location was substantially unchanged since 1879.

1907 to 1937 - At some unknown time during this period, the portion of the river passing through the east half of Section 16 and the west half of Section 15 shifted its location about a quarter mile to the south, by unknown means.

1938 - The GLO completed a supplemental survey, showing that a substantial island had formed on the line between Sections 14 & 15. This island was platted and lotted as a supplemental part of those two sections, but no other islands were shown to exist as yet in Section 15.

1939 to 1946 - By the end of this period, a portion of the area that had been shown lying south of the river in 1879 and in 1906 was now actually north of the main channel, and was in the form of an island, lying in the westerly part of Section 15, between the main channel and a high water channel that remained at the southerly edge of the original main channel. Therefore, Lot 4 in Section 15 was now separated from the main channel of the river by the bed of the former main channel, the current high water channel, and this new island. This island was never platted or patented by the GLO, but by the end of this period Roe had become the record owner of the island, and Rahn had become the record owner of Lot 4 in Section 15 along with the adjoining Lot 1 in Section 16. Exactly how or when these parties acquired their lands is unknown, and how Roe's island was described is also unknown, but each of them agreed that the ownership of the other had a legitimate basis. Rahn was apparently the successor of Newman, who may have been the original patentee of the lots lying directly north of Roe's island. At an unknown time, following the shift in the location of the river, an unknown party had built a fence in the former bed of the river, running roughly parallel with the high water channel, situated an unspecified short distance north of that channel,

and both Roe and Rahn had accepted, used and maintained this fence thereafter. How the location for this fence was selected is unknown, but there is no indication that it was placed with reference to any surveyed line. The fence henceforward served as a de facto boundary between the lands used by each party, as their livestock grazed on the portions of the original river bed lying on their respective sides of the fence.

1947 to 1969 - During this period, Rahn paid taxes not only on her lots, but also on an additional 30 acres that was described in the tax records only as "accrued land", which was obviously intended to cover either all or part of the land lying within the former river channel. Roe on the other hand, paid taxes only on her island. At the end of this period, Rahn had her land surveyed, and the survey evidently indicated that she owned all of the land north of the high water channel, meaning that the fence was located entirely on her property.

1970 - Upon learning of the results of Rahn's survey, Roe decided to have a survey done as well, and her surveyor evidently adopted the fence as her north boundary, so both surveys included the same portion of the original river channel, comprised of the area lying between the island and the fence, creating an apparent overlap and resulting in a state of conflict between Roe and Rahn. Roe decided to press her claim of ownership up to the fence, so she filed an action against Newman and Rahn, who was apparently the successor of Newman, who was deceased by this time, seeking to quiet title to all of the land south of the fence, which had remained in place and had been functioning as Roe's northerly boundary for over three decades.

Roe argued that the shift in the location of the river had taken place as the result of a single event, at some unknown time in the distant past, so it constituted avulsion rather than accretion, and she had acquired the portion of the original river bed lying on her side of the fence by virtue of her long undisputed possession of that area, which she characterized as having been abandoned by the river. Rahn argued that the river had not moved south during a single event, but had instead migrated in a southerly direction, so the land now lying in the former main channel had formed by means of

accretion rather than avulsion, and it had therefore attached to her lots and become part of those lots, and Roe had no valid claim to any of it based on possession, because Rahn was the only one who had paid taxes on it, so Rahn was the owner of all of the land lying north of Roe's island. The trial court agreed with Rahn's version of what had historically transpired, and so quieted title to the disputed strip in her.

As can be seen from the foregoing timeline of relevant events, the essence of the dispute between these two women, as it had been outlined by them, was over whether or not the fence formed their mutual boundary. Both of them appear to have been quite thoroughly convinced that the only legal question to be resolved was whether or not the fence represented a binding property boundary dividing their respective lands. Neither of the two litigants evidently recognized that in reality the existence and location of the fence in question was not the central issue at all, nor did the trial court evidently grasp the true consequences of the scenario that had developed as a result of the river's lateral movement. Since both the year or years when the river shifted its position, and the year or years when each of the women first came to the area in question are unknown, it was impossible to be certain exactly how much each of them really personally knew about the history of the river, but both of them naturally took positions that they believed supported their own competing claims of ownership. Rahn took the position that the land in controversy was not merely an abandoned channel, but must have been accretion, evidently realizing that if the river had in fact abandoned its channel all at once, her southerly boundary would have become locked in place at that moment. In order to justify her claim to the land lying further south, Rahn had to assert that the land between the 1879 meander line and Roe's island had built up and arisen from the river, through the process of accretion to her bank of the river, rather than being simply the avulsively exposed former bed of the river. However, Roe also knew that accretion would be beneficial to Rahn, so she chose to maintain exactly the contrary, insisting that the river had jumped in effect, out of its original channel and into a new channel further south, during a single avulsive event. She therefore maintained that the land forming her island had originally been part of the south bank of the river, and that it had become an island only as a result of a particular event, during which the river had cut a new main channel, leaving only the existing high water channel as a remnant of the original main channel, and the existence of an old bridge abutment at the east end of her island supported this suggestion. In the absence of evidence to the contrary, the Court noted, river movement is presumed to be the result

of accretion, but here there was in fact substantial evidence to the contrary, since just as in the McCafferty case 9 years earlier, old trees existed on Roe's island, strongly tending to negate the idea that the river had gradually swept over the land, as had been proposed by Rahn. The fact that each of the litigants flatly called the claims of the opposing party squarely into question made it necessary, the Court indicated, to require whichever party was to prevail to satisfactorily carry their burden of proof, rather than allowing the outcome of such a conflict to be determined on the basis of a questionably applicable presumption, as the trial court had done. In assessing the merits and persuasiveness of the evidence that had been presented by each of the opposing parties, the Court found that the arguments which had been put forth by both of these combatants revealed more weaknesses than strengths, stating that:

“Mrs. Rahn did not carry the burden of proving her right to the claimed accretions ... Mrs. Roe disagrees with Mrs. Rahn's contention. However, she does not fully explain on what basis ... Under this contention, title to the disputed strip, and indeed a considerably larger strip, is not in either of the litigants, but rather in either the federal or state government ... if it were shown that the land configuration is now substantially the same as when originally platted, and no accretion or avulsion took place, the federal government could assert claim ... or if avulsion was proved and it was shown that the land in question was previously the Yellowstone river bed, the state could assert claim to the land ... the dilemma is not fully or satisfactorily answered ... ”

The fundamental issue that both parties had utterly failed to address was the issue of the navigability status of the particular section of the river in controversy here. Although the Court had previously treated a nearby section of the Yellowstone as being non-navigable in the 1921 Bode case, that site lay upstream from the location of this battle, and the Court held that this stretch of the river was properly characterized as being navigable, which was a net negative for both of the women, but was especially devastating to the claim made by Roe. The decision of the Court on the navigability question did not completely destroy Rahn's claim, because accretion operates to the benefit of riparian land owners situated on both navigable and non-navigable

bodies of water. However, the navigability ruling had the effect of introducing the possibility that Montana might have rights to the land at issue, meaning that the matter could not be completely resolved between Roe and Rahn alone, without Montana being given the opportunity to participate and assert a claim that could prove to be superior to any claims made by any private parties. The avulsion argument made by Roe left her completely locked into her island boundaries by the navigability decision, because she could make no valid claim to any portion of the abandoned channel, even if her assertion that avulsion had taken place was in fact correct, since no length of time in possession of the abandoned bed could bring her any rights whatsoever, against Montana as the owner thereof. While the navigability ruling effectively ended any chance of victory that Roe might have had, Roe was still able to do great damage to the claim made by Rahn, and that was exactly what she had accomplished, by exposing the highly suspicious nature of Rahn's accretion claim. Rahn had been correct in thinking that having paid taxes on the area lying within the former channel for several years could prove to be very beneficial to her, in such a struggle over land rights waged against any private party, such as Roe, but of course her tax payments would be of no avail at all to her against any claim to the bed that might be made by Montana, so her burden of proof was effectively elevated by the possibility of having to overcome a governmental claim of well documented avulsion. Both parties had come ill prepared, and had been blindsided by the navigability status of the river, so the Court ruled that no conclusive decision on the true ownership of the land in question was possible without more definitive evidence, and potentially the participation of additional interested parties with possible rights at stake, such as Montana, remanding the case for a new trial. This decision by the Court is quite indicative of the nationwide judicial trend toward upholding navigability that steadily gained ground during the twentieth century, which we will see even more emphatically demonstrated in a case yet to come. In this case, the two surveys that had been done for the litigants both proved to be entirely without value, since neither surveyor had taken into account the very serious possibility that the entire abandoned channel could still be under the ownership of Montana. Both surveyors had evidently been so intent upon attempting to support the desires and wishes of their respective clients that they "failed to see the forest for the trees", as the old saying goes, leaving the fate of both surveys wholly at the mercy of Montana, should it choose to pursue a claim to the contrary, based on clear evidence of an avulsive event. The spot where this action took place now comprises the east end of Riverfront Park, just south of Billings.

BROWN v CARTWRIGHT (1973)

The next adverse possession case that we will review provides great insight into how the Court sees various actions that have been taken in the past, as well as significant omissions, by the parties who come before the Court, seeking correction of errors or rectification of mistakes involving their land rights, by means of adjudication. Although no boundary conflicts that are related to any survey errors or issues exist in this case, it serves to demonstrate how the Court views and resolves description errors that have been given actual effect by the parties on the ground, through the application of the powerful equitable concept of repose, which is supported by major equitable principles such as estoppel and laches. The controversy presented here, rather than being based on any boundary location issues, stems from a title conflict, the origin of which lies in a plain mistake, manifested by a description error, making adverse possession an appropriate means of resolving the situation, since the core purpose of adverse possession is to eliminate title conflicts by honoring the title that has been given physical effect on the ground, while invalidating the title that has been negated through disuse. Even though adverse possession inevitably results in changes to property ownership, and in that sense has an impact on boundaries, when successfully completed, it should be understood that adverse possession was not devised as a boundary resolution tool, so any boundary alterations resulting from its application are purely incidental. In *Epletveit v Solberg* in 1946, the Court defined the role of equity using the time honored maxim that "Equity aids the vigilant and not those who slumber on their rights", and the case we are about to review stands as a classic example of the application of that rule to land rights. From this case we learn several of the many factors that the Court sees as critical to land rights determination, and observe the impact that certain seemingly subtle factors can have, when they operate together to paint a clear picture of a negligent land owner, in the eyes of the Court. Here we watch the Court note that an adverse possessor granting an easement to a third party across the land at issue, or restricting the record owner's use of some portion of his land, effectively reducing the record owner's rights, from the right of full use

held by an owner to a restricted use, comparable to that of a mere easement holder, both support adverse possession. In addition, a conversation during which the owner of record proposes to buy the area in controversy from the adverse claimant, indicating that the owner of record asserts no current right of ownership, supports adverse possession, even if such an offer is made out of sheer ignorance and never carried any farther, and the same is true if the record owner allows the adverse claimant to put a third party into actual possession of such an area. These actions, which can just as easily be portrayed as omissions to object, on the part of the owner of record, all lead to his defeat in this case, because they all serve to reveal his failure to exert dominion and control over his own land in a timely manner, and importantly, such acts or omissions can function to supplement and balance a state of minimal actual use of the land in question by the adverse possessor, by reducing the need for the adverse claimant to provide the essential element of notice through physical use.

1954 - A railroad right-of-way ran in a northeasterly direction through an unspecified section, cutting off a triangular tract, containing 8.8 acres, lying in the northwest corner of the northeast quarter, from the remainder of the northeast quarter lying to the southeast of the railroad right-of-way. There was a fence along the southeasterly side of the right-of-way, and also a fence along the north line of the section, but both of these fences contained gates, providing access to the 8.8 acre tract, from the southeast and from the north respectively. All of the land southeast of the right-of-way was owned by Marks, the land northwest of the right-of-way in the section to the north was owned by Winslow, and the land northwest of the right-of-way in the section in question was owned by Brown, so Brown was the record owner of the 8.8 acre triangle, which represented the extreme northeastern corner of his land. There was no dispute over the location of the fences, all of these parties recognized the fences as marking their true boundaries. All three owners were apparently ranchers, with ranches of substantial size, Brown owned a total of about 700 acres, the size of the Marks and Winslow ranches is unknown. Marks died and the administrator of his estate conveyed his ranch to Cartwright.

However, the legal description created by the administrator, and used in his deed to Cartwright, mistakenly included the entire northeast quarter of the section in question, neglecting to except out the 8.8 acres that was owned by Brown.

1961 - Cartwright acquired the Winslow ranch, and from this time forward he drove his cattle through the two gates linking his two ranches on a regular basis, in the belief that the area between the gates was part of his land, since it was included in his legal description. Brown saw Cartwright doing this, but he made no objection to this use of his land. Shortly after he acquired the Winslow ranch, Montana Power asked Cartwright for an easement to build a gas line which was to run through his land, including the triangle in question. Cartwright asked the Montana Power land agent to check the land records to verify his ownership of all the land in question. The land agent did so, and then returned and told Cartwright that although Brown claimed to own the triangle, the agent had verified that it was owned by Cartwright, so Cartwright granted the requested easement and Montana Power built the gas line across the triangle in question, without ever acquiring any easement from Brown. Brown observed the construction of the gas line taking place, but he made no objection to it, either during or after the construction. Brown then went to the tax office and discovered that the triangle was being taxed to Cartwright rather than to him, but Brown did nothing about this either, so Cartwright continued to pay the taxes on the triangle.

1962 - Brown discussed their mutual use of the triangle with Cartwright, and he offered to buy the area from Cartwright, because Brown's cattle still grazed on the land, at those times when Cartwright was not driving his cattle across it. Cartwright, in the belief that he was the owner of the triangle, instead agreed to allow Brown to continue using the area just as Brown always had, at such times as Cartwright had no need to use it himself.

1964 - Cartwright decided that he wanted to fence the west side of the triangle, so he ordered a survey of the quarter section line for that purpose, but for unknown reasons the surveyor never completed the

survey.

1966 - Cartwright obtained another surveyor to survey the quarter line, the line was marked, and Cartwright had a fence built on that line. A gate was built in the new fence, so that Brown could still access his ranch by driving across the triangle, but Brown's cattle were no longer allowed to graze on the triangle. Brown nevertheless told Cartwright that he was satisfied with this state of affairs, since his right of access had been preserved.

1967 - Cartwright sold the triangle to Swain, who moved a house onto the tract and began occupying it. Brown continued to drive across the tract on a regular basis, raising no objection whatsoever to the presence of Swain's house.

1970 - Brown hired an attorney to verify his land ownership and the attorney discovered that Brown was in fact the true record owner of the triangle. Brown then had his attorney order Cartwright and Swain to vacate the triangle. They refused to leave, or to cease using the tract, so Brown filed an action against them seeking to quiet his title to the area in question. In addition, when Brown subsequently discovered that Swain had failed to pay any taxes, he had his wife pay the delinquent taxes for 1968 & 1969, in the hope that doing so would destroy any adverse possession claim that might be leveled against him.

Brown argued that he had been the true record owner of the triangle throughout the entire time period in question, and Cartwright had never legally acquired it, therefore Brown was entitled to possession of the tract, and also to damages from Cartwright and Swain for all of their use of the tract, which Brown characterized as trespassing. Cartwright, on behalf of Swain and himself, argued that Brown's claim was barred by the statute limitations, Brown having not been in possession of the tract in question for a number of years prior to the assertion of his present claim, and that Brown was guilty of laches and should be silenced by estoppel. For his part, Swain argued that he was entitled to damages from Cartwright, due to Cartwright's inability to convey clear title to him. The trial court found that adverse possession had not taken place, therefore ruling that Brown was still the owner of the triangle, and also awarding damages to Swain against

Cartwright for Swain's loss of the tract, while quieting title to the disputed area in Brown.

The Court began its analysis of the situation by acknowledging that the origin of the problem was clearly a mistake that had been made by one or more parties in the past, yet none of the parties participating in the litigation were directly responsible for any error or errors that had precipitated the conflict, and none of the parties had made any charges of fraud, so any mistakes that had been made had presumably been made innocently. In view of that, the Court noted, the incorrect description held by Cartwright, although wholly illegitimate and without legal effect as a conveyance, did nevertheless constitute valid color of title under the law, and was therefore not entirely without value to him. Citing the 1926 Fitschen case, reviewed previously herein, the Court explained that Cartwright was entitled to rely upon the description provided to him by his grantor, just as he had done, because there was no evidence, and not even any accusation, that he had not accepted and held his deed in complete good faith. Had it been proven that Cartwright actually knew of the presence of the mistake or the ensuing description error, and that he had merely pretended to be unaware of what had happened, the deed would have been of no equitable or legal benefit to him at all, because color of title cannot be legitimately asserted in bad faith, by a party who knows and comprehends the falsity of his own claim. To obtain the beneficial support provided by an erroneous document representing potential color of title, the beneficiary must occupy a position of demonstrably genuine innocence, as the Court recognized that Cartwright did, so he gained the advantage of the shorter statutory period of 5 years, effectively reducing the burden of proof associated with his adverse possession claim, since his valid color of title fully met the statutory requirement that a claim of title, in some form, must be clearly made. Operating in conjunction with the fact that he had also paid all the taxes on the triangle for many years, Cartwright's color of title put him in a highly advantageous position, that relatively few adverse claimants enjoy, manifesting a virtually unassailable level of good faith, which stood in high contrast to the flagrant negligence toward his own land that had been displayed by Brown. Cartwright however, had full physical control over the tract in question under fence, for only about 4 years, at the time when Brown launched his effort to reclaim the land in 1970, so the Court was required to examine the character of Cartwright's occupation and use of the triangle prior to the point in time when he had prevented Brown from making any further use of it for grazing purposes by fencing it off. The fact that both

Brown and Cartwright appeared to have used the triangle as they pleased, prior to the erection of the quarter line fence in 1966, represented a potentially serious legal hurdle for Cartwright to surmount, because it could be viewed as evidence that Brown still had control to some extent over the area in question, meaning that the possession of Cartwright could be seen as failing to meet the exclusivity requirement for adverse possession. Addressing the key question underlying the scenario that had been painted by the evidence placed before the Court, which was the question of what activities do or do not constitute dominion and control over land, under such remote rural conditions, the Court took the position that:

“... the character of the land in question determines the degree and character of the possession or occupancy necessary to satisfy the statutes ... The rule of adverse possession is to be applied reasonably in view of the location and character of the land claimed. It is sufficient, if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises ...”

Having set the stage for a reversal, by determining that the limited uses made of the ground in question by Cartwright were potentially within the range of satisfactorily adverse uses and acts, the Court turned its focus upon the acts of Brown. While the true controlling intent in all adverse possession cases is that of the adverse claimant, and not that of the owner of record, the failures and omissions of the record owner can certainly contribute to the loss of his land, as we see most amply demonstrated here. People are all merely human, the Court understands, and mistakes of all kinds are constantly being made, so there must be a legal mechanism that serves to terminate the opportunity to insist that all past mistakes remain forever correctable. The bar that prevents such corrections from being made, falls most frequently and heavily upon those land owners who pave their own road to ruin, by displaying negligent behavior toward their own property, providing justification, if not outright motivation, for the Court's decision to allow their land rights to be extinguished. The presence of a proven mistake does not always justify correction, in the eyes of the Court, and adverse possession serves not only to render past mistakes unimportant and moot, it also serves to silence the indolent, whose behavior and conduct makes them guilty of laches, exposing them to potential estoppel, under the

fundamental principle that no party can close his eyes to reality for a period of time, only to later assert his now stale rights. The Court saw the granting of the Montana Power easement by Cartwright in 1961 as a legally distinct and conclusive assertion on his part of his ownership of the triangle, along with all of his other adjoining land, since this act indicated that Cartwright viewed that area no differently than his surrounding lands. Beginning at this time, the Court observed, Brown was clearly on notice that Cartwright was claiming ownership of the triangle and openly acting as the owner of it as well, and the ensuing series of negligent blunders made by Brown demonstrated with increasing emphasis that he considered the triangle to be legally detached from his adjoining land. Brown failed to raise any issue concerning the placement of the gas line across his land, failed to take any steps to correct the tax error that had freed him of his tax burden relating to the triangle, and he had approached Cartwright and proposed to buy the triangular tract, all within a period of two years. Later, the Court continued, Brown had allowed Cartwright to limit Brown's use of the triangle for grazing purposes, he had eventually allowed the fence placed on the quarter section line to physically cut him off from free use of the area, and ultimately he had allowed a stranger to place a permanent structure on the disputed ground. Each of these actions on Brown's part, the Court decided, operated to confirm that Brown had acknowledged Cartwright as being the real owner of the triangle, regardless of any misunderstanding by Brown of his own rights, and such acts amounted to a virtual invitation to Cartwright to take and maintain control over the area at issue, just as Cartwright had done. Furthermore, the Court concluded, Brown's attempt to regain his forsaken control over the land at issue by paying the taxes that had been neglected by Swain in 1970, had come far too late to be of any benefit whatsoever to Brown. Applying the fundamental principle that physical notice is the controlling element of adverse possession, the Court reversed the lower court's decision in favor of Brown, denying his claim of ownership of the triangle, thereby enabling Swain to occupy the triangular tract, by virtue of his conveyance from Cartwright, which was allowed to stand as a legitimate conveyance under the Court's ruling.

BRADY v STATE HIGHWAY COMMISSION (1973)

Also in the busy year of 1973, the Court produced a decision that sheds considerable light on the way the Court views plats, specifically illustrating their value as evidence and indicating where they rank in relation

to other forms of evidence that can control boundaries and land rights. The Court certainly recognizes the potentially controlling value of plats, as we have seen in a number of previous cases, typically adhering to the widely followed concept that a plat referenced in a conveyance creates a strong right of reliance on the part of the grantee, but that right of reliance is a general one, relating to the substance and meaning of a plat, which cannot be presumed to extend to every detail shown on it. The plats involved in this case are quite old, and the Court is undoubtedly highly aware that platting in the early days was vastly inferior to modern platting, given the greatly improved platting standards that have been introduced in modern times, leading the Court to look somewhat askance on the integrity of details shown on relatively crude plats, such as those in play here, dating from the nineteenth century. One important lesson for surveyors that is on display in the case we are about to review is that fact that platted dimensions are typically not the strongest evidence of intent, while the overall plan represented by the plat is a source of major concern to the Court, details such as dimensions in this instance, must bow to physical evidence of subsequent construction, which the Court sees as manifesting the larger intent of the development scheme that drives the platting process. In this case, we find the Court focused upon the large and prominent features of the plats at issue, such as the roadways, which the Court readily embraces as monuments, in the absence of original survey monumentation, representing "practical evidence of the true location" as the Court favorably characterizes the grid of streets that forms the framework of a city. In addition, we observe the Court maintain that "common assent" can control boundaries, in the absence of higher evidence, reaffirming the Court's inclination toward supporting and justifying the status quo, whenever it comes under some form of attack founded upon technicalities, such as conflicting dimensions, which the plaintiff here, in his ignorance and desperation, attempts to exploit to his advantage, to no avail. In a series of cases beginning with *Bache v Owens* in 1994, the Court examined the differences between plats and other boundary surveys completed in accordance with modern standards, eventually formulating what has come to be known in Montana as the "easement by reference" doctrine, which constitutes legal recognition of the legitimacy of land rights created by means of depiction upon boundary surveys of other

kinds, as well as plats, when such a survey is incorporated by reference into a conveyance. While the Court has thus clearly become increasingly comfortable with the concept of legal reliance upon various aspects of modern plats and surveys in recent decades, this position taken by the Court is not without limitation, as was demonstrated in the case of *Goodman v Monson*, also decided in 1994, shortly after the *Bache* case. In the *Goodman* case, the Court refused to acknowledge the legitimacy of an easement that was shown on a Certificate of Survey, because it was only graphically depicted, with no accompanying text description to properly define it, for which reason the Court treated the alleged easement as a nullity.

1872 - The original plat of the Higgins & McCormick Addition to Missoula was recorded. This plat was apparently very basic in composition, amounting only to a general scheme of lots and blocks, providing no dimensions, but it did show a certain street known as West Broadway to be straight, throughout the area covered by the plat. To what extent this plat was referenced or used in either conveyances or the construction of streets or buildings is unknown.

1883 - Either all or a substantial part of the same area platted in 1872 was platted again, but this time two separate plats were prepared, one for Higgins and one for McCormick. Although these plats appeared to have been intended to adopt and follow the same street alignment scheme set forth on the 1872 plat, the lot dimensions introduced by these plats were at variance. The McCormick plat indicated the lots along West Broadway to be 130 feet deep, while the Higgins plat indicated the equivalent dimension as 138.5 feet, creating a patent conflict with the 1872 street alignment scheme, which evidently showed no intention to create any jogs, offsets or width variations in the streets, and which depicted all the relevant streets as being completely consistent in alignment. To what extent either of these plats were referenced or used in any subsequent conveyances or the subsequent construction of improvements is unknown, and there was no indication that any lot or block corners were physically monumented at this time.

1884 to 1929 - During this time period, buildings were erected along West Broadway and other nearby streets, throughout the area covered by the 1872 and 1883 plats, and the alignment of all the buildings along the right-of-way was evidently substantially straight, no material jog or offset appeared, at the point where the discordant 1883 plats met, or anywhere else.

1930 to 1949 - At an unspecified time during this period, the Montana State Highway Commission obtained jurisdiction over West Broadway and it became part of a state highway. The Montana Department of Highways henceforward improved and maintained the roadway, which ran straight through the entire area covered by the 1883 plats, and was essentially parallel and perpendicular with all of the other nearby platted city streets, indicating that the variation in the lot and block dimensions shown on the 1883 plats had evidently never been taken into account or applied during the construction of any of the streets or buildings in the area.

1950 to 1970 - At an unspecified time during this period, Brady bought a grocery store that had been built at an unspecified date in one of the blocks lying along the south side of West Broadway in McCormick's Addition. There was a parking area located between the building and the roadway, an area that was about 22 feet wide, which Brady apparently always assumed to be part of his property, and which was used as such for decades by the customers of the grocery store. At an unspecified date near the end of this time period, Montana evidently decided to widen the roadway, which had previously occupied only a small portion of the full platted width of West Broadway, which was 99 feet. A highway survey crew staked the southerly boundary of the right-of-way of West Broadway and it fell just 9 inches north of the front face of Brady's building, indicating that his whole parking area was actually located within the platted right-of-way.

1971 - Convinced that the right-of-way location indicated by the highway survey was wrong, Brady hired a surveyor of his own and ordered another survey to be conducted, for the purpose of contesting

the highway survey. Brady's surveyor produced a survey that showed the conflicting lot and block dimensions appearing on the 1883 plats, which introduced the possibility that the streets and blocks may not have been intended to be built in direct alignment. Armed with this survey, fortified by boundary monuments set by his surveyor, several feet north of the highway right-of-way stakes, Brady filed an action against the Montana State Highway Commission, charging that the highway right-of-way had been erroneously located at the face of his building, when in fact it was located a significant distance further north.

Brady argued that using the lot and block dimensions platted in 1883, and measuring from certain corners and lines of nearby blocks and streets, the boundaries of the block in which his property was situated could be shown to be several feet north of the location indicated by the highway survey, and that the dimensions appearing on the 1883 plats clearly indicated that the blocks along West Broadway were out of alignment, and that the original plat dimensions must control the location of the right-of-way and the block boundaries. Montana argued that the centerline of West Broadway had been long established, by both the actual usage of the existing roadway location and by surveys done at the time when Montana obtained jurisdiction over the roadway as part of the state highway system, so the physical centerline of the actual roadway controlled the location of the right-of-way, and the fact that the roadway had always run straight throughout the area proved that the street and all of the adjoining blocks were intended to be in alignment. The trial court agreed with Montana that the original plats were mutually contradictory, and the location of the right-of-way and block boundaries in question were therefore properly controlled by the existing physical evidence, provided by the actual location of the roadway and the adjoining buildings, as they had been constructed, ruling that the highway survey controlled, and that Brady had failed to show that it was incorrect.

As can be seen from the outline above, this case confronted the Court with the classic conflict, which so frequently arises, between existing physical conditions and evidence of record. The documentary evidence in this case came in the form of plats that had presumably been referenced in numerous conveyances, such as Brady's, and which had very likely been used by many parties for various other purposes, such as construction, over the century that had elapsed since the development of the area in question had begun. The existing physical conditions were substantially in agreement

with the original plat created in 1872, since the alignment of the streets was straight and square, suggesting that the streets had been originally located and developed based on the 1872 plat. Yet there was no specific or conclusive evidence of how the centerlines or boundaries of the streets or blocks had been originally established, and no original monuments were found or even known to have ever existed. No explanation for the source of the varying dimensions shown on the adjoining 1883 plats was presented, and whether some or all of those dimensions were actually on the original plats was also unknown, making it possible that certain dimensions had been written on the plats at some later time, by unknown parties for unknown reasons. The Court treated the controversy as a plain contest between competing surveys, the first being the highway survey and the second being the survey done for Brady, and important extrinsic evidence, in the form of testimony, was provided by both surveyors, in support of the work that each of them had done. The outcome, the Court determined, would rest upon which of the two surveys was based upon the strongest and best evidence, as is typical of cases in which both litigants expressly charge that the survey done for the opposing party is erroneous. The survey done by the highway department was based upon the historic location of the roadway itself, and represented a perpetuation of the physical location of West Broadway, dating back at least to the time when that street was incorporated into the state highway system, if not earlier. A sewer line had been built running down the center of the roadway, for an unspecified distance at an unknown time, evidently in the distant past, and the highway department had taken the position that the line formed by the sewer manholes represented the best evidence of the originally intended location of the centerline of West Broadway. There was no evidence specifically supporting the concept that the sewer line had been intended to represent or mark the exact centerline, but there was also no evidence to the contrary, and its physical location, with respect to the paved surface of the roadway, served to indicate that it had always been treated as marking the centerline for all road improvement purposes. Based on this long standing physical evidence, the Court was willing to adopt the presumption that the centerline, as marked by the sewer line, and supported by the relationship of the physical road surface and the buildings along the roadway to the sewer line, had been correctly adopted as such by the highway department for purposes of establishing the boundaries of the state highway right-of-way, which were coincident with the boundaries of the platted city blocks. Had any original survey monuments known to have been established at the time of the original plats been in existence, the situation would have been different, but citing the Buckley

case, and quoting in part from the work of esteemed author Frank Emerson Clark, the Court approved the principle that:

“Where boundaries are lost or uncertain they may be established by the best evidence under available circumstances ... A highway or street may be a monument, and in the absence of other controlling calls or landmarks which can be ascertained, the location and occupancy of a street as indicated by old buildings and fences, and by its use for many years, may be taken as practical evidence of the true location of the street, and the lines of the street may then determine the location of the boundaries of abutting lands ... in the absence of known monuments, the best evidence obtainable may be resorted to for the purpose of establishing a boundary line ... better evidence of the boundary having ceased to exist ... members of a community ... will know where it is, and their common assent will prove what they know. This is the rule promulgated in most of the United States, and for sound reasoning. It is a matter of justice and equity.”

Having thus concluded that the highway survey was based upon legitimate boundary evidence, and having set in place the legal presumption that it was accurate and correct, until such time as the contrary might be successfully proven, the Court then turned to the survey that had been prepared for Brady. The surveyor hired by Brady evidently did a very thorough job of research and a very good job of documenting the evidence that he had discovered and used in the course of performing his survey. All of the historical facts, regarding the plats and other documents of record relating to the matter at hand, which are enumerated in the timeline above, were discovered by, or known to, Brady's surveyor, who clearly understood that it was his responsibility to obtain all of the relevant documentation that was available. In his survey report, portions of which were presented as evidence and were quoted by the Court in the text of the case, Brady's surveyor explained that applying the lot dimensions shown on the McCormick plat, which included Brady's block, with respect to the known or accepted location of Pine Street, which lay to the north of West Broadway, would have the effect of shifting West Broadway and Brady's block about 17 feet to the north, which was the position that was contended

for by Brady. Of course, doing this would also have the effect of creating multiple jogs of varying magnitude in street and block alignments that had always been treated as being straight, creating a condition of general misalignment throughout the area, based solely upon measurements, and Brady's surveyor was fully aware of this, so he forthrightly pointed this out in his report. He concluded by conceding that no original monuments had been found or used in conducting his survey, and he wisely stated that it was not his intention to shift any existing boundaries or relocate any boundaries based on measurements alone. Although he indicated that his survey had been conducted for evidentiary purposes only, rather than boundary resolution purposes, Brady's surveyor did set monuments marking his calculated right-of-way location in front of Brady's building, to physically show the magnitude of the difference between the highway survey and his own findings, enabling Brady to assert that those monuments, about 17 feet north of his building, represented the true southerly boundary of the right-of-way. Had Brady's surveyor not set any boundary monuments, Brady would have been left without any physical basis upon which to launch his legal assault, but since the surveyor had done so, effectively encouraging Brady to proceed with his obviously senseless litigation, the Court was harsh in its criticism of Brady's surveyor. Observing that Brady's survey was devoid of value to him as boundary evidence, being contrary to the existing physical evidence, and being based entirely on measurements, the Court fully upheld the decision of the lower court that Brady had failed to disprove the validity of the highway survey, confirming that the right-of-way was in the location indicated by the highway survey. Brady's surveyor deserved a better fate, if only on the merit of his outstanding research, but the Court utterly dismissed his survey, because it was all directed toward the wrong fundamental premise, which was the notion that measurements could control over existing physical objects, such as roadways and buildings. In so ruling, it should be well noted, the Court had implicitly applied the principles of practical location and acquiescence in the context of public boundaries, despite the fact that it has always refused to apply those same principles to disputes involving only private boundaries, again witnessing the twentieth century judicial trend toward increasingly staunch protection of public land rights, when they come into conflict with private land rights.

STEPHENS v HURLY (1977)

Some surveyors may wonder whether or not modern survey standards and related measures that have been enacted over the last several decades, for the purpose of improving the consistency and reliability of land surveys, have had any real effect on the quality of surveys, or any real benefit for surveyors, so here we take note of a case that clearly answers such questions in the affirmative. The real purpose of survey standards, like all such professional rules, is not to make life easier for surveyors of course, the primary motivation behind such ideas is to make survey results more dependable, for the ultimate benefit of those who need to be able to make use of surveys for all land development purposes, which is the public at large, but in fact surveyors can also benefit as greater uniformity of survey work is achieved. One example of this mutual benefit is the creation and use of corner monument record forms, which provide public notice of controlling monument locations in a given area, if the corner recovery and restoration process is carried out in a professional manner as legally envisioned, ideally setting the stage for agreement between both surveyors and land owners on boundary locations, and thereby minimizing boundary conflicts that have historically resulted from disagreement over the validity or location of controlling monuments and corners. Although the right to dispute a given corner location is always legally available, in theory at least, a professionally documented corner monument bears the presumption of correctness, and its controlling value can certainly become virtually absolute over time, particularly if it becomes the subject of significant reliance through repeated use. In the case we are about review, the benefit derived from this scenario, by both a land owner and his surveyor, is quite evident and controls the outcome, as the Court takes the important step of approving reliance upon non-original monuments, which have been adopted and used by multiple professional land surveyors, due to the fact that the controlling nature of the monuments in question has been made a matter of public record, through the corner monument recordation process. As can readily be observed, the position taken by the Court in this instance stands in high contrast to the attitude displayed by the Court in earlier cases, such as the

Vaught case of 1945, previously reviewed herein, during which a surveyor who unquestioningly accepted non-original monuments, and based his own work upon them, was vilified by the Court for doing so. This difference between the modern and historic positions of the Court on the acceptance and use of existing monumentation, is indicative of the Court's respect for the efforts made by the land surveying profession to put in place policies, such as corner monument recordation, that encourage uniformity of survey results, precluding many disputes that would have been instigated by conflicting surveys, in the absence of publicly available boundary control information. So here we see a powerful demonstration of the real benefit derived by surveyors from the adoption of the policy mandating public documentation of controlling PLSS monumentation, as the institution of that policy serves to motivate the Court to significantly broaden its position on the application of the principle of monument control, and embrace the idea that subsequent surveyors, as well as land owners, have the right to rely on professionally documented non-original monuments, as well as bona fide original monuments.

1934 - Barkley was the owner of a tract of lakefront land of unspecified size, located on Monks Bay on the southeast side of Whitefish Lake. How or when Barkley had acquired his land is unknown, but his ownership of it was undisputed, and he conveyed a parcel of unspecified size and shape to an unknown predecessor of Stephens at this time. How this parcel was described is unknown, there is no indication that Barkley ever had any of his land surveyed or platted. How the boundaries of this parcel were marked on the ground, if they were physically marked at all, is unknown, and there is no indication of what use was made of this parcel, or any of the surrounding land, either before or after this conveyance.

1935 - Barkley conveyed another parcel to an unknown predecessor of Hurly, lying directly north of the parcel that he had conveyed the year before. The legal description and other details relating to this parcel, such whether or not it was ever monumented on the ground in any way, are also unknown, but both parcels were bounded on the east by a highway and on the west by the lake. Whether Barkley retained the

remainder of his land, or conveyed it to others is unknown, but only the boundary between these two parcels was destined to come into controversy. There is no indication that any conflict or inconsistency existed in the descriptions of these two parcels, presumably their common boundary line was correctly described in all of the relevant conveyances.

1959 - Hurly acquired the north parcel, which had been fenced on all sides by this time, except along the lakefront. Hurly did not order a survey, apparently he just assumed that the fences represented the parcel boundaries, there is no indication that anyone had ever told him anything about the fences or the boundaries of the parcel. Who had built the fences, when they were built, and how the locations at which the fences were built had been determined, are all unknown. How the north parcel was used, either before or after this time is unknown, but at some point in time a mobile home was placed upon it, presumably by Hurly, and evidently it was placed within a few feet of the south fence, on the assumption that the fence was on the property line. Whether or not Hurly ever actually lived on this parcel is unknown.

1973 - Stephens acquired the south parcel, which was evidently still undeveloped vacant land. The fence along the north side of this parcel was still in place, and Stephens apparently simply assumed, just as Hurly had, that the fence was located on the parcel line of record. Shortly after acquiring his parcel, Stephens decided to build a house on it, and he had a house custom designed to precisely fit on a parcel 80 feet in width, which was evidently the parcel width stated in his deed. How the south boundary of this parcel was marked is unknown, but when the house designed for Stephens was staked out on the ground, it was discovered that 80 feet of usable width was not present, so the house would not fit into the available area. At this point, Stephens ordered a survey of his property, which showed the fence along his north boundary to be south of the parcel line of record, by 2 feet at the east end and by 10 feet at the west end. So Stephens contacted Hurly, apparently hoping that Hurly would agree to allow the fence to be relocated to the surveyed parcel line, but Hurly refused

and openly dared Stephens to file a legal action against him, which Stephens then proceeded to do, in an effort to quiet his title to the full 80 feet described in his deed.

Stephens argued simply that the survey that had been done for him was perfectly accurate and correct, and that it should therefore control the location of the parcel boundary in question, and the fence and mobile home were nothing more than encroachments, subject to removal, regardless of how long they had been in existence. Hurly argued that he had acquired the portion of the south parcel lying north of the fence by means of adverse possession, and also that the survey in question had not been properly performed and was illegitimate, because it was not based upon any original survey monuments, so the mobile home did not represent an encroachment and the fence should be legally recognized as the parcel boundary. The trial court decided that adverse possession had not been successfully completed, and that there was nothing wrong with the survey, and therefore quieted title to the disputed strip in Stephens, on the basis that the survey had proven the strip in controversy to be part of his parcel.

As indicated in the timeline above, whether or not Hurly really believed that the fence in question was located on the parcel line, as that line was described in the relevant deeds, is unknown, since he never produced any evidence in support of the notion that the fence actually marked the original parcel boundary, yet he attempted to cover both possibilities in his defense. He attacked the survey done for Stephens, because it showed that the fence was not on the described parcel line, but he also claimed that adverse possession had taken place, which obviously amounted to an admission that the fence was not on the described boundary line. Since the statute of limitations, if successfully invoked, would make all of the survey issues irrelevant, the Court first addressed the matter of adverse possession. Recognizing that the south parcel had sat vacant since being created nearly 40 years earlier, by the time Stephens arrived on the scene, the Court was unwilling to view the possession of the strip by Hurly, or any of the prior owners of the north parcel, as being genuinely adverse. The standards for the establishment of adverse or prescriptive rights on vacant land are always higher and more difficult to fulfill than those typically applied to occupied land, because in the case of vacant land, the effectiveness of the critical element of notice is far less certain, since no occupant is actually present on the invaded tract to observe the encroachment and react to it. For this reason, the Court held that the fact that none of the owners of the south parcel prior to Stephens had ever physically possessed the strip in question, or even

questioned the location of the fence, was not conclusive, because use of vacant land generally does not become truly adverse until such time as the owner of the land encroached upon desires or attempts to make some actual use of it. Yet this was not the Court's primary reason for dismissing Hurly's adverse possession claim, the truly decisive factor proved to be the tax payment requirement. The tax assessor testified that taxation in the area was based solely upon legal descriptions, rather than observations of any physical conditions on the ground, so Hurly could not prove that he had ever paid any taxes on any land lying outside the boundaries of his description, and his adverse possession claim was thereby doomed, regardless of his opinion concerning the significance of the fence, and regardless of any other factors that might otherwise have operated to his benefit. Had Hurly been able to show any evidence that an agreement expressly acknowledging the fence as the boundary had ever been made, the Court noted, the tax requirement could have been overcome and set aside, but here once again, the vacancy of the south parcel effectively eliminated the applicability of the concept of a boundary agreement, so Hurly's apparent lack of knowledge of any prior statements or agreements that may have been made concerning the fence, sealed the fate of his adverse possession claim. As has been previously noted, the tax payment requirement is designed to serve two judicially beneficial functions, one being to provide evidence of good faith on the part of the adverse claimant, and the other, which is applicable here, being the fact that the tax requirement substantially minimizes opportunities for adverse possession to be used to acquire slivers of adjoining land, thereby limiting adverse possession to its true purpose as a title conflict resolution method, and restricting its use as a boundary resolution method. Moving on then, to the core boundary issue, which was the validity of the survey that had been done for Stephens, the Court approvingly quoted the testimony of the surveyor, who when attacked by Hurly, because his survey evidently showed a section line bearing that was different from the bearing for the same line shown on the original GLO plat, answered:

“I chose to accept the controlling elements of the survey. Now, in a GLO survey the controlling elements are the original corners, which were set, or the locations for those corners. Now, they control over bearing and distance. And so in retracing the survey, you use the monuments, or if you don't have the original monuments, you use what is the best evidence as to the location of those corners. And I consider the best

evidence of the location of those two corners to be the monumented corners which are of record and have been used by other surveyors for at least 21 years, as far as I know."

