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Land Boundary Surveys II

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Land Boundary II

Jan Van Sickle, PLS

Module 1

Following the footsteps of the original surveyor is an idea that is frequently quoted in the context of resurveys- in fact, the resolution of the contention between the Sellmans and the Schaafs, hinged on consideration of that very concept. Here is the case.

SELLMAN et. al.

(Grace, Reuben, George, and Marjorie, and Marilyn Snyder)

Appellants

versus

SCHAAF et al.,

(Charles L. and Dorothy E)

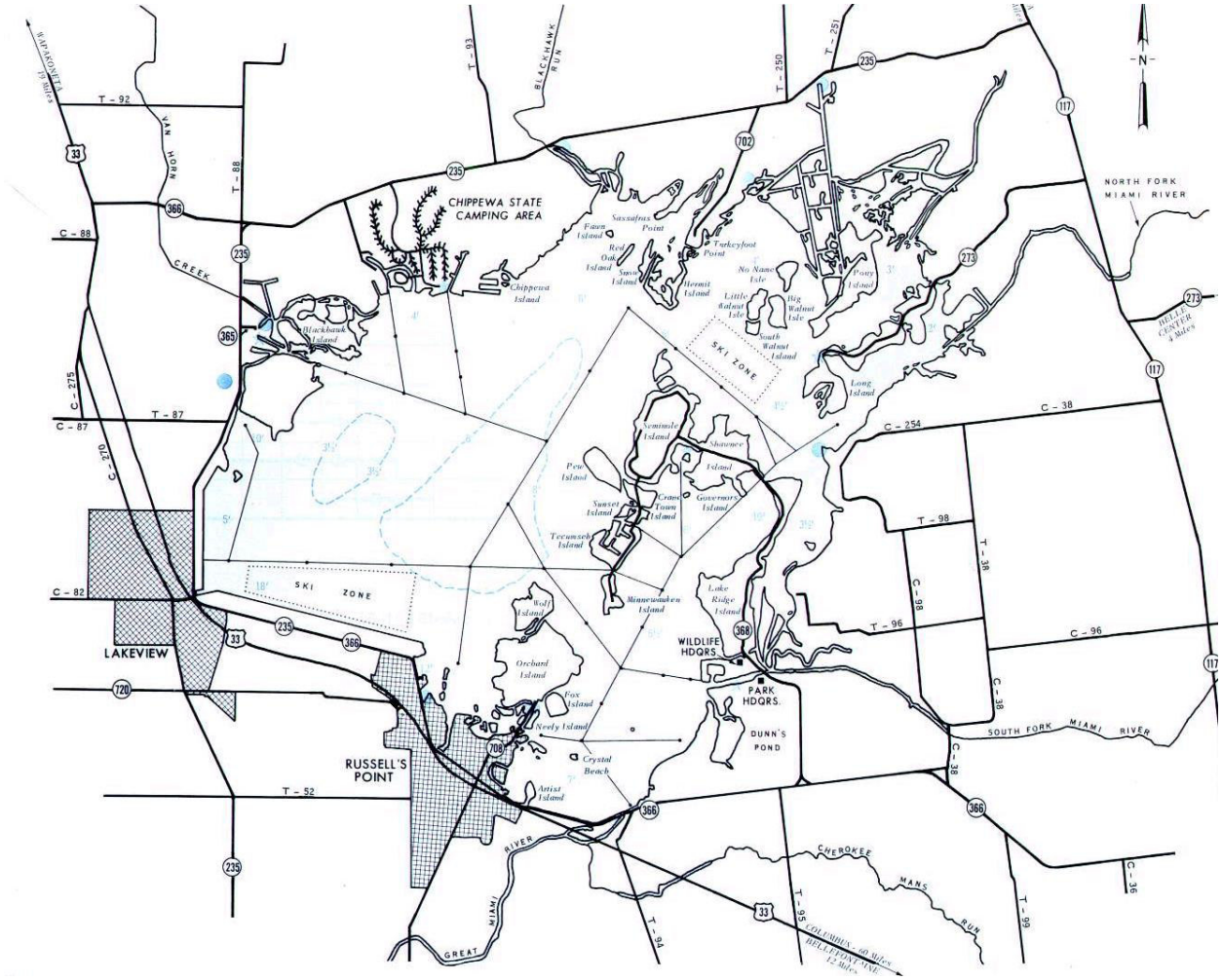
Appellees

Court of Appeals of Ohio,

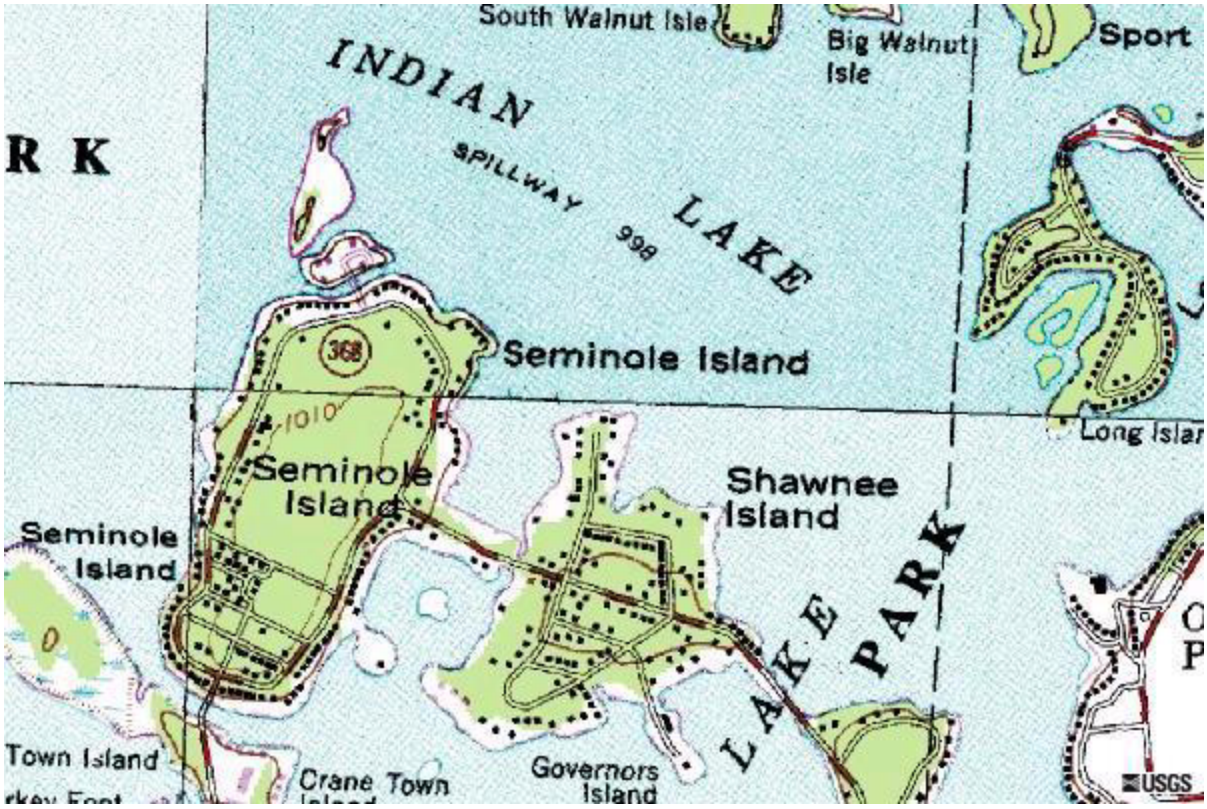
Logan County

April 7, 1971

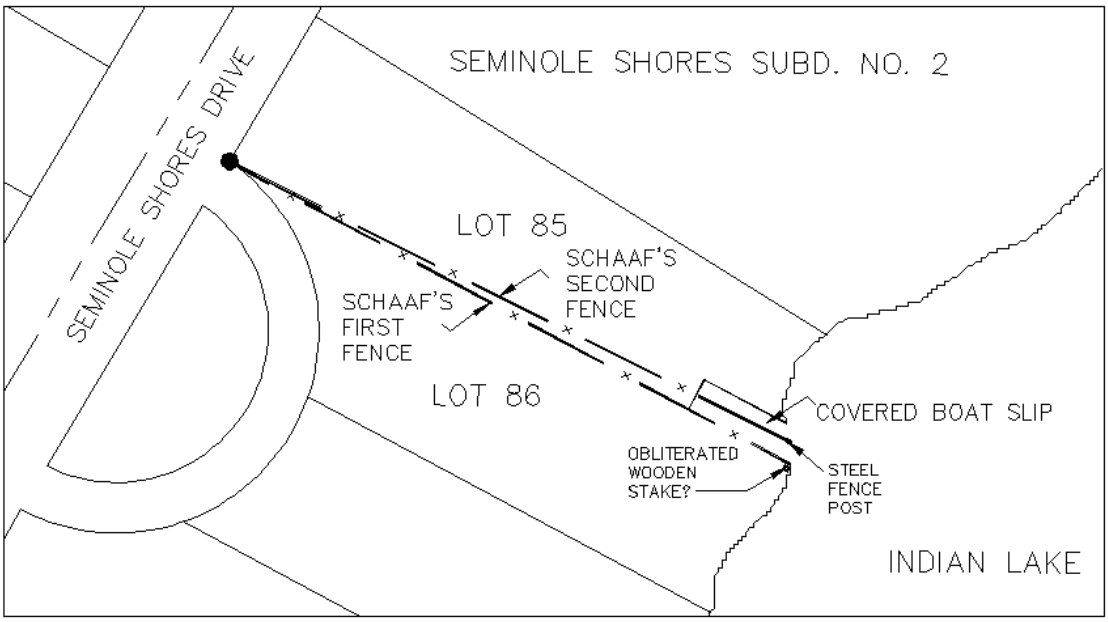
Ohio's Indian Lake is in Logan County. It has nearly 30 miles of shoreline and covers about 5,800 acres. Boating and water skiing are popular there and on its shores are resort homes, condominiums and residences. The villages of Lakeview, Russell's Point, Huntsville, Belle Center and Roundhead are nearby.



There are numerous islands on the lake; Orchard, Tecumseh, Shawnee and Seminole are among the largest. It was on Seminole Island, near the center of the lake, that this case arose.



In late 1944 Walter Toy, a surveyor laid out Seminole Shores Subdivision No. 2 on the island. The plat was approved and subsequently recorded in Logan County on December 20, 1944, in Book C on page 34. Even though a notation on the plat mentioned that all the lots had been staked, and monumented with galvanized pipes, they were not all actually in place when the plat was recorded.



Sketch

