

**BOUNDARY LOCATION IN SEQUENCE
AND SIMULTANEOUS CONVEYANCES**

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SEQUENCE CONVEYANCES

Defined

Sequence conveyances are all conveyances except simultaneous conveyances. More specifically, sequence conveyances are those in which parcels are created at different times by different instruments and, possibly, by different grantors.

The Primary Rule

The primary rule in dealing with sequence conveyances is that, to the extent possible, the senior right gets what is granted by the deed, without regard to conflicting claims of the junior right. In other words, the junior right yields completely to the senior in any conflict. There is no compromise or sharing involved. There is no proration.

What is intended by the deed?

The purpose of interpreting a conveyance is to discover the intent of the parties at the time of the conveyance. However, that intent is never determined by the later statements of the parties as to their intent at the time of the conveyance. Asking the grantor what he intended to sell or the grantee what he thought he was buying is never admissible to show the intent of the conveyance or interpret a deed. It is simply too open to fraud to admit into evidence. What can be considered, outside of the deed itself, in determining what the parties intended to convey? According to the *parol evidence rule*, pretty much nothing at all.

The Parol Evidence Rule.

The parol evidence rule is not a rule of evidence at all, but a substantive rule of law. This rule states that, in the absence of an ambiguity in the deed, its meaning must be determined solely from the language of the instrument itself. If the deed is clear and unambiguous on its face, absolutely no outside evidence can be admitted to vary or contradict its terms and you must determine the limits of the conveyance from the deed language alone. This rule is very strictly applied in most cases. It means that if a particular fact or piece of evidence is not referenced in the deed itself, it cannot be considered at all when reading the description unless one first determines that the description cannot be meaningfully applied without that evidence. Note that an ambiguity is not created merely because the parties to the conveyance ascribe different meanings to the description. If the court can apply the description to a unique piece of land without considering any parol evidence, then there is no ambiguity

even if both parties believe a different parcel was the intended subject matter and the conveyance will be upheld as conveying the property clearly described in the deed. The ambiguity itself must be of sufficient magnitude to actually affect the ultimate location of the property. However, if the deed is so ambiguous that the identification of the property depends solely on parol evidence, the conveyance fails.

Limits on the Parol Evidence Rule.

There are, however, some limits on this rule. First of all, if the deed refers to another document, like a plat, that document is not extrinsic evidence but is considered part of the conveyance itself, just as if it were attached to the deed. Moreover, reference to a survey completed prior to the conveyance is considered to be a reference to another document and the entire survey then becomes a part of the description. This includes not only the plat or map of the survey, but all evidence thereof, including the field notes, the monuments used to control the survey and the monuments set in the survey. Therefore, the monuments set in the course of such a survey are not extrinsic to the deed, but are an integral part of the description. As will later appear, it is the location of such monuments, not the monuments themselves, which is of paramount importance. If the monuments are lost or destroyed, the location in which they existed, if demonstrated by competent evidence, will still control the boundary. But is evidence of the location of the lost monuments within the proscription of the parol evidence rule? Colorado case law concludes that, the monuments themselves being without the ambit of the rule, evidence of their location in the event they are lost is also be admissible. As a part of the above limitation, it is universally accepted that, when a description contains a call to a corner in the public land survey system, that entire survey system is included as a part of the deed and the rule does not preclude extrinsic evidence of the location of corners in the said system. The same is true of calls to lot or block corners or lines in an adjoining subdivision. The entire plat and all of the original corners actually set in the survey thereof become a part of the conveyance, even though the property conveyed is not within the plat bounds. The mere call to a corner therein is sufficient to include the plat and the survey within the deed and, because of that inclusion, evidence of the location of these or other corners in the subdivision is admissible. Therefore, if a metes and bounds description of property lying outside of *Zuchini Heights, Tenth Filing* contains a call to the Northwest corner of Lot 5, Block 16 of that subdivision, and the monument for that lot corner cannot be found on the ground, it is permissible to use other monuments in Zuchini Heights to re-establish the location of the called monument.

Testimony of location on the ground.

As a further limit on the parol evidence rule, it has been held that this rule does not preclude

testimony of surveyors as to the location of the property on the ground. It simply requires the surveyor to locate the description as set forth in the deed without using any outside evidence *to vary or explain the language of the description*. You can use extrinsic evidence, or evidence outside the language of the deed, to locate the conveyance on the ground. You just cannot use such evidence to explain, vary, decode or deduce the meaning of, the description itself. For example, if a deed calls for a #5 rebar driven in the ground, you cannot accept a 1" axle set in concrete as the monument, even if the instrument man on the crew who did the survey tells you he clearly recalls setting that monument instead of the #5 bar. His testimony is extrinsic evidence offered to vary or contradict the written conveyance. However, in the same circumstance you can use fences and other improvements to show that the axle is in the location where the original monument was placed. Here, the extrinsic evidence, that being the location of the improvements and testimony that they were built and located using the original monument, is not offered to vary the written conveyance, but rather to allow location of some of its elements on the ground. We aren't trying to substitute a different monument for the one described in the deed. We're merely establishing where the monument described in the deed was located before it was destroyed.

Order of importance of conflicting calls.

When interpreting a deed which contains conflicts among the several elements of the description, the following order of precedence is to be used:

1) *Call for a survey*. This applies only if the survey is performed before the conveyance and is called for in the conveyance. 2) *Call for monuments*. This applies only if the monuments are described in the deed with sufficient detail to allow certain identification. The monuments must be shown to be the original monuments called for in the deed and to be in their original location. If the original monuments are disturbed or missing, their original location will still control if this can be shown from parol evidence, which is admissible for this purpose. A call *to* a fence, a road, a boundary line, a stream or any other identifiable object is a call to a monument. A call *along* a fence, boundary line or other identifiable line is considered a call to two monuments and is superior to a call for a bearing. A call to a point in the public land survey system is a call to a monument even when no physical monument is described. A call to a monument will always control a distance or bearing call if the monument, *or its original location*, can be established. This means you have to keep your head up when conducting boundary survey, literally. Too often, it seems, surveyors spend hours, even days, with their heads down searching for pins, crosses, axles and caps. If they find none of those wondrous things, off they

go to set the missing point using the record measurement. Clearly, the surveyor needs to spent adequate time in a diligent search for monuments and, just as surely, there will come a time when there is simply no alternative to reliance on bearing and distance calls. Sometime between these two events, however, there should come a time when the surveyor looks up to observe the larger environment around him. Before you are allowed to throw in the towel, forget about the monument calls and begin setting points based upon record course and distance calls, you are required to determine that the original location of the missing monuments cannot be deduced form other evidence. Are there improvements like fences or buildings that would indicate the original location? How about water wells? if a mining claim is involved, is the discovery shaft still evident? How about an adit reported in the patent documents or in statements of improvement? Have you spoken to people in the area who might remember the monument and point out improvements built from its location? Are there any old surveys around that might disclose its location? In short, have you taken reasonable steps to try to re-establish the location of the missing monument? In Colorado, the case law clearly establishes that extrinsic evidence is admissible to show the location of a missing control monument and that the location so re-established controls bearing and distance calls.

3) *Distance calls.*

4) *Direction, bearing or angular calls*

5) *Calls for a specific area*

6) *Calls to co-ordinates* of any kind, including state plane co-ordinates. This low priority seems to result from the courts lack of understanding about what coordinates are, what they represent and how they are obtained.

The importance of seniority.

Seniority counts in the location of sequence conveyances. The senior deed always gets the full measure of what is described in the conveyance when in conflict with a junior deed. There is no proration or apportionment. The junior conveyance always yields completely to the senior conveyance.

Seniority does not expand the description.

That said, where two deeds are not in conflict, seniority affects neither. If two deeds do not conflict, there is no need to apply senior - junior principles, since neither deed will be allowed to benefit beyond its plain meaning. In other words, seniority will not allow the description in a deed to be expanded beyond that which is clearly conveyed. If descriptions that supposedly abut do not actually coincide, the resulting gap or gore is not apportioned to the senior deed.

Determining relative seniority.

There is an old adage that first in time is first in right. In modern land titles, however, this is not necessarily the case. First of all, in most states, and certainly in Colorado, first to record is usually first in right. Beyond that however, seniority is affected by a number of factors including the language of the conveyances, the descriptions of the properties conveyed, the relationship of the parties, the extent of the title held by the various grantors, the existence of possessory rights and whether the description can actually be located on the ground.

Seniority as between Grantor and Grantee.

As between the grantor and the grantee, the recording date is clearly meaningless. In that case, seniority is determined first from the language of the deed itself. The principles involved in determining seniority from the deed language are discussed below. If the language of the deed does not resolve the issue, resort is next had to acts of the parties which indicate their intent as to the boundary. This is known as *practical location by the parties* and is not favored by the courts if other means are at hand. The acts considered must have occurred prior to the advent of the controversy and must consist of physical acts, such as the mutual erection of a fence on the supposed boundary line or the occupation of a specific, identifiable portion of the ground by one of the parties without objection by the other. Note that acts are required. Statements of the parties don't count unless they are in writing and signed by the party to be charged therewith, were made prior to the controversy and are of a promissory or contractual nature. If no clear intent as to seniority appears in the deed and there are no qualifying acts from which the court might find practical location by the parties, then the deed will be construed against the grantor, unless the grantee drafted it.

Seniority as between Strangers.

Where two grantees acquire properties by separate deeds made either by the same grantor or by different grantors and the deeds conflict, the following order of precedence establishes seniority:

Ripened possessory rights. These are conclusive, regardless of the paper title. We talking of course about adverse possession. In Colorado, adverse possession is effective even if made in the mistaken belief that the property possessed actually belongs to the adverse possessor. Therefore, if one takes possession of property in the belief that it is part of the conveyance described in the deed and continues in possession openly, continuously, exclusively, adversely and notoriously for eighteen years, one has seniority. The problem is that this is not seniority which the law permits surveyors, lawyers or title companies to recognize in the absence of a court decree.

Date of recordation. To the extent that the descriptions actually conflict, seniority may be determined by the relative recording dates of the deeds. Note that it is the recording dates that matter, not the dates of the conveyances. This may seem strange at first glance, particularly in those instances where the grantees have a common grantor. After all, having conveyed the ground to the first grantee, what could the grantor have had left to convey to the second grantee? But the law looks to assign relative fault in the transaction. Clearly, the grantor bears the greatest fault and, assuming he's available and solvent, he must make the second grantee whole. But what if he's dead, gone or insolvent? The law says the next most delinquent actor in the transaction is the first grantee if he failed to record. After all, if he had recorded in a timely manner, Grantee Two would have been able to discover the first conveyance and, presumably, the conflict with his proposed purchase and avoid the problem. The theory is that Grantee One should therefore suffer the loss because he allowed the conflict to occur by failing to timely record. Note, however, that this is only true if Grantee Two had neither actual or constructive notice of the first conveyance. If Grantee Two knew of the first conveyance or if he knew facts which should have caused him to inquire, he is bound by the first conveyance and Grantee One prevails. If Grantee One does record prior to the second conveyance, Grantee Two is at fault for failing to look for and find the first conveyance and he must therefore suffer the loss. Therefore, in Colorado, relative seniority is determined by recordation date, not by conveyance date.