The general principle that all boundary surveys must be performed in accordance with GLO and BLM standards and rules was well established and well known by this time, having been repeatedly upheld by the Court, so Hurly, being apparently ignorant of survey standards and details, as a typical land owner, chose to make this the basis of his attack on the surveyor. Where the parcels in question were located in relation to the section line that was shown on the survey is unknown, since no diagram was included by the Court in the text of this case, but regardless of the exact location of the parcels, this principle was equally applicable, so Hurly attempted to pounce upon the numerical differences that he observed between the Stephens survey and the original plat, and employ those differences to insinuate that the surveyor was guilty of the fatal sin of failing to follow the original survey. As his testimony made perfectly clear however, the surveyor was not only well aware of the appropriate procedures for boundary surveys, he had followed them flawlessly. The surveyor, as he states in the passage quoted above, had correctly applied the principle of monument control, naturally resulting in bearings and distances that varied from the original plat, and of course the Court accepted the validity of this procedure. Still, there was an issue introduced here that was new to the Court, and that was the question of the validity of corner monument records as controlling documentation of restored GLO corners. In earlier cases, the Court had consistently taken the general position that surveys not clearly tied to definitively original monuments were of questionable value, and here no original monuments had been found, so Hurly pressed his attack on the basis that the surveyor had wrongly accepted non-original monuments in conducting his survey. The Court however, evidently favorably impressed with the practice of filing and using corner monument records, which had been instituted by the land surveying profession, embraced the monuments relied upon by the surveyor, implicitly recognizing the filing and use of such constructive documents as a mark of genuine professionalism. Having found that the surveyor was guilty of no demonstrable errors, since he had adopted monuments that represented certifiably legitimate perpetuations of original corners, and in so doing he had properly applied the principle of monument control, the Court fully upheld the ruling of the lower court in favor of Stephens, which included punitive damages against Hurly, for his meritless claims and allegations. The testimony given by the surveyor in this case stands as a virtual model of

perfection for expert witness testimony, it was concise, yet directly on target, poignantly and powerfully responding to the allegations made against him, conclusively proving that he knew exactly what he was talking about, and that his survey had been properly performed in all respects, thereby clinching victory for Stephens. Hurly, on the other hand, had fallen victim to his own ignorance and lack of preparation for this legal battle, his worst mistake being his exceedingly foolish decision to bypass a survey and instead attempt to personally argue about survey details, before a judge, against an experienced land surveyor. Hurly's decision not to employ a surveyor of his own was devastating to his case, not just because it revealed arrogance on his part, but because his failure to bring a survey supporting his assertions into court raised the presumption that he could find no surveyor who agreed with him about the true boundary location, which in turn enhanced the credibility of the proposition that his opponent's survey was correct, leaving Hurly with no means of overcoming the Stephens survey. For the first time, the Court had given it's explicit blessing to the controlling value of non-original monuments, while yet again reiterating the core principle that monuments control over all numerical values.

DYKSTERHOUSE v DOORNBOS (1977)

This case represents an interesting example of a situation that every surveyor could potentially face, in which the intimate involvement of the surveyor with multiple parties who are participants in a given project, makes the surveyor a key witness when things go astray, even though the actual work performed by the surveyor is not the focal point of the controversy. As a professional, every surveyor comes into contact with numerous parties who will inevitably rely upon the surveyor in a variety of ways that can create legal, equitable or ethical obligations, often with respect to business matters, as well as technical details, so although this case contains no survey details at all, it is worthy of the attention of all professional surveyors. Being a professional, the surveyor is presumed to be a person of high integrity, making the surveyor a potentially powerful witness, even when the subject in conflict is not within the realm of matters upon which the surveyor is qualified to testify as an expert, and requires only testimony regarding the surveyor's personal knowledge and observations of various statements and events. Surveyor testimony has been prominent in other cases not involving

boundary disputes that have come before the Court, and has sometimes been decisive, as in the 1912 case of *Dallas v Douglas*, a battle over which of those two surveyors was entitled to payment for certain GLO survey work, which had been executed in the field by a group that included Douglas, under a contract that had actually been obtained by Dallas. The testimony of Dallas, explaining the details of the circumstances under which he had obtained the GLO contract and arranged for Douglas and others to perform the field work, convinced the Court that he was in fact the surveyor in responsible charge of the work, despite the fact that he had no personal involvement with the field work at all, leading the Court to decide that Dallas was entitled to the money at issue, reversing a lower court ruling against him. In other instances however, surveyor testimony has proven to be unpersuasive and ineffective, as in 1980 when the Court was called upon to review the revocation of the registration of a professional land surveyor by the Montana Board of Professional Engineers and Land Surveyors, in a case known as *In the Matter of Shaw*. The surveyor had agreed to complete a survey, including certain monumentation, and had subsequently been accused by the land owner, who was his client, of failing to properly complete the monumentation of the property that had been surveyed. The Board launched an investigation and the surveyor informed the investigator that the monumentation had been properly completed, but the land owner continued to insist that it had not been properly completed. Another investigation revealed that certain monuments had apparently never been set, others had been set but not properly marked, and others had been set so poorly that they could be easily extirpated from the ground, leading the Board to revoke the surveyor's license. The surveyor sought judicial reversal of the Board's decision, but the Court upheld a lower court ruling that the revocation was justified, on the grounds that the surveyor was estopped from raising any issues concerning the Board's treatment of his case, because he had provided false information relating to his work to the Board, and that offense alone was sufficient to justify the Board's action, regardless of any details pertaining to the monuments at issue.

1974 - Doornbos owned a tract containing about 23 acres, of unspecified shape and location, that was apparently vacant land, and

which was located either near or adjoining another tract, that was being developed as a subdivision by Dyksterhouse. Dyksterhouse needed to connect his new subdivision to an existing trunk sewer line that ran near the two properties, but in order to do so, he needed to construct an outfall sewer line across the property of Doornbos. Doornbos offered to sell the tract in question to Dyksterhouse, and the two men went to the office of a local attorney, where they discussed and verbally agreed upon all the terms of the conveyance in the presence of the attorney. The only matter left undetermined was the exact acreage of the tract to be conveyed, which was necessary to determine the total price, so they decided to have the tract surveyed. As a benefit to Doornbos, Dyksterhouse agreed to convey an easement to Doornbos, as part of the transaction, for the purpose of installing a sewer connection to a house owned by Doornbos, that was located on another tract owned by Doornbos, adjoining the tract that he had agreed to sell to Dyksterhouse. In addition to the sewer easement, Dyksterhouse also agreed to have the sewer connection running to the house in question installed for Doornbos, along with the construction of the outfall sewer line that he was planning to build for his own purposes. Instead of having the attorney prepare a written contract however, relying on their spoken agreement only, they then went to the office of a local surveyor, who was also an engineer, who had previously been employed by both Dyksterhouse and Doornbos on other projects that each of them had separately done, where they proceeded to describe exactly what they wanted the surveyor to do for them. The surveyor agreed to prepare a certificate of survey for them, which was then completed without any problems, and the surveyor staked out the proposed sewer lines across the surveyed tract as well. The surveyor evidently also served as the engineer, determining the exact location, depth and grade of the sewer lines in the field, but whether or not any sewer plans were ever prepared for this purpose is unknown. The construction of the sewer lines, including the one connecting to the house owned by Doornbos, was then completed, all within a period of less than two months, during which time both Dyksterhouse and Doornbos personally observed the progress of the

work at frequent, if not daily, intervals. No written contract had ever been prepared however, and when the work was done, although the sewer apparently functioned properly, Doornbos refused to complete the agreed conveyance of the tract to Dyksterhouse, claiming that he was unsatisfied with the way the sewer had been installed, and with its location. Dyksterhouse then filed an action against Doornbos, in an effort to legally compel him to complete the land transaction in question.

Dyksterhouse argued that a definite agreement had been made, although it was undocumented, which included conveyance of the tract of land in question to him, and that he had innocently relied upon that agreement in good faith, to the extent of his investment in the construction of the sewer lines in question, fulfilling his responsibility under the agreement, so Doornbos, having obtained the benefit due to him under the agreement, should be estopped from denying the existence of the agreement, and be legally required to honor his commitment to convey the tract at issue. Doornbos argued that no definite or complete agreement had ever been reached, which was the reason that no written contract existed, and that the conveyance proposed by Dyksterhouse was in violation of the statute of frauds, so he could not be held responsible for the fact that Dyksterhouse had hastily and foolishly proceeded with the construction of the sewer lines in question, without first putting any written contract in place, and therefore Doornbos had no obligation to complete the conveyance in question. The trial court found that a complete and legitimate agreement had been reached between the parties, which did not represent a violation of the statute of frauds, and that Dyksterhouse had satisfactorily upheld his end of the agreement, therefore ordering Doornbos to convey the tract in question to Dyksterhouse.

This case provides a superb example of the tremendous importance of physical reliance. As we have seen in earlier cases, the Court prefers to uphold agreements, rather than negate them, whenever possible, and whenever an innocent party acting in good faith has invested time, effort and money, physically developing or improving land, in reliance on an agreement, the stage is effectively set for such physical reliance to become the decisive factor in any resulting litigation. Reliance upon documents and instruments is strongly supported by the Court as well of course, being a positive force in modern society, that enables efficient land transactions to take place, but physical acts have the power to render documentation

secondary in importance, just as physical monuments control written descriptions, and it is this theme that we see clearly demonstrated once again here, with respect to land rights. The creation and recordation of documents of conveyance, being highly beneficial to those engaged in land transfers, is supported and encouraged by the statute of frauds, as a way of minimizing fraudulent claims relating to transfers of land or land rights, but the Court maintains control over the applicability of all such statutes, through its role as the branch of government expressly charged with interpreting the intent and meaning of such products of legislation, known as the spirit of the law. The spirit of the statute of frauds is seen by the Court as the general prevention of opportunities for deception in land rights transfers, and the Court has the authority to apply it or set it aside accordingly, on a case by case basis. Doornbos appears to have failed to realize this, since he evidently allowed events to proceed in the mistaken belief that the absence of a written contract, between Dyksterhouse and himself, meant that he had the right to deny that any binding agreement had ever existed, regardless of any development that might take place subsequently. Had he better understood the law, he would have recognized that the events taking place on his land were easily enough to put his rights to that land in serious jeopardy, particularly given the fact that the sequence of relevant events had commenced at his own instigation, when he offered to provide the land needed by Dyksterhouse. By allowing, if not encouraging, Dyksterhouse to make a serious investment and commitment relating to the tract in question, Doornbos made the perception of bad faith, if not outright entrapment, on his part, practically inescapable. Given the clear evidence in this case that an agreement had actually been made, and that it included the conveyance of the tract in question, the Court treated the agreement as being equivalent to a written contract, and focusing as it typically does upon the protection of innocent grantees, the Court found this to be yet another occasion upon which it was appropriate to set the statute of frauds aside. Citing the 1902 Cobban case and the 1925 Hogan case, both of which we have previously reviewed, the Court reiterated the fundamental concept that no party can be allowed the right to invoke the statute of frauds, or any other law, to their own benefit, in order to facilitate a denial that something was agreed upon or promised, once such an inducement has been legitimately relied upon by another party who has acted in a constructive manner and in good faith, stating that:

“Where one party to an oral contract has, in reliance thereon, so far performed his part of the agreement ... equity will regard the

case as being removed from the operation of the statute and will enforce the contract ... While there is not any hard-and-fast rule for determining just what acts will constitute part performance sufficient to take a case out of the operation of the statute, the authorities are practically all agreed that if possession taken in pursuance of the contract is followed by the making of valuable improvements on the land by the vendee, there is a sufficient part performance."

Here again, we observe that the Court focuses on productive acts, affirmatively performed for a beneficial purpose, and endeavors to give effect to all such acts, by means of both legal and equitable support. Although no precise rule or definition of what constitutes or represents legitimate reliance, worthy of either legal or equitable protection, can be established, due to the endless variability of the possible circumstances, the Court has made it clear that it knows legitimate reliance when it sees it, and in such instances the Court's protection will be forthcoming. The construction performed for Dyksterhouse, being clearly permanent in nature, was enough to invoke an estoppel against Doornbos, who had observed the construction virtually every step of the way, and was therefore powerless to subsequently complain that it had taken place without his blessing. Unwilling to condone the obvious effort made by Doornbos to obtain the proverbial "something for nothing", the Court fully upheld the decision of the lower court in favor of Dyksterhouse, mandating the conveyance of the tract in question to him, in accordance with the terms of the agreement, which had been provided by testimony. The participation of the surveyor was key in this case, primarily as an objective party, who was presumably of genuinely professional character, who was thus capable of providing critical testimony based on his direct personal knowledge regarding the comments, acts and apparent intentions of the competing litigants, and he evidently served admirably in that role, although the Court did not find it necessary to quote any of his testimony in the published text of the case. To the surveyor's credit, the parties here, who evidently both knew him well, appear to have trusted him completely, to such a great extent in fact that they simply put the entire project in his hands, which had the unusual and important effect of turning the actions of the surveyor himself into valid evidence of the true intentions of both parties. Dyksterhouse even went so far as to suggest that the written evidence compiled by the surveyor, such as his drawings and other documents related to the sewer project, and various

notations that the surveyor and the litigants had written on them, represented valid evidence of the existence of a binding conveyance agreement between Doornbos and himself, and constituted written memoranda sufficient to satisfy the statute of frauds. It would have been very interesting for surveyors to hear the Court's opinion regarding that assertion, had it been necessary for the Court to deal squarely with that issue, but since the Court had already decided to rule in favor of Dyksterhouse anyway, regardless of the validity of the survey evidence for that purpose, the Court declined to specifically address the potential value of the survey or engineering documents as evidentiary support for the conveyance in question. Despite the general allegations made by Doornbos, indicating that he was unsatisfied with the outcome of the project, he leveled no specific accusations of error whatsoever against the surveyor, so the surveyor was not required to explain or justify anything he had done, his work was simply given the typical presumption of correctness applied to all professional work, as outlined and discussed in previous cases, and there was no suggestion that he might bear any liability. Had Doornbos elected to charge the surveyor with negligence, the burden would have rested upon Doornbos to provide professional testimony in support of that charge, sufficient to show that the surveyor was guilty of performance that was below established professional standards.

JACKSON v STATE (1979)

Our next riparian rights case is a particularly fascinating one, with a long and well detailed timeline of events and a powerful human interest angle, which clearly illustrates how unfortunate misconceptions regarding land rights principles, and the variation in their applicability under differing circumstances, can be to land owners who imagine or suppose for many years that they have certain land rights, without ever obtaining any verification of their actual rights. While some may consider the elderly widow who is ultimately vanquished in this case as a crafty villain who attempted to commit land piracy, getting nothing other than what she deserves from the Court, its equally possible to view her sympathetically, as a problematic land rights issue arrives on her doorstep late in her life, following the passing of her husband, after she has spent her full adult life on the accreted land, no doubt trusting that she would be able to live out her life there. Such are the potentially grave consequences however, for those

who make false assumptions about the nature or extent of their land rights, particularly when their mistaken notions bring them into conflict with the rights of the government or the public, which are generally staunchly protected by the Court. In this instance, we look on as the Court applies the equitable principle of laches to invoke an estoppel against the widow, in a classic example of the power of that combination, which can come into play whenever procrastination relating to an assertion of land rights is present. In addition, here we again note the inclination of the Court to uphold agreements dividing land and establishing boundaries, as the Court leaves a land division scheme devised by a group of riparian land owners intact, rather than mandating the imposition of an arbitrary accretion division plan, which would have been necessitated, had the relevant parties been unable to reach and form an accretion division agreement of their own. In 1975 the Court had disposed of another case involving accretion, which contained a bizarre twist, indicative of the fact that even attorneys can sometimes improperly understand riparian principles, in *Jumping Rainbow Ranch v Conklin*. The Ranch was comprised of two government lots that had been increased in size by accretion, but for some unknown reason, Conklin, who was an attorney, thought he saw an opportunity to claim some of the accreted land for himself, so he obtained a wholly fictitious quitclaim deed from his own secretary to facilitate his claim. The Court came down hard on Conklin, not merely rejecting his claim to the accreted land, but upholding the decision of the lower court finding him guilty of slander of title, subjecting him to punitive damages, as the Court reiterated that slander of title requires the presence of malicious intentions, which in the view of the Court, Conklin had exhibited in executing his scheme. Interestingly, the case we are about to review did not turn out to mark the last involvement of the Jackson widow in land rights litigation, as she went on to prevail in the precedent setting mineral rights case of *Jackson v Burlington Northern* in 1983, another case triggered by the meandering of the Yellowstone River, which took place just a mile to the north of the scene of her defeat here.

1884 - The GLO subdivided a township through which the Yellowstone River runs in a generally northerly direction. As shown on the plat produced at this time, the river entered the township

through the southeast quarter of Section 35, then curved to the east, passing just east of the northeast corner of that section, before bending back to the west and continuing north along the line between Sections 25 & 26. Since the northwest corner of Section 36 fell upon the west bank of the river, a small government lot was platted in the northwest corner of that section. In accordance with the whims of nature, Lot 2 in Section 36 would eventually grow from this miniscule origin to an enormous size, and in so doing, it would become a major source of controversy.

1931 - The husband of Jackson leased Lot 2 in Section 36, which was owned by Montana, as state school land. Whether or not the Jacksons or anyone else were able to tell exactly where the boundaries of Lot 2 were actually located at this point in time is unknown, but the Jacksons evidently began using some unspecified amount of land lying west of the river in the northwest quarter of Section 36 at this time, by virtue of this lease.

1933 - Jackson's husband acquired the southeast quarter of Section 35. He was not the original patentee of this land, and whether the river was still in its originally platted location at this time or not is unknown, but his ownership of all the land lying west of the river in the southeast quarter of Section 35 was never disputed. The land in the east half of the northeast quarter of this section lying west of the river was owned by Steinbeisser, and there was no dispute between Jackson and Steinbeisser, each of them held and used their respective parts of Section 35, lying to the south and west of Lot 2 in Section 36.

1941 - The Jacksons lease was renewed and they continued their use of Lot 2 in Section 36.

1951 - The Jacksons lease was renewed again and they continued their use of Lot 2.

1954 - The BLM published a dependent resurvey, which was based upon field work that had been done in 1948, and which appeared to indicate that the river had moved very little, if at all, prior to this time. However, this plat showed only the lots lying east of the river, so it

provided no new information relating to Lot 2, which was the only platted lot in Section 36 lying west of the river.

1961 - The Jacksons lease was renewed again, but the size of Lot 2 was now indicated as 153 acres. How this acreage figure was calculated is unknown, there is no indication of whether or not it was based upon a survey.

1963 - Jackson's husband died, but the Jackson ranch continued to function, making use of all of the same land that the family had been using for decades.

1964 - Jackson conveyed her land in Section 35 to her son, and the family ranch continued to operate just as it had previously, as the family continued to maintain complete control over the physical use of all the land lying in Section 36 west of the river. For unknown reasons, the tax records pertaining to Section 36 were changed at this time, and the land occupied by the Jacksons west of the river was identified as 65 acres.

1971 - The Jacksons 1961 lease expired, and whether or not it was renewed again is unknown, but the family continued their use of Lot 2, although there is no indication of what the size of Lot 2 was believed to be, and no indication that anyone had any clear knowledge of where its boundaries were located, at this time.

1974 - Jackson's son died, and the ranch passed to his wife, who conveyed it to the Holly Sugar Corporation. The description in this conveyance did not explicitly state that it included any part of Section 36, but it did state that it included "accretions of approximately 343.3 acres", without defining the location or boundaries of that area, and without indicating how the dramatically enlarged acreage figure had been derived. The Jackson family continued to use all of the land that they had been previously using as part of their ranch, even after this conveyance was executed.

1975 - A dispute evidently arose between the Jackson family and Holly Sugar when the company attempted to take possession of the entire Jackson ranch, and the Jacksons filed a quiet title action against

Holly, which resulted in a decision that although Holly had acquired all of the land formerly owned by the Jacksons in Section 35, Holly had acquired no rights to any land lying in Section 36. As a result of this decision, Jackson and her family fenced all of the land lying west of the river in Section 36 and continued to operate their ranch on that land, while Holly took over sole possession of all the land in Section 35 that the company had acquired from Jackson's daughter-in-law. Shortly thereafter, Jackson somehow discovered, or she was informed by some unknown party, that Steinbeisser was claiming to own some of the land that the Jacksons were occupying in Section 36, so Jackson contacted the Attorney General of Montana, who informed her only that Montana made no claim to any land in Section 36 by virtue of adverse possession. Jackson made no further inquiries, with Steinbeisser or anyone else, and nothing more was done by any of the parties at this time, Jackson and her family continued to occupy and use all of the land in Section 36 lying west of the river, and no one openly challenged their right to the physical possession or use of any of that land.

1976 - A survey was ordered by an unknown party for unknown reasons, which verified that the river was no longer located in Section 35 at all, it was now located entirely in Section 36, and according to the survey 171 acres of dry land existed west of the river in Section 36. How the locations of the section corners and lines were determined during this survey is unknown, there is no indication of who performed the survey, or whether any monuments of any kind were found or not, and no indication of where any of the existing fences were located in relation to the section lines shown on the survey. Nevertheless, the physical use of all of the land west of the river in Section 36 remained under the complete control of Jackson and her family, just as it had been for 45 years by this time. Without informing Jackson or her family, Montana, Steinbeisser and Holly got together and formed an agreement to split up all of the land lying west of the river in Section 36 between themselves. A boundary agreement document was created and signed by all of these parties, which

divided the entire 171 acres up between the three of them, Montana getting portions at the north and south ends, Steinbeisser getting most of the central portion, since that portion adjoined his land in Section 35, and Holly getting a small portion south of Steinbeisser's portion, adjoining Holly's land in Section 35. Upon discovering the existence of this land division agreement, Jackson filed an action against all of these parties, claiming that her family had acquired title to all of the land lying west of the river in Section 36, with the exception of Lot 2 and an unspecified but presumably small number of acres lying between the original Lot 2 and the river, which she acknowledged as being a small accretive extension of Lot 2 as it had been originally platted.

Jackson argued that all of the land west of the river in Section 36 was accretion, with the exception of Lot 2, as it had been originally platted, and that since accretion does not stop at section lines, she was entitled to claim all of the land in Section 36 that her family had fenced, as accretion that had attached itself to the riparian Jackson property located in Section 35. She further argued that since adverse possession applies to land that develops through the process of accretion, her family's 45 years of occupation and use was more than sufficient to entitle her to the vast majority of the large amount of accreted land that they had fenced, between the west line of Section 36 and the river. Montana and the other defendants agreed that the land at issue was composed entirely of accretion, but argued that it could not be considered part of the Jackson property in Section 35, because the principle of accretion is subordinate to the principle that land owned by Montana is inviolate, so because Section 36 was a school section, neither accretion, nor adverse possession, nor anything else, could penetrate the boundaries of that section, as long as Montana held a legal interest in the land contained within that section. The trial court found no merit in the assertions of Jackson, and ruled that the boundary agreement dividing the land among the defendants was valid, quieting title in each of them to their respective portions of Section 36, and leaving Jackson with nothing.

On the surface, it may appear that Jackson and her family had a very strong claim, particularly given the great length of time that they had served as the sole stewards of the land in controversy, as it expanded eastward following the retreating river, and they did indeed have a number of factors operating in their favor. Jackson correctly understood that the land that her

late husband had acquired in the southeast quarter of Section 35 in 1933 was riparian in nature, being bounded on the east by the river, according to the original plat, and that as such it was entitled to benefit from the process of accretion, at least in theory, and all of the parties agreed that accretion had taken place, thereby eliminating from the dispute any suggestion that an avulsive event had occurred. In addition, she was correct that accretion can and often does carry land ownership rights beyond the artificial boundaries established by section lines, and even beyond township lines, a concept which the Court had recognized and acknowledged as legitimate in the Smith case of 1937, as we have already seen. Being correct on these particular legal points however, would not prove to be enough to bring her victory, because apparently unbeknownst to her, an even more formidable array of important legal factors stood in her way. The most insurmountable factor that stood against her was the simple fact that Section 36 was not just any regular section, it was a state school land section, so she was confronted by all of the various notions that can be conjured up for the purpose of protecting the rights of the public to such land, which is quite an imposing group of ideas, that have frequently garnered substantial judicial support. She knew, of course, that Montana owned Lot 2, since her family had been leasing it from Montana for decades, but she evidently failed to realize that the rest of Section 36, including all of the accreted land in controversy, was subject to the same protection as Lot 2 itself, in the eyes of the Court, and this factor alone would have been enough to prevent her claim from finding success. The Court was unwilling to support her claim that the accreted land in Section 36, or some portion of it at least, had attached to the land originally acquired by her husband in Section 35, legally as well as physically, regardless of when the accretion had begun or how it had progressed, the Court being quite adamantly determined to protect the sanctity of the school section to the greatest possible extent. Moreover, the Court decided, even if accretion had taken place, to the benefit of the Jacksons, they had conveyed all of it away to Holly Sugar, as a result of their failure to expressly reserve any specifically described accretion land in the 1974 conveyance to Holly, applying the principle that a grantor will always be presumed to have intended to convey any lands not expressly reserved, placing the burden of creating a clear, correct and complete conveyance squarely on the Jacksons, as the grantors. This position taken by the Court had the effect of negating any benefit that Jackson may have supposed that she had gained from the 1975 quiet title decision in the Jacksons favor, which the Court had never before had the opportunity to strike down, since Holly had chosen not to appeal it. Noting that the Jacksons had been put on

notice of the rights of Montana to all of the accreted land in Section 36 by the dramatic increase in the acreage described in their 1961 lease, and observing that the Jacksons had accepted and effectively bowed to Montana's claim that the lease covering Lot 2 included all of the accretion in that section lying west of the river, the Court took the relatively rare step of applying the powerful doctrine of laches as a bar against the claim made by Jackson, holding that:

“... the Jacksons have accepted the terms of the lease ... it would be inequitable to claim property they have continuously leased ... We agree with the trial court in applying the doctrine of laches to the facts here ... Equity aids only the vigilant; laches exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted claim inequitable.”

Jackson and her family, the Court concluded, had essentially tried to have things both ways, and they had been fortunate enough to obtain the great benefit of the use of an extensive amount of land for many years as a result, so the Court had little sympathy for their current plight. They had openly proclaimed their right to occupy and use the accreted lands in question for several decades, by virtue of being tenants of Montana, under their long standing lease, thus adopting the ownership of the school section by Montana as a protective shield, at those times when doing so suited their needs. Yet Jackson had also attempted to deny that all of the accretion in controversy was the property of Montana, at those times when denial of the applicability of the lease to all of the land west of the river better suited her agenda. Even if such vacillation and self contradictory behavior had actually been fully innocent in character, the Court would have been very reluctant to reward it, but in fact the claims set forth by Jackson created at least the perception that she was juggling the law, attempting to prevail by twisting the principle of accretion to fit the boundary configuration that was most advantageous to her. Her accretion claim having been dashed, Jackson was left only with her claim of adverse possession, and in order to prevail on that claim, she had to overcome two major hurdles, which were the tax payment requirement, and the fact that the land she was claiming was fundamentally public in character. In the end, she was able to find success on neither of these two fronts, as the Court ruled that the payment of taxes by the Jackson family on their land in Section 35 was of no benefit to them with regard to

any of the land they were claiming in Section 36, and also that since the accretion in Section 36 had all become property of Montana, as it had gradually formed over the years, the possession and fencing of it by the Jacksons, even if under a claim of ownership, had all been for naught. The Jacksons had failed to ever expressly repudiate their state land lease, quite the contrary, instead of ever denying its validity or applicability to any portion of Section 36, they had repeatedly renewed it and repeatedly relied upon it, so Jackson was clearly in no position to make any adverse possession claim, having openly recognized Montana as her landlord throughout the entire period of her family's occupation and use of the entire accreted area. Jackson also tried to claim that Montana had disclaimed any interest in the land at issue, when she had inquired with the Attorney General about the area in 1975, but the Court was quite unwelcoming toward this suggestion as well, choosing instead to fully uphold the lower court decision, confirming that Jackson had never acquired any land in Section 36 by any means. Since the land in question was all owned by Montana, as school land, at the time that Montana and the other defendants had made their agreement, showing how they intended to divide the land among themselves, the 1976 boundary agreement was fully legitimate and legally valid, so the boundaries thus created were approved as controlling by the Court. In the end, the fact that the land that was at the center of this conflict was formed by accretion was not really of any significance, nor was the navigability status of the river, because despite all that had happened, under the ruling of the Court, none of the land originally platted within the boundaries of Section 36 was subject to invasion or alteration of any kind, being fundamentally public trust land, no portion of which could be relinquished by Montana except by means of a deliberate agreement, as had been done to Jackson's exclusion. The seemingly insignificant little lot, created by a GLO surveyor, and barely visible on the original plat, as depicted by a GLO draftsman nearly a century before, had become the cause of far more controversy and litigation than anyone could ever have imagined in 1884.

SWECKER v DORN (1979)

In this case, we encounter a fine example of the interaction between two well known legal concepts relating to the ownership, acquisition or transfer of land, adverse possession and the statute of frauds, which rarely collide in one legal battle, and we observe how the Court resolves a situation

in which the principles underlying both concepts are applicable. As has been previously noted in discussing some of the prior adverse possession cases reviewed herein, the Court has embraced an expanded view of adverse possession, in line with the prevailing judicial trend that has been followed by virtually all of the states for well over a century, enabling the Court to resolve a broad array of land rights issues through the use of prescriptive principles. It can be fairly said that in the arena of land rights, where equitable considerations are invariably present, no single element or factor carries as much weight as good faith behavior or conduct, which arches like an umbrella over all of the minor or technical details that may appear in the process of resolving any given land rights conflict. The modern judicial concept of prescriptive rights includes not only rights stemming from conditions that raise the implication of an agreement, which has become lost in the mist of time, but also rights that are adverse in their origin, and therefore represent the very antithesis of a state of agreement. This expanded judicial perspective, incorporating adverse and prescriptive rights, which has been quite widely adopted, typically allows courts to analyze and scrutinize the claims and assertions made by the litigants in any given case, for the presence of actions indicative of either good faith or bad faith, and craft a decision that results in an equitable outcome, while also maintaining the integrity of the existing statutes, that define land rights and their limitations in arbitrary legal terms. This case provides an excellent demonstration of how the Court uses the subjective equitable considerations that are unique to each case as a guiding light, to navigate its way through the maze of objective legal rules and principles, as here the questions regarding the applicability of adverse possession among close family members again arise as potential obstacles, but the Court finds its way around them, focusing on the fact the related parties are not cotenants. Likewise, the complications arising from the intervention of the statute of frauds are readily bypassed, due to the Court's recognition that adverse possession can be an appropriate remedy for circumstances in which the statute of frauds renders an intended conveyance ineffective. In the 1978 case of *Schwedes v Romain*, a dispute between a grantor and a jilted grantee, over a proposed conveyance that was initially agreed to, but then disrupted and not accomplished, the Court explained that conditions sufficient to generate an estoppel must be in

evidence in order to justify a dismissal of the statute of frauds. Due to the presence of comparably compelling conditions in the case we are about to review, pointing to a balance of good faith favoring the prescriptive claimant, the Court sees fit to employ adverse possession, to artfully overcome the hindrance presented by the statute of frauds.

1949 - Martell acquired a group of typical city lots in Billings. The dimensions of the lots, and when they were created, are unknown, but they were apparently adequately marked, and there was no dispute over the location of any of the lot lines. What actual use Martell made of these lots is unknown, there is no indication that he ever erected any improvements on them or lived on them, but his ownership of the lots was undisputed.

1954 - Swecker, who was Martell's sister, acquired a group of lots adjoining those owned by her brother. She evidently occupied her lots, though whether she moved into an existing house or had a new house built on her lots is unknown.

1967 - Martell deeded all of his lots to Dorn, with the exception of the south half of the most southerly lot, which was the one adjoining the lots that were owned by his sister. Martell told his sister that he had decided to give the south half of his south lot to her, but he never deeded it to her or gave her any documentation of this gift, and she never took any steps to document her ownership of it either, although she did begin using it and paying taxes on it. The only structure on the land given to Swecker by her brother was a shed, which she used to store her gardening tools. The size of the shed, and whether Martell or Swecker actually placed it on the lot in question, are unknown.

1969 - Swecker fenced in the half lot that had been gifted to her, along with her other lots, and she planted an unspecified number of trees and a flower garden throughout this area comprising the northerly portion of her property, and she subsequently maintained the entire fenced area as part of her yard. She evidently somehow determined the proper location for the fence with reasonable accuracy, as no suggestion was ever made that she had fenced in more than half of the

lot in question.

1975 - Martell died.

1977 - Martell's estate, upon discovering that the south half of the lot in question was still in Martell's name in the public records, deeded it to Dorn. Swecker filed an action against Dorn, seeking to quiet title to the area, which apparently neither Martell nor Swecker had ever spoken with any other family members about.

Swecker argued that her late brother had intended to give her the land in question, and that he had left it intentionally unconveyed for that reason, although he had never documented his intentions to that effect in any way, and she asserted that her subsequent use of the land was sufficient notice to all the world that she had become the owner of the area, so she was entitled to it, either by virtue of Martell's oral grant to her, or by means of adverse possession. Dorn argued that the oral gift from Martell to Swecker was invalid, as a violation of the statute of frauds, and that the occupation and use of the land in question by Swecker should not be considered adverse possession, because there was no evidence that her use of it was truly adverse anyone, having been merely permissive use, of the kind typically allowed between family members. Both parties requested summary judgment in their favor, and the trial court granted summary judgment to Dorn, dismissing the argument set forth by Swecker without consideration of any details or of its potential merit.

As we have learned from previous cases, neither adverse possession nor the statute of frauds are always applicable, even though at first glance they may appear to be, since many subtle equitable factors can negate the operation of either of these legal concepts, but certain elements of both of these doctrines were clearly in evidence here, requiring the Court to determine whether either of them, or both of them, should control the outcome. Dorn had good reason to suggest that the statute of frauds was relevant to this scenario, and good reason to suppose that it might prevail and dictate the result of this conflict as well, because Swecker and her late brother had demonstrated an amazing degree of negligence in their behavior toward the relatively small fragment of real estate that was in controversy here. Why they had made no effort whatsoever to properly document their real intentions for the half of a lot in question, although it would have been exceedingly simple and inexpensive to describe and convey, and despite the fact that they had several years to address the matter, remains a mystery.

Such an absence of any form of documentation obviously raises the possibility of deception, and it is quite possible that Swecker just made up the whole oral conveyance story, since her brother was dead and no other parties were involved, but significantly Dorn did not accuse her of lying, and did not explicitly call her good faith into question, which in turn suggests that he may have suspected, or even actually known, her story to be true. Nevertheless, the Court agreed that the alleged conveyance was clearly void under the statute of frauds, and could not be treated as an exception to that statute, as the Court had treated some comparable situations in previous cases that we have reviewed, so Swecker's claim to the half lot on the basis that it was simply a plain gift was of no value to her, in itself. Yet, the Court's decision confirming the presence and operation of the statute of frauds, was not enough alone to clinch the victory for Dorn, just the contrary in fact, that decision merely set the stage for a scenario in which adverse rights could potentially accrue. Moreover, although Swecker was undoubtedly guilty to some extent, of negligently failing to provide any constructive notice of her acquisition of the area in question, Dorn was not entirely guiltless himself, with regard to his own responsibilities and obligations as a grantee, in the eyes of the Court. Though she had utterly failed to provide any documentation of her acquisition of the half lot for public review or inspection, Swecker had shown her good faith by paying the property taxes, she had used the land openly, and she had taken the essential step of enclosing it along with her deeded lots, making it clear to all the world that in her mind the half lot was hers, just as certainly as were her deeded lots. Since Dorn had long been the owner of the adjoining lots, he bore an especially high burden of notice, and the legal presumption that he had observed all of Swecker's openly performed acts of occupation, was in place, because regardless of whether Dorn had ever actually occupied his lots or not, he certainly had at least visited them from time to time, and therefore he had ample opportunity to observe all that Swecker had done, putting him on inquiry notice prior to the conveyance of the half lot to him. Recognizing that Swecker effectively occupied the position of an innocent grantee, with regard to the oral conveyance from her brother, and that as such she could not be held responsible for Martell's failure, as her grantor, to execute and issue a deed for the half lot to her, the Court adopted the position that:

“... although the verbal grant was ineffectual to pass title ... it did furnish a sufficient foundation upon which to lay a claim ... a gift, after all, is a manifestation of the donor's intent to

relinquish title, and a majority of jurisdictions accordingly reason that any other view would be inconsistent with the concept of a gift ... a parol grant of real property can serve as a foundation for a claim of title by adverse possession, notwithstanding the statute of frauds."

The willingness of the Court to accept and consider Swecker's possession evidence, despite the fact that her occupation and use of the area in controversy was admittedly based upon a state of agreement, as opposed to an adversarial relationship, with the record owner of the land at issue, who was her late brother of course, was the key to the outcome of this battle. The fact that Swecker and Martell had been very close family members, with a relationship that was known to have been mutually supportive, was not enough to prevent her possession of the land at issue from being adverse in nature, the Court decided, the statutorily fraudulent nature of the oral grant had triggered possession by Swecker that was necessarily adverse to the legal interest in the lot which was still held by Martell. As we have seen in previous cases, familial relations can make adverse possession problematic, if not impossible, under certain circumstances, but here the Court held that Swecker and Martell were effectively functioning as strangers, when they engaged in their oral transfer of land, so the standards typically applied by the Court to adverse possession between family members and cotenants were inapplicable, meaning that the possession of Swecker had in fact been genuinely adverse throughout the relevant time period. The fact that the half lot was virtually devoid of structural improvements, bearing only a lone tool shed, and the fact that the fence had stood through only a portion of the requisite period, were also not enough to negate the value of Swecker's use of the land, because she had invested extensive time and effort in beautifying the area, the Court noted, and even more importantly, because she had made it part of her yard, effectively melding or merging it with her deeded lots. In short, Swecker had done enough to make it clear to all the world that it was her intention to treat, use and protect the half lot as her own in all respects, which was enough to validate her claim of title to it, despite the fact that she held no document even representing color of title to it, much less actual title. Reiterating that the fundamental basis of all adverse possession is a genuine claim of title, openly demonstrated to the world through physical acts of occupation and use, communicating the intentions of the possessor to all who care to take notice, the Court reversed the judgment of the lower court in favor of Dorn, and entered judgment in favor of Swecker, quieting title to

the half lot in her. Although Swecker's use of the area at issue was seemingly trivial, the crucial fact remained that it was enough to provide clear and open notice of her intentions, which as we have seen in past cases, the Court considers to be at least equivalent in force and in importance to recorded documentation that provides constructive notice of land rights. This case also serves to illustrate that under urban circumstances, any use of land can become magnified in importance, making it especially critical for subsequent grantees, such as Dorn in this case, to take particular notice of all indications of occupation and use of any urban parcels proposed for conveyance, and of course for surveyors as well to diligently document all such evidence that they may discover, and to respect its potential legal significance. In the end, all of the factors working against Swecker were swept aside by the Court, including the statute of frauds, having been overcome by the fact that Dorn was not an innocent purchaser, he was instead a subsequent purchaser on notice, again displaying the great power of the principle of notice.

NOTT v BOOKE (1981)

Our last case tracing the evolution of adverse possession documents the unfortunate results of an inadequate legal description, which was based on bungled survey work, capped off by a subsequent survey that serves only to provoke controversy, by revealing those long bygone mistakes, and thus provides a superb example of the kind of mess that the Court has adapted adverse possession to resolve. This case brings the application of adverse possession in Montana full circle, clearly showing how the Court has effectively merged the divergent concepts of agreement and adversity, to allow adverse possession to function in a manner that eliminates the need to engage the doctrine of practical location in order to equitably resolve boundary issues, thus evading the concerns related to the statute of frauds that have attended the use of practical location in some other states. Although adverse possession was not originally intended to operate as a boundary resolution tool, the Court was required to craft a position on adverse rights suitable to fill the void created by the absence of a useful practical location doctrine, resulting from the Court's refusal to adopt the idea that a boundary agreement can become binding without the passage of a

prolonged period of time. The outcome here exemplifies the Court's implementation of what it deems to be an appropriate form of adverse possession, as even the unusually strong evidence of a genuine boundary agreement seen here proves to be insufficient to motivate the Court to accept boundaries established through practical location as binding, instead leaving the Court inclined to simply characterize the agreement as invalid, thereby making it a legitimate trigger for adverse possession. Tiny Tillotson once very wisely observed that courts, in their intense drive to maintain boundary stability, often use adverse possession as a device with which to protect occupation and use that appears to have been innocently based upon poorly executed early surveys, and this case certainly demonstrates the veracity of that observation. Of course Tillotson knew that surveyors have no authority to adjudicate adverse rights and cannot simply base surveys on possession, yet he very astutely noted that proportioning lost corners should always be reserved as a method of last resort by surveyors, who he believed should make the best possible use of all available evidence, and should seek to promote boundary agreements, rather than allowing their work to precipitate conflict by placing measurements above physical evidence. In *Tiffany v Uhde* in 1950, the Court decided a boundary dispute between a 1932 survey and a 1949 survey, both done by county surveyors, in favor of the 1949 survey, without delving into the merits of the competing surveys at all, and that same presumption of correctness is again applied here by the Court to the most recent survey, but as we have learned from previous cases, technical correctness alone does not mean that the survey will be found to control the boundary at issue in the final analysis. In addition, the case we are about to review also once again clearly demonstrates that the most dangerous land to acquire, from the standpoint of boundary certainty, is the remaining land held by a grantor who has conveyed away a portion or portions of his land, because the successors of a careless or ignorant grantor inevitably bear the legal burden and consequences of his failures or mistakes.

1899 - A township through which the Clarks Fork River runs was subdivided into sections by the GLO. The river wound it's way through Section 4 in such a circuitous manner that 12 government lots

had to be created in that section. Lot 9 was where the northwest quarter of the southeast quarter would normally have been, with Lot 11 directly to the south of it, and Lot 10 was directly west of Lot 11, in the position which would otherwise have been known as the southeast quarter of the southwest quarter. All of these lots were west of the river, and there is no evidence that the river ever materially changed its position in this locality.

1942 - Nott acquired the northeast quarter of the southwest quarter and Lot 9 in Section 4. Who Nott acquired his land from, and how it had been used, are unknown, there is no indication that Nott made any effort to learn where any of the boundaries of the property were located, or that anyone told him anything regarding the location of his boundaries. Shupak was already the owner of Lots 10 & 11 directly south of Nott's land by this point in time, although the origin of his ownership is likewise unknown. The exact location of the boundary between the lands of Nott and Shupak was evidently not visible on the ground, but no dispute existed and there is no indication that there was any communication between Nott and Shupak regarding their boundary location at this time. How Nott and Shupak used their respective lands is unknown, there is no indication that either they or their predecessors had ever used any of the land near their common boundary for any particular purpose, and there is no indication that there were any buildings or other structures anywhere near their mutual boundary.