Harry E. Johnson and John P. Schooley owned the land at the time the plat was recorded, but Mr. Johnson eventually became the sole owner. On August 26, 1950, Mr. Johnson sold Lot 86 of the subdivision to Mr. And Mrs. Leatherman and he also sold Lot 85 to Mr. And Mrs. Grafelman. The deeds were recorded later. The Leatherman deed, Lot 86, was recorded September 12, 1950 and the Grafelman deed, Lot 85, July 26, 1951.

Over the following year the Grafelmans began building a house on Lot 85 and built a boat slip with a roof over it near the southeast corner their property. Then on September 1, 1951 Mr. Grafelman sold the lot to Grace Sellman, Reuben Sellman, George Sellman, Marjorie Sellman, and Marilyn Snyder, known here as simply "Sellman". The Sellmans completed the house that the Grafelmans had started and used the property over the following years.

Later the Schaafs, Charles and Dorothy, acquired Lot 86 from the Leathermans on May 10, 1956. They recorded their deed on the same day. It seems that they were unusual in getting their deed recorded so quickly. The others in the chain of title on the subject properties seemed to have had delays in getting to the Logan County recorder. Nevertheless, "It is apparent from the testimony that possession was actually transferred in each case at the date on the deed or shortly thereafter." (*Sellman* v. *Schaaf*, 269 N.E.2d 60, 26 Ohio App.2d 35, page 63).

Sometime in the next three years, that is between 1956 and 1959, the Schaafs built the fence illustrated in the sketch and labeled, "Schaaf's First Fence." It was an extension of the south line of the boat slip and apparently both parties presumed that to be the line between the two lots, at least at that stage. "At some point in the ownership of the Sellmans and the Schaafs a fence was erected by Schaaf essentially continuing the south line of the boat slip, a line then assumed to be the dividing boundary between the two lots." (*Sellman* v. *Schaaf*, page 63).

