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Boundaries: Description v. Survey

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> *"The lines run and marked on the ground are the true survey, and when they can be found will control the calls for a natural or other fixed boundary; and also constitute the boundaries in the grant where they differ from those produced by the courses and distances stated in the patent. This well-settled rule in cases of lands granted by the commonwealth, applies to grants by individuals."*[1]

> *"The plat is only intended to be a representation of the actual survey as made upon the land itself. It is in the nature of a certified copy of an instrument which will be controlled by the original."*[2]

THESE propositions I first encountered as a student in law school. At that time they struck me as rather startling propositions, which could not be reconciled with other things I had learned about the law of conveyancing. I do not recall exactly how they were disposed of: whether they were to be regarded as the law on the subject or merely as a couple of striking aberrations. There were too many other matters demanding attention at that time to allow much fretting over so small a question. Upon returning to the classroom some years later—but now sitting on the other side of the desk—I had to cope with these cases again. Now it was not so easy to pass them off; and so I have been confidently announcing for some time that this was not the law, or at least should not be. Still I could not be sure, at least of what the law was, for, so far as I could tell, nobody had ever gone into it very far. I thought perhaps the question had not come up very often; for if it had, we would have heard more about it. This probably served as a basis for my pronouncements to students; for unless there were extensive authority for the above-quoted propositions, it seemed doubt-

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1 Burkholder v. Markley, 98 Pa. 37 at 40 (1881).

2 Whitehead v. Ragan, 106 Mo. 231 at 235, 17 S.W. 307 (1891).

ful that they could or would find general acceptance. But I was not content to leave the question there, and so set off to see what could be found in the reports, moved principally to satisfy my own curiosity. The number of relevant cases turned up in this inquiry proved to be all out of proportion to the magnitude of the question. But I had a growing feeling that, however narrow the question might be, the answer might have not a little practical value to conveyancers by and large. So I saw the matter through, and this article is a report of that endeavor.

We should be clear to begin with what the question is. The two statements quoted above are two aspects of the same problem: can extrinsic evidence be admitted in an action at law concerning the boundaries of land conveyed to prove that prior to the effectuation of the conveyance a survey was made of the land to be conveyed, or that the parties otherwise designated on the ground the land to be conveyed; and if such facts can be proved, will they overcome and take the place of an inconsistent but otherwise express and unambiguous description in the instrument? Putting it more briefly, will the boundaries designated by the parties on the ground control the boundaries described in the deed? For convenience the affirmative answer to this question will be referred to as "the rule" in the discussion which follows; and the cases will be discussed in terms of being for or against the rule, without further restatement of it, except where qualifications found in the cases are reported.

Any such sweeping statement of this problem is bound to leave some doubt as to its full extent or application. And there are some similar and related questions which are easily confused with it. For these reasons it is desirable to list those problems which are to be distinguished from the question at hand and excluded from the discussion of it.

Excluded Doctrines, Rules, or Problems

1. The rule of construction that *calls for monuments control calls for courses and distances* or other calls of lesser rank, and the various exceptions to this rule. Unfortunately there are many cases in which a call for a monument was given priority, but the result was explained by the statement that "monuments control courses and distances," which may leave the impression that a marked boundary may prevail even if not called for.[3] Unless one is careful, such a result may follow

[3] E.g.: Merlino v. Eannotti, (Pa. Super. 1955) 110 A. (2d) 783; Davis v. Strong, 208 Ark. 254, 186 S.W. (2d) 776 (1945); Howard v. Cunningham, 36 Cal. App. 229,

from a logic which takes the above statement as one premise and then takes as other premises the assumption that monuments are necessarily found on the ground, but that courses and distances are necessarily found in a deed.

2. The rules relating to the admissibility of extrinsic evidence in the construction of *ambiguous instruments.* It seems to be settled that evidence of a survey or acts of the parties in designating boundaries is admissible in such cases.[4] The commonest ambiguity of this sort is that which appears only when an attempt is made to apply the calls of a deed to the ground.[5]

3. The admissibility of extrinsic evidence to prove the *location of monuments called for by a deed.* Such evidence is admissible.[6] A result of its admission may be to place the call for the monument in conflict with a call for course and distance, and a decision may be reached by an application of the rule of construction stated in exclusion No. 1 above.

4. Conveyances of land described *"according to government survey thereof."* Here it is well settled that the monuments indicated by the government surveyor for lines or corners of sections or fractions thereof will control any inconsistent calls in the field notes or plat prepared by the surveyor, and the boundaries so established cannot be challenged on the ground that if the surveyor had performed his task according to law, such boundaries would have been placed elsewhere.[7] The only way in which this rule can be said to involve the question under discussion is by treating the field notes and plat as incorporated

171 P. 976 (1918); Hammonds v. Jones, 275 Ky. 788, 122 S.W. (2d) 736 (1938); Conner v. Jarrett, 120 W.Va. 633, 200 S.E. 39 (1938).

[4] Albert v. Schenley Auto Sales, Inc., 375 Pa. 512, 100 A. (2d) 605 (1953).

[5] See Waterman v. Johnson, 30 Mass. 261 (1832).

[6] E.g.: Mills v. Lux, 45 Cal. 273 (1873); Mitchell v. Moore, 152 Fla. 843, 13 S. (2d) 314 (1943); Robinson v. White, 42 Me. 209 (1856); Holmes v. Barrett, 269 Mass. 497, 169 N.E. 509 (1929); Lessee of Alshire v. Hulse, 5 Ohio 534 (1832); Clary v. McGlynn, 46 Vt. 347 (1874). Cf. Bradshaw v. Booth, 129 Va. 19, 105 S.E. 555 (1921).

[7] Galt v. Willingham, (5th Cir. 1926) 11 F. (2d) 757; Galbraith v. Parker, 17 Ariz. 369, 153 P. 283 (1915); Luther v. Walker, 175 Ark. 846, 1 S.W. (2d) 6 (1927); Chapman v. Polack, 70 Cal. 487, 11 P. 764 (1886); Watrous v. Morrison, 33 Fla. 261, 14 S. 805 (1894); Ogilvie v. Copeland, 145 Ill. 98, 33 N.E. 1085 (1893); Rollins v. Davidson, 84 Iowa 237, 50 N.W. 1061 (1892); Britton v. Ferry, 14 Mich. 53 (1866); O'Neil v. Davidson, 147 Minn. 240, 180 N.W. 102 (1920); Woods v. Johnson, 264 Mo. 289, 174 S.W. 375 (1915); Myrick v. Peet, 56 Mont. 13, 180 P. 574 (1919); Harris v. Harms, 105 Neb. 375, 181 N.W. 158 (1920); Fellows v. Willett, 98 Okla. 248, 224 P. 298 (1923); Schmidtke v. Keller, 44 Ore. 23, 73 P. 332, 74 P. 222 (1903); Randall v. Burk Township, 4 S.D. 337 (1893); Daniels v. Florida Industrial Co., 159 Va. 472, 166 S.E. 712 (1932). In the words of one court, "A survey of public lands does not *ascertain* boundaries; it *creates* them." Cox v. Hart, 260 U.S. 427 at 436, 43 S.Ct. 154 (1922).

into the description contained in the patent, and by treating the survey itself as extrinsic. But this is hardly justified if the statutory scheme for the surveying and disposition of government lands is to be vindicated, nor in view of the fact that these conveyances are of land described according to the government *survey*. The importance of distinguishing the two situations must be emphasized, lest one offer the rule as to government-survey boundaries as authority for the main rule under discussion. This has happened on occasion, as will be pointed out in due course.

A rule similar to the government-survey rule has been stated by some courts in regard to land originally held by a state and patented or granted by it, although the reasons for the rule in the one case are not necessarily present in the other.[8]

5. The problem under discussion is clearly not involved in a situation which has occasionally arisen, but which cannot be designated otherwise than by a statement of its typical facts. Land owned by a grantor is surveyed in preparation for a conveyance of all or part thereof, but the surveyor mistakenly sets boundaries which include land not owned by the grantor and exclude land intended for conveyance. The description in the deed is then stated in accordance with the survey. Here there is no conflict between description and survey, but both fail to include land which the parties believed had been conveyed. In the absence of other facts there is no ground for a claim by the grantee that the unreformed deed in question conveyed the land unintentionally omitted from it.[9]

6. That vague and as yet uncharted sea of doctrine which can be loosely designated under the head of *boundaries by acquiescence*. This is not to say that a case involving our rule cannot also involve a question of acquiescence. Indeed, a large percentage of the cases here considered were at least potentially acquiescence cases. And whenever an acquiescence issue gets into the picture, it is likely to predominate. But often it does not get into the picture, perhaps because suit is brought before it can. The two problems are alike in that they both involve the question whether boundaries can be fixed against the express terms of a deed. They are unlike in that the acquiescence problem has to do with facts occurring after the conveyance, while in our problem the crucial facts occur before the conveyance.

[8] See discussion of North Carolina and Pennsylvania cases below.

[9] Jones v. Poundstone, 102 Mo. 240, 14 S.W. 824 (1890); Blassingame v. Davis, 68 Tex. 595, 5 S.W. 402 (1887). Cf. Watts v. Howard, 77 Tex. 71, 13 S.W. 966 (1890).

7. The rule of *Lerned v. Morrill.*[10] If a deed calls for monuments which have not been placed on the land at the time of the conveyance, but which are later so placed by the parties, the latter will be bound thereby, as if the monuments existed at the time of the conveyance.[11]

8. *Adverse possession.*

One's initial reaction to our rule as stated is likely to be wholly unfavorable. Indeed, it is also likely to be one of disbelief that this rule could be the law anywhere. It seems desirable that some preliminary analysis of this reaction be offered by way of further introduction.

The first basis for indictment of the rule that will occur to one is the Parol Evidence Rule. It is difficult to conceive of any principle of interpretation which would reconcile these two rules. Indeed, it would seem that to do what is sought to be done with our problem would constitute the most flagrant sort of subversion of the integrity of a written instrument. Is there not also a question about the rule's consistency with the Statute of Frauds? And can it not also be argued that the rule is inconsistent with the principle that the preliminary negotiations and contracts of the parties to a conveyance are merged in the consummating deed? Whatever specific theoretical objections are raised, basically the question is whether one of the parties to a conveyance will be allowed to deny the effect of their solemn and formal act. To the extent that the description of the land conveyed is concerned, are the parties' acts in surveying or otherwise marking the land upon the ground to become the legally operative acts and their deed merely a subordinate record thereof? Is this rule consistent with the modern policy which seeks by various rules to make it possible for a purchaser of land to rely on the written records of prior transactions? Does not this rule in fact amount to a partial revival of the feoffment?

An answer can be made by way of confession and avoidance that the integrity of the Parol Evidence Rule and kindred rules can be preserved by applying in this situation the equitable doctrine of reformation for mutual mistake. It must be apparent that many of the cases of this kind which arise could be disposed of on that basis; that is, the facts show that the discrepancy between the description and the marked boundaries was the result of a mistake in drafting the instrument. Our

[10] 2 N.H. 197 (1820).

[11] Knowles v. Toothaker, 58 Me. 172 (1870); Kennebec Purchase v. Tiffany, 1 Me. 219 (1821); Cleaveland v. Flagg, 58 Mass. 76 (1849). Cf. Oliver v. Muncy, 262 Ky. 164, 89 S.W. (2d) 617 (1936). *Contra,* Cripe v. Coates, (Ind. App. 1954) 116 N.E. (2d) 642.

rule, however, declares that a deed may in effect be reformed in an action at law, in ejectment, trespass, etc. Now if the only question involved were the observance of procedural requirements, there would be little reason for an article such as this. Or if a court desired to apply an equitable doctrine in a legal action, this would be of small interest to one primarily concerned with the law of conveyancing. We would want to be certain even here that the court and the parties were aware of what was going on and that the established requirements for reformation were observed. But what are the chances of ignoring these safeguards if a court frames the issue, not in terms of reformation, but in terms of construction, and decides the case, under our rule, not on the basis of facts which the deed should have contained, but on the basis that the deed in fact or in law did contain them? One should want to look very closely to see if the marking of boundaries on the ground were not the unilateral act of the grantor or, where the boundaries were marked by a surveyor on the direction of a grantor, if the grantee accepted the deed on the basis thereof. Of gravest import is the status in such a situation of a subsequent bona fide purchaser of the land without notice of the extrinsic acts of the original parties. Such a purchaser will be protected in a suit for reformation. But will his status as a bona fide purchaser be relevant in an action where the issue is the proper construction of the instrument? The rule as stated takes no account of him, either expressly or by implication.

It was with some such thoughts as these that a search was made of the cases to discover where the rule as stated has been adopted, why it was adopted, and what qualifications or limitations, if any, have been imposed upon it.

I. THE RULE IN GENERAL

This part includes a discussion of the cases for and against the rule as defined above and as indicated by the quotation first stated at the beginning of this article. These cases are considered separately from those which are thought to involve the same basic issues, but which are confined to a special factual situation. The latter are discussed in Part II.

A. Authority for the Rule

It is possible for the problem to be presented in a surprising variety of ways. Usually it will arise in an action at law for the recovery of land or for trespass, although it may arise in a suit for specific performance of a contract for the sale of land, where the title of the vendor is at

stake. The suit may be between the parties to a conveyance or between their successors in interest. A successor of either grantor or grantee may have taken by gift, descent, or devise, or he may be a purchaser, with or without notice of the extrinsic acts of the original parties. By far the most common situation will involve grantees of adjacent parcels from a common grantor. This typical basic situation may itself be subject to numerous variations in terms of the priority in time of the two original conveyances and the question as to which of the grantees or his successor is suing the other or his successor. Unfortunately the cases do not often reveal the variations at this point. Where the rule is conceded to be no more than a rule of construction, such variations would not be relevant. But they would be relevant to one who is concerned about the status of a subsequent bona fide purchaser without notice of marked boundaries. We may be aided at this point by certain assumptions which seem justified by the nature of the general circumstances. It may be assumed in the first place, where there have been conveyances of adjacent land by a common grantor, that the descriptions in the two conveyances conflict, or at least are capable of being so construed. It may also be assumed that the question relates to the extent of the conveyance which is prior in time; that is, whether its descriptive terms or previously marked lines will control. Obviously nothing would be gained by an inquiry into any subsequent conflicting conveyance of adjacent land in this regard if the description of the prior conveyance were unimpeachable. The prior grantee or his successor may be seeking, by application of the rule, to add to his recognized holdings a strip of land at the expense of the subsequent purchaser or his successor. Or the subsequent purchaser or his successor may be seeking, by application of the rule, to narrow the scope of the prior conveyance to his advantage. It may be inferred, however, that the latter of these possibilities is not likely to occur, for it is not likely that the subsequent purchaser will be in a position to know anything about what transpired between the grantor and a prior grantee of other land, except as recorded in the instrument. This process of elimination by way of assumptions is not intended to suggest that the eliminated possibilities cannot or have not occurred in the cases. It is intended merely to suggest that, in the absence of reported facts in the cases relevant to this classification, the typical and most likely situation will have involved a suit by a prior grantee or his successor against a subsequent grantee or his successor, the former seeking to gain by resort to lines marked prior to the conveyance to him. If this is so, the status of the defendant as a possible bona fide purchaser without knowledge of the marked lines certainly seems

relevant. It is surprising, therefore, that so few of the cases contain any reference to the problem. Where a court regards the rule as one of construction only, it is not surprising for such a question to be dismissed as irrelevant. But where the question is not even mentioned in the court's opinion, it is natural to infer that it was not raised by counsel. This in turn implies that the facts may have precluded it, that the above assumptions may not be correct, or that the subsequent purchaser in fact may not have been bona fide. But this is not at all conclusive. Such an issue may not occur to counsel who is facing the assertion by his opponent of a proposition which takes the form of a simple rule of construction. It is not likely to occur to him that opposing counsel is masking what is really a claim for reformation for mutual mistake, against which a defense of bona fide purchase would be pertinent. It is even more unlikely where the parties are remote grantees from a common grantor, for who would believe that his opponent is implicitly seeking reformation when the latter is so far removed from the instrument to be reformed?

It is fair to assume, therefore, that the cases about to be discussed, most of whose facts are inadequately reported, include some which apply the rule against persons who, in equity, ought not to have been subjected to it. To this extent, justification for the rule remains to be found. Where, however, cases are found which do reveal facts or statements relevant to this question, appropriate mention will be made of that fact.

It seems desirable to present first the origin and development of the problem in four states in which it has received the greatest attention. For this purpose a roughly chronological presentation of the cases in those states is indicated.