1946 - Nott had a survey performed, during which the surveyor staked the south boundary of the Nott property. Unfortunately, Nott had selected the same surveyor whose bungling was the cause of the controversy that resulted in the Vaught case, and the poor work of this surveyor would eventually have similarly disastrous consequences for subsequent land owners here as well. There is no indication of how the surveyor located the government lot lines forming the boundary between Nott and Shupak, and no indication that any monuments were found or used by the surveyor. Nott then built a fence on his southerly boundary line, as that line had been staked by the surveyor,

but shortly thereafter Shupak stated, for unknown reasons, that he thought the fence was too far south. The surveyor was summoned back to check his previous work, and after doing so he informed Nott and Shupak that he had made an error, apparently stating without explanation that he had staked the line in question 19 feet too far south. Nott and Shupak then discussed the matter and came to an agreement on how to handle the situation, with which they were mutually satisfied. Since Nott did not want to have to rebuild the fence, which was nearly 2000 feet in length, and Shupak decided that he did not need the 19 foot strip for any particular purpose, Shupak agreed to convey the strip to Nott, so the fence could remain where it was and henceforward it would represent their true boundary. Shupak then deeded the 19 foot strip to Nott, describing it simply as the north 19 feet of Lots 10 & 11, without making reference to any monuments or to the fence, and the strip was henceforward included with Nott's property for tax purposes. Who composed this weak description of the intended strip is unknown.

1947 to 1975 - During this period Nott developed his land, building corrals up against his side of the fence, and also a concrete flume, which ran along his side of the fence, in the 19 foot strip, for an unspecified distance. How Shupak used the land on his side of the fence, if he used it at all, is unknown. At an unspecified time during this period, Shupak conveyed all of his remaining property to Heidema. How the land was described in the deed to Heidema is unknown, presumably it simply excepted out the north 19 feet that had been conveyed to Nott. There is no indication that Heidema ever concerned himself at all with the location of either the fence or the north boundary of his land.

1976 - Heidema conveyed all of his land to Booke. How the land was described in the deed to Booke is unknown, evidently it just reiterated the same description that had been used in the deed to Heidema.

1977 - Booke ordered a survey, which indicated that the northerly boundary of Lots 10 & 11 was actually located well to the north of Nott's fence, by about 60 feet on the west end and about 90 feet on the

east end, meaning that the southerly boundary of the 19 foot strip conveyed to Nott, as it had been described, was 40 to 70 feet north of the fence. How this survey was conducted is unknown, there is no indication of how the location of the boundary between the lots in question was ascertained. After seeing the results of this survey, Boone apparently concluded that he owned a strip of land on Nott's side of the fence and informed Nott accordingly. Nott reacted by filing an action against Boone and Heidema, seeking to quiet his title to all of the land lying north of his fence, on the basis of adverse possession.

1979 - The claim of adverse possession made by Nott was rejected by the trial court, which granted summary judgment to Boone and Heidema, finding Nott's claim to be entirely without merit and unworthy of any consideration. Nott then appealed that decision to the Court, which ruled that summary judgment was inappropriate, and ordered the trial court to properly resolve the controversy by conducting a full trial.

Nott argued simply that he had acquired whatever portion of Lots 10 & 11 was north of his fence by means of adverse possession. Boone and Heidema argued that Nott had only paid taxes on the most northerly 19 feet of Lots 10 & 11, so he had no valid claim to any land south of that 19 foot strip, as it was shown on the 1977 survey, well to the north of the fence in question, regardless of his use of the land south of that location. The trial court, wisely heeding the guidance that had been provided by the Court, this time quieted title in Nott, to all the land on his side of the fence.

When this case first came to the Court, in 1979, the Court had found that the evidence was insufficient to form any basis for a conclusive resolution of the issues in dispute. Specifically, the Court had indicated at that time that legitimate questions existed, regarding the boundary and the fence in controversy, relating particularly to the details of the boundary agreement made between Nott and Shupak in 1946. For that reason, the Court had sent the matter back to the trial court at that time, with instructions to accept additional evidence, including testimony, and to give proper consideration to all of the relevant evidence pertaining to that boundary agreement and the conveyance of the 19 foot strip that had resulted from it. There was no dispute that a boundary agreement had been made between Nott and Shupak in 1946, but because the conveyance resulting from that

agreement failed to define the location of the 19 foot strip in relation to the fence, or any other physical monuments, in the view taken by the Court the agreement itself was powerless to control the outcome of the present dispute. Because the physical location of the strip that was subject to the boundary agreement had been so poorly described in the 1946 deed to Nott, the agreement served only to prove that Nott owned 19 feet of Lots 10 & 11, it did not indicate where that 19 feet was actually located on the ground, nor did it prove that the southerly boundary of the strip was at the fence. Therefore, upon taking up the matter for the second time, the decisive issue for the Court was exactly what effect the boundary agreement that had been made over three decades earlier, in apparent ignorance of the actual location of the lot line, should have, if any, on the determination of the property boundary location at the present time. Although Nott testified that the intent of the 1946 conveyance was to make the existing fence the boundary between his land and that of Shupak, the Court was not surprisingly unwilling to accept his testimony alone as conclusive, since it was not in agreement with the 1946 deed, which failed to connect the strip to the fence in any way. Had that deed mentioned the fence, this whole conflict would never have taken place, because the true original intention of the parties to make the fence a boundary monument would have been clear for all to see, and there was no suggestion that the fence had ever been relocated. Since the Court had repeatedly declined to recognize practical location and acquiescence as valid boundary resolution doctrines in prior cases, as we have seen, Booke and Heidema had good reason to be confident of victory, and Nott was left with only adverse possession as a possible means of retaining all the land that he had been quite innocently occupying and using for decades. Because the evidence made it clear however, that the possession by Nott, of all the land on his side of the fence, was based in good faith on his part, having its origin in his honest reliance upon a survey that had only subsequently been discovered to have been erroneous, the Court elected to treat this scenario as a legitimate exception to the tax payment requirement for adverse possession. With reference to that statutory requirement, the Court reiterated the position that it had set forth in the Townsend and Stephens cases, based upon decisions from numerous other states, most notably including Idaho, and applied the boundary agreement exception to support adverse possession for the first time in Montana, as follows:

“...in the absence of an agreement ... payment does not constitute payment of the taxes ... However, where a boundary line has been agreed upon or fixed because of the uncertainty of

the parties as to the true boundary and the deed description (held by the adverse possessor) does not include the disputed land, the payment of taxes according to the deed description does constitute a payment upon such land for the purpose of satisfying the statute."

This pivotal judicial rule, which effectively negates the tax payment requirement for adverse possession, and has been adopted by states such as Montana, in which acquiescence and other forms of practical location are unavailable to assist in the resolution of boundary disputes, enables the Court to overcome the limitation of adverse possession to title issues, which the tax payment requirement represents, freeing it to serve the Court in effect as a surrogate boundary resolution method. By applying this exception, which is typically described as "extending" existing boundaries, the Court is able to accomplish, through adverse possession, the same result that would be accomplished by allowing boundaries to be resolved through practical location, which is simply to support and protect existing land use patterns by maintaining the status quo. This prime objective, the protection of boundary stability, is one that all courts invariably see as paramount to the protection of land rights in our society, although it obviously runs directly contrary to the manner in which land surveyors often locate boundaries, relying exclusively upon data of record, making this rule necessary and useful to the Court, in achieving its goal of supporting harmonious and productive use of land, by means of whatever legal and equitable tools are available for that purpose. Appreciating the role and value of this concept, which is consistently applied by courts everywhere, is key to surveyors in their efforts to understand why, as in this case, even correctly surveyed boundaries may not control ownership and related rights. Having effectively nullified the tax payment requirement in this manner, and eliminated any impact that Boone and Heidema had hoped it would have on their behalf, the result in favor of Nott became fully justifiable, since his physical possession of the area in question had been absolute and undisputed for decades. Importantly, to combat the claim of Nott, the defendants attempted to rely upon the language found in the 1919 Myrick case, stating that whenever it can be shown that any line was adopted as a boundary as the result of an error or mistake, it cannot control the boundary, and the parties are required to "conform to the true line when ascertained". This notion must have seemed to Boone and Heidema to be perfectly applicable to this scenario, since the 1977 survey had been accepted as proof that the 1946 survey was

erroneous, but the Court took this opportunity to clarify that the Myrick rule is inapplicable when an agreement can be shown to have taken place, and is applicable only where no uncertainty exists and no agreement ever occurred. So although the survey done in 1977 was presumed to be perfectly correct in all respects, and had been recognized as such, simply by virtue of being the most recent survey, its accuracy having stood uncontested, it could not control the outcome of the present conflict, and was therefore of no benefit whatsoever to Boone and Heidema in that regard. Applying adverse possession once again as a means of resolving a boundary location, and also just as in the Swecker case, treating a boundary agreement as evidence supporting, rather than contradicting, adverse possession, the Court upheld the decision of the lower court in Nott's favor, as being in accordance with the views expressed by the Court in its 1979 guidance. It should also be pointed out that this result operated to protect Nott, the innocent grantee of the 1946 conveyance, by placing the consequences of that poorly described conveyance squarely upon the successors of Shupak, the 1946 grantor, since they had acquired the land with full notice of the observable physical conditions, including the occupation of all the land north of the fence by Nott, so they could acquire nothing, despite the language of any deeds, or the results of any survey, beyond the distinctly perceptible boundary of their grantor's remainder.

CHRISTIE v PAPKE (1982)

This case provides a sharp contrast with the case just previously reviewed, on the subject of how much controlling value or weight should be given to a fence in the boundary resolution process, potentially leading some, who look only at the results of such cases, without considering the differences in the circumstances, to accuse the Court of inconsistency in dealing with fences in the context of boundaries. Nothing could be farther from the truth however, as in virtually all such matters the consistency and harmony of the Court's decisions becomes fully apparent, upon proper examination of the basis for the divergent results of superficially similar cases. While both litigants in any given case typically believe their own position to be rock solid, one of them is eventually proven to have been wrong in every instance, and the loser in each case is invariably guilty of having made at least one major mistake, either in the presentation of their

argument itself, or more often in the thought process through which they devised their argument to begin with. So in reviewing the results of land rights cases, its always quite instructive to make note of the specific key mistakes made by the defeated party, since these mistakes typically provide the most powerful lessons to be garnered from the outcome, and the vanquished defendant here made both of the aforementioned types of mistakes. First, he supposed that the fence in question in this case would be seen by the Court as equivalent in significance to controlling fences which the Court had dealt with in past cases, such as the Nott case, instead of realizing that all fences are not equal, and the Court has in fact rejected at least as many proposed fence boundaries over the years as it has accepted, based on it's rejection of the principle that plain acquiescence alone can alter boundaries. In addition to laboring under that initial misconception, the defendant also made the crucial mistake of failing to obtain a survey in support of his claim, thereby placing his own argument at a distinct disadvantage to that of his opponent, who was well armed with a recent survey supporting his position. In *Sherlock v Greaves*, a 1938 water rights case, the Court had clarified the fact that acquiescence cannot control property rights of any kind, if it amounts to nothing more than silent toleration of existing conditions, since such a state of affairs is not necessarily indicative of the existence of a state of agreement between the relevant parties, so in order for acquiescence to become a controlling factor, the circumstances must mandate an estoppel. In the context of silent acquiescence, the fundamental linkage between the highly intimate equitable principles of laches and estoppel is clearly on display, as acquiescence, in the view of the Court, like laches, cannot trigger an estoppel with the mere passage of time, it must be further shown that the passage of time actually resulted in damage to the rights of an innocent party, before an estoppel can be invoked. The maxim "no man is required to fence all of his land" figures prominently in the outcome of the case we are about to review, as the fact that the unilateral origin of the fence at issue is known, proves to be critically important to the perspective taken by the Court with regard to that fence. The widely heard comment that "a fence is just a fence" can therefore be seen to be a rationalization, exercised as a matter of convenience by those who find it most expedient to take a dismissive attitude toward evidence, and

thus employ that phrase to justify their decision not to concern themselves with such things, though a fence, or indeed any comparable artificially placed structure or object, can certainly be valid boundary evidence, only however, if a genuine relationship between the object and the boundary in question can be shown.

1920 - A fence was built running east and west, along or near a certain quarter section line, in an unspecified section, under the direction of a predecessor of Christie, who owned an unspecified amount of land south of the quarter line in question. No further details, regarding the purpose or location of the fence, or the ownership of the land at this time, are known.

1921 to 1975 - The land on both sides of the fence in question changed hands an unspecified number of times, the land on the south side eventually coming into the ownership of Christie, and the land on the north side coming into the ownership of Papke. There is no indication of how the lands on either side were used, and in fact the lands at issue here may well have been located in a remote area, since there is no evidence that any use was actually made of these properties at all over these many decades, but the fence remained in place, undisturbed throughout this time period.

1976 - Christie ordered a survey, which indicated that the fence was not on the quarter section line, it was an unspecified distance south of the line. The length of the fence is unknown, presumably it ran the full length of the boundary between Christie and Papke, but how large their properties were is also unknown. There is no indication of whether or not any monuments were located during the survey, or at any time in fact, and no indication of how the position of the quarter line in question was located by the surveyor.

1978 - Christie moved the old fence to the quarter line surveyed in 1976.

1980 - Papke moved the fence back to it's original location. Christie then filed an action against Papke, seeking to quiet title in himself up to the line surveyed in 1976.

Christie argued that the fence never had any significance as a boundary, since there was no evidence that it was originally intended to function as a boundary, and no evidence that it had ever been treated as a boundary by anyone, so he was entitled to claim that the surveyed quarter section line had always been his north boundary, and he was entitled to move the fence to the surveyed line, as he had done. Papke argued that the fence had been established as the boundary, between the adjoining properties that were now owned by Christie and himself, decades earlier, as a result of the acquiescence of the prior land owners on both sides of the fence, so the actual location of the quarter section line had become irrelevant and Christie had no right to move the fence from its original location. Papke further argued that he was entitled to compensation from Christie for Papke's work in relocating the fence back to its original location. The trial court agreed with Christie that the fence had no relevance whatsoever to the boundary in question, and that it had always been located entirely on Christie's side of the boundary, according to the survey, which was undisputed, so Christie had every right to do whatever he wanted to do with it, quieting title in Christie up to the surveyed quarter line.

The shortage of factual information presented in this case, particularly the absence of any survey details, may be somewhat frustrating to the typical surveyor, and may appear to reduce the value of cases such as this one, in which the circumstances are only very briefly and minimally described, for surveyors. Rather than being frustrated over the absence of details however, its best to focus on what can be learned, because despite the lack of details that surveyors would like to know, valuable lessons about the ways that such boundary conflicts are handled and resolved can be gleaned even from cases such as this one, that are framed by the Court only in rudimentary terms. The Court will always address any matters that are both relevant and important to the outcome of a case, but the Court will not reach out and bring in issues or theories that are not introduced by the litigants themselves, so when details are not presented, their absence can be accounted for by one of two factors, either the Court did not consider the omitted details to be essential, or the parties failed to put important details, which might have changed the outcome, in play. In this case, Papke seems to have fallen victim to the notion that the passage of a long period of time is all that is required for any fence located near a boundary to control the boundary, which is a mistake that is quite commonly made by those with an inadequate understanding of boundary law, as we have seen in previous cases, such as the 1966 Townsend case for example. While the passage of time is one factor that is

subject to consideration in the resolution of boundary controversies, there are a number of other factors that are of equal or greater significance, and it was Papke's failure to address any of these other factors that would lead to his downfall here. It may be wondered why Papke chose to argue acquiescence, rather than adverse possession, in view of the fact that the Court had never accepted or approved acquiescence as a boundary resolution method, while adverse possession had often succeeded under similar circumstances. Adverse possession however, would not have served Papke any better, because he was unable to show any evidence that the strip of land lying between the original fence location and the quarter section line, as that line was located by the 1976 survey, was ever put to any actual use whatsoever. As we have seen well illustrated in many previous cases, it is the degree to which the boundary in question was actually relied upon, for purposes of the physical improvement and productive development of the land, that makes the greatest impression on the Court, rather than the mere passage of time without any evidence of true reliance. Therefore, having no positive evidence that either he or any of his predecessors had ever made any use of the strip in question, between the old fence and the line of record, Papke apparently realized that an adverse possession claim had no chance of success. Nevertheless determined, for unknown reasons, to prevent Christie from making use of the area in question, Papke and his legal team evidently decided to take their best shot at convincing the Court that it was time to adopt the concept of acquiescence into Montana boundary law, but they found the Court still as adamant as ever that acquiescence was insufficient, as the Court again reiterated its long held position that acquiescence cannot control boundaries in Montana, as follows:

“... long acquiescence in the existence of the 1920 fence did not create an implied agreement establishing a boundary. Papke cites authority from other jurisdictions holding that long acquiescence is enough. However, our law is to the contrary, and we choose to follow it ... adjoining proprietors ... must conform to the true line when it is ascertained ...”

At first glance, this statement by the Court may seem to stand in complete contradiction to the words of the Court just one year before in the Nott case, which we have just previously reviewed, since in that case the Court refused to apply the very same language, yet a deeper look reveals that these two decisions are actually in complete harmony, the difference in the

outcomes being the result of the dramatically different conditions between the two scenarios. While Papke was unable to show that he or anyone else had ever relied on the fence in this case, Nott provided positive evidence that he had productively used every bit of the land right up to his fence, effectively proving that the fence in that case had actually functioned as a real and meaningful physical boundary. In addition, while Papke had no evidence that the fence in this case was ever even discussed by any of the parties occupying the land on the opposing sides of it, Nott had positively shown that his fence was the subject of an explicit agreement, in which he and his neighbor had both freely and openly acknowledged the fence as their true boundary, so while Nott had shown the presence of a definite boundary agreement, Papke was unable to show anything even suggesting that there had ever been any actual agreement relating to the fence in this case. The concept of acquiescence holds legal value only as an indication of the existence of a boundary agreement made at an earlier time, in the absence of direct evidence of such an agreement, which in turn amounts to evidence that the location of the boundary in question was settled upon by previous land owners for some practical purpose, which is known as the doctrine of practical location. Recognizing the fact that acquiescence is merely one form of evidence, which can support the concept of practical location, and is not a complete boundary resolution doctrine in itself, the Court correctly treated Papke's argument, which was entirely dependent upon the concept of acquiescence, as incomplete and therefore insufficient. Since the Court has never been willing to accept the doctrine of practical location, and has always required direct evidence of a deliberate boundary agreement, in order to create a boundary that is binding upon all parties, acquiescence is effectively negated as a factor in boundary resolution in Montana, and due to Papke's failure to show any evidence of a definitive boundary agreement, the Court had no difficulty in upholding the ruling of the lower court in favor of Christie. The fence had been erected by Christie's predecessor, on his own land, so the fence was owned by Christie, who was therefore free to do whatever he pleased with it, and Papke had no business doing anything with it. In so deciding, the Court gave Papke the option of moving the fence back to the surveyed quarter line himself, or paying the expenses incurred by Christie in having it once again moved to the quarter line.

Like several others before him, Papke had made the critical mistake of failing to obtain a survey supporting the idea that the fence had been built on the true original quarter line. If Papke had done so, and had thereby shown that the fence was in fact genuine evidence of the original quarter line

location, he could have overcome the 1976 survey and prevailed on that basis, just as Laird had done in the Buckley case, 10 years earlier. Since Papke failed to present any survey evidence at all however, the Court applied the typical presumption of correctness to Christie's survey, holding that the 1976 survey was completely accurate, and that it showed the true original quarter line, without looking into any details relating to how that survey was conducted. The survey controlled the boundary in question, not because any specific procedures had been used, or because any detailed analysis showed that it was correct, but simply because Papke had failed to make the validity of the survey itself an active issue in the case. Proving the correctness of any particular survey that is presented as evidence becomes unnecessary when no competing survey, or other evidence contesting the results of the survey, is presented, because every survey that is professionally prepared carries the initial presumption of correctness. So in the eyes of the Court, the failure of any litigant, such as Papke in this case, to raise any specific issues calling the integrity of a given survey into question, represents a tacit acknowledgement on his part that there is nothing wrong with that survey, so there is no reason for the Court to invest any time or effort in probing its details. As can readily be seen, bogus surveys can therefore wind up controlling boundaries, simply because none of the opposing parties ever scrutinized those surveys well enough to discover any material flaws they might contain, and even more importantly, no one ever challenged any of the basic elements upon which the results of boundary surveys are based, such as the crucial decisions relating to lost or obliterated corners for example. This failure normally occurs, quite naturally, as a result of the fact that the parties are merely land owners and attorneys, all lacking the knowledge that a surveyor brings to the battle, making the decision not to enlist the assistance of an experienced land surveyor in any boundary dispute one that virtually guarantees defeat. There is obviously no basis for any suggestion that the 1976 survey in this particular case was bogus in any way however, since it was never even discussed in any serious detail. In fact, the decision of Papke and his legal team to base their attack solely upon acquiescence, rather than to directly attack the 1976 survey, may very well signify recognition on Papke's part that the survey was entirely legitimate, and the fence was never intended to be on the quarter section line in question. Moreover, given that no evidence was ever presented to show that the fence in question either originated as a practical boundary, or was ever relied upon as such, both the legal presumptions applied by the Court and the decision rendered by the Court would have been fully justified in this instance, even if the Court had been willing to consider practical location

supported by acquiescence as a potentially valid boundary resolution method.

PILGRIM v KUIPERS (1984)

Once again in this case a fence lies at the center of the controversy, but as we will see, the rights of the competing parties are determined by the Court primarily upon the basis of their own actions, and particularly with respect to the losing party, on the basis of his own failures. As has been previously noted, a battle over land rights between a grantor and a grantee is fought on a very different field than a contest between two parties whose title and ownership share no such intimate relationship, typically putting the grantor at a distinct disadvantage. This is true because the Court is well aware that the grantor once had full control over all of the land involved in such a dispute between a grantor and his grantees, or the successors of either of those original parties, which causes the Court to take a significantly different perspective upon the responsibilities and obligations of the parties to one another. While neighbors whose lands have an essentially independent origin, the property of one not having been split off from the land of the other, generally stand as complete strangers in a genuinely adversarial position to each other, a grantor and grantee have a mutual history that can be scrutinized by the Court, in the process of resolving conflicts that have developed between them. Moreover, under the circumstances that attend a normal conveyance, in which the grantor is the party who is expected to supply reliable information regarding the land being conveyed, the grantee has the fundamental right to depend upon the grantor to provide only information that is reasonably accurate, and certainly not information that is unclear, incomplete, erroneous or materially misleading. Therefore, while the intent of the grantor is theoretically always the most important controlling element of a conveyance, the grantor can easily shoot himself in the foot in effect, rendering his own intent powerless, simply by failing to properly communicate his true intent properly or fully to his grantee. So if the grantor arranges for a survey to be done for conveyance purposes, for example, as in the case we are about to review, the grantor is bound by his own acceptance and use of the survey, to live with the

consequences of that survey, even if it contains errors that do not manifest themselves until years later, as occurs here. This case holds a stern lesson for grantors, and reveals that the Court sees the grantor's responsibility with regard to a conveyance as being at least equal to that of the surveyor who performed whatever work, such as physically dividing the subject property or describing the parcels created at the grantor's behest, may have been required to facilitate the conveyance, if not greater. Ultimately, consistent with the result of the Christie case, just previously reviewed, here the Court forcefully reiterates that a fence which bears no relation to a boundary of record cannot simply be assumed to represent the line of record. Although the fence rejected by the Court in the scenario presented here is both highly dubious in character and uncalled for, in the 1980 case of Huggans v Weer the Court refused to accept a fence even though it was expressly called out in a deed as a controlling boundary monument, due to the fact that in that instance the fence proved to be located on land that had been previously conveyed by the grantor, causing the Court to decide the matter by giving priority to the principle that a grantor cannot be allowed to sell the same land twice.

Prior to 1984 - At an unspecified time, Pilgrim, who owned a large tract of land lying along the north side of the Beaverhead River, decided to split his property and convey a portion of it to Brooks. A fence of unknown origin and purpose, with numerous angle points, ran haphazardly from tree to tree across the central portion of the Pilgrim tract, in a generally northerly direction, from a point somewhere near the river to a point somewhere near Pilgrim's north boundary. Evidently, Pilgrim actually intended to keep the parcel on one side of the fence and sell the parcel on the other side of the fence, so he hired a surveyor to create a dividing line along the fence, and prepare a legal description to be used in his conveyance to Brooks, and this task was executed by the surveyor, who delivered the results of his work to Pilgrim, who then used the description in his deed to Brooks. There is no evidence however, that Pilgrim ever expressly notified Brooks of Pilgrim's actual intentions regarding the boundary between their parcels, or expressly informed Brooks that the fence

bore any relation to the parcel boundary. How Brooks used his parcel is unknown, if in fact he used it all, but it was subsequently conveyed a number of times, while Pilgrim remained the owner of his parcel, and how Pilgrim used his parcel is also unknown. An unspecified number of years later, Kuipers became the owner of the Brooks parcel, and without contacting Pilgrim, Kuipers removed an unspecified portion of the fence, which he believed was on his side of the described parcel boundary, and proceeded to build a garage where that portion of the fence had been. How Kuipers knew exactly where the described boundary was located is unknown, he may have obtained the assistance of a surveyor or he may have just attempted to measure or estimate the location of the boundary himself. Pilgrim was unhappy with the location of the garage built by Kuipers, since Pilgrim had apparently always believed that the fence itself actually represented the true parcel boundary, and he and Kuipers were unable to come to any agreement to resolve the matter, so another surveyor was summoned to locate the described parcel boundary. This surveyor staked the boundary in question in a location which did not match the location of the original fence, placing the boundary in question an unspecified distance on Pilgrim's side of the fence. Kuipers was fully satisfied with this location of course, since it indicated that his garage was not over the parcel line, but Pilgrim was quite unsatisfied, and still insisted that the parcel line was originally intended to follow the fence, so he filed an action against Kuipers, seeking to quiet his title up to the original fence line.

Pilgrim argued that it had been his intention for the existing fence to form the boundary between the parcels in question, which he had created for his original conveyance of the parcel that had been acquired by Kuipers, and that his testimony to that effect should control the location of the disputed boundary. He further argued that the most recent survey, which had ignored the fence and instead used the original legal description of the parcel boundary to locate the line in dispute, was erroneous, and had been improperly performed, and therefore could not control the boundary location. Kuipers naturally argued that the boundary location shown by the most recent survey was correct, and that it proved that he had been correct to ignore the fence, and that Pilgrim's testimony concerning his original

intentions regarding the fence should not be allowed to alter the described parcel boundary location. The trial court found the most recent survey to be entirely acceptable, and no other evidence to be relevant, and quieted title in Kuipers accordingly, declaring the boundary to be in the location indicated by that survey.

When confronted with a boundary dispute such as this one, in its efforts to see that justice is done, the approach taken by the Court in assessing the acceptability and value of the evidence presented includes observing who is responsible for the origin of the controversy at hand, and when it is obvious that bungling or other negligent behavior on behalf of one particular party is clearly the root of the problem that the Court is being asked to resolve, the Court proceeds accordingly. How Pilgrim imagined that he could prevail in this case is unclear, because although he correctly grasped the simplistic idea that intent is important, and he evidently hoped to ride that notion to victory, he could have had no such hopes, had he realized how stridently the Court has always protected innocent grantees and penalized careless grantors, such as himself. The description created by the original surveyor for Pilgrim clearly indicated that one straight line, 675 feet in length, formed the portion of the parcel boundary in question, and it made no reference at all to the fence in question. Pilgrim evidently either never read the description that his surveyor had created to split Pilgrim's original tract, or if Pilgrim did read it, he failed to realize that the surveyor had used the fence to determine the placement of the parcel boundary in only a most general way, apparently due to its meandering zig-zag configuration, and had described the entire boundary as being on Pilgrim's side of the fence. Therefore, Pilgrim's original intent had become lost, either due to the failure of the original surveyor to follow Pilgrim's instructions, or due to Pilgrim's failure to communicate his true intent to the original surveyor. Nevertheless, since the original surveyor was apparently no longer available and was not a party to the present dispute, the consequences of that bungled communication, between the grantor and his surveyor years earlier, were destined to fall squarely and solely upon Pilgrim himself. In another critical error, no monuments had been set during the original survey, leaving the boundary between the two parcels completely dependent upon the described location of the line in question, which was particularly critical, because the original description did not close, although the Court treated this as a relatively insignificant technical matter, holding that the last surveyor had properly resolved the closure error, since the acreage resulting from his survey matched the acreage that was stated in the description, in

approximate terms, reasonably well. Nonetheless, due to the presence of all these errors on Pilgrim's part, indicative of his carelessness or negligence in the creation of the parcel in question, planting the seeds from which the present conflict had grown, the Court was highly disinclined to allow him any opportunity to prevail by sweeping aside his own prior negligence with only his own testimony. The description created by the original surveyor, in the absence of any physical monuments along the line in question, and in the absence of any claims based on physical use or occupation of the land, the Court decided, must control, being the best evidence of the footsteps of the original surveyor. With reference to the applicable statutes, pertaining to description resolution, the Court indicated that the last surveyor had properly applied the rules, and in so doing he had arrived at a legally supportable and defensible location for the parcel boundary in question, stating that:

“... rules of construction ... resolve inconsistencies in the descriptive part of a conveyance ... If the description in the written conveyance can be reasonably construed pursuant to such rules, extrinsic evidence cannot be used to contradict such a construction ... The final boundary is prescribed by these definite and ascertained boundaries using the rules of construction.”

The unusually stern application of these rules by the Court in this case was necessary, due to the fact that this was a conflict between a grantor and a successor of his grantee, who thus stood in the shoes of the original grantee. The level of ambiguity that was present in the description at issue in this case would typically be sufficient to make the Court receptive to extrinsic evidence of intent, but here the introduction of such evidence would have had the effect of rewarding Pilgrim, the delinquent grantor, by allowing him to correct his own past errors, at the expense of an innocent party. Pilgrim had failed to properly or fully express his true intent for the boundary location in question, by allowing a description that made no reference to the fence, or to any other monuments on the line in question, to be used, when he had the opportunity to correct it, at the time the parcel was created, so the Court elected to deny him that opportunity at this time. Finding that the resolution of the various shortcomings contained in the description in question by the last surveyor had been sufficient to eliminate any ambiguity regarding the parcel boundary, the Court concluded that the testimony of Pilgrim, regarding his true original intent, had been properly

excluded, and could not control the boundary location at issue, fully upholding the ruling of the lower court. In taking this position, the Court reinforced several important concepts, including the right of a grantee to fully rely on a description provided by his grantor, the fact that a grantor ultimately bears the responsibility for a description created by him, or for him, which he approves by using it in a deed, and the fact that while extrinsic evidence can certainly supplement a description, it cannot directly contradict anything that is clearly stated in the description in question. While intent is indeed always paramount, a grantor cannot be allowed to use that maxim as a weapon, against his own grantee or the grantee's innocent successor, for the grantor's own benefit, and that is the primary lesson delivered by the Court here, which Pilgrim learned on this occasion. The most fundamental error Pilgrim had made was the very same error that was made in the Nott case, failing to fully identify the truly intended boundary location by failing to connect it to any physical monuments or objects. The Court has repeatedly declared that a fence, or in fact any such visible and permanent object, can be cited in a description as a legitimate monument, so the Court is quite naturally unforgiving toward the responsible party when that is not done. The fence controlled in the Nott case, as we have seen, despite not being called out in the description at issue there, and the survey showing a different boundary location was disregarded, because the party contending in favor of the fence in that instance was an innocent grantee, Pilgrim however, as the grantor who created the problem by means of his own mistakes, was in no such sympathetic position as Nott had been, nor had any reliance been placed upon the fence in this case. Of course, Pilgrim could have filed a liability action against his original surveyor, but he still would have had to bear the heavy burden of proving that his surveyor had negligently failed to perform the original survey work in accordance with Pilgrim's specific instructions, regarding the location of the boundary created at that time, in order to prevail, and it is highly unlikely that Pilgrim could have successfully carried that burden, since he had failed to pay sufficient attention to what his own surveyor had done. Pilgrim's accusations against the retracing surveyor were clearly futile and obviously bound for failure, because the retracing surveyor was merely following a description that Pilgrim himself had approved, so the very result that Pilgrim objected to, was a result of his own making. Once again here, in the end the survey controlled, because no superior claims based upon physical evidence or possession could be successfully made.

MONTANA COALITION v CURRAN (1984)

In the spring of 1984, the Court finally addressed an issue that had long been neglected and therefore remained shrouded in mystery in Montana, waiting for a conflict such as the one that plays out here to come along, thus providing an opportunity for the Court to make a definitive statement on the subject, which was the manner of determination of the navigability status of any given body of water lying wholly or partially within the state. With respect to rivers in Montana, only certain portions of the Missouri and the Yellowstone had ever been expressly deemed navigable, and the decisions of the Court relating to those waters had not been seriously questioned or challenged, so the full depth and breadth of the issue of navigability had never before been intensely focused upon by the Court, leaving the navigability status of many smaller streams very much in doubt. Although it may appear at first glance that ownership of land which is virtually useless for all typical purposes, due to being constantly submerged, is really a matter of very little significance, in fact ownership of bedlands can become a major issue under certain circumstances, such as where valuable minerals exist to be extracted from the bedlands, or where having control over the submerged land is essential to a land owner's privacy, and both of these important factors are present in the case we are about to review. Due to the existence of the general legal presumption that any body of water is non-navigable until proven otherwise, placing the burden of proof upon any party who suggests that a given body of water is in fact truly navigable, it had long been widely supposed that all Montana rivers of lesser size would be deemed non-navigable, if their navigability should ever become an issue. Long prior to this case, the United States Supreme Court had made it clear that the individual states do not have the right or the option to determine navigability for purposes of title or ownership of land in any manner that would operate in derogation of private property rights that have their origin in federal standards for title navigability, so no state can simply declare that every body of water is navigable, and legitimate justification for all navigability decisions at the state level must be shown. The "log floating test" for title navigability purposes, applied by the Court in deciding this

case, has long been quite controversial, making the certainty of any ruling based solely upon that element rather questionable. In 2010 in *PPL Montana v State of Montana*, a case concerning the erection and use of certain dams on three rivers for utility purposes, the Court essentially reiterated the position established here on the ability of individual states to determine navigability, over the dissent of two Justices, again bringing navigability and riparian rights to the forefront of judicial controversy, by boldly asserting the position of Montana on the matter, subject of course to approval by the Supreme Court of the United States. It is also noteworthy that the Court declined, in this 1984 case, to follow the language used in *Herrin v Sutherland*, a case which featured a comparable riparian scenario, decided in 1925, but which was quite a bit more restrictive toward the rights of the public, evidencing the evolution of judicial thought upon the interaction between public and private rights, relating to both land and water, over the intervening six decades, and reflecting the impact of the rise of modern society upon the law.

1887 to 1889 - During this period, railroads were being built across Montana, and trees were being harvested from the timbered regions, to be converted into railroad ties. One such area was along or near the Dearborn River, and each year during this period, at least one major log drive took place, in which massive numbers of railroad ties were transported down the river. The ties were allowed to float with the current to their destination, and were then fetched out of the river and used to construct Montana's railroads. Thus at the time of statehood, the river was actually functioning as a highway, at least on a seasonal basis, for at least this one commercial purpose.

1890 to 1983 - At an unspecified time, Curran, who was the owner of an oil company, acquired numerous sections of land through which the central portion of the 66 mile long river flows, and he began using the area for oil production. Curran believed that he was the owner of all of the land in his sections, including the bed of the river, and he did not want anyone else on his land, so he attempted to prevent all use of the river by the public. The Montana Coalition for Stream Access was formed, to deal with situations such as this one, and the Coalition,

which included the Department of State Lands and the Department of Fish, Wildlife and Parks, filed an action against Curran, seeking to have him legally compelled to cease his efforts to prevent the public from using the portion of the river lying within the boundaries of his land.

The Coalition argued that the use of the river for log drives around the time of statehood was valid evidence that the river was navigable at that time, and therefore the bed of the river belonged to Montana, so since Curran's ownership extended only to the water's edge, he had no right to prevent or interfere with either travel on the river by the public or public activities taking place within the river, such as swimming, boating and fishing. Curran argued that the evidence relating to the log drives was insufficient to prove that the river was genuinely navigable, and that there was no other evidence of commercial use supporting the idea that the river was navigable at all times, or even most of the time, and that the modest and irregular public recreational use of the river that had taken place was not valid evidence of navigability either, so the river should be deemed to be non-navigable and subject to his control. The trial court ruled that the river was clearly navigable, so Curran did not own the bed, and he had no right to exert control over any activities taking place either on or in any portion of the river, dismissing his claim without any consideration of its potential merit, by means of summary judgment.

The navigability status of various bodies of water represents a fundamental element of boundary law, since any body of water, whether natural or artificial, can potentially serve as a controlling boundary monument, and many rivers and lakes obviously constitute natural boundaries. All navigable bodies of water form boundaries between public rights and private riparian rights, and non-navigable watercourses are very often adopted as boundaries as well, typically between private lands. Riparian principles such as accretion, erosion, reliction and avulsion apply to the action or movement of both navigable and non-navigable waters, but the navigability status of the watercourse in question determines where the rights of riparian land owners end, and whether or not rights of the public are present, so making a proper evaluation and judgment of the navigability status of any given body of water is always highly important. All watercourses in the west were originally part of the public domain, and are presumed to be non-navigable, until such time as sufficient evidence of their usefulness, as of the time of statehood pertaining to any given location, is

presented to merit the status of a navigable body of water. Contrary to common belief, the GLO and BLM have never had any authority to conclusively determine navigability, so the existence of meander lines and government lots does not positively indicate navigability, which must be legally determined through an assessment of the true usefulness of each watercourse, on a case by case basis. The Supreme Court of the United States has, since the nineteenth century, taken the position that navigability can be established by potential usefulness as well as by actual historic use that is documented or proven to have taken place. Under the federal equal footing doctrine, every state had the opportunity to assert title to the beds of all navigable watercourses within its boundaries at the moment of statehood, but in a key battle over the navigability of certain lakes in Oregon, the United States Supreme Court held in 1935, that no state can make any final determination on the issue of navigability for title purposes that has the effect of reducing or damaging the land rights of any riparian patentee who acquired a portion of the public domain from the federal government. So all successors of any entrymen of land that was patented into private ownership out of the public domain have the right to maintain that the navigability status of any watercourses forming their boundaries must be determined in accordance with federal law, since the origin of their land ownership rights rests in federal law. Curran made the critical mistake of failing to properly put this potentially key issue in play in this case, allowing the Court to simply bypass it, but as we shall see, the ultimate ruling of the Court effectively rendered his claim of ownership of the bed of the river moot anyway. Analyzing the evidence that was presented, the Court first elected to accept the validity of the "log floating test", a concept which proposes that any stream capable of floating logs, even if only at its highest normal annual water level, can be deemed navigable for title purposes, although this concept has been rejected by other states and some federal courts as being too minimal to indicate genuine navigability. Then going beyond the issue of the ownership of the bed of the river, the Court took the dramatic step of adopting a second and separate form of navigability, relating only to the water itself, rather than to the boundaries of the land underlying the water, citing comparable decisions from Minnesota and Wyoming, as follows:

“Clearly the Dearborn satisfied the log-floating test for navigability under the federal test of navigability for title purposes ... title to the riverbed was owned by the federal government prior to statehood and was transferred to the State

of Montana upon admission to the Union ... the log-floating test was properly applied and the State found to hold title to the riverbed of the Dearborn ... as a further attribute of sovereignty, the states have assumed for many years the power to determine as a matter of local law the question of what waters are navigable ... and the boundary therein between state and private ownership ... Of further importance to the issue of navigability for title is the Public Trust Doctrine ... which provides that states hold title to navigable waterways in trust for the public benefit and use ... we do not see why boating or sailing for pleasure should not be considered navigation ... the idea of navigability for public recreational use has spread ... Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes ... whether Montana has adopted the log-floating test of commercial navigability is immaterial ... whether the Dearborn River is navigable under the federal commercial use test is also immaterial to determining the question of navigability for recreational purposes ... "

As the Court correctly indicated, the federal government, including the federal courts, have always left the definition of the location of the boundaries of all bodies of water that have been properly found to be genuinely navigable, to the discretion of each state. As a result, some states extend the boundaries of navigable watercourses to the high water mark, while others adopt the low water mark, others use certain variations or combinations of high and low water levels, and a small number of states decline to treat any of their watercourses as being navigable, for purposes of the ownership of the underlying lands. As the Court noted, Montana limits its ownership of the beds of all navigable watercourses to the low water mark, but of course the difference between ordinary high and low water levels is typically of far less significance than the question of navigability itself, since in the absence of navigability, the ownership of the adjoining riparian land owners extends all the way to the center or centerline, as the case may be, of the particular body of water in question, dependent upon its physical configuration. Following the strong national trend, that was in evidence throughout the twentieth century, toward increasing emphasis on

the protection of public rights however, the Court chose to take the opportunity presented by this case to go beyond the required decision on the ownership of the bed of the river, and establish guidelines for the protection of public rights to the use of the water itself. Properly recognizing that navigability has more than one valid meaning and application, the Court declared its support for the concept that all naturally flowing waters within the boundaries of Montana are fundamentally public in character, and that wherever the principle of navigability is applicable, even if only for recreational benefit, as opposed to commercial or profitable use, navigable water can be deemed to exist. With its recognition of the existence of multiple forms and meanings of navigability, the Court was able to distinguish and legally divorce the use of the water itself from the use of the land forming the bed of the river, enabling the Court to establish the existence of navigability for public recreational use, without having to abide by the stricter federal rules that are to be applied when establishing navigability for title and land ownership purposes. Curran was obviously vanquished, as the Court concluded, over the voice of a single wisely dissenting Justice, that Curran's case was indeed an utterly hopeless one, unworthy of any legal or equitable consideration or support, since in view of the positions taken by the Court, he could succeed in his claim neither with respect to bed of the river, nor with respect to control over the use of the water itself. As can be readily seen, the Court sought, by virtue of this extended decision, to minimize the legal significance of the ownership of all lands lying underwater, throughout Montana, by staunchly adhering to the public trust doctrine, which in the view of the Court, makes the right of the public to the use of the water itself, clearly superior to the right of a private land owner to control what takes place upon any submerged land lying within his boundaries. With the precedent it had established to that effect in this case, the Court had accomplished the goal of protecting public recreational use of all waters in Montana to the maximum extent possible, at least until such time as review by the Supreme Court of the United States results in either affirmation or denial of the validity of the position first taken here, and subsequently maintained, by the Court.