Then something happened. In 1959 the Schaafs hired a surveyor, Mr. Lewis, to determine the line between the two lots. Apparently, Mr. Lewis found monumentation at the southwest corner of Lot 85 but none at the southeast corner. However, he did find stakes at other lot corners and using those as control determined the location of the southeast corner and subsequently the line between the lots. "He says only that he found no stake or monument," *(at the southeast corner of Lot 85)*, "and proceeded to establish the line by reference to other discovered stakes in somewhat distant lots." (*Sellman* v. *Schaaf*, page 67).

Following the lot line that Mr. Lewis monumented the Schaafs moved their fence to the middle of the boat slip. This fence is shown in the sketch and is labeled, "Schaaf's Second Fence."

On October 17, 1960, Sellman recorded the deed to Lot 85 with the Logan County recorder and two days later on October 19, 1960, filed a petition against the Schaafs. "Sellman on October 19, 1960, filed a petition against the Schaafs, praying for a temporary and permanent injunction enjoining Schaafs from interfering with their possession to this, the defendant Schaafs filed an answer and cross-petition setting forth four causes of action:

1. In ejectment for recovery of real estate.
2. For damages for wrongful use of a real estate
3. For prospective damage for continued use.
4. To quiet title, and also for a mandatory injunction to require plaintiffs to remove the boat slip from their premises.

Thereafter, the plaintiffs (*Sellman*) filed an amended petition joining as defendants their predecessors in title, the Grafelmans and the original dedicators, John P. Schooley and Harry E. Johnson; also joined were Mrs. Leatherman (Mr. Leatherman being deceased), and a Mr. Cary owning Lots 87 and 88 to the south of Lot 86. They then prayed for a temporary and permanent injunction against Schaafs (*defendant*) from interfering with the plaintiff Sellmans' use of the boat dock, a mandatory injunction to remove the steel fence erected by defendant Schaafs, for a determination of the true boundary line of the premises." (*Sellman* v. *Schaaf*, page 63).

The Sellmans lost this initial suit. The court denied their petition for injunction. It decided that the boundary between Lot 85 and Lot 86 did indeed bisect the boat slip. In fact, the Schaafs were awarded $450 damages from the Sellmans for wrongful use of part of the Schaaf's lot - though the court did award the Sellmans a judgment of $450 against Grafelman, one of their predecessors in title. In fact, the Sellmans were required by mandatory injunction to remove the boat slip.

The Sellmans appealed the decision.

The Ohio Court of Appeals determined that the issue was not the mandatory injunctions that both the Sellmans and the Schaafs sought. In other words, the solution was not to be found in just forcing the Schaafs to remove the fence or forcing the Sellmans to remove the alleged encroaching boat slip. The court took the point of view that the primary relief requested by both parties was actually the quieting of title to real estate and that the only real way to do that was to determine where the common boundary line between Lot 85 and Lot 86.

Both lots are on the Shore of Seminole Island and they both have their eastern dimension on Indian Lake. The western boundary of Lot 85 is on Seminole Shore Drive. The western boundary of Lot 86 is on a circular drive that comes off of Seminole Shore Drive. The common border between Lot 85 and Lot 86 is the subject of the dispute. More correctly the ownership of the narrow strip of land roughly represented by Schaaf's first and second fences is the subject of the dispute. Therefore, since there is agreement on the southwest corner of Lot 85 the issue is narrowly defined around the position of the southeast corner of Lot 85. "However, the plaintiffs and defendants claim differing locations for the southeast corner of Lot 85 which should be identical with the northeast corner of Lot 86. The plaintiff contends this corner lies to the south a short distance from the boat dock. The defendants, Schaafs, place the corner some distance north in

the middle of the boat dock. To determine the ownership of this pie shaped wedge it is necessary to analyze the law pertaining to descriptions, boundaries and surveys to place in proper perspective the evidence here presented." (*Sellman* v. *Schaaf*, page 64)

One of the important facts the court mentioned in this deliberation was that the Seminole Shores Subdivision was created by survey with the plat following. "Thus, the subdivision is first done by the survey of the premises, establishing monuments, corner posts, etc, so that a physical or semi-physical dividing of the land with the attendant markings takes place. Then a 'plat is made.' The symbolic representation of what was done on the premises becomes the recorded documentation of the action taken and provision is made for the dedication and acceptance of public streets and ways. Today there are more regulations than existed at the time the plat here involved was made but the essential sequence of events remains the same." (*Sellman* v. *Schaaf*, page 64). The essential fact here is that this was a subdivision by survey not by protraction meaning that retracement surveys must begin from the presumption that the lots created and monumented by the original survey take precedence over the plat. As Brown writes:

"Lots within a subdivision have been created by an original survey with monuments. Some subdivision lots were created (created on paper without a field survey). These two different methods of originally creating lots result in different procedures used to determine a lot's location.

Principle. If interior lots of a subdivision were originally created by protraction, the lots are located by measurements from the subdivision boundaries; if interior lots of a subdivision were originally created by survey with monumentation then the original survey and monuments control lot locations.

Prior to the conduct of a lot survey, the surveyor must determine whether the subdivision resulted from the performance of a field survey in which the lots were created and monumented or whether the lots were created by protraction. The approach in a retracement is different for each situation." [Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3rd edn, New York: John Wiley and Sons, Page 121]

The deeds for Lots 85 and 86 incorporated the information noted on the plat by reference. That information included measurements, courses, distances and monuments. In other words, the plat is a symbolic representation of the actual physical marks on the Earth. The court concluded,

"The actual physical markings and location by monument or otherwise is the primary thing. It locates the land. The map or plat is secondary to this purporting to symbolically represent that which has been physically located." (*Sellman* v. *Schaaf*, page 64).

"Principle. Original monuments set upon the ground, except where the intent is clearly otherwise, control facts given upon a plat.

The lines marked upon the earth represent the true full-scale map of the subdivision; the lines as marked upon paper are a shorthand representation of what the surveyor purported to do. When there is an inconsistency between the map and the facts on the ground, the map must yield to the facts on the ground. When facts cannot be established on the ground, that is, the lines were never run on the ground or are completely lost, the data on the map are the best available evidence (Heaton v. Hodges, 14 Me. 66)." [Brown, C.M., Robillard, W.G. and Wilson, D.A. (1986) *Boundary Control and Legal Principles*, 3rd edn, New York: John Wiley and Sons, Page 125]

On the plat of Seminole Shores Subdivision, there is a black dot at the eastern end of the line dividing Lots 85 and 86, there is no contention between the parties about the west end of that line. The legend stated that the dot meant that the surveyor, Mr. Toy, had set a galvanized iron pipe at that corner. Also the plat explicitly stated, "All lots have been staked." However, "Whether the pipe was so placed is doubtful according to the testimony. . ." (*Sellman* v. *Schaaf*, page 65). Nevertheless, the testimony during the appeal does establish that Mr. Toy had, in fact, set a wooden stake at the Southeast corner of Lot 85 during his original survey in 1944. It was also established that the wooden stake was no longer there.