1. *The North Carolina Cases*

Person v. Roundtree is the earliest case in point which has been found. It is not in fact officially reported, but appears in a note to another early case.[12] Its date is not indicated, but it must have been decided some years before the end of the eighteenth century. Yet it has been cited in a number of other cases in North Carolina and elsewhere. The briefly stated facts about it raise our problem in a striking manner, and have not been exactly repeated in any later case. As the result of a mistake either of the surveyor or another official, the land described, apparently in a grant by the state, was on the opposite side

[12] ____ v. Beatty, 2 N.C. 487 (1796).

of a creek from and included none of the land surveyed. The grantee, however, settled on the land surveyed. The plaintiff claimed the land surveyed under a deed from another, and sued in ejectment. Judgment was for the defendant, and the only reported comment was that the mistake of the officer who "filled up" the grant should not prejudice the defendant. If the facts as stated were clearly proved, the defendant would have the strongest kind of claim to relief by way of reformation; and if he were in possession when the plaintiff took his deed, which seems implied, the latter would have been on notice of his claim. This decision, therefore, may offend against nothing save procedural regularity. Three other early cases contain dicta approving the departure from a line described to follow a marked line.[13] The court in one of these[14] doubted the wisdom of departing in the first instance from the words of a grant, but said that many decisions of their courts have allowed such departures, citing *Person v. Roundtree.*

The leading North Carolina case, however is *Cherry v. Slade's Administrator.*[15] Although the decision was not in point, the court defined by way of dictum, a series of rules governing boundaries, together with an explanation of the special circumstances existing in the state which made such rules necessary. One of the rules was stated to be that whenever it can be proved that there was a line actually run by the surveyor, which was marked, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed. The extravagance of this statement is obvious, since it omits any requirement that the line actually run shall be with the knowledge or consent of either party. It may be that the court had in mind the same principle that now prevails in the case of land described according to government survey; that is, that the acts of an official surveyor determine the boundaries.[16] The justification given by the court for the rules laid down, however, was the physical condition of the country, which at that time consisted largely of uninhabited, mountainous, and heavily forested land. Under these conditions, the inexact and often unskilled efforts to survey large tracts would have resulted, in the court's view, in a chaos of boundaries if the courses and distances recited in patents and deeds were relied on. The

[13] Ibid; Loften v. Heath, 3 N.C. 347 (1805); Blount v. Benbury, 3 N.C. 353 (1805).
[14] Loften v. Heath, 3 N.C. 347 (1805).
[15] 7 N.C. 82 (1819).
[16] See statement in Den v. Green, 9 N.C. 218 at 224-225 (1822). It is obvious that such a principle can be justified only where the land is described according to such survey, not where it is described, as in these cases, by metes and bounds.

court believed that the only way to keep any semblance of order was to assign primary significance to natural boundaries, marked lines, and well-established lines and corners of adjoining tracts.[17]

A few years later a significant limitation was placed upon the rule of the *Cherry* case in *Den v. Green.*[18] First the court said that *Persons v. Roundtree* could be explained on the ground of an inconsistency between a call for a marked line or corner and calls for courses and distances. But it was admitted that, however much lamented, the courts of the state had gone further and permitted parol evidence to contradict a deed. The court, however, confined this principle to a case where the marks of a line or corner remained visible at the time of the trial, which was not so in this case. To allow proof of marked lines no longer visible "would place the boundaries of our lands at the mercy of perjured, ignorant or forgetful men." Two years later this limitation on the rule was ignored, and it was left to the jury to decide whether marked lines were once located where they were alleged to be.[19] The limitation on the rule was reasserted in *Den v. Shenck,*[20] together with the further limitation that old marks on the ground must appear to correspond with the date of the deed, and must so nearly correspond with course and distance that they may well be supposed to have been made for the boundaries described. A still further limitation was imposed in the rejection of proof of stakes on the ground, they being by nature too much subject to decomposition to alter the construction of the deed. Some years later in *Den v. Alexander*[21] the court appeared to repudiate the rule altogether, at least in cases not involving grants from the state, and distinguished *Person v. Roundtree* on that basis.[22] Later *Doe v. Perkins*[23] followed the *Shenck* case in rejecting proof of

[17] The rule above stated was the second of four laid down by the court. The others were: (1) Whenever a natural boundary is called for the line is to determine at it, without regard to inconsistencies with course or distance. (3) Where lines or corners of an adjoining tract are called for, the lines shall be extended to them, without regard to distance. (4) Failing marked trees or corners, calls for natural boundaries, or calls for adjacent tracts, courses and distances may then control, for there is nothing else left to rely on. Compare the statement about early conditions in the state in Brown v. House, 116 N.C. 859 at 864, 21 S.E. 938 (1895).

[18] 9 N.C. 218 at 225 (1822).

[19] McNeill v. Massey, 10 N.C. 91 (1824).

[20] 13 N.C. 414 (1830).

[21] 29 N.C. 237 (1847).

[22] Doe v. Rives, 32 N.C. 256 (1849), two years later, might be regarded as involving a conflict between a call for a tree as a monument and calls for course and distance, there being no tree found by following course and distance. The jury was instructed that if the tree alleged to be the terminus of the line were marked at the time of the original survey, it would control. The instruction was approved, and the court cited Den v. Schenck and McNeill v. Massey, supra.

[23] 47 N.C. 222 (1855).

a stake placed at the time of the survey. The rule of the *Cherry* case was again recognized in *Safret v. Hartman*,[24] but with the essential qualification which requires proof that the marked corner must have been acted upon in making the deed. The court added, as in *Den v. Alexander*, that the *Cherry* rule should be confined to patents or grants by the state.[25] In *Graybeal v. Powers*[26] the court accepted the rule but denied its applicability to a case where, as here, a natural boundary is called for. An established line of an adjacent tract was held to be a natural boundary for this purpose. Presumably this means that proof of a marked line can control course or distance, but not a call for a natural monument.[27]

During the last quarter of the last century there appeared a number of other cases which either accepted the rule by way of dictum,[28] refused to apply the rule because the facts did not justify it,[29] or purported to apply the rule where in fact the terms of the grant appeared to be ambiguous.[30] These dicta recognize the limitation not stated in the *Cherry* dictum that the marked lines must have been made or adopted by the parties with a view to making the deed or grant conform to them. One case states that where a description is so wanting as to vitiate the conveyance, the rule cannot be used to supply the want.[31] *Higdon v. Rice*[32] is significant for a statement which seems to be an effort to justify the rule: "it is nevertheless competent to correct a mistake in a description by oral testimony tending to show what the parties consented to at the time of executing a deed, for the reason that it is in explanation of what is always so far ambiguous as to require evidence *dehors* the deed to establish it." This must mean that extrinsic evidence is always admissible to apply the description to the ground; to show, for example, where a monument called for is actually located. If this is so, then it follows that extrinsic evidence is admissible to show where

[24] 50 N.C. 185 (1857).

[25] Addington v. Jones, 52 N.C. 582 (1860), also recognized the rule in the case of a grant, but did not apply it because of insufficiency of proof.

[26] 76 N.C. 66 (1877).

[27] See also Batts v. Staton, 123 N.C. 45, 31 S.E. 372 (1898).

[28] Baxter v. Wilson, 95 N.C. 137 at 143 (1886); Cox v. McGowan, 116 N.C. 131 at 133, 21 S.E. 108 (1895); Shaffer v. Gaynor, 117 N.C. 15 at 23, 23 S.E. 154 (1895); Deaver v. Jones, 119 N.C. 598, 26 S.E. 156 (1896); Batts v. Staton, 123 N.C. 45 at 48, 31 S.E. 372 (1898).

[29] The Falls of Neuse Mfg. Co. v. Hendricks, 106 N.C. 485, 11 S.E. 568 (1890); Tucker v. Satterthwaite, 123 N.C. 511, 31 S.E. 722 (1898); McKenzie v. Houston, 130 N.C. 566, 41 S.E. 780 (1902).

[30] Higdon v. Rice, 119 N.C. 623, 26 S.E. 256 (1896).

[31] The Falls of Neuse Mfg. Co. v. Hendricks, 106 N.C. 485, 11 S.E. 568 (1890).

[32] 119 N.C. 623 at 625, 26 S.E. 256 (1896).

lines were run, without regard to the description. This argument comes close to saying that if extrinsic evidence is admissible for one purpose, it is admissible for all purposes.

In *Elliott v. Jefferson*[33] the rule was squarely applied in the construction of a deed, by way of approval of an instruction given by the court below incorporating the rule.[34] Two other cases purported to follow *Elliott v. Jefferson.*[35] It is interesting that in one of these[36] the court said that a marked line would control a call for a corner or a line of another tract. Such an application of the rule had been previously rejected in *Graybeal v. Powers,* above.

The rule was applied in *Clarke v. Aldridge,*[37] which was a suit in partition between the heirs of a grantor, the grantee being made a party-defendant. Although these facts could not raise the issue of a bona fide purchase without notice, the court for the first time recognized the relevance of that issue, saying that the rule would apply "certainly as between the parties or voluntary claimants who hold in privity. . . ." The court also expressly denied that the rule depended upon any written reference in the deed to the survey or markings on the ground. The bona fide purchase issue was also recognized in *Allison v. Kenion,*[38] but the defendant was held to have been on notice of the proper construction of the deed, because of language in the deed which the court decided was an adequate reference to a corner established on the ground, so that extrinsic evidence was admissible to locate the corner. This fact, plus the fact that the corner was marked by the parties *after* the conveyance,[39] is sufficient to remove this case from the compass of the rule. But the court nevertheless said that the line of cases stemming from the *Cherry* case were authority for the decision. More appropriately, another ground offered was estoppel based on long acquiescence in the established boundary.

[33] 133 N.C. 207, 45 S.E. 558 (1903).

[34] In commenting on the instructions given and those refused, the court reiterated the qualification of the Cherry dictum that the marked line can control only when it can be shown to have been the intention of the parties by their deed to describe the line as marked. But in Fincannon v. Sudderth, 140 N.C. 246, 52 S.E. 579 (1905), the court quoted the original Cherry dictum in a case which, however, involved the admissibility of evidence to resolve an ambiguity in the description. In Caldwell Land & Lumber Co. v. Erwin, 150 N.C. 41, 63 S.E. 356 (1908), the rule was held inapplicable, under the qualification stated in the Elliott case, since it was not proved that the line was marked at the time of the grant with a view to making it one of the boundaries.

[35] Mitchell v. Welborn, 149 N.C. 347, 63 S.E. 113 (1908); Lance v. Rumbough, 150 N.C. 19, 63 S.E. 357 (1908).

[36] Mitchell v. Welborn, note 35 supra.

[37] 162 N.C. 326 at 330, 78 S.E. 216 (1913).

[38] 163 N.C. 582, 79 S.E. 1110 (1913).

[39] Cf. the Lerned v. Morrill situation, discussed at notes 10 and 11 supra.

That a marked boundary, to control a written description, must have been made before or contemporaneously with the deed, not after, was declared in *Ritter Lumber Company v. Montvale Lumber Company*.[40] Indeed, as before laid down, the court requires that the parties must have intended their deed to convey the land as marked by them. Putting it in other words, the court said that the marked lines must be so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the intent of the grantor. By stating the rule in this way the court is led into a superficially plausible justification for it: the intention of the parties is primary; the words used are not the "principal things to be considered"; and so, after all, the rule is not intended to allow a violation of the terms of a deed, but is only in furtherance of its purposes.[41] There was a lengthy discussion of prior cases, and an admission that the rule was adopted with reluctance and was sometimes questioned. Proper limits were required, the court said, so that the rule would not be pushed beyond its necessary import. The evidence in this case failed to meet the particular limitation imposed here, and the rule was not applied. The justification offered by the court is particularly significant in that it proceeds from an assumption that the rule is only one of construction. Such an assumption is inconsistent with the thought that the court in these cases was in effect reforming deeds on the ground of mutual mistake. In this view, of course, there is no ground for an equitable defense of bona fide purchase without notice of marked lines.

In a division of land of a decedent it was held that if the commissioners who allotted the shares went upon the land and put up *stakes* marking the lines of each share, these would control the written description thereof, if the commissioners made a mistake in writing out the description.[42] The parties to the suit took adjoining lots in this division, but nothing is said of their relation to the decedent, or whether in fact anyone other than the commissioners was aware of the boundaries they marked.[43]

The bona fide purchase issue was again raised in *Dudley v. Jeffress*,[44] where tenants in common agreed to partition, and were with the surveyor who marked the line, which they both approved. The

[40] 169 N.C. 80, 85 S.E. 438 (1915).

[41] See also similar argument in Elliott v. Jefferson, 133 N.C. 207, 45 S.E. 558 (1903).

[42] Lee v. Rowe, 172 N.C. 846, 90 S.E. 222 (1916).

[43] The rule was also applied to the heirs or devisees of adjacent landowners who settled a dispute over their boundary by agreeing on a line and executing quitclaim deeds accordingly. Millikin v. Sessoms, 173 N.C. 723, 92 S.E. 359 (1917).

[44] 178 N.C. 111, 100 S.E. 253 (1919).

plaintiff was a successor through mesne conveyances to one of these parties. In applying the rule, the court rejected the argument that the plaintiff was a bona fide purchaser by finding that he purchased with knowledge of the marked line, and so held "subject to the same estoppel." One is brought up short by the court's unobtrusive insertion of the word "estoppel." This may have been only a meaningless slip of verbiage. Surely the court was not intending to say at this late date that its long-reiterated rule was founded on estoppel. It may be significant here that to have held otherwise would have allowed the plaintiff to take land on which stood certain of the defendant's buildings. Maybe the court was taking into account the conduct of the parties after the conveyance, which would be relevant to a question of boundary by estoppel or acquiescence, but irrelevant to the rule which it purported to be applying. Something of the same thought crept into the next case to be decided, *S.S.M. Realty Company v. Boren.*[45] Here it seems clearer that the court was blending two rules, the rule under discussion and a rule of estoppel based on acquiescence, for evidently there were facts which raised both issues, although this is not made entirely clear. And again, as in *Dudley v. Jeffress,* estoppel is mentioned in reference to the "privies" of the original parties.

Finally, in *Yopp v. Aman,*[46] a suit by a grantee against his grantor to establish a boundary, the defendant raised the issue which should have occurred to parties to these suits long ago. He alleged mutual mistake, and this issue was squarely presented to the jury. The result in effect was reformation. But the court felt impelled to restate the old rule, quoting from *Clarke v. Aldridge,* above.[47] Although there was no issue here of bona fide purchase, the latter quotation, it will be recalled, declares the rule to be applicable as between the parties or "voluntary claimants who hold in privity."

In summary, the rule has been recognized in North Carolina throughout the entire reported legal history of the state. A single early case repudiating the rule has been engulfed and isolated by a long line of later cases. But there has been a kind of see-sawing down through the years as the court, evidently alarmed by the full implications of what it had done, sought from time to time to put some sort of shackles on its ill-conceived brain-child. It is not surprising that the court seldom undertook to justify the rule except in terms of precedent. The early

[45] 211 N.C. 446, 190 S.E. 733 (1937).

[46] 212 N.C. 479, 193 S.E. 822 (1937). See Zink v. Davis, (Ore. 1954) 277 P. (2d) 1007, for a recent case from another state in which the problem was solved by reformation.

[47] 162 N.C. 326, 78 S.E. 216 (1913).

argument of the *Cherry* case, resting on the physical circumstances of an undeveloped country, has long since lost its force, except perhaps in regard to descriptions which may still perpetuate or refer to the descriptions in the early grants. The few other arguments for the rule are unconvincing. Of the numerous qualifications which have appeared from time to time, the most important was intended to correct the sweeping dictum of the *Cherry* case, and required that the lines on the ground must have been made by or with the knowledge of both parties to the conveyance, who must further have intended their deed to describe such lines. Although this qualification may have been ignored on one or more occasions, it seems pretty well established. It has also been held that (1) the rule applies only to grants from the state, (2) the rule applies only where the marked lines remain visible, (3) it does not apply where the only markings were made by stakes, (4) lines on the ground can control calls for courses and distances, but not calls for natural boundaries, (5) the rule cannot be used to supply a total want of description, and (6) the marks on the ground must so approximate the calls of the deed as to raise the inference that the one was intended to describe the other. But the first four of these qualifications have been ignored in later cases; and the sixth qualification may also have been forgotten, for all that appears in the facts of later cases. There has been some passing recognition in several of the later cases of the special claims of a bona fide purchaser without notice of the boundaries on the ground; but no case has been decided in favor of such a purchaser; nor is it clear that any case would be so decided, in view of the assumption expressed by the court on several occasions that the problem is purely one of construction. Apart from this issue, the rule as originally stated in this article is firmly established in North Carolina. Whether a vital exception will be made in favor of a bona fide purchaser is a question upon which no confident prediction can be made at this time.