FUNK v ROBBIN (1984)

Here we reach the case that comes as close as the Court has ever come to approving a boundary on the basis of practical location and acquiescence alone, in the context of the PLSS, during the modern era. The conclusion of

the Court that the boundary in controversy in this case had become fixed in position simply by the use of the lands on both sides of that boundary, despite the absence of any definitive evidence of a boundary agreement between either the present owners or any of their predecessors, fully embodies the spirit of the doctrine of practical location, although the Court chooses not to characterize it as such. Had the Court wanted to apply practical location and label it as such, this was its best chance to do so, but the Court still shuns that idea, passing up the opportunity offered by this scenario to uphold practical location as a legitimate boundary resolution doctrine, instead choosing to base this decision on the weakness of the survey presented by the plaintiff here. This decision may appear somewhat surprising, in the light of the *Christie* and *Pilgrim* decisions, both made in just the previous few years, and both holding that a fence which cannot be shown to have any certain relationship to a given boundary cannot control the location of that boundary, but in fact the result here, rather than standing in contradiction to either of those cases, shows the openness of the Court to varying results based on variations in the evidence and the balance of equity between the litigants. The principal lesson to be learned from these diverging results in boundary cases involving fences, is that the critical factor in any such situation is the question of how much evidentiary weight to give to a fence, when its origin, and therefore its actual relation, if any, to the boundary in dispute, is unknown. While the answer to that question may sometimes be simply "none", as the *Christie* and *Pilgrim* decisions would appear to suggest, that is certainly not always the case, and here we observe how and why rulings to the contrary are produced. Due to the absence of any corner monument records in this instance, which as we have seen from the 1977 *Stephens* case, the Court holds in fairly high regard, the Court on this occasion returns to its prior strong insistence upon original survey evidence, to form a valid basis for any subsequent survey, and upon not finding the survey to include any original evidence, the Court turns against it. That position has the effect of freeing the Court to view the boundary agreement concept in a more favorable light, ultimately allowing that concept to prevail, and demonstrating once again, much to the disappointment of those searching for stark black and white clarity, that in reality none of the positions taken by the Court on the subject of boundary evidence are truly

dogmatic or absolute, they are all intended to flex with the equitable variations in the circumstances, from case to case. Tillotson tells us that surveys, first and foremost, must be legally defensible, and here we look on as an excellent illustration of the importance of prioritizing that idea unfolds, showing that surveyors should be aware that when a survey runs contrary to a long standing fence, there is a real chance that the fence will control over the survey, either because the fence represents superior evidence to that upon which the survey is based, or because the fence represents an agreed boundary location.

1891 - The GLO subdivided a township through which the Flathead River runs. The portion of the township lying east of the river was sectionalized at this time, the sections west of the river having been created several years earlier. Section 3 was among those created at this time, and it was platted in the typical manner, with four government lots along the township line and the rest of the section being aliquot in character.

1892 to 1963 - At an unspecified date during this period, the parents of Funk acquired the entire southeast quarter, and also the east half of the southwest quarter of Section 3, and also at an unspecified date, Robbin acquired the adjoining portions of the same section, so by the end of this period the lands of the Funk family were bordered on the north and on the west by the lands of Robbin. There is no indication that either the Funks or Robbin were the original patentees of their lands, but there was no dispute regarding their title or ownership of their respective aliquot portions of the section. A fence of unknown origin ran along the aliquot lines forming the boundary between these properties, which these parties and their predecessors had apparently always respected as representing the limits of their respective aliquot parts. In 1958, Robbin cleared some timber from a 20 acre area along the west side of the fence, in order to prepare the area for cultivation, and he subsequently used all of the land west of the fence as crop land. Whether or not any such productive or meaningful use had ever been made of that area prior to this time is unknown.

1975 - The Funks wanted to construct a ditch, to drain the westerly portion of their land in a westerly direction down to a creek running through Robbin's land, which was located an unspecified distance west of the fence, so they obtained a written agreement from Robbin, by which he provided them with a license, enabling them to build their proposed ditch across a certain portion of his land, running down to the creek. While working on the ditch, the Funks temporarily took down a portion of the fence, and they then restored the fence to its original position when the ditch work was complete. At Robbin's request, the Funks also removed all of the construction debris left on Robbin's side of the fence, and they restored all of the land on Robbin's side of the fence to its previous condition.

1980 - A Certificate of Survey was prepared for Funk's parents, which indicated that the fence at the west end of their property was actually located an unspecified distance east of the sixteenth line that represented their west boundary. There is no indication of how this survey was performed, or what it was based upon, and no evidence that any monuments, original or otherwise, were ever found anywhere in or around Section 3.

1981 to 1983 - At an unspecified time during this period, Robbin was evidently informed that the survey performed for Funk's parents had called the location of the old fence line into question, so Robbin hired another surveyor, who reported to Robbin, after doing some research, that he disagreed with the results of the survey that had been done for the Funk family. Although there is no indication that this surveyor actually performed a complete survey himself, he did consult with another surveyor who was apparently also familiar with the area at issue, and who also generally agreed that the Funk survey had not been properly executed. On the basis of this information, Robbin evidently concluded that the survey done for the Funks was incorrect, so he took the position that the fence itself represented the true boundary line between the properties in question. Since Robbin was unwilling to give up any of the land that he had been using west of the fence and allow the fence to be relocated to the surveyed sixteenth

line, the parents of Funk filed an action against Robbin, seeking to quiet their title up to the sixteenth line that was shown as their westerly boundary on their survey.

Funk's parents both died while the legal action was in progress, so he inherited their land, and he argued that the survey done for his parents was correct and should therefore control the property boundary in question, because there had never been any agreement between his parents and Robbin concerning the location of the sixteenth line in question. Robbin argued that the survey done for the Funk family was incorrect, and that even if it had been properly performed, it still could not control the property boundary location, because Funk's parents had always accepted the fence as their westerly property boundary and they had fully acknowledged his ownership of all the land west of the fence. The case was placed before a jury, which decided that the fence was the true boundary between the properties of the litigants, and the trial court entered judgment accordingly, in favor of Robbin.

Yet again in this case, the central focus was upon the validity of a fence as a boundary, so the principal objective of each of the parties was to provide evidence either supporting or discrediting its validity, in accordance with their competing views regarding the fence. The Court was clearly mindful of the fact that a great deal of time had passed, during which the litigants had lived in harmony, abiding by the fence as a physical boundary, although never explicitly stating or confirming their opinions about the fence, either verbally or in writing, until the Funk survey compelled Robbin to rise to its defense. As we have seen from earlier cases, it was well settled by this point in time that acquiescence and practical location are not valid options for boundary establishment in Montana, having been dismissed or shunned by the Court, when brought into play by prior litigants, so Robbin was evidently aware that there was no point in presenting a case based on these boundary resolution doctrines, nor was adverse possession his best option. Yet as we have also clearly seen from a great many prior cases, the Court is always prepared to recognize equitable issues and to employ whatever legal or equitable tools are necessary, or best suited in the Court's view, to accomplish the ultimate goal of justice, and Robbin very wisely proceeded in a manner, in presenting his evidence, that enabled the Court to rule in his favor without having to reverse any of the positions it had previously taken on the subject of boundary resolution. Instead of arguing that the fence had become the boundary by implication through acquiescence, he asserted that the acts of the Funks, particularly their actions

taken in 1975, went beyond acquiescence and constituted outright agreement to the fence boundary, equivalent in force to a statement of express agreement, and with key support from two surveyors, he was able to mount a legal assault which proved to be highly persuasive to the Court. Robbin's first task was to discredit the survey done for the Funks, and either Robbin or his legal team had learned the important lesson from earlier cases that it takes a surveyor, or better yet two surveyors, to successfully dismantle an inadequate survey and effectively draw the attention of the Court to its fatal flaws. The two surveyors who testified on behalf of Robbin both indicated that the Funk survey was baseless, being tied to no original corners, and they went on to state that there was no way to properly survey the section in question without dealing with numerous lost corners, which Funk's surveyor had evidently not attempted to do. The scenario painted by Robbin's surveyors, including the need for survey work that was far more extensive than that which had been done by Funk's surveyor, in order to properly reset the required lost corners around the section in question, destroyed the presumption of correctness that would otherwise have attended the Funk survey, and in so doing, made the idea of boundary agreement much more palatable and attractive to the Court than it would otherwise have been. By depicting what amounted to boundary chaos in the vicinity in question, with their testimony, Robbin's surveyors very astutely steered the Court toward acceptance of the existing fence as the only logical and reasonable boundary solution, correctly pointing out that no retracement survey could meet the burden of proving that the fence was not originally correctly located, and very deftly shifting the presumption of correctness to the fence itself, as opposed to the survey. Funk attempted to object that certain jury instructions given by the trial judge, relating to surveys, were inconsistent and had thus mistakenly influenced or confused the jury, but the Court disagreed, stating that:

“Instruction No. 11 instructs that the original survey must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it. Instruction No. 18 instructs that in making its decision the jury is not to consider or conjecture as to the affect of the decision on the boundaries or corners of adjacent lands owned by persons not parties to this suit. We find no inconsistency between these instructions.”

Unlike the Stephens case, seven years before, in which a survey based on non-original survey monuments that had been well documented in corner monument records had been approved, the Court again in this instance returned to insistence upon evidence of original monuments to validate a survey. Furthermore, the Court approved the trial judge's important instruction indicating that rejection of a survey purporting to show aliquot lines, in favor of a boundary agreement, does not constitute damage to the local fabric of the PLSS that could have an adverse impact on any nearby boundaries, clearing away that potential obstacle to the boundary agreement concept. Here the Court realized that the presumption that the most recent uncontradicted survey is correct can present a legal conundrum, because very often the goal of preserving the lines of the original survey is actually best served by the adoption of older evidence, such as earlier surveys, or fences that were built at a time when the corners and lines of the original survey were still plainly in evidence on the ground. Therefore, here the Court wisely took the opportunity presented by the expert testimony of Robbin's surveyors, even though they had not conducted complete surveys themselves, to withdraw the presumption of correctness from the Funk survey, which had obviously been made without any effort to establish any original lines through the use of physical evidence, and was apparently based primarily on measurements, similar to the infamous Burke survey, so harshly criticized by the Court in the 1945 Vaught case. Concluding from the testimony of Robbin's surveyors that the original sixteenth line location was, for all practical purposes, "impossible to establish" by means of measurement, the Court found that under such conditions of high boundary uncertainty a binding boundary line agreement held merit, consistent with its ruling in the Box Elder case of 1920. The acts of Funk's parents in 1975, the Court determined, were genuinely indicative of the existence of a state of complete and binding agreement upon the boundary location in question, thus applying the principle of practical location without so stating, by treating the fence as the actual sixteenth line and acknowledging the fence as a monument marking that aliquot line, so there was no need to change the existing aliquot descriptions of the properties in question. Deciding that the actions of Funk's parents in 1975, in recognizing the fence as a boundary by replacing it in place, and in restoring possession of the land on the other side of it to Robbin, amounted to legally sufficient verification of a boundary agreement that was fatal to Funk's claim, the Court fully upheld the lower court decision quieting title in Robbin up to the fence. In addition, the Court expressly upheld the ruling of the trial court that evidence of the existence of other earlier surveys of adjoining properties was irrelevant, indicating that it

made no difference whether or not Funk's surveyor had known about any other surveys that had been done in the vicinity, since even if he knew of such surveys he would have had no right to base his survey upon them, again insisting upon evidence of direct reliance upon the original GLO survey, in order to validate a retracement survey. The Court also observed that this case was very similar to the Christie case, decided just two years before, without noting the irony in that reference, since in that case a survey which completely disregarded a fence controlled, and the fence was deemed to be worthless as boundary evidence. The key reason accounting for the diverging outcomes between this case and the Christie case however, is that in this case the origin of the fence was unknown, opening the door to the suggestion that it was the product of an actual agreement, which idea was abundantly supported by the subsequent conduct of all the parties, as we have seen. Once again, although his work had been thoroughly maligned as baseless, and ultimately rejected as incorrect and useless, the Court made no suggestion that Funk's surveyor might bear any liability, since it could not be shown that any detrimental reliance upon his work had taken place.

HELEHAN v UELAND (1986)

Among all of the many boundary cases involving PLSS corners that we have reviewed so far, only a relatively small handful have provided any detailed insight into how the Court assesses the validity of specific individual monuments, most notably the Kurth, Buckley and Stephens cases, and only in 1909 in the Hamilton case, which did not involve PLSS corners, did the Court take an especially stern or harsh view of purportedly original monuments that had been recovered by a surveyor. Generally, both the Court and the lower courts apply the typical presumption of correctness to monuments that have been accepted or employed by a land surveyor, out of deference to the professional expertise regarding such matters that every professional surveyor is presumed to possess. This initial acceptance can be overturned however, when some form of evidence to the contrary appears and is made a point of contention, putting the validity of any specific monument in play, and creating a legitimate issue to be adjudicated. This case presents a pure contest between surveys, focused specifically on the judgment of surveyors relating to monumentation, with no possession or agreement claims made by either side, and while a fence is present, it has no

impact at all, since neither of the parties chooses to argue that it has any controlling value with respect to their section line boundary. Here we watch as the Court continues to emphasize the long judicially honored theme of rejecting marginal or non-original survey evidence, which has manifested itself in numerous prior cases, such as the Funk case, just previously reviewed, extending that theme to a detailed analysis of one specific monument, illustrating that use of even one bogus monument in a survey can be fatal to that survey. The outcome here should not be taken as an indication that the Court prefers measurements over monuments however, or that no questionable monument can ever be deemed acceptable, this decision simply stands for the well established proposition that the best available evidence prevails, and shows that the Court realizes that a monument with distinctly suspicious characteristics is quite unlikely to represent the best evidence of a corner location. This case can be viewed as either positive or negative for the land surveying profession overall, negative because three surveyors were evidently duped into accepting a monument that was eventually ruled to have been either disturbed or entirely fraudulent, yet positive because one surveyor was able to shed crucial light on the situation, thereby serving to reveal the truth of the matter to the satisfaction of the Court. While the apparent lack of communication between the surveyors involved here, which could potentially have precluded this legal battle, is lamentable, the Court's reliance upon the work of the prevailing surveyor stands as a fine example of the concept expressed by Tillotson, that survey work essentially and ideally supports boundary resolution through our judicial system, making the surveyor's role as an investigator and gatherer of evidence one of the most significant roles of the land surveyor. In 1995 in *NFC Partners v Stanchfield Cattle*, another case focused squarely upon survey monumentation, the Court again emphasized the great importance of actual physical monumentation, and again demonstrated its strong inclination to adhere strictly to modern monumentation standards, by voiding a certificate of survey, due to the failure of the surveyor to put the required monumentation in place in a timely manner.

1969 - Helehan was the owner of several mining claims, some patented and some unpatented, located in an unspecified section,

while Ueland was the owner of the section lying directly to the west, and either the entire section line, or some portion of it, evidently represented the boundary between their lands, though how or when either of them had acquired their lands is unknown. A fence of unknown origin ran more or less along the section line, but neither party had ever maintained it, so portions of it had fallen down, and neither party believed that it represented the true section line location. Ueland built a new fence in the same location as the old one, not for boundary purposes however, he intended it only to keep Helehan's livestock off his property.

1970 - Helehan did not like what Ueland had done, because he believed, for unknown reasons, that the section line in question was actually located west of the fence, so he hired a surveyor, who after performing a survey, confirmed that the fence was located an unspecified distance east of the section line, but Helehan took no further action on this information at this time.

1975 - Helehan filed an action against Ueland, charging Ueland with trespassing and encroaching on his land, apparently as a result of the presence of the fence and Ueland's use of the land along the west side of the fence.

1976 - Before the trial could get underway, Ueland reacted to Helehan's charges by hiring another surveyor, who performed a survey that confirmed Ueland's belief that the section line was actually located east of the fence. Ueland then moved the fence an unspecified distance to the east, to the section line location that had been indicated by his surveyor. Nothing more was done at this time, and for unknown reasons, the trial did not commence and was delayed for several years.

1984 - Preparing to finally move forward with the trial, Helehan hired two more surveyors, and both of them agreed with the section line location west of the fence, that had been previously indicated by Helehan's first surveyor. Ueland evidently remained unconvinced that the section line was west of the fence, so he continued to maintain that the easterly section line location was the correct one.

1985 - The long delayed trial finally commenced.

Helehan argued that his surveyors had correctly recovered the original section line location, proving that Ueland's fence was on Helehan's land, and it was therefore an encroachment subject to removal. Ueland argued that his surveyor had correctly rejected the work of Helehan's first surveyor, because it was erroneous, and asserted that his surveyor had correctly located the section line further to the east, proving that the fence in question was not encroaching on Helehan's land. The trial court found the work of Ueland's surveyor to be superior, and therefore ruled that Ueland had properly moved the fence to the true boundary line, so it was not subject to removal.

As can be seen from the foregoing information, the fence was really irrelevant in this case, because neither party based their assertions on it, and in fact neither party made any kind of land rights claim based on possession at all. The original fence was never relied upon by either party for any boundary purpose, and neither party produced any evidence indicating that their predecessors had ever relied on it either, so the value of the original fence location as boundary evidence was nil. The fence location adopted by Ueland in 1976 was completely dependent upon the validity of the survey that had been done for him, since he had relocated the fence after the filing of a legal action against him by Helehan, and no adverse or prescriptive period can begin to run once a boundary dispute has erupted and the matter has become the subject of pending litigation, so the passage of time was of no significance. Since the cases presented by both parties were based entirely on the opinions of their respective surveyors, regarding the true location of the original section line in question, in order to prevail, Ueland could not rely upon his use or possession of the area at issue, he would have to prove that the surveys that had been done for his opponent were so fundamentally erroneous and unreliable as to be without merit, just as Robbin had done in the Funk case two years before. Like Robbin, Ueland was evidently smart enough to realize that he would benefit greatly from the assistance of a professional land surveyor, particularly one who had a significant amount of experience doing boundary work in the area in question, so Ueland had hired a surveyor with the appropriate knowledge, to be of maximum value to him in the legal battle that he knew was coming. As we have seen from the Funk case, outnumbering the opponent's expert is a potentially wise and successful legal tactic, which worked out well for Robbin in that case, as his two surveyors launched a powerful coordinated attack upon his opponent's one surveyor, which carried Robbin to victory, and Helehan or his legal team may very well have taken note of that fact, so

Helehan may have felt quite confident about being supported by three surveyors going into this confrontation. Quantity alone does not always prevail however, and in the view of the situation taken by the Court in this case, Helehan's three surveyors were no match for Ueland's one surveyor, who held a subtle but very distinct advantage over all of them. Like the Stephens case of 1977, the central focus of the controversy here was the existing survey monumentation, specifically whether or not one particular monument was either an original GLO monument, or a genuine and reliable perpetuation of an original monument. As we have observed, the Court had shown itself to be quite receptive to the use of non-original monuments that had been properly documented using corner monument records, in the Stephens case, but then had again insisted upon evidence of original monumentation in the Funk case, in which no verifiable monuments had been used, leaving the survey that was being scrutinized there quite vulnerable, and ultimately leading to a decision that it was of no value. Consistent with the position on monumentation that it had reiterated in the Funk case, the Court again demanded clear evidence of the verifiable status of the monuments found here, and raised the bar another notch, by demanding a degree of authentication that it had never before expressly required, from a surveyor claiming to have located an original monument and based his survey upon it, noting that:

“... government surveyors often marked section corners and quarter corners by embedding a large stone in the ground and surrounding it with smaller stones. The large stone was then usually engraved with an appropriate identification ... the true corner of a government section is where the original surveyor in fact established it, whether such location is right or wrong as shown by subsequent surveys ... it is essential that they properly identify and authenticate the original monument.”

For the first time here, the Court questioned the validity of a specific monument that had been accepted by a surveyor as a section corner, requiring explicit proof of the authenticity of that monument, by virtue of its markings, accompanied by evidence that it was undisturbed and had been found in its actual original location. The reason for this unusual skepticism toward an otherwise acceptable monument, on the part of the Court, becomes evident upon a detailed examination of the scenario and the sequence of the pertinent events. An unmarked stone had been found at one

end of the section line in question by Helehan's first surveyor in 1970, and had been accepted by him as a section corner, even though there were apparently no bearing trees or other accessories present to substantiate its location. Although there was no evidence of exactly why the 1970 surveyor had accepted this particular stone, and no evidence that Helehan had showed it to that surveyor, the Court was clearly mindful of the fact that Helehan had ordered the 1970 survey for the specific purpose of proving that the old fence was too far east, so he had good reason and ample motivation to guide the attention of that surveyor to the particular stone in question, since it was west of the fence. Unbeknownst to Helehan or the 1970 surveyor however, Ueland's surveyor had surveyed the same section in 1949, and Ueland's surveyor testified that he had diligently searched the same area in question at that time, and the stone found in 1970 was not there. In 1949, after finding no original monument, Ueland's surveyor had accepted a section corner position that was shown on a 1929 highway plan, as the true section corner location, and this location was about 200 feet east of the Helehan stone and east of the original fence location as well. The two additional surveyors employed by Helehan in 1984 had merely adopted the same stone that had been accepted as marking the section corner in question by the 1970 surveyor, evidently without doing sufficient research to realize that it was highly suspect, so their work carried no additional force in the eyes of the Court, being nothing more than an inadequately researched reiteration of the 1970 retracement survey. Since the validity of the stone had been successfully called into question by the survey done for Ueland, and it could not be conclusively shown to be a genuine original monument, or a valid perpetuation of an original monument, and there was no physical evidence such as crop lines, fences or buildings supporting the stone's position, the Court had no difficulty agreeing with the trial judge that the stone was subject to rejection, which of course meant that all of Helehan's surveys were useless to him. Even if Helehan did not actually place the stone there himself, and even if he did not tell his surveyors that it was the corner, there was still no logical or reasonable basis for them to have accepted it and declared it to be the section corner, the Court decided, without verifying that it was properly marked and firmly set in place, in the manner of a typical original monument that had been in existence for approximately 100 years. In view of the definitive evidence, supplied by Ueland's surveyor, that the stone in question was of very dubious character, the Court upheld the decision of the lower court in Ueland's favor, finding the work and testimony of his one surveyor to be sufficient to render the work of Helehan's three surveyors essentially worthless, and approving the section

line location provided by Ueland's surveyor as conclusive. Once again, since no accusations of fraud or conspiracy were made by Ueland against any of Helehan's surveyors, no suggestion was made that any of them bore any liability for their mistaken conclusions, regarding either the stone itself or the section line location.

BOLLINGER v HOLLINGSWORTH (1987)

Less than one year after handing down its decision in the Helehan case, just previously reviewed, the Court was confronted with another boundary dispute centered entirely upon the validity of a certain monument, which again was intended to represent a section corner. The circumstances and the origin of the conflict in this case were quite different however, since the monument in question on this occasion, rather than being suspicious in nature, as was true in the Helehan case, came with a very strong pedigree, having been set by the BLM, yet it was destined to meet the same fate as Helehan's stone, at the hands of the Court. Contrary to popular belief, although survey work conducted by the BLM is performed under federal authority, and is therefore not subject to review by the Court, the Court is not obligated to treat all BLM survey work as perfect or flawless, since BLM surveyors are capable of making errors that can result in conflicts, just as are all other surveyors, so the Court can find BLM survey work to be erroneous. Neither the Court nor any other parties or bodies deriving their authority from the state level can compel the BLM to change its work or its position however, and this is the key difference between the authority of the Court over surveyors licensed under state authority, who are subject to the rulings of the Court, and BLM surveyors, who are not. BLM surveys are subject to full and potentially intense scrutiny however, initially through the review process that is executed within the BLM itself, and next by the Interior Board of Land Appeals, known as the IBLA, a panel of administrative law judges serving essentially as a court, that deals with issues arising within the United States Department of the Interior, in those instances when a final decision of the BLM is challenged. In the event that a case involving BLM survey work cannot be conclusively resolved through this process, the case then goes into the federal court system for final

adjudication, since only the federal courts have the authority to judicially rectify errors made under federal authority. Nevertheless, as in the case we are about to review, errors made by BLM can sometimes be first discovered and exposed during litigation at the state level, paving the way for possible subsequent litigation against the BLM in the federal courts. The Court's rejection of the BLM monument at issue here however, should not be construed as a sign of disrespect toward BLM survey work in general, in fact BLM surveys typically prove to be fully legally supportable and therefore typically prevail, once the BLM is given the opportunity to participate, by providing it's own evidence relating to the matter in controversy. A recent outstanding example, in addition to those we have already observed, of the Court's great respect for the work of both the GLO and the BLM, as the successor to the survey functions previously performed by the GLO, can be seen in the 2003 case of *Olson v Jude*, arguably the most important Montana boundary case of the past decade, which is replete with details of several surveys spanning practically the entire twentieth century. In that case, which involved errors in the original monumentation of a residential subdivision, which failed to conform to a certain quarter section line, the Court rejected the work of the original surveyor of the residential subdivision, declining to bestow the status of a true original survey upon his work, declaring instead that the GLO survey was in fact the only truly original survey ever done in the subject area, and therefore only the original GLO monumentation could be treated as being error free and beyond reproach, so the monumented residential subdivision boundary could not control.

1912 - Fosseum was the owner of the northeast quarter of a certain Section 10, which had been created by the GLO just 9 years earlier. Fosseum, who was presumably the original patentee of his quarter, built a fence along the west boundary of his property at this time. The northwest quarter of the section was owned by Manicke, who was also presumably the original patentee of his quarter, and who would eventually become the father-in-law of Bollinger. Manicke had no problem with the location of the fence built by Fosseum, and both parties treated it as their mutual boundary henceforward.

1930 to 1939 - At an unspecified time during this period, a highway

was built along a portion of the north line of Section 10, and the original quarter corner monument, provided that it was still in existence when the construction took place, was either buried or destroyed by the road construction crew, without being referenced, preserved or restored.

1940 to 1981 - At an unspecified time during this period, Bollinger married Manicke's daughter and the Bollingers eventually inherited the northwest quarter. Also during this period, Fosseum conveyed the northeast quarter to Shelley. How Shelley or the Bollingers used their lands is unknown, there is no indication that anything was ever built anywhere near the fence, all of the parties simply left the fence undisturbed throughout this period, and they all apparently limited their activities to their own respective sides of the fence. In 1964, for unknown reasons, the BLM set a brass cap monument at the northeast corner of Section 10. There is no indication that the federal government had any interest in any land in Section 10, presumably the monument was set during a survey of federal land that was located in one of the adjoining sections.

1982 - Bollinger rebuilt the 1912 fence in the same location and Hollingsworth acquired the northeast quarter from Shelley.

1984 - Hollingsworth informed Bollinger that he intended to remove the fence that Bollinger had recently rebuilt, and build another fence about 50 feet west of the existing fence. Bollinger had his attorney contact Hollingsworth, to obtain an explanation for this proposed action on Hollingsworth's part, but without providing any explanation Hollingsworth proceeded to remove Bollinger's fence and build his own fence about 50 feet further west.

1985 - Bollinger ordered a survey of Section 10, and his surveyor found the original GLO monument, a sandstone bearing the markings described in the GLO field notes, at the northeast corner of Section 10, which had evidently not been found during the 1964 BLM survey, and which was an unspecified distance east of the 1964 BLM monument. The location of the northwest corner of Section 10 was

evidently well known and undisputed, so rejecting the BLM monument, Bollinger's surveyor reset the missing north quarter corner at the midpoint of the north section line, using the original northeast corner monument that he had just recovered, to calculate the position for that quarter corner, which Bollinger had asked him to reset. Bollinger then built another fence along the quarter section line, as the location of that line was indicated on the survey that had just been done for him, which was only about 8 feet west of the original fence location, but was about 42 feet east of Hollingsworth's fence. Hollingsworth reacted to this by cutting down portions of Bollinger's new fence.

1986 - Bollinger filed an action against Hollingsworth, seeking to quiet title to the northwest quarter, as it was shown on his survey, and seeking damages for the destructive acts of Hollingsworth.

Bollinger argued that his surveyor had correctly restored the north quarter corner of Section 10, at the midpoint of the line formed by the original section corners on the north boundary of the section, therefore his new fence had been properly located, so Hollingsworth's destruction of it was unjustified, and Hollingsworth's fence represented an encroachment upon his land. Hollingsworth argued that the 1964 BLM monument was the true northeast corner of the section, and the north quarter corner was actually located midway between that monument and the northwest section corner, which was where he had built his fence, so his fence was located on the true quarter section line, and Bollinger's fences had both represented encroachments upon his quarter, so he had been fully justified in building his fence, and in destroying both the old fence and the new one built by Bollinger. The trial court determined that the monument found by Bollinger's surveyor, east of the BLM monument, was a genuine undisturbed original GLO section corner monument, and therefore controlled the section corner location over the BLM monument, so Bollinger's fence was on the true quarter section line and Bollinger was entitled to punitive damages from Hollingsworth.

Just as in the Helehan case, decided just the previous year, the Court was here once again confronted with a dispute that really centered entirely upon conflicting knowledge and opinions regarding one particular section corner. As is very often true in boundary disputes, the opposing parties in this scenario did not enter the legal battlefield as equals in terms of

knowledge, one party typically has an advantage based on some form of knowledge that the other party is lacking, and that was clearly true of this situation. In this instance, the advantage that the Bollingers had rested upon the fact that their family had occupied their quarter practically since the time it had come into existence, while Hollingsworth was a newcomer, evidently with no personal knowledge of the history of the use of the land in this particular section, who was apparently told little or nothing about the historic use of the land, by his grantor or anyone else, when he arrived on the scene. Bollinger's wife, by contrast, being the daughter of the original entryman, had lived on the land her entire life, so she knew very well that the old fence line was a long respected boundary, which had been established at a time when the original monumentation, including the north quarter corner, was all still in existence, and she therefore knew that the rebuilt fence was either on, or very close to, the true original boundary in question. While Hollingsworth had no idea of the potential meaning and significance of the old fence, the Bollingers had the key advantage of knowing that it had been legitimately established, and that its location could therefore be successfully defended. In fact, the Bollingers could have argued that the original fence itself represented the best evidence of the original location of the quarter line in question, and served as a physical pointer to the missing quarter corner, and they very likely would have prevailed on that basis, just as Laird had done in the 1972 Buckley case, but they chose another route that they evidently saw as being even more likely to successfully accomplish their objective of eliminating Hollingsworth's fence. Since their occupation and use of the land had been minimal, and presumably to avoid the potential consequences of the statutory tax payment requirement, the Bollingers elected to defend their long standing boundary on the basis of survey evidence, rather than on the basis of possession evidence, and this would prove to be a very astute decision on their part. In order to emerge victorious however, the Bollingers clearly realized that they would need a very sound survey, to conclusively prove that their family's long use of the strip in dispute had been legitimately based upon the original GLO survey, without all the trouble and expense that attempting to uncover the quarter corner monument under the roadway would entail. Hollingsworth, on the other hand, evidently felt very comfortable relying upon the 1964 BLM section corner monument, which he may have either found himself or been told about by some unknown party, and he must have been highly confident going into this conflict, knowing that BLM surveys typically prevail. Hollingsworth, although he evidently did consult a surveyor, was apparently so confident of victory that he saw no need to

obtain a complete survey of his own, to put up against the survey that had been done for the Bollingers, presumably because he believed that a BLM monument was sure to triumph over any competing monument. Bollinger's surveyor however, armed with genuine original evidence, was fully prepared to disprove the validity of the BLM monument, as the Court noted:

"The testimony of the Bollingers surveyor ... indicate that the resurvey followed in the footsteps of the original survey and was based upon location of the original corner monuments for Section 10. The Hollingsworths have argued that courses and distances based upon the BLM resurvey are more consistent with the original GLO notes than those of the Bollingers surveyor ... courses and distances must yield to natural or artificial monuments."

Much to the chagrin of Hollingsworth, the Court thereby informed him that even BLM surveys are not infallible, and they do not prevail automatically, just because the survey work involved was performed by the BLM. In fact, BLM resurveys can never control the location of any corners or lines of the PLSS that have passed completely into private ownership, simply by virtue of a survey subsequently performed by BLM, because BLM has authority only over public lands, and the process of patenting land into private ownership effectively terminates all opportunities for the federal government to unilaterally or arbitrarily control PLSS boundary locations by means of resurveys. Although Bollinger's surveyor had obviously not literally walked in the precise footsteps of the original GLO surveyor, he had earned the praise and approval of the Court, by following the spirit of that commandment, to the extent that his efforts had ultimately lead him to an original monument location that had evidently gone undiscovered by the BLM surveyor. Regarding measurement evidence, Hollingsworth was also destined to be disappointed, as here again the Court reiterated that the primary objective of any retracement survey is always to recover, protect, restore and document all original evidence, so it is never appropriate to set out to improve upon the quality of original measurements, or rectify past measurement errors, in derogation of physical evidence of an original survey. Having educated Hollingsworth, as to the fundamental errors in his thinking, concerning both monuments and measurements, the Court fully upheld the ruling of the lower court in favor of Bollinger, including the lower court's award of the punitive damages that had been requested by

Bollinger, characterizing the behavior of Hollingsworth as "malicious and oppressive". There are very few things that irk the Court as much as a private citizen taking the law into his own hands, as Hollingsworth had effectively done, by repeatedly destroying the Bollingers fences, even after being warned by their attorney, and by depriving the Bollingers of the use of a portion of their land, based solely upon his own personal erroneous notions regarding the legal principles and the types of evidence that truly control boundaries. Quite ironically, acceptance of the BLM monument fought for by Hollingsworth, would have resulted in less total land for both parties, while the original monument discovered by the Bollingers surveyor, not only conformed almost perfectly with the original occupation of the two quarters in question, being within 8 feet over half a mile, it also resulted in additional footage along the north line of Hollingsworth's quarter, showing that he was actually entitled to a larger amount of land than he had supposed. The measurement shortage that had caused Hollingsworth so much consternation did not really exist, the missing footage that had been of such concern to him simply lay at the east end of his quarter, rather than the west end, so the outstanding diligence of Bollinger's surveyor actually proved to be of potential benefit to both parties, providing Hollingsworth with the opportunity to assert a claim to additional land on the east side of his property, should he choose to do so. Interestingly, concerning the missing original north quarter corner, although the Court described that original monument as having been merely buried under the roadway, and therefore being potentially still discoverable, rather than being destroyed outright, the Court nevertheless expressly identified that corner as being lost, rather than merely obliterated, apparently concluding that an original corner under a paved roadway should be treated as lost, as a practical matter, rather than mandating that such corners must be recovered through costly excavation.

FILLER v MCDANIEL (1987)

Our next riparian case is one that includes both description issues and survey issues, and is reminiscent of the 1950 Strack case, once again demonstrating the unfortunate consequences that can occur when parties possessing only a poor understanding of GLO plats, and the fundamental description principles related to PLSS conveyances, attempt to describe and convey land without expert assistance. In reality, practically every deed contains implications of some kind, and one of the most basic principles

governing how the real meaning of a deed will be judicially determined is that implications arising from the absence of items that were not properly spelled out in the deed in question, although they could and should have been, will operate against the party who had control over the language that was either used in the document or left out of the document, which is typically the grantor. Several Montana cases that did not involve any survey or boundary issues are nonetheless noteworthy, since they express important concepts pertaining to conveyances, similar to the foregoing one, which controls the outcome here. In 1914 in *Gibson v Morris State Bank*, the Court took the position that even a warranty deed does not always represent an actual conveyance, if it can be shown that the deed was not intended to enact an actual transfer of land ownership, because the intent that was present at the moment of conveyance is the only truly controlling intent. In *Lindeman v Pinson* in 1918, applying the powerful principle that substance always controls over form, the Court held that a contract for deed, pledging that a "good and sufficient deed" will be provided, binds the grantor to provide a warranty deed or the equivalent thereof, and the grantee is not obligated to accept a mere quitclaim deed. In 1939 in *Aitken v Lane*, declaring that holding a mere quitclaim deed does not always prevent a subsequent grantee from being a purchaser in good faith, the Court ruled that the rights of the quitclaim deed holder were superior to those of a prior grantee, who had failed to record or otherwise provide any form of notice of the existence of his rights to the land at issue. In *Lodge v Thorpe* in 1947, the Court stated that a quitclaim deed can never carry any after-acquired title, even if it contains the word "grant", because a quitclaim by definition conveys only the interest in the land actually held by the grantor at the moment of conveyance. In 1991 in *Wild River Adventures v Board of Trustees of School District No. 8 of Flathead County*, the Court observed that the phrase "subject to" can only serve as a reference to an existing easement and cannot operate to create a new easement, in addition, no easement can be created in the absence of any indication of who is to benefit from the proposed easement, or in the absence of any indication of the alleged easement's purpose. While properly using and understanding PLSS descriptions, is the main focus of the case we are about to review, the involvement of the surveyor is worthy of consideration as well. While there is no definite

evidence that the surveyor did anything wrong or made any errors, his decision to define a separate accretion parcel, apparently at the request of his client, when in fact no such separate parcel legally existed, and his client was not even the actual owner of the land at the time, suggests that the surveyor may have been operating under a serious misunderstanding of the law, which could have become highly problematic, resulting in potential liability for the surveyor, had events played out differently.

1880 - The GLO subdivided a township through which the Yellowstone River runs. Flowing in a generally easterly direction, the northerly bank of the river intruded upon the southern portion of Section 11 in this township at this time, so five government lots were platted in the south half of the section, including Lot 1, containing 36.4 acres, which was located in the southeast corner of this section.

1881 to 1979 - During this period, the river gradually migrated in a southeasterly direction, so that the southeast corner of Section 11 was eventually no longer in the river, it was an unspecified distance north of the river. There is no indication of who owned the land along the north side of the river, in Section 11 or any of the adjoining sections, and no indication that any use was made of the area, at any time during this period, it was evidently a remote area that remained substantially vacant and was apparently seen as useless throughout this period. These lands were eventually patented into private ownership however, at some point during this time period.

1980 - Bell acquired the east half of the northeast quarter, the northeast quarter of the southeast quarter, and Lot 1, all in Section 11, described in just that manner, from an unspecified party or parties, and his description also expressly stated that it included any accreted land attached thereto. Bell also acquired other lands lying in the adjoining sections at this time, and his ownership of all the land in the area was never challenged, but there is no indication that he ever made any actual use of any of his land, or built any improvements anywhere on it.

1983 - Bell conveyed the same portion of Section 11 that he had

acquired 3 years earlier, to Filler, describing it however only as the east half of the east half of Section 11, and making no express statement in this conveyance regarding accretion.

1984 - Bell sold an unspecified amount of his land in Section 12, including the west half of the southwest quarter, to McDaniel, making the section line the boundary between Filler and McDaniel. Filler then built a fence, running for an unspecified distance, along what he believed to be the section line, and extending south to the river. How Filler reckoned where the section line was located is unknown, there is no indication that any recent surveys had been done in the area, or that any monuments were in existence anywhere in the area. McDaniel felt that Filler's fence was too far east, and also that it extended too far south, and was therefore on his land, so he tore it out. Where McDaniel got his notion concerning the section line location is also unknown. In an apparent attempt to quell this conflict and clarify the situation, Bell then ordered a survey, which indicated that about 16 acres of accretion had attached to the south side of Lot 1, as a result of the southward movement of the river over the previous several decades. Bell then conveyed this accretion parcel to McDaniel, effectively leaving Filler with no river frontage, and cutting him off from access to the river.

1985 - Filler dropped the issue concerning the section line location, and he did not attempt to rebuild the fence that had been destroyed by McDaniel, he was evidently upset about being deprived of all of his river frontage and his access to the river however, so he filed an action against both McDaniel and Bell, claiming that the accretion parcel had been conveyed to him in 1983, and that the deed from Bell, purporting to convey 16 acres lying west of the section line to McDaniel, therefore actually conveyed nothing.

Filler argued that the accretion parcel belonged to him, even though it was not expressly described as a distinct parcel in his deed, and even though it's existence had not been revealed until the survey was done in 1984, after he had acquired his land, because accretion, by definition, attaches legally as well as physically, to the land upon which it forms, so it had passed to him

in 1983, through his acquisition of Lot 1, and neither Bell nor McDaniel had any valid claim to any of it. Bell and McDaniel argued that Bell had intended to convey only the area shown as the east half of the east half of Section 11 on the GLO plat to Filler, and that the description in Bell's deed to Filler clearly stated this, indicating that Bell had not intended to convey any additional acreage not shown on the GLO plat to Filler, so Bell had remained the owner of the accretion parcel, until the time when he conveyed it to McDaniel. The trial court found that the accretion parcel was not embraced within Filler's description, so it had not been conveyed to him, quieting title to the 16 acre parcel in dispute in McDaniel.

In this case, the Court was once again required to adjudicate a controversy over rights of ownership relating to riparian lands, with specific emphasis on the consequences of the particular language that had been used to convey the land at issue, so the principal focus of the Court here was upon the conveyance language, rather than upon the existence of any survey monuments, or any physical use of the land in question. The survey that had been performed in 1984 was not contested by any of the parties, all of them were evidently satisfied that it was completely accurate, so there was no controversy over the location or the boundaries of the area in dispute, the conflict was purely a question of who had the superior title to the 16 acres along the river that had been defined and shown for the first time on the survey. The principle of accretion was also not a source of conflict, the Court noted, as all of the parties agreed that the river's migration to the south, away from Lot 1 in Section 11, had taken place slowly and steadily, over a period of about a century, and no one suggested that any form of avulsion was a potential factor. Likewise, navigability was not an issue here, since the only concern of the parties was the ownership of the dry land lying north of the river, and the principle of accretion was clearly applicable to that area, regardless of whether or not the bed of the river was owned by Montana, therefore there was no need for the Court to make any ruling on the navigability status of the river at this location. It is also notable that although Filler evidently felt that he had been cheated, he made no accusation of fraud against Bell, so the actions of Bell were all presumed to have been taken in good faith, making the only question whether or not the language used by Bell, as a grantor, had the legal effect of accomplishing what he had truly intended. Bell, for his part, made no suggestion that the language used in any of the deeds was anything less than completely clear, and the effect of this position taken by Bell was to prevent his own testimony, regarding his true intentions, from having any effect on the

outcome, because the subsequently spoken words of a grantor cannot contradict the language that he previously chose to use in a deed, so the focus of the Court was thereby narrowed to a decision solely upon the legal effect of the existing deed language. Bell really had no alternative on this matter, because even if he had tried to claim that his deed to Filler was unclear, the Court would not have allowed him, as the grantor responsible for the language selected, to benefit from his own lack of clarity in composing the deed to Filler, so his testimony regarding his intent to retain the 16 acres would still have been of no avail to him. Bell testified that until he learned otherwise, after the 1984 survey was done, he had been under the impression that all accretion was owned by the BLM, so he could not possibly have intended to convey any land to Filler that he did not know he owned. Since ignorance of the law is not a valid excuse for foolish actions, conduct or behavior however, this erroneous belief on Bell's part, even if completely truthful, could also serve him in no beneficial manner, in the view of the Court. The Court very succinctly summed up the controlling legal principle, citing the 1937 Smith case and the 1979 Jackson case, both previously reviewed herein, as prior applications of the same concept, in declaring that the decision of the lower court must be reversed as erroneous, and quieting Filler's title to the 16 acre parcel, stating that:

“The conveyance from Mr. Bell to the Fillers did not except or reserve any accreted land. Therefore, title to any land which has accreted to that purchased by the Fillers passes to the Fillers. The subsequent sale from the Bells to the McDaniels is void.”

