Pennsylvania Exam Review: Legal Aspects.

Email: kristopherkline1@gmail.com

New Source: Kline Articles www.2point.net (blog)

Common Law & the Surveyor

Surveyors have a lot of work ahead…
Poch v. Urlaub; 357 Mich. 261; 98 N.W.2d 509; 1959

- "We agree with the judge below that this survey could not lawfully be regarded. **A surveyor** has no more right than anyone else to decide upon starting points and other elements of location.
- We have had frequent occasion to refer to the **mischief done by the officious meddling** of such persons under some notion **that it is within their province to unsettle possessions and landmarks.**"

Surveyors have a lot of work ahead…
Poch v. Urlaub; 357 Mich. 261; 98 N.W.2d 509; 1959

- In **Fisher v. Dowling**, again the Court said:
- "We have had frequent occasion to **condemn the assumptions of surveyors** in determining lines and landmarks **according to their own notions.**
- They have no such right, and their assumptions are not lawful. There are **few evils more annoying** to public or private peace than the **intermeddling with land boundaries,** and the disturbance of peaceable possessions."" [Cites omitted]

Blackstone: The Perfection of Reason (1)
Commentaries on the Laws of England Vol 1,
(Oxford: Clarendon Press, 1765)

- And hence it is that our lawyers are with justice so copious in their ecomiums on the reason of the common law; that they tell us, …
- …**that the law is the perfection of reason,** that it always intends to conform thereto, …
- …and that what is not reason is not law.
- Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.

Blackstone: Precedent Has a Reason (2)

Commentaries on the Laws of England Vol 1, (Oxford: Clarendon Press, 1765)

- The doctrine of the law then is this:
- …that **precedents and rules must be followed**, …
- …**unless flatly absurd or unjust**: …
- …for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.

PENN: Perfection of Reason (1)

Appleton Estate: 81 Pa. D. & C. 85 (1951)

- It is enlightening and a guide to the general principle of law to project the course that would be pursued, were the prayer of petitioner granted, …
- …**because, the law being the perfection of reason**, …
- …that which turns out to be reasonable is likely to be the law …
- …and that which turns out to be unreasonable is likely not to be the law.

PENN: Perfection of Reason & Common Law (2)

Kilheffer v. Herr: 17 Serg. & Rawle 319 (1828)

- **The, foundation of the law is not laid on such a fluctuating basis.**
- It has been pronounced, by the greatest jurists, to be the **perfection of reason, not of every man's natural reason, but an artificial perfection of reason, gathered by long study, observation, and experience.**

Common Law & Common Sense

Mass: Common Sense & Deeds (1)

Sumner v. Williams: 8 Mass. 162; 1811

- This reasoning is **the plain dictate of common sense and justice;** and it is not stronger than the case under consideration, which is an attempt to render the defendants liable upon a contract for the performance of obligations, which we know they never assumed.
- The case of *Browning vs. Wright*, which I before referred to, fully maintains the principles adopted by me, in construing this covenant. The case is not dissimilar.
- **It is so well reported, and the argument of Lord Eldon is such a triumph of common sense over technical niceties, that I would rather recommend the reading of the whole, than to weaken by attempting to epitomize it.**

Common Sense in Kentucky

Linebaugh v. Carroll, 2009-CA-000888-MR (KYCA)

- "In determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution. . . ." *Arthur v. Martin*, 705 S.W.2d 940, 942 (Ky.App. 1986). In attempting to ascertain intent, courts are admonished to **employ common sense – all too often a rare guest in the house of the law:**
- Fairness, justice and common understanding must enter into the interpretation of any instrument, and an apparent mistake in the use of words will not be permitted to impair what was the real intention of the parties or to defeat their obvious purpose.

Why a Statute of Frauds??

PENN: Statute of Frauds (1)
Ebert v. Wood: 1 Binn. 216; 1807

- Ebert offered to **give evidence of a parol partition having been made by lines run and marked on the ground**, and of possession having been taken by each party respectively according to this partition, and the part allotted to each having been held in severalty from the time of the partition to the time of bringing the action.
- The first objection is founded on the act of **Assembly of 21st March 1772, by which a writing is made necessary for the passing of any estate or interest in lands.** This act of Assembly, so far as respects the point under consideration, is in substance the same as the English statute of frauds and perjuries

PENN: Part Performance (2)
Ebert v. Wood: 1 Binn. 216; 1807

- **specific execution of a parol agreement shall be decreed in equity, where the agreement has been carried into effect in part only.**
- This determination was founded on two principles:
- 1st, that where the **parties have acted upon their agreement,** there is no danger of perjury in proving it; and
- 2d, because it is against equity that a man should refuse to perfect an agreement, from which he had derived benefit by an execution in part.

PENN: Statute of Frauds (1)
Schettiger v. Hopple: 3 Grant 54; 1857

- …the **written instrument contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol.**
- And let it be remembered that the only **purposes for which deeds were invented, and by the statute of frauds** a writing signed was rendered necessary in regard to land, **were to secure evidence of contracts certain as to subject matter and interest.**
- They become, **when executed, the agreed evidence of the intent of the parties,** as to what is conveyed, for what estate, and under what conditions or covenants.

Justice Cooley – "Knowing the Law"

- **QUASI-JUDICIAL CAPACITY OF SURVEYORS**
- I have thus indicated a few of the **questions with which surveyors may now and then have occasion to deal,** and to which they should bring good sense and sound judgment.
- **Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity** with the acquiescence of parties concerned; and **it is important for them to know by what rules they are to be guided** in the discharge of their judicial functions.
- What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value.

Original Intent
&
Four Corners Rule

PENN: Intent of the Parties (1)
Huss v. Stephens: 51 Pa. 282; 1866

- Still, however, it is true of deeds **that the intent of the grantor, when legal, is a governing principle in the construction** of his deed: ***Means v. The Presbyterian Church, 3 Watts & Serg. 303.***
- **As long ago as 1800 it was declared** … that **the great rule of interpretation, with respect to deeds and contracts,** is to put such a construction upon them as will **effectuate the intention of the parties,** if such intention be consistent with the principles of law.

PENN: Intent of the Parties - Recent (1)
Midland v. Ohioville: 108 A.3d 132; 2015

- The **fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties.**
- The parties' intention must be ascertained from the document itself, if its terms are clear and unambiguous.
- The document is ambiguous if it is ***reasonably susceptible of different constructions and capable of being understood in more than one sense.***
- Parol evidence is admissible to explain, clarify or resolve the ambiguity.

PENN: Intent of the Parties - Recent (2)
Midland v. Ohioville: 108 A.3d 132; 2015

- Although the **rules of construction aid the courts in ascertaining the intention of the parties**, …
- …they are ***not intended to be "a talismanic solution*** to the construction of ambiguous language."
- **Rules of construction** serve the legitimate purpose of ***aiding courts in their quest to ascertain and give effect to the intention of parties*** to an instrument.
- They are not meant to be applied as a substitute for that quest

Penn: Intent of the Parties - Recent (3)
Midland v. Ohioville: 108 A.3d 132; 2015

- **Where a document is found to be ambiguous, inquiry should always be made into the circumstances surrounding the execution of the document** in an effort **to clarify the meaning that the parties sought to express** in the language which they chose ….
- It is **only when such an inquiry fails to clarify the ambiguity** …
- …that the rule of construction ... should be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document.

Penn: Four Corners Rule (1)
Burleigh Estate:405 Pa. 373 (1961)

- The pertinent principles of law are well settled; their application is sometimes difficult.
- **It is now hornbook law**
- (1) that the testator's intent is the polestar and must prevail; and
- (2) that his intent must be gathered from a consideration of (a) **all the language contained in the four corners of his will** and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts;

Penn: Four Corners Rule (1)
Commonwealth v. Fitzmartin: 376 Pa. 390 (1954)

- The reservation in a deed must be construed as a whole and the intent gathered from a consideration of the entire instrument:
- He that runs may read that the words of the present reservation, **considered from its four corners,** clearly and unequivocally refer to deep mining and not to strip mining.

Grammar Isn't Everything

Florida : Intent is "Pole star" (1)

Ansley v. Graham

73 Fla. 388; 74 So. 505; 1917

- The **modern rule**, which prevails in his State, is much simpler, and much more calculated to carry out the wishes of the grantor.
- **The intention of the grantor, as gathered from the four corners of the instrument, is now the pole star of construction.**
- That intention may be expressed anywhere in the instrument, and in ***any words, the simpler and plainer the better,*** that will impart it; and the court will enforce it no matter in what part of the instrument it is found."

Penn : Intent and Grammar (1)

Steele v. Statesman Ins.: 530 Pa. 190 (1992)

- It is basic that no interpretation of contractual language is necessary or permissible unless there is ambiguity which must be resolved.
- Words and phrases shall be construed according to rules of grammar and according to their common and approved usage.
- "It is often stated in judicial opinions that **where the language used in a statute is clear and unambiguous there is no need for interpretation or construction.** The same rule applies to the construction of contracts."

SCOTUS: Grants from the State (1)

Shively v. Bowlby: 152 U.S. 1 (1894)

- The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants.
- The familiar rule and its chief foundation were felicitously expressed by Sir William Scott:
- **"All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants;...**
- *[KK Note: sentence continued next slide]*

SCOTUS: Grants from the State (2)

Shively v. Bowlby: 152 U.S. 1 (1894)

- ...and upon this just ground, ...
- ...that the prerogatives and rights and emoluments of the Crown **being conferred upon it for great purposes, and for the public use**, ...
- ...it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, ...
- ...**beyond what such grant by necessary and unavoidable construction shall take away."**

Identification by the Senses And the Meeting of Minds

Penn: Meeting of Minds (1)
Martin v. Penn. Turnpike Comm: 381 Pa. 67 (1955)

- In granting the rule against Martin the court below said that "a rescission of a contract must be based on a sufficient consideration."
- **But this is a superstructure built on a phantom foundation.**
- **There never was a contract here to rescind.**
- "Nothing is better settled than that in order to constitute a contract **there must be an offer on one side and an unconditional acceptance on the other.**

Penn: Meeting of Minds (2)
Martin v. Penn. Turnpike Comm: 381 Pa. 67 (1955)

- So long as any condition is **not acceded to by both parties** to the contract, …
- …the **dealings are mere negotiations** and may be terminated at any time by either party while they are pending.
- **There must be a meeting of minds in order to constitute a contract.**
- This doctrine is very familiar and has been recognized many times in our Courts."