"It will be noted the evidence itself, as presented by the two sides, basically does not contradict, but travels or points in these different directions. The defendants, the Schaafs, did not testify as to the position or identity of any original stake but predicated their claim on a new or resurvey from certain surviving monuments. Mrs. Leatherman called by Schaafs, testified first that she and her husband were shown corners of the lot and stakes on the ground when they bought . . . The basic

witness for the Schaafs is Lewis, the surveyor, who in 1959 surveyed the line for the Schaafs. He says only that he found no stake or monument and proceeded to establish the line by reference to other discovered stakes in somewhat distant lots. . . The defendants, Schaafs, contend this monument is utterly lost and resort must be had to the plat, to courses and distances and other monuments from which their surveyor (*Mr. Lewis*) relocates the point and hence the line. . .On the other hand, the testimony of the Sellmans does not in effect dispute the accuracy of this survey. These witnesses all testify as to the location of what they contend was the original monument placed by the original surveyor, Toy, and dispute the necessity for establishing the line by reference to any other monuments." (*Sellman* v. *Schaaf*, page 67)

Therefore, the contention between the Sellmans and the Schaafs does not hinge on whether or not Mr. Toy set a wooden stake at the Southeast corner of Lot 85, nor do they disagree that the wooden stake is no longer there. The contention between them comes down to whether or not evidence can establish where it once stood as the Sellmans believed or a resurvey based on the courses and distances from the plat is the correct recourse as the Schaafs believed.

As you recall the Schaafs had a resurvey done by Mr., Lewis. His determination of the Southeast corner of Lot 85 seemed to place it in a substantially different spot than Mr. Toy's wooden stake. This leads to the question, "If the original wooden stake were still in place would there be a conflict between the courses and distances noted on the plat and the stake?" And if that were true then which should determine the boundary? Or said another way, "When corner established by a surveyor in setting up a subdivision differs from the description or plat what is to be done?"

On this question, the court clearly came down on the side of the physical monument over the plat. "Although much discussion is set forth in the briefs dealing with the priority of calls and whether monuments govern courses and distances, it would appear the actual question is not initially this order of precedence but what was actually done by the original surveyor. It is inherent in the relationship between the survey on the land and the plat; the survey as actually made on the land must govern. It is Lot 85 as originally surveyed which we are trying to find, and by this we mean is original location on the ground. If this can in fact be found, it is that land that was sold, not the symbolic plat, and it is the land as marked out by the original surveyor that constitutes Lot 85; and likewise with Lot 86.

"We therefore conclude that the original survey by Toy in 1944 made on the 1944 established the monuments and lines by which the boundaries of the two lots here involved were delineated. If the original monuments can be established by parol or other evidence, they may be relocated upon the land irrespective of any deviation in courses and distances from other monuments as shown on the plat. The monuments the original surveyor established on the land govern and establish the line. Here, only one monument is in question and is determinative of the line. It is the stake placed by Toy at the time of the original survey and constituted the intersection of a north-south line (a measurement or traverse line) near the lake front with the east-west line between Lots 85 and 86. The plat designates that such a monument, artificial in character but nevertheless a monument, was placed by Toy, the original surveyor. This court is in essence doing that which a second surveyor would do. It is attempting to follow Toy's footsteps and establish what he actually did on the land itself. If this can be established, it takes priority; if not, then we must turn to the use of the plat and courses and distances from other monuments actually located.

Essentially, the evidence in this case is predicated upon each of the two routes to the establishment of a boundary line. The Plaintiffs, Sellmans, contend that, although the stake is gone, its actual location may, by evidence, be established sufficiently to define the line. The defendants, Schaafs, contend this monument is utterly lost and resort must be had to the plat, to courses and distances and other monuments from which their surveyor relocates the point and hence the line. As we have seen, the establishment of the position of the original stake as placed in November, 1944, by Toy, the surveyor, takes precedence. If the evidence can establish this location, then the steps of the original surveyor having been followed, the case is ended. The original position so established, governs. (*Sellman* v. *Schaaf*, page 67)

In other words, the two theories of the case never collide. If the proof establishes the position of the corner (actually a stake placed to mark the intersection of a traverse line and the line between Lots 86 and 85) with reasonable accuracy and this is, in fact, the position of the stake as placed by Toy, then under the law as we have analyzed it, this must govern even if Toy was in error in the original placement. On the other hand, if this location is not established, then the monument is lost completely. Then, the resurvey as made Lewis based upon courses and distances shown on the plat as run from found and established monuments must govern and there is no expert testimony contradicting him. The issue then boils down to the evidence of the

location of the stake. If this is established by the appropriate degree of proof, then the line must be so established. If it is not established by the appropriate degree of proof, the survey by Lewis replacing the lines by the next best method must govern. In a word the issue depends upon the case made by the plaintiffs, Sellmans, for if their proof fails, the Lewis survey must prevail.

As indicated in prior paragraphs, we consider the basic issue here to be a mutual action to quiet title and the balance of the relief requested by both parties is ancillary and subsidiary to this question and this basic issue must therefore be governed by the preponderance of the evidence.

Do the Sellmans and their witness establish the location of the original traverse point as marked by a stake set by the original surveyor, Toy, and do they establish this by a preponderance of the evidence?" (*Sellman* v. *Schaaf*, page 68)

The court's answer to this question was, yes.

"Without analyzing in detail the testimony of the various plaintiffs who are the owners in common of Lot 85, and of the others called by them we arrive at certain basic conclusions of fact.

The original surveyor, Toy, did mark the various corners of the lots including the intersection of the traverse line and the common boundary of Lots 85 and 86 by wooden stakes in 1944

When the Sellmans purchased Lot 85 in 1951, there was a wooden stake about a foot or foot and one-half south of the southeast corner of the boat slip The position of this stake may be located within practical limits necessary to establish a common boundary between Lots 85 and 86 since there is no issue as to the location of the west terminus of the line.