At the core of the decisive principle applied here by the Court, lies the fact that every grantor is always fundamentally burdened, as we have seen in several previous cases, with knowing what he owns, and with describing it to his grantee in his conveyance with clarity, certainty and completeness, provided that the grantor or any agent acting on his behalf, typically a surveyor or attorney, was responsible for creating or choosing the descriptive language that was used. In this case, the relevant descriptions all consisted of typical PLSS language, making reference to aliquot parts and government lots, as surveyed and platted, and whenever such PLSS language is used, all of the rules applicable to PLSS descriptions are potentially in play, which in this instance included three important concepts. First, the fact that the plat made the river a boundary monument which controls over acreage, secondly the fact that accretion is always presumed to have occurred and to be of benefit to any riparian government lots that were

platted, and lastly the fact that since accretion is appurtenant to the land to which it becomes physically attached, it passes automatically to any grantee of a riparian lot, even without ever being mentioned at all in any deed, because it is not a separate parcel, it is part of the riparian land itself. So under these principles, Bell was legally expected to know that he had acquired and owned any and all accretion to Lot 1 in Section 11, regardless of whether or not the exact location or quantity of that accretion had ever been surveyed and illustrated, at the time he conveyed the area to which the accretion had attached to Filler. Because Bell had failed to inform Filler, his innocent grantee, in his deed to Filler, that he intended to convey no accretion, Bell had lost the opportunity to claim that he had intended to retain ownership of the accretion, regardless of the possibility that he did not know that it existed at that time, or the possibility that he mistakenly thought he did not own it. The fact that Bell had removed the direct reference to Lot 1, that appeared in his own deed, from his deed to Filler, also had no impact on Filler's rights, the Court determined, because Lot 1 was clearly embraced within the area described in Filler's deed, and the absence of any explicit reference to Lot 1 in that deed amounted only to a technicality, which could not overcome the force of the larger applicable principles, to Filler's benefit as an innocent grantee. Bell may very well have innocently failed to understand the important concept dictating that he was required, as a grantor, to clearly reserve any land he wished to retain. Since his own deed clearly stated that accretion was included with the lands conveyed to him, he presumably thought that merely removing that reference to accretion from his deed to Filler would be legally sufficient to retain any accretion that might exist unto himself. What he failed to realize, was that the reference to accretion in his own deed was meaningless, and had no legal effect at all, because under the law any accretion had been conveyed to him in 1980, regardless of whether his deed made any mention of it or not, so merely removing that reference from his deed to Filler, as he had done, likewise had no legal effect at all. Failing to describe lots as lots does not operate to detach accretion, accretion is a physical process that cannot be subverted merely by the use of description language that is subtle or nuanced, an accretion parcel must be clearly and explicitly severed, if such is the true intention of its owner.

Because the litigants had all adopted the survey as a true and complete definition of the area in controversy, and had not raised any issue about the division of the accretion between Sections 11 & 12, the Court was not required to address this potential issue, and simply decreed that the 16 acres

belonged to Filler, just as it was shown on the survey. Whether the survey extended the line between Sections 11 & 12 south to the river, or ran an angled boundary line from a point on the section line across the accreted area at right angles or radially to the river, is unknown, but this could easily have become an additional source of conflict, had the parties seen fit to argue about it. Since Filler was evidently satisfied with obtaining access to the river, by virtue of his legal triumph here, he was apparently unconcerned about exactly how much river frontage he had been awarded, so the issue of accretion division was left unaddressed by the Court. In addition, the Court made no reference to the possibility that all or most of the accretion at issue had taken place before the land in question was ever patented, while it was still part of the public domain, in which event the United States could have elected to assert a claim to it, as omitted land, such as had been found to exist in the Bode case of 1921. Since there was apparently no evidence clearly indicating that the accretion in question had taken place prior to the patenting of the lands to which it had attached however, the Court simply discarded the possibility that the United States might still own the accretion parcel, and none of the parties might be legally entitled to it. As to McDaniel, being a subsequent grantee of a grantor who had made a prior conveyance, he could make no claim to the area in question independent of Bell's rights, so the conclusion that Bell had no rights to the 16 acres, at the time he tried to convey it to McDaniel, eliminated the value of any further input from McDaniel. Because Filler had very prudently avoided escalating the conflict, by refraining from rebuilding his destroyed fence, and had instead wisely responded promptly to the cloud upon his title, created by the bogus conveyance of the accretion parcel to McDaniel, before McDaniel had any opportunity to occupy or improve the 16 acres, potentially giving him an equitable claim to it based on physical use, Filler had effectively prevented McDaniel from establishing any rights of his own, as an innocent grantee, independent of the rights of his grantor. Of course, if Bell gave McDaniel a warranty deed, McDaniel could have recovered his full loss from Bell, due to Bell's inability to convey the 16 acres, putting Bell in breach of warranty and making him the real loser here, but if McDaniel accepted a quitclaim deed from Bell, then he was stuck with the entire loss himself, and left with no land in Section 11. Once again, completely unnecessary problems between grantees had developed from mistakes made by their mutual grantor, that resulted in errors stemming from their grantor's lack of knowledge of basic law relating to the PLSS, riparian lands, and conveyancing in general, and the whole scenario had been created by an accident of timing over 100 years before. Had the original survey been

conducted later, the river may no longer have touched the southeast quarter of Section 11, in which event no riparian Lot 1 would ever have been created.

GOODOVER v LINDEY'S (1988)

At this point we arrive at the most extensively argued boundary dispute in Montana history, which we will follow as it transitions into not just one, but two, surveyor liability cases. The boundary conflict that sparks this massive conflagration is actually a relatively simplistic one, very obviously resulting from the unfortunate, but quite common, combination of poor platting and poor monumentation, which has caused many similar problems in countless other locations around Montana, like every other state, eventually leading to the adoption of modern standards for the division of land. In this particular scenario however, the seemingly minor boundary issue becomes blown up into a test of wills, as is often the case when headstrong individuals who both refuse to back down confront each other, leading to a case that returns repeatedly to the Court, expanding to include an extremely broad range of issues, touching upon most of the topics covered herein, and ultimately standing as a testament to the obstinance of one land owner, who was simply unable to accept defeat. Once the frustrated land owner is initially vanquished on the basic boundary issue, things get interesting, as he sets out for legal revenge, not just against the victorious land owner, but also against both his own surveyor and his opponent's surveyor. After being defeated again, on his liability charge against the surveyor who had prepared the survey that he had relied upon, and on an encroachment issue that had also resulted from the disagreement over the location of the boundary in question, this land owner finally experiences his only taste of success, as the Court holds that his actions, which included ordering and recording a survey that was in direct conflict with the initial ruling of the Court, did not amount to contempt, saving him from incarceration. Still unrepentant however, the land owner then hatches a devious scheme to take down the surveyor whose work had carried the land owner's opponent to victory at the outset, on the boundary controversy, only to meet with abject failure once again, after investing a great deal of time

and money in additional surveys, which the Court properly declined to even review. Finally, having met with utter failure in all of his marginally rational attempts to prevail, the desperate land owner becomes so irrational as to order yet another survey, this time of a different area which he apparently believes that he can successfully claim by means of adverse possession, just by virtue of having it surveyed, without ever having made any actual use of that area at all, sadly demonstrating the kind of foolishness that can be perpetrated by those bent on vengeance at any cost. Woven into this epic saga are several important lessons, further illuminating the Court's perspective on such major issues as dealing with defective platting, reconciling conflicting monumentation, what amounts to legitimate boundary testimony, effective preparation of survey evidence for litigation and combating charges of negligence, along with related legal principles and judicial rules relevant to surveys and surveyors, making this long story of a bitter and arduous battle quite a memorable one.

1944 - The original plat of Seeley Lake Shores Sites was recorded, showing a subdivision lying along the southeasterly side of the lake. The plat depicted an unspecified number of lots fronting on the lake, all having 100 feet of lake frontage, except Lot 1, which had 125 feet of lake frontage. The lots were not numbered consecutively for some reason, Lots 2 & 4 were southwest of Lot 1, while Lots 3 & 5 were northeast of Lot 1, along the lakefront. Who designed or created this subdivision, and whether or not the lot corners were monumented in any manner at this time, are unknown.

1965 - Goodover acquired Lot 2, which had evidently been occupied and used as a typical residential lot, by at least 3 prior owners, for an unspecified number of years by this time. The northerly corner of this lot, on the side of the lot lying along the lake, was marked by a boat spike of unknown origin, which had been accepted by all of the prior lot owners as a valid lot corner monument. Various wooden stakes had served to indicate the position of this monument over the previous years, and Goodover's grantor had placed a barrel on top of it, as a more permanent means of making its location apparent. Goodover was also shown by his grantor that a line of blazed trees marked the

northeasterly boundary of his lot, and he saw that this line of trees pointed roughly toward the barrel. Shortly after acquiring his lot, without obtaining a survey, Goodover built a boathouse, approximately 5 feet from the barrel that he had been told marked his lot line. Uncertainty over the exact location of this lot line would go on to become the source of all of the subsequent controversy.

1970 - Lot 5, directly northeast of Lot 3, was surveyed and monuments were set at all of the corners of that lot. Who owned this lot, and how the lot corners were located during this survey, are unknown.

1978 - Lindemer, the owner of Lindey's Restaurants, acquired Lots 1 & 3, which were two adjoining lots that were both owned by Forrest, lying directly southwest of Lot 5 and directly northeast of Lot 2. How these lots had been used prior to this time is unknown, but Lindemer apparently intended to construct a restaurant on the lots. As part of this transaction, Forrest agreed in writing that he would have these two lots surveyed and their corners marked, to facilitate Lindemer's planned construction project, but for unknown reasons the construction was evidently delayed.

1982 - Goodover had his lot surveyed, by the same surveyor who had performed the survey of Lot 5 in 1970. Goodover's surveyor did not find the boat spike that had been present in 1965, possibly due to the presence of the barrel, but he discovered an iron monument of unknown origin, consisting of a pipe with a rod inside it, which he identified as marking the same lot corner, the lakefront corner between Lots 1 & 2. This monument was found approximately 5 feet from the boathouse, and therefore indicated that the boathouse had been properly built on Lot 2 and was not encroaching on Lot 1. However, while this monument provided 99.33 feet of lake frontage for Lot 2, it provided only about 120 feet of lake frontage for Lot 1, less than the full platted width of Lot 1.

1984 - Forrest ordered a Certificate of Survey for Lots 1 & 3, pursuant to his promise to Lindemer 6 years before. All of the corners of Lots 1

& 3 were found and accepted during this survey, with the exception of the lakefront corner of Lots 1 & 2 near Goodover's boathouse. A rebar with an aluminum cap was set to mark this corner, very close to the side of the boathouse, which indicated that the lot line, when extended to the actual lakeshore, passed through the boathouse, so the boathouse was cited as an encroachment onto Lot 1. The iron monument found by Goodover's surveyor in 1982 was not found by Forrest's surveyor, although it was still in place, and the frontage of Lot 2 was shown on this survey as being only about 95 feet, as opposed to its platted width of 100 feet, while Lot 1 was given its full 125 foot platted width. Lindemer did not demand that the boathouse be moved, but he had a fence built, running for an unspecified distance along the lot line to the monument next to the boathouse, and he began development of his lots based on the lot line shown on the Certificate of Survey, which included the construction of an outhouse and underground tanks, that were located at, or very near, the lot line in controversy. Goodover filed an action against the corporation owned by Lindemer, and against the estate of Forrest, who had died, seeking to have the survey that had been done for Lindemer's use struck down, since that would enable Goodover to insist upon the removal of Lindemer's fence, and serve to clarify that Goodover's boathouse was not encroaching on Lindemer's Lot 1.

Goodover argued that the lot line between Lots 1 & 2 was incorrectly shown on the Certificate of Survey that had been done for Lindemer, and that Goodover had always known the true lot line location, which had been shown to him by his grantor and by other prior owners of his lot at the time he acquired the lot in 1965, and that the line in question had been properly verified by Goodover's surveyor, so the boathouse was not encroaching on Lot 1, and Lindemer's new fence was actually on Lot 2. Lindemer argued that the iron monument discovered by Goodover's surveyor was not a valid or controlling boundary monument, because it could not be proven to be a genuine original monument, and in fact no one even claimed that it was an original monument, therefore it should be given no controlling force. He further argued that Goodover's surveyor had not performed a complete or proper survey, so his work did not represent sufficient evidence to overcome the lot dimensions stated on the subdivision plat, and the testimony of

Goodover and others concerning the lot line was irrelevant, therefore the survey performed for Lindemer should be allowed to stand as controlling, since it provided him with the full platted lake frontage to which he was entitled. The trial court found that the evidence showed that the iron monument discovered by Goodover's surveyor was within a foot of the location where the barrel had been in 1965, and it lined up reasonably well with the blazed tree line, therefore that iron monument marked the true lot corner location, and controlled over the monument that had been set in 1984 for Lindemer, leaving Lindemer with less than the 125 feet of lake frontage that he had expected to get, based on the subdivision plat. The trial court also instructed the surveyor who had prepared the Certificate of Survey that had been used by Lindemer to amend it, by adopting the iron monument in question as the true lakefront corner of Lots 1 & 2, and the surveyor did so.

From the existing conditions and the various events that comprised the evidence in this case, it was clear to the Court that deficiencies in the original platting and monumentation of the lots at issue formed the real foundation for the current controversy, and since the platted lot frontage was simply not present, somebody was going to wind up with an amount of lake frontage that was materially less than that which was shown on the plat. As we have seen, the Court typically resolves such platting and measurement errors by applying the principle that original monuments make such discrepancies moot and irrelevant, but here no original monuments were in evidence, and there was no clear indication that any had ever existed, so the Court was compelled to once again extend the principle of monument control to non-original monuments, as it had done in the Stephens case, 11 years earlier. Since the two surveys each called the validity of the other into question, and neither of them were in agreement with the platted lot dimensions, neither of them bore any presumption of correctness, so the outcome, the Court indicated, would be governed by which of the alleged lot corner monuments was most in accord with the lot line location that had been historically relied upon as the originally intended boundary. Emphasizing that the disagreement between the litigants was limited to one particular lot corner, the Court proceeded to treat the matter solely as a conflict between two specific views regarding the true location of that one corner, and not as a contest over the validity of any other corners beyond the one being adjudicated, since that could involve assessing the measured and recorded dimensions of the many other lots shown on the plat in question, a process upon which the Court clearly believed that it would be unwise to embark, describing the plat as "filled with errors". Importantly for future

purposes, although not crucial to the outcome of this case, the Court took the position that the information that had been communicated to Goodover about the exact location of the lot corner in question was unreliable hearsay, that should not have been accepted as valid boundary evidence. While confirming that boundary location testimony is generally acceptable, and that it had proven to be quite important, and even decisive in previous cases, such as the 1928 Kurth case and the 1934 Nemitz case, which we have reviewed, the Court held that the statements made by prior property owners to Goodover in 1965 were not relevant boundary evidence, because they represented merely personal opinions of individuals. In order for hearsay evidence to control boundaries, the Court decided, the hearsay must represent a view regarding the boundary location in question that is widely held by numerous members of the community in which the land at issue is situated, rather than the opinion of only those few individuals whose land is bounded by the corner or line in question. Addressing the overall validity of the hearsay exception, and its specific applicability to cases involving land ownership and boundary issues, the Court explained that:

“... the exception ... allows hearsay because it provides a rebuttable presumption that a person is the owner of property from common reputation of ownership ... the testimony must report a general consensus of opinion and not just an assertion of an individual's personal observation ... Goodover presented statements of personal observation ... The reason for this rule is not only caused by the perishable nature of boundary markers, but also because general reputation about facts of community interest are generally trustworthy ... discussion by the community sifts out the possible errors and gives ... trustworthiness which allows these facts to be presented as evidence in a court of law.”

This view taken here by the Court has the effect of allowing hearsay boundary evidence only when it extends to a general consensus regarding the ownership and location of the property in question, among a substantial percentage of the members of a given community. Of course, this does not mean that a grantee cannot rely on what he is told by his grantor, the grantor remains responsible, and potentially liable, for the potential ill effects of any misinformation he provides to his grantee, with respect to boundary locations. In this case, after announcing its position on hearsay boundary

evidence, the Court decided that the improper presence of the hearsay evidence concerning the lot line location in this situation was insignificant, since plenty of other solid physical evidence, such as the blazed trees marking the lot line, accomplished the same purpose of defining the lot line location, with greater strength than the invalid hearsay. So even without the benefit of the testimony that had been provided by Goodover's predecessors on his behalf, regarding their opinions as to the lot line location, Goodover was able to prevail, based on the fact that the existing physical evidence, although scant and not clearly original, all tended to support the monument that had been found and accepted by his surveyor in 1982. The monument set by the subsequent surveyor in 1984, on the other hand, was not in harmony with any physical evidence, and represented only an attempt to obtain the maximum possible amount of lake frontage for Lot 1, by arbitrarily employing the platted frontage dimension for that lot only. Observing that the methodology through which the aluminum capped monument had been set was fundamentally measurement based, rather than being based on any of the available physical evidence, the Court upheld the ruling of the lower court that the Certificate of Survey was in error, so it could not control the lot corner location, and it was subject to correction, as the lower court had directed. Unlike most parties who are vanquished or chastened by the Court however, Lindemer was not content to simply accept defeat, and he evidently had both the resources and the inclination to carry on with further litigation, so the story of this grueling legal struggle was only beginning to unfold. Although Lindemer allowed his fence to be removed, he remained convinced that justice had not been done, and that he had been cheated, because he had not gotten his full 125 feet of lake frontage, so he became determined to uncover evidence that would compel the Court to reverse its approval of the monument that had been successfully defended by Goodover. Since the Certificate of Survey that had been done at his request was no longer of any value to him, at this point Lindemer resolved to prove that in fact all of the accepted monuments in the whole subdivision were wrong. He attempted to keep the boundary issue legally active and alive, by claiming that he could present additional evidence, which would prove that original subdivision monuments still existed, and thereby discredit the work of Goodover's surveyor, but the Court declined to address Lindemer's allegation that the original monuments had all been buried under a layer of fill material, warning him that the matter had been conclusively put to rest.

While Lindemer was engaged in his effort to find original survey

evidence within the subdivision in question, in order to obtain revenge against both Goodover and Goodover's surveyor, he also elected to launch a separate legal attack upon the firm and the surveyor who had prepared the Certificate of Survey that had been deemed erroneous by the Court, to try to recover some of his losses, resulting from his unsuccessful legal tilt with Goodover. This second case stemming from the same original controversy came to be known as Goodover II, although Goodover himself was not actually involved in it at all. There was no question, in view of the outcome of Goodover I, that the Certificate of Survey had been incorrect, the only question was whether or not Lindemer had the right to rely on the survey, as he had done. The core issue in Goodover II was Lindemer's accusation of professional negligence in the performance of the survey that had been ordered by Forrest, in order to fulfill his promise to provide a survey of the property that he had conveyed to Lindemer. Lindemer filed this legal action, as a result of the failure of the Certificate of Survey to fulfill his expectation that it would be able to withstand legal scrutiny, following the determination by the Court in Goodover I that the survey was inaccurate and did not control the boundaries of Lindemer's lot, seeking damage compensation from all of the parties responsible for the survey, including the estate of Forrest, as well as the surveyor and the firm that employed him. Lindemer evidently struggled however, to find anyone willing to testify as an expert witness on his behalf, in support of his professional negligence claim against Forrest's surveyor and his employer, and he was ultimately unable to prove that the error or errors made during the survey amounted to genuine negligence. The trial court therefore rejected all of the charges brought by Lindemer and entered summary judgment against him, which he chose to appeal, so the case of *Lindemer v Professional Consultants, aka Goodover II*, returned this boundary dispute to the Court in 1990, this time in the context of a professional liability claim. Since not all professional errors amount to negligence, the burden was on Lindemer to prove that the Certificate of Survey in question represented not only poor judgment on the part of the surveyor and his firm, but genuinely unprofessional performance, and since he presented no evidence sufficient to prove that the survey work was truly unprofessional, this portion of his claim was dead on arrival. Since the survey had actually been done for Forrest, and then handed over by Forrest to him, Lindemer also charged Forrest with breach of warranty, hoping to recover damages from Forrest's estate, but the Court upheld the judgment of the lower court, finding that Forrest had only agreed to provide a survey of the property in question, and had never guaranteed Lindemer that the survey would be entirely accurate or completely reliable. Under the circumstances,

there was of course no way that the surveyor, or his firm, or Forrest, or anyone else could have guaranteed Lindemer any specific amount of lake frontage, even if they had desired or intended to do so, they had done all they could possibly do to provide him with the maximum possible frontage. Lindemer was thus completely unsuccessful in his quest for damage compensation, and was left with the realization that he had mistakenly relied upon the survey, and he was therefore stuck with all of the expenses he had incurred. Rather than learning his lesson and conceding defeat however, he seems to have become only increasingly determined to fight on.

Although Lindemer had removed the fence that had been built on Goodover's lot, based on the lot line shown on the erroneous Certificate of Survey, he had not removed the outhouse and underground tanks, and Goodover decided to insist upon their removal as well, so this aspect of the conflict became the focus of Goodover III. As a result of this third action, Lindemer was compelled to obtain another survey, showing the underground tank locations, in order to prove that they were not encroaching on Goodover's lot. The survey showed that the tanks were in fact located entirely on Lindemer's side of the lot line that had been decreed to be conclusively correct and binding by the Court, but they were within 3 feet of the lot line, which represented a setback violation, so to make Lindemer sorry for forcing him to defend his lot, Goodover decided to insist that the tanks be relocated. Lindemer grudgingly moved the outhouse, which had been straddling the lot, but left the concrete foundation where it was, and took no steps at all toward relocating the tanks. The trial court ruled that the tanks did indeed represent a violation and must be removed, penalizing Lindemer for his apparently deliberate procrastination by fining him for every passing week that he failed to properly address the situation. Lindemer again chose to appeal the ruling against him, so Goodover III placed the matter before the Court for the third time in 1992. At this point, the Court learned from the evidence that was presented at this time that after being vanquished in 1988, Lindemer had employed another surveyor, for the purpose of proving that at least some original monuments still existed in the subdivision in question, buried under an unspecified amount of fill material that had apparently been widely applied to the lakefront lots, presumably in the 40s or 50s. Lindemer's surveyor had apparently found some unspecified objects that he believed could well have been original monuments, and this discovery evidently gave Lindemer renewed motivation to press on with the battle, more convinced than ever that he could persuade the Court to reverse itself, if he were given the opportunity. Lindemer however, had come up

against the judicial principle known as *res judicata*, which equates to that which has been judicially decided, or judicially put to rest. Under this powerful principle, intended to prevent litigants from filibustering or wasting exceedingly valuable judicial time by revisiting matters that had previously been fully dealt with, thereby preventing justice from moving forward, all issues once fairly argued and decided are conclusively put in repose, and become law, with respect to the subject matter and the litigants involved. Unimpressed with Lindemer's efforts to introduce fresh evidence pertaining to a dead issue, and growing indignant about his persistent obstinance, the Court refused to consider the boundary issues that he attempted to raise, and upheld the substantial damages put in place by the lower court against him, warning Lindemer for the third time that the boundary dispute was no longer an active matter in any sense:

“Lindey's raises a myriad of issues in an attempt to relitigate the boundary line question. We refuse to examine these arguments however, because the boundary line issue was reviewed and finally decided during the first appeal to this Court. The District Court's determination of the boundary line is thus *res judicata* and cannot be reconsidered on this appeal ... This argument has no more merit now than it did when Lindey's raised it in Goodover II. All issues relating to the boundary and the encroachments are *res judicata*.”

While the second and third cases were playing out as described above, Lindemer continued his personal crusade to reform the existing boundaries within the subdivision in question. Apparently beginning in 1989 or 1990, his surveyor discovered what may have been original monuments at or near a number of unspecified lot corners, and at some point in time, evidently during 1991 or 1992, a Certificate of Survey was filed by this surveyor, covering an unspecified number of lots and showing the allegedly original monuments that had been found. The boundaries shown on this survey were evidently in material disagreement, by varying amounts, with numerous existing non-original lot corner monuments that had been long accepted by property owners and various surveyors, presumably including both Goodover's surveyor and Forrest's surveyor, so this survey stood in flat contradiction to the lot line that had been established through the boundary resolution process that had been approved by the Court in Goodover I. The recording of this survey evidently represented Lindemer's effort to

reconfigure the boundaries in the area, for the purpose of proving that Goodover and his surveyor had been wrong about the true location of the boundaries of Goodover's lot, and thereby also proving that the Court had been wrong to give it's approval to the work of Goodover's surveyor. By having this separate and independent survey, which was unrelated to the survey that had been done by Forrest's surveyor, completed, Lindemer apparently hoped to force the Court to reconsider and reverse it's original boundary resolution decision. Goodover reacted to the recording of this additional survey, along with Lindemer's delays in dealing with the encroachment issues debated in Goodover III, by charging Lindemer with contempt, and the trial court agreed, in this case known as Goodover IV, fining Lindemer again and ordering him to be imprisoned for 5 days. Lindemer of course employed his option to appeal once again, so Goodover IV came to the Court in 1993 in the form of a request by Lindemer for the Court to issue a writ vacating the contempt order against him, so he would not have to go to jail. Although the Court obviously did not approve of what Lindemer was trying to do, and saw his efforts as an attempt to create boundary chaos in the area in question, potentially disrupting the lives of several completely innocent property owners, merely to gratify his own plainly vindictive attitude toward Goodover, the Court nevertheless agreed with Lindemer that the recording of the survey did not constitute contempt of court on his part. Indicating that contempt is shown only by the performance of an explicitly prohibited act, or by the failure to perform an explicitly ordered act, the Court held that Lindemer was not in contempt, because he had never been expressly ordered not to obtain another survey, and he was therefore within his rights in doing so. Since a mere survey alone, executed without authority, has no impact upon land rights, and recording it does nothing to increase it's force or effect, in the absence of any documents making reference to it, the recording of the survey was seen by the Court as a harmless though useless act, because it amounted to a legal nullity from a conveyance standpoint, so the contempt ruling against Lindemer was reversed by the Court. Lindemer however, seems to have mistakenly viewed the Court's apparent support for his effort as a turning of the tide in his favor, which only encouraged him to press on with his quest to legally resurrect the core boundary controversy.

Apparently convinced that his investigative efforts were finally about to bear fruit, Lindemer launched the assault which he must have hoped would at last bring his ordeal to a climax that would be favorable to him in 1993, and he chose to frame it in the form of an attack on Goodover's

surveyor. In 1990, Lindemer had attempted to hire Goodover's surveyor himself, offering to pay that surveyor to perform another survey of Lindemer's lots, in accord with Lindemer's opinion of the lot line location in question, knowing that if he could persuade Goodover's surveyor to do that, Lindemer would then be able to destroy the professional credibility of Goodover's surveyor, which Lindemer hoped would then lead the Court to finally reject that surveyor's earlier work for Goodover. Wisely, Goodover's surveyor, knowing that his work bore the Court's stamp of approval, had steadfastly stood behind his work, wholly rejecting Lindemer's accusations, rather than showing uncertainty and weakness by changing his position, which had been the critical mistake made by the surveyor in the Vaught case of 1945, that had cost him the respect of all the parties involved in that case, particularly since his second opinion had proven to be even less credible than his first opinion. Since Goodover's surveyor had refused to cooperate with Lindemer however, Lindemer had resolved to beat him in court, by obtaining a more comprehensive survey of the area, which would prove all of the work of all the previous surveyors in that area to have been bogus, or so Lindemer supposed. This had resulted in the discovery of several allegedly original monuments, evidently buried under an unspecified amount of fill, covering an unspecified area within the subdivision, by the surveyor who Lindemer ultimately hired, after being rejected by Goodover's surveyor. Upon completion of this survey, Lindemer took it to Goodover's surveyor, suggesting that he had better change his previous work, in the light of this newly discovered evidence, but again Goodover's surveyor, stalwart even under serious direct pressure, declined to comply, leading Goodover to file this fifth action, which would come to be known as Goodover V, in which Lindemer named both Goodover and his surveyor as defendants. Lindemer charged Goodover's surveyor with two counts of professional negligence, first for failing to locate the alleged original monuments, second for stubbornly refusing to change his work to match that of Lindemer's surveyor, but the trial court again ruled against Lindemer, forcing him to again place his issues before the Court. The Court took up the controversy yet again, in 1994, in response to his appeal, but not surprisingly, rather than appreciating his diligence, quite the contrary, the Court was not at all inclined to be sympathetic to Lindemer's position. Yet again, the Court was compelled to remind him that he was senselessly pounding on the door of a vacant building:

“The boundary line in question has been determined ... no matter what name Lindey's chooses to give the present action,

what it seeks ... is another chance to have the disputed boundary line reviewed ... any re-evaluation of that boundary line was prohibited ... Lindey's had a chance to fully and fairly litigate the issue of this boundary line ... Lindey's presents what superficially appears to be legitimate reasons for a change in the previous boundary ... error (by the surveyor) however ... has never been legally proven ... (the surveyor) had no legal duty to Lindey's ... for negligence, Lindey's has to show duty, breach of duty, causation, and injury ... Lindey's unsubstantiated argument here is that a surveyor ... has an ongoing duty to change a survey if it is in error ... error is not a legally determined fact ... the legal duty (of the surveyor) was to complete the survey using the best evidence available ... Lindey's has failed to sustain its burden ..."

Harkening back to the 1909 case of *Hamilton v Monidah Trust*, in which it will be recalled, a very similar attempt to resurrect long buried and unused original monuments was made, without success, it can be seen that although the Court is very welcoming toward genuine original monuments, it can also be highly skeptical of alleged original monuments, so even if the monumentation issue had been open to relitigation, Lindemer would not have been sure to prevail. The Court however, saw no need or reason to revisit the original monumentation issue, and thus again declined to give Lindemer the opportunity he was seeking, explaining that new evidence is not equivalent to a new case, if the parties and the subject matter are the same, the matter remains closed. Lindemer's introduction of another surveyor and another survey did not change either the parties or the subject matter at the core of the original issue, so the boundary contest, the Court maintained, was sealed in history, because a vanquished litigant can never again launch the same attack, simply using a new basis, that he later finds to be more suitable than the one he originally chose to use. Lindemer had blown his one opportunity to prove where the original lot boundaries really were, by foolishly relying upon the work of Forrest's surveyor, who had produced an unreliable survey, and who owed no direct professional duty to Lindemer, having been engaged by Forrest. Lindemer's chance to prove that any error existed in Goodover's survey had passed, and having successfully run the gauntlet of litigation once, Goodover's lot corner monument had become golden, regardless of any subsequent evidence casting any form of

doubt upon it. This principle of judicial finality is particularly relevant to land surveys, since further evidence of some kind can practically always be discovered, potentially seriously disrupting the lives of innocent people, were monuments that had never been relied upon by anyone, having never even been seen by anyone, allowed to suddenly set well established boundaries asunder. The Court consistently takes the position that finality is absolutely essential to society, following the principle that stability is more important than perfection, with respect to both surveys and boundaries, although this idea may be antithetical to some surveyors, being of a more scientific mindset, in contrast with the mindset of the Court, which is oriented primarily toward justice and equity. With regard to Lindemer's charges of surveyor negligence, the Court fully upheld the decision of the lower court that such charges were utterly without merit. Goodover's surveyor owed no professional duty to Lindemer, the Court observed, so even if his work was bogus, he had no obligation to change it, and he could certainly not be expected to change it once it had been approved by the Court. Goodover's case could have been demolished at the outset, and Lindemer could have prevailed, if Lindemer had properly based his original argument on reliable original monuments, and proven their validity as such at that time, rather than simply relying upon a conveniently calculated corner location, as he had done. Since it was now too late to discuss the monumentation issue any further however, the Court concluded that Goodover's surveyor was correct to refuse to change his survey and was not negligent for so refusing, declining to adopt the assertion by Lindemer that a surveyor's duty is never ending, and that his surveys are all subject to perpetual revisions, again in observance of the need for finality and stability. Ultimately, Lindemer had learned the hard way that he had no right to rely on either of the surveys that had been in play in Goodover I, and he had shot himself in the foot by foolishly allowing Forrest to arrange the survey, reducing his own role, with respect to all of the survey work, to that of a mere bystander. At last, at the conclusion of Goodover V, Lindemer became convinced that there was no way that he could prevail, at this point in time, based upon any kind of survey evidence, but he had one more idea that he was determined to try.

In his desperation, Lindemer quite appropriately capped off this incredible saga of futility with one of the most nonsensical claims ever seriously made in a land rights case. Litigating parties frequently present foolish arguments in land rights cases, either because in truth they are only motivated by emotional factors such as spite and revenge, or just out of plain

ignorance, but the claim made by Lindemer in Goodover VI was so absurdly perverse as to be difficult to describe. Going on the offensive one last time, Lindemer was still bent upon getting his full platted lake frontage, and if he could not get it in the location of his preference, he decided, he would get his pound of flesh all the same, from an entirely different location. Amazingly, still either unable or unwilling to grasp the concept of monument control, Lindemer asserted that the shortage of his lot along the lake must mean that Goodover's whole lot was shifted to the northeast, meaning that a vacant strip must exist on the southwest side of Goodover's Lot 2, where it was bounded by Lot 4 owned by the Welch family, and Lindemer set out to seize that completely imaginary strip, located roughly 100 feet away from the scene of the initial dispute, for himself. Having been forced to concede the boundary location between Lots 1 & 2 to Goodover, Lindemer apparently decided to try to surround Goodover in effect, presumably for the purpose of swapping the strip sought here by Lindemer to Goodover, in exchange for the strip that Lindemer really wanted and had been fighting for all along. Lindemer had his surveyor locate the purported original corner of Lots 2 & 4 along the lake, which was allegedly in disagreement with the existing lot corner location that had long been established and recognized as legitimate by Goodover and Welch by about 18 feet. Lindemer then filed an action against both Goodover and Welch, claiming that the strip had been legally abandoned and should be awarded to him on the basis of adverse possession, essentially as a reward for having discovered its existence, and to compensate him for his own lost lake frontage. Since there was no evidence that Lindemer had ever even attempted to make any actual use of the fictitious sliver that he was now claiming, this scheme that he had contrived had no opportunity whatsoever to succeed, and indeed it may well be that his only real intent in going forward with this assertion was to put his neighbors through as much grief as possible. The trial court held that merely ordering a survey of a strip of land owned by others is not equivalent to adverse possession, since a mere survey obviously does not constitute either use or improvement of the land in question, dismissing Lindemer's case, and thereby putting him on that same well worn path to the doorstep of the Court, for the sixth and final time. The Court could not have been either happy or surprised to see Lindemer coming again in 1994, a full 10 years after Goodover had initiated this legal struggle, but it would have to deal with Lindemer one more time, in order to put him out of his misery, although the vengeful spirit motivating this action was so plain that the Court could scarcely have failed to take notice of it. The Court's description of the charge leveled by Lindemer at his neighbors in this case shows it to be

so fundamentally flawed as to amount to sheer nonsense:

“Appellant (Lindey's) contends that it's 1990 survey created a discrepancy between the original boundary of Lots 2 and 4 ... Appellant argues that this discrepancy impliedly created a narrow triangular parcel of land which was omitted ... and which was abandoned by the former owner (Goodover) thereof in the course of litigation ... appellant's claim demonstrates appellant's continued refusal to accept the results of Goodover I.”

The claim made by Lindemer here, aside from being flatly outrageous, could not have been better designed for legal failure, since it stands in flagrant violation of some of the most fundamental principles that have been consistently honored and upheld by the Court throughout it's history. This claim made by Lindemer was based entirely upon measurements, and therefore stood in direct defiance of the principle of monument control, and in addition, it deliberately sought to create the very kind of isolated and useless parcel of land that the Court has always deplored and earnestly sought to avoid creating. The legal presumption that a grantor intends to convey all of his land, and does not intend to retain any useless fragments that may have been accidentally excluded when attempting to precisely describe his boundaries, exists for the purpose of preventing parcels such as the one set forth by Lindemer here from coming into existence. Moreover, one can scarcely imagine how Lindemer could have realistically expected the Court to view his position sympathetically, when his own action had the effect of victimizing the Welches, who were completely innocent parties, that Lindemer had drawn into his senseless grudge match with Goodover for no good reason at all. Defining Lindemer's argument as "a distortion", and pointing out the elementary idea that all boundaries are "interdependent", the Court fully upheld the decision of the lower court against him, bringing Goodover VI to a close, and finally ending Lindemer's pathetic decade long crusade to gain literally just a few feet of additional lake frontage, despite the enormous expense it entailed. For the money he paid in legal expenses and fines, Lindemer could probably have purchased another entire lot, or perhaps even several lots, but as so often happens, treacherous emotions got the best of him, quite possibly supported and compounded by bad advice regarding surveys and land rights as well. As usual, this sad saga of protracted litigation left all of the parties damaged and none of them could

have been likely to emerge from it feeling fully satisfied, much less triumphant, after having their lives scarred by this terribly acrimonious episode. If any benefit is to be derived from this grim tale of tribulation, it would have to be the lesson that it provides today for all those who deal with land rights as professionals, showing that the principle of reliance upon a court mandated boundary forecloses any opportunity to overcome that boundary by means of a subsequent survey, however diligent or accurate that survey may be. Going forward therefore, it would be of immense benefit to both land owners and the land surveying profession, if every professional land surveyor would simply resolve to always do his or her utmost to acquire and properly portray all available evidence, before completing any boundary resolution that is intended to be conclusive and controlling, in order to insure that every survey stands as a fully reliable model of genuine thoroughness and professionalism.

ZAVARELLI v MIGHT (1989)

While the Goodover case, just previously reviewed, stands as an ample demonstration of the fact that proceeding with construction in reliance upon the basis of an inadequate survey, particularly in the presence of a conflicting survey, is obviously a recipe for disaster, this case forms a distinct contrast with that scenario, by illustrating the possible consequences when construction is undertaken and conveyances are made without any attempt at boundary verification being made at all. Although one might well expect the results of such circumstances, stemming from the clearly negligent decision to forego a survey before making significant use of land, to be equivalent to those suffered by the constructing party in that prior case, the outcome here is to the contrary, as the party engaging in the construction activity prevails in this instance, showing that the details relating to the unique manner in which each particular controversy develops, make generalizations about the law problematic. Here we not only see once again that a fence is not necessarily just a fence, as several previous cases have also indicated, we also observe that whether construction was performed before or after a conveyance can be a critical factor, not just in determining whether or not the construction represents an encroachment, but even in determining where the boundary itself is actually located, which serves to

emphasize the need to obtain all potentially relevant evidence, before drawing any conclusions regarding boundaries. In addition, here we again look on as a survey that may have been substantially correct and fully acceptable, which could very well have been treated as controlling under different circumstances, ultimately proves to be powerless and without any legal effect, just like the surveys that turned out to be ineffective in the Goodover case, due to the fact that the survey depicted only a boundary of record, while a different boundary had been created by the acts of the parties. Although it may be a source of consternation to some surveyors, its important to realize that in the realm of equity, a physical object, even one that is not referenced in any document of record, can control a boundary described in a conveyance, and the description of record can both legally merit and require correction, through the reformation process exemplified in this case, to properly express the truly intended boundary location, given evidence sufficient to justify such rectification. Similarly, in 1974 in *City of Missoula v Rose*, the Court ruled that the true location of a sewer easement was controlled by the physical location of the sewer line, and that the existing easement deed, which erroneously described another location, should be corrected to match the location in which the sewer had actually been built, on the basis that the only location which served the intended purpose was the physical location that was in actual use, making the sewer line itself the strongest evidence of the intended easement location. Then in *Hayden v Snowden* in 1978, a case involving a prescriptive easement for access purposes, the Court held that even a description which had been judicially created was subject to correction through reformation, if it could be shown that it described an area in excess of that which was actually required for the intended purpose.

1966 - The father of Zavarelli and Might, who were brother and sister respectively, owned a substantial amount of land, consisting of several city lots in Missoula, which were located in two adjoining platted subdivisions. Their father died, and all of his interest in the lots passed to his son and daughter as equals, so the two siblings together became the owners of all of the lots that had formerly been owned by their father. How the lots had been used by their father is unknown, there is

no indication that any improvements existed on any of the lots, with the exception of a fence that had been built by their father running along or near the boundary between the two platted subdivisions, and there is no indication of whether or not the boundary between the two subdivisions may also have been a section line or aliquot line. Operating on the belief that the fence marked the true location of the subdivision boundary, Zavarelli commenced construction of an apartment building on the lots located in the subdivision lying north of the fence. Why Zavarelli believed that the fence marked the boundary in question is unknown, there is no indication that any survey had been performed to confirm this, or that anyone had told him that the fence was located on the boundary. There is no indication that either Zavarelli or Might lived on any of these lots, presumably they both lived elsewhere, but Might was fully aware of the construction that was being done under the direction of her brother, and she made no objection to it. Practically all of the land north of the fence was devoted to the apartment building, which was served by a septic system that was installed by Zavarelli on the south side of the building, in the area directly north of the fence.

1971 - Zavarelli and Might decided to divide their late father's land into separate ownerships. They evidently felt that the simplest way to do this was to employ the existing subdivision boundary, which apparently ran approximately through the middle of the area that they owned together, so Zavarelli quitclaimed the lots south of the subdivision boundary to Might, and she quitclaimed the lots north of that same line to him. Both of them, for unknown reasons, continued to believe that the fence was on the subdivision boundary, so after executing these deeds they both believed that their respective rights of ownership had been properly divided and that no conflict existed. However, they had neglected to make any reference to the fence in either of these deeds, and this omission would become the source of the future controversy between them.

1983 - Might ordered a survey of her property, for unspecified reasons, which indicated that the subdivision boundary was actually

located an unspecified distance north of the fence. There is no evidence regarding how this survey was performed, or what it was based upon, but both parties accepted it as correct and never challenged the surveyed location of the subdivision boundary. The survey also indicated that a substantial portion of the septic system serving Zavarelli's apartment building was located south of the subdivision boundary, so it was actually located underneath the lots that he had quitclaimed to his sister. Might then had a fence built on the surveyed boundary, but it was promptly removed by an unknown party or parties, and Zavarelli filed an action against his sister, seeking to maintain his exclusive control over the whole area lying north of the original fence. The trial court ruled that Might owned the strip in question, but that the septic system was protected by a prescriptive easement, leading Might to appeal that decision, which brought the case before the Court for the first time in 1988. The Court struck down the prescriptive easement and sent the case back to the trial court, without drawing any conclusions relating to the boundary location, thereby requiring both the litigants and the lower court to deal squarely with the boundary conflict and resolve the matter as a boundary issue.

In the second trial focused on the same subject matter, Zavarelli wisely took heed of the fact that his initial argument had been found to be highly inadequate and misdirected by the Court. Accordingly, this time he argued that although the survey correctly showed the location of the subdivision boundary, that line was not the line that he and his sister had intended to adopt as their mutual boundary in 1971, therefore the descriptions included in the quitclaim deeds exchanged at that time should be corrected to match the true intended location of that boundary, which was the location of the original fence. Might on the other hand, made no changes to her position, and simply continued to insist that she was entitled to all of the land south of the subdivision boundary, by virtue of her brother's quitclaim deed to that effect, maintaining that there was no valid basis upon which to change the descriptions in the quitclaim deeds, so she had the right to force her brother to remove those portions of his septic system that were encroaching on her lots. The trial court again ruled in favor of Zavarelli, this time holding that the descriptions in question were subject to correction, to

match the true original intent of the parties, therefore Zavarelli owned all of the land north of the fence, so no encroachment existed.