Meeting of Minds: U.S. Supreme Court (1)
Brawley v. U.S.A.: 96 U.S. 168; 24 L. Ed. 622; 1877

- The written contract merged all previous negotiations, and is presumed, in law, **to express the final understanding of the parties.**
- **If the contract did not express the true agreement, it was the claimant's folly to have signed it.** The court cannot be governed by any such outside considerations.
- Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

Dictionary as a Fortress??

Penn : Intent and Grammar (1)
Commonwealth v. McDermott:
236 Pa. Superior Ct. 541 (1975)

- The **setting in which the words are uttered, more strongly than any delicate shading in grammar**, reveals the intention of the parties.
- On this principle **rather than by a pedantic examination of the meaning of the words** of a lay witness, the decision in Murdock's Estate is justified

Judge Learned Hand: Dictionary as Fortress
Cabell v. Markham: 148 F.2d 737; 1945

- Of course it is true that the **words used, even in their literal sense, are the primary, and ordinarily the most reliable,** source of interpreting the meaning of any writing: be it a statute, a contract, or anything else.
- But it is one of the surest **indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary**; but to remember that statutes always have some purpose or object to accomplish, whose **sympathetic and imaginative discovery** is the surest guide to their meaning.

Judge Learned Hand: "Twenty Bishops"
Ashwood Capital v. OTG Management:
948 N.Y.S.2d 292 (2012)

- This case serves as a reminder that in order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it. **As Judge Learned Hand stated:**
- "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.
- A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.

Judge Learned Hand: "Twenty Bishops"
Ashwood Capital v. OTG Management:
948 N.Y.S.2d 292 (2012)

- **If, however, it were proved by twenty bishops** that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, …
- …he would still be held, unless there were some mutual mistake, or something else of the sort.
- Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent"

Penn: Dictionary as a Fortress (1)
Commonwealth v. Smith: 221 A.3d 631 (2019)
(Concurring Opinion)

- As used in Section 6110.2,[1] the term "alter" is ambiguous.
- As the Majority notes, **some dictionaries propose narrow definitions** of the word, while others propose broad ones.
- **The resulting muddle brings to mind Judge Learned Hand's wisdom that…**

Penn: Dictionary as a Fortress (2)
Commonwealth v. Smith: 221 A.3d 631 (2019)
(Concurring Opinion)

- …"it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."
- **Consistent with Hand's interpretive spirit, the Majority astutely investigates the skullduggery** that Section 6110.2 is seeking to remedy.

Tenn: The Song vs. the Notes (1)
Crown Enterprises v. Woods: 557 S.W.2d 491 (1977)

- **Judge Learned Hand, whose wisdom has enriched most branches of jurisprudence**, has said of statutory interpretation:
- "It does not follow that Congress meant to cover such a transaction, **not even though the facts answer the dictionary definitions** * * * **the meaning may be more than that of the separate words as a melody is more than the notes,** and no degree of particularity can ever obviate recourse to the setting in which all appear and which all collectively create." *Helvering v. Gregory, 69 F.2d 809, 810-11 (2d Cir.1934).*

Harmonize All Parts

Virginia: Harmonize all Deed calls (1)

Conner v. Hendrix: 194 Va. 17; 72 S.E.2d 259; 1952

- In the construction of deeds it is to be remembered "That it is the **duty of the court to give the proper meaning to every word** used in the instrument if possible."
- "**Effect and meaning should be given to every part of the deed,** if it can be done consistently with the rules of law."
- Words descriptive of the land conveyed should be given their established, definite, usual and ordinary meaning, unless a contrary intent appears.

Virginia: Harmonize all Deed calls (2)

Conner v. Hendrix: 194 Va. 17; 72 S.E.2d 259; 1952

- "To justify the suppression of a part of a description it must not **only be out of harmony with other parts** of the description; …
- …but it must be **undeniably so in some important respect**, after putting a reasonable construction upon the rest of the description."

Virginia: Harmonize all Deed calls (3)

Conner v. Hendrix: 194 Va. 17; 72 S.E.2d 259; 1952

- "It is a well-settled rule of construction that inasmuch as the **parties must have intended all the provisions and terms of a deed to have some meaning** and be given some import, from the fact that the terms and provisions were actually inserted in the deed, a deed will be so interpreted as to make it operative and effective in all its provisions, if its terms are susceptible of such interpretation.
- **Every word, if possible, is to have effect,** for, it has been said, the deed, as the witness to the contract between the parties, should speak the truth, the whole truth, and nothing but the truth."

Penn: Harmonize all Calls (2)

Hardy v. PennDER: 515 A.2d 356 (1986)

- Petitioners' interpretation renders the statutory term "initiates", as found in "initiates an adversary adjudication," 71 P.S. 2033(a), mere surplusage.
- **We must construe a statute to give effect to every word, if possible,**

Penn: Harmonize all Calls (2)

Commonwealth v. Driscoll: 485 Pa. 99 (1979)

- Our purpose in this case, as it is in any case requiring interpretation of a statute, is to give effect to the intent of the legislature.
- To determine that intent we look both to the statutory scheme, and to the specific language of the Act.
- We must assume that the legislature intends every word of the statute to have effect.

What are the "Surrounding Circumstances?"

Intent in Light of Surrounding Circumstances Includes…

- **Common Law principles** current at the time of the creation of the description (not at the later time of transcribing the original description!)
- **Current Land Use** as of the time of writing
- Current **technology** (example, mining and drilling techniques)
- Current Municipal Ordinances at time of writing
- Customs at time of writing
- Idioms and local usage

PENN: Surrounding Circumstances (1)

Yuscavage v. Hamlin: 391 Pa. 13; 137 A.2d 242; 1958

- As we recently pointed out …certain rules are applicable in the construction of deeds. Among such rules are those providing:
- (1) that the **nature and quantity of the interest conveyed must be ascertained from the instrument itself**
- …and **cannot be orally shown in the absence of fraud, accident or mistake**
- …and **we seek to ascertain not what the parties may have intended by the language but what is the meaning of the words;**

PENN: Surrounding Circumstances (2)

Yuscavage v. Hamlin: 391 Pa. 13; 137 A.2d 242; 1958

- (2) **effect must be given to all the language of the instrument and no part shall be rejected if it can be given a meaning;**
- (3) the language of the deed **shall be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.**

PENN: No part of Deed rejected (3)

Yuscavage v. Hamlin: 391 Pa. 13; 137 A.2d 242; 1958

- And while it is true that a recital not a necessary part of the deed can neither diminish nor qualify the grant if that operative part of the deed is certain and definite yet, where the terms are uncertain or contradictory, reference may be made to the recital to determine the intention of the parties.
- On this aspect of the matter we must also keep before us one of the **cardinal principles in the construction of deeds, i.e., that no part shall be rejected if it can be given a meaning.**

Significance of Parol Statements

PENN: Significance of Parol Agreement (1)

Pierro v. Pierro: 438 Pa. 119; 264 A.2d 692; 1970

- "Where it is necessary to prove any essential feature of an agreement for the sale of land by oral testimony, the agreement is not in writing within the meaning of the statute of frauds
- **"'[P]arol evidence to describe the land intended to be sold is one thing, (and hence is inadmissible) …**
- **…and parol evidence to apply a written description to land is another and very different thing, and for that purpose is admissible.'"**

PENN: Significance of Parol Agreement (2)

Pierro v. Pierro: 438 Pa. 119; 264 A.2d 692; 1970

- "'If the subject-matter, the land, be described, **we admit evidence in order to apply the description to the land;** but we cannot admit parol evidence, first, to describe the land sold, and then, to apply the description.'"
- **"[P]arol evidence may be used to explain and define the description contained in the writing, but not to create the description itself."**
- Because the agreements contain no descriptions, any parol evidence would be creating the description rather than explaining, defining, or applying the description already given.

PENN: Parol Evidence Rule: (1)

Ledonne v. Kesler: 256 Pa. Super. 280 (1978)

- Succinctly stated, the **purpose of the parol evidence rule** is ". . .to preserve the integrity of written agreements by refusing to permit the contracting parties to attempt to alter the import of their contract through the use of contemporaneous [or prior] oral declarations."
- "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement."

Public Intent vs. "What he intended"

- "Intentions" as applied to the construction of a deed is a term of Art and signifies a "meaning of the writing" (Donald A. Wilson)
- Thus the proper question is not what he meant to do, but what he did according to the words recorded in a description.
- Each word has a specific meaning, whether it be a technical term or a layman's phrasing, but the grantor is assumed to understand the meaning of every word in a description that he signed.
- A deed is the written embodiment of the intent…

Intent and Government Surveys

Washington: Where it actually was… (1)

Strunz v. Hood:
44 Wash. 99; 87 P. 45; 1906

- …**a court or a court commissioner cannot correct the United States government surveys,** …
- …or establish government corners at points other than those fixed by the government surveyors; that in any attempt to reestablish an original survey …
- …the purpose should be to **follow the footsteps** of the government surveyor as nearly as possible, and that when there is any variance between field notes and monuments as set up by the United States government surveyors, the monuments must prevail

Washington: "Where it should have been"?? (2)

Strunz v. Hood:
44 Wash. 99; 87 P. 45; 1906

- It was undoubtedly the duty of the commissioner to ascertain if possible where the original government monuments had been actually located and established,…
- … rather than where he might think they ought to be located or established.

Follow the Original Footsteps

PENN: Original Survey (1)

Healy v. Moul, 5 Serg. & Rawle 181 (1819)

- After a survey made and returned, the **lines cannot be altered by the deputy surveyor** to the injury of a third person, on the ground of mistake in such survey: …
- …and evidence of a diagram afterwards made by authority of the deputy surveyor and approved by him and returned to the surveyor general's office, who directed a resurvey which was suspended by suit, is not admissible after a lapse of time to shew mistake in the original survey in excluding some lands and including others.

