BROWN'S BOUNDARY CONTROL AND LEGAL PRINCIPLES

Fifth Edition

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conflicts between written evidence and physical evidence. For instance, called for, found, and proven monuments may control a course or a distance for a variety of reasons, but this rule applies only when both are recited in the same description and are in conflict with each other.

11.13 SENIOR RIGHTS

Where two parties are given title to the same parcel of land, and where possession is not a consideration, the party with senior rights has the right of possession according to common law. Patrick L. Brown purchased land from Ashley Bishop on 3/16/50, and his title reads, "The westerly 50 feet of lot A." Willard Woods purchased land from Ashley Bishop on 3/17/50 and his deed reads, "The easterly 50 feet of lot A." Because of the earlier time, Patrick Brown is said to be senior and he receives all of the land coming to him, as shown in Fig. 11.1. Willard Woods could not buy more than Ashley Bishop's remainder and is junior in character. The overlap in Fig. 11.1 in title belongs to Brown, and if there is no possession, Brown has the right of possession. If, however, Woods had possession up to his title line for a prolonged period of time as required by law, his possession might give him the right to go to court and obtain title to the overlap. Whether senior rights are investigated by the surveyor or not depends on the custom within the state and the terms of the contract under which the surveyor is working. In many states, especially in the West, title companies issue title policies with senior considerations stated in the description furnished. In such states it is advisable for surveyors to work with title policies and deeds. In some states little or no title information is available, and it is extremely difficult to trace senior rights. An abstract and attorney's title opinion is common in the

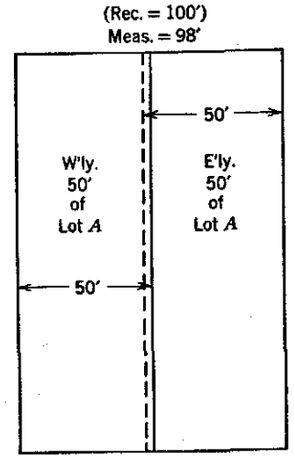

Figure 11.1 Senior rights and overlaps

midwest, and in these areas opinions and abstracts are used by surveyors. In many of the east coast states, where grants were made in sequence by the state, it may become necessary for the surveyor to determine the dates of entry and/or survey to understand junior and senior rights.

11.14 CALL FOR AN ADJOINER

Principle 6. A call for an adjoiner is not always a correct criterion for determining senior rights. A title search back to the original formation of the conveyance is necessary for a correct solution.

A call for an adjoiner (bounded by Jones on the east: to the line of Smith as described in Book 1021, page, etc.) may be a call for a senior right, but not always. For example, Richard Johnston's deed reads in part: "Bounded on the south by the land of Stanley Burne as described in volume 7, book of deeds, page 42, etc." Stanley Burne's deed reads in part: "thence N. 0°27′00″ E., 301.27 feet to the southerly line of Richard Johnston's land as described in . . . etc." Each calls for the other. In such an event an extensive title search is necessary to determine who has prior rights. They do exist! The cause of such ambiguity is usually a subsequent change of the words or the form of a description after the first conveyance. Later owners cannot obtain more than was described in the original document, except by the process of lawful prolonged possession, which ripens into a title right.

11.15 WRITTEN INTENTIONS OF THE PARTIES TO THE DEED

Principle 7. Excepting senior rights of others and a valid unwritten right of possession, the intentions of the parties to a deed, as expressed by the writings, are the paramount considerations in determining the order of importance of conflicting title elements.

The primary and fundamental principle to which all others relate and must yield is that the intentions of the parties gathered from the whole instrument, taken in connection with the surrounding circumstances, must control.[8] A deed should be construed according to the intentions of the parties, as manifested by the whole instrument.[9] Principles given to determine the order of importance of conflicting elements are not conclusive but are principles of evidence or principles of construction adaptable to surrounding circumstances. A call that would defeat the parties intentions is rejected regardless of its comparative dignity.[10]

The following principles of construction, given to determine the control between conflicting elements within a deed, are rebuttable presumptions subordinate to the

[8] *Cates* v. *Reynolds,* 228 S.W. 695, 143 Tenn. 667 (1920).
[9] *Mills* v. *Catlin,* 22 Vt. 98 (1849).
[10] *Miller* v. *Southland Life Insurance Co.,* 68 S.W.2d 558 (1934).

preceding principle. Like all principles based on rebuttable presumptions, when the contrary is shown, the presumption is overcome and the principle does not apply. In court decisions involving land boundary disputes, the written intentions of the parties who were a part of the original transaction are the paramount considerations; the written intentions control all other points. When land is first conveyed, the transfer cannot be by parol means; only a properly written and signed document in accordance with the laws of the state can be used. To determine the intent of an instrument from the parties of the transaction by oral statements is tantamount to permitting transfer of titles by parol means. This is a violation of the statute of frauds.