2. *The Pennsylvania Cases*

The rule in Pennsylvania, as in North Carolina, appeared at an early date. The first case, *Hall v. Powel*,[48] concerned the description of land in a patent. The boundaries actually surveyed were held to control inconsistent boundaries indicated by the return of survey and patent. This explanation was given: "The field notes, the original plots made by the surveyor, the survey returned, and the patent, are

[48] 19 Pa. 456 (1818).

only evidence of the survey. The real survey, the primary evidence, is the marks on the ground."[49] This seems to be the same principle which is now applied to land conveyed according to United States government survey, but without the justifying fact, found in cases of the latter type, that the patent describes the land according to the survey. Whether or not the official nature of the survey in such a case as this justifies the rule laid down, a decision reached on such ground is no authority for applying the rule to private deeds. Apparently in such a patent case only the acts of the surveyor are relevant, not those of the patentee, nor even his knowledge of the survey. It is also obvious that under such a rule there is no room for argument about the status of a subsequent bona fide purchaser from the patentee who relies on the patent but not on the survey itself.[50] A few years later it was held in *Martz v. Hartley*[51] that where there is a call for an adjoining survey, the line must go to such survey without regard to inconsistent lines marked on the ground; but this proposition was soon repudiated.[52]

Blasdell v. Bissell[53] is the leading case in Pennsylvania, for it extends the rule governing patents to deeds between private parties, that is, to descriptions which do not merely restate descriptions contained in previously issued patents. Although the action was in trespass, by original grantor against original grantee, the court, speaking through Chief Justice Gibson, spoke in sweeping terms of the exact parallel between the two situations, and with no exceptions indicated. The only other justification offered for adopting the rule is sufficiently indicated in brief by the statement that "if we suffered ourselves to be governed by the compass and by measurement, collisions would be incessant." This is pretty much the same excuse as was offered by the North Carolina court, and may have been prompted in both states by the same

[49] Id. at 462.

[50] Cf. statement of Gibson, C.J., in Smith v. Moore, 37 Pa. 348 at 352 (1829).

[51] 44 Pa. 261 (1835).

[52] Walker v. Smith, 2 Pa. 43 (1845); Hall v. Tanner, 4 Pa. 244 (1846); McGinnis v. Porter, 20 Pa. 80 (1852). Hall v. Powel was followed in Heath v. Armstrong, 12 Pa. 178 (1849); Mills v. Buchanan, 14 Pa. 59 (1850).

In some cases title to land was claimed on the basis of state-issued warrants and surveys with no patents having been issued, or with patents issued many years after possession was taken under the warrants. In conflicts between lines surveyed and returns of survey, or between survey on the one hand and return of survey and plat on the other, a series of cases declared in favor of the survey. Wharton v. Garvin, 34 Pa. 340 (1859); Quinn v. Heart, 43 Pa. 337 (1862); Malone v. Sallada, 48 Pa. 419 (1864); Darrah v. Bryant, 56 Pa. 69 (1867); Riddlesburg Iron & Coal Co. v. Rogers, 65 Pa. 416 (1870); Pruner v. Brisbin, 98 Pa. 202 (1881); Grier v. Pennsylvania Coal Co., 128 Pa. 79, 18 A. 480 (1889). It would be difficult to hold otherwise where the title of a claimant can be fixed by a transaction which has little semblance of a formal conveyance.

[53] 6 Pa. 258 at 259 (1847).

topographical conditions. The rule of *Blasdell v. Bissell* has been followed in a line of cases, the last of which came down within the past two years.[54] In other cases the rule was not applied because of lack of proof that the lines found on the ground were ever intended to serve as boundaries.[55] Thus even in Pennsylvania it is not enough merely to prove that a survey was made prior to a conveyance; the survey must be linked somehow with the conveyance, although the slender thread of the intention of the parties will suffice for this purpose.

Some of the cases cited as approving *Blasdell v. Bissell* deserve special comment. *Willis v. Swartz*[56] seems to say that a grantor may be estopped to assert the description in his deed if he represented to the grantee, prior to the conveyance, that the boundary between the lot conveyed and the lot retained was to be as he had marked it on the ground. It is not clear whether this was offered as a separate ground for decision or as an equitable theory in support of the rule favoring lines marked on the ground.[57] If it is the latter, then estoppel based on misrepresentation must be added to reformation based on mutual mistake as a possible equitable explanation for decisions which are declared in terms of a rule of law. But nowhere else in the Pennsylvania cases does such an argument appear. The bona-fide-purchase question was dismissed in *Ogden v. Porterfield*[58] by the astonishing proposition that the purchaser could not have been deceived, for he was bound to know the law; that is, that a call of the deed might be controlled by boundaries on the ground. This of course virtually eliminates the bona-fide-purchase problem altogether, as well as the thought that the rule is essentially equitable, and leaves the rule bald and

[54] Dawson v. Mills, 32 Pa. 302 (1858) (acquiescence subsequent to deed also involved); Ogden v. Porterfield, 34 Pa. 191 (1859); Lodge v. Barnett, 46 Pa. 477 (1864); Craft v. Yeaney, 66 Pa. 210 (1870); Burkholder v. Markley, 98 Pa. 37 (1881); Medara v. Du Bois, 187 Pa. 431, 41 A. 322 (1898); Rook v. Greenewald, 22 Pa. Super. 641 (1903); Metcalf v. Buck, 36 Pa. Super. 58 (1908); Rozelle v. Lewis, 37 Pa. Super. 563 (1908); Caputo v. Mariatti, 113 Pa. Super. 314, 173 A. 770 (1934); Ross v. Golden, 344 Pa. 487, 25 A. (2d) 700 (1942); Albert v. Schenley Auto Sales, Inc., 375 Pa. 512, 100 A. (2d) 605 (1953). See also Willis v. Swartz, 28 Pa. 413 (1857); Dunlap v. Reardon, 24 Pa. Super. 35 (1903); Muia v. Herskovitz, 283 Pa. 163, 128 A. 828 (1925). In Morse v. Rollins, 121 Pa. 537, 15 A. 645 (1888), there appeared to be a conflict in the description between a call for a monument and a call for a distance, but the court stated the rule in its usual form.

[55] Rifener v. Bowman, 53 Pa. 313 (1866); Eshleman v. Rankin, 32 Pa. Super. 254 (1906).

[56] 28 Pa. 413 (1857).

[57] Estoppel here is based on misrepresentation, and should be compared with the term as it appeared in the North Carolina case, Dudley v. Jeffress, 178 N.C. 111, 100 S.E. 253 (1919).

[58] 34 Pa. 191 (1859).

relentless in its operation. In *Lodge v. Barnett*[59] the court made it clear that the proof need not be of manifest or visible lines, but might be proof of their former existence. In *Medara v. DuBois*[60] the court applied the rule in a specific performance suit to defeat the defense of the purchaser that the vendor's title was unmarketable. Here there were adjoining lots, each with a house on it, the houses separated by a common wall, which in fact was built several inches west of the boundary between the lots as described in previous deeds. The court below held that the intendment of the contract was that title should pass to half of the wall, and since the deed tendered included less than that, the vendor could not recover. Perhaps a better ground would have been that the house on the vendor's land, according to the boundaries stated in the deed, encroached on adjoining property. But this ruling was reversed on the ground that the party wall was an artificial monument on the ground, and that when the common owner of the two lots originally conveyed them to different persons, the latter took only to the center line of the wall, no matter what their deeds may have said. Clearly it would be difficult to say in a case like this that the court was applying a sort of reformation principle, for the proper parties to such a suit were not before the court.[61] In *Rook v. Greenewald*[62] the court expressly said that the rule was not based on reformation, and any requirement that the evidence be sufficient to justify reformation would be error. Merely a preponderance of the evidence, sufficient to satisfy the jury that the parties to the deed intended the boundaries to be as marked on the ground rather than as described in the deed, is all that is required. The court also held, without discussion, against the argument that the agreement between the parties about lines on the ground merged in the deed. Further, an effort was made to justify the rule in terms of the existence of a latent ambiguity, which arises not from the deed but from collateral matter. Of course, a deed, apparently unambiguous, may be rendered ambiguous when an effort is made to apply it to the ground; but it is quite another thing to say that parol evidence may normally be admitted not merely to resolve but also to create an ambiguity. In *Rozelle v. Lewis*,[63] a suit between the original parties to the deed, the court met the argument that the rule violates the Statute

[59] 46 Pa. 477 (1864).

[60] 187 Pa. 431, 41 A. 322 (1898).

[61] See also Ross v. Golden, 344 Pa. 487, 25 A. (2d) 700 (1942), with similar facts, except that the suit was in ejectment, between the owners of adjoining lots.

[62] 22 Pa. Super. 641 (1903).

[63] 37 Pa. Super. 563 (1908).

of Frauds by saying that it was the deed which passed the title and that no estate was created or conveyed by parol, any more than in the case of a "consentible line," established by the parties after the deed. The most recent case, *Albert v. Schenley*,[64] was a suit for damages by a vendor for breach of contract for the sale of land. The contract called for a lot 146 feet "more or less" in depth, but the deed described the property as extending only 109 feet on one side and 107 feet on the other. The purchaser refused to accept the deed, but the plaintiff was allowed to recover on proof that he had pointed out the property described by the deed, and monuments marking it, prior to the contract. The court stated the rule and added: "Especially is this so where a purchaser inspects the property and has an opportunity to see the physical boundaries." The purchaser here of course was the original purchaser, not a subsequent purchaser from one of the original parties; and so this statement can mean no more than that, for the rule to apply, both parties to the deed (or contract) must consent to or know of the line on the ground.

Pennsylvania, more clearly than North Carolina, has been committed to the rule as originally stated. The only qualification imposed is the obvious one that the boundaries must have been placed on the ground as the work of both parties to the conveyance, and the deed must have been intended to describe them, although it may be doubted whether this qualification has been strictly adhered to on all occasions. The rule is one of construction, with little thought of any equitable foundations. And there seems to be little hope for one who would claim to be a bona fide purchaser without notice of lines on the ground.

3. *The Tennessee Cases*

An early case[65] recognized the North Carolina case, *Person v. Roundtree*,[66] as authority where the question raised was whether testimony could be used to vary the description in a grant from the state by showing that the original grantee intended to run the boundaries in a different manner and had assumed that the survey described in the grant had been so run. The court said that the jury could correct such a mistake if, as in the *Person* case, the grantee had taken possession of the land according to his claim so as to give notice thereof to subsequent purchasers; but that they could not do so to the prejudice of

[64] 375 Pa. 512, 100 A. (2d) 605 (1953).
[65] Miller's Lessee v. Holt, 1 Tenn. 110 (1805).
[66] Reported in note to —— v. Beatty, 2 N.C. 487 (1796), discussed at note 12 supra.

subsequent claimants who had no other notice of the manner in which the lines were run than what the register's books would afford. This was getting off to a somewhat better start with the rule than in North Carolina or Pennsylvania, at least in regard to the claims of subsequent purchasers. But it will also be noted that the testimony varying the grant, which would be admissible against any but a bona fide purchaser, was merely of a contrary intention of the grantee, not of inconsistent acts on the ground. It is doubtful that so liberal an application of the rule is sustained by later cases.

A line of later cases applied[67] or approved by dicta[68] the proposition that in a grant from the state the survey of the land granted controls the calls of the grant, or a plat accompanying it.[69] Nothing more was said about bona fide purchasers, but apparently none were involved, although the relation of the parties is not entirely clear in several of these cases. *Person v. Roundtree* was cited as authority, and little other authority or justification for the rule appears. Apparently proof of the survey did not need to include proof of continuing or visible marks on the ground.[70] As previously stated, special justification may be offered for such a rule, to the extent that it is applied to grants from the state, which serves at the same time as a limiting factor, not present in private conveyances, and therefore excluding one type of case as authority for the other.

But at an early date the same principle was applied to an ordinary conveyance in *Hale v. Darter*.[71] In justification the court said, "The purchaser cannot be concluded by any technical rule of law from showing the land he actually bought and had surveyed to him, although, by an error or oversight in drawing his deed, there may be some conflict between the courses and distances called for, and those actually run and marked at the time of the survey."[72] The plaintiff won in ejectment on this basis, but the nature of the defendant's claim is not indicated, nor whether he might have qualified as a claimant without notice of the survey. The bona-fide-purchase issue seems implicit in the facts of *Dyer v. Yates*,[73] where the same result was reached. A grant of land

[67] M'Nairy v. Hightour, 2 Tenn. 302 (1814); Garner & Dickson v. Norris' Lessee, 9 Tenn. 62 (1821); Smith v. Jones, 35 Tenn. 533 (1856). Cf. Martin v. Nance, 40 Tenn. 648 (1859) (involving a river boundary).

[68] Nolen v. Wilson, 37 Tenn. 332 at 337 (1858); Disney v. Coal Creek Mining & Mfg. Co., 79 Tenn. 607 at 612 (1883).

[69] Tate v. Gray's Lessee, 31 Tenn. 73 (1851).

[70] Garner & Dickson v. Norris' Lessee, 9 Tenn. 62 (1821).

[71] 29 Tenn. 91 (1849).

[72] Id. at 94.

[73] 41 Tenn. 135 (1860).

omitted a parcel actually surveyed. The grantee died, and the same land was sold by his executor at public sale, the same description being used. Then the executor sold the omitted parcel to the plaintiff. The defendant won in trespass. There was testimony that at the public sale the executor expressed his intention to sell only what the deed described, but there was other testimony to the contrary, and the jury found for the defendant on this issue. The court said there was no doubt that the executor intended to limit the amount sold, but that if in fact the entire tract was "sold" to the defendant, the executor's ex parte intention would not restrict the purchase unless a new boundary had been fixed by the conveyance. Nothing was said about the plaintiff's notice of the original survey or of the import of the public sale, presumably because the question was not raised. Maybe this case means merely that the rule about grants from the state applies to all who purchase the same land from the grantee by way of the same description. If so, it might be easier to say that the bona-fide-purchase issue was irrelevant, at least if the application of the rule in such a case is justified by the special machinery involved in placing state land in private ownership, to which the usual rules of conveyancing are not always applicable.

The latest case, *Staub v. Hampton*,[74] involved similar facts, except that none of the deeds incorporated the description of any original grant from the state. The parties took deeds from a common grantor, the defendant's junior deed clearly including the land in dispute; and the question was whether the plaintiff's prior deed also described that land. The plaintiff won in ejectment on the ground that it did. There was proof of lines marked on the ground consistent with the plaintiff's claim. His difficulty was to establish the beginning point of his description, which was called to be in the line of an adjacent tract. That line, however, in fact was located considerably north of where the parties thought it was. The court said that the plaintiff's deed was ambiguous, which may be doubted; but the decision was placed in part on this ground. The court went on, however, to say that the rule applied here, and undertook to explain and justify it more fully than in any other case which has been found. The rule was justified by way of quotation from two Pennsylvania cases[75] to the effect that the physical demarcation of boundaries is always the primary fact in the designation of land conveyed, the deed merely a representation or copy thereof;

[74] 117 Tenn. 706, 101 S.W. 776 (1906).

[75] Ogden v. Porterfield, 34 Pa. 191 at 195 (1859); Smith v. Moore, 37 Pa. 348 at 352 (1829).

the one a reliable measure of intention, the other less so. For once the normal arguments against the rule were made, and the court undertook to answer them. There was no violation of the registration laws, it was said, for those laws were not involved. Why they were not involved was not explained. The Statute of Frauds was also dismissed, also without specific reasons other than the apparent assumption that this was not a question of adding to the deed but simply of construing it. The same argument presumably would be applicable to dispose of the Parol Evidence Rule, which in fact was not mentioned as such. The court did say that it was not necessary to proceed in equity to reform the deed, for the rule applied was an old one which had in effect become a rule of property. If the rule is one of property, how pertinent would be the claims of a bona fide purchaser? That question was specifically raised, but easily resolved here by the finding that the defendant had notice of the plaintiff's claim through the possession of the plaintiff's tenant at the time the defendant purchased.

On the basis of the above-mentioned cases, the rule is well established in Tennessee, and without regard for the requirements of reformation for mutual mistake. It is not clear that protection will be reserved for a bona fide purchaser, but it is clear at least that the court is aware of that problem, and nothing has been found in the cases definitely inconsistent with such a qualification of the rule.