PENN: Original Survey (2)

Healy v. Moul, 5 Serg. & Rawle 181 (1819)

- The first presumption is, that every survey is made with the consent of the owner, if it is returned.
- That presumption is corroborated, if it is patented.
- It would require evidence of fraud and imposition by the surveyor, or by the adverse claimant, to let the owner take lands that had been appropriated to others.
- It would be opening a wide door, if at the end of 30 years, evidence were to be received, that all this was done in mistake, and land opened to a new survey, where it had been appropriated by grant and patent, for all that time.

PENN: Original Survey (3)

Healy v. Moul, 5 Serg. & Rawle 181 (1819)

- **What miserable confusion would ensue,** if every deputy, after his survey returned, *was at liberty to change the position of an actual survey, actually returned, and disturb intermediate grants.*

Tenn: Original Footsteps, Not Later Ones (5)

Open Lake v. Lauderdale Haywood:
No. W2009-02269-COA-R3-CV (2011)

- …the duty of a retracement surveyor is to **locate on the ground the boundary lines and corners established by the original survey.**
- …in order to determine the location of disputed boundary lines on the ground, a **retracement surveyor must restore the original surveyor's lines in the same position as they were marked initially** at the time of the original land grant.
- …the purpose of the resurvey is to determine **where the footsteps of the original surveyor were located, not the footsteps of the most recent surveyor.**

PENN: Original Footsteps (1)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- But **with an original mark for a starting point,** the lines may be run in accordance with the legal presumption and will hold the tract against all younger surveys.
- **The work found on the ground is the basis.**
- It **fixes the footsteps of the surveyor,** so far as it exists, and from it the legal presumption projects the lines along the courses and distances as returned, and incloses the tract.

PENN: Original Footsteps (2)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- The following important facts should be borne in mind in examining this question:
- 1st. The location of the block, as such, is not involved, nor are its lines before us.
- 2d. The location, that is, the existence on the ground, of no member of the block is challenged in any manner.
- 3d. The question is simply one of boundary between two interior surveys in a block conceded to be on the ground.
- **What have we to guide us in fixing this boundary?**

PENN: Original Footsteps (3)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- Unless there is some monument of the survey or some call to control it, **the line must be run from the white oak, on its official course**, to the intersection with the line southwest from the pine.
- Is there monument or call to deflect this line from its course as returned?
- It is conceded that there is nothing on the southwest of Steiner and northeast of Scott, for the line was not run on the ground.

PENN: Original Footsteps (4)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- There is no marked tree or fixed monument called for at the southwest corner.
- There is **no call for an adjoiner that can control** the direction of this line;
- for, while the connected draft represents these four tracts as having a common post corner, and the Frey as adjoining the Steiner along the whole extent of its northwest side,
- **the work on the ground, which overrides the calls, shows the return to be mistaken.**

PENN: Original Footsteps (5)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- But the **learned judge regarded the sugar**, the common corner of the Frey and the Slough, **as a monument of the Steiner. Why?**
- It is not on the lines of the Steiner.
- It is **not adopted, referred to, or noted in any manner by the deputy surveyor,** as a monument of the Steiner, in his official return of that survey.
- It **belongs to other surveys, which, while members of the same block, are in all other respects independent of each other** and well located by original lines on the ground.

PENN: Original Footsteps (6)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- **It was a mistake, therefore, to apply a rule** intended to protect a member of a block which was without lines on the ground from the encroachments of a junior survey by calling to its aid all the marks on the lines of the block to fix its location, to a question of boundary between interior members of the same block; especially when as here the lines of the block were not before the court.
- The legal presumption that the survey was made as it was returned must prevail, until it is overcome by work on the ground, or by calls that require an abandonment of it.
- This rule is **applicable to a single survey and to a block of surveys with equal force.**

PENN: Original Footsteps (7)

Bloom v. Ferguson: 128 Pa. 362; 18 A. 488; 1889

- But **with an original mark for a starting point, the lines may be run in accordance with the legal presumption and will hold the tract against all younger surveys.**
- **The work found on the ground is the basis.**
- It fixes the footsteps of the surveyor, so far as it exists, and from it the legal presumption projects the lines along the courses and distances as returned, and incloses the tract.

Tenn: More Certain Controls (1)

Vincent v. Johnston:
No. E2013-00588-COA-R3-CV (2014)

- It is well settled in Tennessee that "'[i]n determining disputed boundaries resort is to be had **first to natural objects or landmarks,** because of their very permanent character; next, to artificial monuments or marks, then to the boundary lines of adjacent landowners, and then to courses and distances.'"
- The governing rules are near universal and are recited by the Court of Appeals in Ohio in ***Sellman v. Schaaf, 26 Ohio App.2d 35, 269 N.E.2d 60, 66 (1971).***

PENN: Original Surveyor – Mistake (1)

Sugarloaf Township Appeal
209 Pa. Super. 52 (1966)

- By **utilizing the bearings as actually drafted** on the incorporation plot the **description closed without difficulty.**
- Utilizing the bearings as written thereon a distortion arose which resulted in an outline of an area that did not close, the terminal of the final bearing being far removed from the beginning point.
- It appeared to the Commission that the original surveyor by inadvertence **had made an error in transposing two letters in the bearings, not an uncommon error,** and that their transpositions were the cause of the dispute.

PENN: Original Surveyor – Mistake (2)

Sugarloaf Township Appeal
209 Pa. Super. 52 (1966)

- After hearing, view of the boundaries on the ground, and examination of records, the Commission, one member of which was a registered surveyor and the other two members of the Luzerne County Bar, made its report in which it …
- …recommended corrections in the description of the
- …northerly line from N. 54° W. to S.54° W., and of the …
- …southerly line from S. 80° E. as written, to N. 80° E., as plotted.

Rules of Construction

Old Surveys were often Inaccurate?: Va.

Herbert v. Wise: 7 Va. 239; 1802

- To pursue the proper descriptions of our land boundaries, would render men's titles very precarious, not only from the variations of the compass, …
- …but that **old surveys were often inaccurate**; and mistakes often made, in **copying** their descriptions into the patents; **leaving out lines**, and **putting north for south**, and east for west; and in **copying those descriptions into subsequent conveyances**:

The Rules of Construction – Generic (Priorities, or Order of Importance)

1. Natural Monuments – creeks, streams, ridgelines, etc.
2. Artificial Monuments – marked survey lines, concrete monuments, rebar.
3. Adjacent tracts or boundaries (call for adjoiners)
4. Courses and / or bearings (may be combined with 5)
5. Distances – States are not consistent when considering the hierarchy between course and distance. Most consider them of nearly equal stature.
6. Area or Quantity

Note that the Rules of Construction are guidelines, not a straightjacket!!

PENN: Rules of Construction (1)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- Initially, we note that the **primary function** of the trial court resolving a boundary dispute is to ascertain the **intent of the grantor** at the time of the original subdivision.
- **To achieve this result, our courts have employed certain rules of construction that are commonly thought to provide the best indication of that intent.**

PENN: Guidelines Only (2)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- **As a general rule, where there is a conflict** between courses and distances or quantity of land and natural or artificial monuments, the **monuments prevail.**
- Moreover, natural monuments normally take preference over artificial marks or monuments.
- **These rules, however, are not imperative but are aids in construction that must yield to a contrary showing.**

PENN: Rules of Monuments (3)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- **Monuments are visible markers or indications left on natural or other objects indicating the line of a survey.**
- "[N]atural objects, such as the bank of a stream, the shore of a lake, a precipice or ledge or rocks, a fountain or spring of water, may be adopted . . . as . . . monuments fixing the location of lines and corners."

PENN: Rules of Monuments (4)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- We fully recognized **the general rule that monuments on the ground are of the highest value** on questions of boundary, …
- …but that **rule cannot prevail where the monument claimed is so manifestly wrong as to lead to an absurd result** …
- …as here, **embracing the land of a third party. An alleged monument, which is a palpable mistake, will be disregarded.**

PENN: Rules of Monuments (5)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- In Appeals of ***Borough of Dallas, supra***, this court stated:
- Though some of the terms of description . . . are entitled usually to more probative value than others, …
- …yet, in the end, the true construction is ascertainable **by the totality of their combined effect and not wholly and exclusively by any one term when it is irreconcilable with the other terms** of description.
- **To lay down the hard and fast rule that only monuments . . . are determinative elements of a description . . . is to make the rule contended for more important than the underlying intent of the contracting parties** . . . .

Ohio: Guidelines, Not Straightjacket: (7)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- Appellant argues that the trial court erred by using area over distance and by looking at the intent at the time of the partition.
- However, the record establishes that the trial court did not use area as the controlling factor and did not apply a different standard.
- **First, we note that the standard in Broadsword is not a rigid rule that must be followed blindly in every situation.**

Ohio: More Certain Controls: (8)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- The ground of the rule is that **mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent.**
- The reason assigned for this rule is that **monuments are considered more reliable** evidence than courses and distances.
- A description by **course and distance is regarded as the most uncertain kind of description,** because mistakes are liable to occur in the making of the survey, in entering the minutes of it, and in copying the same from the fieldbook."

Alabama: Reject the False (2)

Crampton v. Prince
83 Ala. 246; 3 So. 519; 1887

- The reason of the rule is that where there is a discrepancy between two descriptions, **the one will be adopted as to which there is least liability of mistake**,--
- **Rejecting the description which is most apt to be erroneous,** the law regards it as a mere misdescription, and not as a warranty of the quantity of land intended to be conveyed.

PENN: Call for Adjoiner (5)

Stark v. Equitable Gas: 116 A.3d 760; 2015

- '[w]here monuments are doubtful, resort will be had to the courses, distances, and quantity.'")
- ("When the **line of another tract** is **called for in the description of a deed as one of the boundaries** of the land conveyed, the line ordinarily runs to such boundary line.
- **When such line is certain and notorious**, it is to **be treated as the monument or boundary** rather than …
- …**the ambiguous location of the center of a paper street** which need not be taken as a monument or permanent landmark for the purpose of fixing the boundary line in this case.")