Actual conflict.

Often, when the descriptions are properly read, no conflict actually exists. Where, for example, the first deed conveys the *South 65' of Lot 10* to A and the second conveys the *North half of Lot 10* to B, both conveyances being based on the assumption that Lot 10 is 130' long North to South, there is no conflict in the deeds when Lot 10 is found to be 142' long. B gets the North 71' while A gets the South 65' of the Lot and the Grantor still owns the 6' gap.

The effect of legal descriptions on seniority.

In the same scenario as in the preceding paragraph, where the conveyance to B once again reads *the North half of Lot 10*, and this time Lot 10 is found to be just 120' long, A's right to the 5' overlap may at first seem to be determined by the language of the description. Such is not the case, however. The fate of the 5' parcel depends entirely on whether A recorded before B and upon B's knowledge of the first deed. If B recorded first and did not know or have reason to know of the deed to A, B gets the 5', otherwise it belongs to A. This illustrates the point that while it may sometimes appear that seniority is determined by the deed description, such is rarely, if ever, the case.

Consider the following example. A conveys the *North half of Lot 10* to B and *Lot 10 except the North half thereof* to C. While the language of the description in C's deed may seem to establish the conveyance to B as senior, all it really does is preclude the possibility of any conflict. In essence, the exception is a call to the boundary of the conveyance to B as a monument. **Conclusion.**

The rules regarding the location of boundaries created by sequence conveyances may be thus summarized. First, to the extent possible, the senior right gets what is granted by the deed without regard to conflicting claims of the junior right. When interpreting a deed which contains conflicts among the descriptive elements, look first to a call for a survey, then to calls to monuments if the monuments are described in the deed with sufficient detail to allow certain identification. Next in order of precedence are distance calls, then angular calls, then area calls and finally calls for coordinates. Seniority will not expand a conveyance beyond that which is clearly described and gaps or gores are not mended by giving the excess to the senior right.

As between the grantor and the grantee to a deed, seniority is determined first from the language of the deed itself. In many, if not most, conveyances the deed language will resolve senior rights issues by resolving the conflict itself. This is to say that, when the deed is correctly interpreted, there simply is no conflict between adjoinders and therefore senior rights just never come into play at all. If, however, the language of the deed does not resolve the issue, resort is next had to acts of the parties which indicate their intent as to the boundary, or practical location by the parties. If no clear intent as to seniority appears in the deed and there are no qualifying acts from which the court might find practical location by the parties, then the deed will be construed against the grantor, unless the grantee drafted it.

As between strangers, senior rights are determined first by consideration of ripened possessory rights, then by date of recordation. In Colorado, first to record is first in right, unless the first grantee to record had either actual or constructive notice of the first conveyance, in which event he is bound

thereby.

The necessity to apply senior rights considerations may be obviated by the language of the deed itself. A call to a monument or boundary line, for example, doesn't really establish the seniority of the claim called. What it does is exclude any land on the other side of that monument or boundary line from consideration as a part of the conveyance, thus avoiding the conflict completely.

SIMULTANEOUS CONVEYANCES

Definition.

To be classified as simultaneous conveyances, parcels must be created at the same time by a single instrument. Lots in a subdivision are the usual examples of simultaneous conveyances. All lots in a single filing of a subdivision are created at the same time by the filing of a plat which, no matter how many pages it contains, is a single document. A single filing of a subdivision is therefore a simultaneous conveyance.

No Seniority.

Conflicts between parcels created in a simultaneous conveyance cannot be resolved by seniority, since all are equally senior. Since all lots and blocks in a single filing of a subdivision are created by a simultaneous conveyance, the filing of the plat, no seniority exists between lots or blocks. Separate filings of a subdivision, on the other hand, are not usually created at the same time by the filing of a single plat and therefore are not treated as simultaneous conveyances. Courts therefore apply seniority as between lots in two different filings of the same subdivision.

Exterior boundaries.

The exterior boundaries of subdivisions are governed by seniority, by principles of simultaneous conveyances, or sometimes by both. The external bounds of a subdivision created by re-subdividing lots of an existing subdivision are located by applying simultaneous conveyancing principles to the lots and blocks of the original subdivision, *unless* some of the area re-subdivided consists of only portions of lots. In the latter event, as discussed below, seniority considerations may well arise. The exterior boundaries of a subdivision created from lands to which senior rights apply will usually be established by seniority. Why usually? How else can they be determined?

Interestingly enough, if a parcel the boundaries of which are to be determined by seniority is subdivided by a survey which ties to a lot corner in an existing subdivision, the bounds of the new subdivision will be determined, at least in part, by simultaneous conveyancing principles. The corners of the existing subdivision lot, including that to which the new subdivision is tied, must be established by simultaneous conveyancing principles. Since the location of the existing lot affects the location of the exterior boundary of the new subdivision, the new exterior will depend on both simultaneous conveyancing and seniority principles. This situation can occur in a subdivision the exterior of which is described in part as *...commencing at the Northwest corner of Lot 11, Dirty Weasel Acres; thence North 100 feet to a point on the North line of said subdivision; thence continuing North to the point of beginning; thence....*

Location of interior lots within a subdivision.

The touchstone for locating lots within a subdivision is to preserve the intent of the original subdivider at the time of plating as to the size, shape and location of all lots. Therefore, the initial question is how we determine the intent of the original subdivider?

Subdivider's statements.

The only statements by the subdivider that are admissible to determine his intent at the time of plating are those contained in the plat itself. The subdivider's oral statements, whether made before, at or after the recording of the plat, can never be considered, as the use of such evidence to modify or even explain the plat would violate of the parol evidence rule. The same is true of his written statements, except as to those found on the plat itself. The parol evidence rule does not distinguish between oral and written evidence or, for that matter, photographic or video evidence. No evidence of any kind from outside the four corners of the plat is admissible in court to vary or contradict the written plat. This being so, it is incumbent upon you to avoid reliance upon such evidence in forming your opinion of the boundary location. To the extent that your opinion is based upon inadmissible evidence, it is unsupported as far as the court is concerned.

Evidence of Subdivider's intent.

To determine the subdivider's intent at time of platting, use original monuments in their original location if possible. If there are none such, you are next to consider the location of missing monuments as re-established by parol. Only after these sources are exhausted should resort be had to the plat by applying platted distances, using proration as necessary. If distances are not set forth on the plat, platted bearings are next used. Finally, if all else fails, one may use distances scaled from the plat.

Control of original monuments.

Original monuments always control lot location. This theory, developed last century when records were more inaccessible and literacy less prevalent, holds that iron in the ground is the best evidence of the developers intent, plat or no plat, and is also that evidence with which the ordinary owner is likely to be most familiar and to find most accessible. Therefore, monuments always control over plat dimensions. In Colorado, *Whiteman v. Mattson*, 446 P2d 904 (Colo. 1968) and *Morales v. CAMB*, 160 P.3d 373 (Colo. App. 2007) may be cited in support of this principle. This means where the original surveyor actually set his monuments, not where he should have set them or where he would have set them if only he had bothered to set any monuments at all.

What is an Original monument?

An original monument, for these purposes is only a monument set by the platting surveyor at the time and for the purpose of platting. If your name isn't on the plat, you are not the original surveyor, even if no one has set pins before. Later surveyor's monuments are not sacred, no matter how old, except to the extent they can be shown to have been set in the location of the original surveyor's monuments. Monuments set in a later survey do not control even if the original platting surveyor set no monuments and the later survey in question was the first to set monuments marking the lots.

Evidentiary requirements.

In order for a monument to control, a preponderance of the evidence must establish that it is the original monument in its original location. The burden is on the party offering the monument as evidence of the lot location to prove up the above elements. However, once some evidence of the required elements is presented, the burden of going forward with evidence to disprove the monument shifts to those opposing it. Courts in Colorado like monuments and tend to give the benefit of the doubt to those proposing the monument over those using platted locations.

Control of missing monuments re - established.

In this context, a monument is *missing* if it has either been destroyed or so disturbed that its present physical location cannot be shown by a preponderance of the evidence to bear a significant relationship to its original location. A monument which is shown never to have been set is not *missing* and therefore it cannot be re-established and can never control the location of lots. Thus, if you rely upon the re-established location of a monument, you must first show that the original surveyor did

indeed set something to memorialize the corner in question.

Re-establishing control.

If an original monument is missing and its original location can be shown by a preponderance of the evidence, including parol evidence which is admissible for this purpose, than such location will control the lot location over dimensions shown on the plat. The idea is that the monument itself was only important as the best evidence of the original subdivider's intent as to the location of the lots. Therefore, if its original location can be re-established by parol evidence, this is better evidence than the plat which often suffers from drafting errors and unrecorded revisions. So, if the original monuments can't be found, the next step is not to turn to the plat dimensions, but to search for evidence that monuments were indeed set by the original surveyor and evidence of the location of those monuments.

Evidence of prior location.

Courts have accepted many types of evidence to re-establish the original location of a missing monument. Testimony of witnesses who saw the monument in place near the time it was supposedly set and who can give a reasonably accurate physical description of the monument and its location is often accepted. Improvements built soon after the monument was set and which can be shown to have been located in accordance with the monument can also be determinative. Earlier surveys which note the monument as found and contain a sufficient physical description of the monument and its placement to allow identification and re-establishment are excellent evidence. Any other evidence the surveyor can find which tends to show the original location will generally be received by the courts. There is no particular order of precedence here and no one type of evidence is generally preferred over another. The idea is to accumulate as much evidence as possible of as many different types as possible to support the re-established location.

Control of plat dimensions.

Applying the dimensions on the plat to locate lots in the subdivision, with or without proration, is done only after all attempts to find or re-locate original monuments have failed. If resort must be had to the platted dimensions, one must rely first on the written distances appearing on the plat and then on the written courses, bearings or angles thereon. Resort is had to scaling only if the plat contains insufficient written dimensions to locate the lot.

Proration.

If a lot cannot be located by original monuments, either found or re-established, and one must resort to the platted dimensions, any excess or deficiency found between existing original monuments must be distributed among the affected lots in proportion to their record measure on the plat. Authority for the use of this rule of proration in Colorado is found in *Gaines v. Sterling*.

The Six Rules of Proration.

The following rules apply to the use of proration in locating simultaneous conveyances.