The intent must be determined from the written instrument itself, not from the mistaken ideas of one of the parties. Where a party believes that he or she has a right to a disputed parcel of land and that right is not based on a written deed, only a court or a true title owner can transfer paper title. In such cases, the surveyor should advise the client to seek legal advice.

If two elements in a deed are in conflict, before a proper location can be made, it becomes necessary to decide which one was intended and which one was informational. A deed written "N 20°E a distance of 310 feet to Boulder Creek" presents a conflict because Boulder Creek is 410 feet away. What was intended? Here the court rule is that the natural monument, the creek, more clearly shows the intent than does the informative term "310 feet." An additional problem is whether the line goes to the side line of the creek or to the thread or center of the creek. In this case it would be improper to ask the buyer or seller what the intentions were; the document as signed is the best evidence of intent. In most states, if the stream is navigable, the line stops at the side of the creek; if it is not navigable, the line stops at the thread or center of the creek. This principle is applicable in every state in one form or another.

To determine the intent of a deed, sometimes an explanation of the terms of a deed or an understanding of the surrounding circumstance existing when the deed was written is necessary. Thus a deed beginning "at a well-known sycamore tree in Alpine" must be investigated and parol evidence taken to explain where the tree is. A deed stating "starting at a blazed pine tree; thence running a line through a second blazed pine tree to the Cuyamaca Park line" is indefinite without extrinsic evidence. Here terms are not being added to or subtracted from a deed; an explanation of the terms existing in the deed is being sought for clarification or meaning. Nowhere is a statement made that any particular element written in a deed is controlling; the element most effectually expressing the intent of the parties is to be adopted. As early as 1858 it was stated,

> The rules adopted in the construction of boundaries are those which will best enable the courts to ascertain the intentions of the parties. Preference is given to monuments, because they are least liable to mistake; and the degree of importance given to natural or artificial monuments, course and distances, is just in proportion to the liability of the parties to err in reference to them. But they do not occupy an inflexible position in regards to each other. It may sometimes happen, in case of a clear mistake, that an inferior means of location will control a higher.[11]

[11] [illegible] 10 Cal. 500 (1858).

The intentions of the parties to the deed must be gathered from all the terms of the deed, each term taken in the light of all other terms. A call for a monument, although normally controlling, may be rejected where all the other terms in the deed indicate that the call for the monument was inserted in error.

Exception to the Principles of Intent

The intentions of parties to a conveyance can never overcome the rights of a senior claimant who is not a part of the conveyance proceedings or litigation. Thus a call in a deed for "2172 feet to Hyde Road" cannot go to the road if the seller did not in fact own to the road. Considerations in the senior deed (adjoiner) may limit the call for Hyde Road (a record monument) to a line determined by items of lesser standing, such as measurements or area. The principle of intent is applicable only to the parties of the conveyance.

11.16 AIDS TO INTERPRET THE INTENT OF A DEED

The following maxims of jurisprudence are frequently quoted in cases involving land disputes:

1. When the reason for the principle ceases, so should the principle itself.
2. Where the reason is the same, the principle should be the same.
3. One who grants a thing is presumed to grant also whatever is essential to its use.
4. Between rights otherwise equal, the earliest is preferred.
5. Particular expressions qualify those that are general.
6. An interpretation that gives effect is preferred to one that makes void.

General Acceptation of Terms

The terms of a writing are presumed to have been used in their primary and general acceptation, but a local, technical, or otherwise peculiar signification may be shown to be the intent, in which case the agreement must be construed accordingly. The terms represent the meanings at the time of the writing.

Least Likely Mistake

If a deed contains conflicting description elements, that description element is to be adopted which is the least likely to be affected by mistakes.[12] If the conflict is significant, the deed may be either totally void or voidable.

[12] *Vance* v. *Fore*, 24 Cal. 436 (1864).