Course vs. Distance

https://www.2point.net/blog
Aug 8th, 2021

SCOTUS: Course v. Distance (1)

Preston's Heirs v. Bowmar: 19 U.S. 580 (1821)

- "It may be laid down as a universal rule, that course and distance yield to natural and ascertained objects.
- But where these are wanting, and the **course and distance cannot be reconciled,** there is **no universal rule that obliges us to prefer the one or the other.**
- Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances."

Skelton: Course vs. Distance (1)

from: Boundaries & Adjacent Properties (1930)

- The basic principle underlying all rules of construction is to give control to that which is the most certain and which most likely expresses the intention of the parties…
- It is axiomatic that the relative precision of two calls is inverse to their relative probable error, but **this theory is of little aid in ranking the control between course and distance** for the reason that they are both observed quantities, each liable to error in field determination and in recording.

Skelton: Course vs. Distance (2)

from: Boundaries & Adjacent Properties (1930)

- **Attempts to frame a rule that which most likely expresses the intention control lead nowhere**, …
- …for courses and distances are merely a method for describing lines, and therefore have no physical existence, but only mathematical significance, …
- …**meaning nothing to the layman**, and but little to the engineer until they are laid upon the ground or platted to scale and checked for error of closure.
- Any error that is latent until it is revealed by actual survey or mathematical calculation.

PENN: P.O.B., Course v. Distance (1)

Baker v. Roslyn Swim Club:
206 Pa. Super. 192; 213 A.2d 145; 1965

- ""Where the calls for the location of boundaries to land are inconsistent, other things being equal, resort is to be had …
- …first to natural objects or landmarks, …
- …next to artificial monuments, then to …
- …adjacent boundaries (which are considered a sort of monument), …
- …and thereafter to courses and distances."

PENN: P.O.B., Course v. Distance (2)

Baker v. Roslyn Swim Club:
206 Pa. Super. 192; 213 A.2d 145; 1965

- However, the same paragraph continues with the following language:
- "Where, however, it is apparent that a mistake exists with respect to the calls, **an inferior means of location may control a higher one.**
- In the last analysis **the call adopted as the controlling one should be that most consistent with the apparent intent of the grantor."**
- "Generally, among the inferior calls, course will control distance if they are inconsistent, and course and distance will control quantity."

PENN: P.O.B., Course v. Distance (3)

Baker v. Roslyn Swim Club:
206 Pa. Super. 192; 213 A.2d 145; 1965

- Likewise, the same general rule and the same exceptions are cited in 11 C.J.S. Boundaries § 51, as follows:
- **"The rule that artificial monuments control courses and distances in case of conflict is not an imperative and exclusive one,** …
- …but is a rule of construction to ascertain, or to aid in determining, the intention of the parties; …
- …and it is not followed where strict adherence to the call for a monument would lead to a construction plainly inconsistent with such intention.""

Variation of the Compass

www.ngdc.noaa.gov/geomag/declination.shtml

PENN: Declination (1)

Hagey v. Detweiler: 35 Pa. 409; 1860

- A line which depends on allowances for **the variation of the needle**, and the position of a post set so long ago as 1784, **cannot be considered free from doubt, however traceable by its appropriate course it may be**, if the position of the post be assumed.
- **The doubt has reference of course** to the starting-point, not to the bearing of the line; **but that doubt infects the line from beginning to end.**

Area

PENN: Area …(1)

Glen v. Glen, 4 Serg. & Rawle 488 (1818)

- It may be, however, that the original intent was, to convey 200 acres, and through a mistake arising from miscalculation, such boundaries have been fixed, as contain 213 acres;
- How would the law stand, on that supposition ?
- The boundaries being recognised by both parties, must betaken for those intended by the deed;
- …

PENN: Area …(2)

Glen v. Glen, 4 Serg. & Rawle 488 (1818)

- …and thus we have the case of a **deed, containing 13 acres more than was supposed by either party**; possession held for 13 years, and then, both grantor, and grantee being dead, an attempt to open the conveyance, for no other reason, than that it contained a surplus of 13 acres.
- **Why were the words more or less used**, but to shew, the understanding of the parties, that the boundaries should not be affected by a deficiency or surplus of quantity ? Would a court of chancery interfere in a case of this kind ?
- **I think not.**

PENN: Area as an "Absurd Result" (6)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- With the exception of the deed of April 27, 1978, **none of the deeds in either chain of title makes reference to any monuments**, …
- …nor was any evidence presented at trial showing that any monuments were erected by either of the parties or their predecessors with intent to conform to the deed.
- The defendants' [appellants] claim to a tract containing 40.29 acres would seem to be the type of 'absurd result' which the Post court wished to avoid."

PENN: Area …(7)

Pencil v. Buchart: 380 Pa. Super. 205; 551 A.2d 302; 1988

- "Evidence of the acreage of land, especially where the number of acres is followed by the words **'more or less', has little weight as against specific boundaries** and is in its nature **an uncertain method of description and often a mere estimate.**
- **Where, however, a doubt exists** as to the actual location of the boundary and the writing contains **no words to definitely fix the line by either metes and bounds or monuments** on the ground, **evidence of the acreage becomes a material factor** in the determination of the intention of the parties

Oregon: Original Government Line Controls (4)

Kanne v. Otty:

25 Ore. 531; 36 P. 537; 1894

- Section 2396, U.S. Revised Statutes, provides that "**All the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners** of the sections or subdivisions of sections which they are intended to designate."
- In ***Goodman v. Myrick, 5 Ore. 65***, it was held that all claims surveyed under the act of congress, approved September twenty-seventh, eighteen hundred and fifty, were recognized as legal subdivisions, and that **the true line was the one actually run upon the ground in the original survey of donation land claims.**

Ohio: Area: (6)

Bart v. Hughes:
2002 Ohio 5452; 2002 Ohio App.

- Area is the weakest of all means of description."

Are Modern Surveys Different?? (Define 'Modern')

Blog: www.2Point.net — Feb. 17, 2020

Why the rules still apply to Modern Subdivisions

1) One of the most telling points against the abandonment of the rules of construction is their continued and consistent application in modern decisions.
2) While the four corners rule is applied commonly to deeds, wills, and contracts, it is equally applicable to recorded and unrecorded plats.
3) **Wheeler v. Hoffman: No. 40-2-07 Oecv; Vermont Super (2009)** points out the fallacy of depending on local regulations while ignoring the rules of construction.
4) The stability of property boundaries and titles is of paramount concern to the courts.
5) Surveying and Engineering are different disciplines

Pennslyvania: Interpreting a Plat (1)

Commonwealth v. M'Donald,
16 Serg. & Rawle 390 (1827)

- The thirty-two lots conveyed, are the thirty-two lots in the town of Pittsburg, marked in the general plan of the said town by Col. Woods, by Nos. 1, 2, 3, &e.
- Common sense would say, **it is necessary only to cast your eye upon Woods' map, to find out what was bought,** and what was sold, and the plan of Col. Woods is made, in explicit terms, the land mark.
- **The sale, as strong as words can render any thing, was by the map** as certain as if the courses and distances of each number had been particularly set forth in the conveyance.

Pennslyvania: Interpreting a Plat (2)

Commonwealth v. M'Donald,
16 Serg. & Rawle 390 (1827)

- The purchaser put his finger on the number he wanted in Woods' map; and the description, and, I add, …
- …the only certain description, by which all the lots in Pittsburg are held, is by a reference to the map, …
- …**which is the great charter of the rights of all.**
- If Craig and Bayard did not buy the numbers in the map, then they have no rights, as the grant is without quantity or dimensions..

Maryland – 1793 is 'Modern Times' (1)

Martindale's Lessee v. Troop: 3 H. & McH. 244; 1793

- This is confirmed by a **very modern author.** (2 Woodd. Lect. 170.) "There may exist a right of possession to lands in one who is not the actual possessor of them; and such is properly called a right of entry.
- Upon what ground of political or legal propriety is it that **in modern times** estates tail, reprobated by our laws, condemned by every country in the world which commerce has enlightened,

Michigan: – Modern Survey in 1878 (1)

Diehl v. Zanger: 39 Mich. 601; 1878

- And in some of them the impropriety of disregarding the various landmarks which time and actual occupancy and improvements and the behests of usage and general acquiescence have produced, in deference to the **disordering achievements of some modern survey,** has been distinctly adverted to and explained.

Mich. Cooley: – New Survey in 1878 (2)

Diehl v. Zanger: 39 Mich. 601; 1878

- **Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors.**
- This is as true of the government surveys as of any others, and if all the lines were now subject to **correction on new surveys,** the confusion of lines and titles that would follow would cause consternation in many communities.
- 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.**

Monuments

Creek as a Monument: Maryland (1)

Keech's Lessee v. Dansby: 1 H. & McH. 20; 1704

- The second line of the defendant's land is expressed in the patent to run west up the creek;
- whereas the plots returned make it appear that the course west does not run up but across the creek, and thereby runs into the plaintiff's land, which is the cause of the difference, and notwithstanding the act of Assembly a and common reason direct,
- **that the greater certainty is always to be preferred to the less, and that the natural course of the creek is more certain than the artificial course of the compass**;…

Creek as a Monument: Maryland (2)

Keech's Lessee v. Dansby: 1 H. & McH. 20; 1704

- …besides the several testimonies that the taker up and the son of Ascham always intended and understood their land to be bounded by the creek,
- and not by the artificial line; yet the Jury rejecting law, reason, and the evidence, found for the defendant; that is, that the natural bound should be rejected, and the artificial adopted, …
- …so that the defendant is permitted by the verdict to run over the creek and take the plaintiff's land, **which is error**.

Ohio – What is a Monument? (6)

Owens v. Haunert:
137 Ohio App. 3d 507; 739 N.E.2d 5; 2000

- A "monument" is a tangible landmark, and monuments, as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary, even though this means either shortening or lengthening of distance. ***

When is a monument…not a corner?? (1)

August 1990 ACSM Bulletin "Law and Ethics"
"Uncalled-For Monuments" by David R. Knowles.