Proration is used as a last resort only. From the above discussion, it is clear that proration will never be used until all efforts to find or re-establish the missing corners have failed. Even if the necessary corners are missing, one should still try to localize the error, if possible. Sometimes it is possible to reach reasonable conclusions, based on the evidence discovered and sound surveying theory, as to exactly where the error occurred. If such a conclusion is possible, theory tells us we should put the error where it occurred and avoid proration. ***Note! This does not allow the application of the so called blunder rule to alter the location of found original pins or the re-established location of original pins!*** Nothing is allowed to move original pins or the re-established location thereof. It doesn't matter if you can localize the error or find and prove up the blunder. The original iron holds, period. Read *Morales v. CAMB*, attached hereto.

Use proration only between original monuments. Proration can be used only between original monuments or between the re-established locations of such monuments. Again, see *Morales v. CAMB*.

Rights established by possession are not altered. Proration can't alter possessory rights.

Record lengths required. Proration can only be used where the record lengths of the affected lots are shown on the recorded plat. Duh! Without record distances the math doesn't work.

Confine to blocks. Proration should be confined within blocks, where possible.

Streets and alleys not prorated. If proration must be applied between blocks, streets and alleys are allotted their full platted width and are not prorated.

The formula.

To calculate the prorated length of a lot line, first calculate the proration factor by dividing the distance actually measured between two original monuments by the platted distance between these same monuments, then multiply the platted length of the affected lot line by this factor.

$$(AM / RECORD)(RECORD LOT LENGTH)$$

The Remnant Rule.

When an undimensioned lot is platted at the end of a block, it is presumed that the subdivider intended to place all excess or deficiency for the block in that end lot and proration is therefor improper. The rule relies on the supposed intention of the subdivider for its justification, but a simpler justification is that proration is impossible in this circumstance since the record measure of the lot cannot be determined because of the missing dimension. Note that if the record lot dimension can be determined, by using the overall dimension of the block or by other written dimensions on the plat, the lot is not really a remnant, this principle doesn't apply, and proration must be used.

A variation on the rule.

What if the undimensioned lot is located in the middle of the block instead of at the end of the block? It is believed that the remnant principle would apply here as well. Even though the subdivider's intent may not be as clear, it is still impossible to apply proration since the record lot dimension is not available.

Another variation of the remnant principle.

This principle has also been applied when the so called remnant lot is not undimensioned but is instead irregularly dimensioned. This situation arises when one lot in the block has a dimension significantly different from the remaining lots which all share the same dimension. There is no known case where Colorado courts have applied this rule and you do so at your extreme risk!

Seniority considerations in partial lot conveyances.

Although seniority is never an appropriate method by which to determine the boundary between two lots in the same filing of a subdivision, it is a consideration when establishing the boundaries where parts of lots are conveyed. Consider the following conveyances. A conveys to B *Lot 10 and the East 35 feet of Lot 11, Dirty Weasel Acres*. A then conveys to C *the West 30 feet of Lot 11, Dirty Weasel*

Acres. Upon survey, the North corners of Lot 11 are located by proration at points 50 feet and 100 feet West of the Northeast corner of Lot 12. Instead of the expected 65 feet, we find only 50 feet of lot width. Here, suddenly, right in the middle of Dirty Weasel Acres Subdivision, we apply senior rights to determine the location of the line between B and C. If B recorded first, B wins and he gets all 35 feet called out by his deed, leaving only 15 feet for C. If C records first and he knows nothing of the conveyance to B, C wins and gets all 30 feet called for in his deed, leaving only 20 feet for B. *Seniority applies to this case because the two parts of Lot 11 were not created at the same time by the same instrument and are therefore not simultaneous.*

Conclusion.

In conclusion, the rules for the location of boundaries created by simultaneous conveyances are as follows. To be classified as simultaneous conveyances, parcels must be created at the same time by a single instrument, like a single filing of a subdivision.

Parcels created in a simultaneous conveyance all have equal seniority and therefore conflicts in their boundaries cannot be resolved by seniority. Lots in two different filings of a subdivision are not treated as simultaneous conveyances and conflicts are therefore resolved by seniority.

The external bounds of a subdivision created from lots of an existing subdivision are governed by simultaneous conveyancing principles while those a subdivision created from unsubdivided lands are subject to seniority considerations.

The guiding principle for locating lots within a subdivision is to preserve the intent of the original subdivider at the time of plating as to the size, shape and location of all lots. However, the only statements by the subdivider that are admissible to determine that intent are those in the plat itself.

In case of conflict between the elements of a plat, the following order of precedence applies: original monuments in their original location; the re-established location of missing monuments; platted distances, using proration as necessary; platted bearings; distances scaled from plat.

Original monuments, if found, always control lot location. This means where the original surveyor actually set his monuments, not where he should have set them. Original monuments are only those set by the platting surveyor at the time and for the purpose of platting. For a monument to control, it must be shown to be an original monument in its original location. The location of a missing original

monument may be re-established by parol evidence and if so re-established, will control the lot over dimensions shown on the plat. However, if the evidence shows that a particular monument was never set, it is not *missing* and therefore it cannot be re-established. Locating lots in the subdivision from the dimensions on the plat, with or without proration, is acceptable only after all attempts to find or re-locate original monuments have failed.

If resort must be had to the platted dimensions, one must rely first on the written distances appearing on the plat and then on the written courses, bearings or angles. Resort is had to scaling only if the plat contains insufficient written dimensions to locate the lot.

If one must resort to the platted dimensions, excess or deficiency found between existing original monuments must be distributed among the affected lots in proportion to their record measure on the plat. The following rules apply to the use of proration: proration is used as a last resort; there is no blunder rule in Colorado; proration cannot move original monuments or alter the re-established location of such monuments; proration cannot alter rights established by possession; proration can only be used where the record lengths of the affected lots are shown on the plat; proration should be confined within blocks; if proration must be applied between blocks, streets and alleys are not prorated. If there is an undimensioned lot at the end of a block, place all excess or deficiency for the block in that end lot. However, if the record lot dimension can be determined by using other dimensions on the plat, this principle doesn't apply and proration must be used.

Supreme Court of Colorado

CULLACOTT

v.

CASH GOLD & SILVER MIN. CO.

6 P. 211 - 1885

The facts of this case are novel. Prior to the acquisition of the government title it is not an unusual circumstance for a mining claim to be entered upon and appropriated by strangers to the location. A failure on the part of the original locators to comply with any of the specific requirements of the law relating to the location of mining claims, or failure to perform annual labor within the time and of the value required after location, is often made the pretext for jumping or relocating claims. But after the miner has complied with all requirements of state and federal statutes, -has bought ***180** and paid for his claim, and received the patent investing him with title thereto in fee-simple, -it has been supposed that the jumping period has expired, and that the miner was secure in the possession of his surface ground and improvements, at least. It would seem that even this ****212** rule has its exceptions; the case before us furnishing an example. The Cash mine, at Gold Hill, Boulder county, was located by Robinson, Hock, and Sanford in November, 1882, and was surveyed for patent early in the spring of 1873. Payment was made to the government, and a duplicate receiver's receipt issued to the locators, bearing date May 15, 1873. Considerable work appears to have been done upon the property; for, in addition to the discovery shaft covered by a shaft-house, five or six other openings, or workings, upon the vein were made. The vein is a strong one, and crops out on the surface from 500 to 1,000 feet.

A government patent was issued to the locators, February 4, 1875, for 1,500 feet in length by 50 feet in width, upon the Cash lode; being mineral entry No. 343, and lot No. 62, in Gold Hill mining district. The field-notes and plat of the official survey were incorporated as part of the description. The property became, and still remains, one of the best known mining properties in the vicinity of Gold Hill. Not only was its name familiar, but the lode itself was prominent, cropping out, as stated, upon the surface, and the workings thereon being distributed along the course of the vein. Its monuments also are known, used, and referred to in the location of mining claims in the neighborhood. The government title, thus acquired, was transferred to the Cash Gold & Silver Mining Company, the appellee herein, in June, 1875, and remained unquestioned until the autumn of 1880, when the appellants took possession of the lode, surface grounds, and workings, and located what they named the Queen of May lode, with the dimensions of 1,500 by ***181** 150 feet; the Cash lode and its improvements forming the interior of the parallelogram. The only perceivable excuse for this appropriation of the property of the appellee is a misdescription of the patented premises as to courses and distances; the principal error being in the course and distance of corner No. 1 from the quarter-section corner on the east boundary of section 12, township 1 N., range 72 W. of the sixth principal meridian. The bearing of the quarter-section corner from corner No. 1, as stated in the patent, is N. 83_39' E. and the distance 1,403 feet; whereas recent surveys make the correct bearing N. 75_58' 37" E. and the actual distance 1,365.2 feet.

The surveyor who made the official survey for patent had died before the date of the trial below, and no witness was able to say whether the line described as tying corner No. 1 to the quarter-section corner had been actually run and measured or estimated only. It is probable, however, that it was merely estimated; since the testimony shows that it would be difficult to

measure it on a true course, on account of the rough and broken condition of the ground. The appellants, relying upon this error to justify their appropriation of the patented premises, gravely contended that the ground called for in the patent lay wholly outside the Queen of May location. In support of this theory they caused a survey to be made of a certain parcel or **213 plat of ground, having the same dimensions described in the patent; the lines being run from the initial point indicated in the patent as corner No. 1, computing the locality of such point from the quarter-section corner by course and distance. The tract thus laid off was duly platted, and labeled _Cash Lode,_ although it was in fact 200 feet distant from the boundaries of the patented premises at the nearest point. This plat *182 and survey, together with a plat and survey of the so-called Queen of May lode, were exhibited, to show that no conflict existed between the two locations. But this was duly exposed on the cross-examination of the appellant's surveyor, who was forced to admit that, establishing the exterior lines of the Queen of May location, he had included within its boundaries the discovery shaft, shaft-house, and surface improvements of the Cash lode.

Other discrepancies in the patent, as tested by recent surveys, were in the length and width of its surface ground, and in the bearings of its side lines. Instead of being 1,500 feet in length by 50 feet in width, it was found to measure only 1,378 feet in length by 46.6 feet in width, and a variance of 1_ > 49' was discovered in the bearing of its side lines. The shortage in measurements was explained by the facts that the surface is hilly and uneven, and that the measurements in the original survey were along the slopes, or surface, whereas the recent measurements were horizontal. Lines laid off by the former method would necessarily fall short when tested by the latter method. But the identity of the patented premises does not depend upon courses and distances alone. There were other calls in the patent: It calls for a _granite rock in mound of stones' at each of the four corners of the surface ground. The plat, incorporated as a part of the description, shows the location of the discovery shaft. And another fact of importance is that the name of the lode or mine is given. Several errors are assigned to the rulings of the court upon the trial, and to the instructions given and refused; but the controlling question in the case is, were the premises in controversy properly and sufficiently identified as the premises described in the patent?