Suppose a defendant in ejectment relies on his possession and proof that title is not in the plaintiff. The plaintiff relies on a conveyance to him which purports to cover the land in question, but the defendant seeks to prove that the calls of the conveyance are inconsistent with boundaries marked on the ground. Can he make such a defense? Do the arguments for or against the rule apply here? If reformation were accepted as a foundation for the rule, can the defendant seek such relief where he is neither party nor privy to the mutual mistake? If the rule is offered apart from any right to reformation, does the Parol Evidence Rule bar the defendant's proof where he is a stranger to the conveyance?[76] A couple of Tennessee cases seemed to involve such a situation.[77] The rule was either applied or recognized, but without recognition of the special circumstances. No clear solution to this unusual aspect of the problem appears, and no effort will be made here to suggest one, for it reaches the outermost limits of all relevant doctrines,

[76] 9 WIGMORE, EVIDENCE, 3d ed., §2446 (1940).

[77] Garner & Dickson v. Norris' Lessee, 9 Tenn. 62 (1821); Martin v. Nance, 40 Tenn. 648 (1859).

where differing views may reasonably be defended. It may be suggested, however, that if the plaintiff could prove that he took without notice of the extrinsic marking of boundaries, he should be protected in his reliance on the written record of his title. The problem is similarly perplexing if, in such a situation, it is the defendant who relies on the description in the plaintiff's chain of title, and the plaintiff who seeks to prove inconsistent markings on the ground.[78]

4. *The Kentucky Cases*

It may be misleading to present the Kentucky cases at this place, for some doubt is raised by the most recent cases as to the status of the rule in that state. It is clear enough from the early cases that the rule was established and adhered to for over a century. It was applied both to patents[79] and to private deeds;[80] and was approved by dicta in other cases.[81] No exceptions or qualifications of any sort are mentioned, and both patents and deeds are regarded as within the compass of the same rule. Although little explanation is given for the rule, and no cases from other jurisdictions are cited, the date of the earliest case and the brief statement about the rule in that case[82] leave little doubt that it was produced by the same kind of circumstances mentioned by the courts in the states whose cases are discussed above.[83]

Several of the cases cited should be separately mentioned. In *Cowen v. Fauntleroy*[84] the effect of the proof of marked lines was to alter only the course of one call in the patent. In meeting the argument

[78] Cf. Smith v. Jones, 35 Tenn. 533 (1856), where the plaintiff claimed under an entry and grant from the state, and the question was whether there was any vacancy left by prior grants. This of course depended on the extent of the prior grants, and in this regard the court held that if, as actually surveyed, there was a vacancy left by prior grants, the calls of such grants would have to give way.

[79] Cowen v. Fauntleroy, 5 Ky. 261 (1810); Preston's Heirs v. Bowmar, 5 Ky. 493 (1811); Thornberry v. Churchill, 20 Ky. 29 (1826); Reid v. Langford, 26 Ky. 420 (1830); Buford v. Cox, 28 Ky. 582 (1831); Kant v. Rice, 21 Ky. L. Rep. 1365, 55 S.W. 203 (1900). Cf. Dimmitt v. Lashbrook, 32 Ky. 1 (1834).

[80] Lyon v. Ross, 4 Ky. 466 (1809); Young v. Leiper, 7 Ky. 503 (1817); Curtis v. Kinkead's Executrix, 2 Ky. L. Rep. 60 (1880); Willoughby v. Willoughby, 20 Ky. L. Rep. 1061, 48 S.W. 427 (1898).

[81] Morriso v. Coghill's Legatees, 2 Ky. 322 at 324 (1804) (patent); Finley v. Meadows, 134 Ky. 70 at 76, 119 S.W. 216 (1909) (patent); Johnson v. Harris, 24 Ky. L. Rep. 449 at 451, 68 S.W. 844 (1902) (deed); McCormick v. Applegate, 25 Ky. L. Rep. 914 at 512, 76 S.W. 511 (1903) (deed); Profit v. Wentworth Oil Co., 206 Ky. 784 at 786, 268 S.W. 549 (1925) (deed).

[82] Morriso v. Coghill's Legatees, 2 Ky. 322 at 324 (1804).

[83] In Holmes v. Trout, 32 U.S. 171 at 177 (1833), concerning Kentucky land, the court said: "Entries were made at an early day, by individuals who were more acquainted with the stratagems of savage warfare than the precision of language."

[84] 5 Ky. 261 (1810).

that this amounted to contradicting the record by parol proof, the court offered this ingenious argument:

> "This would be true, if where a line is described by its course only, a mathematical line in the cause, either according to the true meridian or the magnetic variation were intended; but it is apprehended that this is a misconception of the true meaning of such a description of boundary. Such a line was never run in making any survey, and is impossible to be ascertained with perfect precision and certainty by any human means. It seems more rational to presume the description of a line by its course to be applicable to the line as actually run and marked by the surveyor. . . . With this consideration, no rule of evidence will be violated in the admission of proof to show the line as actually run and marked by the surveyor, though it should deviate in some measure from a direct mathematical line."[85]

Whether or not one accepts this argument as justifying the rule in such a situation, at least one can appreciate the difficulty facing a court in Kentucky in the year 1810 when the calls of the patent were for courses and distances only, without any calls for monuments. Similarly, in *Willoughby v. Willoughby*[86] the court held that, where a deed called for a course from one monument to another, presumably in a straight line, it could be proved that the line actually run deviated somewhat from a straight line. These cases of course do not mean that the rule in Kentucky was confined to questions about the courses of boundary lines as distinguished from other items of description.

Turning to the more recent cases, *Fordson Coal Company v. Potter's Executors*[87] apparently was a suit to reform the calls of a deed according to the lines surveyed. The court declined to grant such relief against bona fide purchasers from the grantee without notice of such survey. Since such a result is inescapable in any proceeding upon equitable principles, one may wonder whether the plaintiff mistook his remedy. The court has never specifically declared that the rule adopted in the earlier cases could be applied against such a bona fide purchaser, but if the rule was laid down, as it appears to have been, as a rule of construction, it is easy to deny the relevance of the bona-fide-purchase issue. This case at least demonstrates the incongruity produced by the rule as it is applied in a state like Pennsylvania, which denies any special protection to such a purchaser. Presumably in that

[85] Id. at 261-262. Cf. Dimmitt v. Lashbrook, 32 Ky. 1 at 2 (1834).
[86] 20 Ky. L. Rep. 1061, 48 S.W. 427 (1898).
[87] 237 Ky. 311, 35 S.W. (2d) 298 (1931).

state, assuming that the usual equitable principles are applicable in reformation suits, two suits with identical facts could reach opposite conclusions of substantive law, depending on the form in which the plaintiff states his cause of action.

In *Lawrence v. Wheeler*[88] a deed called for a stake on a certain quarter section line, "being a stake established by the said Henley and A. D. Wheeler. . . ." The plaintiff in ejectment sought to prove that the stake actually had been set a few feet west of the quarter section line. But the court held for the defendant saying, "The Andrus deed calls for a stake *on the quarter section line*, therefore, the deed conveyed no land west of that line, although Wheeler and Henley may have placed a stake at some other point." This is a square, although not an express, rejection of the rule. It is all the more striking because of the statement in the deed that the stake had been "established" by the parties mentioned, which would be sufficient to cause some courts to say that the deed called for the stake as established and that to fix the corner as it was in fact established would not be to vary the terms of the deed.[89] This court did not refer to any of the prior decisions applying the rule.[90]

5. *Cases in Other Jurisdictions*

(a) *In general.* The rule was applied in several early cases in New Jersey[91] and Virginia.[92] The justification offered by the New Jersey court for the rule was substantially the same as that expressed by the North Carolina and other courts whose decisions have been previously discussed. Two intermediate court decisions from California[93] and one from New York,[94] as well as single decisions by the Maine[95] and South Carolina courts,[96] seem to go on the same basis; but the special facts involved or the failure of the courts to explain themselves sufficiently leaves some doubt about the commitment of these courts to the rule. Dicta from a number of other states support

[88] 285 Ky. 288 at 289, 147 S.W. (2d) 698 (1941).

[89] Cf. Allison v. Kenion, 163 N.C. 582, 79 S.E. 1110 (1913); Nivin v. Stevens, 5 Har. 272 (Del. Super. 1850), both discussed at notes 107 and 108 infra.

[90] See also Daniels v. Davis, 311 Ky. 293, 223 S.W. (2d) 998 (1949), involving a conflict between a map referred to in the deed and the survey on which it was based.

[91] Opdyke v. Stephens, 28 N.J.L. 83 (1859).

[92] Baker v. Seekright, 11 Va. 177 (1806); Dogan v. Seekright, 14 Va. 125 (1809). See also Herbert v. Wise, 7 Va. 239 at 242 (1802).

[93] Nebel v. Guyer, 99 Cal. App. (2d) 30, 221 P. (2d) 337 (1950); Beall v. Weir, 11 Cal. App. 364, 105 P. 133 (1909).

[94] Whan v. Steingotter, 54 App. Div. 83, 66 N.Y.S. 289 (1900).

[95] Emery v. Fowler, 38 Me. 99 (1854).

[96] Altman v. McBride, 4 Strob. (S.C.) 208 (1850).

the rule.[97] It should be noted, however, that of the cases cited, all are inconsistent with other decisions or dicta within the same respective states,[98] except the dicta from New Hampshire, South Carolina, and Washington. The fact that a single dictum is the sole authority for the rule in the several states mentioned leaves some doubt about the weight to be given to such dicta. It may be noted, on the other hand, that one of the California appellate court decisions referred to[99] is the latest expression by a California court on the subject.

The Illinois and Washington dicta are put in evidentiary terms; that is, the marks or monuments on the ground are "the most satisfactory evidence of the place where the true lines were located,"[100] or the line established on the ground by the parties is presumably the line mentioned in the deed.[101] Does this mean that lines on the ground will prevail over lines described in the deed? It does at least in the Illinois case, for the court expressly said so. In that case there was an ambiguity in the instrument; so the evidence of lines on the ground was admissible without regard to the rule. It is easy to spot the error lying behind the court's statement of the rule, for the cases cited in support of its dictum were either cases declaring the familiar proposition that calls for monuments control calls for courses and distances, or were cases involving government survey boundaries, in which the marked boundaries of any government survey subdivision control in conveyances based on such survey.[102]

The Ohio court in *Lessee of Nash v. Atherton*[103] rejected the rule as one of general application, but said it would be applicable in certain situations. Such would be where a call were to run a particular course, and there were a marked line of the same general course, although not exactly the same;[104] or where a call were to run a particular course from one natural object to another, the course run between these two objects

[97] Riley v. Griffin, 16 Ga. 141 at 148 (1854); Fisher v. Bennehoff, 121 Ill. 426 at 433, 13 N.E. 150 (1887); Cornell v. Jackson, 50 Mass. 150 at 154 (1845); Heywood v. Wild River Lumber Co., 70 N.H. 24 at 31, 47 A. 294 (1899); Newton v. McKeel, 142 Ore. 674 at 681, 21 P. (2d) 206 (1933); Bradford v. Pitts, 2 Mill (S.C.) 115 at 118 (1818); Martin v. Hobbs, (Wash. 1954) 270 P. (2d) 1067 at 1068 (see discussion of other Washington cases at note 130 infra); Gwynn v. Schwartz, 32 W.Va. 487 at 496, 9 S.E. 880 (1889); Adams v. Alkire, 20 W.Va. 480 at 486 (1882).

[98] See cases cited note 136 infra.

[99] Nebel v. Guyer, 99 Cal. App. (2d) 30, 221 P. (2d) 337 (1950).

[100] Fisher v. Bennehoff, 121 Ill. 426 at 433, 13 N.E. 150 (1887).

[101] Martin v. Hobbs, (Wash. 1954) 270 P. (2d) 1067 at 1068.

[102] See exclusions No. 1 and 4, pp. 648 and 649 supra.

[103] 10 Ohio 163 (1840). Cf. McAfferty v. Conover's Lessee, 7 Ohio St. 99 (1857).

[104] Cf. Den v. Shenck, 13 N.C. 414 (1830); Western Mining & Mfg. Co. v. Peytona Cannel Coal Co., 8 W.Va. 406 at 416 (1875).

would be the true course, whatever might be the course called for.[105] Similar distinctions were drawn by the West Virginia court, which stated, among other things, that proof of marked lines could control calls merely for courses and distances, but not calls for monuments.[106]

As stated in the introduction, it is generally conceded that extrinsic evidence of a marked line is admissible to resolve an ambiguity or an inconsistency between the calls of an instrument. It might be expected that some courts, which in certain situations were especially impressed by proof of boundaries run on the ground, but were at the same time unwilling to violate the integrity of the written record of the conveyance, would strain the instrument in search of an ambiguity, so that extrinsic proof could be admitted. In *Allison v. Kenion*,[107] a North Carolina case previously referred to, the court held a reference in a deed to the "established" northwest corner of the land in question was sufficient to allow proof of where the corner had in fact been established, although this would reach a point inconsistent with the distances called for. Several other courts have gone even farther in this direction. In *Nivin v. Stevens*[108] a reference in a deed of a city lot to buildings thereon was allowed to fix a boundary according to the lines of a building, where otherwise the line of the lot would have run through a part of the building. In *Miles v. Barrows*[109] the habendum of a deed provided that the grantee agreed to put up and maintain fences where the premises adjoined other land owned by the grantors. It was not clear whether the grantee erected the fences before or after the deed, but the court allowed the line of a fence to govern the line called for by the deed. The court said this did not violate the Parol Evidence Rule, for there was an ambiguity in the deed, since the reference to the fences must be regarded as calling for the fences as monuments. In *Smith v. Neghbauer*[110] the plaintiff sued for breach of covenant in a deed which described a lot as being eighty feet in length, on the ground that the lot in fact extended only 65 feet. Recovery was denied on the ground that the deed referred to the premises as consisting of a row of houses and the lot on which they stood. Since a house and lot ordinarily imports a house with a curtilage, shut off from neighboring grounds by some physical objects, it was implied that the land was enclosed

[105] Cf. Willoughby v. Willoughby, 20 Ky. L. Rep. 1061, 48 S.W. 427 (1898).
[106] Winding Gulf Colliery Co. v. Campbell, 72 W.Va. 449 at 466, 78 S.E. 384 (1913). Cf. Graybeal v. Powers, 76 N.C. 66 (1877).
[107] 163 N.C. 582, 79 S.E. 1110 (1913).
[108] 5 Har. 272 (Del. Super. 1850).
[109] 122 Mass. 579 (1877).
[110] 42 N.J.L. 305 (1880).

within physical boundaries. This was taken to be an equivalent of calling for a fence as a boundary.[111]

(b) *Practical location by common grantor—sub-rule A.* Reference should be made at this point to a group of comparatively recent cases which stand as authority for the rule, but which, as indicated below, state the rule in somewhat different terms from those originally expressed herein. For the convenience of this discussion the rule in this context will be referred to as sub-rule *A*.

In *Herse v. Mazza*[112] a New York court decided a boundary dispute between the grantees of two lots from a common grantor on the basis of a line marked on the ground prior to the deeds by the grantor, of which both grantees had knowledge when they purchased. Apparently the plat which was alleged to show a different line was ambiguous, a fact which should have justified a reference to the practical location. But the court placed its decision on another ground, saying:

> "The line established in that manner is presumably the line mentioned in the deed and no lapse of time is necessary to establish such location. The location does not rest upon acquiescence in an erroneous boundary but upon the fact that the true location was made and the conveyance made in reference to it."[113]

This is substantially a statement of the main rule: when a boundary is marked on the ground and the conveyance is intended to describe that boundary, the deed will be held to have that effect, whether or not its terms in fact so provide. The court does not indicate what would be done if one grantee had taken with reference to or with knowledge of the marked line but the other had not. The proposition does seem to be stated, not as a rule of equity, but as one of construction. This case has had little effect on later New York decisions. One lower court[114] reformed a deed on the ground of mutual mistake where the facts were similar, and added that the establishment of the line on the ground plus undisturbed possession by the grantee for twenty years made the marked line controlling even if erroneous, citing *Herse v. Mazza*. This amounts to treating the earlier case merely as authority for establishing a boundary by acquiescence. Indeed, under the above-

[111] The court cited Opdyke v. Stephens, 28 N.J.L. 83 (1859). Cf. Kanne v. Otty, 25 Ore. 531, 36 P. 537 (1894), where the court said there was a latent ambiguity if the line described in a patent was not surveyed on the line there indicated.

[112] 100 App. Div. 59, 91 N.Y.S. 778 (1904).

[113] Id. at 63.