There is now no stake at this position at the corner of the boat slip.

In the survey of federal lands, many special rules appear to govern but one distinction made in these rules appears to be reasonable and applicable to the present situation. This is the distinction made between an 'obliterated' corner and a 'lost' corner. Thus the stake if 1951 is not lost - its position can be shown by competent testimony which is undisputed and

which is reasonably the same from a substantial number of witnesses. Mrs. Leatherman, called by the defendants, Schaafs, in her first recollection, so located this stake, although in cross-examination her answers are vague and less definite. However, the question narrows to the problem of the identity of the stake of 1951 and the stake of 1944. If the stakes are identical, then the monument placed by the original surveyor Toy is not lost simply obliterated and its position is established. If the proof fails as to identity, the monument is lost and the point and thus the line must be considered lost and relocated by the Lewis survey." (*Sellman* v. *Schaaf*, page 69-70)

Here it might be appropriate to point out the difference between a lost and an obliterated corner. The distinction is an essential principle of the Public Lands Rectangular system, but the court has seen fit to mention it in the context of this case. An obliterated corner is a corner at which "there are no remaining traces of the monument or its accessories, but whose location has been perpetuated or may be recovered beyond reasonable doubt, by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities, witnesses, or by some acceptable record evidence." (Definitions of Surveying and Associated Terms, American Congress of Surveying and Mapping and the American Society of Civil Engineers, 1972, Page 43).

A lost corner is a corner which "cannot be recovered beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears on the original position, and whose location can be restored only by reference to one or more interdependent corners." (Definitions of Surveying and Associated Terms, American Congress of Surveying and Mapping and the American Society of Civil Engineers, 1972, Page 42)

"It is our conclusion that the identity is established by a preponderance of the evidence and that the stake of 1951 is the same stake placed by the original surveyor, Toy.

Although there is a period of six years between the sale of the lot to Graefelman by Johnson in 1950 and the placing of the stake by Toy in 1944 there is no evidence the original stake was moved or replaced during the period. There was some testimony by Lewis that dredging operations had occurred near other lots but at no time was it indicated nor was it testified to that Lots 85 and 86 were specifically affected. Johnson the then owner establishes the identity of these stakes of 1944 and 1950.

The identity of the 1951 stake with the stake pointed out by Johnson to Graefelman in 1951 is established by Grafelman.

The actions of Toy, the surveyor, in 1951, at the Labor Day Conference on the site are consistent only with the conclusion that he recognized the stake as his and as located by him, Toy, it is testified, explicitly identified the stakes then on the premises as his.

The testimony indicates that measurements made in 1951 were exactly as shown on the plat as to the distance between the two stakes on the traverse line- a highly unlikely result if either of the stakes was different.

Although this testimony is made by interested parties they are parties in a position to observe: their testimony is uncontradicted and there is substantial mutual corroboration.

Concluding then that the stake of 1944 is the stake of 1950 and that the stake of 1950 is the stake of 1951, we find that the stake marking the intersection of the traverse line with the common boundary of Lots 85 and 86 as placed by Toy the original surveyors not lost, but, being merely an obliterated monument, its position for all practical purposes is established and must govern the location of the boundary.

The witnesses differ slightly as to their distance from the boat dock wall, varying from 'just south *(of)* the boat slip' to one and one-half feet south. The plat made by Lewis and marked Exhibit D locates this line by reference to the fence that had been in place for many years. Extending this fence line establishes the boundary line at 54 feet from the edge of the boat slip roof and for practical purposes represents the boundary as originally surveyed by Toy.

This, then, we determine to be the line between Lots 85 and 86 and title to the disputed land north of the line as so located is quieted in the plaintiffs, Sellmans, et al. Title to the disputed land south of the line as so located is quieted in the defendants, Schaafs.

Turning to the prayer of the petition and cross-petition supplemental and ancillary relief prayed for:

1. The defendants Schaafs' prayer for recovery of the triangular parcel as established by the survey of Lewis is denied.

2. The defendants Schaafs' prayer for damages is denied.

3. The defendants Schaafs' title is quieted as above set forth.

4. The defendants Schaafs' prayer for a mandatory injunction is denied.

5. The plaintiffs Sellmans' prayer for an injunction is granted to the extent that defendants Schaafs are enjoined from interfering with the use by Sellmans of the land north of the boundary so established and are directed to remove the steel fence from the Sellman premises as herein determined and are further directed to remove the steel pipe placed by them or caused to be placed by them in the boat slip area of Lot 85.

6. The plaintiffs' prayer that the true boundary line be determined is granted as aforesaid.

7. The plaintiffs' prayer for alternative relief against their predecessors in title is denied.

Costs are assessed against defendants Schaafs and the cause is remanded to the Court of Common Pleas for execution and enforcement of the judgment.

Judgment accordingly

Younger P. J., and GUERNSEY, J, concur." (*Sellman* v. *Schaaf*, page 69-70)

Simply put the Schaafs won the initial petition and the Sellmans won on appeal. The principle of "following in the footsteps of the original surveyor" was firmly established in this case. As the court wrote, "This line of reasoning is buttressed by the concept governing all resurveys. When an original survey has been made, it is not the plat or the metes and bounds description that is primary. The primary function of the second surveyor is to find first where the first surveyor established the boundaries. Only where this becomes impossible of accomplishment does the second survey turn to the courses, distances and still existent monuments to determine the boundaries. The essential rule governing the resurvey is to follow the steps of the first surveyor." (*Sellman* v. *Schaaf*, page 65)

The case of Sellman v. Schaaf is well known for its reinforcement of the that the primary duty of a surveyor making a resurvey of a parcel is to first discover the boundaries and corners as established by the original surveyor on the land itself regardless of deviation from the course and distance indicated on the plat.

However, there were at least two other interesting issues that came up along the way.

The Standing of a Plat in a Subdivision by Survey

Where a plat that subdivides land into lots is derived from a survey, the plat is secondary. In a conflict between the plat and a monumented survey is made after the survey from which it is derived the plat yields. The monuments placed and the boundary lines established on the ground by the monument are primary.

The Standing of Original Monuments

Where original monument monuments as located surveyor still exist or where an obliterated monument's position can are ascertainable by parol or other evidence boundary lines determined by such monuments will determine boundaries of lots regardless of deviation from courses or distances as set forth in plat. In this case a wooden stake marking intersection of traverse line with common boundary of lots was a sufficient verified monument placed by the original surveyor during the original survey of the parcels. In answer to the question of whether the wooden stake was a sufficient monument in view of the fact that it was not the iron pipe called for on the plat the court responded.