- " The most widely accepted legal principle in land surveying is probably that of a monument controlling direction, distance, and area.
- It is in fact the most quoted principle in court decisions:
- **However, the term "monument: lacks an important adjective - "called for".**
- **In other words, called for monuments control dimensions.**

When is a monument…not a corner?? (2)

August 1990 ACSM Bulletin "Law and Ethics"
"Uncalled-For Monuments" by David R. Knowles.

- "There seems to be a **growing practice** in the profession of indiscriminately **yielding to uncalled-for monuments that happen to be in the general vicinity of the presumed corner location.**
- In some cases, the deed calls for, either directly or indirectly, original monuments of a different type.
- In other cases the **deed calls for no monuments whatsoever** – the description is pure metes with only dimensions given.
- **Yielding to an uncalled-for monument without predetermined justification may lead to embarrassment in court."**

When is a monument…not a corner?? (3)

August 1990 ACSM Bulletin "Law and Ethics"
"Uncalled-For Monuments" by David R. Knowles.

- " **When accepting uncalled for monuments** or any other evidence the **surveyor should be prepared** to persuade the court that this is the **best evidence available of the corner location,** and not accept a monument merely because it was there."

PENN: Measurement can prove identity (1)

Chisholm v. Thompson: 233 Pa. 181; 82 A. 67; 1911

- "The **identity of a monument existing on the face of the earth** with one referred to in a deed is always a question of fact" and …
- …"**While monuments capable of being identified must always control courses and distances, the measurements of the lines whose courses and distances are given should not be disregarded in determining the identity** of the monuments claimed to be found with those referred to in the deed:"

PENN: Litmus Test for Monument …(8)

Pencil v. Buchart: 3551 A.2d 302; 1988

- **Before a physical monument is accepted as a boundary line, there must be evidence other than its mere existence** that the monument was intended for that purpose …
- …and **at no point were the stones used by Van Why to mark the southeast boundary ever mentioned in any deed in other chains of title.**
- Nor is there any evidence that any past parties erected it as a monument to mark the boundary.

PENN: What is a Monument? (1)

Stark v. Equitable Gas: 116 A.3d 760; 2015

- It has been said that "a stone wall is strong evidence of a boundary line."
- One court has said that a monument, when used in describing land, is **"any physical object on the ground which helps to establish the location of the line called for,"** whether it be natural or artificial.
- That court noted that, just as in contracts or wills, the intention of the parties governs the interpretation of deeds and…***[KK note: continued next slide]***

Kentucky – Monuments Identifiable (1)

Sackett v. Ky. Coal: 160 Ky. 793; 1914

- It is the **ordinary rule, of course**, that **natural monuments and not distances control.** To apply this rule, however, the **natural monuments must be located with reasonable certainty.**
- There is **not only uncertainty as to the particular ridge,** but **uncertainty as to the precise point on the particular ridge.**
- We therefore conclude **that in a case like this**, where there is such doubt, confusion and uncertainty as to the proper location of the natural monument called for, **the distance called for by the patent, and not the natural monument, should control.**

PENN: Uncalled For Monument (1)

Yoho v. Stack: 373 Pa. Super. 77; 540 A.2d 307; 1988

- The **tree-fence line** upon which appellant's **surveyor relied** is ***not identified as a monument in the deed descriptions.***
- Therefore, it is **not entitled to the controlling effect** which appellant's surveyor gave to it.
- The trial court did not err when it accepted appellees' survey in preference to appellant's survey.

Other Types of Monuments

Fence as a Monument?

PENN: Surveyor Testimony re: fence (1)

Bossert v. McGhee: 2014 Pa. Super. Unpub.

- **The reference to woven wire is just the same as any other monumentation. Survey is an attempt to retrace the original surveyor's footsteps.** Any reference by a stream, an iron pin, a stone, fence, those are all monuments.
- The **original deed** from . . . Annie Fearon, to the railroad in 1896 **referenced a fence which would be installed** by and maintained by the railroad.
- We have found that **fence was installed at the described location to the west of Maple Avenue**, but it was not installed at the--to every piece of information we found, it was not installed at the described location to the east of Maple Avenue in the disputed area.

PENN: Surveyor Testimony re: fence (2)

Bossert v. McGhee: 2014 Pa. Super. Unpub.

- This document was prepared in June of 1917...
- the area in question is delineated by the railroad as according to historical documentations.
- **When I look down very close to the south line of the original 66 foot right-of-way, I see it labels fence there. It says STD for standard wire fence.** . . .
- So it appears to me the railroad constructed their fence line in the current location of the property line

PENN: Sometimes the Fence is critical (3)

Bossert v. McGhee: 2014 Pa. Super. Unpub.

- …**railroad map, which is no longer ststandard wire fence**, depicted in a 1917 anding…
- Instantly, the trial court found the boundary between the parties' properties was established by Appellees' expert AAAAA's survey. Decree, 6/4/13.
- The trial court agreed with AAAAA that the standard wire fence was a monument and it prevailed in the instant land dispute. Prelim. Decree at 2.
- The court concluded the "fence [was] the most significant factor in this dispute . . . and based [its] Decree on the location of that fence in conjunction with the AAAAA survey."

Stake as a Monument

Artificial Monuments – "Stake"

- What is the significance of a call to a stake?
- Is a call for a stake an artificial monument or is it in fact merely on par with a call for a point?

PENN: Call for a Stake (1)

Allison v. Olihger: 141 Pa. Super. 201; 14 A.2d 569; 1940

- The appellants also make reference to the fact that the original description in defendants' **deed called for a post** but **no such post has been identified as existing at the present time.**
- **The reference to a stake or post in the ground long since gone is not such a monument as is controlling:** ***Detwiler v. Coldren, 101 Pa. Super. 189, 195.***

PENN: Call for a Stake (2)

Allison v. Olihger: 141 Pa. Super. 201; 14 A.2d 569; 1940

- "**But what sort of a monument is a stake**?
- **It is so unsubstantial, that in country surveys, it usually indicates a corner which the surveyor never visited,** and which exists only on paper.
- **Artificial boundaries which are meant to be fixed monuments,** are made with **more care than merely sticking a stake, which the next wind may blow over,** which one of **a thousand accidents may destroy,** and which **must rapidly decay, if not otherwise obliterated.**
- **So frail a witness is scarcely worthy to be called a monument,** or to control the construction of a deed in so important a particular as that under consideration":

Roads as Monuments

- Roads are not waterways – it is the surveyors job to re-locate the original road as it was at the time of the original survey which created the boundary in question.
- The principles of accretion and avulsion do not apply to roads or to artificial canals.
- Later survey work may (and frequently does) define a new highway easement in a location that is different from that of the original boundary.

PENN: Roads as Monuments (1)

Patterson v. Watkins: 27 Pa. D. & C.3d 671 (1983)

- Ordinarily, **a road is a monument which will govern over courses and distances.**
- In the case at bar, it is clear from the deed and the testimony that the **intention of the parties to the 1958 conveyance was that the private lane constitutes the northern border.**
- The defendants in 1958 inspected the property and were present at the time that the boundaries were designated and measured for the deed.
- …**the rule that the monument prevails is especially applicable where the "purchaser inspects the property and has an opportunity to see the physical boundaries."**

Trees as Monuments

Ohio: Trees as Monuments

Broadsword v. Kauer:
161 Ohio St. 524; 120 N.E.2d 111; 1954

- Consequently, if ***marked trees and marked corners*** be found conformably to the calls of the patent, …
- …or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects.
- When it comes to courses and distances, the latter yield to the former.

PENN: Tree the Wrong Type (1)

Wray v. Miller, 14 Pa. 289 (1850)

- Our law has ever held that where two corners are established, the course is to be disregarded: ***Hall v. Powell, 4 Ser. B. 462.***
- If the chesnut oak was really the corner of the plaintiff's survey, a diagonal line to the white oak would prevail.
- **The return drafts did not call for the chesnut oak corner.**
- They **called for a chesnut** eighty-one or eighty-two perches distant, and so returned to the land-office three quarters of a century ago.

PENN: Tree the Wrong Type (2)

Wray v. Miller, 14 Pa. 289 (1850)

- The reasoning upon the facts in evidence was strong.
- **The chesnut oak was eighty-one perches** from where it ought to have been, if called for.
- **It was not mentioned or returned on either of the surveys.**
- **The returned drafts called for a chesnut,** and the parol evidence tends strongly to prove that anciently it existed.
- If it existed, it was the true corner of these surveys.

PENN: Were all lines run?? (1)

Mills v. Buchanan: 14 Pa. 59; 1850

- Nothing is more common in ascertaining old lines than to **start from a marked line or corner** on the other end of the tract than that where the difficulty exists. **It is sometimes the surest, and sometimes the only way in which a dispute can be accurately settled.**
- There are **many surveys in this commonwealth where only one line was run**, and very many where a number of surveys have been protracted upon one.
- In such cases, **the only way of ascertaining the locality of these chamber surveys, as they are called,** is to **commence where the marks of the hand of the surveyor are fixed and certain, and run off the courses and distances.**

PENN: Marked Trees (2)

Mills v. Buchanan: 14 Pa. 59; 1850

- "If the jury believe that the white oak is the **corner of Braddock's Field survey,** and that the **two blocked trees,** as stated by Patterson, are the lines of the Braddock's Field survey, …
- …then the **line is from the white oak by those line trees;** and if they are satisfied that the corner on the river is where the defendant claims, then the line is to be ascertained by running the course, with the proper variation and the distance from the river corner, thence by the next course, with the proper variation,
- …until the course intersects the line from the white oak by the marked trees."