[114] Myer v. Idlewood Association, 146 N.Y.S. 469 (1914).

quoted proposition, the line on the ground could not be treated as "erroneous."[115]

From the variety of doctrine emerging from the lower and intermediate courts of New York, it is not unusual to find cases which exert a greater influence beyond the borders of that state than within them. In *Maes v. Olmsted*[116] the Michigan court followed *Herse v. Mazza* in preferring a boundary marked in the course of a survey over that indicated by the plat on the basis of which adjoining lots had been sold. The parties in ejectment were successors in interest of the grantees of adjacent lots. It is interesting to note that the court found it impossible to reach its decision on the basis of adverse possession because of the peculiar tacking rule which at one time prevailed in that state.[117] Also the decision could not be based on the rule of boundaries by acquiescence because the defendant's predecessors knew nothing of the marked line. But the defendant himself did know of it, and this was enough to invoke the rule against him. It was also a fact that the plaintiff's predecessor had purchased after the line had been pointed out to him, and he had built a fence thereon. The court said that its decision was based on a special kind of acquiescence arising out of the practical location of a boundary line by a common grantor.[118]

Maes v. Olmsted was relied on by the Wisconsin court in the most recent case on this subject, *Thiel v. Damrau*,[119] in which the same result was reached. The court also quoted at length from *Herse v. Mazza*. The rule as stated by this court requires not only the establishment of the line by a common grantor but also that the respective grantees shall have purchased with reference to it. Although the parties here were found to have so purchased, the court said that all persons claiming under such grantees would also be bound, without stating the relevance of the question whether such subsequent purchasers had notice of the line previously established.

The Idaho court in *Taylor v. Reising*[120] reached a similar result in

[115] Muir v. Palmater, 125 Misc. 793, 211 N.Y.S. 710 (1925), affd. 216 App. Div. 734, 214 N.Y.S. 886 (1926), also cited Herse v. Mazza for a decision preferring a marked boundary, but without further indication of the exact basis for the decision.

[116] 247 Mich. 180, 225 N.W. 583 (1929).

[117] See Hanlon v. Ten Hove, 235 Mich. 227, 209 N.W. 169, 46 A.L.R. 788 (1927). But see Gregory v. Thorrez, 277 Mich. 197, 269 N.W. 142 (1936).

[118] The court's source for this proposition was 9 C.J. 244 (1916), which cited Herse v. Mazza therefor. The latter case did not assert its rule in quite such terms, although it was a fact that the line there had been fixed by a common grantor. Most of the cases in which the question arises are cases of claimants under a common grantor.

[119] (Wis. 1954) 66 N.W. (2d) 747.

[120] 13 Idaho 226, 89 P. 943 (1907).

respect to a series of conveyances which described the land according to government survey. Although the boundaries might have been held to be established by acquiescence, the court specifically used equitable estoppel as the main ground for its decision, which may be a different way of saying the same thing. In addition the court quoted the unsupported statement by the author of an early treatise on boundaries[121] that where the parties have purchased from a common vendor who previously had run a line between their parcels, such line will be regarded as the boundary between them. Later the court in *Schmidt v. Williams*[122] approved the rule of *Herse v. Mazza*, and also cited *Taylor v. Reising* as authority to the same effect. To apply such a rule, however, the court said that a tract must have been sold by the seller according to the marked boundary, and also so purchased by the buyer. In two recent cases the Idaho court cited *Taylor v. Reising* as authority for boundaries by acquiescence, which was the principle relied on by the court in both cases.[123] In one of these, *Campbell v. Weisbrod*,[124] it was indicated that a period of five years is all that is required for acquiescence in that state. In the same case the court added that where seller and buyer go on the land and mark a boundary, the line thus fixed controls the courses and distances contained in the deed, citing two North Carolina cases previously discussed.[125] It is not clear, however, whether the court regarded this statement of the main rule as applicable without subsequent acquiescence in the line so fixed. It is significant that the plaintiff, who was claiming under an original grantee, and who asserted the boundary as described in the deed, was found to have purchased with notice of the marked line. The doubt about the extent of the Idaho rule was not resolved in the latest case, *Paurley v. Harris*.[126] There proof of the marking of a boundary and the knowledge thereof by both grantees of adjacent land was excluded by the trial court on the ground that it was matter which merged in the deed. This ruling was reversed on the ground that the defendant's pleading raised the issues of fraud and mistake, to which such evidence was relevant. The problem would have been simplified considerably if the court had stopped here; but it went on to quote the main rule as

[121] TYLER, BOUNDARIES AND FENCES 335 (1874).

[122] 34 Idaho 723, 203 P. 1075 (1921).

[123] Campbell v. Weisbrod, 73 Idaho 82, 245 P. (2d) 1052 (1952); Mulder v. Stands, 71 Idaho 22, 225 P. (2d) 463 (1950).

[124] 73 Idaho 82, 245 P. (2d) 1052 (1952).

[125] Millikin v. Sessoms, 173 N.C. 723, 92 S.E. 359 (1917); S.S.M. Realty Co. v. Boren, 211 N.C. 446, 190 S.E. 733 (1937).

[126] (Idaho 1954) 268 P. (2d) 351.

stated in *Campbell v. Weisbrod,* qualifying it, however, by a reference to acquiescence in the marked line "for a considerable period of time." Further confusion appears from the fact that acquiescence here had not continued for the five-year period. Beckwith, J., dissenting, objected to reducing the period for acquiescence below five years. He added that *Campbell v. Weisbrod* stood for the determination of a boundary on the basis of its practical location alone, but that this was an error which had been later corrected.[127] It would be difficult to say at this time whether the rule in any form exists in Idaho apart from a requirement of subsequent acquiescence in a marked boundary for some period of time.

Similarly, *Herse v. Mazza* was quoted approvingly in two Oklahoma cases,[128] but there is some indication that a boundary fixed by a common grantor will be binding only where it is later acquiesced in by the parties, although not necessarily for the full statutory period.[129]

A line of Washington cases applies the rule in terms of the fixing of a line by a common grantor,[130] although *Herse v. Mazza* is apparently not the direct source thereof.[131] The first case[132] to apply the rule relied on a Tennessee case.[133] This case might also have been justified on the basis of a proper construction of the deed in question. It seems clear from these cases that the grantees must have purchased with reference to the line fixed by the common grantor or with notice of it. Again there are some references to subsequent acquiescence in

[127] Edgeller v. Johnston, 74 Idaho 359, 262 P. (2d) 1006 (1953), an adverse possession case, in which the court also held that a boundary might be established by acquiescence for the full statutory period.

[128] Lake v. Crosser, 202 Okla. 582, 216 P. (2d) 583 (1950); Roetzel v. Rusch, 172 Okla. 465, 45 P. (2d) 518 (1935).

[129] Cf. Reynolds v. Wall, 181 Okla. 110 at 112, 72 P. (2d) 505, 113 A.L.R. 417 (1938).

[130] Atwell v. Olson, 30 Wash. (2d) 179, 190 P. (2d) 783 (1948); Strom v. Arcorace, 27 Wash. (2d) 478, 178 P. (2d) 959 (1947); Windsor v. Bourcier, 21 Wash. (2d) 313, 150 P. (2d) 717 (1944); Roe v. Walsh, 76 Wash. 148, 135 P. 1031, 136 P. 1146 (1913); Windsor v. Sarsfield, 66 Wash. 576, 119 P. 1112 (1912); Campbell v. Seattle, 59 Wash. 612, 110 P. 546 (1910); Turner v. Creech, 58 Wash. 439, 108 P. 1084 (1910). See Weidlich v. Independent Asphalt Paving Co., 94 Wash. 395 at 405, 162 P. 541 (1917).

[131] Strom v. Arcorace, 27 Wash. (2d) 478, 178 P. (2d) 959 (1947), cited 11 C.J.S. 651 (1938), which cited Herse v. Mazza.

[132] Turner v. Creech, 58 Wash. 439, 108 P. 1084 (1910).

[133] Ross v. Turner, 13 Tenn. 338 (1833). This case does not seem to stand for the proposition relied on—location by a common grantor. There is a spare dictum which suggests either the acquiescence doctrine or the principle of Lerned v. Morrill, 2 N.H. 197 (1820). The Michigan case, Flynn v. Glenny, 51 Mich. 580, 17 N.W. 65 (1883), discussed at note 191 infra, was also cited by the court in Turner v. Creech.

the line or the making of improvements in reliance on it;[134] indeed in most of the cases one or the other of these facts was present, although in two of them[135] the facts do not make this clear, and the court rather stressed the fact that the party relying on the terms of his deed had notice of the marked line by virtue of improvements made in accordance with it.

The facts in practically all of the cases which apply sub-rule *A* show either that the party who was held bound by the marked line had notice thereof at the time he purchased or that there was subsequent acquiescence therein. Although the reported facts of a few of the cases may not dispel all doubt on this point, none of the cases indicate an application of the rule against a clearly innocent and unsuspecting purchaser. If this is true, the cases can be objected to only because they reached the right decision on wrong or misleading grounds. Where the fact of notice of a marked line to a grantee is stressed, very probably the decision can be supported by the existence of a mutual mistake in the drawing of one or more deeds, for which relief should be available against anyone who purchased with notice of it. As previously stated, no great objection can be made to affording such relief in a legal action, provided a court is careful to require proof that the mistake really was mutual and that no one who purchased without notice of it shall suffer because of it. It would certainly be preferable, however, if a court stated its rule for decision in such terms rather than by way of a proposition which defines only one characteristic element found in these cases—the marking of a line by a common grantor—and ignores the others.

The same may be said for the cases in which the decisive fact was acquiescence after a conveyance in a line marked before the conveyance. Acquiescence presumably requires knowledge, or at least notice, of facts in which one may be held to have acquiesced. If knowledge or notice is imparted before one purchases, acquiescence may be unnecessary. If it comes after the conveyance, certain questions arise as to what constitutes acquiescence and what facts must exist as a foundation for it. These questions become especially urgent where a court adapts its acquiescence doctrine in these cases, as the Idaho and Oklahoma courts seem to have done, so as not to require any definite period therefor. In any case where a court prefers a line on the ground to one

[134] See especially Roe v. Walsh, 76 Wash. 148, 135 P. 1031, 136 P. 1146 (1913); Campbell v. Seattle, 59 Wash. 612, 110 P. 546 (1910); Turner v. Creech, 58 Wash. 439, 108 P. 1084 (1910).

[135] Atwell v. Olson, 30 Wash. (2d) 179, 190 P. (2d) 783 (1948); Strom v. Arcorace, 27 Wash. (2d) 478, 178 P. (2d) 959 (1947).

described in a deed, a fair disposition of the case requires an observance of a number of appropriate requirements or safeguards, the full extent of which is beyond the scope of this article. By simply stating subrule *A* or the main rule, however, a court may at its discretion impose or dispense with any of such requirements.

B. Authority Against the Rule

The courts of a number of states, by decision or dicta, have declared themselves against the rule.[136] It will be seen that several of the states whose cases are cited must have experienced the same topographical and historical conditions which have been offered in justification for the rule by the courts which are its leading proponents. In those cases where the courts stated theoretical objections to the application of the rule, the Parol Evidence Rule was most often referred to,[137] or a proposition which amounts to the same thing; that is, that monuments or other boundaries on the ground will control certain calls of description in a deed only when they are themselves called for by the deed.[138] Or the same thing may be implied by a statement that proof of the parties' acts on the ground is admissible only where the deed is equivo-

[136] *Alabama:* Wilson v. Connor, 219 Ala. 344, 122 S. 404 (1929). *California:* Powers v. Jackson, 50 Cal. 428 (1875); Williams v. Hebbard, 33 Cal. App. (2d) 686, 92 P. (2d) 657 (1939). *Connecticut:* See Kashman v. Parsons, 70 Conn. 295 at 303, 39 A. 179 (1898). Cf. Patzloff v. Kasperovich, 116 Conn. 440, 165 A. 349 (1933). *Georgia:* Hall v. Davis, 122 Ga. 252 (1904). *Illinois:* Duggan v. Uppendahl, 197 Ill. 179, 64 N.E. 289 (1902). *Iowa:* Messer v. Reginnitter, 32 Iowa 312 (1871). *Kentucky:* Lawrence v. Wheeler, 285 Ky. 288, 147 S.W. (2d) 698 (1941). See other Kentucky cases discussed at note 79 supra. *Maine:* Linscott v. Fernald, 5 Me. 496 (1829). See White v. Jones, 67 Me. 20 at 24 (1877). Cf. Wiswell v. Marston, 54 Me. 270 (1866). *Massachusetts:* Cleaveland v. Flagg, 58 Mass. 76 (1849). Cf. Miles v. Barrows, 122 Mass. 579 (1877), discussed note 109 supra. *Michigan:* Bruckner's Lessee v. Lawrence, 1 Doug. (Mich.) 19 (1843). Cf. Lundberg v. Wolbrink, 331 Mich. 596, 50 N.W. (2d) 168 (1951), with which compare Nordberg v. Todd, 254 Mich. 440, 236 N.W. 826 (1931). *New Jersey:* See Jackson v. Perrine, 35 N.J.L. 137 at 142 (1871). *New York:* Gleason v. Shuart, 142 App. Div. 320, 127 N.Y.S. 101 (1911); Clark v. Baird, 9 N.Y. 183 (1853); Clark v. Wethey, 19 Wend. (N.Y.) 320 (1838). *Ohio:* McAfferty v. Conover's Lessee, 7 Ohio St. 99 (1857), cited note 103 supra. *Oregon:* Hennigan v. Matthews, 79 Ore. 622, 155 P. 169 (1916); Crandall v. Mary, 67 Ore. 18, 135 P. 188 (1913); Talbot v. Smith, 56 Ore. 117, 107 P. 480, 108 P. 125 (1910). *Texas:* See discussion of Texas cases at note 152 infra. *Virginia:* Trimmer v. Martin, 141 Va. 252, 126 S.E. 217 (1925); Bradshaw v. Booth, 129 Va. 19, 105 S.E. 555 (1921). See Richmond Cedar Works v. West, 152 Va. 533 at 541, 147 S.E. 196 (1929). *West Virginia:* Cf. Winding Gulf Colliery Co. v. Campbell, 72 W.Va. 449 at 466, 78 S.E. 384 (1913); Western Mining & Mfg. Co. v. Peytona Cannel Coal Co., 8 W.Va. 406 at 416 (1875).

[137] Wilson v. Connor, 219 Ala. 344, 122 S. 404 (1929); Linscott v. Fernald, 5 Me. 496 (1829); Bruckner's Lessee v. Lawrence, 1 Doug. (Mich.) 19 (1843); Gleason v. Shuart, 142 App. Div. 320, 127 N.Y.S. 101 (1911).

[138] Powers v. Jackson, 50 Cal. 428 (1875); Kashman v. Parsons, 70 Conn. 295, 39 A. 179 (1898); Cleaveland v. Flagg, 58 Mass. 76 (1849); Talbot v. Smith, 56 Ore. 117, 107 P. 480, 108 P. 125 (1910); Trimmer v. Martin, 141 Va. 252, 126 S.E. 217 (1925).

cal.[139] The Statute of Frauds was mentioned as a bar in two New York cases,[140] one of which also offered the principle of the merger of oral agreements in the deed.[141] These further terse indictments of the rule have been found:

> "To admit parol proof of a marked line, nowhere mentioned in the deed, but entirely variant from its calls, would serve to render titles to real estate dependent, not on deeds of conveyance, and the language of the grantor, and courses, distances and monuments, but on the mere memory of witnesses."[142]
>
> "If such be the law, it is useless in a survey or patent that there should be any calls for boundary."[143]

The jeopardy to bona fide purchasers of an unqualified application of the rule is recognized:

> "It would create great confusion in titles if some subsequent innocent purchasers for value could be deprived of a considerable portion of his domain by parol proof of an intent existing in the minds of his predecessors in title of which he had no knowledge."[144]

It is implicit in this last statement, in view of the fact that the proof rejected was of a line marked with iron stakes, that while such proof may seem objective and therefore dependable, it must rest on further proof that the parties intended the marked boundaries to be those described in the deed. It is this latter subjective element which is the rub, even if the rule were considered to be otherwise defensible.

Statutes in Oregon and California stating the usual constructional preference for "permanent and visible or ascertained boundaries or monuments" over measurements, although as misleading and equivocal as the many dicta to the same effect, have been construed to refer only to such monuments or boundaries as are mentioned in the deed.[145]

In *Nordberg v. Todd*[146] the Michigan court used language which seems to be an approval of the rule, and in fact marked lines were held

[139] Jackson v. Perrine, 35 N.J.L. 137 at 142 (1871).

[140] Clark v. Baird, 9 N.Y. 183 (1853); Clark v. Wethey, 19 Wend. (N.Y.) 320 (1838).

[141] Clark v. Wethey, note 140 supra.

[142] Bruckner's Lessee v. Lawrence, 1 Doug. (Mich.) 19 at 28 (1843).

[143] Lessee of Nash v. Atherton, 10 Ohio 163 at 170 (1840).

[144] Hennigan v. Matthews, 79 Ore. 622 at 625, 155 P. 169 (1916). See also Linscott v. Fernald, 5 Me. 496 (1829), where the protection of a bona fide purchaser was offered as one ground for the decision.