"Although monuments set at the time of an original survey on the ground and named or referred to in the plat are the best evidence of the true line, if there are none such, then stakes actually set by the surveyor to indicate corners of lots or blocks or the lines of streets, at the time or soon thereafter, are the next best evidence."

It was determined by the court that even though it was obliterated, it was not lost because its position could be established by a preponderance of evidence. As the court pointed out, "In the discussion of the relocation or re-establishment of government corners, a distinction is frequently drawn between "obliterated" corners and "lost" corners, the importance being that in the case of an obliterated corner the investigation is directed toward the determination of its a original location while in the case of a lost corner the question is one of relocating the corner by a new survey. For the purpose of this distinction an obliterated corner may be defined as one of which no visible evidence remains of the work of the original surveyor in establishing it but of which the location may be shown by competent evidence. A lost corner is one, which cannot be replaced by reference to any existing date or sources of information." Ultimately this wooden stake governed location of boundary between lots even though it deviated from course and distance on plat.

Summary

Perhaps the best summary of this case is from Clark:

"Theory of the following surveyor.-The cardinal principle guiding a surveyor who is running the lines of a previous survey is to follow in the footsteps of the previous surveyor. The essential rule of a resurvey is to follow the steps of the first survey. Where a survey is once made and parties have acted on the strength of the surveyor's lines, property rights have arisen which cannot be taken away without the consent of the owners, regardless of the errors committed by the original surveyor. It is the extensive duty of the retracing surveyor to see what the first surveyor did, not what he should have done. No matter how inaccurate the original survey may have been, it will be conclusively presumed to be correct and, if there is error in the measurements or otherwise, such error is the error of the last surveyor. Hence the surveyor will at all times, keep this presumption in mind and conform his acts thereto." [Grimes, J.S. (1976) *Clark on Surveying and Boundaries*, 4th edn, New York: Bobbs-Merrill, Page 339-340]

Land Boundary

Jan Van Sickle, PLS

Module 2

A deed carries the greatest estate the language permits. That is one of the key principles that came to bear on the construction of the mineral deed in this case. It was part of the resolution of the confusion between Davis and Andrews.

Van Zandt County Texas is about fifty miles east of Dallas in the Claypan Area of northeastern Texas. Today there are about 50,000 people in the county. Oil was discovered near Van in the eastern portion of the county in 1929 and it along with tourism, agribusinesses, salt production and more is still important to the area's economy today. This case had its beginning in a contention over exactly who should receive payments from the Pure Oil Company. Here is the case.

ARIA DAVIS et. al.

Appellants (Davis and the York Group)

versus

LINNIE LEE ANDREWS et al.,

Appellees (Andrews and the Persons Group)

Court of Civil Appeals of Texas,

Dallas

September 28, 1962

In the lower court, that is the District Court, Van Zandt, County, A. A. Dawson, J., rendered a judgment in favor of Andrews and the Persons Group, the Appellees here, from which an appeal was taken by Davis and the York Group, the Appellants.

This is an interpleader suit. That means that it involves two or more parties claiming the same thing of a third. In this case, the York Group, (Aria Davis and others) and the Persons Group, (Linnie Lee Andrews and others), claimed payments from the Pure Oil Company. The Pure Oil Company, which laid no claim itself, nevertheless joined the two groups and asked them to resolve their claims so that the company would know who it should actually pay.

It involves the construction of this mineral deed.

"By deed dated June 2, 1930. Henry York, and wife, Ola York, Mrs. Ells York, a widow, G. N. York and wife, Dennie York, and Aria Davis joined by her husband L.L. Davis as grantors, conveyed, subject to oil and gas leases - a 1/32nd of 1/8 mineral interest in 50 acres of land of the John Walling Survey in Van Zandt County, Texas.

This deed, omitting immaterial portions, as well as the description of the land, reads as follows:

'We, Henry York and wife, Ola York and Mrs. Ella York, a widow, of Smith County, Texas, G. A. York and wife, Dennie York of Wood County, Texas, and Aria Davis joined by her husband L. L. Davis of Van Zandt County, Texas, for and in consideration of the sum of Ten Dollars ($10.00) cash in hand paid by J. T. York, hereinafter called Grantee, the receipt of which is hereby acknowledged, have granted, conveyed. assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said Grantee an undivided 1/32nd of the usual one-eighth interest in and under, and that may be produced from the following described land situated in Van Zandt County, Texas, to wit:

This conveyance is intended to cover, the above-described 50 acres of land does not affect interest in any excess acreage there may be in the above-described tract of land together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals and removing the same therefrom.

Said land now being under an oil and gas lease executed in favor of F. L. Luckel it is understood and agreed that this sale is made subject to the terms of the said lease but covers and includes one-thirty-second of all the oil royalty, and gas rentals or royalty due and to be paid under the terms of said lease, in so far as it covers the above-described property.

It is understood and agreed that none of the money rentals which may be paid to the said Grantee and in event that the above-described lease for any reason becomes canceled or forfeited then and in that event undivided one-thirty-second of the lease interest and all future rentals on said land for oil, gas and other minerals privileges shall be owned by said Grantee herein owning 1/32nd of all oil, gas and other minerals in and under said lands together with 1/32nd interest in all future rents.

To have and to hold the above-described property, together with all singular the rights and appurtenances thereto in any w i s e belonging unto the said Grantee herein, his heirs and assigns forever and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said Grantee herein, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, *for a period of 20 years from date hereof and no longer*.' (Emphasis supplied)

C. F. York and wife Lillian York executed and acknowledged file above deed, but were not named therein as grantors. On November 21, 1930, C. F. York and his wife Lillian York, as grantors, executed and delivered a correction deed to J. T. York, in which the grantors recite the execution of the prior deed and the failure of that deed to contain their names as grantors. The correction deed does not anywhere contain that part of the quoted portion of the prior deed reading - - - *for a period of 20 years from date hereof and no longer*

Oil was discovered in paying quantities on the land in question prior to 1930 and has been continuously produced therefrom to the date of the trial. The Pure Oil Company is the admitted owner of oil and gas leases on the property.

On October 13, 1958, The Pure Oil Company is a stakeholder in this action." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 421-422)

That means that the Pure Oil Company is a third party that holds the money, as in a wager, until the outcome of the event decides which of the contesting parties has the right to it.