Both of the litigants in this case, being typical property owners with no knowledge of how to properly address and resolve boundary issues, initially made arguments that were weak, ineffective and off target, failing to frame the controversy as a boundary dispute and treating it instead as an encroachment situation. Zavarelli initially sought only an injunction, to prevent Might from entering the area on his side of the original fence, while Might merely asserted the right to control and use the same area, and neither of them made any arguments during the first trial directly addressing the core issue, which was the true boundary location. The Court however, recognized that the evidence clearly pointed to the original establishment of the boundary created by the litigants themselves as the source of the conflict, and therefore was unwilling to make any decision on any issues such as trespassing or encroachment without first resolving the fundamental question of what actually represented the true boundary between the parties. Since neither of the parties had suggested that the creation of an easement was an appropriate solution, the Court had rejected the trial court's attempt to settle the matter by upholding Might's ownership of the strip between the original fence and the surveyed subdivision boundary, but simultaneously granting Zavarelli an easement covering part of that area, which would enable Zavarelli to continue to maintain and use his existing septic system. Instead of approving this evasive solution, which amounted to a compromise, the Court essentially elected to force Zavarelli to focus in the second trial on presenting evidence concerning the true boundary location, in order to prevail, noting that he was not entitled to an easement if his sister owned the strip in question, and he had no need for an easement if he owned the strip himself, so he could not save the septic system unless he could prove that the fence had truly been intended to serve as the boundary. Thus the Court clearly framed the controversy as a boundary dispute, by taking the view that the septic system could not be protected by means of an easement, and represented an encroachment subject to removal, unless Zavarelli could prove that he actually owned the land under which he had placed it. During the second trial, Zavarelli maintained that he had always believed that his father had built the original fence on the subdivision boundary, so when he agreed to quitclaim his interest in the lots lying in the southern subdivision, it was his true intention to quitclaim only the land south of that fence. This belief, which in reality clearly amounted to nothing more than a false assumption on his part, would not have been enough to

allow Zavarelli to prevail however, the key to his success did not reside in his own testimony, but in the statements of his sister, who evidently failed to realize the potential consequences of her own admission that she had also always held the same belief as her brother, regarding the location of the fence. Since Might, in her honesty, had freely and openly acknowledged that she had also acted with reference to the original fence location, in granting her own quitclaim to her brother, the Court concluded that the reference to the subdivision boundary in the two quitclaim deeds was in fact a mutual mistake, which left both of the deeds at issue subject to correction by means of reformation:

“The finding of fact as to the mutual intent of the parties at the time of the execution of the deeds is founded on substantial evidence ... a mutual mistake had been made by the parties in determining the common boundary line ... the judgment finding mutual mistake between the parties and correcting the description is not improper ... ”

Only rarely does the Court deviate from the well known rule that plain language used in a conveyance controls, if it is free of ambiguity, which was certainly true in this case, and the presence of clear language typically eliminates the opportunity to introduce any kind of extrinsic evidence, but as can be seen here, the presence of compelling evidence of a contrary intention can constitute an exception to that rule. Since both parties had openly conceded that they had acted with reference to the original fence, and that they had been unaware that the fence was not on the subdivision boundary, at the time they made their conveyances to each other, it was clear that the fence had been the true object of their intent. The references to the lots in their deeds, in the view of the situation taken by the Court, amounted to nothing more than a way of stating that one of them was to have all of the lots north of the fence, and the other was to have all of the lots south of the fence, it did not indicate that the new boundary was necessarily meant to coincide with the subdivision boundary. Both parties had functioned as grantors and as grantees in their exchange of quitclaim deeds, so neither one of them had any advantage over the other on that basis, and both of them, the Court decided, were bound by the clearest and strongest evidence of their true intent at the time of conveyance, which was the physical evidence, rather than the language that they had mistakenly used in their deeds. The fact that Zavarelli had relied on the fence as a boundary for construction

purposes, and Might had tacitly consented by never objecting to the construction undertaken by her brother, was the clinching factor, shifting the balance of equity in favor of Zavarelli and effectively foreclosing Might's opportunity to protest that the original fence was never intended to represent the boundary being created, consistent with the equitable principles of laches and estoppel. Allowing construction of any kind to take place, without raising any boundary issues relating to the improvements being made at the earliest possible time, is one of the surest ways to trigger estoppel, since that failure to act can be viewed by the Court as a form of negligent and harmful delay, bringing it within the scope of the doctrine of laches. In addition, Might learned the hard way, as have many others both before and after her, that an untimely survey, even if completely correct, may hold no controlling value whatsoever. Had she ordered the survey in 1966, or perhaps even in 1971, it could have had a serious impact, and it could potentially have controlled the outcome, but her failure to seize the opportunity when it was ripe, left her with a survey showing a boundary that was of no legal value or use to her. Zavarelli, of course, was equally negligent in failing to order a survey at the time of his construction, but since the property of their late father had not yet been divided between the parties in 1966, the Court observed, he had the right to build on any portion of the property at that point, because he had an ownership interest in all of the land at that time, so his construction could not be characterized as an encroachment, as would have been the case had he built across an existing boundary of ownership. The Court determined that the parties had the right to adopt the original fence as their mutual boundary, as opposed to the subdivision boundary, and in fact they had quite logically done just that, under the circumstances that existed in 1971, so the 1983 survey revealing the true subdivision boundary location could be given no controlling effect. Therefore, the Court upheld the ruling of the lower court in favor of Zavarelli, declaring the boundary between Zavarelli and Might to be controlled by the original fence location, and approving the reformation of their descriptions to accomplish that purpose. Once again, the Court had illustrated the fact that physical evidence of the intent of the parties is always a primary factor in the determination of boundaries, and that unjustified reliance upon documentary evidence, which is clearly in conflict with existing conditions, can be quite unwise.

SMITHERS v HAGERMAN (1990)

Here we encounter yet another boundary conflict that revolves around the relationship between a fence and a surveyed line of record that does not coincide with the fence, contrary to the expectations of the parties, which provides an opportunity to examine the importance of the knowledge held by adjoining land owners concerning their mutual boundary, and the significance that such knowledge holds, in the eyes of the Court. It has long been well established that the acts of adjoining land owners are very often the strongest evidence of their claims of ownership, on the basis that performance such as construction of physical improvements openly displays the intent of the acting party to assert ownership of the land being used, presumably under a claim based on a good faith belief that they own the land they are using, placing the burden on any interested party who believes the contrary to take notice of what is being done on the land. In a great many situations however, land simply remains unused, often for an extended period of time, so there are no physical manifestations of any acts of major significance to give notice of the limits or extent of adjoining tracts of land. This is obviously one of the main reasons that surveys are necessary, because the monuments and descriptions that testify to surveyed boundary locations serve society by providing boundary evidence even when properties remain vacant and go unused. The case we are about to review presents a classic example of a scenario in which adjoining tracts of land are created, but those tracts, or substantial portions of them, including the area along their mutual boundary, goes undeveloped for a long time, allowing both uncertainty and assumptions regarding the boundary location to come into play. In cases such as this one, where the boundary was created on paper only, without the benefit of a survey on the ground, the true boundary location can remain shrouded in mystery to some extent, being largely ignored for many years, awaiting the arrival of some event that essentially requires one or both of the adjoining land owners to finally take a serious interest in the exact boundary location. As this case very clearly demonstrates, when physical indications of a boundary location are either absent, scant or misleading, the actual knowledge of the adjoining land

owners relating to their mutual boundary can become a key and even controlling factor, in the subsequent resolution of any boundary dispute that may arise. While a subsequent survey is typically not equivalent in controlling force to an original survey, it does fulfill the crucial function of supplying all adjoining land owners with knowledge of where their described boundaries are located on the ground, at least according to the findings and opinion of that particular surveyor, putting them on notice in the same manner as physical improvements constructed by adjoining parties along their boundaries, such as buildings, fences, walls, hedges or planted trees. In this case, we observe the impact of a subsequent survey ordered by one land owner, for his own purposes, which quite ironically later turns out to operate as a serious legal liability to him, due to his tacit acceptance of it and failure to object to it, while operating as a benefit to his opponent, the adjoining owner, by blocking any form of possession based claim from achieving success, on the basis of the knowledge that each of the parties derives concerning their mutual boundary, for the first time, from the survey at issue.

1954 - The father of Aker owned a tract of unspecified size lying in the south half of an unspecified section. How or when he had acquired this tract is unknown, but his ownership of it was never disputed. How Aker's father had used his land during the time he had owned it is also unknown, but at some point in time he had built a fence across his property, which evidently ran the full length of the property and was approximately parallel with the south section line. Aker's father decided to divide his land into two parcels at this time, and he conveyed the northerly portion of his tract to his son and Smithers, so Aker and Smithers together became the owners of the northerly parcel created by Aker's father, who retained the southerly parcel. The southerly boundary of the parcel acquired by Aker and Smithers was described by metes and bounds as being 997.5 feet north of the south section line, which was approximately where the fence was located, but the description made no reference to the existing fence. Aker believed that his father had intended the fence to represent the boundary, so he did not obtain a survey to determine whether or not

the fence was really 997.5 feet from the south section line, he and Smithers simply used all of the land north of the fence, on the assumption that the fence was probably in about the described location.

1955 - Hagerman acquired the southerly parcel from Aker's father, which was also described by metes and bounds, and his description indicated that his northerly boundary was 997.5 feet north of the south section line, entirely consistent with the description held by Smithers and Aker. Hagerman also neglected to obtain a survey at this time and assumed that the fence represented his northerly boundary line. Whether or not Hagerman made any actual use of the area near the fence over the following years is unknown, but no improvements were evidently built anywhere near the fence at this time.

1971 - Hagerman obtained a survey of his parcel at this time, for unknown reasons, which revealed that the fence was actually more than 997.5 feet north of the south section line, by showing the fence to be an unspecified distance north of the north line of the Hagerman parcel. How the location of the section line was determined during this survey is unknown, and there is no indication of whether or not any monuments existed anywhere in the area at this time, but Hagerman accepted the survey as being correct, and he acknowledged the property corners set by the surveyor at this time as marking his north boundary line. Hagerman then informed Smithers and Aker of the situation revealed by the survey, and asked them to grant the strip between the fence and the surveyed boundary to him, but they refused. Smithers and Aker chose not to relocate the fence however, so the fence simply remained in it's original location.

1983 - Hagerman rented an unspecified portion of his tract to a tenant, who built a garage on the strip between the fence and the boundary line. Smithers and Aker warned the tenant that he was building the garage on their parcel, but he completed it anyway.

1985 - Hagerman attempted to install a septic system on the strip in question, but Smithers and Aker filed an action against him, to halt the

construction of the septic system and require the removal of the encroaching garage as well.

Smithers and Aker argued that the boundary between the two parcels in question was clear and certain, and its location was properly described in the deeds held by both parties, and that location had been properly marked on the ground during the 1971 survey, so they owned all of the land north of the surveyed line and the objects placed north of that line by Hagerman and his tenant represented encroachments which were subject to removal. Hagerman argued that one survey alone is legally insufficient to conclusively determine a boundary location, and both adjoining properties must be surveyed before a boundary line can be considered conclusive, so since the plaintiffs had never obtained a survey, they had no valid claim to the boundary line that was shown on his survey, and they owned only the land north of the fence. Hagerman further argued that he was entitled to rely on the fence as his northerly boundary because it had existed prior to his arrival, and because Aker and Smithers had effectively adopted the fence as their own boundary by never making any use of any land south of the fence. The trial court ruled that the 1971 survey was binding upon both parties, quieting title to the strip between the fence and the surveyed boundary in Smithers and Aker.

Many seriously errant claims and arguments have been made in land rights cases over the decades, in Montana and everywhere else that such cases have arisen, but few surpass the weakness of the survey related claim made by Hagerman in this case. The primary argument made by Hagerman, that one survey alone can never control a boundary line, was so baseless and misguided as to amount to little more than utter foolishness, nevertheless the Court gave it ample consideration before eventually dismissing it. As every surveyor should already know, a survey is never automatically controlling or binding upon anyone, because it is not within the power of a surveyor to bind the parties by any act that the surveyor may perform of his or her own volition. This applies even to an original survey, which becomes controlling only once accepted by a party or parties with the authority to accept it, so even an original survey has no force or effect, if it is never referenced, used or otherwise relied upon in any way. The authority vested in a surveyor by virtue of the surveyor's license does not amount to the authority to independently create new boundaries, nor to control existing boundaries, it is merely the authority to exercise the privilege to present himself or herself to the public as a valid and qualified licensee, capable of performing competent survey work. Even the work of an original surveyor is binding only to the

extent that it represents the execution of the wishes of the owner of the land being subdivided, so the authority that makes original surveys binding is derived only through the surveyor as the legal representative of the owner of the land, who is typically the party that the real authority to conclusively divide the land and create new boundaries emanates from. Furthermore, the work of a retracement surveyor is never binding, unless it is so well executed as to subsequently prove to be unassailable on any basis, or it is simply never challenged at all, or all of the relevant parties agree that it will be binding upon them. A retracement survey can become controlling once relied upon, but as can readily be seen, in such instances it is once again the actions of the land owners themselves, and not the actions of the surveyor, that lends gravitas to the survey, enabling it to become conclusive. Yet despite the presence of all of these caveats that are applicable to the work of land surveyors, the Court was compelled to confirm the obvious, stating that there can be no doubt that one survey alone can control a given boundary line, and there is no legal requirement for any given line to have been surveyed multiple times, or from multiple directions, or with any certain degree of precision or exactness, in order to create a binding boundary. Smithers and Aker had as much right as did Hagerman himself, the Court indicated, to rely upon the boundary marked during the survey that had been performed for Hagerman. Noting that the 1971 survey stood unchallenged, and therefore bore the full presumption of correctness, while also observing that the consistent language of the deeds describing the adjoining properties effectively eliminated the possibility of any boundary conflict based upon any description discrepancy, the Court put the blatantly erroneous argument made by Hagerman to rest, holding that:

“Hagermans maintain that plaintiffs have failed to substantiate their claim because they never surveyed their property. They maintain that both parcels must be surveyed to show a common boundary ... The law does not support Hagerman's argument that all four corners of both parcels must be surveyed to establish the correct boundary. The survey established the boundary line without contradiction. In addition the description in the deeds to the plaintiffs and the Hagermans established the same common boundary line.”

Having upheld the validity of the 1971 survey, against the groundless assertion relating to its legal effect, which had ironically been made by the

very same party who had ordered it, all that could prevent the survey from controlling the location of the boundary in dispute was the fence. In the Zavarelli case, decided by the Court less than a year before and just previously reviewed, the potential power of a fence to control a boundary was clearly on display, even though the fence stood in direct contradiction to the boundary location described in the deeds of both parties, and the fence itself was never mentioned at all in any deed. Although those same important factors were present in this case however, the key element of intent was lacking here, and the failure of Hagerman to provide any evidence that the fence was ever intended to physically mark the boundary in question sealed his defeat. Hagerman was evidently never told by his grantor, the father of Aker, or by anyone else, that the fence represented the boundary, nor had any construction ever been undertaken with reference to the fence as a boundary, so Hagerman had no right, the Court concluded, to assume that the fence was located on the boundary in controversy. Instead of equating the situation presented here to the Zavarelli case, the Court elected to equate the circumstances of this case to those presented in the Christie case of 1982, since the fence in both this case and that one had been built by a land owner inside his own land, with no apparent intention of marking a boundary. Under such circumstances, the Court determined again here, the fence can never become a valid agreed boundary through acquiescence alone, in the absence of any improvements built in such close proximity to it as to deem it a boundary by virtue of estoppel. The fact that Aker himself believed for many years that the fence was the boundary was insufficient, the Court found, to make the fence a boundary binding upon Aker, because his belief was the result of a mere baseless assumption on his part, which did not operate to prevent him from accepting the boundary location of record, once that line was shown to him, as Hagerman's survey had done. When Hagerman openly acknowledged the validity of the surveyed line as his boundary in 1971, the Court pointed out, he had destroyed any adverse or prescriptive rights that may have accrued in his favor prior to that time, and he had also given Smithers and Aker the opportunity to adopt the surveyed line, which they had done, since they had plainly and openly told Hagerman at that time that the surveyed line, and not the fence, marked the extent of their claim of ownership. On that basis, the Court disposed of the adverse possession claim upon which Hagerman had fallen in his desperation, as a last resort, fully upholding the decision of the lower court, including an award of substantial damages against Hagerman for the unauthorized occupation of the strip in question by his septic system and his tenant's garage, which the Court agreed were encroachments subject to removal.

Hagerman may very well have been perfectly right that the fence had truly been intended by Aker's father to represent the boundary at issue, but by the time Hagerman set forth his claim concerning the fence, the series of events and omissions that had taken place had made his claim untenable, by making it impossible for him to produce any definite evidence regarding the true intentions of the father of Aker, more than three decades before. Ultimately, the 1971 survey controlled the disputed boundary, although it had never been verified or tested in any way for correctness, simply because it was presumptively correct, and Hagerman had failed to demonstrate any reason why it should be viewed as dubious or erroneous in any respect.

LARSON v UNDEM (1990)

Although we have seen how consistently the Court mandates compliance, in the performance of land transactions between a grantor and a grantee, with their respective obligations to each other, we have also noted that both legal and equitable exceptions to the generally assigned roles of the parties to a transaction do exist, as in the 1949 Whorley case for example. The case we are about to review presents a situation that is highly comparable to the one presented in that case in several respects, the main difference being that this case involves the creation of a new legal description, as opposed to the mere use of existing descriptions, and accordingly, this case illustrates another important exception to the typical allocation of responsibility for the consequences of description errors, as here once again the grantor's burden is effectively shifted to the grantee, who then takes the fall. Like many other cases previously reviewed herein, this one also presents a scenario that could prove to be very helpful to land surveyors, in their efforts to convince land owners that it is prudent, if not absolutely essential, to engage a professional land surveyor when conveying land, since the whole controversy here is precipitated by the foolish decision to attempt to divide land without any assistance from a land surveyor. As should be quite readily apparent to all, even those without a surveyor's knowledge, the fundamental mistake made by the parties in this instance is their exclusive reliance upon existing information of record, based upon their mistaken notion that no field verification is necessary to create a description of a new boundary. While it is obviously true that under certain

simplistic circumstances a new boundary can be accurately created entirely on paper, without any survey field work, that is rarely the best course of action, and it is certainly not the best way to proceed when the boundary being created contains any complexity, such as when it is comprised of a line, or series of lines, intended to follow a certain course through an existing tract, that has been chosen by the parties on the ground, as is the case here. The decision to try to describe the new boundary with measurements, and by reference to other existing boundaries, in the absence of any monumentation on the new boundary, proves to have been a very bad one in this case, creating a conflict between the boundary location actually selected by the parties together on the ground, and the boundary indicated by the bogus description, setting the stage for the Court to again apply the principle that a boundary which has been defined on the ground, and agreed upon, must control. In another case of a similar nature, *Parcel v Myers*, which was addressed by the Court twice, in 1984 and 1985, the grantee wisely insisted that the grantor have the property to be conveyed surveyed, but the parties then completed the conveyance using a description which was based on an erroneous survey, that was actually done by an unlicensed surveyor, leading the grantee to seek reimbursement for an acreage deficiency that was subsequently discovered. The Court ruled that the acreage discrepancy was irrelevant, because the conveyance was predicated upon specific boundaries, which had been viewed and identified by the parties on the ground, and was not executed by the acre, so the grantee was compelled to simply accept whatever acreage was contained within the boundaries that he had been physically shown, and had agreed to, and the grantor bore no liability for any shortage of acreage.

1972 - Larson was the owner of a tract of unspecified size and shape, and she decided to sell a portion of it, while reserving another portion containing about 7 acres. Undem proposed to acquire the portion that Larson wanted to sell, and he agreed to provide the legal description that would be required for the conveyance. Larson and Undem walked the tract together and agreed to the location of the boundary on the ground, between the portion to be conveyed to Undem and the portion to be reserved by Larson. Undem then undertook to fulfill his

commitment to create a description following the agreed boundary, by attempting to compose a metes and bounds description himself, but he was unable to do so properly. Udem then sought and obtained the assistance of an engineer, who relied upon several documents, including existing plats, highway plans and railroad plans, in an effort to create a valid description, but no surveyor was involved and no field survey work was ever performed. The conveyance went forward anyway, employing the legal description provided by Udem, and the parties subsequently occupied or used their respective portions of the tract for unspecified purposes or activities. Whether any improvements existed on the tract is unknown, and there is no indication of whether or not any improvements were ever constructed by either party.

1973 - While working on the land one day, with the help of her sons, Larson made some measurements which apparently suggested to her that the description that had been prepared by Udem contained errors of unspecified magnitude, with the result that the area described in the deed reservation failed to properly cover the entire intended reservation parcel. Larson notified Udem that she was concerned about the legal description that he had provided, and Udem agreed to address the matter, but the description was never corrected.

1984 - Although the contract for deed between Larson and Udem stipulated that Udem could not sell his parcel until he had completed his payments to Larson, and Udem had not yet made all of his payments, Udem conveyed his interest in his parcel to Olson, using the same legal description that appeared in his contract for deed with Larson.

1986 - Udem completed his payments to Larson and obtained the warranty deed from Larson that had been held in escrow until the completion of his payments for the land.

1987 - Still concerned about the accuracy of the legal description that had been used in her transaction with Udem, Larson hired a surveyor to verify her suspicion that the existing legal description did not fully

cover the intended reservation area. No details of what the surveyor actually did are known, but he evidently agreed with Larson, concluding that the existing description did not cover the whole parcel being claimed by Larson, so he prepared another description at her request, defining the boundaries of the area that represented the originally intended reservation parcel according to Larson. Upon obtaining this confirmation from her surveyor of her belief that the existing legal description was incorrect, Larson filed an action against Udem, charging him with breach of contract, and seeking to quiet her title to the 7 acre reservation parcel that she and Udem had agreed upon, which she claimed had been improperly described by Udem, but had been properly described by her surveyor.

Larson argued that she had the right, in 1972, to delegate the authority to create the required legal description to Udem, as she had done, and that having accepted that responsibility, Udem had an obligation to provide an accurate description, in order to fulfill his part of their contract, so she had the right to fully rely upon the correctness of the description that Udem had provided, and the failure of the description to properly delineate the boundary in question placed Udem in breach of their contract. She further argued that Udem's conveyance to Olson represented an additional violation of the contract in question, which had created a cloud upon her title to the originally intended reservation parcel, and had resulted in severe emotional distress to her, so Udem should be held liable for emotional damages to her, in addition to being legally compelled to perform his part of their contractual agreement, by bearing the expense of correcting the erroneous existing legal description. Udem did not argue that the description he had provided was accurate or correct, and he did not deny that he was aware that it contained errors, he effectively conceded that the description had been improperly prepared and that it failed to properly describe the parcel boundary location originally agreed upon by Larson and himself. Instead of defending the validity of the description in question, he argued that Larson had been obligated to verify the correctness of the description before allowing it to be used in her contract for deed with him, and her failure to bear her legal obligation to do so at the appropriate time, prior to signing the contract in 1972, along with her subsequent delays in pursuing a legal remedy for the problem, operated to bar her claim to the full originally intended reservation parcel. The trial court rejected the assertion made by Udem that Larson was so delinquent in attempting to resolve the

description error that she had forsaken her rights to the land in question, and ruled in favor of Larson on both the description issue and the issue of damages, finding Udem to be in breach of contract and requiring him to fully perform the terms of his contractual agreement with Larson, which included rectifying the description to conform to the intended boundary location.

As we have seen from previous cases involving conflicts between a grantor and a grantee, each party to a given transaction involving land or land rights has definite legal responsibilities, which are determined by the role that each party plays in the transaction. A grantor is presumed to convey his or her land, or some portion thereof, freely and voluntarily, and to be the party who stands to profit financially from the transaction, so the grantor is typically presumed to be the motivating party driving the transaction, by virtue of the grantor's decision to offer some or all of their land for sale. With respect to the description of the land or the land rights to be conveyed, the grantor, being the party who is presumably most familiar with the land, typically bears the primary responsibility for the use or creation of an adequate description of the land and the rights associated with it, in order to fully and clearly inform the grantee of exactly what is being conveyed, and in the case of a reservation or exception, exactly what is not being conveyed. The grantee on the other hand, typically being unfamiliar with the land, is presumably an innocent party, and is therefore entitled to rely upon the knowledge regarding the land and the rights associated with it that is communicated by the grantor, provided that the grantee or grantees uphold their legal burden to alertly and vigilantly observe the openly visible characteristics and condition of the land, and any improvements existing upon it, thereby maintaining their status as bona fide purchasers. Ultimately however, beyond their specific duties to each other as parties to their transaction, both parties have the larger obligation to perform in good faith in all respects, and this is the one vital legal burden that neither party can ever legitimately shed, either by simply discarding it, or attempting to pass it on to the other party. Although legal presumptions are highly important, and often control the outcome of cases in which specific evidence is scant or lacking, such presumptions can be overcome by definite evidence to the contrary, and this case stands as a classic example of the reversal of the description burden that typically rests upon a grantor. Udem may have believed that as the grantee he bore little or no legal responsibility with respect to the description of Larson's land, and if he had declined to accept Larson's stipulation that he provide the description, he could have

successfully maintained that position. Once he accepted her offer to take control of the description process however, the Court decided, he had no right to execute that responsibility carelessly, he owed a duty to Larson to provide a description that effectively carried out the true intentions of both parties, which they had personally agreed upon. Since all parties are free to contractually obligate themselves to perform specific tasks, in the process of executing a conveyance, the Court held that Larson had been free to shift the description burden to her grantee, as she had very clearly and openly done, and Udem, having contractually accepted that burden, could not shift it back onto Larson simply by failing to properly execute his duty to provide an accurate description, stating that:

“Although Mr. Udem is not a licensed surveyor, the parties agreed that Mr. Udem would prepare the property description including the description of the seven acres reserved by Larson ... Udem obtained the help of an engineer ... and delivered the same to Larson and her attorney ... none of the parties realized that the description was incorrect ... it failed to accurately describe the reserved seven acre parcel.”

While no portion of the actual erroneous description was quoted by the Court in the text of the case, the description was clearly deficient in numerous respects, just as one would expect a description that was prepared piecemeal from an assemblage of various records to be. No suggestion was made by Larson that Udem was guilty of fraud, or that he had set out to cheat her of any land, her accusations pointed only to genuine bungling on the part of Udem and whoever assisted him in creating the description in question. Turning to Udem's primary argument, that Larson's delay in demanding that the description be rectified was unjustified, making her guilty of laches, so her delay had cost her the opportunity to make any demand for correction of the description at issue, the Court found that the applicable statute of limitations was of no benefit to Udem. Udem asserted that the 8 year statutory period of limitation had begun to run against Larson in 1973, upon her discovery that a description problem existed, so her opportunity to demand rectification had terminated in 1981. The Court disagreed however, indicating that the description error did not constitute any form of damage, injury or threat to Larson until the point in time when Udem had used it to convey his parcel to Olson in 1984, so Larson's cause of action against Udem had not begun to accrue until that

date, and her right to insist on correction of the original description had not yet terminated. Larson, the Court concluded, was therefore fully within her rights to demand that Udem make good on his original contractual obligation to her, which included providing an accurate description of her reservation parcel, and that Udem relinquish any claim being made by himself or Olson to any part of her parcel, in order to quiet her title to it. Though Udem may not have acted in deliberate bad faith, his decision to convey his parcel to Olson, using a description that he had been warned was erroneous, cast him as a bad actor, and sealed his fate in the eyes of the Court. In addition, Udem's decision to convey his parcel to Olson without proper authorization to do so from Larson, despite the fact that he had contractually agreed that he would not convey the parcel to anyone without her consent, also constituted an action taken in apparent bad faith, regardless of whether or not Udem had made that conveyance in a deliberate attempt to escape his legal obligations to Larson. Observing that Udem had in fact breached his contract with Larson in at least two respects, the Court upheld the lower court's decision that he remained legally obligated to Larson to perform his contractual duties, thus requiring all of the documents in which the bogus description had been included to be reformed, adopting the corrective description created by Larsen's surveyor, while striking down however, the damages awarded to Larson for emotional distress. Its important to note in conclusion that the decision of the Court, regarding the boundary location aspect of this controversy, was not based upon the fact that the description provided by Udem failed to provide Larson with exactly 7 acres, it was based upon the fact that the description of Larson's reservation parcel excluded land that Larson and Udem had physically walked and viewed together, and which they had agreed would be included in the reservation parcel, so this result does not represent a ruling that acreage controls boundary locations. The basis for Larson's triumph was the fact that a boundary which was physically pointed out and agreed upon by the parties on the ground controls over an erroneous description, because a physically observed or marked boundary location, once agreed upon by the relevant parties, stands as the highest and strongest expression of the true intentions of the parties to the agreement, leaving the erroneous description subject to correction, to give legal effect to their real intentions.

MONTANA v ARMSTRONG (1992)

Our last riparian rights case does not involve any surveys or surveyors at all, but that fact itself is relevant to the controversy between public and private interests that plays out here, because the absence of any survey evidence is one of the factors that makes the true status of the land at issue ambiguous, and the boundary that is ultimately declared to exist by the Court here creates the need for a survey to identify and document its location. Navigability is not an issue in this case, since it takes place on the undoubtedly navigable lower portion of the Missouri River, but the Court again reiterates that the low water line is the boundary between public and private ownership along all navigable waterways. In 1990 in *Edwards v Severin*, a case that took place on the Yellowstone River, near the site of the 1921 *Bode* case, the Court reiterated that the ownership of islands is fundamentally linked to navigability, holding that islands which arise from the bed of a navigable watercourse belong to Montana, even if they are truly detached islands only for a portion of each year, being separated from the adjoining privately held land by a channel that is only seasonally active. The *Edwards* case also serves as a clear confirmation of the Court's distinct shift toward finding navigability and away from finding non-navigability, as in that case the Court deemed the same portion of the Yellowstone that it had found to be non-navigable in 1921, to be navigable, basing this change upon the log floating test and the recreational use test, both of which had been upheld as valid tests of navigability by the Court in the *Curran* case of 1984, a highly controversial decision that we have previously discussed. The primary focus of the case we are about to review however, is the distinction between accretion and avulsion, in the formation of islands in a navigable stream, and most critically to the outcome, the potential effects of substantial accretion to islands. In resolving this case, the Court takes the long overdue step of correcting the mistaken impression concerning avulsion that it had created in the *McCafferty* case of 1964, thereby clarifying that river movement is in fact always presumed to be attributable to accretion, placing the burden of proof on the party arguing that avulsion occurred, rather than accretion. In addition, here once again we see that when a dispute involves

either islands or alleged islands, the presence of trees, which can stand as crucial evidence of avulsion in some instances, as we have learned from previous cases, can also represent highly important evidence of how long islands have been above water, which can be instrumental in determining their time of formation. Ironically, since this is our final riparian case, its noteworthy that the outcome here is practically identical to that of the Bode case of 1921, the earliest major Montana riparian decision, in that both cases result in the defeat of a riparian land owner, leaving the land of the vanquished parties cut off from the water by the presence of an island that has the effect of displacing a portion of the river. This case demonstrates very well that such a scenario can occur not only as a result of avulsion, which was what happened in the Bode case, where the change to the river was caused by an ice jam, but also as the result of accretion alone, because accretion that builds up from opposing directions, eventually merging together along a certain line, can have the same effect as avulsion, leaving only a dry boundary of ownership, as a vestige of a boundary that was once riparian.

1902 - The GLO platted a township which included a portion of the Missouri River, lying just west of the state line. The river entered this township from the north through Section 5 and exited the township on the east through Section 24, but the river was substantially curved between those points, as a large oxbow bend, bulging over a mile in a northeasterly direction, carried it through Section 4 and the east half of 9, and this area was apparently prone to variations in the course of the river.

1937 - Fort Peck Dam was constructed, stabilizing the downstream portion of the river, which included the township involved here, by reducing the frequency and magnitude of flooding, allowing sand bars in that stretch of the river, which would formerly have been periodically washed away, to survive and develop into islands.

1940 to 1948 - Two islands began to form in Section 9, one in the northwest quarter and one in the southwest quarter. The river had not penetrated the west half of Section 9 at the time the township was

platted, it had evidently moved southward from Sections 4 & 5, invading the east half of Section 8 and the west half of Section 9 over the previous four decades. Trees began to grow on the two islands in Section 9 and there is no evidence that these islands were ever washed out, or were ever again completely submerged after this time.

1949 - The BLM produced a plat of a dependent resurvey, showing the southward migration of the river into Sections 8 & 9, but not showing any islands, which were apparently still too small to be considered significant at this time.

1956 to 1967 - During this period, the river channel running along the south side of these islands gradually closed, as a result of the increasing accumulation of sediment, due to the reduced force of the water's flow through this channel, as the northerly channel proved to be the dominant one.

1986 - By this point in time, the south channel had completely closed and the two islands had become part of the south bank of the river. The length, width and acreage of these two areas comprising the former islands are unknown, and there is no indication that they had ever been surveyed, but they were apparently substantial enough to be considered worthy of attention. At an unspecified date, a group including Armstrong had become the owners of an unspecified amount of land in Section 9, including a substantial amount of land lying along the river, possibly the entire section. These parties may not have been aware of the full history behind the formation of the land in the area, and how their land holdings were described in their deeds is unknown, but they believed that the area in dispute was legally part of the lands that they owned, which is quite understandable, given the appearance of the land at this point in time. Whether or not any of these land owners ever made any actual use of the former island areas is unknown, but the land was suitable for grazing, and it presumably had potential value for oil and gas exploration and extraction purposes as well, so they evidently decided that it was worth fighting for. These two areas that had once been islands came to the attention of the Montana Department of State

Lands at this time, and Montana filed an action against the land owners, claiming that the former islands belonged to Montana.

Montana argued that the areas in controversy had originally formed from or upon material constituting part of the bed of the Missouri River, which has at all times since statehood been a navigable river under the control and ownership of Montana, therefore the islands had come into existence as distinct bodies of land, independent of any lands acquired by the defendants, originally located entirely within the river, and as such these lands had always been under the ownership of Montana, since first emerging from the river. Montana further argued that the original islands had steadily grown in size by means of accretion, and the fact that the islands had gradually become connected to, or united with, the bank of the river, did not operate to terminate Montana's ownership of the former islands, or to legally merge the former islands into the ownership of the private land owners, to whose lands the islands had become attached. Armstrong and his fellow land owners argued that all of the changes that had taken place, including the formation and abandonment of any river channels and the formation of any islands, had been the result of avulsion, therefore they were entitled to all of the land lying within their boundaries along the river, as the river was currently located, regardless of how that land had formed, because all of the land along the river had been patented to them or their predecessors, and the avulsive action of the river could not operate to deprive them of any of their land. The trial court, following the language used by the Court regarding avulsion in the 1964 McCafferty case, agreed with the land owners that the changes in the location of the river had been visible and perceptible over time, and therefore represented avulsion, quieting title to all of the land at issue in the land owners.

By the time this case took place, Montana had a substantial number of generally well established laws and rules pertaining to riparian land rights principles, based primarily on the decisions and rulings of the Court in the major riparian rights cases that we have reviewed, some of which had been codified into statute law as well. The basic riparian principles relating to accretion, reliction and erosion, and the potential consequences of those natural actions on the land, were well known and understood, and the formation and development of islands had been well addressed in a number of earlier cases, as we have also observed. The operation of avulsion however, remained unfortunately somewhat clouded and apparently misunderstood, at least in part as the result of some misleading language employed by the Court in describing the general characteristics of avulsion

in the McCafferty case, as previously discussed herein. Avulsion, the Court had indicated in that 1964 case, could be deemed to have taken place whenever the lateral movement of a stream was "perceptible" over even a very long period of time, such as a century. This language was clearly well beyond and outside the proper limits of the principle of avulsion, and here at last, after 28 years, the Court finally had an ideal opportunity to rectify that mistaken notion. It was well understood and agreed that avulsion, unlike accretion and the other riparian principles akin to accretion, leaves boundaries intact and in place. The physical processes of accretion and avulsion represent the two sides of a coin, with respect to their impact on the boundaries of riparian land ownership and the extension of riparian rights, so drawing a clear distinction between the two principles is essential to those engaging in any analysis of riparian land rights. The real difference between accretion and avulsion lies in the character of the land itself, as determined by the manner in which it emerged from an aquatic or submerged state, into a dry or upland state, and the legal effect of each of these principles stands in recognition of the differing impact that each of these physical processes actually has on lands bordered or bounded by water. Whenever land has been transformed from wet to dry incrementally, through a process that was not dependent upon any single event, then it is logical to allow such land to benefit the owner of the tract upon which it formed, by merging seamlessly into that tract, because any attempt to segregate it as a separate tract would amount to an exercise in futility, and would serve only to cut the riparian owner off from his most precious resource, the water itself, and this is the basis for the principle of accretion. Land that is exposed by a single event however, such as a flood, generally viewed as an act of God, or the construction of a structure forming an artificial blockage, deliberately diverting flowing water, represents a true abandonment of the totality of a certain portion or length of a stream, which provides no such logical basis for the alteration of any existing boundaries, and this is the basis for the principle of avulsion. The Court used the following language in this case, wisely focusing this time upon the identifiability of the land, rather than focusing on either the magnitude of the movement involved, or the passage of time, to clarify its position on the characteristics and determination of avulsion, and to supersede the erroneous message concerning avulsion that had been sent by the language used in the McCafferty case:

“The District Court ... found the migration of the Missouri River to be avulsion and not accretion ... Avulsion occurs when a stream suddenly changes its channel and forms a new one. If

avulsion moves a stream ... the property boundary line remains where it had previously been. The landowner's property remains identifiable ... the evidence did not show a distinct new channel ... Although the migration of the Missouri between 1902 and 1987 was very dynamic, the river movement cannot be characterized by avulsion ... Avulsion is a sudden change in a river channel, resulting in an identifiable piece of land."

The Court had quite admirably taken notice of this flaw in its earlier judicial thinking and wisely acted to correct it, by adopting the widely acknowledged definition of avulsion, as a complete abandonment of a portion of the existing bed of a river, in favor of a new and different bed, in an entirely new and different location. Under this definition of avulsion, time is not the foremost factor in the differentiation between accretion and avulsion, the decisive factor is the effect upon the land, of the event or process by which the river location changes. Accretion and reliction can occur very rapidly, even visibly fast, when operating in tandem with rapid erosion, but if the water sweeps across the land, wiping out trees and other objects, the process is one of rapid accretion. Only if the stream deflects its course around the area in question, leaving the surface of that area untouched, while vacating all or part of its former channel, has a truly avulsive event occurred, and this is rarely the case, typically happening only when the force of a flood causes a stream to break through the neck of an oxbow. Nothing of that nature was shown by any of the evidence that was presented to have taken place in this locality, so based on the testimony of a sedimentologist and a geomorphologist, the Court found itself compelled to disagree with the lower court's avulsion ruling. The former islands, the Court determined, had arisen from the bed of the river and taken on a substantial existence, rather than being merely ephemeral sandbars, thanks to the moderating and protective effect of the dam upon the river, vesting title to the dry land thus created, through accretion upon or within the bed of the river, in Montana. Once created by nature, the Court noted, the islands had become just as entitled to enjoy the legal benefit of the effects of ever ongoing accretion as any other body of land, such as the land of Armstrong and his fellow defendants adjoining the river. Moreover, the Court held that the merging of island and riverbank, as a consequence of the accumulation of accretion, augmenting and expanding both bodies of land, in combination with the reliction of the defunct river channel separating them, represented a meeting of equals, which results in the creation of a new dry boundary for

both, extending the full length of the line of contact between them. An island, although having merged with other lands, remains an identifiable and therefore distinct tract of land, no less well defined after merging than it had been at the time when it was surrounded by water, so the act of merging had no effect upon the title and ownership status of the islands, the Court decided, confirming that they had in fact remained under the ownership of Montana. The land owners had been effectively cut off from the river, at least in part if not completely, since the full extent of their lands is unknown, by the demise of the river channel, which had formed the riparian boundary of their lands so long as it had survived. The islands had interposed themselves between the land owners and the river, sealing the once riparian properties off from the water, by devouring the inferior channel, which had connected those properties to the main channel of the famously fickle river. The Court concluded by reversing the decision of the lower court in favor of Armstrong and his fellow defendants, leaving the exact location of their mutual boundary with the state lands that had been formed by accretion unaddressed and unspecified, but presumably subject to precise definition by means of a subsequent survey, accurately delineating the location of the thread of the deceased south channel.

YELLOWSTONE BASIN PROPERTIES v BURGESS (1992)

At this point we reach a case that delves into a topic which had long remained substantially unexamined by the Court, although it represents a subject of the utmost concern to land surveyors, and that is the matter of potential liability to a client, due to the failure of a survey to meet the needs or expectations of the client. While this case is somewhat limited in scope, since it concerns only boundary surveys, and it does not involve any claims made by third parties such as adjoining land owners, the fact that it focuses solely on the very infrequently argued issue of surveyor liability makes it Montana's most prominent case of that kind. Charges of professional negligence can be leveled against any surveyor, like any other professional, by anyone who believes that they have been damaged in some way by the professional work or decisions of the surveyor, as we have already seen in reviewing the Goodover case, in which a land owner became so upset that he chose to legally attack the work of both surveyors, the one who surveyed the adjoining property and the one who surveyed his property, without success

in either instance. Although both that case and this one involve only boundary issues, surveyors can be charged with negligence relating to virtually all other aspects of their work, performed in either the field or the office, such as the production of topographic data, or the staking of improvements for construction purposes, which constitute the most frequent sources of surveyor liability claims nationwide, but to the apparent credit of Montana surveyors, have never come before the Court for adjudication in Montana. The principal difference between this case and the Goodover case is not the fact that this case involves the BLM and PLSS boundaries, while the Goodover case involved only a residential lot line, its the fact that in this case the surveyor admitted that he had erred before any charges were launched against him, which had the effect of inviting the surveyor's client to take action against him, based on the mistaken conclusion that he had already admitted that he was guilty of negligence. So quite ironically, it was the surveyor's own honesty that caused him to have to endure this ordeal, had he rigidly defied the suggestion that he had erred, the extensive additional expense on the part of his opponents that would have been required to assemble a case against him could very well have proven to be prohibitive, but since the Court, not surprisingly, chose to view the surveyor's honesty as a strong point in his favor, he was destined to prevail in any event. Two other cases involving liability, PLSS boundaries, and statutory survey requirements as well, were brought before the Court during this era and may also be worthy of note, those being the 1985 case of *McCarthy v Timberland Resources* and the related 1987 case of *Timberland Resources v Vaught*. In conveying land to McCarthy, Timberland appeared to run afoul of the 20 acre statutory survey requirement, when Sanders County effectively denied the validity of that conveyance, based upon the county's interpretation of the applicable statute mandating surveys. The Court held in 1985 that Timberland was liable to McCarthy for the problematic conveyance, regardless of whether the objection that had been raised by the county was legitimate or not, provoking Timberland to file an action against the county. Then in 1987, in response to the direct assault made by Timberland on the position that had been taken by the county, the Court ruled that the county had indeed been mistaken in it's interpretation of the statute in controversy, clarifying that the Court saw no necessity for

surveys of aliquot boundaries, by flatly stating that "it would be a manifest injustice to require a survey", unfortunately indicating the great reluctance of the Court to support such requirements.