*183 Counsel for appellants contend that monuments, to control courses and distances in the description of real estate, must be unquestionable; otherwise, courses and distances must prevail. They further contend that a rock in a mound of stones, in a country abounding in rocks and stones, is not an unquestionable monument. **The rule of law is that monuments will control courses and distances; and while judges, in commenting upon the facts of particular cases, speak of the monuments as being unquestionable, the rule is not so qualified. The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact, to be determined, like other questions of fact, according to the rules of evidence.** All the authorities on the subject assign to courses and distances the lowest place in the scale of evidence, as being the least reliable. Mr. Washburn says this kind of evidence is **214 regarded with great confidence in some cases, where the lines are short. He adds, however:

But, ordinarily, surveys are so loosely made, instruments so liable to be out of order, and measurements, especially in rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land. _ 3 Washb. Real Prop. (4th Ed.) 403.

That **it is not so much the character of the monuments, as satisfactory proof of their location, that is to fix the locus in quo**, is shown by the adjudged cases. In *Lodge v. Barnett*, 46 Pa. St. 484, it is said:

The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, where the marks or monuments are gone. So, the return of a survey, even *184 though official, must give way to the location on the ground, while the patent, the final grant of the state, may be corrected by the return of survey; and if it also differs, both may be rectified by the work on the ground. _

In *Opdyke v. Stephens*, 28 N. J. Law, 89, the court says:

But the rule is well settled that boundaries may be proved by every kind of evidence that is admissible to establish any other fact.

Smith v. Prewit, 2 A. K. Marsh, *158, is cited in support of this proposition. In *Tyler, Bound.* 285, it is said:

Where monuments-for example, stakes, stones, or a tree-are referred to in a deed, parol proof is always admissible to show their location.

Tested by these rules and principles, we think the original boundaries of the Cash lode were established by competent testimony on the trial, and that the jury was fully warranted in finding that the appellants had unlawfully entered upon and taken possession of said lode. Three, out of the four monuments called for, were identified by witnesses who had known its boundaries for from five to eight years; one of them being a deputy United States mineral surveyor, who had been accustomed for several years to survey mining claims in the neighborhood, and who stated that he had tied surveys of other properties to its corners probably one hundred times. There was no question of conflicting lines or surveys here, but simply a question of identifying the patented premises as a whole. The effect of the doctrine contended for by the appellants would be to declare the grant void for uncertainty. But it is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void. *Boardman v. Lessees of Reed*, 6 Pet. 345. It is plain that no such consequence could result here; for the identity of the property in controversy as the Cash lode, was known to the witnesses of both sides. *185 This being the name under which it was granted and under which it had been for years held, worked, and generally known, the name alone would be a sufficient description to prevent a forfeiture. *Sedg. & W. Tr. Title Land*, § 461. We regard the proof of identity **215 as leaving no reasonable ground of doubt that the property recovered is the same property described in the patent. The irregularities complained of are of minor importance. None of them are deemed of sufficient importance to warrant a reversal.

Supreme Court of Colorado.

DUNCAN

v.

EAGLE ROCK GOLD MINING & REDUCTION CO.

1910.

John T. Duncan made application through the proper United States Land Office for patent to certain lode mining claims designated as survey lot No. 17,375, situate in Sugar Loaf Mining district, Boulder county. The Eagle Rock Gold Mining & Reduction Company filed an adverse, and thereafter within the time limited by law this suit in support thereof, claiming of Duncan's lodes substantially all of the Black Prince, Black Prince No. 1, and Black Prince No. 2, located in 1904, as portions of its Ellmettie and Grace lodes, located in 1898.... By the complaint the legal right to occupy and possess said premises and to the possession thereof was claimed _by virtue of full compliance with the local laws and rules of miners of said mining district, the laws of the United States and of the state of Colorado, by pre-emption and purchase, and by actual possession as lode mining claims located on the public domain of the United States._ *571 Duncan, defendant below, denied specifically the allegations of the complaint, and alleged title in himself to the territory in question. The replication traversed the allegations of the answer. Upon the issues so joined, trial was had, resulting in a verdict for plaintiff, the appellee here, for possession of the territory in dispute, \$225 expenses and counsel fees, in support of the adverse, and \$700 damages. Motion for new trial interposed and overruled, judgment in accordance with verdict entered, and writ of restitution ordered. From the judgment Duncan prosecutes this appeal, and assigns numerous errors, only a few of which we deem it necessary to consider.

It was incumbent upon the plaintiff to clearly establish the segregation from the public domain, and the appropriation by it, of the particular territory claimed in its adverse. In order to do this, it was essential, among other requirements, that it produce in evidence certificates of location, or amendments thereof, in conformity with law, covering or including the particular territory in dispute. In this essential requirement it failed, and the court erred in not so advising the jury at the request of the defendant.... *578

As said in *Thallman et al. v. Thomas* (C. C.) 102 Fed. 935, 936: **The rule that monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained. If there be doubt as to the monuments, as well as to the course and distance, there can be no reason for saying that monuments shall prevail, rather than the course given in the patent; and that is this case.** In the Ellmettie location certificates the west end corner stakes are practically the east end corner stakes of the Fair Count, yet the surveyor failed to take that into consideration, and failed to locate or show the Fair Count claim. *The certificate of the Ellmettie calls for a discovery shaft, yet the surveyor took an adit, and constructed the claim around it, notwithstanding a discovery shaft was upon the ground at the identical spot designated in the certificate of location.* The location certificate of the Grace also calls for a discovery shaft, but again an adit was taken for the initiative point of the survey. **The discovery shaft, adit, or cut, as the case might be, as called for in the certificate, constituted one of the principal monuments for the purpose of finding the claim.** When the location certificate of a claim in the vicinity of territory which a prospector desires to locate calls for a particular monument, to wit, a shaft, an adit, a cut, or _a post four inches square, set two feet in the ground, the prospector has a right to look for, and to demand, the particular monument specified, and his

rights cannot be jeopardized by proof of some other monument not designated.

***581** In *Resurrection Co. v. Fortune Co.*, 129 Fed. 668, 672, 64 C. C. A. 180, 184, it is said: **Parol evidence, however, is incompetent to substitute a different monument for one clearly called by a deed or patent, or by the survey upon which it is founded**, because that course of proceeding would violate the settled rule that written contracts may not be contradicted or modified by oral evidence. In that case the patent did not call for a monument at corner No. 3. The field notes were introduced in evidence, and at said corner called for a post four inches square, four feet long, two feet in ground, marked 3-2309, cut into the post. Evidence was then introduced that a round stake four inches in diameter, with two blazes, the later on the side of the earlier, with the figures 3-2309 written in pencil, but not cut into the post, was really intended. The trial court instructed the jury that this stake satisfied the description of the corner post. In reversing that holding it is said: **Its effect is to strike out of the patent and field notes the description of the square post marked by the figures 3-2309 cut into it, and to write into them the description of the round, blazed *593 stake inscribed with the figures 3-2309 by means of lead pencil, and in this way to violate the settled rule that written conveyances may not be modified or contradicted by parol.**

This court in *Pollard v. Shively*, 5 Colo. 309, 315, 318, said: **In this case the call is for a post at the southwest corner, and it is insisted that parol evidence is admissible to show that, while a post is called for, a stump was in fact established as a corner. Courts have gone far in the admission of parol evidence in the matter of uncertain and disputed boundaries, but I am unable to see how this demand of the defendant can be sustained on principle. The *582 certificate, like a deed, must be construed ex visceribus suis. When the intent is clearly expressed, no evidence of extraneous facts of circumstances can be received to alter it. 3 Wash. R. P. 400, 404; Bagley v. Morrill, 46 Vt. 99. The general rule stated more fully is that parol evidence cannot be admitted to control or contradict the language of a deed, but latent ambiguities can be explained by such evidence. Facts existing at the time of the conveyance, and prior thereto, may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties when by the terms of the deed such line is left uncertain. 3 Wash. R. P. 401; Drew v. Swift, 46 N. Y. 209; Claremont v. Carlton, 2 N. H. 369 [9 Am. Dec. 88]; Peaslee v. Gee, 19 N. H. 277. There is neither latent ambiguity nor uncertainty in the terms of the certificate to bring it within the meaning of the rule. The call of the certificate is for a post. A stump does not answer the call. If parol evidence is admissible to show that a stump, and not a post, is the actual corner, it would be equally competent to show a pile of stones, or any other monument uncalled for. This would not be construing the calls of a survey, but making them. It would not be an application of the rule that monuments control courses and distances, but an infringement of the rule that, in the absence of latent ambiguity, a deed cannot be varied or contradicted by parol evidence. It would not be controlling courses and distances by monuments, but controlling both by parol evidence. Claremont v. Carlton, 2 N. H. 369 [9 Am. Dec. 88]. The rule is that, where monuments are relied upon to control courses and distances, they must be found as called for. Bruckner v. Lawrence, 1 Doug. (Mich.) 19; McCoy v. Galloway, 3 Ohio, 282 [17 Am. Dec. 591]; *583 Seaman v. Hogeboom, 21 Barb. [N. Y.] 399; Finley v. Williams, 9 Cranch, 164 [3 L. Ed. 691]. In the case of McCoy v. Galloway, supra, it was held that, where the patent called for a tree of one kind, it was not competent to show a tree of another kind. * * * Where there is a variation to any considerable extent between the courses and distances as the location certificate and monuments established on the ground, the record with its misdescription, in point of fact, gives no notice of the ground actually appropriated. If the monuments are swept away, no search, no exercise of prudence,**

diligence, or intelligence would advise the subsequent locator of the prior appropriation. In such case the rule demanded by the defendant would work the greatest injustice and hardship, and would be an interpretation of the law in the interest of erroneous records and indolent claimants. _

Appellee argues that as section 3154, Mills' Ann. St., makes an open cut, cross-cut, tunnel, or adit each the equivalent of a shaft, therefore, though the certificate of location calls for a shaft, and the proof shows an open cut, or an adit, there is no variance between the proof and the certificate. This contention is unquestionably sound when applied to the discovery work required; but when used in a certificate, for the purpose of ascertaining the situs of the claim, it has not that force and effect. The Legislature in making a cut, a tunnel, or an adit equivalent to a discovery shaft did not change the definition or meaning of those respective words. Notwithstanding the statute, an open cut or an adit is not a shaft, and in locating the claim that for which the certificate calls must alone be used. Moreover, the evidence is undisputed that, as located, the Grace was a straight claim with six posts, one at each corner, and one at the center of each side line; *584 yet upon the plat the claim is shown as extending from corner No. 2, being also corner No. 3 of the Ellmettie, N. 67_36' E. 115.70 feet, thence S. 82_41' E. 1369.97 feet, to corner No. 3. The surveyor, having testified that he constructed this plat, not from the monuments and calls given in the certificates, but from the stakes upon the ground as pointed out, admitted that there were no stakes at either of the angle corners as shown on the plat, yet, in order to make the adit pointed out the discovery point, it was necessary to construct the claim with this angle. A plat or diagram so constructed, based upon assumptions only, in utter disregard of, and contrary to, the facts, should have no place in a court of justice.