The Pure Oil Company "instituted this suit in the nature of a bill of interpleader naming therein a large number of defendants. Defendants aligned themselves in this lawsuit as follows: Aria Davis, and husband L. L. Davis, and others (sometimes referred to as the York Group) and being the heirs of the grantors under the two deeds described above as appellants; and Linnie Lee

Andrews, and others (sometimes referred to as the Persons Group) being the remote grantees under J. T. York, as appellees.

The Pure Oil Company alleged that it had been confronted with conflicting claims of interest by the two groups of defendants named, said contentions growing out of the construction to be placed upon the two deeds described above, and asked the court to determine the respective interest of the parties and deliver to the rightful owner the proceeds of oil and gas that had been produced from the said property for a long period of time preceding the filing of this suit." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 421-422)

Well, that presents a pretty good outline of the issues involved in the case. Now here are the arguments of the two parties, the York Group and the Persons Group.

In this appeal, the York Group, which lost in the lower court, contended that the actual *grant* in the deed should have terminated on June 2, 1950, twenty years after the deed was executed. In other words, any interest that the Persons Group held for those twenty years under the deed has now lapsed. They should have no longer had any of the money from the Pure Oil Company. The Persons Group interest has expired.

The York Group further claimed that if the deed as it is worded does not accomplish that, "they alleged that through a mutual mistake of the parties that the instrument dated June 2, 1930, did not convey the true meaning intended by the parties to limit the grant to a period of 20 years and therefore the court was requested to reform the instrument to correctly reflect such alleged intent." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., page 422). In other words, the York Group said that both they and the Persons group believed that the deed conveyed the grant for only twenty years and no longer, and if that isn't what the deed said that was their mutual mistake.

The York Group also contends that if the deed does not limit the grant to twenty years it was ambiguous because that was certainly their intention.

The Persons Group, Appellees, took a different point of view. They said they were the owners in fee of the interest conveyed in the deed. They claimed that the limitation of 20 years mentioned in the deed only applied to the warranty, not to the grant itself. In general, a warranty is, of course, a promise that the facts are as represented. Here, more specifically, the

grantor they believed the grantor offered a guarantee of actually holding the rights which were being sold. In other words, the Persons Group believed that the warranty was the only thing that expired after 20 years, not the grant.

Also, "In answer to appellants (the York Group) prayer for reformation, appellees (The Persons Group) pled the statute of limitations, the statute of frauds, estoppel on the ground that appellants were bona fide purchasers, stale demand and laches."

That is quite a list. Let's look at each of these elements. A statute of limitations is a legal deadline by which a plaintiff must start a lawsuit. The original action took place eight years after the 20-year limitation mentioned in the deed. The Persons Group thought that the time had run out on the York Group's ability to bring the action.

"The Statute of Frauds, enacted by the English parliament in the reign of Charles II, 1672, made void any oral transfers of land. This statute has been re-enacted in all of the states of the Union. As so re-enacted in most states any oral agreement by the party conveying land changing fixed boundaries is at best voidable." (Grimes, J.S. 1976 *Clark on Surveying and Boundaries*, 4th edn, New York: Bobbs-Merrill, Page 6, Section 2). That means that if the York Group did not write what they meant to convey in the deed, they cannot now change the terms by testimony.

A stale demand is a claim which has been for a long time undemanded. For example, where there has been a delay of eight years before the initial suit as in this case without explanation the York Group cannot now make the demand.

Estoppel includes being prevented from claiming something by your own false representation or concealment. That is called equitable estoppel. Another kind of estoppel is based on the failure to take legal action until the other party is prejudiced by the delay. That is called estoppel by laches. In this case, the Persons Group contended that the York Group had not mentioned that the 20 years applied to the grant for many years, and that to claim so now was prevented by their own, the York Group's, inaction. In other words, they could not let the Persons Group continue on as if they had a full right to the payments from Pure Oil by a grant for eight years and then jerk the rug out from under them. An estoppel is a preclusion that prevents someone from alleging or denying a fact that is contrary to their own previous actions.

Laches is a legal doctrine that a claim will not be enforced or allowed if a long delay in asserting it has hurt the other party. In other words, if one party knew the correct property line and yet watched his neighbor complete a house over the line and then sued it would be a legal ambush that is prevented by laches. This word, derived from the French *lecher*, which means negligence.

Now the plot thickens. It seems that J.T. York, Ella York's nephew, wrote the deed being litigated. "Appellants during the trial offered to introduce the testimony of Mrs. Aria Davis, L. L. Davis and Mrs. Ola York, to the effect that some few days prior to June 2, 1930, J. T. York, a nephew of Ella York came to the York family in an effort to purchase royalty under the 50-acres of land in question; that appellants advised J. T. York that they had sold some mineral interest under the land but that same had been limited in the grant for a period of 20 years and that they would not make another sale of royalty unless the grant was likewise limited.

That thereafter J.T. York had a conveyance drafted and returned to the York family with it, such conveyance being the one in litigation. That the York family being inexperienced in the conveyance of mineral or royalty interest in lands and since they were with a nephew of Mrs. Ella York and a cousin of her children, relied upon his assertion that the limitation following the warranty clause in the conveyance would be effective to limit the conveyance for a period of 20 years from the date of such an instrument and that such conveyance expire on June 2, 1950: that the York family did rely upon such representations and but for them would not have executed same" (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 421-422)

The court was not convinced, "This testimony was rejected by the trial court.

At the conclusion of the non-jury trial the court rendered judgment decreeing that the Pure Oil Company be discharged from liability to all defendants; that the appellees (Andrews and the Persons Group) should recover title and possession of an undivided 1/32nd of 1/8 mineral interest in and under the 50 -acre tract of land subject to the oil and gas leases of The Pure Oil Company, together with the proceeds of the production of the oil and gas from said tract of land attributable to said interest: and denying all relief sought by appellants (the York Group)." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 423)

In short, the court held that the 20-year limitation did not apply to the grant as the York Group contended. It only applied to the warranty as the Persons Group believed. The

language in the deed was not ambiguous. It actually conveyed a fee simple absolute title to the 1/32nd of 1/8 mineral interest in and under the 50 -acre tract of land.

The court dealt with each of the points raised by the appellants (the York Group).