[145] Williams v. Hebbard, 33 Cal. App. (2d) 686, 92 P. (2d) 657 (1939); Hennigan v. Matthews, 79 Ore. 622, 155 P. 169 (1916); Talbot v. Smith, 56 Ore. 117, 107 P. 480, 108 P. 125 (1910).

[146] 254 Mich. 440, 236 N.W. 826 (1931).

to control distances called for in the deed. The appellant asserted against this result that the complainant was really seeking reformation rather than the construction for which he prayed. But the court said that reformation could be had under the complainant's prayer for general relief, especially since the issue of reformation was specifically raised by the appellant's cross-bill. That the court regards such a result as attainable only in equity, upon pleading and proof of mutual mistake, is further emphasized by the recent case, *Lundberg v. Wolbrink*,[147] where the court refused to depart from the boundaries called for in an action of ejectment in which the plaintiff won, and which is all the more striking because the boundary so fixed ran through a gasoline station on the defendant's premises.[148]

In *Messer v. Reginnitter*[149] the defendant offered a loaded instruction to the trial court which put the rule in an appealing guise. It was to the effect that monuments set by the parties as boundaries were to be considered as stronger evidence of the true boundaries than measurements made many years after. The court evidently saw through this maneuver and refused the instruction, and this was affirmed on appeal. Clearly it was the language of the deed which really was under attack, not the fallibility of a later survey which purported to follow it. The court said that any such proposition, which takes no account of the correctness of the survey, needs no refutation.

Crandall v. Mary[150] presents an interesting variation of fact. The deed in question called for the northeast corner of a block but did not purport to describe where that corner was located. The court held that the corner was located as indicated by existing sidewalks and buildings. The plaintiff claimed that the corner originally had been set and marked on the ground at some other point. But the court held that, since such point was not indicated by anything in the deed, it could not control the description in the deed. It might have been argued that the proof offered in fact did not vary the terms of the deed, since it is always possible to prove where monuments called for by a deed are in fact located. It is one thing to say that the location of existing structures is better evidence of the location of a street corner than the evidence offered by the plaintiff; but, since both are extrinsic, it may be doubted whether one but not the other should be rejected

147 331 Mich. 596, 50 N.W. (2d) 168 (1951).

148 The same remedial distinction was recognized in an early Maine case, Linscott v. Fernald, 5 Me. 496 (1829). But cf. Maes v. Olmsted, 247 Mich. 180, 225 N.W. 583 (1929), discussed at note 116 supra.

149 32 Iowa 312 (1871).

150 67 Ore. 18, 135 P. 188 (1913).

on that account. This is an odd variation in facts, for, although street corners have been determined according to existing structures in other cases, this usually has been accomplished by an application of the rule, rather than a rejection of it.[151]

The Texas Cases

The courts of Texas have concerned themselves with the rule in more cases than are to be found in any other state. This is not surprising in view of the constant reiteration in that state of the proposition that in any boundary dispute the main objective is to "follow the footsteps of the surveyor." It may also be significant that, while Texas is topographically unlike the eastern states, it probably experienced comparable problems in the process of getting state lands into private ownership, particularly in the lack of an official system of surveying state lands like the United States government survey, so that metes and bounds descriptions, with all their deficiencies, predominated.

The rule was given appreciable recognition in the early cases. The first case in which the question was raised, *Urquhart v. Burleson,*[152] involved complicated and ambiguously stated facts about the description in a patent, and it is not clear that the description was not actually ambiguous. In any event the land as surveyed was held to pass by the patent, the court relying on *Person v. Roundtree,*[153] which it called a Tennessee case. It was also not clear in two later cases whether the patents were ambiguous, but the court in one of them[154] stated the rule about the priority of monuments over courses and distances, without specifying that such monuments had to be called for in the instrument; and in the other case[155] the court quoted with approval from the leading Pennsylvania case, *Blasdell v. Bissell.*[156] These three cases were cited in *Dalby v. Booth*[157] to justify a definite application of the rule.

[151] It has been held that a call for a street means the street as actually laid out, as against evidence of some other location, such as that indicated on an official city map not referred to in the deed. Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165 (1862); Hill v. Taylor, 296 Mass. 107, 4 N.E. (2d) 1008 (1936); Hunt v. Keye, 150 Minn. 142, 184 N.W. 840 (1921); Barrows v. Webster, 144 N.Y. 422, 39 N.E. 357 (1895); Blackman v. Riley, 138 N.Y. 318, 34 N.E. 214 (1893). The same result has been reached where the deed referred to a map. Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900). Compare the problem discussed in Part II below.

[152] 6 Tex. 502 (1851).

[153] Discussed at note 12 supra.

[154] Hubert v. Bartlett's Heirs, 9 Tex. 97 (1852).

[155] Bolton v. Lann, 16 Tex. 96 (1856).

[156] 6 Pa. 258 (1847), discussed at note 53 supra.

[157] 16 Tex. 564 (1856).

The next year, however, the court in *Anderson v. Stamps*[158] held that the lines of a survey as marked on the ground could control the courses and distances only when such lines were called for in the instrument.[159]

Since *Anderson v. Stamps* the rule has been approved by dictum in one case,[160] and the court has purported to apply it on other occasions which, however, involved conflicts between the calls of the instruments in question.[161] The latter, therefore, cannot be classed as decisions in support of the rule. In several of these the "footsteps" rule was stated as governing.[162] In *Millerman v. Megaritty*,[163] where there was a conflict between calls, some of which were consistent with the survey, the court stated the rule, and added that the suit partook of the nature of a suit for reformation, which was denied on the ground that no mistake was proved and, even if it had been, it would not be available against the defendant, who took title in good faith and in ignorance of the mistake. The case is of interest because the alleged mistake, if it could have been sustained, would have operated against rather than in support of the rule.

It sometimes happens that a deed will call for the corner of another tract of land (or "survey," as a tract originally granted in Texas is usually designated), and it will later be discovered that the true corner is not where the parties to the deed or the surveyor thought it was. *Koenigheim v. Miles*[164] was such a case, but there were other calls which supported the boundaries as actually surveyed. Such boundaries were held to prevail, and properly, because of the conflict between the calls. But the court went on to say, "The rule is general that the boundaries of a grant as actually surveyed are the limits of the grantee's right, and will control calls for the unascertained boundaries of existing

[158] 19 Tex. 460 (1857).

[159] Anderson v. Stamps was distinguished in Booth v. Upshur, 26 Tex. 64 (1861), where there was an inconsistency between the calls. Parol evidence was also admitted in Hughes v. Sandal, 25 Tex. 162 (1860), but the court added the startling proposition that the Parol Evidence Rule is applicable only to the parties to the instrument, not to those claiming under them.

[160] Welder v. Carroll, 29 Tex. 318 at 333 (1867).

[161] Burnett v. Burriss, 39 Tex. 501 (1873); Williams v. Mayfield, 57 Tex. 364 (1882); Fulton v. Frandolig, 63 Tex. 330 (1885); Montague County v. Clay County Land & Cattle Co., 80 Tex. 392, 15 S.W. 902 (1891); Millerman v. Megaritty, (Tex. Civ. App. 1922) 242 S.W. 757.

[162] The court of civil appeals purported to apply the rule in Lutcher & Moore Lumber Co. v. Hart, 26 S.W. 94 (1894), but the inadequate reporting of the facts leaves the case without discernible significance.

[163] (Tex. Civ. App. 1922) 242 S.W. 757.

[164] 67 Tex. 113, 2 S.W. 81 (1886).

surveys."[165] It is difficult to know what the court meant by "the unascertained boundaries of existing surveys." Every separate tract of land has boundaries the location of which can be ascertained by some means. If the parties to a deed call for a boundary of another tract, and later show that they were mistaken as to the location of such boundary, this hardly constitutes an excuse for ignoring the calls of their deed and looking solely to the survey on the ground, in the absence of a proper basis for reformation, or unless the calls of their deed are conflicting or ambiguous. In *Plummer v. McLain*[166] the court "corrected" the calls of a patent to conform to the survey in an action of trespass to try title. This result does not seem too objectionable, since it was found that the defendant filed his claim to adjacent land with notice of the extent of the plaintiff's claim. The court, however, said that it was not necessary to resort to equity to make such a correction, since this did not really reform the patent, but was only to aid in rightly interpreting the description. The real difference between reforming an instrument and "correcting" it in aid of interpretation was not made clear. Other courts which have approved the rule have not gotten so far out on a limb in their efforts to explain the rule as one of construction rather than of reformation.[167]

Except for the cases mentioned above, the Texas courts have repeatedly rejected the rule by decision[168] and dictum,[169] and have repeatedly stated that resort can be had to proof of marked lines only when there is an inconsistency between or ambiguity in the calls of the instrument,

[165] Id. at 123. See also Busk v. Manghum, 14 Tex. Civ. App. 621, 37 S.W. 460 (1896); Chesson v. La Flore, (Tex. Civ. App. 1917) 191 S.W. 745.

[166] (Tex. Civ. App. 1917) 192 S.W. 571.

[167] The court also made a distinction which seemed to go something like this: the survey will prevail over slightly inconsistent calls of a deed, and where it is clear that in general the survey is that which the deed purported to call for, but it will not prevail where it is entirely repugnant to the calls of the instrument. For similar distinctions see cases cited notes 20 and 104 supra.

[168] Schaeffer v. Berry, 62 Tex. 705 (1884); Reast v. Donald, 84 Tex. 648, 19 S.W. 795 (1892); Jamison v. New York & T. Land Co., (Tex. Civ. App. 1903) 77 S.W. 969; Missouri, K. & T. Ry. v. Anderson, 36 Tex. Civ. App. 121, 81 S.W. 781 (1904); Hamilton v. Blackburn, 43 Tex. Civ. App. 153, 95 S.W. 1094 (1906); Brodbent v. Carper, (Tex. Civ. App. 1907) 100 S.W. 183; Davis v. George, 104 Tex. 106, 134 S.W. 326 (1911); Hays v. Clawson, (Tex. Civ. App. 1926) 286 S.W. 857; Magnolia Petroleum Co. v. Jones, 138 Tex. 67, 158 S.W. (2d) 548 (1941).

[169] Johnson v. Archibald, 78 Tex. 96 at 102, 14 S.W. 266 (1890); Converse v. Langshaw, 81 Tex. 275 at 278, 16 S.W. 1031 (1891); Thompson v. Langdon, 87 Tex. 254 at 258, 28 S.W. 931 (1894); Hamman v. San Jacinto Rice Co., (Tex. Civ. App. 1921) 229 S.W. 1008, revd. on other grounds, 247 S.W. 500 (1923); Wilson v. Giraud, 111 Tex. 253 at 263, 231 S.W. 1074 (1921); Gill v. Peterson, 126 Tex. 216 at 222, 86 S.W. (2d) 629 (1935); Blake v. The Pure Oil Co., 128 Tex. 536 at 544, 100 S.W. (2d) 1009 (1937).

or when such marked lines have themselves been called for by the instrument. In rejecting the rule, the court in *Brodbent v. Carper*[170] remarked that the plaintiff did not plead mistake or ask for reformation on that ground. In *Hamman v. San Jacinto Rice Company*[171] the "footsteps" rule was placed in proper perspective by this statement: "The 'footsteps of the surveyor' will not be followed outside the boundaries fixed by the field notes of the grant when such boundaries can be found and identified upon the ground."

C. Conclusion

Anyone who adheres to a statistical jurisprudence expressed in terms of the "weight of authority" could, in one view of the above cases, announce that the cases supporting the rule far outnumber those which reject it. It would be less misleading, however, to state the fact that, outside of three or four states, the authority for the rule in the form originally announced is slight and inconclusive, as well as being outweighed by the number of opposing cases. Nor is there any noticeable tendency for the rule in its original form to break loose into new jurisdictions. But the rather more recent appearance of the rule in a somewhat different guise—practical location by a common grantor—is disquieting. It does not appear that any harm has come of this as yet, because the application of the rule in this form has so far usually been confined to facts which might have justified the decisions on other grounds. But an obvious danger remains so long as the obvious and necessary restrictions upon the rule remain undefined.

Mention probably should be made of the fact that a majority of the states have not had occasion to declare themselves at all on the question. There may be some reason to count these states as constituting a "silent vote" against the rule, for in predicting the outcome of a case before a court which has not yet committed itself, the presumption would appear to favor a rejection of this aberration in the law; and the silence on the subject could signify that no one had had the temerity to contend for it, or indeed had even thought of it.

The reasons mentioned for the early adoption of the rule by those courts which constitute its stronghold may explain its adoption without wholly justifying it. Those circumstances may well justify the principle that calls for monuments are the more reliable and, therefore, should be preferred to other calls. It is more difficult to believe that such cir-

[170] (Tex. Civ. App. 1907) 100 S.W. 183.
[171] (Tex. Civ. App. 1921) 229 S.W. 1008 at 1012.

cumstances provide an excuse for resorting to monuments or lines which the parties did not choose to specify in their deed. At any rate, it may be doubted that these reasons still exist. It may also be inferred that the same circumstances existed in other states which did not adopt the rule. In those few states with substantial authority for the rule, the established requirements and limitations of the more appropriate remedy of reformation have in some cases been ignored, expressly rejected in others, yet expressly recognized on occasion, usually in the more recent cases. It may be that eventually most if not all of these courts will settle upon a rule which would be no more than an innocuous application of equitable principles in actions at law. The continuing danger of ignoring the safeguards of reformation lies in the view that the rule is really only one of construction.

We could rest with more confidence that the law would remain free of general infection in this regard if we could bring this inquiry to a close at this point. But this is not all of the story. Our rule has been given further life by being offered in another and perhaps more appealing guise. This development remains to be considered.

II. PLAT V. SURVEY—SUB-RULE B

The problem here is raised by the proposition stated in the second of the two passages quoted at the beginning of this article. When a description in a deed, usually of a city lot, and usually by lot and block references, contains such words as these, "according to recorded plat thereof," or words of similar import, and it is later found that the survey on which the plat was based varies from the plat, which of the two will prevail in a dispute over boundaries? It is well established that a reference in a deed to a plat, like that quoted above, is sufficient to incorporate the plat in the deed as if it had been set out therein. It is assumed that there is no other language in the deed which would justify a finding that the description was ambiguous. But the rule to be examined here nevertheless states that the survey on the ground will control the plat. It is obvious at the outset that this is nothing other than a special application of the general rule previously discussed. The reason for treating it separately is that the courts have done so. A moment's look at the cases cited for and against the two rules will show little correlation on either side. Some courts have adopted or rejected one rule without having had to consider the other; but more important, a few courts have declared themselves for one of the rules but against the other, and without recognition of the similarity between them. Since

the two rules are related in principle, the one to be considered at this point, although separately from the other, will for convenience be referred to as "sub-rule *B*."

There is one significant difference between the two rules. Since the main rule is stated in terms of boundaries marked on the ground by the parties to a deed prior to the conveyance, proof necessary to invoke the rule likely will be sufficient proof of mutual mistake in drafting the deed. For this reason the main rule can often be justified in its application where the interests of a bona fide purchaser are not involved. But under sub-rule *B* as stated the survey determines the boundaries without regard to whether either or both of the parties participated in it or knew of it. This poses a special problem. Not only will there be involved the rights of a possible subsequent purchaser without notice of the surveyed boundaries, which is similar to the problem created by the main rule, but there will be the further question whether the mistake in drawing the plat was in fact a mistake of both or either of the parties to the deed. For this reason, as well as for other obvious reasons, it will be necessary in examining the cases, not only to look for the reasons given for adopting this rule, but also to pay especial attention to the factual circumstances to which the rule has been applied.