Judgment reversed.

Supreme Court of Colorado.

DERHAM et al.

v.

HILL et al.

142 P. 181 - 1914

In 1892, there was made and filed for record, in Mesa county, a plat of more than 200 acres of land designated as the Grand Junction Orchard Mesa Land Company's Orchard subdivision. The plat showed the land subdivided into numbered tracts or lots of about ten acres each, with various portions, 40 feet wide, marked as roads.

One Mrs. Powers became the owner of lots 28 and 29, by deed, wherein the land was described as lots 28 and 29 in the subdivision. In May, 1905, she made a deed to one Joynson, containing a description as follows:

***347** _The north nine (9) acres, more or less, of lot twenty-eight (28) of the Grand Junction Orchard Mesa Land Company's Orchard subdivision, more particularly described as follows: Beginning at the southwest corner of lot twenty-one (21) of the Grand Junction Orchard Mesa Land Company's Orchard subdivision; thence east six hundred forty feet (640); thence south six hundred and five (605) feet; thence west six hundred forty (640) feet; thence north six hundred and five (605) feet to the place of beginning._

In July, 1905, Joynson made a deed to the Hills, defendants in error, wherein the land intended to be conveyed was described the same as in the deed from Mrs. Powers to Joynson. At the time these deeds were made, the road between lots 21 and 28, shown on the plat, did not appear on the surface of the ground. Lot 28 was covered by fruit trees set in rows east and west, and these rows of trees continued north and occupied the road. The Hills went into possession of the land under their deed from Joynson. On the south part of what they supposed was their land, there was first a row of apple trees, and next, south, a row of prune trees. There was no fence between lots 28 and 29, nor any division fence between ****182** the land claimed by the Hills and the portion south of it. Just south of the row of prune trees and about a foot or a foot and a half from the trees there was a furrow or ditch, and from this the trees on the land were watered; the slope being to the north.

After making the deed in 1907 to the Derhams for lot 29 and the south 35 feet of lot 28, Mrs. Powers moved away from the neighborhood, evidently to California. Thereafter the Derhams made claim upon her for more ground, and after some controversy, in December, 1910, she made a quitclaim deed to the Derhams for the south 75 feet of lot 28. The north 40 feet of the south 75 feet of lot 28 is the land in controversy. In February, 1911, the Derhams took possession of this 40 feet and erected a fence on its northern line about 2 feet north of the row of apple trees above mentioned, so as to include these apple trees as well as the row of prune trees. About June, 1911, the Hills began an action to recover ***349** the possession of the 40 feet in controversy, which resulted in a judgment in their favor. The court found that by the deeds from Mrs. Powers to Joynson and by the latter to the Hills it was the clear intention of the grantors to convey the land in controversy, and that from the receipt of their deed the Hills were in the exclusive possession

thereof and farmed the same until dispossessed by the Derhams.

It is the claim of the Derhams that the deed from Mrs. Powers to Joynson, and from the latter to the Hills, conveyed the north 565 feet only of lot 28, and that the remaining 40 feet included in the deeds was embraced in the road. They claim that the description _the north nine (9) acres, more or less, of lot 28,_ must be disregarded and the description by metes and bounds with the place of beginning at the southwest corner of lot 21 must be accepted as the true description of the land conveyed. They say that the words _nine acres, more or less,_ are merely descriptive and do not control the location by metes and bounds, and that the description by quantity must yield to the more certain description.

We do not, in any manner, dispute the many authorities cited to sustain this contention. Had the description in the deed been _nine acres more or less described as follows,_ and then the point of beginning and the metes and bounds given as in the deed, or had it started with the point of beginning and the metes and bounds and ended with the words, _containing nine acres, more or less,_ the quantity might have been of little importance, and the authorities cited might have been applicable.

What is said in this opinion, as is the case in every other opinion, is said in the light of all the surrounding facts and circumstances existing in the case, and each of these facts and circumstances are given weight in arriving at the conclusion reached. When the Derhams took their quitclaim deed, they took it with full knowledge,***350** either actual or constructive, of the facts and circumstances which are mentioned, and, having done so, they ought to have been apprised with certainty of the land that was intended to be conveyed to the Hills. Where there are two repugnant descriptions in a deed, _the court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties._ 2 Devlin on Deeds, § 1038; Wade v. Deray, 50 Cal. 376.

In construing a deed, the object is to discover and effectuate the intention of the parties to it. While that intention is to be gathered from the language and words of the deed, it should be read in the light of the surrounding circumstances at least when it is ambiguous. Am. Nat. Bank v. Madison, 144 ****183** Ky. 152, 137 S. W. 1076, 38 L. R. A. (N. S.) 597.

When a particular of a description is plainly false, that particular should be rejected, and, if enough remains to locate the land, the deed is effective. Irving v. Cunningham, 66 Cal. 15, 4 Pac. 766. When necessary, where in a deed two descriptions intended to apply to the same land are not reconcilable, evidence of extrinsic facts may be admitted to show the intention of the parties, confining this for the present to such parties as the Hills and Derhams, who each had full knowledge of the extrinsic facts admitted in evidence and referred to herein. And where a deed contains two descriptions of the land conveyed, the one which when applied to the land owned by the grantor is found not true must be rejected. Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

In the deed in question, the description begins, _the north nine (9) acres, more or less, of lot 28._ **There is more than mere quantity in this. It states definitely and certainly that all the land intended to be conveyed is in lot 28 and it fixes the north line of that land as the north line of lot 28. The beginning in this description is definite and certain. Instead of being a point it is a *351 line, to wit, the north line of lot 28, marked and limited on the plat as**

definitely and certainly as any corner of any lot. From this beginning the description certainly proceeds south with a width equal to that of lot 28 until a line is reached marking the southern limit of an area equal to nine acres, more or less. There is some uncertainty, it is true, in the expression, '_nine acres, more or less'; but the description by metes and bounds following definitely shows the area of the tract intended to be conveyed and definitely fixes that area as the amount of land contained in an area 605 feet by 640 feet, which the court found to be 8.88 acres, and which corresponds to the quantity expressed by nine acres more or less.

Looking closely at the description in the deed, it is plainly apparent that the point of beginning at the southwest corner of lot 21 is false. It says:

The north nine (9) acres, more or less, of lot twenty-eight (28), * * * more particularly described as follows: Beginning at the southwest corner of lot twenty-one (21), etc.

By this language it was an area located entirely in lot 28, and whose northern boundary was the north line of that lot, that was intended to be described by the particular description, and by reference to the plat it is plain that such an area cannot be described as attempted by beginning with the southwest corner of lot 21. Such place of beginning is so plainly false that it must be rejected as a point of location of the land conveyed, and when it is so rejected, and retained merely as a point from which to describe an area equal to that conveyed, there appears described an area of ground wholly within and of the width of lot 28, extending from east to west 640 feet, from north to south 605 feet, and bounded on the north by the north line of the lot.

From the county records, the Derhams, at the time they took their quitclaim deed, had notice that Mrs. Powers, when she made the deed to Joynson, owned lots 28 and 29 and did not own the 40 feet designated as _road,_ and could not convey such road, and that *352 no part of lot 28 could be exclusively described by including that road. After making her deed to Joynson and her deed for the south 35 feet of lot 28 to the Derhams, Mrs. Powers moved away and exercised no more dominion over any part of lot 28, while the Hills were in possession and farmed all of lot 28 north of the 35 feet described in Derham's deed.

As plainly appears from this record, Mrs. Powers intended to convey only land that she owned. If the description, beginning at the southwest corner of lot 21, were applied to land owned by her, it would not fit; while, if the first description in the deed, together with the area of the tract as stated in the second description, were applied to her land, the description would exactly fit land owned by the grantor. All these facts and circumstances sustain the court below in its finding of what the intention of the parties to the deed was, and the Derhams knew, of ought to have known, that such was the intention at the time they took their quitclaim deed. The judgment is therefore affirmed.

Judgment affirmed.

Supreme Court of Colorado.

BEAVER BROOK RESORT CO. et al.

v.

STEVENS.

230 P. 121 - 1924

The parties to this litigation were owners of adjoining tracts of timber land in Clear Creek county. The defendant in error owned the north half of the northwest quarter of section 21, and the northeast quarter of the northeast quarter of section 20, all in township 4 south, range 72 west. Plaintiff in error, the Beaver Brook Company, owned lands immediately south of this row of 40's. Defendant in error had judgment in an action against the plaintiffs in error for damages alleged to have resulted from the cutting of timber on her property. The verdict was for \$650, which included \$150 exemplary damages. Judgment was entered on the verdict.

The question on which the right to damages**122 turned was as to the south line of plaintiff's property, which was, of course, the north line of defendants' property. One of the errors assigned is the giving of instruction No. 2, by which the jury was informed that the line between the lands of the plaintiff and defendants, as established by the survey of one Barbour, is the true boundary line of the lands, and it was to be so considered.

It does not appear from the record that any undisputed monuments of the original government survey were found. It is conceded that the northwest corner of section 21 was *133 a point material to be established, from which the south line of plaintiff's property could be located. Barbour, who made the survey adopted by the court, testified that at the point which he established, and which the court accepted as that corner, he found no monument; but two trees, one standing and one down, one marked _16_ and the other _17,_ were accepted by him as witness trees. He testified further that he found on the ground, something less than a mile east of this corner, a stone which he took to indicate the northeast corner of the section. He further testified that he found the west quarter corner of 21, the southeast corner, and the east quarter corner. None of these stones taken by Barbour as monuments appears by his testimony to have been in place. He testified that he did not go west of the point selected as the northwest corner of 21, or north of it, nor did he go south of it beyond the quarter corner.

[1] The method of restoring lost corners is indicated in *Westcott v. Craig*, 60 Colo. 42, 151 P. 934. The rule is one of apportionment; under it, to establish a lost corner, the surveyor should locate, if possible, government corners east of it, west of it, north of it, and south of it, and then by apportioning the distance as found to be between these points, the true corner will be established.