"By their first seven points on appeal, appellants contend in essence,

(1) that the deeds in question clearly reflect that the grant thereby made was limited to a term of 20 years from and alter June 2, 1930;

(2) that the court erred in finding that the interest conveyed by the deeds was unlimited and that the only limitation was to warranty for a period of 20 years;

. . . . . .

At the threshold of our determination of the inquiry presented by appellant's points, i. e., the construction to be placed upon the mineral deeds, we deem it advisable and proper to focus attention on the cardinal objective which is to ascertain the intention of the parties to the written instruments in question. The first rule of construction of a deed is that the intention of the parties be ascertained and given effect 19 Tex.Jur.2d § 107, p. 391. Even this primary rule of construction must be immediately modified with the restriction that it is not the intention of the parties may have had, but failed to express in the instrument, but it is the intention which by said instrument did express. Stated another way, the question is not what the parties meant to say but the meaning of what they did say." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 423)

The same idea is expressed in this quote, "In the determination of boundary lines as set forth in a deed all rules yield to the manifest intention of the parties to the extent that this can be ascertained from the language used, which is the controlling consideration" (Grimes, J.S. 1976 *Clark on Surveying and Boundaries*, 4th edn, New York: Bobbs-Merrill, Page 561, Section 454). And even though boundaries are not at issue here, rights in property are and the same principle holds. So, in this case it may be that the language in the deed does not express the intention of the York's. Nevertheless the language as stated will be enforced, because it is clear and unambiguous.

. . . . . .

(3) "that the deeds in question were ambiguous and uncertain:

. . . . . .

Another and equally important rule of construction, sometimes called the "four corners rule" is that the intention of the parties and especially that of the grantor is to be gathered from the instrument as a whole and not from isolated parts thereof." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 423)"

In Clark the four corners rule is discussed this way," In construing deeds the primary question is what the language speaks, not necessarily what the grantor intended by the words he used. A deed is said to speak from its 'four corners.'" *Clark on Surveying and Boundaries*, 4th edn, New York: Bobbs-Merrill, Page 415, Section 328)

There is another Texas case that presents some ideas that are pertinent to this point - it is Ladd v. Du Bose, Tex.Civ.App., 344 S.W 2d 476. It also involved the construction of a mineral reservation. In that case, the court wrote:

(1) "A deed will be construed to confer upon the grantee the greatest estate that the terms of the instrument will permit.

(2) "It is a principle of universal application that grants are liberally, exceptions strictly, construed against the grantor.

(3) "Another applicable rule is that should there be any doubt as to the proper construction of the deed, that doubt should be resolved against the grantors, whose language it is, and be held to convey the greatest estate permissible under its language.

(4) "Where a deed is capable of two constructions the one most favorable to the grantee and which conveys the largest interest the grantor could convey will be adopted." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 423)"

. . . . . .

(4) "that since said instruments were ambiguous the trial court was error in not permitting extrinsic evidence to be introduced to ascertain the intention of the parties;

(5) that the court erred in refusing to permit appellants to introduce extrinsic evidence with reference to the circumstances surrounding the parties out of which the in question arose to thereby correctly ascertain the intent of the parties." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 423)

. . . . . .

"the granting clause in the deed of June 2, 1930 reveals nothing the way of limitation of the grant by grantor to grantee of an undivided 1/32nd of to usual 1/8 interest in and to the oil, gas and other minerals under the land in question. Neither do we find any words of limitation in the habendum clause which grants to grantee, his heirs and assigns 'forever the interest conveyed in the granting clause. The only clause of limitation appearing in the instrument follows a comma at the end of the warranty clause, saying "for a period of 20 years from date hereof and no longer." Appellants argue that it is not reasonable that grantors would intend to limit the warranty clause for a period of 20 years. They say that such is not usually done. We are not impressed with this contention. The mere fact that something is not usually done does not render the doing of that act wrong or illegal. The fact that the parties have limited the warranty, though possibly unusual, does not destroy its validity." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 423-424)

The habendum clause is the part of the deed that usually begins with the words "to have and to hold." It normally follows the granting clause and specifies the extent of the interest being conveyed. The court ruled that the limitation of 20 years occurred after the words, "to warrant" in the subject deed. The warranty clause is only to indemnify the grantee against loss that may results from a grantor's defective title. It does not speak to the character of the title conveyed.

"Neither can we agree with appellants that the instrument was ambiguous. We agree with the trial court in his finding that the instrument was free of ambiguity. A contract is not ambiguous in the sense that parol evidence is admissible to explain its meaning unless application of the pertinent rules of interpretation leave a real uncertainty as to which of two or more possible meanings represent the true intention of the parties. An application of the rules of construction discussed above reveals no conflict of meaning and therefore no ambiguity results." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 425)

The court is here holding to a well-established principle that a patent ambiguity in the language of a deed is one that appears on its face. It is the result of defective language. Where a patent ambiguity is present parol, that is oral, testimony is not usually admissible to explain it. However, a latent ambiguity is an ambiguity that arises from evidence outside the deed itself. Their parol testimony is often allowed.

"Holding as we do that the instrument in question dated June 2, 1930 was not ambiguous it necessarily follows that the trial court did not err in refusing to permit parol testimony concerning the intent of the parties. Appellants' points of error one through seven, inclusive are overruled." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., pages 425)

"Appellants contend that they had no knowledge of the alleged error in the mineral conveyance until this original suit was filed in 1958 and further that they did not have notice of the alleged error in 1950 at the time The Pure Oil Company commenced withholding payment of royalties We think the law to be settled that a grantor is charged as a matter of law with knowledge of the contents of his deed from the date of its execution and therefore limitations should begin to run against his action to correct such deed from the date. However, if this not be true then certainly the statute of limitations began to run at the expiration of 20 years from the date of the deed that is in 1950, being the time when appellants contend that the limitations of the grant would expire. At that time a reasonably prudent person would be placed upon inquiry to ascertain the facts concerning the payment of royalty by the holder of the oil and gas lease on the property - there is no contention made by appellants that such was done." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., page 426)

"The Court of Civil Appeals, William, J. held that deed which contained no time limitation in granting clause or habendum but which stated, following warranty clause which formed, with habendum, compound sentence, 'for a period of 20 years from date hereof a no longer,' disclosed expressed intention to limit warranty but not to limit title conveyed." (*Davis v. Andrews*, 361 S.W. 2d 419, Tex. Civ. App., page 419)

The judgment of the lower court was affirmed.