PENN: Lines Marked are original survey (3)

Mills v. Buchanan: 14 Pa. 59; 1850

- the **marked or artificial lines made by the surveyor constitute the true survey and must be followed.**
- There would be no sense or reason in the rule, if the marks must be on the line returned.
- They must prevail over it.
- Taking a course between these trees diagonally, it seems there would be little variation and but a short distance from the line thus indicated.
- **The courses and distances run on the ground are the true survey**

Reversing Calls, Point of Beginning

SCOTUS: Running a Deed backwards

Ayers v. Watson:

137 U.S. 584; 11 S. Ct. 201; 34 L. Ed. 803; 1891

- If this was so, (and it was for the jury to determine whether it was or not,) **the judge was entirely right** in charging **that the footsteps of the original surveyor might be traced backward as well as forward**;
- and that **any ascertained monument in the survey might be adopted as a starting point** for its recovery.
- This is always true where the whole survey has been actually run and measured, and ascertained monuments are referred to in it.

PENN: Reversing Direction of Survey (3)

Merlino v. Eanotti: 177 Pa. Super. 307 1955

- The trial Judge, in accepting appellees' surveys concluded that a counter-clockwise survey was the correct method of determining the proper lines.
- We do not consider such a conclusion warranted by the actual monuments on the ground.
- **Where the calls are readily ascertainable, all corners are of equal dignity and a survey may be started at any one of them.**
- However, **where the beginning corner is the only one marked on the ground**, it is necessarily of controlling force

PENN: Summary: Direction of Survey (4)

Merlino v. Eanotti: 177 Pa. Super. 307 1955

- **Reversing the lines of a survey should be resorted to only when the terminus of a line cannot be ascertained by running forward.**
- When the beginning corner is known, the calls ought not to be reversed except in order to make the survey close

Water as the Monument
Strip & Gore Doctrine*
(The Centerline Presumption)

U.S. Supreme Court on Illinois Lakes: (4)

Hardin v. Jordan:
140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- It **has been the practice of the government from its origin,** in disposing of the public lands, **to measure the price to be paid for them by the quantity of upland** granted, no charge being made for the lands under the bed of the stream, or other body of water.
- The **meander lines** run along or near the margin of such waters are run for the **purpose of ascertaining the exact quantity of the upland** to be charged for, …
- …and **not for the purpose of limiting the title of the grantee to such meander lines.**

Penn: non-navigable stream boundary (1)

Alburger v. Philadelphia Electric: 535 A.2d 729 (1988)

- We begin by recognizing that we are concerned here with a **nonnavigable water course**.
- While the Commonwealth holds title to all lands underlying navigable waters in trust for the public, …
- …**title to the lands underlying nonnavigable waters is held by the owners of lands bordering such waters. Thus, Appellants here are the owners of the creek bed of the East Branch as it flows across their properties.**

Penn: non-navigable stream boundary (1)

Shaffer v. Baylor's Lake: 392 Pa. 493 (1958)

- Ordinarily, title to land bordering on a **navigable stream extends to low water mark subject to the rights of the public to navigation** and fishery between high and low water, …
- …**and in the case of land abutting on creeks and non-navigable rivers to the middle of the stream,**

Penn: Streets – Strip & Gore Doctrine (1)

Cox v. Freedley, 33 Pa. 124 (1859)

- "Now applying the ruling in *Paul v. Carver* to this description, **is it not perfectly manifest that we must say Cox took to the middle of Egypt and Race streets?**
- And why should not the doctrine of that case be applied?...
- But it was with a knowledge of such authorities, Judge Lewis remarked, in *Paul v. Carver,* that the circumstance of being bounded by the side of a street, instead of the street itself, was entirely too insignificant to produce a result so inconvenient, and so contrary to the practice of the people."

Penn: Streets – Strip & Gore Doctrine (2)

Cox v. Freedley, 33 Pa. 124 (1859)

- *beginning at a stake on the north-east corner of Egypt and Race streets, and thence along the north-east side of said Egypt street, south forty-eight degrees five minutes east, ninety-one feet eight-tenths, to a stake in the middle of a ten feet wide alley …*
- *… to a stake on the south-west side of Penn street; and along said side of said street, north sixty degrees forty-five minutes west, fifty-four feet and two-tenths, to a stake on the south corner of Penn street and Race street afore-said ; and along the south-east side of said Race street,*

Penn: Streets – Strip & Gore Doctrine (1)
Firmstone v. Spaeter, 150 Pa. 616 (1892)

- Deed to lands bounded by public roads. Where a street or road is called for as a boundary in a contract for the sale of land, …
- …**the middle line of the street is always intended unless the contrary plainly appears;** …
- …and a purchaser who agrees to buy a certain tract of land at a certain price per acre, the same to be surveyed, is bound to pay at that price for the parts of the beds of boundary roads included within the lines of the tract so described.

Penn: Streets – Strip & Gore Doctrine (1)
Firmstone v. Spaeter, 150 Pa. 616 (1892)

- *" all that certain messuage or tenement and tract of land situate in the borough of Jenkintown, bounded by … Walnut Lane and Greenwood Avenue, containing forty-one acres, more or less, (the same to be surveyed) together with the appurtenances thereto belonging."*

Penn: Streets – Strip & Gore Doctrine (1)
Fitzell v. Philadelphia: 211 Pa. 1 (1905)

- "The leading case in this state enforcing this general principle is *Paul v. Carver, 24 Pa. 207,* decided in 1855; it is followed down to *Higgins v. Sharon Borough, 5 Pa. Superior Ct. 92, decided in 1897,* probably in number twenty cases, all of them adhering strictly to the same principle.
- The large number of cases since are to be ascribed to two causes, first, Paul v. Carver, was apparently inconsistent with two earlier cases,…

Penn: Streets – Strip & Gore Doctrine (2)
Fitzell v. Philadelphia: 211 Pa. 1 (1905)

- Many attempts to so limit it by evidence dehors the deed in subsequent cases were made, …
- …but the **rule has finally settled down to this,** that to so limit there must be an express reservation, …
- …or the **lines must be stopped short of the middle of the street or highway by a permanent natural or artificial monument.**
- This brings us to the question involved in this issue."

Penn: Streets – Strip & Gore Doctrine (1)
Scholl v. Emerich, 36 Pa. Super. 404 (1908)

- **So, where a street is called for as a boundary, the title passes to the center of the street.** …
- If no other reason could be assigned in support of this rule of construction, the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights ought to have great weight."
- He then referred to the inconvenience which in cities would result from the adoption of any other rule when a street was called for as a boundary, and concludes thus:

Penn: Streets – Strip & Gore Doctrine (2)
Scholl v. Emerich, 36 Pa. Super. 404 (1908

- "Influenced by these considerations the **law has carried out the real intention of the parties by holding that the title passed to the center of the street subject to the right of passage.**
- Where a street is called for as a boundary it is regarded as a single line.
- **The thread of the road is the monument or abuttal,"** …
- …and cites Newhall v. Ireson, 62 Mass. 595.
- In the case thus cited, Chief Justice Shaw said: **"The road is a monument, the thread of the road, in legal contemplation, is that monument or abuttal…"**

Penn: Streets – Strip & Gore Doctrine (1)

Rahn v. Hess: 378 Pa. 264; 106 A.2d 461 (1954)

- **Where land is laid out in town lots, with streets and alleys,** the owner receives a full consideration for the streets and alleys in the increased value of the lots…
- **If the streets were to be vacated, of what value would they be to the original grantors, unless for the purposes of annoyance to the lot owners?**

Penn: Streets – Strip & Gore Doctrine (2)

Rahn v. Hess: 378 Pa. 264; 106 A.2d 461 (1954)

- A long strip of ground fifty or one hundred feet wide and perhaps several miles in length, without any access to it except at each end, is a description of property which it is not likely either party ever contemplated as remaining in the grantor of the lots on each side of it.
- Influenced by these considerations, the law has carried out the real intention of the parties by holding that the title passed to the centre of the street subject to the right of passage.
- Where a street is called for as a boundary it is regarded as a single line. The thread of the road is the monument or abuttal …

The Limits of Markers on Riparian Features

Penn: Low Water Mark a Boundary Line (1)

Cobb v. Keen Lake Camping: Unpublished 2015

- It is clear that the low-water mark of Keen's Lake is the line which becomes the shoreline when the volume of water in the lake sinks to its low point. *It is not, as Cobb proposes, the point where the lakebed dips down closest to the center of the earth.*
- As KLCCR's expert explained, **the reason deeds for properties along a body of water were made to the low-water mark was to guarantee access to the water**:
- "back in the day when you needed cattle to be able to get to the water to drink, they would make it to the low[-] water mark so they weren't standing four f[ee]t back" when the water was at its low point…

Penn: Low Water Mark a Boundary Line (2)

Cobb v. Keen Lake Camping: Unpublished 2015

- Unless the volume of water in Keen's Pond is at its lowest, Cobb owns land that is under water.
- **At all other times, his boundary line is not the shoreline, and he in fact owns land that is under the water.**
- Thus, there is no merit to his argument that he could not have been a plaintiff to the 1972 action unless the low-water mark is the zero-foot contour line.

Penn: Low Water Mark a Boundary Line (3)

Cobb v. Keen Lake Camping: Unpublished 2015

- **The trial court's determinations that the low-water mark and the zero-foot contour line are not the same,** and …
- …that Cobb's land below the waters of Keen's Lake extends only to the low-water mark, are a result of the correct application of the law to factual findings that are supported by the record.
- Hence, Cobb's first issue warrants no relief.

Penn: Artificial Lake is Different (1)

Miller v. Lutheran Conference & Camp Ass'n,
331 Pa. 241 (1938)

- …but in the case of a **non-navigable lake or pond where the land under the water is owned by others,** …
- …no riparian rights attach to the property bordering on the water, and an attempt to exercise any such rights by invading the water is as much a trespass as if an unauthorized entry were made upon the dry land of another:

Penn: Artificial Lake is Different (4)

Intili v. Salak
403 Pa. Super. 578, 589 A.2d 761 (1991)

- However, we note that the July 12, 1990 order merely embodies the long-held legal principle that **where a non-navigable lake is entirely on property belonging to one party,** …
- …that party has sole rights to it as the owner, and other owners whose property forms the shoreline do not obtain the right to use the lake by virtue of their ownership of adjoining land forming the shore.