The rule has been adopted by the courts of a considerable number of states.[172] Authorities specifically rejecting it are surprisingly few.[173]

[172] *Arkansas:* Pyburn v. Campbell, 158 Ark. 321, 250 S.W. 15 (1923). *California:* O'Farrel v. Harney, 51 Cal. 125 (1875); Arnold v. Hanson, 91 Cal. App. (2d) 15, 204 P. (2d) 97 (1949). See Andrews v. Wheeler, 10 Cal. App. 614 at 616, 103 P. 144 (1909). Cf. Penry v. Richards, 52 Cal. 496 (1877); Cleveland v. Choate, 77 Cal. 73 (1888); Burke v. McCowen, 115 Cal. 481 (1896). *Illinois:* Decatur v. Niedermeyer, 168 Ill. 68, 48 N.E. 72 (1897); Bauer v. Gottmanhausen, 65 Ill. 499 (1872). *Indiana:* Evansville v. Page, 23 Ind. 525 (1864). *Iowa:* Tomlinson v. Golden, 157 Iowa 237, 138 N.W. 448 (1912); Thrush v. Graybill, 110 Iowa 585, 81 N.W. 798 (1900); Root v. Cincinnati, 87 Iowa 202, 54 N.W. 206 (1893); Bradstreet v. Dunham, 65 Iowa 248, 21 N.W. 592 (1884). *Maine:* Stetson v. Adams, 91 Me. 178, 39 A. 575 (1898); Bean v. Bachelder, 78 Me. 184, 3 A. 279 (1886); Williams v. Spaulding, 29 Me. 112 (1848); Esmond v. Tarbox, 7 Me. 61 (1830). See also Coleman v. Lord, 96 Me. 192 at 194, 52 A. 645 (1902); Ripley v. Berry, 5 Me. 24 at 25 (1827); Brown v. Gay, 3 Me. 126 at 129 (1824). Cf. Proctor v. Carey, 142 Me. 226, 49 A. (2d) 323 (1946) (lack of proof of survey); Bussey v. Grant, 20 Me. 281 (1841) (map not referred to); Heaton v. Hodges, 14 Me. 66 (1836) (lack of proof of survey); Thomas v. Patten, 13 Me. 329 (1836). *Michigan:* See discussion of Michigan cases at note 188 infra. *Minnesota:* Hunt v. Keye, 150 Minn. 142, 184 N.W. 840 (1921); Turnbull v. Schroeder, 29 Minn. 49, 11 N.W. 147 (1882). Cf. Arms v. City of Owatonna, 117 Minn. 20, 134 N.W. 298 (1912) (ambiguity in deed). *Missouri:* See discussion of Missouri cases at note 208 infra. *Nebraska:* Holst v. Streitz, 16 Neb. 249, 20 N.W. 307 (1884). *New Hampshire:* Hall v. Davis, 36 N.H. 569 (1858). *New Jersey:* O'Brien v. King, 49 N.J.L. 79, 7 A. 34 (1886). *New York:* Weinheimer v. Ross, 80 Misc. 269, 141 N.Y.S. 55 (1913), affd. 214 N.Y. 630, 108 N.E. 1110 (1915); Jackson v. Freer, 17 Johns (N.Y.) 29 (1819). See also Hastings v.

Of the cases supporting the rule, a few contain special circumstances which are offered in justification for the decisions. In two cases the plats contained the words "as surveyed by me," or the equivalent, which were said to amount to a call for the survey in the deeds.[174] Obviously these courts were trying to squeeze the facts into the area of ambiguous or conflicting descriptions, and so justify the admission of proof of the surveys to control the specifications of the plats. Another court construed a reference in the deed to a map to be merely for the purpose of locating the block in which the land lay and for no other purpose.[175] In an early New York case the court said its decision was required by specific legislation governing the particular type of allotment which was involved.[176]

Several different arguments for applying the rule, apart from special factual situations, are to be found in the cases. The principle that "monuments control courses and distances" has been misapplied in this situation so as to prefer marked lines not called for.[177] So has the principle that government-survey boundaries are as they were fixed by the official surveyor, which overlooks the obvious difference between describing land "according to government survey thereof" and "according to recorded plat thereof."[178] A Texas court, apparently in an unguarded moment, picked up its old "footsteps" rule to serve in the present circumstances,[179] which is a little surprising in view of its apparently having escaped from that error in dealing with the main rule.[180] The

McDonough, 13 App. Div. 625, 43 N.Y.S. 628 at 629 (1897); Van Wyck v. Wright and Johnson, 18 Wend. (N.Y.) 157 (1837). Cf. Smith v. Stacey, 68 App. Div. 521, 73 N.Y.S. 1022 (1902) (conflict between map and other descriptive calls); Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900); Jackson v. Cole, 16 Johns (N.Y.) 257 (1818). *Oregon:* See Bernitt v. Marshfield, 89 Ore. 556 at 562, 174 P. 1153 (1918). *Pennsylvania:* Rozelle v. Lewis, 37 Pa. Super. 563 (1908). *Texas:* Smith v. Boone, 84 Tex. 526, 19 S.W. 702 (1892); Fulford v. Heath, (Tex. Civ. App. 1948) 212 S.W. (2d) 649; Taft v. Ward, 58 Tex. Civ. App. 259, 124 S.W. 437 (1909). *Vermont:* See Neill v. Ward, 103 Vt. 117 at 148, 153 A. 219 (1930). *Washington:* Neeley v. Maurer, 31 Wash. (2d) 153, 195 P. (2d) 628 (1948); Olson v. Seattle, 30 Wash. 687, 71 P. 201 (1903). *Wisconsin:* Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N.W. 599 (1883); Fleischfresser v. Schmidt, 41 Wis. 223 (1876). Cf. Marsh v. Mitchell, 25 Wis. 706 (1868).

[173] Daniels v. Davis, 311 Ky. 293, 223 S.W. (2d) 998 (1949); Townsend v. Hayt, 51 Barb. (N.Y.) 334 (1868); Trimmer v. Martin, 141 Va. 252, 126 S.E. 217 (1925). See discussion of Missouri cases at note 208 infra.

[174] Penry v. Richards, 52 Cal. 496 (1877); Turnbull v. Schroeder, 29 Minn. 49, 11 N.W. 147 (1882).

[175] Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900).

[176] Jackson v. Cole, 16 Johns (N.Y.) 257 (1818).

[177] O'Farrel v. Harney, 51 Cal. 125 (1875).

[178] Bauer v. Gottmanhausen, 65 Ill. 499 (1872); Root v. Cincinnati, 87 Iowa 202, 54 N.W. 206 (1893).

[179] Taft v. Ward, 58 Tex. Civ. App. 259, 124 S.W. 437 (1909).

[180] See discussion of Texas cases at note 152 supra.

opinion has been expressed that early town plats and surveys were notoriously inaccurate and that the only way to avoid a virtual chaos of boundaries is to rely on monuments actually established and, after they are gone, on improvements made in accordance therewith.[181] On this point the Wisconsin court said, "At almost any time in the course of municipal history, to rely upon the figures, courses, and distances of the original plat and survey, or upon a resurvey upon the *data* thereof, would be utterly subversive of the rights of real property, and of public and private interests."[182] This is reminiscent of the argument offered by courts favoring the main rule. The argument that proof of marked boundaries not called for violates the Statute of Frauds was denied by one court.[183]

By far the most commonly found excuse for sub-rule *B* is that the survey is the substance, the original, the legally operative fact, of which the plat is only a picture, a representation, a delineation on paper.[184] This means, of course, that the plat is subordinate, and can never overcome that which it merely represents. There was a time, centuries ago, when such a statement would have expressed the primitive concept of conveyancing then in vogue. But as a principle of modern conveyancing, such a shadow-and-substance argument is so specious on its face that one is moved to ask, "Now what was the real reason why the court decided as it did?"

The facts of a large percentage of the cases are revealing in this regard, in several particulars, some of which have already been mentioned; although we would be better off in this regard, as in the cases dealing with the main rule, if we knew more than we are told in most of the opinions. Mention has already been made of the view of some courts that plats or other records of surveys are not to be trusted. One may doubt, however, the relevance of such an observation where the parties to a deed have chosen to incorporate the plat therein. Apart from this, if these courts mean only that marks on the ground are the more reliable indicia of the intention of the parties to a conveyance, is there any reason for adopting a rule of law which assumes, where plat and survey conflict, that the plat is always wrong, and which leaves no room for proof in particular cases that the plat was right, or at least that one or both parties relied on it? It seems, however, that these courts

[181] Diehl v. Zanger, 39 Mich. 601 at 605 (1878); Racine v. J. I. Case Plow Co., 56 Wis. 539 at 541, 14 N.W. 599 (1883).

[182] Racine v. J. I. Case Plow Co., 56 Wis. 539 at 541, 14 N.W. 599 (1883).

[183] Rozelle v. Lewis, 37 Pa. Super. 563 (1908), discussed at note 63 supra.

[184] See Whitehead v. Ragan, 106 Mo. 231 at 235, 17 S.W. 307 (1891), quoted at note 2 supra.

had something more in mind. They were concerned about the generally unsettling effect of upsetting marked boundaries long relied upon. Thus the more significant fact is not the marking of the boundaries but the general reliance upon them. Where this is in fact the problem, the way out may be plain; but it does not require sub-rule *B* to reach it. We have moved into that area of law having to do with the effect of the conduct of the parties subsequent to the conveyance. This is the area of boundaries by acquiescence, estoppel, etc. Where these principles are applicable, a decision favoring the boundary so established may be justified. But attention must be directed to some cases in which such principles were used as a ground for decision in addition to sub-rule *B*.[185] In other cases the facts were such as to indicate, or at least to suggest the possibility, that the decisions could have been based on such a ground.[186] In still other cases it is obvious that the courts were impressed by the fact that a decision preferring the plat would have upset recognized boundaries, not only of the lots in question, but also those in an entire block or other large area.[187]

The Michigan cases deserve special attention in this regard. In *Diehl v. Zanger*[188] the court established a line according to a fence of long standing and based its decision on the acquiescence principle. Judge Cooley, however, in a concurring opinion, added another ground for decision. He fell into the error which other courts have made of equating these cases with the cases involving government-survey boundaries,[189] so that the question could be only one of determining where the boundaries were established on the ground by the original survey. He even went so far as to say that if such boundaries were no longer discoverable on the ground, the question would be only one of proving where they had been. Then he added the argument previously mentioned about the unreliability of early town plats and the general con-

[185] Decatur v. Niedermeyer, 168 Ill. 68, 48 N.E. 72 (1897); Bauer v. Gottmanhausen, 65 Ill. 499 (1872); Evansville v. Page, 23 Ind. 525 (1864); Neill v. Ward, 103 Vt. 117, 153 A. 219 (1930).

[186] Root v. Cincinnati, 87 Iowa 202, 54 N.W. 206 (1893); Hunt v. Keye, 150 Minn. 142, 184 N.W. 840 (1921); Holst v. Streitz, 16 Neb. 249, 20 N.W. 307 (1884); O'Brien v. King, 49 N.J.L. 79, 7 A. 34 (1886); Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900); Smith v. Stacey, 68 App. Div. 521, 73 N.Y.S. 1022 (1902); Rozelle v. Lewis, 37 Pa. Super. 563 (1908); Smith v. Boone, 84 Tex. 526, 19 S.W. 702 (1892); Olson v. Seattle, 30 Wash. 687, 71 P. 201 (1903); Marsh v. Mitchell, 25 Wis. 706 (1868).

[187] Arnold v. Hanson, 91 Cal. App. (2d) 15, 204 P. (2d) 97 (1949); Tomlinson v. Golden, 157 Iowa 237, 138 N.W. 448 (1912); Jackson v. Freer, 17 Johns (N.Y.) 29 (1819); Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N.W. 599 (1883).

[188] 39 Mich. 601 (1878).

[189] See cases cited note 178 supra. See also exclusion No. 4, p. 649 supra.

fusion of title which would follow an effort to adhere to them, presumably after long reliance on boundaries otherwise established, saying, "Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity."[190]

In *Flynn v. Glenny*[191] the parties to the suit built a boundary fence according to previously established marks on the ground and continued to recognize this fence as a boundary for nearly ten years. In a suit growing out of the discovery that this boundary varied from that indicated on the plat, the court decided on the basis of the boundary fence. The opinion of the court, written by Judge Cooley, contains this statement:

> "Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines. The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance on them. If such was the case they must govern, notwithstanding any errors in locating them."[192]

Several other Michigan cases were cited, all of which, however, had to do with boundaries by acquiescence. It is not clear from the opinion, therefore, whether the survey will control the plat in any event, whether it will control provided the parties have purchased in reliance upon it, or whether the parties also must have acquiesced therein for a period of time. In *Beaubien v. Kellogg*,[193] although the facts are not entirely clear, it seems that there was an ambiguity in the plat, which would have justified the decision approving the admission of proof of the survey. But the court quoted Judge Cooley's statement in *Diehl v. Zanger*. *Flynn v. Glenny* was followed in *Le Compte v. Lueders*,[194] on similar facts and with the same argument in support of the decision. The same probably may be said for *Miller v. Michel*,[195] where the court also quoted the argument made in *Flynn v. Glenny*, although the

[190] 39 Mich. 601 at 605 (1878).
[191] 51 Mich. 580, 17 N.W. 65 (1883).
[192] Id. at 584.
[193] 69 Mich. 333, 37 N.W. 691 (1888).
[194] 90 Mich. 495, 51 N.W. 542 (1892).
[195] 227 Mich. 497, 198 N.W. 950 (1924).

facts do not so clearly indicate a boundary by acquiescence. *White v. Peabody*[196] clearly involved a boundary by acquiescence, but the court in relying on *Diehl v. Zanger* spoke of that case as holding that a later survey is for the purpose of finding where the original lines were drawn, not where they should have been drawn, and also that long practical acquiescence in a boundary may be conclusive. *Diehl v. Zanger* has been cited in numerous other Michigan cases, in all of which the decisions turned on the acquiescence question.[197] The case has also been cited in support of dicta that old fences are strong evidence in ascertaining boundaries.[198] *Flynn v. Glenny* has also been cited in later cases, and in most of these the question was one of acquiescence[199] or something other than the applicability of sub-rule *B*.[200]

There is ground for concluding that there is nothing in the Michigan cases but a few dicta justifying a preference for marked lines except in cases involving boundaries by acquiescence. At least there is no case in which the decision was clearly and unequivocally based on sub-rule *B*.[201] So long as that rule is confined, either in Michigan or elsewhere, to cases which also involve the acquiescence principle, there is neither need nor justification for the rule, and its further reiteration will serve only to continue the danger that it may one day be applied to facts from which the real ground for preferring the survey is absent.[202]

Suppose the facts of a case fall short of proving a boundary by acquiescence, but they do show that all parties to the boundary dispute purchased their respective lots in reliance upon or with the assumption that their boundaries were as shown by monuments on the ground, or at least with notice that others so relied. Later, one of them discovers,

[196] 106 Mich. 144, 64 N.W. 41 (1895).

[197] See, e.g., Escher v. Bender, 338 Mich. 5, 61 N.W. (2d) 143 (1953); Marion v. Balsley, 195 Mich. 51, 161 N.W. 820 (1917); Veltmans v. Kurtz, 167 Mich. 412, 132 N.W. 1009 (1911); Husted v. Willoughby, 117 Mich. 56, 75 N.W. 279 (1898); Carpenter v. Monks, 81 Mich. 103, 45 N.W. 477 (1890); Case v. Trapp, 49 Mich. 59, 12 N.W. 908 (1882).

[198] See, e.g., Anderson v. Wirth, 134 Mich. 612 at 614, 96 N.W. 926 (1903); Pugh v. Schindler, 127 Mich. 191 at 197, 86 N.W. 515 (1901); Hoffman v. Port Huron, 102 Mich. 417 at 438, 60 N.W. 831 (1894); Carpenter v. Monks, 81 Mich. 103 at 109, 45 N.W. 477 (1890).

[199] Jones v. Dosey, 224 Mich. 351, 195 N.W. 129 (1923); Breakey v. Woolsey, 149 Mich. 86, 112 N.W. 719 (1907); Wilmarth v. Woodcock, 66 Mich. 331, 33 N.W. 400 (1887).

[200] Pere Marquette Ry. Co. v. Tower Motor Truck Co., 222 Mich. 190, 192 N.W. 634 (1923); Brown v. Milliman, 119 Mich. 606, 78 N.W. 785 (1899). See also Nordberg v. Todd, 254 Mich. 440, 236 N.W. 826 (1931), discussed at note 146 supra.

[201] Cf. Maes v. Olmsted, 247 Mich. 180, 225 N.W. 583 (1929), discussed at note 116 supra.