1980 to 1983 - During this time period, Burgess, who was a Montana licensed professional land surveyor, performed surveys for Yellowstone Basin Properties and Central States Ranch, which were Montana corporations involved in land development. The work performed by Burgess for these parties included recovering and remonumenting numerous GLO corners, since the area to be developed covered several square miles of land located in portions of two townships. Burgess and his team, which included at least one other licensed professional land surveyor, obtained the appropriate records, including GLO plats and field notes, and physically searched for evidence of many original GLO monuments across the project area, which had been originally surveyed and platted over 100 years earlier, and they filed a number of Certificates of Survey and Corner Monument Record forms to document their work. In one particular area, they set monuments to mark the section corners and the quarter corner between Section 3, which was owned by their clients, and Section 4, which was public domain under the control of the United States Forest Service. In doing so, Burgess treated these corners as having been obliterated rather than lost, based upon unspecified physical evidence that had been found, having been unable to locate the original monuments themselves on this particular line.

1986 - The BLM performed survey work in the same area that had been surveyed by Burgess, and after completing their preliminary survey work, the BLM informed Burgess that his monuments along the line between Sections 3 & 4 appeared to be incorrect, based upon certain unspecified evidence that had been found by the BLM. The BLM marked the northerly corner of Sections 3 & 4 on the ground, on a preliminary basis, subject to approval of the BLM resurvey, but then deconstructed the new BLM monument, because the resurvey was not approved prior to the passage of Section 4 into private ownership, which had the effect of eliminating the authority of the BLM to

conclusively determine the location of the section line in question, since the BLM is not authorized to perform controlling surveys of privately held land. Nevertheless, in his correspondence with the BLM, Burgess evidently acknowledged that the evidence discovered by the BLM appeared to indicate that some of his monuments may have been set in error, agreeing in principle that if the surveys he had done could not legally stand they would need to be amended, which would have a highly detrimental impact upon his clients. Yellowstone and Central, upon learning of this situation, decided to acquire additional land, based upon the BLM section line location, which varied from the section line monumented by Burgess by over 300 feet, in order to avoid potential future accusations that their development work, which was intended to be limited to Section 3, represented an encroachment upon Section 4.

1988 - In an effort to recover the expense they had incurred in acquiring the additional land lying between the Burgess section line and the BLM section line, which was more than \$80,000, Yellowstone and Central filed an action against Burgess and his colleagues, claiming that Burgess had breached his contract with them by performing negligent survey work. To support their claim that the northerly corner of Sections 3 & 4 had been incorrectly set by Burgess, Yellowstone directed one of its employees, who was a licensed professional land surveyor, to file documentation adopting the location for that section corner that had been temporarily marked by the BLM as the true section corner location, and he did so.

Yellowstone and Central argued that the survey work done by the BLM was correct, and that work had proven that the work done by Burgess and his survey crews had been incorrect, therefore Burgess was guilty of negligence, he had failed to uphold the standard of care for land surveyors, and he had failed to properly execute his contractual obligation to provide Yellowstone and Central with correct surveys that they could fully rely upon for land development purposes. Yellowstone and Central further argued that once Burgess had conceded that his work was erroneous, they had become entitled to legally rely upon that admission made by him, which amounted to an admission of negligence on his part. Burgess argued that he had executed

the survey work in question in accordance with typically accepted standards for such work, thereby completing his contractual obligations to his clients, so although his work may have contained errors, nothing that he had done, or failed to do, constituted professional negligence, so he was not responsible for the costs incurred by his clients as a result of their decision to reject his survey and acquire additional land based upon information provided by the BLM. The trial court ruled that the work of the BLM had been unofficial, and was therefore not controlling or binding upon any private parties, so the survey work performed by Burgess had not been conclusively shown to be incorrect or invalid, and Burgess was not guilty of either professional negligence or breach of contract, leaving Yellowstone and Central to bear the full cost of their additional land acquisitions themselves.

The arguments made by Yellowstone and Central in this case confronted the Court with several issues specifically relating to the proper professional performance of land surveys, requiring the Court to examine the consequences of survey errors, and their implications for land surveyors, in greater depth than it had ever previously done. In many of the cases that we have previously reviewed, various issues involving or resulting from survey errors, or conflicts between surveys indicating the presence of erroneous survey work, have been resolved by the Court, but as has been often noted, the actual correctness of the surveys is seldom made an active issue in such cases by the litigants. Moreover, even when the correctness of a survey is expressly questioned and successfully challenged, the survey is most often simply discounted or disregarded, without any further consideration of the implications of the shortcomings of the survey, so the issue of surveyor liability only very rarely comes into play. In this case however, rather than attempting to defend the survey work that had been done by Burgess for them, Yellowstone and Central effectively turned the typical legal presumption of survey correctness, which would have operated in their favor if they had stood by Burgess, against themselves, by taking the position that the work of Burgess was erroneous, based in part upon statements made by BLM personnel, and in part upon statements made by Burgess himself. Nevertheless, despite the fact that the assault on the work of Burgess came from his own client, rather than an adjoining land owner, the crucial legal presumption that he had performed his work in a professional manner remained intact, so a heavy burden rested upon the plaintiffs, as his attackers, to prove not merely that the survey work in question was incorrect, but that it was not even of professional quality. Both the trial court

and the Court made it clear from the outset that no boundary issues were in play, because the legal action had been undertaken for the sole purpose of establishing liability, and not for the purpose of adjudicating or resolving any boundary issues, so the objective was not to arrive at any conclusions regarding the true location of the section line in dispute, it was merely to ascertain the validity of the professional negligence accusations made by the plaintiffs. Yellowstone and Central had already voluntarily resolved the boundary and ownership issues themselves, in a de facto manner, by virtue of their acquisition of additional land, securing ownership of the disputed area unto themselves regardless of which section it was really located in, so the Court found that they had effectively rendered the issue of the true original section line location moot and irrelevant, leaving only the matter of financial liability to be decided. Yet to decide the negligence issue, the Court gave detailed consideration to the validity of the survey work executed by both Burgess and the BLM, the disparity between which had created the controversy. Quoting in part from the text of the trial court's decision, the Court made the following statements, which serve to illustrate and clarify its perception of the proper role of land surveyors, and to highlight the significant limitations that are applicable to any attacks upon professional survey work, providing staunch protection for licensed surveyors who perform their work with genuine diligence:

“The land surveyor's work often involves retracing the footsteps of surveyors who, approximately 100 years previous, performed surveys ... While present day licensed land surveyors are required to follow ... standards of practice ... it is a foregone conclusion that present day surveyors may or may not find a particular ancient monument ... the surveyor is held to certify that he followed all of the rules and regulations ... but it is impossible for him to insure that he is, in fact, standing in the 100 year old footprints of the original surveyor ... It is possible for two qualified surveyors to meticulously follow the standards of practice for surveying ... and disagree on a corner location without either being negligent ... approval or disapproval of a particular survey does not automatically establish either compliance or non-compliance with a surveyor's standard of care ... A surveyor who complies with rules and regulations as set forth in the ... Manual of Surveying Instructions, and who

uses the best evidence obtainable, meets the standard of care required for Registered Land Surveyors ... surveyors are not insurers of their work ... Defendants surveying activities were neither haphazard or arbitrary, nor ... based upon a lack of diligence ... Defendants ... based decisions upon careful and studied analysis, fully consistent with surveyors accepted standards of care, prudence and skill."

Positively impressed with the level of diligence that Burgess and his employees had applied to the task of completing the survey work that Burgess had agreed to perform for the plaintiffs, and emphasizing that Burgess and his team had clearly executed their work with the essential element of good faith, the Court was unwilling to find that he had actually made any survey errors at all, and was unwilling to find him guilty of negligence, even assuming that errors had in fact been made. The Court thus upheld the basic principle that error is not equivalent to negligence, and accusations of professional negligence place a high burden upon the accuser, not only to prove the existence of errors, but also to prove that they resulted from genuinely unprofessional behavior, conduct or judgment, amounting to carelessness and dereliction of professional duty. The Court pointed out that several surveyors had all testified that the work of Burgess and his crews met the typical standard of care for such work, and none had testified to the contrary, so there was no basis upon which to find that he had let his clients down in any respect. Since the work of the BLM had been only preliminary, and had been subsequently retracted without ever being approved, no one had any legal right to rely upon it, and it could not be used as evidence to disprove the validity of the work done by Burgess and his team. Moreover, even if the BLM corner locations were correct and those of Burgess were incorrect, no liability for such a discrepancy could devolve upon Burgess, in the absence of evidence that his failure to discover certain original monuments was the result of unprofessional performance in conducting his work, which in the view of the Court, the evidence did not reveal. The fact that Burgess had openly agreed that his work might contain certain errors was irrelevant, the Court held, since he had been misinformed, and had believed that the BLM survey work contradicting his own work was conclusive, rather than merely tentative, at the time he made his comments on the situation, so the plaintiffs had no right to rely on any such comments or statements that Burgess may have made. In addition, the filing of supplemental documents by the surveyor employed by Yellowstone, alleging

to correct the work of Burgess to match the BLM survey, was also irrelevant the Court decided, since Yellowstone's surveyor had done no actual survey work whatsoever in the area, and was therefore entirely unqualified to file any such information, dismissing the documents that he had filed as a legal nullity. Concluding that his clients had mistakenly relied upon the BLM survey, by their own choice, the Court upheld the decision of the lower court in favor of Burgess, fully vindicating him with respect to both negligence and liability, regardless of whether the section corner locations shown on his survey were in error or not, and applauding him for the professional integrity and honesty that he had shown in dealing with the issues that had arisen. The Court further stated that the lower court had correctly declined to address any boundary issues, despite specific requests that it do so, because the monuments set by Burgess, based on his treatment of the original monuments as obliterated, continued to stand as the best evidence of those corner locations, and remained presumptively correct, until such time as the contrary might be conclusively shown, which had not been done by BLM or by anyone else. Yellowstone and Central had learned a hard lesson, they had acquired the additional land in haste, for no valid reason, when they should have supported the work of their surveyor and sought adjudication of the boundary conflict, before jumping to the false conclusion that his work was indefensible, so no opportunity existed for them to shed any of the cost that they had incurred in so doing.

STEVENSON v ECKLUND (1993)

Our next case returns us to an urban setting, where an unexplained but very substantial apparent platting error lay dormant in a small town for half a century, before finally being dealt with by a surveyor, only to later become a source of controversy anyway, between two grantees and their grantor, despite the efforts of the surveyor to clarify their lot line locations. Although the legal descriptions of the various parties might appear to be fundamental to the resolution of this case, and they would certainly be of interest to any surveyor analyzing the way the events involving these parties played out, they were not included in the text of the case, yet their content can be deduced from the facts that are known. The Court made no direct citations from the legal descriptions held by the litigants because it was not necessary to do so in this instance, since the descriptions all made reference to

different platted lots, so no title conflict could exist and the only possible source of contention was the true location of the lot lines in question, leading the Court to properly categorize the conflict as a boundary dispute. While countless problems have been caused by shortages of land that has been depicted with dimensions on a plat, here we watch as an excessive amount of land proves to be just as problematic. Although this case was centered upon the issue of liability between the three parties involved, it provided the Court with a rare opportunity to comment on the apportionment of measurement error by land surveyors, and the Court's approval of the work of the surveyor who performed a proportion of relatively large magnitude here, increasing the size of a dozen lots by nearly 20 percent each, clearly indicates that the Court is comfortable with the apportionment concept. Even though the use of proportioning to locate platted lot lines is limited to unusual situations such as this one, and is not appropriate where either sufficient monumentation or evidence of occupation representing original lot line locations is present, it is nonetheless significant that the Court recognizes apportionment as being a valid option which land surveyors have the authority to implement, when truly necessary, as in this scenario. Despite the fact that measurements obviously play an important role in the events leading up to the outbreak of this dispute, it should be understood that any controlling value that the dimensions hold lies entirely in the adoption of the actual lot lines, as they were monumented on the ground, by each of the parties as grantees. While the adjustment of lot dimensions, in an effort to eliminate a measurement discrepancy, sets the stage for this conflict, creating the opportunity for one grantee to attempt to prey upon another, it is the principle of physical notice that provides the means of resolving the matter, and the fact that the concept of notice controls the outcome, is one reason why the legal descriptions of the parties are not treated as the primary controlling elements by the Court. The 1981 case of *Rase v Castle Mountain Ranch* presents another context in which the principle of notice operated to prevent a grantee from making unjust reliance upon documents of conveyance, as if documentation could be detached from reality. In that case, Castle Mountain acquired land which contained numerous cabins, some of which had stood for decades and been developed as homes by their owners, based upon agreements they had made with prior owners of the

land. Despite the fact that Rase and his fellow cabin owners held no land rights of any legal nature, the Court decided that Castle Mountain could not simply order them off the land, and was bound to honor their established equitable rights, since their cabins had always been perfectly visible, placing the full burden to take notice of their presence upon Castle Mountain, as the grantee.

1910 - An addition to the town of Ulm was platted, evidently using the rectangular city block configuration that was typical during the early years of the twentieth century. Block 1 of the addition was depicted as containing 12 lots of equal size, all in a single row, and all being shown on the plat as 50 feet in width, presumably bounded by streets or adjoining properties or a combination of the two, making this block 600 feet in length, according to the plat. Whether or not any field survey work was performed in the creation of this addition is unknown, but there is no evidence that any original lot or block corner monuments were ever set.

1916 - The local school district, which already owned Lots 1 through 3 in Block 1, acquired Lot 4. Whether or not a school existed on the land at this time is unknown, but the school district subsequently began using these lots, at an unspecified date.

1954 - The district became aware that Block 1 was actually 700 feet in length. How this 100 foot discrepancy had come to exist, and how it was discovered, are both unknown. There is no indication of whether or not any of the other lots in this block, aside from those owned by the district, had ever been sold, occupied or used by anyone, and there is no indication that any surveys had ever been performed in this block.

1966 - Needing room to expand, the district acquired Lots 5 & 6. The district ordered a survey at this time, and the surveyor staked the 6 lots that were owned by the district. In so doing, the surveyor proportionally distributed the excess of 100 feet equally among all of the lots, expanding every lot from 50 feet to 58.33 feet. Whether or not the surveyor recorded any drawing or other evidence of what he

had done is unknown. Apparently the 6 lots that were not owned by the school district remained vacant at this time.

1967 to 1974 - At an unspecified time during this period, Woods acquired all of the lots in the block that were not owned by the district, Lots 7 through 12. There is no indication of how the lots were described in this conveyance to Woods, presumably they were described with reference to the 1910 plat. Woods personally viewed the lots however, so he clearly understood them to be 58.33 feet in width each.

1975 - Woods quitclaimed Lots 10, 11 & 12 to Ecklund. How the lots were described in this deed is also unknown. Ecklund had these 3 lots surveyed, and the lot corners that were set for Ecklund also reflected that the lots were all 58.33 feet in width. Ecklund then proceeded to occupy these lots, making his home there.

1977 - Woods conveyed Lots 7, 8 & 9 to Stevenson by warranty deed. How the lots were described in this deed is also unknown. The existing corners of the properties owned by the school district and by Ecklund were shown to Stevenson by Woods, so Stevenson also understood that he had acquired 3 lots that were all 58.33 feet in width. Whether or not Stevenson built any improvements on his lots, or otherwise occupied them, is unknown.

1985 - Stevenson evidently had not made use of the entire 175 feet lying between the school district property and the Ecklund property, so during the summer of this year Ecklund decided to start mowing part of that area, with the intention of asserting a claim of ownership to a portion of it. After doing this for a short period of time, apparently without objection from Stevenson, Ecklund built a fence at an unspecified location within the 175 foot wide area, and openly claimed the portion of that area that was on his side of the fence, on the basis that the fenced area was not part of the 3 platted lots that had been acquired by Stevenson. Stevenson responded by filing an action against Ecklund, seeking to quiet his title to the full 175 foot area, on the basis that the 3 lots that had been conveyed to him covered the

entire 175 foot area, rather than just 150 feet, as platted.

Stevenson argued that he was entitled to 175 feet of frontage or width, regardless of whether or not his deed specified that he had acquired 175 feet, because the excess in the block at issue had been properly applied to each lot, legally expanding every lot to 58.33 feet in width, and because Woods had shown him the full 175 feet, telling him that full area was being conveyed to him. Stevenson subsequently expanded the scope of his action to include Woods as a defendant as well, charging that Woods had created the conflict by making his conveyances to Ecklund and Stevenson as he had done, and asserting that the attack upon Stevenson's title made by Ecklund had left Woods in breach of his warranty deed to Stevenson. Ecklund argued that the proportioning of the excessive length of the block had not been properly executed and was not legally binding, so the area owned by Stevenson was legally controlled entirely by the language of Stevenson's deed. Therefore, he argued, Stevenson had acquired only 3 platted lots that were each 50 feet in width, and since Woods had quitclaimed one end of the block to Ecklund, Ecklund was free to assert a claim to whatever portion of the block was not included in either the deed held by Stevenson or the deeds held by the school district, which he had done by building the fence in question. The trial court decided that the lot proportioning procedure that had been applied by the school district's surveyor in 1966 was legal and binding upon all of the lot owners, since they all had both notice and knowledge of the lot expansion, and therefore quieted title to the entire 175 foot area in Stevenson, also awarding damages to Stevenson against both Ecklund and Woods.

The sole issue on appeal was the matter of the damages that had been awarded to Stevenson, essentially as compensation for having been illegitimately forced to incur fees and other expenses, in defending his title against a baseless claim. Ecklund had been vanquished and did not participate in the appeal, but Woods maintained that he should not be held liable for any damages, because he had always agreed with Stevenson that the proportioning procedure was fully legal and had been correctly applied, so he should not be associated with the groundless claim that had been made by Ecklund, or be held responsible in any way for the consequences to Stevenson of Ecklund's decision to make such a foolish claim. Just as in the Yellowstone case, just previously reviewed, the issue here was not the boundary location, which had been settled and had not been preserved as an active issue on appeal, the question for the Court here concerned the involvement of Woods, as the grantor of both of the litigants, so the focus of

the Court was specifically on whether or not Woods should be liable in part for the fallacious attack that had been made by one of his grantees upon his other grantee. Had the deeds from Woods to Ecklund and Stevenson clearly stated that the lots being conveyed were each 58.33 feet in width, and that each grantee was getting 175 feet of frontage, no dispute could have arisen, because there would have been no discrepancy between the descriptions and the lot corners that had been set after the 100 foot excess was discovered, so the evidence pointed to the descriptions used by Woods as the true source of the conflict. Apparently Woods assumed that describing the lots by number only, without indicating that they were no longer 50 feet in width, as they had been originally platted, was an adequate legal description, and he did not realize that in so doing he was planting the seeds of a future controversy. As we have seen demonstrated in numerous earlier cases, grantors typically bear the burden of properly informing their grantees of what is being conveyed, and many grantors have suffered the consequences of unclear descriptions, employing mistaken or poorly chosen language, for which the grantor was responsible. However, a grantor can make his intentions clear to his grantee in several ways, and one of those ways is by physically showing his grantee exactly what is being conveyed on the ground. Woods had shown the actual lot boundaries to both Ecklund and Stevenson, just as Mrs. Larson had shown Udem her intended boundary location, which controlled the outcome of the Larson case just three years earlier, so Woods had fulfilled his legal burden by physically putting both of his grantees on notice, as to exactly what they were acquiring, and they were both legally bound by their knowledge of the actual lot boundaries, regardless of any shortcomings in their legal descriptions. Woods had implicitly accepted the equal apportionment of the excessive frontage to all of the lots, and he had clearly intended to convey the apportioned lots, rather than the smaller original lots, so if the apportionment procedure was valid, then the lots had in fact been permanently enlarged and Woods had not improperly conveyed them. With regard to the question of whether or not the apportioning of the excess by the surveyor who had discovered it had been appropriate, the Court took the position that:

“... because the doctrine of apportionment was properly applied to correct the 100 foot discrepancy in the 1910 plat the Ecklunds had no legal basis to support their assertion of ownership over part of Lot 9 ... Throughout the litigation, the Stevensons maintained that the Ecklunds had no lawful claim to

any of their property ... the discrepancy in the 1910 plat regarding the size of Block 1 was properly resolved by applying the doctrine of apportionment ..."

The Court thus upheld the use of proportioning to distribute measurement error in a city block and implicitly approved the enlargement of the lots in question by the 1966 surveyor, as permanent and legally binding, even in the apparent absence of any documentation of record showing the expansion of the lots. Because the use of this procedure had not reduced or damaged the rights of any lot owners at the time it was put into effect in 1966, and because what had been done by the surveyor in 1966 was openly known to all of the subsequent parties involved with the lots, the Court approved what the surveyor had done as perfectly legitimate. Of course, if any of the lots involved had been previously conveyed with reference to the original plat, and boundaries had been established on the ground between lot owners prior to 1966 based on the platted lot dimensions, so that alteration of the lots would result in damage to the rights of any lot owners, the outcome would have been different, since apportionment would have been inapplicable under such circumstances and certainly would have been disapproved by the Court. Since the expansion of the lots was fully legitimate and legally binding upon all of the parties however, Woods had made no mistake, the Court determined, he had properly conveyed the enlarged lots, even if they were described only by lot number in the deeds to Ecklund or Stevenson. Since the 50 foot wide lots no longer existed after 1966, and all of the parties were on full notice of that fact, any reference to the lots made thereafter was effectively a reference to the apportioned lots, and not the smaller original lots. Woods had properly carried out his conveyances to both Ecklund and Stevenson, meeting his obligations to them as their grantor, the Court decided, so he bore no responsibility or liability for the dispute that had subsequently erupted between them. Since Stevenson had prevailed over Ecklund, and Ecklund's claims against Stevenson had proven to be false and ineffective, Stevenson had suffered no loss of land or loss of rights, so the conveyance from Woods to Stevenson had remained intact, therefore the Court concluded that Woods was not in breach of his warranty to Stevenson. A warranty deed, the Court stated, protects the grantee only against lawful claims, and the claims made by Ecklund had been proven to be unlawful, so Woods had no obligation to bear the expense of protecting Stevenson from any such bogus claims. Woods would have been in breach of his warranty only if Stevenson had suffered an actual loss of land or rights, as a result of a deficiency or failure

of the conveyance from Woods to Stevenson, so by virtue of his victory over Ecklund on the boundary issue, Stevenson had effectively eliminated any possible liability on the part of Woods. If Ecklund had been victorious however, Woods could have been held responsible for the resulting damage to Stevenson. Holding that a temporary cloud upon a title, such as the one created by Ecklund's false claim, is not equivalent to an encumbrance upon the title, for which a grantor can bear liability, the Court reversed the lower court's award of damages against Woods, leaving Ecklund alone to cover the cost of Stevenson's efforts to defend his land. The apportioning of the lots by the 1966 surveyor had withstood Ecklund's challenge, not however because that surveyor had any authority to unilaterally alter the size of the lots, but rather because the lot owners had accepted and adopted the resolution that he had provided, and the subsequent purchasers of the lots had notice of the adjusted lot dimensions and lot line locations at the time they acquired their lots, binding them to honor the lot boundaries that had been physically shown to them.

GILMAN v BECK (1994)

The next boundary dispute addressed by the Court, just 6 months after disposing of the Stevenson case, also arose in an urban context, and stands in contrast to that case with respect to measurement evidence, while augmenting it on the great value of physical evidence in boundary determination. In that previous case, the Court endorsed the work of a surveyor who had dramatically altered platted lot dimensions, in laying out lot lines, applying the fundamentally equitable solution of proportionate distribution of measurement error, out of necessity, since his decision to do so had met with acceptance by all of the relevant parties and had been put into practice on the ground. The very different treatment of measurement evidence by the Court here however, clarifies that the altered lot dimensions themselves did not represent the controlling factor in that case, as in this case the Court dismisses a survey which is based entirely upon measurements, because approving and upholding the survey in this instance would have the effect of elevating measurement evidence above physical evidence of established boundaries, with which this survey makes no effort or claim to reconcile itself. This case thus serves as an excellent illustration

of the fact that the Court sees measurements and dimensions as informational, rather than controlling, and that while reliance upon authentic monumentation typically meets with the Court's full approval, reliance upon measurements alone, without any valid basis, particularly when those measurements have the effect of creating conflicts with the existing conditions on the ground, should not be expected to find support from the Court. The potentially controlling force and effect of boundary testimony is also well exhibited by this scenario, particularly the testimony of prior owners of the properties lying on both sides of the boundary in contention, which has the power to greatly impress the Court by showing how long respected boundaries were established and honored by the predecessors of the current litigants, providing the Court with an appreciation of the degree of reliance that has been made, on a certain boundary location, in good faith. In addition, we look on as the Court once again upholds a boundary agreement, allowing testimony concerning the agreement to serve as support and justification for the treatment of the established boundary as a legitimate and possibly original lot line location, supplying an element of precious certainty in the midst of a situation otherwise overflowing with uncertainty, and overcoming the unwelcome reconfiguration of the neighborhood suggested by the survey at issue. The case of *Bragg v McLaughlin*, a very bitter legal battle fought over an access easement, which came before the Court four times during the 1990s, also stands as a fine example of the impact of testimonial evidence on land rights, in the context of ascertaining the meaning of ambiguously designed conveyance language. Bragg and McLaughlin were grantees of adjoining properties, and McLaughlin, who was an attorney, agreed to compose a "special provision" that would provide legal access across her property to the Bragg property, and she did so. Subsequently however, McLaughlin denied that any access easement existed across her property, asserting that the special provision language did not operate to create an easement. When the Court ruled that Bragg did indeed have an easement across McLaughlin's property, on the basis of extensive testimony revealing that she had deliberately crafted the language in a manner that would be legally inadequate, McLaughlin protested that extrinsic evidence such as testimony could not be allowed to alter the language that she had composed. The Court responded by informing her that

whenever the meaning of descriptive language is in controversy, all evidence surrounding or shedding light upon the circumstances and intentions of the parties is in play "so that the judge may be placed in the position of those whose language he is to interpret".

Prior to 1976 - At an unspecified date, a certain residential subdivision was created in the town of Deer Lodge. Whether or not any original lot or block corner monuments were ever set in this subdivision is unknown. In a certain block of this subdivision, Lot 1 lay directly south of Higgins Avenue, Lot 2 lay directly south of Lot 1, and the lot numbers continued to rise sequentially, proceeding south to the end of the block. At an unspecified date, Springer became the owner of Lots 1 & 2 while Breeding was the owner of Lots 3 & 4, all of which were typical rectangular lots, 30 feet in width, so Springer owned the north 60 feet of the block and Breeding owned the next 60 feet to the south. The Springer property contained a house and a detached garage, which had evidently been built by prior lot owners, but the Breeding property was apparently vacant. Breeding conveyed her lots to Browne, showing Browne a circular mark in the sidewalk, which ran along the street that bounded her lots on the west, and she told Browne that the mark represented the northwest corner of Lot 3. After Browne had acquired Lots 3 & 4 from Breeding, Springer and Browne agreed that the mark in the sidewalk was in fact the lot corner between their properties, and they jointly built a fence from that point, running the full length of their lots, to an alley that bounded their lots on the east. How they determined the direction of the lot line from that starting point in the sidewalk is unknown, there is no evidence that they found any other monuments or that they made any measurements. Browne then built a house and garage, placing the garage in the northeast corner of Lot 3, about 3 feet south of the fence. Part of the sidewalk was subsequently torn out during utility installation, eradicating the circular mark, but Browne replaced the mark himself, by scribing a similar mark where the old one had been, at the end of the fence, shortly after the sidewalk was repaired. Browne subsequently conveyed his lots to Streufert. Aside from the

mark in the old sidewalk, the origin of which is unknown, there is no indication that any of the lots had ever been surveyed.

1976 - Gilman acquired Lots 1 & 2 from Springer and took up residence there. He and Streufert both accepted the existing fence as the lot line, so there was no controversy concerning the location of the line between Lots 2 & 3 at this time.

1984 - Beck acquired Lots 3 & 4 from Streufert and occupied those lots. The title package given to Beck included a sketch, of unknown origin, showing the improvements on the property that he was acquiring, and indicating that no encroachment issues existed. Beck accepted the information provided to him, which appeared to verify the existing conditions, at face value, and he did not order a survey of the lots he was buying, for that reason. There is no indication of how either the Gilman or Beck properties were described in any of the conveyances involving those lots, presumably they had been described only by means of reference to the original plat. Relations between Gilman and Beck were apparently bad from the outset and only grew worse with the passage of time.

1987 - For unknown reasons, Gilman ordered a survey at this time, which showed that the fence was not on the line between Lots 2 & 3 and the garage owned by Beck was encroaching on Gilman's Lot 2 by about 3 feet. There is no indication of what the survey was based upon, or whether or not any monuments were located anywhere in the block during the survey. Upon learning of the alleged encroachment issue, Beck apparently measured the width of his property himself, and he found it to be 60 feet in width, just as it was supposed to be, whereupon he informed Gilman that he would defend his 60 feet, as it existed, refusing to move his garage. Gilman therefore filed an action against Beck, seeking to have Beck ordered to move the garage, but this action apparently stalled for some unspecified reason, leaving the matter undecided.

1989 - Gilman filed a second action against Beck, this time claiming that a wood burning stove owned by Beck was generating excessive

smoke, which was frequently carried by the prevailing winds directly into Gilman's home. This action also sat idle however, for a period of years, without any progress being made toward resolution of the situation.

1993 - The two legal actions that had previously been initiated by Gilman were combined into one action, and finally went to trial.

Gilman simply argued that the survey that had been performed for him was correct, and that it proved that Beck's garage was an encroachment subject to removal. Beck argued that Gilman's survey was incorrect, and that the fence in question had long been physically established, and accepted by all of the prior owners of both properties as the true original lot line, and that as an innocent grantee he had been entitled to rely upon the information provided to him at the time of his acquisition, which indicated that the fence was on the lot line and no encroachments existed, so he should not be required to move his garage. The trial court held that the survey performed for Gilman was insufficient to control the lot line location in question, which was controlled instead by the evidence that had been presented by Beck, so the fence and garage were not encroachments on Lot 2, and it was also decreed that Gilman was not entitled to any damages from Beck due to the presence of the smoke emanating from Beck's property.

At first glance, it may appear that Gilman had done everything right and Beck had done everything wrong, and indeed Gilman had one major advantage over Beck, since Gilman had obtained a survey to support his case, while Beck had elected not to do so. Gilman may very well have imagined that the result would inevitably be in his favor, because his survey appeared to be legitimate in all respects, and it appeared to serve exactly the purpose that he had intended it to serve, which was to force Beck into retreat, by showing that he was guilty of encroachment. Gilman's survey was entitled to the presumption of correctness, as a professional product, and Beck had made no attempt to directly contradict Gilman's survey, by obtaining a survey of his own to cast doubt upon the validity of Gilman's survey. Beck and his legal counsel however, evidently realized that it is not absolutely necessary to obtain a survey to overcome an opposing survey, because there are other ways of rendering the opposing survey invalid, which is what they set out to do, and they proved to be equal to the challenge of gathering enough evidence to cause the Court to look askance upon Gilman's survey. Although the Court, as we have noted in our review of several previous cases involving boundary disputes, has never formally

adopted any boundary resolution doctrines based upon the practical location of boundaries by land owners, or upon silent acquiescence of land owners to an existing fence or other object as a boundary, the Court has always remained open to genuine evidence of a boundary agreement, freely and openly made by adjoining land owners. Under the circumstances present here, Beck had no need to assert that any line other than the true original lot line had ever been adopted or agreed upon, and he wisely made no claim to that effect, he simply presented an extensive amount of evidence indicating that no line other than the fenced line had ever been either treated or recognized by anyone as the lot line, suggesting to the Court that the fence may well in fact have been built upon the true original lot line. Since there was no evidence that any original monuments had ever been set in the area at issue, and the Court had often previously held that in order to control, a survey must be based upon original monuments, Gilman's survey was inconclusive, the Court observed, and represented only the opinion of one surveyor as to the lot line location, being based only upon measurements. The evidence presented by Beck, revealing the historical location, acceptance and treatment of the lot line in question, made it clear to the Court that a state of agreement regarding the lot line location had existed among all of the several prior owners of both properties involved, and that the fenced line had been repeatedly adopted and reinforced by the actions of all of the predecessors of both Gilman and Beck. Importantly, due to the absence of original monumentation, the perception of the prior lot owners, that the fenced line represented the original lot line location, had a potentially valid basis, the Court recognized, which Gilman's survey could not conclusively disprove. Comparing the evidence presented by both parties, after noting that the value of the survey was suspect, since it did not appear that any physical or testimonial evidence had been taken into account by Gilman's surveyor, the Court found that:

“Beck provided the testimony ... former owners who stated that according to the historical boundaries of the lots, Beck's garage is entirely within his own property. Both of the Brownes testified ... Mrs. Breeding showed them a sidewalk marker, marking the lot line for the property they were to purchase ... they invited their neighbors, the Springers, over to obtain their opinion about the location of the proposed garage. The Springers wanted the garage moved a little farther from the fence line, and the Brownes accommodated them, building the

garage at its present location. Streufert also testified and reported that it was his understanding that the Gilmans garden fence line was the proper lot line for the property."

In the absence of any evidence of conclusive monumentation anywhere on or near the lots in question, the Court saw the testimonial evidence supplied by Beck as highly persuasive, and treated it as the next best alternative to original monumentation, superior to the measurement evidence represented by Gilman's survey. Gilman's surveyor testified on Gilman's behalf, but he did not do Gilman any favors, stating that in his view "all of the lots in the area were out of kilter" by over 6 feet, and also indicating that he believed Gilman's garage encroached upon Higgins Avenue, which illustrated to the Court that accepting his survey could imply multiple encroachments, potentially on every lot in the block, possibly triggering a wholesale rearrangement of established boundaries and existing improvements throughout the area. Criticizing Gilman's surveyor for failing to take physical evidence of existing boundaries into account, and for failing to seek any testimonial evidence from the relevant property owners, pertaining to their knowledge of the origin of the existing lot boundaries, the Court disapproved the measurement based methodology with which the survey had been conducted and discounted its value accordingly. Since Gilman had elected to rely entirely upon his survey, the full weight of the testimonial evidence ran uniformly against him, and in the eyes of the Court, the strength of the testimony provided by Beck and the prior lot owners proved to be more than enough to disqualify the survey and prevent it from being allowed to control the location of the lot line in question. While the survey had not been definitively contradicted or proven to be positively erroneous by Beck, by means of any evidence relating to measurements or dimensions, Beck had demonstrated, to the satisfaction of the Court, that the survey was not based upon the best available evidence, which was sufficient to lead the Court to reject it, and thereby fully uphold the decision of the lower court in Beck's favor. Gilman pointed out that the sketch provided to Beck, upon which Beck claimed to have relied, was not a true survey and was clearly inferior to the survey that had been done for him, but the Court concluded that Beck's reliance on the sketch was not unjustified, stating that the sketch was not the basis for the Court's ruling anyway. The evidence that the predecessors of both Gilman and Beck had never disputed the lot line location, and that they had agreed upon it to such an extent that they had relied upon it in the construction of permanent improvements, convinced the Court that the existing improvements stood as the best evidence of the

originally intended lot line locations in the block at issue. Gilman was just as guilty as Beck and all of the other lot owners, the Court realized of course, in having failed to order a survey at the time he acquired his lots, and having failed to question the existing conditions at that time, apparently supposing that he could always do so in the future, at whatever time might prove to be most convenient for him. From the decision of the Court however, Gilman had learned that as a grantee, he stood in the shoes of his predecessors, and therefore could expect to be given no opportunity to deny the validity of the lot line location, which had been openly adopted and approved by his own grantor and others, since he had full physical notice of the fenced boundary at the time he acquired his lots. Gilman's surveyor had learned that measurement evidence cannot be relied upon to prevail, even in the absence of any competing survey, given the presence of higher forms of evidence, such as testimony relating to legitimately established boundaries. Despite this outcome negating and dismissing the survey, the Court continued to maintain, consistent with its position set forth in the Yellowstone case just two years before, that a survey represents only an opinion, which typically results in no liability for the surveyor, mere error not necessarily equating to the requisite negligence.

CECHOVIC v HARDIN (1995)

Here we come to a case that all grantors and grantees, and indeed all professionals involved in the conveyance and development of land as well, should be aware of, which illustrates both the great potential value of a survey, and the very unfortunate consequences that can befall those who decide to forego a survey. No survey errors are resolved in this case, because none were made, so no controversies relating to survey work are presented here, and no survey procedures or other details are discussed, yet the importance of surveys is central to the outcome, and the defeated parties are left with good reason to deeply regret their disdainful attitude toward surveys. Although we have seen many instances in which surveys have failed to accomplish a certain intended objective, such as controlling or correctly defining an ambiguous boundary location, as in the Gilman case just previously reviewed, which can occur for a wide variety of reasons, surveyors know very well that surveys can have value in many other respects. Few others however, know as well as surveyors how many

different ways serious boundary issues can come to exist, even in situations where no survey errors have been made, through innocent mistakes and misunderstandings, making boundary verification vital to the protection of land rights. A survey should always be considered necessary for construction, not to create boundaries, but to verify the relative locations of items that may appear to represent boundaries, but may in fact be misleading. Contrary to the common misconception that surveys are only really necessary when new tracts, parcels or lots are being created, surveys that provide clarification of ambiguous conditions and serve as definitive evidence of spatial relationships between improvements and other objects can hold just as much value. There is great irony in this case, as neither the party who made the initial mistake, and really caused the problem with his carelessness, nor the party who becomes the victim of that mistake, by virtue of his own ignorance and trusting nature, ultimately bear the consequences, which the Court instead places squarely upon the shoulders of professional intermediaries. The essential elements of negligent misrepresentation are enumerated here by the Court, defining it as "the failure to exercise the care or competence of a reasonable person in obtaining or communicating information", a very broad definition that could easily ensnare land surveyors, as well as realtors and many others dealing with land rights on a professional basis, and the critical discovery rule, that can keep long past errors legally in play, appears here again as a factor as well, as discussed earlier in the 1909 American case. Even the Court itself has unfortunately sometimes taken a rather dismissive attitude toward surveys, the 1987 action known as *In Re the Marriage of Hancock* being one example, which reveals a somewhat surprising lack of appreciation for the value of a survey in the creation of a new boundary. In that instance, when Hancock and his wife decided to get divorced, they agreed to physically partition their ranch, so they had to establish a boundary that would split the land to the satisfaction of both parties. The Court approved a lower court decision allowing the property at issue to be permanently and conclusively divided by a line simply drawn by hand on a map by Hancock, whose wife then chose which side of that line would be her land, without any field survey work, or any monumentation, or any precise description at all, observing in so holding that the line drawn by Hancock was "relatively straight".

1977 - Grizzard owned an extensive amount of land, situated along the Yellowstone River, which he subdivided into an unspecified number of large tracts, each having substantial river frontage. He sold Tract 4, which contained about 20 acres, to Saville, but he did not sell Tract 5 at this time, which was directly west of Tract 4. Tract 5 apparently remained vacant.

1980 - Saville was an absentee owner who did not live in Montana, she had bought Tract 4 only as an investment. She had Tract 4 split, and she sold the east half, identified as Tract 4B, to Handl, while retaining the west half, known as Tract 4A.

1981 to 1986 - At some time during this period, Handl decided that he would like to be able to use Saville's Tract 4A as an additional pasture for his livestock, and Saville told him that he could do so, but he would have to fence it himself, so Handl told Grizzard that he planned to fence Tract 4A, and asked Grizzard to show him the boundary line between Tracts 4 and 5 for that purpose. Grizzard showed Handl the location where he thought the boundary was, and Handl built the fence there, but in fact Grizzard was mistaken about the location of the tract boundary, so unknown to anyone the fence was built about 160 feet west of the tract boundary, entirely on Tract 5.

1987 - Saville decided to sell Tract 4A, so she hired Hardin, who was a real estate broker, to act as her agent. Bullock, who was a real estate agent employed by Hardin, showed Tract 4A to Cechovic. After walking the property together, Bullock and Cechovic reviewed the Certificate of Survey showing Tract 4A, both of them assuming that the fences were all located on the boundaries of Tract 4A. Cechovic then proceeded to acquire Tract 4A from Saville.

1988 - Cechovic completed the construction of a house, just a short distance east of the westerly fence built by Handl, and took up residence in the house.

1991 - Grizzard decided to sell Tract 5, so he ordered a survey, which revealed that not only was the fence built by Handl located on Tract 5, the entire house built by Cechovic was also located on Tract 5.

Grizzard insisted that Cechovic move the house off his tract and Cechovic did so. Cechovic then filed an action against Hardin, Bullock and Saville, seeking reimbursement for the cost of moving the house to Tract 4A.

Cechovic argued that Hardin, Bullock and Saville were all guilty of misrepresentation, for failing to inform him that the fenced area which had been shown to him was not all included in the tract that he intended to acquire, so they should be required to compensate him for the cost of relocating the house to his lot, which was over \$65,000. Hardin and Bullock maintained that they had not said anything misleading to Cechovic, and he was guilty of failing to order his own survey, so they should not be required to cover his relocation expenses, asserting that their failure to show Cechovic the true boundaries of the tract in question did not amount to negligence, and arguing that even if they had been negligent, the statute of limitations had expired, so Cechovic could recover nothing from them. Saville argued that she was unaware of the manner in which the transaction had been conducted, since she was not in Montana, and she had no idea what had taken place, so Hardin and Bullock, who had functioned as her legal agents, should be held fully responsible for any problems resulting from the transaction. A jury trial was held, and the jury found that all of the parties had been negligent to some extent, but Hardin and Bullock, being the only real estate professionals involved, were guilty of professional negligence, so Hardin and Bullock should bear 99% of the cost, requiring them to absorb the loss that would otherwise have descended upon Saville, as the grantor, and leaving Cechovic to bear only 1% of the cost himself, as the grantee.