Justice Thomas Cooley
Duty of the Surveyor

Quote from Justice Cooley
"The Judicial Function of Surveyors"

- When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor.
- **It is by no means uncommon that we find men whose theoretical education is thought to make them experts, who think that when the monuments are gone the only thing to be done is to place new monuments where the old ones should have been,** and would have been if place correctly.
- **This is a serious mistake**. The problem is now the same that it was before: to ascertain by the best lights of which the case admits, where the original lines were.

Quote from Justice Cooley
"The Judicial Function of Surveyors"

- If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, **the place of the …**
- **…original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern,** even though the effect be…
- … to make **one half-quarter section 90 acres and the one adjoining, 70;** for parties buy, or are supposed to buy, in reference to these monuments, and are entitled to what is within their lines, and no more, be it more or less.
- While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes.

Cooley – The Duty of the Surveyor

- 1. He is to search for original monuments, or for the places where they were originally located,…
- … and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant.
- By monuments, in the case of government surveys, we mean of course, the corner and quarter stakes.

Interaction between Multiple Descriptions

Simultaneous vs. Sequential Conveyance

- Simultaneous conveyance often occurs when a plat is recorded showing multiple lots in a subdivision; each lot has equal rights regardless of which is sold first.
- Sequential conveyance occurs when properties are sold individually, each by it's own survey and deed.

PENN: Junior-Senior title (1)

Manhattan Coal v. Green: 73 Pa. 310; 1873

- **An older survey cannot be changed or contradicted by the lines of a junior survey.**
- **The calls of the latter, whether mistaken or true, do not limit the lines of the former**
- In affirming the defendants' 11th point the court correctly informed the jury, **that the proper way to locate the block of thirteen** was **first to run out the older blocks for which it called,** and if there was not a sufficient vacancy left to contain the whole thirteen, those of the thirteen first surveyed would be entitled to the vacant land, but **in no event could any of the younger block exclude any of the older block.**

PENN: Junior-Senior Title (5)

Merlino v. Eanotti: 177 Pa. Super. 307; 110 A.2d 783; 1955

- Where there is a **clash of boundaries in two conveyances from the same grantor**, …
- …**the title of the grantee in the conveyance first executed is, to the extent of the conflict, superior;** and this is so even though the conveyances were made with reference to a map or plot:

PENN: Simultaneous Conveyance (1)

Morrison v. Seaman: 183 Pa. 74; 38 A. 710; 1897

- In popular use the phrase **"a block of surveys"** means any **considerable body of contiguous tracts surveyed in the same warrantee's name, without regard to the manner in which they were originally located.**
- In legal use the same phrase is employed to describe a body of contiguous tracts **located by exterior lines, but not separated from each other by interior lines.**
- But the interior lines of the Robert Morris warrant are not left to be ascertained in this manner.
- Two tiers of tracts directly west of the district line, containing six tracts each, had all their corners marked upon the ground by the surveyor, which fixed absolutely the position of all their lines.

PENN: Simultaneous Conveyance (2)

Morrison v. Seaman: 183 Pa. 74; 38 A. 710; 1897

- **In the absence of monuments of the original surveys, calls for adjoiners, courses and distances** and the legal presumption that the surveys were made as they were returned into the land office are to be resorted to in order to locate the line of any given survey
- **In the case of interior members** of a block the rule is that **marks made by the surveyor** for any tract in the block are evidence for the purpose of fixing the lines of any other tract in the same block
- But **where lines are run and marks made by the surveyor for a particular tract sufficient to fix its place** on the ground, the **general rule is that its place must be found by tracing the footsteps of the surveyor.**

PENN: Simultaneous Conveyance (1)

Mathers v. Hegarty: 37 Pa. 64; 1860

- True, **the surveys were made on different days not distant from each other**, but this **does not militate against their having been located as one body.**
- It rather tends to show the honesty of the surveyor.
- **It is vain to deny that surveys thus made by one surveyor upon warrants thus calling for each other returned to the land office on the same day,** and belonging to the same owner, are to be regarded as one block, and located together.

PENN: Simultaneous Conveyance (2)

Mathers v. Hegarty: 37 Pa. 64; 1860

- where the question is what is the true location of a survey more than sixty years old, of which there are no visible monuments, and which must be located by its calls for other surveys, …
- …it is not error for the court to say to the jury that it cannot be severed from the body of which it was returned as a part, and for which it calls, when, by…
- … **adhering to such body, it answers the greater number of its calls, preserves its figure and its distances, and also its quantity, even though the consequence be that another call must be disregarded.**

PENN: Simultaneous Conveyance (3)

Mathers v. Hegarty: 37 Pa. 64; 1860

- We understand the court below as having said no more.
- **The fact that such a location caused an interference with a junior survey, is of no consequence whatever.**
- **The true question is, what was the location before the junior survey had any existence?**
- **What it was then it must always continue to be.**

How Much Research is sufficient

- In order to determine the correct solution in a sequential conveyance scenario, the surveyor must search the chain of title for each lot that affects his solution.
- Is there any possibility that a description, copied in several iterations from an original survey, may include one or more transcription errors??
- Additional research may be necessary to determine the appropriate age of trees called for as monuments.

Case Study – Research: Ohio (1)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- *The Dispute:* This case involves a dispute over the ownership of the 14-foot right of way reserved in the Sims deed. **Over the years, all parties and their predecessors in interest have used the right of way at issue for ingress and egress to the adjoining properties.**
- **There have been multiple surveys performed in this case. Each of the surveys performed used a line within inches of the others to mark the western boundary of the property** to the immediate east of that property owned by the plaintiffs and the defendants. **In other words, these surveys use a similar line to mark the western boundary of the Old Schoolhouse Lot.**

Case Study – Research: Ohio (2)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- The court finds that the surveys conducted by XXXXXXXX, XXXXXXXXXX, and XXXXXXXX **do not reflect the intent of the grantor, as evidenced by the chains of title. In the original deed from Sims to Brown, dated April 30, 1860,** the grantor states that the property is conveyed "Reserving the right of way along Smith's line to the Williamsburg road." From this, the court finds that Sims intended to convey the property with a reservation of a right of way along Smith's line, which became the Old Schoolhouse Lot.

Case Study – Research: Ohio (3)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- **Although the language in the deed may have changed, the intent of the original grantor,** Sims, to convey the property subject to a reserved **right of way** across the plaintiff's property and connecting the defendant's property to the main road **is clearly reflected in the language so chosen.**
- The court finds, however, that the **intent of the grantor was lost within the defendants' chain of title**; and this is, perhaps, **the reason that the surveys concluding that the defendants own the land do not echo the intent of the original grantor, Sims.**

Case Study – Research: Ohio (4)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- From this, the court finds that the **intent of Sims in the Bess deed was to convey the Bess property with an assignment of the use of the right of way** across the Brown property. This specific language is also used in the deed from Bess to Beck, recorded on February 5, 1869.
- The confusion in the defendants' chain of title appears to have arisen on March 13, 1906, when Beck conveyed a "tract or strip of land for a Right-of-Way" to C.W. Jordan (the "first" deed). **That deed appears to indicate, at first glance, that Beck owned the property outright.**

Case Study – Research: Ohio (5)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- Upon reviewing the first deed for the "tract or strip of land for a Right-of-Way," the court finds that **Beck did not intend to convey fee simple title in the strip of land** but instead made a conveyance of the use of a right of way across the adjoining property. This is evidenced by the language used, i.e., "for a Right-of-Way"
- However, many of the deeds subsequent to the March 1906 deed **dropped the "right-of-way" language, and they appear to convey fee simple title to the 14-foot tract of land.** This "third tract of land" appears in the conveyance from Jordan to Hughes, recorded February 26, 1914…

How many Standards for sufficiency of research

1. Current deed descriptions of subject parcel and any adjoiners
2. Research subject parcel back to source of present description.
3. Research Back to creation of each boundary line
4. Research Back to State Grants.
5. Complete Title Search.
6. Definition used by the courts: If missed evidence, you didn't do enough research!
7. To know the answer

Some Truly Awful Excuses for Substandard Research

- That would be really Inconvenient…
- I was over budget…
- We're Booked Solid…
- My Client won't stand for that…
- My Client is in a hurry…
- That's not how it's done here…
- These things happen…

Three questions that we should ask

- Is there any information or evidence that you do not understand on your project?
- Can you make a clear statement defending why you hold/set/don't agree with every corner?
- Have you paid adequate attention to rights of way and easements providing access to or crossing your project?

The Constellation of Evidence.

- The Surveyor needs to consider all available evidence – Deeds, conversations with neighbors, Sketches on grocery bags, as well as all physical evidence on the ground. Balk lines, old creek beds, fences, age of trees, creek fords, old road beds are all helpful.
- A program presently available on the NGS website to calculate approximate magnetic variance is very useful.
- The idea is to build a "high degree of professional surety" by developing a strong preponderance of evidence.

Apportioning Excess-Deficiency

When Considering Apportioning…

1. Single Plat as the Source…or not…
2. Existing Original Corner Markers…or not…
3. Detailed Deeds vs. Calls for Plat Lot Number.
4. Is there an Unmistakable Mathematical Blunder.
5. Status of Adjoining public ways, interior alleys.
6. Apparent 'original intent' regarding 'Remnant Lots.'
7. Permanence and age of existing structures on Lots.
8. Time-span between recorded plat and present dispute.
9. Reliance of lot purchasers on subsequent surveys.
10. Federal rules associated with Government Boundaries.