[2] We regard the evidence of Barbour as wholly insufficient to justify the court in holding that the south line of the plaintiff's property as located by him was correct, even if there were no evidence to the contrary. The line as located by Barbour and accepted by the court was admittedly several hundred feet farther to the south than it would be under the field notes which were in evidence. The notes give Beaver Brook's location, with reference to the southwest corner of the section, at the point where it crosses the west line, and if that point be as stated in the notes, the south line of plaintiff's property has been carried by Barbour much too far to the south. Barbour

testified that he did not regard physical features mentioned in the notes as material, where government corners contradicted the *134 notes. In this he was probably correct, but as applied to this case he is wrong. The west quarter corner, while properly marked, was not in place and so located as to make it controlling as against the reference to the brook.

In *Morse v. Breen*, 66 Colo. 398, 182 P. 887, we said:

Stones are liable to removal, and hence they are not as good evidence of the lines run as are physical objects used as monuments, or located on plats, such as streams, etc., which are permanent in their location.

Barbour seems to have been satisfied with finding what he called the two bearing trees as fixing the location of the northwest corner of 21.

Supreme Court of Colorado, en Banc.

EVERETT et al.

v.

LANTZ.

252 P.2d 103 - 1952.

George G. Everett and Bonnie Vera Everett began an action in the district court of Fremont county on February 1, 1945, against Carl A. Lantz, alleging in their complaint ownership of certain described**104 real estate in said county in which defendant claimed some estate or interest adverse to them. They sought a judgment against defendant enjoining him from asserting any claim whatsoever in and to the lands allegedly owned by them.

The parties hereto owned adjoining lands in different ranges and in different counties. In the complaints the lands are described by governmental subdivisions followed by a metes and bounds description evidently taken from the field notes of a survey approved by the Surveyor General of Colorado on December 6, 1881. Plaintiffs take the position that the courses and distances evidenced by the field notes and the acreage computed therefrom and the delineation of the original 1881 plat, together with possession, entitles them to the relief sought in their complaints.

*506 In each case, in the answer filed, it was denied that the plaintiffs were the owners of any part of the premises described in their complaint which conflicts with the lands owned by defendants which were described in the answer by legal subdivisions. Further, it was admitted that as to the title of the lands in conflict, if any such existed, it was an adverse interest and claim on their part. In each action, for a further defense and counterclaim, defendants alleged ownership in the property therein described and prayed that title thereto be confirmed and quieted as against the claim of plaintiffs....

Trial was had to the court on May 11, 1950, and on September 1, 1950 judgments were entered in favor of defendants and against plaintiffs, who are, as we have said, here by writ of error seeking a reversal of the judgments.

The record discloses that a dependent resurvey of Townships 50 and 51 North, Ranges 9 and 10 East of the New Mexico Principal Meridian, was ordered by the General Land Office of the Department of the Interior in 1939, and the returns thereof were approved July 19, 1941. It discloses also that This resurvey was authorized at the request of the Forest Service in order to identify the boundaries of the remaining public lands in these townships. Approximately 40% of the land in T. 51, N., R. 10 E., and about 75% of the land in each of the other three townships are still public lands of the United States. (Italics ours.)

As a result of the dependent resurvey it was found that errors in distances and in cardinal directions had been made in the 1881 survey as disclosed by some of the original 1881 monuments found on the ground in their original location. Using the 1881 monuments as the basis of the dependent resurvey, the lands in Township 51 North, Ranges 9 and 10 East, assumed distorted shapes rather than the precise squares in which the sections and quarter sections were delineated on the 1881 plat, and this occasioned this litigation.

The plaintiffs' only witness, S. F. Elliot, was a registered civil engineer who testified that he had never made a survey of the lands in question but that by superimposing a plat of the dependent resurvey over that of the 1881 survey a composite plat resulted showing the relative*509 different positions of the sections as established by the dependent resurvey, resulting in a loss to plaintiffs of approximately 200 acres in Township 51 North, Range 10 East, and a very considerable loss of acreage in Township 51 North, Range 9 East. This witness testified that so far as he knew the location of the 1881 monuments had not been disturbed and that the dependent resurvey was correctly executed.

Carter Hutchinson, a licensed engineer, made a survey of defendants' property in **106 Township 51 North, Ranges 9 and 10 East, in 1939, and testified that some of the 1881 monuments found were in their original locations and were sufficient from which to reasonably identify defendants' lands. He further testified that the 1881 plat of Township 51 North, Ranges 9 and 10 East, was wholly inaccurate; that according to his survey, based on the 1881 monuments actually found in their original locations, the lands involved in this litigation were conveyed to defendants by patents to them or their predecessors.

The depositions of Thomas W. Crawford and Arthur W. Brown were in evidence, both of whom were engaged in making the dependent resurvey of Township 51 North, Ranges 9 and 10 East. Both engineers were in 1939, at the time of the dependent resurvey, and for many years prior thereto had been, employed by the Department of Interior, General Land Office and Bureau of Land Management; both were rated as cadastral engineers; and both of them were assigned by the government for work in connection with the resurveys of this particular township. Both deposed that the resurvey work done by them in this township was in strict accord with the governmental regulations pertaining to dependent resurveys and that their resurvey was based solely on the 1881 survey and was controlled by the remaining evidence of the original survey and the original monuments of said survey. Both deposed that the statement appearing on the plat of the dependent resurvey was true, part of which is as follows:

This plat of the resurvey of T. 51 *510 N., R. 10 E., delineates a retracement and reestablishment of the lines of the original survey as shown upon the plat approved Dec. 6, 1881, * * * in their true original position according to the best available evidence of the position of the original corners; all differences between the measurements shown on the original plat and those derived in the retracement have been distributed proportionately between accepted corners in accordance with surveying rules; * * *.

Both testified that in making the dependent resurvey of Township 51 North, Range 10 East, they found in place a sufficient number of the original monuments and corners of the 1881 survey to enable them to establish the dependent resurvey and that the same as delineated upon a plat offered and received in evidence, was correct. This plat of the dependent resurvey, as we have said, delineates section lines in an irregular shape rather than cardinal courses and accurate distances. Brown deposed that in making the dependent resurvey in Township 51 he found sufficient of the original monuments and corners of the 1881 survey to definitely identify the lands therein and that the sections therein were irregular in shape and inaccurate in acreage and courses and distances.

Here the 1939 dependent resurvey, according to the evidence of Crawford and Brown, was a retracement of the lines of the 1881 original survey. Brown, in answer to a question requiring a

statement of the variation between the original 1881 survey and the resurvey of 1939, as the same pertained to Township 51 North, Range 10 East, stated:

The S 1/2 of west boundary of Section 18 has a true bearing of N. 0° 01' E., only at variance by 1' of arc from a true north line and from the survey record. The line between sections 15 and 16 has a bearing of N. 28° 34' W., when it should be practically due north. These represent the extremes in direction. In some cases discrepancy in distance is just as bad.

In my 37 years of cadastral engineering I have come across only a few other cases as badly distorted as this one. In each case I have endeavored to picture in my mind how the original surveyor could be so wild on so many lines. Sometimes I have been able to construct a reasonable answer. In the present case I have not been able to fully do so and would not like to attempt an explanation here.

Here it is undisputed that the 1939 dependent resurvey was a retracement of the original lines of the 1881 survey by adopting a plan whereby existing evidence of the original survey was given primary control over the positions of all of the boundaries to be re-established. Identified corners of the original survey were found and re-monumented in their original positions and were sufficient to enable the engineers to establish boundary lines between plaintiffs' and defendants' lands. It is undisputed that patents to the lands claimed by plaintiffs, as well as defendants, were issued according to the original 1881 survey of the lands here in question.

[1] Plaintiffs take the position that the United States, having issued its patents to the lands here in controversy, a dependent resurvey thereof which will change the boundaries of the respective patentees' lands cannot be effective and binding upon the patentees, and with this we are in accord. United States v. State Investment Company, 264 U.S. 206, 44 S.Ct. 289, 68 L.Ed. 639; Larson v. Larson, 89 Cal.App.2d 846, 202 P.2d 121; Phelps v. Pacific Gas & Electric Co., 84 Cal.App.2d 243, 190 P.2d 209; See Ben Realty Co. v. Gothberg, 56 Wyo. 294, 109 P.2d 455; 73 C.J.S., Public Lands, § 33, p. 683; 42 Am.Jur., p. 820, § 41.

[2][3] The General Land Office, in its instructions under date of March 25, 1939, authorized a dependent resurvey of Township 51 North, Ranges 9 and 10 East, in order to identify the boundaries of the remaining public lands in these townships' and did not purport to authorize identification or establishment of the boundaries of lands already patented. Assuming that the General Land Office of the Department of Interior could not by a dependent resurvey settle the disputed boundaries between the plaintiffs and defendants, nevertheless this in no wise detracts from the force and effect of the testimony given by the cadastral engineers who made and superintended the dependent resurvey. The force and effect of their testimony as engineers is to be regarded and received and be given the same weight and credence as any other engineers, and their qualifications are not here questioned. Consequently, the question here for determination is whether the record contains sufficient competent evidence of a survey, and, if so, the identification of the subdivisions of Township 51 North, Ranges 9 and 10 E, must be accepted, for, according to the evidence, it is an exact retracement of the original 1881 survey. If the acreage designated in the patents is inaccurate, that is a matter of which the patentees therein cannot complain. The undisputed testimony of qualified engineers established the boundary lines here questioned by a location of the original monuments erected in making the 1881 survey, and, as we have said, the fact that this was done in making a dependent resurvey is wholly immaterial. The monuments

of the original survey control.

It is a general rule that the original corners as established by the government surveyors, if they can be found, or the places where they were originally established, if that can be definitely determined, are conclusive on all persons owning or claiming to hold with reference to such survey and the monuments placed by the original surveyor without regard to whether they were correctly located or not. (Citing cases) See Ben Realty Co. v. Gothberg, supra [56 Wyo. 294, 109 P.2d 460].

Supreme Court of Colorado, In Department.

Donald WALLACE and Phyllis J. Wallace

v.

Jacob HIRSCH

350 P.2d 560 - 1960.

Plaintiff and defendants are owners of adjoining land situate in the North half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter, Section 20, Township 13 South, Range 91 West, 6th P.M., in Delta County, Colorado, the defendants' property lying immediately to the north of that owned by the plaintiff. The basic dispute between the parties concerns the location of the common boundary line between their respective properties, i. e., the northern boundary line of the plaintiff's property which is also the southern boundary line of defendants' property.