As all surveyors know, people often question the need for a survey, and everyone would prefer to save money by not ordering a survey, but this case stands as a classic example of just how disastrous that decision can be. It is true of course, that even a correct survey can prove to be of no benefit or value, if events have taken place that prevent the survey from controlling, as we have just seen in the Gilman case for example, but whenever boundary uncertainty of any kind exists, development of the land without a survey is highly dangerous. Unfortunately, many people believe that if a survey has been done in recent years, then there is no value in obtaining another survey, failing to realize that even a recent survey is of no benefit, if none of the parties know where the surveyed corners and lines are actually located on the ground. In this case, two surveys of the land at issue had been done, less than 10 years before the problem arose, one when Grizzard had his land

subdivided, and another when Saville split her lot, and there is no indication that there were any problems with either of these surveys. However, no one had paid any attention to where the surveyed tract boundaries were located, so the situation in 1987, when Bullock and Cechovic first visited the property, was essentially the same as it would have been if the last survey had been done 100 years earlier. Cechovic expressed concern about the tract boundaries, because the fences that he saw were not shown on the survey, but his concerns were brushed aside by the realtors, who explained that the fences had been built after the survey was done, but in fact the fence in question would not have appeared on the survey done for Saville even if it had been built before the survey was done, because it was so far off her tract that a typical surveyor would not have imagined that it was intended to represent the tract boundary. Saville, to her credit, had suggested that another survey should be done, because she had no idea where Handl had built the fence, but her agents had paid no attention to her, apparently due to their desire to save money. When Cechovic raised questions about the fence, Bullock's key mistake, aside from deciding that a survey was unnecessary, was failing to inquire about the origin of the fence, and instead very unwisely assuming that it had been properly located on the tract boundary. Bullock and Cechovic walked the fenced area and had a conversation while standing on a hill near the fence, so she knew that Cechovic intended to build his house there, and she allowed him to believe that area was part of Tract 4, due to her desire to close the deal, thereby misleading him, without ever saying anything specific about the location of the tract boundaries. The fact that her ignorance was genuine, and that she had never actually lied about the boundary location in question, could not save her from liability, the Court decided, nor could the fact that Cechovic had the opportunity to independently discover that the fence was not on the tract boundary eliminate her professional responsibility to avoid misleading him. The Court responded to the allegations of Hardin and Bullock, that Cechovic knew enough about the situation to recognize that a mistake had been made well before the house was built, and that he should have realized that the west fence could not possibly have been located on the tract boundary, by observing that:

“Although the Cechovics did visit the property several times before the sale, and did obtain a Certificate of Survey from the County Clerk and Recorder's office, Mr. Cechovic testified that he did not attempt to compare the plat to the boundaries

because he relied on Bullock's representations regarding the western boundary ... an independent investigation clause does not preclude justifiable reliance by a buyer on misrepresentations of the seller and its realtor ... where a plaintiff relied on a realtor's misrepresentations, the seller is liable ... the Cechovics justifiably relied on Bullock's representations regarding the property boundary ... Hardin and Bullock claim that the error was obvious ... However, they do not explain how their oversight in this regard was reasonable if the discrepancy was so obvious ... our decision does not mean that a broker is responsible to have property surveyed in every case ... these defendants negligently misrepresented the boundary of the property ... In Montana, every person who suffers detriment from another's unlawful act or omission may recover damages."

The Court made it quite clear that although a realtor is not obligated to order a survey, the decision not to obtain a survey places an elevated level of professional risk upon the realtor, since a realtor, unlike an innocent purchaser, is presumed to have a professional level of knowledge regarding land rights issues, and to understand and appreciate the potential value of a survey. Faced with the Court's conclusion that they had indeed been negligent, Hardin and Bullock sought the shelter of the statute of limitations pertaining to negligent misrepresentations, which serves to protect professionals from obsolete charges and claims. Since over 3 years had passed, from the time of their involvement with Cechovic to the time he had filed his action, Cechovic had lost his right to legally attack them, regardless of what had transpired, the realtors alleged. The Court however, cut them off, applying the discovery rule to dismiss the idea that Cechovic had lost his rights due to any delay on his part, since he had not suffered any real damage until 1991, when Grizzard, who ironically had set the stage for all of the subsequent problems with his own negligent misrepresentation of the boundary in question, discovered what had happened and ordered him to vacate Tract 5. Until that time, the Court noted, Cechovic had no reason to suspect that any problem existed, and he was actually reaping the benefit of using the additional acreage, so having suffered no loss, he had no basis upon which to file any action against anyone, thus he had in fact filed his action promptly and was guilty of no delay at all. Finally, Hardin and

Bullock suggested that because Cechovic had gotten the full amount of land that he had bargained for, which was the full extent of Tract 4A, as it was shown on the Certificate of Survey, he had no right to complain, implying that Cechovic had really filed his action in bad faith, just because he was upset about having been caught in a deliberate attempt to snatch extra land that he really knew he was not entitled to, through his occupation of the land between the fence and his tract boundary. The Court readily disposed of this theory, since there was no evidence to indicate that Cechovic had not occupied Tract 5 in plain ignorance and good faith, by confirming that the location of the land being conveyed is just as important and just as relevant to a conveyance as it's size, so the fact that Cechovic did not get all of the land that he was physically shown was sufficient to prove that he had been legally damaged, making the fact he did actually get all of Tract 4A irrelevant. Cechovic, the Court concluded, had been fully entitled to rely on Hardin and Bullock, as parties presumed to have professional knowledge of land rights, to be both thorough and truthful in all respects in their dealings with him, and to give him no misleading information. Since Hardin and Bullock had failed to apply the proper standard of care in dealing with Cechovic, they had breached their duty to him as professionals, due to their negligent handling of his acquisition, therefore the Court fully upheld the damages awarded to Cechovic, and against Hardin and Bullock for professional negligence, by the lower court. Saville escaped undamaged, through indemnity, because she had been smart enough to shed her own potential liability by hiring licensed professionals, who she was legally entitled to fully rely upon. In truth, it took a number of contributors to bring this catastrophe to complete fruition, Grizzard, Handl, Saville, Hardin, Bullock, and of course Cechovic himself, could all have prevented the problem simply by exercising greater diligence in their various roles, but the Court steadfastly declined to saddle Cechovic, an innocent grantee, with the consequences. Although Hardin and Bullock were not surveyors, they were professionals who were dealing with non-professionals, just as are land surveyors typically, so surveyors would do well to heed the warning, relating to the high burden of professional responsibility, offered here by the Court.

FERRITER v BARTMESS (1997)

Just as in our last previous case, no surveys or surveyors are involved in this conflict, which is over the meaning of a description, although the origin of the description in question is unknown, so it is possible that it was

written by a surveyor, but that is highly doubtful, as it bears the appearance of a description created by an attorney or clerk acting as a scrivener. Since surveyors very often compose descriptions and thereby take on the role of the scrivener, it should be noted that a scrivener's knowledge is an important focal point in the largest overall lesson taught by this case, which is the fact that a poorly composed description can have unintended consequences. In this instance, the author of the description presumably realized that a right-of-way is generally only an easement, but made the false assumption that everyone else also understands that concept, leading to the inclusion of misleading language that would eventually become a source of unnecessary controversy. The unsuccessful claim made here points out how poorly understood the concept of public right-of-way is, as many people believe that every public right-of-way represents fee ownership, failing to grasp the very fundamental concept that a right-of-way is typically intended to represent only an easement, forming a blanket that merely lies on top of the land of others, not changing the ownership of the land beneath it. Such a misconception is readily understandable however, since it is widely acknowledged that any right-of-way is dominant, leading those ignorant of different types of land rights to suppose that the public must actually own the land comprising a public right-of-way. The decision of the Court in this case demonstrates the Court's recognition that references to roads in descriptions can often be seen as having been included only for informative purposes, rather than controlling purposes, and also shows that dimensions can control, though only when they represent the best evidence, in the absence of a controlling physically established location. This case also harkens all the way back to the 1891 Metcalf case on surplusage, our first statehood era case, showing both the long term consistency of the Court's decisions, and the fact that many principles expressed in even the earliest cases remain potentially relevant and applicable today. Here we observe that the surplusage concept forms a convenient way for courts to simply dismiss the content of the latter part of a description, when it appears that the subsequent language was intended only to be informative and not controlling. If such language appears to hold some controlling value however, the four corners rule, which dictates that every word used in a description must be considered and given its intended effect, is applied, and

the surplusage rule is discarded. The centerline and right-of-way issues presented here were also in play in the 1947 case of McPherson v Monegan. The parties in that case owned tracts located on opposing sides of a county road, they asked for the road to be vacated, and the county vacated it. However, the tract boundaries of both parties were clearly described as running along their respective edges of the right-of-way, leaving the ownership of the vacated strip unclear, so Monegan obtained a quitclaim deed covering the entire strip from the previous owners of the area, and thereby claimed to own the whole vacated strip. Showing it's strong support for the centerline boundary concept, the Court ruled that Monegan's quitclaim deed was worthless, because he and McPherson each already owned half of the strip, because the road centerline had always been their boundary, despite the calls in their deeds to the edge of the right-of-way, since under the powerful principle of appurtenance, half of the roadway strip had been conveyed to each of them, having always been part of each respective tract.

1943 - Synness owned the southwest quarter of the southwest quarter of a regular section and conveyed it to Peterson, reserving an area described as being 250 feet by 250 feet in size, located in the southwest corner of that quarter quarter. The description however, then went on to state that the land described was bounded on the south by a certain public road and was bounded on the west by another public road. These roads were in existence at the time and were presumably typical public roads, centered on the section lines. The width of the right-of-way of these two roads was unstated, and there is no indication that the boundary between the tract that was conveyed and the tract that was reserved was ever surveyed or physically marked in any manner.

1944 to 1996 - How these two tracts were used, and how many owners each of them had over the subsequent decades, are unknown, but there is no indication that any improvements were ever erected on either property anywhere in close proximity to the boundaries of either tract, although there was a commercial building in an unspecified location somewhere on the reservation tract. These two

tracts evidently remained in separate ownership and were never reunited, so the boundary created in 1943 remained legally in effect at all times, apparently without any controversy for about half a century. The smaller reservation tract was evidently always conveyed using the same description by which it had been created, and likewise, the larger tract created in 1943 was evidently always conveyed citing the reservation tract as an exception. Apparently toward the end of this period, the larger tract was acquired by Ferriter and the smaller tract was acquired by Bartmess, which of them arrived on the scene first being unspecified. How these parties used or intended to use their land is unknown, but for unspecified reasons a conflict developed between them concerning the exact location of their mutual boundary lines, those lines having never been established on the ground, by means of either monumentation or actual use of the land. There is no indication that either party ever sought the assistance of a land surveyor, either in the process of trying to comprehend the meaning of the descriptions in their deeds, or in the process of trying to determine the location of the described boundary on the ground. Ferriter filed an action against Bartmess, charging that Bartmess had exceeded his boundaries and was using, or claiming ownership of, some of Ferriter's land, through which Ferriter sought to quiet his title to all of the southwest quarter of the southwest quarter, except the south 250 feet of the west 250 feet.

Ferriter argued that the 1943 description clearly reserved only the south 250 feet of the west 250 feet, and the 250 feet must be measured from the respective section lines, to establish the location of the boundary lines in question, so he owned the entire quarter quarter, excepting only the most southwesterly portion, as defined by those dimensions. Bartmess argued that since the deed clearly called for the roadways as his boundaries on the south and the west, the 1943 reservation was not intended to include any portion of either existing road right-of-way, so the 250 feet must be measured northward and eastward, respectively, from the northerly and easterly right-of-way lines of the two roadways, as they existed in 1943, to establish the deed boundaries in question. The trial court was so thoroughly unimpressed with the assertion made by Bartmess that it awarded Ferriter summary judgment, refusing to even rule upon the possibility that the deed

interpretation presented by Bartmess might have any validity, dismissing his case without any consideration.

The Court recognized that here it was facing a case of conflicting opinions regarding the original intent of the parties to a conveyance, long after the original parties were gone, leaving only their documentation of their transaction to stand as evidence of their true intent. As usual of course, the litigants were both reading the documents in question in the manner that was most beneficial to their own interests, requiring the Court to serve its role as the referee, and settle the controversy by applying the appropriate legal and equitable principles. Had there been any physical evidence, such as a long standing fence or a long standing crop line, consistent with the boundary location espoused by Bartmess, he could have made a reasonably strong case that the subsequent conduct of the parties, manifested by such an established land use pattern, represented the true meaning of the deed language to the original parties, and thereby operated as a physical clarification of their actual intent. His failure to bring forth any argument of that kind however, serves as an indication that either no such physical evidence existed, or if it did, Bartmess himself had no confidence in its validity, leaving him with the difficult task of convincing the Court that the descriptive language at issue should be construed in his favor upon another basis. Since his tract had been created as a reservation, and a reservation is the legal equivalent of a grant operating in reverse, being a return grant from the original grantee to the original grantor, Bartmess may well have felt that he was in fact the successor of a grantee, and was therefore entitled to the benefit of the presumption at law typically favoring grantees on description interpretation issues. The Court declined to view the position of Bartmess in that manner however, since his predecessor Synness, or a scrivener writing on behalf of Synness, was presumably the author of the original description, so Bartmess was effectively left in the position of being merely the successor to a grantor's remainder, with no legal presumptions operating in his favor. As we have repeatedly observed, the Court staunchly maintains that the primary goal of deed evaluation is always to ascertain and give effect to the true original intent of the party who acted as the author of the deed language, including the descriptive language, which is typically the grantor or an agent acting for the grantor, unless it can be shown that it was the grantee or an agent acting for the grantee. However, along with the benefit of being the party who has the opportunity to express the intent, by composing the text used in a description, invariably comes the burden of having to express that intent with complete clarity and certainty, because no

party can be allowed to benefit from any deliberately unclear or misleading language, composed either by himself or his predecessor. Provided that the descriptive language clearly communicates the extent of an original grant, no additions or deletions to that language, having the effect of negating any of it, can thereafter be successfully suggested or interposed, so while the true meaning of obscure terms is always subject to illustration by means of extrinsic evidence, no terms having any clearly contradictory effect on the existing language can be introduced, and none that were used can be nullified, barring evidence of a mistake requiring reformation. In addition, a call for a roadway of any kind is a call for a monument, and unless otherwise stated, a call for a monument carries to the center thereof, regardless of whether the actual width of the monument is very small, as in the case of a typical survey monument, or quite large, as in the case of a more substantial monument such as a roadway or stream. Quoting in part from the applicable statutes, the Court reiterated each of these important principles, stating that:

“The reasoning in the District Court's written order is flawless ... A deed should be interpreted liberally, to effect it's intent ... when a grantor conveys property, described as being bounded by a road, the conveyance is presumed to include the grantor's rights to the middle of the road ... an unambiguous deed must be interpreted according to it's language as written, without resort to extrinsic evidence of the grantor's intent ... Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.”

With the application of the final principle quoted above, the Court terminated any opportunity that Bartmess might have had to demonstrate that the edge of the right-of-way was the truly intended original boundary, rather than the centerline, by effectively striking the language upon which the claim made by Bartmess depended from the documents in dispute. Under this rule, the language that first appears is legally presumed to contain or embody the fundamental thrust or spirit of the conveyance under consideration, and any subsequent language is presumed to represent a mere attempt to reinforce the prior language, from a different perspective. In this instance, the language relied upon by Bartmess, pointing out the existence of the roads bordering portions of both of the subject properties, was seen by

the Court as mere surplusage, or unnecessary words that were included merely to confirm that the section lines, which truly control the location of the conveyance, were in fact physically manifested on the ground in the form of visible roadways. Having categorized the language that formed the foundation of the claim made by Bartmess as extraneous surplusage, which was intended only to provide helpful extra information, but was in fact potentially harmful, by virtue of being misleading, and was never intended to be controlling, the Court was able to entirely dismiss it, on the basis that surplusage can never function to create ambiguity that would not exist in its absence. Holding that the lower court had been entirely correct in rejecting the assertion of Bartmess, concerning the possibility that the right-of-way was intended to be the true boundary of the 1943 reservation, the Court fully upheld the lower court's summary judgment in favor of the boundary location claimed by Ferriter, quieting his title as he had requested. In so deciding, the Court drew an important distinction between real ambiguity and what the Court deemed to be "apparent ambiguity", indicating that while the former represents a valid basis for the admission and potential acceptance of extrinsic evidence as controlling, the latter can simply be swept aside, through the application of the statutory rules that have been codified in Montana for purposes of deed construction. The Court's inclination to apply the surplusage rule, to excise poorly chosen descriptive language that the Court sees as useless, obviously places a high premium upon composing very clear and concise descriptions, written in a direct manner, free of qualifying clauses that might operate to contradict or obfuscate other language used previously in the same description. Bartmess clearly had an uphill battle, so his defeat is not surprising, given that there was no logic in the idea that his predecessor Synness did not own either right-of-way, nor any sense in the notion that Synness had really intended to retain fee ownership of each right-of-way, leaving the claim set forth by Bartmess with the appearance of having been contrived in bad faith and being purely self serving, rather than legally sound. Furthermore, even if the roadway calls had been deemed to control over the section lines, the result would have been the same, due to the operation of the centerline aspect of the principle of monument control, which was also reiterated here by the Court, so there was no way the edge of the right-of-way could be presumed to have been intended to become a boundary, in the absence of any language expressly pointing to the width or the boundary of either right-of-way. The ultimate lesson of this case is that not all language in every deed should be treated as controlling, because descriptive language can be ruled to have been intended to be merely informative.

ERKER v KESTER (1999)

In our last urban case, we review a scenario in which a typical residential subdivision plat does not control the boundaries of a platted lot, even though the plat is expressly referenced by a deed in the usual manner, due to the presence of a subsequent Certificate of Survey, which has the effect of superseding the original plat, by altering the platted configuration of the lot in question. Much like the Ferriter case, just previously reviewed, this case involves no survey errors and no issues relating to survey procedures or decisions, but serves to illustrate the importance of understanding description principles, in order to make proper use of existing surveys for description purposes, and shows that knowledge of the law is essential, when either creating new descriptions or analyzing existing descriptions. Here we see several vital principles relating to conveyances in operation, including the fact that a grantor bears the burden of an insufficient legal description that was prepared by or for the grantor, the right of a grantee to rely on a drawing, in this case a Certificate of Survey, that was viewed, or available for viewing, by the grantee, and the fact that any description which fails to capture the true or full intent of a conveyance agreement is potentially subject to reformation. The 1990 case of *D'Agostino v Swanson* also vividly portrays the heavy burden that can come down upon a grantor who is found to have been careless or negligent in making a conveyance, and like many cases noted earlier herein, it represents another instance in which the failure to order a survey resulted in genuine cause for regret as well. *D'Agostino* acquired a motel, consisting of several cabins that were situated upon several platted lots. He subsequently discovered that some of the cabins might not be located entirely on the lots he had thought they were located on, yet without ordering a survey to confirm his suspicions, he sold one of the lots that was partially encroached upon by the cabins to Swanson, intentionally closing his own eyes to the encroachments, and telling Swanson that the lot being conveyed was a vacant lot. A survey was subsequently done, and the cabin encroachments were depicted on it, yet *D'Agostino* refused to move the cabins, claiming that Swanson should have noticed the cabins, so Swanson had no right to

insist that they must be moved off his lot. The Court, not surprisingly, found no validity whatsoever in the position taken by D'Agostino and very thoroughly rejected it, refusing to allow him to benefit from his own failure to obtain a survey, which would have revealed the encroachments prior to the conveyance, upholding heavy punitive damages against him as well, for deliberately conveying encumbered land to an innocent party. The consequences of problems that arise from language used in documents of conveyance, most notably ambiguous or erroneous descriptive language, do not always descend upon the grantor however, because justice calls for those consequences to reside with the party who is responsible for their existence. In 1949 in *Hart v Barron*, a decision that has been subsequently cited many times by the Court with reference to this principle, the Court declared that since the language of the contract at issue there had been prepared by an attorney who was functioning as an agent of the grantee, any uncertainty arising from that document must be interpreted in a manner that was favorable to the grantor and unfavorable to the grantee, clarifying that it is ultimately the preparer of any misleading language who must be held accountable for any damage resulting from it.

Prior to 1979 - A large residential subdivision was platted and recorded in Big Sky, containing an unspecified number of blocks and lots. A portion of this subdivision contained a cul-de-sac with lots distributed around it, which were obviously designed to be accessed via the cul-de-sac, in a typical modern subdivision lot pattern. An unspecified number of these lots were owned by a development firm, which also owned some other land adjoining the subdivision. The subdivision streets were built and lots began to be sold, built upon and occupied by individual lot owners. Croghan acquired one of the lots situated on the cul-de-sac, identified as Lot 26, but he apparently did not build anything upon his lot, so it remained vacant. Whether the corners of this lot, or any of the other lots situated around the cul-de-sac, were monumented or not is unknown.

1979 - Croghan decided to sell Lot 26 and Kester, the buyer, commenced construction of a house on the lot. The construction work performed for Kester included the construction of a driveway leading

to the house from the cul-de-sac. After the house and driveway had been built, a survey was performed, which revealed that the driveway was not entirely located on Lot 26, it crossed over one of the lot lines before reaching the cul-de-sac and covered about 1600 square feet of an unspecified adjoining lot or tract, which was apparently still vacant and was owned by the development firm. Rather than tearing up the driveway and rebuilding it on Lot 26, the parties decided to relocate the lot line that was crossed by the driveway, to expand Lot 26 enough to include the entire existing driveway. Croghan conveyed Lot 26 to Kester, and Croghan agreed to have a Certificate of Survey prepared, to document the relocation of the lot line, which all of the parties had agreed upon.

1980 - The Certificate of Survey, which identified the area adjoining Lot 26 and containing the driveway as Parcel A, was properly completed and recorded. This Certificate of Survey showed the newly created lot line as a solid line, properly representing the boundary of the enlarged Lot 26, and it showed the original lot line as a dotted line, properly indicating the intention of the parties to alter or eliminate the original lot line, but it also contained a separate legal description of Parcel A alone, giving the impression that Parcel A was a distinct tract of land, separate from Lot 26. The developer then conveyed Parcel A to Croghan, who in turn conveyed it to Kester, and these transactions were properly recorded, so all of the parties were satisfied that the driveway problem had been eliminated by the relocation of the lot line in question, and Kester used the driveway without any issues over the ensuing years. Due to the manner in which Parcel A had been created however, Lot 26 and Parcel A were treated as separate parcels for tax assessment purposes.

1990 - Kester decided to sell his house and Erker decided to buy it, so they entered a sale and purchase agreement, in which the subject property was described only as "Lot 26 Block 3 (Kester House) ...", with no reference to Parcel A. The next day however, the sale and purchase agreement was amended by Kester's real estate agent to read "Lot 26 Block 3 plus the added contiguous tract". The subsequent

deed from Kester to Erker however, once again failed to make any reference to Parcel A, reading "Lot 26 Block 3 ... according to the official plat thereof ,,", pointing to the original subdivision plat, which of course did not indicate the existence of Parcel A, rather than pointing to the Certificate of Survey, which did show Parcel A, and therefore stood as the only truly complete graphic illustration of the relevant boundaries. Erker, having no visible reason to suspect that any unresolved boundary issues existed relating to Lot 26, moved into the house and began using the driveway, just as Kester had used it.

1991 - Kester's attorney informed Erker that Kester would be willing to sell Parcel A to Erker, if Erker desired to acquire it. Believing that he already owned Parcel A, Erker declined this offer and went right on using Parcel A, just he had been using it previously.

1996 - Erker decided to sell the house, and the buyer obviously wanted to acquire the right to use the driveway, so Erker was required to acquire Parcel A from Kester and convey it along with Lot 26 to Erker's grantee, and Erker did so. Erker however, was upset about having been forced to pay Kester for Parcel A, which Erker still believed that he had actually acquired 6 years earlier, so he filed an action against Kester, seeking to recover his payment for Parcel A, which was being held in escrow, to prevent Kester from keeping it.

Erker argued that Parcel A was not a legally separate or distinct parcel of land, it represented nothing more than a part of Lot 26, which he had already legally acquired along with the originally platted portion of Lot 26 in 1990, regardless of the fact that his deed gave no specific indication that Parcel A was included in his acquisition at that time, or even existed at all, so Kester had no right to demand any additional sum of money from him for Parcel A. Kester argued just the contrary, that Lot 26 and Parcel A were two separate and distinct tracts of land, because Parcel A had been legally created, described and conveyed as a unique and individual parcel of land, independent of any adjoining land, and he had never conveyed Parcel A, so he was still the legal owner of Parcel A, and he was therefore entitled to demand that Erker pay him for it. The trial court agreed with Erker and therefore granted summary judgment to him, denying the possibility that

Kester could have any valid legal claim to any portion of Lot 26, which included Parcel A, despite its absence from Erker's deed.

Here again the Court was confronted with a situation which required it to ascertain the true intent of various actions related to a past conveyance and determine the true spirit in which the parcel in question had been created. The conveyance in question in this case was relatively recent, having taken place less than 10 years earlier, and the documentation pertaining to it was very good and quite complete, so the task of the Court was simply to examine all of the events that had taken place and decide what legal result those events had produced. As is always the case, in any controversy such as this, between a grantor and his grantee, the parties do not enter the battlefield as equals, one always has the advantage of one or more presumptions at law operating in his favor, while the other has the burden of overcoming any applicable presumptions, in order to prevail. While Erker bore the initial burden of proof, as the plaintiff, he was able to meet that burden easily, by means of his presentation of extensive and well documented evidence of everything that had transpired, so in reality it was Kester who bore the much heavier burden, as the grantor responsible for the manner in which his transaction with Erker had been conducted, putting him at a distinct disadvantage from the outset. The Court began by pointing out, consistent with numerous prior decisions of the Court that we have reviewed, and quite ominously for Kester, that a contract containing any sort of uncertainty in its language is always construed against the party who caused the uncertainty to exist. No one is entitled, under this often pivotal principle, to prepare a document that leaves important matters unclear, or includes self-contradictory language, and end up profiting from any such inadequate or misleading elements present in the contract, regardless of whether such issues were created through innocent blundering or deliberate chicanery on the part of the preparer. Cognizant that Kester's own carelessness during construction, in failing to ascertain the boundaries of the original Lot 26, had caused the problem, and that Parcel A had been created for the specific purpose of eradicating that problem, to Kester's benefit, the Court noted that in its quest to discover the true intentions of the parties, it is not constrained by either the use or the neglect of any isolated words or phrases in a contract, indicating that the Court was disinclined to place any significance on the fact that the description in Erker's deed neglected to mention Parcel A. It was evident to the Court that Erker clearly had no physical indication that Parcel A was not part of Lot 26 when he viewed Kester's property, prior to agreeing to buy it, so the Court found that he was

fully entitled to rely, as an innocent grantee, on the existing physical conditions that he saw at that time. Therefore, the Court concluded that Erker had not failed to carry his burden of inquiry notice, and he was correct in presuming that the driveway was legally, as well as physically, appurtenant to the house that he was acquiring, under the elementary principle that one who conveys land implicitly conveys a legitimate and binding right of passage to it, regardless of whether or not the issue of access is specifically addressed, or mentioned in the relevant documents of conveyance at all. Pointing out that the position taken by Kester was supported only by legal technicalities, the Court explained that higher principles of justice will inevitably overcome any such argument, stating that:

“... in accordance with natural justice and reason ... every right will pass to the purchaser which is necessary to the complete use and enjoyment of the property conveyed, unless expressly reserved ... it was reasonable for the Erkers to presume that the entire driveway, which included Parcel A, was one of the essential benefits of their bargain with Kesters ... access necessarily required the conveyance of Parcel A as part of their purchase from Kesters ... Kesters argue that they did not convey Parcel A as described on the record to Erker when they sold Lot 26 ... This is precisely the technicality discovered by the title insurance company - that the deed describing only Lot 26 was insufficient to properly convey the property subject to the contract ...”

Having thoroughly assessed the implications of the essential physical circumstances upon the parties and their transaction, the Court went on to review the impact upon this scenario of the relevant language found in the Montana Subdivision and Platting Act, so well known to land surveyors. Since Kester maintained that Erker should have known that Parcel A was a distinct tract of land, from an examination of the public records which Erker should have conducted, and Kester insisted that he had no obligation to tell Erker anything about Parcel A, because Erker had constructive notice of its separate existence, the Court deemed it appropriate to inform Kester to the contrary. The Subdivision and Platting Act, the Court recognized, clearly contemplated and legitimized boundary relocation, such as that which had

taken place in this instance, by means of which Croghan had provided the driveway at issue to Kester. Quoting from the Act, the Court observed that a given boundary line can be legally "expunged", and that was exactly what had obviously been done by Croghan, in ordering the Certificate of Survey which had created Parcel A, there being no legitimate evidence, aside from the form that had been used to describe it, that Parcel A was ever intended to stand alone as a unique individual tract of land, and there being no rational basis for any such suggestion. Parcel A had clearly been unified with Lot 26 from its inception, the Court decided, in observance of the spirit in which it was created, and no other interpretation of the events that had taken place could withstand scrutiny, applying the equitable principle that substance must control over form. The reliance of Kester upon the specific language of his deed to Erker, omitting any reference to Parcel A, had been entirely misplaced, since the mere fact that the Certificate of Survey had provided a legal description of Parcel A alone, was insufficient to express an intention to isolate Parcel A from Lot 26. Erker, rather than being legally required to rely upon any such technicalities, was entitled to rely upon his knowledge of the actual use of the driveway that had been made by Kester, without objection from anyone, as physical notice of the fact that the driveway was legally connected to the house, and was therefore being conveyed along with it, as an appurtenance under his contract with Kester, despite Kester's subsequent failure to deed it to him, regardless of whether that failure had been accidental or deliberate. The absence of Parcel A from Kester's deed to Erker was subject to correction, akin to deed reformation, the Court ruled, so Kester must either once again convey Lot 26 to Erker, this time as enlarged by the Certificate of Survey merging Parcel A into the original platted lot, or else Kester must convey Parcel A alone to Erker, without compensation, fully upholding the summary judgment of the lower court to the same effect. Kester's first deed to Erker had erroneously purported to transfer to Erker only Lot 26 as originally platted, which was impossible since the original lot no longer existed, following the legal adoption of the Certificate of Survey modifying the lot by Croghan and Kester, so Kester had in effect breached his contractual obligation to deed Parcel A to Erker, obligating Kester to remedy his error, in order to clear the cloud that his error had placed upon Erker's title. As the grantor, Kester learned, he had the burden of expressly reserving or excepting whatever he truly did not intend to convey to his grantee, and it was his failure to realize that, which had delivered him into the hands of defeat. The lesson for surveyors here, aside from the obvious significance of legal knowledge in the preparation of descriptions, is the fact that a deed is not necessarily the final word on ownership, because a strict or

literal rendition of a description may not control, if subsequently found to be in derogation or contravention of a valid agreement, and can therefore remain indefinitely subject to correction, to enact the true intentions of the parties, which may not come to light until many years later.

CEDAR LANE RANCH v LUNDBERG (1999)

Our final case of the twentieth century returns us to a rural setting, to take one last look at yet another description based controversy, the Court's resolution of which serves to highlight and clarify the significance of both acreage and monument references, when acreage is included in a description that was created in the PLSS context, and which is supplemented by an additional call or calls for physical monumentation. At issue here is a relatively simplistic tract, in terms of configuration, being bounded by a section line on one side, aliquot lines on two other sides, and an existing roadway on the remaining side, yet when a discrepancy is subsequently discovered, as is so often the case, a long silent party emerges to attempt to take advantage of what appears to be an opportunity to alter a long accepted boundary. One very interesting aspect of this scenario is the great irony that the boundary which is challenged here is in reality the clearest and most visibly prominent of the four described boundaries of the tract in question. As all surveyors know, aliquot boundaries are frequently subject to dispute, based typically upon conflicting opinions regarding an aliquot line location, often including conflicting opinions held by different surveyors, as to the proper subdivision of a given section, and even section lines can be equally likely sources of contention, when questions arise concerning the legitimacy of purported section corner and quarter corner monuments. Yet in this case, the location of those bounding lines goes unchallenged, and it is the validity of a road, which has been in place for well over a century by the time of the litigation, as a boundary, that becomes the focal point of contention between the parties, even though its very likely that the original acreage discrepancy was the result of ambiguity in the location of the other three boundaries of the tract, there being no ambiguity in the road boundary. Aside from the prevalence of opportunistic behavior on the part of land owners, this situation points to the fact that many people who accept the controlling value

of survey monuments do not realize or appreciate the fact that not only survey markers can represent monuments, any visible object can potentially represent a boundary, and any such object can become a fully valid and legally controlling monument, particularly when called out as such. Also noted as relevant by the Court in this case, is the fact that those challenging the physically established boundary presented no survey showing any definite boundary as an alternative to the existing land use conditions, thereby essentially inviting the Court to find their claim meritless. The decision of the Court here on the treatment of acreage, whenever the quantity of a conveyance is stated in the form of an estimation, or in fact in any instance when the quantity conveyed does not constitute the essence of the transaction, is fully consistent with the minimal position that acreage occupies in relation to the many other potentially controlling items to be found in legal descriptions. In 1937 in *Conner v Helvik*, in resolving a dispute between a grantor and a grantee, the Court had addressed a comparable situation, involving a deed that cited the acreage being conveyed as 21 acres more or less, when in fact the subject property had later been discovered to contain 24.4 acres. In that case, following the rule that the substance of a conveyance agreement is the material and controlling aspect of any conveyance, displacing erroneously stated details that were intended only to describe the land actually agreed upon, the Court held that the incorrectly estimated acreage presented no obstacle to the completion of the intended transfer of the subject property, upholding a lower court ruling reforming the description to rectify the mistaken acreage figure.

1892 - A large area of unspecified extent, including a certain Section 26, was patented to Tinklepaugh. A county road ran in a generally northerly direction through the east half of the east half of Section 26.

1902 - Tinklepaugh conveyed a tract to McGowan, which he described as "About 7 acres of land off of the west side of the NE1/4 of the NE1/4 of Section 26 ... Said piece of land being west of the foot of the hill where the county road now runs." How Tinklepaugh obtained or derived the acreage figure that he used in this deed is unknown, there is no indication that it resulted from a survey or that it was based on measurements of any kind.

1916 - Tinklepaugh conveyed to Nelson a tract lying directly east of the one that he had conveyed to McGowan in 1902, describing this tract as "The NE1/4 of the NE1/4 of Section 26, except that portion of approximately 7 acres off of the west side, all lying on the west side of the public highway." McGowan and Nelson evidently treated the existing road as their mutual boundary, and never had any dispute over the location of the boundary between their lands. At an unspecified subsequent time, each of them built a fence along his own side of the public roadway.

1944 - McGowan conveyed his tract to Lundberg, repeating the description by which he had acquired it 42 years earlier, and the description remained as valid as it had originally been, since the road was still in its original location.

1958 - Lundberg intended to convey his entire ranch, which evidently included a large amount of adjoining land, also lying to the west of the public road, in Section 26 and possibly extending into other sections as well, to Wallace. However, Lundberg neglected to include the tract that he had acquired in 1944, accidentally omitting it from the description in his deed to Wallace. Wallace, apparently unaware of this omission in his deed, used all of the land henceforward, just as Lundberg had used it. Lundberg never subsequently made any use of the omitted tract, and never attempted to convey it to anyone else, nor did he ever return to the area to make any claim to it, evidencing the accidental nature of his description omission.

1972 - Wallace conveyed the same ranch to Cedar Lane, repeating the description by which he had acquired it. Again, the grantee took possession of the whole ranch, unaware that any description issue existed, perpetuating the unknown description error. Cedar Lane and the Nelson family both continued to respect the public road as their boundary.

1994 - The road was adopted as a state highway, and the fact that Lundberg was still the record owner of the tract lying west of the road in the NE1/4 of the NE1/4 of Section 26 was discovered and brought

to the attention of the parties. In addition, as a result of highway right-of-way survey work performed at this time, the parties learned that the tract created in 1902 actually contained about 13 acres, rather than 7 acres, as it had been described at that time and ever since. These discoveries naturally triggered a controversy over this area, which had been virtually ignored and literally "taken for granted" for decades. Cedar Lane felt compelled to file an action against Lundberg, seeking to quiet title to the entire 13 acres, which had never been explicitly deeded to Cedar Lane.

Cedar Lane argued that the acreage discrepancy involving the tract in question was inconsequential, because the public road represented the east boundary of the tract, and there was no evidence that the road location had ever changed to any material extent, and there was no controversy regarding any of the other boundaries of that tract, so Cedar Lane was entitled to the entire tract, either on the basis of the historic chain of conveyances, despite the description omission, or by virtue of adverse possession. Lundberg was evidently long gone or deceased and made no appearance at the trial, so it was the members of the Nelson family, the descendants of the elder Nelson who had originally acquired the easterly portion of the NE1/4 of the NE1/4 early in the century, who presented the real opposition to the claim made by Cedar Lane. The Nelsons argued that both of the conveyances made by Tinklepaugh were intended to be controlled by the acreage stated in the 1902 deed, so Cedar Lane was limited to 7 acres of the disputed tract, and the Nelsons were entitled to 6 acres west of the highway, by virtue of their 1916 deed and their tax payments on 33 acres in the NE1/4 of the NE1/4, which they had faithfully made in ignorance of the acreage issue for several decades. The trial court ruled that the acreage figures in both the deeds and the tax records relied upon by the Nelsons were not controlling, and that the evidence established adverse possession of all the land west of the highway, quieting title in Cedar Lane by means of summary judgment, dismissing the case set forth by the Nelsons.

Two separate issues were in play in this case, both of which presented potential legal obstacles to Cedar Lane, in their attempt to clear their title to the land that they and their predecessors had been exclusively occupying and using for nearly a century. One issue was presented by the acreage discrepancy, which had been created by the apparently inaccurate estimation of the acreage lying west of the road in 1902 by Tinklepaugh. The other issue was the omission of any reference to the tract that had been created in

1902 from any deed subsequent to the one to Lundberg in 1944, fully half a century before anyone became aware that such an omission had taken place. At first glance, one might suppose that the latter issue, resulting in the complete absence of the 1902 tract from the last two conveyances of the ranch, would prove to be the more serious issue, but in the view of the situation taken by the Court, that was not the case. As we have seen demonstrated in the Erker case, just previously reviewed, and earlier cases, written descriptions are by no means absolute, and the contents of a deed may not control, if they can be shown to be clearly contrary to the true intentions of the original parties, in which event the description can generally be reformed to bring it into alignment with those proven intentions, provided of course that no rights of any innocent parties are adversely impacted in so doing. If Lundberg had been present and had asserted a claim to the land omitted from his 1958 deed to Wallace, the description omission could have become a real issue, but in the absence of any effort by Lundberg to set forth any claim that he had intentionally reserved the 1902 tract in 1958, at any point in time during the intervening 40 years, the Court found the presumption that the omission was genuinely accidental to be entirely acceptable, so the deed omission actually had no impact at all on the current controversy. Since the Nelsons were the only parties actively contesting the validity of Cedar Lane's claim to the 1902 tract, the fact that Lundberg or his descendants might have had some claim to that tract was of no value or benefit whatsoever to the Nelsons, under the well settled rule that no party can rely solely upon the weakness of an opponent's description, so the claims of each of the litigants would either stand or fall upon their own inherent strength, or lack thereof. If the Nelson family was to prevail over Cedar Lane, the Court indicated, they would have to prove the genuine superiority of their own claim, rather than merely pointing to possible flaws in Cedar Lane's legal position, so both the 1958 and 1972 description omissions were not relevant at all to the contest between the current parties. Turning to the acreage discrepancy, the Court took this opportunity to reiterate the equally well settled rule that acreage controls only when it is clearly intended to control, and it cannot be presumed to have been intended to control when boundaries are specified, because acreage is implicitly subordinate to boundary calls of any kind. A sale in gross, disregarding acreage, is presumed to have taken place, the Court noted, where no evidence of a sale by the acre is present, disqualifying acreage for controlling purposes, and that presumption was applicable to the conveyance through which the disputed tract had been created in 1902, because the 1902 description was fully controlled by specified boundaries.

Examining the numerous variations in language that have sometimes been used in deeds with reference to acreage, the Court stated that:

“... the plain meaning of the words "about" and "approximately" utilized respectively in the 1902 and 1916 deeds is the same as the more commonly used phrase "more or less" ... "more or less" excludes the assumption of an exact number of acres and makes it clear that the precise dimensions of the property are not of the essence of the contract ... Furthermore courts have construed similar words and phrases with like meaning ... such as "about", "by estimation", "approximately", "supposed to contain", "in the aggregate" and "nearly" ... the plain meaning of the words "about" and "approximately" indicates that the parties did not intend to convey a precise number of acres ... indicating a sale in gross."

Thus the Court upheld the principle that all parties either conveying or acquiring land by means of a deed featuring acreage figures that are flagged or otherwise denoted as being approximate in nature, are on notice that the stated acreage is descriptive or informative only, and should not be misunderstood to be controlling. In such instances, no advantage is held by either the grantor or the grantee, all parties equally assume the risk of any acreage variation that may be subsequently discovered, just as occurred here, and none of them can successfully seek any remedy for such an acreage deviation, where defined boundaries govern, since all of them had equal notice that the acreage provided was either a mere estimate or was suspected of being unreliable. The Nelsons however, suggested that "the foot of the hill where the county road now runs" is too vague and indeterminate to legally define a distinct or unique boundary location, making it necessary to apply the acreage to establish the limits of a grant so described. In response to that assertion however, the Court pointed out that there would be no certain means of telling where the boundary is, if in fact it was not located at the road, revealing the fundamentally fallacious character of the claim made by the Nelsons, and justifying the lower court's decision to award Cedar Lane summary judgment. In view of the fact that the Nelsons had always openly honored the road as their de facto physical boundary, and the road clearly represented a valid monument, consistent with numerous previous decisions of the Court on the subject of objects described as monuments, the Court decided that the lower court had been correct in its determination that the

Nelsons could show nothing amounting to a valid or legitimate claim to any land west of the highway. One dissenting Justice agreed with the Nelsons that the 1902 and 1916 descriptions were quite vague and that under such circumstances acreage could potentially play some role in the determination of boundaries, but only in the genuine absence of any superior evidence serving to provide certainty to the location of such boundaries. The dissenting Justice also correctly observed that the decision of the lower court in favor of Cedar Lane could not be supported on the basis of adverse possession, due to the existence of the tax payment requirement, since it was undisputed that neither Cedar Lane nor any of their predecessors had ever paid any taxes on anything more than 7 acres, while the Nelsons had long paid taxes on the balance of 33 acres, and no explicit boundary agreement relating to the road boundary had ever been made. While the tax payment issue was sufficient to legally negate the claim made by Cedar Lane based on possession, since Cedar Lane had never paid taxes on 13 acres, that issue had no impact on the ruling made by the majority of the Court, because the decision upholding the result reached by the lower court was based, as always, on affirmative legal and equitable principles applicable to boundaries, descriptions and conveyances, which as we have learned herein, are entirely independent of adverse or prescriptive principles. The Court had completely discounted the issue of possession, and it's confirmation of the lower court's ruling was therefore unrelated to Cedar Lane's adverse possession claim, being based instead on the Court's conclusion that Cedar Lane had in fact legitimately acquired the 1902 tract by means of a valid sequence of conveyances, flowing from the intent to create a distinct tract bounded by the road 97 years before. In the end, the outcome in favor of Cedar Lane was the equivalent of judicial reformation of their deed, effectively treating the 7 acre figure as surplusage, which had been enacted for the purpose of giving effect to the true intentions of all their predecessors, going back to the original grantor, with respect to both the inclusion of the omitted tract in their ranch, and the resolution of it's disputed boundary.

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