[202] On the acquiescence principle in Michigan see comment, 39 MICH. L. REV. 614 (1941).

perhaps to his surprise, that the plat shows him entitled to more land than the monuments show; and accordingly he brings suit to recover the difference. A number of cases purporting to apply the rule seem pretty clearly to have involved some such circumstances.[203] It may also be noted that in several of these cases, as well as in others in which the rule was applied,[204] the question related to the proper location of a street, whether it was to be as shown on the plat or as laid out and used on the ground. There seems in these cases to have been general reliance by purchasers of lots on the streets as laid out.[205] In some of these cases the rule adopted is in fact limited in terms to controversies over the location of streets,[206] as though the decision in such a case would not necessarily be applicable to boundary disputes generally. Actually there seems to be no difference in principle between the street cases and others, except that a court probably would be even more reluctant to prejudice the physical integrity of an opened street than a boundary otherwise located on the ground, certainly if the location of the street were indicated by its improvement at the time the lot in question was purchased.[207]

Is there justification, apart from sub-rule *B*, for preferring the surveyed boundaries over those indicated by the plat in cases of this type? Reformation may again be suggested tentatively for this purpose, for the facts of these cases suggest the presence of mistake in failing properly to indicate on the plat the boundaries with respect to which the parties believed they were contracting. If this is so, the decisions in

[203] Tomlinson v. Golden, 157 Iowa 237, 138 N.W. 448 (1912); Thrush v. Graybill, 110 Iowa 585, 81 N.W. 798 (1900); Root v. Cincinnati, 87 Iowa 202, 54 N.W. 206 (1893); Hunt v. Keye, 150 Minn. 142, 184 N.W. 840 (1921); Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900); Weinheimer v. Ross, 80 Misc. 269, 141 N.Y.S. 55 (1913), affd. 214 N.Y. 630, 108 N.E. 1110 (1915); Rozelle v. Lewis, 37 Pa. Super. 563 (1908); Fulford v. Heath, (Tex. Civ. App. 1948) 212 S.W. (2d) 649; Neeley v. Maurer, 31 Wash. (2d) 153, 195 P. (2d) 628 (1948); Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N.W. 599 (1883); Marsh v. Mitchell, 25 Wis. 706 (1868).

[204] Evansville v. Page, 23 Ind. 525 (1864); Bradstreet v. Dunham, 65 Iowa 248, 21 N.W. 592 (1884); Flynn v. Glenny, 51 Mich. 580, 17 N.W. 65 (1883); O'Brien v. King, 49 N.J.L. 79, 7 A. 34 (1886). See Bernitt v. Marshfield, 89 Ore. 556 at 562, 174 P. 1153 (1918).

[205] Cf. Evansville v. Page, 23 Ind. 525 (1864), where long acquiescence in the street was referred to.

[206] O'Brien v. King, 49 N.J.L. 79, 7 A. 34 (1886); Weinheimer v. Ross, 80 Misc. 269, 141 N.Y.S. 55 (1913), affd. 214 N.Y. 630, 108 N.E. 1110 (1915); Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900).

[207] It is even easier to prefer the location of the street on the ground where, as in Burke v. Henderson, 54 App. Div. 157, 66 N.Y.S. 468 (1900), the deed not only refers to the plat, but also includes descriptive matter referring to the street. It would be generally conceded that a call in a deed for a street would be for the street as located in the absence of other language to the contrary. See exclusion No. 3, p. 649 supra. See also note 151 supra.

these cases may be supported; but, as in the cases which suggest the presence of acquiescence, resort need not and should not be made to sub-rule *B* for this purpose.

This is an appropriate place to discuss the history of the rule in Missouri. In *Whitehead v. Ragan*[208] sub-rule *B* was applied on the often-mentioned ground that the plat was but a representation of the survey, like a certified copy of an instrument which will be controlled by the original, and also by way of misapplication of the principle that monuments control courses and distances. The losing party here was a remote grantee of the defendant, who was the original grantor, and there was nothing to indicate that he had purchased with knowledge of the survey. The same facts and the same parties were before the court again in *Whitehead v. Atchison*,[209] in which the court expressly overruled *Whitehead v. Ragan*. It is significant that the surveyed corners alleged to control the plat were hidden and apparently not known to any party involved prior to his purchase. The court said:

> "To announce and adhere to, as a fixed rule of law, without qualification, the proposition announced in the 106 Mo., when these same litigants were then before the court, 'If the line between lots 1 and 4 was located upon the land when surveyed and subdivided, and can now be ascertained and determined, that line will constitute the true division line between the lots . . . though it conflicts with the description given in the plat,' when lots are sold by their lot number according to the subdivision plat, would be to involve the entire communities of our cities (where in most instances all conveyances of property are made by lot number simply, with a reference to the recorded plats for locating the courses and distances of the boundaries) in confusion and doubt as to the stability and fixedness of their possession and rights. . . . If the courses and distances as indicated on the plat of which his lot is a part, are to be overturned, as in this case is sought by the hidden corners, or what is still worse by the testimony of the surveyor himself twenty odd years after the survey was made, that he established a line at a point thirty or fifty feet from where he certifies on the plat made by himself that it was located, the lot owner can know nothing of his boundaries. . . . Between the purchaser of a lot and one who promulgates a plat describing and defining the lots thereof, the purchaser will not be held at his peril to ascertain whether or not the plat agrees with the original survey of the land subdivided and platted; but he is justified in assuming that

[208] 106 Mo. 231, 17 S.W. 307 (1891).
[209] 136 Mo. 485, 37 S.W. 928 (1896).

> the plat is correct, and that the lot or lots purchased by him are of the dimensions, and bounded by the courses and distances as indicated on the plat, to which, for particulars, his deed must refer, when the lot number alone is given in the deed."[210]

But only four years later, in *McKinney v. Doane*,[211] the court approved an instruction to the jury that when a grantee buys a lot after stakes set by a survey are pointed out to him, and takes possession and makes improvements on the basis thereof, the boundary will be set according to such stakes as between the parties to the conveyance and any subsequent grantee who knows thereof.[212] The court said that when no monuments are called for by the deed, the courses and distances shown on the plat must govern (citing the *Atchison* case), unless there is a conflict between the plat and an actual survey, in which case the latter will control (citing cases from other jurisdictions which adopt sub-rule *B*). But the court went on to say that in fact there was no conflict here between the plat and the survey. The court of appeals in *Bast v. Mason*[213] followed the *Atchison* principle in approving the refusal of an instruction below which would have fixed the boundary according to a fence if the plaintiff had seen the fence and intended to purchase according to it. The court said it was not for the jury to find an intention of the plaintiff not indicated by his acts. Except for the reference in the instruction to the making of improvements in *McKinney v. Doane*, it is difficult to square the dictum in that case with the ruling in *Bast v. Mason*. The Supreme Court re-asserted the rule of the *Atchison* case in *City of Laddonia v. Day*,[214] the reported facts of which do not indicate whether anyone relied on the survey rather than the plat. The court seemed to be placing its preference for the plat over the survey on the ground of estoppel, without indicating why one needs that principle in order to recover on the basis of his muniments of title. The court added that this result was now required by a proper interpretation of a statute relating to the dedication of streets and alleys;[215] that is, a city's title to a street, and the fixing of the boundaries thereof, must be governed solely by the procedures prescribed for the dedication of the street. *McKinney v. Doane* was distinguished on the

[210] Id. at 495-496.

[211] 155 Mo. 287, 56 S.W. 304 (1900).

[212] Cf. Thrush v. Graybill, 110 Iowa 585, 81 N.W. 798 (1900); Rozelle v. Lewis, 37 Pa. Super. 563 (1908).

[213] 165 Mo. App. 718, 148 S.W. 398 (1912).

[214] 265 Mo. 383, 178 S.W. 741 (1915).

[215] Mo. Rev. Stat. (1909) §10294; Mo. Stat. Ann. (Vernon, 1952) §445.070.

ground that there the monuments were still present on the ground and well known, while here none were shown to exist except by parol evidence, which alone is not sufficient.[216] Does the court mean to say that the rule of the *Atchison* case applies only where the marks on the ground are "hidden," so that proof of the survey would depend solely on someone's testimony, but that sub-rule *B* will be applied where the marks on the ground remain visible at the time of the trial? If so does this amount to saying that where the marks are visible they will constitute notice to anyone who purchases a lot affected by them? Such a conclusion clearly would be inconsistent with the decision of the court of appeals in *Bast v. Mason*; and it may be doubted that the Supreme Court today, simply on the authority of *McKinney v. Doane* and in spite of its other expressions on the question, would enforce sub-rule *B* in all cases where the surveyed lines or corners were not hidden. A more obvious basis for distinguishing *McKinney v. Doane* is to be found in the instruction which the court approved in that case. That instruction, it will be recalled, stated the issue in terms of what the grantee relied on when he purchased. Did he rely on the survey and take possession and improve his lot accordingly, or did he rely on the plat? The decision went on a finding of reliance on the survey. On the other hand, there is nothing in the other Missouri cases to indicate that any party relied on surveyed boundaries. As in *McKinney v. Doane,* cases previously cited from other jurisdictions,[217] in which sub-rule *B* was applied, also indicate a reliance on the survey. Does this explain the striking contrast between the policy arguments offered by the court in *Whitehead v. Atchison*[218] on the one hand and by Judge Cooley in *Diehl v. Zanger*[219] on the other? Were not the two courts addressing themselves to different factual situations, which would naturally evoke different sympathies and the expression of apparently opposing policies?

[216] The Laddonia case was cited in dicta in later cases for the proposition that parties who purchase according to the same plat are bound by it. City of Pacific v. Ryan, 325 Mo. 373 at 379, 28 S.W. (2d) 652 (1930); Wright v. City of Joplin, 275 Mo. 212 at 224, 204 S.W. 910 (1918); Jackson v. Miller, (Mo. 1917) 195 S.W. 703 at 704. In Wright v. City of Joplin, supra, the court purported to apply the statutory rule announced in the Laddonia case, but in fact it seemed that that rule was not applicable, for the plat was ambiguous, and marked boundaries were held to control. In Macom v. Brewster, 273 Mo. 616, 201 S.W. 547 (1918), the court followed the estoppel principle announced in the Laddonia case. It is significant here that if the decision had been otherwise and the survey preferred the defendant's house would have rested on the plaintiff's land.

[217] See cases cited note 203 supra.

[218] See quotation at note 210 supra.

[219] See quotation at note 190 supra.

In several of the cases applying sub-rule *B* the applicability of the rule to a bona fide purchaser without notice of the marked lines was expressly reserved,[220] or a party's claim to such status was denied as a finding of fact.[221] But in one case the rule was applied against a party who seemed clearly to have a just claim to such a status.[222] Mention should also be made of a number of cases the facts of which do not reveal that there was present any of the factors discussed above which might justifiably induce a court to prefer the survey to the plat.[223] It is possible that one or more of these factors were present but not adequately reported. On the other hand, it is possible that the rule was applied in these cases as a rule of construction, binding either subsequent bona fide purchasers or prior purchasers who did not participate in or know of the surveying of the lots prior to their sale and who did not later acquiesce therein.

It has been suggested above that the decisions in most of the cases in which sub-rule *B* was applied might have been justified by the doctrines of acquiescence or reformation, and that to this extent the rule cannot be approved, because it is not needed, and also because it disguises the real grounds for decision. Reference has also been made to other decisions which were not or may not have been so justified, and that to this extent the rule cannot be approved, because it produces wrong results. Is it possible that this classification does not exhaust the possibilities? Can a case be put in which equity and good conscience, as well as the policy of modern title law, could be vindicated, or at least not unreasonably distorted, by protecting one who relies on surveyed boundaries, but whose case cannot be brought within the requirements of the doctrines either of acquiescence or of reformation? One may be tempted to say that it cannot, and that such a party must be held to the express terms of his deed. A satisfactory answer to this problem would require a detailed analysis of the principles of acquiescence and reformation in relation to the special factual problem here involved. No such analysis seems justified here. It must be admitted

[220] Thrush v. Graybill, 110 Iowa 585, 81 N.W. 798 (1900); Bradstreet v. Dunham, 65 Iowa 248, 21 N.W. 592 (1884); McKinney v. Doane, 155 Mo. 287, 56 S.W. 304 (1900).

[221] Rozelle v. Lewis, 37 Pa. Super. 563 (1908).

[222] Williams v. Spaulding, 29 Me. 112 (1848). Cf. Linscott v. Fernald, 5 Me. 496 (1829), cited notes 136 and 148 supra.

[223] Pyburn v. Campbell, 158 Ark. 321, 250 S.W. 15 (1923); O'Farrel v. Harney, 51 Cal. 125 (1875); Stetson v. Adams, 91 Me. 178, 39 A. 575 (1898); Bean v. Bachelder, 78 Me. 184, 3 A. 279 (1886); Esmond v. Tarbox, 7 Me. 61 (1830); Hall v. Davis, 36 N.H. 569 (1858); Taft v. Ward, 58 Tex. Civ. App. 259, 124 S.W. 437 (1909); Fleischfresser v. Schmidt, 41 Wis. 223 (1876).

in passing, however, that the principles governing acquiescence are uncertain to the point of chaos; and it may be that in some jurisdictions they do not readily adapt to the present problem. For example, there is some authority that a boundary by acquiescence will be established only where there was some dispute or uncertainty over the proper boundary when the parties acted.[224] It has even been held that a boundary agreed to under a mistaken belief that it was the true boundary cannot be established by acquiescence.[225] Or a time requirement may be imposed for the continuance of acquiescence. So far as reformation is concerned, it is not easy to bear the burden of proving the mutual mistake required for that remedy, especially where the controversy is between others than the original grantor and grantee of a particular lot. And technical obstacles may exist here, too.[226]

In view of these considerations, if our hypothetically meritorious case is to be correctly decided, it may be necessary to modify or adapt the doctrines referred to in their application to the present problem. The only other alternative consistent with the integrity of written instruments of title would be to denote the problem as *sui generis* and apply to it a rule, essentially equitable in nature, preferring the survey to the plat where this is necessary to vindicate the expectations of purchasers of lots or to protect them in their reliance on marked or surveyed boundaries. If the Missouri cases epitomize the typical factual variations of our problem, they may also epitomize the evolution of such a solution; for if *McKinney v. Doane* is still law, it is difficult to reconcile it with other decisions in that state except in some such terms as these. Either alternative, whether otherwise necessary or desirable, would be preferable to a rule which asserts that the survey must always prevail because it is the substance of a conveyance, while the plat is only a picture. As for courts which insist upon clinging to the rule because it is a simple and handy rule of thumb, the least that can be expected of them is an express qualification which will protect the interests of subsequent bona fide purchasers without notice of the survey.

The specter which frightens courts in some of the cases is that of the effect of a ruling preferring the plat where over a large area the purchasers of lots may have relied on the survey. It is not perceived, however, how this more striking situation is materially different from the case where the discrepancy between plat and survey affects only

[224] See 69 A.L.R. 1430 at 1443 (1930).
[225] Id. at 1486.
[226] See, e.g., Holley v. May, (Fla. 1954) 75 S. (2d) 696; 149 A.L.R. 749 (1944).

the parties to the suit. It may be supposed that if one purchaser of a lot may have relief on the basis of his reliance on the survey, others will have the same rights. If some of these do not, this is not necessarily an occasion for consternation. It must also be kept in mind that if the rule is invariably applied, there is a similar if not greater cause for concern about a series of adjacent owners who may have purchased in reliance on the plat.

Most difficult to justify are the statements of a few courts that a purchaser of a lot is entitled to rely on the surveyed boundaries as against those shown on the plat. There seems to be no reason for any presumption in favor of the survey. Conceding that there may be cases where one who in fact relies on the survey will be protected in such reliance, the presumption should be just the reverse.

It is certainly the policy of the law to protect peaceable possession and to secure the recognized boundaries of owners of land. We may well seek to prevent one person from claiming a windfall at the expense of his neighbor on the basis of a plat of which he had previously taken little heed. But we should be as much interested in securing boundaries against those who claim similar windfalls on the basis of a previously unrecognized or unknown survey. The greatest vice in sub-rule *B* is that, while it may serve as a safeguard against land-grabbing in the one case, it is an invitation to land-grabbing in the other. Where the rule is in effect and unqualified, there is a good deal of force in one court's warning that a property owner "can know nothing of his boundaries."[227]

III. CONCLUSION

Parties to conveyances of land often contract with reference to existent physical boundaries or lines pointed out on the ground. Since descriptions in deeds are usually in technical terms, parties usually assume that they were drawn by persons who were competent to do so, and rarely do they think of the chance that what they agreed to was not what the deed called for. How often do purchasers insist on a survey to assure themselves on this point? This being the case, courts are disposed to find ways to protect parties in their reasonable expectations. It is entirely commendable that they should do so. Objections have been made in this article, however, to seeking this end in haste, by means of sweeping rules which leave disorder in their wake. There are well-established doctrines for reaching the desired end without

[227] Whitehead v. Atchison, 136 Mo. 485 at 495, 37 S.W. 928 (1896).

subverting other important doctrines. The inclination of a number of courts to take the short-cuts, as noted in this article, suggests that perhaps the established doctrines may not be always or entirely satisfactory. Maybe they do not reach every meritorious case; maybe the orderly process is too cumbersome in its requirements; maybe some more simple, all-inclusive rule could be devised. I am not prepared to define such a rule at this time. I am certain only that the answer does not lie in the rules discussed herein. One further observation must be made. It seems evident that the effort to frame a solution should not even be attempted until that vast miscellany of diverse doctrine relating to boundaries by acquiescence has been further explored. It is to this task that the present writer, with many misgivings, intends next to turn.