It is agreed by both the plaintiff and the defendants that there is an error in the description contained in the plaintiff's deed from S. Arthur Wade, the same error being repeated in the exception of this land in the deed now held by the defendants. This error occurs in the description of the northern boundary of the plaintiff's property, which as indicated supra is the southern boundary of the defendants' land. This mis-description results from the fact that there are repugnant calls in the description. The repugnant or inconsistent calls are: _thence South 63_05' West 2910 feet, more or less, to the SW corner of the NW 1/4 SW 1/4 of said Section 20._ This repugnance or inconsistency results from **562 the admitted fact that if the northern line of the plaintiff's property takes a course _South 63_05' West 2910 feet, more or less' it will never intersect the _SW corner of the NW 1/4 SW 1/4 of said Section 20,_ and that for such boundary line to in fact intersect said corner it would have to follow a course approximately South 67_ West 3,070 feet, more or less, instead of _South 63_05' West 2910 feet, more or less._ In other words, the call as to course and distance is inconsistent and repugnant to the *267 call that said line shall terminate in the _SW corner of the NW 1/4 SW 1/4 of said Section 20._

Upon trial the plaintiff contended that the true boundary line was one which intersects the _SW corner of the NW 1/4 SW 1/4 of Section 20,_ regardless of the angle, whereas the defendants contended that the true northern boundary line was one which _takes a course 63_05' West_ and proceeds 2,910 feet, more or less, even though such would never intersect the _SW corner of the NW 1/4 SW 1/4 of said Section 20,_ and which if followed _2910 feet, more or less' would terminate somewhere in the SW quarter of the SW quarter of said Section 20.

At the outset it is agreed that there is an error in the description set forth in the plaintiff's deed. It is also agreed that where, as here, there is a mis-description *268 the court must then ascertain the true intent of the parties (S. Arthur Wade and the plaintiff) if possible from the deed itself and if not then by parol evidence which would reveal the true intent of the parties. In *Derham v. Hill*, 57 Colo. 345, 142 P. 181, 182, this court said:

_Where there are two repugnant descriptions in a deed, _the court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties._ 2 Devlin on Deeds, § 1038; Wade v. Deray, 50 Cal. 376.

When a particular of a description is plainly false, that particular should be rejected, and, if enough remains to locate the land, the deed is effective * * *.

[2] Additionally, analysis of the plaintiff's deed in and of itself leads to the inescapable conclusion that it was the true intention of the parties that the northern boundary line on the plaintiff's property should terminate in the _SW corner of the NW 1/4 of the SW 1/4 of said Section 20. **_A general rule of construction invoked in the case of repugnant calls in a deed is that courses and distances are the least reliable of all calls, and that a call which designates a point capable of precise and exact location takes precedence over a call for a course and distance if there is a repugnancy between the two. Hence, the _SW corner of the NW 1/4 SW 1/4 of said Section 20_ describes a point on the earth's surface which can be located with mathematical certainty. So, under the general rules of construction this call takes precedence over a call for course and distance.** In this connection 11_C.J.S. Boundaries § 47. b., p. 597, reads:

A call for an established and identified corner may, unless uncertain or mistaken, control conflicting calls, *270 such as for quantity, course, distance, the unmarked open line of an adjoiner, or a corner or line of an adjoiner mistakenly assumed to be in the same place as the located corner.

Patton on Titles, Second Edition, Vol. 1, Page 396, Sec. 150, states:

Although junior in importance to monuments marking a surveyed line, any fixed or natural monument which is definite and certain will control over a statement as to quantity and over the courses and distances used in a plat or in a metes and bounds description. * * * Among the natural and fixed objects which are so substantial and definite as to have been considered controlling564 are: * * * the corner of a lot, * * *. When the plat or conveyance describes a line as running to such a monument, but the course and distance given would not bring it to that point, the course and distance will be disregarded * * *. (Emphasis supplied.)**

In line with this general rule is our own decision in Cullacott v. Cash Gold & Silver Mining Company, 8 Colo. 179, 6 P. 211, 213, where it is said:

_The rule of law is that monuments will control courses and distances; and while judges, in commenting *271 upon the facts of particular cases, speak of the monuments as being unquestionable, the rule is not so qualified. The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact, to be determined, like other questions of fact, according to the rules of evidence. All the authorities

on the subject assign to courses and distances the lowest place in the scale of evidence, as being the least reliable. (Emphasis supplied.)

True, there may not be a monument, as such, at the SW corner of the NW 1/4 SW 1/4 of said Section 20, although there was some evidence that a pile of rocks had been placed at this point. Nevertheless, the SW corner of the NW 1/4 SW 1/4 of said Section 20 describes a specific point which is capable of being determined with absolute certainty. Such was also the case in *Matthews v. Parker*, 163 Wash. 10, 299 P. 354, at page 355, wherein the Supreme Court of Washington said:

It seems to us to be too well settled to call for citation of authorities that, in a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land be fixed by ascertainable monuments and by courses and distances, the well settled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls. In the description of this plat we have the north quarter corner of section 34, a monument, as the beginning point from which the first course runs south to the center of section 34, another monument, erroneously stating the distance between those two monuments. It is true that the center of the section is not a physical government monument, as is the north quarter corner, as we must presume, but it is a point capable of being mathematically ascertained, thus constituting it, in a legal sense, a monument call of the description.' (Emphasis supplied.)

Colorado Court of Appeals,

Gordon JACKSON, Plaintiff-Appellee,

v.

William L. WOODS and Judith K. Woods, Defendants-Appellants.

876 P.2d 116 - 1994.

William and Judith Woods (Woods) appeal the trial court's judgment construing the legal description of certain real property in this boundary dispute. The judgment quieted title in plaintiff, Gordon Jackson, and permanently enjoined the Woods from entering upon the property or interfering with Jackson's possession. We affirm.

Both the Woods and Jackson derive their claims of title from a common predecessor. The Woods claim title to a portion of the original parcel described, insofar as pertinent here, as that land: which lies North and East of the old County Road, being described by metes and bounds as follows: [the point of beginning], thence S, 4_ 30' East 1189 feet; thence along the road, center thereof; thence N[orth] ... to the place of beginning, containing 26.63 acres....

Jackson's immediate predecessor in title, a bankruptcy trustee, had a survey performed. The survey revealed a discrepancy between the property as described by the call to the road and that described by the distance to the road. The deed from the bankruptcy trustee to Jackson contains a legal description based on the new survey, which changed the language describing the relevant course and distance with respect to the excepted parcel to _1,069.98 feet to a point on the center line of the old County Road (now known as Trout Creek Road)._

As a result of this survey, Jackson filed this action seeking a permanent injunction prohibiting the Woods from interfering with his possession of the property as newly surveyed and described in the trustee's deed. The Woods denied that the property is correctly described in the bankruptcy trustee's deed and asserted that the correct and controlling description is the distance call of 1189 feet. They further contend that the distance call should prevail since there was evidence that the course of the road might have been altered and that Trout Creek Road might not even be the same road referred to in the earlier deeds as _the old County Road._

Following a bench trial, the court found that the road now known as Trout Creek Road is, indeed, the road referred to as _old County Road_ in the previous deeds. Concluding*118 that the call to the center of the road prevailed over the distance call, the trial court entered judgment in favor of Jackson.

The Woods now argue that the court erred by disregarding the distance call. They further contend that the location of the road was uncertain and that the reference to the road in the legal description was merely incidental. We do not agree.

[1] We initially note that, in the case of repugnant or contradictory descriptive calls in a deed, the court may reject or disregard the one which is false or mistaken. *Whiteman v. Mattson*, 167 Colo. 183, 446 P.2d 904 (1968).

[2][3] In resolving an inconsistency in a deed, the court should look first to natural

monuments, next to artificial monuments, then to courses and distances. Whiteman v. Mattson, supra; Cullacott v. Cash Gold & Silver Mining Co., 8 Colo. 179, 6 P. 211 (1884); 1 R. Patton, Patton on Titles § 150 (1957). Monuments control courses and distances, which are considered the least reliable of all calls. Wallace v. Hirsch, 142 Colo. 264, 350 P.2d 560 (1960).

[4][5] **A monument, when used in describing land, is any permanent physical object on the ground which helps to establish the location of the line called for, and a monument may be either natural or artificial. A road may serve as such a monument.** 1 R. Patton, Patton on Titles § 150 (1950). The existence and location of a monument are questions of fact to be determined from the evidence. Cullacott v. Cash Gold & Silver Mining Co., supra.

[6] Here, the trial court received evidence that the distance call from the point of beginning to the road was erroneous, and there was no evidence of the intent of the parties to the original conveyances. In such a case, the court is justified in applying rules of construction. See Wallace v. Hirsch, supra.

The previous deeds through which Jackson traces title demonstrate on their face that the old County Road was to serve as the property boundary and that the call is to the center of that road. It is undisputed that, if, in fact, the road now known as Trout Creek Road is the same monument as old County Road, then the distance of 1189 feet to the center of the road is incorrect.

Colorado Court of Appeals,

Roque R. MORALES

v.

CAMB,

160 P.3d 373 - 2007.

In this boundary dispute litigation, defendants, CAMB, Max Garwood, Peterson Family, LLC, and G & B, a Nebraska partnership, appeal from the summary judgment entered in favor of plaintiff, Roque R. Morales (Morales). We affirm.

Because the judgment below was entered in response to a motion for summary judgment, we review that judgment on a de novo basis. *Grynberg v. Karlin*, 134 P.3d 563 (Colo.App.2006).

The Vasquez Village subdivision in the Town of Winter Park, Colorado was surveyed, platted, and approved in 1981. It contained eight lots. The subdivision plat as approved contained a Surveyor's Certificate, which attested that the monuments required by Title 38, Article 51, C.R.S.1973, had been placed on the ground.

The pertinent statute, now § 38_51_105, C.R.S.2006, requires that the external boundaries of platted subdivisions are to be monumented on the ground, that the boundaries of all blocks be monumented before any sale is made and that the boundaries of any lot be established by monuments within one year of the sale. Section 38_51_105(1), C.R.S.2006. The subdivision here, however, contains only eight lots; it has no lots within a block, as such. Moreover, it is undisputed that monuments were placed at the corners of each of the lots before the subdivision plat was approved.

Through various conveyances, defendant CAMB acquired title to lots 3, 4 and 5, and plaintiff obtained title to lot 6, which abuts lot 5 on its north. All of the pertinent conveyances referred only to the Vasquez Village subdivision plat for their legal descriptions.

In 2002, CAMB began planning to re-plat its three lots for development of a town home project. In re-surveying these lots, it was discovered that the monuments marking the boundary between lots 5 and 6 were inconsistent with at least one distance call shown on the Vasquez Village plat. While this distance was shown as 25 feet on the plat, the monument was placed some 38 feet from the pertinent prior point. Further, while the monument for the southeast corner of lot 6 was consistent with a distance call on the plat for that location, it is some 13 feet south of the *375 location of the boundary line as depicted on the plat. Both monuments, therefore, exist some 13 feet south of the boundary between the two lots as shown on the plat.

Defendants contend that the district court erred in quieting title in favor of plaintiff because the intent of the grantors was to convey the lots by reference to the subdivision plat and not as located by the monuments. We are not persuaded.