Florida: Apportioning (1)

Pompano Beach v. Beatty:
177 So. 2d 261; 1965

- It is a well established rule that an **excess or deficiency by reason of an error of the surveyor who made the original plat** or by inaccuracies therein, such deficiency or excess **must be apportioned among all lots and blocks according to their apparent size as shown on the plat.** ***Clark on Surveying and Boundaries, 2d Ed., ß 189.***
- This rule, like most well settled rules, **has its exception in a situation where its application is impractical or there are facts and circumstances that are otherwise controlling.**

Arkansas: Apportioning (1)

Hughes v. Yates: 311 S.W.2d 179 (1958)

- In arriving at the result just stated I have applied the rule given by the text writer in ***8 Am.Jur. 796, "Boundaries", § 71***, which is as follows:

"If, after a tract of land has been subdivided into parts or lots and title thereto has become vested in different persons, it is discovered that the original tract contained either more or less than the area assigned to it in a plan or prior deed, the excess should be divided among, or the deficiency borne by, all of the smaller tracts or lots in proportion to their areas. * * * The sequence of lot numbers on the plat of lots is immaterial in the application of the rule. The sequence of sale of the lots is likewise immaterial

AZ: Rationale for Apportioning (7)

Galbraith v. Parker: 17 Ariz. 369; 153 P. 283; 1915

- "If lines of a survey are found to be either shorter or longer than stated in the original plat or field-notes, the **causes contributing to such mistake will be presumed to have operated equally in all parts of the original plat or survey,** and every lot or parcel must bear the burden or receive the benefit of a corrected resurvey, in the proportion which its frontage, as stated in the original plat or field-notes, bears to the whole frontage as there set forth.
- This rule applies to government surveys.

AZ: Apportioning – Sometimes… (8)

Galbraith v. Parker: 17 Ariz. 369; 153 P. 283; 1915

- In such cases **the rule is that no grantee is entitled to any preference over the others,** and the excess should be divided among, or the deficiency borne by, all of the smaller tracts or lots in proportion to their areas.
- **The causes contributing to the error or mistake are presumed to have operated equally on all parts of the original plat or survey,** and for this reason every lot or parcel must bear its proportionate part of the burden or receive its share of the benefit of a corrected resurvey.

NM: Don't Apportion past corner. (3)

Canavan v. Dugan:
10 N.M. 316; 1900-NMSC-022; 62 P. 971; 1900

- If this were a contest between the owner of the south half and the owner of the north half of section 15, it might be that the line would have to be extended north so as to include the natural objects called for in the field notes, and thus make the south half of the section much larger than the north half.
- But **we know of no reason or rule of law requiring an error to be protracted beyond the point which will include the natural or artificial monuments called for** in the field notes.

Ohio: Apportioning Excess-Deficiency

Ohio – Apportionment in Subdivision (1)

Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- The rule is that the boundaries fixed by a recorded plat of a subdivision govern where they are true and correct, but not as to valid claims of adverse possession. See *Brewster v. Bulaw, 296 S. W., 372.*
- Where a surveyor makes a plat of certain land, and the dimensions or length of the lines that are laid down upon the plat conflict with proved or admitted facts they must give way to them.

Ohio – Apportionment in Subdivision (2)

Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- **Subject to qualifications**, …
- …the general rule is…
- … that where a tract of land is subdivided and is **found to contain either more or less than the aggregate amount called for** in the survey of tracts within it, …
- …the proper course is to apportion the excess or deficiency among the several tracts.

Ohio – Apportionment in Subdivision (3)

Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- In *8 Amer. Jur., Page 796, Section 71*, it is stated that…
- … ***"if after a tract of land has been subdivided into parts or lots, and title thereto has become vested in different persons, …***
- ***…it is discovered that the original tract contained either more or less than the area assignd to it in a plan or prior deed, …***
- ***…the excess should be divided among, or the deficiency borne by all of the smaller tracts or lots in proportion to their areas."*** See also *March v. Stephenson, 7 Ohio St., 264.*

Ohio – Apportionment in Subdivision (4)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- In *Wilson Bros., Inc. v. Kalm et, 314 Ill., 275, 145N. E., 340,* …
- …it is stated in the second proposition of the syllabus that …
- **…"in absence of any agreement or question of title by adverse possession, where a block has been platted into lots, and lots sold, shortage in block will be pro rated among the several lots. "**

Ohio – Apportionment in Subdivision (5)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- **Although it is the general rule** that where land is subdivided by a plat, the shortage shall be apportioned among all of the lots, **such apportionment will only be made in the absence of facts showing that equity does not require the application of a different rule.**
- It would be impractical, if not impossible to take all of the land included in said Davis Fourth Addition to said Village of Mineral City, Ohio, and pro-rate this alleged deficiency among all of the lots contained therein.
- To do so would affect the location of all existing streets and alleys in the said addition.

Ohio – Apportionment vs. Dedicated Alley (6)
Labus v. Jones, 93 Ohio Law Abs. 161 (1963)

- The recorded plat of said Davis' Fourth Addition to said Village of Mineral City, Ohio, shows that an alley 16-1/2 feet wide, between lots 230, 231, 232 and 233, and lots 242, 243, 244 and 245 was donated to the village by the acceptance of said Plat.
- The alley not having been vacated, and having been donated to the village for public use by the proprietor before any lots were sold, the court must fix its width as 16-% feet. Any short- age must be apportioned as nearly as possible and practical pro rata among the lots in question.

Indiana – Apportionment Dispute (1)
Geiger v. Uhl, 204 Ind. 135 (1932)

- The appellees bought a lot on the west side of North Meridian Street, south of Twenty-second Street, in the city of Indianapolis and erected thereon a brick business building.
- The appellant, who owns the north forty feet of the lot which adjoins appellee's lot on the south, claims that the building erected by appellees extends over upon his lot a distance of 4 3/8 inches…

Indiana – Background of the Case (2)
Geiger v. Uhl, 204 Ind. 135 (1932)

- The gasoline station (and the brick building west of it) occupy the full width of lot 32, viz: 50 feet south of Twenty-second Street and the foundation of appellees' store building is 49.64 feet wide extending south from lot 32 (lot 31 being 50 feet wide).
- There is a hedge between appellees' and appellant's lots extending east from the alley in the rear (on the same line an old fence formerly stood), which hedge is 100 feet south of Twenty-second Street.

Indiana – Background of the Case (3)
Geiger v. Uhl, 204 Ind. 135 (1932)

- There is a hedge in the front and a board fence in the rear on the appellant's south boundary line—extending all the way from Meridian Street to the alley—and such hedge and fence are each 140 feet south of Twenty-second Street.
- These are actual distances measured on the ground, and are also the exact distances as shown on the plat,

Indiana – Apportionment – The Rule (4)
Geiger v. Uhl, 204 Ind. 135 (1932)

- This rule is: where a tract of land is subdivided and is subsequently found to contain either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts, 9 C. J. 295, except so far as possession has fixed the limits,
- *Anderson v. Wirth (1902), 131 Mich. 183, 91 N. W. 157.*
- The rule is supported by numerous decided cases…

Indiana – Apportionment is Guesswork (5)
Geiger v. Uhl, 204 Ind. 135 (1932)

- …although as stated in *Barry v. Desrosiers (1908), 14 B. C. 126, 128*, …
- …it is **mere guess work** to say arbitrarily that the error extended uniformly along the whole frontage, and it is a rule that is more properly prescribed by legislation
- (as in *Maysville v. Truex (1911), 235 Mo. 619, 139 S. W. 390)* than by judicial construction.
- Its application when only one or two property owners are litigants, out of the many among whom a deficiency is distributed, must be careful in order to avoid adjudicating the rights of those not before the court.

Indiana – Qualification for Apportionment (6)
Geiger v. Uhl, 204 Ind. 135 (1932)

- A qualification of the apportionment rule is that when dimensions are given to each subdivision (lot) except one (or two) **which is an irregular space, without dimensions designated**, …
- …such **remnant portion will bear the shortage or receive the overplus.**

Indiana – Apportionment not Applicable (7)
Geiger v. Uhl, 204 Ind. 135 (1932)

- From our examination of the evidence we are not convinced that a determination of the legal question with reference to the "apportionment" and "remnant" rules is necessary to a decision of this appeal or that the trial court in determining this action in appellees' favor was bound to decide or did decide such question.
- On the contrary we believe the trial court was obliged to find in favor of the appellees for the reason that the **facts proven do not make out a case for the application of the rule** contended for by appellant, even if that rule be correct, which we neither concede, nor decide.

Indiana – Apportion the Entire Block (8)
Geiger v. Uhl, 204 Ind. 135 (1932)

- If there is a shortage that should be apportioned among all of the lot frontages on the west side of Meridian Street between Twenty-second Street and McLean Place (or between Twenty-second Street and the alley south of McLean Place) and no adjustment or apportionment has ever been made, then all of such frontagers should have been made parties to this action.

PENN: Apportioning Rejected (1)
Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- Defendants suggest, "The boundary for Noah Mellott must be constructed by considering his total acreage after apportioning the boundary between Noah Mellott and William Valiance based on their joint title of 125 [acres,] more or less."
- Because neither Noah nor Valiance had superior title, Defendant's argue apportionment is required.
- To that end, Defendants propose the following calculation:

PENN: Apportioning Rejected (2)

Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- *Based on the acreage that Noah Mellott and William Valiance purported to divide, Noah Mellott acquired 68.86 percent of the title contained in the Divelbiss Deed (110.25 acres divided by 160.11875 acres total) and William Valiance acquired 31.14 percent of the title (49.86875 acres divided by 160.11875 acres total). Applying these percentages to the title conveyed by the Divelbiss Deed, Noah Mellott only acquired 86.075 acres or 86 acres and 12 perches.*

PENN: Apportioning Rejected (3)

Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- Practically speaking, what the Mellotts propose could upend nearly 150 years of property ownership by MFLP and their predecessors in title.
- Indeed, Noah and Valiance entered into an agreement in 1870 to divide the land they obtained from Divelbiss in 1865. **The agreement included a drawing or survey with a specific metes-and-bounds description of each parcel as well as noted the adjoiners.** After a series of conveyances, Noah's parcel was obtained by George and Sally Harris.
- The First and Second Harris Deeds, with **specific, although erroneous metes-and bounds descriptions**, were executed in 1917 and recorded in 1944 and 1932, respectively.

PENN: Apportioning Rejected (4)

Malot v. Mellott: No. 502 MDA 2020 (Unreported)

- The act of recording provided all concerned — including future purchasers — the opportunity to learn of error and inconsistency.
- **Inexplicably, the first discovery of the errors** in the metes-and-bounds descriptions in the First and Second Harris Deeds was in the instant timbering dispute in **2010**, some 140 years after Noah and Vallance entered their agreement and 90 years after the Harris Deeds were executed.
- Now, in 2019, this Court is asked to turn back time and correct the errors.