[1] If there appears to be a misdescription in a deed, a court must ascertain the true intent of the parties. *Wallace v. Hirsch*, 142 Colo. 264, 268_69, 350 P.2d 560, 562 (1960); see

Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, 1235 (Colo.1998)(in construing a deed, it is paramount to ascertain intent of parties).

However, certain rules of construction are used to disclose that intent.

[2] First, **[i]t is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed,** and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself. _ Spar Consol. Mining & Dev. Co. v. Miller, 193 Colo. 549, 552, 568 P.2d 1159, 1161_62 (1977), citing Cragin v. Powell, 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566 (1888).

[3][4][5] **Further, it is a general rule that the monuments placed by the original surveyor are conclusive on all persons owning or claiming to hold with reference to such survey.** Everett v. Lantz, 126 Colo. 504, 514, 252 P.2d 103, 108 (1952). _ Monuments control courses and distances, which are considered the least reliable of all calls. _ Jackson v. Woods, 876 P.2d 116, 118 (Colo.App.1994). **_ The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, where the marks or monuments are gone.**_ Cullacott v. Cash Gold & Silver Mining Co., 8 Colo. 179, 183, 6 P. 211, 214 (1885)(citing Lodge v. Barnett, 46 Pa. St. 477 (1864)); 12 Am.Jur.2d Boundaries § 74 (_ Where land is disposed of by reference to an official plat, the boundary lines [as] shown on the plat control. **In locating land upon the ground from the calls and descriptions in the map, plat, or field notes referred to, the same primary rules apply as exist in the locating of calls and descriptions in a deed containing no such reference, that is, the various calls are given the same order of preference. In case of conflict, monuments control plats or maps, and an actual survey controls over a plat or a map.** _)

In the trial court, CAMB presented an affidavit from a registered professional land surveyor who averred that, using the field notes for the Vasquez Village subdivision, the descriptions contained in those notes were consistent and allowed the exterior boundary lines of that subdivision to _close._ However, CAMB's surveyor averred that, if the locations of the monuments were used as the *376 boundary indicators, the resulting description of the subdivision's exterior boundary would not close. Hence, this expert concluded that the discrepancy between the monuments and at least one distance call on the plat resulted from the misplacement of the monuments, or a _field blunder,_ and that the distance calls and boundary line as reflected on the plat, rather than the monuments, should control the location of the pertinent boundary.

The trial court rejected this ultimate conclusion, and so do we.

[6] **Even if we assume that both monuments were mis-placed, the rule that monuments control over distance and course calls on the plat is nevertheless applicable and the monuments still control the boundary location.** See Everett v. Lantz, supra, citing Ben Realty Co. v. Gothberg, 56 Wyo. 294, 109 P.2d 455 (1941) (monument mis-placing 8th standard parallel still controls description of land in grant).

Supreme Court of Colorado, En Banc.

Oren L. GAINES and Louise F. Gaines

v.

CITY OF STERLING, Colorado, a municipal corporation.

342 P.2d 651 - 1959.

Plaintiffs commenced a quiet title action under Rule 105, R.C.P. (Colo.), to adjudicate the location of the common boundary line between their property and property of the defendant. Plaintiffs have registered Certificate of Title No. 2134 to the East Half of the Northwest Quarter of Section 35, Township 8 North, Range 53 West of the 6th P.M. in Logan County, Colorado. Defendant has registered Certificate of Title No. 2851 to the West Half of the Northeast Quarter of the same section. Titles so registered are commonly known as Torrens Act Titles and are expressly provided for by statute in Colorado (C.R.S. '53, 118-10).

[1] Though all of the land involved was not always held by a common owner, it now appears that prior to the acquisition of their respective properties by plaintiffs *65 and defendant both tracts of land were in one common ownership and while so owned in the year 1919 were registered along with other lands under the Torrens Title Registration Act. From the exhibits in the case, though no mention of it is made in the briefs filed in this court, it appears that defendant's title is now subject to two express mineral reservations, and that the owners of such reservations were not joined as parties in this action. Obviously no decree of the trial court or of this court could affect the rights, if any, of such parties to minerals which might be under the disputed**653 area in question. Compare *Geiger v. Uhl*, 1932, 204 Ind. 135, 180 N.E. 10; *Elam v. Hickman*, 1915, 166 Ky. 135, 179 S.W. 17; *Falvy v. Sellers*, 1928, 166 La. 207, 116 So. 853.

[2] After the case was at issue in the trial court defendant moved to have a Commission appointed under C.R.S. '53, 118-11-1 et seq. Plaintiffs resisted this, urging the method was inapplicable to Torrens Act Titles. However, the trial court correctly concluded that Rule 105 did not apply, and that the complaint stated a cause of action under the statutory proceedings for establishing disputed boundaries, and appointed Cecil J. Osborne, a registered professional engineer and land surveyor, as Commissioner to locate the correct corners and boundary line.

[3] Plaintiffs contend that under the Torrens Act a title once registered thereunder becomes forever binding and conclusive upon all persons' (C.R.S. '53, 118-10-30) and may not be reopened except as provided in 118-10-31, which methods of reopening do not apply to this situation. We point out that while construction of plaintiffs' deed and its legal effect are questions of law, the location of a boundary line is usually a question of fact, thus **the Torrens Act can have no application to the settlement of a boundary dispute arising after registration of title whether between two registered owners or a Torrens holder and a non-registered owner. This, of course, *66 would not be true if the boundary question had first been raised in the proceedings to register the title for it could be properly determined at that time too.** See *Balzer v. Pyles*, 1932, 350 Ill. 344, 183 N.E. 215.

The evidence discloses that Section 35 is one of those parcels of land which is not standard in size, and that all original four section corners, as well as the original quarter section corners in question, had been obliterated, and at the time of suit were unmarked as to the original

government survey. This does not mean that the section corners were lost corners, however, in the sense that they could not be relocated with some degree of accuracy by recognized natural or permanent monuments, or even by re-survey from township lines some miles away. See *Mason v. Braught*, 1914, 33 S.D. 559, 146 N.W. 687, at page 689.

There is an old fence in the north half of the section running north and south approximately 80 feet west of where plaintiff contends the properties should be divided, and there is now a new fence generally parallel to the first fence and some 80 feet east therefrom which plaintiffs contend is the correct line. The latter fence was erected shortly before this action was commenced by defendant after its city manager and engineer had agreed with plaintiffs that the old fence was not the correct line. These city officials were later overruled by the defendant, and the old fence, which had been torn down in the meantime, was then replaced and resistance offered by defendant to plaintiffs' attempt to claim land east thereof.

Following trial the court held that the Commissioner's report more nearly coincided with the original government survey than the two surveys of plaintiffs, and proceeded to apportion the strip in dispute by holding that plaintiffs own that portion which lies east of the old fence and west of a line drawn from a point which is 30 feet east of the old fence beginning at their southeast corner, said line running thence northerly to where the old fence line intersects the north line of section 35. *654....

The record discloses that the Commissioner appointed by the trial court proceeded to the nearest original governmental markers located some three miles away and then surveyed in to what he determined to be the north quarter corner of section 35. He then correlated this with an old irrigation filing and other monuments, including some grown over road ruts in the south half of section 35, to arrive at what he concluded was the original dividing line between the two properties in question. His Plat of Pertinent Survey Data To Divide The W 1/2 From The E 1/2 Sec. 35 T 8 N R *68 53 W 6 P M. is defendant's exhibit No. 1. The surveyor's certificate thereon is replete with such unacceptable wording as *** As shown above by superimposing a theoretical section from the returned government distances from the east side of the Township we find such a section as respects the line in question does intercept the old line and that fence which was probably on the west side of an old road did start and continue north for a half mile very nearly on such a line. At that time in all probability, the fence was continued north from the end of the road and necessarily would have deflected to the east if it was established at a corner ***. (Italics added.)

[5] Defendant's exhibit one showed a final division of the section (and we note that none of the other owners of the section were parties to this action) apportioning the west half of the section 2,578 feet along the north line and 2,691 feet along the south line and apportioning the east half of the section 2,740 feet along the north line and 2,643 feet along the south line. Thus the disparity between the amount awarded plaintiffs as against that given to defendant could also result in a disturbance of other long established land titles in section 35. It also runs afoul of the rule of law which provides that no state can make any rule or law providing for apportionment contrary to Acts of The Congress. See *Knight v. Elliott*, 1874, 57 Mo. 317; *Vaughn v. Tate*, 1877, 64 Mo. 491; *Cordell v. Sanders*, 1932, 331 Mo. 84, 52 S.W.2d 834.....

[6] The general rule (known as the apportionment rule) is that where a tract of land is

subdivided into parts or lots, title to which becomes vested in different persons, none of the grantees are entitled to a preference over the others upon the discovery of an excess or deficiency in the quantity of land contained in the original tract. The excess or deficiency is then divided among all the lots or parcels in proportion to their areas. See 97 *71 A.L.R. 1227-1228 et seq.; and 11 C.J.S. Boundaries §§ 124-125, pp. 737-739.

Some limitations and exceptions have inevitably grown up to invade the pure application of the apportionment rule. It has been applied when the original surveys were made at the same time and so are held to have equal standing. See *Pandem Oil Corp. v. Goodrich*, Tex.Civ.App.1930, 29 S.W.2d 877, reversed on other grounds Tex.Com.App.1932, 48 S.W.2d 606. Another court has applied it only as a last resort. *Chandler v. Hibberd*, Cal.App.1958, 332 P.2d 133. It has been limited to each block within a subdivision. *Tyner v. McDonald*, Fla.1953, 63 So.2d 504. And at least one court has refused to apply it at all where possessory rights have intervened. *Vance v. Gray*, 1911, 142 Ky. 267, 134 S.W. 181. The remnant rule has been applied to limit it and to apply to lots or parcels sold under a plan with the last grantee receiving only what is left. *Barrett v. Perkins*, 1911, 113 Minn. 480, 130 N.W. 67; *Adams v. Wilson*, 1902, 137 Ala. 632, 34 So. 831, and *Geiger v. Uhl*, supra. Yet the latter rule has been rejected and vigorously attacked by a New York court as not being what the grantor intended. *Mechler v. Dehn*, 1922, 203 App.Div. 128, 196 N.Y.S. 460, affirmed without opinion in, 1923, 236 N.Y. 572, 142 N.E. 288.

Most courts recognize a distinction between the application of the rules relating to government surveys as between correct original surveys and their application where the original surveys are found to have been erroneous or the original corners and lines have been wholly lost. In the latter case the surplus or deficiency is apportioned in most states but not all. See 97 A.L.R. 1233-1234, in which the Colorado case of *Westcott v. Craig*, supra, is cited among cases from many other jurisdictions following the reasoning in *Moreland v. Page*, supra, that there should be a clear application of the apportionment rule without regard to the distinction above mentioned.